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1995

The Criticism of the Third-world Debt and the Revision of Legal Doctrine

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and the Revision of Legal Doctrine**

Tamara Lothian

Working Paper No. 389

Spring, 1995

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THE CRITICISM OF THE THIRD-WORLD DEBT AND THE REVISION OF LEGAL DOCTRINE

TAMARA LOTHIAN*

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*Director, International Corporate Finance, First National Bank of Boston. Special thanks to Roberto Mangabeira Unger, Robert W. Gordon, Harold H. Koh, Charles Sabel, William H. Simoa, Henry J. Steiner, Katherine Stone, David M. Trubek, and William C. Whitford.

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I. INTRODUCTION

No idea is more important to contemporary law and legal thought than the belief that the rights of individual choice and the rights of collective choice depend upon practical conditions for their enjoyment.¹ When these

¹ This thesis was central to the work of the American legal realists and institutional economists. See, e.g., Felix S. Cohen, *The Basis of Contracts*, 46 HARV. L. REV. 553 (1933); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Robert L. Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 604 (1943); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). The literature of American institutional economics includes J.R. COMMONS, *THE LEGAL FOUNDATIONS OF CAPITALISM* (1924); J.R. COMMONS, *INSTITUTIONAL ECONOMICS* (1934); RICHARD ELY, *PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH* (1914).

The idea has taken two forms in modern political thought: the idea of freedom as emancipation from a background structure of hierarchy and social division, and freedom as the acquisition of the economic and cultural equipment needed to make the experience of individual freedom real. This duality is captured in the traditional distinction between positive and negative freedom. See, e.g., ISAIAH BERLIN, *Two Concepts of Liberty*, reprinted in *FOUR ESSAYS ON LIBERTY* 118 (1969). More recently, writers such as Amartya Sen have attempted to specify a theory of freedom as a series of enabling conditions. See AMARTYA SEN, *INEQUALITY REEXAMINED* (1992). See also RALF DAHRENDORF, *THE NEW LIBERTY*

conditions remain unfulfilled, the promise of free choice becomes a sham. From this concern arises the characteristic division between rules, doctrines, and arrangements defining individual and collective self-determination,² and rules, doctrines and arrangements protecting the effective enjoyment of rights.³

In no field has the characteristic counterpoint between rights of choice and the practical conditions for their enjoyment advanced less than in the field of international law.⁴ The international debt crisis of the 1980s illuminates the consequences of this relative backwardness. By revisiting that now fading crisis from the perspective of this problem — the relation, in international law, between the idea of self-determination and the idea of the effective enjoyment of the right of self-determination — I propose a way to overcome the relative backwardness. Moreover, I argue that we cannot adequately integrate the concept of effective enjoyment into international law without deepening our insight into the meaning and potential of that concept for law in general.

Democracy is popular self-government under the energizing constraints of an organized civil society and pluralistic political competition. Democracy adds value and strength to national self-determination. The debt crisis of the 1980s, and the political and economic developments leading up to it, further undermined experiences of popular self-government and national self-determination already suffering from many taints and threats.⁵ It did so by narrowing the power of governments to formulate their own national-development strategies and to invest in people and the resources needed to turn them into capable citizens and economic agents. Many developing economies risked becoming machines for generating the funds with which to honor what often turned out to be ill-conceived and collusive deals between national political elites and foreign bankers.

(1975).

² See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 18-22, 769-84 (2d ed. 1987) (discussing separation of powers doctrine and the development and protection of "fundamental" rights in contemporary constitutional law); FRIEDREICH KESSLER ET AL., *CONTRACTS: CASES AND MATERIALS* 55-110 (3d ed. 1986) (describing the basic doctrine of classical contract law and its concern with "freedom of contract"). See also JAMES L. BRIERLY, *THE LAW OF NATIONS* 49-54 (6th ed. 1962); IAN BROWNIE, *PRINCIPLES OF INTERNATIONAL LAW* (4th ed. 1990).

³ See discussion below at Part III.A. and accompanying notes.

⁴ A characteristic example of this divide is the rejection of the idea of economic duress within international law. See LOUIS HENKIN, *INTERNATIONAL LAW: POLICIES, VALUES AND FUNCTIONS* 49 (1989).

⁵ See Stephan Haggard & Robert R. Kaufman, *Economic Adjustment and the Prospects for Democracy*, in *THE POLITICS OF ECONOMIC ADJUSTMENT* 319 (Stephan Haggard & Robert R. Kaufman eds., 1992). See also Paul Drake, *Debt and Democracy in Latin America, 1920s-1980s*, in *DEBT AND DEMOCRACY IN LATIN AMERICA* 39 (Barbara Stallings & Robert R. Kaufman eds., 1989). See discussion below at Part II.B.2.

The essential logic of the compulsion to pay at any cost was practical before it was moral or legal: pay or you will be excluded from the world of international capital; pay or you will be forced into the dead-end of economic autarchy and political radicalism. However, the practical imperative would have seemed less overwhelming if it had failed to wear the garb of legal duty and contractual sanctity.

One of my aims is to disrobe the creditors' imperative of this disguise. An important intermediate step in my argument is the thesis that the debt contracts should be analogized to the world of continuing contractual relations where reliance, good faith and fiduciary self-restraint have a voice, rather than to the world of one-shot transactions and arms-length gambles, where parties can readily deny responsibility for the effects upon their contractual partners of their claims to exercise rights. Another intermediate step in my argument is the effort to justify a practice of international-legal analysis which evades the simple contrast between relations among governments and relations among private citizens. An alternative style of analysis would focus instead upon complex connections cutting across the boundaries supposedly separating governments, firms and civil societies.

The argument of the article develops in four stages. In the first part, I consider the established arguments against debt repudiation. Here, I seek to show how traditional, narrowly tailored economic arguments about the unfeasibility of debt repudiation fail adequately to account for the difficulty of outright denunciation of the debt.⁶ Instead, the obstacles to repudiation must be understood from a broader political perspective.⁷ The explanatory approach which that perspective requires leads to a normative political and legal argument about constraints on the duty to repay that concerns the second part of this article.⁸

In the second part of this article, I develop a normative moral and political argument in favor of constraints on the duty to repay sovereign debt.⁹ The central argument is that full and timely repayment of the sovereign debt is incompatible with the practical conditions of individual and collective self-determination. Not only the debt, but also the financial and

⁶ See discussion below at Part II.A.1.

⁷ See discussion below at Part II.A.2..

⁸ Here I have benefitted greatly from many of the policy pieces prepared by international economists sympathetic to the plight of the debtor countries and knowledgeable of their domestic political situations. See, e.g., Jeffrey D. Sachs, *Conditionality, Debt Relief, and the Developing Country Debt Crisis*, in *DEVELOPING COUNTRY DEBT AND THE WORLD ECONOMY* 275 (Jeffrey D. Sachs ed., 1989) [hereinafter *DEVELOPING COUNTRY DEBT*]; CHANDRA S. HARDY, *RESCHEDULING DEVELOPING COUNTRY DEBT, 1956-1981: LESSONS AND RECOMMENDATIONS* (Overseas Development Council Monograph No. 15, 1982).

⁹ Readers interested in the policy literature that has grown up in response to the third-world debt crisis should consult the following recent works: RUDIGER DORNBUSCH, *THE WORLD DEBT PROBLEM: ANATOMY AND SOLUTIONS* (Prepared for the 20th Century Fund, 1987); *DEBT, STABILIZATION AND DEVELOPMENT* (Guillermo Calvo et al., eds., 1989); SACHS, *DEVELOPING COUNTRY DEBT*, *supra* note 8; *DEVELOPMENT AND EXTERNAL DEBT IN LATIN AMERICA* (Richard E. Feinberg & R. Ffrench-Davis eds., 1988).

economic relations that generated the debt, threaten the practical requirements for democracy, in all its forms of national autonomy and collective-self-government.

The third part of the article explores the extent to which the ideas discussed in part II should take legal form. My aim here is less to argue for a particular solution to the third-world debt problem than to examine through the lens of that issue the translation into law and legal thought of the emergent approach to individual and collective freedom discussed in Part III.

In the fourth part of this article, I turn from substance to method, examining the implications of the experience studied and of the arguments presented for the understanding of doctrinal innovation: how it does and should occur. I argue that contemporary legal analysis has ample reason to persist in the cumulative weakening of rigid distinctions between legal and non-legal arguments.¹⁰ I further claim that such an evolution necessarily brings into question both the privileged role of jurists as agents of doctrinal innovation and the privileged place that the adjudicative, jurist-controlled settlement of rights occupies in legal thought.¹¹ Law is about society, its institutions and ideals. Lawyers, lawsuits, courts, and judges are a small part of the picture. If we forget that, we are likely to make developments in the substance and method of legal analysis, such as the ones for which I argue in this article, hostage to the scruples and anxieties of the jurists about the proper limitations on their role and the plausible justifications of their power. Here I argue, implicitly, and much against the grain of American traditions of legal thought: vision above content; content above method; method above process, propriety and role.

II. THE ARGUMENT FOR THIRD-WORLD DEBT RELIEF

A. *Preliminary Observations: The Feasibility of Repudiation*

Contemporary discussions of proposals to repudiate in whole or in part third-world sovereign debt usually begin, and often end, with the argument that non-payment is simply impractical. According to this view, failure to

¹⁰ Although this claim is commonly associated with the critical legal studies movement, its range of application is much wider. See O.W. Holmes, *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); John P. Dawson, *Economic Duress - An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE (1984). See also Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); 2 MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 193-272 (1992); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986).

¹¹ Similar proposals have been advanced recently by Bruce Ackerman and Cass Sunstein. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 3-33 (1991); Cass R. Sunstein, *Administrative Substance*, 3 DUKE L.J. 607, 607-22 (1991).

honor debt obligations would produce an immediate suspension of the short-term credit lines which are essential to sustaining a country's foreign trade.¹² For the crucial credit lines are supplied by the same banks that own the foreign debt, or by banks, industries, and international organizations that are linked to the creditors by many ties of economic and ideological solidarity. More generally, repudiation of the debt would result in ostracization from the world economy and the denial of access to both loan and risk capital.¹³ The disappointing experiences of countries such as Peru, Argentina, and Brazil that declared confrontational moratoria — of varying degrees of severity and duration — are adduced in support of the claim that repudiation confronts an allegedly inexorable obstacle.¹⁴

The argument in this section develops in two steps. First, I examine in greater detail the fear of economic ostracization. My conclusion, based on a review of the profile of financial and commercial transactions between a few of these countries and the world economy, as well as on familiar historical comparisons, is that the threat of economic ostracization is so exaggerated as to be misleading. The economic objections determine little until much is specified about the political, diplomatic, economic and ideological context in which repudiation takes place. This context decisively influences the force and direction of the economic difficulties associated with repudiation.¹⁵

The second part of the argument moves beyond standard economic considerations to address features of the political context in which repudiation occurs. A key distinction is whether the confrontation with the foreign creditors occurs under the aegis of a political project enjoying widespread support in the society; a movement transcending basic ideological and social rifts. Nationalism — political and cultural as much as economic — has historically provided one such basis.¹⁶ But it is not the only possible basis. Another, as argued in a later section, is an idea about practical conditions of collective and individual self-determination that shapes much of what is most distinctive in contemporary legal and political thought.

¹² See, e.g., Jeffrey D. Sachs, *Introduction to DEVELOPING COUNTRY DEBT*, *supra* note 8, at 1, 26. See also Robert Kaufman, *Democratic and Authoritarian Responses to the Debt Issue: Argentina, Brazil, Mexico*, in *THE POLITICS OF INTERNATIONAL DEBT* 187 (Miles Kahler ed., 1986).

¹³ See Sachs, *supra* note 12; Kaufman, *supra* note 12; HARDY, *supra* note 8, at 40-41; R. Ffrench-Davis, *The Foreign Debt Crisis and Adjustment in Argentina and Chile, 1976-1986*, in *MANAGING WORLD DEBT* (Stephany Griffith-Jones ed., 1988). See also Luis Carlos Bresser Pereira, *Da Crise Fiscal a Reducao da Divida*, in *DIVIDA EXTERNA E DESENVOLVIMENTO* 41 (José Olympio ed., 1990).

¹⁴ This point of view appears throughout the World Bank and IMF literature. A brief example may be found in the text accompanying WORLD BANK, *WORLD DEBT TABLES* 37 (1992) (Box 3.1, *The Costs and Effects of Arrears: The Case of Brazil*).

¹⁵ For a review of the historical precedents see GONZALO BIGGS, *A CRISE DA DIVIDA LATINO-AMERICANA E ALGUNS PRECEDENTES HISTORICOS* (1987).

¹⁶ See PAUL EINZIG, *WORLD FINANCE, 1914-1935*, at 217-23 (1935).

If it is true that practical constraints may make political and legal ideas more or less realistic; it is also true that once such ideas are ascendant, they become realities, and help spur the movement of more tangible forces. The overriding aim of this section is to present an empirical view that will broaden the received sense of what is possible to do about the debt and create a space within which more complex criticisms and proposals may emerge.¹⁷ A subsidiary goal is to illustrate on a modest scale how empirical analysis and normative argument may and must join in a revised practice of legal analysis.

1. Critique of the Conventional Objection to the Repudiation of the Third-World Debt

Consider first the conventional argument against repudiation of the foreign debts contracted by developing countries in the 1960s and 1970s.¹⁸ Policy makers have long assumed that the foreign trade so crucial to these countries required repayment of the sovereign debt contracted from Western financial institutions. Failing continuing debt service, the banks would withdraw their short term credits in retaliation for the financial losses suffered on their portfolio of long term credits.

To evaluate the merits of this argument, it is necessary to understand at least two sets of economic relations: (1) the magnitude and direction of the foreign trade balance in the debtor countries; and (2) the aggregate net resource flows between the debtor countries and the world economy.¹⁹

The starting point in assessing a country's ability to finance its trade relations is the balance between imports and exports, commonly referred to as the balance of trade. Only in cases of chronic trade deficit must countries rely on external sources to finance trade. If a country generates a trade surplus, the country will be able independently to channel all or part of the proceeds to the payment of imported goods. In contrast, deficit positions create a need for foreign financing equal to the net surplus of imported goods.

Countries, however, do not live by trade alone. A country may generate financial resources available to finance trade from capital transactions: from foreign investments outside the country, or from an increased flow of capital

¹⁷ Latin American economists and publicists undertook similar efforts throughout the nineteen-eighties. For one example, see ANTONIO BARROS DE CASTRO & FRANCISCO EDUARDO PIRES DE SOUZA, *A ECONOMIA BRASILEIRA EM MARCHA FORCADA* 144-56 (1985).

¹⁸ See KARIN LISSAKERS, *BANKS, BORROWERS AND THE ESTABLISHMENT* 218 (1991). The premise also underlies many of the efforts to estimate the costs of repudiation. See, e.g., ANATOLE KALETSKY, *OS CUSTOS DA MORATORIA* 63-67 (1988).

¹⁹ A glossary of terms is provided in 1 WORLD BANK, *WORLD DEBT TABLES* xiii-xx (1993-94) (Analysis and Summary Tables) [hereinafter *WORLD DEBT TABLES*]. See also JEFFREY D. SACHS & FELIPE LARRAIN B., *MACROECONOMICS IN THE GLOBAL ECONOMY* 34-37 (1993).

investment into the debtor country. The net effect of these transactions is to increase a country's reserves in excess of the amount generated through foreign trade.

Conversely, capital transactions may diminish a country's ability to finance trade. Suppose a country has accumulated a large stock of current international financial obligations — in relation, say, to past borrowings or to past imports of capital equipment. Even if the country generates a strong trade surplus, its overall financial position may be precarious. The "net transfer of resources," defined as the difference between inflows and outflows of foreign capital, in addition to interest payments, may, in some cases, overwhelm a positive trade balance, leading to a decrease in the country's reserve position.

Within this framework, the conventional objection to repudiation may best be restated as an argument based on three underlying assumptions: (1) the existence of large, recurrent trade deficits, on a country and regional basis; (2) no negative resource transfers (at the very least, these must be no larger than the corresponding trade deficits); and finally, (3) no alternative sources of trade finance (i.e. non-bank sources) from the international financial system.

Once we focus on these empirical assumptions, the conventional argument loses much of its vigor. Consider first the financial and trade flows between several of the leading debtors and the world economy.²⁰ Chart I provides trade data for leading debtors in Latin America on both a regional and per country basis during the period 1980 - 1990. Chart II presents information relating to net resource transfer: capital flows to and from the region in the period of the sovereign debt crisis.²¹

²⁰ See 1 & 2 WORLD BANK, WORLD DEBT TABLES, (1993-94).

²¹ 1 WORLD BANK, *supra* note 20, vol. 1 at 186-89.

CHART I.

Balance of Trade (in US\$ billions)*						
	1980	1986	1987	1988	1989	1990
Latin America and the Caribbean						
Exports	124.5	110.7	123.4	139.2	156.1	171.7
Imports	155.9	129.4	135.6	151.5	164.2	179.7
Trade Balance	-31.4	-18.7	-12.2	-12.3	-8.1	-8.0
Selected Countries						
Argentina						
Exports	11.2	8.8	8.4	11.4	12.0	15.1
Imports	16.0	11.7	12.6	12.9	13.4	13.3
Trade Balance	-4.8	-2.9	-4.2	-1.5	-1.4	1.8
Brazil						
Exports	23.3	25.1	28.7	36.8	38.8	36.3
Imports	36.3	30.1	30.3	32.8	38.0	40.9
Trade Balance	-13.0	-5.0	-1.6	4.0	.8	-4.6
Mexico						
Exports	22.1	23.9	30.1	32.3	37.7	43.6
Imports	33.0	25.8	26.6	35.0	42.0	52.2
Trade Balance	-10.9	-1.9	3.5	-2.8	-4.3	-8.6
Peru						
Exports	4.8	3.5	3.6	3.7	4.5	4.1
Imports	5.1	4.8	5.5	5.2	4.6	5.5
Trade Balance	-.3	-1.3	-1.9	-1.5	-.1	-.6

* WORLD BANK, *supra* note 20.

CHART II.

Net Resource Transfers (in US\$ billions)*

	1980	1986	1987	1988	1989	1990
Latin America and the Caribbean						
Net resource transfer**	7.5	-18.9	-16.2	19.6	-22.4	-6.0
Interest on debt	17.5	25.6	25.2	29.2	21.0	18.9
Selected Countries						
Argentina						
Net transfer	1.6	-3.0	-2.6	-1.7	-1.4	-2.6
Interest on debt	1.3	3.7	3.7	2.7	1.5	2.2
Brazil						
Net transfer	-.7	-7.8	-7.5	-8.6	-11.9	-4.9
Interest on debt	6.3	6.5	6.5	11.7	4.4	2.2
Mexico						
Net transfer	3.0	-6.4	-1.5	-7.1	-7.6	4.5
Interest on debt	4.6	7.7	7.7	7.5	7.9	5.9
Peru						
Net transfer	-.6	.2	.3	.2	.2	.2
Interest on debt	.7	.2	.2	.1	.2	.1

* WORLD BANK, *supra* note 20.

**Net resource transfer is defined as net new flow of long term debt and equity investments (including official grants) minus payments of profits and interest. For a graphic illustration, see 1 WORLD BANK, *supra* note 20, at xix.

As Chart I reveals, the pattern of trade for the region is far different than usually assumed. Although the balance of trade for the region as a whole was negative throughout the nineteen-eighties, the size of that deficit varied greatly from one period to another. At times, the deficit was as small as US\$2 billion (for a region with an aggregate GDP equal to roughly US\$8000 billion in the period under review). At other times, however, the trade deficit for the region rose greatly, to nearly US\$17 billion (for the year 1986).²²

At no time however, did the trade deficit for the region exceed the value of net resource transfer. In each of the years 1984-1990, annual net resource transfer for the region as a whole ranged from US\$15.5 billion to US\$21 billion. For the same period, the annual regional trade imbalance ranged from of US\$2 billion to \$16 billion. Indeed, to take but one example: in 1986, the negative net resource transfer from Latin America and the Caribbean exceeded by nearly US\$12 billion the aggregate trade deficit for the region. In other words, more than US\$2 in financial resources were remitted from Latin America for every US\$1 in trade credits required to finance the negative balance in trade.

To this point, only "abstract" resource transfers have been discussed. A critique of the conventional objections to repudiation becomes even clearer when we consider that the dominant element in the table on resource transfer is repayment of interest on international long term debt. Note the line on interest payment for the region in Chart II. Throughout the nineteen-eighties, interest payments on foreign debt vastly exceeded the annual deficit in trade. In 1984, for the region as a whole, interest paid on foreign debt was roughly 14 times greater than the negative balance of trade.²³

One objection to this line of reasoning is that it confuses cause with effect. For the improvement in the balance of trade for the debtor countries in the 1980s was itself the result of an aggressive policy of internal restructuring, as countries struggled to slash their imports in order to generate a surplus in trade.²⁴ This objection, however, is inadequate. If anything, the evolution toward trade balance in the region confirms the extent to which debtor countries possessed the power to re-orient commerce and trade. In transforming their commercial and financial relations with the rest of the

²² Although there were variations across debtor nations, the regional analysis is indicative of the situation facing the largest debtors in Latin America.

²³ 1 WORLD BANK, *supra* note 20, vol. 1 at 186-88.

²⁴ Import reduction is a typical response to a balance of payments crisis. See Rudiger Dornbusch & Sebastian Edwards, *Macroeconomic Populism*, 32 J. DEV. ECON. 247 (1990). For discussion of the strategy of import reduction in a particular case, see Edward F. Buffie & Allen Sangines Krause, *Mexico, 1958-1986: From Stabilizing Development to the Debt Crisis*, in DEVELOPING COUNTRY DEBT, *supra* note 8, at 141, 155-65. These same economists often fail to note the possibility of alternative policy response, in particular, reduced payment on the foreign debt. For one notable, though controversial exception, see the discussion of the Peruvian case below at Part II.A.2.

world, the debtor countries set their own course in the midst of financial constraint.²⁵

So far, I have analyzed only traditional sources of finance: the leading international banks responsible for the bulk of the original sovereign lending. But alternative sources of credit beyond the banking system exist. These alternatives include government loans, multilateral facilities,²⁶ and supplier credits.²⁷ By the end of the 1980s, increased government lending and supplier credits accounted for nearly sixty-seven percent of total disbursements to the region, nearly double the figure of a decade earlier.²⁸

According to the conventional wisdom, these sources of credit should have disappeared in the confrontational context of the 1980s, as the governments, industries and multilateral organizations withdrew their financial support from third-world countries, in acts of economic and ideological solidarity with first-world banks. This assumption fails because there are simply too many layers and too many factions within the global financial community for fully coordinated activity to occur. Consider the sheer number of entities involved: international banks; multilateral agencies; OECD governments and industries. Far from constituting a monolith, the sovereign and commercial organizations are divided at many points: by varying exposures to the outstanding debt and by differing capacities and agendas in the third-world countries.²⁹

Committees of banks assembled to restructure the sovereign debt clashed repeatedly throughout the many rounds of debt rescheduling. There were as many strategies, interests and points of view within the international

²⁵Several elements enter into the balance of payments equation: imports and exports of goods and services (reflected in a country's "current account"); inflows and outflows of loan and equity capital (reflected in a country's "capital account"). A change in any of these elements will alter a country's balance of payments and reserve position. For a concrete illustration of the discretionary element in national responses to the debt crisis, see Robert R. Kaufman, *Democratic and Authoritarian Responses to the Debt Issue: Argentina, Brazil, Mexico*, in *THE POLITICAL ECONOMY OF THE SOVEREIGN DEBT* 187 (Miles Kalher ed., 1986).

²⁶ Multilateral facilities are credits provided by the multilateral institutions, such as the IMF and the World Bank, to debtor countries, often in the context of a balance of payments crisis. Supplier credits are loans provided by sellers (exporters) to buyers (importers) of goods without intermediation of financial institutions.

²⁷ A systematic analysis of the sources and uses of sovereign credit is provided in WORLD BANK, *supra* note 20. For a historical perspective of alternative forms of finance in Latin America, see BARBARA STALLINGS, *BANKER TO THE THIRD WORLD* 58-106 (1987).

²⁸ WORLD BANK, *supra* note 20, at 136. Ratios are based on public and publicly guaranteed disbursements, and on private disbursements. Both sets of figures are adjusted by an equivalent amount for private, guaranteed debt, which I have placed in the category of private commercial bank debt.

²⁹ For a discussion of the conflicting responses to the policy of the Peruvian government to limit service on external debt to ten percent of export revenues, see John Crabtree, *The Consolidation of Alan Garcia's Government in Peru*, 9 *THIRD WORLD QU.* 804, 815-18 (1987). For historical examples of fragmentation in the banking sector, see Barry Eichengreen & Richard Portes, *After the Deluge: Default, Renegotiation and Readjustment During the Interwar Years*, in *THE INTERNATIONAL DEBT CRISIS IN HISTORICAL PERSPECTIVE* 12, 21-23 (Barry Eichengreen & Peter H. Lindert eds., 1989).

financial community as there were regional, cultural and historical differences distinguishing members of the group.³⁰

Conflicts within the banking community were exacerbated by conflicts between private bankers, Western governments and multilateral organizations. Toward the end of the 1980s, the positions of governments and commercial banks collided. In the minds of international bureaucrats and policy-makers, two considerations were paramount: first, the prospect of deepening recession and political instability in the debtor countries; second, the related effects on international economic activity. Stagnation abroad meant shrinking markets for foreign goods, especially goods from U.S. exporters.³¹ Gradually the Washington D.C. consensus shifted in favor of comprehensive debt relief.³²

As with trade flows and trading patterns, so with other elements of the international economy. Throughout the debt crisis, the debtor countries possessed far greater room for maneuver than the standard argument against repudiation ever conceded. Moreover, their ostensible opponents, Western banks, were far more divided than they liked to admit. Once Western governments decided to support debt reduction, the banks had little choice but to accept generous repayment schedules for debtor nations.

2. An Alternative View: Political and Ideological Factors in the Formation of Economic Constraint

Peru, Argentina and Brazil are often cited as confirmation of the existence of inexorable financial constraints against repudiation. What explains the great difficulties encountered by these countries in the wake of their relatively confrontational debt moratoria? I suggest that internal political and ideological factors — and not simply external financial constraints — decisively influenced the fate of their debt relief programs.³³

³⁰ See, e.g., LISSAKERS, *supra* note 18. The pattern here conforms to the general historical experience. See Eichengreen & Portes, *supra* note 29; Peter H. Lindert and Peter J. Morton, *How Sovereign Debt Has Worked*, in DEVELOPING COUNTRY DEBT, *supra* note 8, at 225; Barry Eichengreen, *The U.S. Capital Market and Foreign Lending, 1920-1955*, in DEVELOPING COUNTRY DEBT, *supra* note 8, at 237.

³¹ This fear was expressed repeatedly by Washington analysts at the time. See Richard E. Feinberg, *Latin American Debt: Renegotiating the Adjustment Burden*, in DEVELOPMENT AND EXTERNAL DEBT IN LATIN AMERICA 56-58 (Richard E. Feinberg & R. French-Davis eds., 1988).

³² The phrase is taken from John Williamson, *What Washington Means by Policy Reform*, in LATIN AMERICAN ADJUSTMENT (John Williamson ed., 1991).

³³ Domestic political factors receive similar emphasis in Dionisio Dias Carneiro, *Brazil and the IMF: Logic and the Story of a Stalemate*, in MANAGING WORLD DEBT, *supra* note 13, at 141; Carlos Fortin, *Power, Bargaining and Latin American Debt Negotiation: Some Political Perspectives*, in MANAGING WORLD DEBT, *supra* note 13, at 308.

The Peruvian case is instructive.³⁴ President Alan Garcia's unilateral decision to repudiate the foreign debt is often seen as the exception that proves the rule about the logic of debt repayment.³⁵ After all, the program of national recovery introduced by the government's decision to limit service on external debt to ten percent of export proceeds ultimately proved disastrous. Critics point to this failure as proof of an unrealistic strategy toward foreign creditors and the global banking community.³⁶

But the story of Peru is far more complicated than this narrative suggests. The programmatic core of the Garcia administration was a form of economic populism.³⁷ The government pursued a policy of demand-led inflationary growth, fueled by cheap credits, government subsidies, and a substantial increase in real wages for members of the popular classes.³⁸ Three tools figured prominently in this program: a massive increase in government spending; pseudo-keynesian finance of the spending program;³⁹ and the application of price controls over products, wages and foreign exchange, to contain inflationary pressures.⁴⁰

For a time, the program succeeded in achieving its objectives. Government spending, financed in part by savings from reduced debt service, produced a short-term boom and a substantial rise in both real and nominal wages. At the same time, inflationary pressures were held in check by the combination of price controls and increased imports, paid for from reserves which had swelled in the period following the new debt policy.⁴¹ The boom-bust cycle characteristic of debt-led expansion began in Peru in spectacular fashion.

However, problems soon began to appear. Increased demand failed to stimulate a corresponding increase in supply and bottlenecks developed.

³⁴ See generally PERU'S PATH TO RECOVERY (Carlos E. Paredes & Jeffrey D. Sachs eds., 1991); Rosemary Thorp, *The Apra Alternative in Peru*, in 1 THE PERU REPORT (1987); FELIPE ORTIZ DE ZAVALLOS M., THE PERUVIAN PUZZLE (1989); CAROL WISE, PERU IN THE 1980'S: POLITICAL RESPONSES TO THE DEBT CRISIS (1988); WASHINGTON OFFICE ON LATIN AMERICA, PERU IN PERIL: THE ECONOMY AND HUMAN RIGHTS, 1985-1987 (1987) [hereinafter PERU IN PERIL]. See also JOHN CRABTREE, PERU UNDER GARCIA: AN OPPORTUNITY LOST (1992).

³⁵ See, e.g., Richard Lago, *The Illusion of Pursuing Redistribution Through Macro-Policy: Peru's Heterodox Experience, 1985-1990*, in THE MACROECONOMICS OF POPULISM IN LATIN AMERICA 263, 283-86 (Rudiger Dornbusch & Sebastian Edwards eds., 1991).

³⁶ *Id.* at 282-84.

³⁷ This is the conventional term used to describe the economic policy discussed in the following paragraphs. In a later section I develop the notion of pseudo-keynesianism as an alternative and better description of this policy applied in the context of contemporary Latin America. For a general discussion of economic populism in Latin America, see Dornbusch & Edwards, *supra* note 24.

³⁸ See Lago, *supra* note 35, at 273-79; Armando Caceres & Carlos E. Paredes, *The Management of Economic Policy, 1985-1989*, in PERU'S PATH TO RECOVERY, *supra* note 34, at 80.

³⁹ See discussion below at Part II.B.2.(b).

⁴⁰ See Lago, *supra* note 35.

⁴¹ The Peruvian sequence of events conforms to the general pattern described by Dornbusch & Edwards, *supra* note 24. See also Dornbusch & Edwards, *Macroeconomic Populism*, in STABILIZATION, DEBT AND REFORM 253, 267-77 (Rudiger Dornbusch ed., 1993).

Growing shortages at home prompted increased imports, putting pressure on a balance-of-payments already weakened by an increasingly over-valued exchange-rate and a drop in export earnings.⁴² By the first quarter of 1987, the situation had deteriorated greatly. Rapidly diminishing foreign reserves provoked a balance-of-payments crisis, brought about by an unsustainable rise in imports, disinvestment and capital flight.⁴³ Two years later, the Garcia government returned to the IMF, resuming payment of arrears and adopting an austerity program tailored to the demands of the IMF.⁴⁴

The conventional criticisms of repudiation fail to explain the Peruvian economic crisis that occurred in the latter half of the Garcia presidency.⁴⁵ Peru did not experience a sudden shut-down of foreign loans and equity capital in response to the infamous ten percent debt moratorium.⁴⁶ Furthermore, Peru's trade and short-term trade credit were not measurably affected by international hostility toward the country. Indeed, export credits increased annually each year from 1983-1988.⁴⁷ Shortfalls in the flow of import credit could be financed, at least temporarily, from increased reserves brought about by reduced remittances on external debt.⁴⁸

In retrospect, two factors seem crucial to understanding Peru's economic crisis. First, the inherent limitations of a domestic policy based on cheap money and demand-led growth in a context of extreme economic dualism and inequality.⁴⁹ Second, the lack of internal support (the state of "local business confidence")⁵⁰ for a program that relied on private investment and

⁴² This phase of the demand-led cycle is not controversial. See Dornbusch & Edwards, *supra* note 24; Lago, *supra* note 35; Caceres & Paredes, *supra* note 38. Several conventional economists acknowledge the absence or inadequacy of investment in Peru at the time. See, e.g., Caceres & Paredes, *supra* note 38, at 80. See also PERU IN PERIL, *supra* note 34, at 9 (commenting that "increased profits generated from higher industrial capacity utilization have not been transformed into increased productive investment"). The dispute between international economists and others centers on two points: (1) an assessment of the magnitude and nature of investment; and (2) an evaluation of the role of imaginative and institutional assumptions in the determination of domestic investment.

⁴³ The spiral downward is well chronicled in Lago, *supra* note 35; Richard C. Webb, *Domestic Crisis and Foreign Debt in Peru*, in DEVELOPMENT AND EXTERNAL DEBT IN LATIN AMERICA, *supra* note 9, at 241.

⁴⁴ See Caceres & Paredes, *supra* note 38, at 92-95.

⁴⁵ Peru's confrontational debt strategy did, of course, provoke some measure of retaliation in international financial circles, though the magnitude and effect of these measures is a subject of controversy. See, e.g., Lago, *supra* note 35, at 318 ("Although assessing the costs of default is difficult, suffice it here to say that they were significant in terms of paralyzed development projects, reluctant new foreign investments . . . and above all, major macroeconomic failure."). For an opposing view, see Sachs, *supra* note 12, at 26 ("Ironically, those countries that have suspended interest payments in recent years [Brazil, Ecuador, Peru] have generally been able to maintain their trade credit lines.").

⁴⁶ See 2 WORLD BANK, *supra* note 20, at 358-60.

⁴⁷ *Id.*

⁴⁸ This conforms to the general pattern explored by Eichengreen and Portes, *supra* note 29.

⁴⁹ See discussion below at Part II.B.2.(c). See also Caceres & Paredes, *supra* note 38, at 83-87.

⁵⁰ Garcia was much less successful in engaging the business elite in a program of sustained investment than he was in obtaining their support for his confrontational debt policy. See CRABTREE, *supra* note 34; Carlos E. Paredes & Jeffrey D. Sachs, *Introduction and Summary* to PERU'S PATH TO RECOVERY, *supra*

business initiative to respond to increased demand and the need for adjustment in the growing economy.⁵¹

Critics of economic populism in Latin America are quick to assert that demand-led growth regularly leads to macroeconomic imbalance.⁵² Yet, these same critics fail to recognize the many structural and institutional factors that contribute to instability. In the Peruvian case, as in Latin America generally, the key institutional factor is private control over investment decisions. To the extent that the model relies on private decisions, frictions between populist politicians and entrenched economic elites will always ensue.⁵³ The key structural factor is the mix of economic dualism and inequality. The combination of these factors helps explain both the resistance of the business class and the political motives underlying a populist, demand-led expansion.⁵⁴

The analysis of the Peruvian experience suggests that the decisive practical obstacle to repudiation is, contrary to widespread perception, more political than economic and more domestic than foreign. There is an element of truth in the standard economic objections to non-payment. But even the qualified force of these economic considerations seem to depend on their association with a recurrent political dynamic.

In the circumstances of contemporary third-world debtor countries, repudiation is generally perceived as a radical move, the prologue to a concerted effort at internal political and economic restructuring.⁵⁵ In the genealogy of this perception, it is hard to distinguish ideological preconceptions from tangible economic and political forces.

On the one hand, repudiation seems part and parcel of a determination to secede from the rules of the world economy, and especially of the international capitalist economy. The denunciation of the debt, and the downgrading of the practical consequences of non-performance appear to signal a refusal to recognize the legitimacy not only of the debt contracts

note 34, at 13.

⁵¹ *Id.*

⁵² This is the central argument of Lagos, *supra* note 35; Caceres & Paredes, *supra* note 38. Peru is one of the two cases studies included in Dornbusch & Edwards, *supra* note 24.

⁵³ The macro economists fail to discuss the extensive political negotiations between the Peruvian government and representatives of the major business families prior to the downward spiral. The decisive political events are discussed in WISE, *supra* note 34; PERU IN PERIL, *supra* note 34.

⁵⁴ Sachs and others identify unresolved distributive conflict as a key element in the equation, without broadening the argument to include either political or institutional factors. See Jeffrey D. Sachs, *Social Conflict and Populist Policies in Latin America*, in LABOR RELATIONS AND ECONOMIC PERFORMANCE 138 (Renato Brunetta and Carlo Dell'Ara eds., 1990).

⁵⁵ The general concern is emphasized in Stephen Haggard & Robert R. Kaufman, *The Politics of Stabilization and Structural Adjustment*, in DEVELOPING COUNTRY DEBT, *supra* note 8, at 263. See also Stephan Haggard, *The Politics of Adjustment: Lessons from the IMF's Extended Facility*, in THE POLITICS OF INTERNATIONAL DEBT, *supra* note 12, at; Miles Kahler, *Politics and Proposals for Reform*, in THE POLITICS OF INTERNATIONAL DEBT, *supra* note 12, at 259.

themselves, but of the whole style of economic organization that enables weak states to finance their infrastructural investments, their social assistance programs, and even their ordinary government activities without imposing more than a fraction of the costs on the domestic moneyed classes. Moreover, the agent of repudiation is the state: a central government working to carry out a clearly defined and admittedly risky political project rather than trusting to international trade and capital markets. It is just this arrogation of purpose and power by a state that so understandably frightens economic and political elites. The state that begins by repudiating its debt seems already to have set out on a course of upheaval.

Thus, the propertied interests and their allies may be expected to resist even partial and oblique forms of repudiation as a threat to their own position⁵⁶ for they will quite plausibly see it as a harbinger of radical domestic reform, both because it is imaginatively linked to ideas favorable to such radical reformism and because it creates practical pressures inviting reformist efforts. This fact helps account for how the intensity of domestic opposition to any measure of non-payment varies according to the explicitness of the repudiation. A de facto, comprehensive moratorium may be tolerated by national elites, as well as by foreign banks and governments, so long as it remains unaccompanied by an explicit rejection of the legitimacy of the debt. By contrast the mere threat to repudiate part of the debt may generate a storm of both internal and foreign opposition, accompanied by capital flight and foreign financial and political pressure if it is interpreted as the announcement of an intention to play by new rules.⁵⁷

Things have not always been this way. In some historical circumstances, conservative entrepreneurial, landowning and bureaucratic elements have joined middle-class political movements and popular forces to oppose payment of sovereign debt, even at a substantial cost to themselves. Such was the case with the war debt of some of the central European nations, notably Germany and Hungary, in the period between the two World Wars of the twentieth century.⁵⁸

⁵⁶ For an example of just this dynamic in a Brazilian context, see Guillermo O'Donnell, *Brazil's Future: What Future for Debtors' Cartels?*, 9 THIRD WORLD Q. 1157-58 (1987) (discussing internal political opposition to then Finance Minister Dilson Funaro's decision to declare unilaterally a moratorium on outstanding long term external debt).

⁵⁷ Source material on capital flight include: JOHN T. CUDDINGTON, CAPITAL FLIGHT: ESTIMATES, ISSUES AND EXPLANATIONS (Princeton Studies in International Finance No. 58, 1986); Alberto Alesina & Guido Tebellini, *External Debt, Capital Flight and Political Risk*, J. INT'L ECON. 27 (Nov. 1989); Liliana Rojas-Suarez, *Risk and Capital Flight in Developing Countries*, in DETERMINANTS AND SYSTEMATIC CONSEQUENCES OF INTERNATIONAL CAPITAL FLOWS 83 (IMF Occasional Paper No. 77, 1991).

⁵⁸ A general treatment of the repudiation of war debts during the Interwar period may be found in EINZIG, *supra* note 16, at 91-106, 217, 274-86. The analogy between German reparations in the 1920's and the Latin American debt of the 1980's is developed in ARMINIO FRAGA, GERMAN REPARATIONS AND BRAZILIAN DEBT: A COMPARATIVE STUDY (Princeton Essays in International Finance No. 163, 1986). See also Albert Fishlow, *Lessons From the Past: Capital Markets During the Nineteenth Century and the*

The key distinguishing factor in these situations of elite confrontation seems to have been a difference of perception, a difference with real political consequences. Nationalism, rather than populist reformism, left-wing radicalism, or even simple humanitarianism, provided the dominant element and unifying force in the climate of these contrasting situations. Economic, bureaucratic, and military elites allowed themselves to be swept up in nationalist fervor, and tried to turn it to their own advantage.⁵⁹

What lessons should we infer from this contrast of experiences? The practical economic objections to repudiation are real. But they must be drastically qualified. Much of their force derives from their association with forces arising out of the political and imaginative setting in which governments propose to restructure or repudiate their foreign debts. For that reason, the analysis of the feasibility of repudiation merges into the discussion of the normative ideas — political and legal — that underlie or undermine the obligation to repay.

B. The Moral and Political Justification for Debt Relief

This section presents the moral and political justification for repudiation of the third-world debt. The first part of this section considers the conventional justification for repudiation of the third-world debt obligations. I argue that the conventional justification is inadequate, largely because it fails to consider the distinctive economic setting in which the debt arose and the ways in which this context denies or jeopardizes the minimal requirements of individual and collective self-determination. In rejecting as inadequate some of the standard objections to the validity of the loan obligations, I nevertheless recognize that the conventional objections have a kernel of truth. They shed light on a context of injury to fiduciary responsibilities: of governments to their citizens; of banks to developing countries; and of rich states to poor states.

The second subsection sets forth the moral and political justification for debt relief. I argue that enforcement of the third-world debt is incompatible with the effective exercise of individual autonomy and collective self-government in third-world countries. The argument focuses on the causal links between repayment of the debt and three distinct aspects of individual and collective freedom in the developing countries: (1) economic sovereignty, narrowly construed as administrative control over the main tools of economic policy; (2) economic sovereignty broadly construed to include the capacity of a government in a developing country to perform the tasks

Interwar Period, 39 INT'L ORG. 357 (1985). See generally THE INTERNATIONAL DEBT IN HISTORICAL PERSPECTIVE, *supra* note 29.

⁵⁹ See EINZIG, *supra* note 16.

associated with economic progress and modernization; and (3) collective self-government in its broadest sense, as the power of citizens freely to choose how to live individually and collectively, without the constraints imposed by enormous economic inequality or persistent political instability.

1. Conventional Criticisms of Third-World Debt and of the Validity of the Sovereign Debt Contracts

Throughout the 1980s, three standard objections were raised against repayment of the debt: first, many of the debts were tainted by their origins in the military regimes of the 1970s;⁶⁰ second, the commercial banks were largely responsible for the excessive borrowing of the period;⁶¹ and, third, full repayment of the loans would create intolerable social hardship.⁶²

Each claim appears simple and compelling. Many of the loans were produced by military regimes lacking democratic legitimacy or accountability.⁶³ The commercial banks did engage in a frenzy of lending, multiplying overnight the stock of debt made available to developing countries.⁶⁴ A pattern begins to emerge in which contractual relations are imposed from above, despite the fact that many debtor nations were ill-equipped to withstand the consequences of excessive borrowing or wasteful consumption.

But there are several reasons to mistrust their line of analysis. One problem with the first criticism is that it fails to distinguish adequately between the issues of moral-political legitimacy and legal validity. To question the validity of contractual obligations undertaken by undemocratic governments would make it difficult for many or most third-world

⁶⁰ For one representative treatment of the link between Latin American dictators and the build-up of the sovereign debt, see BERNARDO KUCINSKI & SUE BRADFORD, *A DITADURA DA DIVIDA* 81-89 (1987). See also WISE, *supra* note 34 (noting the relevance of background political conditions to assessing the legitimacy of developing country debt). For a discussion of the role of the military in debt-led industrialization in Latin America, see JOHN SHEAHAN, *PATTERNS OF DEVELOPMENT IN LATIN AMERICA* 188-94 (1987).

⁶¹ The eagerness of the bankers for sovereign loans is well chronicled in LISSAKERS, *supra* note 18, at 85-113. See also WILLIAM A. DARITY, *THE LOAN PUSHERS: THE ROLE OF COMMERCIAL BANKS IN THE INTERNATIONAL DEBT CRISIS* (1988).

⁶² See, e.g., CELSO FURTADO, *ABC DA DIVIDA EXTERNA* (1989); JEFFRY A. FRIEDEN, *DEBT, DEVELOPMENT AND DEMOCRACY: MODERN POLITICAL ECONOMY AND LATIN AMERICA: 1965-1985* (1991); ROBERT R. KAUFMAN, *THE POLITICS OF DEBT IN ARGENTINA, BRAZIL & MEXICO: ECONOMIC STABILIZATION IN THE 1980S* (1988); *WORLD DEBT AND THE HUMAN CONDITION* (Jed Nanda et al., eds., 1993).

⁶³ The dictatorships in Brazil, Argentina and Chile, for example, were responsible for much of the sovereign borrowings in those countries. See, e.g., *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (James M. Malloy ed., 1977); *AUTHORITARIANS AND DEMOCRATS: REGIME TRANSITION IN LATIN AMERICA* (James M. Malloy & Mitchell A. Seligson eds., 1987).

⁶⁴ See the discussions in SACHS & LARRAIN, *supra* note 19, at 670-95; Albert Fishlow, *External Borrowing and Debt Management*, in *THE OPEN ECONOMY* (Rudiger Dornbusch & F. Helmes eds., 1988).

governments to arrange capital transfers. It would also invite a conflation of business relations and ideological judgements that has often served in the past as a form of imperial domination rather than a shield protecting the weak against the strong.⁶⁵

A second inadequacy is that this criticism fails to link the legitimacy of the sovereign loans to the style of industrialization financed by the public debt. Not accidentally, the period of greatest sovereign borrowing coincided with the consolidation of the national strategy of fordist industrialization⁶⁶ and of the pseudo-keynesian public finance⁶⁷ that regularly accompanied it.⁶⁸ Often, the denunciation of the military or authoritarian character of the borrowers' governments masks resistance to this industrialization strategy and this approach to public finance. Yet comparative experience demonstrates that Fordist industrialization and pseudo-keynesian public finance, with their accompaniment of runaway foreign borrowing, were pursued with or without the presence of a dictatorship.⁶⁹

A third inadequacy is the failure to acknowledge the financial context in which the loans were made. The loans resulted from the exploitation of nation states in a context of systematic poverty and inequality, and the bankers had multiple roles in this structural situation: they were (1) lenders, (2) internal funders, and (3) partners of the multinational corporations which in turn helped organize and benefit from the dualistic economy, with its hierarchical profile of production and consumption.⁷⁰ In other words, the most telling form of joint responsibility is the one that results from the ways in which the very same banks that lent the money were also partners of economic systems that left hundreds of millions of people in poverty but denied the state proper sources of finances.⁷¹

A final objection may be raised in connection with the argument of social hardship. If it is not in the interests of the poor — individuals or societies — to make all contracts into which they enter voidable, then the

⁶⁵ This alludes to the practice of "gunboat diplomacy" common in the nineteenth century. The development of the "Calvo Clause" was a reaction to this practice. See HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT* 443-561 (3d ed. 1986). For a contemporary account of the political use of economic sanctions, see DAVID BALDWIN, *ECONOMIC STATECRAFT* (1985).

⁶⁶ See *infra* at Part II.B.2.(c).

⁶⁷ See *infra* at Part II.B.2.(b).

⁶⁸ For a discussion of this relationship in the Brazilian context, see CASTRO & SOUZA, *supra* note 17, at 97-156.

⁶⁹ See SHEAHAN, *supra* note 60; FRIEDEN, *supra* note 62.

⁷⁰ On the relation between international financial flows and economic dualism in developing countries, see PETER B. EVANS, *DEPENDENT DEVELOPMENT: THE ALLIANCE OF MULTINATIONAL, STATE AND LOCAL CAPITAL IN BRAZIL* (1979); Peter B. Evans, *Transnational Linkages and the Economic Role of the State: An Analysis of Developing and Industrialized Nations in the Post-World War II Period*, in *BRINGING THE STATE BACK IN* 192 (Peter B. Evans et al., eds., 1985).

⁷¹ On the insufficiency and narrowness of the tax base throughout Latin America, see RICHARD GOODE, *GOVERNMENTAL FINANCE IN DEVELOPING COUNTRIES* (1983); see also INTERNATIONAL MONETARY FUND, *GOVERNMENT FINANCE STATISTICS YEARBOOK* (1990).

criterion of voidability must be something other than mere social burden. A blanket condemnation of all contracts with poor countries would make difficult even the most salutary commercial agreements.

In what sense, then, does concern with social hardship express something more than the condemnation of increasing poverty? It does so when the poverty aggravated by repayment is tied to a series of conditions that threaten the very basis of collective self-government in developing countries. Consider one possible reformulation of the argument against debt repayment. A new argument would begin by focusing on the context of inequality in which the loan contracts were formed: the fact that rich, first-world banks made huge loans available to developing countries marked by poverty, capital scarcity, and minimal forms of democratic self-rule. Within this context of inequality between rich and poor countries, the debtors pursued, and the creditors funded, a highly dualistic program of industrialization. Full repayment of the sovereign debt is objectionable because it denies debtor countries the ability to undertake reforms and to reestablish conditions for economic growth and collective self-government.

Recast in this fashion, the argument gains vigor and clarity. It begins to resemble an argument of economic duress, extended to the international setting. The argument differs from the generalization of economic duress arguments inside particular societies both by emphasizing institutional factors and by considering broader social effects.

To summarize my criticism: particular defenses or criticisms of these contractual relations make sense only as part of broader debates about the domestic and international structure to which they belong. Yet, to take the validity of voluntary agreements and relations seriously is to inquire into the factual conditions that make such agreements and relations possible, both constraining and supporting their validity.

2. An Alternative Justification: Debt Relief and the Practical Conditions of Individual Autonomy and Collective Self-Government

a) Third-world debt and the subversion of economic sovereignty in debtor countries

This section suggests how the foreign debt, and the IMF-style programs imposed to help insure its repayment, weaken the basis for economic sovereignty and for a democratized market economy. I focus on the programmatic and institutional character of the debt restructuring process. In the course of debt rescheduling, sovereign nations are forced to adhere to a single model of economic and political organization. Through its "conditionality" provisions, the IMF imposes a comprehensive program of

stabilization and adjustment on debtor countries.⁷² The imposition of the IMF-style program undermines economic sovereignty in the debtor countries by removing from the country's internal control many of the chief tools of macroeconomic policy.

The IMF has been at the center of the adjustment process since the start of the sovereign debt crisis. Beginning with Mexico in 1982, and in each subsequent sovereign debt restructuring, the IMF has played a key role in negotiating the terms of adjustment and in bringing all parties together to produce a comprehensive program of finance and reform.⁷³ In exchange for their commitment to pursue stabilization policies, debtor nations received short-term funds with which to finance the adjustment process.⁷⁴ Banks and official lenders were essential partners in this process, conditioning their own negotiations with debtor countries on prior agreement with the IMF.⁷⁵

"Conditionality" is the term applied to the series of policies and performance parameters required of the debtor countries in exchange for new IMF credit.⁷⁶ The main purpose of conditionality is to ensure that the debtors bring about an adjustment in the balance of payments. A typical conditionality agreement touches all aspects of the macroeconomy, including exchange rates, levels of government expenditure, domestic credit and real wages.⁷⁷

Consider the three main components of the IMF program of stabilization. The first component is fiscal adjustment.⁷⁸ The Government should bring expenses into line with revenues. But the government should do so primarily by cutting back on public investment, rather than by raising the tax burden. This bias reveals the distinctive ideological-institutional slant of the IMF. It is hostile to state intervention, although the universal experience of later industrialization (and most recently the experience of the East Asian tigers) suggests the importance of government-business partnerships and investments.⁷⁹

⁷² For a discussion of the neoliberal project and its implementation in particular Latin American countries, see JOHN WILLIAMSON, *THE PROGRESS OF POLICY REFORM IN LATIN AMERICA* (1990). For a general discussion of the policy initiatives that accompanied third-world debt rescheduling, see RICHARD FEINBERG & BARBARA STALLINGS, *GLOBAL FINANCIAL TRENDS: IMPLICATIONS FOR THIRD WORLD DEVELOPMENT* 6-8 (University of Wisconsin, Series on the New International Context of Development, Working Paper No. 5, 1993).

⁷³ See LISSAKERS, *supra* note 18, at 195-216; Sachs, *supra* note 12, at 22-27.

⁷⁴ See Haggard, *supra* note 55.

⁷⁵ See LISSAKERS, *supra* note 18; Sachs, *supra* note 12.

⁷⁶ See IMF CONDITIONALITY (John Williamson ed., 1983).

⁷⁷ See *id.* See also MANUEL GUITIAN, *FUND CONDITIONALITY: EVOLUTION OF PRINCIPLES AND PRACTICES* 4-8 (1981).

⁷⁸ See RUDIGER DORNBUSCH ET AL., *EXTREME INFLATION: DYNAMICS AND STABILIZATION* (Brookings Papers on Economic Activity No. 2, 1990).

⁷⁹ See ALEXANDER GERSCHENKRON, *ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE* (1962); see also Stephan Haggard, *The Newly Industrialized Countries in the International System*, 38 *WORLD POL.* (1986); Evans, *supra* note 70. For a discussion of the role of the state in economic development in

The second component is export orientation.⁸⁰ Export earnings are to be mobilized for debt service rather than enlisted to finance the import of capital goods, needed for progressive technological transformation. Government subsidies and incentives are to be used to promote the development of new export industries, or the expansion of existing ones.⁸¹

The third component is structural adjustment, based on privatization and liberalization. Public enterprises and banks should be privatized. Tariff barriers should be brought down and the internal economy exposed to the stimulus of foreign competition. The state should get out of the business of production and devote itself instead to promoting the ground rules of private initiative within a context of free trade.

There is a two-way relation between the IMF orthodoxy and the program of foreign debt. The build-up of the debt was often a strategy of postponement and circumvention: avoiding the measures that an IMF-style program imposes while failing to develop a feasible alternative strategy of economic growth and of integration into the world economy. Yet, once the opportunity to borrow money runs out (and it tends to run out simultaneously with the self-destruction of pseudo-keynesianism public finance), the need to surrender to an IMF-style cost-cutting regime becomes all the greater. The state that would be capable of spearheading an alternative strategy of growth and international economic integration no longer has the political power or financial means to achieve such a plan.⁸²

The harm done by this relationship between the debt burden and the IMF-style program is complex. In the first place, it is harm consisting in the progressive loss of control over matters central to economic statecraft. The detailed framework of conditionality requires an intense and on-going scrutiny of the macro-economic policies of debtor countries. Secondly, it is a harm imposed upon the state, and upon the possibility of financing and organizing a state that can enter into any number of forms of government-business partnership and invest in people and infrastructure.

Recognition of the harms stemming from the loss of domestic economic control have been obscured by apparent successes of IMF style programs in Mexico and Argentina. Orthodox stabilization and structural reform have apparently led, in each case, to vigorous growth, economic vitality and an increasingly diversified export portfolio.⁸³

East Asia, see ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990). For a critique of the neoliberal model based, in part, on a comparative analysis of the Latin American and East Asian Experiences, see *ECONOMIC LIBERALIZATION: NO PANACEA* (Teriug Banuri ed., 1991).

⁸⁰ See *LATIN AMERICAN ADJUSTMENT*, *supra* note 32.

⁸¹ *Id.*

⁸² See *infra* discussion at Part II.B.2.

⁸³ See WILLIAMSON, *supra* note 72.

However, Mexico and Argentina are not true counter-examples. In the first case, a Saint-Simonian⁸⁴ dictatorship has developed and extended the limits of transplanted fordism by opening up a special relationship to the United States⁸⁵ and by compensating for dualism with an ambitious welfare program ("Solidarity").⁸⁶ In the second case, stabilization, although resulting in a speculative boom, has been accompanied by deindustrialization and by a worsening of internal dualism.⁸⁷

The adjustment program of the IMF is often portrayed as a necessary component of market freedom. Applied to the upper-tier debtor countries⁸⁸ in the throes of debt-rescheduling, this view is doubly false. The policy prescriptions of the IMF propose a single model of political economy for all the debtor countries. This model, in turn, contributes to a narrowing of democratic control over the content and character of economic development.

b) Third-world debt and the permanent fiscal crisis of the State

In this section, I examine the particular chain of causal links by which the third-world debt interferes with the exercise of both economic sovereignty and collective self-determination. My central thesis is that the sovereign debt represents both a cause and a consequence of a permanent fiscal crisis of the state. This fiscal crisis disorganizes the public sector and prevents the government from effectively performing the roles of economic leadership and social development that states have typically performed in late industrializing countries.⁸⁹ As a result, many third-world societies are set on a course of economic stagnation or involution and recurrent dictatorship that denies hundreds of millions of people the practical conditions for forming and executing their own life projects.⁹⁰

In the rich Western industrial democracies, it is now customary to think of the central government and its administrative apparatus as responsible for two main tasks, apart from the minimalist jobs of internal security and national defense. First, the state must ensure the economic conditions for the profitability of private firms. It must do so by managing the economy

⁸⁴ "Saint-Simonian" refers here to the belief that society is best governed by a class of enlightened technocrats. See THE DOCTRINE OF SAINT-SIMON: AN EXPOSITION, FIRST YEAR, 1828-1829, at 1-57 (George G. Iggers trans., 1972).

⁸⁵ See NORA LUSTIG, MEXICO: THE REMAKING OF AN ECONOMY (1992).

⁸⁶ See Kaufman, *supra* note 12, at 196-200.

⁸⁷ See INTER-AMERICAN DEVELOPMENT BANK, ECONOMIC AND SOCIAL PROGRESS IN LATIN AMERICA, 1992 REPORT (1992).

⁸⁸ See WORLD BANK, *supra* note 20.

⁸⁹ See sources cited *supra* note 79.

⁹⁰ For a discussion of the relation between sovereign debt and fiscal crisis in the Brazilian setting, see Geraldo Biasoto Jr., *Divida Externa e Desequilíbrio Financeiro no Setor Público*, 2 ANALISE E CONJUNTURA 25 (1987). See also Pereira, *supra* note 13.

counter-cyclically, by investing in human capital, and by making the infra-structural investments or carrying out the productive activities that private economic agents cannot undertake at a profit. Second, the state must work to redress the extremes of economic inequality and insecurity engendered by the workings of the economy. It achieves this goal by the development of an elaborate network of social entitlements, funding programs of social welfare and social insurance through a moderately progressive tax system.⁹¹

When we reconsider, from the standpoint of contemporary third-world societies, the role accorded to the state by this compromise, both the regulatory and the redistributive (or social) tasks appear both more inescapable and correspondingly less feasible. There are many more requirements of infra-structural investment and human-capital formation to satisfy before private firms and competitive markets can incorporate more resources and people. The problems of internal business cycles are aggravated by the dependence of relatively peripheral economies on the fortunes of the metropolitan economies to which they remain orientated.⁹²

The formidable managerial and social tasks of governments in late-industrializing countries, therefore, require strong states: states strong enough to redeploy resources and contain consumption, to resist the tyranny of the short-run and the pressures of the well-off, and to make decisive choices between alternative pathways of economic growth, and between the distinct patterns of sacrifice and burden they impose.⁹³ Instead, we find that the states of many of these third-world societies are characteristically weak in just the sense I have examined. They are weak despite the extraordinary degree of "statism" that marks these societies: the broad-ranging powers of the central government over the economy, the large size of the public sector, and the ingrained dependence of entrepreneurs on a rich array of governmental favors, subsidies, protections and exclusions.⁹⁴

"Pseudo-keynesian" is the economic policy that most tellingly expresses this standard and persistent form of state weakness. It is a policy of cheap money, massive domestic and foreign borrowing, high and permanent inflation, and, consequently, huge deficit finance. It says in effect: no

⁹¹ See Margaret Weir & Theda Skocpol, *State Structure and the Possibilities for "Keynesian" Responses to the Great Depression in Sweden, Britain and the United States*, in BRINGING THE STATE BACK IN, *supra* note 70, at 107. See also Michael Shalev, *The Social Democratic Model and Beyond: Two 'Generations' of Comparative Research on the Welfare State*, 6 COMP. SOC. RES. 315 (1983).

⁹² For a review of the recent comparative historical literature on the state and economic development, see Haggard, *supra* note 80.

⁹³ See Dietrich Rueschemeyer & Peter B. Evans, *The State and Economic Transformation: Toward an Analysis of the Conditions Underlying Effective Intervention*, in BRINGING THE STATE BACK IN, *supra* note 70, at 44.

⁹⁴ For a discussion of the conception of "weak states" from a different methodological perspective, see JOEL S. MIGDAL, *STRONG SOCIETIES AND WEAK STATES* (1988). For a discussion of the growth of state power in countries of the southern cone in Latin America, see Alfred Stepan, *State Power in the Southern Cone of Latin America*, in BRINGING THE STATE BACK IN, *supra* note 70, at 317.

recession and no meaningful cuts in either social programs or public works. Under this policy framework, the government uses deficit state finance to whatever degree necessary, short of hyper-inflation and economic disorganization, to accomplish its objectives. Pseudo-keynesianism often merges into a populist economic policy that raises nominal wage and social-benefit levels, subsidizes certain goods of popular consumption, promotes the import of such goods at subsidized exchange rates, depresses the service prices of government owned utilities, and uses public enterprises and governmental agencies to employ some of the unemployed, or at least those of the jobless with political patrons.⁹⁵

This policy is keynesianism in the superficial sense that it abandons sound-finance doctrine in favor of the aggressive use of deficit finance — the trade brand of vulgar keynesianism. But it is pseudo-keynesian because its real economic and political meaning, in context, is radically different from that of the economic policy it appears to resemble. The original keynesianism was, among other things, a response to particular market rigidities, such as the downward rigidity of wages and the hoarding reaction that occurred in the face of economic slump, preventing the full utilization of productive resources. Its implementation required a connected series of bold ideological and institutional innovations, including the abandonment of both sound finance practice and the gold standard, and the development of the legal and institutional instruments for the counter-cyclical management of the economy.⁹⁶

By contrast, Latin American pseudo-keynesianism is a manifestation of state weakness. It promises a way to execute the redistributive and managerial responsibilities of the state without directly imposing the cost on particular social groups. It discharges the modern, favored sector of the dualistic economy from having to pay up front the cost of infra-structural investment, investment in human capital, and compensatory social assistance. Moreover, to the extent pseudo-keynesianism holds out the prospect of economic redistribution, it does so without posing the present threat of economic reorganization. It offers an easy, relatively painless way to approach the fabled condition of the European social democracies. Thus,

⁹⁵ Macro economists interested in Latin America have applied the terms “populism” or “macroeconomic populism” to describe and analyze this phenomenon. See Dornbusch & Edwards, *supra* note 24. For an interesting series of national case studies, see THE MACROECONOMICS OF POPULISM IN LATIN AMERICA, *supra* note 35.

⁹⁶ I recognize that there is also a plausible case for interpreting original keynesianism as marked by a minimalist technocratic view of state capacity, which would bring it closer to pseudo-keynesianism. See Donald Winch, *Keynes, Keynesianism, and State Intervention*, in THE POLITICAL POWER OF ECONOMIC IDEAS: KEYNESIANISM ACROSS NATIONS 107, 110-13 (Peter Hall ed., 1989).

it is both a postponement and a circumvention. In both capacities, it reveals a state that is bloated and weak.⁹⁷

Pseudo-keynesianism may produce impressive results for a limited time, especially when developed into the broader populist experience detailed above. The economy booms. Wage and popular consumption levels rise. Indexing contains the disruption of inflation. Entrepreneurs and workers alike are content, especially those in the capitalized, modern sector who enjoy a stronger organization and a louder voice than their counterparts in the second economy. Nevertheless, the recent experience of countries such as Peru, Argentina, and Brazil suggests that this pseudo-keynesian and populist boom cannot sustain itself for more than two years.⁹⁸ Pseudo-keynesianism follows a familiar course that culminates in economic disorganization and involution and, all too often, in uncontrolled social and ideological strife and the suspension of political democracy.⁹⁹ Three aspects of this itinerary of self-defeat deserve to be singled out.

First, there is high and accelerating inflation — the most straightforward economic consequence of feverish deficit finance. At first the adoption of pervasive indexing helps limit the pains of a regime of high inflation. But indexing ends up making the inflation both more intractable and more virulent: more intractable because it perpetuates inflationary expectations and more virulent because the differential rates at which forms of income — wages, rents, and returns to capital — are indexed, become in their own right, foci of the unresolved distributive conflicts that help fuel inflation.

A second feature of pseudo-keynesianism, in its late and sullen phases, is the disorganization of the public sector.¹⁰⁰ The government cuts back on both its managerial and welfare activities. It begins to sell off the most profitable as well as the most costly of its productive enterprises.¹⁰¹ A cry arises from the entrepreneurial classes and their allies in both the political parties and the media — that the government and the public sector are responsible for “everything.” Indeed, in a sense the government is responsible; in part for having failed to make the modern advanced sector of the economy pay the cost of investment in infrastructure, human capital, and social welfare; in part for having failed to embark on a course of structural

⁹⁷ The policies of pseudo-keynesianism have been applied broadly in Latin America. An illustrative series of case studies may be found in *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA*, *supra* note 35.

⁹⁸ See Dornbusch & Edwards, *supra* note 24. The Peruvian case is discussed in Caceres and Paredes, *supra* note 38; see also Eliana Cardoso & Ann Helwege, *Populism, Profligacy and Redistribution*, in *THE MACROECONOMICS OF POPULISM*, *supra* note 35, at 45, 50-52.

⁹⁹ See Dornbusch & Edwards, *supra* note 24; see also Cardoso & Helwege, *supra* note 99, at 50-52.

¹⁰⁰ For a discussion on the relation between sovereign debt and fiscal crisis in the Brazilian setting, see Biasoto, *supra* note 91, at 25. See also Pereira, *supra* note 13.

¹⁰¹ See John Waterbury, *The Heart of the Matter?: Public Enterprise and the Adjustment Process*, in *THE POLITICS OF ECONOMIC ADJUSTMENT*, *supra* note 5, at 182.

transformation that would have begun to dismantle the arrangements supporting economic dualism.

A third aspect of late pseudo-keynesianism is the sequel it favors: the disruption, disillusionment, and sheer impoverishment produced by a prolonged pseudo-keynesian regime which sets the next stage for an acceptance of an orthodox, monetarist, fiscally conservative, IMF-like policy as a requirement of national salvation. Such a policy seeks to cure the work of pseudo-keynesianism with a vengeance. It accepts massive recession and unemployment, brought on by a sudden contraction of the money supply, an abolition of direct or indirect subsidies to popular consumption, and a dramatic lowering of wage and consumption levels, as the inevitable price of economic catharsis. It drastically restricts public expenditure, especially outlays for the managerial and social responsibilities of the state. Moreover, to the extent it approaches the traditional model of IMF conditionality agreements, it mobilizes the national economy to the almost single-minded task of producing, through increased exports and diminished national consumption, the hard currency needed to pay the country's foreign creditors.¹⁰²

I can now specify the role of the third-world sovereign debt in the drama of pseudo-keynesianism. At first, the accumulation of foreign debt serves as one of the chief tools of pseudo-keynesianism. Together with various deficit finance schemes, it enables governments to avoid imposing much of the cost for its managerial and social activities on the propertied classes and the modern, favored sector of the economy. It provides, or so its architects hope that it provides the means for rapid, forced industrialization without the sacrifices of massive redistribution and repressed consumption that have usually accompanied such efforts.

In the final stages of pseudo-keynesianism, the role of the foreign debt shifts from tool to nemesis. Rather than being a practical instrument of the policy, it becomes an expression and an aggravant of its catastrophic legacy. In three basic ways, foreign sovereign debt defines and worsens the consequences of pseudo-keynesianism.

First, the need to service the debt helps quicken the march toward hyper-inflation and therefore also toward the orthodox, recessionary and regressive antidote to hyper-inflation. This inflationary effect pressures the government into buying hard currency from exporters in order to continue servicing the debt. Given the mounting level of debt service and the widening spread between revenues and outlays accompanying the evolution of pseudo-keynesianism, the government must pay for these earnings by printing money or by borrowing it internally. An astronomical internal debt

¹⁰² See Joan M. Nelson, *Poverty, Equity, and the Politics of Adjustment*, in *THE POLITICS OF ECONOMIC ADJUSTMENT*, *supra* note 5, at 221, 226-31.

may prove to be one of the more lasting and troublesome legacies of the episode of the third-world debt, long after the external debt and hyperinflation have been resolved. The significance of such an oversized internal debt is to diminish both a government's margin of maneuver and its resources available to enact structural changes in society.

Second, the obligation to service the debt denies the national economy the hard currency it needs to import at the level required by sustained economic growth and technological transformation. The indebted countries must run a large trade surplus, and they must increasingly use this surplus to pay their bankers. Much of the remaining capacity for imports may be squandered in the importation of consumption goods at subsidized exchange rates, both because of the temptation to assuage popular consumption pressures, and because of the long-standing prestige of import-substituting industrialization strategies. Thus, the import of capital goods and technical services may bear the weight of the sacrifice.

Third, and most fundamentally, servicing of the foreign debt has regularly ended up as part of a circumstance of net negative capital outflows from the economy.¹⁰³ Every contemporary third-world society that has built a development strategy around foreign loan capital to the extent common among the Latin American republics of today has found itself remade into an involuntary exporter of capital.¹⁰⁴

The debt, which begins as a manifestation of political circumvention, ends up as a threat to the exercise of collective self-determination, first in the economy and then in the polity.

c) Third-world debt and the structural threat to self-determination

Just as I placed this discussion of economic sovereignty in the context of a criticism of pseudo-keynesian economic policy, so I now place the analysis of pseudo-keynesianism in the setting of an account of common structural obstacles to collective self-determination in the debtor countries.

I focus on two central structural problems shared by many of the debtor countries: a stark division between a favored, advanced economy and a disfavored backward economy; and a political cycle that drives countries through repeated bouts of politically liberal but socially conservative governments, frustrated populist reformism, and authoritarian breakdown.

¹⁰³ See WORLD BANK, *supra* note 14 (providing quantitative estimates of capital outflows from debtor countries on both a national and regional basis). See also SACHS & LARRAIN, *supra* note 19, at 706 (showing the magnitude and duration of negative net transfers of resources from Latin America, 1982-1990).

¹⁰⁴ See Peter B. Evans, *Class, State, and Dependence in East Asia*, in *THE POLITICAL ECONOMY OF THE NEW ASIAN INDUSTRIALISM* 203, 206-17 (Frederic C. Deyo ed., 1987).

These structural difficulties regularly jeopardize collective self-determination, both by reversing economic progress and by undermining political democracy. I argue here that the sovereign third-world debt has been, to a large extent, both a consequence and a cause of the failure to resolve these problems.

Economic dualism is the division of the national economy into two sectors: one, organized, highly capitalized, fully integrated into national and international markets, and, above all, favored by the state; the other, where most of the people actually work, with only tenuous access to capital, markets, and technology. This internal division of the national economy supports — and is supported by — a specific place of the national economy within the world economy. The favored sector uses traditional standardized mass-production techniques — the traditional fordist style of industry already in decline in the advanced economies — both to produce for the internal market and to export. These industrial technologies and organizational styles are sufficiently capital-intensive to sustain the economic dualism and produce the goods that enable the propertied classes to emulate the consumption habits of the richer countries. But they are also backward enough to narrow the range in which the national economy can compete in the world market and to force it to trade on a comparative advantage of lower labor costs. Thus, in both its domestic core and its foreign ramifications, economic dualism helps reproduce a steeply hierarchical profile of both production and consumption.

In many of the debtor countries, a turbulent political cycle accompanies this economic dualism.¹⁰⁵ I describe this cycle in its characteristic Brazilian form.¹⁰⁶ But the political cycle appears in many analogous variations throughout much of Latin America, and even in other parts of the developing world.

The pattern begins with an authoritarian military regime that takes over the state following a period of frustrated reform and alleged subversion, during which the middle-class is frightened by economic crisis and social agitation to the point of allying with the right.¹⁰⁷ The military regime finds it difficult to hold on to power indefinitely.¹⁰⁸ It has no coherent plan of

¹⁰⁵ For a discussion of the political cycle in the modern history of eight Latin American countries, see RUTH BERINS COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* (1991).

¹⁰⁶ See Kaufman, *supra* note 12, at 195-217; Thomas E. Skidmore, *The Politics of Economic Stabilization in Postwar Latin America*, in *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA*, *supra* note 63, at 149. For discussion of oscillation between authoritarian and democratic regimes in modern Brazilian political history, see BRASIL, *SOCIEDADE DEMOCRATICA* (José Olympio ed., 1985); THOMAS E. SKIDMORE, *POLITICS IN BRAZIL, 1930-1964* (1967).

¹⁰⁷ See GUILLERMO O'DONNELL, *BUREAUCRATIC AUTHORITARIANISM: STUDIES IN SOUTH AMERICAN POLITICS* (1973).

¹⁰⁸ See COLLIER & COLLIER, *supra* note 106, at 108-10; see also *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA*, *supra* note 35 (discussing recurrent political and economic cycles in Latin America

government. It wants to build national wealth and power without either imposing a greater part of the costs on the propertied classes or carrying the repression of the workers to the limits required by a reactionary practice of heroic industrialization.¹⁰⁹ Thus, despite its self-perception of strength, the governing regime starts down the seductive yet dangerous path of pseudo-keynesianism, abusing the full panoply of forms of deficit finance, including foreign loan capital.¹¹⁰

The military regime is followed by a conservative-liberal government committed to the reestablishment of republican institutions.¹¹¹ This government tries to compromise with the entrepreneurial and labor groups that occupy strategic positions in the modern sector.¹¹² The economic policies respect and reproduce the established profile of production and consumption. The government seeks to make the infra-structural investments required by the modern economy while it employs nominal and ineffective social-welfare programs in order to pacify the masses languishing in the backward sector of the economy.¹¹³ Furthermore, it tries to fund both its productive and its social responsibilities without imposing the brunt of the burden on its actual or desired allies in the favored groups of the modern sector.

The ascension to power of the would-be populist inaugurates the most contentious and decisive stage of the political cycle.¹¹⁴ The reformers find themselves at odds with the declared or covert conservative interests entrenched in the Congress, the Judiciary and other central institutions of society. The working people, particularly those who comprise the second economy, remain largely unorganized.¹¹⁵ If government reformers attempt to appeal to the disorganized masses over the heads of the elite institutions, they are likely to arouse violent opposition.¹¹⁶ Moreover, these reformers may find themselves in a situation which offers no alternative to the continuation of pseudo-keynesianism, as its attendant liabilities become increasingly onerous. Finally, capital flight and runaway inflation ensue to help fuel the

from a different methodological perspective).

¹⁰⁹ See ALBERT O. HIRSCHMAN, *STRATEGY OF ECONOMIC DEVELOPMENT* (1961).

¹¹⁰ See CASTRO & SOUZA, *supra* note 17.

¹¹¹ See COLLIER & COLLIER, *supra* note 106, at 100-57.

¹¹² *Id.*

¹¹³ Recent anti-poverty programs in Mexico and Chile offer examples of this dynamic. See PEDRO ASPE, *ECONOMIC TRANSFORMATION - THE MEXICAN WAY* 117-21 (1993).

¹¹⁴ See COLLIER & COLLIER, *supra* note 106, at 161-68 (providing schematic framework for discussion of populism in Latin America); F. WEFFORT, *POPULISMO NA POLITICA BRASILEIRA* (1978). A comparative analysis of populist experiences in Peru and in Chile is provided in Cardoso & Helwege, *supra* note 99; see also MICHAEL L. CONNIFF, *LATIN AMERICAN POPULISM IN COMPARATIVE PERSPECTIVE* (1982).

¹¹⁵ See SHEAHAN, *supra* note 60; O'DONNELL, *supra* note 108; WEFFORT, *supra* note 115.

¹¹⁶ See OCTAVIO IANNI, *A FORMACAO DO ESTADO POPULISTA NA AMERICA LATINA* (1975); WEFFORT, *supra* note 115. See also case studies developed in *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA*, *supra* note 35.

burgeoning economic crisis.¹¹⁷ This enables the right to mobilize the middle class. With the resulting polarization of the pseudo-keynesian plagued society, a military coup is staged.¹¹⁸ The political cycle begins again.

Although the foreign debt does not create these structural conditions, it fuels the crisis. Economic dualism and the political cycle are strongly linked. Economic dualism perpetuates the social and cultural conditions that drive the political cycle. This political cycle prevents the emergence of a government with the strength and the will to dismantle the arrangements that sustain economic dualism. Thus the debt — which appears at first as a consequence of the failure to resolve these structural problems — ends up cementing their hold and making more difficult their transformation.

III. THE EXPRESSION AND DENIAL OF THE MORAL-POLITICAL JUSTIFICATION FOR DEBT RELIEF IN CONTEMPORARY DOMESTIC AND INTERNATIONAL LAW

This part of the article shows how the moral-political argument about debt repudiation is simultaneously expressed and denied in contemporary domestic and international legal doctrine. It reviews a number of recognized doctrines that bear, directly and indirectly, on the sovereign debt controversy.

The first section examines the penetration of the modern, empirically-oriented idea of freedom into contemporary American law and legal doctrine. The second section reviews the relative failure of this idea to penetrate international law and legal theory. In the third section I consider the emergence of a set of ideas associated with the principle of self-determination in the inter-war period. The fourth section summarizes the contemporary treatment of the third-world debt controversy under international law.

Post-realist legal scholars are accustomed to think of legal doctrine as the continuation of politics by other means. But it is the forms and devices of discontinuity between the legal ideas and the political concerns of an age that stand out in this analysis of the aspects of international law that bear most closely on the specific problems of debt and on the larger ideas invoked here regarding the institutional forms and empirical conditions of self-determination. Each body of orthodox doctrine examined fails to speak to the real economic and political issues that have come to lie at the center of conflicts such as the one over third-world debt. The recognized triggers of

¹¹⁷ Source material on capital flight includes: CUDDINGTON, *supra* note 57; Alesina & Tebellini, *supra* note 57; Rojas-Suarez, *supra* note 57.

¹¹⁸ See Robert R. Kaufman & Barbara Stallings, *The Political Economy of Latin American Populism*, in *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA*, *supra* note 35, at 15, 37-38; Frederico A. Sturzenegger, *Description of a Populist Experience: Argentina, 1973-1976*, in *THE MACROECONOMICS OF POPULISM IN LATIN AMERICA*, *supra* note 35, at 77, 107-13.

contractual obligation and excuse in international law enjoy little connection with the facts generating or undermining the sense of obligation and the reality of trust between debtors and creditors.

*A. The Modern, Empirically-Oriented Idea
of Freedom in Contemporary Municipal Law*

The idea that freedom in all its forms presupposes the existence of practical enabling conditions is one of the most powerful and unifying ideas in contemporary legal and political thought.¹¹⁹ Illustrations may be found in all areas of American law, in both public and private law doctrine.

Consider just a few examples:

(1) The doctrine of economic duress, which looks to the real and not merely formal relations between individuals in their contractual dealings with one another.¹²⁰ The doctrine is context-sensitive. It allows the court to intervene in the market system to prevent the real relations between individuals from deviating too far from the ideal conditions of free and equal contract.

(2) Strict liability in tort establishes the *practical conditions* in which negligence principles can continue to be triggered by real experiences of freedom and responsibility.¹²¹ To be truly self-determining and choice capable in areas in which informed choice is possible, people must be secured against the catastrophic consequences of risks against which they cannot reasonably protect themselves. The imperative is particularly strong when the risks arise in a context of gross-inequality and/or statistical happenstance.

(3) The creation of social insurance schemes which relieve individuals from the extremes of economic dependence and insecurity, so that they may act as free citizens and economic agents.¹²²

¹¹⁹ See sources cited *supra* note 1.

¹²⁰ The classic works are Dawson, *supra* note 10; Hale, *Bargaining*, *supra* note 1. See also Robert L. Hale, *Force and the State: A Comparison of 'Political' and 'Economic' Compulsion*, 35 COLUM. L. REV. 149 (1935).

¹²¹ See generally HENRY STEINER, *MORAL ARGUMENT AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW* (1987); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981); Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law and Comparative Law*, 62 TUL. L. REV. 1303 (1988).

¹²² See generally BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984); BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE WELFARE STATE* (1980); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* (1990); Raoul Berger, *The Activist Legacy of the New Deal Court*, 59 WASH. L. REV. 751 (1984); Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723 (1984).

(4) The development of collective bargaining procedures, which ensures the degree of countervailing power in labor-management relations necessary to establish the factual conditions for contractual relations.¹²³

(5) Lastly, modern interpretations of the First Amendment to the U.S. Constitution, which may require active, governmentally sponsored redistribution of the means of communication, not merely passive prohibition of government tutelage of thought.¹²⁴

If there are characteristically several ways to go about ensuring the reality of self-determination in any particular field of legal doctrine and social practice, then each of these ways is likely to move the institutional organization in a different direction. Thus, the idea that self-determination depends upon practical conditions, so that choice must be limited for the sake of choice passes into the much less familiar idea that institutional conceptions like that of a market economy may have very different legal-institutional forms.

Consider any particular facet of freedom: for example, the ability of workers to make meaningful contracts with their employers. Suppose that the practical conditions of this freedom (as I argue in another article) can plausibly be satisfied in several ways, with varying degrees of efficacy; for example, by the direct legal regulation of certain terms of the employment relation; by the entitlement to receive, outside the employment relation, an array of guarantees against joblessness, ranging from unemployment compensation and negative income tax to a right to retraining; or by a scheme for mandatory enrollment in a single, comprehensive, national union scheme, designed to empower organized labor and to prevent its descent into "business unionism."¹²⁵

These need not be mutually exclusive routes. But, to the extent any of them prevails over the others, it is likely to develop the conceptions of workers' freedom in a different direction, rather than to provide an alternative satisfaction of an invariant conception of freedom. In other words, the consequence of treating the conditions of individual and collective self-determination as precarious and controversial, is not merely to launch an investigation of the best means to reach a fixed goal; it is to confront us with the ambiguity of the goal itself, with its alternative possibilities of

¹²³ National Labor Relations Act (Wagner Act), 29 U.S.C. § 157 (1982). See Neil W. Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COLUM. L. REV. 829 (1948).

¹²⁴ For an example of the new First Amendment jurisprudence, see Owen M. Fiss, *State Activism and State Censorship*, 100 YALE L.J. 2087 (1991). See also Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405 (1986); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255 (1992).

¹²⁵ See Tamara Lothian, *The Political Consequences of Labor Law Regimes: Contractualism and Corporatism Compared*, 7 CARDOZO L. REV. 1001 (1986).

development. When contemporary legal and political thought begins by considering how best to establish a certain part of freedom in practice, it ends by having to choose among alternative accounts or versions of that freedom. It has to redefine what it wants to realize.

The circle may now be closed. The legal-political view outlined in earlier pages to justify qualified repudiation, or qualified payment, of third-world debt may seem unfamiliar, high-handed or "political" when considered in isolation. But viewed in a broader context, the argument becomes simply one more analogical application of the modern, factually-oriented idea of individual and collective self-determination. A relation must be established between the conditions for requiring full repayment of the sovereign debt and the conditions for exercising a series of interlocking sets of collective and individual powers: sovereignty among states, political democracy within states, and no insuperable barriers to individual self-determination and group life imposed by obligations contracted or upheld in the international financial system.

*B. The Failure of the Moral-Political Argument About Debt
Repudiation in International Law*

Although the modern, empirically-oriented idea of freedom has emerged in many areas of domestic law, it has yet to set much of an imprint on international law and legal thought. In part, for this reason, current international law and jurisprudence remain largely indifferent to the political argument about the third-world debt, denying legal consequence to all normative attacks on the legitimacy of the debt. The methods, principles and vocabularies of the dominant doctrines in international law provide no tools with which even to express and discuss the broader concerns about the practical conditions of collective and individual self-determination.

1. The Classical Doctrine of International Law and the
Reification of the Ideal of Sovereignty ¹²⁶

According to the classical doctrine of international law, individual and collective self-determination may be achieved by fidelity to a system of rights derived from the abstract idea of sovereignty.¹²⁷ The state is the bearer of legal rights and duties. These rights and duties form the substance of the law, and establish the claims of the system to uphold an order based on the principles of equality and freedom.

¹²⁶ See BRIERLY, *supra* note 2, at 49-54; BROWNLIE, *supra* note 2, at 287.

¹²⁷ Contemporary treatments include HENKIN, *supra* note 4, at 216; Mark W. Janis, *International Law?*, 32 HARV. INT'L. L.J. 363, 367-70 (1991).

Three central doctrines structure the system of states' rights. First, the doctrine of territorial jurisdiction;¹²⁸ second, the doctrine of non-interference with the political independence, territorial integrity and domestic affairs of (other) states; third, the doctrine of voluntary relations among nation states (identified with a contract-based treaty order).¹²⁹

These three doctrines are considered intrinsic to an international community founded upon the principles of sovereign independence and equality.¹³⁰ Conversely, the realization of the core commitments of the international legal system — political autonomy and self-government within nations; independence and equality between nations — are contained in the core concepts of territorial sovereignty (based on the analogue to private property) and treaty (based on the model of private contract).¹³¹

The continuing strength of the traditional doctrine of state sovereignty represents a failure in the progress of the modern, empirically-oriented conception of freedom. International law remains committed to the belief that there exists a single, allegedly determinate system of legal rights inherent in the idea of a free and voluntary international order.¹³² According to this idea, it is not necessary to determine whether the rights prescribed by the classical system create the practical conditions of freedom. Instead, undertakings by subjects of international law in conformity with the classical doctrine are simply assumed to be part of an order based on respect for the principle of freedom.¹³³

2. The Relatively Uncritical Acceptance of Traditional Notions of Contract and Property

The counterpart to this classical doctrine of state sovereignty is the persistence in international law of traditional notions of contract and private property. Just as freedom in the international order is identified with principles of territorial integrity and voluntary relations among nation states, so freedom within a state is identified with the classical system of limited government and the protection of property and contract rights. Property and

¹²⁸ For a general review of the area, together with a statement of the influence of private-law analogies in international legal doctrine, see BROWNLIE, *supra* note 2, at 107-127; *see also* BRIERLY, *supra* note 2, at 162.

¹²⁹ *See* BRIERLY, *supra* note 2, at 317.

¹³⁰ *Id.* at 49-54; BROWNLIE, *supra* note 2, at 287.

¹³¹ *See* HURST HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* 14-23 (1990).

¹³² The principle of territorial jurisdiction is often viewed as inherent in the general idea of sovereign independence. *See, e.g.*, BROWNLIE, *supra* note 2, at 287. It is an aspect of the lingering formalism of international law that the commitment to freedom may be satisfied through an endorsement, at a very abstract level, of the inherent requirements of freedom.

¹³³ For a particularly good example of this approach, *see* BROWNLIE, *supra* note 2, at 287-91.

contract rights are treated as fundamental;¹³⁴ state action is restricted if it violates or interferes with the enjoyment of either.¹³⁵

Two doctrinal examples show the enduring presence of this idea in international law and legal doctrine. A first example is the doctrine of vested or acquired rights, especially in the context of state succession.¹³⁶ According to the doctrine of acquired rights, property and contract rights survive transformations of sovereignty; successor states must respect these rights independent of the factual circumstances of succession.¹³⁷ The property rights of aliens may not be taken, absent a showing of cause and payment of adequate compensation.¹³⁸

The law of expropriation provides a second illustration of the incorporation of classical private law categories into international legal doctrine.¹³⁹ Like the doctrine of vested rights, the traditional standard of compensation relies upon a primitive, absolutist view of the rights of property and of the justification for legal constraints on governmental interference with property arrangements. The key rule of compensation allows expropriations in cases involving alien property; however, the legality of the act is conditioned upon payment of full compensation.¹⁴⁰

The contrast between the reality and the ideal of property in these situations could not be greater. In the circumstances of state succession, especially succession related to revolutionary upheaval, the protection of

¹³⁴ See U.N. Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), at Art. 17; The American Declaration of the Rights and Duties of Man, signed May 2 1948, Res. XXX, Final Act, 9th Int'l Conf. of American States, Bogota, Mar. 30 - May 2, 1948, at 38, *reprinted in* 43 AM. J. INT'L L. 133 (Supp. 1949). See generally Eduardo Jimenez de Arechaga, *State Responsibility for the Nationalization of Foreign Owned Property*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 546, 546-59 (Richard Falk et al. eds., 1985).

¹³⁵ See BROWNIE, *supra* note 2; LORD MCNAIR, BRITISH YEARBOOK OF INTERNATIONAL LAW 16-18 (1957); L. Sohn & R. Baxter, *Responsibility of States for Injuries to the Economic Interests of Aliens*, 55 AM. J. INT'L L. 545 (1961). Lawful acts of expropriation must meet two basic conditions: they must be undertaken in furtherance of a "public purpose," and the state must pay compensation to aliens whose property has been expropriated. See BROWNIE, *supra* note 2.

¹³⁶ The concept and doctrine of acquired rights is discussed by F. V. Garcia Amador, *State Responsibility*, [1959] 2 Y.B. INT'L L. COMM'N 9, 9, U.N. Doc. A/Cn.4/Ser. A/1959/Add.1.

¹³⁷ See BRIERLY, *supra* note 2, at 156-61; BROWNIE, *supra* note 2; Philip C. Jessup, *A Modern Law of Nations*, 46 COLUM. L. REV. 913 (1946); see also D. P. O'CONNELL, *STATE SUCCESSION IN MUNICIPAL AND INTERNATIONAL LAW* (1967).

¹³⁸ BRIERLY, *supra* note 2, at 531-45. The meaning of "adequate compensation" has been a focus of intense controversy and interest. See sources cited *supra* note 135.

¹³⁹ See Amador, *supra* note 137, at 9.

¹⁴⁰ But see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 196-97 (1987) (imposing a standard of compensation looser than the traditional "just, prompt and adequate" formulation). Commentators split on whether the traditional standard represents a norm of customary international law. See, e.g., 1 OPPENHEIM'S INTERNATIONAL LAW (Robert Jennings et al. eds., 1992). Brownlie offers the contrasting position. See BROWNIE, *supra* note 2. Whatever the appropriate standard of compensation, both sides agree that international law treats property and contractual rights as fundamental, protected by the law of state responsibility. See *id.*; see also Oscar Schachter, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121 (1984).

property rights easily becomes the defense of a pre-revolutionary status quo.¹⁴¹ The same may be said of the traditional doctrine of expropriation. The right of sovereigns to expropriate property on grounds of economic or political self-determination will be of little use if the obligation to pay compensation is unqualified.¹⁴² In these cases, the treatment of property as fundamental undermines the creation of a more truly pluralistic and self-determining society.

There is a relation between the two themes that I have focused on thus far. Traditional notions of property and contract can appear uncontroversial in international law because the emphasis on the state obscures real relations of power — among nations in the international system, and between individuals and groups within nation states. Were we to substitute the idea of the state for the notion of a people or national community¹⁴³ and compound this change with an emphasis on the satisfaction of practical needs, the traditional conceptions of property and contract would seem more problematic. We might then be moved to revise our conceptions of both property and sovereignty ideals.

3. The Truncated Development of an Alternative Approach: Self-Determination in the Inter- and Post-War Period

The possibility of an alternative set of doctrinal conceptions in international law is not purely hypothetical. The aftermath of the First World War saw the emergence of a set of ideas about international and transnational legal obligations that focused on peoples rather than states as the primary focus of international law and gave great weight to the effective exercise of national self-determination and the satisfaction of its practical requirements.¹⁴⁴

¹⁴¹ This has been the common objection of third-world critics of the traditional rules of expropriation. See de Arechaga, *supra* note 135; see also STEINER ET AL., *supra* note 65.

¹⁴² A similar argument is presented in de Arechaga, *supra* note 135. See also STEINER ET AL., *supra* note 65 (discussing the Chilean nationalization of the copper industry under Allende).

¹⁴³ For a discussion of the concepts "nation" and "people" in the inter-War period, see Nathaniel Berman, *But the Alternative is Despair: Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1793, 1800-08 (1993).

¹⁴⁴ See generally GEOFFREY BUTLER & SIMON MACCOBY, *THE DEVELOPMENT OF INTERNATIONAL LAW* (1928); HEATHER A. WILSON, *INTERNATIONAL LAW AND THE USE OF FORCE BY NATIONAL LIBERATION MOVEMENTS* (1988); Michla Pomerantz, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1 (1976). The political concept of national self-determination is discussed in Woodrow Wilson, Speech at San Francisco (September 18, 1919), in 2 WAR AND PEACE: PRESIDENTIAL MESSAGES, ADDRESSES, AND PUBLIC PAPERS, 1917-1924, at 259-60 (Ray Stannard Baker & William E. Dedd eds., 1927); ALFRED COBBAN, *NATIONAL SELF-DETERMINATION* (1944). For contemporary treatment of the idea of self-determination, see HANNUM, *supra* note 132; Guyora Binder, *The Case for Self-determination*, 29 STAN. J. INT'L L. 223 (1993).

Consider a few of the doctrinal ideas to emerge with the self-determination movement in the inter- and post-War period: (i) the conditional character of private right and obligation; (exemplified by the development of alternative forms of expropriation and vested rights);¹⁴⁵ (ii) the inadequacy of the classical doctrine of state sovereignty under conditions of extreme poverty and inequality (the experience of the newly emerging states and the newly independent states¹⁴⁶); and (iii) the failure of allegedly voluntary agreements, formed under circumstances of structural inequality (the example of a contract or concession agreement formed between a newly independent state and its former colonial master).¹⁴⁷ In each of these cases, new developments in international law revealed a partial insight into the multiplicity of institutional forms and the factual preconditions of individual and collective self-determination.

In this emerging trajectory lay the possibility for a novel doctrinal approach. Urgent needs in the newly developing countries might have pointed to the inadequacy of established international doctrines and provided the impetus for a continuing process of legal innovation. However, this process never occurred. The ideas of international and transnational legal obligation that emerged in the aftermath of the two World Wars did not develop into a system of international legal doctrine comparable to the developments in domestic legal doctrine. It is as if international and domestic law about similar subjects expressed two different phases of historical development: the international betraying the pre-history of the national.

Two reasons may help explain this divergence. The first is cultural. To this day, in the larger international financial and legal community, there is little identity with or sense of moral responsibility for citizens of the developing nations. The second reason is the absence of a shared history of political struggle, through which contemporary moral ideas might have been asserted and developed. Instead, the predicament of the third-world countries, especially those of Latin America, has been one of relative isolation and estrangement from the world community.

Looking back over the contemporary history of international legal doctrine, it is tempting to note a line of missed opportunities and subsequent defeats. However, opportunities for doctrinal innovation still remain. Could

¹⁴⁵ See U.N. Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966); see also OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 302-03 (1991); Emily Carasco, *A Nationalization Compensation Framework in the New International Economic Order*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW*, 359 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

¹⁴⁶ See S. Prakash Sinha, *Perspective of the Newly Independent States in the Binding Quality of International Law*, in *THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW*, *supra* note 146, at 23.

¹⁴⁷ See Christopher H. Scherer, *Unjust Enrichment in International Law*, 22 AM. J. CRIM. L. 281 (1974); see also Schachter, *supra* note 141, at 121-30.

not the debate over a new legal doctrine contribute at least in part to the creation or development of the moral foundations needed to nurture alternative conceptions of international law?

4. Current Treatment of the Debt Controversy in International Law

This section concludes with an analysis of the current treatment of the debt controversy in international law. My first objective is to show how ideas discussed earlier influence and constrain the legal analysis of the sovereign debt controversy. My second objective is to illustrate the hostility of contemporary international law to the moral, political and economic arguments that lie at the heart of this article.

Several elements from the classical framework of international law are directly relevant to the legal analysis of the sovereign debt. The first element is the interpretation of the sovereign debt as a private commercial obligation, subject to the ordinary rules of private law provided by domestic legal systems. Among courts, commentators and jurists, there is general agreement that the contractual debt obligations constitute private rather than public obligations.¹⁴⁸ As borrowers in the "commercial" realm, the states enjoy few prerogatives in the matter of debt repayment. Subject to the qualifications noted below, the sovereign loans are considered relatively fixed obligations, worked out in advance and subject to a detailed background of legal rules.¹⁴⁹

Within the framework of domestic law, principles of unconscionability and duress could serve as points of departure in the legal analysis of the sovereign debt. At the very least, the extension of loans to developing countries presents a *prima facie* case of "unfairness" and "inequality of bargaining power."¹⁵⁰

But it is difficult to apply domestic law concepts in the international setting. Consider the doctrine of economic duress. As a development of common law doctrine, the concept of duress reflects the individualist premises of that legal system and the development of paradigmatic cases

¹⁴⁸ See Gary W. Larson, Comment, *Default in Foreign Sovereign Debt: A Question for the Courts?*, 18 IND. L. REV. 959, 965 (1985) (citing support for proposition that "borrowing money by a sovereign nation or its instrumentalities is a commercial activity . . ."); see also BROWNLIE, *supra* note 2, at 547-50; Georges R. Delaume, *Economic Development and Sovereign Immunity*, 79 AM. J. INT'L L. 319 (1985).

¹⁴⁹ But see BROWNLIE, *supra* note 2, at 549-50 (Exploring the contrasting view that the financial obligations of governments should be treated differently. A conception of the qualified force of public contracts has figured prominently in many municipal law jurisdictions). See also Thomas W. Merrill, *Public Contracts, Private Contracts, and the Transformation of the Constitutional Order*, 37 CASE W. RES. L. REV. 597 (1986-1987).

¹⁵⁰ For a similar approach to the problem of "unjust contracts" in the area of concession agreements, see SCHACHTER, *supra* note 146, at 302-03.

organized around individuals.¹⁵¹ The focus is on an isolated act of exchange. It is not on the structural setting within which parties act, certainly not parties to an international transaction. With this image in mind, it is not easy to make the case for government as victim in its dealings with financial organizations.

Modern international law presupposes a system of equal and independent states. In order to adapt the idea of duress to the international setting, this premise must change. It is first necessary to recognize structural differences between rich and poor; between developed and developing countries.¹⁵²

Second, according to the doctrine of "fundamental rights,"¹⁵³ private property and contractual rights enjoy broad protection against governmental interference or infringement. The unilateral decision of a debtor country to repudiate or suspend its obligations would trigger automatically a duty of compensation. Without such compensation, such acts are illegal.¹⁵⁴

These classical doctrines of international law provide a first line of defense against the restructuring or repudiation of sovereign loan obligations. Yet states may legally alter the timing or impact of payment due under external loans in a variety of ways that are sanctioned by international law. Examples include the imposition of exchange controls¹⁵⁵ or the alteration of exchange rate systems which determine, in practice, the real expense of foreign debt service. Many traditional doctrines of state sovereignty, such as the Act of State doctrine,¹⁵⁶ the doctrine of Foreign Sovereign Immunity,¹⁵⁷ and the principle of Comity,¹⁵⁸ as well as a variety of international instruments, such as the Articles of Agreement of the IMF¹⁵⁹ provide foreign governments with legal shields to administer national policy. Thus, although states may not unilaterally reduce the scope of their debt obligations, they may exercise other prerogatives of sovereign right which lead indirectly to this objective.¹⁶⁰

¹⁵¹ See Dawson, *supra* note 10; Hale, *Bargaining*, *supra* note 1.

¹⁵² This form of awareness underlies the contemporary debate over the New International Economic Order. See Symposium, *On the New International Economic Order*, 16 VA. J. INT'L L. 233 (1976). See also MOHAMMED BEDGAOUI, *TOWARD A NEW INTERNATIONAL ORDER* (1979); STEINER ET AL., *supra* note 65, at 527-35.

¹⁵³ For a concise statement of the classical position, see BRIERLY, *supra* note 2, at 49.

¹⁵⁴ See BROWNLIE, *supra* note 2, at 531-45; Amador, *supra* note 137.

¹⁵⁵ See Jody Daniel Newman, Comment, *Exchange Controls and Foreign Loan Defaults: Force Majeure As An Alternative Defense*, 71 IOWA L. REV. 1499 (1986).

¹⁵⁶ BROWNLIE, *supra* note 2, at 507-08. See STEINER, ET AL., *supra* note 65, at 753-820.

¹⁵⁷ See STEINER ET AL., *supra* note 65, at 771-73; 1 OPPENHEIM'S INTERNATIONAL LAW, *supra* note 141, at 356.

¹⁵⁸ BROWNLIE, *supra* note 2, at 29-30.

¹⁵⁹ See Andreas F. Lowenfeld, *Foreword* to Symposium, *The International Debt Crisis*, 17 N.Y.U. J. INT'L L. & POL. 485 (1985); see also Larson, *supra* note 149, at 65-67; BROWNLIE, *supra* note 2, at 548.

¹⁶⁰ See Lowenfeld, *supra* note 160 (considering a number of these doctrines in relation to the controversy over sovereign debt).

Yet deferral is not the same as relief, neither in practice nor in theory. As a practical matter, each major developing country debtor has struggled to reduce its debt obligations within a municipal and international legal framework generally hostile to its cause.

IV. TOWARDS AN ALTERNATIVE APPROACH IN INTERNATIONAL LAW TO THE PROBLEM OF DEBT RELIEF

How can legal doctrine express the normative political conception developed in earlier parts of this essay? This part suggests one approach in the area of international and transnational legal obligation.

The guiding theme of the doctrinal approach is to render the force and scope of the contractual debt obligations relative to the satisfaction of the practical, enabling conditions of individual collective self-determination. These conditions include economic sovereignty and political democracy, and they should be paramount to the requirements of a domestic and international order in which contractual obligations can be more than the mask of coercion or economic duress. A subsidiary theme is abuse of power (a public law equivalent to comparative negligence) and unjust enrichment: giving legal significance to ways in which the creditors both actively contributed to the anti-self-determining economies and profited from them enormously.

A. Elements of an Alternative Doctrinal Approach to the Problem of Transnational Obligation

The core of the new approach is the sovereign commercial agreement, understood as is a form of agreement intermediate between treaty and contract. The form is meant to apply at the intersection of international politics and political economy. Transactions in this area combine two characteristics. They are transnational agreements between governments and firms (the latter may be public, private, or mixed public-private entities). Moreover, they involve large-scale trade or investment flows, or large-scale projects of strategic interest to the national economy.

Like a treaty, the sovereign commercial agreement would be treated as an expression of political will, subject to standards of public interest and relative to the social and political circumstance of the sovereign party to the agreement. Like a contract, however, the form would also address the legitimate interests and expectations of the commercial entities involved: contribution of effort and capital would be legally protected, even in cases of sovereign distress leading to revision or rescission of the sovereign commercial agreement.

This solution relies on two conceptual techniques. The first is a doctrine of excuse that renders obligations contracted by sovereign entities

more fluid and open-ended. A second technique is the application of broadened standards of fiduciary responsibility on both sides of the transaction. These standards are appropriate to a realm of social practice viewed as continuous with national policy. Thus, standards would apply to ensure the compatibility of sovereign commercial agreements with the foundations of collective self-government and with principles of fairness, conceived, for this purpose, as limitations imposed on gross disparities of performance or on unrestrained self-interest at the expense of the public good.

*B. Sovereign Economic Distress and the Discharge and/or Revision
of Sovereign Commercial Agreements*

In contrast to the classical view of relatively fixed contractual obligations, the form of obligation I propose in this essay is conditional from the outset. A sovereign commercial agreement would be subject to a series of defenses rendering the force and scope of the obligation relative to the satisfaction of the practical conditions of individual and collective self-determination. This approach does not require that we develop, a priori, a taxonomy of "distress situations" — a theory of the nature and range of extreme situations in which states may justifiably refuse or amend their contractual obligations. Instead, we may proceed in a contextual manner, identifying varieties of distress and devising appropriate remedies. Rather than proposing rigid quantitative content for the necessary criteria, reformed international organizations, freed from the hegemony of the great powers, should develop and quantify these criteria in context.

I use the term "economic distress" to describe a situation in which a state loses the capacity to sustain democracy and growth. A major common thread in the defense of democracy and the promotion of growth is the nation's capacity to invest in people: in their physical, social, and educational development. A state approaches economic distress when performance of an international obligation denies it the resources to fund these minimal investments. A state trapped in a situation of economic distress is unable to fulfill one of the central tasks of contemporary democracy: the expansion of the area of overlap between the conditions of material progress and individual emancipation.

Consider the specific components of the capacity to satisfy the requirements of economic growth. A government must be able to invest adequately in people and the infrastructure of transport and communication. It must, according to the lessons of the comparative history of late industrialization, be capable of entering into a broad range of partnerships with private producers. Finally, it must develop a substantial capacity to import capital goods and to pay for them with export earnings. These earnings cannot be largely absorbed by debt service.

But a sliding scale exists. The considerations above gain legal significance for contract modification to the extent a government adequately exercises its power to tax and to prevent, punish or reverse capital flight. The less this power to develop public savings is exercised, the weaker the case to modify established contracts. Revisionism in foreign economic relations is not, and should not be pursued as a surrogate for internal resource mobilization.

Notice the style of analysis required by this conception of economic distress. The analysis of economic distress is both empirical and contextual. It is empirical because its basic elements refer to purely factual conditions. Whether a particular transnational obligation prevents a state from pursuing a socially necessary program of investment is a factual question, to be decided on the basis of an analysis of many factors. These include the scope of the obligation relative to the resources of the state and the needs of the investment program for a particular country and population. The analysis is contextual because the determination of economic distress will require a broader view of state activity: for example, whether tax revenues are sufficient in light of existing social needs or whether the program of public investment effectively mobilizes and channels resources to the economy and population.

These considerations suggest that the doctrine of economic distress cannot be based on the formulation of standards that are both universal in application and precise in content. There can be no common framework for determining whether and under what conditions a state has lost the minimal conditions for exercising its essential functions. Rather, the form of analysis required is one combining moral, political and legal judgment with specialized economic analysis. Here, empirical assumptions and causal conjectures become more than an informative background to legal analysis; they enter into the content of the analysis and merge with normative concerns. Clusters of developmental criteria must be formed, based on an understanding of the requirement of growth. But whether these clusters are satisfied in a given case will require a normative and political judgment of both the existing situation and alternatives to it.

There are two paths on which to develop such legal standards: a hyperambitious style of legal analysis that has incorporated and developed comparative political economy, and the contextual development of such standards by appropriately reformed international organizations. The first path is unacceptable because it requires a leap into unmeasurable and unreasonable doctrinal-technocratic rationalism, and because it lacks, in a world of warring trading blocs and vast disparities of state influence, a credible institutional agent. This agent should be the repertory of present and future international organizations, charged with the responsibility of refining — and quantifying — the legal criteria in light of their simultaneous work of shaping international flows of resources and people.

Existing international agencies, such as the World Bank, the IMF, and their regional counterparts begin with two key advantages: first, they begin with the technical international economic expertise required to evaluate the circumstances of growth and democracy in developing countries; and second, it is also their mission to promote a new international order committed to these goals.

As currently constituted, the international agencies are not equipped to perform in a way that is both effective and legitimate. Although established to represent impartially the needs of a new world order, they have instead acted under the influence of the leading powers. As such, they cannot serve as credible arbiters in situations of conflict and economic distress. To discharge this function, the agencies must be re-cast to perform their original roles and be true to their founding mission.

C. The Standard of Feasible Compensation

A revised, context sensitive rule of just compensation, known as feasible compensation, should serve as the main doctrinal tool in the reformulation of sovereign commercial obligations. In both substance and method, the standard of feasible compensation should track the analysis and determination of a debtor's economic distress. Thus, the same empirical and contextual developmental criteria applied in the initial diagnosis of the situation may be used to devise appropriate contractual modifications. There will be many different ways to modify an existing contract in light of its effect on a state's ability to sustain democracy and growth. The choice among alternative contractual remedies will depend on a normative and political judgement of the existing situation and alternatives to it.

D. The Application of Broadened Standards of Fiduciary Responsibility: Abuse of Power and Unjust Enrichment

Contractual modifications relative to fulfillment of the conditions of self-determination are qualified and developed in two distinct ways. First, they are counterbalanced by the sliding scale of the exercise of governmental power to mobilize resources internally, through taxation and restraints upon capital flight. Second, they must be refined through a consideration of the moral and political context within which the obligations were undertaken.

This context should be understood as one of fiduciary responsibilities: of governments to their citizens; of banks to the developing countries to which they lend; and of states, with starkly different levels of power and prosperity, in their dealings with one another. Fiduciary principles are narrative or historical in content: they look to the genealogy of the obligations rather than to the consequences of their performance.

Fiduciary violations open a second track to contract relief and modification. The case for modification and relief strengthens when the revisionist claim can move on both tracks and weakens when it must advance on one track alone. In such a case, the fiduciary violation of the damage to self government must be unequivocal.

Abuse of power and unjust enrichment should be, in this field, the two major instruments of fiduciary analysis.

1. Abuse of power

Abuse of power, as intended here, is a public-law counterpart to contributory negligence. It refers to a situation in which a large-scale commercial organization, engaged in the performance of a sovereign or quasi-sovereign function, acts in reckless disregard of the conditions of individual and collective self-determination in the country in question.

The attribution of fiduciary responsibility is especially appropriate in the area of transnational obligation. Many such obligations will lie at the intersection of public and private activity. Thus, ostensibly commercial financing may become policy in disguise, facilitating certain tracks in a nation's internal political economy and establishing constraints on future courses of action.

In this context, the application of the doctrine of abuse of power to qualify an entitlement is justified on grounds of fairness in compensation. The party claiming the entitlement is partly responsible for creating the situation in which performance is rendered difficult (the analogy to contributory negligence). The party against whom the defense is claimed has violated a larger duty to the society and to the democracy harmed or destabilized because of the reckless action.

2. Unjust enrichment

Unjust enrichment signifies the failure of the government, bank or industrial organization to temper its interest in the obligation by respect or concern for the parties to whom it owes a fiduciary responsibility. Such violations of fiduciary responsibility can take many forms: from a government's decision to undertake a series of financial obligations compromising future social investment programs without any corresponding structural gain for the majority of its citizens; to the willingness to pay exorbitant fees to international banks or financial consultants in a setting of widespread poverty and domestic austerity measures.

The focus of power, trust and interdependence in the context of a sovereign obligation suggests that both sides may be charged with fiduciary responsibility. A government may be held to account for the circumstances of its citizenry; a bank may be held to account for the conditions of

democracy in the nation to which it makes a loan. Both sides might engage voluntarily in a sovereign commercial agreement, notwithstanding its highly prejudicial effects on the conditions of growth or democracy in the borrowing country. In this situation, the violation of fiduciary responsibilities on both sides strengthens the case for contractual modification. Just as the corporation is, according to modern doctrine, a nexus of contracts, so relationships such as those studied here involve a complex of fiduciary dependencies. Transactions between public borrowers and private lenders may violate the joint fiduciary obligations of both to a third prejudiced party — the population of the borrowing country.

E. Concluding Observation: The Revision of the Doctrine of Transnational Obligation and the Problem of Capital Flows to Third-world Countries

There is one obvious policy objection to all the above proposals and arguments: Any conception tending to weaken the force of the debt obligation is not in the interest of capital-starved economies. The best response to this objection answers at two levels.

First, it is not in the interest of the countries to receive capital, especially loan capital at any cost or under all conditions. This is illustrated by the earlier discussion of pseudo-keynesianism and the comparison of Latin American countries with the East Asian NICs further illustrates.

Second, there is an implicit, general interest in the creation of a stable, international capital market in which capital transfers remain subject to rules that help ensure the growth potential of each of the national economies that participate in the market, and a widespread recognition of the legitimacy of the transfers that take place.

A set of rules that allows or even encourages net negative capital outflows from poor to rich countries for indefinitely long periods can benefit only very sectarian and short-run interests. It creates a situation in which reform-minded governments must either acquiesce in a situation that paralyzes their reform capabilities or disrupts the emerging world market in capital and goods by de facto or de jure repudiation.

In other words, the policy objection can be met on its own grounds as well as criticized from the vantage point of a conception of freedom and its enabling conditions.

V. DOCTRINAL INNOVATION: A POSTSCRIPT

The aim of this postscript is to make explicit some of the assumptions and implications of the argument of my essay that concern the nature and agency of doctrinal innovation.

What I propose here is, in part, propose a rethinking of certain doctrinal ideas in the service of practical needs and political ideals. Characteristic of much doctrinal innovation, the novelty requires extending to one area of law and legal analysis ideas entrenched in another area: in this instance, it requires extending to international law ideas and analysis already prominent in domestic law.

What light does the argument of this essay sheds on the nature of innovation in law and legal thought? There are two main issues:

1) The process and the conditions of major shifts in substantive legal ideas. This essay analyzes one such shift — a change in our understanding of the kinds of rights and the kind of thinking about rights that are needed to secure individual and collective self-determination — and proposes a specific advance in the working out of this transformation — the extension of the new approach from domestic law to international law.

2) The agents of change. Many of the ideas defended in this piece have been adumbrated by politicians and activists rather than by lawyers. How do broad changes such as this article proposes influence the identity of the agents of legal change?

A. *The Nature of Legal Innovation*

Consider first the question arising with respect to substantive legal ideas. Redrawing the line, defining what counts as a legal, rather than political or moral argument seems to be a recurring feature of doctrinal innovation. Each major change of substantive ideas in the modern history of law and legal thought has been accompanied by a redefinition of the boundaries of legal argument.¹⁶¹ What was previously defined as political or moral comes to be redefined as having legal relevance.¹⁶² There seem to be two main interpretations of this modern movement. According to one view, the effect of these shifts in the law is simply to draw the boundaries of legal argument

¹⁶¹ See ACKERMAN, *supra* note 123; HORWITZ, *supra* note 10; SUNSTEIN, *supra* note 123.

¹⁶² See, e.g., BENJAMIN CARDOZO, *THE NATURE OF JUDICIAL PROCESS* (1921); JAMES LANDIS, *THE ADMINISTRATIVE PROCESS* 139 (1938); HENRY M. HART & ALBERT M. SACKS, *LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (2d ed. 1994); MYRES MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* (1960); THOMAS K. MCCRAW, *PROPHETS OF REGULATION* (1984); John Henry Schlegel, *American Legal Realism and Empirical Science: From the Yale Experience*, 28 *BUFF. L. REV.* 459 (1979), O.W. Holmes, *supra* note 10; Walter W. Cook, *The Privileges of Labor Unions and the Struggle for Life*, 27 *YALE L.J.* 779 (1918); Cohen, *supra* note 1; HORWITZ, *supra* note 10, at 169-92. See also *Muller v. Oregon*, 208 U.S. 272 (1908); *Miller v. Schoene*, 276 U.S. 272 (1928).

in a different place.¹⁶³ But once the boundaries are redrawn, legal argument continues much the same, relying on traditional techniques of reasoning and drawing its materials from established sources in the law. According to an alternative interpretation, the effect of these substantive shifts is to deny legal analysis its distinctive identity, to merge it gradually into moral and political controversy.¹⁶⁴

The change in legal ideas on which I elaborate in this essay and apply to the third-world debt issue represents only one aspect of a major transformation in the history of modern law and legal thought. What light does this transformation shed on the choice between the two views described?

The truth does not fit fully with either thesis. The experiences studied here suggest that legal argument remains recognizable, but its substance changes. The approach to contractual obligation in particular, and to the legal forms of individual and collective self-determination in general, resembles other contemporary examples of doctrinal analysis and reform. But a whole different style of legal analysis comes into its own through this transformation in substantive legal ideas.

The three principal characteristics of this revised practice of legal analysis are:

- 1) a self-conscious focus on the details and the detailed variations of institutional arrangements. Rather than supposing a comprehensive institutional plan to be built into a predefined system of individual rights, we come to think of a system of rights as no more than the expression of detailed institutional commitments; of institutional commitments pushed to the micro level.
- 2) an incorporation into legal analysis of empirical investigation, in particular, investigation of the detailed institutional obstacles and encouragements to the exercise of individual and collective self-determination.
- 3) an effort to redefine the content of the ideals or principles that are supposed to be realized in the law. The argument of this essay takes inspiration from two different settings: the complex historical controversy surrounding the legitimacy of the third-world debt; and the approach to social freedom manifest in diverse areas of

¹⁶³ See ACKERMAN, *supra* note 123, at 165 (characterizing efforts by legal realists to alter the style of analysis in public law, while preserving traditional techniques in private law).

¹⁶⁴ See HORWITZ, *supra* note 10, at 3-31; see also KENNEDY, *supra* note 10; ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986).

contemporary law. The attempt to give legal form in an international context to emerging notions of individual autonomy and collective self-government results in a change — however incremental — in the ideals animating the law.

The use of materials from existing doctrine may seem, at first, purely instrumental. But the method of borrowing is part of an effort to expand the range of concern in law and to realize the professed ideals of the law in areas of social life beyond their original application. This effort will succeed only if there is widespread acceptance of the proposal. This, in turn, depends on a broadening of moral and legal discussion. In this way, the original act of doctrinal creation leads naturally to discussion in society at large (even if “society” is, in the first instance, constituted by lawyers and judges). The exercise loses its instrumental character as its concerns are taken up and debated in the democracy.

B. The Agents of Legal Change

Finally, consider the question arising with respect to the agents of legal change. This question is structurally analogous to the question about the nature of doctrinal innovation. Do such repeated changes alter merely the identity or the responsibilities of legal analysts? Or do they end up undermining the unique mission of the legal analyst?

Thus, according to one view, the new ideas are prefigured by non-lawyers such as politicians or publicists. However, after the ideas achieve their regular, institutional form, they are taken over by the lawyers.¹⁶⁵ (This essay would be precisely an example of such a takeover.) According to the alternative view, lawyers become at the end of the day less distinguishable from non-lawyers.

Once again, the implications of this argument fail to fit this choice. The legal analysts who are capable of practicing the method I recommend still have a special work, the work of the discursive practice enumerated above. But their relation to the rest of society changes drastically. They do not conduct a discrete and expert cult. They do not practice a specialized science, radically distinct from everyday discourse. They refine continuously, in institutional, empirical, and normative detail, the self-reflective, self-critical discourse of the democracy. They help make its “wide reflective equilibrium” possible.

¹⁶⁵ See ACKERMAN, *supra* note 11.