THROUGH A GLASS DARKLY: REFLECTIONS UPON THE HISTORY OF THE INTERNATIONAL LAW OF PUBLIC DEBT IN CONNECTION WITH STATE SUCCESSION†

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I. INTRODUCTION

The business of government is never easy and almost always expensive. Regardless of their form, governments need substantial funds to operate effectively. Thus, wherever an historian seeks out a state or nation in the modern sense he is also likely to find a government as debtor.

Historically, governments generally borrowed funds from their own citizens. In late medieval and early modern Italy, for example, syndicates of moneylenders known as *Monti*[1] provided needed funds for the Italian city states. One of the first such *Monti*, the Monte Vecchio was founded in 1156 A.D. to provide loans to the government in exchange for the security of the city's future tax revenues.[2] Later, in sixteenth century France, the *Hotel de Ville de Paris*, a syndicate of Parisian bankers, advanced funds to the French Crown secured by the Crown's revenues pledged in perpetuity.[3] Similarly, in the nineteenth century, the House of Rothschild provided the necessary funds for the government of Great Britain to purchase shares in the Suez Canal.

When domestic sources of funds are insufficient to meet a govern-

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1. A. SACK, LA SUCCESSION AUX DETTES PUBLIQUES D'ETAT 70 (1929). Professor Julius Kirschner of the University of Chicago is currently engaged in research on the legal issues involved in these syndicates and delivered a paper on the subject at the 1981 Annual Meeting of the Medieval Academy of America at Columbia University in April 1981.

2. A. SACK, *supra* note 1, at 70. In many of these arrangements the *Monti* were authorized to take over the collection of the tax revenues themselves to ensure that the revenues were ultimately received.

3. *Id.* In 1522, the Crown pledged a portion of its tax revenues to Parisian lenders in perpetuity as security for a loan. This was repeated in 1536 and again in 1537.

ment's needs, however, the government must borrow internationally. Some present-day participants in the international money market might be surprised to discover that international loans are not a modern phenomenon, but date back to the later Middle Ages. During that period, lenders to sovereign powers could not depend on international law or morality to ensure repayment. Indeed, what medieval juristic opinion existed on the subject, in large part the *consilia* of civil and canon lawyers such as Baldus de Ubaldis, seemingly provided more obstacles than aid to repayment of such loans.[4] Thus, lenders had to use their ingenuity to provide for the security of medieval international loans. For example, when James II of Scotland borrowed 60,000 Florins from Christian I, King of Denmark and Norway, he had to pledge his title to the Shetland and Orkney Islands as security.[5] Creditors of German monarchs Henry III and Charles IV exacted even more severe terms. Lenders required Henry to pledge his crown; Charles had to pledge both his crown and his coronation robe.[6] In 1508, the creditors of Maximilian I required him to physically surrender the royal jewels of the House of Burgundy for security.[7] The situation faced by King Edward III of England was even more desperate. Forced to borrow from the moneylenders of Brussels, Edward initially gave his crown as security. In 1340, however, Edward petitioned Parliament for additional funds from the Estates of the Realm, stating that if the funds were not forthcoming he would be obliged to surrender his own person as "hostage" to secure his royal debts.[8]

Although a discussion of the medieval history of public international debts might be interesting, the true starting point of this article is the late sixteenth and seventeenth centuries. During the early modern period, the first stirrings of a modern notion of international law appeared in the writings of Grotius, Gentili, Puffendorf, and Brynkershoek. It is interesting that these earliest modern writings on international law such as Grotius' *De Jure Belli ac Pacis* and Gentili's *De Jure Belli Libri Tres* raise the question of the legal obligation of successor states to honor the debts of predecessor states.[9] Indeed, from Grotius onwards the question of the survival of public debt in instances of state succession has occupied both jurists and sovereign nations themselves, for the issue has arisen frequently over the centuries and

4. *See* P. RIESENFELD, INALIENABILITY OF SOVEREIGNTY IN MEDIEVAL POLITICAL THOUGHT (1956); M. WILKS, THE PROBLEM OF SOVEREIGNTY IN THE LATER MIDDLE AGES (1963). For a discussion of the work of Baldus de Ubaldis, see J.A. CLARENCE SMITH, MEDIEVAL LAW TEACHERS AND WRITERS: CIVILIAN AND CANONIST (1975); A. SACK, *supra* note 1, at 98.

5. A. SACK, *supra* note 1, at 75.

6. *Id.* at 99. One can understand the concerns of creditors. In 1619, after the death of Frederick I, his successor repudiated all of the Crown's debts.

7. *Id.*

8. *Id.*

9. These texts are conveniently available in modern editions with English translation in the Carnegie Endowment series.

never has been resolved satisfactorily from the perspective of international law.

The question of the survival of public debt has many variations. State succession may be total, such as when a predecessor government or state is wholly extinguished by successful revolution or total conquest. Alternatively, succession may be only partial, such as when one sovereign state annexes a portion of another or a state is partitioned into several sovereign states. The succession may be peaceful or violent. The debts in dispute may arise prior to the circumstances of succession or as a part of the very process which leads to succession. The debts may be general and unsecured or they may be secured either upon tangible property or future revenues. Writers on the question of survival of public debt have adopted these distinctions in their analyses of state succession, but the importance attached to each distinction has varied among the authors.[10]

An attempt to form a library of all the writers who have examined the obligations, legal and otherwise, of successor states in regard to the public debt of predecessor states would fill a rather large wall of bookcases. The list of those who have written upon the subject of state succession and public debt reads much like a history of international law: Grotius, Gentili, Brynkershoek, Fouchaille, Huber, Hall, Halleck, Field, Kent, Wheaton, Westlake, Calvo, Sack, Feilchenfeld, Baty, and most recently, O'Connell, all have written on the international law of state succession and public debt.[11] Of these, and many not named, two treatments stand out as capable and thorough historical analyses. Alexander Nahum Sack, once a minister of Tsarist Russia and thence, after the October Revolution, a Parisian law professor, authored two major works on the subject: *Les Effets des Transformations des Etats sur leurs Dettes Publiques et Autres Obligations Financieres* and *La Succession aux Dettes Publiques d'Etat*. Ernst Feilchenfeld, a German refugee who found a haven at the Harvard Law School, published his monumental *Public Debts and State Succession* less than a decade after the first appearance of Sack's works. Both authors' treatises are comprehensive in scope, awesome in their linguistic and analytic achievements, and remarkably thorough in their exposition of the development of both the theory and practice of state succession. Yet, both treatises are now somewhat old, though still fundamental, and even their most recent and worthy successor, the two volume treatise by Professor D.P.

10. *See* Foorman & Jehle, *Effect of State Succession and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers*, elsewhere in this symposium. The authors state, "Although there have been notable attempts to formulate rules dispositive of these issues based on the type of succession involved, the existing precedents are too inconsistent to be very helpful." *Id.* at 14-15.

11. A convenient bibliography is to be found in 1 D.P. O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW (2d ed. 1967).

O'Connell, leaves some room for reflection, if not a retelling of already propounded history.

This article does not attempt a comprehensive history of state succession problems, but rather focuses on three issues, which may help clarify the problems of public debt and state succession from the perspective of international law. First, the article discusses whether the theoretical expositions of this question from Grotius to O'Connell have proved useful and relevant to actual international practice by sovereign states and provided an adequate foundation for a generally accepted rule of international law. Second, the article examines the actual practice of certain states in regard to the public debts of their predecessors. The article gives special attention to the positions advanced by the United States and Great Britain in the nineteenth century, when both were heavily involved in imperialistic enterprises and often in the position of successor states, and in the twentieth century, when these states found themselves, and their citizens, more often in the role of creditor rather than of successor to a debtor. In these historical accounts the influence of Professor Feilchenfeld's work is clear. Finally, the article examines closely the role of pragmatism in international fiscal relations and what one may call the "Principle of Expediency," an almost Bismarckian *Realpolitik* which underlies, in my opinion, the history of public debt and state succession and briefly reexamines a work of Arthur Berridale Keith, *The Theory of State Succession with Special Reference to English and Colonial Law*, a long overlooked and undervalued examination of the international law of public debt in instances of state succession.[12]

II. Writers in Search of a Principle: Theoretical Elaborations of the International Law of Public Debt and State Succession

Prior to the nineteenth century, the overwhelming majority of writers on the subject of public debt in instances of state succession found that there exists in international law an absolute binding legal obligation upon a successor state to assume the payment of a predecessor's public debt which arises solely from the fact of succession. This position is, in itself, rather significant, but, as will become clear, many instances in actual practice contradict the proposition.

The earliest theorists of state succession found a binding obligation by importing into international law models and analogues from private, municipal law. One theory, quite prominent in the seventeenth century and influential well into modern times, is the theory of "universal succession."[13] O'Connell describes this theory as one which "commences from an *a priori* analogy between international law and private

12. *See* text accompanying notes 120-125 *infra*.
13. 1 D.P. O'Connell, *supra* note 11, at 28.

law, and seeks to force State practice within the confines of a single rubric."[14] The analogies drawn upon by the universal successionists derive almost exclusively from Roman law and specifically the Roman law of heirship.[15] The argument, in capsule form, is that a successor state occupies a place in the community of nations analogous to that occupied by an heir in Roman law. Thus, the heir must assume the debts of its predecessor, for under the Roman law heirship model there exists a legal continuity from the juridical personality of the deceased to that of his estate and thus to his heir.[16] This theory of universal succession is, in fact, a theory of identity; the Roman heirship analogy demonstrates an identity between the predecessor state and successor state. By finding such an identity between states, an obligation of the predecessor state automatically becomes an obligation of the successor state.[17]

Other theories of identity also have been propounded by writers on state succession. For instance, a number of writers have seen an identity between successor and predecessor states in the continuity of the populace, in spite of any changes in governmental structure or personnel.[18] This theory is one based upon the notion that the true essence of the state is in the people and not in "the fictitious element of political organization."[19] According to this theoretical school, a change in government leaves liability for public debts intact, for these debts represent obligations of the state, i.e., the people, rather than of the specific governmental structure. This simple theory of continuity was especially popular in the nineteenth century among a number of German jurists influenced by Otto von Gierke, an historian of the medieval development of the state and the rise of popular sovereignty.[20] Gierke theorized that the state is analogous to and fundamentally different from a living creature; it is a "social organism" comprised of people and territory. A change in the government of such a "social organism" does not necessarily cause a change in the true essence or identity of that organism. Here, once again, as identity of states can be found, continuity of obligation will follow.

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14. *Id.*

15. On this Roman doctrine, see W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW 282-333 (P. Stein rev. 3d ed., 1963); M. KASER, DAS RÖMISCHE PRIVATRECHTE (1977). *Cf.* Sherman, *The Nature and Sources of International Law*, 15 AM. J. INT'L L. 349 (1921).

16. 1 D.P. O'CONNELL, *supra* note 11, at 9-11.

17. This point is crucial. The universal succession theory allows no flexibility or loophole. A successor state "steps into the shoes" of its predecessor and, thereby, assumes all benefits and burdens thereof.

18. 1 D.P. O'CONNELL, *supra* note 11, at 11. *See, e.g.*, Schönborn, *La nature juridique du territoire* in 3 ACADEMIE DE DROIT INTERNATIONAL (HAGUE) RECUEIL DES COURS 7 (1928) *cited in* D.P. O'CONNELL, *supra* note 11, at 11 n.1.: "Es soll nicht ein neues Recht an Stelle des fruheren treten, sondern das Recht des neuen subjekts als identisch mit dem des alten subjekts gelten."

19. D.P. O'CONNELL, *supra* note 11, at 11.

20. Otto von Gierke is best known for his multi-volume synthesis of legal history, jurisprudence, and political philosophy, DAS DEUTSCHE GENOSSENSCHAFTSRECHT (Berlin 1868-1913).

These theories of identity have met with devastating modern criticism. The theories based upon analogy to Roman private law have been attacked on the ground that a sovereign state is fundamentally dissimilar to a private individual. Critics also have rejected the theories on the ground that the basic jurisprudential premises of these theories are derived from Roman law, a legal system no longer regarded as either authoritative or as a general source of the "ius commune."[21] Thus, such premises and their concomitant theoretical elaboration are now unacceptable. In defense of the universal successionists, however, the importation of private law models into public law through the use of analogy and metaphor is a device with a long history and frequent, and often successful, results.[22] The true problem inherent in the universal succession theories is that they are too abstract and divorced from reality. International law cannot look to the coercive or even the fully normative authority of municipal law. Its foundations are different: commonly accepted practice, commonly accepted rules, etc. To a large extent, the acceptance of a rule as a "binding rule" of international law must depend both upon the inherent persuasive force of that rule, in the sense that deviation from that rule will be deemed blameworthy, and upon the acceptance of that rule by the community of nations so that deviance will elicit some actual negative response. The universal successionists fail in their persuasiveness; their models and analogies are not universally acceptable and, thus, the universal succession theory, in the end, remains little more than an interesting intellectual exercise which has, over the past few centuries, provided a source for academic speculation and, on occasion, political rhetoric.

The identity theories not based upon private Roman law analogies, but rather upon particular philosophical notions of what constitutes a "state" juristically and practically, have come under equal attack. O'Connell has observed:

> The difficulty with all theories that base themselves on the continuity of the social substratum to which rights and duties are alleged to attach is that, once the distinction between change of sovereignty and change of government is conceded, it is the fact of a substitution in sovereignty which is alone relevant. There may be excellent reasons for attributing rights and duties to the successor State in virtue of the stability of the social structure, but a legal rule to this effect does not derive merely from the fact of social

21. In this context, the major continuing support for these theories is found among Continental scholars, whose own municipal law systems are derived from Roman law and the revival of "scientific jurisprudence" during the later Middle Ages. On the notion of Roman law as a European *ius commune*, see P. KOSCHAKER, EUROPA UND DAS RÖMISCHE RECHT (1953).

22. *See* Hoeflich, *Gelasius and Roman Law: One Further Word*, 26 J. THEOLOGICAL STUD. (n.s.) 119 (1975); Hoeflich, *The Speculator in the Governmental Theory of the Early Church*, 34 VIGILIAE CHRISTIANAE 120 (1980). *See also* a forthcoming essay in 98 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FUR RECHTSGESCHICHTE (1981).

continuity.[23]

The identity theories have a broader appeal than the universal successionist theories based upon Roman law models precisely because they are not tied to the legal premises of a particular municipal system. Instead, these theories are founded on the social perception that the "kernel" of what we mean by "state" is not the governmental apparatus or bureaucracy of the state but rather something else: people, territory, or an amalgam thereof. This premise, while more appealing, also suffers from a fatal weakness; it somehow lacks that persuasive force of a self-evident juristic principle. In short, it is a theoretical abstraction useful for explanatory purposes but without the necessary force to elevate itself into a normative and binding legal rule.

Modern theorists have abandoned the identity theories in their search for a binding rule of international law, but have not abandoned the search itself. The quest for a persuasive theory imposing legal liability upon successor states continues though most theorists now look to other types of theoretical construct. Sack, for all of his practical experience of state succession in the Soviet repudiation of Tsarist debt, could not bring himself to argue that "pure" international law created a legal obligation upon a successor state to assume its predecessor's public debt. The weight of history, of which he was well aware, made such a position untenable. Instead, Sack created an entirely new juristic construct, "international fiscal law," not "pure" normative law in the international community, but a positive rule of law with its grounds in the practice of nations and the requirements of international commerce and communication.[24] Feilchenfeld, while rejecting Sack's newly created "international fiscal law," ultimately relied upon another juristic construct, "international equity law" and the notion of a "rule of maintenance."[25] The modern theories dependent upon such juristic constructs are often, however, so highly abstracted, so argumentative, and so little grounded in international legal language and practice that it is difficult to see what relevance, other than as *post factum* explanatory models, they may have. Indeed, many of these theories advanced by Sack and Feilchenfeld have not been fully accepted, even among later theoreticians.[26]

O'Connell has developed a most interesting theory in his writings on state succession and the continuity of public debt. O'Connell avoids the major pitfall which felled many of his predecessors. He does not attempt to demonstrate an abstract theoretical basis for a binding rule of international law holding successor states obligated for the public

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23. 1 D.P. O'CONNELL, *supra* note 11, at 25.

24. A. SACK, LES EFFETS DES TRANSFORMATIONS DES ETATS SURS LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERES (1927).

25. E. FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION (1931).

26. *See, e.g.*, D.P. O'CONNELL, THE LAW OF STATE SUCCESSION (1956) (containing unpublished British Foreign Office documents).

debts of their predecessors. Rather, O'Connell constructs a factual argument and, like the early universal successionists, imports a model by analogy, that of "unjust enrichment" or "acquired rights," a model already suggested by some continental theorists such as Selosse.[27] O'Connell, like Feilchenfeld, does not look to a "strict legal rule" but rather to a rule of equity and justice. He argues that the basis of a successor state's obligation lies not in abstract notions of identity or continuity but in the tangible enrichment of the successor state by virtue of its possession of the physical wealth of its predecessor. O'Connell argues:

> When a state borrows money two things are created. There is, first, the juridical link between the parties, which exists until either the money is repaid or the state itself has disappeared. There is, secondly, the factual situation which consists in the actual detention by the state of money in which the lender has an equitable interest. When the debtor state is superseded, the legal duty to repay this money is not inherited *ipso jure* by its successor. What is "inherited" is the state of facts to which the now extinguished legal relationship has given rise. The equitable interest which the lender has in this actual situation is an acquired right which the successor state must respect. The latter becomes invested, not with the legal obligations of its predecessor, but with a new obligation, the obligation not unjustifiably to enrich itself at the expense of private investors who have an equitable interest in the debt. It is not an obligation derived from the predecessor state, but one imposed *ab exteriore* by international law, and it arises when the successor, through its own action in extending its sovereignty, becomes competent to destroy the titleholders' interest.[28]

The great advantage of the unjust enrichment or acquired rights theory in this context is that it entirely sidesteps the question of whether international law includes a specific "legal" rule as a "general principle" imposing a fiscal obligation upon successor states in cases of state succession. The question presented by the unjust enrichment analysis is not whether there is such a positive legal rule as to state succession, but whether a successor state which can be shown factually to have been unjustly enriched at the expense of a predecessor state's public creditors is under an "equitable" obligation to take steps to correct the situation.[29] This theory is more easily adaptable to the actual practice of modern states in the international community, a practice which has been somewhat inconsistent but which, to a large extent, has recognized at least a "moral" obligation while often rejecting any "strict legal"

27. O'Connell, *Secured and Unsecured Debts in the Law of State Succession*, 28 BRIT. Y.B. INT'L L. 204 (1951).

28. *Id.*

29. One great advantage of the unjust enrichment model is that it is acceptable both to civil and common law lawyers. For a comparative study of this concept, see J. DAWSON, UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS (1951).

obligation.[30]

The persuasiveness of any particular theory of state succession and financial obligation, however, is relatively unimportant if this theory does not find practical application. History reveals that many sovereign states, especially continental European nations and their former colonies prior to the twentieth century, have tailored their practice to one theory or another and have accepted successor state legal liability for public debt. History also reveals, however, that many states have not accepted the theories of absolute liability, regardless of which particular theory is advanced, but have acted in ways which suggest that their cardinal principle was expediency. Rhetoric and theoretical constructs have been developed to soften the harsh realities of the principle of expediency, but a close examination of the behavior of several nation states, including Great Britain and the United States, reveals a pattern of behavior more in keeping with Bismarck's than Grotius's notions of international law.

III. An Historical Examination: From Imperial Annexation to Twentieth Century Revolution

The reaction of a number of major Western nations over the past two centuries reveals a notable and still relevant historical pattern—a pattern which contradicts the seemingly "settled doctrine" set forth by the juristic writings of continental scholars. The behavior of the United States and Great Britain during the nineteenth century towards the public debts of states conquered or annexed by them appears to be inconsistent, both theoretically and practically, with the positions those two governments took in response to similar acts by other states in the twentieth century.[31] These apparent inconsistent positions stem largely from the changed political and military positions of these two nations during these two centuries. Throughout the nineteenth century, both nations were imperialist in outlook and action.[32] The United States was following its notion of "manifest destiny" to its own geographic borders and beyond to Hawaii, Cuba, and the Phillipines. Great Britain was forming the empire on which the sun could not set. During the twentieth century, in contrast, both nations have witnessed the dismemberment of their colonial holdings and have become members of the "old guard" among nations, concerned primarily not with their own expansion, but with "newer" powers antithetical to their own interests

30. *See* text accompanying notes 31-116 *infra*.

31. One may argue that the inconsistencies are, in fact, not present, but that each situation is distinguishable from all others. This sophisticated, nominalist argument based upon subtle distinctions, however, also effectively destroys any possibility of saying there is a "settled" doctrine.

32. The use of the word "imperialistic" is not intended to introduce any "Marxist" connotations. Rather, both Great Britain and the United States clearly underwent periods of intensive territorial expansion during the nineteenth century.

in the world community.[33] In many respects, the self-interest of the nineteenth century has become an enemy of the self-interest of the twentieth, and the rhetoric, theories, and practices of the United States and Great Britain in the nineteenth century linger on as very unwelcome ghosts. The doctrines developed by Britain and the United States in the nineteenth century created great uncertainty as to the state, or even the existence of an international law of state succession and the legal obligation of a successor state to assume the public debt of a predecessor.[34] A brief examination of the actions of the United States and Great Britain during the past 150 years demonstrates why this came about.

A. *The Nineteenth Century: The Practice of Imperialism*

When the United States and the Republic of Texas drafted a treaty designed to effectuate their union in 1844,[35] the public debt of the Texas Republic presented difficulties. This was debt secured in part by the revenues of the Republic, and, in certain cases, the proceeds from the sales, both present and future, of Texan public lands.[36] The treaty called for an assumption of the Texan debt, up to a limit of $10,000,000, subject to some adjustment.[37] Indeed, in his Fourth Annual Message of 1844, President Tyler stated that the United States "could not with honor take the lands without assuming the full payment of all incumbrances upon them."[38] The United States Senate,

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33. In the second half of the twentieth century, many state succession problems have arisen in the so-called "Third World" countries, once colonies of the nineteenth century's "great powers."

34. Note, for instance, the comments of Hackworth, *Effects of Change of Sovereignty*, 1 DIG. INT'L L. 1 (1940):

> The matters connected with the distribution of public obligations in the case of the division of a state into distinct states, or the cession of a portion of one state to another have engaged the attention of numerous writers without having led to any definite conclusion except that no universal rule of international law on the subject can be said to exist.

Id. at 539. This may be contrasted with the statement of Mr. Adams, the American Secretary of State, to a Mr. Everett in 1818:

> No principle of international law can be more clearly established than this: That the *rights* and the *obligations* of a nation in regard to other States are independent of its internal revolutions of government. It extends even to the case of conquest. The conqueror who reduces a nation to his subjection receives it subject to all its engagements and duties toward others, the fulfillment of which then becomes his own duty.

Moore, *Sovereignty: Its Acquisition and Loss*, 1 DIG. INT'L L. 1, 334 (1906).

35. E. FEILCHENFELD, *supra* note 25, at 271; H. WILKINSON, THE AMERICAN DOCTRINE OF STATE SUCCESSION 74 (1934). This was the so-called Treaty of Washington.

36. Article V of the treaty provided:

> The United States assume and agree to pay the public debts and liabilities of Texas, however created, for which the faith or credit of her Government may be bound at the time of the exchange of the Ratifications of this Treaty; which debts and liabilities are estimated not to exceed in the whole 10,000,000 of dollars.

E. FEILCHENFELD, *supra* note 25, at 271.

37. The adjustments called for were extremely complex and were made more difficult by the accrual of arrears in payment during the period of uncertainty between 1844 and 1855.

38. President Tyler's 4th Annual Message (3 December 1844), *reprinted in* Moore, *supra* note 34, at 344.

however, failed to ratify the treaty of 1844, and Texas joined the Union the following year by Joint Resolution rather than by treaty. The Joint Resolution did not resolve the question of the assumption of debts,[39] but in 1850 the United States agreed to pay the State of Texas $10,000,000 in consideration of the cession of its territory and sovereignty to the United States and of its relinquishment of "all claim upon the United States for liability of the debts of Texas."[40] Thus, between 1844 and 1850 a major shift in the United States' position vis-à-vis its obligation towards the pre-annexation Texan debt occurred. The United States, however, did specify in 1850 that one-half of the $10,000,000 would remain unpaid until secured creditors of the Texan debt filed claim releases with the United States Treasury, a provision presumably drafted to ensure that the United States would not pay the full $10,000,000 and still be at risk to creditors of Texas.[41]

Subsequent to the passage of the 1850 Act, Texas did not satisfy her creditors. In 1852, the Texas legislature authorized payment of only a portion of her outstanding debt.[42] Meanwhile, the Attorney General of the United States issued an opinion interpreting the 1850 Act which left the liability issue wholly unclear.[43] In a report to the President, Secretary of the Treasury Corwin argued strongly for the proposition that the United States was, indeed, liable for the debts of the Republic of Texas. He stated, in part:

> [W]here an independent power contracts obligations and is afterwards, by the act of another power jointly with herself, incorporated into and subjected to the dominion of the latter, whereby the national responsibility of the former is destroyed, and the means of fulfilling her obligations transferred to the latter, all such obligations, to the extent at least of the means thus transferred, attach with all their force to the nation to whom such means have been transferred.[44]

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39. Indeed, the Joint Resolution specified that Texas would retain liability for her debts and that "in no event are said debts and liabilities to become a charge upon the Government of the United States." E. FEILCHENFELD, *supra* note 25, at 273.

40. *Id.* Moore, *supra* note 34, at 344.

41. The requirement that creditors file releases was obviously a substantial modification in the terms of the debt, but one which, presumably, could not be avoided if the hoped-for repayment required the $5,000,000 additional funding. *See* Moore, *supra* note 34, at 345.

42. E. FEILCHENFELD, *supra* note 25, at 274-75; H.R. MISC. DOC. NO. 171, 33d Cong., 2d Sess. 29-31 (1855). Section 4 of the Act required a release of the United States from any further obligations, providing:

> That before the payment of any of the claims provided for by this act, the claimant shall be required to sign a receipt to the State of Texas, that the amount so received is in full liquidation of the claim or claims so presented, and also a release exonerating the United States from all liability for the same . . . .

Id.

43. Moore, *supra* note 34, at 344; E. FEILCHENFELD, *supra* note 25, at 275; 6 Op. Att'y Gen. 130, at 146 (1853).

44. Report to the President, *reprinted in* H.R. MISC. DOC. No. 17, 33d Cong., 2d Sess. 5 (1855).

While the internal debate on the responsibility of the United States government gained momentum, an external factor entered the picture. In 1854 a British holder of Texas Bonds issued in 1839 sued for payment of principal and interest by the United States before the Mixed United States-British Commission, formed in 1853 to permit citizens of one state to sue the government of the other on disputed claims.[45] Interestingly, and in spite of a clear internal tendency to recognize the United States' obligation towards the Texas bondholders, the United States argued against this claim on jurisdictional grounds, i.e., that the claim was one properly against Texas, not the United States.[46] The umpire before the Mixed Commission accepted this position and dismissed the claim.[47] Although the United States argued for the dismissal of the British claims before the Mixed Commission, Congress was swayed by the "justice" of the bondholders' arguments. On February 28, 1855, Congress passed an Act authorizing the pro rata payment of $7,750,000 to holders of the Texas bonds deemed to be within the scope of the 1850 Act.[48]

The behavior of the United States between 1845 and 1855, a decade of uncertainty for the bondholders, is noteworthy. First, the bondholders' legal rights remained unclear for a period of ten years. Second, in spite of internal leanings towards recognizing some successor obligation, the United States argued against the British bondholders before the Mixed Commission, albeit on jurisdictional rather than substantive grounds. Third, although Congress did, in fact, authorize a payment to bondholders, this payment in some cases may have been less than the face value of the outstanding bonds, was limited only to certain classes of bondholders, and, most importantly, was subject to the substantial modification in terms introduced by the 1850 Act which required all bondholders who wished repayment to file releases with the United States Treasury within a specified time period.[49] In short, the payment authorized by the Act of 1855 did not satisfy all bondholders in full or on the same terms as specified at the time of issuance of the bonds. Additionally, any bondholder hoping to dispose of his bonds during the 1845-1855 period must have encountered great difficulties because of the highly insecure nature of the bonds during this ten year period.

Throughout the decade in which the Texas debt remained unpaid and its assumption or discharge by the United States uncertain, the whole tone of the American argument betrayed a strong moralistic

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45. *See* 4 J.B. MOORE, INTERNATIONAL ARBITRATIONS 3591 (1906).

46. E. FEILCHENFELD, *supra* note 25, at 281-82.

47. *Id.* at 277; 4 J.B. MOORE, *supra* note 45, at 3594. It is undocumented whether the British creditors ever recovered. E. FEILCHENFELD, *supra* note 25, at 277 n.60, however, notes that "[i]t appears from the Act of 1855 that the creditors were finally satisfied."

48. An Act to Provide for the Payment of Such Creditors of the Late Republic of Texas as are Comprehended in the Act of Congress of Sept. 9, 1850, ch. 29, 10 Stat. 617 (1855).

49. *Id.*

rather than legal flavor. This suggests that at that time the issues were not perceived as wholly legal in the sense that by virtue of the transfer of sovereignty to the United States there was, *ipso facto*, placed on the United States a binding legal obligation to assume the debt. Rather, the language and argumentation indicate that the question was seen more in terms of what would be "right" and "just" in the circumstances.[50] The position would have been perfectly reasonable in a context in which there was still a real distinction, for municipal law purposes, between law and equity, and in which international law was perceived not as a set of legal rules actionable in established tribunals backed by the threat of coercive force, but as a system of "positive morality."[51] This notion embodied the idea that international law derived its force from "the will of nations whose presumed consent expresses itself in treaties and customs."[52] Of course, such a "positivist" theory of international law was quite convenient in actual practice, because it left the United States free to decide, based upon its own judgment of "right" and in the light of its perceived self-interest, whether to assume the public debts of predecessor states.[53]

The position taken by the United States in regard to the Texan public debt foreshadowed later actions and was the beginning of a policy rejecting the Continental theory and practice of accepting that there was a strict legal obligation to assume debts and, indeed, showed that even in cases where the United States would ultimately agree to assume or discharge debts of predecessor states whose sovereignty had been transferred to the Union, it would feel free to modify the terms of such debts adversely to the interest of creditors, even to the extent of impairing the security pledged for such debts.[54] What began mildly in the period 1844 through 1855 found its most extreme flowering a half century later in the negotiations over the Cuban (Puerto Rican and Phillipine) debt at the Paris peace conference of 1900 following the Spanish American War.

As a result of the United States' victory over the Kingdom of Spain in the War of 1898, the United States again was faced with the

50. *See Memorial of the Creditors of the Late Republic of Texas to the Congress of the United States* in H.R. MISC. DOC. No. 17, 33d Cong., 2d Sess. 24 (1855) : "But *eight years* have passed away—*eight long years* of 'hope deferred'—and no part of the debt due your memorialist has been paid."

51. W. FRIEDMAN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 76 (1964). The notion of international law as a "mere" system of "positive morality" is most strongly expressed in the works of Vattel, an eighteenth century French jurist.

52. *Id.* at 76.

53. This "positive moral" theory was not universally accepted amongst U.S. jurists. Story, for instance, under the influence of Continental writings, apparently favored the imposition of a more rigid obligation upon successor states. *See* Sayre, *Change of Sovereignty and Private Ownership of Land*, 12 AM. J. INT'L L. 475 (1918). *See also* E. FEILCHENFELD, *supra* note 25, at 411.

54. Also note that the United States assumed the pre-existing Hawaiian debt upon its annexation on July 7, 1898, but only in an amount not exceeding $4,000,000; *see* Moore, *supra* note 34, at 351; H. WILKINSON, *supra* note 35, at 79-81.

problems of annexation and succession to public debt. By the Protocol of Armistice signed on August 12, 1898, the United States annexed Puerto Rico, Cuba, the Phillipines, and a number of Caribbean Islands.[55] During the subsequent peace negotiations, the United States sought to include the following clause:

> Article I. Spain will relinquish all claim of sovereignty over and title to Cuba.[56]

The Spanish Commissioners opposed this bare statement of cession and demanded a fuller statement, including an acknowledgment by the United States of a transfer by Spain to the United States of:

> all charges and obligations of every kind in existence at the time of the ratification of this treaty of peace, which the Crown of Spain and her authorities in the island of Cuba may have contracted lawfully in the exercise of the sovereignty hereby relinquished and transferred, and which as such constitute an integral part thereof.[57]

The American Commissioners rejected the Spanish proposal. As a result, a controversy arose which demonstrated that no settled law covered this issue. As Feilchenfeld has observed: "That neither two hundred years' development of usage, nor the various abstractions and theories of writers had created recognized rules of international law on the treatment of debts in case of cession, was shown even more clearly in the peace negotiations which followed the Spanish-American War of 1898."[58]

The Cuban debts consisted of a series of bond floatations made after 1880 and consolidated first in 1866 and again in 1890.[59] These bonds had been sold on the international market and were held by nationals of a number of major powers, including France and Belgium.[60] The Spanish government argued the debts were Cuban obligations and must be assumed by the United States upon the transfer of sovereignty. The Spanish Commissioners contended:

> [I]t is perfectly self-evident that if, during the period intervening between the assumption by a sovereign of an obligation and the fulfillment of the same, he shall cease to be bound thereby through relinquishment or any other lawful conveyance, the outstanding obligation passes as an integral part of the sovereignty itself to him who succeeds him. It would be contrary to the most elementary notions of justice and inconsistent with the dictates of the universal conscience of mankind for a sovereign to lose all his rights over a territory and the inhabitants thereof, and despite this to continue

55. Moore, *supra* note 34, at 351.

56. *Id.*

57. *Id.* at 352.

58. E. FEILCHENFELD, *supra* note 25, at 329-30.

59. *Id.* at 332-34; Moore, *supra* note 34, at 357-85.

60. *See* E. FEILCHENFELD, *supra* note 25, at 331.

bound by the obligations he had contracted exclusively for their regime and government.

These maxims seem to be observed by all cultured nations that are unwilling to trample upon the eternal principles of justice, including those in which such cessions were made by force of arms and as a reward for victories through treaties relating to territorial cessions. Rare is the treaty in which, together with the territory ceded to the new sovereign, there is not coveyed a proportional part of the general obligations of the ceding state, which in the majority of cases have been in the form of a public debt.[61]

The Spanish Commissioners also pointed out that each of Spain's former colonies in Central and South America had assumed that portion of Spain's public debt properly attributable to the colony when it achieved independence.[62] Finally, the Commissioners noted that after the American Revolution the thirteen original colonies paid over £15,000,000 to Great Britain in discharge of the colonies' debts.[63]

The American response to these points continued to be negative. Indeed, as the controversy grew, the American Commissioners contended that the Cuban debt was not contracted for the benefit of the Cuban people, but contracted against the will of the Cuban population for the precise purpose of crushing their attempts to revolt against Spanish domination.[64]

The American Commissioners also vigorously refuted the claims regarding American actions after the American Revolution, stating that:

[t]he American Commissioners are not acquainted with the works of the publicists who maintain that the thirteen original United States paid to Great Britain 15,000,000 pounds sterling, presumably for the extinguishment of colonial debts. The American Commissioners, however, feel no interest in the matter, since the statement is entirely erroneous.[65]

The debate between the Spanish and American Commissioners to

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61. Moore, *supra* note 34, at 353; E. FEILCHENFELD, *supra* note 25, at 336.

62. Moore, *supra* note 34, at 355-56.

63. *Id.* at 365.

64. The American Commissioners stated:

From no point of view can the debts above described be considered as local debts of Cuba or as debts incurred for the benefit of Cuba. In no sense are they obligations properly chargeable to that island. They are debts created by the Government of Spain, for its own purposes and through its own agents, in whose creation Cuba had no voice, from the moral point of view, the proposal to impose them upon Cuba is equally untenable. If, as is sometimes asserted, the struggles for Cuban independence have been carried on and supported by a minority of the people of the island, to impose upon the inhabitants as a whole the cost of suppressing the insurrections would be to punish the many for the deeds of the few. If, on the other hand, those struggles have, as the American Commissioners maintain, represented the hopes and aspirations of the body of the Cuban people, to crush the inhabitants by a burden created by Spain in the effort to oppose their independence would be even more unjust.

Id. at 358-59.

65. *Id.* at 372.

the Paris Conference is of interest on several counts. First, of course, is the conflict over whether international law mandates an automatic transfer of obligations upon cession regardless of the nature of the debts involved. The United States took the position that such an automatic transfer did not occur; on the contrary, if the debts were deemed to be "repugnant"[66] by the annexing nation, it could refuse to assume them.[67] Equally interesting is the language used by the two sides to the dispute. The Spanish Commissioners spoke of legal obligations incident to the concept of state sovereignty. They attempted to base their arguments upon historical precedent and upon what they claimed to be a settled doctrine of international law. The American Commissioners, however, strongly rejected the strict doctrinal arguments of the Spaniards and either rejected or distinguished the historical precedents. The language of the American submissions is far less doctrinally absolute. These documents echo the earlier debates of 1844-1855 and shun notions of strict legal obligation arising automatically. Instead, the Americans spoke in terms of justice, equity, and moral duty.[68] Clearly, the American Commissioners purposely chose "moralistic" rather than "legalistic" language. By choosing to view the state succession question from a moral perspective, the American Commissioners more easily could construct an acceptable rationale for repudiating "odious" debts contracted for immoral purposes. This difference between the Spanish and the American Commissioners represents another specific instance of a general theoretical distinction between Continental theory and practice and the practice of the United States and Great Britain which had been anticipated by the United States' actions in 1844-1855 in regard to the Texan debt. As Feilchenfeld has noted:

> Both American and English decisions failed to base their unvaried insistence on the maintenance of acquired rights on theories of succession. The Continental theories were rigid theories of positive law which allowed no exceptions. *The English and American theories, on the other hand, because of the inclination to regard international law as a system of positive morality, advocated doctrines of justice, rather than inflexible rules of positive law. Such doctrines naturally were subject to modifications in special cases where justice seemed to demand a deviation from the general principle.* This difference in theory was a potential source of controversy, because Continental lawyers, accustomed to absolute theories of succes-

66. Feilchenfeld uses the term "odious" debts. E. FEILCHENFELD, *supra* note 25, at 337-42.

67. Herbert Wilkinson wrote that:

> [t]he policy of the United States concerning the assumption of such debts has been varied. In case such obligations were contracted for purposes hostile or not beneficial to the interests of the territory transferred, the United States has not assumed them no matter whether they were formally hypothecated on the resources of the territory or not.

H. WILKINSON, *supra* note 35, at 96.

68. *See, e.g.*, Moore, *supra* note 34, at 358: "From the moral point of view . . . ."

sion, were not likely to approve of such modifications.[69]

An additional point demonstrates the full extent of the United States' notion of "right" in the Cuban context. During the course of the debate, the Spanish Commissioners referred to the equitable issue of doing justice to the bondholders of the Cuban debt, arguing that the annexation of Cuba by the United States substantially impaired the security of Cuba's creditors. The American Commissioners were unmoved by this argument and took a hard line, perhaps foreshadowing future events:

> As to the rights, expectations, or calculations of creditors, to which the Spanish memorandum adverts, the American Commissioners have only to say that as regards the so-called Cuban debt, as explained in their memorandum of the 14th instant, *the creditors, from the beginning, took the chances of the investment. The very pledge of the national credit, while it demonstrates on the one hand the national character of the debt, on the other hand proclaims the notorious risk that attended the debt in its origin, and has attended it ever since.*[70]

What one sees, therefore, in the debates at Paris and the submissions by the American Commissioners is an elaboration of the moral theory which avoided notions of automatic, strict legal obligation in favor of the notion of simply doing right, an elaboration which permitted the American Commissioners to go even further than their predecessors had gone a half century before during the controversy over Texan debts.[71] The American argument marked the highpoint of the development of a theory which elevated sovereign will above any concept of international law as independent of the sovereign states subject to it. The obligation to assume public debt in cases of state succession was, ultimately, an obligation to do "right," but what was "right" was to be determined by the successor state. So long as a state was at the height of its military power, its concept of "right," regardless of any independent evaluation, would be hard to challenge. From the American point of view in the nineteenth century, such a theory was highly advantageous. What one sees here is that felicitous meeting of theory and practice resulting in what can only be described as a maximization of national self-interest. In the "moral" theory, the principle of expediency reached its high point in power and found its best justification. The exercise of naked power is always more acceptable when clothed in justificatory rhetoric.

Leaving the theoretical justification aside, one sees here a clear instance of power politics. Implicit in the submissions of both sides is a notion that ultimately the question of assumption of debt by a succes-

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69. E. Feilchenfeld, *supra* note 25, at 312 (emphasis added).
70. *Id.*
71. It is important to note that the Texas Debt controversy and its eventual resolution entered into the U.S.-Spanish debates. *See* Moore, *supra* note 34, at 372.

sor state rests, in part, on its political, economic, and military power, vis-à-vis the creditors involved and the whole community of nations. Notably, in the case of the Texan debt, the United States did, in fact, discharge most of the debt, and it acknowledged that act during the Cuban debt controversy.[72] The United States, however, did not acknowledge any liability for the Cuban debt at issue in 1900. Stripping away the theory and rhetoric, perhaps this difference in behavior may be explained by the fact that the United States, having achieved a military victory over the declining Spanish monarchy, was near the height of its international power and influence.

Great Britain also was faced with the problem of state succession to the public debt of predecessor states several times during the nineteenth century. Britain, like the United States, developed both a theory and a practice in opposition to the doctrine of the continental jurists, permitting her to pursue imperial goals without the external restraints that the continental notion of binding, inflexible international law might require. Throughout the nineteenth century Great Britain's Foreign Office carefully avoided establishing a precedent for holding a successor state *legally* obligated to assume the debts of its predecessor. The most significant incident in this regard was Britain's annexation of the Boer Republics of the Transvaal and the Orange Free State after the successful conclusion of the Boer War. Even prior to this, however, Britain and her law officers carefully developed the notion, parallel to the American "moral" theory, that a successor state which assumed the debts of a predecessor did so not *ex lege*, but *ex gratia*. This theory lay behind Britain's actions in regard to her annexation of the Fiji Islands[73] and of Upper Burma.[74] Indeed, the British consistently applied the "grace" theory, even when it militated somewhat against British interests.

The South American guano cases illustrate the consistency of the British position.[75] In 1879, Peru pledged certain guano deposits to her creditors, including both U.S. and British citizens, as security for a portion of her national debt. In that same year, as a result of a war between Chile and Peru, Chilean forces occupied the region of Tarapaca, where most of the pledged guano was located.[76] Chile subsequently sold one million tons of this guano, thereby substantially diminishing the security of Peru's creditors. In a confidential Foreign Office document dated February 2, 1884, the Law Officers of the Crown considered Chile's obligations towards those creditors whose loans had been secured by the guano deposits. The officers took the position that no

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72. *See* text accompanying note 48 *supra*.

73. E. FEILCHENFELD, *supra* note 25, at 287-94.

74. A. KEITH, THE THEORY OF STATE SUCCESSION 64 (1907); E. FEILCHENFELD, *supra* note 25, at 379.

75. For a discussion of the *Guano* cases, see E. FEILCHENFELD, supra note 25, at 322-29.

76. E. FEILCHENFELD, *supra* note 25, at 322.

legal obligation lay upon Chile. However, the officers recommended diplomatic intervention because it was their opinion that the creditors had an "equitable claim" against Chile:

> [A]lthough it would be more equitable that when a part of the territory of one state is acquired by another by conquest, a part of the debt of the conquered country, if any exists, proportionate to the territory so acquired, should be taken over with it; yet there cannot be said to be any absolutely settled rule of international law to that effect. An equitable apportionment of the debt has been frequently, but not invariably, provided for in Treaties of Peace. If, therefore, there were no special circumstances in the present case, it might be doubted whether there was ground for intervention on the part of Her Majesty's Government.
>
> The circumstances which exist in the present case, are, however, certainly peculiar. There can be no doubt that the money was lent by the bondholders, in reliance mainly on the security of the valuable guano deposits belonging to the Peruvian Government. And, as one of the most important of these deposits is included in the territory to be ceded, we think there is an *equitable claim* on the part of the bondholders of a special character, which may *justly* be strongly *urged* upon the consideration of the Governments.[77]

The major test of the British theory, however, did not occur until 1900. After the Boer War and Britain's annexation of the Boer Republics the question arose as to whether Britain was legally bound to assume the debts of the states she had conquered. There was, at least technically, some impairment of the Boer Republics' assets upon annexation because, under a 1905 decision of the Supreme Court of the Transvaal, *Postmaster General v. Taute*, Britain was deemed to have succeeded to all of the Republics' assets, including accounts receivable.[78] However, the British Foreign Office, the Government, and the Law Courts clearly indicated that this succession principle did not extend to public debts. O'Connell remarks: "In the negotiations for peace in South Africa, the British Government in general repudiated liability for debts contracted during the war."[79] Keith is more precise, stating: "In the case of the annexation of the Transvaal and the Orange Free State, in 1900, His Majesty's Government declined to recognize any strictly legal liability for the debts of the conquered territories."[80] These actions of the British Government were affirmed, in argument

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77. F.O. Confidential Paper (5121), No. 65, *reprinted in* D.P. O'CONNELL, *supra* note 26, at 336-37 (emphasis added). *See also* F.O. Confidential Paper (5121), No. 66, *reprinted in* D.P. O'CONNELL, *supra* note 26, at 339-40; F.O. Confidential Paper (5440), No. 8, *reprinted in* D.P. O'CONNELL, *supra* note 26, at 344-46.

78. Postmaster Gen. v. Taute, [1905] T.S. 582 (Sup. Ct. 1905). *See* E. FEILCHENFELD, *supra* note 25, at 385-87.

79. D.P. O'CONNELL, *supra* note 26, at 378.

80. A. KEITH, *supra* note 74, at 64.

before the Court of King's Bench, in 1905 by counsel for the Government, Sir R.B. Finlay and Sir E. Carson, in the case of *West Rand Central Gold Mining Co. Ltd. v. The King*.[81] They stated that "there is no principle of international law by which a conquering state becomes *ipso facto* liable to discharge all the contractual obligations of the conquered state."[82]

A confidential paper of the British Foreign Office, from the Law Officers of the Crown to the Colonial Office, of November 30, 1900, sheds further light on the debt assumption issue.[83] Apparently, certain officials wished to take extreme positions in regard to the general public debt of the Boer Republics. First, they wanted the British Government to make clear that no legal liability for these debts attached to Britain as a result of the annexation and that any debts assumed by Britain might be assumed at her will *ex gratia*.[84] In addition, they raised the question of whether if Great Britain had to assume some of the Boer public debt, she could modify the terms of such debt. In fact, it was suggested at this time that Britain repay the Boer bonds at a rate of five percent instead of at their ten percent coupon rate "in view . . . of the increased security given for the payment of these loans by the substitution of the British Government, as a debtor, for the extinct Government in each case."[85] The Law Officers were of the opinion that:

> 3. Her Majesty's Government, as successor to the Governments of the South African Republic and the Orange Free State, are bound to take over the public debts of these States as a charge thereon, but not, of course, as debts payable otherwise than from revenue derived from the conquered states respectively.
>
> (a) The conditions attaching to such debts will still continue, but it will be open to Her Majesty's Government to alter such conditions in any respect that may be more equitable, having regard to the altered condition of affairs.
>
> (b) Her Majesty's Government are bound to pay any instalments [sic] of principle [sic] and interest which may be due insofar as they have revenues from the conquered territory available for that purpose.[86]

It is somewhat difficult to determine the extent to which the Law Officers in this memorandum of 1900 believed Great Britain to be legally rather than morally bound to assume the Boer debt. The suggestion

81. [1905] 2 K.B. 391.

82. *Id.* at 394. *See* E. FEILCHENFELD, *supra* note 25, at 385-87; 1 D.P. O'CONNELL, *supra* note 11, at 378.

83. F.O. Confidential Paper (7516), No. 22A, *reprinted in* D.P. O'CONNELL, *supra* note 26, at 396-400.

84. D.P. O'CONNELL, *supra* note 26, at 396. *See also* 1 D.P. O'CONNELL, *supra* note 11, at 378; E. FEILCHENFELD, *supra* note 25, at 383.

85. D.P. O'CONNELL, *supra* note 26, at 398. *See* A. KEITH, *supra* note 74, at 64, who takes this suggestion as evidentiary of British Foreign Office rejection of a succession doctrine.

86. 1 D.P. O'CONNELL, *supra* note 11, at 378.

that the British Government could make equitable modifications indicates that the officers believed the obligation was, in fact, a moral one and, therefore, any assumption technically would be *ex gratia* of the British Crown.[87] If that is the case, the British position in regard to the Boer debt was quite similar to the positions taken by the United States in both the Texan and Cuban debt controversies.[88]

Another strong parallel between the U.S. and British positions arises in connection with the debts that the Boer Republics contracted to enable them to wage war against the British. In 1900, the South African Republic had floated a loan to finance its military operations against Britain.[89] After its defeat, during the peace negotiations at Vereeniging, South Africa asked Britain to assume this debt along with its other public obligations upon annexation.[90] The British Government denied all legal responsibility for such "odious" debt, denied the Republic's capacity to have issued such debt validly, and announced that the British Government would not honor the bonds upon presentation.[91] In fact, the British Government did, *ex gratia*, pay two shillings on the pound sterling, i.e., ten percent, to these bondholders.[92] Thus, as Keith has recognized, these British actions in regard to the Boer war debt were remarkably similar to those of the United States towards the Cuban war debts.[93]

One rather special public debt of the Transvaal merits further attention—a loan floated by the House of Rothschild. The British Crown and the Rothschilds had a close relationship in the nineteenth century; indeed, to a large degree the Rothschilds had become "bankers to the British Crown." Without their aid, for instance, Britain might never have obtained her interest in the Suez Canal. Thus, one would expect the British Government to simply assume any debt owed to the Rothschilds without modification. The tradition of non-assumption was so strong, however, that even in the case of the Rothschild loan the British Government demanded major modifications. No interest payments were made until August 1901, and then only to those bondholders who had surrendered the proper interest coupon before annexation. Further, the bonds could be called at par on three months notice, and failure to surrender the bonds discharged Great Britain from the limited

87. A further indication that the Law Officers believed that Britain had only a moral obligation to assume the Boer debt comes from the fact that one of the officers signing the opinion was Sir R.B. Finlay. Five years later, in the *West Rand* case, Finlay would argue that Britain had no *legal* obligation for the Boer debt.

88. *See* text accompanying notes 35-72 *supra*.

89. A. KEITH, *supra* note 74, at 65.

90. *Id. See also* E. FEILCHENFELD, *supra* note 25, at 380-81.

91. A. KEITH, *supra* note 74, at 65. *See* E. FEILCHENFELD, *supra* note 25, at 393-94.

92. A. KEITH, *supra* note 74, at 65. The Lyttelton Commission, appointed to look into the question, issued a report in which it argued that *never* would a conqueror be under an obligation *of any type* (i.e. legal or moral) to assume such debts. *See* E. FEILCHENFELD, *supra* note 25, at 381-85.

93. A. KEITH, *supra* note 74, at 63-65.

obligation it had voluntarily assumed.[94] Here, Great Britain's acts strongly paralleled the acts of the United States from 1844 to 1855.

The picture of nineteenth century Anglo-American practice that emerges is extremely interesting. Britain and the United States steadfastly maintained that a successor state had no *legal* obligation to assume a predecessor state's debts in cases of cession and annexation. Both governments maintained this position in the face of an almost unanimous body of juristic opinion to the contrary on the Continent. Moreover, most other nations, both in Europe and in Central and South America, generally agreed with the Continental theorists.[95] During the nineteenth century, however, the Anglo-American position was of little practical significance. Eventually, both Britain and the United States did discharge the substantial part of the controverted debt. Thus, although certain modifications in terms substantially damaged some creditors and the marketability of some debt was impaired over relatively long periods, for the most part the "rule of maintenance," to use Feilchenfeld's phrase,[96] was upheld in practice, though challenged in theory. Nevertheless, the nineteenth century Anglo-American precedent created confusion regarding the international legal obligations of successor states. Ironically, that confusion has been used against the interests of the United States and Great Britain in the twentieth century. For example, the remarks of the American Commissioners at the Paris Conference of 1900 to the effect that international creditors should be aware of the "notorious risk" of their investments linger on into this century as an unwelcome and heavily ironic ghost of the best-forgotten past.[97]

B. The Twentieth Century: Rejections of the Continental Theory

The First World War radically changed the political face of the European continent. It is not surprising that the question of succession to public debt arose more than once during the post-war peace confer-

94. *Id.* at 64; 1 D.P. O'CONNELL, *supra* note 11, at 379. It is especially interesting to compare this British theory of "modification" with a letter of R. Phillimore to Earl Russell (4 Nov. 1863) now in the British Foreign Office as F.O. 83/2263, *reprinted in* D.P. O'CONNELL, *supra* note 26, at 308-10:

> [I]n the case of a debt due to a Foreign State or Subject, I am not aware of any principle of reason or justice, or any dictum of authority which enables the debtor State to cancel its obligation to a Foreign Creditor by importing an *ex post facto* condition, without the consent of the Foreign Creditor, into the original obligation. I am of opinion that this cannot lawfully be done.

Id. at 380. This statement arose in the context of state succession as the result of dismemberment (of the Republic of Colombia) rather than annexation.

95. *See* E. FEILCHENFELD, *supra* note 25, at 300-10; A. SACK, *supra* note 24, at 51.

96. Feilchenfeld uses this phrase to refer to maintenance of a debt in good standing or by discharge regardless of whether the "assuming" successor state acknowledged any legal liability. *See* E. FEILCHENFELD, *supra* note 25.

97. *See* text accompanying note 70 *supra*.

ences.[98] The immense complexity of the problems and the major economic upheaval of several years of modern warfare, however, presented the adoption of solutions based on coherent theories or prior precedents. Consequently, the negotiators took a pragmatic and *ad hoc* approach to the question of public debt and state succession. In the words of an historian of the Paris Peace Conference, "the Conference discarded all attempts to proceed on any distinct doctrinal basis, and to settle the principle of the law of succession. They put all theories on one side and came down to facts and figures."[99]

From the perspective of state succession and public debt, the most significant event arising from World War I was the Russian Revolution of November 1917, and the establishment of Soviet Russia. The events of 1917 and 1918 in Russia have been told many times and need not be repeated here. The question of the fate of the Tsarist debt during this period, however, has not been fully explored. After the February Revolution of 1917, the Provisional Government declared that the new government would assume and pay all of the Tsarist debt.[100] This resolve soon faltered, however, and the new Soviet state officially repudiated the Tsarist debt, debt which remains in default to this day.[101] The precise justifications offered for this have varied over time, but the near contemporary opinion of Professor Korovine, quoted by Sack, is of interest:

Mr. Korovine, of the Institute of Soviet Law, is of the opinion that

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98. *See* E. FEILCHENFELD, *supra* note 25, at 431-529; 1 D.P. O'CONNELL, *supra* note 11, at 399-404.

99. 5 A HISTORY OF THE PEACE CONFERENCE OF PARIS 13 (R. Temperley ed. 1921), *cited in* 1 D.P. O'CONNELL, *supra* note 11, at 400 n.1.

100. Sack relates:

> S'inspirant entièrement de la conception de l'État moderne où les droits de chacun sont rigoureusement gardés et où chacun remplit scrupuleusement ses obligations, et ayant en mémoire que l'ébranlement des bases de l'administration financière pendant la guerre menacerait la patrie de malheurs irrémédiables, le gouvernement provisoire fait savoir qu'il assume sans faute toutes les obligations financières imposées au trésor lors de l'ancien gouvernement, à savoir: paiement des interêts et amortissements des emprunts d'État, paiements découlant des contrats, traitements aux employés, pensions et tous autres paiements à effectuer par le trésor, conformément à la loi, au contrar où à toute autre base légale . . . En même temps, tous les paiements devant être éffectuées au trésor, impôts, taxes et autres sommes dues doivent être versés comme auparavant jusqu'à leur modification par une nouvelle loi . . . .
>
> Il est curieux de noter dans cette déclaration la phrase: "Ayant en mémoire que l'ébranlement des bases de l'administration financière pendant la guerre ménacerait la patrie de malheurs irrémédiables." Il semble que la reconnaissance de toutes les dettes et obligations de l'Empire russe ait été motivée ici, non par le principe de la succession des dettes d'État, mais par les circonstances particulières dans lesquelles se trouvait alors la Russie.

A. SACK, *supra* note 24, at 52. Interestingly, in 1921 the White Russian Provisional Government also announced its intention to honor all Tsarist debts, obviously in a bid for international recognition.

101. Indeed, this debt is still traded in a secondary market. A principal market maker in the United States is Carl Marks & Co. in New York City. *See*, C. Brophy, *Will Russia and China Pay Off?*, 1 FACT. THE MONEY MANAGEMENT MAGAZINE 51 (1982). Carl Marks & Co. has brought suit for repayment on these bonds under the Foreign Sovereign Immunities Act of 1976 and has temporarily suspended trading in them.

> succession to debts does not exist in cases of state succession; they are the personal debts of the former government, they are, as to the new government *res inter alias acta*.[102]

In the context of this essay, however, the most interesting statements are not those made by the Soviet Government repudiating what might well have been termed by them "odious" Tsarist debts, but rather those made in a joint telegraphic communique sent by Great Britain and France to Russia on March 28, 1918:

> No principle is better established than that which holds a nation responsible for the acts of its government; without a change of government having an effect on pre-existing obligations . . . such obligations may be repudiated by no authority, regardless of who they are, without fundamentally overturning international law. Otherwise, there would be no security in relations among states, it would be impossible to enter into long term contracts, for fear they would be rejected; this would be the ruin of state credit, from the political, as well as the financial point of view.[103]

This communique is perfectly consistent with French policy; even after the Revolution of 1789, the Revolutionary Government had assumed all of the debts of the prior monarchy.[104] Nevertheless, it sounds somewhat strained as a British statement. Of course, the British could have argued that the Soviet situation was fundamentally different from the American and British cases during the nineteenth century. In those earlier cases, annexation or cession took place without the total extinguishment of the prior government and state. Nevertheless, Great Britain had fostered the growth of the "positivist" theory of international law, and, thus, Britain's invocation of well-established and binding principles of international law does not ring wholly true. Moreover, Britain's warning about the dire consequences of repudiation and the possible loss of international credit sounds a false note. Although Britain and the United States did, in fact, discharge most of the outstanding predecessor debt when they were involved in cases of state succession during the nineteenth century, they often did so after long periods of uncertainty and with substantial modifications in terms.

102. A. SACK, *supra* note 24, at 68. *See also* 1 D.P. O'CONNELL, *supra* note 11, at 19-21. The French translation is by Sack. The text states:

> M. Korovine, de l'Institut du droit soviétique, est d'avis que la succession des dettes n'a pas non plus lieu en cas de transformation politique; il y avait dettes *personnelles* de l'ancien gouvernement, elles sont pour le nouveau "res inter alias act."

103. A. SACK, *supra* note 1, at 114:

> Aucun principe n'est mieux établi que celui d'après lequel une nation est responsable des actes de son governement sans qu'un changement d'autorité affecte les obligations encourues: . . . les engagements ne peuvent être répudiés par aucune âutorité, quelle qu'elle soit, sans quoi la base, même du droit international se trouverait ébranlée. Autrement, il n'y aurait plus de sécurité dans les relations entre les États, il deviendrait impossible de traiter un contrat à longuè échéance si ce contrat risquait d'être méconnue; ce serait *la ruine du credit des États* au point de vue politique, comme au point de vue financier.

104. A. SACK, *supra* note 1, at 115.

Neither Britain nor the United States, however, lost all international credit standing because of their practices. The problem for Britain and the United States in 1918 was that the Soviets took as pragmatic a view of the matter as Britain and the United States had in the nineteenth century. The Soviets eschewed legal liability and developed a justificatory theory for their actions.[105]

The wheel turned full circle in 1938 when Germany annexed Austria. Although British and American officials could argue that the Russian situation in 1918 was fundamentally different from that of Texas in 1845 or Cuba and the Boer Republics in 1900,[106] they could not do so as easily with regard to the Anschluss, for this annexation strongly resembled the earlier Anglo-American annexations. Germany, taking a position fully consistent with nineteenth century Anglo-American practice, refused to recognize any legal liability for the Austrian debt. Unfortunately for the United States and Great Britain, the Austrian Government had been heavily indebted to the U.S. Government and to numerous British and American citizens.[107] Thus, after Austria failed to make a monthly loan payment on June 1, 1938,[108] the United States protested to the German Government and argued that:

> It is believed that the weight of authority clearly supports the general doctrine of international law founded upon obvious principles of justice that in case of absorption of a state, the substituted sovereignty assumes the debts and obligations of the absorbed state, and takes the burdens with the benefits. A few exceptions to this general proposition have sometimes been asserted, but these exceptions appear to find no application to the circumstances of the instant case. Both the 1930 loan and the relief loans were made in time of peace, for constructive works and the relief of human suffering. There appears no reason why American creditors of Austria should be placed in any worse position by reason of the absorption of Austria by Germany than they would have been in had such absorption not taken place.[109]

The German Government was unpersuaded by the U.S. argument, particularly the United States' dismissal of the "few exceptions," which obviously included Texas and Cuba. The reply of the *Reichsminister* of Economic Affairs suggests that the German jurists had been closely

105. For a discussion of the "Communistic" theory and its development since 1918, see 1 D.P. O'CONNELL, *supra* note 11, at 19-21.

106. While Texas, Cuba, and the Boer Republics all involved annexation by conquest or voluntary cession of sovereignty and left the predecessor state still in some, albeit diminished, status of existence at international law, the Soviet Revolution totally extinguished the Tsarist government and left creditors no recourse for payment except the new Soviet government. A number of writers have adopted the now traditional distinctions of cession, dismemberment, annexation, and total extinguishment (or partial v. full succession) and formulated different rules for each. Such a fragmentation may be useful for certain purposes.

107. *See* 1 D.P. O'CONNELL, *supra* note 11, at 381-82; Hackworth, *supra* note 34, at 543-48.

108. The loan was the famous Austrian loan of 1930.

109. Hackworth, *supra* note 34, at 545.

studying their history. The communication stated three grounds for avoiding legal liability: (1) the Anschluss was a case of self-extinction of a sovereign state (as was Texas); (2) the "political character" of the Austrian debt precluded succession (as in the case of Cuba); and (3) other states, including the United States and Great Britain, had rejected any legal responsibility for debts in similar circumstances.[110] On July 15, 1938, the German Foreign Office reiterated Germany's position and informed the United States that Germany "supported by historical precedures, took a generally negative stand with regard to the debts of the Austrian Government, since they were brought about in order to support the incompetent Austrian state artificially created by the Paris Treaties."[111]

Throughout the summer of 1938, announcements that Germany and the European powers, including Great Britain, had reached separate diplomatic settlements of the Austrian debt problem greatly increased American anger.[112] Those settlements, however, were not without complications. First, the settlements were with countries with which Germany had export surpluses from which funds could be withdrawn. Secondly, certain debts, such as those of the Österreichische Kreditanstalt, had their coupon rates reduced from seven to five percent, a tactic first considered by the British Foreign Office in 1900.[113] The United States, however, because of the absence of any German trade surplus, was not offered such a settlement.[114] Germany did offer

110. THE TIMES (London), 17 June 1928, at 16. *See* 1 D.P. O'CONNELL, *supra* note 11, at 381. *See generally* Garner, *State Succession raised by German Annexation of Austria*, 32 AM. J. INT'L L. 421, 425-30 (1938). It is interesting to note that Garner, while mentioning the ultimate assumption of the South African debt by Great Britain in 1909 and the payment of the Texan creditors by the United States in 1855, does *not* discuss the intervening modifications or repudiation of any *legal* obligation. Garner concludes:

> The conclusion of the whole matter is that should Germany refuse to assume responsibility for the payment of the debts of Austria, it would be in the face of an overwhelming body of practice, including her own, and contrary to the vast preponderance of the best juridical opinion, both of which taken together are evidence enough that the duty of assumption may now be regarded as required by international law.

Id. at 430.

111. Hackworth, *supra* note 34, at 545.

112. 1 D.P. O'CONNELL, *supra* note 11, at 382-83; Hackworth, *supra* note 34, at 546.

113. 1 D.P. O'CONNELL, *supra* note 11, at 383. In fact, the notion of reducing the rate of outstanding debt actually was suggested by the United States of Columbia prior to the British annexation of the Boer Republics. *See* Letter of Robert Phillimore to Earl Stanley, now in the British Foreign Office as F.O. 83/2257, *reprinted in* D.P. O'CONNELL, *supra* note 26, at 323-24.

114. The American ambassador in Germany noted the refusal in a letter to the German Foreign Office:

> It appears therefore that with respect to bonds of the Austrian Government which are held by citizens or residents of the United States, the German Government while disclaiming legal responsibility is prepared to make de facto provision for payment as a charge on the German Government, and that it has caused the suspension of capital and interest payments by the agencies charged therewith prior to October 2, 1938. This confirmation of the position that holders of the bonds of the Austrian Federal Government must look to the German Government for the discharge of these obligations might reduce the question of legal responsibility to an academic question were adequate provision, acceptable to the bondholders, made for the payment of the obligations. Unfortunately, under the foreign exchange laws and practices of the Reich, the Reichsmark securities of the German Government tendered

an exchange *ex gratia*, of Austrian bonds for four and one-half percent German bonds at an exchange rate of 262 Reichsmarks par value per $100 United States par value,[115] but the United States rejected this proposal.[116]

The Russian and Austrian cases, like the earlier Texan, Cuban, and South African situations illustrate the development of an international practice rejecting, when advantageous, the doctrine of absolute responsibility promulgated by some early Continental theorists. This is not to say that history reveals a pattern of actual repudiation, but history does disclose a pattern which differs markedly from the continental absolute liability theory. The alternative pattern permits sovereign nations to escape liability for debts in instances of state succession by finding loopholes in the traditional theory. The importance of this alternative pattern developed in Anglo-American practice and its potential justificatory power as historical precedent is well illustrated in the statement of the *Reichsminister* in reply to the United States protest of June 1938. While creditors may eventually be repaid on relatively reasonable terms, they are not necessarily repaid because states feel an international legal obligation to do so. Rather, states make payment because they find it economically or politically expedient to do so or, in Germany's case, because they are forced to do so after a war. Thus, the nineteenth century Anglo-American examples and the twentieth century rejections of the Continental theory provide powerful historical precedents for the repudiation of a predecessor state's debts by a successor state.

IV. The Principle of Expediency

Having examined the history of the law of state succession to public debts, one begins to feel rather depressed and confused and even despairing of ever discovering a "settled" principle of international law. Two distinct traditions emerge. The Continental juristic tradition described in the first part of this paper, conceptualizes a binding rule of international law that, in most situations, requires a successor state to assume the public debts of its predecessor. The second tradition, developed principally in the practice and theories of the United States and

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> by the offer of October 24, 1938, as the terms of the offer are interpreted by my Government from the published text, could be accepted by residents of the United States only at the cost of a prohibitive sacrifice of the market value and income yield of securities they hold, while the German Government states in its note under acknowledgment that it has not been able to find an adjustment providing for payments in the United States comparable to the provisions made for other foreign holders of Austrian bonds.

Letter from U.S. Ambassador in Germany to German Foreign Office (Nov. 25, 1938), *reprinted in* Hackworth, *supra* note 34, at 547.

115. Hackworth, *supra* note 34, at 546.

116. The Austrian debt issue was not resolved until after World War II. In 1952, Germany, now thoroughly defeated and under American political and economic domination, agreed to a settlement of its liability for the Austrian obligations during the Anschluss period. 1 D.P. O'Connell, *supra* note 11, at 383-84. Austria herself resumed payments in 1954. *Id.* at 384.

Great Britain, during the nineteenth century, is that there is no binding international "legal" rule on this subject at all, but only a "moral obligation" to assume a predecessor state's debts.

One might ask validly whether there is, in fact, a significant difference *for practical purposes* between these two traditions. According to the British and American nineteenth century traditions, international law is fundamentally different from municipal law because it generally lacks both the administrative apparatus and the coercive backing common to municipal law systems. Some modern jurists have argued that the differences between these two traditions are more apparent than real. They suggest that, in the modern world, the two traditions have become one, albeit with a somewhat different emphasis. For example, in the 1967 revision of his treatise, *State Succession in Municipal Law and International Law*, O'Connell states:

> Once the view is accepted that law is rooted in the metaphysics of community existence the inhibition [to accept the existence of a rule of international law] caused by a belief in the supremacy of the sovereign will in international law disappears, for then the moral and sociological pressures, which all the authors have recognized, become juristically normative: "equity" or "justice" is more easily transformed into rules of positive law, *lex ferenda* into *lex lata*. The appreciation of the law of State succession is, then, ultimately one of emphasis. A rational approach will thrust the emphasis on positive manifestation of the need for order and stability to be discovered in regular solutions devised by States in their day-to-day practice; an imperative approach will thrust it on the formal divergencies and discrepancies in this practice.[117]

Admittedly, despite the seeming divergence between Anglo-American theory and practice and Continental theory, predecessor state debts have been assumed or discharged in most instances of state succession. In the Constitution of September 1791, for example, the French Republic adopted the following principle: "On no pretext may the necessary sources for repayment of a national debt be either repudiated or suspended."[118] Similarly, after the overthrow of the Brazilian monarchy in 1889, Ruy Barbosa, the new Brazilian Minister of Finance, telegraphed the following communique to the Secretary of State of the United States as one of his first official acts: "Government is constituted in Republic of the United States of Brazil; Monarchy deposed; imperial family left the country . . . Republic respects strictly all engagements and contracts entered upon by the State."[119]

117. *Id.* at 33.

118. A. SACK, *supra* note 1, at 115 (as translated). The original states: "Sous aucun prétexte, les fonds nécessaires à l'acquittement de la dette nationale ne pourront etre ni refusés, ni suspendus."

119. *Id.* at 118; Moore, *supra* note 34, at 252.

O'Connell would argue that these acts, like many others, are simple examples of obedience to international law.

The work of Arthur Berridale Keith, however, presents an alternative explanation.[120] In *The Theory of State Succession with Special Reference to English and Colonial Law*, Keith attacked the Continental jurists who argued that international law creates a binding legal obligation upon states to succeed to the debts of predecessor states and that as a result of this "settled" rule of law, states had done so. In a detailed historical analysis, Keith demonstrated that both the United States and Great Britain had denied the existence of such a binding legal obligation, that no such obligation was imposed by international law, and that the assumption of public debts had occurred not from any sense of legal liability but because it was expedient for the successor nations to assume the debts. For Keith, international law was irrelevant.[121]

Keith's work has met with mixed reaction. Ernst Feilchenfeld thought the work was quite valuable:

> Keith was one of the first writers to strive to base his conclusions on the subject on a detailed study of state practice rather than on constructions and theories. His book, *The Theory of State Succession, with Special Reference to English and Colonial Law*, although a brief, rather than an entirely detached opinion, has justly acquired great authority among later scholars, and his arguments, some of which are very brilliant indeed, are almost all still deserving of serious consideration.[122]

O'Connell, on the other hand, has rejected Keith's "negativist" views as a simple "apologia" for British policy in the nineteenth century and as both naive and inappropriate for the modern world.[123]

One's opinion of Keith's work ultimately rests upon whether one believes, as does O'Connell, that the two traditions, the Anglo-American "moral" theory of international law and the Continental "legal" theory of international law, are really but one tradition. If there is really only one tradition and Anglo-American practice is to be viewed only as an eccentric exception to a settled doctrine, then one can say that there is an international rule on state succession. The belief that a

120. Arthur Berridale Keith was an officer of the British Colonial Office and a prolific author of works on two subjects: Buddhism and international law. In 1906, Keith presented a thesis to the Faculty of Laws at Oxford for the degree of D.C.L. titled *The Theory of State Succession with Special Reference to English and Colonial Law*, the thesis was published as a monograph in 1907. *See* note 74 *supra*. Copies of Keith's work are relatively rare in the United States. A photocopy of the Yale Law Library copy is on deposit with the UNIVERSITY OF ILLINOIS LAW REVIEW. The author wishes to express his appreciation to the Yale Law Library and its Librarian, Morris Cohen, Esq., for aid in obtaining this photocopy.

121. Or, if not irrelevant, at least highly unreliable and insecure. Another British exponent of the "negativist" approach championed by Keith was Sir Erle Richards. *See* Richards, *The Liabilities of a Conqueror*, 28 LAW MAG. & REV. 129 (1903).

122. E. FEILCHENFELD, *supra* note 25, at 404.

123. 1 D.P. O'CONNELL, *supra* note 11, at 17. O'Connell also criticized Keith for being the only writer of his time who was not "at home with the literature of four languages." *Id.* at 27.

binding international legal rule exists, however, may lead to dangerous assumptions that law-abiding nations will assume debts in instances of succession and that this will occur, regardless of the circumstances and actual situation. The belief that there are two traditions, however, and that nations may well adopt what has here been called the Anglo-American position so that it becomes not an exception to a rule, but a competing rule, causes this sense of security to disappear. A potential lender is forced to examine the circumstances of each case and to determine what expediency will dictate. As Keith has observed:

> Expediency naturally produces different results in different circumstances. In peace, cessions of territory are naturally accompanied by the taking over of part of the debt of the ceding state; on the other hand cessions forced by her are naturally not accompanied by any such taking over as was the case in 1871 and 1898, or at best only a small part of the debt is taken over as in 1859 and 1866.[124]

The real danger in ignoring the significance of nineteenth century Anglo-American practice lies in complacency. O'Connell is undoubtedly correct that Keith's *apologia* for power politics and the attempt to elevate expediency to a justification *should be* inappropriate today, but the expediency theory was accepted by two great powers in the nineteenth century and there is evidence that it has been used by other states during this century.[125] At the very least, the historical precedents are widely known and may be ignored only with peril, as the United States discovered in 1938. While Keith's "Principle of Expediency" may not provide the best theory upon which to base international law, it does, at least, provide a model which highlights rather than downplays the confusion in practice and theory that historical research uncovers. In addition, Keith's analysis focuses attention on the unpleasant aspects in the history of state succession: debts have been repudiated. As has often been observed, one who ignores history does so at his peril, for he is most likely condemned to repeat it.

Thus, Keith's "Principle of Expediency" may provide a salutary dose of reality and ought to be of continuing interest to lawyers and lenders. Assuming that Keith's analysis provides a realistic alternative view, then lenders should rely not only upon their possible international and municipal legal rights, which may prove to be chimerical, but also upon devising other forms of protection. Conservative lenders should examine closely their sovereign debtors and, whenever possible, avoid loans to states which are or could become unstable. At the very

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124. A. KEITH, *supra* note 74, at 62.

125. For example, there still is no indication that either the U.S.S.R. or Communist China intends to assume, within the near future, the debts of its predecessor government. Nevertheless, an Alabama federal district court recently ruled that the Chinese government is in default on bonds of the Hukuang Railway. Jackson v. People's Republic of China, No. CA-79-M-1272-E (N.D. Ala. Oct. 22, 1981). Cuba and Czechoslovakia are also in default to international creditors.

least, lenders should ensure that if state succession were to occur, it would be highly *inexpedient* for the successor to repudiate the predecessors' debts. Keith's work suggests that lenders should look to diplomatic as much as political, economic, and legal solutions. In 1855, it was a political rather than a legal solution which resulted in the payment of the Texan debt. Similarly, while the United States argued the law in 1938, Great Britain sought a diplomatic solution. British bondholders were repaid there and then; U.S. creditors waited until 1952 to be repaid, and the legal solution was not devised until after a military triumph.

V. Conclusion

Most treatises on the subject of public debt and state succession include a series of distilled doctrinal statements of, or, perhaps suggestions for, binding rules of international law. Underlying these doctrinal analyses is a conviction that the development of binding rules will once and for all settle the problem. Modern jurists continue to reject Keith's "Principle of Expediency" as "negativist;" they also ignore or distinguish away those historical instances antithetical to their theories. Perhaps this stems from a belief that a "settled" rule of state succession is necessary for the maintenance of international financial order. The theorists tell us that international law will protect lenders. Lenders continue to lend substantial sums in highly risky circumstances, always seeking new outlets for investment capital.[126] When repudiation occurs, as in the case of the Russian or Chinese debt, there is a general shock, as if such repudiations offend the senses and are so unusual as to be inconceivable. Yet, even a brief historial examination refutes this. United States lenders cannot ignore a statement by a former Secretary of State to the effect that international lending involves a "notorious risk."[127] Nor can U.S. lenders ignore an historical record that shows both the United States and Great Britain asserting the right to repudiate debts of predecessor states in analogous circumstances. History demonstrates that the supposed security provided by an international legal rule may be very weak indeed.

The lesson to be learned from this history is a lesson in pragmatism. Perhaps some nations will not repudiate predecessor debt because of some sense that a rule of international law ought to be obeyed. Just as likely, however, public debts of predecessor states will be assumed and paid because of economic, political, or military expediency. A successor state may need legal recognition, further loans, or military aid.[128] Alternatively, a successor state may simply decide, as did Great

126. *See* A. Sampson, The Money Lenders (1982).

127. *See* text accompanying note 70 *supra*.

128. Many of the Iranian concessions on repayment of external obligations stemmed from these types of pressures.

Britain in 1900, that some gesture is politically advantageous.

Commentators currently are discussing the need for and utility of an international convention on the subject of the treatment of debt in the case of state succession.[129] Such a convention might clear away much of the confusion and help render the checkered history of this subject irrelevant. Nevertheless, history ought not to be totally forgotten; the drafting and signing of a convention is not a panacea that will solve all potential problems. Successor states may not be signatories to the convention or may discover that it is more expedient to repudiate debt, even in the face of an international convention and possible world opprobrium, than it is to honor such debt. History suggests that some nations will choose the expedient way, regardless of any international legal "rule." A convention may be helpful, but history, and self-interest, suggest that it will not be enough. Lenders still will have to look carefully at their potential borrowers and attempt to minimize their risks. Indeed, lenders might want to review the ingenuity shown by their medieval and early modern counterparts.[130] The rule of law may be recognized as an ideal, but it is not yet wholly a reality.

129. *See* Foorman & Jehle, *Effects of State and Government Succession on Commercial Bank Loans to Foreign Sovereign Borrowers*, elsewhere in this symposium.

130. *See* text accompanying notes 6-9 *supra*.