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Origin Myths, Contracts, and the Hunt for *Pari Passu*

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ORIGIN MYTHS, CONTRACTS, AND THE HUNT FOR *PARI PASSU*

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Abstract

Sovereign loans involve complex but largely standardized contracts, and these include some terms that no one understands. Lawyers often account for the existence of these terms through origin myths. Focusing on one contract term, the *pari passu* clause, this article explores two puzzling aspects of these myths. First, it demonstrates that the myths are inaccurate as to both the clause's origin and the role of lawyers in contract drafting. Second, the myths often are unflattering, inaccurately portraying lawyers as engaged in little more than rote copying. The article probes this disjunction between the myths and lawyers' actual practices and explores why contracts origin myths might hold such appeal for this elite segment of the bar.

• Faculty at the University of North Carolina, Columbia University, and Duke University, respectively. In their prior professional lives, Gulati and Weidemaier were on opposite sides of the fence in terms of their association with the parties at the center of the Elliott v. Peru dispute, although neither worked on that case. Gulati was an associate at Cleary Gottlieb and worked with Lee Buchheit on sovereign debt matters, and Weidemaier, while an associate at Dechert, worked on other matters for Elliott Associates. Scott has been the neutral arbiter among his bickering co-authors.

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I. INTRODUCTION

This project originated in an unexpected place. In our separate work, we were pursuing questions related to how contracts evolve – or fail to evolve – over time. One of these projects sought to shed light on why, even in sophisticated markets, contract language often is slow to change in response to problems. To get traction on that question, two of us (Gulati & Scott 2011) interviewed lawyers about why they continued to use a standard term in sovereign debt contracts, the *pari passu* clause, even after an infamous court decision in 2000 that most believed had misinterpreted the term. The question posed was straightforward: "Most people think that the court misinterpreted the *pari passu* clause. Why didn't lawyers change it to prevent future misinterpretation?"

The responses surprised us. Sovereign debt lawyers are elite corporate practitioners and paradigmatic market actors, so we expected to hear market-based explanations for the failure to modify the *pari passu* clause. We expected respondents to identify the function served by the clause or to explain that what mattered was how market participants understood the clause, not how a court had misinterpreted it. And some respondents behaved as expected. But many did not. Senior lawyers in particular often responded by telling stories about the possible history and origins of the *pari passu* clause. Their stories linked the clause to remote but significant events, often using mythic language. Respondents described contract terms as "magic incantations" and "talismans," referred to contract drafting as a "ritual," and, in one instance, likened a search for the origin of *pari passu* to the "search for the Holy Grail."

In this article, we explore two questions prompted by these stories. First, we take each story literally as an empirical proposition about the world, one that purports to identify the origins of a particular contracting practice. Using a dataset of sovereign debt contracts spanning almost 200 years, we ask whether the lawyers have it right. Do they correctly identify the origins of an important term routinely included in their contracts? After conducting our own hunt for the origins of *pari passu*, we believe the answer is no. Each story contains elements of truth, especially one told by veteran lawyer Lee Buchheit. But none of the stories adequately accounts for the origins or meaning of the clause (compare Coates 2001:1380).

Second, we explore why these veteran sovereign debt lawyers would tell stories like these in the first place. Here, we analyze the stories not as empirical propositions but as *stories* – as selective interpretations of the professional world experienced by these lawyers. What emerges is a disjuncture between the stories and our contracts dataset. The stories invoke themes – lawyers as constrained by history and ritual, lawyers as rote copiers of documents, lawyers who allow drafting errors to persist for decades – that portray sovereign debt lawyers in unflattering terms. This alone is puzzling; sovereign debt lawyers are not famed for their modesty. More puzzling still, our dataset suggests that sovereign debt lawyers behave collectively more like sophisticated market actors than the stories imply. Instead of blind copying, they appear to engage in frequent contract tailoring. Instead of chasing the origins of contract terms, they focus primarily on current practices. And instead of overlooking mistaken additions to contract boilerplate, they demonstrate a thorough understanding of the language used in their contracts. With that disjuncture between what lawyers say and what they do as backdrop, we explore why contracts origin stories might hold such appeal, and we mine the stories for insight into this elite segment of the legal profession.

II. THE BRUSSELS DRAMA

Court decisions interpreting obscure contract terms rarely produce widespread consternation. Yet the *pari passu* clause was not destined for such a quiet fate. The clause appears in virtually every modern sovereign debt contract and provides something such as the following:

> These Notes rank, and will rank, equally (or *Pari Passu*) in right of payment with all other present and future unsecured and unsubordinated External Indebtedness of the issuer.

In the context of unsecured corporate debt, this language has a recognized meaning. The clause ensures that the debt will have the same priority as all of the borrower's other unsecured debt in the event of a liquidation (Choi & Gulati 2005-2006; Buchheit & Pam 2004). In a corporate bankruptcy, for example, an equal share of the proceeds of any liquidation will be distributed among all holders of *pari passu*-ranking debts (after higher priority creditors are paid). But sovereign borrowers do not go into insolvency and cannot be liquidated. When a sovereign defaults, no judicial officer supervises the distribution of sovereign assets in accordance with creditors' respective priorities. In the context of sovereign lending, then, it is fair to say that no one really knows what the *pari passu* clause means, something that even eminent practitioners have long acknowledged (Wood 1995:165; Buchheit 1991:11).

In many respects, this is not such an unusual phenomenon. Over time, many boilerplate contracts become larded with terms that no longer serve a useful function but that drafters are reluctant to remove (Goetz & Scott 1985:288). One prominent lawyer explains: "Documents are like ships travelling the oceans: they gather barnacles as they go." (Wood 2009:8). The *pari passu* clause, however, was to become the central feature in one of the most contentious episodes in the history of sovereign debt. In 1996, the Republic of Peru agreed to debt restructuring terms with a number of its creditors. Subsequently, a so-called vulture fund, Elliott Associates, that had not agreed to the terms of the restructuring obtained an ex parte restraining order from a court in

Brussels that jeopardized Peru's ability to pay holders of its restructured debt. Elliott successfully argued that, as an unsecured creditor, it could invoke the *pari passu* clause to prevent Peru from making preferential payments to other unsecured creditors with whom Elliott ranked equally. In effect, this meant that Elliott was entitled to a ratable share of any payment Peru made even though it had not agreed to the restructuring plan. Afraid of defaulting on its obligations to holders of its restructured debt, Peru settled, and Elliott received a sizeable return on the debt it had purchased at a steep discount.

The foregoing description does not do justice to the uproar that followed the *Elliott* injunction. The decision sent shockwaves through the sovereign debt world, many members of which were aghast at the possibility that copycat litigation would complicate future efforts to restructure distressed sovereign debt. (Concerned players in the market feared that few bondholders would participate in a restructuring if those who did not participate could claim a share of any payments made to those who agreed to the restructuring plan.) Sovereign borrowers and their advisors were quite certain that the *pari passu* clause did not require borrowers to make ratable payments to all unsecured creditors and especially not to holdout creditors. Indeed, it is not uncommon for distressed sovereigns to pay important creditors, like the IMF, without servicing other outstanding debt (Monteagudo 2010). Yet despite the belief that the *Elliott* interpretation was wrong, there was no widely-held understanding of what the clause actually *meant*. Moreover, although the *Elliott* litigation had made the ambiguity of the *pari passu* clause painfully apparent, new sovereign bonds continued to be issued with the pre-*Elliott* version of the clause (Bradley et al. 2010; Choi & Gulati 2005-2006).

This, then, was the situation after the *Elliott* litigation: Loans of hundreds of millions of dollars, involving the most elite law firms and investment banks in the world, were being implemented through contracts whose very architects professed "a degree of agnosticism" about the meaning of a central contract term (Buchheit & Pam 2004:875). More important, unlike many other instances of contractual uncertainty, this one had potentially significant macroeconomic consequences. These events formed the backdrop for our lawyer interviews.

III. THEORETICAL BACKGROUND

We became interested in how lawyers explained their use of the *pari passu* clause for several reasons. First, contracts scholarship and teaching tends to conceptualize transactional lawyering as a process of identifying and addressing risk through the design of appropriate contract terms (Scott & Triantis 2006). From this perspective, the *Elliott* case raises a puzzle. The litigation revealed that a common variant of the clause increased the risk of litigation by holdout creditors, yet sovereign bonds continued to use the pre-*Elliott* version of the clause. As academics who teach and study contracts, we wanted to know how these lawyers would explain why contracting practices did not conform to the theory. Taking our cue from other interview-based studies of lawyers, we were aware that "lawyers' reports of their behavior may not reflect their actual practices." (Mather, McEwen & Maiman 2001:199; McEwen, Mather & Maiman 1994:152). By juxtaposing the lawyers' explanations against a dataset of sovereign bond contracts, we hoped to provide a richer picture of how contracts implemented by sophisticated market actors respond to legal shocks.

In addition to shedding light on contract evolution and change, the interviews are a source of information about the nature of sovereign debt legal work. Lawyers are involved in managing the sizeable risks associated with sovereign borrowing. Thus, our lawyer-respondents also are "informants" who report their understandings and beliefs about this elite practice setting. (Mather, McEwen & Maiman 2001:199; McEwen, Mather & Maiman 1994:152). Although we had expected them to discuss modern sovereign debt transactions, many of the most senior lawyers responded by telling stories. This by itself is not surprising. Storytelling is a common social activity, even among professionals (Economides & O'Leary 2007; Conley & Williams 2005-2006; Ewick & Silbey 2003; O'Barr & Conley 1992a; 1992b; Shearing & Ericson 1991). It is a means by which people selectively reconstruct and interpret past events so as to create a particular understanding of their significance (Bennett & Feldman 1981:7). What surprised us was that many of the stories had the character of origin myths. These are accounts that purport to explain the origin and continued persistence of a particular cultural or social practice. (Silbey 2007-2008:323-27; Engle 1993:789-92; O'Barr & Conley 1992a:77; O'Barr & Conley 1992b:22). Origin myths often involve remote events "that are not the subject of precise historical reports" but that adherents to the myth nevertheless view as self-evident. (O'Barr & Conley 1992a:77).

That is a fair description of the stories told by our lawyer-respondents. Instead of stories about how sovereign bond deals are "done," they told stories about the emergence of the *pari passu* clause, long ago, during some tumultuous era in the history of sovereign borrowing. For our purposes, this history includes three principal eras. In the first, external borrowing typically involved the issuance of bonds in major international financial centers such as London and, increasingly over the course of the 20th century, New York. Such issuances were common throughout the nineteenth century and continued until brought to an abrupt halt by a wave of Depression-era defaults in the 1930s (Cassis 2006:192-93; Gelpern & Gulati 2006:1632; Rosenberg 1999:240-43). The second era begins after World War II and features unsecured loans, first by multilateral lenders such as the World Bank, and then by syndicates of commercial banks flush with petrodollar deposits (Fisch & Gentile 2004: 1054-55). Rather than bonds, most sovereign lending during this era took the form of direct loans from a relatively small number of financial institutions. The third and most recent era was precipitated by a wave of defaults on these syndicated loans in the 1970s and 1980s. From roughly the late-1980s to the mid-1990s, banks were persuaded to exchange their defaulted loans for tradable Brady Bonds. Trading in these bonds reinvigorated the sovereign bond markets, which once again became the primary means of external borrowing (Gelpern 2009:1101).

IV. TALES OF *PARI PASSU*

The stories emerged in the course of a larger project involving interviews with over 200 sovereign debt lawyers in New York, London, Frankfurt, and Paris. The interview methodology is described in detail in Gulati & Scott (2011). Because the most senior lawyers had witnessed first-hand the evolution of the sovereign debt market and its documentation practices, we expected that they would have the most to say about why the *pari passu* clause had not changed after *Elliott*. And indeed, their responses differed from those of less senior lawyers. The difference, however, was that the most eminent and senior of the respondents primarily told origin stories.

Over a six-year period, roughly two-dozen of these wise men of the field were interviewed. (Given practice demographics, they were all men.) They ranged in age from late 50s to early 70s; many were nearing retirement, and some had already retired. Like other respondents, they were asked why the *pari passu* clause had not changed, not about the origin or meaning of the clause. This was partly because respondents might hesitate to provide answers that might conflict with a client's interests and partly because leading practitioners had already suggested that no one knew what the clause actually meant (Wood 1995; Buchheit 1991). But instead of addressing the impact of *Elliott*, virtually all of these senior statesmen told origin stories.[1] To be clear, less senior respondents often echoed the content of these stories. What distinguished the senior statesmen was that the interviews came to resemble storytelling sessions.

A. The First Story: *Pari Passu* as an Anti-Earmarking Device

The most frequently-told story was that the *pari passu* clause is a restriction on the "earmarking" of revenues and assets. This story also features prominently in the background literature on sovereign debt documentation (Olivares-Caminal 2009a; Wood 2007; Buchheit & Pam 2004; Tudor John 1983).

The anti-earmarking story posits that borrowers in the 19th and early 20th centuries often pledged, or "earmarked," assets or revenue streams for use in repaying a loan. In our dataset, for example, Greek bonds issued in 1914 promised bondholders a "first charge" on customs receipts collected at two ports and on receipts from a tobacco tax. Given the law of sovereign immunity, these earmarks had limited value, especially when bondholders depended on the borrower to collect and distribute the pledged revenues. If the borrower diverted these revenues to another purpose, bondholders often had little recourse. Nevertheless, borrowers often honored their promises and, when they did, bondholders effectively enjoyed priority over other creditors with respect to the earmarked funds. Thus, according to this story, unsecured bondholders worried that borrowers would earmark customs duties, oil or mining revenues, and the like for new lenders and thereby diminish their ability to repay existing debt.

According to respondents, concerns about earmarking lingered into the latter part of the twentieth century. To be sure, most contracts for unsecured sovereign loans contain "negative pledge" clauses, which forbid the debtor to issue subsequent debt secured by its assets or

[1] Recent discussions of the clause by groups of eminent lawyers continue to focus on historical meaning, rather than contemporary usage (see, for example, Financial Markets Law Committee (2005:7); Wood (2010:21).

revenues that would rank ahead of unsecured debentures (Scott 1986). But earmarking arrangements typically do not create formal security interests. For that reason, many respondents asserted that the *pari passu* clause was used to prevent borrowers from granting informal preferences that fell outside the scope of the negative pledge clause.

B. The Second Story: We Copied it From Corporate Deals … Inadvertently

The second most frequently-told story was one of inadvertence and path dependence. Many respondents would begin by saying (sometimes in hushed tones) that they were going to share a "dark secret" of their profession: contract provisions from prior deals are often simply repeated, sometimes without careful thought, in new transactions. This dark secret, of course, is neither secret nor dark; there is a rich theoretical and empirical literature discussing the "stickiness" of boilerplate contracts and the fact that such contracts rarely involve anything resembling the paradigmatic "meeting of the minds" (examples include Kastner 2010; Ben-Shahar & Pottow 2005-2006; Choi & Gulati 2004; Hill 2001-2002; Kahan & Klausner 1997; Johnston 1990; Goetz & Scott 1985).

According to multiple respondents, the *pari passu* clause originated in the switch from syndicated bank loans to sovereign bonds in the late-1980s and 1990s. This switch was precipitated by a wave of defaults on syndicated loans made by Western banks to Latin American borrowers. As noted previously, the restructuring of these loans into Brady bonds created a robust market for bonds and sovereigns once again began to borrow on the bond markets. Yet because sovereign lending had been dominated by syndicated bank loans for many years, respondents asserted that the lawyers doing these initial bond deals had no drafting template from which to borrow. So, the story goes, lawyers simply borrowed standard terms from cross-border *corporate* bonds without considering whether these terms were appropriate for sovereign borrowers. Because the *pari passu* clause was a standard term in cross-border corporate bonds at the time, it was swept along in the wholesale transfer of corporate bond terms to this new context. And once embedded in sovereign bond boilerplate, there it remained.

C. The Third Story: Gunboat Bankruptcy

The puzzle raised by the *pari passu* clause is that most modern sovereign loans are unsecured, yet most commentators believe the clause makes sense for unsecured debt only when there is the possibility of a bankruptcy or liquidation. Because sovereigns do not go into bankruptcy and cannot be liquidated, the clause would seem to serve little purpose in sovereign loans.

Nevertheless, some of the senior statesmen sought to link the origins of the *pari passu* clause to a time when there existed something approximating a bankruptcy receivership model for certain sovereign borrowers. These respondents pointed to the era of "gunboat diplomacy," referring to the international politics of the late 19th and early 20th centuries. According to this story, creditor states during this time routinely employed military force to enforce debt contracts. As an example, some respondents invoked a joint blockade of Venezuela in 1902 by the British, German, and Italian navies. Respondents suggested that creditor states often responded to default by appointing a receiver who would use customs revenues to pay creditors in accordance with the ranking of their debts. With such a receivership in place, the *pari passu* clause might serve a function similar to the one it served in a corporate bankruptcy.

We elaborate on the empirical premises underlying this story in Part V, when we evaluate its consistency with our dataset of contracts. But apart from that evidence, there is reason to doubt that gunboat diplomacy was a prevalent or effective means of enforcing sovereign debt obligations (for relevant studies, see Alfaro, Maurer & Ahmed 2010; Tomz 2007; Mitchener &

Weidenmier 2005a; Mitchener & Weidenmier 2005b; Finnemore 2003). Moreover, except in rare instances, such as the threatened use of force by the British against Guatemala in 1913 (Tomz 2007:132-33; Dinwoodie 1970:251), creditor states did not employ force simply because a borrower had defaulted on its external debt (Tomz 2007:124-47). To the contrary, most actual or threatened uses of force were related to broader political or territorial disputes, often arising from personal or property injury suffered by citizens of the creditor state (Tomz 2007:125-32; Lipson 1985:47-50). As we discuss in Part V, however, the gunboat diplomacy story may be plausible for a subset of Latin American and Caribbean borrowers in the first decades of the twentieth century. That, plus the fact that some borrowers clearly were *not* at risk of gunboat diplomacy, allows us to explore the validity of this story.

D. The Fourth Story: No More Haircuts … We Promise!

Although Elliott's interpretation of the *pari passu* clause has been much maligned, a couple of respondents suggested that Elliott may have interpreted the clause correctly. As with those who told the inadvertent copying story, these respondents located the origins of the clause in the shift from syndicated loans to bonds in the mid-1980s and 1990s. In the course of restructuring the syndicated loans, smaller banks were pressured by their governments and by larger lending institutions into dramatically reducing their claims against defaulted borrowers. According to this story, the smaller banks resented having to take these haircuts and believed that larger banks were receiving a disproportionate share of the benefits of restructuring.

Determined not to endure similar writedowns in the future, smaller banks demanded that the new bonds include a package of terms that would protect them against restructuring requests. For example, the smaller banks reportedly demanded that the bonds include a clause requiring unanimous bondholder approval for changes to payment-related terms. Such a term makes restructuring extremely difficult by enabling a single bondholder to prevent a voluntary reduction of the borrower's payment obligations. In addition, respondents suggested, smaller banks demanded that the new bonds include *pari passu* clauses. Armed with the *pari passu* clause, a bondholder could refuse to participate in a restructuring and then sue those who did for a ratable share of their payments. In other words, these respondents told an origin story that directly supported the interpretation advanced by Elliott in the Brussels case.

E. The Fifth Story: The Moving Target

The final story is told by perhaps the most eminent sovereign debt practitioner, the venerable Lee Buchheit of Cleary Gottlieb. In an article seeking to refute Elliott's interpretation, Buchheit and an associate, Jeremiah Pam, attempt to demonstrate that the *pari passu* clause has never been interpreted to require pro rata payments to creditors. The story is complex, and we focus on only two of its main claims. Given its complexity, it is unsurprising that none of the respondents recounted the Buchheit-Pam story in full. Nevertheless, the story appears to have been significant. For example, a number of respondents referenced the article as "putting to rest" any debate about the origin and meaning of the clause, and others echoed portions of the Buchheit-Pam story in their own narratives about *pari passu*. The article also formed the basis for a widely-discussed *amicus* brief arguing against Elliott's position filed by the U.S. government in litigation involving defaulted Argentine debt (Bradley et al. 2010:299; Hagan 2005:314).

1. First appearance in early-1970s syndicated loans

Central to the Buchheit-Pam story is the claim that the *pari passu* clause appeared only in *secured* sovereign loans until the early 1970s. They also assert that the traditional version of the clause used language consistent with the grant of a security interest, such as "*pari passu* in point of charge" (Buchheit & Pam 2004:894-95). To support their story, Buchheit and Pam embarked on what they termed "a small exercise in legal paleontology" (Buchheit & Pam 2004:891). Their "hunt for *pari passu*" (2004:891) began with a discussion of secured corporate debt in an 1898 English form book by Francis Beaufort Palmer. According to Palmer, when loans made at different times were secured by the same collateral, earlier lenders had priority over later ones under English law (and, as Buchheit and Pam note (2004:895-96), possibly under U.S. law as well). This first-in-time rule was a default rule, and not a very satisfactory one. So loan contracts included the *pari passu* clause to assure lenders separated by time that they would share equally in the proceeds of any liquidation of collateral.

Buchheit and Pam speculate that the clause served a similar function in sovereign loans. Because sovereign borrowers also issued something akin to secured debt (including the earmarked loans discussed above), the first-in-time rule may have provoked a similar concern and prompted drafters to include the *pari passu* clause in sovereign bonds. Buchheit and Pam emphasize, however, that the clause appeared *only* in secured sovereign debt instruments throughout the nineteenth and early twentieth centuries and therefore governed only the allocation of proceeds from a sale of collateral (2004:896).

2. Protection against involuntary subordination

Buchheit and Pam trace the first appearance of the *pari passu* clause in *unsecured* sovereign loans to syndicated bank loans in the early 1970s. In the decades after World War II, multilateral financial institutions such as the World Bank dominated sovereign lending and made unsecured loans as a matter of policy. For that reason, Buchheit and Pam assert that "there was no point in adding a conventional *pari passu* clause" (2004:899). Instead, loans included a strict negative pledge clause that prevented borrowers from incurring later secured debt without securing existing lenders on an equal basis.

When commercial banks entered the sovereign debt markets in the 1960s, they too lent on an unsecured basis. Buchheit and Pam posit, however, that commercial banks soon became aware that local laws in some jurisdictions might permit some unsecured bondholders to gain priority over others without the latter's consent (2004:903-06). For example, they point to a law in the Philippines giving priority to debts notarized in a public instrument. Arguably, this law would enable lenders who followed the requisite formalities to gain priority over other lenders (2004:914-17). According to Buchheit and Pam, the *pari passu* clause made a "great leap" into unsecured loans in the early 1970s primarily, though not exclusively, to protect against this kind of risk, which they term the risk of "involuntary subordination" (2004:902-05). They interpret the *pari passu* clause as a representation by the borrower that no unsecured but senior claims exist at the time of the loan and suggest that the clause makes it an event of default for a borrower to allow a subsequent lender to obtain priority in this manner (2004:905). Their argument has gained purchase in the sovereign debt literature (Blackman & Mukhi 2010; Olivares-Caminal 2009b).

3. Some concluding thoughts

The Buchheit-Pam story is complex, and our brief discussion does not begin to do it justice. Rather than explore all of its nuances, we close by noting a link between their story and those told by our lawyer-respondents. As noted earlier, each story locates the origins of the *pari passu* clause in some significant era in the history of sovereign debt. The Buchheit-Pam story is no exception. By focusing on the clause's evolution over the past hundred years – what they term the "*pari passu* odyssey" (2004:894) – they implicitly suggest that contract language is, in large part, a function of major historical events. And they are especially interested in events that are salient, even defining, for members of the sovereign debt community.

Thus, Buchheit and Pam attribute a major step in the evolution of the *pari passu* clause to an infamous episode in which Zaire and two U.S. banks tried to structure a new loan in a way that would give the banks priority over Zaire's existing lenders (2004:906-11). For our purposes, the details of this arrangement are unimportant. What matters is that, as Buchheit and Pam tell the story, the furor (and litigation) that erupted over the Zaire loan produced two changes to sovereign debt documentation. Before this episode, they explain, sovereign loans typically combined the *pari passu* and negative pledge clauses in a single contract term, perhaps in the hope that one or both clauses would prevent borrowers from granting any kind of priority to new lenders. After Zaire, the negative pledge clause was broadened to cover preferential arrangements that fell short of creating a formal security interest (Buchheit & Pam 2004:910).[2] Second, the *pari passu* clause "split off" from the negative pledge to become a stand-alone contract provision that drafters came to view primarily as a tool for protecting against involuntary subordination. According to the Buchheit-Pam story, the modern *pari passu* clause thus emerged from what was, until *Elliott*, perhaps the most significant battle over the meaning of sovereign debt contract language.

V. CHASING THE STORIES

If our respondents doubted the truth of their stories, or had some ulterior motive for telling them, they gave no sign of this. Their responses suggested that origins mattered, that we would solve our puzzle if only we asked the right questions (or undertook the right "quest," as

[2] This change to loan documentation has been noted elsewhere in the sovereign debt literature (Asiedu-Akrofi 1994-1995; Buchheit 1990; Bradfield & Jacklin 1984).

one put it). The implication was that, if we unearthed the origins of *pari passu*, all would become clear.

We took the respondents up on this challenge. In the course of this and other projects, we have compiled a dataset of over 1300 contracts and disclosure documents for sovereign bonds issued between 1823-2010.[3] The first portion of our dataset consists of the set of sovereign bond offerings available as of 2010 from the Thomson OneBanker database, one of the most comprehensive sources of such documents. The database, however, primarily includes issuances from the mid-1990s to the present. To supplement our data from Thomson, we gathered bond contracts and disclosure documents from financial archives and libraries, primarily in New York and London.[4] Consulting these varied sources produced a sample that includes 372 issuances before the end of World War II, 139 issuances from the relatively dormant era of sovereign bond lending between the end of World War II and roughly 1985, and 851 issuances after 1985.[5] The Appendix provides a fuller description.

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[3] Sovereign bond documentation includes at least the bond; a disclosure statement that summarizes key bond terms; and a contract between the issuer and its bankers that specifies bond terms. Our sample consists primarily of disclosure statements. Sovereigns are not usually required to disclose bond terms, but most reproduce or describe key terms in detail. In the modern era, once an issuer elects to make such a disclosure securities laws may require it to disclose completely and accurately. We therefore assume that the disclosure documents accurately reproduce the terms of the bonds. We are limited in our ability to test this assumption, for we do not have the full set of documents for most issuances. In 24 cases between 1896 and 2010, however, we were able to compare the prospectus to the bond or fiscal agency agreement and found no impact on our coding of the *pari passu* clause.

[4] We visited as many financial archives as funding would allow and gathered or recorded every document we found. One or more of us visited the Rothschild archives, the HSBC archives, the Barings archives, the Duke University archives, the UBS library, the JP Morgan Library and Museum, the Guildhall library, the Harvard Business School library archives, and the Willard Straight papers at Cornell University.

[5] The dataset includes 57 instances by foreign cities or provinces, which could not necessarily have claimed sovereign immunity. In many cases, however, it would have been nearly impossible for foreign bondholders to enforce a judgment against these issuers. The dataset also includes 86 issuances by English colonies or protectorates, against which it may

We read each prospectus or bond ourselves and extracted the relevant information by hand. The resulting dataset has limits. For example, archives in Germany, France, and the Netherlands may also have useful data. Nevertheless, the dataset is adequate to test some of the origin stories – such as the claim that the *pari passu* clause originated in the transfer of terms from cross-border corporate bonds in the late-1980s. And we know of no larger or more representative dataset that would permit an exploration of the origins of the *pari passu* clause. Indeed, our research uncovered what we believe to be the first recorded use of the clause in both secured and unsecured sovereign bonds.

The following, then, reports the results of our quest to find the origins of *pari passu* and, in the process, to test the stories told by our senior statesmen. To lend continuity to the discussion, we work backwards in time with the stories. Thus, we begin with the shift from syndicated loans to sovereign bonds beginning in the late 1980s.

A. The Inadvertent Copying Story Revisited

The inadvertent copying story posits that lawyers thoughtlessly imported the *pari passu* clause from cross-border corporate bonds and have been copying it in new bond deals ever since. From the outset, we were skeptical about this story. We have little doubt that modern transactional lawyers are reluctant to alter standardized terms. To risk-averse lawyers, boilerplate reflects the accumulated wisdom of prior drafters. Why change it without good reason? But this is not to say that lawyers cavalierly import boilerplate terms from one contracting context to another. *That* practice is anything but risk-averse. Moreover, it seemed implausible that lawyers with extensive experience drafting syndicated sovereign loans would not know that they would

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have been easier for English bondholders to enforce claims. We collected these because we thought it consistent with the gunboat bankruptcy story for such bonds to include the *pari passu* clause. Because we did not detect different patterns in how these various issuers used the *pari passu* clause, we do not separately report data by type of issuer.

need to modify corporate bonds to account for the fact that sovereigns do not go bankrupt. To all of this, we add only that the lawyers involved worked at elite law firms with significant institutional knowledge of sovereign debt transactions. This is hardly a perfect proxy for diligence and legal acumen, but we hesitate to attribute such thoughtlessness to so experienced and accomplished a group.

When we turn to the contracts dataset, the inadvertent copying story begins to unravel. The first reason is straightforward: Syndicated loans may have dominated sovereign lending before the Brady-era restructurings, but nevertheless there *were* a number of sovereign bond deals. And the documentation for these issuances routinely though not uniformly included the *pari passu* clause. Table 1 reports the number of unsecured bond issuances in our sample, and the percent that included the *pari passu* clause, for each decade between 1940 and 2000.[6] Although the clause becomes nearly ubiquitous after 1990, it was routinely included in bond deals well before then. Indeed, in our sample the clause appears in over eighty percent of issuances between 1960 and 1980, although it did not appear in the relative handful of unsecured issuances between 1940 and 1959.

[6] Note that our sample includes multiple issuances for most countries. Because issuers rarely change the language of existing contracts, bonds issued by the same country are not independent observations. We make no formal effort to adjust our data to account for this fact. We do, however, report both the percentage of *issuances* that contain a term, and the percentage of *issuers* whose bonds include that term, whenever there is more than a trivial difference in these figures. (If an issuer altered its bonds, we counted it as having used a particular term if any of its bonds include the term during the relevant period.)

Table 1. Use of *Pari Passu* in unsecured bonds, by decade

Decade	Number of issuances	Percent with *pari passu*
1940s	8	0.0%
1950s	3	0.0%
1960s	30	93.3%
1970s	28	71.4%
1980s	108	81.5%
1990s	325	94.5%
2000-Present	471	99.6%

The law firms involved in issuing sovereign bonds during the 1960s and 1970s, moreover, also handled the Brady-era restructurings. Before 1980, Sullivan and Cromwell (10 deals), Cravath (6), Linklaters (5), Clearly Gottlieb (2), Allen and Overy (2) and other firms heavily involved in the Brady restructurings had all acted as issuer's or underwriter's counsel in one or more of the deals in our sample. Lawyers at these firms did not need to copy from cross-border corporate bonds; they could look to the sovereign bond documentation in their own files. And most of those documents already contained the *pari passu* term.

Another aspect of our data arguably conflicts with the inadvertent copying story. The story implies that lawyers paid little heed to the *pari passu* clause. If that is so, then after being incorporated into sovereign bond boilerplate the clause presumably would have attracted little attention until the *Elliott* litigation brought it into the limelight. Yet our data show the clause undergoing a series of changes beginning in the early- to mid-1990s. Before then, virtually all versions of the clause provided that "the bonds rank *pari passu* with all External Indebtedness," or something to that effect. This version of the clause is not readily susceptible to Elliott's ratable payment interpretation, because it refers only to the ranking of debt and says nothing at all about payment.

There are at least two other versions of the modern clause, however, and each poses a greater risk of Elliott-type holdout litigation (Bradley et al. 2010). A "medium risk" clause, for example, might state that "the bonds will rank at least *pari passu* in priority of payment and in rank of security." The addition of the word "payment" makes this clause more susceptible to Elliott's interpretation, for it arguably implies an obligation to pay equally-ranking debtholders on an equal basis. Language like this enabled Elliott to advance its ratable payment interpretation. A clause in the "high risk" category might append "and shall be paid as such" to the end of the standard "ranks equally" clause. Such language fits Elliott's interpretation, for it explicitly requires equal treatment at the moment of payment.

If the *pari passu* clause had really escaped the notice of sovereign debt lawyers, we would expect the clause to remain largely unchanged, at least until the Elliott decision in October 2000. But that is not what we observe. Beginning in the 1990s, the clause began to mutate, with bonds increasingly incorporating language that was *more* susceptible to the ratable payment interpretation. Figure 1 depicts the frequency of use of low, medium, and high risk *pari passu* language over five decades, beginning in 1960. ("Risk," in this case, means risk of being interpreted in the manner suggested by Elliott.)

Figure 1. Versions of *pari passu* over time

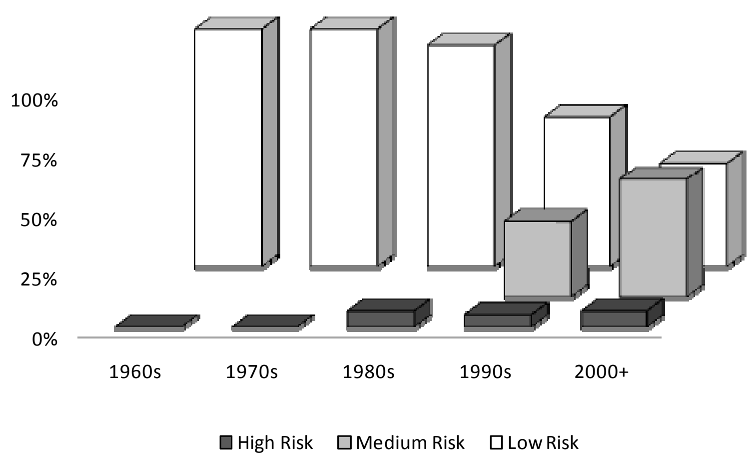


Figure 1 suggests that sovereign debt lawyers began to tinker with the *pari passu* language well before the *Elliott* litigation. After the 1980s, sovereign bond contracts increasingly adopted language that posed a higher risk of being interpreted to require ratable payments.[7] These revised clauses may have increased the perceived risk of holdout litigation (Bradley et al. 2010). In other words, the effect of the revisions from 1960 onward was to produce a more "creditor friendly" clause over time. That lawyers were revising the *pari passu* clause in this fashion, of course, does not rule out the possibility that they had thoughtlessly imported the clause from corporate bond documents years earlier. But the data are hard to reconcile with the cavalier approach to the clause implied by the involuntary copying story.

B. No More Haircuts… Smaller Banks as the Source of *Pari Passu*

The second story that locates *pari passu's* origins in the Brady-era restructurings emphasizes the role of smaller banks in the restructuring negotiations. Respondents who told this story explained that smaller banks resented the pressure applied during these negotiations by large banks and the official sector, and they demanded the *pari passu* clause as a defense against future writedown requests. Our data do not support this explanation for the origins of the clause. But the story may contain an element of truth. Although smaller banks were not responsible for the initial inclusion of the *pari passu* term in sovereign bonds, their frustration may have contributed to a change in the form of the clause.

Table 1 indicates that the *pari passu* clause was well-established in sovereign bond documentation before the restructurings of the 1980s and 1990s. For that reason, we can say with confidence that smaller banks did not cause the introduction of the *pari passu* clause during that

[7] The frequency with which issuances included medium or high risk language was significantly higher the 1990s than the 1980s ($\chi^2(1, N=433)=34.7$, $p < .0001$) and higher again in the decade after 2000 than in the 1990s ($\chi^2(1, N=796)=34.9$, $p < .0001$). As Figure 1 shows, the increase occurred in the increased use of the medium risk clause.

era. This result should not be surprising. We have difficulty understanding why small banks would have viewed the clause as protection against being pressured into a restructuring. Syndicated loans had already contained a term similar to the *pari passu* clause as interpreted by Elliott – an explicit version called a sharing clause (Asiedu-Akrofi 1992:13-14; Buchheit & Reisner 1988:501-02) – and this had not provided insulation from large bank and official sector pressure. Moreover, even if the *pari passu* clause had offered some degree of insulation, why would smaller banks have assigned much weight to this benefit? For these banks, the way to avoid pressure was to become anonymous, so that large banks and public sector officials would not know whom to pressure. The switch from syndicated bank debt to tradable bonds accomplished this result.

Despite our skepticism, respondents may have been on to something by linking creditor ire to the *pari passu* clause. Smaller banks were surely frustrated by the defaults that led to the Brady restructurings. No doubt their displeasure was echoed by other creditors. Under those conditions, one might plausibly expect a more creditor-friendly set of contract terms to evolve. Figure 1 hints that such an evolution may have taken place with respect to the *pari passu* term. Recall that, beginning in the 1990s, bond contracts increasingly employed *pari passu* terms that were more susceptible to Elliott's ratable payment interpretation. To the extent such terms increase the risk of holdout litigation, they complicate restructuring efforts and increase the cost of default. The use of such terms, then, is consistent with a story in which angry creditors demand terms that might reduce the likelihood of future default. But this story is itself embarrassed by the fact that barriers to restructuring may actually increase the risk of non-payment by preventing the sort of composition and extension of debts that would permit the creditor to at least recoup a portion of the loan On balance, therefore, we remain skeptical of a story that links increased creditor frustration to the inclusion of the *pari passu* term.

C. The Anti-Earmarking Story

The anti-earmarking story links the *pari passu* clause to concerns that borrowers would grant new lenders favored status by "earmarking" customs and other revenue streams for use in repaying the new loan. A borrower might make such a promise in a new loan contract, or it might pass domestic legislation granting preferential treatment to new lenders (Mandeng 2004). To examine this story, we begin with a bit of history. Our data suggest that the historic function of the clause was unrelated to concerns about earmarking, which were primarily (if incompletely) addressed by a version of the negative pledge clause.

1. Pre-World War II Bonds

Many respondents remarked that pre-World War II loans often contained earmarks. Our data support this claim. One hundred and sixty-four (44.1%) of the 372 pre-WWII bonds in our sample pledge some asset or revenue stream in exchange for the loan. If such pledges were honored or could be enforced, the designated revenues would become less available to satisfy the claims of other creditors, including prior lenders. The negative pledge clause offered unsecured lenders some protection against this risk. A typical clause might provide that, if the borrower gave future lenders "a lien on any specific revenue or asset, these bonds shall be secured equally and ratably with such loan" (Prospectus, Republic of Chile 20 Year Sinking Fund 8% Gold Bonds, Feb. 15, 1921). Note, however, that this negative pledge clause refers to a "lien," and thus arguably covers only formal security interests. The anti-earmarking story suggests that the *pari passu* clause offers additional protection against informal preferences like earmarks.

Whatever the validity of this story in the modern era, it does not appear that the *pari passu* clause served this function in pre-World War II bonds. The story presumes that the negative pledge and *pari passu* clauses work in tandem to prevent borrowers from granting any form of priority to new lenders. If that is so, we would expect bond contracts to use both terms and thereby to protect against both formal security interests and informal earmarks. Yet only one of the pre-World War II unsecured bonds in our sample includes both terms. When the *pari passu* clause does appear, moreover, it rarely imposes across-the-board restrictions on the borrower's ability to grant preferential treatment to new lenders. To the contrary, the clause most often appears when the borrower pledged or anticipated pledging the same assets or revenues for multiple loans. For example, bonds issued by Tokyo in 1912 to raise funds for railway construction pledged the city's revenues as security for the loan and provided that the loan would rank *pari passu* with a 1906 loan issued for the same purpose. A similar loan, issued by the Chinese government in 1911 and also used for railway construction, provided that, if construction funds ran out, the government would issue a second series of bonds secured *pari passu* with the first. We will have more to say about such loans later, when we assess the Buchheit-Pam story. For now, the important point is that these *pari passu* clauses only maintain equal ranking among holders of the specified bonds; they do not otherwise prevent the borrower from granting preferential treatment to future lenders.

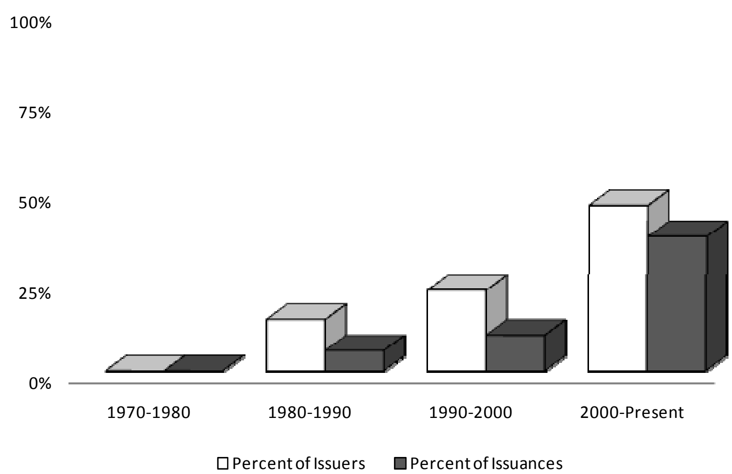
2. Pari Passu in Modern Bonds

Our data on the *pari passu* term in modern bonds provides further evidence that the clause did not evolve to offer protection against earmarking. In the first place, the modern version of the negative pledge clause has been broadened to address preferential arrangements that do not create formal security interests (Buchheit & Pam 2004:910). Moreover, our data reveal that sovereign bonds governed by English law increasingly have employed a modified version of the *pari passu* clause that exempts certain legislative acts by the borrower from the general requirement that unsecured debts rank equally. As an example, consider the following clause from a 2007 issuance by Ukraine:

> The payment obligations of the Issuer under the Notes shall rank at least *pari passu* with all other unsecured and unsubordinated obligations of the Issuer, present and future, *save only for such obligations as may be preferred by mandatory provisions of applicable law* (Prospectus, Ukraine 3.5% Notes due 2018, Jan. 29, 2007) (emphasis added).

As Figure 2 shows for the English-law bonds in our sample, such language has increased in frequency since the 1980s.[8] We do not report data for bonds governed by New York law because this mutation appears very rarely in those bonds.[9]

Figure 2. English-law bonds with exception for "mandatory" or other law



[8] Breaking our data down by decade for simplicity, exceptions for "mandatory" or other law appeared significantly more frequently in the decade after 2000 than in the 1990s ($\chi^2(1, N=294)=28.6$, $p < .0001$). Other differences were not significant.

[9] We coded a random sample of 124 bonds governed by New York law, only four of which included this mutation. Each of the four was issued in the London market.

To understand the import of the italicized language in the preceding version of the clause, recall that a borrower might earmark assets or revenues for the service of new debt either by promising to do so in a loan contract or by enacting a law to that effect. Even if we assume that the standard *pari passu* clause is designed to prevent earmarking, the italicized language in the modified clause seems to allow preferential treatment when required by legislation. That leaves a rather gaping hole in the protection supposedly offered by the clause. After all, it is plausible to believe that a borrower might enact a law granting favored status to a subset of its creditors. In 2005, Argentina passed a statute (the so-called "Padlock Law") that arguably forbade the government to settle with holdout creditors who had refused to participate in Argentina's restructuring efforts after its 2001 default (Olivares-Caminal 2009b:757-58; Gelpern 2005:6). Although not an earmarking arrangement, the statute was similar in that it granted favored status to one group of bondholders. Yet if Argentina's bond contracts had contained a *pari passu* clause like the one quoted above, the clause might have been interpreted to permit such an action.[10]

This brings us to our third reason for skepticism about the anti-earmarking story: Market participants have not behaved as if there is a link between the *pari passu* clause and concerns about earmarking. As we noted just above, Argentina's 2005 Padlock Law arguably required the government to grant preferential treatment to creditors who had participated in the restructuring.

[10] Some senior lawyers have attributed the "mandatory law" exception in English bonds to a drafting error in which the language was mistakenly imported from corporate bonds. One even pointed to a widely-read 2005 report by the Financial Markets Law Committee, a group of some of the most eminent sovereign debt lawyers in the U.K., which explicitly stated that this language makes no sense in sovereign bonds. The modified version of the *pari passu* clause discussed in the text, however, varies in its form and potential meaning, and it is hard to square such variance with a drafting mistake. Plus, it is one thing to say that an isolated bond contract or two might contain unnoticed errors. But over forty percent of the bonds in a thriving, high-volume market? Finally, the FMLC report seems to have had no impact on drafting practices. A slightly higher percentage of issuers in our sample used the "mandatory law" exception in the five years after the report than in the five preceding years (44% vs. 37%).

If market participants had interpreted the *pari passu* clause to forbid such conduct, holdout creditors presumably would have invoked the clause, or at least threatened to invoke it, in legal action against Argentina or against restructuring participants. Yet it was 2010 before the first creditors (Elliott, of course) pressed the earmarking argument.[11] Until then, only a few academics (e.g., Olivares-Caminal 2009b:766-76; Gelpern 2005:6) had raised this possibility, and their suggestions went unheeded by creditors. The collective shrug with which market participants responded to these suggestions implies that few drew a meaningful connection between earmarking and *pari passu*.

D. The Buchheit-Pam Story

We turn now to the relatively complex story told by Buchheit and Pam about the evolution of *pari passu*. We focus on two core components of the story: that the clause appeared only in secured sovereign debt instruments until the early 1970s, and that the clause has evolved to deal primarily with the risk of involuntary subordination. Relative to the other stories, this one holds up against the data. Nevertheless, it contains some flaws, and a number of questions remain.

1. Pari Passu in Unsecured Sovereign Debt Instruments

Buchheit and Pam assert that, during the 19th and early 20th centuries, "[a] version of the *pari passu* clause was routinely used … but *only* when the instrument benefited from collateral security" (Buchheit & Pam 2004:894). Therefore, they conclude, the clause simply confirmed that all bondholders would receive equal shares of the proceeds from any sale of the collateral.

With two significant caveats, this aspect of their story holds up fairly well against our data. The first caveat is that we find the *pari passu* clause in multiple unsecured loans during this

[11] This litigation is ongoing in the Southern District of New York.

era (Cape of Good Hope in 1899 and 1908, St. Petersburg and Chile in 1913; Riga in 1914; Dresden in 1927). In the documents relating to these bonds, we were unable to find any language purporting to grant bondholders preferential access to any assets or revenues. That said, relatively few (30/372) of the bonds issued before the end of World War II contain the *pari passu* clause, and most of these (24/30) appear in loans that are at least arguably secured. These secured loans, moreover, often were issued in multiple tranches or in multiple markets and currencies. Our earlier discussion of the earmarking story, for example, mentioned that China and the city of Tokyo each pledged the same revenues to secure multiple railway construction loans. This pattern is consistent with Buchheit and Pam's explanation.

This brings us to our second caveat. To accept this aspect of the Buchheit-Pam story, one must take an extraordinarily broad view of what constitutes a secured loan. Given sovereign immunity and the difficulty of finding and seizing sovereign assets, the term "security interest" has always been something of a euphemism in this context (Borchard 1951:83). We have been willing, however, to treat a wide range of loans as secured, including loans that contain earmarks. One reason for this is that the loans often identified specific revenues that would constitute security and gave lenders or creditor states substantial control over the pledged revenues. For example, Chinese bonds issued in 1911 were secured by a "first charge" on specified provincial revenues and, after a default, required these revenues to be administered by the Imperial Maritime Customs Service, which was controlled by Western powers (Rauchway 1997:374).

We think it fair to characterize such loans as backed by something akin to a security interest. But not all of our "secured" loans fit this profile. A number contain only a generic representation that the loan constitutes a charge on the borrower's general revenues. For example, English bonds issued in New York in 1901 and 1902 provided that the loan "will be a charge on the Consolidated Fund of the United Kingdom." It is not clear to us how, if at all, these differ from unsecured loans. The bonds do not use language (such as "first charge") granting bondholders priority over other creditors. Nor do they designate specific revenues, such as customs duties, that could be seized by force and administered for the benefit of creditors. This is true even when the issuer (unlike the United Kingdom) might plausibly have been at risk of such intervention.

If one treats such bonds as unsecured (as we have not), then the *pari passu* clause appears with some frequency in unsecured loans both before and after World War II. This would raise serious questions about this aspect of the Buchheit-Pam story. Moreover, there is at least one respect in which the story is mistaken. Buchheit and Pam locate the first appearance of the *pari passu* clause in unsecured debt instruments in early-1970s syndicated bank loans (2004:902). But even under our generous conception of secured loans, the clause appeared (if rarely) in unsecured bonds as early as 1899. Moreover, as Table 1 indicates, the clause routinely appeared in unsecured bonds as early as the 1960s. Thus, whatever else we can say about the use of *pari passu* in unsecured debt instruments, the clause did not originate in the syndicated loan contracts of the 1970s.[12]

2. Involuntary Subordination

Buchheit and Pam also claim that the *pari passu* clause has evolved into a tool offering protection against laws that grant preferential treatment to some unsecured creditors or that allow one unsecured creditor to obtain priority over another without the latter's consent. Laws such as

[12] Nor do we find support for the Buchheit-Pam claim that, before the birth of the modern *pari passu* clause in the 1970s, drafters used language such as "*pari passu* in point of charge" (2004:894-95). Language such as this appears only twice in the bonds in our sample.

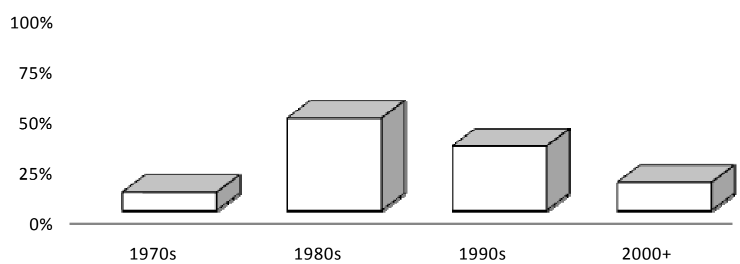
these present traps for unwary bondholders, who rarely perform substantial due diligence into the borrower's local law (2004:917). Our data support aspects of this story, but for reasons that differ from those proffered by Buchheit and Pam.

We begin by describing the ways in which our data support this story. Focusing first on the pre-World War II era, recall that the *pari passu* clause often appeared when the borrower issued debt in multiple tranches or in multiple markets and currencies. A possible explanation for this pattern is that, but for the *pari passu* clause, the first-in-time rule would have conferred priority on bondholders in the first tranche and deterred participation in the second. The clause thus ensured that both sets of bondholders would enjoy equal priority.

At first glance, a second aspect of our data supports the involuntary subordination story. Beginning around 1980, a new variant of the *pari passu* clause began to appear with some frequency. The standard clause provides something like, "the bonds will rank pari passu with all other unsecured External Indebtedness." The new variant added the phrase "regardless of date of issue" or, in some cases, "regardless of date of issue and currency of payment." The purpose of this language is unclear, but it is possible that drafters hoped the revised clause would ensure that bondholders would rank equally regardless of local laws conferring priority on lenders who had lent first in time or in local currency. To that extent, this new variant supports the link Buchheit and Pam posit between *pari passu* and concerns over involuntary subordination.

Nevertheless, we remain skeptical that the modern *pari passu* clause should be viewed as a tool to prevent involuntary subordination. As Figure 3 shows for English-law bonds, the new variant decreased in frequency after the 1980s and has now largely disappeared except from bonds issued by a handful of issuers.[13] If drafters intended the *pari passu* clause to prevent subordination to first-in-time or local-currency lenders, why would they have removed the language that explicitly addressed these risks? To be sure, if one interprets the generic *pari passu* clause also to provide this protection, the additional language served little purpose. But it also did no harm.

Figure 3. Percent of English-law bonds with "date of issue" or "date of issue and currency of payment" mutation



In addition, recall from Figure 2 that sovereign bonds governed by English law increasingly have exempted from the *pari passu* requirement priorities required or permitted under the borrower's local law. The implication of such exceptions to the *pari passu* requirement is that the borrower may pass laws that grant preferences to a subset of unsecured creditors or that allow some unsecured creditors to gain priority over others. When considered together, then, Figures 2 and 3 suggest a story that is nearly the opposite of the one told by Buchheit and Pam. Over the past decade, sovereign bonds governed by English law increasingly have employed *pari passu* language that arguably allows borrowers to create preferences through legislation (Figure 2). Moreover, sovereign bonds have gradually *shed* language clarifying that the equal ranking

[13] This variant of the clause appears infrequently in New York-law bonds, although its use appears to follow a similar pattern. In the random subset of New York-law bonds mentioned earlier, the variant appeared in 6 of 9 bonds from the 1970s and 1980s and less frequently in the 1990s (4/39) and 2000s (2/75).

requirement applies no matter when or in what currency the debt was issued (Figure 3). If anything, these two patterns suggest that the *pari passu* clause has become less focused on involuntary subordination over time, rather than more.

E. The Gunboat Bankruptcy Story

We conclude by exploring the story that locates the *pari passu* clause in the era of "gunboat diplomacy," when creditor states supposedly backed their citizens' foreign investments with military force. We have noted our skepticism that gunboat diplomacy played a key role in enforcing sovereign debt obligations. Nevertheless, there is at least one context in which the gunboat bankruptcy hypothesis has some purchase. We capitalize on this fact to look for a relationship between the *pari passu* clause and the prospect of creditor-state intervention.

In the first decades of the 20th century, a central component of U.S. foreign policy – typically referred to as "dollar diplomacy" – consisted of arranging controlled loans to borrowers in the Western Hemisphere (Rosenberg 1999). Borrowers would obtain financing arranged by U.S. banks and, in return, would submit to a process of reform in which they would cede some degree of fiscal and political autonomy to agents designated by the U.S. government or by private bankers. Hoping to limit the influence of European powers in the hemisphere, the U.S. also asserted, through the 1904 Roosevelt Corollary to the Monroe Doctrine, a right to intervene "into the domestic affairs of Latin American and Caribbean countries delinquent in the payment of their public debts" (Boyle 1999:89). In furtherance of this policy, the "United States increasingly resorted to military and political intervention to force the repayment of foreign debt" (Pérez, Jr. & Weissman 2006-2007:710).

We thought it plausible to assume that loan contracts would reflect this political reality. In previous work, for example, one of us (Weidemaier 2010) had argued that lenders employed arbitration clauses selectively, not to facilitate a lender-borrower arbitration, but to pave the way for post-default intervention by the United States. Similarly, we suspected that loan contracts would be more likely to include the *pari passu* clause when lenders expected default to result in a U.S.-imposed receivership. That expectation would be most reasonable in the context of early-20th century loans by U.S. banks to Latin American and Caribbean borrowers such as Cuba, the Dominican Republic, Haiti, Nicaragua, and Honduras.

Our data, however, do not bear out our expectation. True, the *pari passu* clause appears with some frequency between 1890 and 1930, including in loans to Austria, Brazil, Buenos Aires, Chile, China, Germany, Estonia, Hungary, Queensland, Riga, St. Petersburg, Sudan, Tokyo, the United Kingdom, and Westphalia. But as even a glance at this list makes clear, these were hardly the entities most at risk of an externally-imposed receivership. To be sure, some of the loans were subject to a significant degree of international supervision and control.[14] But few of these borrowers fit neatly into the receivership model. It goes without saying, for example, that the United Kingdom was not at risk of being placed into a U.S.-sponsored receivership. Perhaps more significantly, in the bonds where we expected to find it – including Bolivia, Columbia, Costa Rica, Cuba, Panama, and El Salvador – we found nothing resembling a precursor to the modern *pari passu* clause.

VI. REVISITING THE STORIES

If our respondents were subtly trying to induce us to undertake our own hunt for *pari passu*, they succeeded. Collectively, the three of us have spent hundreds of hours digging through old financial archives, interviewing veteran lawyers, and otherwise trying to locate the

[14] Bonds issued by Hungary, Estonia, and Austria, for example, would have been arranged under the auspices of the League of Nations as part of the League's post-World War I reconstruction efforts (Myers 1945:506-10). Loans to Germany were associated with the Dawes and Young plans to fund war reparations and economic development.

first use of *pari passu* in sovereign bonds. When we found the clause in secured bonds issued by Bolivia in 1871, and in arguably-unsecured bonds issued by the United Kingdom in the early 1900s, we were elated. Surely, we thought, our respondents would be delighted to learn of our findings. The Bolivian bonds even came with a great story featuring a colorful cast of characters, sovereign default, and holdout litigation by early "vulture" creditors like Elliott.[15] Some of the respondents' law firms, moreover, had handled these early deals and might still have notes from the lawyers involved. If so, we were offering the keys to unlock the puzzle of *pari passu*. If the lawyers wanted to find the origins of the clause, all they had to do was look.

There was, however, a singular lack of interest in the data we had collected. None of the lawyers we called even requested a copy of the old bonds. "It is so interesting what you [academics] are able to spend your time doing," observed one lawyer in response to our findings. This disinterest only deepened the puzzle presented by the stories themselves. In addition to wondering why lawyers would tell origin stories in the first place, we now puzzled over why they seemed uninterested in what we thought was the "real" story.

One unflattering answer to this conundrum is the possibility that the lawyers told stories to obscure the role they or their firms played in producing or maintaining the problematic version of the *pari passu* clause. Recall from Figure 1 that this version emerged during the 1990s and became more prevalent thereafter, when many of our respondents were already in practice. We also acknowledge our own role in producing these stories. After all, we were pointedly asking the lawyers why they continued to use a problematic contract term. Respondents may have

[15] The central character was the American adventurer, engineer, soldier and scientist, Colonel George E. Church, who raised funds for an effort to build a communications system that would connect landlocked Bolivia to the Atlantic coast. The plan proved a disaster and bondholders sued for the return of what funds remained in trust. The suit prompted accusations that "an unscrupulous body of commercial pirates" had bought Bolivian bonds at a discount, hoping "to realize an enormous profit" through litigation (Craig 1907:58, 449).

wished to project an impression consistent with the idealized image of the elite transactional lawyer (Goffman 1959). Yet the interviews made this difficult. Instead of tactfully overlooking the disconnect between performance and reality (Goffman 1959:229-33), we had asked respondents to explain why sovereign debt lawyers did not behave as we expected elite transactional lawyers to behave.

On reflection, however, we do not believe that the respondents were seeking to deflect attention from their own practices or that their stories were substantially determined by the context of our interviews. After all, the stories are anything but exculpatory. Whether or not these lawyers or their firms played a role in creating the modern version of the *pari passu* clause, they are using it *now*. If the clause is problematic, even a distinguished historical pedigree would not justify its continued use. Moreover, although the stories were shaped by the interview context, it is odd that respondents would tell stories that are in many respects both unflattering and inaccurate. The stories are unflattering because they portray lawyers as rote copiers (sometimes of the wrong form!) of terms whose meaning is unclear. And the stories are inaccurate not only because they fail to account for the origins of *pari passu*, but because our data show that sovereign bond contracts have mutated over time and therefore suggest that sovereign debt lawyers are *not* rote copiers.

We remain puzzled why eminent lawyers would tell such stories in response to a question about modern contracts. We doubt they would tell the inadvertent copying story to prospective clients or reveal ignorance about the meaning or origin of the clause (Flood 1991:44-45). To the contrary, we suspect they tell clients that their work involves tailoring form contracts to account for risks specific to the client's transaction (Suchman 2003:102; Flood 1991:58). In fact, we know of one instance in which an issuer asked its lawyers why its *pari passu* clause included language vulnerable to Elliott's interpretation. In reply, it received a research memorandum explaining that a number of highly-rated issuers used similar language – suggesting that the clause was a credibility signal that helped assure investors that default was unlikely. In other words, the client received a functional explanation, not an origin story.

To summarize, the portrait that our lawyer-respondents paint of transactional lawyers as a cohort does not seem to match the behavior of the same cohort of lawyers that is revealed by the contracts. The lawyers tell stories implying that knowledge of the past is key to understanding today's contracts, but they ultimately are disinterested in unearthing the origin of *pari passu*. Lawyers claim to be engaged in rote copying, but in fact transactional lawyers have made seemingly systematic changes to contract documents. And lawyers suggest that their inattention to the clause has allowed junior colleagues' mistakes to persist for decades, when in fact lawyers appear to have quietly but repeatedly updated the clause to suit new contexts. Several themes emerge in these disjunctions between what the lawyers we interviewed say and what sovereign debt lawyers actually do that potentially shed light on these "sophisticated," but routine, transactions.

1. Origin Myths and the Nature of Contract Change

Although respondents told conflicting stories about the *pari passu* clause, a common theme runs though the stories. Respondents explained the clause not in terms of its function but in terms of its history. This in itself is surprising. The conventional understanding of contracts is that each term has a function and that parties choose the terms that best govern their transaction. Consistent with this understanding, we suspect that most lawyers, if asked about a term in a contract they had drafted, would explain what the term *does* and not why it was first included – perhaps hundreds of years ago – in contracts of this sort.

By contrast, our respondents told a dynamic, almost biological, story of contract evolution. Respondents located the origins of *pari passu* in some of the most significant parts of the last 100 or more years of sovereign debt history. Their stories recall the era of gunboat diplomacy in the late 19th and early 20th centuries, the depression and resulting wave of defaults in the 1930s, the Latin American debt crisis in the 1980s, and the ensuing revival of sovereign bond markets in the 1990s. As a whole, the stories suggest that contract terms are a function of major historical events, beyond the power of ordinary transactional lawyers to change. The implication is that change requires something like a seismic shift, an event sufficiently jarring to displace deeply entrenched contracting practices.

Our data, however, show that sovereign bond contracts are *not* static and that the *pari passu* clause has been revised in subtle ways over time. Yet these changes have generally been modest and have occurred at the margins. It may be that major shifts in sovereign debt contract provisions – adding or removing a term, say, rather than tinkering with its language – are driven more by history and financial crisis than by lawyer ingenuity. Perhaps stories about the past serve a dual function for these lawyers, both justifying their failure to do more than tinker at the margins of contract language and giving vent to their frustration at this aspect of their practice. At the same time, by linking sovereign debt contracts to momentous past events, and to times of political and financial upheaval, it may be that the stories seek to convey an idealized vision of the sovereign debt lawyer as an integral player in significant global events (Goffman 1959: 34-51).

2. *Contracts as Relics; Contracting as a Ritual*

There is a second way in which the stories clash with a functional view of contract language. Our sense from the interviews is that many lawyers cared about the history and tradition of contract language even if they could not fully articulate its function. For example, some respondents described contract drafting as a "ritual" and likened *pari passu* and other obscure provisions to "talismans" or "magic incantations." These terms, they seemed to be telling us, are best viewed as customary utterances that cannot be removed or changed without disrupting the "ritual" of sovereign debt contracting. If so, their comments highlight the ceremonial nature of contract formation and echo Mark Suchman's description of contracts as "social artifacts" that have symbolic and aesthetic properties, as well as technical ones (Suchman 2003; Riles 2008 & 2006).

Our respondents, however, did not portray themselves as "medieval artisans … producing extensively hand tailored wares" (Suchman 2003:102). Nor did they describe themselves as engaged in an intricate process in which a standard form document is "cut up, then eventually stitched together and given new life" to advance a client's goals (Flood 1991:58). To the contrary, they portrayed themselves more as custodians of some ancient and sacred document, one whose inscrutable text they would not dare to alter. To hear these lawyers describe their role in sovereign debt transactions, they merely carried this document from ritual to ritual, much as an acolyte might carry a candle in a religious procession. Yet we know from our dataset of contracts that transactional lawyers frequently made small changes to their "sacred" texts.

Again, we suspect that the disjunction between story and reality stems in part from a frustration that modern lawyers have with the nature of their professional practice. Frequently, in our interviews, senior lawyers would talk about the lost tradition of mentorship and teaching that characterized transactional practice of a generation ago. In that model, the wise elders of the firm would work closely with young lawyers, passing down the history of contract language and showing how to tailor new terms for modern clients. But the current "big law" business model, with the pressures of high associate salaries, client demands, and lateral moves by partners, provides neither the time nor the inclination to train junior lawyers. These pressures also mean that senior lawyers can no longer invest in their own human capital: "It used to be a craft, not a business," said one frustrated respondent. "Today's clients are simply not willing to subsidize the [necessary] mentoring and training," complained another. A third told a story that also invoked frustrations associated with contract boilerplate. In this story, the respondent pointed out during a negotiation that a form contract developed by the opposing lawyer's firm mistakenly omitted an entire line, turning part of the contract into "gibberish." The other lawyer – a junior associate – adamantly refused to correct the mistake and defended this intransigence by noting that he had no authority to change his firm's standard form.

Stories like these seem to highlight the frustrations many respondents experience in connection with their practice. Stories about sovereign debt "rituals" may give voice to this frustration while still conveying some of the importance that we suspect these lawyers attribute to their work. Indeed, by emphasizing the history and tradition associated with sovereign borrowing, perhaps the stories seek to legitimize the relatively stagnant nature of sovereign debt contracts (cf. Hobsbawm 1983). Transactional lawyers may not design innovative contracts, the stories seem to imply, but they play a central, even sacramental, role in the ritual of sovereign debt.

3. From the Head of Zeus…

The disjunctions between the stories of our lawyer-respondents and the observed behavior of sovereign debt lawyers may also have been a function of the questions we posed. Sovereign debt lawyers typically enjoy elite status, even among lawyers who work at prestigious global law firms. The public revelation that they were using a contract term that none of them fully understood likely was at odds with their professional self image. Moreover, many respondents felt constrained by institutional pressures from amending sovereign debt contracts to prevent another occurrence similar to the *Elliott* litigation. Stories that present contract terms as a function of historical events offer an implicit explanation for this lack of control. Likewise, stories that liken contract terms to "magic incantations" and "talismans" lend an exoticism, even grandeur, to sovereign debt practice that reinforces the inability of individual lawyers to amend contract terms. Even the inadvertent copying story, to which we now turn, arguably reflects lawyers' perceived powerlessness to shape the terms of sovereign debt contracts.

The inadvertent copying story posits that lawyers copied the *pari passu* clause over and over in each new transaction after mistakenly borrowing it from corporate bond documents. This is a remarkable way for elite lawyers to describe their professional skills. Yet respondents told a version of this story in a number of contexts. For example, when presented with evidence that the *pari passu* clause had changed over time – for example, by increasingly employing "medium risk" language (Figure 1) or by including an exception for preferences mandated by local law in English-law bonds (Figure 2) – some senior lawyers attributed these changes as well to blind copying. They suggested that a junior associate may have unilaterally and mistakenly modified contract language and that this error was perpetuated in new contracts.

We think it strange that distinguished lawyers would tell a story that renders them at least inferentially complicit in such sloppy practices. But the story is just that – a story. Like the contracts themselves, the behavior of the respondents during the interviews suggests a different reality. Most respondents demonstrated a thorough familiarity with the key contract terms, often fluently discussing contract language without referring to an exemplar. In short, respondents did not behave like professionals who would or could easily overlook newly-introduced language.

Nor did any of the respondents offer a compelling explanation for why, in a firm where rote copying was the supposed norm, junior associates would have been introducing new language that altered the apparent meaning of established boilerplate, much less doing so without calling attention to the changes made. Few would challenge the claim that, in reality, junior associates at a large, elite law firm do what they are told (Wilkins & Gulati 1998:1636-38).

The inadvertent copying story may be implausible and hard to square with our data, but it may also serve an important purpose for the lawyers who tell it. One possibility is that lawyers do not wish to be *seen* as making changes to documents that are supposed to be standardized. Sovereign bonds are tradable documents, and market participants may not wish to invest time and resources in investigating the meaning of new contract language. This puts transactional lawyers in something of a bind. Their experience may suggest ways to refine existing contract language, and their sense of what lawyers are *supposed to do* tells them that they should implement the change. Yet they are not likely to be rewarded for their efforts by clients and bankers who simply want the deal to go through without additional diligence costs. Perhaps stories of relentless and inadvertent copying are valuable precisely because they are false; they obscure the fact that lawyers frequently do amend contract language in ways they regard as inconsequential.

A second possibility links the lawyer-as-copier narratives to stories that emphasize the historic pedigree or "talismanic" nature of the *pari passu* clause. Central to each story is the notion of the lawyer as powerless to change standard form contract terms. Some junior lawyers told something of a counter-narrative, one in which an heroic figure rises above the constraints imposed by history and legal culture. These stories invoked a different model of lawyering practiced by a few giants of the field. One junior lawyer described walking into his first deal where an eminent lawyer arrived with nothing but a blank yellow pad and a fountain pen. There were no copies of prior deal documents on the conference table to be marked up. According to the story, the great lawyer simply asked the client's representative, a ministry of finance official: "How can we help you?" Then, as the ministry of finance official described what the client wanted, the lawyer began to draft clauses on the yellow pad from scratch. "It was as if the provisions were flowing directly from the head of Zeus," said this junior associate. "I had never seen anything like it before." We heard another variant of this story, not involving a yellow pad or fountain pen, but making the same point.

What makes the story notable is that it presents the classic model of transactional lawyering – in which a lawyer designs a bespoke contract for a client's unique needs – as something of a heroic ideal. Only super-human lawyers, the story seems to imply, can rise above the intellectual, experiential, and status-based constraints that bind other lawyers to a more mundane professional existence. The implication is that respondents find the routine use of form documents a distasteful aspect of their practice. Perhaps the story justifies this unpleasant aspect of their job by suggesting that one could hardly expect otherwise from mere mortals, who are relegated to rote copying. Perhaps, too, these lawyers were suggesting that the form contracts – for which they bear no responsibility – are the real cause of snafus like the *pari passu* saga. Maybe they were telling us that such problems would not arise if contracts were drafted differently; from scratch, using a fountain pen, on a yellow legal pad.

VII. CONCLUSION

In *The Method of Hope*, the anthropologist Hirokazu Miyazaki describes his ethnographic research among the Suvavou people of Fiji, who for generations have sought compensation for the loss of their ancestral land. Many times during his research, Miyazaki heard of a "hidden document," lost somewhere in government archives, that would validate the Suvavou claim. The document was an obsession for many Suvavou, for government officials, and ultimately for Miyazaki himself. Yet months of research in government archives turned up no lost document. What was interesting, Miyazaki ultimately concluded, was the idea of the document, and the hope it sustained, rather than the truth or existence of the document itself.

Prompted by our respondents' origin stories, we spent much of this project engaged in our own hunt for *pari passu*. And unlike Miyazaki, we found our lost document, or something close to it. So we were disappointed, to say the least, when our respondents were largely disinterested in our discovery. Their lack of interest, however, may be revealing. The themes that emerge from our respondents' stories highlight the disconnect between the idealized model of transactional lawyering and the everyday reality of sovereign debt legal work. In a sense, the stories help bridge that divide by providing an explanation for lawyers' relative powerlessness and by imbuing the "ritual" of sovereign debt contracting with meaning. Perhaps what mattered, in the end, was not that the clause had any particular origin, but simply that it *had* an origin, one grounded in remote but significant events.

REFERENCES

Alfaro, Laura et al. (2010) "Empire and Lawsuits: On U.S. Enforcement of Sovereign Debt in Latin America" __ *Law & Contemporary Problems*. __-__.

Asiedu-Akrofi, Derek (1992) "Sustaining Lender Commitment to Sovereign Debtors" 30 *Columbia J. of Transnational Law* 1-56.

______. (1994-1995) "Negative Pledge Clauses in International Loan Agreements," 26 *Law & Policy in International Bus*iness 407-58.

Bauman, Richard (1986) *Story, Performance, and Event: Contextual Studies of Oral Narrative*. Cambridge: Cambridge Univ. Press.

Bennett, W. Lance & Martha S. Feldman (1981) *Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture*. New Brunswick, NJ: Rutgers Univ. Press.

Ben-Shahar, Omri & John A.E. Pottow (2005-2006) "On the Stickiness of Default Rules," 33 *Florida State U. L. Rev.* 651-82.

Blackman, Jonathan I. & Rahul Mukhi (2010) "The Evolution Of Modern Sovereign Debt Litigation: Vultures, Alter Egos and Other Legal Fauna," __ *Law & Contemporary Problems* __-__.

Borchard, Edwin (1951) *State Insolvency and Foreign Bondholders*. New Haven: Yale University Press .

Boyle, Francis A. (1999) *Foundations of World Order: The Legalist Approach to International Relations, 1898-1922*. Durham, NC: Duke University Press.

Bradfield, Michael & Nancy Jacklin (1984) "The Problems Posed by the Negative Pledge Covenants in International Loan Agreements," 23 *Columbia J. of Transnational Law* 131-42.

Bradley, Michael et al. (2010) "The Market Reaction to Legal Shocks and Their Antidotes: Lessons from the Sovereign Debt Market," 39 *J. of Legal Studies* 289-324.

Buchheit, Lee C. (1990) "Negative Pledge Clauses; the Games People Play," *International Financial Law Rev.* 10-11 (July).

______. (1991) "The *Pari Passu* Clause *sub specie aeternitatis," International Financial Law Rev.* 11-12 (December).

Buchheit, Lee C. & Jeremiah S. Pam (2004) "The *Pari Passu* Clause in Sovereign Debt Instruments," 53 *Emory Law. J.* 869-922.

Buchheit, Lee C. & Mitu Gulati (2002) "Sovereign Bonds and the Collective Will" 51 *Emory Law J.* 1317-63.

Buchheit, Lee C. & Ralph Reisner (1988) "The Effect of the Sovereign Debt Restructuring Process on Inter-Creditor Relationships" 1988 *University of Illinois Law. Rev*. 493-517.

Cassis, Youssef (2006) *Capitals of Capital: A History of International Financial Centres, 1780-2005*. Cambridge: Cambridge University Press.

Choi, Stephen J. & G. Mitu Gulati (2004) "Innovation in Boilerplate Contracts: An Empirical Examination of Sovereign Bonds," 53 *Emory Law J.* 929-996.

Coates, John C. (2001) "Explaining Variation in Takeover Defenses: Blame the Lawyers," 89 *California Law Review* 1301-1421.

Conley, John M. & Cynthia A. Williams (2005-2006) "Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement," 31 *J. Corp. L.* 1-38.

Craig, Neville B. (1907) *Recollections of an Ill Fated Expedition*. Philadelphia, PA: J.B. Lippincott Co.

Cymrot, Mark (2002) "Barricades at the IMF: Creating a Municipal Bankruptcy Model for Foreign States" 36 *International Lawyer* 1103-15.

Dinwoodie, D.H. (1970) "Dollar Diplomacy in Light of the Guatemalan Loan Project, 1900–1913," 26 *The Americas* 237-253.

Economides, Kim & Majella O'Leary (2007) "The Moral of the Story: Toward an Understanding of Ethics in Organisations and Legal Practice," 10 *Legal Ethics* 5-25.

Engle, David M. (1993) "Origin Myths: Narratives of Authority, Resistance, Disability, and Law," 27 *Law & Society Rev.* 785-826.

Ewick, Patricia & Susan Silbey (2003) "Narrating Social Structure: Stories of Resistance to Legal Authority" 108 *American J. of Sociology* 1328-72.

Financial Markets Law Committee (2005) *Issue 79: Pari Passu Clause*. London: The Bank of England.

Fisch, Jill E. & Caroline Gentile (2004) "Vultures or Vanguards: The Role of Litigation in Sovereign Debt Restructuring" 53 *Emory Law Journal* 1043-1113.

Finnemore, Martha (2003) *The Purpose of Intervention: Changing Beliefs About the Use of Force*. Ithaca, NY: Cornell Univ. Press.

Flood, John (1991) "Doing Business: The Management of Uncertainty in Lawyers' Work," 25 *Law & Society Rev.* 41-72.

Gelpern, Anna (2005) "After Argentina," Rutgers School of Law-Newark Research Paper No. 011, at http://ssrn.com/abstract=880794.

______. (2009) "Financial Crisis Containment" 41 Connecticut Law Review 1051-1106.

Goetz, Charles J. & Robert E. Scott (1985) "The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms," 73 *California Law Rev.* 261-322.

Goffman, Erving (1959) *The Presentation of Self in Everyday Life*. New York: Anchor Books.

Gulati, Mitu G. & Robert E. Scott, (2011) *Three and a Half Minutes: A Case Study of Contractual Boilerplate, Big Law and the Limits of Contract Design* (Ms. ed.)

Hagan, Sean (2005) "Designing a Legal Framework to Restructure Sovereign Debt," 36 *Georgetown J. of International Law* 299-402.

Hill, Claire A. (2001-2002) “Why Contracts are Written in Legalese,” 77 *Chicago Kent Law Rev*. 59-85.

Hobsbawm, Eric (1983) “Introduction: Inventing Traditions” in E. Hobsbawm & T. Ranger eds., *The Invention of Tradition*. Cambridge, MA: Cambridge University Press.

John, William Tudor (1983) “Sovereign Risk and Immunity Under English Law and Practice,” in R. Rendell ed., 2d vol. 1 *International Financial Law*. London: Euromoney.

Johnston, Jason Scott (1990) “Strategic Bargaining and the Economic Theory of Contract Default Rules,” 100 *Yale Law J*. 615-664.

Kahan, Marcel & Michael Klausner (1997) “Standardization and Innovation in Corporate Contracting (Or “The Economics of Boilerplate”)”, 83 *Virginia Law Rev*. 713-770.

Kastner, Tal (2010) “The Persistent Ideal of Agreement in an Age of Boilerplate,” *Law and Social Inquiry* 793-823.

Lipson, Charles (1985) *Standing Guard: Protecting Foreign Capital in the Nineteenth and Twentieth Centuries.* Berkeley: University of California Press.

Mather, Lynn et al. (2001), *Divorce Lawyers at Work: Varieties of Professionalism in Practice.* Oxford University Press.

Mandeng, Ousmène Jacques (2004) “Intercreditor Distribution in Sovereign Debt Restructuring,” IMF Working Paper WP/04/183.

McEwen, Craig et al. (1994), “Lawyers, Mediation, and the Management of Divorce Practice,” 28 *Law & Society Review* 149-186.

Mitchener, Kris & Marc Weidenmier (2005) “Empire, Public Goods, and the Roosevelt Corollary,” 65 *Journal of Economic History* 658-692.

______. (2005) "Supersanctions and Sovereign Debt Repayment," The National Bureau of Economic Research Working Paper #11472, Cambridge, MA (June 2005).

Miyazaki, Hirokazu (2004), *The Method of Hope: Anthropology, Philosophy, and Fijian Knowledge*. Stanford University Press.

Monteagudo, Manuel (2010) "Peru's Experience in Sovereign Debt Management and Litigation: Some Lessons for the Legal Approach to Sovereign Indebtedness" __ *Law & Contemporary Problems* __-__.

Myers, Margaret G. (1945) "The League Loans," 60 *Political Science Quarterly* 492-526.

O'Barr, William M. & John M. Conley (1992a), *Fortune and Folly: The Wealth and Power of Institutional Investing*. Homewood, IL: Business One Irwin.

O'Barr, William M. & John M. Conley (1992b) "Managing Relationships: The Culture of Institutional Investing," 48 *Financial Analysts Journal* 21-27

Olivares-Caminal, Rodrigo (2009) "To Rank *Pari Passu* or not to Rank *Pari Passu*: That is the Question in Sovereign Bonds After the Latest Episode of the Argentine Saga," 15 Law & Business Rev. of the Americas 745-78.

______. (2009) "Understanding the *Pari Passu* Clause in Sovereign Debt Instruments: A Complex Quest," 43 International Lawyer 1217-1233.

Pérez, Jr., Louis A. & Deborah M Weissman (2006-2007) "Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony," 32 *North Carolina J. of International Law & Commercial Regulation* 699-748.

Rauchway, Eric (1997) "Willard Straight and the Paradox of Liberal Imperialism," 66 *Pacific Historical Review* 363-97.

Riles, Annelise (2008) "The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State," 56 *Am. J. Comp. L.* 605-30.

______. (2006) Introduction, in *Documents: Artifacts of Modern Knowledge*. The University of Michigan Press.

Rosenberg, Emily S. (2003) *Financial Missionaries to the World: The Politics and Culture of Dollar Diplomacy, 1900-1930.* Cambridge: Harvard Univ. Press.

Scott, Robert E. & George G. Triantis (2006) "Anticipating Litigation in Contract Design, 115 *Yale L. J.* 814-879

----------. (1986) "A Relational Theory of Secured Debt," 86 *Colum. L. Rev*. 901-977.

Shearing, Clifford D. & Richard V. Ericson (1991) "Culture as Figurative Action," 42 *British J. of Sociology* 481-506.

Silbey, Jessica (2007-2008) "The Mythical Beginnings of Intellectual Property Law," 15 *George Mason L. Rev.* 319-79.

Suchman, Mark (2003) "The Contract as Social Artifact," 37 *Law & Society Rev.* 91-142.

Tomz, Michael (2007) *Reputation and International Cooperation: Sovereign Debt Across Three Centuries.* Princeton: Princeton University Press.

Weidemaier, W. Mark C. (2010) "Contracting for State Intervention: The Origins of Sovereign Debt Arbitration" __ *Law & Contemporary Problems* __-__.

Wilkins, David D. & G. Mitu Gulati (1998) "Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms," 84 Virginia Law Review 1581-1681.

Wood, Philip (1995) *Project Finance, Subordinated Debt and State Loans.* London: Sweet & Maxwell.

Wood, Philip R. (2007) *The Law and Practice of International Finance*. London: Sweet & Maxwell.

Wood, Philip R. (2009) *Life After Lehman: Allen & Overy Analysis of Changes in Market Practice*. London: Allen & Overy.

Wood, Philip, R. (2010) "Sovereign Syndicated Bank Credits in the 1970s," 73 *Law& Contemporary Problems* 7-28.

Appendix

Issuers, by frequency of appearance

Issuer	Freq.	Pct. of Total	Issuer	Freq.	Pct. of Total	Issuer	Freq.	Pct. of Total
Argentina	65	4.8%	Cuba	5	0.4%	Congo	1	0.1%
Finland	58	4.3%	Egypt	5	0.4%	Copenhagen	1	0.1%
Belgium	57	4.2%	Salvador	5	0.4%	Dresden	1	0.1%
Sweden	47	3.5%	Thailand	5	0.4%	Dubai	1	0.1%
Portugal	45	3.3%	Kazakhstan	4	0.3%	Dutch East Indies	1	0.1%
Mexico	42	3.1%	Latvia	4	0.3%	Edmonton	1	0.1%
China	41	3.0%	Slovakia	4	0.3%	Fed. Malay States	1	0.1%
Brazil	36	2.6%	Sudan	4	0.3%	Gabon	1	0.1%
Italy	33	2.4%	Trinidad &Tobago	4	0.3%	Georgia	1	0.1%
Greece	31	2.3%	Bergen	3	0.2%	Ghana	1	0.1%
Philippines	29	2.1%	Cape of Good Hope	3	0.2%	Hamburg	1	0.1%
Uruguay	28	2.1%	Ecuador	3	0.2%	Helsinki	1	0.1%
Colombia	27	2.0%	Estonia	3	0.2%	India	1	0.1%
Denmark	27	2.0%	Guatemala	3	0.2%	Kieff	1	0.1%
Iceland	27	2.0%	Morocco	3	0.2%	Louisiana	1	0.1%
Turkey	25	1.8%	Queensland	3	0.2%	Luxembourg	1	0.1%
Chile	24	1.8%	Serbia	3	0.2%	Macedonia	1	0.1%
Russia	24	1.8%	Switzerland	3	0.2%	Madras	1	0.1%
Venezuela	24	1.8%	Western Australia	3	0.2%	Maisonneuve	1	0.1%
Australia	21	1.5%	Aruba	2	0.1%	Malaya	1	0.1%
Malaysia	21	1.5%	Bahamas	2	0.1%	Micronesia	1	0.1%
Buenos Aires	19	1.4%	Belarus	2	0.1%	Milan	1	0.1%
Austria	18	1.3%	Berlin	2	0.1%	Moldova	1	0.1%
Jamaica	18	1.3%	Cordoba (Argentina)	2	0.1%	Montenegro	1	0.1%
Japan	18	1.3%	Danzig	2	0.1%	Natal	1	0.1%
New Zealand	18	1.3%	Fiji	2	0.1%	New Brunswick	1	0.1%
Ireland	17	1.3%	Grenada	2	0.1%	Newfoundland	1	0.1%
Panama	17	1.3%	Honduras	2	0.1%	Nicaragua	1	0.1%
Lithuania	16	1.2%	Iran	2	0.1%	Nigeria	1	0.1%
Norway	15	1.1%	Iraq	2	0.1%	Oman	1	0.1%
Poland	15	1.1%	Kenya	2	0.1%	Oslo	1	0.1%
Spain	15	1.1%	Liberia	2	0.1%	Oxaca (Mexico)	1	0.1%
Canada	14	1.0%	Manitoba	2	0.1%	Palestine	1	0.1%
Croatia	14	1.0%	Mauritius	2	0.1%	Perth	1	0.1%
United Kingdom	14	1.0%	Ottoman Empire	2	0.1%	Poyais	1	0.1%
Costa Rica	13	1.0%	Pakistan	2	0.1%	Pretoria	1	0.1%
Saudi Arabia	13	1.0%	Paraguay	2	0.1%	Prince Albert	1	0.1%
Indonesia	11	0.8%	San Paulo	2	0.1%	Rhodesia & Nyasaland	1	0.1%
Peru	11	0.8%	Seychelles	2	0.1%	Riga	1	0.1%
Cyprus	10	0.7%	Siam	2	0.1%	Rosario	1	0.1%
Germany	10	0.7%	Slovenia	2	0.1%	Santa Fe (argentina)	1	0.1%
Barbados	9	0.7%	South Carolina	2	0.1%	Santos	1	0.1%
El Salvador	9	0.7%	Tokyo	2	0.1%	Senegal	1	0.1%
France	9	0.7%	Trinidad	2	0.1%	Sierra Leone	1	0.1%
Hungary	9	0.7%	Tucuman	2	0.1%	Silesia	1	0.1%
Israel	9	0.7%	Ukraine	2	0.1%	South Australia	1	0.1%
Romania	9	0.7%	Victoria	2	0.1%	Southern Rhodesia	1	0.1%
South Africa	9	0.7%	Abu Dhabi	1	0.1%	St. Chris./Nevis/Anguilla	1	0.1%
Czech Rep./Czechoslovakia	8	0.6%	Aden	1	0.1%	St. Petersburg	1	0.1%
Korea	8	0.6%	Antigua	1	0.1%	St. Vincent	1	0.1%
New South Wales	8	0.6%	Antofagasta	1	0.1%	Stockholm	1	0.1%
British Guiana	7	0.5%	Auckland	1	0.1%	Sydney	1	0.1%
Dominican Republic	7	0.5%	Bahrain	1	0.1%	Tanganyika	1	0.1%
Lebanon	7	0.5%	Bengal	1	0.1%	Tasmania	1	0.1%
Qatar	7	0.5%	Budapest	1	0.1%	Vietnam	1	0.1%
Bulgaria	6	0.4%	Calgary	1	0.1%	Warsaw	1	0.1%
Ceylon	6	0.4%	Christiana	1	0.1%	Westphalia	1	0.1%
Belize	5	0.4%	City of Johannesburg	1	0.1%			
Bolivia	5	0.4%	City of Yokohama	1	0.1%			

Issuances By Decade

Decade	N	Percent of Total
1820s	6	0.4%
1830s	1	0.1%
1840s	0	0.0%
1850s	6	0.4%
1860s	19	1.4%
1870s	23	1.7%
1880s	21	1.5%
1890s	24	1.8%
1900s	47	3.5%
1910s	74	5.4%
1920s	85	6.3%
1930s	59	4.3%
1940s	11	0.8%
1950s	14	1.0%
1960s	38	2.8%
1970s	28	2.1%
1980s	108	7.9%
1990s	325	23.9%
2000+	471	34.6%

***Pari Passu* usage over time, secured and unsecured bonds**

	Secured Bonds		Unsecured Bonds		Total
	Pari Passu	No *Pari Passu*	*Pari Passu*	No *Pari Passu*	
Pre-1860	0	8	0	5	13
1860-1879	1	18	0	23	42
1880-1899	2	17	1	25	45
1900-1919	8	49	4	60	121
1920-1939	12	47	1	84	144
1940-1959	0	14	0	11	25
1960-1979	0	8	48	10	66
1980-1999	0	0	395	38	433
2000-present	0	0	469	2	471

Post WW-II *pari passu* mutations (unsecured bonds with *pari passu* only)

	Number of bonds		Level of risk of Elliott interpretation (Fig. 1)			Mutations (English law only) (Fig. 2 & 3)		
	Total	With *pari passu*	Low	Medium	High	N, English law bonds	Exception for "mandatory" law	Date of issue or currency of payment mutation
1970s	28	20	20	0	0	11	0	1
1980s	108	88	82	0	6	35	2	16
1990s	325	307	194	97	16	123	12	39
2000-present	471	469	205	232	32	171	64	23