

FISCAL SOVEREIGNTY: TAX HAVENS AND THE DEMARCATION OF THE THIRD WORLD

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ABSTRACT

In 2021, the First World closed ranks around a corporate minimum tax in a paradoxical feat of multilateral governance over globalization. This victory for the redistributive state coincided with the publication of a totalizing social science tome that celebrated the Western, educated, industrial, rich, and democratic (WEIRD) countries. Capping parallel economic and intellectual histories, policymakers and social scientists may have succeeded in ending the history of nations that sought to protect their markets, propagate their culture, or innovate beyond liberal legality. Since the ancient empires of the East gave way to the modern Atlantic trade, the globe became the market. There, laissez-faire competition required losers as well as winners. Islands removed from natural resources that attempted to monetize their sovereignty in tax havens would be eclipsed by the WEIRD cartel. Meanwhile, evolutionary anthropology became the heir to twentieth-century social science, which rationalized the cultural cleavages between the Global South & North, and in turn, the nineteenth-century discourse of political economy, which originated the inquiry into the wealth of nations. Across the Pacific, a Great Rivalry has reframed the identity of the Third World. At the same time, the disciplinary stepchildren of anthropology dealt with lingering particularism, as race, religion, and nationalism continued to have totemic appeal. Amidst this political culture, it was unclear that juridical mechanisms such as property and taxation could be anything but markers of economic exclusion.

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I. INTRODUCTION

A. *Global Banishment or Intrinsic Errancy*

In 2021, finance ministers across the globe agreed to the imposition of a corporate minimum tax of 15 percent.¹ “We believe this deal” will facilitate “the continued success of the liberal international economic order as we have known it over the last 75 years,” proclaimed the U.S. Treasury’s deputy assistant secretary for multilateral tax.² Tax compliance by “big companies and their shareholders” matters “because the activity of multinationals is the backbone of the success of globalization.”³ Although “it certainly has its flaws, globalization has brought benefits not just for multinational corporations but for people in the United States and around the world” as opposed to “economic populism, protectionism and anti-immigrant sentiment.”⁴ Confronting hesitancy on the outskirts of Europe, the leading industrial nations effectively banished small, uncooperative economies from the global market.⁵

This same year, social science confirmed the primacy of that economic order. In the publication of a comprehensive text, evolutionary anthropologists pronounced the unique accomplishment of the Western, educated, industrial, rich, and democratic (WEIRD) states.⁶ According to the chairman of an Ivy League anthropology department, “the institutional pathways to premodern states are relatively narrow, and the hidden footpath to WEIRD states requires a special maneuver, a kind of doubling back that allows for an end run around premodern state formations.”⁷ Among all the cultures in world history, the most successful ones, in the Chairman’s view, are essentially congruent with the neo-liberal market.⁸

In light of these stated achievements of economics and anthropology, this Article will consider a couple of alternatives. On one

1. See Alan Rappeport, *Treasury Official Says an International Tax Deal Would Help Make Globalization Work*, N.Y. TIMES (Jul. 21, 2021), <https://www.nytimes.com/live/2021/07/21/business/economy-stock-market-news> [<https://perma.cc/9HWC-5SQM>].

2. *Id.*

3. *Id.*

4. *Id.*

5. See *infra* Part IV.C.

6. See JOSEPH HENRICH, *THE WEIRDEST PEOPLE IN THE WORLD: HOW THE WEST BECAME PSYCHOLOGICALLY PECULIAR AND PARTICULARLY PROSPEROUS* 8 (2020) (ebook) (labeling Western, educated, industrial, rich, democratic countries with the acronym WEIRD).

7. *Id.* at 106.

8. See *id.* at 476 (sub-titularly proclaiming that “the West” is “particularly prosperous” while concluding that this results from “the coevolution of institutions and psychology.”)

hand, both policymakers and social scientists may have finally succeeded in ending the history of nations that sought their own path, whether by protecting their markets, propagating their culture, or innovating with their juridical concepts.⁹ On the other hand, the “rich and powerful have always needed a place to hide their money – from the state, from the poor, from each other.”¹⁰ Consequently, the 2021 restatement of political economy would reflect the persistence of errant economies, *qua* tax havens or Third World countries, as a condition of the prosperity of the hegemon.¹¹

To achieve exclusivity, the excluded population is still necessary. Neither condoning tax evasion nor denying material betterment, this Article questions the imposition on the Global South of preconceived notions of the *laissez-faire* market, universal evolution, and liberal legality. Instead, the future is open to creative interpretation and dispositive action.

B. *Overview*

This Article proceeds as follows: To address the historical context of the international relations introduced above, Part II starts from the ancient empires, proceeding through the early modern creation of the world economy, which after the Second World War yielded tripartite or bipartite rankings. Likewise, Part III reviews the intellectual history of political economy and its social scientific successors, which essentially rationalized the clash of civilizations between “the West versus the rest.”¹² In this context, evolutionary anthropology became the heir in a family whose sub-disciplinary stepchildren were still at large. Against the foregoing background of splintered economic and intellectual history, taxation and tax havens appear in Part IV as financial and juridical markers of globalized competition, which distinguishes winners from losers. Part V confirms the fundamental cleavages between cultures, exacerbated by economic self-interest. Part VI concludes that a socio-economic vision to reconcile the cross purposes of exclusive partic-

9. See generally FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (discussing that, as societies struggle for liberalism and democracy and satisfy mankind’s deepest longings for recognition, Hegel asserted “no further progressive historical change is possible”).

10. Charles A. Dainoff, *Outlaw Heaven: Why States Become Tax Havens* 106 (Jan. 10, 2018) (Ph.D. dissertation, University of Kentucky) (on file with the Department of Political Science at UKnowledge, University of Kentucky).

11. See *infra* Part III.D.

12. See *infra* Part III.B.

ularism and inclusive community, exemplified in the fiscal realm, remains elusive.

II. THE ORDER OF NATIONS

The recently emerging international relations were not new. Starting from the ancient civilizations, collateral and hierarchical relations emerged between countries.¹³ By the modern epoch, the pristine states of Asia gave way to the world capitalism of Europe.¹⁴ Thereafter, primary production in the agricultural periphery came under the rubric of the Third World and now the Global South.

A. *Ancient Empires*

The order of nations was formed by a history of empires and colonies. From the so-called Near to Far East, the archaeologically pristine states were the site of the original dependencies.¹⁵

1. Pharaonic Nubia

The “first colonial empire” was revealed by Egyptology.¹⁶ From 3200 to 1200 BCE, the pharaonic incursions southward into the Nubian Kush became increasingly “exploitive.”¹⁷ The process went from “peaceful trade with native suppliers” of animal products, “through warfare and capture” of slaves, to “outright colonization and the establishment of extractive industries” for “mineral products.”¹⁸ By the time of the New Kingdom (Dynasties XVIII to XX) at the end of this era, the “founding of new towns, temples, and productive enterprises brought Egyptian colonists to Nubia in significant numbers for the first time, and permitted the development of a typically Egyptian manorial economy” that may have constituted a settler colony.¹⁹ Nevertheless, this settlement operated “on a more militaristic and imperialist basis than ever before.”²⁰ Thus, the pristine state of Egypt under the pharaohs set the imperial precedent.

13. *See infra* Part II.A.

14. *See infra* Part II.B.

15. *See* V. GORDON CHILDE, *WHAT HAPPENED IN HISTORY* 24–25 (1954).

16. William Y. Adams, *The First Colonial Empire: Egypt in Nubia, 3200–1200 B.C.*, 26 *COMPAR. STUD. SOC'Y & HIST.* 36, 36 (1984).

17. *Id.* at 40.

18. *Id.*

19. *Id.* at 64.

20. *Id.* at 38, 64.

2. Assyrian Dependencies

At the end of the second millennium BCE, a nearby Near Eastern civilization pursued imperial innovation. According to Orientalists, the “rise of Assyria marked a new era in the government of dependencies.”²¹ Whereas predecessors “had been content with vassal states . . . Assyria reduced the conquered areas to provinces.”²² The central government “transported to far-off lands” the local rebels, leaving “the provincials . . . united in worship of the national god Ashur and of the divine king.”²³ This was the ancient incidence of the governing of the periphery from the core.

3. Han Through Qing Dynasties

Across the continent, another pristine state underwent imperial iterations. As of the second century BCE, “the Han dynasty . . . adopted a peculiar sort of tribute system whereby, in exchange for recognition of the Chinese emperor as world-sovereign, they have been willing to shower their client states with gifts far greater than they receive in return.”²⁴ Thus, China set the precedent for buying fealty.

While the Chinese civilization had been established in the prior millennia, modern involutions followed. In the seventeenth century CE, the Manchu conquered much of the country, and by the eighteenth century, the Qing dynasty had expanded into Mongolia, Xinjiang, and Taiwan.²⁵ According to Sinologists, these “were new territories acquired by conquest by an invading minority, where strategic decisions were made in Beijing about the governance of the periphery, and where the conquest elite definitely felt superior to the natives and entitled to rule them and kept itself separate from them.”²⁶ Invoking divine right, the Chinese emperors “credited their military victories to the ‘Mandate of Heaven’ (*tianming*).”²⁷ From the ancient to the early modern era, China has been “both a victim of imperial domination and an empire inflicting domination on other peoples at the same time.”²⁸ This duality in historical roles problematized the notion of imperialism.

21. A.T. OLMSTEAD, *HISTORY OF THE PERSIAN EMPIRE* 14 (1948).

22. *Id.*

23. *Id.*

24. DAVID GRAEBER, *DEBT: THE FIRST 5,000 YEARS* 371 (2011).

25. Peter C. Perdue, *China and Other Colonial Empires*, 16 *J. AM.-E. ASIAN REL.* 85, 92 (2009).

26. *Id.*

27. *Id.*

28. *Id.* at 101.

4. Mauryan Dynasty Through the Mughal Empire

The subcontinental pristine state also experienced multiple aspects of imperialism. Under the Mauryan dynasty in the second century BCE, Kautilya's *Arthashastra*, the treatise of political economy, related mineral, monetary, and military resources: "Mines are the source of treasury; from treasury comes the power of government; and the earth whose ornament is treasury is acquired by means of treasury and army."²⁹ Through prior centuries of statecraft, the Indian civilization had a theory of world conquest by the time of the Mughal invasion.³⁰

In turn, the Mughal empire was succeeded by the British raj. "Both were centralized autocratic states ruled by a single" official, the Mughal emperor or the British viceroy, "who issued edicts, laws and regulations to be obeyed throughout the subcontinent."³¹ In early modern India, "governance occurred through complex networks of sovereignty rather than rule by a bureaucratic regime; not even Prussia was governed by what Max Weber would have called a bureaucratic state."³² In the nineteenth century, the "Mughal polity was able to act effectively when it mobilized and incorporated a network of actors who had their own locally rooted forms of political authority."³³ Broadly speaking, the Indo-European empires shared feudal roots.

Thereafter, a modern transition occurred. The "commercialization of royal power" took place where "the English East India Company's officers acted in the same way as India's local merchant-princes or 'portfolio capitalists', trading goods, collecting revenue by tax-farming, hiring out troops, and establishing local monopolies in goods such as salt and opium."³⁴ Thus, the successive empires superimposed themselves on local power structures. In the end, the colonial "reorganisation and consolidation" were "essential conditions for the unification of a diverse range of nations, peoples, races, ethnic and linguistic groups into a state-

29. KAUTILYA, *ARTHASHASTRA* 116 (R. Shamasastri trans., 1956) (ebook); see GRAEBER, *supra* note 24, at 233.

30. See GRAEBER, *supra* note 24, at 233.

31. John F. Richards, *Fiscal States in Mughal & British India*, in *THE RISE OF FISCAL STATES: A GLOBAL HISTORY 1500–1914* 410, 411 (Bartolome Yun-Casalilla & Patrick K. O'Brien eds., 2012).

32. Jon E. Wilson, *Early Colonial India Beyond Empire*, 50 *HIST. J.* 951, 960 (2007).

33. *Id.* at 956.

34. *Id.* at 957–58.

entity with the ability to reproduce and sustain itself.”³⁵ Consequently, the modern Indian republic as a confederation of multiple states was as much a product of colonialism as indigenous authority.³⁶

5. Summary

Before the modern advent of the Atlantic economy, the colonial empires of Africa and Asia were already old. By the time of the European invasions, the ancient civilizations had established roles between ruling states and client territories.

B. *Capitalist World-System*

When the ancient empires gave way to the modern states, the world-historic transformation of the international order spread through market trade from Europe to Asia, Africa, and America.³⁷ This transformation was facilitated not only by transoceanic shipping and industrial technology, but by financial and juridical concepts such as monetary currency and alienable property.³⁸

1. Sixteenth-Century Market

By the sixteenth century, the ancient empires would undergo qualitative as well as quantitative transformation. In Europe, the medieval “crisis of feudalism” coincided with “climatic changes . . . which created a dilemma” that could be resolved only “by a geographic expansion of the division of labor.”³⁹ From “Poland in the northeast westwards and southwards throughout Europe and including large parts of the Western Hemisphere as well[,]” the generation of “agricultural products for sale and profit” led to the “economic predominance of market trade.”⁴⁰ Economic historians have coined the term “agricultural capitalism” to characterize the resulting “world-economy” where the “core areas,” led by the

35. Radha D'Souza, *Re-Territorialising & Re-Centring Empires: The Connivance of Law and Geography*, 22 N.Z. GEO. SOC'Y 324, 327 (2003).

36. On contemporary colonialism by India, see Nitasha Kaul, *Kashmir Is Under the Heel of India's Colonialism*, FOREIGN POL'Y, (Aug. 13, 2019, 10:51 PM), <https://foreignpolicy.com/2019/08/13/kashmir-is-under-the-heel-of-indias-colonialism/> [https://perma.cc/4FZ4-M9XP].

37. See *infra* Part II.B.1.

38. See generally IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM II: MERCANTILISM AND THE CONSOLIDATION OF THE EUROPEAN WORLD-ECONOMY, 1600–1750* (Univ. Cal. Press 2011) (1980).

39. Immanuel Wallerstein, *The Rise and Future Demise of the World Capitalist System: Concepts for Comparative Analysis*, 16 COMPAR. STUD. SOC'Y & HIST. 387, 407 (1974).

40. *Id.* at 391, 399.

Dutch United Provinces and British United Kingdom (UK), appropriated the surplus value from the “peripheral, raw material-producing” areas.⁴¹ In the ancient epoch, states could have been pristine, but in modernity, the whole world entered into systemic dependency between empires and colonies.

The rise of the world economy corresponded to internal developments. Intrinsically, monetary currency arose not as “the measure of the value of an object, but the measure of one’s trust in other human beings.”⁴² Culturally viewed, the emergence of money exchange was symbolic rather than disembodied. Thereafter, governments would “use taxes to create money,” or “to create markets in conquered territories, or to pay for soldiers or other state functions.”⁴³ As economic historians have observed, the imposition of money taxes liquifies the economy, facilitating the establishment of markets where buyer and seller set prices removed from social context.⁴⁴ According to economic anthropologists, the history of capitalism is “the story of how an economy of credit was converted into an economy of interest; of the gradual transformation of moral networks by the intrusion of the impersonal – and often vindictive – power of the state.”⁴⁵ Ultimately, financial currency afforded the abstraction of economic trade from cultural context.

2. Global Division of Labor

From its early modern inception, the world economy created a global division of labor. As a business model, “perfect competition” makes it “absolutely impossible to make significant profit,” which instead “requires a monopoly, or at least a quasi-monopoly, of world-economic power.”⁴⁶ To amass profit, the capitalists from the European core captured the market throughout the world.⁴⁷

41. *Id.* at 392, 399, 401.

42. GRAEBER, *supra* note 24, at 47.

43. GRAEBER, *supra* note 24, at 53, 56.

44. See GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 174 (David Frisby ed., Tom Bottomore & David Frisby trans., Taylor & Francis e-Libr. 2005) (1978) (ebook) (explaining that the exchange function of money facilitated interactions between individuals and contributed to the formation of “society”); ROBERTO MANGABEIRA UNGER, *PLASTICITY INTO POWER: COMPARATIVE-HISTORICAL STUDIES ON THE INSTITUTIONAL CONDITIONS OF ECONOMIC & MILITARY SUCCESS* 3–4 (1987). See also Treas. Reg. § 20.2031-1(b) (as amended in 1965) (Estate Tax Reg. establishing Fair Market Value between willing buyer and seller).

45. GRAEBER, *supra* note 24, at 332.

46. IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM III: THE SECOND ERA OF GREAT EXPANSION OF THE CAPITALIST WORLD-ECONOMY 1730s–1840s* xvii (Univ. Calif. Press 2011) (1989).

47. See *id.* at xvii, xviii.

To the extent that this world economy was systemic, the impact would be felt by both proletarians in the core and peasants in the periphery. By the early twentieth century, those leading the revolution against capitalism observed that “international trade is a prime necessity for the historical existence of capitalism—an international trade which under actual conditions is essentially an exchange between capitalistic and non-capitalistic modes of production.”⁴⁸ This observation set the stage for international class conflict.

3. International Class Conflict

The modern world economy of international trade was supported by national governments. In large part, capitalism owed its success to “the constant absorption of economic loss by political entities, while economic gain is distributed to ‘private’ hands.”⁴⁹ Regulating trade, government entities functioned as a managerial corps funded by tax, which enabled “the state to have a larger and more efficient civil bureaucracy and army which in turn leads to greater tax revenue.”⁵⁰ In the arena of economic policy, “the skills of particular managerial groups make a difference.”⁵¹ In other words, the public sector was a function of private enterprise in the capitalist state. For example, the quasi-governmental, para-military enterprise was incorporated as the English or Dutch East India Company in 1600 and 1602.⁵² Thus, the modern emergence of the highly productive world economy formalized “political and economic decision-making” that made global distribution regressive.⁵³

At first, the world economy outsourced class struggle to the periphery. By relegating the harvesting of raw materials to “zones of the world economy that are, on the average, lower-wage areas,” namely the colonies, “capitalists worldwide have been able to limit this political pressure” that is exerted by enfranchised workers in

48. ROSA LUXEMBURG, *THE ACCUMULATION OF CAPITAL* 359 (Agnes Schwarzschild trans., 1951) (1913).

49. IMMANUEL WALLERSTEIN, *THE MODERN WORLD-SYSTEM I: CAPITALIST AGRICULTURE AND THE ORIGINS OF THE EUROPEAN WORLD-ECONOMY IN THE SIXTEENTH CENTURY* 607 (Univ. Calif. Press 2011) (1974) (ebook).

50. *Id.* at 618.

51. *Id.*

52. See NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* 128–29 (2008); Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form* 2, 13 (Amsterdam Ctr. L. & Econ. Working Paper No. 2013-02).

53. WALLERSTEIN, *supra* note 49, at 607.

the core economies.⁵⁴ Inside the core, social “welfare efforts by governments” alleviated the relatively egregious inequalities.⁵⁵ Eventually, the globalization of trade meant that “the whole world system is de-ruralized,” leading to a situation where “the only option for capitalists is to pursue the class struggles where they are presently located” even in the periphery.⁵⁶ Ultimately, workers in both the historic core and the urbanized periphery would make political demands for economic equality.

As a result of world-wide profit maximization, alienation took hold in both the First and Third Worlds. In the industrial West, “what is perceived as the ‘fiscal crises of the states’” is a chance “for capitalists to demand a rollback” of redistributive government, for which they “seek popular support on the grounds that individual taxation is also rising sharply.”⁵⁷ According to commentators, “post-‘revolutionary’ regimes” in the Global South “have not been able to reduce worldwide or even internal polarization to any significant degree, nor have they been able to institute serious internal political equality” given their lack of autonomous leverage in the world system.⁵⁸ Instead, “we may expect the degree of collective and individual security to decrease, perhaps vertiginously, as the state structures lose more and more legitimacy.”⁵⁹ In short, the high productivity of the world economy depended on both geographic and labor extraction that became the source of instability.

Meanwhile, the increasingly financial economy shifted social responsibility to individual debtors. As Georg Simmel, the philosopher of money, posited, “[m]oney freed people from corporate statuses but left them with nothing but money itself with which to evaluate and judge the social and natural worlds around them.”⁶⁰ Freed from feudal bonds, people became creatures of their own bank accounts.⁶¹ This amounted to “a double-edged egalitarian-

54. Immanuel Wallerstein, *Globalization or the Age of Transition? A Long-Term View of the Trajectory of the World System*, 15 INT'L SOCIO. 251, 261 (2000).

55. *Id.* at 263.

56. *Id.* at 261–62.

57. Wallerstein, *supra* note 54, at 264. See Joseph A. Schumpeter, *The Crisis of the Tax State*, in *THE ECONOMICS AND SOCIOLOGY OF CAPITALISM* 116 (Richard Swedberg ed., 1991) (1918); Eric A. San Juan, *The Distributive State & the Function of Tax Expenditures*, 71 TAX LAW. 673, 713 (2018).

58. Wallerstein, *supra* note 54, at 265.

59. *Id.* at 266.

60. Bill Maurer, *The Anthropology of Money*, 35 ANN. REV. ANTHRO. 15, 19 (2006). See SIMMEL, *supra* note 44 at xxii, xxiii (by using money, individuals could have achieved modernity by establishing “the mature money economy that destroys fixed values other than money itself”).

61. *Cf.* GEORGE MARCUS, *LIVES IN TRUST* 145 (1992).

ism.”⁶² On one hand, “‘primitive’ and peasant societies encountering money in the colonial transformation of labor experienced it as Aristotle did at the time of the ascendance of the Greek democratic polis against the symposia of hierarchical elites.”⁶³ Money wages created the appearance of free labor.⁶⁴ On the other hand, “the possibility of retirement hinges on our financial investments, not our affective attachments to a lifetime employer or a national welfare state.”⁶⁵ Critically speaking, “money and the violence of its abstractions erode the sociability subtending human existence, and the very idea of society itself.”⁶⁶ The stasis of serfdom gave way to the anonymity of the proletariat.

4. Sovereign Neo-Colonies

Over the centuries, the ancient empires were transformed. Politically, the divine right of the emperors yielded to the rule of law. Paradoxically, “with the decline of natural law . . . the last vestiges of transnational ethical morality [were] removed and the states [became] fully insulated from each other in law.”⁶⁷ Originally, the rule of law was a replacement for natural morality. By the nineteenth century, the New World became the site of this fresh order among law-governed nations.⁶⁸ In 1823, U.S. President James Monroe announced his Doctrine that Latin American “[g]overnments who have declared their independence and maintained it” could not suffer “any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power in any other light than as the manifestation of an unfriendly disposition toward the United States.”⁶⁹ Consequently, the Manifest Destiny of the great North American nation was for “mutual recognition through bilateral treaties (contractual relations between states) as the basis for interstate relations” in the

62. Maurer, *supra* note 60, at 19.

63. *Id.* at 21.

64. See David Graeber, *Turning Modes of Production Inside Out: Or, Why Capitalism Is a Transformation of Slavery*, 26 *CRITIQUE ANTHROPOLOGY* 61, 68–69 (2006).

65. Maurer, *supra* note 60, at 18.

66. *Id.* at 19.

67. Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 *INT’L ORG.* 151, 165 (2002).

68. See Radha D’Souza, *Imperialism & Self-Determination: Revisiting the Nexus in Lenin*, 48 *ECON. & POL. WKLY.* 60, 61 (2013).

69. ANN. CONG. (Sen.) 18th Cong. 1st Sess. 14, 22–23, *December 2, 1823: Seventh Annual Message (Monroe Doctrine)*, MILLER CENTER, <https://millercenter.org/the-presidency/presidential-speeches/december-2-1823-seventh-annual-message-monroe-doctrine> [https://perma.cc/226P-X3VE].

Western hemisphere.⁷⁰ Later critics would argue that “liberalism’s formal legal equality” in international relations “fetishised and camouflaged real inequality and oppression between states.”⁷¹ Nevertheless, a formal rule of law now governed the states, including former colonies of Europe.

Of course, the Monroe Doctrine applied to Western states rather than indigenous polities. In the twentieth century, U.S. Justice Oliver Wendell Holmes Jr. observed frankly that “[w]hatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land.”⁷² Whether frank or hypocritical, later critics could perceive colonialists “as morally culpable historical actors.”⁷³ Ironically, the “modern concept of rights owes its birth to that moment when land was transformed into a commodity and hundreds of thousands of people were evicted from the places they called their ‘homeland.’”⁷⁴ Upon the crumbling of the old empires, global capitalism prepared the way for disembodied legal rights.⁷⁵

By the same token, the legal notion of property rights became modernized. As a practical matter, people previously could exclude others from land or other assets. Legally, one “can imagine property not as a relation between people, but as a relation between a person and a thing, if one’s starting point is a relation between two people, one of whom is also a thing.”⁷⁶ As Professor Patterson taught, “the notion of absolute private property is really derived from slavery.”⁷⁷ The alienability of property central to capitalism had its basis in the slave trade.

For the rule of law, it was revolutionary that modernity accorded rights to all people (while dehumanizing slaves).⁷⁸ In 1972, when the late legal academic posed the improbable question “[s]hould trees have standing?”, the Federal courts answered no.⁷⁹ Persist-

70. D’Souza, *supra* note 68, at 62.

71. *Id.* at 63.

72. *Cariño v. The Insular Gov’t of the Phil. Islands*, 212 U.S. 449, 458 (1909).

73. Wilson, *supra* note 32, at 953.

74. RADHA D’SOUZA, WHAT’S WRONG WITH RIGHTS?: SOCIAL MOVEMENTS, LAW AND LIBERAL IMAGINATIONS 5 (2018).

75. *See id.*

76. GRAEBER, *supra* note 24, at 199–200.

77. *Id.* at 199. *See* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH 261 (1982).

78. *See* ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY 54 (1976); HENRY SUMNER MAINE, ANCIENT LAW 148 (10th ed. 1908).

79. Christopher D. Stone, *Should Trees Have Standing?—Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 450 (1972). *See Sierra Club v. Morton*, 405 U.S. 727, 727 (1972).

ently, Third World advocates questioned, “[c]an land and nature be commodities like shoes or clothes?”⁸⁰ In 2017, the appellate court in the Indian highland State of Uttarakhand, the origin of the Ganges River, long revered as sacred by Hindu tradition, granted to several adjacent bodies of water the rights as “living entities,” designating State officials as their legal guardians.⁸¹ Although the Supreme Court in New Delhi subsequently reversed the ruling, other jurisdictions around the world followed suit, giving rivers and parks standing.⁸² Thus, Third World attorneys set a precedent for overturning the commoditizing nature of liberal legality.

5. Summary

Between the sixteenth and twentieth centuries, the Great Powers of Europe took over the globe by market domination and military subjugation.⁸³ At the same time, the profitable exploitation of the world economy created instability as the peasants historically rebelled in the periphery, while ultimately the revolutionaries envisioned an alternative to capitalism.⁸⁴

C. *Third World*

Ancient and modern history established the dialectic between empire and colony, or world-economic core and periphery. In 1952, a French demography professor coined the term “Third World” for the nations marginalized in the bipolar aftermath of World War II.⁸⁵ Three years later, Bandung, Indonesia, was the site of a conference of non-aligned nations among whom India attempted to establish “positive neutralism” between the emerging

80. D’SOUZA, WHAT’S WRONG WITH RIGHTS?, *supra* note 74, at 8.

81. See *Salim v. Uttarakhand & others*, Writ Pet. No. 126 of 2014, ¶ 19 (High Ct. of Uttarakhand, Mar. 20, 2017) (India).

82. See *Uttarakhand v. Salim*, S.Ct. of India (Jul. 7, 2017); GABRIEL ECKSTEIN ET AL., CONFERRING LEGAL PERSONALITY ON THE WORLD’S RIVERS: A BRIEF INTELLECTUAL ASSESSMENT 3 (2019).

83. See Ian Morris, *The Rise and Fall of the Great Powers: China, the European Union, and the United States in the Twenty-First Century*, L’EUROPE EN FORMATION, Winter 2013, at 5, 15–18. See also Kyle Lascurettes, RAND Corp., *The Concert of Europe & Great-Power Governance Today: What Can the Order of 19th-Century Europe Teach Policymakers About International Order in the 21st Century?* 3–4 (2017), <https://www.rand.org/pubs/perspectives/PE226.html> [<https://perma.cc/9TPP-AX3D>].

84. See *supra* Part II.B.2.

85. See Marcin Wojciech Solarz, *‘Third World’: The 60th Anniversary of a Concept that Changed History*, 33 THIRD WORLD Q. 1561, 1561 (2012) (referencing Alfred Sauvy, *Trois monde, une planète*, L’OBSERVATEUR (Aug. 14, 1952)).

superpowers, while participants from Ceylon and Iraq advocated an anti-communist stance.⁸⁶ The periphery was coming together.

In Bandung, the disempowered nations came to a mutual understanding. Besides “the issues of . . . colonialism and political freedom,” the Philippine statesman Carlos P. Romulo observed, “[A]ll who are represented here are certainly concerned with the issue of . . . racial equality.”⁸⁷ The colonized peoples have known “the searing experience of being demeaned in our own lands, of being systematically relegated to subject status not only politically and economically and militarily — but racially as well.”⁸⁸ In 1961, Caribbean psychiatrist Frantz Fanon wrote that the “Third World . . . underdeveloped countries ought to do their utmost to find their own particular values and methods and a style which shall be peculiar to them.”⁸⁹ By crystallizing their experience of exploitation, the Third World identity gave a common cause to the peripheral economies marginalized by the industrial core.

In February 1974, Chairman Mao pronounced his three worlds theory. In his view, “the United States and the Soviet Union belong to the first world. The in-between Japan, Europe and Canada belong to the second world.”⁹⁰ Otherwise, “Asia belongs to the third world. So does the whole of Africa and Latin America.”⁹¹ Two months later, China’s Deng Xiaoping expounded before the United Nations (U.N.) General Assembly. Then-Vice Premier Deng promised that “China was not and would never be a superpower in the future.”⁹² The Maoist version promoted the erstwhile Union of Soviet Socialist Republics (USSR) to the First World, demoting the secondary capitalist powers to the Second.⁹³ Nevertheless, the agrarian populace remained in the Third World.

In the same year, political leaders joined business executives in Davos, Switzerland, for their European Management Forum. By

86. B.R. Tomlinson, *What Was the Third World?*, 38 J. CONTEMP. HIST. 307, 309 (2003).

87. CARLOS P. ROMULO, THE MEANING OF BANDUNG 64 (1956).

88. *Id.* at 68–69; Saunders Redding, *The Meaning of Bandung*, 25 AM. SCHOLAR 411, 415 (1956).

89. FRANTZ FANON, THE WRETCHED OF THE EARTH 99 (Constance Farrington trans., Grove Press 1963).

90. *Chairman Mao Zedong’s Theory on the Division of the Three World and the Strategy of Forming an Alliance Against an Opponent*, MINISTRY OF FOREIGN AFFAIRS, THE PEOPLE’S REPUBLIC OF CHINA https://www.fmprc.gov.cn/mfa_eng/ziliao_665539/3602_665543/3604_665547/t18008.shtml [<https://perma.cc/VL6H-Z2WF>].

91. *Id.*

92. *Id.* (quoting an address to the world federation known as the U.N.).

93. See Herbert S. Yee, *The Three World Theory and Post-Mao China’s Global Strategy*, 59 INT’L AFFS. 239, 239–41 (1983) (referring to the former Communist Russia then known as the USSR).

expanding the scope of the membership, the governmental and civil society representatives were to transform the annual conference into the World Economic Forum (WEF) by 1987.⁹⁴ This non-governmental organization (NGO) confirmed the modern European concept of interaction among the state, civil society, and the market.⁹⁵ Speaking critically, the “invisible hand of the market is joined by the invisible hands of imperial states masquerading as ‘civil society.’”⁹⁶ By convening government officials as well as for-profit leaders, the WEF confirmed the inception of capitalism as a beneficiary of the state.

During the 1970s, two key events in financial history occurred. The rising price of oil, the life-blood of industrial energy, became a crisis; at the same time came “the end of the dollar’s convertibility into gold.”⁹⁷ As a result, “the world’s financial markets underwent competitive deregulation, as countries sought to capture newly-mobile capital and as industries sought to diversify the sources of production by moving offshore.”⁹⁸ Meanwhile, the Organization of Petroleum Exporting Countries (OPEC) members “ended up pouring . . . their newfound riches into Western banks,” that in turn convinced “Third World dictators and politicians to take out loans” that “led to the Third World debt crisis” overseen by the International Monetary Fund (IMF), which, unlike an ordinary business creditor, had the quasi-governmental power “to insist that . . . policies of” austerity take hold.⁹⁹ In effect, this chain of events exacerbated the gap between the Western industrial core and the peripheral yet primary producers in the Third World, opening space for opportunism.

In 1989, a researcher from the Institute of International Economics coined the term Washington Consensus.¹⁰⁰ A decalogue of fiscal reforms represented what the U.S. Government, multilateral financial institutions, and think tanks agreed that Latin American

94. *A Partner in Shaping History – the First 50 Years*, WORLD ECON. FORUM, <https://www.weforum.org/about/history> [<https://perma.cc/38MG-UUC7>] (posted by the World Economic Forum, an international business network).

95. See IMMANUEL WALLERSTEIN, *WORLD-SYSTEMS ANALYSIS: AN INTRODUCTION* 6 (Duke Univ. Press 2004) (discussing civil society including NGOs, a type of voluntary association).

96. D’SOUZA, *supra* note 74, at 36.

97. Bill Maurer, *Islands in the Net: Re-wiring Technological and Financial Circuits in the “Offshore” Caribbean*, 43 *COMPAR. STUDS. SOC’Y & HIST.* 467, 469 (2001).

98. *Id.*

99. GRAEBER, *supra* note 24, at 2 (concerning fossil fuel producers and First World financiers known respectively by the acronyms OPEC and IMF).

100. See JOHN WILLIAMSON, *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* 7 (1990).

and similarly situated Third World debtors should do to overcome their burdens. The list of prescriptions consisted of fiscal discipline, reordering public expenditure priorities, tax reform, liberalizing interest rates, a competitive exchange rate, trade liberalization, liberalization of inward foreign direct investment, privatization, deregulation, and property rights.¹⁰¹ In short, the peripheral countries should imitate the liberal ideals of the core economies. On its face, the capitalist prescription accorded equal treatment to the nations that aspired to develop.

After decades of industrialization, the divisive theory of a tripartite world gave way to a global slogan. In 1995, the World Trade Organization (WTO) emerged as the multilateral vehicle for globalization.¹⁰² Within a decade, the WTO boasted that “China is one of the most recent new Members – and is being followed by Russia, Vietnam and others” whose enrollment “highlights . . . the unique and central role played by the WTO in the economic and development ambitions of its members.”¹⁰³ Until the mid-1980s, China as well as India had pursued “inward-looking policies on trade and investment.”¹⁰⁴ According to the WTO, “the marks of closed economies are lack of democracy and a free media, political repression and the absence of opportunity for individuals to improve their lives through education, innovation, honest hard work and commitment.”¹⁰⁵ With globalization, the member countries are “exploiting the opportunity that the world economy provides for faster growth.”¹⁰⁶ Thus, the world economy resurfaced in neo-liberal ideology.

Globalization was not without its malcontents in the Third World. For example, a Philippine sociologist (and later Congressman) published an exposé of the World Bank’s rural development projects that resulted in growth with immiseration for the benefit of multinational corporations at the expense of local capital, the state, and peasantry.¹⁰⁷ At the grassroots, this was yet another phase of imperialism.¹⁰⁸

101. See John Williamson, *A Short History of the Washington Consensus*, 15 L. & BUS. REV. AM. 7, 9–10 (2009).

102. See SUTHERLAND ET AL., THE FUTURE OF THE WTO ¶ 1 (Geneva 2004).

103. *Id.* ¶ 7.

104. *Id.* ¶ 19.

105. *Id.* ¶ 12.

106. *Id.* ¶ 19.

107. See WALDEN BELLO ET AL., DEVELOPMENT DEBACLE: THE WORLD BANK IN THE PHILIPPINES 1 (1982).

108. See *id.* at 14.

Nevertheless, the latter-day stewards of world capitalism went on. They would deny “any failing in the neoliberal policies of privatisation and liberalisation,” blaming instead “the absence of a secure institutional environment and the rule of law.”¹⁰⁹ As discussed above, the rule of law was in turn a euphemism for the commoditized values of private “property and contract, individual entrepreneurialism, and protection of foreign investors.”¹¹⁰ Today, even the incumbent U.S. Treasury official could not fail to acknowledge criticism to the effect that “capitalist development creates not only great wealth but also great inequality, exclusion, dispossession, and disempowerment.”¹¹¹ Consequently, alternatives to globalization arose.

At the dawn of the next century, Porto Alegre, Brazil, was the location of the *Forum Social Mundial* (FSM or World Social Forum, WSF). The 2001 gathering turned out to be the first of annual conventions of “social movements and projects which share the will to put people and the environment at the centre of the economy,” in order “to put an end to an economy based on extraction, growth, competition and the market.”¹¹² Some participants envisioned an alternative to the world economy as conceived in the sixteenth century in the form of “a socialist world government.”¹¹³ In any case, the economic justice coalition could not overcome internationalization.

In 2004, cosmopolitan India was the site of a grassroots alternative camp.¹¹⁴ The so-called Mumbai Resistance, “seeing a futility in the amorphous presentation of ‘Another Possible World’ by the WSF, seeks to concretely define an alternative socio-economic structure, as one built on a basis of self-reliance, with a total break from all controls, domination and subjugation by imperialism and the institutions of the world capitalist system – such as World Bank,

109. Tor Krever, *The Rule of Law and the Rise of Capitalism*, in HANDBOOK ON THE RULE OF LAW 184 (Christopher May & Adam Winchester eds. 2018) (ebook).

110. Tor Krever, *Law, Development & Political Closure under Neoliberalism*, in NEOLIBERAL LEGALITY 22, 23 (Honor Brabazon ed. 2017).

111. Krever, *supra* note 109, at 200. Cf. Itai Grinberg, Comment on Miranda Stewart’s “Redistribution Between Rich and Poor Countries”, 72 BULL. INT’L TAX’N 310 (2018) (containing commentary by a sometime Treasury official on global inequality).

112. *What Is FSMET?*, WORLD SOC. FORUM OF TRANSFORMATIVE ECONOMIES (2020) <https://transformadora.org/en/about> [<https://perma.cc/B4QV-X6RN>] (posted by the international social democratic network whose initials in English are WSF).

113. WALLERSTEIN, *supra* note 49, at 607.

114. See generally Pao-yu Ching, *Critical Views of the World Social Forum – from Mumbai Resistance*, 5 INTER-ASIA CULT. STUD. 331 (2004) (explaining how Mumbai Resistance 2004 (MR2004) was initiated and how it criticized the funding structure of WSF).

IMF, WTO, TNCs, *etc.*”¹¹⁵ The Philippine communist representative said that WSF “harps on ‘civil society’ as to mean good citizenship and docile nongovernmental organizations under the bourgeois state system whose violence is directed against the working people.”¹¹⁶ As the neo-liberal ideology confirmed the industrial-capitalist First World and the socio-economic justice coalition confirmed the Second, the anti-imperialist camp demonstrated that the Third World masses remained in the margin.

D. *Global South*

In 1980, an NGO reported on the economic plight in the southern hemisphere.¹¹⁷ Under the heading “North-South,” the so-called Brandt Commission promulgated “A Program for Survival.” In 2003, the initiative of the U.N. Development Program was “Forging a Global South.”¹¹⁸ By the middle of the first decade of the twenty-first century, commentators could refer to a “Beijing Consensus” as “an alternative to the neoliberal Washington Consensus.”¹¹⁹ The former meant “the Chinese commitment to autonomy, equity, and social justice—if only at the level of an ideology of global relationships that counters a hegemonic neoliberal order that would place the fate of humanity in the marketization of society itself, and the privatization of its lifelines.”¹²⁰ The recent industrialization of the world’s most populous country contributed to the recombination of the Second and Third Worlds in the Global South.¹²¹

E. *Great Rivalry Across the Pacific*

As introduced above, the continuous development of the East Asian pristine state has occupied the middle of world history.¹²² Although “Confucian orthodoxy was overtly hostile to merchants and even the profit motive itself,” the ancient “bureaucracy . . .

115. *Mumbai Resistance 2004*, ANTI-IMPERIALIST CAMP (Aug. 27, 2003), <https://www.antiimperialista.org/en/node/2088> [<https://perma.cc/4JKC-G9H8>].

116. Jose Maria Sison, *Message to the Mumbai Resistance 2004*, 2–3 (Jan. 15, 2004, 7:29 PM), <https://www.nadir.org/nadir/initiativ/agp/free/wsf/mumbai2004/0115sison.htm> [<https://perma.cc/H758-DCJG>].

117. INDEP. COMM. INT’L DEV. ISSUES, NORTH-SOUTH: A PROGRAM FOR SURVIVAL (1980).

118. U.N. DEV. PROGRAMME, FORGING A GLOBAL SOUTH (2003).

119. Arif Dirlik, *Global South: Predicament and Promise*, 1 GLOB. S. 12, 17 (2007).

120. *Id.* at 18.

121. See generally FREDERICK COOPER & ANN LAURA STOLER, TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD (Univ. Calif. Press 1997) (discussing the interaction between the former Third World colonies and the industrial metropole).

122. See *supra* Part II.A.3.

actively promoted markets, and as a result, commercial life in China soon became far more sophisticated, and markets more developed, than anywhere else in the world.”¹²³ Since then, like “the early industrializing capitalist core” discussed above, “its East Asian counterparts developed on a diet of state-coordinated policy interventions anathema to the pieties found in contemporary economics textbooks.”¹²⁴ In the twentieth century, “China’s Great Leap Forward and Cultural Revolutions were attempts to develop a capitalist-style economy without capitalist politics and culture.”¹²⁵ Historically, the market was a creature of the government.¹²⁶

That history has conditioned the future. Now, China has the potential to create a political-economic regime “by which competing firms also cooperate, pooling financial, commercial, and technological resources—with a partnership between government and business, between public organs or social organization and private producers.”¹²⁷ Meanwhile, “the World Bank and other development agencies are using the knowledge gained through activist scholarship.”¹²⁸ This is the alternative to “the antiquated Fordist style of industry—mass production of standardized goods, with rigid machines and production processes, operated by semi-skilled labour” governed by “individual property rights, free-ranging inequality, and semi-democratized government.”¹²⁹ The civilization that originally problematized the notions of empire and colony now may refract capitalism with communism.

The possibilities are not without peril. As Dr. Kissinger acknowledged, China was the land that “produced a greater share of total world GDP than any Western society in eighteen of the last twenty centuries.”¹³⁰ After half a century of communism, the economists of inequality can now quantify the asymmetry of accumulation in China.¹³¹ Now the millennial middle class has deployed a tactic “to

123. GRAEBER, *supra* note 24, at 260.

124. Tor Krever, *The Legal Turn in Late Development Theory: The Rule of Law and the World Bank’s Development Model*, 52 HARV. INT’L L.J. 288, 318 (2011).

125. D’SOUZA, *supra* note 74, at 193.

126. *See id.*

127. Roberto M. Unger & Zhiyuan Cui, *China in the Russian Mirror*, NEW LEFT REV. 78, 82 (1994).

128. Radha D’Souza, *The Prison Houses of Knowledge: Activist Scholarship and Revolution in the Era of “Globalization,”* 44 MCGILL J. EDUC. 19, 32 (2009).

129. Unger & Cui, *supra* note 127, at 83, 87.

130. HENRY KISSINGER, ON CHINA 11–12 (2012).

131. *See generally* Thomas Piketty, Li Yang & Gabriel Zucman, *Capital Accumulation, Private Property & Rising Inequality in China, 1978–2015* (Nat’l Bureau Econ. Rsch., Working Paper No. 23368, 2017) (supplying “the first estimates of the level and structure of China’s national wealth since the beginning of the market reform process” while finding “the top

lie flat” rather than striving toward unpromising career advances.¹³² This posture resembles that of the satirized sleepwalkers in the shopping mall at the twilight of consumer capitalism in the West.¹³³ The future holds at least as many variabilities as the past.

As a culmination of ancient civilization, modern markets, and post-modern globalization, the world economy has been left with a Great Rivalry dominated by two states.¹³⁴ On one side of the Pacific Ocean lay the New World consumer republic with a regressive, hidden welfare state.¹³⁵ On the other side rose the Middle Kingdom’s communist heir with commercial characteristics.¹³⁶ Navigation between these two civilizations became the current task.

III. SOCIAL SCIENCE

The economic history among the nations of the world was followed by intellectual history to rationalize the emerging order. To succeed the comparative propositions of political economy, social science offered academic objectivity.¹³⁷ This year’s economics,

10% income share rose from 27% to 41% of national income between 1978 and 2015, while the bottom 50% share fell from 27% to 15%”).

132. See David Bandurski, *The ‘Lying Flat’ Movement Standing in the Way of China’s Innovation Drive*, BROOKINGS: TECHSTREAM (July 8, 2021), <https://www.brookings.edu/techstream/the-lying-flat-movement-standing-in-the-way-of-chinas-innovation-drive/> [https://perma.cc/KEH6-YMES].

133. See, e.g., Kyle William Bishop, *The Idle Proletariat: Dawn of the Dead, Consumer Ideology, and the Loss of Productive Labor*, 43 J. POPULAR CULTURE 234, 234–35 (2010) (describing American zombies as a metaphor for “slaves to the master of consumerism”).

134. See generally YI WEN, *THE MAKING OF AN ECONOMIC SUPERPOWER: UNLOCKING CHINA’S SECRET OF RAPID INDUSTRIALIZATION* (2016) (ebook) (arguing that China is poised to overtake the United States as the next economic superpower in the twenty-first century “because of its correct state-led development strategy and its much larger unified domestic market”).

135. See LIZABETH COHEN, *A CONSUMERS’ REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA* 23 (1st ed. 2004) (stating that the Democratic administration’s response to the Great Depression with the New Deal created a national welfare state in which “industrial relations were restructured around state-sanctioned collective bargaining, and the federal government assumed a more active role in the economy”). See also San Juan, *supra* note 57, at 675. See generally CHRISTOPHER HOWARD, *THE HIDDEN WELFARE STATE: TAX EXPENDITURES AND SOCIAL POLICY IN THE U.S.* (1997) (examining major tax expenditure programs with social welfare objectives that remain hidden from the United States public as well as policy makers and academics despite their “impressive size and scope”).

136. Cf. Jiang Zemin, *Hold High the Great Banner of Deng Xiaoping Theory for an All-round Advancement of the Cause of Building Socialism with Chinese Characteristics’ Into the 21st Century*, BEIJING REV. (Mar. 25, 2011), www.bjreview.com.cn/document/txt/2011-03/25/content_363499.htm# [https://perma.cc/2TCY-5VU3] (labeling “socialism with Chinese characteristics” as “Deng Xiaoping Theory”).

137. See *infra* Part III.B.

anthropology, and allied disciplines owe their heritage to the classical inquiry.

A. *Classical Political Economy*

From its dawn, the Western Enlightenment was a comparative project.¹³⁸ The Scots professor's treatise was, on its face, "an inquiry into the nature and causes of the wealth of nations."¹³⁹ In 1776, Smith observed there that "China is a much richer country than any part of Europe."¹⁴⁰ Since then, the East-West dialectic has continued to be the stuff of political economy.

In the next century, the European theorists elaborated. The Anglo-German critics of political economy opined that "the cruelest form of state, Oriental despotism," reigned "from India to Russia" based on an Asiatic Mode of Production which was "an agglomeration of *villages*, each with its own distinct organisation and each forming its own small world."¹⁴¹ No wonder the autarkic East was ripe for commercial conquest when the ships sailed down from the Atlantic to establish the world economy discussed above.¹⁴²

Subsequently, the German socio-legal scholar closed the loop. According to Weber, the Lutheran Reformation of the Roman Church had exposed secular values of an "impulse to acquisition, pursuit of gain, of money, of the greatest possible amount of money."¹⁴³ In turn, "rational enterprise under individual initiative, with fixed capital and certainty of calculations" arose "in a comparative state of legal and formalistic perfection only in the Occident."¹⁴⁴ Thus, the maximizing rational actor was a native of Europe.

138. See generally GIOVANNI ARRIGHI, ADAM SMITH IN BEIJING 2 (2007) (discussing "Adam Smith's prediction of an eventual equalization of power between the conquering West and the conquered non-West").

139. ADAM SMITH, AN INQUIRY INTO THE NATURE & CAUSES OF THE WEALTH OF NATIONS (1776) (ebook).

140. *Id.* at 264.

141. FRIEDRICH ENGELS, HERR EUGEN DÜHRING'S REVOLUTION IN SCIENCE pt. II ch. IV (Emile Burns trans., 1894); KARL MARX, PREFACE TO CRITIQUE OF POLITICAL ECONOMY (1859) (ebook); Marx, Ltr. to Engels (June 14, 1853) 39 MARX & ENGELS COLLECTED WORKS 347 (2010).

142. See WEN, *supra* note 134, at 75, 99 (noting "the lack of a well fermented market and intermediaries to organize India's massive number of autarkic and anarchic peasants to form organizations based on the principle of the division of labor").

143. MAX WEBER, THE PROTESTANT ETHIC & THE SPIRIT OF CAPITALISM xxxi (Talcott Parsons trans., Routledge Classics 2001) (1930).

144. *Id.* at xxxviii.

Meanwhile, nascent social science confirmed the natural order of nations. Adapting “that which Mr. Darwin has called ‘natural selection,’” the self-styled English sociologist coined the term “survival of the fittest” for “the preservation of favoured races in the struggle for life.”¹⁴⁵ Social Darwinism explained: “The poverty of the incapable, the distress that comes upon the imprudent, the starvation of the idle, and those shouldering aside of the weak by the strong, which leave so many ‘in shallows and in miseries,’ are the decrees of a large, farseeing benevolence.”¹⁴⁶ The new social science rationalized human exploitation.

Ultimately, the heirs of social science would have to interpret the classical theories considering the information then available about Asia and the rest of the world beyond Europe. Nowadays, critics note “the resilience of social Darwinism in development theories, how the World Bank continues to embrace the legal theories of Sir Henry Maine (legal advisor to the British colonial government in India) on societies moving from ‘status’ to ‘contract’ forms of legal relations.”¹⁴⁷ Nevertheless, eighteenth and nineteenth century political economy offers a classical intellectual genealogy to the social science of economic development.

B. *Anthropological Evolution*

In the twentieth century, social scientists updated the views of the nineteenth century political economists. The natural contrast between European rationality and Asian obedience was reoriented to the staple crop evolution of wheat agriculture by rainfall *versus* the engineered irrigation of rice paddies.¹⁴⁸ According to an authoritative restatement:

The modest Tower of London and the dispersed castles of Medieval Europe express the balanced baronial society of the Magna Carta as clearly as the huge administrative cities and colossal palaces, temples, and tombs of Asia, Egypt, and ancient America express the organizational coordination and the mobilization potential of hydraulic economy and statecraft.¹⁴⁹

The organic formation of “hydraulic despotism” explained the fundamental difference of the Orient.¹⁵⁰

145. HERBERT SPENCER, *PRINCIPLES OF BIOLOGY* 444–45 (1864).

146. HERBERT SPENCER, *SOCIAL STATICS* 323 (1851).

147. Radha D’Souza, *Introduction to the Special Issue: Postcolonialism, Realism & Critical Realism*, 9 J. CRITICAL REALISM 263, 265 (2010).

148. *See generally* KARL WITTFOGEL, *ORIENTAL DESPOTISM* (Yale Univ. Press 1957).

149. *Id.* at 45.

150. *Id.* at 101.

At the height of the Cold War, the dean of cultural interpretation confirmed that modernization would arrive in Asia to parallel values from overseas. In the case of Javanese peasants, the inland masses remained mired in “agricultural involution, shared poverty, social elasticity, and cultural vagueness,” but “a small minority of the Outer Island peasants moved toward agricultural specialization, frank individualism, social conflict, and cultural rationalization.”¹⁵¹ Ethnography confirmed that Western-style values would motivate economic development.

After the fall of the Berlin Wall, political scientists advised that the clash of civilizations would persist beyond national striving toward economic development. “The great divisions among humankind and the dominating source of conflict will be cultural,” superseding the Westphalian states.¹⁵² There were “seven or eight major civilizations . . . Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and possibly African civilization.”¹⁵³ At the time, Professor Samuel Huntington thought that “[a]part from Japan, the West faces no economic challenge.”¹⁵⁴ Candidly, he wrote that through “the IMF and other international economic institutions, the West promotes its economic interests and imposes on other nations the economic policies it thinks appropriate.”¹⁵⁵ Harking back to the nineteenth-century view of the exotic Orient, late twentieth-century social science confirmed that the political landscape consisted of “the West versus the rest.”¹⁵⁶

After the totalizing hydrology of Oriental despotism, technology faltered in East Asia. Revisiting the comparative project of the Enlightenment, Professor David Landes taught that the “rejection of foreign technology was the more serious because China itself had long slipped into technological and scientific torpor, coasting along on previous gains and losing speed as talent yielded to gentility.”¹⁵⁷ In his view, engineering, or the commercial application of science and technology, was the engine of economic development.

Against the foregoing intellectual history, the current discipline evolved. When the evolutionary psychologists coined the term WEIRD, the acronym was a multi-cultural rejoinder to the universal

151. CLIFFORD GEERTZ, *AGRICULTURAL INVOLUTION* 123 (1963).

152. Samuel P. Huntington, *The Clash of Civilizations?*, 72 *FOREIGN AFFS.* 22, 22 (1993).

153. *Id.* at 25.

154. *Id.* at 39.

155. *Id.*

156. *Id.*

157. DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS* 342 (1998).

assumptions of Western science.¹⁵⁸ Problematizing European psychology, they then sought the historical origins of the rationalizing assumptions. Updating the nineteenth century theory of the Protestant ethic, they found that pre-modern Christianity, culminating in the Gregorian church, which had already expanded the incest taboo, “slowly degraded, dismantled, and eventually demolished” the “intensive kin-based institutions of many European tribal populations.”¹⁵⁹ By “dissolving intensive kinship and shifting people’s psychology,” the Church “opened the way for the slow expansion of political pluralism and modern democracy.”¹⁶⁰ Rehabilitating the Weberian theory, the psychological anthropologists concluded that “[b]y driving widespread literacy, Protestantism thickened people’s *corpus callosa*, sharpened their verbal memories, and eroded their facial recognition abilities.”¹⁶¹ Through psychological anthropology, the divergent evolution of the brain was now grounded in history.

Revisiting the comparative project, this year’s anthropologists updated the Western prescription for Asia. They observed that by capitalizing on pre-existing cultural adaptations such as teamwork, “Japan, South Korea, and China, have been able to adapt relatively rapidly to the economic configurations and global opportunities created by WEIRD societies.”¹⁶² For example, after “a 30-year hiatus” in the People’s Republic, Chinese “clans were soon competing over land and access to economic opportunities,” when those became available under Chairman Deng, “especially in multiclan villages.”¹⁶³ Ironically, twenty-first-century anthropology circled back to the universal evolution of capitalism.

Nevertheless, the current cohort of evolutionary anthropologists have not been naïve sociobiologists. The former conceded that “kin selection and reciprocal altruism” were not only “insufficient to explain cooperation in the modern world, or in other complex societies,” but moreover “they are insufficient to explain cooperation in small-scale societies,” including those of “nomadic hunter-gatherers.”¹⁶⁴ Instead, anthropology’s new generation has

158. See Joseph Henrich et al., *The Weirdest People in the World?*, 33 BEHAV. & BRAIN SCI. 61, 63–64 (2010).

159. HENRICH, *supra* note 6, at 165.

160. *Id.* at 412.

161. *Id.* at 418.

162. *Id.* at 476.

163. *Id.* at 358.

164. JOSEPH HENRICH, *THE SECRET OF OUR SUCCESS: HOW CULTURE IS DRIVING HUMAN EVOLUTION, DOMESTICATING OUR SPECIES, AND MAKING US SMARTER*, at 172 (2016) (ebook).

observed that “cultural evolution can produce sticky social norms that are bad for everyone” especially because “cultural adaptations, including tools, practices, and recipes, has led our species to be capable of placing immense faith on cultural information, often trumping our own direct experience.”¹⁶⁵ This cultural view of evolution has superseded both nineteenth-century social Darwinism and its twentieth-century successors.

C. *Critique of Orientalism*

Meanwhile, social theorists developed alternatives to the evolutionary narrative. At the Eastern edge of Europe, the early twentieth-century advocates for the revolutionary overthrow of capitalism divined “in the destiny of backward countries . . . the universal law of unevenness . . . the law of combined development – by which we mean a drawing together of the different stages of the journey, a combining of separate steps, an amalgam of archaic with more contemporary forms.”¹⁶⁶ In particular, they saw in the Russian czarism not merely agrarian feudalism but also the effects of world capitalism.¹⁶⁷ To reconcile their revolutionary aspiration for the peasantry with Marx’s disdain for those who had to be “rescued . . . [from] the idiocy of rural life,” they coined the oxymoron “rural proletariat.”¹⁶⁸ Paradoxically, the evolution of the world as a system meant that some countries would remain underdeveloped.

Nevertheless, those who conceived of capitalism as a world system maintained a perception of historical stages. Due to the overwhelming effects of international trade, bolstered by coercive force, “there is no such thing as ‘national development’” to the extent that each nation was as much a product of global force as indigenous practice.¹⁶⁹ Instead, “the proper entity of comparison is the world-system,” where evolutionary stages occurred as a whole.¹⁷⁰ The myopic scope of any one country created an appear-

165. *Id.* at 106, 175.

166. LEON TROTSKY, *THE HISTORY OF THE RUSSIAN REVOLUTION* 5–6 (Max Eastman trans., 1932) (ebook).

167. *See id.* (discussing the effect of archaic feudalism and contemporary capitalism on the Bolshevik Revolution).

168. Karl Marx & Frederick Engels, *Manifesto of the Communist Party*, MARXISTS INTERNET ARCHIVE (Feb. 1848) <https://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf> [<https://perma.cc/CN9D-NNC6>]; Vladimir I. Lenin, *The Proletariat and the Peasantry*, LENIN INTERNET ARCHIVE (2003) (1905) <https://www.marxists.org/archive/lenin/works/1905/mar/23.htm> [<https://perma.cc/BY94-XJFP>].

169. Wallerstein, *supra* note 39, at 390.

170. *Id.*

ance of “stage-skipping” which was “nonsense.”¹⁷¹ Socio-historically, the “genesis of capitalism was not in the triumph of a new group, the urban burghers, over the landed feudal nobility” but rather “the reconversion of seignior into capitalist producer, an essential *continuity* of the ruling families.”¹⁷² In any case, evolution was instantiated by concrete historical experience.

In 1978, Professor Edward Said debunked Orientalism. He wrote the following:

[P]oets, novelists, philosophers, political theorists, economists, and imperial administrators, have accepted the basic distinction between East and West as the starting point for elaborate theories, epics, novels, social descriptions and political accounts concerning the Orient, its people, customs, ‘mind,’ destiny, and so on.¹⁷³

Consequently, Orientalism became “the corporate institution for dealing with the Orient . . . making statements about it, authorizing views of it, describing it, by teaching it, settling it, ruling over it: in short, Orientalism as a Western style for dominating, restructuring, and having authority over the Orient.”¹⁷⁴ Harking back to the eighteenth and nineteenth century speculation on the Asiatic mode of production, Orientalism was a locus of both knowledge and power.¹⁷⁵

The next year, Professor Ezra Vogel announced that Japan ranked first among nations. Beyond the contemporary manufacturing boom, “in the effectiveness of its present-day institutions in coping with the current problems of the postindustrial era Japan is indisputably number one.”¹⁷⁶ Not only had Japan surpassed other industrial countries, but it had socio-political lessons as well. For instance, to “achieve the purpose for which regulations were created, Americans would do well to follow the Japanese model and rely on moral suasion, on creating a consensus of concerned people who can exert their positive influence.”¹⁷⁷ At this point, East Asia had turned into a mirror of the industrial world.

171. *Id.*

172. Immanuel Wallerstein, *A World-System Perspective on the Social Sciences*, 27 *BRIT. J. SOCIO.* 343, 350 (1976). See also Eric A. San Juan, *Fiscal Anthropology: Production, Consumption, Wealth & Taxation*, 30 *REV. L. & SOC. JUST.* 251, 260 (2021).

173. EDWARD W. SAID, *ORIENTALISM* 2–3 (1979) (1978).

174. *Id.* at 3.

175. See *id.*

176. EZRA F. VOGEL, *JAPAN AS NUMBER 1: LESSONS FOR AMERICA* 22 (Harv. Univ. Press 1979).

177. *Id.* at 236.

Whereas the previous theories had advanced the term Oriental Despotism to encompass continental stasis, social anthropology responded with cultural particularism.¹⁷⁸ Contrary to despotism, “between *c.* 600 and 321 BCE, India had a series of ‘republican’ institutions . . . originated either in ‘tribes’ (presumably acephalous peoples) or in refugees from the kingdoms” who “elected leaders and instituted voting procedures . . . and assemblies.”¹⁷⁹ As discussed above, evolutionary anthropology focused on the legitimacy of Christian marriage, and likewise, a “number of historians . . . as well as many sociologists, see modern Europe as marked by a particular constellation of sentiments, including love, that characterised, even promoted, the contemporary world in ways that were more difficult for others to accomplish.”¹⁸⁰ On the contrary, that “same element of distance and idealization is found in the extensive tradition of love poetry which the Chinese developed dating back to *The Book of Songs* from the ninth to the seventh century BCE.”¹⁸¹ Ethnography in particular offered sharp tools to puncture European exceptionalism.

After the Second World War, social scientists confronted a divided landscape. In particular, anthropology was “rooted in an unequal power encounter between the West and Third World which goes back to the emergence of bourgeois Europe, an encounter in which colonialism is merely one historical moment.”¹⁸² As a practical matter, the division of the Earth among the Great Powers meant that each of the various indigenous peoples “fell under the political jurisdiction of a modern state, which guaranteed order and the safe access of the anthropologist.”¹⁸³ Eventually, many social anthropologists came to see themselves as spokespersons for the Third World.¹⁸⁴

Eventually, two competing schools of anthropology emerged. On one hand, social anthropologists hoped to articulate the experience of ethnographic subjects whose distinct practices were nec-

178. See generally WITTFOGEL, *supra* note 148.

179. JACK GOODY, *FOOD & LOVE: A CULTURAL HISTORY OF EAST & WEST* 268–69 (Verso 1999).

180. *Id.* at 96.

181. *Id.* at 111.

182. Talal Asad, *Introduction to ANTHROPOLOGY & THE COLONIAL ENCOUNTER* 16 (Talal Asad ed., 1973).

183. WALLERSTEIN, *supra* note 95 at 7.

184. See Clifford Geertz, *Culture War*, N.Y. REV. BOOKS (Nov. 30, 1995), <https://www.nybooks.com/articles/1995/11/30/culture-war/> [<https://perma.cc/SD3R-K6P8>] (comparing a cultural anthropologist to a “Public Defender”).

essarily overwhelmed by the world economy.¹⁸⁵ On the other hand, biological anthropologists inherited the long-standing evolutionary tradition.¹⁸⁶ Once anthropology had aspired to multiple sub-fields, but now division became the order of the day.¹⁸⁷

During the late twentieth century, in-fighting within anthropology reflected the theoretical competition. According to one critic:

Anthropologists who operate with synchronic, idealist, structuralist and eclectic research strategies incapable of producing interpenetrating sets of theories about the divergent and convergent trajectories of sociocultural evolution have only themselves to blame if sociobiologists step into what appears to be an intellectual disaster area.¹⁸⁸

The parochial splinters aligned with concerns fundamental to political economy. At the same time, socio-legal scholars observed that:

[T]hose who have rebelled against the intimidating example of natural science have often done so by assimilating social theory to the humanities. The result has been to abandon the causal explanation of social facts and historical events to people who hold up the example of a single-minded view of science.¹⁸⁹

Consequently, the question remained whether social science could validate extant cultures within the world system that had arisen in the sixteenth century.

One attempt to reconcile the particular cultures with the general system was as follows. The imposition of industrial capitalism on feudal agriculture through international trade meant that “the two modes of production ‘articulated’ with each other, and therefore each was affected in some way by the other.”¹⁹⁰ The theory of articulation may have validated the underdeveloped country.¹⁹¹ Interpreting the world economy from the perspective of the “people without history,” it was the Europeans who had “learned to copy Indian textiles and Chinese porcelain, to drink native American chocolate, to smoke native American tobacco, to use Arabic

185. *See id.*

186. *See, e.g.,* HENRICH, *supra* note 6.

187. *See* Robert Welsch & Luis Vivanco, ASKING QUESTIONS ABOUT CULTURAL ANTHROPOLOGY: A CONCISE INTRODUCTION 21 (2016).

188. MARVIN HARRIS, CULTURAL MATERIALISM: THE STRUGGLE FOR A SCIENCE OF CULTURE 140 (1979).

189. ROBERTO MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK 11 (1987).

190. WALLERSTEIN, *supra* note 49, at 22.

191. *See* Akhil Gupta & James Ferguson, *Discipline & Practice: “The Field” as Site, Method and Location in Anthropology*, in ANTHROPOLOGICAL LOCATIONS 24–25 (1997).

numerals.”¹⁹² The supposedly isolated primitives included the civilizations that originally had advanced their culture beyond their gates.¹⁹³

By the twenty-first century, reconciliation between anthropologists was foregone. Then “the fight tended to be fiercest” in “university anthropology departments” resulting in “cultural and evolutionary wings that . . . split into two entirely separate departments” on prominent campuses.¹⁹⁴ In this instance, the WEIRD author has assumed the chair of an Ivy League Department of Human Evolutionary Biology.¹⁹⁵ The ongoing reconstitution of the Weberian narrative in evolutionary terms has represented a triumph of biological anthropology.

Meanwhile, the emergence of China into world capitalism has re-opened a fundamental question of political economy.¹⁹⁶ Whereas the nineteenth century writers had dismissed the Middle Kingdom as a thing of the past, now world-system researchers have revisited China’s impact on early modern trade.¹⁹⁷ It was undeniable that China led the export of “silks and ceramics and . . . also of gold and copper coin and later of tea.”¹⁹⁸ Quantitatively, “in 1750 Asia’s 66 percent share of the world’s population produced 80 percent of the world’s GNP, while Europe’s 20 percent of population produced less than the remaining 20 percent of world output, since Africa and the Americas also contributed to the same – and to European GNP itself.”¹⁹⁹ If the prior social scientists had underestimated the output of the East Asian empire, their theory of the Asiatic Mode of Production also may have represented a misunderstanding.²⁰⁰

Recently, archaeologists have proposed an objective measure by which to compare civilizations. Ecologically, they have viewed culture as the product of energy multiplied by technology, or “ $C = E \cdot$

192. ERIC R. WOLF, *EUROPE & THE PEOPLE WITHOUT HISTORY* 3 (Univ. Calif. Press 1982).

193. *See id.*

194. IAN MORRIS, *THE MEASURE OF CIVILIZATION: HOW SOCIAL DEVELOPMENT DECIDES THE FATE OF NATIONS* 16 (2013) (ebook).

195. *See* HENRICH, *supra* note 6, at 652.

196. *See generally* MORRIS, *WHY THE WEST RULES—FOR NOW* (2010).

197. *See* ANDRE GUNDER FRANK, *REORIENT: GLOBAL ECONOMY IN THE ASIAN AGE* 114–15 (1998).

198. Andre Gunder Frank, *ReOrient Histography and Social Theory* 18 (Rsch. Ctr. Dev. & Int'l Rel., Working Paper No. 94, 2000).

199. *Id.* at 21.

200. *See generally* STEWART GORDON, *WHEN ASIA WAS THE WORLD: TRAVELING MERCHANTS, SCHOLARS, WARRIORS & MONKS WHO CREATED THE RICHES OF THE EAST* (2008).

T.”²⁰¹ Quantitative metrics of energy capture and technology implementation throughout economic history thus have yielded a comparative index of civilizations.²⁰² By this measure, the East produced more material culture than the West until the first century BCE and between 541 and 1773 CE.²⁰³ Despite “the impressive performance of early-modern Europe,” discussed above in the context of the world economy, “truly revolutionary changes came only after 1800 CE, as northwest Europeans unlocked and applied the energy trapped in fossil fuels.”²⁰⁴ Moreover, “the ‘rise of the east’ in the past fifty years is not a temporary hiccup in the story of Western dominance . . . it is the outcome of a medium-term historical trend, driven by changes in the meaning of geography (above all, the effective shrinking of the Pacific Ocean) that go back more than a century.”²⁰⁵ Since the eighteenth century, social science and its predecessors have been a comparative project. Yet now its measures may be refined, yielding different insights.

D. *Terminal Civilization*

Overall, the world-historical emergence of complex societies from technologically simple ones remains a question of political economy and particularly anthropology.²⁰⁶ While a biological anthropologist could observe the inevitability of evolution, a social anthropologist has noted that “[s]tratification and specialization . . . tend to promote overpopulation, overconsumption, and other symptoms of the environmental crisis, and are clearly linked to poverty, war, crime, and many personal crises.”²⁰⁷ This was not to resort to a romanticized “noble savage.”²⁰⁸ Nevertheless, evolution-

201. MORRIS, *supra* note 194, at 12. See Leslie A. White, *Energy and the Evolution of Culture*, 45 AM. ANTHROPOLOGIST 335, 338 (1943); Leslie A. White, *History, Evolutionism & Functionalism*, 1 S.W.J. ANTHROPOLOGY 221, 241 (1945) (identifying technology as a factor on which a functionalist would focus when writing about the structure and function of the system).

202. See MORRIS, *supra* note 194, at 12.

203. *Id.* at 241.

204. *Id.* at 252.

205. *Id.* at 262.

206. See generally DAVID GRAEBER & DAVID WENGROW, *THE DAWN OF EVERYTHING: A NEW HISTORY OF HUMANITY* (2021) (ebook) (comparing political economists’ and anthropologists’ efforts to explain social change).

207. JOHN BODLEY, *ANTHROPOLOGY AND CONTEMPORARY HUMAN PROBLEMS* 217 (2d ed. 1985).

208. See HERBERT J. MULLER, *THE USES OF THE PAST: PROFILES OF FORMER SOCIETIES* 57 (Oxford Univ. Press 1952). See generally JEAN JACQUES ROUSSEAU, *I SOCIAL CONTRACT* Bk. I.1 (G.D.H. Cole trans., 1762) (emphasizing humanity’s innate goodness in the proclamation that “[m]an is born free”).

ists have conceded that some adaptations prove disadvantageous in changing environments, revealing the trajectory of “terminal civilization.”²⁰⁹ While underdevelopment has been the preoccupation of political economy, now it is overdevelopment, especially the economically explosive exploitation of fossil fuels mentioned above, that has led to the current terrestrial climate crisis.

E. *Summary*

From the nineteenth-century discourse of political economy, which inquired into the relative wealth of nations, came twentieth century social science, which rationalized the clash of civilizations between the East and the West. In the twenty-first century, a reborn evolutionary anthropology has promised to explain the natural adaptations to modernity.²¹⁰ Yet the unavoidable crises of ecology and economy have continued to raise questions for cultural critics.

IV. TAX HAVENS

Against the background of the world economies and associated intellectual history set forth above, governments have imposed taxes to satisfy their need for revenue. At the same time, taxpayers have sought haven from those duties.²¹¹ Geographically and financially, tax havens have been offshore.²¹² Since the world became an international market of legally cognizable attributes for sale to the highest bidder, tax competition for global capital was the financial consequence.²¹³

A. *Precedents*

History offered several precedents for tax havens in Europe and North America. In classical Greece, “nearby islands” were a clandestine depot for goods destined to Athens, which otherwise would have imposed a “custom duty in value of 2%” on imports.²¹⁴ By 1789, Swiss bankers were “offering secrecy . . . for a fee” to French aristocrats hiding their wealth from the revolutionaries.²¹⁵ At the

209. BODLEY, *supra* note 207, at 216.

210. *See supra* Part III.B.

211. *See infra* Part IV.C.

212. *See infra* Part IV.D.

213. *See id.*

214. Eugenia Ramona Mara, *Determinants of Tax Havens*, 32 *PROCEDIA ECON. & FIN.* 1638, 1639 (2015). *See also* U.S. DEPT. OF THE TREASURY, *TAX HAVENS AND THEIR USE BY UNITED STATES TAXPAYERS: AN OVERVIEW* 20 (1981).

215. Palan, *supra* note 67, at 161.

end of the next century, the bankers had established numbered accounts, *les comptes anonymes*, later codified in the Swiss banking law.²¹⁶ By 1868, Prince Charles III abolished the individual impost, making Monaco a tax haven.²¹⁷ By 1880 and 1899, New Jersey and Delaware, respectively, had established “quick company registration” that facilitated “competitive reduction in corporate taxation.”²¹⁸ In 1933, U.S. Justice Louis Brandeis complained that “[c]ompanies were early formed to provide charters for corporations in states where the cost was lowest and the laws least restrictive.”²¹⁹ From the beginning, it was a race to the bottom.

B. Federal Legislation

Upon enacting the Federal income tax, Congress created an incentive to move income abroad. Successive administrations defended against shell companies, excessive deferral, and corporate inversion. By the twenty-first century, globalized business had come in vogue, yet revenue demand still curtailed tax havens.²²⁰

1. Enactment of Income Tax

At the outset, the Federal tax legislation created the incentive to move income overseas.²²¹ Four years before enacting the income tax, the U.S. Congress imposed an excise on the net income of “every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company.”²²² In 1913, Congress confirmed the corporate tax by imposing on individuals, as well as corporations, a

216. See FEDERAL ACT ON BANKS AND SAVINGS BANKS, art. 47 (1934) (Switz.).

217. See Sovereign Ord. (Feb. 8, 1869) Principality of Monaco.

218. Palan, *supra* note 67, at 160; Mara, *supra* note 214, at 1639; see N.J. CONST. art. IV § VII ¶ 11 (1875) (stating “[t]he legislature shall not pass private . . . or special laws . . . [g]ranting to any corporation . . . any exclusive . . . franchise”); An Act Concerning Corporations, 1880 N.J. Laws 92–93 Ch. LXX, sec. 1, § II.10 (stating “[i]t shall be lawful for three . . . or more persons . . . to associate themselves into a company . . . upon making and filing a certificate”); Delaware General Corporations Law, 86 Del. Laws 445 (1899) (allowing “[a]ny number of persons, not less than three . . . to establish a corporation . . . upon making and filing a certificate” instead of requiring a legislative charter to incorporate); see generally Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323, 327 (2007) (explaining “charter competition”).

219. *Liggett Co. v. Lee*, 288 U.S. 517, 558 (1933) (Brandeis, J. dissenting).

220. See *infra* Part IV.B.5.

221. See OFF. TAX POL’Y, DEP’T OF THE TREASURY, THE DEFERRAL OF INCOME EARNED THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS 8 (Dec. 2000).

222. Revenue Act of 1909, ch. 6, 36 Stat. 112, § 38.

tax on income from whatever source (and wherever) derived.²²³ Economically, the result was a “double” tax on income produced by entities as well as people, but attempts to integrate the provisions were short-lived.²²⁴ To clarify, the 1913 legislation covered all income of corporations “organized in the United States, no matter how created or organized” and on certain U.S. source income of corporations “organized, authorized, or existing under the laws of any foreign country.”²²⁵ Ratified by the Sixteenth Amendment, the Federal tax created the incentive to incorporate and produce income abroad.²²⁶ Thereafter, the United States ranked among industrial countries that taxed worldwide income, subject to foreign tax credits, such as Britain, Japan, Norway, and Greece.²²⁷

2. Great Depression

By the time of the Great Depression, U.S. businesses had exploited tax havens.²²⁸ Foreshadowing reports below, the “Bahama Islands are not a suitable place for the development of great corporate enterprises,” U.S. Treasury Secretary Roswell Magill complained, yet “long lists of impressive sounding corporations, financed by American capital, appear on the directories of the local office buildings.”²²⁹ By way of explanation, he added, “[t]he inhabitants are poverty stricken.”²³⁰ The contrast between the capitalist core and the tropical periphery marked the instantiation of tax havens dating back to the Franklin Delano Roosevelt Administration.²³¹

In 1932, legislation addressed the abuse of tax havens.²³² To stem the movement of capital offshore, the statute required recognition of gain on the transfer of property to a foreign corporation unless the Commissioner of Internal Revenue was satisfied that the

223. See Revenue Act of 1913, ch. 16, 38 Stat. 114, § II.B.

224. See Leon Gabinet & Ronald J. Coffey, *The Implications of the Economic Concept of Income for Corporation-Shareholder Income Tax Systems*, 27 CASE W. RESV. L. REV. 895, 897–98 (1977); see also Reuven S. Avi-Yonah, *Corporations, Society and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193, 1218 (2004).

225. Revenue Act of 1913, ch. 16, 38 Stat. 114 § II.G.

226. See U.S. CONST. amend. XVI.

227. See James R. Hines Jr., *Do Tax Havens Flourish?*, 19 TAX POL'Y & ECON. 65, 69 (2005).

228. See RANDOLPH PAUL, *TAXATION IN THE U.S.* 207 (1954).

229. Joseph J. Thorndike, *In the 1930s, the Bahamas Became a Problem for Treasury*, TAX NOTES FED. (June 24, 2021), <https://www.taxnotes.com/opinions/1930s-bahamas-became-problem-treasury/2021/06/24/76pmh> [<https://perma.cc/8DCX-92LC>].

230. *Id.*

231. See *id.*

232. See PAUL, *supra* note 228, at 168.

transfer was not principally pursuant to tax avoidance.²³³ Five years later, Congress addressed overseas accumulation by U.S. taxpayers. To capture offshore income, the legislation taxed the undistributed profits of what it characterized as a foreign personal holding company.²³⁴ Essentially, the company was a shell containing the income of a U.S. shareholder. In defense of the income tax, which supplied revenue necessary for the New Deal and other programs, the Roosevelt Administration attacked tax havens.²³⁵

3. Cold War

After World War II, the United States sought to address the “balance of payments,” among other international financial concerns.²³⁶ In 1961, President John F. Kennedy asked Congress to eliminate “tax deferral privileges in developed countries” and “tax haven deferral privileges” in all countries.²³⁷ Specifically, the “undesirability of continuing deferral is underscored where deferral has served as a shelter for tax escape through the unjustifiable use of tax haven[s]” such as Switzerland.²³⁸ Harking back to the incentive to incorporate and produce income abroad as enacted a half-century earlier, his first proposal addressed U.S.-owned foreign subsidiaries in the industrial world.²³⁹ Distinguishing less developed countries, the Kennedy Administration echoed the difference between periphery and core that had been centuries in the making, as discussed above.²⁴⁰

Under the proposal, there would have been no tax incentive to relocate elsewhere in the industrial world from the United States. Nevertheless, Congress rejected this proposal “because tax deferral in developed countries could have been obtained by taxpayers that were conducting normal business operations through non-tax motivated transactions.”²⁴¹ In other words, the first proposal was overbroad since it would have accelerated taxation on foreign subsidiaries that had economic reasons to operate in other industrial

233. See Revenue Act of 1932, S. 665, 72d Cong. § 112(k).

234. See Revenue Act of 1937, ch. 815, 49 Stat. 1732.

235. See Eric A. San Juan, *From Tax Collector to Fiscal Panopticon: A Social History of a Century of Federal Income Taxation*, 15 RUTGERS J.L. & PUB. POL'Y 128, 146 (2018).

236. Warren M. Salomon, *Qualified Investments in Less Developed Countries Under the Revenue Act of 1962*, 18 U. MIAMI L. REV. 675, 682 (1964).

237. H.R. DOC. NO. 87-140 (1961).

238. *Id.*

239. See Karen V. Kole, *The Status of United States International Taxation: Another Fine Mess We've Gotten Ourselves Into*, 9 NW. J. INT'L L. & BUS. 49, 53 (1988).

240. See *supra* Part II.B.

241. See OFF. TAX POL'Y, *supra* note 221, at 125.

countries as well as those that simply sought to avoid tax.²⁴² Consequently, President Kennedy's first proposal did not succeed.²⁴³

The next year, Congress enacted President Kennedy's second proposal.²⁴⁴ Whether in the core or periphery, the legislation would accelerate tax if the foreign subsidiary was effectively in a tax haven.²⁴⁵ Generally, what became Subpart F, governing controlled foreign corporations (CFCs) in the part of the income tax Code on "outbound" transactions, taxed the 10-percent U.S. shareholders on certain CFC income even if not distributed.²⁴⁶ In large part, Subpart F income consisted of passive accruals such as gain, interest, dividends, rent, and royalties from foreign personal holding companies.²⁴⁷ Likewise, Subpart F currently included in the U.S. shareholder's income that of a tax haven corporation.²⁴⁸ As a practical matter, the latter was a foreign base company controlled by one "incorporated elsewhere, to siphon off profits from activities in yet a third country without payment of tax by the controlling corporation and with the payment of little or no tax in the 'tax haven' country."²⁴⁹ To prevent income tax-free repatriation through U.S. investment, the legislation taxed the U.S. parent on the foreign subsidiary's investment of retained earnings in U.S. property.²⁵⁰ Beyond Subpart F, the legislation imposed ordinary income—rather than favorable capital gain—rates on accumulated earnings and profits at the sale of stock in a foreign investment company by a U.S. shareholder.²⁵¹ Thus, the 1962 Act reduced the tax advantage of a foreign subsidiary.²⁵²

At the time of enactment, commentators questioned the constitutionality of accelerating income inclusion. According to them, the provision "has run head-on into *Eisner v. Macomber*," which

242. *See id.*

243. *See id.* at 124.

244. *See* Revenue Act of 1962, Pub. L. No. 87-834, § 12, 76 Stat. 960, 1006 (1962).

245. *See* H.R. REP. NO. 87-2508, at 29 (1962) (Conf. Rep.).

246. *See* I.R.C. § 951(3).

247. *See* I.R.C. §§ 954(a), (c) (including in "foreign personal holding company income" certain "gains . . . [d]ividends, interest, royalties, rents, and annuities") incorporated by reference into § 952(a)(2) (including "foreign base company income" in "subpart F income").

248. *See id.*

249. William D. Popkin, *Less Developed Countries and the Revenue Act of 1962*, 40 IND. L. J. 1, 4 (1964).

250. *See* I.R.C. § 956(a).

251. *See* I.R.C. § 1246(a)(1) as enacted by Pub. L. No. 87-834 § 12, 76 Stat. 960, 1036 (1962) (in case of "foreign investment company stock" allowing for "[t]reatment of gain as ordinary income").

252. *See id.*

announced the realization principle of income recognition.²⁵³ Since 1962, the courts have upheld Subpart F.²⁵⁴ Although the CFC restriction would have raised revenue, the legislation overall, including the investment tax credit, as amended by the Senate, created an estimated loss of \$630 million in Fiscal Year (FY) 1963.²⁵⁵

Obversely, deferral persisted where there was no tax haven.²⁵⁶ This was where the subsidiary paid “foreign income tax approximating the United States rate . . .”²⁵⁷ Satisfactory payment included distribution to the U.S. parent of “earnings sufficient, when the foreign tax burden is taken into account, to make the combined tax paid on retained and distributed earnings approximate the United States rate . . .”²⁵⁸ Likewise, deferral persisted where the gross income of the subsidiary “includes less than 30 per cent in the form of ‘Subpart F income,’” described above.²⁵⁹ By forbearance from acceleration in appropriate circumstances, the enactment of President Kennedy’s second proposal avoided overbreadth.²⁶⁰

Similarly, the 1962 revenue act offered favorable treatment to qualified investments in less developed countries.²⁶¹ The law identified these as countries other than: (1) Australia, Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Liechtenstein, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Union of South Africa, San Marino, Spain, Sweden, Switzerland, and the United Kingdom; and (2) the Sino-Soviet

253. Richard J. Horwich, *The Constitutionality of Subpart F of the Internal Revenue Code*, 19 U. MIAMI L. REV. 400, 412 (1965); see *Eisner v. Macomber*, 252 U.S. 189 (1920).

254. See *Est. of Whitlock v. Comm’r*, 494 F.2d 1297, 1300 (10th Cir. 1974), *aff’d per curiam* 59 T.C. 490 (1972), *cert. denied*, 419 U.S. 839 (1974); *Garlock, Inc. v. Comm’r*, 489 F.2d 197, 203–04 (2d Cir. 1973), *cert. denied*, 417 U.S. 911 (1974).

255. See *supra* text accompanying note 252 (stating “the 1962 Act reduced the tax advantage of a” CFC); S. REP. NO. 87–1881, 87th Cong. 2d Sess. I.B.1, 1962 U.S.C.C.A.N. 3297, 3309 (scoring the bill for “a revenue loss of \$630 million”).

256. See I.R.C. § 963 as enacted by 76 Stat. at 1023 (identifying conditions where “no amount shall be included in gross income . . . of a controlled foreign corporation”).

257. David R. Tillinghast, *U.S. Tax Problems of American Enterprises Operating in Europe Through Subsidiaries (Part II - Under the Revenue Act of 1962)*, 7 SEC. INT’L & COMP. L. BULL. 18, 24 (1963).

258. *Id.* at 24.

259. *Id.* at 25.

260. See I.R.C. § 954 as enacted by 76 Stat. at 1010 (allowing “exclusion and special rules” for foreign base company income).

261. See I.R.C. § 955 as enacted by 76 Stat. at 1013 (defining “qualified investments in less developed countries”).

bloc.²⁶² In general, this delineation aligned with the contemporary notion of the First, Second, and Third Worlds.

In the next decade, Congress reversed the preferences for less developed countries. In 1975, legislation repealed the preferential exclusion from Subpart F income of interest, dividends, and gain from qualified investments.²⁶³ In 1976, Congress repealed the remaining exclusion of earnings accumulated in a less developed country.²⁶⁴ Essentially, Congress “remove[d] a benefit from companies investing or operating in countries with lower marginal returns on capital.”²⁶⁵ At the time, “the Congress believe[d] that it would be preferable to provide whatever assistance is appropriate to less-developed countries in a direct manner where the economic costs can be accurately measured.”²⁶⁶ Moreover, it was “estimated that this provision will result in an increase in budget receipts of \$14 million in fiscal year 1977 and of \$10 million thereafter.”²⁶⁷ Whatever may have been the solicitude of the Kennedy Administration for the Third World, it was ineffective in the view of subsequent legislators.

Later amendment to Subpart F occurred after energy production on earth had reached crisis proportions, as mentioned above.²⁶⁸ In 1982, Congress included in the controlled foreign corporation’s Subpart F income that which related to foreign oil and gas if derived outside of the country of extraction or consumption.²⁶⁹ In effect, this tightened the pre-existing statute in the amount of \$621 million to be received in Fiscal Years 1983 to 1987.²⁷⁰

During the Reagan Administration, Congress enacted the fundamental Tax Reform Act of 1986 (TRA '86).²⁷¹ In pertinent part, the 1986 Code enhanced the rules against deferral by establishing

262. See Exec. Order No. 11,071 (Dec. 27, 1962) (listing the countries in the accompanying text).

263. See Pub. L. No. 94-12 § 602, 89 Stat. 26, 58 (1975).

264. See Pub. L. No. 94-455, 90 Stat. 1520 (1976) amending I.R.C. § 1248.

265. Adam H. Rosenzweig, *Why Are There Tax Havens?*, 52 WM. & MARY L. REV. 923, 977 (2010).

266. JOINT COMM. TAX'N, JCS-33-76, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, 230 (1976).

267. *Id.* at 231.

268. See *supra* Part II.C.

269. See Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982, Pub. L. No. 97-248 § 211, 96 Stat. 324, 448-51 (1982) (amending I.R.C. § 954).

270. See JOINT COMM. ON TAX'N, JCS-38-82, GENERAL EXPLANATION OF THE TAX EQUITY AND FISCAL RESPONSIBILITY ACT OF 1982, 457 (1982).

271. See Tax Reform Act of 1986, Pub. L. No. 99-514 § 1231, 100 Stat. 2085, 2561-63.

the passive foreign investment company (PFIC) regime.²⁷² A PFIC was a foreign corporation in which passive income was either 75 percent or more of gross income or the product of at least half the assets.²⁷³ Generally, the regime required U.S. shareholders to include PFIC income currently.²⁷⁴ The PFIC reform was slated to increase tax by \$81 million from FY 1987 to 1991.²⁷⁵ In principle, acceleration was consistent with Subpart F.

At the same time, the 1986 reform enhanced the transfer pricing rules.²⁷⁶ Beyond foreign incorporation, transfer pricing could achieve tax avoidance through the non-market exchange of goods and services between related firms. Typically, the U.S. taxpayer could overprice goods allocated to the foreign member firm.²⁷⁷ In an economy of high technology, hard-to-value intellectual or other intangible property could be especially susceptible to the transfer pricing technique.²⁷⁸ Consequently, TRA '86 stipulated the inclusion of an amount relative to the transferred property "commensurate with the income attributable to the intangible."²⁷⁹ Over the five years from enactment, the reform of intangible transfer pricing was estimated to raise revenue of \$410 million.²⁸⁰ In the case of a transfer to a foreign firm in the context of an otherwise tax-deferred corporate transaction, the Code already accelerated the recognition of gain commensurate with the disposition of the intangible property.²⁸¹ In these ways, the tax law responded to advances in technology.

Two decades after the Kennedy-era international tax reform, the Comptroller General reported on tax havens.²⁸² According to the General Accounting Office (GAO), tax havens continued to have

272. See I.R.C. § 1291 (governing passive foreign investment companies known by the acronym PFIC).

273. See I.R.C. § 1297.

274. See I.R.C. § 1293 (imposing "[c]urrent taxation of income from qualified electing funds" including PFICs under § 1295).

275. See JOINT COMM. ON TAX'N, JCS-10-87, GENERAL EXPLANATION OF TAX REFORM ACT OF 1986, 1373 (1987).

276. See Tax Reform Act of 1986 § 1231.

277. See JOINT COMM. ON TAX'N, JCX-37-10, PRESENT LAW & BACKGROUND RELATED TO POSSIBLE INCOME SHIFTING & TRANSFER PRICING, 18 (2010) (concerning "the effectiveness of the arm's length standard with respect to intangible property").

278. See H. REP. NO. 99-426, 99th Cong. 1st Sess. 423-24 (1985) (stating at tit. VI.D.2 "The problems are particularly acute in the case of transfers of high-profit potential intangibles.").

279. I.R.C. § 482.

280. See JCS-10-87, *supra* note 275, at 1373.

281. See I.R.C. § 367; see also Revenue Act of 1932 § 112(k).

282. See GENERAL ACCOUNTING OFF., FEDERAL EFFORTS TO DEFINE AND COMBAT THE TAX HAVEN PROBLEM 2-3 (1983).

the same practical advantages as in the past. In particular, tax havens still “(1) impose[d] a low or zero rate of tax on all or certain categories of income, (2) offer[ed] a high level of banking or commercial secrecy, (3) rel[ied] on banking as an important segment of their economy, (4) ha[d] modern communications facilities, (5) d[id] not impose currency controls on nonresidents, and/or (6) promote[d] themselves as tax havens.”²⁸³ Despite the strictures of Subpart F, the underlying incentive to move income overseas persisted from the beginning of the century. While Congress still needed “to protect their own revenue base,” the intervening “neoliberal paradigm” of Ronald Reagan and Margaret Thatcher had eroded the regulatory landscape.²⁸⁴ The stage was set for an era of free trade.

4. Free-Trade Era

In the twenty-first century, economists repeatedly showed that tax havens persisted. In 2002, “the proportion of firms conducting IPOs in the United States that are incorporated in tax havens began to increase[.]”²⁸⁵ While foreign incorporation had been effective since the previous century, a new trend was that “Chinese-headquartered firms drive this increase.”²⁸⁶ At this point, tax avoidance may not have been the primary motivation. Instead, “legislative restrictions relating to foreign ownership of Chinese-incorporated firms, shareholder and creditor rights, listing approval, and foreign exchange convertibility” pointed to the PRC as the headquarters for firms doing business in the United States.²⁸⁷ East Asian industrialization combined with the worldwide income tax to drive corporate homes out of North America.²⁸⁸ The Great Rivalry was on.²⁸⁹

In 2004, Congress attacked corporate inversion.²⁹⁰ This referred to the practice of overturning a U.S. firm to place its headquarters abroad while retaining domestic operation.²⁹¹ The legislation

283. *Id.* at 4.

284. Bill Maurer, *Re-Regulating Offshore Finance?*, 2 GEO. COMPASS 155, 161 (2008).

285. Susan C. Morse & Eric J. Allen, *Tax-Haven Incorporation for U.S.-Headquartered Firms: No Exodus Yet*, 66 NAT'L TAX J. 395, 416 (2013).

286. *Id.* at 395.

287. *Id.* at 410.

288. *See id.* (noting the shift of the capital of corporate industry from the United States to China).

289. *See supra* Part II.E.

290. *See* American Jobs Creation Act of 2004, Pub. L. No. 108-357 § 801, 118 Stat. 1563, 1562-66 (2004) (enacting “[t]ax on inversion gain of expatriated entities”)

291. *See* I.R.C. § 7874.

would tax a multinational corporation as a domestic taxpayer “even after acquisition by a foreign corporation if: (1) at least 80 percent of the foreign corporation’s stock is owned by former owners of the U.S. parent . . . and (2) the firm lacks ‘substantial business activities’” where “the new foreign parent is incorporated.”²⁹² Alternatively, if “at least 60% of the foreign parent’s stock is held by former shareholders of the U.S. company, then the U.S. subsidiary . . . is limited in its ability to claim credits and deductions” for federal income tax purposes.²⁹³ Enacted under the George W. Bush Administration, this legislative restriction on the use of tax havens was to raise revenue of \$830 million from FY 2003 to 2014.²⁹⁴

Subsequently, GAO substantiated the importance of so-called offshore financial centers.²⁹⁵ Specifically, Cayman Islands was “an offshore financial center (OFC) that has no direct taxes and attracts a high volume of nonresident financial activity from the United States and elsewhere.”²⁹⁶ Geographically, the archipelago was “a United Kingdom Overseas Territory located in the Caribbean Sea south of Cuba and northwest of Jamaica, with a total land area approximately 1.5 times the size of Washington, D.C., and a population of 47,862. . . .”²⁹⁷ Economically, “U.S. taxpayers reported about 1,400 controlled foreign corporations incorporated in the Cayman Islands to IRS” in Tax Year 2004.²⁹⁸ Overall, some “5.5 percent of the nearly \$362 billion repatriated between 2004 and 2006 was from Cayman Islands controlled foreign corporations.”²⁹⁹ Echoing reports from the past century, these facts and figures confirmed the financial significance of lands off the shore of America.³⁰⁰

However, GAO declined to characterize the Islands as a tax haven. On the contrary, they were well-regulated. Rather than promoting secret, uncontrolled transactions, Cayman had a

292. Morse & Allen, *supra* note 285, at 399.

293. ERIKA K. LUNDER, CONG. RSCH. SERV., R44617, CORPORATE INVERSIONS: FREQUENTLY ASKED LEGAL QUESTIONS 2–3 (2016).

294. See JOINT COMM. ON TAX’N, JCS-5-05, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 108TH CONGRESS 557 (2005).

295. See generally U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-778, CAYMAN ISLANDS: BUSINESS AND TAX ADVANTAGES ATTRACT U.S. PERSONS AND ENFORCEMENT CHALLENGES EXIST (2008) (arguing that business advantages with tax minimization are a major reason for U.S. entities’ financial activity in the Cayman Islands, one of the OFCs).

296. *Id.* at 4.

297. *Id.* at 6.

298. *Id.* at 4.

299. *Id.*

300. See *supra* Part IV.B.2.

“strong compliance culture” reflected in “a regulatory regime that the International Monetary Fund (IMF) has deemed to be generally in compliance with a broad range of international standards.”³⁰¹ The imprimatur of the First World international financial institution legitimized the tropical jurisdiction.

Furthermore, the Cayman transactions were “typically legal[.]”³⁰² For a U.S. parent company, “a Cayman Islands subsidiary earning foreign income may be able to defer U.S. taxes” assuming compliance with Subpart F.³⁰³ In the case of a federally tax-exempt entity such as a pension fund or university endowment, investment “in hedge funds organized as foreign corporations can be paid in dividends,”³⁰⁴ which legitimately avoid unrelated business income tax that otherwise would apply to exempt entities.³⁰⁵ Thus, technical compliance with the reform dating back to the Kennedy Administration effectively shielded OFCs from taint as tax havens.

Moreover, OFCs defended their own legitimacy. For example, the Premier of the British Virgin Islands (BVI) complained that OFCs merely offered the same financial services as the industrial economies: “Why is it that we now in the colonies, because we are still a colony, can’t have a financial center? . . . If you’re doing something and you’re saying I can’t do it, are you saying that I’m inferior?”³⁰⁶ In other words, to impugn OFCs as tax havens would constitute “a neocolonial effort to subjugate present and former dependencies right at the moment when they had achieved success in the global economy.”³⁰⁷ In particular, the financial sector offered new white collar jobs to family “members of the islands’ historical elites.”³⁰⁸ The Kennedy-era preference for developing countries still resonated. In the age-old discourse of colonies and empires,³⁰⁹ OFC became the new nomenclature.

301. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 295, at 6.

302. *Id.* at 26.

303. *Id.* at 29.

304. *Id.* at 30.

305. See I.R.S. Notice 2018-67, 2018-36 I.R.B. 416 (“subpart F income generally is excluded from the calculation of UBTI”).

306. Bill Maurer, *Jurisdiction in Dialect: Sovereignty Games in the British Virgin Islands*, in EUROPEAN INTEGRATION AND POSTCOLONIAL SOVEREIGNTY GAMES: THE E.U. OVERSEAS COUNTRIES AND TERRITORIES 138 (Rebecca Adler-Nissen & Ulrik Pram Gad eds., 2013) (citing Ben Fox, *Islands Resent Crackdown of Tax Havens by G-20* (April 4, 2009), available at [https://advance-lexis-com./api/document?collection=News&id=urn:contentItem:7VCG-WCN1-2PFT-80XC-00000-00&context=1516831](https://advance.lexis-com./api/document?collection=News&id=urn:contentItem:7VCG-WCN1-2PFT-80XC-00000-00&context=1516831)).

307. Maurer, *supra* note 284, at 163.

308. *Id.* at 169.

309. See *supra* Part II.A.

At the same time, academic studies confirmed the economic substance of overseas incorporation. According to Professor Mihir Desai, different countries supplied financial, organizational, and managerial assets to multinational corporations, especially in a decentered era of global telecommunication.³¹⁰ In an epoch of free trade, tax havens may have become an afterthought.

The year after GAO's Cayman report, the Obama Administration proposed legislative reforms. In 2010, Congress enacted the Foreign Account Tax Compliance Act (FATCA).³¹¹ Generally, this required the withholding of income tax from payments to foreign firms and the reporting of foreign financial assets over \$50,000 by U.S. taxpayers.³¹² Although primarily procedural, FATCA was estimated to raise revenue of \$8,714 million through FY 2020.³¹³

The need to track foreign accounts was underscored by economic research. According to a landmark study published after the enactment of FATCA, eight percent of the world's wealth, amounting to \$5.9 trillion, was held in tax havens.³¹⁴ These immense holdings would correspond to \$200 billion in revenue lost to the world's Treasuries.³¹⁵ The loopholes persisted.

In 2017, Congress enacted sweeping reform in the Tax Cuts & Jobs Act (TC&JA), a signature legislative achievement of the Trump Administration.³¹⁶ Generally speaking, the bill reoriented international taxation from worldwide income to a territorial model. As originally conceived, the tax on worldwide income created an incentive to move income abroad.³¹⁷ In pertinent part, the Trump tax reform reduced that incentive by allowing corporate deduction of dividends received from related foreign corporations.³¹⁸ Given the ever-advancing effect of technology on the industrial economy, TC&JA enacted a tax on income from intangibles, whether global or foreign. At the same time, the legis-

310. See Mihir Desai, *The Decentering of the Global Firm*, 32 *WORLD ECON.* 1271, 1276–77 (2009).

311. See Foreign Account Tax Compliance Act, Pub. L. No. 111-147 §§ 501–541, 124 Stat. 71, 97–117 (2010).

312. See I.R.C. §§ 1471–74; I.R.C. § 6038D.

313. See JOINT COMM. ON TAX'N, JCS-2-11, GENERAL EXPLANATION OF TAX LEGISLATION ENACTED IN THE 111TH CONGRESS 712 (2011).

314. See Gabriel Zucman, *The Missing Wealth of Nations: Are Europe and the U.S. Net Debtors or Net Creditors?*, 128 *Q.J. ECON.* 1321, 1343 (2013).

315. See GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS* 47 (Teresa Lavender Fagan trans., 2015).

316. See Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017) (hereinafter TC&JA).

317. See *supra* Part IV.B.1.

318. See TC&JA § 14101; I.R.C. § 245A.

lation joined the global effort to combat base erosion by replacing the corporate alternative minimum tax with one that essentially disallowed deduction of payments to related foreign parties.³¹⁹ Over the next decade, the Act bore a cost of \$1,456 billion in revenue foregone by the Treasury, of which \$324.4 billion was attributable to international tax reform.³²⁰ In sum, the Trump tax act was a revenue loser.

Already, critics have observed that the provisions appeared to work at cross purposes. As to the tax on global intangible low-taxed income (GILTI), “GILTI incentivizes companies to move their tangible assets to low-tax jurisdictions,” as to the base erosion anti-abuse tax (BEAT), “BEAT gives companies an incentive to shift their intangible assets.”³²¹ To the extent that a payment for foreign intellectual property became the cost of goods sold — economically “a reduction to income”³²² — there was no otherwise deductible payment for BEAT to disallow.³²³ Ironically, the Trump-era bill encouraged repatriation from tax havens only by making America more of one.³²⁴

5. Persistent Loopholes

After the Trump-era reform, tax havens were still in business. Specifically, “the share of total foreign income in seven prominent tax havens is nearly identical in the two years after the law (2018 and 2019) as it was in the five years prior to the law,” according to the Biden Administration’s Deputy Assistant Secretary for Tax Analysis.³²⁵ Her complaint was followed by the assertion that enforcement could capture revenue.³²⁶ In the wake of FATCA,

319. See TC&JA § 14401; I.R.C. § 59A.

320. See H.R. REP. NO. 115-466, at 690 (2017) (Conf. Rep.).

321. Varun Kukreja, *A Rocket with No Fuel: How the Tax Cuts and Jobs Act Creates More Loopholes for Corporations to Exploit the U.S. Economy*, 60 SANTA CLARA L. REV. 369, 387 (2020).

322. See H.R. REP. NO. 115-466, *supra* note 320, at 269, 653.

323. See David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks & Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1508 (2019).

324. See *id.*

325. *How U.S. International Tax Policy Impacts American Workers, Jobs, and Investment: Hearing Before S. Comm. on Fin.*, 117th Cong. 48 (2021) (statement of Kimberly A. Clausing, Deputy Assistant Secretary, Tax Analysis, U.S. Department of the Treasury).

326. See Kimberly Clausing, Emmanuel Saez & Gabriel Zucman, *Ending Corporate Tax Avoidance and Tax Competition: A Plan to Collect the Tax Deficit of Multinationals* 6 (Working Paper, 2021). See also Charles O. Rossotti, Natasha Sarin & Lawrence Summers, *Shrinking the Tax Gap: A Comprehensive Approach*, 169 TAX NOTES FED. 1467, 1467–68 (2020) (estimating that investment of “less than \$100 billion in the IRS over a decade will generate \$1.2 trillion to \$1.4 trillion in additional tax revenue, primarily from high-income individuals, who are disproportionately responsible for underpayment of owed tax liabilities”).

economists reported that “enforcement initiatives increased capital income reporting by \$2.5 to \$4 billion annually, corresponding to \$0.7 billion to \$1 billion in annual tax revenue.”³²⁷ Emerging from the novel coronavirus pandemic, the promise of revenue ripe for collection was irresistible to the new Administration intent on reinvigorating the “social safety net.”³²⁸

Meanwhile, Third World advocates protested tax havens. For example, the charitable Oxford Committee for Famine Relief (Oxfam) linked wealthy “elites’ use of offshore centers for ‘asset protection’ . . . to the erosion of the revenue base in countries like those of sub-Saharan Africa that could ill afford it.”³²⁹ At this point, the attack on tax havens assumed the rhetoric of the poor against the rich.

By the end of 2021, the First World solidified its coalition against tax havens. Negotiators led by the United States and France exerted sufficient pressure on “a main holdout to the deal,” the Republic of Ireland, whose abstention could have scuttled the participation of the entire European Union.³³⁰ In Dublin, Prime Minister Michael Martin assured his cabinet that the 15 percent minimum tax rate would apply only “to multinational giants like Facebook and Apple, but not to Irish companies operating only in Ireland.”³³¹ Memorialized by the multilateral Organisation for Economic Cooperation & Development (OECD), the West achieved regulatory hegemony.³³²

In an anomaly, the holdout was not from the Global South but inside the imperial core. According to economic historians, “Ireland’s situation was not very different than that in many of the African societies . . . perched uncomfortably on the fringe of an expanding commercial one” at times encompassing “a very lively slave trade.”³³³ Now specialists observe that “[t]he phenomenon of

327. Niels Johannesen et al., *Taxing Hidden Wealth: The Consequences of U.S. Enforcement Initiatives on Evasive Foreign Accounts*, 12 AM. ECON. J.: ECON POL’Y 312, 315 (2018).

328. See Catie Edmondson & Emily Cochrane, *Pelosi Says Democrats Near Accord on Social Bill*, N.Y. TIMES, Oct. 25, 2021, at A18. See also *Ending a Rigged Tax Code: The Need to Make the Wealthiest People & Largest Corporations Pay Their Fair Share of Taxes: Hearing Before the S. Comm. on the Budget*, 117th Cong. 11 (2021) (statement of Gabriel Zucman).

329. Maurer, *supra* note 284 at 163–64; see OXFAM, TAX HAVENS: RELEASING THE HIDDEN BILLIONS FOR POVERTY ERADICATION 7 (2000).

330. Alan Rappeport & Liz Alderman, *Deal to Set Minimum Tax Gets Closer*, N.Y. TIMES, Oct. 8, 2021, at B4.

331. *Id.*

332. See generally OECD, *Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy* (Oct. 8, 2021).

333. GRAEBER, *supra* note 24, at 171. Cf. NOEL IGNATIEV, *HOW THE IRISH BECAME WHITE* 7 (Routledge 2015) (addressing Ireland’s antislavery tradition).

Celtic nationalism may be seen as a political response to the persistence of regional inequality.”³³⁴ More explicitly, “[t]hough largely white, Anglophone and westernized, Ireland was historically in the paradoxical position of being a colony *within* Europe” of the British Empire.³³⁵ Like the ancient civilizations discussed above in both East and South Asia, Ireland exemplifies the European experience as both empire and colony. Relative autonomy within the Continental market afforded the possibility of undercutting multinational competition by serving as a tax haven.

6. Summary

Since the enactment of the federal income tax, taxpayers have had an incentive to move income abroad. Through the Great Depression and Cold War, the Treasury defended against offshore erosion.³³⁶ In the current century of globalization, more latitude opened for transnational business.³³⁷ Yet the ever-expanding need for revenue made tax havens an irresistible target.

C. *Tax Havens Insular and Imperial*

At the turn of the century, blacklists appeared, initially targeting classic insular tax havens.³³⁸ In 1998, the OECD, an economic standard-bearer since the time of the Marshall Plan, published a report entitled *Harmful Tax Competition: An Emerging Global Issue*.³³⁹ In 2000, the OECD published a list of 35 tax havens “to be ‘named and shamed.’”³⁴⁰ Namely, they were: sixteen U.K. Overseas Territories, Dependencies of the British Crown, or Commonwealth realms, to wit Anguilla, Antigua & Barbuda, Bahamas, Barbados, Belize, BVI, Gibraltar, Grenada, Guernsey/Sark/Alderney, Isle of Man, Jersey, Montserrat, St. Christopher & Nevis, St. Lucia, St. Vincent & Grenadines, Turks & Caicos; two Dutch domains, Aruba and Netherlands Antilles; two New Zealand islands, Cook Islands and Niue; one American possession, USVI; seven insular republics,

334. MICHAEL HECHTER, INTERNAL COLONIALISM: THE CELTIC FRINGE IN BRITISH NATIONAL DEVELOPMENT 1536–1966 at 161 (1975).

335. Luke Gibbons, *Ireland & the Colonization of Theory*, 1 INTERVENTIONS: INT’L J. POSTCOLONIAL STUD. 27, 27 (1998).

336. See *supra* Part IV.B.2, 3.

337. See *supra* Part IV.B.4.

338. See OECD, TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING & ELIMINATING HARMFUL TAX PRACTICES 17 (2000).

339. OECD, *Harmful Tax Competition: An Emerging Global Issue* (1998).

340. Maurer, *supra* note 284 at 163; cf. S. 396, 110th Cong. § 7875 (2007) (listing tax havens).

to wit Dominica, Maldives, Marshall Islands, Nauru, Samoa, Seychelles, and Vanuatu; two insular kingdoms, Bahrain and Tonga; three European principalities, to wit Andorra, Liechtenstein, and Monaco; and two coastal republics, Liberia and Panama.³⁴¹ The suzerain recurrence of the historic empires of England, Holland, and lately the United States was more than coincidence.³⁴²

Despite free market ideology, the multilateral act had the effect of world government. As a practical matter, blacklisting was among “‘soft law’ innovations in international policymaking” that marked “the privatization of governance and the emergence of new global regulators that are not beholden to standard democratic processes.”³⁴³ Inasmuch as compliance with prescribed reporting could result in removal from the list, the OECD wielded coercive power.³⁴⁴ Ultimately, all jurisdictions agreed to exchange information under the OECD’s transparency regime.³⁴⁵

In 2021, the non-profit Tax Justice Network (TJN), based in England since the beginning of the century, listed tax havens.³⁴⁶ TJN’s Corporate Tax Haven Index (CTHI) measured the scope and quantity of multinational corporate tax abuse allowed by a country’s tax and financial systems.³⁴⁷ As listed in Table 1 below, the top seventy CTHI countries were almost evenly divided between Global South and West. Evidently, industrial economies joined the competition to host multinational corporations as discussed above.³⁴⁸

341. See OECD, *supra* note 338, at 17.

342. See *supra* Part II.B.1.

343. Maurer, *supra* note 284, at 156.

344. See JANE G. GRAVELLE, CONG. RSCH. SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE & EVASION 5 (2015).

345. See OECD, *Countering Offshore Tax Evasion* 10, (Sept. 28, 2009) (confirming that “all jurisdictions covered in the Global Forum’s assessments have now agreed to implement the standard”).

346. Tax Justice Network, *Our History: Tax Just Network is Launched*, <https://taxjustice.net/our-history/> [<https://perma.cc/V9PZ-ARG3>].

347. See Tax Justice Network, *Corporate Tax Haven Index – 2021 Results*, <https://cthi.taxjustice.net/en> [<https://perma.cc/8MU8-ZQT2>].

348. See *supra* Part IV.B.4.

TABLE 1. TAX HAVENS³⁴⁹

Country	CTHI	GDP (\$ Bn)	Tax ratio (%)	Population	Km ²
Global South					
BVI	2,854	0.50	38.9	37,891	151
Cayman Isl.	2,653	4.78	38.9	63,131	264
Bermuda	2,508	5.23	16.3	72,084	54
Hong Kong	1,805	420.13	23.2	7,263,234	1,108
Singapore	1,714	531.04	15.7	5,866,139	719
UAE	1,665	655.79	28.8	9,856,612	83,600
Bahamas	1,454	12.10	17.6	352,655	13,880
Mauritius	1,013	24.64	22.5	1,386,129	2,040
PRC	896	23,009.78	21.3	1,397,897,720	9,596,960
Panama	411	109.52	20.1	3,928,646	75,420
Curacao	353	3.86	16.6	151,885	444
Mexico	324	2,306.32	22.7	130,207,371	1,964,375
Turks & Caicos	290	0.82		57,196	948
Anguilla	255	0.18	46.7	18,403	91
Costa Rica	253	100.25	14.3	5,151,140	51,100
Lebanon	222	79.51	21.5	5,261,372	10,400
So. Afr.	198	680.04	26.6	56,978,635	1,219,090
Liberia	187	6.85	16.9	5,214,030	111,369
Macao	174	35.58	29.2	630,396	28
Seychelles	166	2.40	39.6	96,387	455
Taiwan	98	1,143.28	16.0	23,572,052	35,980
Aruba	94	4.16	25.2	120,917	180
Botswana	80	37.72	30.5	2,350,667	581,730
Peru	68	371.29	27.1	32,201,224	1,285,216
Ghana	68	164.84	20.3	32,372,889	238,533
Kenya	62	226.94	17.6	54,685,051	580,367
Brazil	54	2,989.43	35.7	213,445,417	8,515,770
Tanzania	50	152.79	15.2	62,092,761	947,300
Ecuador	43	182.24	32.0	17,093,159	283,561
Argentina	36	893.31	18.9	45,864,941	2,780,400
Gambia	13	5.22	20.3	2,221,301	11,300
Montserrat	3	167.40		5,387	102

349. See Tax Justice Network, *supra* note 347 (supplying CTHI); *Country Comparisons Real GDP (Purchasing Power Parity)*, THE WORLD FACTBOOK, <https://www.cia.gov/the-world-factbook/field/real-gdp-purchasing-power-parity/country-comparison> [<https://perma.cc/8AJE-G984>] (also supplying tax as a percentage of GDP, population, and area).

Country	CTHI	GDP (\$ Bn)	Tax ratio (%)	Population	Km ²
West					
Netherlands	2,454	945.48	43.4	17,337,403	41,543
Switzerland	2,261	590.71	35.7	8,453,550	41,277
Luxembourg	1,815	69.72	44.4	639,589	2,586
Jersey	1,724	5.57	16.6	101,476	116
Ireland	1,455	447.97	26.0	5,224,884	70,273
Gr. Britain	1,382	2,797.98	39.1	67,081,000	243,610
Cyprus	1,379	33.67	39.9	1,281,506	9,251
Belgium	973	557.11	51.3	11,778,842	30,528
Guernsey	954	3.47	20.6	67,334	78
France	908	2,832.17	53.8	68,084,217	643,801
Isl. Man	850	6.79	14.2	90,895	572
Malta	763	20.60	40.4	460,891	316
Spain	688	1,714.86	37.9	47,260,584	505,370
Germany	634	4,238.80	45.0	79,903,481	357,022
Hungary	599	302.32	44.5	9,728,337	93,028
USA	514	19,864.72	17.0	334,998,398	9,833,517
Sweden	467	524.75	50.6	10,261,767	450,295
Italy	443	2,322.14	46.6	62,390,364	301,340
Gibraltar	349	2.04	23.3	29,516	7
Finland	304	261.39	53.1	5,587,442	338,145
Austria	303	463.12	48.3	8,884,864	83,871
Denmark	295	326.20	53.0	5,894,687	43,094
Liechtenstein	291	4.98	14.9	39,425	160
Czechia	269	409.97	40.5	10,702,596	78,867
Estonia	257	47.44	39.9	1,220,042	45,228
Romania	248	556.07	29.3	21,230,362	238,391
Latvia	239	56.92	37.5	1,862,687	64,589
Monaco	206	7.67	14.9	31,223	2
Bulgaria	169	155.06	35.7	6,919,180	110,879
Portugal	157	331.64	42.9	10,263,850	92,090
Slovakia	154	165.57	39.4	5,436,066	49,035
Poland	144	1,223.46	39.5	38,185,913	312,685
Croatia	131	107.11	46.1	4,208,973	56,594
Lithuania	123	102.66	33.7	2,711,566	65,300
Greece	93	292.40	48.8	10,569,703	131,957
Slovenia	93	76.75	43.1	2,102,106	20,273
Andorra	67	3.33	69.0	85,645	468
San Marino	41	2.06	40.6	34,467	61

As tabulated above, many countries offered favorable tax treatment to foreign corporations. Not all were characteristic of classic

tax havens as listed by OECD in 2000 and described below.³⁵⁰ Stereotypically, tax havens were insular and unproductive. Yet the CTHI ranked the vast, populous, and industrial economies among those which vied to host foreign corporations.³⁵¹ Nevertheless, blacklisting could mean ostracism from the community of nations or at least their world market.

D. *Structural Reasons for Tax Havens*

Tax havens have persisted for structural reasons.³⁵² Explicitly, tax havens have been “prostituting their sovereign rights,” peddling “legal platforms for globalizing financial and . . . other types of services.”³⁵³ Statistically, “the percentage of services in GDP proves to be the most prominent variable” in identifying a tax haven.³⁵⁴ Yet this commercialization of the state was not a perversion “of the principle of sovereignty as much as . . . a direct outcome of the conflicting principles of national sovereignty in the age of mobile capital.”³⁵⁵ As discussed above, the modern market emerged hand-in-hand with commoditized legal rights.³⁵⁶ “The ensuing conflict between the increasing insulation of the state in law and the internationalization of capital forced . . . pragmatic solutions,” especially “the commercialization of sovereignty” and “the development of the tax haven.”³⁵⁷ When nations became disembodied legal entities while capital flowed freely through the world economy, tax havens were inevitable.

As a practical matter, service as a tax haven offered opportunity domestically. For a state lacking natural resources for agriculture or industry, tax havens created a “virtual resource.”³⁵⁸ Among related characteristics, tax havens were “small and weak” states that were “strangers to any sort of armed conflict.”³⁵⁹ Instead, tax havens traded on their governance, constituted by stable “political and governmental institutions” that “make well-reasoned politically popular decisions regarding their polity” and evinced “the ability

350. See *infra* Part III.D.

351. See *infra* tbl. 1 (West).

352. See RONEN PALAN ET AL., TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 256 (Eric Helleiner & Jonathan Kirshner eds., 2010).

353. Palan, *supra* note 67, at 172.

354. Mara, *supra* note 214, at 1638.

355. Palan, *supra* note 67, at 173.

356. See *supra* Part II.B.4.

357. Palan, *supra* note 67, at 153.

358. Dainoff, *supra* note 10, at 26.

359. *Id.* at 60.

to competently implement those decisions.”³⁶⁰ Internally, tax havens were unhampered by “certain elements of civic and political life that promote organized opposition, such as an independent media, organized opposition parties, or institutions of higher education.”³⁶¹ Conversely, “[c]ountries with a high population cannot afford to become tax havens because they cannot afford to lose tax revenue, and this is . . . proved by the fact that all the jurisdictions that are known as tax havens are sparsely populated.”³⁶² As noted above, tax havens have created otherwise unavailable white collar jobs in the financial sector.³⁶³ For a few people, selling sovereignty has been an economic option.

Internationally, tax havens have been anomalous polities. Externally, tax havens “encourage foreign investment” through “renegade behavior despite the application of international regimes.”³⁶⁴ Many tax havens sustained this duplicity due to “a post-colonial lifeline to their former masters” who offer “security and some domestic funding.”³⁶⁵ Historically, “tax havens have . . . taken root in jurisdictional anomalies – holdovers of empires, feudal city-states, territories never fully incorporated into the Westphalian system of nation-states.”³⁶⁶ Moreover, “relationships of rank clearly govern multilateral and international organizations, which are still the preserve of certain historically wealthy or historically militarily victorious countries seeking to preserve their status.”³⁶⁷ Typically, tax havens were creatures of the world economy whose internal politics reflected external demand.

Theoretically, tax havens were a conundrum for neoclassical economists who assumed efficient allocation of capital would occur naturally. Professor Robert Lucas posited, “if trade in capital good is free and competitive, new investment will occur only in the poorer economy,” rather than a wealthier one, “and this will continue to be true until capital-labor ratios, and hence wages and capital returns, are equalized.”³⁶⁸ Empirically, the “evidence consistently demonstrates precisely the opposite, however: that

360. *Id.* at 104–05.

361. *Id.* at 49.

362. Mara, *supra* note 214, at 1645.

363. *See supra* Part IV.B.4.

364. Dainoff, *supra* note 10, at 49–50.

365. *Id.* at 104.

366. Maurer, *supra* note 284, at 171.

367. *Id.*

368. Robert E. Lucas Jr., *Why Doesn't Capital Flow from Rich to Poor Countries?*, 80 AM. ECON. REV. 92, 92 (1990).

developing countries attract disproportionately lower amounts of capital than predicted under any version of neoclassical economic theory.”³⁶⁹ Beyond the vacuous assumption of economically neutral tax law, tax havens posed a practical option.

As a practical matter, the incentives were as follows. Realistically, beyond tax avoidance there was “a larger set of disparate incentives for capital to locate in wealthier as opposed to poorer countries.”³⁷⁰ As observed above, the “increasing the mobility of capital out of wealthier countries,” characteristic of globalization, “creates the possibility of rational incentives for certain countries to compete over capital through taxes.”³⁷¹ Since the creation of the world economy discussed above, poor countries have had to compete for capital from the rich.³⁷² Thereafter, tax reform in the nature of anti-inversion or preferential legislation had the effect of a transfer either “of capital, and thus tax revenue, from the tax haven back to the” parent country, or of the “tax base from one tax haven to another.”³⁷³ Ironically, either form of punitive legislation could increase “the incentive for the tax haven to compete over that [amount] even more aggressively.”³⁷⁴ No wonder tax reform had limited success in tax havens.

Further economic context illuminated the issue. As anticipated above, “[t]ax havens attract greater foreign investment than do other countries of similar sizes and income levels, and partly as a result, their economies have grown much more rapidly than have the economies of countries with higher tax rates.”³⁷⁵ Moreover, “tax haven activity and nearby investment in higher-tax countries appear to be complementary: a [one] percent greater likelihood of establishing a tax haven affiliate is associated with [two-thirds of one] percent greater investment and sales in nearby non-haven countries.”³⁷⁶ In other words, tax havens have attracted capital not only to themselves but to their entire region.³⁷⁷ Consequently, a tax haven may not have become a pariah among its neighbors.

369. Rosenzweig, *supra* note 265, at 932.

370. *Id.* at 933.

371. *Id.* at 954.

372. *See supra* Part II.B.3.

373. Rosenzweig, *supra* note 265 at 959, 961.

374. *Id.* at 959.

375. Hines, *supra* note 227, at 94.

376. *Id.* at 67, 93 (“a 1 percent greater likelihood of establishing a tax haven affiliate is associated with 0.5 to 0.7 percent greater sales and investment growth by non-tax-haven affiliates”).

377. *See id.*

Leading scholars have suggested solutions to the persistence of tax havens.³⁷⁸ Their premise has been that “little of the benefit of tax havens flows to their sometimes needy residents, but rather to the professionals providing banking and legal services, who often live elsewhere.”³⁷⁹ Nevertheless, they have recognized the need for “transitional aid to move away from these offshore activities.”³⁸⁰ After the hypothesized transition, it has been unclear what productive activities could sustain the insular jurisdictions without natural resources.

Since the early modern world economy, capital has flowed between the industrial core and the Southern periphery. Insular jurisdictions lacking natural and human resources have competed for capital by commercializing their sovereignty.³⁸¹ This strategy has worked as long as finance has been globalized.³⁸² Recently, the multilateral exclusion of low-tax jurisdictions had the effect of domestic retention of corporate revenue inside industrial countries.³⁸³ Now that the First World has united on a minimum corporate tax, the question may have become whether tax havens will be simply more obscure or whether the united front approached the world government envisioned by utopians of the left or the end of history envisioned by those of the right.

V. DISCUSSION

The rank order implicit in multilateral membership or stigmatization as a tax haven has become the financial aspect of competition in the global marketplace. This international hierarchy, which originated in early modernity but perfected after the Second World War, has continued to play out along cultural, juridical, and political lines.

A. *Quotidian Commune*

Since the advent of the ancient empires introduced above, the question has arisen whether they and their industrial successors advanced or perverted the life chances of their inhabitants through

378. See generally JOSEPH GUTTENTAG ET AL., BRIDGING THE TAX GAP: ADDRESSING THE CRISIS IN FEDERAL TAX ADMINISTRATION (Max B. Sawicky ed., 2005) (suggesting IRS enforcement, bilateral information exchange, cooperation with OECD, effective control over incentives to tax havens, and sanctions on non-cooperating tax havens).

379. GRAVELLE, *supra* note 344, at 35.

380. *Id.* at 37.

381. See Dainoff, *supra* note 10, at 23–24.

382. See Rosenzweig, *supra* note 265 at 954.

383. See *supra* Part IV.B.5.

the production of material wealth or the disruption of humane culture.³⁸⁴ According to social anthropologists, ancient and modern civilizations displaced organic communities.³⁸⁵ The “genealogy of the modern redistributive state – with its notorious tendency to foster identity politics – can be traced back not to any sort of ‘primitive communism’ but ultimately to violence and war.”³⁸⁶ As set forth above, the global hegemony of “capitalism as the only possible way to manage anything” contradicts “capitalism’s own unacknowledged need to limit its future horizons lest speculation, predictably, go haywire.”³⁸⁷ As long as the maximizing rational actor executed the infinitely abstract acquisitive impulse, Great Depressions and Recessions were sure to follow.

On the other hand, ancient and modern cultures naturally fostered community. According to Professor Graeber, society was rooted “in the ‘love and amity’ of friends and kin, and it found expression in all those forms of everyday communism (helping neighbors with chores, providing milk or cheese for old widows) that were seen to flow from it.”³⁸⁸ Ethnographically, such quotidian communism was observed among modern in-groups, as for example in the sharing of “help in repairing one’s nets in an association of fishermen, stationery supplies in an office, [or] certain sorts of information among commodity traders.”³⁸⁹ Conversely, “the need to share is particularly acute in both the best of times and the worst of times: during famines, for example, but also during moments of extreme plenty.”³⁹⁰ Even as it depends on exclusive membership, “[b]aseline communism might be considered the raw material of sociality, a recognition of our ultimate interdependence that is the ultimate substance of social peace.”³⁹¹ Society was inherently reciprocal.

The practical extent of primordial reciprocity remained in question. For quotidian communism to apply to commerce, it would require the founding of “market relations, ultimately, in something

384. See MARSHALL SAHLINS, *STONE AGE ECONOMICS* 36–39 (1972).

385. See generally GRAEBER & WENGROW, *supra*, note 206.

386. GRAEBER, *supra* note 24, at 113. See also ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY & THE STATE* 94 (Alick West trans., 1942) (2000) (ebook) (1884) (identifying primitive communism when “production was essentially collective, just as consumption proceeded by direct distribution of the products within larger or smaller communistic communities.”).

387. GRAEBER, *supra* note 24, at 383.

388. *Id.* at 329.

389. *Id.* at 100.

390. *Id.* at 98.

391. GRAEBER, *supra* note 24, at 99.

other than sheer calculation: in the codes of honor, trust, and ultimately community and mutual aid, more typical of human economies.”³⁹² This utopian view presumed an in-group or homogeneous population.³⁹³

Practically, cultural divisions have persisted even under an elected egalitarian regime.³⁹⁴ For example, ethnography has revealed a case in Kerala, India, where “the grassroots Communist Party apparatus in the village maintains its dominance by adapting itself to regressive caste hierarchies for political profit at the same time as laying claim to having challenged them.”³⁹⁵ If everyday communism has been appealing, its realization remained aspirational.

B. *World-historic Hierarchy*

While empires and colonies had an ancient history, modernity was characterized by global trade between the Western core and the Southern periphery. As industrial technology surpassed agricultural production, the Great Transformation created vast new wealth, captured disproportionately in the First World, while the Third remained relatively tied to the land.³⁹⁶ Anthropology naturalized the resulting order of nations by reference to race, culture, and evolution.³⁹⁷ Meanwhile, the rule of law rationalized the international asymmetry by reifying sovereignty. “Legal anthropology and legal history focused on the past where colonialism was seen to belong, unable to transcend the juridical line of formal independence. . . .”³⁹⁸ Thereafter, “modernist legal and institutional mechanisms[,]” namely “economic centralization and political decentralization . . . helped insulate post-war capitalism and impe-

392. *Id.* at 385.

393. *Id.* at 100 (“There will be certain things shared or made freely available within the group, others that anyone will be expected to provide for other members on request, that one would never share with or provide to outsiders”).

394. See Nitasha Kaul & Nisar Kannangara, *The Persistence of Political Power: A Communist ‘Party Village’ in Kerala and the Paradox of Egalitarian Hierarchies*, INT’L J. POL. CULT. & SOC’Y, 3 (2021).

395. *Id.* at 3.

396. See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL & ECONOMIC ORIGINS OF OUR TIME* 39 (1944) (describing the emergence of the Industrial Revolution as an “event [that] was peculiar to England”).

397. See generally GEORGE W. STOCKING JR., *RACE, CULTURE & EVOLUTION: ESSAYS IN THE HISTORY OF ANTHROPOLOGY* (1968) (titularly coining the phrase “race, culture, and evolution” to encapsulate the history of anthropology).

398. Radha D’Souza, *The ‘Third World’ and Socio-Legal Studies: Neo-Liberalism and Lessons from India’s Legal Innovations*, 14 SOC. & L. STUD. 487, 493 (2005).

rialism from political and social turmoil.”³⁹⁹ The rule of law commoditized natural attributes, precluding the trees from legal standing, as discussed above.⁴⁰⁰ The juridical mechanisms laid the foundation for the multilateral politico-economic institutions as follows.

C. *Globalization*

While advocates of globalization favored the free market, the world economy was never free of official supervision. Since the incorporation of the first joint-stock companies in England and Holland to exploit the East India trade with quasi-governmental and paramilitary powers, “the economic interventions of the state were modelled along corporate lines.”⁴⁰¹ After World War II,

[p]roperty rights . . . were instituted not by individuals engaged in spontaneous buying and selling as in early capitalism but by monopolistic transnational corporations, banks and financial institutions acting as syndicates, engaged as consortia ‘packs’ in state-capture to alter the legal and institutional order in their favour.⁴⁰²

In particular, “[t]he shareholding structures of the World Bank and the International Monetary Fund give the largest voting rights to five states making the largest contributions to the capital base” of the international economic organizations.⁴⁰³ The resulting “interventions in favour of a small group of G7 states” are “very far away from classical ideas of free markets.”⁴⁰⁴ Instead, “[t]he oppression by a small group of states over the vast majority *qua states* is the hallmark of expropriation in the epoch of imperialism.”⁴⁰⁵ The globalized prosperity that the multilateral financial institutions attributed to “innovation, honest hard work and commitment” was equally a result of state-orchestrated extraction.⁴⁰⁶

D. *Totemic Instinct*

In response to First World appropriation, Third World liberation struggles have arisen. According to commentators, “the continuing expropriation of land, natural resources, displacement and

399. *Id.* at 494.

400. *See supra* Part II.B.4.

401. D’Souza, *supra* note 68, at 67.

402. D’SOUZA, *supra* note 74, at 154.

403. D’Souza, *supra* note 68, at 67.

404. D’SOUZA, *supra* note 74, at 154.

405. *Id.* at 189.

406. Sutherland, *supra* note 102, Ch.1, ¶ 12 at 10.

devastation unleashed by each crisis” of transnational monopoly finance “means ideas of revolutionary and structural change continue to attract people in the Third World, especially in rural areas.”⁴⁰⁷ Consequently, “[t]he unity that anti-colonial movements forged were not based on formal equality and cultural rights that liberalism promises but real equality based on safeguarding the interests of groups oppressed by colonial rule.”⁴⁰⁸ Then it can be no surprise that “[f]ar too many struggles in the third world today are intuitively against imperialism and for self-determination, but politically inspired by identity politics that manifest as ethnic, religious and cultural conflicts.”⁴⁰⁹ Due to an anthropological instinct, struggles such as civil wars “strongly trace to ethnically or religiously marked differences, and not to class, income, or political ideology.”⁴¹⁰ Naturally, the control of resources aligned with cultural identity.

Looking forward, revolutions may not restore equity between the West and the Global South. Instead, “the fundamental cleavage will be between those who wish to expand . . . liberties . . . of the majority and . . . of the minorities – and those who will seek to create a non-libertarian system under the guise of preferring either the liberty of the majority or the liberty of the minorities.”⁴¹¹ The global disruption wrought by industrialization may become manifest in internecine struggles between identifiable populations.

E. *Summary*

The fundamental cleavages in the social world were those between established civilizations. Over time, these came to align with totemic instincts of race, religion, and nationalism.⁴¹² At the same time, united fronts in opposition to foreign exploitation may have created an experience of community for identifiable populations.⁴¹³ Overlaid on this political culture, it was unclear that juridical and financial tools such as property and taxation could be anything but markers of economic exclusion.⁴¹⁴

407. D’SOUZA, *supra* note 74, at 194.

408. *Id.* at 204.

409. D’SOUZA, *supra* note 68, at 61.

410. HENRICH, *supra* note 162, at 241.

411. WALLERSTEIN, *supra* note 95, at 89.

412. *See supra* Part V.D.

413. *See id.*

414. *See supra* Part V.C.

VI. CONCLUSION

In 2021, the First World consortium succeeded in closing ranks behind the corporate minimum tax. This victory for the redistributive state coincided with the publication of a comprehensive version of social science that cleverly celebrated the Western ethos as WEIRD.⁴¹⁵

This was a triumphant intellectual pronouncement. The WEIRD school of thought confirmed that evolutionary anthropology became the heir to twentieth-century social science, which rationalized the cultural cleavages between the Global South and the West, and in turn, the nineteenth-century discipline of political economy, which initiated the inquiry into the wealth of nations.⁴¹⁶ Through this intellectual history, social science naturalized the financial current between the industrial core and the peripheral yet primary places of production.⁴¹⁷

Since the ancient empires of the East gave way to the modern Atlantic trade, the globe became the market. There the unfettered competition implicit in capitalism required losers as well as winners. As a strategic gamble, islands without natural or human resources have monetized their sovereignty.⁴¹⁸ Ironically associated with neo-liberalism, the multilateral fiscal apparatus promised to eclipse the rogue jurisdictions.⁴¹⁹ Without sympathy for scofflaws who abscond with wealth, a *de facto* fiat of world governance has emerged.⁴²⁰

Meanwhile, the disciplinary stepchildren of anthropology confronted lingering questions of social science. Across the Pacific, a Great Rivalry between rising mercantile communism and declining republican consumerism has resuscitated the clash between the East and the West.⁴²¹ The renewed vitality of the so-called Orient postponed the end of history.⁴²² Particularistic difference was unavoidable, as race, religion, and nationalism continued to have totemic appeal.⁴²³ At the same time, the crises of ecology and epidemiology compounded economic pressure.⁴²⁴ In the end, a

415. *See supra* Part III.B.

416. *See supra* Part III.A.

417. *See supra* Part III.C.

418. *See supra* Part IV.D.

419. *See supra* Part IV.B.5.

420. *See supra* Part IV.C.

421. *See supra* Part II.E.

422. *See supra* Part III.C.

423. *See supra* Part V.D.

424. *See supra* Part III.D.

vision that could be both universal and communitarian remained an intellectual and political challenge for the future.