

TAX HAVENS AS PRODUCERS OF CORPORATE LAW

William J. Moon*

RE-IMAGINING OFFSHORE FINANCE: MARKET-DOMINANT SMALL JURISDICTIONS IN A GLOBALIZING FINANCIAL WORLD. By *Christopher M. Bruner*. New York: Oxford University Press. 2016. Pp. xii, 236. \$95.

INTRODUCTION

Bank-secrecy laws, low tax rates, and shell companies amassed at P.O. boxes are some of the common features associated with offshore financial havens that have catapulted famous vacation destinations in the Caribbean and elsewhere into magnets for global financial transactions.¹ The culprits in these stories—usually abetted by small offshore jurisdictions facilitating tax evasion²—range from celebrities, including Mel Gibson and Vivienne Westwood, to corporations, including Apple and Google.³ While the topic of tax evasion is nothing new,⁴ a series of massive document leaks in recent years, exposing the vast scope and variations of evasion schemes, has propelled

* Acting Assistant Professor, New York University School of Law. I thank Bruce Ackerman, Philip Alston, Ian Ayres, Lea Brilmayer, Richard R.W. Brooks, Diarra M. Guthrie, Gloria Ho, Tal Kastner, Christine Kim, Alec Stone Sweet, and Clint Wallace for helpful conversations and comments and Alex Gulbrandsen, Kristi How, and Joann S. Park for excellent research assistance. I also thank Christopher Bruner for his generosity in reading the piece before its publication and the editors of the *Michigan Law Review*, especially Kathryn M. Brown, for terrific editorial suggestions.

1. See, e.g., Andrew Ross Sorkin, *When It Comes to Tax Avoidance, Donald Trump's Just a Small Fry*, N.Y. TIMES: DEALBOOK (Oct. 4, 2016), <https://www.nytimes.com/2016/10/04/business/dealbook/when-it-comes-to-tax-avoidance-donald-trumps-just-a-small-fry.html> (on file with the *Michigan Law Review*); *Storm Survivors*, ECONOMIST (Feb. 16, 2013), <http://www.economist.com/news/special-report/21571549-offshore-financial-centres-have-taken-battering-recently-they-have-shown-remarkable> [<https://perma.cc/5ZUK-EBF9>].

2. Scholars typically distinguish tax evasion, a set of illicit activities aimed at reducing taxes, from tax avoidance, which includes various legal maneuverings. See, e.g., RONEN PALAN ET AL., *TAX HAVENS: HOW GLOBALIZATION REALLY WORKS* 9–10 (2010). The distinction between evasion and avoidance is notoriously difficult to ascertain. Pp. 19–20.

3. See Daniel Bukszpan, *These Celebrities Shelter Their Wealth in Tax Havens*, FORTUNE (Apr. 14, 2015), <http://fortune.com/2015/04/14/celebrity-tax-havens/> [<https://perma.cc/KAS4-SCWE>]; Jonathan Chew, *7 Corporate Giants Accused of Evading Billions in Taxes*, FORTUNE (Mar. 11, 2016), <http://fortune.com/2016/03/11/apple-google-taxes-eu/> [<https://perma.cc/A4H9-5MW2>].

4. See Ronen Palan, *Tax Havens and the Commercialization of State Sovereignty*, 56 INT'L ORG. 151, 153 (2002) (tracing the emergence of the “first modern tax havens” to “the last years of the nineteenth century”).

multilateral government crackdowns⁵ and attracted academic interests from a wide range of disciplines, including economics, international relations, and the law.

Christopher Bruner's *Re-Imagining Offshore Finance: Market-Dominant Small Jurisdictions in a Globalizing Financial World*⁶ is a significant contribution to the literature that should become required reading for both consumers and producers of knowledge concerning the regulation of global financial transactions. Bruner starts with the observation that "reducing or eliminating taxes does not itself guarantee the arrival of cross-border capital" (p. 21). Instead, the handful of small jurisdictions that have become the dominant players in cross-border finance provide more than just low taxes and bank-secrecy laws: they offer "cutting-edge regulatory regimes in high value-added areas of cross-border financial services" (p. 47). Bruner's careful comparative case studies cut through ideologically charged old labels and reveal several important characteristics shared by certain small jurisdictions, like Bermuda and Singapore, that account for their disproportionate success in the global market for cross-border finance.⁷ Bruner terms these jurisdictions "market-dominant small jurisdictions" ("MDSJs") (pp. 7–8). There is more than semantics at play here, for MDSJs have "much to tell us about the future of financial globalization, territorial sovereignty, and territorial financial regulation in the twenty-first century" (p. 13).

Descriptively, Bruner's work provides a compelling account challenging the all-too-popular scholarly view that conceptualizes small offshore jurisdictions as parasitic entities that subsist largely at the expense of eroding the tax base of developed nations.⁸ To the contrary, Bruner observes that MDSJs have "promoted innovation in their areas of specialization later emulated by larger markets, and otherwise enhanced market efficiency within such larger markets" (p. 224). In doing so, Bruner complicates the debate over the function of small offshore jurisdictions, which is largely taking place in the absence of good data.

This Review situates Bruner's contribution to the literature examining the regulation of cross-border finance and highlights the import of Bruner's book for thinking about the complex (and contested) relationship between territorially configured domestic laws and the increasingly liberal movement of capital. Part I sets out the book's central thesis. I highlight Bruner's novel framework, which identifies the factors that propel certain small jurisdictions into becoming magnets for cross-border finance. I also outline the limits of this framework in accounting for the stability in the overall demand for the commercialization of sovereignty. Part II examines the rise of MDSJs

5. See, e.g., Stephen Castle, *E.U.'s Five Biggest Economies Join Tax Crackdown After Panama Papers*, N.Y. TIMES (Apr. 15, 2016), https://www.nytimes.com/2016/04/16/business/international/panama-papers-europe.html?_r=0 (on file with the *Michigan Law Review*).

6. Christopher Bruner is a Professor of Law, University of Georgia School of Law.

7. See pp. 7–8, 41–50.

8. For a seminal account, see Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1575, 1578–79 (2000).

and other offshore jurisdictions as they relate to the territorially configured domestic rules—a subject that has yet to attract the attention that it deserves. While Bruner views the rise of MDSJs as typifying the continued dominance of territorial sovereignty, I show that it is a reflection of a new jurisprudential tendency that deemphasizes the relationship between soil and the law. This understanding has significant implications, because small offshore jurisdictions, intentionally or not, increasingly supply templates of substantive and procedural law that govern cross-border finance and replace and reconstitute territorially configured domestic rules. Here, I develop a paradigm conceptualizing tax havens as “producers” of corporate law and start a discussion about the normative desirability of this emerging trend.

I. CAPITAL MOBILITY AND THE WINNERS OF CROSS-BORDER FINANCE

A. Market-Dominant Small Jurisdictions

Delaware maintains a preeminent status in corporate law. In the United States, corporate law—the body of law governing the relations between the firm’s shareholders and managers—is largely a matter of state law.⁹ Under the internal affairs doctrine, firms choose their state of incorporation for statutory domicile “independent of physical presence.”¹⁰ This system sets up a competition between states to supply corporate law—one that has been dubbed the central building block underlying the “genius of American corporate law.”¹¹

It was not always like this. Before the merger movement in the late nineteenth century, corporate activities were primarily local, and corporate law was largely monopolized by the state where the corporation conducted its business. Capital mobility and the growth of interstate business effectively broke this monopoly since “[l]egislatures could not afford to . . . driv[e] business out of state to the detriment of local interests.”¹² Delaware has been the clear winner in this “race” enabled by regulatory competition.¹³ Notwithstanding the state’s status as one of the smallest states in the United

9. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 1–3 (1993).

10. Roberta Romano, *Competition for Corporate Charters and the Lesson of Takeover Statutes*, 61 *FORDHAM L. REV.* 843, 843 (1993). The internal affairs doctrine “is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation’s internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.” *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

11. ROMANO, *supra* note 9, at 1.

12. Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 *J. CORP. L.* 33, 45–46 (2006).

13. Scholars vigorously disagree about whether this reflects a “race for the bottom” or a race to the top. Compare William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663, 705 (1974) (describing American corporate law as encouraging a “race for the bottom”), with Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. LEGAL STUD.* 251, 256 (1977) (offering a race-to-the-top account).

States (both by land mass and population) (p. 175), Delaware is the juridical home to “more than half of all U.S. publicly traded companies and 65 percent of Fortune 500,”¹⁴ only two of which are physically headquartered in Delaware (p. 181). Delaware derives a substantial portion of its government revenue from the incorporation business (p. 176) and works hard to retain its competitive advantage in producing cutting-edge corporate law. The Delaware General Corporation Law is a byproduct of “a decidedly cooperative public-private undertaking” (p. 183), while some of the country’s most renowned experts in business law staff its judiciary (pp. 183–84).

Delaware is just one of a handful of small jurisdictions that Bruner identifies as the dominant players in cross-border finance—broadly defined to include insurance, Islamic finance, private wealth management, cross-border banking, and incorporation services (p. 7 n.19). Bruner identifies the following characteristics shared by MDSJs: (1) they are “poorly endowed with natural resources,” creating a strong incentive to convert their main asset—the ability to write laws—to attract foreign capital; (2) they can exercise legislative autonomy, which need not be full sovereignty recognized under international law; (3) they are culturally and geographically proximate to major economic powers; (4) they are rich in human capital and professional networks; and (5) they maintain credibility with the private sector through a mix of collaboration and oversight (pp. 43–47; emphasis omitted). These factors, Bruner claims, reveal six paradigmatic jurisdictions that cut across differences in geographies, cultural affinities, and legal traditions: Bermuda, Delaware, Dubai, Hong Kong, Singapore, and Switzerland.¹⁵ According to Bruner, these jurisdictions are “not merely successful, but literally globally dominant in specialized areas of cross-border finance” (p. 9).

Consider the fascinating case of Bermuda, an island roughly one-third the size of Washington, D.C., widely recognized as one of the largest centers for insurance and risk management in the world (pp. 51–52). Bermuda squarely fits the MDSJ paradigm. Despite being a territory of the United Kingdom (voluntarily), the island wields substantial legislative autonomy, enabled by the United Kingdom’s broad delegation of authority (p. 45). Bermuda has used this autonomy to develop some of the essential ingredients for its success—“substantial investment in human and institutional capital catering to cross-border finance, as well as the development of a competitive regulatory regime in close coordination with the private sector” (p. 56). As Bruner sees it, the legislature’s “business-friendly capacity to innovate” has played a significant role in the island’s economic development (pp. 56–58). Today, this island with a population of less than 100,000 people (p. 52) is

14. JEFFREY W. BULLOCK, DEL. SEC’Y OF STATE, DELAWARE DIVISION OF CORPORATIONS 2013 ANNUAL REPORT 2 (2014), https://corp.delaware.gov/Corporations_2013%20Annual%20Report.pdf [<https://perma.cc/E525-6D32>].

15. As implied by Bruner, these jurisdictions are not the only jurisdictions that would fit the MDSJ paradigm. P. 10 (“I have consciously chosen six jurisdictions that differ substantially . . .”).

home to “subsidiaries of 75% of the Fortune 100,”¹⁶ while controlling a dominant share of insurance policies connected to the United States and elsewhere—evidenced by the significant growth in disputes arising under the famous “Bermuda Form” policy insurances.¹⁷

Singapore, a small island nation in Southeast Asia almost 10,000 miles away from Bermuda, shares similar traits. Despite being one of the smallest independent states, Singapore has come to dominate the wealth-management industry, even while the industry in the “United States and Europe grapple with the worst slump in a generation.”¹⁸ Bruner attributes Singapore’s ascendance in large measure to deliberate state policies adopted in the latter half of the twentieth century, aimed at developing the infrastructure broadly resonant with the MDSJ concept (pp. 115–21). This includes maintaining some of “the least restrictive immigration laws in Asia for foreign talent,”¹⁹ and a regulatory environment that is said to be closely attuned to the interests of the private sector (pp. 129, 132). Today, this island nation with a land mass about twice the size of Detroit²⁰ is “the world’s fastest-growing wealth management center . . . and its share of global offshore wealth is expected to outstrip Switzerland by 2020.”²¹

To be sure, MDSJs *do* offer attractive tax rates, usually combined with some form of bank-secrecy laws, as critics of tax havens have pointed out. Bermuda offers “no corporate or capital gains taxes”;²² Dubai generally levies “no direct taxes on corporate profits or personal income” on net profit

16. FOREIGN & COMMONWEALTH OFFICE, *THE OVERSEAS TERRITORIES: SECURITY, SUCCESS AND SUSTAINABILITY*, 2012, Cm. 8374, at 92 (UK).

17. *Bermuda Form Dispute Resolution Experience*, K&L GATES, http://www.klgates.com/files/Uploads/Documents/Global_Insurance/Bermuda_Form_Dispute_Resolution.pdf [<https://perma.cc/P79Q-8B32>].

18. Neil Chatterjee & John O’Donnell, *Wealth Management Prospers in Singapore*, N.Y. TIMES (Nov. 14, 2008), <http://www.nytimes.com/2008/12/14/business/worldbusiness/14iht-singapore.1.18654227.html> (on file with the *Michigan Law Review*).

19. P. 132 (quoting Jek Aun Long & Danny Tan, *The Growth of the Private Wealth Management Industry in Singapore and Hong Kong*, 6 CAP. MARKETS L.J. 104, 116–17 (2011)).

20. See DETROIT FUTURE CITY, 139 SQUARE MILES (2017), https://detroitfuturecity.com/wp-content/uploads/2017/09/DFC_139-SQ-Mile_Report.pdf [<https://perma.cc/QR7D-YQ27>] (showing Detroit spans 139 square miles); *Land Area (Sq. Km.)*, WORLD BANK: DATA, <https://data.worldbank.org/indicator/AG.LND.TOTL.K2> [<https://perma.cc/K4YH-WHQN>] (showing Singapore spans 273 square miles).

21. Sophie Song, *Singapore, Now World’s Fastest Growing Wealth Management Hub, Not Free from Tax Evasion and Other Crimes*, INT’L BUS. TIMES (Feb. 18, 2014, 10:40 AM), <http://www.ibtimes.com/singapore-now-worlds-fastest-growing-wealth-management-hub-not-free-tax-evasion-other-1556309> [<https://perma.cc/8N69-8NLR>].

22. P. 57 (quoting *Bermuda: Country Profile*, BUS. BERM. REV., 2012, at 19, 22).

generated outside of Dubai;²³ Singapore offers full tax exemption for foreign-sourced income,²⁴ with strict bank confidentiality laws that carry criminal penalty for breaches (pp. 126–27); Hong Kong famously levies “no sales, withholding, capital gains, dividends, or estate taxes” (p. 137); Switzerland offers “competitive” tax rates and hallmark bank-secrecy law codified in its constitution (pp. 164, 166–67); and Delaware levies no corporate income tax on goods and services provided by Delaware corporations operating outside of Delaware (p. 187).

But so do a lot of other small jurisdictions—including Nauru, Niue, Palau, Samoa, and Vanuatu, to name a few—that come nowhere close to the success enjoyed by MDSJs (pp. 195–96). The small South Pacific island nation of Nauru, for instance, occupying one of the great phosphate-rock islands, looked to cross-border finance as a source of government revenue in the face of dwindling phosphate sales (pp. 193–94). In the late 1990s, the island attracted considerable criminal money—including \$70 billion of Russian mafia money and hundreds of “fictional” banks with no physical existence (p. 194). But with its refusal to comply with multilateral anti-money-laundering initiatives in the early 2000s, the island’s share of the global market for offshore finance quickly dissipated (pp. 194–96). The problem, as Bruner sees it, is that jurisdictions like Nauru fail to invest in infrastructure and resort to copying and pasting legislation from other jurisdictions, which results in little competitive advantage (pp. 195–96).

MDSJs offer something different than the garden variety of tax havens that fail to maintain stability or dominance in the global market for cross-border finance—something at least partially backed up, according to Bruner, by the fact that “diplomatic and legal pressures that have arisen since the 1990s have not fundamentally eroded the MDSJs’ advantages” (p. 225).

B. *Limits of the MDSJ Concept*

Bruner’s book is largely an effort to establish a causal claim: that the salient characteristics shared by MDSJs account for their extraordinary success in cross-border finance. It is, therefore, unsurprising that Bruner remains optimistic in predicting that “small jurisdictions that have profited predominantly through abusive practices will ultimately fail as global standards steadily improve” (p. 236).

This view finds support from recent work by legal scholars and economists who argue that small offshore jurisdictions enable jurisdictional competition, ultimately resulting in efficient and desirable regulatory regimes.

23. P. 81 (quoting *Dubai Economy*, GOV’T DUBAI, <http://dubai.ae/en/aboutdubai/pages/dubaieconomy.aspx> [<https://perma.cc/H5GE-A9PN>]).

24. Generally, nation-states tax on one of two bases, source or residence. Jurisdictions differ on how to tax income from other jurisdictions. For a general overview on the concept of foreign-sourced income, see Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 TAX L. REV. 99 (2011).

For instance, Jonathan Macey and Anna Manasco Dionne argue that regulatory competition between offshore jurisdictions and developed economies leads to increased innovation in regulatory rules because onshore jurisdictions are forced to offer more competitive transaction costs through the reduction of regulations and the use of financial innovations.²⁵ Others write “in praise of tax havens,” using economic models to assess that fears of a “race to the bottom” in corporate tax rates may be misplaced.²⁶

While Bruner attempts to avoid taking sides on the policy merits of jurisdictional tax competition (p. 35), the MDSJ concept, to a certain extent, inescapably clashes with the tax-haven literature that predominantly portrays small jurisdictions as “parasites” of larger jurisdictions, insinuating their non-value-added function.²⁷ Embedded in the tax-haven literature is the belief that small cash-strapped jurisdictions—acutely vulnerable to capture by nonmajoritarian interest groups—introduce the potential for a race to the bottom in tax rates and regulations.²⁸

In my view, both accounts reflect accurate morsels of descriptive reality. Bruner is correct to observe, as are race-to-the-top proponents, that small jurisdictions cannot achieve and sustain this measure of success without heavy investment in a wide range of institutional-capacity building. Those investments may in some cases lead to jurisdictional competition, resulting in innovative rules that govern cross-border financial activities.

But that causal relationship does not necessarily indicate that the absence of the independent variable would lead to failure. This is true especially if one starts looking at the internal political dimensions of various small jurisdictions. Importantly, not all small jurisdictions benefit from investing in the type of infrastructure that can lead to long-term economic development, at least from the point of view of the ruling elite. This is the endemic problem of agency: the interests of the ruling elite do not necessarily align with the interests of the local population.²⁹ Where there appears to be a severe agency problem, it may be just as lucrative from the point of view of the ruling elite to “commercialize sovereignty.”³⁰ Such commercialization is similar to ways in which state leaders across sub-Saharan Africa,

25. Anna Manasco Dionne & Jonathan R. Macey, *Offshore Finance and Onshore Markets: Racing to the Bottom, or Moving Toward Efficient?*, in OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION 8, 8–10 (Andrew P. Morriss ed., 2010).

26. E.g., Qing Hong & Michael Smart, *In Praise of Tax Havens: International Tax Planning and Foreign Direct Investment*, 54 EUR. ECON. REV. 82, 83–84 (2010).

27. See, e.g., Joel Slemrod & John D. Wilson, *Tax Competition with Parasitic Tax Havens*, 93 J. PUB. ECON. 1261, 1262 (2009).

28. PALAN ET AL., *supra* note 2, at 158–59.

29. See JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4–5 (2005) (comparing the state to a corporation subject to agency costs).

30. See Palan, *supra* note 4, at 153 (describing how historical trends of political fragmentation and the internationalization of capital have enabled states to commercialize sovereignty).

Latin America, and Southeast Asia have profited from “selling off” land to multinational corporations, largely at the expense of the local population.³¹

Noticeably absent from Bruner’s sampling are small jurisdictions like Liberia and Panama that are active in the global market for cross-border finance without reaching the extraordinary level of success enjoyed by MDSJs.³² Indeed, these jurisdictions may precisely be the jurisdictions whose “core business consists of charging rent or license fees in return for granting firms a right to incorporate in their jurisdictions.”³³

There are also important reasons to be skeptical about the effectiveness of multilateral crackdowns. For instance, a recent study by Niels Johannesen and Gabriel Zucman found that an increase in multilateral regulatory coordination and crackdown on tax havens resulted in “tax evaders shift[ing] deposits to havens not covered by a treaty with their home country. The crackdown thus caused a relocation of deposits at the benefit of the least compliant havens.”³⁴ Indeed, because closing down a subset of tax havens will make it more lucrative for the remaining havens, “renegade” jurisdictions are likely to thrive even in the era of heightened multilateral coordination.³⁵

With that said, this shortcoming does not detract from the book’s major achievements. The MDSJ concept provokes a thoughtful line of inquiry into thinking about the role of small offshore jurisdictions in relation to the existing, territorially configured domestic regulatory laws in a landscape where

31. The recent “land grab” phenomenon involving corrupt state leaders selling or leasing large-scale agricultural land to foreign entities is an example of this dynamic. Lea Brilmayer & William J. Moon, *Regulating Land Grabs: Third Party States, Social Activism and International Law*, in *RETHINKING FOOD SYSTEMS: STRUCTURAL CHALLENGES, NEW STRATEGIES AND THE LAW* 123, 124–25 (Nadia C.S. Lambek et al. eds., 2014).

32. To be sure, Bruner also examines large and successful jurisdictions—principally New York and London—to further illuminate the boundaries of MDSJs’ explanatory domain (p. 192). This effort, however, does not persuasively establish a negative causal inference. Bruner readily admits that his small sample of failed jurisdictions alone “hardly provide[s] a robust test of [his] causal hypotheses” (p. 192). To be fair, there is an inevitable tension between supplying a sufficient number of case studies to venture causal claims and focusing in on a manageable number that one can treat in sufficient depth and sophistication. It is my hope that Bruner’s provocative thesis, laden with careful case studies, inspires further academic investigation.

33. RONEN PALAN, *THE OFFSHORE WORLD: SOVEREIGN MARKETS, VIRTUAL PLACES, AND NOMAD MILLIONAIRES* 83 (2006).

34. Niels Johannesen & Gabriel Zucman, *The End of Bank Secrecy? An Evaluation of the G20 Tax Haven Crackdown*, *AM. ECON. J.*, Feb. 2014, at 65, 65.

35. See May Elsayyad & Kai A. Konrad, *Fighting Multiple Tax Havens*, 86 *J. INT’L ECON.* 295, 295 (2012) (“Closing down a subset of tax havens reduces competition among the havens that remain active. This makes their ‘tax haven business’ more profitable and shifts a larger share of rents to these remaining tax havens, making them more reluctant to give up their ‘tax haven business.’”). The effectiveness of recently enacted Foreign Account Tax Compliance Act (FATCA), which imposes reporting obligations regarding offshore accounts and assets for U.S. tax payers and certain financial institutions, also remains to be seen. See generally Young Ran (Christine) Kim, *Considering “Citizenship Taxation”: In Defense of FATCA*, 20 *FLA. TAX REV.* 335, 359–67 (2017) (noting the various merits of and concerns associated with the FATCA).

financial transactions increasingly implicate the interests of multiple jurisdictions. What makes his contribution particularly important, in my view, is his short but provocative discussion about the future of territorial regulations in an era of unprecedented capital mobility. This is a topic that only receives brief attention in Bruner's book, and a concept that I develop in Part II.

II. TERRITORIAL SOVEREIGNTY AND GLOBAL FINANCE

The prevailing account in the literature tends to conceptualize tax havens as vehicles used by corporations and high net-worth individuals ("HNWI") to escape otherwise applicable domestic tax liabilities.³⁶ This line of thought owes its intellectual debt to scholars who view the growth of cross-border commerce—along with a private system of governance developed outside of the sphere of state intervention³⁷—as undermining territorial sovereignty, or even rendering it antiquated.³⁸

Bruner views capital mobility's impact on territorial sovereignty as "double-edged" (p. 234). To Bruner, the ability of MDSJs to attract business is "profoundly dependent upon territorially defined financial regulatory authority" (p. 18). It is for this reason Bruner predicts that "there are powerful and well-endowed constituencies with strong incentives to maintain territorial financial regulation—and, accordingly, territorial sovereignty itself" (pp. 234–35).

This assessment is too crude, in my view, because it underappreciates that much of the success of MDSJs is attributable to the nonterritorial nature of global financial transactions and the fictional character of small offshore jurisdictions.³⁹ Indeed, perhaps the single most important reason for the success of tax havens "lie[s] in their ability to provide protection from national regulation and taxation *without* the need to physically relocate to the host country."⁴⁰ That is, unlike territorially connected productive activities that define other industries—land-based agriculture and the extractives

36. See, e.g., Stephen J. Kobrin, *Economic Governance in an Electronically Networked Global Economy*, in *THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE* 43, 45, 56 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

37. For an excellent commentary of transnational private regulation in the financial derivatives market context, see Gabriel V. Rauterberg & Andrew Verstein, *Assessing Transnational Private Regulation of the OTC Derivatives Market: ISDA, the BBA, and the Future of Financial Reform*, 54 VA. J. INT'L L. 9 (2013).

38. E.g., PETER MALANCZUK, *AKHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 7 (7th rev. ed. 1997); Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, in *TERRITORIALITY AND CONFLICT IN AN AGE OF GLOBALIZATION* 219, 219–21 (Miles Kahler & Barbara F. Walter eds., 2006); Alec Stone Sweet, *The New Lex Mercatoria and Transnational Governance*, 13 J. EUR. PUB. POL'Y 627 (2006).

39. To be fair to Bruner, this point is not developed at length in the book. Moreover, the book should be credited for successfully responding to the more extreme claims in the globalization literature that argue the effect that technological advancement enabling "frictionless transfers of money" is essentially erasing "geography." Pp. 16–18.

40. Palan, *supra* note 4, at 163.

industry would be paradigmatic examples—cross-border finance is *legally constituted*. As Katharina Pistor notes in her legal theory of finance, “Financial assets *are* contracts the value of which depends in large part on their legal vindication.”⁴¹ Financial instruments and legal regimes are interconnected, in that “the rules that establish the game are continuously challenged by new contractual devices, which in turn seek legal vindication.”⁴²

For this reason, I offer a different theoretical account concerning the complicated relationship between territorial sovereignty and cross-border finance. To the extent that small offshore jurisdictions offer a way for corporations and HNWIIs to escape territorial laws of a state without having to physically exit the territory of that state, the rapid ascendance of these jurisdictions in cross-border finance may not be a reflection of territorial sovereignty’s enduring reign. Rather, this ascent may be attributable to certain segments of territorially configured rules ceding to privately curated *juridical* constructs, ironically in the name of territorial sovereignty.⁴³ That is, it is the growing acceptance of private choice that seeks to exploit the juridical sovereignty of small offshore jurisdictions that more accurately describes the rising preeminence of tax havens. The rise of small offshore jurisdictions, therefore, ought to also be understood as the tendency to deemphasize the relationship between soil and the law.

This understanding has significant doctrinal and theoretical implications largely unrecognized in the existing literature. The most obvious cases of territorial rules being abandoned are in the areas of corporate law and laws tertiary to corporate law, largely owing to the increasing frequency with which corporate entities choose to incorporate in small offshore jurisdictions. As summed up by Lorraine Eden and Robert T. Kudrle, nearly all Caribbean and Pacific tax havens “are also headquarters havens insofar as the low value-added activity is not a subsidiary of a foreign firm but is independent and legally based in the haven.”⁴⁴

While private entities’ desire to secure low tax rates may primarily drive this structure, the effect may be much more than simply shortchanging the Internal Revenue Service. It has resulted in the transformation of offshore

41. Katharina Pistor, *A Legal Theory of Finance*, 41 J. COMP. ECON. 315, 315 (2013).

42. *Id.*

43. Cf. Ronen Palan, *Offshore and the Structural Enablement of Sovereignty*, in OFFSHORE FINANCE CENTERS AND TAX HAVENS: THE RISE OF GLOBAL CAPITAL 18, 20 (Mark P. Hampton & Jason P. Abbott eds., 1999) (explaining that offshore both maintains the state system and removes the threats of state regulation and taxation, “all done in the name of and by the state system itself”).

44. Lorraine Eden & Robert T. Kudrle, *Tax Havens: Renegade States in the International Tax Regime?*, 27 LAW & POL’Y 100, 102 (2005). Incorporation in tax-haven jurisdictions does not necessarily mean that the entity conducts business in that jurisdiction. See, e.g., Andrew Willins, *Shareholder Disputes in the British Virgin Islands*, APPLEBY RESOL. NEWSL. (Appleby, Hamilton, Berm.), Q1 2014, at 1, 1, [http://www.applebyglobal.com/publication-pdf/article/2014/shareholder-disputes-in-the-bvi-\(andrew-willins\)-february-2014.pdf](http://www.applebyglobal.com/publication-pdf/article/2014/shareholder-disputes-in-the-bvi-(andrew-willins)-february-2014.pdf) [<https://perma.cc/LVZ9-5573>] (explaining that the British Virgin Islands is a popular holding company jurisdiction “through which joint venture parties will often co-operate in ventures far removed from the shores of the British Virgin Islands”).

financial havens into producers of laws governing cross-border finance. Below, I use recent developments in corporate law and bankruptcy law to show that the deterritorialization of domestic laws governing certain financial transactions is already taking place, albeit not without resistance.

A. Corporate Law

Before courts began to articulate the internal affairs doctrine in the 1860s, firms had little choice about where to incorporate because states typically required domestic corporations “to maintain economic ties with the state.”⁴⁵ The growing mobility of businesses effectively ended the state’s monopoly to impose its laws on corporations doing business in their state.⁴⁶ Instead, capital mobility established and facilitated the modern charter competition, effectively deterritorializing corporate law.⁴⁷ Thus, corporate law is perhaps the most salient example where the tension between territorial laws and private choice has been resolved largely in favor of juridical private choice over territoriality.⁴⁸

While the internal affairs doctrine developed in the domestic context and is predominantly discussed in terms of interstate relations, federal and state courts are increasingly extending the doctrine to firms incorporated outside of the United States. Although largely unrecognized in the extant literature,⁴⁹ this extension is important because foreign jurisdictions mandate significantly different rules governing shareholder rights relative to ones available under domestic law.

One salient example is the minority investor’s right to bring a derivative suit—a lawsuit on behalf of the corporate entity for alleged wrongdoing to investors, enforcing a right that the managing members have refused to assert.⁵⁰ Because derivative suits fall under the categories of relationships deemed to be the “internal affairs” of a corporate entity, courts typically look to the law of the entity’s state of incorporation to determine the applicable law.⁵¹

45. Tung, *supra* note 12, at 44.

46. *See id.* at 60.

47. *See id.* at 97–100 (summarizing the preconditions, including corporate mobility, that were crucial in enabling such competition).

48. *See* Larry E. Ribstein & Erin Ann O’Hara, *Corporations and the Market for Law*, 2008 U. ILL. L. REV. 661.

49. *See, e.g.*, Frank H. Easterbrook, *The Race for the Bottom in Corporate Governance*, 95 VA. L. REV. 685, 698 (2009) (“[I]t is much harder to remove capital from the United States as a whole, and this country does *not* recognize an internal-affairs doctrine in its dealings with other nations.”).

50. For a general overview, see Daniel R. Fischel & Michael Bradley, *The Role of Liability Rules and the Derivative Suit in Corporate Law: A Theoretical and Empirical Analysis*, 71 CORNELL L. REV. 261 (1986).

51. *See, e.g.*, *Stephenson v. Citco Grp. Ltd.*, 700 F. Supp. 2d 599, 608 (S.D.N.Y. 2010) (“When deciding issues of ‘shareholder standing,’ that is, whether claims should be brought directly or derivatively, courts must look to the law of the fund’s state of incorporation.”)

Extending the internal affairs doctrine internationally is consequential since many foreign jurisdictions—including tax havens—severely limit derivative actions. Consider the case of *Winn ex rel. Scottish Re Group Ltd. v. Schafer*,⁵² which involved Scottish Re, the second-largest reinsurer in the United States,⁵³ incorporated in the Cayman Islands.⁵⁴ A shareholder brought a derivative action against Scottish Re’s officers and directors for “breach of fiduciary duties arising out of alleged misrepresentations as to the Company’s business.”⁵⁵ Despite Scottish Re’s irrefutable ties to the United States—evidenced by the shareholder’s allegations that Scottish Re maintained several offices in the United States and that U.S. investors owned a majority of Scottish Re’s outstanding shares—Scottish Re’s incorporation in the Cayman Islands proved to be fatal to the shareholder’s suit.⁵⁶ Citing the internal affairs doctrine, the court applied Cayman Islands law, which primarily looks to English common law for guidance.⁵⁷ This severely limited the shareholder’s rights because, under English law, “derivative claims are owned and controlled by the company, not its shareholders, and that a shareholder is not permitted to bring a derivative action on behalf of that company.”⁵⁸

To be sure, the applicability of the internal affairs doctrine outside of the United States is not a settled issue. Indeed, some courts have refused to apply the internal affairs doctrine internationally to small offshore jurisdictions on grounds that there is insufficient nexus between the incorporation jurisdiction and the litigants.⁵⁹ But courts in recent years have increasingly extended

(quoting *Debussy LLC v. Deutsche Bank AG*, No. 05 Civ. 5550(SHS), 2006 WL 800956, at *3 (S.D.N.Y. Mar. 29, 2006), *aff’d*, 242 F. App’x 735 (2d Cir. 2007)).

52. 499 F. Supp. 2d 390 (S.D.N.Y. 2007).

53. Verified Shareholders’ Derivative Complaint for Breach of Fiduciary Duty, Abuse of Control, Gross Mismanagement, Unjust Enrichment and Constructive Fraud Seeking Equitable Relief and Damages ¶ 1, *Winn*, 499 F. Supp. 2d 390 (No. 06-CV-10170), 2006 WL 3669780, at *2 [hereinafter Complaint].

54. *Winn*, 499 F. Supp. 2d at 392.

55. *Id.*

56. Complaint, *supra* note 53, ¶¶ 7–8.

57. *Winn*, 499 F. Supp. 2d at 393.

58. *Id.* at 396.

59. See, e.g., *UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, No. 650097/2009, 2011 WL 781481, at *3 (N.Y. Sup. Ct. Mar. 1, 2011) (“Application of the law of New York is also mandated on the ground that SOHC has almost no ties to the Cayman Islands. . . . Other than being incorporated in the Cayman Islands, SOHC has no obvious ties to that jurisdiction.”), *aff’d in part, modified in part*, 940 N.Y.S.2d 74 (N.Y. App. Div. 2012).

the internal affairs doctrine to famous tax havens, including the British Virgin Islands,⁶⁰ the Cayman Islands,⁶¹ and the Bahamas.⁶²

These developments ought to give some pause to domestic courts that mechanically apply the internal affairs doctrine internationally. Of course, there are reasons to find this emerging jurisprudence unproblematic. Ever since Roberta Romano wrote an influential piece conceptualizing corporate law as “products” supplied by states,⁶³ the dominant view in corporate law presupposes that corporations choose legal systems that are beneficial for shareholders.⁶⁴ Under this frame of thought, there appears little reason to think that increasing the number of “suppliers” competing to provide corporate law would be anything but beneficial, at least from an efficiency standpoint.

Enter taxation into the equation, and efficiency cannot be assumed. Here is why: when the tax rate outside of the United States is lower than the effective rate at home, “taxpayers will prefer international investments over domestic investments that, but for the tax regime, would provide more efficient returns.”⁶⁵ This is important because incorporation decisions in the domestic interstate context do not generally implicate a dramatic altering of the effective federal or state tax rate, notwithstanding the differences in state franchise tax fees. Federal income tax is unaffected because firms operating within the United States must pay federal taxes. State income tax is unaffected because corporations must establish physical presence within a state to be subject to that state’s tax.⁶⁶ Incorporation in offshore financial havens

60. See *Microsoft Corp. v. Vadem, Ltd.*, No. C.A. 6940–VCP, 2012 WL 1564155, at *4 (Del. Ch. Apr. 27, 2012) (“[B]ecause Vadem, Ltd. is incorporated under the BVI Business Companies Act of 2004 . . . [w]hether Microsoft is required to seek leave to bring its derivative claims depends entirely on BVI law.”), *aff’d*, 62 A.3d 1224 (Del. 2013) (unpublished table decision).

61. See *Krys v. Aaron*, 106 F. Supp. 3d 472, 485 (D.N.J. 2015) (“[B]ecause the disputed claim concerns alleged acts of a former director in his capacity as a director of a Cayman corporation, the internal affairs doctrine presumptively requires the application of Cayman Law.”).

62. *NatTel, LLC v. SAC Capital Advisors, LLC*, 370 F. App’x 132, 133 (2d Cir. 2006) (affirming the district court finding that “the law of the Bahamas—where ODC was incorporated—governed [the] dispute because NatTel’s claims involved matters of internal corporate governance”).

63. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 225–30, 277–81 (1985).

64. See ROMANO, *supra* note 9, 14–17; Winter, *supra* note 13, at 256.

65. Avi-Yonah, *supra* note 8, at 1578.

66. See R. Todd Ervin, *State Taxation of Financial Institutions: Will Physical Presence or Economic Presence Win the Day?*, 19 VA. TAX REV. 515, 516 (2000) (“Under accepted Commerce Clause jurisprudence, a non-domiciliary taxpayer must have established a substantial nexus with a state in order to be subject to that state’s taxing jurisdiction. States traditionally relied on the physical presence doctrine to prove the existence of such a nexus and, accordingly, asserted taxing jurisdiction over a non-domiciliary financial institution only when the institution had established a physical presence within the taxing state.”).

alters this dynamic because it often entails gaining juridical residence precisely for the purpose of avoiding or evading domestic taxes.⁶⁷ When accounting for tax incentives, the fact that consumers of corporate law have not advocated a replacement of the current system, which is often taken as the best evidence of the welfare-enhancing effects of jurisdictional competition,⁶⁸ cannot be assumed. At the very least, the topic deserves wider scholarly scrutiny as to whether a wholesale adoption of the internal affairs doctrine in the international context is desirable.

B. Bankruptcy Law

Incorporation decisions impact laws beyond corporate governance issues. They have already begun to reshape the substantive and procedural law applicable in international insolvency law, a body of law governing creditors and debtors when corporate entities operating in multiple jurisdictions are insolvent.⁶⁹

Traditionally, raw territoriality determined the default bankruptcy law applicable to corporate entities operating in more than one jurisdiction. Courts of the United States, for instance, exercised “jurisdiction over those portions of the company that are within its borders and not those portions that are outside them.”⁷⁰ But a relatively recent multilateral initiative promulgated by the United Nations provides rules on when each jurisdiction will “recognize” parallel proceedings in a foreign jurisdiction, thereby enabling the law of one jurisdiction to govern assets located “extraterritorially.”⁷¹

In the United States, chapter 15 of the Bankruptcy Code implements the initiative, providing rules on when domestic courts will give deference to foreign insolvency proceedings.⁷² The code provides that domestic courts must defer to foreign bankruptcy proceedings where the debtor has its

67. In the international context, the lack of coordination between nation-states enables “good” corporate tax planning to exempt or indefinitely defer income from taxation by any particular jurisdiction. See Jane G. Gravelle, *Tax Havens: International Tax Avoidance and Evasion*, 62 NAT’L TAX J. 727 (2009). Many thanks to Clint Wallace for this insight.

68. Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 211 (2006) (“The output of this competition has been, for the most part, welfare-enhancing. This contention may be best illustrated by the fact that consumers of corporate law—investors, managers, and their lobbying organizations—have not advocated replacing the states’ authority . . .”).

69. See Sandeep Gopalan & Michael Guihot, *Recognition and Enforcement in Cross-Border Insolvency Law: A Proposal for Judicial Gap-Filling*, 48 VAND. J. TRANSNAT’L L. 1225, 1226 (2015).

70. Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy*, 98 MICH. L. REV. 2216, 2218 (2000).

71. *Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V.* (*In re Vitro S.A.B. de C.V.*), 701 F.3d 1031, 1043 (5th Cir. 2012).

72. Congress enacted chapter 15 in 2005 to “implement the Model Law on Cross-Border Insolvency . . . formulated by the United Nations Commission on International Trade Law.” *Id.* Chapter 15 defines foreign insolvency proceeding as “a collective judicial or administrative proceeding in a foreign country . . . under a law relating to insolvency . . . in which . . . the

“center of . . . main interests” (“COMI”) in the foreign jurisdiction.⁷³ This is important because recognition under chapter 15 allows the debtor to recover any claims against or any assets of the entities “located within the territorial jurisdiction of the United States.”⁷⁴

Chapter 15 jurisprudence has resulted in tax havens’ transformation into producers of law that govern cross-border insolvency proceedings, in part because of the high number of private entities choosing to incorporate in those jurisdictions.⁷⁵ Under chapter 15, “the debtor’s registered office,” or the address designated in a corporation’s incorporation papers,⁷⁶ “is presumed to be the center of the debtor’s main interests.”⁷⁷ While this presumption is rebuttable, the difficulty in determining other factors has often resulted in courts’ deferring to that presumption. As Lynn LoPucki observes, “[T]hroughout most of the world, a debtor corporation’s country of incorporation is considered an appropriate venue—if not *the* appropriate venue—for the corporation’s bankruptcy case.”⁷⁸

This is especially true because legal formalities may permit a juridical center of operations appear to be in a particular jurisdiction using little more than glorified paperwork. Consider how Bermuda, an island with a tiny workforce, became a world-renowned hub for the reinsurance industry, the business of insurance for insurers (p. 59). Importantly, the insurance industry relies heavily on nonemployee agents and brokers, to the point where the insurer typically has no direct customer relationship with the insured. Under a practice known as “fronting,” for instance, the “insurer systematically cedes most of its insurance exposure to a reinsurer (typically in a different jurisdiction).”⁷⁹ As Edward Kleinbard notes, “[A] reinsurer can in fact have a commercial presence in the primary insurer’s jurisdiction through the retention of an agent of independent status, thereby facilitating its reinsurance business in respect of risks in that jurisdiction.”⁸⁰ Obviously, this has important tax consequences, because domestically controlled insurance companies owned by Bermudian parent companies reduce the tax burden on their insurance activities without bringing the foreign parent

assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.” 11 U.S.C. § 101(23) (2012).

73. 11 U.S.C. § 1517(b)(1) (mandating courts recognize foreign bankruptcy proceedings filed in the debtor’s “center of . . . main interests”); *id.* § 1520 (listing the consequences of recognition).

74. *In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86, 88 (Bankr. S.D.N.Y. 2012).

75. See Gravelle, *supra* note 67, at 741 (reporting that the British Virgin Islands is a country with over 400,000 registered corporations).

76. See, e.g., *In re Tri-Cont’l Exch. Ltd.*, 349 B.R. 627, 635 (Bankr. E.D. Cal. 2006) (using “the registered office” and “place of incorporation” interchangeably).

77. 11 U.S.C. § 1516(c).

78. LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 196 (2005).

79. Edward D. Kleinbard, *Competitive Convergence in the Financial Services Markets, TAXES*, Mar. 2003, at 225, 236.

80. *Id.*

companies into the U.S. net-income tax system.⁸¹ But this operational structure also has important doctrinal implications under chapter 15, because it has resulted in the laws of small offshore jurisdictions, including the laws of Bermuda, governing insolvency proceedings of corporate entities with substantial connections to the United States.

Consider the case of *In re Gerova Financial Group, Ltd.*, a chapter 15 proceeding involving two limited liability companies registered in Bermuda under the Bermuda Companies Act.⁸² Gerova was an investment company with significant assets in the United States specializing in acquiring “illiquid hedge fund assets, which it planned to use as capital for insurance regulatory purposes.”⁸³ Following a published report by a U.S. securities analyst claiming that the company was a “Ponzi scheme,” Gerova was subject to several securities suits in the United States, ultimately resulting in Gerova ceasing all business.⁸⁴ After creditors petitioned a court in Bermuda to commence winding-up proceedings, liquidators filed a chapter 15 petition asking the bankruptcy court in New York to give recognition to the Bermudian insolvency proceeding.⁸⁵ The court granted the petition, notwithstanding the petitioner’s concession in the briefs that the companies were “exempted companies” under Bermudian law, meaning that they were incorporated for the purpose of carrying on transactions and activities which are external to Bermuda.⁸⁶ The court’s reasoning, which included the observation that Bermuda was “the location of its corporate books and records,”⁸⁷ is revealing, given the court’s acknowledgment that “Gerova may have had significant assets in the United States.”⁸⁸

In re Gerova is hardly an unusual case. Indeed, the jurisprudence’s deference to foreign bankruptcy proceedings has been bolstered by recent court decisions treating the relevant time period for COMI determinations as when the chapter 15 petition is sought. Consider the seminal case of *In re Fairfield Sentry Ltd.*, involving one of the largest of the “feeder funds” that invested \$7 billion with Bernie Madoff’s firm, Bernard L. Madoff Investment Securities LLC.⁸⁹ Sentry was a classic offshore fund, organized under the laws of the British Virgin Islands (“BVI”) as a vehicle for non-U.S. persons

81. *Id.*

82. 482 B.R. 86, 88–89 (Bankr. S.D.N.Y. 2012).

83. *In re Gerova*, 482 B.R. at 88–89.

84. *Id.* at 89.

85. *Id.* at 89–90.

86. See Memorandum of Law in Support of Verified Petition at 20, *In re Gerova*, 482 B.R. 86 (No. 12-13641-alg). In other cases, this status triggers courts to find that a genuine issue of material facts exists as to an entity’s COMI. See, e.g., *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48 (Bankr. S.D.N.Y. 2008).

87. *In re Gerova*, 482 B.R. at 91.

88. *Id.* at 89.

89. No. 10 Civ. 7311(GBD), 2011 WL 4357421, at *1 (S.D.N.Y. Sept. 16, 2011), *aff’d*, *Morning Mist Holdings Ltd. v. Kryss (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 130 (2d Cir. 2013).

and tax-exempt U.S. entities to invest in the Madoff fund.⁹⁰ While the fund called the BVI its juridical home—meaning that it had its registered office, registered agent, registered secretary, and corporate documents located in the BVI—Sentry’s board of directors oversaw the management, with day-to-day operations handled by an investment manager, Fairfield Greenwich Group, based in New York.⁹¹ Despite these significant U.S. connections, the Second Circuit affirmed the lower court’s finding that the COMI was the British Virgin Islands, largely based on the assessment that “the relevant time period is the time of the chapter 15 petition.”⁹² In this case, by the time chapter 15 proceeding was sought, it was a year and a half after the revelation of the notorious Madoff fraud, whereby “the Debtors discontinued the transfer of funds for investment with [Madoff’s firm] in New York . . . [and had] no place of business, no management, and no tangible assets located in the United States.”⁹³ It is revealing, then, that Sentry’s incorporation status in the BVI—in the absence of routine business activities there during the insolvency period—pointed towards the BVI as the center of main interest for chapter 15 purposes.

To be sure, the statutory language in chapter 15 does not conflate COMI as the place of incorporation, and some courts have refused to recognize foreign proceedings taking place in offshore jurisdictions merely on the basis of a corporation’s incorporation situs.⁹⁴ That being said, bankruptcy courts in recent years have recognized foreign proceedings in cases involving corporate entities incorporated in notorious tax havens, including the British Virgin Islands,⁹⁵ Bermuda,⁹⁶ and the Cayman Islands.⁹⁷

This development is significant from several perspectives. From an economic-efficiency point of view, the deterritorialization of bankruptcy law may not be news to bemoan about. In a seminal piece, Douglas Baird and Thomas Jackson famously articulate the goal of bankruptcy law as enhancing the collection efforts of those “who, outside of bankruptcy, have property rights in the assets of the firm.”⁹⁸ To the extent that privileging a corporation’s juridical residence helps move the international insolvency system towards a so-called universalist system—where a debtor’s “home

90. *In re Fairfield*, 2011 WL 4357421, at *1.

91. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 130 (2d Cir. 2013).

92. *Id.*

93. *Id.* at 138.

94. *See, e.g., In re British Am. Ins. Co.*, 425 B.R. 884, 914–16 (Bankr. S.D. Fla. 2010) (declining to recognize an insolvency proceeding in the Bahamas as foreign main proceeding, notwithstanding the company’s incorporation under Bahamian law).

95. *E.g., Morning Mist Holdings*, 714 F.3d at 137–39.

96. *E.g., In re Gerova Fin. Grp., Ltd.*, 482 B.R. 86, 88–89 (Bankr. S.D.N.Y. 2012).

97. *E.g., In re Bancredit Cayman Ltd. (in Liquidation)*, No. 07 Civ. 11338(LAK), 2008 WL 919533 (S.D.N.Y. Mar. 31, 2008).

98. Douglas G. Baird & Thomas H. Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: A Comment on Adequate Protection of Secured Creditors in Bankruptcy*, 51 U. CHI. L. REV. 97, 103 (1984).

country” exercises worldwide jurisdiction over its bankruptcy⁹⁹—offshore jurisdictions may combat perceived evils like forum shopping. Such evils that are aggravated by a purely territorial system in which multiple sovereigns apply their own laws based on the physical location of each of the bankrupt entity’s assets.¹⁰⁰ Indeed, scholars have argued that certain forms of private ordering in bankruptcy law may heighten efficiency.¹⁰¹

But efficiency is not the only game in town. For one, the displacement of domestic bankruptcy laws implicates subversion of the local law’s conception of procedural justice. In the United States, for instance, civil proceedings are generally matters open to the public, under “a strong presumption of public access to court records.”¹⁰² The right to public access to judicial documents predates the Constitution¹⁰³ and is further enshrined in “the public’s [F]irst [A]mendment right to know about the administration of justice.”¹⁰⁴ Such nonlitigant rights may be subject to erosion under a deterritorialized system of governance. For instance, the creditors in *In re Fairfield* objected to the British Virgin Islands proceeding on grounds that it was “cloaked in secrecy,” and therefore against “U.S. public policy.”¹⁰⁵ Although the BVI liquidation proceeding indeed took place under seal, the Second Circuit rejected the argument, reasoning that “public summaries have been made available” and that “restricted access to court documents is not unusual in the BVI.”¹⁰⁶

Then, there is also the problem of applying foreign law that may be at odds with the local law’s conception of distributive justice.¹⁰⁷ To be sure, an efficiency-oriented scholar may view the application of a foreign jurisdiction’s insolvency laws as unproblematic, reasoning that those jurisdictions would have an incentive to devise insolvency laws with strong creditor protection in order to make the companies attractive to investors. But this view takes a rather narrow view of the bankruptcy law’s function. Indeed, the purpose of bankruptcy law is by no means a settled issue, and it may include the interests of various stakeholders besides creditors. As Elizabeth Warren

99. LoPucki, *supra* note 70, at 2220.

100. John A.E. Pottow, *The Myth (and Realities) of Forum Shopping in Transnational Insolvency*, 32 BROOK. J. INT’L L. 785, 787–88, 814–16 (2007).

101. Robert K. Rasmussen, *Resolving Transnational Insolvencies Through Private Ordering*, 98 MICH. L. REV. 2252, 2275 (2000).

102. *Video Software Dealers Ass’n v. Orion Pictures Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 26 (2d Cir. 1994) (citing *Nixon v. Warner Commc’ns Inc.*, 435 U.S. 589, 597–98 (1978)).

103. *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995).

104. *Video Software Dealers Ass’n*, 21 F.3d at 26 (explaining that the policy of open access codified in the Bankruptcy Code “evidences [C]ongress’s strong desire to preserve the public’s right of access to judicial records in bankruptcy proceedings”).

105. *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 139 (2d Cir. 2013).

106. *Id.* at 140.

107. For a seminal work on distributional justice, see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

explains, corporate bankruptcy typically involves a large number of constituencies, owing to the fact that corporations “tend to falter during active, sometimes frantic, operations, leaving contracts in various states of performance and nonperformance; owing past-due bills along with contingent future obligations; and disappointing legions of suppliers, employees, customers, creditors, and others who fear that they will not get all they had expected from their dealings with the debtor.”¹⁰⁸

It is for this reason that mechanical application of foreign law to insolvency proceedings with significant connections to the United States may undermine the function of American bankruptcy policy. As Andrew Dawson notes, “While haven jurisdictions have an incentive to pass strong creditor protections in order to make haven-registered companies attractive to investors, they have little incentive to protect employees, trade creditors, and other interests impacted by business failures.”¹⁰⁹ At the very least, there needs to be a more honest admittance that much of the normative assessment of the impact of tax havens is contingent on the academic paradigm one chooses to adopt.

CONCLUSION

Critics of tax havens are highly attached to the traditional, territorial view of the world: productive economic activities territorially connected to a particular jurisdiction bestow that jurisdiction the right to levy taxes for those activities. Tax havens appear problematic because they upset our sense of social contract. As Thomas Piketty explains, “[I]f some of the wealthiest individuals and some of our largest corporations use tax havens and fiscal dissimulation in such a way that they avoid paying taxes almost entirely, then it is our basic social contract that is at stake.”¹¹⁰

Christopher Bruner’s book provides a valuable service in showing that many small offshore jurisdictions—principally MDSJs—add more value than merely serving as juridical “parking lots” designed to help corporations and HNWI’s evade or avoid taxes. But it also raises some important countervailing considerations, including our jurisprudential tendency to tolerate private entities that transcend territorially configured domestic legal ordering, bootstrapped with lip service to territorial sovereignty.

In this Review, I highlight that small offshore jurisdictions not only allow transnational corporations to structure their operations to minimize taxes, but in doing so become emerging legal hubs producing rules governing global financial transactions. This necessarily involves the erosion

108. Elizabeth Warren, *Bankruptcy Policymaking in an Imperfect World*, 92 MICH. L. REV. 336, 343 (1993).

109. Andrew B. Dawson, *Offshore Bankruptcies*, 88 NEB. L. REV. 317, 319 (2009).

110. Thomas Piketty, *Foreword* to GABRIEL ZUCMAN, *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS*, at vii, viii (Teresa Lavender Fagan trans., 2015).

and reconstitution of domestic legal ordering. Whether, and what, consequences to society may result from this trend, is an issue of importance worthy of further scholarly scrutiny.