EQUALITY OFFSHORE

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INTRODUCTION .......................................................................................................................... 2669
I. THE OFFSHORE DILEMMA ...................................................................................................... 2680
   A. The Prevailing Discourse ............................................................................................... 2681
   B. The Econo-Socio-Legal Lacuna ....................................................................................... 2687
II. GOVERNING OFCS ................................................................................................................ 2690
   A. The Global Governance Ecology .................................................................................. 2690
   B. The Interests and Methods of Global Governors ............................................................ 2693
      1. Organization for Economic Cooperation and Development ...................................... 2694
      2. The Financial Action Task Force .............................................................................. 2698
      3. The G20 ................................................................................................................... 2704
      4. The European Union ............................................................................................... 2708
      5. The United States ..................................................................................................... 2711
III. GOVERNANCE AND THE OFC TRILOGY: CAPACITY, JUSTICE, AND IDENTITY ............. 2714
   A. The Overriding Cause for Concern ............................................................................... 2714
   B. The Capacity Problem .................................................................................................. 2716
   C. The Access to Justice Problem ....................................................................................... 2721
   D. The Identity Problem .................................................................................................... 2728
IV. TOO SMALL TO CARE? ......................................................................................................... 2731
   A. Money and Fairness ........................................................................................................ 2734
   B. Addressing Legal Institutions ........................................................................................ 2736
   C. Understanding Identity and Offshore Finance ............................................................... 2739
CONCLUSION ............................................................................................................................. 2740
Abstract: Global governance architecture, crafted by wealthy nations, has perpetuated the subordination of developing jurisdictions. The Article offers a novel and surprising analysis of governance tools used by wealthy countries and intergovernmental organizations to constrain offshore financial centers (OFCs) by focusing on the tools’ disparate impacts on tax havens whose populations comprise predominantly Black and Brown people. With tax haven issues garnering increasing attention, this Article provides a pathbreaking conceptual framework for examining the international tax, crime, and business discourse on OFCs. It also illuminates how the actions of powerful international actors, such as the Organization for Economic Cooperation and Development (OECD) and the European Union (EU), risk exacerbating the subordination of marginalized jurisdictions.

This Article makes four core contributions to the OFC literature. First, it argues that the current global governance architecture that is premised on the containment and eventual elimination of OFCs inflicts harms disproportionately on small developing countries, such as post-colonial jurisdictions and overseas territories. This approach uses a “hatchet” method that focuses on blunt instruments such as economic coercion and “lists” of non-cooperating jurisdictions to uni-
formly constrain a diverse set of jurisdictions. This uniform approach ignores the differences between wealthier, developed, and politically influential countries like Switzerland, on one hand, and developing, post-colonial jurisdictions like Barbados, on the other hand. A more nuanced, targeted “scalpel” approach would identify differences between jurisdictions and employ tools that cause the least harm to more vulnerable locales.

Second, this Article explains that global governance “lists” that “name and shame” jurisdictions fail to adequately consider how small countries conceptualize and use their limited administrative capabilities for economic development. Third, it highlights how offshore financial services help to build judicial capacity in some smaller developing jurisdictions. Finally, it notes that the offshore financial services sector can be a source of economic identity for the communities within some of these jurisdictions and discusses the implications of this complicating factor for the pursuit of global governance agendas.

INTRODUCTION

At the Forty-Seventh Group of Seven (G7) meeting, President Joe Biden identified offshore financial centers (OFCs) as a problem that requires immediate global attention. OFCs are jurisdictions that disproportionately rely on “financial services for nonresidents” as a source of income. They provide fa-
favorable regulatory and tax benefits to nonresident clients when compared to those clients’ home (onshore) jurisdictions. 4 President Biden adopted the prevailing narrative that OFCs are depriving countries of the tax revenues necessary to provide for the public health and welfare of their residents. 5 In short, OFCs allegedly “cost the world’s governments hundreds of billions of dollars a year, promote corruption, and undermine the rule of law.”6 Indeed, OFCs are

4 Although tax benefits are embedded in what OFCs offer, they are not the exclusive focus of OFCs. For example, OFCs may provide more desirable corporate governance rules for corporations that register in their jurisdictions than would be available in home jurisdictions such as the United States. BRUNER, supra note 3, at 23–34 (noting that the term OFC is too “closely associated with the term ‘tax haven’” because of the other, non-tax incentives that OFCs offer to nonresident institutions); see also William J. Moon, Delaware’s New Competition, 114 NW. U. L. REV. 1403, 1404–11 (2020) (discussing how firms incorporate in offshore jurisdictions to benefit from more favorable corporate governance rules).

5 According to President Biden:

With a global minimum tax in place, multinational corporations will no longer be able to pit countries against one another in a bid to push tax rates down and protect their profits at the expense of public revenue. They will no longer be able to avoid paying their fair share by hiding profits generated in the United States, or any other country, in lower-tax jurisdictions. This will level the playing field and make America more competitive. And it will allow us to devote the additional revenue we raise to making generational investments, which are necessary to keep America’s competitive edge razor sharp in today’s global economy.

Press Release, Joseph R. Biden, President of the United States, Statement by President Joe Biden on Today’s Agreement of 130 Countries to Support a Global Minimum Tax for the World’s Largest Corporations (July 1, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/01/statement-by-president-joe-biden-on-todays-agreement-of-130-countries-to-support-a-global-minimum-tax-for-the-worlds-largest-corporations/ [https://perma.cc/7Y75-647Z]. This approach is consistent with that of those advocating for “neutrality” in support of global welfare. According to one scholar, “the neutrality supporters’ view is that if taxes did not distort market allocation, global investments would flow to where they would be most efficiently used, global welfare would increase, and the resulting efficient allocation of resources would be to the benefit of all countries.” TSILLY DAGAN, INTERNATIONAL TAX POLICY 51 (2018) (footnotes omitted). This scholar criticizes the “neutrality discourse” and argues that “the decentralized structure of international taxation renders global neutrality a virtual impossibility.” Id. at 52.

thought of as an enemy to rich and poor jurisdictions alike; legal scholars suggest that developing jurisdictions also suffer at the hands of OFCs because tax evasion deprives these places of much needed revenue for collective goods and much needed welfare services.\textsuperscript{7} As a result of this dominant narrative, a global governance regime that constrains OFCs across the board is assumed to be in the best interest of the international community.\textsuperscript{8}

President Biden’s call to level the playing field among jurisdictions with regard to taxation was also an effort to address inequality in the United States.\textsuperscript{9} But when leaders seek to address perceived inequality of one type, there is a risk of entrenching other forms of inequality in the process.\textsuperscript{10} For example,
efforts by wealthy countries and international organizations to reform the economies of developing countries in order to facilitate economic growth have led to increased poverty and greater inequality in many of the developing countries.\footnote{See, e.g., Narcís Serra, Shari Spiegel & Joseph E. Stiglitz, Introduction: From the Washington Consensus Towards a New Global Governance (discussing how neoliberal economic policies caused harm to developing countries), \textit{in The Washington Consensus Reconsidered}, 3, 4 (Narcís Serra & Joseph E. Stiglitz eds., 2008); Carol V. Rose, The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study, 32 \textit{Law \& Soc’y Rev.} 93, 124 (1998) (noting the scholarly consensus that the movement to offer international legal assistance was a failure).} The neoclassical economic policies promoted throughout the developing world by key Washington institutions, known as the “Washington Consensus,” demonstrate how outcomes can depart drastically from policy goals.\footnote{See, e.g., Serra et al., \textit{supra} note 11, at 4 (implying, by describing the stifled growth of countries that abided by Washington Consensus policies, that the Consensus’ policy goals were not reflected in its outcome). These Washington institutions included, but were not limited to, the United States Department of the Treasury, IMF, and the World Bank. Chantal Thomas, \textit{Law and Neoclassical Economic Development in Theory and Practice: Toward an Institutionalist Critique of Institutionalism}, 96 \textit{Cornell L. Rev.} 967, 969 n.7 (2011) (citing Serra et al., \textit{supra} note 11, at 3–4).} To stimulate economic growth, proponents of the Washington Consensus pushed developing countries to implement strict fiscal discipline, modify their approach to the provision of public goods, privatize certain government-run enterprises, and aggressively pursue deregulation.\footnote{See, e.g., \textit{Life and Debt} (Stephanie Black 2001). \textit{Life and Debt} is a documentary about Washington Consensus policies in Jamaica, illustrating “the stories of individual Jamaicans whose strategies for survival and parameters of day-to-day existence are determined by the U.S. and other foreign economic agendas.” \textit{About the Film}, \textit{LIFE AND DEBT}, http://www.lifeanddebt.org/about.html [https://perma.cc/S542-Z7YG].} But it is now generally accepted that “[i]n the countries that followed Washington Consensus policies, economic growth was limited at best, and disproportionately benefited those at the top.”\footnote{Joseph E. Stiglitz, \textit{Is There a Post-Washington Consensus Consensus}? (noting that the Washington Consensus failed in not “understanding economic structures within developing countries, in focusing on too narrow a set of objectives, and on too limited a set of instruments”), \textit{in The Washington Consensus Reconsidered}, \textit{supra} note 11, at 41, 42.} And, in regions like Latin America, the policies preceded multiple years of “stagnation and recession.”\footnote{John Williamson, \textit{A Short History of the Washington Consensus} (describing the reforms that constitute the approach of the Washington Consensus), \textit{in The Washington Consensus Reconsidered}, \textit{supra} note 11, at 14, 15–17.}

The Washington Consensus demonstrated that one size does not fit all.\footnote{Id.} Every country has its own history and social context that must be carefully examined and understood before proposing policy reforms.\footnote{See, e.g., \textit{LIFE AND DEBT} (Stephanie Black 2001). \textit{Life and Debt} is a documentary about Washington Consensus policies in Jamaica, illustrating “the stories of individual Jamaicans whose strategies for survival and parameters of day-to-day existence are determined by the U.S. and other foreign economic agendas.” \textit{About the Film}, \textit{LIFE AND DEBT}, http://www.lifeanddebt.org/about.html [https://perma.cc/S542-Z7YG].} Nevertheless, international power brokers, such as the Organization for Economic Cooper-
tion and Development (OECD), the European Union (EU), and the wealthy nations that make up their membership—a group this Article calls the “Global Governors”—have not learned this lesson. The decline of the Washington Consensus has been followed by an anti-offshore center agenda that also ignores jurisdictions’ individual contexts.

This Article intervenes in the international tax and economics debate about OFCs and joins the larger inequality discourse to call for greater attention to the subordination of vulnerable populations. It makes four specific contributions to the legal scholarship on offshore financial jurisdictions. First, it argues that international actors take a “hatchet” approach to preventing

18 The OECD’s website explains that it “works closely with some of the world’s largest economies: Brazil, China, India, Indonesia, and South Africa . . . [which] participate in the OECD’s daily work” although these countries are not members. Our Global Reach, ORG. FOR ECON. COOP. & DEV., https://www.oecd.org/about/members-and-partners/ [https://perma.cc/WD4X-5CSH].


20 See, e.g., Laura Saunders, Quirks in a U.S. Treaty with Malta Turn into a Tax Play, WALL ST. J. (Aug. 20, 2021), https://www.wsj.com/articles/taxes-malta-pension-plan-11629418826?mod=search results_pos2&page=1 [https://perma.cc/3BVU-6EWA] (noting that the Internal Revenue Service described certain tax strategies involving Maltese pension plans as “tax scams” and suggesting that it could challenge their use). Even analysts who do not specifically take this view, suggest that one main harm of offshore finance and tax havens is the impact on inequality in developed countries. For example, with respect to the movement of capital to offshore locations to avoid taxation in the home country, according to international tax law scholar Reuven Avi-Yonah:

If developed countries are unable to tax income from capital and if alternative taxes are not feasible, their only recourse is to cut the social safety net—a net that is needed more than ever both because of demographic factors and because of the increased income inequality, income volatility, and job insecurity that tend to result from globalization.

Avi-Yonah, Globalization, supra note 6, at 1578.

harms, such as tax evasion, money laundering, and terrorist financing, through a combination of naming and shaming and economically coercing OFCs. But the indiscriminate use of these tools can be unnecessarily burdensome to small OFCs that are overseas territories and post-colonial jurisdictions where populations are predominantly Black and Brown—which this Article refers to as “Developing OFCs”—in underappreciated ways. Although some of these OFCs, like Bermuda, the Cayman Islands, and Barbados, have a high gross domestic product (GDP), their economies lack diversity and their size and sparse natural resources make them especially vulnerable to shifts in the global economy.

Further, the instinctive attention to small island OFCs ignores the reality that larger developed jurisdictions are also home to OFCs. For example, the State of Delaware is argued to be an onshore tax haven, and is said to “provide[] some of the most opaque shell companies available anywhere.” As noted by Professor Christopher Bruner, other “offshore” jurisdictions like Du-

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23 According to Dominic Thomas-James,

> In the global financial architecture, British Overseas Territories in the Caribbean and North Atlantic are of material significance. . . . Through their inalienable right to self-determination and pursuit of autonomous governance and financial independence, many developed offshore financial centres to achieve sustainable development, with encouragement from the UK.

THOMAS-JAMES, supra note 3, at 1.

24 See Bravo, supra note 22, at 33–49 (discussing several “illustrative challenges” to the economic sovereignty of developing Caribbean countries); see also Dean & Waris, supra note 7, at 1670–76 (discussing the harms posed to post-colonial OFCs).

25 See, e.g., Tony Freyer & Andrew P. Morriss, Creating Cayman as an Offshore Financial Center: Structure & Strategy Since 1960, 45 Ariz. St. L.J. 1297, 1300–01 (2013) (discussing Cayman’s economic success). This Article considers small post-colonial OFCs (typically islands) with less diversified economies to be Developing OFCs. These jurisdictions, such as Cayman Islands and Barbados, may have relatively high GDPs, but their economies are particularly vulnerable because they depend on only a few economic sectors. See, e.g., Freyer & Morriss, supra, at 1300–01 (noting Cayman’s high GDP); Martin W. Sybblis, Law, Growth, and the Identity Hurdle: A Theory of Legal Reform, 95 Tul. L. Rev. 867, 896–915 (2021) (discussing Barbados’s economic success); David S. Berry, Caribbean Integration Law 10–16 (2014) (describing the structure of the economies of some smaller Caribbean states and territories); see also BRUNER, supra note 3, at 18–28 (same). These small jurisdictions generally “have a very narrow resource base which, along with inaccessibility to natural resources and rich markets in other countries, is said to severely limit their economic structure of production.” Winston H Griffith, Caricom Countries and the Irrelevance of Economic Smallness, 28 Third World Q. 939, 941 (2007).

26 See WEITZMAN, supra note 2, at 54 (“[T]hrough its holding company rules, Delaware has effectively lowered corporate tax rates and made itself into a domestic tax haven.”).

27 BRUNER, supra note 3, at 22. Professor Bruner notes that “the United States . . . has, for almost a century, actively competed to attract foreign capital on the basis of taxation as well.” Id.
bai and Switzerland, are physically located onshore. Consequently, “the [offshore] misnomer suggests that the OFC concept may exhibit not merely an excessive preoccupation with islands, but a more general and troubling assumption that they (offshore) are categorically distinguishable from us (onshore).” Indeed, it would not be unreasonable to question whether the heightened attention on jurisdictions that are physically offshore and lack political and economic power is driven at least in part by a desire to limit competition with big economies. One feasible strategy of wealthy countries could be to drive lucrative business to onshore tax havens by disparaging Developing OFCs.

Second, this Article contends that the current global governance tools that focus on various reporting requirements of OFC governments are harmful to Developing OFCs because of these OFCs’ limited administrative capacities. This insight goes beyond the traditional understanding that some countries lack the depth of financial and human resources to comply with the transparency demands of the Global Governors. Instead, this Article argues that administrative capacity is far more complicated. The diversity of OFCs also encourages considering a variety of strategies regarding how limited administrative capacity should be deployed. For example, the way Switzerland or Luxembourg may choose to use its administrative resources to build its economy is different from how a jurisdiction like Barbados or the Cayman Islands would utilize its administrative capabilities for economic development.

28 Id.
29 Id. at 24. Dominic Thomas-James notes that there are several OFCs that are “not geographically offshore to anything,” such as the Principality of Monaco and Liechtenstein—both in Europe. THOMAS-JAMES, supra note 3, at 43.
31 See, e.g., Kevin E. Davis, Regulation of Technology Transfer to Developing Countries: The Relevance of Institutional Capacity, 27 LAW & POL’Y 6, 6, 16–18 (2005) (noting that some “developing countries [do not] possess sufficient institutional capacity to design and implement sophisticated regulatory regimes”).
32 Although Barbados and Switzerland are both OFCs, there are key differences between these jurisdictions. On the one hand, Barbados only entered the offshore arena in the 1980s after over 300 years of British colonialism and subordination, and “a mono-cultural economy.” Mottley, supra note 30, at 413. See generally HILARY MCD BECKLES, A HISTORY OF BARBADOS (2d ed. 2006). On the other hand, Switzerland’s history as a tax haven stretches back to the 1920s, its political history can be traced to the 1200s, and its economic development success to the eighteenth century. See Yvonne Guo & J.J. Woo, Small States as Banking Powerhouses: Financial Sector Policy in Singapore and Switzerland (discussing the rise and importance of the financial sector in Switzerland), in SINGAPORE AND SWITZERLAND: SECRETS TO SMALL STATE SUCCESS 75, 83–85 (Yvonne Guo & J.J. Woo eds., 2016).
33 Dominic Thomas-James notes: There are fundamental differences in the journeys various countries have taken in becoming offshore centres. Former British colonies in the Caribbean entered the industry due to various factors including reliance on being consumption or barter-based econo-
OFCs that have chosen to strategically invest the bulk of their administrative capacity in the offshore sector are constrained in their ability to pursue other policies and administrative agendas with the potential to enhance their economies. The added burden to onshore jurisdictions of reporting requirements further restricts the range of other productive activities they can reasonably pursue.

Third, this Article highlights how offshore financial services build judicial capacity in Developing OFCs. The international business sector is rife with disputes and relies on expert judges to facilitate the efficient resolution of commercial disputes. Consequently, Developing OFCs have created courts in the model of Delaware’s Chancery Court to facilitate dispute resolution in the commercial arena. But in Developing OFCs, commercial courts arguably serve more purposes than they do in wealthier or more developed OFCs. In Developing OFCs, these courts provide a model for the development of specialized courts that focus on other substantive areas of law. With the growth of specialized courts in areas, such as criminal and family law, local litigants can receive relief and are not subject to the backlog in cases that would otherwise exist. One positive externality of specialized commercial courts is therefore the

THOMAS-JAMES, supra note 3, at 45 (citing Ronen Palan, Trying to Have Your Cake and Eating It, 42 INT’L STUD. Q. 625 (1998)).

Commentators have noted that “just as big states are a diverse lot, so are states with populations of less than 1.5 million.” Sarwat Jahan & Ke Wang, A Big Question on Small States: Can They Overcome Their Size-Related Vulnerabilities and Grow Faster and More Consistently?, FIN. & DEV., Sept. 2013 at 44, 44.

See, e.g., Mottley, supra note 30, at 411–24 (discussing the burdens placed on Barbados by the international taxation regime).


Kawaley, supra note 36, at 19 (noting that Bermuda created a specialist court because of demands by commercial litigators).

Moon, supra note 4, at 1437–38 (highlighting the benefits of Delaware’s Chancery Court).

Kawaley, supra note 36, at 17 (noting that: “[s]ince the establishment of the Commercial Court in 2006, two of Bermuda’s six Supreme Court judges have become specialist criminal judges, a development which the increasingly complex criminal law regime requires”).

Id. (“Since the growth of commercial litigation in the 1990s in Bermuda, the litigation Bar has become increasingly divided into groups of specialists rather than general practitioners.”).
reduction in unequal access to justice within smaller resource-constrained Developing OFCs.  

Finally, this Article explores how the offshore financial services sector may be an economic identity for communities within some Developing OFCs. Where this is the case, the Global Governors should be particularly cautious about how these jurisdictions are governed. A hatchet approach to governance could lead to social harm that reverberates further and longer throughout the community than mere revenue loss would. In some cases, offshore financial services may reflect an active rejection of a colonial era that left some Developing OFCs with no choice about the type of economy they could have. In this vein, the conceptualization of offshore financial services as a source of identity suggests that these services contribute to a shared interpretation of the history, talents, and destiny of a community—beyond colonial outposts.

This Article explores the social costs of OFC-related global governance tools promulgated by powerful intergovernmental organizations and wealthy countries and imposed on the residents of Developing OFCs. It also expands the policy and scholarly focus on the tax, regulatory, and criminal aspects of offshore finance to include socio-legal factors that can lead to the inequitable treatment of Developing OFCs. These jurisdictions have relatively small populations, land mass, and volume of non-offshore economic activity. They

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41 Id. at 19–20 (“Prior to the establishment of the [Bermuda] Commercial Court, there was a criminal case back-log. Three years later, following designation of two judges . . . as specialist criminal trial judges, this backlog has been eliminated.”).
42 See infra notes 399–425, 464–478 and accompanying text.
43 See infra notes 321–357 and accompanying text.
44 See infra notes 399–425 and accompanying text.
45 See Sybblis, supra note 25, at 871 (discussing the relationship between legal reform and the concept of community economic identity).
46 See infra notes 67–478 and accompanying text.
47 See infra notes 67–478 and accompanying text.
48 Kevin Davis has referred to small jurisdictions as those “whose laws govern a low volume of activity . . . .” Kevin E. Davis, Law-Making in Small Jurisdictions, 56 U. TORONTO L.J. 151, 154 (2006) (discussing the limitations of law-making in smaller resource-constrained jurisdictions). This Article refers to small jurisdictions as those where non-offshore financial services activity is relatively low in comparison to those of larger and more developed jurisdictions. Davis describes the mechanics of evaluating jurisdiction size:

A jurisdiction’s size must be assessed by reference to a particular activity, since size can vary across activities. In other words, a jurisdiction may be small for the purposes of one activity (e.g., business activity) and large for the purposes of another (e.g., divorce). When it comes to business activities, the primary determinants of a jurisdiction’s size are likely to be the size of its population and that population’s wealth: generally speaking, a jurisdiction with a small and poor population is unlikely to have a large volume of business activity.
are also constantly grappling with how to strategically engage with the global community because of their historically vulnerable economic and geo-political positions, due in large part to the lingering remnants of slavery and colonization. These places were subordinated to major colonial empires that used them for raw materials and free labor. Because of this background, the imposition of financial reporting requirements on Developing OFCs by wealthy countries smacks of a form of neocolonialism. Indeed, some behavior of the Global Governors may serve as a reminder of a time when colonial empires cared only about their wealth and power, and not about the inhabitants of the places they colonized.

For example, the consequences for Developing OFCs of the OECD’s initial list of “harmful preferential tax regime[s]” were far-reaching. This was seen when “multinationals—banking and financial entities—announced that they would exit [Developing OFCs] and the targeted states and territories feared negative reputational effects would take place.” Developing OFCs were inevitably left with limited ability to express their “economic sovereignty” out of fear of reprisal from the Global Governors. Indeed, freedom from the plantation economies of the past remains elusive.

To address concerns about financial crimes, this Article argues that the Global Governors should abandon the hatchet and instead use a scalpel-like approach to global governance. Unlike the hatchet, the scalpel conforms information reporting and best practices to the historical and local context of each Developing OFC. This type of approach looks for evidence of criminality

Id. at 154.

See generally ERIC WILLIAMS, CAPITALISM AND SLAVERY (1944) (discussing the connection between the slave trade and the economics of the Industrial Revolution).

See Alex Dupuy, Slavery and Underdevelopment in the Caribbean: A Critique of the “Plantation Economy” Perspective, 7 DIALECTICAL ANTHROPOLOGY 237, 250 (1983) (suggesting that the historical exploitation of the Caribbean by European states contributes to continued underdevelopment in the region). See generally WILLIAMS, supra note 49 (discussing the slave trade and the colonial past of many OFCs); ORLANDO PATTERNSON, SLAVERY AND SOCIAL DEATH (1982) (discussing the slave trade, slavery and their consequences in the Caribbean); ATUL KOHLI, IMPERIALISM AND THE DEVELOPING WORLD (2020) (describing the role of Britain and the United States in shaping developing economies from the colonial period to the present day).

See, e.g., Bravo, supra note 22, at 36–49 (discussing some barriers to the “economic sovereignty” of Caribbean jurisdictions).


Bravo, supra note 22, at 38–39.

Id. at 49 (noting that the rules and standards imposed by Global Governors “demonstrate that Caribbean states and territories lack economic sovereignty and are thus unable to chart their own economic destiny”).

See infra notes 436–478 and accompanying text.
and responds proportionately to the harm experienced. It also takes into consideration the national economic and social goals of individual Developing OFCs. A hatchet foregoes investigation into the commission of a crime, as well as the various colonial and development histories of Developing OFCs. Instead, it treats these jurisdictions as immediately suspect of criminality by placing them on lists and threatening harm to their economies if they fail to comply with the Global Governors’ transparency requirements.\footnote{Kevin E. Davis, Benedict Kingsbury & Sally Engle Merry, \textit{Indicators as a Technology of Global Governance}, 46 LAW & SOC’Y REV. 71, 71–74 (2012) (describing the use of indicators in the creation of international norms and standards). Without a keen awareness of the various socio-historical legacies of these places, it is difficult to treat them fairly. This is not dissimilar to the argument for affirmative action in the United States. See generally RANDALL KENNEDY, \textit{FOR DISCRIMINATION} (2013); Commencement Address at Howard University: “To Fulfil These Rights,” 2 PUB. PAPERS 635, 636 (June 4, 1965) (noting that specific efforts must be made to ensure equal opportunity for all).}

The stakes for global justice are high. As this Article reveals, modern global governance efforts drive inequality between and within nations by overlooking the economic, social, and legal (“econo-socio-legal”)\footnote{See Amanda Perry-Kessaris, \textit{Approaching the Econo-Socio-Legal}, 11 ANN. REV. L & SOC. SCI. 57, 58 (2015) (discussing how “the economy and the law are mutually constitutive, and that both are in turn mutually constitutive of wider social life”).} context of the jurisdictions governed.\footnote{International tax law scholar Allison Christians and her colleagues explain that: The cumulative impact of this growing web of collective action problems [in the international tax arena] is the potential demise of the ability of any one country, regardless of size, to effectively collect sufficient revenue to support its public needs. Concurrently, this comes at the very time a growing inequality of the distribution of social burdens and benefits is being perceived worldwide.} This Article draws on the political sociology of development as well as law and society literature to move beyond financial crime and economics and provide a more robust assessment of the human element of offshore global governance.\footnote{See generally STATES IN THE DEVELOPING WORLD (Miguel Centeno, Atul Kohli & Deborah J. Yashar, with Dinsha Mistree eds. 2017) (discussing the role of state capacity in development); \textit{Atul Kohli, State-Directed Development} (2004) (exploring efforts by developing countries to promote economic development); ORLANDO PATTERSON, \textit{THE CONFOUNDING ISLAND: JAMAICA AND THE POSTCOLONIAL PREDICAMENT} (2019) (providing a narrative of development in postcolonial Jamaica); Davis et al., supra note 57, at 71–74 (discussing the use of numerical data in international standard-setting).} It suggests an econo-socio-legal analysis of the current OFC global governance architecture to avoid the continued subordination of a group of historically marginalized jurisdictions.\footnote{See infra notes 112–130 and accompanying text.}
The remainder of this Article is organized into four parts. Part I provides a general overview of the OFC discourse of recent decades. It divides the prevailing views into three categories—optimists, realists, and skeptics. This Part makes the case that these views underappreciate the importance of the interaction between the offshore sector and the residents of Developing OFCs. Part II provides an overview of how OFCs are currently governed. Part III discusses three areas of oversight in OFC global governance: (1) the jurisdictional capacity of small OFCs; (2) access to justice for OFC residents; and (3) the economic identities of Developing OFCs. Part IV emphasizes three considerations to guide how global governance efforts are pursued to engage with OFCs more equitably.

I. THE OFFSHORE DILEMMA

The scholarly and policy debates over the efficacy, legality, and morality of OFCs span several decades. Commentators tend to galvanize into three camps that represent distinct views of OFCs: optimists, realists, and skeptics. These are ideal types—paradigms that emphasize key features. Section A of this Part discusses the prevailing discourse of these three camps. Section B

62 See infra notes 67–130 and accompanying text.
63 See infra notes 67–130 and accompanying text.
64 See infra notes 131–307 and accompanying text. This Part frames the subsequent discussion by highlighting how the United States, EU, OECD, and other powerful global actors have focused exclusively on the economic aspects of offshore financial services in forming and deploying various technologies of global governance.
65 See infra notes 308–425 and accompanying text. Although these areas are more difficult to measure than GDP and lost tax revenue, they are nonetheless relevant because they provide a deeper view of the development goals and socio-historical challenges of some small OFC jurisdictions. Importantly, they show how the dominant narrative of OFC power and influence disguises these jurisdictions’ vulnerability and weakness.
66 See infra notes 426–470 and accompanying text. First, close consideration should be given to how small Developing OFCs conceptualize their government capabilities when designing transparency frameworks. Second, Global Governors should carefully assess the impact of their governance tools on access to justice for OFC residents. Third, Global Governors should study the importance of offshore financial services to the identity of Developing OFCs.
67 See, e.g., Avi-Yonah, Globalization, supra note 6, at 1578.
68 This Article borrows two of these three categories—the categories of “optimists” and “skeptics”—from Kevin Davis and Michael Trebilcock’s scholarship on law and development. See Kevin E. Davis & Michael J. Trebilcock, The Relationship Between Law and Development: Optimists Versus Skeptics, 56 AM. J. COMPAR. L. 895, 895–98 (2008).
69 An ideal type is “a form of archetype or paradigm that aims to express vividly certain consequential features of a social phenomenon that are pertinent to a given scholar’s research interest.” Bruner, supra note 3, at 42.
70 See infra notes 72–111 and accompanying text.
highlights the importance of studying the intersection between the economic, legal, and social lives of OFC residents.71

A. The Prevailing Discourse

Optimists tend to underscore the positive aspects of OFCs by pointing to the benefits of the OFC enterprise for both developed “onshore” jurisdictions and the OFC jurisdiction.72 Optimists represent the smallest and perhaps the least heard group of commentators on OFCs. These scholars and policy makers do not disregard the potential harms that can emerge from OFC operations—like criminal activity, including money laundering, tax evasion, and terrorism financing—but they recognize at least three central goals and benefits of offshore activities.73

Many optimists view the offshore enterprise as a means of economic development for a subset of small jurisdictions.74 Often—though not always—the jurisdictions that house offshore enterprises are islands with minimal natural resources and few options for economic growth.75 International business, by way of the offshore sector, is therefore a viable route for bringing revenue and technology to their shores.76 Some optimists suggest that these jurisdic-

71 See infra notes 112–130 and accompanying text.
72 See, e.g., Anna Manasco Dionne & Jonathan R. Macey, Offshore Finance and Onshore Markets: Racing to the Bottom, or Moving Toward Efficient? (suggesting that OFCs improve rulemaking in the financial industry), in OFFSHORE FINANCIAL CENTERS AND REGULATORY COMPETITION 8, 8–9 (Andrew P. Morriss ed., 2010).
73 See id.; see also Bravo, supra, note 22, at 34–36 (discussing the “economic sovereignty” of OFCs as benefiting from their economic structures).
75 See VLCEK, supra note 74, at 1–24 (defining small states and discussing the challenges faced by small states).
76 See, e.g., Trevor A. Carmichael, Law, Conservation and Sustainable Development (discussing the benefits of the international business sector on the Barbados economy and society), in BARBADOS: THIRTY YEARS OF INDEPENDENCE 265, 272 (Trevor Carmichael ed., 1996); see also Davis, supra note 31, at 6–7 (noting the relationship between legal institutions, technological development, and international investment). With respect to economic development concerns, optimists suggest that small jurisdictions have gained significantly from the offshore financial services sector. Prominent examples include Cayman Islands, Singapore, and Switzerland. See, e.g., Freyer & Morriss, supra note 25, at 1298–304 (discussing benefits accrued by the Cayman Islands through its growth as a financial center); JOHNSON, supra note 74, at 29–47 (noting conditions in the Cayman Islands prior to its development as an OFC); Howard A. Fergus, The Cayman Islands: Britain’s Maverick Caribbean Colony, J.E. CARIBBEAN STUD., Sept. 2004, at 1, 6–9 (discussing Cayman’s development trajectory); see also Guo & Woo, supra note 32, at 75–88 (noting the development of the financial industries of Singapore and Switzerland).
tions—many of which are independent states—should have the autonomy to make policy choices that benefit their citizenry.\textsuperscript{77} Consequently, any effort to penalize these choices arguably goes against the international norms of respecting sovereignty and the right to self-determination.\textsuperscript{78} Another group of optimists argue that OFC regulations pertaining to international business may be good for regulatory competition, in that they push other jurisdictions toward more efficient and even cost-effective regulation of some enterprises.\textsuperscript{79}

Realists, however, acknowledge both the merits and harms posed by OFC jurisdictions.\textsuperscript{80} They are also more inclined to dive into the policy and tax details to better understand whether the global community is better or worse off for the existence of OFCs. For example, according to one perspective, jurisdictions that are well-governed are more likely to pursue offshore financial services as a development strategy and are thus more likely to perform well in this arena.\textsuperscript{81} Scholars of this persuasion also study whether wealthy corporations that use OFCs to maximize their profits harm non-OFCs in the process.\textsuperscript{82} Some realist scholars argue that OFCs are now global players in the world of international finance and corporate governance and even benefit the banking

\begin{itemize}
\item \textsuperscript{77} See VLCEK, supra note 74, at 68–72 (noting the intrusive effect of the OECD and FTAF anti-tax haven and anti-money laundering initiatives on Caribbean economic sovereignty).
\item \textsuperscript{78} See, e.g., Bravo, supra note 22, at 37–41 (discussing challenges to the economic sovereignty of Caribbean nations, including sanctions targeted at tax havens).
\item \textsuperscript{79} See Dionne & Macey, supra note 72, at 8–29.
\item \textsuperscript{80} This Article uses the term “realists” to describe scholars who see OFCs for the complicated jurisdictions that they are. That is, these scholars reflect on both the positive and negative aspects of these places and the practices they facilitate.
\item \textsuperscript{81} See generally Dhammika Dharmapala & James R. Hines Jr., Which Countries Become Tax Havens?, 93 J. PUB. ECON. 1058 (2009) (discussing the governance characteristics of countries that become tax havens).
\item \textsuperscript{82} According to Dhammika Dharmapala, non-OFCs could deploy a range of policy tools to eliminate potential harm caused by OFCs. The fact that they haven’t done so is either the result of collective action difficulties or because in some ways non-OFCs benefit from OFC activities. For example, where it concerns preferential tax jurisdictions, Dharmapala explains:

If preferential regimes are prohibited or infeasible, then countries are constrained to compete by setting a single tax rate for all forms of capital (regardless of mobility). This will result in an inefficiently low tax rate on immobile capital, and forces countries to compete more broadly over the tax rate on all forms of capital. On the other hand, preferential regimes allow countries to tax immobile capital at high rates, while competing only over tax rates imposed on mobile capital. Preferential regimes can thus mitigate tax competition by restricting its effects to a subset of the tax base.

\end{itemize}
sector of neighboring countries. In doing so, those with this realist viewpoint may consider a more complex set of factors that influence the success of some of these jurisdictions. These factors include size, legislative autonomy, geographic location in the world, availability of human capital, and international political strategy. If one were to adopt this realist view, the way to understand how OFCs work would be to ask how certain “geographic, cultural, social, political, and economic features that condition [an OFC’s] development options and strategic opportunities” may impact their success. Recently, a subset of realists approached the OFC/tax haven debate from the perspective of race. They examine the unequal treatment of countries from different racial backgrounds in the global governance of Developing OFCs. These scholars are concerned with the bias in the way that OFCs are governed. They argue that there has been a harsher approach to OFC jurisdictions that are overwhelmingly populated by Black and Brown people.

With respect to regulatory matters, a subset of realists suggest that OFCs could be subject to legislative capture and become havens for actors wishing to escape the United States’ (or other jurisdictions’) mandatory and more discerning corporate law. Under this view, OFCs are considered “Corporate Law Havens” because the corporate governance rules that emerge are tilted to favor managers at the expense of shareholders. For example, Professor William Moon argues that the corporate governance rules in some corporate law havens preclude shareholders from bringing derivative lawsuits against a corporation. The concern here is that shareholders in non-OFC jurisdictions may be

83 BRUNER, supra note 3, at 45; Moon, supra note 4, at 1451; see Andrew K. Rose & Mark M. Spiegel, Offshore Financial Centres: Parasites or Symbionts?, 117 ECON. J. 1310, 1310 (2007) (arguing that OFCs “may also have unintended positive consequences, such as providing competition for the domestic banking sector”).

84 See BRUNER, supra note 3, at 41–50.

85 Id. at 8.

86 See Steven A. Dean, FATCA, the U.S. Congressional Black Caucus, and the OECD Blacklist, 99 TAX NOTES INT’L 83, 85–89 (2020) (describing the role of race in global tax policy and the unequal treatment of developing OFCs, such as Liberia, by the OECD).

87 See id.

88 See Dean & Waris, supra note 7, at 1661–64 (highlighting that lists meant to “name[e] and shame[e]” tax havens consistently name Black and Brown jurisdictions while ignoring affluent European tax havens).

89 Id. at 1661–62. To be clear, Dean and Waris do not defend illegal activities that are facilitated by some OFCs. Instead, they highlight that less wealthy Black and Brown jurisdictions are not the threat to the international economy or welfare system of developed countries that current international tax policy make them out to be. Id. at 1667–70.

90 See, e.g., Moon, supra note 4, at 1444–50 (discussing foreign corporate governance rules that enable corporations to opt out of otherwise compulsory domestic governance rules).

91 Id. at 1443.

92 See id. at 1403–09.
more vulnerable to the actions of managers governed under more “permissive corporate governance rules” in OFC jurisdictions.\textsuperscript{93} In addition to these manager friendly rules, corporations are drawn to the efficiency and expertise linked to the rise in “specialized business courts” that are becoming more popular in these financial centers.\textsuperscript{94}

This perspective views Developing OFCs, such as “Bermuda, the British Virgin Islands, and the Cayman Islands, [as] emerging ‘laboratories’ of corporate law offering attractive corporate governance rules for publicly traded corporations that principally operate outside of those jurisdictions.”\textsuperscript{95} Because of trepidation about the potential impact on American shareholders and public policy concerns regarding strategic corporate behavior, scholars have started to recommend ways to limit the reach and influence of OFCs in this regard. One recommendation is for Congress to enact legislation that requires courts to consider context more carefully in determining whether United States corporate law applies to a dispute involving a functionally-American corporation.\textsuperscript{96} This would limit the draw of corporate law havens because corporations would be less capable of opting out of presumably higher quality default corporate rules in the United States. Of course, other realists suggest that OFC corporate law is of no lesser quality than in the United States, and further argue that OFCs may be good for regulatory competition.\textsuperscript{97}

Skeptics, unlike optimists and realists, ultimately oppose the idea of OFCs—primarily the tax haven variant—due to their role in hiding wealth from onshore taxing authorities.\textsuperscript{98} As is apparent in the narrative of the Biden Administration and G7 countries, OFCs are viewed as rogue jurisdictions that steal wealth from the coffers of the global community, especially more devel-

\textsuperscript{93} Id. at 1403, 1443–50.
\textsuperscript{94} Id. at 1403.
\textsuperscript{95} Id. at 1406 (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).
\textsuperscript{96} See William J. Moon, Regulating Offshore Finance, 72 VAND. L. REV. 1, 52 (2019). One scholar notes a potential approach whereby courts would “contextually and collectively weigh[] all connecting factors” when considering the scope of federal statutes with respect to a given corporation. Id. This approach “would allow courts to avoid the absurd result of a case with overwhelming factual connections to the United States (and no risk of conflict with foreign law) being dismissed as an ‘extraterritorial’ transaction.” Id. The term “‘American’ corporation” is used to refer generally to “corporations that are publicly traded in American securities markets and incorporated in one of the constituent states of the United States.” Moon, supra note 4, at 1422–23 (first citing Marcel Kahan, The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?, 22 J.L. ECON. & ORG. 340, 348 (2006); and then citing Peter Dodd & Richard Leftwich, The Market for Corporate Charters: “Unhealthy Competition” Versus Federal Regulation, 53 J. BUS. 259, 261–64 (1980)).
\textsuperscript{97} Dionne & Macey, supra note 72, at 8.
\textsuperscript{98} See generally NICHOLAS SHAXSON, TREASURE ISLANDS (2011) (discussing the negative consequence to onshore jurisdictions from OFCs).
oped nations. Consequently, skeptics believe that OFCs must be closely governed and, ultimately, eliminated. Arguably, skeptics have been the loudest voices in the OFC discourse. They include wealthy nation states, journalists, scholars, and international organizations led by powerful countries. Leaks, such as the Panama Papers and UBS Bank debacles, have bolstered the claims of skeptics and have led to more aggressive efforts to enforce tax collection across jurisdictions.

As a result of prominent media reports about secret offshore accounts and shady business dealings by the wealthy and by criminals, skeptics have both a ready audience and media tools at their disposal to disseminate their perspective. For example, the United States government, particularly during Democratic administrations, tends to see OFCs as a hindrance to a more robust wel-

99. See ZUCMAN, supra note 6, at 8–33 (noting the massive amounts of wealth in OFCs, particularly in Switzerland).

100. For example, Gabriel Zucman and Gus Wezerek argue that “President Biden should be applauded for trying to end the race to the bottom on corporate tax rates,” but argue this is not enough to address inequality in America. Gabriel Zucman & Gus Wezerek, Opinion, This Is Tax Evasion, Plain and Simple, N.Y. TIMES (July 7, 2021), https://www.nytimes.com/interactive/2021/07/07/opinion/minimum-corporate-tax.html [https://perma.cc/CG5-EAUN]. The authors also note that “[c]ompanies have resorted to devious schemes to justify their profit shifting. For years, the rights to Nike’s Swoosh trademark belonged to one of the company’s Bermuda subsidiaries. In its quest to avoid taxes, Apple moved some of its intellectual property to Jersey, a small island in the English Channel.” Id. Contra DAGAN, supra note 5, at 142–84 (discussing how international cooperation can harm developing countries); Dean & Waris, supra note 7, at 1659 (noting how Black and Brown jurisdictions can become targeted in an effort to end international economic crimes).


103. See generally BERNSTEIN, supra note 101 (discussing the Panama Papers leak in more detail).

106 See generally Avi-Yonah, Globalization, supra note 6 (noting that globalization and the need to provide social insurance were two motivations to constrain tax competition); Avi-Yonah, Shame of Tax Havens, supra note 6 (discussing the negative effects of tax havens).

107 See DAGAN, supra note 5, at 152–70 (explaining how “the OECD redirected its efforts [from campaigning against tax competition] to the more modest goal of increasing transparency of tax systems and information sharing among countries”).

108 RONEN PALAN, RICHARD MURPHY & CHRISTIAN CHAVAGNEUX, TAX HAVENS: HOW GLOBALIZATION REALLY WORKS 241 (Eric Helleiner & Jonathan Kirshner eds., 2010); see also ROSE-MARIE BELLE ANTOINE, CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW 23–43 (2014) (discussing the concept of confidentiality in offshore financial law).


110 Anna Manasco Dionne and Jonathan Macey explain that critics are concerned about offshore confidentiality practices because they:

shield from disclosure information about offshore structures, the beneficial ownership of corporations, and bank account information in the absence of a request from law enforcement authorities supported by specific evidence of criminal activity. Coupled with low rates of taxation and less oppressive regulatory burdens, the confidentiality associated with doing business in offshore jurisdictions makes them highly attractive for wealthy individuals and firms attempting to manage regulatory risk, lower transaction costs of doing business, and minimize the bureaucratic red tape associated with doing business in highly regulated venues such as France and the United States, as well as markets such as China and Russia that may be viewed as presenting problems of risk and regulatory uncertainty.

Dionne & Macey, supra note 72, at 10 (footnote omitted).
there is a growing international effort to facilitate greater transparency among OFCs.  

B. The Econo-Socio-Legal Lacuna

Despite the enduring discourse about the legality of OFC practices, the intersection between the economic, legal, and social lives of OFC residents has been understudied in legal scholarship. Legal scholars have explored the link between British colonialism and OFC development in some parts of the world, but are primarily concerned with the economic and regulatory competition that these jurisdictions generate. Naturally, social scientists have embraced the interaction between the economic and social in OFC jurisdictions, examining both the impact of colonial heritage on the economy and the effects of offshore governance. Indeed, there is a significant chasm in legal academic scholarship regarding the potential legal and social harm to the residents of OFCs from external efforts to constrain this type of economic activity.

Perhaps this oversight is directly related to the general perception that OFC activities are outward facing, meaning they focus on foreign clientele and do not engage the local population of the OFC jurisdiction. But OFC activities create direct economic benefits for the host country, which is why some developing jurisdictions find offshore financial services attractive. For example, OFC activities can lead to “increased export earnings, job creation, higher wages and the upgrading of skills” in the home community. Indeed, OFCs

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111 For example, although there is no evidence that OFCs caused the 2008 Financial Crisis, some commentators argue they enabled it. They argue that some companies kept bad debt off their balance sheet by parking such debt in special-purpose vehicles registered in OFCs, allowing the companies to appear to segregate risks. Allegedly, “the offshore environment facilitated the rapid expansion of this type of activity because of its low costs, light regulation, and relaxed approach to some governance and legal issues—but mostly because splitting the arrangements across international boundaries offered a considerable regulatory advantage.” PALAN ET AL., supra note 108, at 241–42.

112 See, e.g., BRUNER, supra note 3, at 28–30 (discussing the “English legal origins” of OFCs); see also Dharmapala & Hines, supra note 81, at 1060 (noting that tax havens “are also likely to have British legal origins and parliamentary systems, and to use English as an official language”). But see Freyer & Morriss, supra note 25 (discussing the creation of Cayman’s offshore sector).


114 Note that one of the key features of OFCs is “the provision of financial services to nonresidents, namely, exports of financial services.” Zoromé, supra note 3, at 6 (emphasis omitted).

are beneficial to host countries because they are a source of revenue collection, typically through incorporation fees and taxes paid to the host government.\textsuperscript{116} An interdisciplinary view of offshore financial services—an econo-socio-legal perspective—suggests that to effectively and fairly govern OFCs, a more comprehensive approach is required. This approach must acknowledge the obvious—that economic, legal, and social lives are intertwined and constantly interact with each other.\textsuperscript{117}

Although the consideration of economic life addresses the exchange of goods and services, the consideration of legal life focuses on the rules we use to manage various facets of our existence, including commerce.\textsuperscript{118} To this end, “the economy and the law are mutually constitutive,” and help to form important aspects of our social lives.\textsuperscript{119} For example, a community may initially choose to pursue the commercial activity of widget-making and selling because it brings revenue to its residents. But the widget sector may evolve into a shared part of the community’s culture and identity and persist over generations, even when the demand for widgets has declined.\textsuperscript{120} Undoubtedly, part of the persistence of widget-making may revolve around the community’s sunk cost into the widget industry, but the industry’s perseverance may also be due to the community’s shared identity as widget-makers.\textsuperscript{121} And, when faced with a marketplace of potential rules that could enhance the local economy, scarce resources may lead the community to give preference to those formal and informal rules that are more beneficial for the widget industry at the expense of other commercial activities.\textsuperscript{122}

If offshore financial services have taken on a shared meaning and identity to residents of Developing OFCs, it is crucial that the social implications of

\textsuperscript{116} See Moon, supra note 4, at 1407 (discussing the importance of incorporation fees to OFC governments).
\textsuperscript{117} See Perry-Kessaris, supra note 58, at 58–59 (discussing the relationship between the economic, legal, and social); see also Shu-Yi Oei, World Tax Policy in the World Tax Polity? An Event History Analysis of OECD/G20 BEPS Inclusive Framework Membership, 47 YALE J. INT’L L. 199, 208 (2022) (noting the OECD’s role in developing “economic and social policies”).
\textsuperscript{118} See Perry-Kessaris, supra note 58, at 61–63 (defining economic and legal life and discussing their convergence in social life).
\textsuperscript{119} Id. at 63.
\textsuperscript{120} See generally Shannon Elizabeth Bell & Richard York, Community Economic Identity: The Coal Industry and Ideology Construction in West Virginia, 75 RURAL SOCIO. 111 (2010) (discussing the relationship between community identity and the coal industry in West Virginia). Shannon Elizabeth Bell and Richard York spell out the foregoing discussion of economic identity by homing in on the West Virginia coal industry, which, while historically comprising the economic identity of West Virginians, has begun to decline with the influx of service-sector jobs. Id. at 121. Bell and York contextualize their discussion in a neo-Marxian framework. Id. at 111.
\textsuperscript{121} Id. at 111.
\textsuperscript{122} See Sybblis, supra note 25, at 931–36 (discussing the relationship between community economic identity (CEI) and legal reform).
this sector be incorporated into any legal and economic analysis related to any OFC global governance regimes. But legal scholars have not explored this possibility to date. If cultural preferences are indeed influencing the allocation of scarce resources in smaller Developing OFCs, then efforts should be focused on understanding how these preferences interact with the jurisdictional capacity for reform, as well as with these OFCs’ abilities to meet increasing global governance burdens. In the next Part, this Article outlines current global governance strategies that address the perceived harms to the global community emanating from OFCs.

It is apparent that the Global Governors are almost exclusively focused on economic and national security matters. As a consequence, the social condition of residents of Developing OFCs receives no attention. And even when small Developing OFCs are brought to the table in intergovernmental organizations, such as the OECD, their influence is minuscule. Essentially, the global effort to make the world a more economically equal place depends on the weakness and vulnerability of smaller jurisdictions. This paradox hear-

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124 But see Sybblis, supra note 25, at 873–74 (arguing that legal scholarship has not sufficiently explored how community culture impacts business law reforms).

125 See id. at 935–36 (discussing approaches to legal reform when a given OFC is saturated with cultural preferences that may pose as obstacles to reform).

126 See infra notes 131–307 and accompanying text.

127 More recently, scholars have sought to connect international taxation with “human rights abuses.” Winnie Byanyima, Foreword to TAX, INEQUALITY, AND HUMAN RIGHTS, supra note 21, at ix. Indeed, an entire volume has been devoted to a robust discussion of how lost tax revenues impact human lives. Winnie Byanyima, the Executive Director of Oxfam International, explained: “Every school that is not built, every medicine that is not bought for lack of government funds due to tax dodging represents an abuse of the rights of women, children, and men across the world.” Id.

128 For example, Professor Shu-Yi Oei argues:

While a common and arguably dominant narrative surrounding the [Base Erosion and Profit Shifting (BEPS)] Project is that developing countries are well-represented and willing participants in the project by virtue of the endorsement and presence of the G20 in spearheading it, the apparent role of EU listing processes in motivating BEPS membership suggests that fears of the economic and political consequences of being listed might to some extent be driving developing country participation, and that this pathway might merit closer scrutiny.

129 See DAGAN, supra note 5, at 142–84 (noting that “cooperation [with the international tax regime] could, in fact, yield inefficiencies as well as potentially regressive outcomes both among and within the cooperating states”).
ens back to the colonial era where empires built better lives for their citizens on the backs of faraway colonies.\textsuperscript{130}

II. GOVERNING OFCs

The current global governance structure is predominantly focused on revenue loss to onshore jurisdictions. There is little evidence of concern for those who inhabit OFCs. Section A of this Part outlines the global governance ecology for OFCs.\textsuperscript{131} Section B explores the individual and joint interests and efforts of five prominent OFC Global Governors over the last three decades.\textsuperscript{132}

\textit{A. The Global Governance Ecology}

OFCs, like many developing jurisdictions, are governed by a core set of Global Governors that exercise their influence seamlessly across multiple jurisdictions\textsuperscript{133} using a discrete set of tools.\textsuperscript{134} For example, powerful countries and their representatives shape model bankruptcy and secured transactions frameworks through international organizations, such as the United Nations (UN) and the World Bank.\textsuperscript{135} The UN is capable of going further by promul-

\textsuperscript{130} See generally WILLIAMS, supra note 49 (discussing the exploitation of colonies by colonial powers).

\textsuperscript{131} See infra notes 133–152 and accompanying text.

\textsuperscript{132} See infra notes 153–307 and accompanying text.

\textsuperscript{133} Global Actors are therefore actively directly engaged in what has been termed global governance. This concept refers to the phenomenon where actors can exercise “governance [powers] beyond a single state.” Davis et al., supra note 57, at 80. This type of governance speaks to the reality that “certain actors [can] exercise influence over the conduct of large numbers of geographically dispersed actors.” Id. at 81. See generally Kevin E. Davis, Legal Indicators: The Power of Quantitative Measures of Law, 10 ANN. REV. L. & SOC. SCI. 37 (2014) [hereafter Davis, Legal Indicators] (describing the role of legal indicators as a tool of global governance).

\textsuperscript{134} See generally Jay Butler, The Corporate Keepers of International Law, 114 AM. J. INT’L L. 189, 189 (2020) (describing how corporate decisions support “the implementation and enforcement of international law”); SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, GLOBAL LAWMAKERS (2017) (discussing the range of international actors that influence the lawmaking on the global stage); ANNE-MARIE SLAUGHTER, THE CHESSBOARD AND THE WEB (2017) (describing how networks of various types matter for the implementation of foreign policy goals, and highlighting the role of corporations, non-profits and community leaders in influencing global agendas); AMY C. OFFNER, SORTING OUT THE MIXED ECONOMY (2019) (describing the role of United States actors, including business people and economists, in influencing Latin American development).

\textsuperscript{135} See, e.g., BLOCK-LIEB & HALLIDAY, supra note 134, at 227–64 (discussing the design of model secured transactions legal regimes); INT’L FIN. CORP., SECURED TRANSACTIONS SYSTEMS AND COLLATERAL REGISTRIES 5 (2010) (providing “technical advice and guidance to Word Bank Group staff, donor institutions, government officials and other practitioners on the implementation of secured transactions law and institutional reforms in emerging market countries”); Kevin E. Davis & Michael B. Kruse, Taking the Measure of Law: The Case of the Doing Business Project, 32 LAW & SOC. INQUIRY 1095, 1096–97 (2007) (analyzing the World Bank’s Doing Business Project, which, among other things, assesses legal systems and suggests possible legal reform through annual reports).
gating binding resolutions on member states. For example, Resolution 1373 requires UN member countries to take specific steps to “[p]revent and suppress the financing of terrorist acts . . . ”. 136 And international financial institutions, such as the International Monetary Fund (IMF), have, through structural adjustment programs, historically influenced how borrowing countries conceptualize their domestic policies. 137

The Global Governors of OFCs include, but are not limited to, the EU, the United States, and intergovernmental organizations like the Financial Action Task Force (FATF), the Group of Twenty (G20), 138 and the OECD. 139 The primary technologies of global governance for these Global Governors are reputational devices—including the “nam[ing] and sham[ing]” of allegedly rogue jurisdictions—and plain economic duress. 140 These technologies are hatchets because they are imprecise. They impose burdens on all types of OFCs (large, small, rich, and poor) without any clear indication that the burdens are thoroughly analyzed or provide meaningful benefits to onshore jurisdictions in return. It can be fairly said that the prevailing OFC global governance regime represents governance by skeptics. 141

The OECD and EU commonly use lists indicating how cooperative specific OFCs are with onshore jurisdictions as reputational devices. 142 If OFCs


137 See generally THE WASHINGTON CONSENSUS RECONSIDERED, supra note 11 (discussing the rise and fall of the global agenda of institutions like the IMF, World Bank and U.S. Department of the Treasury).

138 The following countries comprise the G20: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Mexico, Russia, South Africa, Saudi Arabia, South Korea, Turkey, the United Kingdom, the United States, and the EU. About the G20, G20, https://www.g20.org/about-the-g20.html [https://perma.cc/A8J9-UTAL]. According to the G20, “Spain is also invited as a permanent guest.” Id.

139 See generally VLCEK, supra note 53 (noting the various Global Governors of OFCs).


141 See supra Part I (discussing the optimist, realist, and skeptic views of OFCs).

142 This bears some similarity to the World Bank’s former Doing Business Indicators—which informed the reader about specific business law reform efforts in a country. See, e.g., Davis & Kruse, supra note 135, at 1115. According to commercial law experts, Professor Kevin Davis and Michael Kruse,
fail to comply with various information-sharing requirements designed by the OECD and the EU, they are placed on a list that indicates their outsider status143 and their potential danger to the international community.144

Lists, as used by the OECD and EU, are sometimes considered forms of indicators—tools that simplify phenomena and data to facilitate judgments and comparisons of various institutions or concepts.145 These indicators, such as the World Governance Indicators146 and the Human Development Index,147 seek to simultaneously: (1) articulate a social phenomenon (for example, “good governance”) by way of a quantitative measure; (2) set global standards for performance;148 and (3) evaluate how various units (states, local governments and other institutions) meet these standards.149

Perhaps the most significant and troubling aspect of indicators is the opacity with which they operate. Scholars note that “[m]any of the best-known indicators are aggregations or ‘mash-up’ compilations . . . with substantial discretion available to the compiler in choosing what specific indicators to in-

Unfortunately, the [World Bank Doing Business] project’s recommendations and benchmarks [were] not being used merely as a basis for further investigation. Lawmakers in many countries, and in particular in developing and transition economies, face[d] considerable pressure from multiple sources to implement the [Doing Business] project’s recommendations and improve their performance as measured by the [Doing Business] project’s benchmarks.

Id.

143 Although the threat of reputational harm has inspired many countries to reform their legal regimes according to the OECD and EU’s standards, it is still unclear whether reputational harm has led to economic harm. See Matthew Collin, Does the Threat of Being Blacklisted Change Behavior? Regression Discontinuity Evidence from the EU’s Tax Haven Listing Process 32 (Brookings Inst. Glob. Econ. & Dev. Working Paper, Paper No. 139, 2020), https://www.brookings.edu/research/does-the-threat-of-being-blacklisted-change-behavior/ [https://perma.cc/XCQ5-EAHJ] (noting that, with respect to the EU list, a study found that “stocks of firms with subsidiaries in blacklisted tax havens fell after the initial publication of the . . . blacklist in December 2017”); see also Aija Rusina, Name and Shame? Evidence from the European Union Tax Haven Blacklist, 27 INT’L TAX & PUB. FIN. 1364, 1368 (2020) (concluding that “naming and shaming by the EU was associated with reputational concerns of investors and hence a decrease in firms’ value”).

144 See Dean & Waris, supra note 7, at 1659–60.

145 See Davis, Legal Indicators, supra note 133, at 37–52 (discussing the function of and controversy surrounding the use of indicators as measures of legal performance); Davis et al., supra note 57, at 71 (describing indicators and their role in global governance).


148 In the international sphere, indicators are used to set standards for how a particular activity should be undertaken and to help guide the decisions of foreign government officials. Davis et al., supra note 57, at 83–87.

149 See Davis, Legal Indicators, supra note 133, at 37–52 (discussing the use of indicators generally); Davis et al., supra note 57, at 74.
clude, in selecting weightings and devices to limit double counting, and in smoothing over data unavailability.” This feature is problematic because indicators put their developers in a unique position of power to simultaneously set standards and evaluate compliance. Arguably, the OECD: (1) creates the standards for the list of non-cooperating jurisdictions; (2) assesses OFC compliance with the standards; and (3) publishes a report with the goal of shaming non-compliant OFCs.

B. The Interests and Methods of Global Governors

The interaction between OFCs and the Global Governors reveals a growing one-way ratchet in global governance—whereby governance tools and geographical reach have slowly increased over the decades. For example, the United States and the OECD (which represents thirty-eight primarily developed countries) have relentlessly tried to stem the flow of tax dollars from within their borders to OFC jurisdictions. To accomplish this goal in the absence of direct regulatory oversight of these jurisdictions, the Global Governors have utilized their international political standing. They shame some OFCs for the lack of transparency in their banking sectors and their failure to exchange tax information for taxpayers who are legally bound to pay tax in the Global Governors’ jurisdictions.

Section B of this Article summarizes the individual and joint interests and efforts of five prominent OFC Global Governors over the last three decades: the OECD; the FATF; the EU; the G20; and the United States. The disparate impact of the hatchet approach to the global governance of OFCs is troubling because it is not merely the unfortunate outcome of necessary and high-quality rules appropriately geared toward stemming the tide of international financial crimes. Instead, the various approaches taken by the Global Governors are questionable in their precision and usefulness and bring with them the added

150 Davis et al., supra note 57, at 74 (citation omitted).
151 Id. at 77.
152 Id.
153 See generally VLCEK, supra note 53, at 97–154 (describing the increasing reach of global governance tools).
154 See Our Global Reach, supra note 18 (listing the OECD’s member countries and explaining the organization’s work).
155 Some Global Governors claim that their intent is not to shame OFC jurisdictions. Significantly, the European Council claims that “[t]he aim of the EU list of non-cooperative jurisdictions, . . . is not to name and shame countries, but to encourage positive change in their tax legislation and practices, through cooperation.” EU List of Non-cooperative Jurisdictions for Tax Purposes, EUR. COUNCIL, https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions/ [https://perma.cc/VXB4-JA23] (July 6, 2022).
156 See infra notes 159–307 and accompanying text.
problem that they are especially harmful to developing OFCs. For example, there have been compelling criticisms of the OECD’s base erosion and profit shifting (BEPS) project, the United States’ Foreign Account Tax Compliance Act (FATCA) and global intangible low-taxed income (GILTI) rules, and the strategies of FATF to curb money laundering. The more important criticisms are addressed below.

1. Organization for Economic Cooperation and Development

More than two decades ago, the OECD made the first meaningful attempt to globally govern what it considers “harmful tax competition.” In 1998, it published a pathbreaking document titled *Harmful Tax Competition: An Emerging Global Issue* (Harmful Tax Report). The Harmful Tax Report was framed as a means of understanding the mechanisms through which “tax havens and harmful preferential tax regimes” are dangerous to the global welfare. Although it did not address the domestic economic or social circumstances of OFC jurisdictions, it framed the project as being in the interest of all countries. Importantly, the aim of this project was explicitly to undermine and eventually eliminate OFC jurisdictions throughout the world. But, as one scholar noted,

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157 See infra notes 237–269 and accompanying text (discussing the BEPS project).

158 See infra notes 159–307 and accompanying text.

159 See Avi-Yonah, *Globalization*, supra note 6, at 1652–62 (quoting Conclusions of the ECOFIN Council Meeting on 1 December 1997 Concerning Taxation Policy, 1998 O.J. (C 2) 1, 1) (noting the approval of the OECD report in 1998 by the OECD council with two abstentions, namely Luxembourg and Switzerland); see also HARMFUL TAX REPORT, supra note 101, at 8 (reporting on the effects of tax havens on global finance and tax systems); VLCEK, supra note 53, at 1–20 (discussing the interests of the EU and OECD in protecting their members’ tax base from “harmful tax competition”).

160 See HARMFUL TAX REPORT, supra note 101, at 8.

161 Id.

162 According to the Harmful Tax Report: “By discouraging the spread of tax havens and harmful preferential tax regimes and encouraging those countries which presently engage in harmful tax practices to review their existing measures, the Report will serve to strengthen and improve tax policies internationally.” Id. That report described tax havens as jurisdictions that have: “(a) [n]o or only nominal taxes; . . . (b) [l]ack of effective exchange of information; . . . (c) [l]ack of transparency; . . . (d) [n]o substantial activities . . . .” Id. at 23. Further, the Harmful Tax Report provided four characteristics often shared by “preferential tax regimes: (a) the regime imposes a low or zero effective tax rate on the relevant income; (b) the regime is ‘ring-fenced’; (c) the operation of the regime is nontransparent; (d) the jurisdiction operating the regime does not effectively exchange information with other countries . . . .” Id. at 25; see also VLCEK, supra note 53, at 131 (noting that the OECD provided “recommendations to counter the structures and practices identified as facilitating harmful tax competition”). The Harmful Tax Report provided nineteen suggested approaches to address harmful tax practices. See HARMFUL TAX REPORT, supra note 101, at 40–59 (proposing solutions to harmful tax practices). In addition, the Harmful Tax Report created a Forum on Harmful Tax Practices (the Forum). See id. at 53–57. The OECD tasked the Forum with monitoring the “implementation of the Guidelines and Recommendations set out in the [Harmful Tax Report].” Id. at 54.
the *Harmful Tax Report* “ma[de] no systematic effort to distinguish on a normative basis between harmful and beneficial tax competition . . . ”\(^{163}\)

Notably, the characteristics it identified as most problematic were associated with more vulnerable countries.\(^{164}\) This disparity may be explained by the criteria used to identify offshore jurisdictions.\(^{165}\) For example, the emphasis on “no or only nominal taxes” with regard to certain income is more likely to be a feature of developing countries.\(^{166}\) Consider that “[t]he developed economy with a large offshore financial services industry would have an established tax rate, which may not be applied to the income in question for some other reason permitted by its tax legislation (a preferential regime).”\(^{167}\) Additionally, if one conceives of OFCs as places with “[o]utsized financial sectors,” one will inevitably speak to small island jurisdictions, like those in the Commonwealth Caribbean.\(^{168}\) The fact is that “other states with substantial financial sectors embedded in a, diversified economy ([like] the Netherlands) [were] not identified as . . . tax haven[s].”\(^{169}\)

The Harmful Tax Report was just the beginning. A subsequent OECD report, titled *Towards Global Tax Co-operation (Tax Co-operation Report)*, used the criteria from the *Harmful Tax Report* to identify countries that were tax havens or provided preferential tax regimes.\(^{170}\) There were thirty-five jurisdictions on this “list”—all small in geographic and economic size.\(^{171}\) If a jurisdiction wanted to avoid inclusion on this list, the OECD required that the jurisdiction’s government publicly commit “to adopt a schedule of progressive chang-
es to eliminate its harmful tax practices . . . ”172 Looming over these jurisdictions was the threat of a “range of possible defensive measures” that the OECD suggested member countries and cooperating jurisdictions could take to protect their tax base.173 Indeed, the Tax Co-operation Report listed eleven measures that could be taken to address “Uncooperative Tax Havens.” These ranged from disallowing “deductions, exemptions, credits, or other allowances related to transactions with” the named jurisdictions to “imposing transactional charges or levies on certain transactions involving [u]ncooperative [t]ax [h]avens.”175

The Harmful Tax Report and the Tax Co-operation Report set the stage for increased attention and pressure on OFCs and a move toward multilateralism.176 Indeed, over time, non-OECD jurisdictions,177 including some countries that have been labeled tax havens, were included.178 This move ensured that “the OECD include[d] the jurisdictions that later would be subject to the multilateral framework it would produce.”179 A more cynical view is that it provided the OECD with some element of cover because an argument was emerging that the OECD’s agenda was to impinge on the sovereignty of small developing states.180

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172 Id. at 19 (establishing a deadline of December 31, 2005).
173 Id. at 25.
174 Id. (listing “the range of possible defensive measures” cooperative jurisdictions could take against uncooperative jurisdictions).
175 Between 2006 and 2010, the OECD produced annual reports that highlighted the “legal and administrative frameworks” of jurisdictions with respect to their tax practices. See GLOB. F. ON TAX’N, ORG. FOR ECON. COOP. & DEV., TAX CO-OPERATION: TOWARDS A LEVEL PLAYING FIELD (2006); GLOB. F. ON TAX’N, ORG. FOR ECON. COOP. & DEV., TAX CO-OPERATION: TOWARDS A LEVEL PLAYING FIELD (2007); GLOB. F. ON TAX’N, ORG. FOR ECON. COOP. & DEV., TAX CO-OPERATION: TOWARDS A LEVEL PLAYING FIELD (2008); GLOB. F. ON TRANSPARENCY & EXCH. OF INFO., ORG. FOR ECON. COOP. & DEV., TAX CO-OPERATION 2009: TOWARDS A LEVEL PLAYING FIELD (2009); GLOB. F. ON TRANSPARENCY & EXCH. OF INFO. FOR TAX PURPOSES, ORG. FOR ECON. COOP. & DEV., TAX CO-OPERATION 2010: TOWARDS A LEVEL PLAYING FIELD (2010) [hereinafter ORG. FOR ECON. COOP. & DEV., LEVEL PLAYING FIELD 2010]. The report initially assessed eighty-two OECD and non-OECD jurisdictions in 2006 but expanded to ninety-three jurisdictions in 2010. ORG. FOR ECON. COOP. & DEV., LEVEL PLAYING FIELD 2010, supra, at 3. In addition, although the Harmful Tax Report had created a Forum on Harmful Tax Practices to monitor and implement the recommendations of the project, a new and more muscular group was tasked with a larger agenda. Id. at 7. The Forum became the Global Forum on Transparency and Exchange of Information for Tax Purposes (the Global Forum). Id. The Global Forum began with ninety-one countries and its mission was to “complete[e] peer reviews of the progress made by its members and other relevant jurisdictions in implementing the international standards of transparency and exchange of information for tax purposes.” Id.
177 The Global Forum comprised OECD member countries, the G20, and dozens of other jurisdictions. ORG. FOR ECON. COOP. & DEV., LEVEL PLAYING FIELD 2010, supra note 176, at 11 (listing the ninety-four member countries as of 2010).
178 VLCEK, supra note 53, at 132 (noting that non-OECD states were included).
179 Id.
180 See, e.g., Bravo, supra note 22, at 39–41 (suggesting that the OECD was impinging on developing state sovereignty through “intrusive monitoring”).
It therefore made sense to incorporate Developing OFCs in the decision-making process.181 But the move also facilitated a tax transparency campaign. The OECD sought cooperation from its member jurisdictions to form tax information exchange agreements (TIEAs).182 These agreements allow a jurisdiction’s taxing authority to exchange bank information from certain of its financial institutions’ customers with other jurisdictions with whom there is a TIEA.183

At the outset, the TIEA arrangement had the appearance of fairness—onshore and offshore jurisdictions had the opportunity to exchange bank information about their residents with each other.184 But this kind of reciprocity was only an illusion.185 One scholar observed that “[i]n practice, one state is likely to need extraterritorial tax information covered by the TIEA while the other does not.”186 The more likely outcome, therefore, is that wealthy countries concerned about the loss of their tax dollars to OFCs require bank information for their residents and OFCs do not require the same for their residents.187 The burden to provide this reciprocal information is consequently on the shoulders of Developing OFCs, while wealthy countries with their own domestic offshore financial centers are left alone.188 For example, the United States is well known for having its own share of OFCs,189 such as Nevada and

181 VLCEK, supra note 53, at 132.
182 ORG. FOR ECON. COOP. & DEV., TAX CO-OPERATION REPORT, supra note 164, at 20 (highlighting a multilateral OECD “Model Tax Information Exchange Agreement”).
183 The OECD notes that some jurisdictions may provide bank information of financial institution customers to other countries for purposes of “mutual legal assistance,” pursuant to other laws, including where it concerns criminal tax activities. ORG. FOR ECON. COOP. & DEV., LEVEL PLAYING FIELD 2010, supra note 176, at 290.
184 See Tax Information Exchange Agreements (TIEAs), U.S. DEP’T OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/tax-information-exchange-agreements-tieas [https://perma.cc/V8GM-CV6Y] (noting that “[a] tax information exchange agreement (TIEA) allows the competent authorities of the United States and the TIEA partner to exchange of information on tax matters in order to provide assistance to each other in the administration and enforcement of domestic tax laws”).
186 Id.
187 Id. at 136–37.
188 According to commentators,
[a]s the U.S. focuses on people and companies using “offshore” tax havens, the “Panama Papers” indicate it doesn’t need to look beyond its own barren backyard. Nevada’s wild, wild west of lax financial and corporate secrecy regulations make it one of the more popular destinations for those looking to hide their money in the shadows of shell companies.

Wyoming. In the case of Wyoming, “regulators [in 2021] fined an agent in Casper more than $500,000 for failing to produce records for 1,130 companies . . . .” Further, “[a]nother agent in the same building failed to produce records for 525 companies.”

2. The Financial Action Task Force

In addition to concerns about revenue loss, the Global Governors have been troubled that OFCs serve as a mechanism for various financial crimes such as money laundering. Consequently, the confidentiality that typically protects the client information associated with financial institutions in OFCs makes these places a prime target for wrongdoers. Given the cross-border aspect of hiding money, those interested in pursuing financial crimes, including terrorists, can conceal their gains offshore where tax collectors and other government officials are less likely to locate them. Several states have joined forces to track these illicit funds. Initially inspired by the connection to drug trafficking, the FATF was founded in 1989 by G7 countries and had “a one-year mandate, focused solely on stopping the flow of funds from the illicit narcotics trade . . . .” After the 2001 terrorist attacks in the United States, the pursuit of terrorism financing soon became part of the FATF’s mandate. The

world’s-favorite-new-tax-haven-is-the-united-states [https://perma.cc/E2D2-KEVE] (noting the emerging prominence of Nevada as a tax haven in the United States).

See O’Toole & Francis, supra note 188 (describing the competition that Nevada and Wyoming pose to traditional tax havens, such as Panama).


Id.


See generally ANTOINE, supra note 108, at 23–43 (discussing the concept of confidentiality in offshore financial law).

See Nance, supra note 193, at 114 (describing increasing concern with money laundering that developed in the late 1980s).

Id. at 115.

stated “objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.”

The governance power of the FATF stems from its wide reach across the globe. Although the FATF was formed by G7 countries, it is now a network of thirty-seven member states, as well as the Gulf Co-operation Council and the European Council, including both developed and developing jurisdictions. FATF also engages directly with NGOs and private sector actors from these places in an effort to share the standards it has developed. As a tribute to its global reach, the FATF has sparked the formation of several regional FATF Associate Members, including the Caribbean Financial Action Task Force, which frames itself as “an international / inter-governmental organi-

198 What Do We Do, FIN. ACTION TASK FORCE, https://www.fatf-gafi.org/about/whatwedo/ [https://perma.cc/Y5VN-UKE8].
200 See Nance, supra note 193, at 115 (noting the FATF comprises a variety of jurisdictions).
201 According to Mark Nance’s overview of the FATF and its variety at every level of functioning:

FATF’s members, with the exclusion of the European Commission, represent a cross-section of states: large and small states, powerful and weak states, post-industrial and developing economies. State delegations often include a variety of domestic agencies, from [t]reasury officials to law enforcement. Observer organizations are a cross-section of global governance: from umbrella organizations like the IMF and World Bank to more specific organizations like the World Customs Union. FATF also brings in a wide range of people and institutions as part of the consultative network that surrounds its work, including representatives from private sector industries affected most directly by FATF’s activities, including the bankers, lawyers, accountants, and non-profit organizations. FATF officials also participate regularly in other international fora as a means of diffusing its standards.

Nance, supra note 193, at 115.

202 These organizations include: Asia/Pacific Group on Money Laundering; Caribbean Financial Action Task Force (CFATF); Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism; Eurasian Group; Eastern and Southern Africa Anti-Money Laundering Group; Financial Action Task Force of Latin America; Inter-Governmental Action Group Against Money Laundering in West Africa; Middle East and North Africa Financial Action Task Force; and Task Force on Money Laundering in Central Africa. FATF Members and Observers, supra note 199.

203 The CFATF currently has twenty-four member jurisdictions, the majority of which are OFCs. Member countries are: Anguilla, Antigua and Barbuda, Aruba, Barbados, Belize, Bermuda, Cayman Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Sint Maarten, Suriname, The Bahamas, Trinidad and Tobago, Turks and Caicos Islands, Venezuela, and the U.S. Virgin Islands. Member Countries, CARIBBEAN FIN. ACTION TASK FORCE, https://cfatf-gafic.org/member-countries [https://perma.cc/NE7U-BV8V]. It is reasonable that these jurisdictions are concerned about money laundering and terrorism financing and find it beneficial to be part of this regional network. It is also feasible that these jurisdictions are concerned about maintaining legitimacy in the international business community. See Paul J.
zation, a regional style body like the FATF which follows and ensures its Members comply with the FATF Recommendations.”

Currently, the FATF outlines forty central norms, plus “Interpretive Notes,” that jurisdictions should follow to protect both their domestic financial systems as well as the international financial community.

Presumably, jurisdictions join the FATF or one of the regional member organizations because they share a concern about global financial crime. But it is also feasible that membership is driven, at least in part, by a desire to virtue-signal. Jurisdictions may choose to join to demonstrate to the rest of the world that they are serious about international financial crimes— to appear to be legitimate members of the global community. Poorer and politically weaker jurisdictions are particularly vulnerable to this strategy. And though the FATF cannot legislate for its members and its recommendations are crafted as “guidance and best practices,” there seem to be two main tools used to ensure some degree of conformity among both its member and non-member jurisdictions.

First, the FATF’s “power derives from its ability to expel members who do not comply with its policies and recommendations.” And where it con-

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206 See What Do We Do, supra note 198 (describing the objectives of the FATF).

207 See DiMaggio & Powell, supra note 203, at 151 (discussing the role of “[m]imetic processes” and modeling that can occur on an international scale, where a country may model itself on another country in a certain respect to enhance legitimacy); see also John W. Meyer, John Boli, George M. Thomas & Francisco O. Ramirez, *World Society and the Nation-State*, 103 AM. J. SOCIO. 144, 144 (1997) (discussing how the nation-state is a “worldwide institution constructed by worldwide cultural and associational processes”).

208 See Davis & Kruse, supra note 135, at 1115 (noting that developing countries follow legal reforms due to “considerable pressure” from wealth countries and international organizations).

209 See FIN. ACTION TASK FORCE, supra note 205, at 135 (referring to the FATF “Guidance and Best Practices” publications).

cerns non-member jurisdictions that have taken inadequate steps to decrease the likelihood of “money laundering, terrorist financing, and proliferation financing,” the FATF places them on a watch list or “grey list.”

According to the FATF, jurisdictions on this list have typically agreed to work with the organization to resolve observed deficiencies.

Second, beyond reputational concerns, OFCs live with the persistent threat of harm to their banking systems if they are deemed non-compliant with the banking policies of developed countries. This is due to the nature of correspondent banking. In a correspondent banking arrangement, two banks—each in a different jurisdiction—have an agreement with each other to facilitate certain cross-border financial transactions. These transactions include, but are not limited to, wire transfers, transactions involving credit cards, and short-term borrowing. Correspondent banking relationships (CBRs) are critical to countries, especially developing countries, because CBRs connect them to the international economy. Without a bank in a developed country to provide a deposit account and other financial services (the correspondent bank), the bank in the developing country (the respondent) is unable to undertake transactions...
that are critical to the jurisdiction’s economy, including international trade, the receipt of remittances, and offshore banking.\textsuperscript{217}

Despite the importance of CBRs to the economic life of countries, the Caribbean region—home to several small island OFCs—has recently seen a noticeable loss of CBRs.\textsuperscript{218} Indeed, a 2016 IMF report highlighted that the OFCs of The Bahamas, Barbados, Belize, and St. Lucia experienced such losses.\textsuperscript{219} The main reason major international banks chose to terminate their CBRs with local banks in these countries was to de-risk.\textsuperscript{220} Stated otherwise, these international banks chose to sever their relationships with smaller banks that pose a “risk for money laundering or terrorism financing, or that processing transactions for them might entail a breach of sanctions regulations.”\textsuperscript{221} Banks may also have been concerned about potential threats to the global economy, like those experienced during the 2007–2008 global financial crisis, as well as reputational harm from associating with a bank engaged in certain kinds of activities.\textsuperscript{222}

De-risking has had a significant impact on Developing OFCs.\textsuperscript{223} These jurisdictions are deemed risky because of perceived weaknesses in their regu-

\begin{itemize}
\item \textsuperscript{217} See id. at 6 (describing the activities in respondent banks that are reduced when there is less access to correspondent banking); see also FIN. & MKTS. GLOB. PRAC., supra note 214, at 5 (noting the decline in correspondent banking around the world, which disproportionately impacts Caribbean nations, and the activities affected by this decline).
\item \textsuperscript{218} See Alleyne et al., supra note 214, at 10 (noting a measurable decrease in CBRs in several Caribbean countries in 2015–2016).
\item \textsuperscript{219} According to the IMF report, “[i]n St. Lucia . . . several offshore banks have experienced termination of CBR relationships . . . .” Id. at 13. In the case of Belize, “where the five offshore banks were the most affected, 13 out of 15 CBR accounts were lost over . . . two years.” Id. The Bahamas experienced the loss of CBRs in connection with ten offshore banks. Id. And “[i]n Barbados, banks have terminated relationships with some corporate vehicles established in the International Business and Financial Services sector . . . .” Id.
\item \textsuperscript{220} See Haley, supra note 213 (referring to the practice of reducing correspondent banking relationships by a correspondent bank as “de-risking”).
\item \textsuperscript{221} FIN. & MKTS. GLOB. PRAC., supra note 214, at 9; see also FATF Clarifies Risk-Based Approach: Case-by-Case, Not Wholesale De-risking, FIN. ACTION TASK FORCE (Oct. 23, 2014), http://www.fatf-gafi.org/publications/fatfgeneral/documents/rba-and-de-risking.html [https://perma.cc/7E2W-QHN4] (describing the phenomenon of “de-risking” and the motivations behind it).
\item \textsuperscript{222} See FATF Clarifies Risk-Based Approach: Case-by-Case, Not Wholesale De-risking, supra note 221 (pointing out that “de-risking” may be motivated by the global financial crisis and reputational concerns).
\end{itemize}
latory framework. For example, IMF staff have indicated that “[o]paque corporate structures and arrangements can be misused to conceal beneficial ownership and control for illicit purposes, including tax evasion, money laundering and evasion of sanctions.” The illicit purposes that they mention overlap with FATF’s key areas of concern. And, as long as OFCs maintain their current legal structures, there is a risk to OFCs that correspondent banks in the developed country will seek to minimize apparent risk of exposure to criminal activities. The threat of the loss of correspondent banking is therefore a significant motivator for OFCs to conform to the best practices stemming from the OECD, FATF, and the United States. Indeed, a 2016 IMF Staff Discussion Note suggests that “it is key for offshore financial centers to assess whether they need to change their business models to maintain their relevance in a world in which greater transparency and harmonization of tax and regulatory regimes would diminish incentives for complex corporate structures and tax avoidance . . . .”

But, at a recent meeting of the Caribbean Financial Access Roundtable in Barbados, some Caribbean leaders raised their concerns about how their countries are being treated by the FATF. For example, according to the chairperson for the Caribbean Community (CARICOM) Commission on the Economy,

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225 Id. (emphasis omitted).

226 See What Do We Do, supra note 198 (stating that the FATF “expanded its mandate to incorporate efforts to combat terrorist financing” and money laundering, which correlate with the illicit purposes mentioned by the IMF).

227 For example, U.S. banks risk fines for “breach of the U.S. sanctions framework.” Erbenová et al., supra note 224, at 24 box 7 (emphasis omitted). According to IMF staff, “[a] survey of the largest penalties for customer due diligence-related breaches reveals that out of 24 fines of more than [$]100 million, all but one originate[d] in the United States.” Id.

228 According to IMF staff, “[c]ountries hosting offshore financial centers are increasingly exposed to reputational risks. Related costs, including the loss of CBRs, may outweigh the benefits of maintaining these business models.” Id. at 38.

229 Id. at 28. The IMF has emphasized that pressure is building for offshore jurisdictions to adopt initiatives such as “public registries of beneficial ownership,” which are but one example of a transparency-oriented reform that could detract from the traditional business model of offshore entities. Id. at 29.

the small Caribbean countries that are placed on international watch lists have minimal financial impact on the global economy.\textsuperscript{231}

Prime Minister Mia Mottley of Barbados argues that the current approach the Global Governors take to prevent international financial crime actually facilitates criminality.\textsuperscript{232} Potential bad actors “need to simply avoid the small, undeveloped countries bearing the weight of the sanctions and opt for the large rich countries that never get sanctioned.”\textsuperscript{233} This argument highlights the perspective that powerful countries are not held accountable for their misdeeds, while weaker countries are easier targets.\textsuperscript{234} Indeed, “small countries [are] asked to carry out the same level of regulation as large countries that have that capacity to distort global systems, leading to a flawed and discriminatory outcome.”\textsuperscript{235} One proposed solution is that fair-minded citizens of developed onshore jurisdictions “demand that no country can be placed on anti-money laundering sanctions lists unless there is also actual evidence of the material money laundering.”\textsuperscript{236}

3. The G20

In addition to the OECD, the G20 countries have become increasingly concerned about the ability of corporations to shift their profits to foreign locations where the profits are effectively hidden from the taxing authorities of developed countries.\textsuperscript{237} The G20 therefore sought the help of the OECD to develop a multilateral framework to address lost revenue through corporate tax avoidance strategies.\textsuperscript{238} This led to the BEPS project.\textsuperscript{239} BEPS “refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax.”\textsuperscript{240} The idea of profit shifting specifically speaks to the strategy of moving capital from a home jurisdiction to

\begin{itemize}
  \item \textsuperscript{231} Id.
  \item \textsuperscript{233} Id.
  \item \textsuperscript{234} Id.
  \item \textsuperscript{235} Id.
  \item \textsuperscript{236} Id.
  \item \textsuperscript{237} VLCEK, \textit{supra} note 53, at 43–64; see \textit{What Is BEPS?}, ORG. FOR ECON. COOP. & DEV., https://www.oecd.org/tax/beps/about/#history [https://perma.cc/BY35-4VBB] (noting that the G20 is concerned with corporate tax avoidance).
  \item \textsuperscript{238} See Ruth Mason, \textit{The Transformation of International Tax}, 114 AM. J. INT’L L. 353, 366 (2020) (noting that the “G20 delegated to the OECD the task of coordinating multilateral efforts” because the G20 did not have a permanent staff).
  \item \textsuperscript{239} See \textit{id.} (noting that the G20 coordination with the OECD produced the BEPS project).
  \item \textsuperscript{240} \textit{What Is BEPS?}, \textit{supra} note 237.
\end{itemize}
another jurisdiction in order to avoid paying taxes in the home jurisdiction.\textsuperscript{241} In some cases, firms are capable of avoiding paying taxes in any jurisdiction.\textsuperscript{242} These kinds of tax avoidance, and, in some cases, corporate law avoidance, have been cast by the OECD as being problematic for developing and developed countries alike—particularly where tax avoidance affects the welfare state.\textsuperscript{243} Some scholars have argued that tax abuse facilitated by OFCs “affect developing country budgets disproportionately.”\textsuperscript{244} But the scope of the developing country concerns are unclear.\textsuperscript{245}

The world financial crisis in 2007–2008 led to a 2009 meeting of the G20 in London where the matter of cross-border tax evasion and avoidance received significant attention.\textsuperscript{246} In support of this effort, the OECD “published a list of countries assessed by the Global Forum against the international standard for exchange of tax information.”\textsuperscript{247} In 2013, the BEPS project officially began with

\begin{footnotes}
\item[241] VLCEK, \textit{supra} note 53, at 43.
\item[242] See, e.g., Moon, \textit{supra} note 96, at 11 (discussing how corporations use “elaborate tax planning tactics” across countries); VLCEK, \textit{supra} note 53, at 54–55 (explaining the concept of “the Double Irish,” a scheme used by corporations to hide income from tax authorities).
\item[243] What Is BEPS?, \textit{supra} note 237 (noting that “[d]eveloping countries’ higher reliance on corporate income tax means they suffer from BEPS disproportionately”).
\item[245] According to the non-profit organization Global Financial Integrity (GFI), billions of dollars “illicitly leave[e] developing countries every year . . . .” Illicit Financial Flows, GLOB. FIN. INTEGRITY, https://gfintegrity.org/issue/illicit-financial-flows/ [https://perma.cc/9QR2-VSAF]. GFI’s research shows the destinations for these funds are “banks in developed countries like the United States and United Kingdom, as well as in tax havens like Switzerland, British Virgin Islands, or Singapore.” Id.; see also DEV KAR & JOSEPH SPANJERS, ILlicit FinAncIAL FLOWS FROM DeVelOPING COUNTRIES: 2003–2012, at iii (2014), https://www.gfintegrity.org/wp-content/uploads/2014/12/I illicit-Financial-Flows-from-Developing-Countries-2003-2012.pdf [https://perma.cc/XR6Y-ASAD] (noting that a large amount of unrecorded money is transferred out of developing countries each year). But some economists suggest that small developing jurisdictions may not have a “meaningful domestic corporate sector that the public wishes to tax . . . .” Dharmapala, \textit{supra} note 82, (manuscript at 6). If this is the case, this may be more of a developed country vulnerability, which then explains why the G20 has been the leading force behind a multinational framework to reduce the likelihood and impact of BEPS. See Kiyoshi Nakayama & Victoria Perry, Residence-Based Taxation: A History and Current Issues (discussing the role of the OECD and G20 in “clo[si]ng gaps in international tax rules that allowed corporate tax bases to be eroded or artificially shifted to low- or no-tax jurisdictions”), in \textit{CORPORATE INCOME TAXES UNDER PRESSURE} 107, 116 (RuuD De Mooij, Alexander Klemm & Victoria Perry eds., 2021); VLCEK, \textit{supra} note 53, at 133–34 (noting that after financial crisis in 2009, the G20 “bec[ame] the locus for global economic governance”).
\item[247] G20, \textit{supra} note 246.
\end{footnotes}
attention to fifteen areas of particular concern to the OECD and G20.\(^{248}\) The BEPS project relies heavily on an OECD/G20 Inclusive Framework, that, as of September 2021, includes the cooperation of 141 jurisdictions—forty-three of which are members of the G20 or the OECD.\(^{249}\) These countries and jurisdictions—wealthy and developing alike—help to enforce four “Minimum Standards” outlined by the BEPS project that are expected to reduce tax avoidance and increase transparency.\(^{250}\) These include: (1) “[c]ountering harmful tax practices with a focus on improving transparency”; (2) “[d]eveloping model tax treaty provisions and recommendations to prevent treaty abuse”; (3) “[i]mproving tax transparency with country-by-country reporting”; and (4) “[m]aking dispute resolution between jurisdictions more timely, effective and efficient.”\(^{251}\)

Scholars have expressed concern that all jurisdictions that sign on to the OECD/G20 Inclusive Framework, including Developing OFCs, must support the fifteen items articulated by the BEPS projects.\(^{252}\) Although the Inclusive Framework approach superficially appears to consider the policy interests of developing countries, particularly those that are cooperating in the BEPS project, this is misleading.\(^{253}\)

Some of the reforms emphasized by the project could run substantively counter to the interests of poorer countries—for example, where a participating country’s use of tax treaties may be deemed abusive by the BEPS project.\(^{254}\) Limited administrative capacity in some developing countries may also prevent them from effectively implementing some of the BEPS action items, including the Minimum Standards.\(^{255}\) Indeed, small island developing states have historically been limited by economics and human resources in their regulatory

\(^{248}\) See Nakayama & Perry, supra note 245, at 116 (noting that the BEPS project focuses on 15 “problematic areas”).

\(^{249}\) See What Is BEPS?, supra note 237 (noting the collaborative effort behind the BEPS project); Oei, supra note 117, at 200–01 (noting the OECD/G20 BEPS Inclusive Framework’s organization).


\(^{251}\) Id.

\(^{252}\) See, e.g., Oei, supra note 117, at 207–08 (describing putting these action items into effect as “not costless”).

\(^{253}\) See Sergio André Rocha, The Other Side of BEPS: “Imperial Taxation” and “International Tax Imperialism” (pointing out the concern that “changes to the ‘International Tax Regime’ might be implemented in a way” that is detrimental to developed nations), in TAX SOVEREIGNTY IN THE BEPS ERA 179, 184 (Sergio André Rocha & Allison Christians eds., 2017).

\(^{254}\) See id.

\(^{255}\) See Oei, supra note 117, at 203 (suggesting that developing countries joined the BEPS inclusive framework in order to avoid negative economic and political consequences of being listed as a tax haven). See generally Mottley, supra note 30 (discussing the limited bureaucratic capabilities of the small developing country of Barbados).
Professor Shu-Yi Oei artfully summarizes the underlying concerns with the role of developing jurisdictions in the BEPS project by observing that “it is by no means clear that [the project’s] priorities will benefit all countries or benefit them all equally.”257 Indeed, commentators have raised substantive concerns about the efficacy of the BEPS project, including that:

[I]ssues raised by developing countries . . . were not prioritized or considered as part of the BEPS Project, including distributional issues, developing-country tax incentives, lack of transfer pricing comparability data, capital gains tax avoidance in developing countries, withholding taxes, and the impacts of developed-country tax systems and tax reform on developing countries.258

Additionally, two procedural concerns about the OECD/G20 BEPS project are worth noting. First, the OECD is a questionable source for developing global tax policies because of its “tend[ency] to focus on developed country concerns . . . .”259 In the interest of global representation and interest, it has been suggested that the United Nations Tax Committee may be a better—more representative—policymaker.260 Second, “because developing countries were not ‘at the table’ at the outset but were only included in 2016 (once the [i]nclusive [f]ramework had already been established), OECD countries continue to control the agenda, and BEPS’s claimed inclusiveness is more formal than substantive.”261 In essence, among scholars and commentators, there are

256 See Mottley, supra note 30, at 419–20 (describing human resources constraints in small island developing economies with respect to regulatory capabilities); Griffith, supra note 25, at 939–58 (discussing production capacity in small countries).

257 Oei, supra note 117, at 210.

258 Id. at 210–11 (citing Martin Hearson, Intergovernmental Grp. of Twenty Four, Developing Countries’ Role in International Tax Cooperation 6 (May 25, 2017) (unpublished working paper), https://martinhearnson.net/2017/08/21/developing-countries-role-in-international-tax-cooperation/ [https://perma.cc/9TWP-PDEG]).

259 Id. at 211.

260 Id.

real concerns as to whether the current BEPS project is the appropriate mechanism to address the issue of base erosion and profit shifting.\textsuperscript{262}

It bears noting that changes are on the horizon for international tax.\textsuperscript{263} The OECD/G20 framework has put forth “a global tax deal” or “BEPS 2.0” geared at reforming what some scholars refer to as “outdated international tax regimes.”\textsuperscript{264} But this new regime is likely to still be burdensome to Developing OFCs. Consider that two “pillars” comprise BEPS 2.0.\textsuperscript{265} The first pillar “concerns modifying profit allocation and nexus rules.”\textsuperscript{266} The second pillar seeks to “introduce a global minimum tax to level the playing field.”\textsuperscript{267} But, similar to earlier OECD efforts to address base erosion and profit shifting, BEPS 2.0 may prove difficult for Developing OFCs that lack the administrative resources to undertake the necessary legal reforms for its implementation.\textsuperscript{268} And tax scholars recognize that the fifteen percent minimum global tax rate “may disproportionately harm developing countries more than developed countries.”\textsuperscript{269}

4. The European Union

The EU has also been engaged in the global governance of OFCs. Although the EU has been primarily concerned with how its member states set their income tax rates and court multinational corporations, it also has been concerned with OFCs outside of Europe.\textsuperscript{270} These jurisdictions include “the

\textsuperscript{262} Professor Ruth Mason notes that “[a]cademics have harshly criticized BEPS, conceiving it as a mere technical project to close tax loopholes.” Mason, supra note 238, at 353 (footnote omitted). But Mason suggests that BEPS has immense significance for international tax. Specifically, “BEPS reflected—and to a significant extent operationalized—major changes in the participants, agenda, institutions, norms, and legal instruments of international tax.” Id. at 354.


\textsuperscript{264} Id. at 1, 13.

\textsuperscript{265} Id. at 13.

\textsuperscript{266} Id. (citing ORG. FOR ECON. COOP. & DEV., TAX CHALLENGES ARISING FROM DIGITALISATION—REPORT ON PILLAR ONE BLUEPRINT 3 (2020) [hereinafter PILLAR ONE BLUEPRINT]). This part “aims to allocate a part of corporations’ residual profits to market countries even if the corporation has no physical presence in those countries.” Id. (citing PILLAR ONE BLUEPRINT, supra, at 8).

\textsuperscript{267} Id. at 13–14 (citing ORG. FOR ECON. COOP. & DEV., TAX CHALLENGES ARISING FROM DIGITALISATION—REPORT ON PILLAR TWO BLUEPRINT 3 (2020)).

\textsuperscript{268} Id. at 45.


\textsuperscript{270} VLCEK, supra note 53, at 71. With respect to the EU, the European Commission adopted two directives: the Common Consolidated Corporate Tax Base (CCCTB) for MNCs and the European Union Savings Tax Directive (EUSTD) for individuals. See id. at 71–85. The CCCTB sought to create
Channel Islands, Isle of Man, and all dependent or associated territories in the Caribbean . . . .” And, like the OECD, the European Council created its own list of OFCs that it considered non-cooperative from a tax transparency perspective. This list first launched in 2017 and is considered a tool to tackle tax avoidance, tax fraud and money laundering by shining light on countries that are not transparent with respect to EU taxpayers’ information. The EU stated explicitly that the list of non-cooperative jurisdictions is “part of [its] external strategy on taxation and aims to contribute to ongoing efforts to promote tax good governance worldwide.” The first EU list included seventeen jurisdictions that were predominantly smaller, developing a sophisticated means of garnering the base for corporate income tax for a particular corporation throughout the various Member States and systematically and fairly share those funds “among the Member States in which the MNC operated.” Id. at 83 (citing Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM (2011) 121 final (Mar. 16, 2011)). According to Vlcek, “the intention was to measure the total taxable income generated by the MNC throughout the EU within a particular tax year.” Id.; see Common Consolidated Corporate Tax Base (CCCTB), EUR. COMM’N, https://ec.europa.eu/taxation_customs/common-consolidated-corporate-tax-base-ccctb_en [https://perma.cc/8779-G6JN]; EUR. COMM’N, CORPORATE TAX REFORM: PRO BUSINESS | ANTI-AVOIDANCE (2016), https://ec.europa.eu/taxation_customs/system/files/2016-11/ctr_fact_sheet2016.pdf [https://perma.cc/N5YX-8GV9]. The EUSTD, which was adopted in 2005 and repealed in 2015, facilitated the sharing of taxpayer account information between Member States and the ability to withhold tax from a non-resident taxpayer in one EU jurisdiction that is later send to the taxpayer’s Member State residence. See Vlcek, supra note 53, at 72. The EUSTD was replaced by a new directive that, among other things, covered a broader scope of income for individuals and bolsters the “automatic exchange of financial account information” between Member States. Repeal of the Savings Directive in Line with International and EU Developments, EUR. COMM’N https://ec.europa.eu/taxation_customs/repeal-savings-directive-line-international-and-eu-developments_en [https://perma.cc/ZG7G-VD2X].

271 Vlcek, supra note 53, at 73.

272 The European Council does not create legislation for the EU, but “defines the EU’s overall political direction and priorities . . . .” European Council, EUR. COUNCIL, https://www.consilium.europa.eu/en/european-council/# [https://perma.cc/3TQW-H9ZH]. It comprises the “heads of state or government of the 27 EU member states, the European Council President and the President of the European Commission.” Id.


275 European Council Press Release, supra note 274.
non-European jurisdictions.\textsuperscript{276} The most recent list has shrunk to nine jurisdictions, and it is now wholly comprised of smaller, developing non-European jurisdictions.\textsuperscript{277} Indeed, as of February 2022, the EU list is comprised of nine island jurisdictions—American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, U.S. Virgin Islands, and Vanuatu.\textsuperscript{278}

It is worth noting that the EU’s list has wrongly and unfairly targeted some jurisdictions, bringing its reliability into question. The case of Dominica is a prime example. Dominica is listed as an OFC but endured two natural disasters in recent years. In 2015, the island was hit by a storm, which was followed by a hurricane in 2017, and leaders sought aid from the international community.\textsuperscript{279} Notwithstanding the island’s vulnerable state, two years later, the European Council placed it on a “grey list.”\textsuperscript{280} Scholars argue that “[t]he excessive punishment meted out to Dominica for the crime of being a tax haven fits an all-too-recognizable pattern of an unlevel playing field.”\textsuperscript{281} Although Dominica, with a population of less than 75,000 people and a real per capita GDP of $9,900, may have been able to use its limited resources and the talent of its small population to become an OFC, its capabilities—even before a natural disaster—may not have been robust enough to meet all the competing requirements of the Global Governors, like Luxembourg, which, in 2020, had a real per capita GDP of $110,300.\textsuperscript{282} Interestingly, scholars note that “in fact,
Dominica had already ‘completed all the required legislative and administrative reforms to which the government had committed in mid-2018 to undertake.’\textsuperscript{283}

5. The United States

Much like the OECD and EU, the United States has a vested interest in reclaiming tax dollars currently residing in OFCs. Two recent pieces of domestic legislation attempt to achieve this goal. In 2010, Congress passed the Foreign Account Tax Compliance Act (FATCA), which focused on getting financial institutions in offshore jurisdictions to share United States taxpayer information with the Internal Revenue Service.\textsuperscript{284} In 2017, Congress adopted a new law that addressed the treatment of “global intangible low-taxed income” (GILTI).\textsuperscript{285} GILTI seeks to tax “the income of controlled foreign corporations, or CFCs, such as corporate subsidiaries of U.S.-parented multinationals.”\textsuperscript{286} Both legal regimes depart from the list culture of prior Global Governors.\textsuperscript{287} In this regard, they signal a departure from the practice of pointing fingers at vulnerable Black and Brown OFC jurisdictions.\textsuperscript{288} But these new approaches to OFC governance are not without their weaknesses.

Leaks and public outrage linked to whistleblower disclosures about hidden offshore bank accounts owned by American taxpayers inspired the creation of FATCA.\textsuperscript{289} The law “increased disclosure obligations and penalties for all American taxpayers with offshore assets and instituted a new mandatory information reporting regime for foreign financial institutions (FFIs) holding assets of U.S. taxpayers.”\textsuperscript{290} The law represents a retreat from business as usual for the United States. Previously, the United States relied on tax information exchange agreements to exchange taxpayer information with other jurisdic-

\begin{itemize}
\item \textsuperscript{283} Dean & Waris, supra note 7 at 1673 (citing Kendol Morgan, CARICOM Statement on Revised EU Blacklist of Members of the Community, CARICOM TODAY, https://today.caricom.org/2019/03/27/caricom-statement-on-revised-eu-blacklist-of-members-of-the-community/ [https://perma.cc/E6E9-83TC] (Mar. 29, 2019)).
\item \textsuperscript{286} Susan C. Morse, The Quasi-Global GILTI Tax, 18 Pitt. Tax Rev. 273, 274 (2021) (citing I.R.C. § 957(a)).
\item \textsuperscript{287} See Dean & Waris, supra note 7, at 1678–81 (noting that the FACTA “[made] no effort to identify or define tax havens,” and that GILTI also “does not rely on blacklists”).
\item \textsuperscript{288} Id. at 1679–80.
\item \textsuperscript{289} See Oei & Ring, supra note 102, at 545–48 (pointing to two major whistleblower leaks as the impetus for FACTA).
\item \textsuperscript{290} Id. at 537.
\end{itemize}
tions. It became apparent, however, that the governments of foreign jurisdictions were disinclined to share information about financial account holders within their borders. Consequently, FATCA represents an attempt by the United States to recover lost tax revenue on its own. According to some international tax scholars, FATCA is the United States’ venture to address “tax evasion as a structural problem,” rather than something endemic to a class of countries.

Although the United States intended to use FATCA to bypass the involvement of OFC governments, it faced a range of hurdles that led policymakers to revisit this scenario. Given that foreign financial institutions in foreign jurisdictions are required to comply with privacy laws and disclosure restrictions in those places that often conflicted with FATCA requirements, the United States resorted to Intergovernmental Agreements (IGAs).

IGAs require offshore jurisdictions, some of whom may lack the capacity to effectively oversee the processes required to ensure that information is reported to the IRS, to deploy administrative efforts. In short, where FATCA arguably sought to eliminate explicit bias toward a category of jurisdictions, bias is still embedded in the interactions between wealthy and poor jurisdictions.


292 See id. (noting the failure of “treaties, agreements, and [Tax Information Exchange Agreements]” because these tools depend on whether foreign jurisdictions are willing to share information).

293 Dean & Waris, supra note 7, at 1679. FATCA requires FFIs throughout the world to report the financial account information of American taxpayers meeting certain criteria to the IRS. See I.R.C. §§ 1471, 7701(b) (defining residence for purposes of paying taxes). FFIs who do not comply with this requirement and have assets in the United States face the consequence of a thirty percent withholding tax on any income that comes from its United States assets. Id. § 1471(a). American persons taxpayers are also required to report their financial assets overseas that are above a certain threshold. Id. § 6038. These IGAs provide for the receipt of taxpayer financial account information directly from the government, and a portion of them allow for reciprocal arrangement—whereby the United States would also provide information to them regarding their taxpayers. See Foreign Account Tax Compliance Act, U.S. DEP’T OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act [https://perma.cc/PB47-C75B] (listing the jurisdictions with which the United States has an IGA and the two types of IGAs—Model 1 and Model 2). According to the U.S. Department of the Treasury, “FATCA requires foreign financial institutions (FFIs) to report to the IRS information about financial accounts held by U.S. taxpayers, or by foreign entities in which U.S. taxpayers hold a substantial ownership interest.” Id.

294 See Dhammika Dharmapala, Cross-Border Tax Evasion Under a Unilateral FATCA Regime, 141 J. PUB. ECON. 29, 31 (2016) (describing the transformation of FACTA by the use of IGAs because of foreign privacy law interference with the original FACTA scheme); Avi-Yonah & Savir, supra note 291, at 8 (noting that FACTA was seen as an “aggressive diplomatic move” by the United States because it imposed reporting requirements on foreign government-owned banks notwithstanding any foreign privacy laws).

295 See, e.g., Dean & Waris, supra note 7, at 1666 (noting how Liberia, for example, lacked “the administrative capacity to exchange information with [the] OECD”).
More recent legislative efforts to collect taxes beyond the United States’
borders is also more targeted than the list approach. But it similarly falls into
the trap of punishing some poorer, resource-constrained jurisdictions.296 GILTI
emerged as part of the Tax Cuts and Jobs Act of 2017.297 That law sought to
discourage corporations from shifting their profits to offshore jurisdictions
where they would bear lower tax burdens.298 GILTI accomplishes this by im-
posing a tax on a certain level of income outside of the United States that is not
otherwise taxed.299 In other words, if foreign jurisdictions that have a right to
tax corporate income fail to collect this tax, the United States swoops in and
collects it.300

But GILTI falls short because it does not consider why a jurisdiction, such
as a developing jurisdiction, would fail to collect certain kinds of taxes.301 For
example, it is feasible that some resource-constrained OFCs may lack the fi-
nancial and bureaucratic capacity to effectively collect these types of reve-
nues.302 One view suggests that “[t]he United States could easily adopt an ap-
proach that would distinguish between states that willfully embrace low tax
policies and those that lack the resources to do otherwise.”303 Because the
United States fails to take this approach, these attempts disproportionately
harm weaker jurisdictions that would desire to collect certain tax revenues but
are unable to do so.304

296 See id. at 1680 (noting that the GILTI effort, while abandoning the list strategy employed by
previous tax-haven initiatives, still suffered from the same weakness of previous initiatives by “punish-
ing ‘low tax’ jurisdictions”).

297 Pub. L. No. 115-97, § 14201, 131 Stat. 2054, 2208–12. This tax is not imposed “where non-
U.S. jurisdictions, in aggregate, impose corporate tax on GILTI at a rate that at least equals 62.5% of
the maximum U.S. corporate rate.” Morse, supra note 286, at 275. According to Susan Morse, “[t]his
threshold is 13.125% when the U.S. rate is 21%, as it has been from 2018 to 2020.” Id.

298 See Morse, supra note 286, at 274 n.2 (noting that GILTI was created to “discourage profit-
shifting to low-tax foreign subsidiaries” (first citing Time Dowd & Paul Landefeld, The Business
Cycle and the Deduction for Foreign Derived Intangible Income: A Historical Perspective, 71 NAT’L
TAX J. 729, 730 (2018); and then citing Kimberly A. Clausing, Fixing Five Flaws of the Tax Cuts and

299 See Morse, supra note 286, at 275 (noting that GILTI imposes a tax on “excess cross-border
corporate profit”).

300 Steven A. Dean, Beyond the “Made in America Tax Plan”: GILTI and International Tax Co-

301 Id.

302 See Timothy Besley & Torsten Persson, The Origins of State Capacity: Property Rights, Taxa-
nations indicates that creation of state capacity to collect taxes and enforce contracts is a key aspect of
development.”).

303 Dean, supra note 300, at 353.

304 But see Noam Noked, Defense of Primary Taxing Rights, 40 VA. TAX REV. 341, 341 (2021)
(discussing “a new defensive tax” that developing countries could use to collect revenue that would go
to other countries under the “OECD’s Global Anti-Base Erosion (GloBE) proposal”).
Beyond the potential fairness concerns surrounding GILTI, Professor Reuven Avi-Yonah has questioned whether the law is constitutional.\textsuperscript{305} Professor Avi-Yonah suggests “[t]he argument that [GILTI] is unconstitutional would rest on the assertion that deemed dividends are economically equivalent to taxing a [controlled foreign corporation] on foreign-source income, which is unconstitutional under the jurisdictional limits of [prior case law] and is also a violation of international law.”\textsuperscript{306} Professor Avi-Yonah further argues that Congress should redefine who a domestic person is under 26 U.S.C. § 7701(a)(4) “to include [controlled foreign corporations] . . . .”\textsuperscript{307} It is unclear whether other scholars or commentators share this view, but it suggests that GILTI may require further scrutiny.

III. GOVERNANCE AND THE OFC TRILOGY: CAPACITY, JUSTICE, AND IDENTITY

The global governance infrastructure described above raises concerns about racial bias or, at a minimum, about insensitivity toward relative levels of development among jurisdictions—often attributable to past colonial experiences.\textsuperscript{308} Section A of this Part explores this concern regarding racial bias.\textsuperscript{309} Section B discusses the problem of administrative capacity facing OFCs.\textsuperscript{310} Section C discusses the problem of access to justice,\textsuperscript{311} while Section D discusses the identity problem troubling OFCs.\textsuperscript{312}

A. The Overriding Cause for Concern

In a recent article, Professors Steven Dean and Attiya Waris argue that OFCs are haunted by “a familiar racial subtext of Black lawlessness and white privilege . . . .”\textsuperscript{313} In this view, it is not just geographic vulnerability in terms of the smallness of Developing OFCs that is at issue, but also the racial demographic and colonial heritage of these places. For example, scholars note that the lists created by the OECD and EU have targeted predominantly Black

\textsuperscript{306} Id. at 286 (citing Cook v. Tait, 265 U.S. 47 (1924)). Professor Avi-Yonah explains that “[i]n Cook, the Supreme Court explained that jurisdiction to tax must rest on one of two bases: nationality/residence or territoriality.” Id. at 284 (citing Cook, 265 U.S. at 54).
\textsuperscript{307} Id. at 287.
\textsuperscript{308} See Dean & Waris, supra note 7, at 1659 (noting the concern with respect to racial subtexts in the global tax system because “blacklist” regulatory tools disproportionately target “‘Black’ and ‘Brown’ jurisdictions”).
\textsuperscript{309} See infra notes 313–320 and accompanying text.
\textsuperscript{310} See infra notes 321–357 and accompanying text.
\textsuperscript{311} See infra notes 358–398 and accompanying text.
\textsuperscript{312} See infra notes 399–425 and accompanying text.
\textsuperscript{313} Dean & Waris, supra note 7, at 1661.
countries, such as Dominica and the Caribbean twin-island republic of Trinidad and Tobago. In contrast, “[w]hite, wealthier states like Switzerland and Luxembourg do not appear on such lists. Others like Hong Kong, Singapore, Mauritius, or Seychelles seem to drop on and off the radar with apparent ease.”

Arguably, the most important shared characteristic among many jurisdictions that lack wealth, are small in size, and comprise majority Black and Brown populations is their vulnerability. Lists and other governance tools tend to target communities that are less capable of politically and economically defending themselves on the world stage and that are already tagged with persistent narratives of subordination. This narrative does not consider Developing OFCs as sophisticated actors in a highly technical space—international finance and taxation—but instead considers them to be wrongdoers. Cases like Dominica and Trinidad and Tobago motivate the call for greater fairness when considering the global governance of OFCs. But even if the Global Governors attempted to “level the playing field” by treating all OFCs the same, they would fail if they did not invest in understanding the social and historical differences between these jurisdictions.

314 Id. at 1661–62.
315 Id. at 1662 (footnote omitted). Professor Karen Bravo notes: “Those considered to be countries that support or allow money laundering are often depicted as countries run by greedy, selfish bureaucrats who simply want money and not care whether they are giving terrorist organizations and criminals a place to carry out their illegal activities on an international scale.” Bravo, supra note 22, at 39 n.15 (citing William F. Wechsler, Follow the Money, 80 FOREIGN AFF. 41, 41–43 (2001)).
317 See Andrés Velasco, Dependency Theory, FOREIGN POL’Y, Nov./Dec. 2002, at 44, 44–45, 48 (discussing dependency theory and the status of “[p]oor countries exiled to the periphery of the world economy”); see also Francis G. Snyder, Law and Development in the Light of Dependency Theory, 14 LAW & SOC’Y REV. 723, 736–61 (1980) (discussing how the exploitation of developing countries impacted their development as well as their approach to law and legal systems).
318 See Dean & Waris, supra note 7, at 1662 (noting that global tax policy relegates developing OFCs, such as Liberia, to villain status). Although it is not a small island Developing OFC, Dean and Waris identify the case of Liberia as a ready example of a tendency to punish the vulnerable in the current OFC global governance structure. According to the authors:

In 2000, when the OECD searched for an explanation for the failures of the international tax system it had overseen for decades, it did not see a war-ravaged Liberia spiraling into more years of brutal killing. The OECD simply saw a state without a comprehensive income tax. Worse, it saw one without the administrative capacity to exchange information with OECD states to help deter offshore evasion.

Id. at 1666 (footnotes omitted).
319 See, e.g., William Vlcek, A Level Playing Field and the Space for Small States, 12 J. INT’L RELS. & DEV. 115, 115–17 (2009) (arguing, ultimately, that powerful global tax policy actors should be constrained in their influence to permit a more equitable regime for smaller developing nations).
In addition to the argument that OFCs can provide jurisdictional competition and serve the interests of onshore jurisdictions, this Article suggests three overlooked features of Developing OFCs that contribute to the current uneven global governance terrain. These features are state capacity, access to justice, and community identity. A lack of appreciation for these admittedly hard-to-measure aspects of the interaction between the offshore sector and the lives of residents of OFC jurisdiction contributes to the perpetuation of global inequality, even when leaders are claiming to pursue global justice.

B. The Capacity Problem

For decades, commentators have linked jurisdictional capacity to economic development. And although “capacity” has been a slippery concept to define, a general consensus exists among political sociologists that “growth depends on governance” and that bureaucratic quality is one facet of the capacity needed for good governance. Places with competent bureaucracies tend to do better economically over time than those without. This is in large part because of the administrative talent available in a high-quality government bureaucracy that can steer political leaders away from poor policy outcomes. Of course, there is a relationship between a high-quality bureaucracy and

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320 See infra notes 321–425 and accompanying text; see, e.g., Dionne & Macey, supra note 72, at 8 (arguing that OFCs have positive effects on regulatory development); Dharmapala, supra note 82 (manuscript at 32–33) (same); William J. Moon, Delaware’s Global Competitiveness, 106 IOWA L. REV. 1683, 1701–03 (2021) (discussing how some OFCs like Cayman Islands provide alternative corporate governance structures to international corporations).


323 See Evans & Rauch, supra note 321, at 760 (demonstrating that “state bureaucracies characterized by meritocratic recruitment and predictable, rewarding career ladders are associated with higher growth rates”); see also Martin W. Sybblis, Regulatory Competition and State Capacity, 13 WM. & MARY BUS. L. REV. 189, 192–98 (2021) (discussing state capacity’s relevance for OFC success).

324 See Skocpol & Finegold, supra note 322, at 258 (explaining how competent government bureaucrats helped to make the Agricultural Adjustment Act a success during the New Deal era).
wealth. A high-quality bureaucracy may require a certain level of expenditure to pay for salaries and institutions to the advantage of wealthier countries.\textsuperscript{325} But scholars have demonstrated that “low levels of per capita income are not necessarily a barrier to achieving more competent and coherent state bureaucracies.”\textsuperscript{326} And initial wealth alone does not explain subsequent economic performance because there is variance in growth among jurisdictions with similar incomes.\textsuperscript{327} In this regard, some scholars suggest that jurisdictional capacity is contextual.\textsuperscript{328} It ultimately depends on the leaders’ goals and how they want to deploy the scarce resources at their disposal.\textsuperscript{329} OFCs are therefore an intriguing example of the capacity enigma.

On the one hand, there is a compelling argument that even the smallest or poorest of successful OFCs\textsuperscript{330} have managed to muster the talent and sophistication to excel in a competitive international environment.\textsuperscript{331} Arguably, the connection between an OFC’s state capacity and its ability to effectively compete with the State of Delaware—known as the leader for corporate law—is sorely underappreciated.\textsuperscript{332} Nevertheless, there is a growing recognition that specific features help to make some small jurisdictions stand out in the offshore arena.\textsuperscript{333}

On the other hand, population size and wealth (measured by GDP) can impose natural limits on administrative capabilities. With respect to size, some Developing OFCs lack the human resources to facilitate a range of administrative tasks. For example, during now-Prime Minister Mia Mottley’s time as Attorney General of Barbados, she explained the island nation’s difficulty in

\textsuperscript{325} See Davis & Trebilcock, supra note 68, at 922 (noting that “[t]here are real costs associated with the operation of sophisticated legal institutions, including, most notably, the costs of training and retaining the skilled personnel required to staff courts and other legal institutions, draft legislation, and to disseminate information about the content of the law” (citing Daniel Kaufman & Aart Kraay, Growth Without Governance (World Bank Pol’y Rsch. Working Paper, Paper No. 2928, 2002))).

\textsuperscript{326} Evans & Rauch, supra note 321, at 756.

\textsuperscript{327} See Enriquez & Centeno, supra note 321, at 137–38 (noting that “development and state building can occur at many points on the GDP/taxation curves”).

\textsuperscript{328} See id. at 156–58 (noting areas of suggested empirical study to develop the proposition that capacity is contextual).

\textsuperscript{329} Id.

\textsuperscript{330} As noted by several scholars, not all OFCs are successful. See, e.g., Dharmapala & Hines, supra note 81, at 1065–66 (suggesting “that tax havens are unsuccessful in the absence of high-quality governance”); see also BRUNER, supra note 3, at 192–202 (discussing why some OFCs have failed).

\textsuperscript{331} See generally Sybllis, supra note 323 (discussing the international competitiveness of OFCs).

\textsuperscript{332} Id. at 204 (noting the slight emergence of scholarly attention to the international competitiveness of OFCs to date).

\textsuperscript{333} See, e.g., BRUNER, supra note 3, at 41–49 (discussing the features of what the author calls “market-dominant small jurisdictions”).
complying with all the reporting requirements of various Global Governors.\footnote{See Mottley, \textit{supra} note 30, at 416, 419–20 (describing the difficulty that most small Caribbean OFCs face in their efforts to comply with the requirements of each regulatory organization, which do not consider the smaller administrative capacity of these nations when promulgating law).} According to Mottley, “[t]he reality is that most of the Caribbean countries are small island jurisdictions. For most of them, it is impossible to be able to maintain adequate coverage on all fronts to the level of detail that is being required by each individual organization.”\footnote{Id. at 416.} The Attorney General then proceeded to emphasize that there were only two people employed by the government agencies responsible for complying with the demands of OECD and FATF in 2003.\footnote{Id. at 419.}

The commitment to pursue tax dollars throughout the globe is understandable, but it fails to recognize capacity differences between OFC jurisdictions. For example, the Cayman Islands and Switzerland are very different culturally, demographically, and economically. The former is a tiny multiracial overseas territory of Britain in the Caribbean Sea with a current population of approximately 63,131\footnote{The World Factbook: Cayman Islands, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/cayman-islands/ [https://perma.cc/P59D-SWVG] (Sept. 14, 2022).} that went from “essentially a barter economy in 1960 with no banks to a . . . [top OFC] by the 1980s.”\footnote{Freyer & Morriss, \textit{supra} note 25, at 1300.} The latter is a European state of approximately 8 million people, is predominantly Caucasian, and has been an OFC since at least the 1920s.\footnote{PALAN ET AL., \textit{supra} note 108 at 107 (“Switzerland was known as a tax haven in the 1920s . . . ”).} Switzerland is also one of top ranked economies in the world, as measured by GDP.\footnote{Switzerland has a real per capita GDP of $68,400. \textit{The World Factbook: Switzerland, CENT. INTEL. AGENCY, https://www.cia.gov/the-world-factbook/countries/switzerland/#economy [https://perma.cc/D94S-25UR] (Oct. 3, 2022); see also GDP (Current US$), WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?most_recent_value_desc=false [https://perma.cc/ZKE8-D4VG] (noting Switzerland’s high recent value as a country vis-à-vis other countries).} Switzerland’s access to resources and its location opens it to more administrative and economic options than those available to the Cayman Islands, even when burdened by multiple complex obligations from the Global Governors.\footnote{For example, scholars argue that “Swiss agriculture and industry . . . developed relatively successfully in the 18th and 19th centuries . . . ” Yvonne Guo & J.J. Woo, \textit{Introduction and Background: The Trajectories of History, Politics and Economics, in SINGAPORE AND SWITZERLAND: SECRETS TO SMALL STATE SUCCESS, \textit{supra} note 32, at xxi, xl.} Switzerland itself is an influential part of the Global Governance framework.\footnote{See \textit{Our Global Reach, \textit{supra} note 18 (noting Switzerland’s membership in the OECD).} Indeed, the forty-plus OFCs identified by scholars exhibit important socio-economic differences that stem from their geographies and socio-histories.\footnote{See, \textit{e.g.}, Dharmapala & Hines, \textit{supra} note 81, app. A at 1066.} Some of these countries,
including those from the Commonwealth Caribbean, possess tortured colonial legacies that create an uneven economic playing field when compared to the positions of other jurisdictions without these histories.344

The hatchet approach of lists and threats against correspondence banking is questionable because the Global Governors have not fairly assessed the relative benefit to each onshore jurisdiction of potentially gaining tax revenue from places such as Barbados, Dominica, and The Bahamas, compared to the burdens that would be placed on these locations by this action.345 Crime prevention justifications aside, one argument for the pursuit of these tax dollars is the inability of developed countries to pay for their growing welfare programs.346 But it is not abundantly clear how much the social safety net would change in a developed country, like the United States, if Developing OFCs complied with all the existing Global Governance requirements. In other words, it is assumed that but for a lack of sufficient resources, the American state could reduce the wealth gap in the United States and ensure that most—if not every—American had access to adequate-quality collective goods and service. Given the country’s history, this assumption may not be well founded. Numerous analysts and scholars have effectively argued and demonstrated that it is not insufficient access to public dollars that drives inequality in America.347

More recently, one commentator artfully explained how racism has led to unequal access to public goods, even though Americans live in a wealthy and powerful country.348 Further, the political-economy literature tells us that it is

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344 See, e.g., Dupuy, supra note 50, at 250 (noting that the “subordination of the Caribbean as colonies of western Europe” among other factors contributed to the underdevelopment of certain Caribbean nations). See generally WILLIAMS, supra note 49 (discussing the trans-Atlantic slave trade and its consequences); PATTERSON, supra note 50, (same).

345 See, e.g., Joseph Stiglitz, Conquering the Great Divide: The Pandemic Has Laid Bare Deep Divisions, but It’s Not Too Late to Change Course, FIN. & DEV., Sept. 2020, at 17, 17–19 (arguing for reforms to create a more equitable economic system); see also Angus Deaton, COVID-19 and Global Income Inequality, 1 LSE PUB. POL’Y REV., no. 4, 2021 at 1, 1 (arguing that during the COVID-19 pandemic, “international income inequality decreased” when data from country to country are examined (emphasis omitted)).

346 Over two decades ago, Reuven Avi-Yonah explained this position and noted that the social safety net in developed countries “is needed more than ever both because of demographic factors and because of the increased income inequality, income volatility, and job insecurity that tend to result from globalization.” See Avi-Yonah, Globalization, supra note 6, at 1578.


348 Heather McGhee makes the powerful point that:

The United States of America has had the world’s largest economy for most of our history, with enough money to feed and educate all our children, build world-leading in-
not a given that states are innately benevolent and committed to the equal distribution of public goods among their population.\(^{349}\) According to policy expert Heather McGhee, when collective goods, such as housing, education, and healthcare, begin to also benefit people of color, the state constrains their availability.\(^{350}\) The implicit assessment—based on a sordid racial history and hierarchy\(^{351}\)—is that if everyone gets access to high-quality collective goods, we should eliminate them because some racial groups are less deserving.\(^{352}\) This scholar describes this as the “zero-sum” proposition that has persisted to the present day.\(^{353}\)

And, as it pertains to the collection of taxes in America, Professor Dorothy Brown makes the case that race and taxes are interrelated in the United States.\(^{354}\) Professor Brown observes that federal tax laws after World War II increased the number of Americans subject to income tax, including Black Americans, thereby increasing revenue for the collective goods and services, including housing and college assistance programs.\(^{355}\) But Black Americans were excluded from many of these benefits.\(^{356}\) In short, Black Americans paid for benefits that infrastructure, and generally ensure a high standard of living for everyone. But we don’t. When it comes to per capita government spending, the United States is near the bottom of the list of industrialized countries, below Latvia and Estonia. Our roads, bridges, and water systems get a D+ from the American Society of Civil Engineers. With the exception of about forty years from the New Deal to the 1970s, the United States has had a weaker commitment to public goods, and to the public good, than every country that possesses anywhere near our wealth.

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\(^{349}\) See, e.g., ACMOGLU & ROBINSON, supra note 52 (generally describing how political institutions impact economic development); PAUL FRYMER, BUILDING AN AMERICAN EMPIRE 8 (2017) (explaining early American territorial expansion and noting that “[t]he dynamic nature of expansion continually prompted debate in the United States regarding how various populations might or might not fit into broader questions of sovereignty, democracy, and community”).


\(^{351}\) See \textit{supra} note 21, at 1–15 (discussing the “racial zero-sum story” that stems from our colonial roots).

\(^{352}\) Id.

\(^{353}\) See, e.g., MCGHEE, supra note 21, at 20–22.

\(^{354}\) Id. at 21 (noting that the post-war income tax base increased).

\(^{355}\) Id. (noting that: “even as [B]lack Americans paid into the system, they were unable to reap its benefits”). For example, Professor Brown explains:

On the federal level, the [Federal Housing Administration] engaged in redlining of neighborhoods where [B]lack Americans lived, rendering homes there ineligible for low-interest-rate thirty-year FHA-insured loans. At the same time, legal and de facto discrimination prevented [B]lack Americans from buying homes elsewhere. Black veterans faced similar barriers at colleges and universities, few of which would enroll
they did not receive. Further, this problem persists—albeit in more subtle ways—as “[B]lack Americans of all income levels are equally invisible when it comes to shaping policy but are paying more in taxes than their [W]hite peers because our tax laws were designed with [W]hite Americans in mind.”

The history of the unequal distribution of public goods and services in a jurisdiction like America—which is a high-capacity jurisdiction both in terms of administrative capacity and wealth—is appalling. And it suggests that the tangible welfare gains from Global Governance tools that seek to burden OFCs deserve careful study. This analysis should include a comparative welfare assessment that examines what would be lost in Developing OFCs and what would be reasonably gained by each resident in the developed world.

C. The Access to Justice Problem

The capacity problem is directly linked to access to justice for the residents of Developing OFCs because it implicates the lacking capacity of the judicial systems involved. Capable lawyers, judges, and other civil servants working in the court system are critical components of the fair and effective administration of justice in modern societies. And when law is viewed as a catalyst for economic development, courts play an important role in the process, because private law disputes require a professional and impartial judiciary for dispute resolution. The consistent interpretation and enforcement of rules ensures certainty and predictability in commercial transactions. But courts play an even larger

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them. Black and white workers both paid the federal income taxes that generated the revenue to finance these benefits, but [B]lack Americans were prevented from receiving them. They could only watch from the sidelines as their money helped fund the creation of a robust middle class, one that was almost exclusively white.

Id. at 15–16.

357 Id. at 21.

358 See Davis & Trebilcock, supra note 68, at 896 (noting the new prominence of legal optimism, where theorists believe that the law is a linchpin for development).

359 See, e.g., KENNETH W. DAM, THE LAW-GROWTH NEXUS 91–122 (2006) (noting the role of courts and legal enforcement in economic development); see also Davis & Trebilcock, supra note 68, at 913–16.

360 Kenneth Dam writes:

No doubt some technical laws can be enforced by administrative means, but a rule of law, in the primary economic sense of protecting property and enforcing contracts, requires a judiciary to resolve disputes between private parties. And protection against the state itself is made easier where the judiciary can resolve a controversy raised by a private party against the state based on constitutional provisions or parliamentary legislation.

DAM, supra note 359, at 93.

361 See Lars P. Feld & Stefan Voigt, Making Judges Independent—Some Proposals Regarding the Judiciary 8 (CESifo, Working Paper No. 1260, 2004) (noting that one of the primary functions of the government is to reduce uncertainty and, thus, “[a]n independent judiciary” is a mechanism to “turn
role in national development. They enable access to justice for the poor and promote equal rights. These two arenas are especially important for developing jurisdictions, including Developing OFCs, and are buoyed by the rapid development of specialized commercial courts in these places.362

The rise of specialized commercial courts in recent years has been a boon to OFCs.363 These specialized courts are “staffed by judges with business law expertise” and are focused on dispute resolution emanating from international business companies.364 They represent “tribunals of narrowly focused jurisdiction to which all cases that fall within that jurisdiction are routed.”365 They tend to follow the model of Delaware’s Court of Chancery, which is likely the most well-known specialized court among business lawyers.366 They are known for (1) having “judges [with] corporate law expertise resolve disputes without juries; (2) the meritocratic nature of selecting Chancery Court judges; and (3) the steady production of case law that reduces uncertainty in the application of substantive law.”367

In addition to commercial courts, other examples of specialized courts include “administrative courts, labor courts, and drug courts.”368 OFCs use specialized courts in an attempt to better serve the needs of foreign clients.369 Specialization is desirable because of the need for substantial judicial capacity in promises into credible commitments”); Roumeen Islam, Institutional Reform and the Judiciary: Which Way Forward? 8 (World Bank Pol’y Rsch. Working Paper, Paper No. 3134, 2003) (arguing that “predictable courts can support the development of economic activity”).

362 See, e.g., Moon, supra note 4, at 1437–43 (describing the emergence of specialized business courts in OFCs).

363 Id. at 1439.

364 Id.
at 1439.


368 Zimmer, supra note 365, at 46.

369 See Stauber, supra note 36, at 155 (describing the role of specialized courts in economic development); Kawaley, supra note 36, at 16 (noting that specialist courts are “beneficial for local and international investors”); see also Moon, supra note 4, at 1438 (noting that “specialized business courts were built specifically to resolve disputes that arise from foreign firms incorporated locally”); Matthew S. Erie, The New Legal Hubs: The Emergent Landscape of International Commercial Dispute Resolution, 60 VA. J. INT’L L. 225, 227–28 (2020) (noting the rise of legal dispute resolution courts in OFCs); Pamela K. Bookman, The Adjudication Business, 45 YALE J. INT’L L. 227, 227–29 (2020) (describing the rise of specialized business courts in global financial centers); Pamela K. Bookman & Matthew S. Erie, Experimenting with International Commercial Dispute Resolution, 115 AJIL UNBOUND 5, 5 (2021) (noting that OFCs are establishing specialized business courts to “attract foreign direct investment”).
OFCs to manage the often complex and transnational character of litigation that enters local courts.\textsuperscript{370} Bermuda, British Virgin Islands, and the Cayman Islands represent important examples of OFCs that have created commercial courts.\textsuperscript{371} Leaders of some OFCs have therefore directed their financial resources and local talent toward offshore financial services and aim to develop the capacity of their bureaucracies to serve this sector of the economy.\textsuperscript{372} The ultimate goal of this kind of capacity is to encourage international business.

As is noted above, some commentators have identified an international trend toward the creation of specialized commercial courts.\textsuperscript{373} Some jurisdictions have discussed the prospect of creating specialist courtrooms and specialist judges, if not creating entire commercial divisions.\textsuperscript{374} These courts and judges ensure the “handling [of] cases in a manner which is (a) expeditious and efficient, (b) independent of any biases, . . . and (c) consistent (as far as possible) with commercial logic and common sense.”\textsuperscript{375} Courts with large caseloads and few judges can leave litigants with rights in theory, but not in practice because rights are not effectively protected through appropriate redress. One positive externality that appears to stem from specialized courts in OFC jurisdictions is the relief provided to the backlog in other local courts that reduces the time residents spend awaiting hearings or judgments.\textsuperscript{376}

\textsuperscript{370} Kawaley, supra note 36, at 16–17 (emphasizing the “global nature” of the transactions at the core of OFC litigation and the role of specialized courts in efficiently managing these complex cases).
\textsuperscript{371} Id. at 17.
\textsuperscript{372} See, e.g., Sybblis, supra note 25, at 922–31 (discussing how Barbados has invested in its offshore sector).
\textsuperscript{373} See, e.g., Moon, supra note 4, at 1437–43 (noting the trend of OFCs establishing business courts). According to Ian Kawaley:

This trend has been driven by the growing significance of courts which are capable of efficiently resolving commercial disputes to businessmen in a global commercial environment which spawns multi-jurisdictional commercial disputes. The specialist commercial court has emerged as part of the national infrastructure which cities and/or countries (as well as local service providers) rely upon to attract business to their shores.

Kawaley, supra note 36, at 16; see also Zimmer, supra note 365, at 46 (discussing further the roles played by specialized courts); Jill E. Fisch, The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters, 68 U. CIN. L. REV. 1061, 1061–63 (2000) (discussing Delaware’s prominence in regulatory competition for corporate charters, which is due in part to its sophisticated business courts).

\textsuperscript{374} Kawaley, supra note 36, at 16 (noting in 2010 that the Bahamas may eventually “establish a dedicated courtroom for commercial cases in Freeport”).
\textsuperscript{375} Id.
\textsuperscript{376} See supra notes 39–40 and accompanying text (discussing the specialization of the judiciary and the legal profession in Bermuda following “the establishment of the Commercial Court in 2006” (quoting Kawaley, supra note 36, at 17)).
For example, prior to the establishment of Bermuda’s Commercial Court in 2006, the capacity of the judiciary concerned lawyers. 377 There were “four Supreme Court judges in Bermuda to hear the full range of family, criminal and commercial cases.”378 The international business sector had brought significantly more commercial activity to the island and, inevitably, more litigation.379 Since the founding of Bermuda’s commercial courts, litigants have benefited from the efficiency of court proceedings and access to experts who can effectively resolve their claims. 380 And this approach to litigation has spread beyond the walls of the commercial courts to other courts and legal institutions. For example, with respect to efficiency, former Bermuda Chief Justice Ian Kawaley notes that “it is difficult to sustain within one court system (particularly in smaller jurisdictions) a modern customer-friendly and impartial approach to commercial cases and a more antiquated parochial approach to other areas of the law . . . .”381

Beyond attending to the needs of the international business community, specialized commercial courts have enhanced the welfare of the residents of some OFCs. Commentators argue that specialization in the commercial law

377 Kawaley, supra note 36, at 19 (discussing the backlog of cases in Bermuda and the perceived need for a commercial court). According to Justice Ian Kawaley,

The initial stimulus for the creation of a specialist court undoubtedly came when a large trust case had to be aborted in 2001 because the trial judge’s contract expired in the midst of the trial and was not renewed. By early 2003 (largely due to judicial staff shortages which could not have been predicted) Bermudian commercial litigators were calling for a commercial court.


379 One Bermudan lawyer commented: “We’ve had situations where people have been able to get exparte [sic] orders and, for example, have bank accounts frozen. It should be possible to have a hearing on such an issue within one or two weeks, but instead it might take up to three months.” Another lawyer noted the important consequences of inadequate judicial resources, stating: “I think it’s also sometimes a factor where people are awaiting trial on criminal charges. Especially where the people are being held in custody, it’s important to get expeditious trials for them. It’s competing demands.” Id.

380 According to Justice Kawaley:

The more subtle spill-over benefit is that of increasing judicial professionalism generally. This in turn seems to have contributed to an enhanced spirit of judicial independence, with a better balancing of the scales between prosecutor and accused (criminal cases) and citizen and state (judicial review and/or human rights cases), and a more sensitive and sophisticated management of family cases.

Kawaley, supra note 36, at 17.

381 Id.
sphere spurs specialization in other areas of the judiciary. \textsuperscript{382} Such specialization includes, but is not limited to, “criminal law, family law and human rights law.”\textsuperscript{383} Further, the presence of international law firms in OFCs—due to international business transactions—allows for additional pro bono assistance to individuals and communities throughout the jurisdiction who would otherwise lack access to legal representation. \textsuperscript{384} Indeed, the international nature of OFCs allows for the overall professional development of the local bar in these jurisdictions.

When domestic OFC judges and lawyers address disputes and facilitate transactions among parties from diverse jurisdictions, they constantly interact with high-caliber lawyers and judges from other jurisdictions. \textsuperscript{385} These interactions allow for the exchange of scripts and norms about the legal profession. \textsuperscript{386} For example, scholars note that the way law is practiced in the United States has diffused to other countries. \textsuperscript{387} Take the case of law firm management as an example. \textsuperscript{388}
example of an American practice that has traveled across borders. Emerging economies, like India, have adopted the design of big American law firms. The Globalization, Law and Emerging Economies project at Harvard Law School is studying the emergence of elite groups of lawyers in developing countries (India, Brazil, and China) and suggests that they are “tied to the creation of a new corporate sector in these countries and the greater integration of their markets into the world economy.”

Beyond the litigation of commercial matters, the lawyers and judges practicing in OFCs are exposed to matters concerning human rights. For example, disputes that would previously not be heard are now brought to the fore by virtue of the interaction between international actors and local residents. One scholar suggests that: “[d]evelopment requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states.” If development is understood as freedom, OFCs may be freedom-promoting agents for residents—both from an economic growth and an individual rights perspective.

Bermuda is an example of this phenomenon. The jurisdiction’s cultivation of a specialized commercial court created both judges who were experts in this


388 Id. This design consists of:

First . . . providing a full range of services to corporate clients. Second, the lawyers in these firms were hired exclusively from top law schools, as opposed to laterally from other law firms, and after a six- to ten-year apprenticeship were either promoted to partnership or asked to leave the firm. Third . . . firms were governed as true partnerships, in which all partners shared equally in the firm’s profits and losses through a “lock-step” compensation system and were entitled to equal participation in firm decision-making.

389 Id. at 10–11.

390 Former Chief Justice Kawaley argues that:

Economic growth [in Bermuda] has also created a new class of public law litigants, be it companies aggrieved by regulatory decisions or policies, or expatriate workers aggrieved by immigration decisions. These more privileged public law litigants arguably empower more vulnerable local citizens who might previously not have contemplated public law remedies. Well-heeled litigants able to fund well-researched cases have educated the judiciary in spheres of the law, creating precedent which will likely benefit those of more modest means.


391 AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (1999).
substantive area and more experts in handling matters of public law.\textsuperscript{392} As a result, a greater capacity to handle non-commercial matters and a seemingly greater sensitivity to the rights of litigants in criminal matters emerged.\textsuperscript{393} For example, “Bermuda’s legal aid scheme has in recent years supported the engagement of foreign leading counsel in serious cases—typically, murder cases, reflecting an enlightened approach to giving substance to fair trial rights, irrespective of a defendant’s means.”\textsuperscript{394} Justice Kawaley of Bermuda explains that:

[T]he Bermuda experience suggests that there is more of a natural synergy between economic development, the efficient resolution of commercial disputes and the protection and promotion of human rights than might ordinarily appear to be the case. This is because promoting prosperity makes it easier for a responsible Government to invest in human rights, as well as because increasing specialisation of the legal profession and judiciary will inevitably result in an enhancement of public and private law systems alike.\textsuperscript{395}

Unless specialized courts become entrenched in a Developing OFC’s approach to dispute resolution, they are at risk of disappearing. Just because an activity has become institutionalized—for example, by statute or through the government’s budgetary process—does not mean that it will persist.\textsuperscript{396} As noted by sociologist Paul Starr, “unlike material objects that persist without human effort, the structures of society depend on people’s continuing choices, practices, relations, and beliefs.”\textsuperscript{397} If global governance pressures force Developing OFCs to retreat from the offshore space or limit their international business activities, the future of specialized commercial courts could be threatened.

For example, if a small jurisdiction such as Bermuda spends limited bureaucratic and financial resources complying with the transparency requirements imposed by the EU or OECD, and those requirements are both burdensome and deter foreign investors, Bermuda may see less revenue from the offshore sector. With less traffic and income from the sector, the use of specialized commercial courts would likely decline and the cost to maintain them

\textsuperscript{392} Kawaley, supra note 36, at 19–20.
\textsuperscript{393} Id. at 19 (noting that, with “dramatic growth of Bermuda’s international business sector, specialisation within the legal profession became the norm rather than the exception, with the quality of advocacy in commercial, criminal and public law cases steadily growing”).
\textsuperscript{394} Id. at 19–20.
\textsuperscript{395} Id. at 20.
\textsuperscript{396} See PAUL STARR, ENTRENCHMENT: WEALTH, POWER, AND THE CONSTITUTION OF DEMOCRATIC SOCIETIES 1–2 (2019) (discussing what it means for an activity to become entrenched, whereby a social institution “becomes resistant to pressures for change”).
\textsuperscript{397} Id. at 1.
would no longer be justified, given other budget priorities. The consequence could be a reversal of fortune, so to speak. The benefits of efficient court proceedings, a range of expert judges, and the development of novel legal theories for domestic litigants could be lost in the process. An offshore global governance regime that fails to consider these consequences to Developing OFCs is not pursuing global justice, as heralded in the offshore literature.398

D. The Identity Problem

A feature that is closely tied to jurisdictional capacity and access to justice is community identity. Jurisdictions must choose how to use limited resources for public goods and services. How they prioritize certain goods and features in this context has been explored by economists and political scientists for decades. Arguably, sociology can contribute greatly to our understanding about why some community choices may appear irrational in terms of pure economic interest but may be completely rational in terms of social values such as identity.399 Indeed, how we conceptualize rationality is a product of our social environment.400 It should therefore be unsurprising that an economic enterprise, such as offshore financial services, could reflect a community’s economic identity (CEI).401

CEI is the shared identity of a community with respect to a particular economic activity.402 For example, in the United States, some communities strongly identify with particular commercial enterprises, such as agriculture, mining, and automobile manufacture. Indeed, environmental sociologists have identified West Virginia’s coal mining industry as a form of economic identity for that community.403 CEI can frame how a community views its choices for future economic development and legal reform.404 For example, given two

398 See generally TAX, INEQUALITY AND HUMAN RIGHTS, supra note 21 (highlighting the connections between international tax governance and human rights); see also Dean & Waris, supra note 7, at 1681 (discussing the importance of inclusion where it concerns international tax); DAGAN, supra note 5, at 185–212 (discussing “international tax and global justice”).
399 See Sybblis, supra note 25, at 869 (arguing that sociology should be incorporated into “analysis of legal reform” because viewing state action as embedded in social identity “provides a more robust explanation” for business law reforms).
400 See Lauren B. Edelman, Rivers of Law and Contested Terrain: A Law and Society Approach to Economic Rationality, 38 LAW & SOC’Y REV. 181, 186 (2004) (arguing that “rationality itself is a social phenomenon” (emphasis omitted)).
401 See, e.g., Bell & York, supra note 120, at 111–13 (showing how the West Virginia coal industry, although declining, comprises the CEI of West Virginia).
402 Sybblis, supra note 25, at 887 (defining CEI).
403 Bell & York, supra note 120, at 111–13 (noting that the coal industry is a CEI for West Virginia).
404 Sybblis, supra note 25, at 884–85 (noting that CEIs present “social hurdles” in the way of potential reform).
choices for legal reform, one that provides a path for new streams of income and another that supports the CEI activity of the community, the community is likely to choose the latter because it reinforces its economic identity. Indeed, long after an economic activity has outlived its usefulness, residents may be nostalgic about its significance to their lives and resist reforms that promise greater prosperity at its expense. Although there is often a monetary component to a community’s opposition to new forms of commercial activities, more is at play. Some commercial activities speak to community tradition and common experiences that transcend economics. And some CEIs reflect the historic journey of a community. Consequently, where some observers may see widget-making, a community may see an activity that represents human progress and generational achievements.

Offshore finance may be central to the CEIs of some—but not necessarily all—Developing OFCs. Consider several of the islands of the Commonwealth Caribbean. These jurisdictions spent hundreds of years under British colonial rule, where they were relegated to the production of commodities for export to Britain. In the post-colonial era, there is a need to diversify these economies for at least two reasons. First, these ex-colonies must pursue economic growth as sovereign jurisdictions or, in the case of places like the Cayman Islands and Bermuda, semi-autonomous jurisdictions, in order to support growing populations. Second, the post-colonial period presents an opportunity to ex-colonies to establish their own identity. These jurisdictions are no longer simply colonial outposts, they are each comprised of people with unique cultures and modes of expression—and although they share a colonial past, they are also different from each other.

Of course, some OFCs are sufficiently intertwined with foreign law firms and accounting professionals making it reasonable to question whether these

405 Id. (noting that legislative reform that is economically superior may fail in the face of a reform that falls in line with a CEI but has a lesser economic benefit).
406 Id.
407 See id. at 933–34 (suggesting that “parties may choose business rules and legal regimes because they support an activity, cause, or value that has intangible meanings to a larger community”).
408 Id. at 884–87 (discussing the origins of CEI).
409 Id. at 914 (noting that CEI can be a “representation of human achievement” for a community (emphasis omitted)).
410 Id.
411 See generally WILLIAMS, supra note 49 (describing the colonial era for offshore jurisdictions).
external actors are the drivers of the offshore sector in the host country. Where this is the case, residents of OFC jurisdictions, such as the Cayman Islands, Barbados, and Bermuda, may not relate to the activities of international accounting, law firms, and hedge funds as part of their CEI. But CEI may manifest differently for other industries. For example, the coal mining and timber industries may include a sufficiently broad swath of the community who work in these areas to form a part of the community’s identity. International finance, in contrast, may include a smaller, elite community whose work is unrecognizable to many in the jurisdiction. Notwithstanding, for residents of OFC jurisdictions, this sector could still be “a source of pride and accomplishment” and even a “representation of human achievement.” In other words, residents may embrace the fact that their jurisdiction is engaged in offshore financial services—a signal of economic growth—and be proud of the fact the sector draws on talented and sophisticated actors. Ultimately, careful sociological research is required to make a conclusive determination as to CEI.

Despite the negative narrative that has emerged about OFCs, for these jurisdictions, providing financial services represents a departure from the traditional products of the bygone era of plantation economies. These jurisdictions have managed to transition from being primarily producers of raw materials for export to sophisticated centers of global finance. Government and private sector publications in Developing OFCs are replete with references to international business and the talented people who oversee their financial sectors, including foreign investment. And the fact that corporations from developed countries flock to register in these jurisdictions is symbolic of the dis-

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414 See, e.g., Moon, supra note 4, at 1433–34 (noting that “‘offshore magic circle’ law firms” have significant influence on the legislation adopted in some OFCs).
415 See Bell & York, supra note 120, at 116–17 (discussing West Virginia’s coal industry and the community formed around it).
416 Sybblis, supra note 25, at 913–14 (emphasis omitted) (discussing how offshore financial services could be a CEI for Barbados).
417 Id.
418 Id. at 893 (“In some instances, careful historiography or sociological study of state institutions, business culture, and the local community will be required to determine the nature of a community’s economic identity, including whether one even exists.” (citing Frederick F. Wherry, The Nation-State, Identity Management, and Indigenous Crafts: Constructing Markets and Opportunities in Northwest Costa Rica, 29 ETHNIC & RACIAL STUD. 125 (2006))).
419 See Sybblis, supra note 323, at 233–44 (describing the industrial transformation of OFCs).
420 See, e.g., BARB. MINISTRY OF INDUS., INT’L BUS. COM. & SMALL BUS. DEV., THE STRATEGIC PLAN FOR THE INTERNATIONAL BUSINESS SECTOR 2014–2019, at 20 (creating, as a goal for Barbados among other OFCs, a plan to “enhance Barbados’ image as a reputable centre for International Business”).
tance some of these places have traveled from a time when they were relatively isolated and undeveloped.421

The pressure placed on the identity of Developing OFCs by the Global Governors risks the substance and appearance of a neo-colonial project. The list approach, threat of economic harm, and transparency requirements that place a burden on their administrative capacity are potentially detrimental to both their economy and post-colonial identity.422 The reality that the Global Governors are shaping both of these factors hearkens back to a time when colonial empires shaped the economy and way of life of indigenous populations in colonized jurisdictions.423 The consequences of OFC global governance for this category of OFCs is therefore different from those faced by wealthier and more developed OFCs. In short, though some scholars have rightly identified sovereignty as a key piece of the international tax arena, the stakes for post-colonial Developing OFCs are high.424 The current global governance regime speaks to aspects of who OFCs are as a community and what they are trying to become—essentially part of the world’s economic center and not merely in the periphery.425

IV. Too Small to Care?

The prevailing OFC global governance regime—built on “naming and shaming” and economic coercion—approaches global justice in a manner that entrenches inequality among a category of jurisdictions. As an initial matter, global justice in the OFC context should begin from the ground up—not the top down. In its current incarnation, global justice, as envisioned by the Global

421 See, e.g., Fergus, supra note 76, at 1, 7 (noting that the number of banks and registered companies accelerated in Cayman after 1966, where Cayman was previously economically underdeveloped and isolated).

422 According to former Jamaican Prime Minister Michael Manley:

As experience accumulated after the attainment of political independence, Third World countries came increasingly to discover that political colonization was only the tip of the proverbial iceberg. Ninety percent of the reality of the situation was to be found beneath the surface of things, in the nature of the economic structures and relations which had evolved during the imperialist occupations. It is this experience that led to the increasing focus of attention on economics and the need to restructure the world’s trading and financial arrangements and to reorganize the structures of world production.


423 See generally KOHLI, supra note 50 (discussing the legacy of imperialism); PATTerson, supra note 50 (exploring the history of slavery in the Caribbean and its broader effects).

424 See generally VLCEK, supra note 74; Bravo, supra note 22 (suggesting the high stakes for postcolonial OFCs).

425 See generally KOHLI, supra note 60 (discussing attempts by developing states to industrialize and develop).
Governors, flows one way—benefiting non-OFCs at the expense of OFCs. What is particularly concerning is that it seeks to treat all OFC jurisdictions as if they were the same—that is, as part of a monolith. But some OFCs are particularly vulnerable, and the potential harm that they may suffer is deeper and more far-reaching than just harm to their economies. Onshore jurisdictions are undoubtedly bound to pursue the best interests of their populations, but this should not preclude them from incorporating the potential harm to foreign communities in their policymaking. Avoiding all potential harms to foreign populations may not be feasible in a competitive global economy. But, at a minimum, this Article argues that the Global Governors should seek to minimize any harm resulting from their governance initiatives.

Humans have an obligation to help others develop capabilities that allow them to flourish. This is premised on the belief that human beings are in-

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426 DAGAN, supra note 5, at 142–84 (discussing the harms of global cooperation for developing countries). Professor Ruth Mason argues that “state heterogeneity and monitoring costs” are barriers to tax cooperation among countries. Mason, supra note 238, at 361. With respect to small states, Professor Mason explains:

Small states with few natural resources used taxes to compete for inbound investment that they could not otherwise win; some even become tax havens. Such countries could not be persuaded to cooperate by the promise that cooperation would yield more tax revenue. Instead, overcoming their incentives to defect required either strict monitoring and penalties or side payments. Side payments were politically unpalatable, as were penalties, and monitoring posed special challenges in taxation because competition takes place on a variety of fields, some nontransparent.

427 See, e.g., Mottley, supra note 30, at 420 (discussing the far-reaching impact of excessive global governance on a small international business jurisdiction like Barbados). According to then-Barbados Attorney General Mottley, “the implications for [Caribbean] economies are not simply that this is a sector that might fold or this is a sector that might show diminished performance. The implications for [Caribbean] economies are implications for [Caribbean] societies.” Id.


429 Scholars of the cosmopolitan philosophical perspective accept that we have responsibility for other people wherever they live in the world. According to Peter Singer: “It makes no moral difference whether the person I can help is a neighbor’s child ten yards from me or a Bengali whose name I shall never know, ten thousand miles away.” Peter Singer, Famine, Affluence, and Morality, 1 PHIL. & PUB. AFFS. 229, 231–32 (1972). This view stretches from obligations at the level of the individual—where it concerns other individuals—to that of the state. Rowell & Wexler, supra note 428, at 511.
nately vulnerable and require community and institutions, including states, to protect and support them. The goal is to ensure that opportunities are available to all, “so that no persons or group of persons are unduly privileged while others are disadvantaged to the extent that they can be said to have few or no opportunities.” This Part presents three strategies to inform more of a scalpel approach to the design of the current global governance architecture to ensure that a subset of jurisdictions are not unduly penalized for how they have structured their economies. Section A focuses on a strategy grounded in money and fairness, Section B emphasizes the importance of high-quality legal institutions, and Section C discusses the importance of considering identity in global governance.

For example, some scholars believe that “governments either owe legal obligations of social justice to those outside their jurisdiction or that they should voluntarily undertake these obligations because individuals cannot effectively do so.” Id. (footnotes omitted) (first citing IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 250 (2000); then citing CHARLES R. BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS 153 (1979); then citing Judith Lichtenberg, National Boundaries and Moral Boundaries: A Cosmopolitan View, in BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS 79 (Peter G. Brown & Henry Shue eds., 1981); then citing Michael J. Green, Institutional Responsibility for Global Problems, 30 PHIL. TOPICS 79, 85 (2002); and then citing Jack Goldsmith, Liberal Democracy and Cosmopolitan Duty, 55 STAN. L. REV. 1667, 1670–71 (2003)). See generally SEN, supra note 391; MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT (2000) (suggesting that feminist theory should include uplifting women in the developing world); Martha Albertson Fineman, The Vulnerable Subject and the Responsive State, 60 EMORY L.J. 251 (2010) (arguing that the state is obligated to follow a more active “equality regime”); Gregory S. Alexander, The Social-Obligation Norm in American Property Law, 94 CORNELL L. REV. 745 (2009) (arguing that American law mandates social obligation on a systematic level). Flourishing does not necessitate or even implicate wealth generation. But it does necessitate mutual obligations on the part of those who are members of a community (local, national, and international). See generally Alexander, supra. Gregory Alexander describes human flourishing as comprising two central aspects. One feature is that individuals should have the ability to live fulfilling lives that involves being embedded in communities that help to develop their humanity. Id. at 761. A second feature is that human flourishing includes “the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable within those available alternatives.” Id.

See Fineman, supra note 429, at 255 (“Vulnerability is posited as the characteristic that positions us in relation to each other as human beings and also suggests a relationship of responsibility between state and individual.”).

Id. at 256–57. Gregory Alexander notes that “the physical process of human development mandates our dependence on others for a great deal of the time during which we are cultivating the necessary capacities.” Alexander, supra note 429, at 765 (citing MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH 34–37 (2004)).

See infra notes 436–470 and accompanying text.

See infra notes 436–449 and accompanying text.

See infra notes 450–463 and accompanying text.

See infra notes 464–470 and accompanying text.
A. Money and Fairness

The current OFC discourse is myopically centered on money, which problematically overlooks the social aspect of the conundrum. On the most basic level, wealthy countries are concerned about the loss of their tax dollars that they could use for public goods and services. Another concern is the loss of oversight of a category of multinational companies that register in some of these OFC jurisdictions. But even this latter category is fundamentally concerned with the financial interest of shareholders in onshore jurisdictions that might be served, for example, by protecting the right to pursue “derivative lawsuits for mismanagement” of corporate assets. Even when the discourse attempts to think beyond the economic, like in the human rights arena, it inevitably returns to its thesis that tax dollars could be used to provide for specific national, as well as global, welfare.

Concerns about the welfare of developing countries, including Developing OFCs, tend to also focus on finances. For example, in the capacity arena, the OECD sought advice from the IMF and World Bank regarding how “G20 countries could assist in overcoming the capacity restraints of the tax systems of developing countries.” Instead of looking within Developing OFCs to determine how they make policy regarding the deployment of their resources, the recommendation of the IMF and World Bank was to explore the “spillover” effect of the tax systems in wealthy countries on developing countries. The underlying concern here is that no country is benefiting directly from a subset of income.

436 See generally Zucman, supra note 6, at 8–33 (discussing the wealth hidden in tax havens); Shaxson, supra note 98 (discussing the economic harms of offshore financial centers to onshore jurisdictions).

437 See generally Avi-Yonah, Globalization, supra note 6 (describing the loss in tax dollars incurred by developed countries because of large amounts of capital in tax havens).

438 See generally Moon, supra note 4 (noting the concern for loss of oversight for OFC-registered companies).

439 Id. at 1409.

440 See, e.g., Allison Christians, The Search for Human Rights in Tax (“All human rights undoubtedly depend on the deployment of resources for their protection, so all undertakings that a state might make with respect to human rights are implicit promises to ensure that adequate resources are gathered and deployed in the service of those rights.”), in TAX, INEQUALITY AND HUMAN RIGHTS, supra note 21, at 115, 119.


442 Id. at 164.

443 Id. (noting the concerns that there is “a transfer from the public sector to multinational enterprises, their executives, their financial intermediaries, and ultimately their shareholders”).
Perhaps the focus on money stems from the view that offshore finance services are naturally a monetary matter. But some tax scholars have suggested that the international tax aspect of the offshore discourse is reflective of a “global socio-legal phenomenon.” According to this perspective, we should analyze the international tax regime, including the aspect that governs the offshore sector, “as the interaction of people, capital, business, other institutions and states, rather than purely as a cost of global capital investment.” The Global Governors would benefit from this approach because it allows for a more complete understanding of the actions and strategies of stakeholders, including Developing OFCs, in the offshore arena. Previously, reference to the “global” practically meant an emphasis on the interest of onshore jurisdictions—excluding or over-simplifying the needs of populations living in Developing OFCs.

If the Global Governors explore the economic, social, and legal dimensions of the offshore sector, they could appreciate the differences in strategies and commitments. A starting point would be to better understand why some small developing jurisdictions can become skillful global players in international finance while lacking the capabilities to do other tasks. Some legal scholars have begun to explore how some OFCs became successful, but few have contemplated the complex ways that the jurisdictional capacity for offshore financial services is developed by places with otherwise limited resources. For example, global policy makers should explore the role of bureaucratic competence in OFC development, the kinds of social environments that hone particular expertise suitable for supporting the offshore sector, and the depth of support from residents within OFCs for the types of international business activities that the sector promotes.

Much of the OFC literature has produced a stylized approach to OFC development and maintenance, primarily tied to a theory of legislative capture. A socio-legal analysis of the sector, however, is likely to reveal other dimensions surrounding the strategic use of limited capacity for offshore activities in

444 Christians et al., supra note 59, at 306.
445 Id.
446 See, e.g., Dharmapala & Hines, supra note 81, at 1059 (noting that tax havens tend to be relatively well-governed); Bruner, supra note 3, at 41–49 (noting the features of “market-dominant small jurisdictions”); Sybblis, supra note 323, at 196–98 (discussing the role of institutional development in offshore financial services).
447 But see Moon, supra note 4, at 1429–32 (discussing the role of industry capture in the offshore sector); Sybblis, supra note 323, at 292–98 (discussing generally how state capacity can be conceived in the economic development sphere, and especially within the OFC context).
448 See, e.g., Moon, supra note 4, at 1411, 1429–32 (providing data that shows “the extent to which lawmakers in [OFCs] are ‘captured’ by foreign corporations by being heavily reliant on annual incorporation fees” (footnote omitted)).
some places. This type of comparative research would reveal important differences between jurisdictions in their ability to comply with the obligations that they are subjected under various global governance regimes. The Global Governors should investigate whether the jurisdiction was once a colony and, if so, what type of colonial economy it was prior to becoming a sovereign or semi-autonomous jurisdiction.  

A jurisdiction that has overcome tremendous development obstacles should be given leeway in fulfilling its obligations under the various governance regimes proposed by the OECD, EU, FATCA, G20, and United States. This would mean abstaining from listing or delisting the jurisdiction on any “blacklist” and discouraging interruptions to correspondent banking relationships between international banks and banks in Developing OFCs. If successful OFCs are a consequence of good governance, as some scholars have shown, they should be supported and encouraged—not penalized by the global community. Of course, where there is evidence of OFCs actively facilitating criminality, such as terrorism financing or money laundering, sanctions are appropriate. But these actions should be targeted and specific to the crime and not leveled across all jurisdictions. Stated otherwise, every effort should be made to enhance the capacity of Developing OFCs.

B. Addressing Legal Institutions

If the Global Governors are committed to global justice, as their platforms state, they should be concerned with access to justice for all—not just access for their own residents. If they are not, they should make this clear. But for

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449 Although Switzerland has been a relatively economically successful country since the late 1800s, prior to becoming a well-known OFC, the Cayman Islands had a very different trajectory. See, e.g., CLIVE H. CHURCH & RANDOLPH C. HEAD, A CONCISE HISTORY OF SWITZERLAND 1–11 (2013) (noting the long-term economic success of Switzerland); Freyer & Morriss, supra note 25, at 1300 (noting that Cayman, while currently a leading offshore financial center, was severely underdeveloped not long ago); see also JOHNSON, supra note 74, at 29–47 (discussing the pre-1960s economy of the Cayman Islands). Switzerland began “as a loose confederation of independent small states, also known as cantons” and endured numerous conflicts over multiple centuries; a nation-state was formally established in 1848. Guo & Woo, supra note 341, at xxv–xxviii. Cayman Islands is a tiny British territory, comprised of three islands (Grand Cayman, Cayman Brac, and Little Cayman), was known for being a colony of the British colony of Jamaica and for its turtle fishing, and only became known for its economic success in the 1980s. Fergus, supra note 76, at 2–3.

450 For example, the OECD Global Roundtable specifically focuses on access to justice across countries. According to OECD’s website, “[t]he OECD Global Roundtables on Access to Justice support countries in closing the remaining gaps in accessibility, effectiveness and efficiency of justice, by identifying and fostering exchange of good practices and experiences in enhancing access to justice from both citizen and business perspectives.” OECD Access to Justice, ORG. FOR ECON. COOP. & DEV., https://www.oecd.org/governance/global-roundtables-access-to-justice/ [https://perma.cc/C56T-HE5X]. The United States and EU also emphasizes access to justice for everyone. See EUR. UNION AGENCY FOR FUNDAMENTAL RTS., ACCESS TO JUSTICE IN EUROPE 1, https://fra.europa.eu/sites/
decades, the prevailing orthodoxy among international finance institutions and economists from the developed world has been that high-quality institutions, including legal institutions, are necessary for inclusive growth and development. And early law and development scholars believed that the transplanta-
tion of law and legal institutions from more developed countries to developing
countries was one way to hasten economic growth. Interestingly, the interac-
tion between investors from the developed world and Developing OFCs has
allowed for the exchange of legal scripts between onshore and offshore juris-
dictions and has sparked the creation of various types of beneficial specialized
courts.

Because institutions can prove difficult to transform and transplant be-
cause of contextual factors, objective gains in judicial institutions should be
preserved. To ensure that there is not a decline in judicial efficiency and ac-
to courts in Developing OFCs that have made strides in this arena, the
Global Governors should channel resources to these jurisdictions to build and
maintain judicial capacity. These efforts should be commensurate with the in-
crease in administrative and financial cost to Developing OFCs as negative
externalities associated with the obligations imposed by the Global Governors
in service of the interest of onshore jurisdictions. Indeed, stronger legal institu-
tions in these places would not only benefit vulnerable offshore jurisdictions
and their residents but could also help to deter various financial crimes that are
of concern to the Global Governors. Instead of penalizing vulnerable jurisdic-
tions, the Global Governors should seek to uplift these places.

451 See, e.g., Thomas, supra note 12, at 969–70 (noting the recent prevailing view of institutional
economics); Davis & Trebilcock, supra note 68, at 896 (noting the prevailing view of scholars about
the connection between law and development); DAM, supra note 359, at 93–122 (discussing the relation-
ship between the rule of law and economic growth).
452 David M. Trubek & Marc Galanter, Scholars in Self Estrangement: Some Reflections on the
Crisis in Law and Development Studies in the United States, 1974 WIS. L. REV. 1062, 1065–69 (not-
ing the early law and development view that law and legal institutions are necessary for development); David M. Trubek, Max Weber on Law and the Rise of Capitalism, 1972 WIS. L. REV. 720, 721 (noting
the early law and development view, championed by Max Weber, that the law played a role in the
development of the West).
453 See generally Kawaley, supra note 36 (noting the emergence of offshore specialized business
courts).
454 See MARIANA MOTA PRADO & MICHAEL J. TREBILCOCK, INSTITUTIONAL BYPASS 6 (2019)
discussing the advantages of incrementalism over wholesale institutional transformation).
This effort could also include funding toward the support of domestic regulatory agencies in OFCs, such as the Cayman Island Monetary Authority\(^{455}\) and Bermuda Monetary Authority (BMA).\(^{456}\) Both agencies were created by their respective governments and aim to regulate their financial services sector.\(^{457}\) For example, according to BMA, one of its primary goals is to “assist[] other authorities with the detection and prevention of financial crime . . . .”\(^{458}\) But there are benefits to the OFC as well. For example, although the Cayman Island Monetary Authority also regulates the financial services industry, it represents “a regulatory innovation that aimed to secure [Cayman Islands’] future competitive advantage.”\(^{459}\) Admittedly, this type of targeted support for agencies that could bolster offshore financial services may be difficult to coordinate among the Global Governors. But perhaps an incremental move toward new institutional arrangements that seeks to promote specific kinds of legal institutions in Developing OFCs could prove mutually beneficial.

If international financial crimes, such as tax evasion and money laundering, can occur because of structural defects in the international tax regime and corporate governance regimes in wealth countries, structural change is required.\(^{460}\) This change should focus on empowering, rather than disempowering Developing OFCs. One approach could involve building institutions within the community of Global Governors (at the level of the OECD, EU, or G20, as an example) that are squarely focused on providing resources to Developing OFCs to enable them to diversify their economies and reduce their reliance on the offshore sector.

This approach may require what some scholars refer to as an “institutional bypass.”\(^{461}\) An institutional bypass is a way of “creating a separate institution that operates in parallel with the dysfunctional institution . . . .”\(^{462}\) With an institutional bypass, the existing regime would stay in place while new arrangements are made. Only when the outcome of the experimental regime is clearly successful would there be any attempt to modify the original institu-


\(^{457}\) See *About Us*, supra note 455; *About Us*, supra note 456.

\(^{458}\) *About Us*, supra note 456.

\(^{459}\) Freyer & Morriss, *supra* note 25, at 1369 (first citing MICHAEL CRATON, FOUNDED UPON THE SEAS 359–60 (2003); and then citing CAROLINE DOGGART, TAX HAVENS AND THEIR USES 153–54 (1979)).

\(^{460}\) Dean & Waris, *supra* note 7, at 1679 (noting that “FATCA showed that treating tax evasion as a structural problem could lead to increased compliance”).

\(^{461}\) MOTA PRADO & TREBILCOCK, *supra* note 454, at 6–7 (describing the concept of an “institutional bypass”).

\(^{462}\) *Id.* at 7.
tion. OFC global governance requires experimentation for new paths forward. But any experimental governance technology must be approached with the best interest of the most vulnerable OFC jurisdictions in mind. An important way to think about the best interest of these jurisdictions is through the lens of identity, explored in the next Section.463

C. Understanding Identity and Offshore Finance

The Global Governors have spent the past several decades seeking to constrain OFCs. But prevailing understandings of why some countries become and remain OFCs in the face of global outcry by some powerful countries has been limited to the political and economic realms. For example, there is a clear economic incentive for small jurisdictions with limited natural resources to see offshore financial services as a viable source of revenue.464 Other commentators suggest that good governance plays an important role in determining whether a country pursues offshore finance.465 Yet others suggest that a variety of international political and economic factors coalesce to provide space for these actors in the world of global finance.466 The potential tools for addressing what is conceived as primarily an international tax and corporate governance problem is therefore limited.

The growing move toward understanding offshore finance through a socio-legal lens demands new modes of understanding what motivates OFCs.467 If some OFCs see the offshore sector as a CEI, this may explain the sector’s resilience, even in the face of “listing” and international coercion.468 Further, if offshore finance is a jurisdiction’s CEI and, by implication, has deeper cultural dimensions, the Global Governors should seek to understand offshore finance from this perspective. This would require undertaking long-term sociological research in offshore jurisdictions. Arguably, the problem with this kind of resource-intensive project is that one cannot know if offshore financial services are a CEI unless one invests time and money into researching this question. And further, how one could measure the depth and strength of this type of CEI

463 See infra notes 464–470 and accompanying text.
464 See PALAN ET AL., supra note 108, at 236 (suggesting that countries with limited resources are incentivized to pursue offshore financial services for income, and that tax havens pursue such policies intentionally).
465 See Dharmapala & Hines, supra note 81, at 1059 (noting that “better-governed countries [are] more likely than others to become tax havens”).
466 See BRUNER, supra note 3, at 41–49 (analyzing the reasons that OFCs “compete in cross-border finance”).
467 See, e.g., Oei, supra note 117 at 201 (suggesting a sociological approach to understand the adoption OECD BEPS project).
468 See Sybblis, supra note 25, at 867–68 (describing the role of CEIs in legal reform and explaining the role of CEIs in a state’s resistance toward popular legal reform).
is unclear. Though these are reasonable and worthwhile considerations, they should not deter careful exploration of the link between offshore financial services and the social lives of residents of Developing OFCs.

An understanding of offshore finance as a CEI provides the Global Governors the opportunity to better comprehend aspects of the history, as well as the economic, political, and social trajectory of Developing OFCs. If the Global Governors accept the cosmopolitan view that, as individuals, states, and even intergovernmental organizations, humans bear some responsibility for helping each other develop our human capabilities and to flourish, at a minimum, the study of CEI would help Global Governors avoid hindering a community’s push toward self-determination.469 But, even if the Global Governors reject this view, it is still the morally correct approach. After centuries of colonialism and subordination, Developing OFCs should be afforded the right to chart a new destiny.470

CONCLUSION

Former Jamaican prime minister Michael Manley once described the development efforts of poor countries as akin to going “up the down escalator.”471 By this he meant that their “gains are eventually eroded because of the structural imbalances which are built into the international system.”472 An understanding of CEI, at a minimum, would recognize a Developing OFC’s right to an identity that is self-generated and independent of a colonial empire. Ignoring this type of identity means failing to recognize Developing OFCs’ progress as free communities.

Powerful international economic actors, such as the OECD, EU, and the United States, have pursued global justice in the offshore finance space in a manner that is biased against developing countries. Their technologies of global governance primarily benefit wealthy nations and ignore the distributional consequences for Developing OFCs. The growing interest in offshore financial services and the international tax and corporate governance implications of these services as a socio-legal phenomenon has inspired new approaches to this contested arena.473 This Article examines the inequality of OFC global

469 See generally SEN, supra note 391 (emphasizing the importance of economic development in improving the quality and freedom of life); NUSSBAUM, supra note 429 (arguing for a conception of feminism that supports and uplifts women in developing countries); Fineman, supra note 429; Alexander, supra note 429.
470 See generally WILLIAMS, supra note 49 (describing the colonial past of OFCs).
471 MANLEY, supra note 422.
472 Id. at 7.
473 See generally Oei, supra note 117 (suggesting implicit coercion as the reason for many developing countries joining the BEPS inclusive framework); Dean & Waris, supra note 7 (explaining why
governance by focusing on Developing OFCs, such as the Cayman Islands, Bermuda, and Barbados through a socio-legal lens.

Recent decades have seen a call for the “leveling of the playing field” in the global governance of OFCs. But answers to these calls have resided predominantly in the economic realm. The Global Governors have sought to tweak efforts to enhance transparency in banking transactions in OFCs and to rely less on infamous lists for sanctions of these jurisdictions, but they have noticeably failed to examine the influence of the offshore sector on the residents of Developing OFCs. Indeed, these residents seem to play little to no role in the OFC global governance arena. Two reasons may explain their conspicuous absence.

First, the populations of small Developing OFCs are typically a fraction the size of the populations of wealthy nations like the United States, Canada, and other European powers. From a cost-benefit perspective, the Global Governors may accept that the interest of the larger group should take precedent because more people would benefit from the policies they promulgate. Second, the residents of Developing OFCs may be incorporated in the negative narrative that has persistently followed OFCs. This narrative holds that these residents’ tacit—if not active—support for criminal activity means that their needs shouldn’t be a consideration in how that activity is governed. This Article argues that both of these claims are unfounded and that a deeper understanding of the relationship between the offshore sector and the lives of offshore resident is warranted to ensure true global justice where it concerns offshore finance.

This Article proposes that OFC global governance has overlooked three potential sources of inequality for Developing OFCs. First, Developing OFCs have developed unique approaches to how they deploy their limited government capabilities. Efforts to understand how they strategically use their financial resources and human resources would help to ensure that prevailing and future global governance regimes do not inhibit their economic development. Second, some Developing OFCs have benefited from the creation and growth of specialized courts because of the dispute resolution needs of the offshore sector. The Global Governors should be careful not to undermine this progress.

global tax policy needs to be more inclusive); BRUNER, supra note 3 (generally investigating OFCs and why small jurisdictions become leaders in particular industries).

474 See generally Vlcek, supra note 319 (dissecting the concept of “level playing field” as it has emerged in international tax discourse); ORG. FOR ECON. COOP. & DEV., LEVEL PLAYING FIELD 2010, supra note 176 (providing an assessment by the OECD of various tax regimes throughout the world, and providing recommended best practices).

475 See Dean & Waris, supra note 7, at 1671 (noting that the historic connection in the literature between skin color and criminality).

476 Id.
because doing so could lead to inequality within the OFC jurisdiction by impeding residents’ access to justice.

Third, offshore financial services may be more than an economic activity for some Developing OFCs. In some cases, they may serve as a form of identity—a community’s economic identity—that has deeper symbolic and cultural meaning.

477 Where this is the case, any harm to the offshore sector of these OFCs may be more impactful than a decline in revenue for the government. Any approach to global justice in the offshore finance arena, and certainly any effort to level the playing field among jurisdictions, must incorporate these socio-legal aspects of OFC existence. Future work in this area must pursue more detailed field research to better understand the “offshore” phenomenon. As other scholars have suggested, “there are valuable lessons to be learned from turning the lens of legal scholarship toward developing countries.”

478 See Sybblis, supra note 25, at 909–10 (noting the potential CEI status of offshore financial services); Bell & York, supra note 120, at 111–13 (noting the importance of the coal industry as a CEI in West Virginia).