2019

The Futility of Walls: How Traveling Corporations Threaten State Sovereignty

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ESSAY

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Inversions—mergers in which one firm merges with another abroad to avoid taxes in its home country—have spread as globalization has reduced many of the transactional costs associated with relocating. As firms acquire the power to choose the laws that govern them, they challenge the sovereignty of nation-states, who find their ability to tax and regulate firms depleted. States and firms compete in a game of cat and mouse to adapt to this new global reality. The subversion of state power by these firms reveals the futility of walls, both literal and regulatory. This Essay describes the phenomenon of these "traveling corporations" and analyzes several remedies that could limit future mergers. We conclude by arguing that inversions provoke deglobalization and yet may continue to flourish despite it as firms take the lead in dictating global norms.

 Professor of Law, Elisabeth Haub School of Law, Pace University. Thanks first to William Scott Sallee for substantial assistance in drafting and researching this piece. Tsilly Dagan's work inspired my engagement with these themes. Special thanks to the Law School at the Institut des Sciences Politiques (Sciences Po), where I taught a seminar in 2015 that inspired this Essay, and to the Faculty of Law at McGill University, where I organized a related workshop in 2018 with the generous support of Dean Robert Leckey. Thanks also to the Institute for Global Law & Policy at Harvard University and the Law & Society Association where I received valuable feedback. Part of this Essay, on the *Samsung* case, appears in *Global Private International Law: Adjudication Without Frontiers*. Thanks to Horatia Muir-Watt, Joan MacLeod Heminway, Bridget J. Crawford, and Robert Wai, as well as Jill Gross, Sonia Katyal, Thomas McDonnell, Victor Muñiz-Fraticelli, Nicholas A. Robinson, and Emily Gold Waldman for their feedback and comments. Thanks to Kristyn Francese, Lucas Mathieu, Jeffrey Massaro, and Darren Kowitt for their research support.

I. INTRODUCTION

Wisconsin-based Johnson Controls, founded over 125 years ago, got its start by introducing a room thermostat to the market.[1] In 2016, Johnson Controls merged with the Irish firm Tyco.[2] In 2015, Johnson Controls paid an effective tax rate of nineteen percent, whereas Tyco's tax rate was only fourteen percent.[3] Recognizing the opportunity to significantly reduce its tax liability, Johnson Controls merged with Tyco and shifted its headquarters abroad.[4] Johnson Controls's relocation from Milwaukee to Cork proved a banner day for the firm. In one transaction, Johnson Controls saved "at least $150 million a year on taxes" by moving its headquarters abroad.[5]

Such "inversion" mergers realize radical tax benefits thanks to the impact of globalization, which has effectively reduced significant transactional costs that would otherwise deter firms from relocating.[6] The rise of globalization has led to the increasing frequency of mergers,

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1. Leslie Picker, *Tyco Merger Will Shift Johnson Controls' Tax Liability Overseas*, N.Y. TIMES (Jan. 25, 2016), https://www.nytimes.com/2016/01/26/business/dealbook/johnson-controls-to-combine-with-tyco-in-tax-inversion-deal.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. Bob Tita & Dana Mattioli, *Johnson Controls, Tyco to Merge in Inversion Deal*, WALL ST. J. (Jan. 25, 2016), https://www.wsj.com/articles/johnson-controls-tyco-to-merge-in-inversion-deal-1453724828.

6. Jed Greer & Kavaljit Singh, *A Brief History of Transnational Corporations*, GLOBAL POL'Y F. (2000), https://www.globalpolicy.org/empire/47068-a-brief-history-of-transnational-corporations.html ("In 1970, there were some 7,000 parent TNCs, while today that number has jumped to 38,000. 90 percent of them are based in the industrialised world, which control over 207,000 foreign subsidiaries.").

which have increased the reach of globalization, each contributing to the other. The ability and ease with which firms can relocate has thus contributed to globalization, which has impacted every firm, industry, market, and country in the world. Firms can mutate to avoid or minimize states' capture of their resources, effectively "vot[ing] with their feet" by relocating to more accommodating jurisdictions.[7] Firms not only judiciously select which state's rules govern their contracts, but they also determine the laws that regulate them.[8] For example, they can select taxation rules in jurisdictions with light tax burdens and avoid states with more weighty tax rules.[9] Thanks to their capacity to relocate based on legal frameworks, we call such firms "traveling corporations."

The Johnson Controls-Tyco merger, however, did not go wholly unnoticed. Both 2016 presidential candidates opposed U.S. firms relocating to avoid paying taxes.[10] The threat inversions pose to state sovereignty may have also played a role in the widespread hostility towards the Johnson Controls-Tyco merger. In our globalized and largely privatized world, firms often command more informational and financial capital than even the most powerful states. Despite this reality, states and civil society leaders continue to pretend that we live in a world of Westphalian sovereignty in which states control their borders, what occurs within them, and what passes across them.[11] While globalization in general and inversions in particular do not obviate a state's utility, sovereignty has markedly diminished as firms

7. Tsilly Dagan, Pay as You Wish: Globalization, Forum Shopping, and Distributive Justice 3 (June 10, 2014) (unpublished manuscript), https://ssrn.com/abstract=2457212.

8. *See* William J. Moon, *Regulating Offshore Finance*, 72 VAND. L. REV. (forthcoming 2019).

9. *Id.*

10. Then-presidential candidate Hillary Clinton chastised the move, describing such mergers as "efforts to shirk U.S. tax obligations [and] leave American taxpayers holding the bag while corporations juice more revenues and profits." Ginger Gibson, *Hillary Clinton Calls Johnson Controls-Tyco Inversion "Outrageous,"* REUTERS (Jan. 25, 2016), https://www.reuters.com/article/us-usa-election-clinton-inversion/hillary-clinton-calls-johnson-controls-tyco-inversion-outrageous-idUSKCN0V32OL. Clinton had expressed a sentiment that even candidate Trump could not refute, stating that one of his goals was to "end job-killing corporate inversions, and cause trillions in new dollars and wealth to come pouring into [the United States]." Donald Trump, Republican Presidential Nominee, Address at Detroit Economic Club Unveiling Economic Plan (Aug. 8, 2016) (transcript available at https://thehill.com/blogs/pundits-blog/campaign/290777-transcript-of-donald-trumps-economic-policy-speech-to-detroit).

11. Stephen D. Krasner, *Pervasive Not Perverse: Semi-Sovereigns as the Global Norm*, 30 CORNELL INT'L L.J. 651, 656 (1997) ("States exist in specific territories. Within these territories, domestic political authorities are the only arbiters of legitimate behavior. The basic rule of Westphalian sovereignty is non-intervention in the internal affairs of other states.").

increasingly exercise their ability to establish global norms for trade, production, and consumption. Of course, states do not willingly relinquish their authority. Rather, they attempt to maintain their sovereignty in many ways. For example, states may resist globalization with physical walls, but as Wendy Brown argued in *Walled States, Waning Sovereignty*, these efforts often prove futile.[12] States also erect barriers through laws and regulations in an attempt to stop cross-border movement of labor, capital, and ideas.[13]

This Essay explores the inherent tension between nations and firms in a globalized market and inquires whether and how states may erect corporate laws—essentially regulatory walls—that might keep firms domiciled within their jurisdiction despite the lure of more favorable foreign jurisdictions. Part II will describe inversions: how they work and why they benefit firms. Part III will evaluate proposed remedies to restrict inversion mergers. Part IV will consider inversion mergers through the lens of Wendy Brown's work on the futility of walls. Part V links inversions to potential deglobalization and explains how they may flourish despite it.

II. GLOBALIZATION, INVERSIONS, AND THE FADING POWER OF STATES

Globalization's expansion has seen firms assemble global empires, many of which surpass the scale of nations. In the 1980s and 1990s, as free trade expanded and tariffs fell, many firms began to manufacture abroad.[14] Then came the wave of outsourcing—first products, then services—to the developing world. Cross-border mergers and acquisitions increased, always driven by synergies and other efficiencies.[15] Firms built or bought subsidiaries abroad, creating a leading group of truly multinational corporations. They maximized efficiencies of labor, capital, and natural resources in each of their

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12. *See generally* WENDY BROWN, WALLED STATES, WANING SOVEREIGNTY (2010) (examining physical walls among nation-states as a way of rejecting globalization and projecting state power and sovereignty).

13. *See, e.g.*, 26 U.S.C. § 367 (2012) (governing the taxation of corporate property transferred from the United States).

14. *See* Louis Uchitelle, *Spread of U.S. Plants Abroad Is Slowing Exports*, N.Y. TIMES (Mar. 26, 1989), https://www.nytimes.com/1989/03/26/us/spread-of-us-plants-abroad-is-slowing-exports.html.

15. *See generally* Simon J. Evenett, *The Cross-Border Mergers and Acquisitions Wave of the Late 1990s*, *in* CHALLENGES TO GLOBALIZATION: ANALYZING THE ECONOMICS 411 (Robert E. Baldwin & L. Alan Winters eds., 2004) (describing the surge of cross-border mergers and acquisitions in the 1990s).

markets, leveraging global supply chains to produce the most profitable combination of workers, products, and consumers.[16] Toward the end of the first decade, it became clear that law was just another efficiency to maximize. Modern corporations, unmoored from their national origins, relocate with relative ease.

A. *Inversions, Regulatory Arbitrage, and the Traveling Corporation*

A corporate inversion is a transaction in which a U.S. firm "restructures and reincorporates in a foreign country."[17] Multinational corporations are incredibly complex; accordingly, there are myriad factors that motivate firms to invert. However, no matter how a CEO might frame the transaction to the public, tax consequences are at the heart of every inversion.

Regulatory arbitrage, the method firms use to game which regulations will apply to them, provides large firms with substantial advantages.[18] A common example of regulatory arbitrage is when a firm terminates an employee, only to rehire the same employee as an independent contractor to avoid employment regulations.[19] Regulatory arbitrage is perfectly legal in the United States, and firms utilize it regularly to minimize the effects of unfavorable regulations—tax or otherwise.[20]

However, inversions represent a new and extreme version of regulatory arbitrage that is unprecedented in scope and impact. It is a prime example of how "states have lost to the ungovernable forces 'unleashed by globalization.'"[21] Sophisticated lawyers and accountants that successfully navigate around regulatory regimes have begun to undermine state sovereignty. This cadre of sophisticated

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16. *See generally* Greer & Singh, *supra* note 6 (detailing the history of transnational corporations in light of globalization).

17. Caroline L. Harris, *Corporate Inversions: History and Impact*, U.S. CHAMBER COM. (Mar. 11, 2016), https://www.uschamber.com/series/above-the-fold/corporate-inversions-history-and-impact.

18. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 229 (2010).

19. Naomi B. Sunshine, *Employees as Price-Takers*, 22 LEWIS & CLARK L. REV. 105, 153 (2018).

20. *See* Fleischer, *supra* note 18, at 229.

21. Tom Vanderbilt, *The Walls in Our Heads*, N.Y. TIMES (Nov. 4, 2016), https://www.nytimes.com/2016/11/06/opinion/sunday/the-walls-in-our-heads.html (quoting BROWN, *supra* note 12, at 24).

corporate planners structures deals that may meet the letter of the law, but arguably undermine the spirit of it.[22]

The corporate mobility that inversions represent marks a radical decline in state sovereignty, as firms grab the power to decide which laws will govern them.[23] In this extreme form of regulatory arbitrage, global firms place subsidiaries and intellectual property in jurisdictions that provide them with the most favorable business environment. Even within the United States, jurisdictions compete openly by offering advantageous tax rules and other regulatory benefits to global firms.[24] While this gaming is not new—firms have historically attempted to minimize their tax exposure—it has reached a new level with the recent wave of inversion mergers crafted to avoid tax liability.

Thus, as depicted in Figure One, states and traveling corporations find themselves in a competitive stance. One similarity between them is governance: the laws, rules, and modus operandi by which both states and corporations conduct their affairs. Governance is an advanced, soft technology that reflects cultural norms and, therefore, is not easy to adopt or port from one context to another. In that regard, corporate governance is more malleable than nation-state governance. The former may act freely to increase shareholder value, while the latter must operate within constitutional and bureaucratic limitations. Traveling corporations, bound to no stakeholder, can mutate their governance systems at will.

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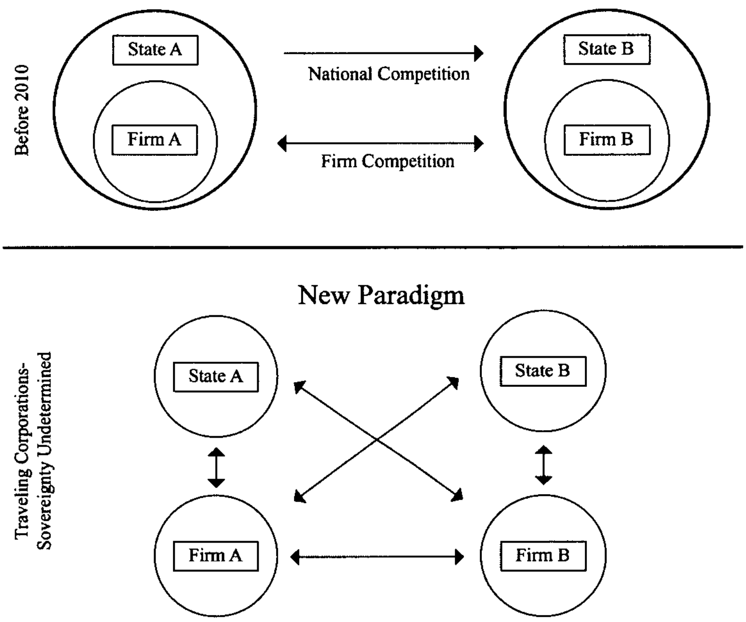
22. Fleischer, *supra* note 18, at 229.

23. *See* TSILLY DAGAN, INTERNATIONAL TAX POLICY BETWEEN COMPETITION AND COOPERATION 26-30 (2018).

24. For example, in the spring of 2018, when Delta Airlines announced that it would end its discount program for members of the National Rifle Association, Delta's home state, Georgia, threatened to end tax breaks that Delta was receiving. In response to Georgia's threat, several states offered Delta a new home. Scott Neuman, *Georgia Lawmakers Punish Delta Air Lines over NRA Feud*, NPR (Mar. 2, 2018), https://www.npr.org/sections/thetwo-way/2018/03/02/590149921/georgia-lawmakers-punish-delta-air-lines-over-nra-feud.

Figure 1

Traditional Firm/State Competition



The intellectual property battle between Samsung and Apple provides an example of how traveling corporations have shifted the competitive stance between firms and states. Apple and Samsung are the two largest manufacturers of mobile phones.[25] Beyond phones, the firms have divergent market shares in distinct product lines. The overlap is undeniable, and their market shares in key countries rival each other. Consumers, media commentators, and scholarly observers commonly view their relationship as a typical clash of the titans.[26]

Despite their similarities, the firms operate with highly distinct relationships toward their home states. Apple has often had an adversarial relationship with the U.S. government. At a 2011 dinner,

25. Don Reisinger, *Samsung Is Back atop the Smartphone Market*, FORTUNE (Apr. 11, 2017), http://fortune.com/2017/04/11/samsung-apple-market-share/.

26. *See, e.g.*, Jeremy Wagstaff & Miyoung Kim, *Apple and Samsung: A Defining Rivalry in a Changed Mobile Market*, REUTERS (Dec. 7, 2012), https://www.reuters.com/article/us-apple-samsung/apple-and-samsung-a-defining-rivalry-in-a-changed-mobile-market-idUSBRE8B61B220121207; *Rivalry Between Apple and Samsung in Smartphones Will Grow Fiercer*, ECONOMIST (Sept. 14, 2017), https://www.economist.com/business/2017/09/14/rivalry-between-apple-and-samsung-in-smartphones-will-grow-fiercer.

President Barack Obama met with Apple CEO Steve Jobs to encourage greater U.S. domestic production of Apple products.[27] Unrepentant, Apple executives asserted that the United States simply did not have the labor force or regulatory flexibility to increase its U.S.-based production.[28] Apple products would remain designed in California, but produced elsewhere, largely in China.[29] Security has been another source of tension: in 2016 Apple fought a federal court order requiring them to write code to allow the FBI to bypass the security features on the iPhone of one of the shooters involved in the San Bernadino massacre.[30] Finally, several U.S. political and business leaders have derided firms such as Apple that bank hundreds of billions of dollars in profits outside the United States to avoid tax liability.[31]

In marked contrast, Samsung's relationship with the state of South Korea is successfully interwoven. As with many corporatist firms, the state plays a central role, and in turn, Samsung's success is critical to South Korea's economic prowess. It accounts for one-fifth of South Korean exports and nearly one-fifth of its gross domestic product.[32] The tightly intertwined relationship between South Korea and

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27. At a presidential dinner with several of Silicon Valley's leaders, President Obama asked Steve Jobs about bringing jobs back to the United States and Jobs said, "Those jobs aren't coming back." Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. TIMES (Jan. 21, 2012), http://www.nytimes.com/2012/01/22/business/apple-america-and-a-squeezed-middle-class.html. Jobs's successor, Tim Cook, has promised to bring some jobs back. Jay Yarow, *Here's How Many Jobs Apple Will Bring to the US to Make Macs*, BUS. INSIDER (Feb. 13, 2013), http://www.businessinsider.com/heres-how-many-jobs-apple-will-bring-to-the-us-to-make-macs-2013-2.

28. *See* Duhigg & Bradsher, *supra* note 27.

29. Yoni Heisler, *Barack Obama References Apple During State of the Union Speech*, NETWORK WORLD (Feb. 13, 2013), https://www.networkworld.com/article/2224030/data-center/barack-obama-references-apple-during-state-of-the-union-speech.html.

30. Matthew J. Weber, *Warning—Weak Password: The Courts' Indecipherable Approach to Encryption and the Fifth Amendment*, 2016 U. ILL. J.L. TECH. & POL'Y 455, 475-76 (2016). This article explains how the front-end encryption on certain messaging apps causes further friction between tech companies and the government, increasing their competition with each other. *Id.* at 459-60. Weber explains that when tech companies are served with a warrant they typically provide the requested information "if they have access to it, and have no reason to object" to the warrant. *Id.* at 459. This is still likely the case, but with the "prevalence of encrypted messaging like iMessage and WhatsApp, the [companies] often do not have access to the unencrypted data." *Id.* at 459-60 (footnotes omitted).

31. *See, e.g.*, Renae Merle, *Obama Criticizes Companies That Leave U.S. for Lower Taxes*, WASH. POST (Apr. 5, 2016), https://www.washingtonpost.com/business/economy/obama-companies-that-denounce-us-citizenship-for-lower-taxes-are-insidious/2016/04/05/cf43a2bc-fb41-11e5-886f-a037dba38301_story.html?utm_term=.2bb0d80a2294.

32. James Estrin, *Samsung and the South Korean Success Story*, N.Y. TIMES: LENS (Nov. 13, 2015), https://lens.blogs.nytimes.com/2015/11/13/samsung-and-the-south-korean-success-story/.

Samsung has led some in the press to call the country the "Republic of Samsung."[33] Such domination by one firm used to exist in the United States—where it was once colloquially said that "[a]s General Motors goes, so goes the nation."[34] This paradigm is no longer—the U.S. economy has diversified, and many of its firms have gone on to become traveling corporations.

Thus, to sum up the typical narrative about the Apple-Samsung dispute, we have two companies battling for global market share—one with close links to its host nation and one without. At the national level, the United States and South Korea present distinct state contexts in which firms operate; these nations compete for investment and trade, even as they cooperate through a contested but successfully negotiated bilateral trade agreement.[35] However, this narrative presumes above all that the United States and South Korea have dominion over Apple and Samsung, respectively. In reality, in many cases firms such as Apple have exceeded the framework of the Westphalian nation-state.

Intellectual property plays a central role in the life of a traveling corporation, which depends on certain property regimes to amass and maintain capital.[36] Firms like Apple protect their intellectual property rights by locating them in jurisdictions where they are most secure. In this way, firms cherry-pick nations based on the laws concerning intellectual property, taxes, and other regulatory structures, and they subdivide to maximize profit.

Not all multinationals challenge state sovereignty, however. Indeed, Samsung plays by rules set in the twentieth century, in which

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33. *See, e.g.*, Chico Harlan, *In S. Korea, the Republic of Samsung*, WASH. POST (Dec. 9, 2012), https://www.washingtonpost.com/world/in-s-korea-the-republic-of-samsung/2012/12/09/71215420-3de1-11e2-bca3-aadc9b7e29c5_story.html?utm_term=.2d8dccec474d.

34. *See As GM Goes, So Goes . . .*, NATION: TOMDISPATCH (Feb. 23, 2009), https://www.thenation.com/article/gm-goes-so-goes. As Charles Wilson, former President of General Motors, said in a confirmation hearing for his nomination to serve as Secretary of Defense, "I cannot conceive of [a situation where the United States and General Motors had adverse interests] because for years I thought what was good for our country was good for General Motors, and vice versa. The difference did not exist. Our company is too big." Ellen Terrell, *When a Quote Is Not (Exactly) a Quote: General Motors*, LIBR. CONGRESS: INSIDE ADAMS (Apr. 22, 2016), https://blogs.loc.gov/inside_adams/2016/04/when-a-quote-is-not-exactly-a-quote-general-motors/.

35. *See* United States-Korea Free Trade Agreement, S. Kor.-U.S., June 30, 2007, https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text [hereinafter KORUS FTA].

36. CHRISTOPHER MAY, A GLOBAL POLITICAL ECONOMY OF INTELLECTUAL PROPERTY RIGHTS 17 (2000) ("[T]he actual appearance of property as an institution . . . protects certain interests in society in a specific manner.").

large firms functioned in tandem with the states in which they resided. Samsung's close links with the South Korean government provide it with regulatory benefits, tax benefits, and access to capital it might not receive if it were any other company.[37] Much of this connection may veer toward corruption, and indeed that word has been used to describe some aspects of Samsung's relationship with the South Korean state.[38] At the same time, Samsung's link with South Korea frames its competition with Apple not only as a competition between a South Korean firm and a U.S. firm, but perhaps more importantly as one between a traditional multinational and a traveling corporation.

In the context of Apple and Samsung, the link to the state could not be more divergent. For Apple, the United States is a competitor, both ranking their need for profits or tax revenue as paramount. Samsung may achieve similar ends from South Korea—avoiding tax liability for instance—but it does so in concert with the state. Evolutionary dynamic theory involves understanding how beings evolve in relation to each other.[39] In this model, Apple and the United States evolve against each other, while Samsung and South Korea evolve together, as co-dependent species in a symbiotic relationship, against other predators and prey—the United States and Apple, for instance.

We attempt to account for these perspectives in Figure Two by examining the state-centered framework, the traveling corporation framework, and how they interact within the Apple-Samsung dispute.

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37. *See, e.g.*, Harlan, *supra* note 33.

38. *See id.*; *see also* Sam Kim, *Samsung's Jay Y. Lee Set Free in Unexpected Court Reversal*, BLOOMBERG (Feb. 5, 2018), https://www.bloomberg.com/news/articles/2018-02-05/samsung-heir-jay-y-lee-goes-free-after-court-suspends-jail-term (discussing deep concerns about Samsung's relationship with South Korea after Samsung's Vice Chairman's prison sentence for bribery was suspended by an appeals court in February 2018).

39. *See generally* Daria Roithmayr, *Evolutionary Dynamics Theory and Method, in* METHODOLOGIES OF LAW AND ECONOMICS 153 (Thomas S. Ulen ed., 2017) (using evolutionary dynamics theory to analyze the ever-evolving relationship between the government and regulated entities).

Figure 2

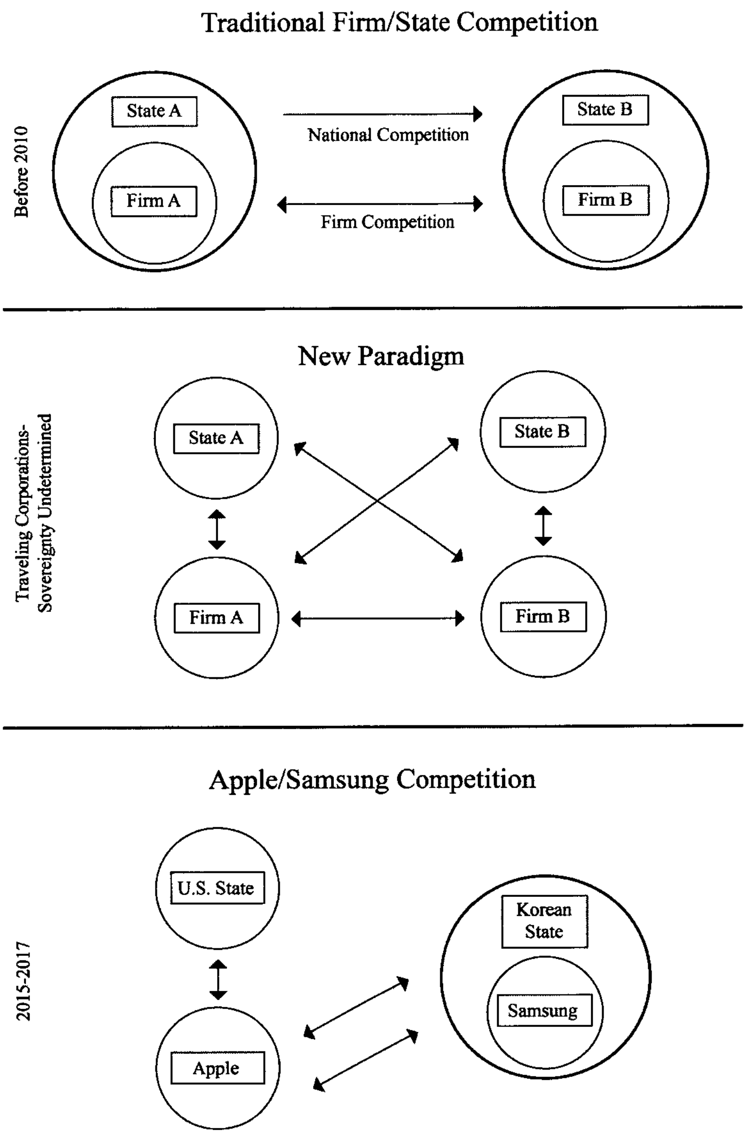

Figure Two depicts the contrast between the evolving paradigm of relationships among firms and states. The figure makes it clear that traveling corporations sit outside the state in which they came into being. Of course, this is not entirely accurate because firms such as Apple do have deep links to their home states, but those links are far fewer than was traditionally the case. Many such firms draw greater revenue from abroad than from their home state and some even have more employees abroad.[40] However, as the third frame representing 2015-2017 depicts, traveling corporations relate differently to their home state and to other firms and other states.

B. *The Risks Inversions Pose*

Economist Dani Rodrik described the relationship between governments and global markets:

> Th[e] imbalance between the national scope of governments and the global nature of markets forms the soft underbelly of globalization. A healthy global economic system necessitates a delicate compromise between these two. Give too much power to governments, and you have protectionism and autarky. Give markets too much freedom, and you have an unstable world economy with little social and political support from those it is supposed to help.[41]

The increase of inversion activity shows little sign of slowing due to the unique negotiating posture of inversion transactions. In every deal, there are three distinct parties: the buyer, the seller, and the state.[42] The government's position, outlined by laws and regulations, is often the least flexible, unless, of course, a party has the regulator's ear. These generally nonnegotiable positions set the parameters within which the other parties must work.[43] Of course, once the government realizes it has been bargained around, it will adapt its position, like any predator, by enacting new rules and laws, in an effort to prevent what has already happened.[44]

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40. *See* U.N. Conference on Trade & Development, World Investment Report 2018, Web Annex Table 19: The World's Top 100 Non-Financial MNEs, Ranked by Foreign Assets, 2017 (June 6, 2018), https://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx (demonstrating that Exxon Mobil's foreign sales account for sixty-five percent of total sales and foreign employment accounts for fifty-eight percent of total employment).

41. DANI RODRIK, THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY, at xvi (2011).

42. *See id.* at 13-14.

43. To be sure, the state, through its agencies, is open to some negotiation as evidenced by the October 2016 amendment of the proposed April 2016 regulations targeting earnings stripping. *See* discussion *infra* Part III.B.3. However, the state is not necessarily a party at the table when a proposed inversion deal is being planned, effectively making its position a known quantity to plan around.

44. *See* Roithmayr, *supra* note 39, at 153.

U.S. political parties have never been as polarized as they are today.[45] Even during this time of unparalleled divisiveness, Republicans and Democrats agree on one thing: inversions should be discouraged.[46] Both sides of the aisle fear an eroding tax base.[47] Corporate tax revenue accounted for around seven percent of all federal tax revenue in 2017.[48] According to a congressional study, inversions will cost the United States approximately two billion dollars per year over the next decade.[49]

Although U.S. tax law is notoriously complex, the result of an eroding tax base is surprisingly straightforward: a government with a smaller tax base will either need to cut spending without lowering taxes, or borrow and increase the deficit to compensate for the lost revenue.[50] The only alternative is to increase the taxes levied on the remaining taxpayers.[51] Neither taxpaying citizens nor elected officials hoping to stay in office would find the aforementioned options viable. While inversions pose a threat to a state's tax revenue, the real threat to states' revenue collection lies in firms' ability to dictate the terms of taxation because of their ability to choose a more advantageous

45. Philip Bump, *Political Polarization Is Getting Worse. Everywhere.*, WASH. POST (Apr. 9, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/04/09/polarization-is-getting-worse-in-every-part-of-politics/?utm_term=.32bae4d551d8.

46. James Hitchcock, *Trump on Corporate Inversion: These People Have No Loyalty to This Country*, REALCLEARPOLITICS (Aug. 17, 2015), https://www.realclearpolitics.com/video/2015/08/17/trump_on_corporate_inversion_these_people_have_no_loyalty_to_this_country.html (quoting then-presidential candidate Trump as saying that inverting companies "have no loyalty to this country . . . . [a]nd we have to do something"); Toluse Olorunnipa, *Obama Calls Inversions 'Insidious,' Praising New Treasury Rules*, BLOOMBERG (Apr. 5, 2016), https://www.bloomberg.com/news/articles/2016-04-05/obama-calls-inversions-insidious-praising-new-treasury-rules (noting that President Obama has called loopholes allowing inversions "unpatriotic").

47. Jared Bernstein, *Protecting the Tax Base: Why It's Important to Block Tax Inversions*, WASH. POST (Nov. 19, 2015), https://www.washingtonpost.com/posteverything/wp/2015/11/19/protecting-the-tax-base-why-its-important-to-block-tax-inversions/?utm_term=.1d3824155a9e.

48. Kimberly Amadeo, *Current U.S. Federal Government Tax Revenue*, BALANCE, https://www.thebalance.com/current-u-s-federal-government-tax-revenue-3305762 (last updated Oct. 12, 2018). However, some scholars argue that estimates of losses of tax revenue from inversions are often overstated because the government recaptures as much as thirty-nine percent of lost revenue when capital gains taxes are levied against shareholders after a firm inverts. *See* Anton Babkin et al., *Are Corporate Inversions Good for Shareholders?*, 126 J. FIN. ECON. 227, 228, 238 n.17 (2017).

49. Zachary R. Mider, *'Unpatriotic Loophole' Targeted by Obama Costs $2 Billion*, BLOOMBERG (Dec. 2, 2014), https://www.bloomberg.com/news/articles/2014-12-02/-unpatriotic-loophole-targeted-by-obama-costs-2-billion.

50. Bernstein, *supra* note 47.

51. *Id.*

jurisdiction. The eroding tax base is especially hard to accept when the firms that invert often do so in form only, while substantively remaining in the United States to take advantage of the country's hard and soft infrastructure.[52]

However, a dwindling tax base is not the only risk inversions pose. Inversions also threaten the sovereignty of states. As depicted in Figure One, inversions shift the competitive posture of both states and firms, ultimately undermining the inherent power of the state. States must no longer merely compete with each other; they now must also compete with firms. Traveling corporations effectively sit outside of the state and command significant influence over competing jurisdictions. This dynamic subverts states' dominion over firms and signals the power that firms—not states—have over global norms. Accordingly, inversions not only threaten the United States' tax base, but they also pose a real threat to its power.

C. *Globalization's Effect on Tax Law*

Tax law has long been the unquestioned mechanism for blocking inversions because it only involves one distortion, whereas non-tax-based rules typically implicate double distortions.[53] For a long time, legislators and jurists have presumed the efficacy of tax law, but academics have questioned this premise.[54] Conventional wisdom provides that in a closed, national-level economy taxes may be the best way to redistribute resources, but in her article *Pay As You Wish*, Tsilly Dagan concludes that in a global context, state redistribution may not achieve its desired goals.[55]

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52. *Id.*

53. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667-68 (1994) (outlining the general advantages of using tax laws for redistribution); *see* Dagan, *supra* note 7, at 3 (discussing the double distortion created by non-tax based rules by explaining that "high taxes will distort people's incentives to work as opposed to engage in leisure activities, [while] tort rules favoring poor fishermen over rich yacht-owners will distort the latter's incentives not only to produce income over leisure but also to take the optimal level of precaution"). For the purposes of this Essay, "distortion" refers to altered behaviors resulting from intervention by a governing body in the market. A classic example is progressive income taxation: because increased earnings results in increased taxation, some people may be discouraged to increase their earnings to avoid additional taxation.

54. *See* Richard S. Markovits, *Why Kaplow and Shavell's "Double-Distortion Argument" Articles Are Wrong*, 13 GEO. MASON L. REV. 511 (2005).

55. *See* Dagan, *supra* note 7, at 29.

There is positive correlation between the efficacy of a rule and the cost of avoiding it.[56] Particularly relevant here, the cost of avoiding unfavorable tax jurisdictions in a globalized marketplace can be relatively small.[57] The rise of globalization has made it easier than ever to avoid jurisdictions with unfavorable taxation schemes,[58] as evidenced by the recent spike in inversion activity.

However, because all rules can be opted out of to some degree, the most successful rules are those that are globally harmonized.[59] While the lure of a jurisdiction with lower corporate taxes and an equally capable workforce might compel some firms to relocate, if the foreign jurisdiction has essentially the same tax rules as its home jurisdiction, the desire to move abroad would be much weaker. Thus, harmonization would eliminate firms shopping around for more favorable jurisdictions.[60]

Global harmonization of tax law is unlikely.[61] However, eliminating striking gaps in tax treatment between similarly situated states is more plausible,[62] as evidenced by the United States' most recent tax law.[63] Harmonization may succeed, but it may also incentivize free riding, in which firms will shift their activity to seek legal regimes that are less harmonized and less redistributive.[64] That is, even if states achieved some tax harmonization, firms would likely devise a way to alter their behavior to fall outside of the harmonized scheme to take advantage of disharmony elsewhere.

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56. *Id.* at 5.
57. *Id.* at 15.
58. *Id.* at 3.
59. *Id.* at 25.
60. *Id.*
61. Emily Chasan, *International Tax Harmonization Less Appealing to CFOs: Survey*, WALL ST. J. (Sept. 4, 2012), https://blogs.wsj.com/cfo/2012/09/04/international-tax-harmonization-less-appealing-to-cfos-survey/ (surveying multinational corporate CFOs and concluding that less than forty percent of American CFOs believe harmonization is desirable, while less than thirty percent believe it is achievable, a decrease from prior survey years); Robert Goulder, *Global Tax Harmonization and Other Impossible Things*, TAX ANALYSTS (June 5, 2015, 8:36 AM), http://www.taxhistory.org/taxcom/taxblog.nsf/Permalink/UBEN-9X6RUL?OpenDocument (arguing that the Independent Commission for the Reform of International Corporate Taxation's recommendations for global tax harmonization are idealistic and current tax practices like separate entity accounting for multinational corporations are unlikely to be reformed); *see* Dagan, *supra* note 7, at 30-32.
62. Dagan, *supra* note 7, at 25.
63. Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054.
64. Dagan, *supra* note 7, at 27.

III. INVERSION REGULATIONS: FIRMS OUTRUN THE STATE

A. *Cat and Mouse*

Large firms have tried to minimize tax liability since the birth of the modern corporation. For example, in the early days of the automobile industry, Henry Ford refrained from paying out dividends to avoid taxation on that income.[65] Instead, he invested the profits to the dismay of the Dodge brothers, minority shareholders.[66] Beyond mere earnings management, firms choose locales based on tax regulation and force localities to compete with tax benefits to attract investment.[67]

States have always faced challenges to ensure that firms within their borders pay taxes. States adopted more and more sophisticated methods to require firms to pay taxes, including more detailed reporting and oversight requirements. In turn, firms adopted new structures and devised new ways to allocate and declare income to avoid tax liability. For example, some firms move intellectual property to the most secure, low-tax home, and then allocate a larger percentage of their profits to that very intellectual property.[68] Thanks to these techniques, the United States' high nominal corporate tax rate did not prevent the largest U.S. companies from posting staggering profits in 2017.[69]

In this context, we see a zero-sum, coevolutionary game of cat and mouse in which the states, as "cats," seek to capture the resources of the firms, as "mice."[70] As evolutionary dynamic theory argues, predator and prey constantly mutate to better catch or avoid capture.[71] Accordingly, it is not only the state that evolves to capture the firms' resources; the firms also evolve to avoid capture of their resources.

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65. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 683 (Mich. 1919).

66. *Id.* at 679.

67. In another example from the automobile industry, Ypsilanti, Michigan, offered tax credits to General Motors to draw them to build and maintain a car factory in the town. The firm began to lose money and cancelled the effort, leading it to withdraw from the town. The town sued with a promissory estoppel argument but lost. Charter Twp. of Ypsilanti v. Gen. Motors Corp., 506 N.W.2d 556 (Mich. Ct. App. 1993).

68. *See, e.g.*, Stephen C. Loomis, *The Double Irish Sandwich: Reforming Overseas Tax Havens*, 43 ST. MARY'S L.J. 825 (2012).

69. Theo Francis & Thomas Gryta, *U.S. Companies Post Profit Growth Not Seen in Six Years*, WALL ST. J. (July 30, 2017), https://www.wsj.com/articles/as-washington-stalls-company-profits-keep-trucking-1501423201.

70. *See* Roithmayr, *supra* note 39, at 153, 174 (explaining that regulators and those they regulate are engaged in a "cat-and-mouse game" of regulatory avoidance).

71. *See id.* at 174.

Inversions provide a perfect example: states are locked into a coevolutionary game with sophisticated corporate planners who nimbly structure combinations around the state's most recent rules. These cat and mouse antics played out by the government and corporate planners are only successful in the short term—if at all.

In this cat and mouse game, inversions provide firms—the "mice"—with an incredible innovation. In order to better capture revenue, states adapt as well, albeit to a lesser extent; because states depend on tax revenue to operate, their incentive could not be greater. With the extensive support of global accounting and law firms, traveling corporations display far greater efficacy in mutating to evade "predators." Through inversion mergers, powerful firms manipulate the global trading system to permit restructuring that enables them to avoid state claims to tax profits and, in some instances, grow larger than states. This Part will explore the various, mostly failed, regulatory attempts by the United States to capture a slice of the record profits firms have logged.

B. *Previous Efforts to Stop Inversions*

1. 1996: The Helen of Troy Inversion

In 1993, Helen of Troy, a U.S.-based cosmetics company, instigated a tax-free inversion transaction through which it became the subsidiary of a Bermuda shell corporation.[72] Believing the transaction was motivated by a desire to avoid U.S. taxes, the Treasury Department took aim at inversions in 1996 and promulgated a regulation that made shareholder gains on inversions taxable.[73] However, this regulation, focused only on shareholder income, did little to stop U.S. firms from inverting.[74] Despite the Treasury's best efforts to foreclose inversions, U.S. firms increasingly undertook inversions.[75] As Congress looked

72. Brandon Hayes, *U.S. Anti-Inversion Provisions*, INT'L TAX REV. (Mar. 27, 2013), http://www.internationaltaxreview.com/Article/3181949/US-anti-inversion-provisions.html.

73. 26 U.S.C. § 367 (2012); Harris, *supra* note 17.

74. Harris, *supra* note 17.

75. Roberto A. Ferdman, *30 Years of Companies Abandoning the U.S. for Lower Taxes, in One Chart*, WASH. POST (July 8, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/07/08/30-years-of-companies-abandoning-the-u-s-for-lower-taxes-in-one-chart/?utm_term=.5cc8932fad49.

more closely at the increased inversion activity, it concluded that tax avoidance was the driving force behind the surge of inversions.[76]

2. The American Jobs Creation Act of 2004

Subsequently, Congress passed the American Jobs Creation Act of 2004, which required U.S. firms undertaking inversions to have "substantial business activities" in foreign jurisdictions if the inversion was to be respected for tax purposes.[77] The Treasury Department subsequently defined "substantial business activity" as a company having at least twenty-five percent of its employees, assets, and income located in, or derived from, the relevant foreign country.[78] The substantial business activity regulation also proved futile in slowing inversions because it coincided with an increased desire for firms to expand globally, so shifting operations abroad not only provided tax benefits but also matched business objectives.[79]

The Treasury's ever-changing regulations typify the cat and mouse game between the state and firms. In fact, inversion deal closings would often create a "domino effect" because of the group rush to finalize transactions before the Treasury enacted rules aimed at proposed deals.[80] Each new wave of deals would bring new regulations—further proof that the state's inherent power is fading as multinational firms play a significant role in shaping the state's rulemaking.

3. The April 2016 Proposed Regulations

The recent proposed inversion between pharmaceutical giant, Pfizer, and Allergan, an Ireland-based pharmaceutical company, was the driving force behind yet another round of proposed Treasury Department regulations announced in April 2016.[81] The first feature of

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76. Harris, *supra* note 17; *see also* Hayes, *supra* note 72 (suggesting that the 1996 regulation failed because it only levied taxes on the U.S. shareholders of multinational corporations).

77. American Jobs Creation Act of 2004, Pub. L. No 108-357, § 801, 118 Stat. 1418, 1563.

78. 26 C.F.R. § 1.7874-3 (2018).

79. Harris, *supra* note 17.

80. Shayndi Raice, *How Tax Inversions Became the Hottest Trend in M&A*, WALL ST. J. (Aug. 5, 2014), https://www.wsj.com/articles/how-tax-inversions-became-the-hottest-trend-in-m-a-1407240175 (quoting a tax partner at Hogan Lovells).

81. Press Release, Allergan, Pfizer and Allergan to Combine (Nov. 23, 2015), https://www.allergan.com/news/news/thomson-reuters/pfizer-and-allergan-to-combine. The proposed $150 billion deal was poised to be the largest inversion to date. Richard Rubin & Liz

the regulations would have effectively reduced the size of a foreign entity by ignoring the foreign entity's combinations with U.S. firms for the previous three years.[82] Post-inversion tax treatment would be dependent on the proportion of U.S. shareholders relative to foreign shareholders of the new entity. Generally, if the shareholders of the U.S. firm own less than sixty percent of the new firm, it would receive favorable tax treatment.[83]

Prior to the proposed regulation, foreign firms would engage in "serial inversions," completing several smaller combinations before undertaking the "target" inversion.[84] Serial inversions increase the number of shareholders in the foreign firm, effectively diluting the number of U.S. shares and making it easier for firms to remain below the sixty-percent threshold.[85] Under the proposed regulation, these smaller transactions occurring within the preceding three years would be ignored, effectively making foreign firms smaller than they appear on paper.[86]

The second and perhaps more biting aspect of the proposed regulations aimed to make acquisitions of U.S. firms less enticing to foreign firms by retooling the treatment of related-party debt. In an inversion deal, a subsidiary of the new parent company remains in the United States, subject to U.S. tax laws.[87] Prior to the proposed regulation, the "real 'juice' in an inversion transaction" came in the

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Hoffman, *New Rules on Tax Inversions Threaten Pfizer-Allergan Deal*, WALL ST. J. (Apr. 4, 2016), https://www.wsj.com/articles/u-s-treasury-unveils-new-steps-to-limit-tax-inversions-1459803636. Pfizer CEO Ian Reed publicly announced that competing with foreign rivals that had lesser tax bills was a motivating factor behind the merger. Michael J. de la Merced et al., *Pfizer Chief Defends Merger with Allergan as Good for U.S.*, N.Y. TIMES (Nov. 23, 2015), https://www.wsj.com/articles/u-s-treasury-unveils-new-steps-to-limit-tax-inversions-1459803636.

82. Richard Rubin, *Treasury's New Inversion Rules*, WALL ST. J. (Apr. 5, 2016), https://blogs.wsj.com/briefly/2016/04/05/treasurys-new-inversion-rules-at-a-glance/.

83. *Id.*

84. *See* Rubin & Hoffman, *supra* note 81.

85. Liz Hoffman & Richard Rubin, *New Inversion Rules Test Pending Deals*, WALL ST. J., https://www.wsj.com/articles/new-inversion-rules-test-pending-deals-1459877333 (last updated Apr. 5, 2016).

86. *Id.* For example, ignoring Allergan's combinations with U.S. firms for the three years leading up to the proposed deal with Pfizer would have reduced Allergan's outstanding shares from 395 million to about 130 million, leaving Allergan investors with about twenty percent of the new Pfizer-Allergan entity, rendering the proposed deal unprofitable from a tax perspective. *Id.*

87. Steven Davidoff Solomon, *Corporate Inversions Aren't the Half of It*, N.Y. TIMES (Feb. 9, 2016), https://www.nytimes.com/2016/02/10/business/dealbook/corporate-inversions-arent-the-half-of-it.html.

form of the ability of the U.S. subsidiary to borrow from the parent and offset its earnings with tax-free interest payments made to the foreign parent company, i.e., earnings or profit stripping.[88] Foreign multinational firms often use earnings stripping to reduce a U.S. subsidiary's overall tax liability because interest payments on loans are deductible.[89]

The Treasury's proposed regulations would have allowed the Internal Revenue Service (IRS) to reclassify many of the related-party debt arrangements as equity, not debt.[90] This reclassification would have ended the practice of U.S. subsidiaries deducting large interest payments made to its foreign parent company.[91] The proposed regulations have yet to take effect. In response to Executive Order 13789, the IRS identified the proposed earnings stripping rules as meeting criteria warranting reform or full repeal.[92] Ultimately, the IRS proposed removing the final regulations.[93]

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88. Press Release, U.S. Dep't of the Treasury, Testimony of Pamela Olson, Acting Assistant Sec'y (Tax Policy), United States Department of the Treasury Before the House Committee on Ways and Means on Corporate Inversion Transactions (June 6, 2002), https://www.treasury.gov/press-center/press-releases/Pages/po3156.aspx.

89. Solomon, *supra* note 87.

90. Press Release, U.S. Dep't of the Treasury, Fact Sheet: Treasury Issues Inversion Regulations and Proposed Earnings Stripping Regulations (Apr. 4, 2016), https://www.treasury.gov/press-center/press-releases/Pages/jl0404.aspx. Examples of instruments issued from a parent to a U.S. subsidiary that would be subject to the reclassification are:

> [I]nstrument[s] that might otherwise be considered debt if [they are] issued by a subsidiary to its foreign parent in a shareholder dividend distribution; . . . dividend distribution[s] of debt in which a U.S. subsidiary (1) borrows cash from a related company and (2) pays a cash dividend distribution to its foreign parent; and . . . instrument[s] that might otherwise be considered debt if [they are] issued in connection with certain acquisitions of stock or assets from related corporations in transactions that are economically similar to a dividend distribution.

Id.

91. *See* Victor Fleischer, *On Inversions, the Treasury Department Drops the Gloves*, N.Y. TIMES (Apr. 5, 2016), https://www.nytimes.com/2016/04/06/business/dealbook/on-inversions-the-treasury-department-drops-the-gloves.html (noting the legality of such reclassification could be questionable); Richard Rubin, *Treasury Announces Final Regulations on Earnings Stripping*, WALL ST. J. (Oct. 13, 2016), https://www.wsj.com/articles/treasury-announces-final-regulations-on-earnings-stripping-1476392428. Despite emphasizing that it would not reclassify related-party debt incurred to fund actual business investment, the Treasury ultimately narrowed the profit stripping provisions of the April 2016 proposed regulations in October 2016. *Id.*

92. *See* I.R.S. Notice 2017-38, 2017-30 I.R.B. 147.

93. Proposed Removal of Section 385 Documentation Regulations, 83 Fed. Reg. 48,265 (proposed Sept. 24, 2018) (to be codified at 26 C.F.R. pt. 1).

C. *Alternative Tax Laws to Curb Inversions*

Although legislators may generally oppose inversions, legislation blocking inversions tends to diverge among party lines: the right tends to favor reducing the corporate income tax rate, while the left favors an exit-tax penalty for firms that choose to invert.[94]

1. Lowering Corporate Tax Rates

One of the most prominent features of the recent tax overhaul passed in December 2017, discussed in greater detail in Part III.E, was a significantly reduced corporate tax rate. While lowering the corporate tax rate passes muster under Occam's razor, the solution is likely not so simple.

Until the end of 2017, the United States had one of the highest statutory corporate tax rates in the world.[95] However, after accounting for deductions, tax breaks, and loopholes, the effective tax rate corporations paid was often much less. For example, from 2007 to 2011, the average effective corporate tax rate for companies with over ten million dollars in assets was twenty-two percent.[96] Accordingly, U.S. firms were hardly at a disadvantage compared to their Organisation for Economic Co-operation and Development (OECD) counterparts, who paid an average corporate tax rate of about twenty-five percent over the same time.[97]

However, if a lower corporate tax rate is intended to stop inversions, the new rate of twenty-one percent is arguably still too high. If legislators do not want firms to leave, the tax rate must ultimately compete with the lowest tax rates in the world.[98] As President Obama's Treasury Secretary Jack Lew commented, "[E]ven if we cut our tax rates and broaden the tax base, we would still need to enact anti-

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94. *See* Neil Irwin, *How Hillary Clinton and Donald Trump Differ on Taxes*, N.Y. TIMES (Aug. 12, 2016), https://www.nytimes.com/2016/08/13/upshot/how-hillary-clinton-and-donald-trump-differ-on-taxes.html.

95. Kimberly Amadeo, *US Corporate Income Tax Rate, Its History and the Effective Rate*, BALANCE, https://www.thebalance.com/corporate-income-tax-definition-history-effective-rate-3306024 (last updated Aug. 19, 2018).

96. OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, AVERAGE EFFECTIVE FEDERAL CORPORATE TAX RATES (2016), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/Average-Effective-Tax-Rates-2016.pdf.

97. Martin Sullivan, *The Truth About Corporate Tax Rates*, FORBES (Mar. 25, 2015), https://www.forbes.com/sites/taxanalysts/2015/03/25/the-truth-about-corporate-tax-rates/#358d706a742c.

98. *See id.*

inversion provisions because companies always would find countries with near-zero rates to which they could relocate."[99]

For example, in 2014, Google took advantage of a quirk in the Irish tax law that enabled the company to save $2.4 billion in worldwide taxes by moving twelve billion dollars in profits from an Irish subsidiary to a subsidiary in Bermuda.[100] Notably, Ireland, which taxes corporate income at 12.5%, is already a destination for firms looking to reduce their tax burden.[101] Thus, even Ireland, the poster child for low corporate tax rates, is losing tax revenue to sophisticated corporate planners.

That said, lowering corporate tax rates does bring the United States into closer harmonization with the rest of the world, which, as Dagan points out, is the most effective way of ending inversions.[102] However, while complete harmonization is something that we can aspire to, it is unlikely to ever materialize.

2. An Exit Tax

An exit tax is structured similarly to the way the United States taxes retirement accounts of individuals who renounce their citizenship: it would effectively impose a tax on all of a corporation's repatriated earnings before the corporation moves abroad.[103] Exit taxes could potentially add a significant amount to the price of an inversion deal. For example, with an exit tax in place, a firm like Amgen could be taxed $10.5 billion before inverting.[104] Some commentators have called such a scheme a "sensible step" that would "throw an impediment" into the cost-benefit calculus for firms currently

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99. Jacob J. Lew, *Close the Tax Loophole on Inversions*, WASH. POST (July 27, 2014), https://www.washingtonpost.com/opinions/jacob-lew-close-the-tax-loophole-on-inversions/2014/07/27/2ea50966-141d-11e4-98ee-daea85133bc9_story.html?utm_term=.bf776a487555.

100. Jeremy Kahn & Jesse Drucker, *Google Lowered Taxes by $2.4 Billion Using European Subsidiaries*, BLOOMBERG (Feb. 19, 2016), https://www.bloomberg.com/news/articles/2016-02-19/google-lowered-taxes-by-2-4-billion-using-european-subsidiaries. For a discussion of the mechanism by which Google attained its tax savings, see *"Double Irish with a Dutch Sandwich,"* N.Y. TIMES (Apr. 28, 2012), https://archive.nytimes.com/www.nytimes.com/interactive/2012/04/28/business/Double-Irish-With-A-Dutch-Sandwich.html?ref=business; Loomis, *supra* note 68, at 836-38.

101. Loomis, *supra* note 68, at 836 n.42.

102. *See* Dagan, *supra* note 7, at 27.

103. Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229, 1240 (2008).

104. Richard Rubin & Laura Meckler, *Hillary Clinton Plans a Corporate "Exit Tax,"* WALL ST. J. (Dec. 7, 2015), https://www.wsj.com/articles/hillary-clinton-plans-a-corporate-exit-tax-1449530258.

contemplating an inversion.[105] However, an exit tax is unlikely to end inversions for good. More likely, it will just be seen as an additional upfront cost for long-term tax benefits.

3. A Border Adjustment Tax

Another solution is to implement a border adjustment tax (BAT).[106] The theory undergirding a BAT, with respect to inversions, is that firms will likely be dissuaded from relocating to a foreign jurisdiction if they know that their goods will ultimately be subject to such a tax at the U.S. border.[107] However, even President Donald Trump has called the border adjustment tax "complicated," and such a tax would have wide-ranging effects that go well beyond its ability to slow inversions.[108] Most notably, by some estimates, the U.S. dollar would have to strengthen by twenty-five percent to offset the proposed tax because the cost of goods would increase so drastically.[109]

Like an exit tax, a BAT would certainly not preclude all inversions and would have broad consequences. Tax experts say that a BAT would have a "profound" effect on global trade, investment, and supply chains.[110] Accordingly, imposing a BAT to avoid inversions does not seem to be the most prudent path forward.

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105. *Id.*

106. A border adjustment tax is defined as:

> [A]ny fiscal measures which put into effect, in whole or in part, the destination principle (i.e. which enable exported products to be relieved of some or all of the tax charged in the exporting country in respect of similar domestic products sold to consumers on the home market and which enable imported products sold to consumers to be charged with some or all of the tax charged in the importing country in respect of similar domestic products).

General Agreement on Tariffs and Trade, Report by the Working Party on Border Tax Adjustments, ¶ 4, GATT Doc. L/3464 (Nov. 20, 1970).

107. Alan Auerbach & Michael Devereux, *The Case for a Border-Adjusted Tax*, N.Y. TIMES (Mar. 6, 2017), https://www.nytimes.com/2017/03/06/opinion/the-case-for-a-border-adjusted-tax.html.

108. *Id.*

109. *See* Bourree Lam, *Where U.S. Companies Stand on the Border Adjustment Tax*, ATLANTIC (Feb. 23, 2017), https://www.theatlantic.com/business/archive/2017/02/companies-border-adjustment-tax/517593/.

110. Barney Jopson et al., *Trump and the Tax Plan Threatening to Split Corporate America*, FIN. TIMES (Feb. 13, 2017), https://www.ft.com/content/008532fa-ef7a-11e6-ba01-119a44939bb6.

D. *Non-Tax-Based Efforts to Control Inversions*

1. Disclosure: Name and Shame

Generally, shareholders support inversions: a lower tax bill frees capital for a variety of purposes that can increase share value. However, in their article, *Are Corporate Inversions Good for Shareholders?*, Anton Babkin, Brent Glover, and Oliver Levine (Babkin et al.) analyzed the shareholder-specific tax consequences of inversions and concluded that inversions create a significant agency conflict.[111] Specifically, Babkin et al. found that there is dissimilar tax treatment between shareholders based on each individual shareholder's capital gains tax rate,[112] cost basis, and age.[113] Accordingly, for some shareholders, an inversion is a wealth-increasing transaction; for others, an inversion is a wealth-decreasing event.[114] Thus, the differing tax consequences of inversions create an agency conflict between individual shareholders and, more importantly, between shareholders and directors.

Diverging shareholder interests are not new or necessarily worrisome. What is concerning, however, is how executives' ownership stakes affect their decision whether to undertake an inversion.[115] While executives and shareholders might have equal

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111. Babkin et al., *supra* note 48.

112. In 1996, the IRS retooled section 367(a) of the Internal Revenue Code so that shareholders of an inverting company would have to realize capital gains on the underlying transaction—even if they retained their shares in the new entity. *Id.* at 230. The forced realization of capital gains has drastically different outcomes for short-term investors and long-term investors. While short-term investors shoulder only "minimal" after-tax costs, long-term investors planning on bequeathing their shares shoulder a much more substantial tax burden. *Id.* at 232. Moreover, several classes of shareholders—like foreign investors and pension funds—do not pay capital gains taxes. Babkin et al. characterize inversions as "a way for shareholders to pay an upfront cost in the form of capital gains taxes to reduce the future corporate tax liabilities of the firm." *Id.* at 228. However, nearly twenty percent of shareholders shoulder the "upfront cost," to the benefit of the remaining shareholders. *Id.*

113. *Id.* at 227.

114. *Id.* at 228.

115. Typically, executives own a combination of stocks and options as part of their compensation. Executives' stocks are taxed like any other taxable shareholders' stock and are subject to the same capital gains tax treatment after a merger. *Id.* at 244. Accordingly, executives' compensation typically parallels that of a short-term investor—a higher basis and a lower gain. Notably, however, executives' compensation often includes options, which are not taxable until exercised. *Id.* Because unexercised options cannot capture the increased value of the post-inversion firm, option holders have a distinct advantage over shareholders with regard to the tax consequences of an inversion. *Id.* Babkin et al. estimated executives with unexercised options earned a return of over two percent on inversion deals, while average shareholders saw gains of less than one percent. *Id.* Although the American Jobs Creation Act

footing with respect to personal tax consequences of owning a company's stock, their interests significantly diverge when unvested stock and unexercised options are considered.[116]

Unsurprisingly, Babkin et al. found that "personal tax consequences of [an] inversion predict the [board's] decision to invert."[117] According to Babkin et al., an executive's decision to undertake an inversion is affected by their personal tax liability.[118] Executives with a higher potential personal gain from inverting are more likely to invert.[119] This "highlight[s] an unusual agency conflict between different blocks of shareholders and management."[120]

This unique problem provides an ideal opportunity for non-tax law to deter inversions. State corporate law exists, in large part, to deal with agency conflicts between shareholders and management. Accordingly, state legislatures are well situated to address the agency conflict between executives and shareholders as a firm considers inverting. While the agency conflict caused by disparate tax treatment in inversion transactions does not give rise to a claim for a breach of loyalty, diverging personal tax consequences of inversions warrant clear and forthright disclosures about executives' holdings and their tax consequences.

Disclosure is a central tenant of corporate law in the United States.[121] Boards seeking shareholder approval for proposed inversions should be required to disclose not only their compensation packages—which is already required[122]—but also highlight the potential disparate post-inversion tax treatment. This is especially important given that long-term shareholders, who have consistently backed a company, have the most to lose.[123] While disclosures will not bring an end to inversions, transparency will, at worst, call attention to the fact that

provided a fifteen percent excise tax on unvested stock and unexercised option compensation that occurs within a twelve-month window surrounding the inversion, it has merely prompted firms to reimburse executives for the costs of the excise tax. *Id.* at 244-45.

116. *Id.*

117. *Id.* at 245.

118. *Id.* at 245-46.

119. *Id.* at 245.

120. *Id.* at 245-46 ("Increasing the CEO's total return from the first to the third quartile increases the probability to invert by 75.0%.").

121. Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 663 (2013).

122. 17 C.F.R. § 229.402 (2018).

123. *See* Babkin et al., *supra* note 48, at 228.

executives and certain shareholders might reap a disproportionate benefit compared to long-term shareholders, and at best, prove an effective tool in slowing inversions.

2. Emerging Corporate Forms

New corporate forms, like benefit corporations, move away from shareholder primacy toward a structure that combines social welfare with profit motives.[124] Benefit corporations "straddle the divide between for-profit and nonprofit and seek to blend the production of shareholder wealth with social and environmental goals under the umbrella of a single entity."[125] Lawmakers across the globe generally support these emerging corporate forms that place the market at the center of finding solutions to societal and environmental problems.[126]

Unlike the traditional corporation, benefit corporation boards have a duty to consider the effects of their actions on various stakeholders,[127] a step beyond constituency statutes that encourage, but do not require, directors to consider stakeholder effects.[128] Because boards must consider the "community in which offices or facilities of the benefit corporation or its subsidiaries . . . are located," benefit corporations may have a more difficult time inverting.[129]

However, benefit corporations remain uncommon, and it seems unlikely that a large corporation would contemplate a conversion. The primary avenue by which a large multinational could be coaxed to incorporate as a benefit corporation would be to offer tax credits or

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124. Esposito, *supra* note 121, at 709. Benefit corporations are not to be mistaken for B-Corporations, which are privately certified. *See id.* at 695. U.S. citizens, shareholders, and executives have expressed their frustration with the traditional fiduciary rule announced in *Dodge v. Ford Motor Co.*, which demands that directors make business decisions based on maximizing shareholder wealth. 170 N.W. 668 (Mich. 1919); Esposito, *supra* note 121, at 642.

125. Esposito, *supra* note 121, at 645.

126. *Id.* at 647; *see also id.* at 670-79 (discussing the various types of social enterprise vehicles available in Europe).

127. *Id.* at 699; *see, e.g.*, CAL. CORP. CODE § 14620(b)(2)-(7) (West 2014) (listing seven stakeholders directors must consider before taking action, including a benefit corporation's employees and workforce, community and societal considerations, and the interests of the customers of the benefit corporation).

128. Christopher Geczy et al., *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 102 (2015).

129. CORP. § 14620(b)(4). This affirmative duty has particularly significant consequences in the context of mergers and acquisitions. For example, many benefit corporation statutes "require that a merger or sale must be approved by, at minimum, a two-thirds vote, or a greater voting share as required by the articles of incorporation." Esposito, *supra* note 121, at 698-99.

other tax-based incentives.[130] While such tax-based incentives also shrink the tax base, statutory incentives are more predictable and controllable than inverting firms. Although benefit corporations theoretically provide a potential mechanism to curb inverting firms, they are realistically years away from becoming either common or adopted by large multinationals likely to invert.

E. The Tax Cuts and Jobs Act

On December 22, 2017, President Trump signed "the most consequential tax legislation in three decades."[131] The principal goal of the Tax Cuts and Jobs Act (the Act) appears to be the reduction of the corporate income tax rate. The Act cuts the corporate tax rate from thirty-five percent to twenty-one percent—a cut slated to cost the United States an estimated $1.3 trillion.[132] As discussed in Part II.C, bringing the corporate tax rate into parity with other similarly situated jurisdictions is a prudent step in deterring firms from inverting. However, the Act does more than merely cut the corporate tax rate.

Notably, the Act shifts from a worldwide system, in which a firm is taxed on both its foreign and domestic earnings, to a territorial tax regime.[133] This shift also brings the U.S. tax code into closer harmony with the rest of the developed world.[134] Instead of taxing firms' worldwide income—a major factor in firms' decision to stockpile foreign earnings overseas—the Act shifts to only taxing income that is generated stateside.[135] As part of the transition to the territorial scheme, the Act affords firms that have amassed profits overseas the opportunity to repatriate their earnings at a one-time rate of about fifteen percent.[136] Apple, the paragon of a foreign-profit hoarder, has already taken the

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130. Esposito, *supra* note 121, at 713.

131. Eileen Sullivan & Michael Tackett, *In Signing Sweeping Tax Bill, Trump Questions Whether He Is Getting Enough Credit*, N.Y. TIMES (Dec. 22, 2017), https://www.nytimes.com/2017/12/22/us/politics/trump-tax-bill.html.

132. *HBR IdeaCast: Breaking Down the New U.S. Corporate Tax Law*, HARV. BUS. REV. (Dec. 26, 2017), https://hbr.org/ideacast/2017/12/breaking-down-the-new-u-s-corporate-tax-law.

133. Danielle Kurtzleben, *The GOP's New Tax Plan Will Affect Everyone, but Will It Grow the Economy?*, NPR (Jan. 14, 2018), https://www.npr.org/2018/01/14/577359530/the-gops-new-tax-plan-will-affect-everyone-but-will-it-grow-the-economy.

134. *Id.*

135. *Id.*

136. Lynnley Browning, *IRS Issues Tax Rate Guidance for Stockpiled Foreign Income*, BLOOMBERG (Dec. 29, 2017), https://www.bloombergquint.com/politics/2017/12/29/irs-issues-guidance-on-tax-rates-for-stockpiled-foreign-income#gs.9FPfpNA.

United States up on the offer and announced it would repatriate the majority of its foreign-held profits, paying $38 billion in taxes.[137]

Of course, by shifting to a territorial scheme, firms that were once reluctant to advance their operations outside of the United States for fear of eventually having to pay a high tax when the profits were returned to the United States will now have incentive to increase their global activity. The Act, however, does not let global firms evade taxes entirely. The Act imposes a ten percent minimum base erosion and anti-avoidance tax (BEAT) on firms' related-party payments to U.S.-based firms or foreign firms with U.S. income.[138] In theory, the BEAT provision should enable the United States to capture *some* earnings of firms conducting business abroad, but due to the complex nature of multinational firms and their interactions with foreign tax jurisdictions, there is ample room for firms to plan around the BEAT. Additionally, some commentators question whether the BEAT violates World Trade Organization rules.[139]

The final aspect of the Act relevant to this discussion is the Act's new rules concerning capital expenditure deductions. Under the Act, firms can immediately write off capital expenditures in full, rather than spreading the deduction out over time as under the previous regime.[140] This is significant. The motivation behind such a rule is clear: to catalyze investment in the United States, both domestically and from abroad. In theory, this makes sense. The ability to immediately deduct in full capital expenditures that would otherwise usually take some time to translate into profit will be alluring to firms—especially in the short term.

President Trump, when he signed the Act, claimed that as a result of the Act, companies will make "tremendous investments" in the

137. Daisuke Wakabayashi & Brian X. Chen, *Apple, Capitalizing on New Tax Law, Plans to Bring Billions in Cash Back to U.S.*, N.Y. TIMES (Jan. 17, 2018), https://www.nytimes.com/2018/01/17/technology/apple-tax-bill-repatriate-cash.html.

138. Erez I. Tucner & William B. Sherman, *Main Effects of U.S. Tax Reform on Foreign Taxpayers*, HOLLAND&KNIGHT (Jan. 2, 2018), https://www.hklaw.com/publications/main-effects-of-us-tax-reform-on-foreign-taxpayers-01-02-2018/; Andrew Velarde, *Senate Wins on Base Erosion; Interest Limitation Dropped*, TAXNOTES (Jan. 1, 2018), https://www.taxnotes.com/tax-notes/tax-reform/senate-wins-base-erosion-interest-limitation-dropped/2018/01/01/1xfyn?highlight=Erosion.

139. Stephanie Soong Johnston, *EU Finance Ministers Fire Warning Shot on U.S. Tax Reform*, TAXNOTES (Dec. 18, 2017), https://www.taxnotes.com/tax-notes-international/tax-reform/eu-finance-ministers-fire-warning-shot-us-tax-reform/2017/12/18/1xdv7.

140. Dave Danic, *New Capital Expense Rules for 2018*, SUMMIT CPA GROUP (Jan. 30, 2018), https://www.summitcpa.net/blog/new-capital-expense-rules-for-2018.

United States.[141] However, some commentators question such claims.[142] The United Kingdom recently lowered its corporate income tax rate to nineteen percent but has yet to see a marked increase in investment or wage growth.[143] To the extent that other measures of the Act might increase investment, it is more likely that the Act will merely accelerate investment that would have eventually happened, not necessarily *create* investment.[144]

It appears, at least in the short term, that the Act may curtail inversions. However, lurking behind the question of whether inversions will slow after the Act is whether the overhaul of the corporate tax code will achieve its intended effect. It appears that the goal of the Act was to make the United States more competitive with other nations in the market for firms shopping for lower corporate tax rates. This change may staunch the U.S. hemorrhage of domestically domiciled firms, but given the speed of drafting and passage, unintended consequences are likely to surface.[145]

Ultimately, the Act may prove to be but a mere sideshow that hides who holds the power in the globalized market. It also provides the perfect example of how sovereignty has flipped: no longer must corporate citizens capitulate to the state. Rather, states must now capitulate to the demands of its corporate citizens to maintain their façades of inherent power, including demands for tax cuts in the United States, the world's largest economy. Perhaps by providing incentives to firms, this tax cut may succeed in walling them into their U.S. domicile.

IV. THE FUTILITY OF BUILDING WALLS

Wendy Brown's work on the futility of walls gives us a much fuller perspective on the inversion phenomenon. Brown defines the paradox of contemporary life: "What we have come to call a globalized

141. President Donald Trump, Remarks at Signing of H.R. 1, Tax Cuts and Jobs Bill Act, and H.R. 1370 (Dec. 22, 2017) (transcript available at https://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1-tax-cuts-jobs-bill-act-h-r-1370/).

142. *HBR IdeaCast*, *supra* note 132.

143. Martin Wolf, *Donald Trump Has Been Lucky with the U.S. Economy*, FIN. TIMES (Jan. 30, 2018), https://www.ft.com/content/2346a2d4-0297-11e8-9650-9c0ad2d7c5b5.

144. *See HBR: IdeaCast*, *supra* note 132.

145. The increase of U.S. firms opting for lower tax jurisdictions has been well documented. *See, e.g.*, Gregory Wallace, *More Companies Bail on U.S. for Lower Taxes*, CNNMONEY (July 7, 2014), https://money.cnn.com/2014/07/07/news/economy/tax-advantage-inversion/index.html; *Tracking Tax Runaways*, BLOOMBERG, https://www.bloomberg.com/graphics/tax-inversion-tracker/ (last updated Mar. 1, 2017).

world harbors fundamental tensions between opening and barricading, fusion and partition, erasure and reinscription. These tensions materialize as increasingly liberalized borders, on the one hand, and the devotion of unprecedented funds, energies, and technologies to border fortification, on the other."[146] This paradox accounts for the simultaneous desire of market actors to traverse boundaries and that of states to restrain parties from going outside of their jurisdiction. It reminds us that globalization is not a cost-free proposition: it undermines state power.

Prior to the market changes of the past three decades, the Westphalian concept that state power controls all law, commerce, and interaction with the outside world reigned supreme and faced little challenge. Before the expansion of globalism, countries could regulate and tax firms as well as restrict citizens with few challenges to their control. Many still believe states hold this power, despite their diminishing dominion. However, "[a]ll countries are today embedded in the same system, which subjects them all to the same pressures: and it is these that are squeezing and warping national political life everywhere."[147]

States that cling to the illusion of their absolute dominion over citizens and resources may erect walls to protect what they purport to own.[148] Walls may be of a physical nature, such as the Berlin Wall or President Trump's proposed wall with Mexico.[149] Such walls necessarily inspire tunnels, flyovers, and other means of circumvention. Indeed, consider the existing U.S. barrier with Mexico, under which drug cartels have dug tunnels and erected their own gates to control access to the tunnels.[150] Legislation, such as the Smoot-Hawley Act, or recent Republican proposals on immigration, also erects "walls" to keep financial capital in, or to keep human capital out.[151]

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146. BROWN, *supra* note 12, at 7-8.

147. Rana Dasgupta, *The Demise of the Nation State*, GUARDIAN (Apr. 5, 2018), https://www.theguardian.com/news/2018/apr/05/demise-of-the-nation-state-rana-dasgupta.

148. *Id.* ("But the current appeal of . . . wall-building and xenophobia, the mythology and race theory, the fantastical promises of national restoration - these are not cures, but symptoms of what is slowly revealing itself to all: nation states everywhere are in an advanced state of political and moral decay from which they cannot individually extricate themselves.").

149. *See* Vanderbilt, *supra* note 21.

150. BROWN, *supra* note 12, at 112.

151. Ruchir Sharma, *When Borders Close*, N.Y. TIMES (Nov. 12, 2016), https://www.nytimes.com/2016/11/13/opinion/sunday/when-borders-close.html.

Various disparate threats undermine sovereignty, and restrictions from within a country invite subversion. Borders allow competition from abroad, while the online world creates a radical transparency of markets. The globalization of trade means states cannot protect their own industries from foreign competition. Distant phenomena—from weather to regulation—can create radical shifts within domestic markets. Online threats, whether those of a competitive or a criminal nature, threaten nations as much, if not more, than weapons do. The move toward online commerce exposes entire industries to constant pricing pressure.[152] States face competition not only from outside the state, but also from within, which undermines the state's ability to generate tax revenue and regulate commerce.

How states react to globalization exposes the paradox Brown describes. While states sometimes embrace the openness ushered in by globalization, all too often globalization invites the erection of walls. Citizens presume the state is still omnipotent and politicians appear loath to disabuse them of that fantasy. Politicians consequently demand protections for various constituencies from the threats of the globalized economy. Early in this century, the administration of President George W. Bush imposed a steel tariff, which was summarily repealed after a loss before the World Trade Organization (WTO).[153] Likewise, President Trump has proposed a variety of tariffs, many of which seem to violate WTO law, and none of which finds much support among economists.[154] For other nation-states, their vulnerability to firm power depends on their integration with other economies, their level of development, and their size.

Brown describes a specific wall between the United States and Mexico to prevent undocumented migration and drugs from crossing the border.[155] These walls are often inherently ineffective because they do very little to reduce demand for whatever requires crossing the wall. Tunnels, boats, planes, and other ways around the wall's surface allow supply to meet demand. On the United States-Mexico border, Brown describes that one part of the wall has a tunnel, and the gang that built the tunnel patrols it and operates it to prevent people from using the

152. Ibrahiim Bayaan, *E-Commerce Continues to Pressure Retailers from All Sides, and Freight and Logistics May Never Be the Same*, FREIGHTWAVES (Feb. 21, 2018), https://www.freightwaves.com/news/economics/e-commerce-continues-to-pressure-retailers.

153. Doug Palmer, *Why Steel Tariffs Failed When Bush Was President*, POLITICO (Mar. 7, 2018), https://www.politico.com/story/2018/03/07/steel-tariffs-trump-bush-391426.

154. *See id.*

155. BROWN, *supra* note 12, at 35.

tunnel without paying the gang.[156] From the perspective of the state that built the wall—the United States—all this activity undermines the policy purpose of the wall in the first place. It is a nearly Sisyphean task.

Such futility seems to await efforts to restrict inversions. States face a great deal of competition in regulation. Internally, a state must listen to the regulatory demands of citizens if it wishes to maintain its authority. As discussed in Part II.C, nations also face fierce competition from other states for subjects in our globalized world. As depicted in Figure 1, nations are further pressured by traveling corporations to promulgate business-friendly regulations. In addition, through various agreements and treaties, states must also adhere to several international compacts that restrict regulations.[157] Just as surely as firms want to lower their cost structures, the supply of lower tax jurisdictions exists. Restrictions may complicate inversion efforts, but they may prove unsuccessful in the long run. The most promising reform is the harmonization of laws so that across borders, the same or similar constraints operate to restrict behavior.

V. INVERSIONS AND DEGLOBALIZATION

The movement of people, goods, and services across borders has always waxed and waned.[158] The first wave of globalization took place in the early twentieth century along with the rise of container ships, the telegraph, and increased immigration.[159] At that time, economic integration reached levels that approach today's globalization with regard to the mobility of capital, goods, and labor.[160] When the 1929 stock market crash led to a full economic depression, the United States responded by passing protectionist laws that only aggravated the economic decline and spread it to other countries with the passage of the Smoot-Hawley Tariff Act.[161]

156. *Id.* at 112.

157. *See, e.g.*, Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054; American Jobs Creation Act of 2004, Pub. L. No 108-357, 118 Stat. 1418; KORUS FTA, *supra* note 35.

158. Sharma, *supra* note 151.

159. *Id.*

160. Laurence Chandy & Brina Seidel, *Is Globalization's Second Wave About to Break?*, BROOKINGS (Oct. 4, 2016), https://www.brookings.edu/research/is-globalizations-second-wave-about-to-break/.

161. *Id.*

Global trade only recovered from those trade restrictions in the 1970s.[162] Even so, it was not until the 1990s, aided by the opening of Eastern Europe to trade, that the flow of cross-border capital rebounded.[163] The similarities between the deglobalization that started in 1914 and today are clear. Today, global trade demand is low and the flow of capital is slipping,[164] and net migration is down, despite various recent refugee crises.[165]

While the most recent spike in globalization has led to great prosperity for some, it has also contributed significantly to an increase in economic inequality across the globe.[166] Inverting firms have raised doubts about our globalized economy. The groundswell of support for protectionist policies the world over marks the cresting of globalization. Globalization may mutate, or the world may deglobalize to some extent. Outsourcing, inversions, and other shifts of corporate resources out of the United States may have provoked this growing hostility towards the global economy.

In two stunning democratic elections, voters on both sides of the Atlantic preferred an isolationist view to one of continued globalization.[167] The anti-globalism trend shows little sign of slowing as contenders in other elections successfully campaign on nationalist platforms.[168] These votes reflect the depth of anxiety provoked by

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162. *See id.*

163. *See id.*

164. *See id.*

165. Sharma, *supra* note 151 ("Despite the flood of refugees into Europe, net migration from poor to rich countries decreased to 12 million between 2011 and 2015, down by four million from the previous five years. Between 2009 and 2014, the number of Mexicans leaving the United States outnumbered new arrivals by 140,000, and that was before Trump's first anti-Mexican tirades.").

166. *See* Larry Elliott, *World's Eight Richest People Have Same Wealth as Poorest 50%*, GUARDIAN (Jan. 15, 2017), https://www.theguardian.com/global-development/2017/jan/16/worlds-eight-richest-people-have-same-wealth-as-poorest-50.

167. *See* Cas Mudde, *The Revenge of the Losers of Globalization? Brexit, Trump and Globalization*, HUFFINGTON POST, https://www.huffingtonpost.com/cas-mudde/the-revenge-of-the-losers_b_11407468.html (last updated Dec. 6, 2017).

168. *See e.g.*, Joe Warmington, *Kevin O'Leary: Next Election Will Be an "Exorcism,"* TORONTO SUN (Jan. 18, 2017), https://torontosun.com/2017/01/18/kevin-oleary-next-election-will-be-an-exorcism/wcm/54a0c247-5d6d-41c0-909e-3e76fa2017a9 (noting that conservative candidate Kevin O'Leary campaigned as "Trudeau's worst nightmare" in the election for Canadian Prime Minister). Although Marine Le Pen lost the 2017 French presidential election, there was sufficient support to force a runoff election. Ingrid Melander, *Le Pen Kicks Off Campaign with Promise of French "Freedom,"* REUTERS (Feb. 4, 2017), https://www.reuters.com/article/us-france-election-fn/le-pen-kicks-off-campaign-with-promise-of-french-freedom-idUSKBN15J007; *France Elections: Macron and Le Pen Through to Run-off*, BBC NEWS (Apr. 24, 2017), https://www.bbc.com/news/world-europe-39686993.

globalization. As developed democracies stagnate and become increasingly xenophobic, the most successful political leaders seem to be those espousing a nationalist message. In the United States, this has led to expanding the use of military power and erecting physical barriers such as the proposed wall with Mexico.[169] As in the 1930s, a retreat from trade and immigration can only raise costs and reduce economic activity.[170]

As Wendy Brown's book suggests, building walls rarely achieves the goal of cutting off access to the other side.[171] Attempts by the United States to limit immigration and wall off trade will either fail or come with significant burdens that dwarf the costs of cross-border movement of goods and labor. Building walls to block mobility for the largest multinationals will not come cheaply.

Traveling corporations will not cede power back to states so readily. The Internet fosters this radical increase of firm power, as cybertrade enables individuals to provide or receive services worldwide without leaving home. Unless the United States and other countries adopt autarkic Internet regulations that cut the country off from the online world, the Internet will likely retain the power to circumvent local rules and norms.[172] As traveling corporations avoid tax liability through clever maneuvering, firms can use the Internet to shift the jurisdictional hold on their transactions away from states that impose other liabilities. As Anupam Chander has inquired, "[I]s law itself at risk, now avoidable by a mere single click?"[173] In such a world, corporate power may continue unchecked, leaving workers and consumers operating in a world ruled by corporations.

VI. CONCLUSION

Inversions subvert sovereignty and upend the relationship between the public and the private. As recent political events suggest, they may have pushed globalization too far. Few solutions seem promising and neither physical nor regulatory walls succeed at keeping capital, goods, or labor from crossing political borders. Tax incentives may soon decrease the number of inversions because firms may come

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169. *See* Vanderbilt, *supra* note 21.

170. *See* Sharma, *supra* note 151.

171. BROWN, *supra* note 12.

172. *See* ANUPAM CHANDER, THE ELECTRONIC SILK ROAD: HOW THE WEB BINDS THE WORLD TOGETHER IN COMMERCE 5-6 (2013).

173. *Id.* at 5.

to more greatly value the pleasures of home, or at least fear the political risk of leaving home. Regardless, legal remedies, as they appear now, seem ill-suited to the task.

Ever since the first inversions began in the mid-1980s, Congress has tried to find a way to effectively protect the United States' tax base. While some congressional efforts have proven useful in the short term, inversions continue to be an unremitting problem as firms become increasingly sophisticated. Cross-border mergers involve increasing complexity as multiple parties, various governments, and heterogeneous constituencies jockey for influence. While inversions often undermine state power, easily controverted solutions like walls will continue to prove futile. The tax code has failed to stop firms from leaving the United States, and non-tax law alternatives as of yet show little chance of success.

As states hold less and less power in our globalized and interconnected world, both states and citizens prefer to avoid the frank assessment of national decline, which only confirms their collective powerlessness and impotence with regard to mass capital. Close attention to limiting inversions may yield pluralist approaches that embrace both cross-border cooperation and sophisticated domestic legislation—remedies that may yet revive the state's potency in the face of its seemingly unstoppable "prey."