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## Sovereignty and the World Economy

Paul B. Stephan

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## ARTICLE

# SOVEREIGNTY AND THE WORLD ECONOMY

PAUL B. STEPHAN\*

Even before COVID-19 struck, we were going through a remarkable moment of political, economic, and social turmoil. Disruption of many international institutions, both formal and informal, and a sea of change in national politics have taken over the global stage. The United States tried to renegotiate the terms of its engagement with the rest of the world; the European Union's structural flaws became manifest, with Brexit possibly only the first sign of a wider crackup; the domestic politics of many great states turned towards populism and the obliteration of historically significant political parties; authoritarianism rose, and liberal democracy waned, in those parts of the world that had seemed transformed in or around the *annus mirabilis* of 1989; and the dark side of technological innovation manifested itself in the privatization of organized violence, unsustainable inequality, and the erasure of privacy.<sup>1</sup> Then COVID-19 came, with its dire if still not

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\* John C. Jeffries, Jr., Distinguished Professor of Law, University of Virginia. This article had a trial run at the University of St. Thomas Law School symposium on Sovereignty in a Fragmenting, Globalizing World. Appropriately enough for the article's theme, but sadly none the less, the symposium moved online in response to the COVID-19 pandemic. I am grateful to the symposium organizers for inviting me and the participants for their comments and questions, as well as my colleagues at Virginia who participated in a virtual workshop that produced many excellent suggestions. Pamela Clark, George Rutherglen, and J. Anderson Thomson read an earlier version of this paper and provided invaluable criticism and suggestions. Marcello Kilani provided great research assistance. Responsibility for errors and misjudgments belongs to me alone.

1. *E.g.*, HUMAN RIGHTS IN A TIME OF POPULISM: CHALLENGES AND RESPONSES (Gerald L. Neuman ed., 2020) (surveying worldwide attacks on liberal democratic conception of human rights); IVAN KRASTEVA & STEPHEN HOLMES, THE LIGHT THAT FAILED (2019) (crisis of liberalism); TIM MAURER, CYBER MERCENARIES – THE STATE, HACKERS, AND POWER (2018) (death of privacy); CATHY O'NEIL, WEAPONS OF MATH DESTRUCTION: HOW BIG DATA INCREASES INEQUALITY AND THREATENS DEMOCRACY (2017) (technological innovation and inequality); MICHAEL O'SULLIVAN, THE LEVELLING: WHAT'S NEXT AFTER GLOBALIZATION (2019) (transformation of international economics and crisis of inequality); THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (2013) (also discussing the transformation of international economics and crisis of inequality); BENJAMIN WITTES & GABRIELLA BLUM, THE FUTURE OF VIOLENCE (2015) (privatization of organized violence); SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2018) (death of privacy).

fully realized consequences. For much of the world, this is a time of troubles.<sup>2</sup>

What does this have to do with sovereignty? The present moment invites yet another reconsideration of the nation-state as the nexus of sovereignty as well as of the dominance of the liberal-democratic ideal.<sup>3</sup> Can we talk about sovereignty without committing to a political or historical theory about the inevitability or desirability of particular kinds of social organization? Is the liberal democratic nation-state indispensable to a minimally acceptable social life, and if not, what is?<sup>4</sup>

This article argues that we cannot begin to make sense of the present series of crises in contemporary domestic politics and international relations without accepting the flexibility and contingency of sovereignty. Localities, substates (States), nation-states, and the international order all may exercise some form of sovereignty.<sup>5</sup> Sovereignty is a relationship, not a fundamental concept on which to build a general theory of political economy.<sup>6</sup> With this insight, one can begin to account for the present troubles, however incomplete that account might be.

My argument is fairly straightforward. First, I lay out the reasons for divorcing the concept of sovereignty from the modern idea of a nation-state. Second, I argue that the most significant force driving economic, political, and social change over the past fifty years is the emergent knowledge economy. The immediate crisis associated with COVID-19 seems to have amplified this process, although we won't know for sure for some time. Third, I

2. In Russian history and culture, the time of troubles refers literally to the disordered period between the end of the Rurik dynasty in 1598 and the ascension of the Romanovs in 1613 and metaphorically to a time of catastrophic social disruption and great suffering, most recently for most Russians in the 1990s. See ALLEN C. LYNCH, *HOW RUSSIA IS NOT RULED: REFLECTIONS ON RUSSIAN POLITICAL DEVELOPMENT* 85–127 (2005).

3. One international law scholar introduced the term “sovereignist” to disparage those who were not internationalists. Peter J. Spiro, *The New Sovereignists*, *FOREIGN AFF.*, at 9, Nov.–Dec. 2000. At least for that writer, sovereignty equates with nationalism and should be contrasted with the historically inevitable triumph of international governance and cosmopolitanism. See generally Peter J. Spiro, *Sovereignism’s Twilight*, 31 *BERK. J. INT’L L.* 307 (2013). This article demonstrates the invalidity of the equation that serves as that writer’s premise, although it also casts doubt on his conclusion. There is no necessary connection between the Westphalian conception of state sovereignty and the supposed inevitability of the liberal-democratic ideal, although some bundle them together. See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992) (inevitability of liberal democracy); MICHAEL McFAUL, *ADVANCING DEMOCRACY ABROAD* (2009) (centrality of liberal democracy as an object of international relations).

4. I had nearly completed this article before the publication of DON HERZOG, *SOVEREIGNTY, RIP* (2020). Our views on the meaning of sovereignty are, although not identical, largely congruent. One wishing to explore the topic further should refer to this erudite and brilliant book.

5. I follow here the convention of capitalizing the word “State” when referring to one or more of the States of the United States. I use the word “state” to refer to nation-states as well as the abstract concept of a state.

6. For those open to economic theory, one might compare sovereignty to a relational contract. See ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 65–70 (2006).

sketch out the effects of that economy on different sites of sovereignty: local, substate, national, and international. These effects, I argue, create both synergies and antagonisms that play out differently at each level. I focus particularly on the waning of international sovereignty as an outcome of these forces. Finally, I speculate about different scenarios that might result from the inherent tensions within and among these sites of sovereignty.

## I. RETHINKING SOVEREIGNTY

The present series of crises refutes the notion that sovereignty is about the nation-state. Indeed, tying sovereignty to that particular political institution seems ahistorical as well as obtuse. Understood functionally, sovereignty describes a relationship between recognized authority and those subject to that authority. For most of recorded history, most people have lived within political and legal structures where nation-states either did not provide a nexus of authority at all or shared authority with structures either below, above, or alongside. Locating an ultimate authority in the nation-state is very much an artifact of the modern era.<sup>7</sup>

Past governance did without the nation-state not because, as Hegel and some of his modern followers have maintained, humanity was benighted until the nation-state revealed itself as the foundation of an ideal system of social ordering.<sup>8</sup> Rather, no universal ideal exists. Social institutions—governance structures included—vary with technological capacities, economic and social conditions, and exogenous challenges such as disease and climate change. We should see sovereignty not as a value but a relationship, one that adapts to circumstances. Today the Hegelian theory that depicts the nation-state as the primary agent of historical progress, even as the fulfillment of human destiny, seems quaintly irrelevant to contemporary political, economic, and social issues.

To redeem sovereignty as a useful analytical category, I conceive of it as a social institution that connects the exercise of authority to the acceptance of that authority. A sovereign issues commands that its subjects accept. Conventional accounts of nation-state sovereignty bolster their analysis by positing that states have a monopoly over the legitimate use of force as a means of social control.<sup>9</sup> But this claim is definitional, not obser-

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7. See Quentin Skinner, *A Genealogy of the Modern State*, 162 *PROC. BRIT. ACAD.* 325 (2009) (discussing origins of the idea of the state as a focus of sovereignty). I am indebted to Don Herzog for the reference.

8. See FUKUYAMA, *supra* note 3 (using Hegelian theory to argue that triumph of the idea of a liberal democratic nation-state in 1989 brought about the end of history).

9. E.g., Max Weber, *Politics as Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 136 (H.H. Gerth & C. Wright Mills trans. & eds., 2013) (“Today, however, we have to say that a state is a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory. Note that ‘territory’ is one of the characteristics of the state. Specifically, at the present time, the right to use physical force is ascribed to other institutions or to

vational, and largely belied by history. Moreover, an emphasis on force misses the point.

Because threats of violence are costly, and for the most part those costs grow with scale as well as over time, acceptance of authority tends to rest on other qualities attached to sovereigns. We might lump these qualities together into a loose category called legitimacy. To be clear, legitimacy does not define authority, but it does complement sovereignty in the sense that it lowers the costs of exercising authority (making law). If we consider sovereignty from the perspective of functionality rather than of moral theory, we may regard legitimacy as whatever works to encourage the acceptance of commands by subjects, with the understanding that different qualities will work better or worse as conditions vary.<sup>10</sup> Sovereignty, then, consists of a sustained capacity to make commands (law) that some others (subjects) will obey due to some mixture of force and legitimacy.

An implication of this functional conception of sovereignty is the possibility of nonexclusivity. Rather than having simple one-on-one relationships, sovereigns and their subjects can form dense networks based on multiple allocations of sovereignty.<sup>11</sup> Sovereignty has a determined scope, rather than an absolute reign. In private life, a person may honor the edicts of his or her lawyer and doctor, but that person has a clear understanding of which commands fall within the issuer's domain and which can be ignored. In public life, the same holds true.

Thus it becomes easier to understand sovereignty not as a hierarchy with an ultimate sovereign always on top, but rather as a set of contracts (in the notional sense used by political theorists from Plato to Rousseau).<sup>12</sup> Multiple sovereigns negotiate the boundaries of their sovereignty—their domains as it were—as set by space (e.g., territory), time (e.g., moment of establishment of the sovereign), and subject matter (e.g., interstate versus intrastate commerce). These negotiations produce allocations of effective

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individuals only to the extent to which the state permits it. The state is considered the sole source of the 'right' to use violence.'").

In light of the COVID-19 scourge, it is poignant, even if beside the point of this article, that not many months after delivering the lecture on which this essay was based, Weber succumbed to the Spanish Influenza pandemic.

For evidence that the development of the concept of sovereignty in the early modern period was, among other things, a reaction to the absence of a state monopoly over the legitimate use of force, see HERZOG, *supra* note 4, at 41–47.

10. Cf. Paul B. Stephan, *The Legitimacy of International Law*, in PALGRAVE HANDBOOK OF INTERNATIONAL POLITICAL THEORY (Howard Williams, David Boucher, Peter Sutch & David A. Reidy eds., forthcoming 2021) (discussing functional approaches to legitimacy).

11. This concept corresponds to Elinor Ostrom's model of polycentric governance. Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641 (2010) (Nobel Prize lecture).

12. See Paul B. Stephan, *Courts-on-Courts: Contracting for Engagement and Indifference in International Judicial Encounters*, 100 VA. L. REV. 17, 39–40 (2014) (using contract as metaphor in political theory).

authority, which may be stable or dynamic.<sup>13</sup> As a result of these allocations, different sovereigns operate on different scales, from the international (which should not be confused with the universal) down to the basic social unit (family or clan, whatever happens to fill that role at a particular place and time).<sup>14</sup>

As a logical matter, one need not confine this conception of sovereignty to public bodies. Private groups can exercise systematic power, for example by forming clubs (in the economic sense) that deliver rules as part of the goods it provides members.<sup>15</sup> For purposes of simplicity, however, this article limits its scope to authoritative acts undertaken by public bodies, even if procured by private interests. As long as the focus remains on domestic politics and their impact on international sovereignty, nothing essential is lost.<sup>16</sup>

One could take a deep dive into history to substantiate and validate this understanding of sovereignty. My interest, however, is not in unpacking all the implications of a pluralistic conception of sovereignty, but rather in its present usefulness. This article focuses on the current disorder in the contemporary world. We have come to the end of the brief reign of liberal internationalism and the undoing of the supposed end of history. Recognizing that sovereignty operates severally, rather than singly, can help us to understand what has happened and what may await us.

In particular, this understanding of sovereignty advances an analysis of the current crisis in international law. As an occasional practitioner of international law, I am interested in the surprisingly difficult question of whether one can attribute sovereignty to international law. The question is difficult because no consensus exists about the sources of international law and which institutions act as international lawgivers. We cannot anthropomorphize international law the way we can tie the sovereignty of the Roman Catholic Church to the pope or that of the United States to the

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13. See Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPP. L. REV. 239, 250–55 (2018) (addressing the process of domain allocation).

14. There is irony, but perhaps aptness as well, in the senior Oliver Wendell Holmes's self-description in the title of his famous collection. OLIVER WENDELL HOLMES, *THE AUTOCRAT OF THE BREAKFAST TABLE* (1858). Herzog concedes the coherence of this conception of sovereignty but disparages it as weird; he would prefer to abandon the term "sovereignty" altogether. DON HERZOG, *supra* note 4, at xii. He would instead employ the concepts of state, jurisdiction, and authority, which in his view avoid what he regards as the ineluctable problem of attributing to sovereignty a nature as either unlimited, undivided, or unaccountable. *Id.* at 290.

15. A rich literature addresses this problem. See, e.g., Kristen Eichensehr, *Digital Switzerland*, 167 U. PA. L. REV. 665 (2019). I have considered it as well. Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1596–97 (2011); Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 VA. J. INT'L L. 743 (1999) (discussing political economy of private international lawmakers).

16. Cf. JACK GOLDSMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD* 65–85 (2006) (describing "How Governments Rule the Net" in spite of claims about the erasure of states in cyberspace).

president and Congress. How can there be an authoritative command-giver (lawmaker) if we can't say who it is?<sup>17</sup>

Yet there seems a clear link between technological changes that increase the value of transborder human interactions (commercial and otherwise), the accretion of customs and the emergence of international institutions and instruments that provide order and stability to these interactions, and the claim that international law is something to be reckoned with. If we can agree that international law does some work in the contemporary world, even if we cannot agree about the specifics of that work or on an account as to why it works, then we must accept that there is some social practice that produces a set of commands to which some people in some instances believe they are subject.<sup>18</sup> There is, in other words, a kind of international-law sovereign, even if it doesn't look like an ancient prince, king, prelate, or emperor, much less the kinds of nation-state sovereigns that rose to power and influence in modern times.<sup>19</sup>

If one accepts that international law reflects a kind of sovereignty, it becomes easier to look into the causes of the current decline in international law's authority. A significant part of the general political upheaval in today's world entails important actors turning their back on international institutions that emerged in the years following World War II and expanded significantly after the collapse of the Soviet Union.<sup>20</sup> As the next section demonstrates, the waning of international law reflects the same forces that have upended politics and social solidarity within so many nation-states.

## II. THE KNOWLEDGE ECONOMY AND THE POLITICAL ECONOMY OF THE WORLD

To understand what has changed broadly in the world, one should start with the postindustrial transformation of the world economy. Technological innovation and the growing role of knowledge in economic relations have had significant political and social consequences. In this section, I provide a brief sketch of the transformation and its effects.

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17. Cf. Ryan Martinez Mitchell, *International Law as Project or System?*, 51 GEO. J. INT'L L. 623, 686–89 (2020) (exploring problem of authorship in international law).

18. Cf. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) (“Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”). Henkin overstated his claim, in part by ignoring the difference between convenience and compulsion. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 654–61, 672 (2000). The statement in text expresses a more defensible claim about international law's capacity to induce (rather than only reflect) behavior.

19. See Stephan, *supra* note 13, at 249–50, 255–58 (discussing domain of international law).

20. See generally Paul B. Stephan, *The New International Law — Legitimacy, Accountability, Authority, and Freedom in the New Global Order*, 70 U. COLO. L. REV. 1555 (1999) (describing expansion of international institutions in the 1990s).

What do we mean by the knowledge economy?<sup>21</sup> Does it even make sense to talk about a political economy of the production of knowledge? These questions seem fundamental to any appreciation of the contemporary world, even if many great thinkers have ducked them. Bertrand Russell famously claimed, “Work is of two kinds: first, altering the position of matter at or near the earth’s surface relatively to other such matter; second, telling other people to do so.”<sup>22</sup> Russell largely deprecated people who fell into the second class, regarding their position as an artificial product of arbitrary social relations, rather than as connected to the accumulation of valuable human and social capital.<sup>23</sup> In this respect his view aligned with that of Marx and Engels, who treated technological innovation, although fundamental to the development of society and history, as an exogenous force.<sup>24</sup>

What this perspective misses is the reality that technological innovation not only shapes, but is shaped by, social structures.<sup>25</sup> Innovation is a dynamic trial-and-error process, with the effectiveness of steps that build on trials depending heavily on the quality of information about the trials’ results. The quality of information turns on the level of investment made to acquire it. How much one invests in acquiring information further depends on that investment’s return. Structures that link investment return to successful uses of the knowledge gained likely lead to better investment decisions than those that do not. The rather messy natural experiment that the

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21. For one useful definition, consider Professor Unger’s: “At first approximation the knowledge economy is the accumulation of capital, technology, technology-relevant capabilities, and science in the conduct of productive activities.” ROBERTO MANGABEIRA UNGER, *THE KNOWLEDGE ECONOMY* 20 (2019). This inclusive conception seems right even if one does not accept the imaginative, indeed utopian, program that Unger proceeds to propose in this work.

22. Bertrand Russell, *In Praise of Idleness*, *HARPER’S MAG.*, Oct. 1932, <https://harpers.org/archive/1932/10/in-praise-of-idleness>.

23. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (describing the concept of social capital); Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 *V.A. L. REV.* 1357, 1358–60 (1984) (summarizing theory of human capital).

24. To be fair, Marx is far from clear. From the perspective of production, he refers to a “revolution” in the means or method of production but seems to view this innovation as “spontaneous” to the system of production itself, and moreover in opposition to the basic thesis of dialectical materialism. See, e.g., KARL MARX, *CAPITAL: CRITIQUE OF POLITICAL ECONOMY*, VOL. 1, at 411, 431, 438, 504 (Ben Bowkes trans., 1990). At times, however, he posits that practical production problems direct mathematical and natural scientific research, but, quite uncharacteristically, provides no factual or historical evidence. *Id.* at 436, 508, 616–17. Accordingly, his concrete analyses treat technological innovation as essentially independent of the system of production. So, it seems, does Unger. UNGER, *supra* note 21, at 42 (describing technological innovation in terms of cognitive psychology).

25. See Dani Rodrik, *Technology for All*, PROJECT SYNDICATE (Mar. 6, 2020), <https://www.project-syndicate.org/commentary/shaping-technological-innovation-to-serve-society-by-dani-rodrik-2020-03> (“The blind spot is the product of a certain kind of technological fetishism that views innovation as an exogenous force behaving according to its own rules. We tend to think we have little control over innovation. It is society that must adjust to technological change, instead of vice versa.”); see also UNGER, *supra* note 21, at 227–33 (regarding as imperative a “structural vision” that will lead to the creation of an inclusive reimagining of the knowledge economy).



world ran between 1928 (the beginning of the first Five Year Plan in the USSR) and 1987 (the first steps toward privatization in the same place) suggests rather strongly, although not definitively, that placing innovation under exclusive state-bureaucratic control stunts innovation relative to some mix of government and market management.<sup>26</sup> The present natural experiment entailed in the various responses to COVID-19 scourge at all levels of sovereignty further reminds us both how information-dependent effective management of a catastrophe is and how easy it is to drown valuable information in a sea of noise.

One need not believe that a simple linear relationship exists between incentive to invest and the production of useful knowledge to appreciate that incentives matter. Economists and specialists in the law of intellectual property are deeply divided over what mix of private- and public-law rules might best generate and disseminate useful knowledge.<sup>27</sup> The point is that only the complete exclusion of private incentives has a clear track record of suppressing innovation.

Another theoretical claim that our experience over the last fifty years seems to have validated is that knowledge, treated as an input in economic activity, has positive returns to scale.<sup>28</sup> Knowledge is costly to acquire, but not so expensive to reproduce. If one obtains valuable knowledge (understanding value as something that can be used in profitable activity, however a society defines profit), applying that knowledge across a broader market generates larger returns without correspondingly increased costs. One strategy to grow the size of markets is to roll back limits on transnational activities, both trade and investment. Without getting into the causation issue, one can confidently say that more globalization increases the value of knowledge, all other things being equal.

A glance around the world confirms this insight. Revolutions in communication and information management have created new technology sectors around the planet. We see this not only in the information-aggregation service companies such as Alibaba, Alphabet, Amazon, Facebook, Microsoft, and Tencent, but in biotechnology and a wide range of hardware companies, including those doing aerospace and defense. Knowledge-based technologies over the past few decades have transformed the shipping industry, one of the most ancient and commercially significant of human social practices. Indirect evidence of the importance of knowledge in the world economy is the growing cost of acquiring it, as reflecting in rising

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26. See generally John H. Moore, *Agency Costs, Technological Change, and Soviet Central Planning*, 24 J.L. & ECON. 189 (1981).

27. See, e.g., CHRISTOPHER JON SPRIGMAN & KAL RAUSTIALA, *THE KNOCK-OFF ECONOMY: HOW IMITATION SPARKS INNOVATION* (2012) (arguing against simple property-right model but accepting importance of incentives). Unger would see the tradeoff as a false choice that hides the need for a wholesale reimagining of methods of production. UNGER, *supra* note 21, at 129–35.

28. Paul M. Romer, *Increasing Returns and Long-Term Growth*, 94 J. POL. ECON. 1002 (1986) (paper contributed to Romer's Nobel in 2018).

tuition charges among the great international universities (and an emerging innovation lag in countries that restrict such rises).

None of this is novel. What adds political salience to these developments, however, is the observation that innovation has a geographic dimension. Knowledge transmission seems to benefit from physical proximity among knowledge workers. In spite of the revolution in remote access over the last forty years, knowledge seems to grow best where innovators have intensive personal contacts with each other.<sup>29</sup> Accordingly, the knowledge economy is also largely an urban-cluster economy.

Clustering implies labor mobility. Artificial distinctions such as nationality, race, gender, and the like have little if anything to do with a person's value within the knowledge economy. Accordingly, maximizing the gains from knowledge clusters mandates razing barriers based on anything other than one's knowledge (understood as qualities valued by the knowledge economy). Cosmopolitanism thus seems a natural accompaniment to these new trends in the global economy. The great global cities have become empires of talent, rather than homelands based on blood and soil.<sup>30</sup>

Were this the whole picture, the knowledge economy would seem an unmitigated blessing for humanity. But it's not. Sociologists more than economists have uncovered a dark side to urban clusters in the knowledge economy.<sup>31</sup> If increasing returns to knowledge (human capital) represents a demand-side story, then there is a parallel supply-side story about people with low levels of human capital. Knowledge workers are specialized, which means that they need others to provide services for their sustenance. Knowledge workers, like most people, prefer to obtain these services at low prices. Price-reducing competition thrives when nationality-based barriers fall, allowing low-human-capital service workers (nannies, cleaners, cab drivers, restaurant workers, etc.) from around the world to come to the global cities.

Knowledge workers have both the incentive and the power to appropriate a portion of the gains service workers obtain through their migration. Accordingly, knowledge workers surround themselves with low-skill service providers who find it easy to come to the new urban empires but face a

29. See Paul Krugman, *Increasing Returns and Economic Geography*, 99 J. POL. ECON. 483 (1991) (paper contributed to Krugman's Nobel in 2008). For legal research pointing in the same direction, see Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Value, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575 (1999).

30. Paul B. Stephan, *Foreign Relations and the City*, in CITIES, GEOPOLITICS, AND THE INTERNATIONAL LEGAL ORDER – REPORT AND THOUGHT PIECES 1 (2019), <https://drive.google.com/file/d/1yiRkITmWZWSRVzoHRHLE—G16ROYTGxU/view>. See also EDWARD GLAESER, TRIUMPH OF THE CITY (2011).

31. Especially prominent is the work of Saskia Sassen. See, e.g., SASKIA SASSEN, THE MOBILITY OF CAPITAL AND LABOR: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW (1988); LOSING CONTROL? SOVEREIGNTY IN THE AGE OF GLOBALIZATION (1996); SASKIA SASSEN, GUESTS AND ALIENS (2000); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

risk of expulsion. Low human capital means it's easy to switch out incumbents with newcomers, which makes knowledge workers indifferent to the service providers' insecurity. Implicit competition between incumbent service workers and their potential replacements lowers the cost to knowledge workers of employing them. As long as a sufficient number of service workers prefer insecure opportunities in urban clusters to a securely impoverished life back home, they will still come.<sup>32</sup> We observe this migration pattern today not just in the great global cities of the rich world, such as New York, London, San Jose, Singapore, and Tokyo, but also Bangalore, Mumbai, the Pearl River Delta, and Shanghai, all of which use restrictions (legal or otherwise) on residence status to lower the wages of low-human-capital internal migrants.

In one sense we have a win-win situation: migrants still can improve their lot and send remittances to their families, while knowledge workers can have their needs met at a lower cost. In another sense, however, the relationship between these groups presents a serious social problem. Low-human-capital migrants may be better off because of their move, but that doesn't mean that their portion of the gains generated by the knowledge economy is sustainable. Great inequality shapes their relations with knowledge workers, social and political as well as economic.<sup>33</sup> Most recently, they have borne a disproportionate share of the burden of the COVID-19 pandemic. Over the long term, this imbalance undermines social cohesion, trust, and ultimately the value of social capital.

Yet inequality is an inevitable byproduct of the knowledge economy. Its scaling capacity, absent social intervention, skews returns toward top producers.<sup>34</sup> As a result, increased inequality is a negative externality of the growth of knowledge-based production. Rectifying this inequality may not be impossible, but it is costly and especially difficult in a time of political conflict and declining social capital.

To summarize: the most significant global development of the last fifty years is the rise of the knowledge economy. This rise both reflects and promotes changes in the mode of production, especially efficiencies in the productive use of knowledge through clustering of knowledge workers. These changes have driven the rise of global cities that bring together a new

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32. Unlike the enslaved people that fueled the first wave of Western globalization in the seventeenth and eighteenth century, these immigrants have a kind of choice. Cf. PETER FRANKOPAN, *THE SILK ROADS: A NEW HISTORY OF THE WORLD* 241–42, 262–69 (2015) (discussing role of slave trade in the rise of East India Company, in particular in making the fortune of Elihu Yale).

33. See, e.g., PIKETTY, *supra* note 1 (documenting rise of inequality), as well as Saskia Sasen's research on inequality in global cities, *supra* note 31.

34. For the underlying theory, see Sherwin Rosen, *The Economics of Superstars*, 71 AM. ECON. REV. 845 (1981). For evidence confirming the theory, see ALAN B. KRUEGER, *ROCKONOMICS: A BACKSTAGE TOUR OF WHAT THE MUSIC INDUSTRY CAN TEACH US ABOUT ECONOMICS AND LIFE* 78–105 (2019).

*über* class of skilled, creative, highly compensated workers, characterized by high human capital, alongside an *unter* class that provides low skilled but essential services, characterized by the easy interchangeability and hence great vulnerability of the class members.<sup>35</sup> The cities have been transformed, with both wealth and inequality increasing along many dimensions.

One last part of the story remains to be told. The knowledge economy has displaced other modes of production in the rich world. Many people who have labored in the displaced sectors fall outside both the *über* and *unter* classes. They can be found wherever manufacturing has declined, in the United States and Western Europe especially but also in those parts of the former socialist world where the collapse of the old system left large portions of the population bereft and unable to benefit from a new emigration-based remittance economy.<sup>36</sup> These dispossessed workers and their families face barriers to acquiring the talents that the knowledge economy rewards, but have developed habits of consumption that make it hard to accept the sub-competitive returns that prevail in the new urban low-human-capital service sectors.<sup>37</sup> These people also have relatively low labor mobility. They find it hard to pick up stakes relative to the knowledge workers and service providers that migrate to the new global cities.<sup>38</sup>

Why these workers face obstacles to upgrading their human capital and have low labor mobility are difficult questions with widely divergent answers. For purposes of this paper, it suffices to assert that these conditions exist, that the people affected are driven away from urban concentrations due to the growing cost of living in those areas, and that those people are sufficiently numerous to have political salience in spaces where they

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35. I use the term “class” here in a colloquial sense, and do not mean to endorse the Marxist conception of class as, from a Hegelian perspective, a fundamental engine of historical development. One can identify a class as comprising elements with specified common characteristics without plugging that class into a particular theory of history. Cf. text accompanying *supra* note 8 (expressing dissatisfaction with Hegelian theory of history because of its nonfalsifiability).

36. Examples include the former German Democratic Republic as well as people in the United Kingdom north and east of London. Thanks to the ravages of the Great Leap Forward and the Cultural Revolution, China largely lacked such a class at the time of the Teng Hsiao-Ping reforms. It was exactly this group that in Russia suffered a shocking decline in life expectancy during the 1990s and in the twentieth century provides a pillar of support to Vladimir Putin. LYNCH, *supra* note 2, at 107.

37. To be clear, people who fall into this class are not necessarily dispossessed of concrete property rights. Rather, changes in the demand for their skills relative to their supply due to structural economic changes have impaired the value of their human capital.

38. See Tadeusz M. Rybczynski, *Factor Endowment and Relative Commodity Prices*, 22 *ECONOMICA* 336 (1955) (developing analytics of unbalanced growth due to diversion of inputs from incumbent sectors to new prospering sectors). The Rybczynski Theorem (more commonly known today as Dutch Disease, perhaps because of difficulties with Polish names) does not provide a definitive explanation for the rise of a dispossessed class in the global economy, in particular because it concentrates on a single-state economy, but it is a good place to start.

live, which are peripheral to the urban centers.<sup>39</sup> It is the emergence of these dispossessed people as a political force that, it seems, explains much of contemporary politics around globalization and disruption.<sup>40</sup>

At a very general level, one can make several observations about the triangular configuration of conflicts among these classes.<sup>41</sup> First, relations between the *über* class of knowledge workers and the *unter* class of low-human-capital service providers rest on both mutual dependence and stark contrasts of equality and opportunity. Members of both classes benefit from the knowledge economy, the *über* group directly and the *unter* through seizing opportunities that would not exist but for the knowledge economy. Yet the great disparity between the two groups remains and presents a grave threat to social cohesion, trust, and capital.

The situation seems a natural candidate for redistributive politics. It is noteworthy, however, that the rich-world political parties most focused on addressing redistribution between these classes—in particular social democrats in Europe, Labour in the United Kingdom—have faced catastrophic electoral losses in recent years, leading in France to the complete liquidation of the historic socialist party and only slightly less extreme outcomes in Greece and Italy. One can wish otherwise, but contemporary politics holds out little hope for accommodation of these tensions over the short run.<sup>42</sup>

39. See ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM (2020). Deaton won the 2015 Nobel. In that year he and Case published the paper that provided the impetus for the book. Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st century*, 112 PROC. NAT'L ACAD. SCI. 15078 (2015).

40. For the argument that economic explanations do a better job than cultural ones in accounting for the rise (as opposed to the existence) of national populism around the world, see Dani Rodrik, *Why Does Globalism Fuel Populism? Economics, Culture, and the Rise of Right-Wing Populism*, (Nat'l Bureau of Econ. Rsch., Working Paper No. 27526, 2020), [https://www.nber.org/system/files/working\\_papers/w27526/w27526.pdf](https://www.nber.org/system/files/working_papers/w27526/w27526.pdf).

41. I do not claim that across the planet, all workers fall into one of these three categories. There doubtlessly are people who work outside the knowledge economy who have not faced immiseration, at least not yet. The argument in text is that, as a generalization, a class of workers defined by their sense of grievance against the knowledge economy, based upon either an experience or a threat of lost prestige as well as material well-being, has grown alongside the knowledge economy and that members of that class increasingly are engaged in struggle against the political, economic, and social status quo.

It perhaps is worth noting that triangular conflict among distinct classes does not fit naturally into the principles of dialectical development on which Hegel rested his analysis and which Marx incorporated into his theory. See text accompanying *supra* note 8 (suggesting limitations in Hegelian methodology). Cf. A.P. Butenko, *Противоречия развития социализма как общественного строя* [*Contradictions in the Development of Socialism as a Social Structure*], ВОПРОСЫ ФИЛОСОФИИ [Questions of Philosophy] 21 (No. 10 1982) (attempting to reconcile Hegelian dialectic with objective features of Soviet development); Ernst Kux, *Contradictions in Soviet Socialism*, 33 PROB. COMMUNISM 1, 15–16 (Nov.–Dec. 1984) (analyzing significance of Butenko's work as an implied critique of the dialectic).

42. Economists have suggested one explanation for this difficulty. They offer substantial empirical evidence for a strong connection (not necessarily causal) between the level of public support for wealth redistribution and the degree of a country's cultural (typically ethnic) homoge-

Second, no political movement on the horizon seems to seek an alliance of the *unter* class and the dispossessed in opposition to the *über* class. People on the left have tried to unite those classes not against knowledge workers, but instead against plutocrats, hoping that those they seek to rally will see billionaires as a proxy for the forces that have given rise to their grievances. One obstacle to forming such an alliance, at least in the rich world, has been an uncompromising disapproval of the illiberal tendencies manifested by many members of the dispossessed. National populists, in contrast, have had considerable success in harnessing the inclination of people who fall into the dispossessed class to see the members of both the *über* and *unter* classes as their adversaries. Needless to say, illiberal tendencies are not a problem for these actors.<sup>43</sup>

Conflict between the dispossessed, on the one hand, and their perceived antagonists, on the other, has a geographical dimension. The dispossessed tend to live outside the great global cities, but cities and their peripheries can have other sovereignties in common, in particular substates or nation-states. Where they share sovereignties, they fight with their class adversaries. In the next section, I explain how these clashes manifest themselves as conflicts over sovereignty.

### III. DIFFERENT SOVEREIGNTIES IN THE WORLD: COOPERATION AND CONFLICT

As explained in this paper's first section, sovereignty is both multi-layered and contestable. To simplify, we can talk about the layers as international, national, subnational (substates of federal states), and local sovereignty, although this leaves out a lot of nuance and detail. Conflicts appear as struggles among these layers over authority to issue commands (make law) about particular subjects, people, or transactions. One way of linking the growing knowledge economy, discussed in the second section, to these conflicts is to show that the economic transformation has led to an increase in the salience of multiple layers of sovereignty and the intensity of conflict among them. In this section I use four examples—struggles over the principle of nondiscrimination based on sexual orientation; the law and policy governing immigration; the rules for international trade and investment; and the relationship between general international law and national constitutions—to illuminate inter-sovereignty conflicts.

These examples build on each other. I look first at an issue that seems divorced from economic interests—the principle of nondiscrimination based on sexual orientation—and about which international law has little if

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neity. ALBERTO ALESINA & EDWARD L. GLAESER, *FIGHTING POVERTY IN THE US AND EUROPE: A WORLD OF DIFFERENCE* (2004).

43. See Rodrik, *supra* note 25 (analyzing response of politicians to globalization shocks); Dani Rodrik, *Populism and the Economics of Globalization*, 1 J. INT'L BUS. POL'Y 12–33 (2018).

anything to say. Next, I look at a debate with significant economic consequences—free migration of labor—that also remains largely unregulated by international law, and thus does not directly implicate international law’s sovereignty. Third, I look at an issue that politically is closely tied to the immigration question—free trade and movement of capital across borders—where international law purports to have a lot to do. Finally, I review a longstanding problem in international law that has manifested itself more frequently lately, namely the power of a state to rely on its domestic constitutional law to avoid its international legal commitments. The progression of examples shows, for the first two, the intrastate geographical structure of political conflicts and, for the last two, how these fights, also based on intrastate conflicts, affect international law’s sovereign domain.

Consider first how my political-economy analysis maps onto a cultural, largely noneconomic issue, namely opposing discrimination based on sexual orientation. I do not mean to discount moral defenses of this nondiscrimination principle, but rather to focus attention on how economic interests affect how people view these moral claims. Knowledge workers value legal protection of sexual minorities because, among many other good reasons, discrimination against this group deters talented people from contributing to knowledge work. In contrast, for those who see themselves as losers in the new economy, the nondiscrimination principle seems doubly offensive, putting aside (but not ignoring) bad reasons of bigotry. Not only does this emerging principle reject tradition as an independent legitimizing ground (tradition being the refuge of people who have known better times), but it implies that the suffering and injustice borne by sexual minorities are greater than those imposed on people whom the knowledge economy has displaced. In the United States, the urban clusters bolstered by the knowledge economy tend to support the nondiscrimination principle, while subnational units (the States) that encompass those left behind are more likely to reject it.<sup>44</sup>

Locating international sovereignty in this controversy is something of a challenge, given ongoing conflicts over the sources and content of international law. There is no relevant treaty applicable to the United States, but only purported customs derived from supposed state practice. Instead, those who pursue nondiscrimination have had some success in persuading the Supreme Court that customary international law supports the principle.<sup>45</sup>

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44. See Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 150 (2005) (providing evidence of conflict).

45. See *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (citing international legal authority); cf. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) (using European Convention on Human Rights to bar criminal prosecution for homosexual activity); see also *Schalk and Kopf v. Austria*, 2010-IV Eur. Ct. H. R. 409 (reversing prior decisions to extend Convention’s principle of nondiscrimination to family life).

Others have questioned whether this is true or, even if true, relevant.<sup>46</sup> One can see this debate as not about whether to accept the sovereignty of international law so much as the instrumental use of international law in contests between State and local sovereignty, with the national government, the Supreme Court excepted, more as a spectator than participant.<sup>47</sup>

Consider next immigration, an issue that mixes economic interests with notions of human dignity. Contemporary conflict over immigration has the same geographical configuration as that over nondiscrimination based on sexual orientation. In the United States, cities tend to adopt measures to protect undocumented aliens, while States are more likely to stigmatize these persons and deny benefits to them.<sup>48</sup> The federal government has switched sides, with the Obama administration's attack on anti-immigrant State (rather than local) law giving way to the Trump administration's efforts to suppress urban resistance to its efforts to deter immigration.<sup>49</sup> International law comes in at times due to a treaty on obligations owed to

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46. *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting); Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59, 92–93 (reviewing debate).

47. See Charlotte Ku, William H. Henning, David P. Stewart & Paul F. Diehl, *Even Some International Law Is Local: Implementation of Treaties Through Subnational Mechanisms*, 60 VA. J. INT'L L. 105, 116–17 (2019) (instances of cities embracing human rights treaties as a means of pushing against gaps in State or federal law); cf. *Massachusetts v. U.S. Dep't of Health and Hum. Serv.*, 682 F.3d 1 (1st Cir. 2012) (upholding State authority and invalidating as *ultra vires* federal statute requiring discrimination). The Supreme Court's last word on marriage equality focused more on the Court's understanding of its particular role in vindicating individual rights and discerning community values. *United States v. Windsor*, 570 U.S. 744 (2013) (invalidating Defense of Marriage Act on due process grounds). Its most recent ruling interpreted existing legislation regulating workplace discrimination as incorporating a comprehensive nondiscrimination principle with respect to sex. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). This move treats adoption of the principle, albeit limited in scope to employment, as an exercise of national sovereignty.

48. *E.g.*, *City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020) (striking down federal funding limits on sanctuary cities); *New York v. U.S. Dep't. of Just.*, 951 F.3d 84 (2d Cir. 2020) (upholding federal limits on grants to sanctuary cities); *City of Los Angeles v. Barr*, 929 F.3d 1163 (9th Cir. 2019) (also upholding federal limits); *United States v. California*, 921 F.3d 865 (9th Cir. 2019) (upholding State laws protecting sanctuary cities), *cert. denied*, 141 S. Ct. 124 (2020); *City of Chicago v. Sessions*, 888 F.3d 272 (7th Cir. 2018) (upholding injunction against enforcement of funding limits); *City & County of San Francisco v. Trump*, 897 F.3d 1225 (9th Cir. 2018) (also upholding injunction against enforcement of funding limits); cf. Adriana Stephan, *The Rise of the Far Right: A Subregional Analysis of Front National Support in France* (2015) (Honors Thesis, New York University), <https://www.semanticscholar.org/paper/The-Rise-of-the-Far-Right-%3A-A-Subregional-Analysis-Stephan/3044c9a523e29e5f95c77a424baa8555711668f3> (observing positive correlation between anti-immigrant politics in France at the *department* level, and negative correlation at the *ville* sublevel).

49. *Compare In re United States*, 138 S. Ct. 443 (2017) (vacating injunction against termination of program pending consideration of reviewability under APA), *on remand*, *Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018) (enjoining change of policy based on violation of APA and plausible equal protection claim), *vacated and remanded*, 140 S. Ct. 1891 (2020) (requiring federal government to justify its reversal of prior administration's policy under APA but rejecting constitutional claim), *with Arizona v. United States*, 567 U.S. 387 (2012) (holding State regulation of undocumented immigrants preempted by federal law).



refugees, the specifics of which are debated.<sup>50</sup> But, as in the sexual-orientation discrimination conflict, international sovereignty intrudes only at the margins, if at all.

These examples, one entirely non-economic and the second combining issues bearing on fundamental human rights with hard-nosed economic conflict, frame consideration of a third example: namely, conflicts over international trade and investment. As discussed above, because of the benefits to the knowledge economy from scaling, increased mobility in factors of production and products favors that sector. Those who supply inputs to the knowledge economy, in particular knowledge workers, thus have a strong incentive to support liberal regimes governing trade and investment. Those who benefit from the knowledge economy have been mostly strong proponents of such a regime.

Again, those dispossessed by the knowledge economy supply a natural base for opposition to liberal rules governing international trade and investment. Largely their views on trade and investment converges with those on immigration. This opposition does not depend on a clear and direct connection between free trade and economic displacement. The empirical economics literature has attempted to distinguish between liberalized international trade and technological innovations as causes of worker injury, with the weight of the evidence assigning greater causal force to the latter.<sup>51</sup> This literature overlooks the role that technological innovation plays in increasing the demand for open borders. More to the point, people who have lost out to the knowledge economy do not require solid empirical evidence to sustain their grievances. It suffices that they can perceive a connection between international economic liberalization and their hard times—convincing proof of causation is unnecessary for carrying a grudge.

Thus, the rise of the knowledge economy has heightened the political volatility of international economic liberalization. It has increased both the demand for and strident opposition to lower domestic barriers to trade and investment. These forces manifest themselves throughout the rich world, with Brexit and the 2016 US presidential election providing only the most vivid examples.

Unlike the sexual-orientation nondiscrimination principle and immigration policy, however, international law dominates the world of international trade and investment. Significant multilateral, regional, and bilateral treaties apply, many accompanied by a compulsory dispute settlement apparatus. Investment dispute settlement often includes direct actions by inves-

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50. *E.g.*, *East Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1274–77 (9th Cir. 2020) (discussing UN Convention on Status of Refugees).

51. *E.g.*, David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (2020) (indicating that superstar firms do a better job both of exploiting factor mobility and knowledge development).

tors, avoiding state-to-state procedures. Some versions of these treaties have been around for centuries, but the post-Cold War period that produced a significant expansion of the knowledge economy also saw a qualitative transformation of the international trade and investment regime.<sup>52</sup>

Over the past few years, a broad effort to unwind that expansion has emerged. The closing down of the Appellate Body, the most court-like component of the World Trade Organization (WTO) Dispute Settlement Body (DSB), is the most recent, but not necessarily the most important, consequence.<sup>53</sup> The United Kingdom's renunciation of the jurisdiction of the Court of Justice of the European Union, the United States' walking away from the Transpacific Partnership and revising the North American Free Trade Agreement, and the eruption of unilateral trade sanctions by the United States all are emblematic. European states also have not been shy about acting unilaterally to attack aspects of international economic relations that they dislike.<sup>54</sup> The present response to the COVID-19 challenge has accelerated the process of renouncing international economic law as a constraint on state behavior as new barriers to trade in needed goods pop up.<sup>55</sup>

Open rejection of international economic law is one thing. More interesting, however, are efforts by states to exploit gaps and paradoxes in the existing rules to undermine the structure as a whole. These rules typically recognize that the bargained-for cooperation and constraint plays out against a background of uncertainty about the future. Accordingly, they leave states some leeway to opt out of commitments in the face of unexpected future conditions. These safety valves, however essential, create opportunities for structural challenges to international sovereignty. Subversion rather than confrontation becomes the means of shrinking the domain of international law.

A good example of this subversion is the use of a national security defense to claims of international trade law violations. Such a defense indisputably exists under WTO law, but a sharp debate has arisen over how it works. In essence, the controversy pits two profoundly different visions of

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52. See Stephan, *supra* note 13.

53. The closing down resulted from the refusal of the United States, starting in 2017, to agree to the appointment of new members of the Appellate Body, coupled with term-limits to incumbency that resulted in the Body's loss of a quorum. As early as the Clinton Administration, the United States had taken a similar approach to state-to-state dispute settlement under Chapter XX of the North American Free Trade Agreement. It refused to agree to a list of candidates to serve as chairs to dispute settlement panels, thus making panel formation impossible. Simon Lester Inu Manak & Andrej Arpas, *Access to Trade Justice: Fixing NAFTA's Flawed State-to-State Dispute Settlement Process*, 18 *WORLD TRADE REV.* 63, 66–69 (2019) (describing process).

54. See Ruth Mason, *The Transformation of International Tax*, 114 *AM. J. INT'L L.* 353, 386 (2020) (discussing the use of digital taxes to target U.S. technology firms); see generally Lilian V. Faulhaber, *Taxing Tech: The Future of Digital Taxation*, 39 *VA. TAX REV.* 145 (2019).

55. See *WTO and IMF Joint Statement on Trade and the COVID-19 Response*, WTO (Apr. 24, 2020), [https://www.wto.org/english/news\\_e/news20\\_e/igo\\_15apr20\\_e.pdf](https://www.wto.org/english/news_e/news20_e/igo_15apr20_e.pdf) (deploring barriers).

the WTO legal regime against each other. On one side, powerful states assert that they retain a general option to call off their legal obligations while remaining within the system. On the other side, international trade specialists argue that such a broad option cannot exist, because if it did the entire principle of rules-based management of international trade would collapse.

The devil, as always, is in the details. Article XXI(b) of the General Agreement on Tariffs and Trade (GATT), the international treaty that functions as a kind of constitution of international trade law, allows any state to disregard its obligations under the GATT system when:

taking any action *which it considers* necessary for the protection of its essential security interests . . . (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations . . . .<sup>56</sup>

The question that jumps out is the scope of the “it considers” modifier. What room does this language leave for adjudication of disputes by the WTO DSB, a system of state-to-state adjudication established in the 1994 Uruguay Round Agreements?<sup>57</sup>

At least three plausible interpretations present themselves. First, the DSB might address only the question whether a state does “consider” the otherwise unlawful measure necessary for its national security interests. Second, the Body might also decide whether, as an objective matter, the measure is connected in some way to military procurement, as determined by the DSB, or is taken in the context of an emergency in international relations, also as determined by the Body. Third, the Body might consider whether a state’s claim as to what measures it considers necessary is made in good faith, taking into account the Body’s independent assessment of necessity with respect to either procurement or a crisis.<sup>58</sup>

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56. General Agreement on Tariffs and Trade, art. XXI(b), Oct. 30, 1947, 55 U.N.T.S. 194, 266 (emphasis added). An identical provision, Article 73(b) of the Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS Agreement], governs disputes over enforcement of intellectual property rights.

57. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter Understanding on Dispute Settlement].

58. The two published cases from the WTO DSB seems to have come close to the last position. Panel Report, *Russia-Measures Concerning Traffic in Transit*, ¶ 7.132, WTO Doc. WT/DS512/R (adopted Apr. 26, 2019) (applying GATT); Panel Report, *Saudi Arabia-Measures Concerning the Protection of Intellectual Property Rights*, ¶ 7.250, WTO Doc. WT/DS567/R (adopted Jun. 16, 2020) (applying TRIPS Agreement). On reading a good-faith requirement into essential-security provisions in treaties generally, see William W. Burke-White & Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48 VA. J. INT’L L. 307, 376–81 (2008) (arguing for implicit good-faith limitation on self-judging national security clauses in investment treaties).

These three approaches represent points along a continuum running from easy invocation, meaning effortless unilateral avoidance of WTO obligations, all the way to rigorous scrutiny of a state's motivations and the real basis of its concerns, meaning third-party oversight having a dominant role in a wide range of trade disputes. A prior issue, however, is whether the "it considers" language permits any third-party review. A state might plausibly argue that when it invokes its essential security interests, all WTO supervisory jurisdiction disappears. Efforts by the DSB to argue otherwise then must be considered illegitimate. In technical language, one can argue that the "it considers" language denies the DSB the capacity definitively and authoritatively to determine its jurisdiction, what in Europe is known as *kompetenz kompetenz*.<sup>59</sup>

If this is correct, or more precisely if enough powerful states assert it is correct, the WTO Agreements have a problem. Without third-party enforcement, the WTO rules don't function as law so much as desiderata. Compliance with these rules seem to drop out of the system. Instead, more general and hard-to-pin-down qualities such as a state's tendency toward cooperativeness or disruption do all the work. Robust resort to a national-security exception, when this choice easily and perhaps automatically ousts formal dispute settlement, seems to nullify the GATT as a rules-based system that constrains states in the pursuit of a greater good.<sup>60</sup>

For the first twenty years of the WTO, no one sought to test the dispute settlement system by invoking Article XXI(b). Commentators have suggested that the logic of mutually assured destruction applied. The risk of creating an easy out from formal dispute settlement, and thus undermining the WTO Agreements as a legal system, deterred states from opening up the national security Pandora's box.<sup>61</sup> In the closing years of the 2010s, however, three states, in particular the heavyweight United States, defended their actions under that Article.<sup>62</sup> Two WTO panels have protected the DSB's jurisdiction against the *kompetenz kompetenz* argument, but the shut-

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59. See, e.g., RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION § 2.8 cmt. a (Prop. Final Draft, Apr. 24, 2019) (*kompetenz kompetenz* in arbitration); J.H.H. Weiler & Ulrich R. Halter, *The Autonomy of the Community Legal Order—Through the Looking Glass*, 37 HARV. INT'L L. J. 411, 413 (1996) (judicial *kompetenz kompetenz*).

60. The point in text is overstated. A significant literature demonstrates how informal rule enforcement (i.e., taking third party dispute settlement bodies and nonstate rule enforcers out of the equation) can, in appropriate contexts, work fine. Scott & Stephan, *supra* note 6, at 84–97, 106–08 (summarizing). The argument is not that the absence of formal enforcement makes law irrelevant (it doesn't); rather, this absence allows qualities not captured by legal rules—such as cooperativeness versus fly-specking, or predictability versus taste for disruption—to become more salient.

61. Tania Voon, *Can International Trade Law Recover? The Security Exception in WTO Law: Entering a New Era*, 113 AM. J. INT'L L. UNBOUND 45, 47–48 (2019).

62. Tania Voon, *World Trade Organization — General Agreement on Tariffs and Trade 1994 — Security Exception — Freedom of Transit — Russia's Accession Protocol*, 114 AM. J. INT'L L. 96, 102 (2020).

ting down of the Appellate Body has undermined the WTO's ability to take an authoritative position.<sup>63</sup>

If significant states, first and foremost the United States, persist in this approach, the WTO has few weapons it can deploy to defend itself. Hypothetically Europe and China could combine to perpetuate WTO rule enforcement.<sup>64</sup> Fractures both within Europe and between Europe and China, however, makes this unlikely as a long-term solution. Maintaining a system without the United States might not be worth it. A more likely outcome, one suspects, is surrender on the part of the WTO. One can imagine a new consensus that retains WTO dispute settlement in some form (perhaps even with a restoration of a reformed Appellate Body) but with the security exception of Article XXI(b) allowing any state who wishes to opt out of particular cases.<sup>65</sup>

The WTO national-security controversy illustrates this article's principal theme, the presence of multiple sovereignties and the fluidity of relations among the sovereignties that result. During the brief reign of the liberal-democratic consensus that followed the Cold War, the dream of international sovereignty in the greatly expanded global economy seemed close to reality. Nowhere has the rise of national populism within states, manifested especially in a growing divide within states between urban center and periphery, expressed itself more clearly than the assault on liberal governance of international trade and investment.

To summarize, international governance in support of free trade and international investment reinforces the knowledge economy. Support for these policies is greatest in urban knowledge centers; opposition is strongest in peripheral areas where the dispossessed live. The sharpening of these

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63. See *supra* note 53 and accompanying text. A panel or Appellate Body decision does not become a binding application of WTO law until a WTO Council adopts it. Each of the various WTO agreements has its own Council, all typically comprising the same national representatives. If a party objects to a panel report and the pathway to appeal is blocked due to the inability of the Appellate Body to function, the best reading of the treaty holds that adoption of the panel report requires a consensus of the Council, which does not exist if one of the parties disagrees with the panel. Understanding on Dispute Settlement art. 16(4). Thus, the United States has opposed any consideration by the DSB of cases that have arisen since the end of the Appellate Body's quorum. Statement by the United States, *United States-Countervailing Measures on Supercalendered Paper from Canada*, WTO Doc. WT/DS505/12 (Apr. 17, 2020), <https://geneva.usmission.gov/2020/03/05/statement-by-the-united-states-at-the-february-28-dsb-meeting-reconvened-on-march-5-2020>.

64. Evidence for China and the European Union working around the United States comes from the 2020 Multiparty Interim Appeal Arbitration Arrangement. The arrangement would create a second level of review of WTO panel decisions, although not a permanent appellate body. *Statement on a Mechanism for Developing, Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1/Add.12 (Apr. 30, 2020), [https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc\\_158731.pdf](https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158731.pdf). How this arrangement would mesh with the U.S. position noted above, *supra* note 63, remains to be seen.

65. This outcome, it must be said, would essentially restore international trade law to where it stood in 1994, before the Uruguay Round created the new dispute settlement mechanism. The old system, which allowed a state to reject decisions of arbitration panels, had considerable bite.

conflicts within states makes it harder to support the domain of international law in this area. The essential-interests ploy shows how states can slip the traces of this law, and thus shrink international sovereignty, without formally repudiating the system.

Consider my fourth example of shifts in sovereignty resulting from municipal (intrastate) conflicts. The “nationalist” part of national populism seems to entail hostility to all things international, not just regimes that directly sustain the knowledge economy. In line with this preference, over the last twelve years states have increasingly exploited a fundamental paradox of general international law. According to the traditional and still dominant conception of international law, states alone make international law, either directly or through their delegates, and must consent to the law made.<sup>66</sup> This premise raises the question of whether states face limits on what kinds of international law they can make. International lawyers sometimes invoke the idea of preemptory norms (*jus cogens*) to assert that the international system itself limits what states can do, implying a kind of hierarchy in favor of international sovereignty.<sup>67</sup> But the reverse also can be true: municipal (national) law may limit (render *ultra vires*) some commitments that states might try to make to the international system.<sup>68</sup>

This possibility, latent in international law and long discussed as a theoretical issue, has become state practice in recent years. An early instance of this trend came within the European Union. The UN Charter has its own supremacy clause. Article 25 obligates all members to carry out decisions of the Security Council, and Article 103 states: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”<sup>69</sup> These provisions seem to indicate, as clearly as legal language can, that a member of the UN may not rely on its other international legal obligations to resist compliance with the Security Council’s mandate. Accordingly, several states belonging to the European Union adopted measures to implement Security Council resolutions mandating the freezing of funds of persons determined by the Council to be supporters of terrorism.

Targets of these measures applied for relief to what was then the European Court of Justice (the Luxembourg Court). That court ruled in 2008 that

66. See Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 L. & CONTEMP. PROBS. 1 (Winter 2008).

67. Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331; Paul B. Stephan, *The Political Economy of Jus Cogens*, 44 VAND. J. TRANSNAT’L L. 1073, 1096–101 (2011) (functional analysis of *jus cogens* concept).

68. This position corresponds closely to what international lawyers considered to be *jus cogens* in the years before World War II, namely the minimal requirements of state sovereignty. Only after the War did international lawyers begin to invoke the *jus cogens* concept to limit, rather than to reinforce, state sovereignty. Stephan, *supra* note 67, at 1081–89.

69. U.N. Charter arts. 25, 103.

no member of the European Union could comply with the freeze resolutions unless and until the Security Council provided procedural safeguards to accompany its orders.<sup>70</sup> Many internationalists supported the decision, partly because the outcome expanded the rights of persons against governmental bodies and partly because the Luxembourg itself was a supranational body thought to be above crass national interests.<sup>71</sup> Yet the case opened the door to other, less cosmopolitan outcomes. These quickly materialized.

Also, in 2008, the Supreme Court of the United States made essentially the same jurisprudential move as the Luxembourg Court, but not for the benefit of personal liberty and human rights. It ruled that, as a matter of constitutional federalism and separation of powers, a State could not be barred from enforcing a capital sentence that the International Court of Justice had declared invalid except by a lawful federal mandate to implement that court's orders.<sup>72</sup> The Court's refusal to honor an international legal obligation, resting on structural constitutional law rather than on fundamental principles of individual rights, illustrated how judicially imposed constitutional resistance could undermine international sovereignty. Judgments to similar effect by the Supreme Court of the United Kingdom and the Italian Constitutional Court soon followed.<sup>73</sup> Then the Supreme Court of the Russian Federation ruled that compliance with an order of the European Court of Human Rights (Strasbourg Court) to compensate a taxpayer for abuses of tax procedural rules violated the constitutional duty to pay properly assessed taxes.<sup>74</sup> Most recently, the German Federal Constitutional Court

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70. Case C-402/05, *Kadi and Al Barakaat Int'l Found. v. Council and Comm'n*, 2008 E.C.R. I-6351. The Treaty of Lisbon, which went into force on December 1, 2009, changed the court's name to the present Court of Justice of the European Union.

71. *E.g.*, ANDRE NOLLKAEPPER, NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW (2011) (defending Luxembourg Court as giving priority to international rule of law over formal obedience to international treaty obligations); Andre Nollkaemper & Rosanne van Alebeek, *Netherlands*, in *DUELING FOR SUPREMACY-INTERNATIONAL LAW v. FUNDAMENTAL NATIONAL PRINCIPLES* 255 (Fulvio Maria Palombino ed., 2019) (demonstrating the reconciliation of competing international obligations within Dutch domestic legal order).

72. *Medellín v. Texas*, 552 U.S. 491 (2008). The Court ruled that no treaty joined by the United States or legislation adopted by Congress provided this mandate, and that the President's attempt to order Texas not to carry out the execution exceeded his lawful authority.

73. Corte cost., 22 ottobre 2014, n. 238, Foro it. 2015, I, 1152 (It.), translated in Alessandro Chechi, Introductory Note to Judgment No. 238-2014 (It. Const. Ct.), 54 Int'l Legal Materials 471 (2015) (parliamentary act implementing decision of International Court of Justice on jurisdictional immunity of states unconstitutionally violates individual right of access to justice); *R (on the application of Chester) v. Sec'y of State for Just.* [2013] UKSC 63 (Act of Parliament required to implement Strasbourg Court decision on voting rights of prisoners). More recently the Italian Constitutional Court has expressed a general willingness to reject EU law that transgresses the Italian Constitution. See Daniele Gallo, *Challenging EU Constitutional Law: The Italian Constitutional Court's new stance on direct effect and the preliminary reference procedure*, 25 Eur. L.J. 434 (2019) (describing cases).

74. Конституционный Суд Российской Федерации Постановление от 19 января 2017 г. № 1-П/[ОАО Neftyanaya Kompaniya Yukos v. Russia], *Sobranie Zakonodatel'stva Rossijskoi Federatsii* [SZ RF] [Russian Federation Collection of Legislation] 2017, No. 1-P, Item 180, [http://www.krsf.ru/en/Decision/Judgments/Documents/2017\\_January\\_19\\_1-P.pdf](http://www.krsf.ru/en/Decision/Judgments/Documents/2017_January_19_1-P.pdf) (official

(Karlsruhe Court) asserted a power it had first indicated it enjoyed back in 1974 to override EU law. It declared invalid as constitutionally *ultra vires* implementation within the German legal system of certain decisions of the European Central Bank that rested on treaty delegations to which Germany had consented.<sup>75</sup>

Not all these cases fit into a narrative based on populist politics. First, the actors are courts, which are presumably less subject to contemporary political pressure. Second, some of the disputes map onto cultural more than economic issues. The debate over capital punishment, for example, has roiled the United States long before the knowledge economy began its present rise, as has conflicts over prisoners' rights in the United Kingdom. But all the cases reflect a sense that the claims of international sovereignty represent not simply an imposition, but an affront to widely shared national values that international cosmopolitanism had disrespected. Italy's beef with the International Court of Justice and the European Union seems pregnant with resentment toward Germany, more based on current fights over austerity than over reparations for World War II; Russia's decision to defy the Strasbourg Court complements widespread revulsion against the (non-ethnically Russian) oligarchs who thrived during the 1990s; and Germany's decision reflects anxiety about the European Union undermining German commitments to fiscal prudence, which in turn rests on a deep historical phobia regarding hyperinflation. In all these instances, the national court decisions were consistent with, even if not procured by, deep political tides pushing back against international sovereignty that present political-economic trends have strengthened.

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English translation). The obligation of Russia to pay compensation (as distinguished from undoing its tax measures) as ordered by the Strasbourg Court rested directly on a treaty that it had joined. Convention for the Protection of Human Rights and Fundamental Freedoms art. 46(1), Nov. 4, 1950, E.T.S. No. 5, *as amended* by Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby art. 1, May 11, 1994, E.T.S. No. 155 (entered into force for the Russian Federation on November 1, 1998). *See also* Paul B. Stephan, *The Future of International Human Rights Law – Lessons from Russia*, 81 L. & CONTEMP. PROBS. 167, 177 (Winter 2018) (providing context). A July 2020 amendment to the Russian Constitution expressly ratifies the power of the Constitutional Court to invalidate international legal obligations.

75. Dr. W. v. Germany, BVerfG, [Federal Constitutional Court (second senate)] 2 BvR 859/15, 1651/15, 2006/15 & 980/16, May 5, 2020, [https://www.bundesverfassungsgericht.de/Shared-Docs/Entscheidungen/EN/2020/05/rs20200505\\_2bvr085915en.html](https://www.bundesverfassungsgericht.de/Shared-Docs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html) (ruling that Luxembourg Court judgment *Weiss and others* (Case 493/17), 2018 E.C.R. I-1000, violated German Fundamental Law). The Karlsruhe Court had first indicated that it would review legal acts of the European Union (then the European Communities) for conformity with Germany's Fundamental Law in *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, BVerfG [Federal Constitutional (second senate)], 2 BvL 52/71, 37 BVerfGE 271, May 29, 1974, <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588>. The 2020 decision, however, is the first to apply that power. *See* John Henry Dingfelder Stone, *Agreeing to Disagree: The Primacy Debate Between the German Federal Constitutional Court and the European Court of Justice*, 25 MINN. J. INT'L L. 127 (2016).



The point is not that these outcomes are manifestly correct or inevitable. International lawyers like to cite the principle that a state cannot use its domestic law to avoid an international obligation. Disagreement exists, however, about the force of the principle and the scope of its exceptions.<sup>76</sup> The problem in some sense is baked into any international legal regime. What is new is not the possibility of these arguments surfacing, but rather the growing willingness of important states to use the constitutionally *ultra vires* argument to walk away from international sovereignty. This trend is noteworthy in and of itself, regardless of how one regards the quality of the arguments.

To conclude, all four examples show how changes in the world economy have political and social repercussions in cities, substates, and nation-states. These repercussions have undermined willingness to submit to international sovereignty and fueled contests over which level of municipal sovereignty should reign. As these fights within nation-states have spread, international sovereignty has receded. In the next section I consider scenarios for the unfolding of these conflicts and their effect on law, politics, and society.

#### IV. SCENARIOS FOR SOVEREIGNTIES

So far, this paper has demonstrated that the growth of the knowledge economy has provoked conflicts through its contradictory effects on coherent groups. It somewhat casually describes these groups as an *über* class of direct beneficiaries of the knowledge economy, an *unter* class that benefits somewhat from migrating to urban concentrations to provide low-human-capital services to these beneficiaries, and a dispossessed class of people that lack the ability to benefit as workers within the knowledge economy and suffer from the stagnation of the incumbent sectors that the knowledge economy has displaced. Conflicts among these groups, as the previous section of this paper shows, has generated considerable instability within states and induced a rollback of international sovereignty along multiple dimensions.

How will all this play out? I consider three possible outcomes—doomsday, utopia, and muddling through. I sketch out each. Within each scenario I take account of how the COVID-19 pandemic might affect the result.

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76. Cf. Vienna Convention on the Law of Treaties art. 46(1), May 23, 1969, 1155 U.N.T.S. 331 (expression of consent that violates internal law not a ground for release from treaty obligation unless “that violation was manifest and concerned a rule of its internal law of fundamental importance”). The United States did not join the Vienna Convention because, among other reasons, the executive and the Senate Foreign Relations Committee could not agree what was “manifest” about constitutional limits on U.S. acceptance of international agreements. Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L. J. 307, 332 (2007).

### A. *Doomsday*

The remarkable success of the knowledge economy over the last fifty years does not guarantee its continued survival. The world learned in 1914–18 that successful economic globalization is insufficient prophylaxis against global cataclysm. That globalization now rests more on the production of knowledge, rather than of physical commodities, does not change the point: a successful world economy based on as well as promoting technological progress can still fall victim to those who lose out in the process. Knowledge works only as long as it is stored and transmitted. Sufficiently widespread turmoil in the world of things can undo that.

Doomsday could come by many paths. Escalating conflict among states—fueled by municipal instability and increasingly desperate political combat—might do terrible things, even if not resulting in outright war. A freezing of international trade and investment, along the lines of what the world experienced in 1930–34, would likely generate widespread unemployment and misery, deepen political unrest, and fuel political extremism. Liberal democratic politics based on delegation of authority and checks and balances would disappear alongside the social trust that makes such politics possible. Climate change caused by anthropogenic global warming might put the nail in the coffin.

The present COVID-19 pandemic might push us further along this path, although any firm conclusions are premature. At the time of this writing, we do not know how long or fatal the pandemic will be, much less its immediate economic, social, and political consequences. A few thoughts may be not crazy, however, even if offered with barrels of salt.

It seems likely that the burden of the pandemic will fall disproportionately on the least privileged. Whether this is due to poverty itself, the greater psychic costs of living as a marginalized minority, or a connection between preexisting health conditions and these factors, is in some sense beside the point. For any of these reasons, the disease may erode social trust even more than we have seen to date, reinforcing the present economic and political trends toward increased confrontation and disorder.

There is considerable evidence that catastrophe, if violent and widespread enough, promotes economic and social equality. Indeed, some believe that nothing else does.<sup>77</sup> One possibility, not necessarily a cheerful one, is that the disease, added to the other forces already discussed, will bring about enough collapse and disorder to disrupt the present hierarchies that divide us from each other. The plutocracy may give way to a republic of misery.

The downward spiral also may make it harder to address the challenges posed by climate change. Some have noted the short-term decline in

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77. See, e.g., WALTER SCHEIDEL, *THE GREAT LEVELER: VIOLENCE AND THE HISTORY OF INEQUALITY FROM THE STONE AGE TO THE TWENTY-FIRST CENTURY* (2018).

carbon emissions resulted from the shutdown of the economy and purport to see a pathway toward a solution to global warming. But ending economic activity as we have known it hardly seems a workable response to carbon in the atmosphere. Most observers have counted on technological innovation, either through changes in the way energy is produced and used or the development of new means to extract and store atmosphere carbon, as a predicate to any successful coping strategy. Shrinking social trust and growing economic desperation, however, do not necessarily provide the best foundations for technological leaps.<sup>78</sup>

Under doomsday conditions, then, the outlook for sovereignty, as for everything else, is grim. Fear, uncertainty, and chaos will drive social, political, and economic structures toward the minimal and local. We will see many Hobbesian Leviathans and little cooperation among them. All will be solitary, poor, nasty, brutish, and short.

### B. *Utopia*

Perhaps everyone will pull back from the brink, embrace the fruits of technological advance, and devise ways to share those fruits more equitably without turning off the engines of growth. People will recognize that both the promotion of the knowledge economy and the sharing of its fruits require international cooperation and will come to trust the institutions that give substance to that end.

As for COVID-19, perhaps scientists and public health experts will organize international cooperation over the heads of domestic political actors. Not only will they spur need-based distribution of protective gear and equipment, but, once available, of treatments and vaccines as well. Such a strategy probably would be optimal for amelioration of the economic consequences of the pandemic. If that cooperation were to be widely seen as contributing significantly to an acceptable resolution of the crisis, then some wind might go out of the sails of national populists. We will have to wait and see.

The difficulty with the utopian scenario is its implicit assumption that social capital and trust can accumulate as rapidly as it can be dispersed.<sup>79</sup> Charismatic political leaders do claim to have this capacity and assert that they can make their places and cultures great again. Some have enjoyed short-term success based on such claims. The historical and comparative evidence for quick turnarounds in declining societies, however, is not reassuring.

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78. The problem is complex. Existential threats can create a stronger incentive to adapt, but not all adaptations succeed. At some point the severity of an existential threat can deter searches for superior response. See Paul G. Mahoney & Chris W. Sanchirico, *Competing Norms and Social Evolution: Is the Fittest Norm Efficient?* 149 U. PA. L. REV. 2027 (2001).

79. One might recall that Thomas More titled his work *Ουτοπία*, or “no place.” How seriously to take More’s implication, *εὐτοπία*, or “good place”, is the heart of the matter.

### C. *Muddle*

Bracketed between an awful doomsday and an improbable utopia lies a range of possibilities, defined mostly by what they don't entail. The domestic and international settlements reached in the wake of the collapse of the Soviet Union seem unlikely to endure, but other arrangements remain possible. States may do more for the dispossessed without dispensing with the fruits of the knowledge economy. Out of the present upheavals in domestic politics might arise new arrangements, perhaps uninspiring but still sustainable.

Several conjectures provide a basis for imagining what these arrangements might entail. First, absent doomsday, the knowledge economy is not likely to go away. Governments may tax or regulate it, but it provides too many useful things and practices to too many people to make significant contraction possible. Virtual connecting during the COVID-19 quarantine is only the most recent manifestation of the knowledge economy's indispensable products. Perhaps some steps will be taken to reduce the inequality that this economy spurs, but, based on past practice, that seems unlikely.

Second, relations between knowledge workers and the dispossessed will remain fraught and politically salient. There is no reason to believe that the advances of the knowledge economy will not entail liquidating incumbents in a wide range of occupations. Self-driving vehicles promise to end truck driving as a livelihood; breakthroughs in artificial intelligence may put most radiologists out of work. There is no reason to believe that the pace of creative destruction will diminish.

Fraught relations need not mean a battle to the death, however. Some mixture of accommodation and exhaustion may ameliorate the conflicts between winners and losers in the knowledge economy. In some places social solidarity based on a widely shared culture might do the job. In other, more diverse societies it might take money. A general disillusionment with promises of new golden ages, or of returns to supposed better pasts, might set in.

A third conjecture is that all these changes will do greater damage to international institutions than domestic ones, not that the latter will go unscathed. Achieving new domestic arrangements will take time and be costly. It seems unlikely that states will wish to make complicated and controversial international commitments at the same time as they thrash out these local settlements.

There is a strand of liberal international relations theory that depicts the institution-building in the wake of World War II as a top-down effort to protect the shattered survivor states from the illiberal impulses of their local politics.<sup>80</sup> One might draw on this precedent to argue that, in the near fu-

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80. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

ture, states might submit to international discipline first, and then work out their domestic conflicts. The analogy fails, however, for at least two reasons. First, the post-war Europeans faced a threat in the form of Soviet hegemony that concentrated minds on the need for collective action. Second, and probably more importantly, the Europeans benefited from a hegemon in the form of the United States that offered both carrots (the Marshall Plan) and sticks (covert action against Soviet political allies in western Europe) to induce submission to this order.<sup>81</sup> Neither condition applies today.

What might this mean? Perhaps the European Union and the WTO both will shed much of their institutional presence even as states continue to maintain a kind of allegiance to the substantive principles of managed reduction of economic barriers. Formal international dispute settlement may migrate away from established courts and toward ad hoc arbitration.<sup>82</sup> International organizations might shy away from lawmaking and instead serve mostly as talking shops, somewhat on the model of the Organization of Economic Cooperation and Development. International financial cooperation faces an uncertain future, but the rise of muscular nationalism in this sphere need not destroy the system.<sup>83</sup>

What about COVID-19? The most likely outcome, at least for the short term, is greater inequality. Overcoming the pandemic will require, and demonstrate the benefits of, even greater knowledge. Whether the breakthrough comes through better detection and data-based social distancing (think of smart phone apps), better treatment methods (not injecting bleach, for example), or better prophylaxis (a vaccine or its equivalent), or all three, knowledge workers will not just bask in the glory but also harvest the benefits, material as well as spiritual. Add to this the great likelihood that the disease will do the most harm to the most vulnerable. In the Spanish Influenza, death and disruption fell disproportionately in the poorer portions of the planet.<sup>84</sup> We can only speculate why, but two plausible explanations are (1) that the conditions of poverty and alienation (poor diet, untreated health problems, addiction) increase susceptibility and (2) that societies tend to channel effective but costly healthcare responses toward the privileged. Both treatment and prophylaxis (vaccines) are likely to be distributed unequally, further exacerbating contemporary tensions. We have seen with the

81. See BENN STEIL, *THE MARSHALL PLAN: DAWN OF THE COLD WAR* 314–17 (2018) (connecting the two projects).

82. See Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

83. See PIERRE-HUGUES VERDIER, *GLOBAL BANKS ON TRIAL: U.S. PROSECUTIONS AND THE REMAKING OF INTERNATIONAL FINANCE* 179–80 (2020) (describing systemic benefits of national hegemon's regulatory interventions in international financial system).

84. See generally JOHN M. BARRY, *THE GREAT INFLUENZA: THE STORY OF THE DEADLIEST PANDEMIC IN HISTORY* 363–64 (2004) (presenting evidence that the largest number of fatalities occurred in societies not as prosperous as Europe and the Anglosphere); see also Lizzie Wade, *An Unequal Blow*, 368 SCIENCE 700 (2020) (reviewing bioarcheological evidence of greater mortality among marginalized groups in past pandemics).

AIDS pandemic how access to extremely effective but somewhat costly drug cocktails depends heavily on geography and social status. As to any prospective COVID-19 vaccine, the states most fully engaged in research and development have indicated a preference for first meeting the needs of their own subjects before wider distribution.<sup>85</sup>

Taking all of this into account, one can imagine a world where knowledge workers do better than ever, the *unter* class is restocked with new members but not uplifted, and the people in the dispossessed class face even greater stress and disappointment.<sup>86</sup> A short-term result might be a temporary drop in support for national populism, especially in the rich world, due to exhaustion more than reconciliation to the status quo. Just as possible, however, is even greater radicalization of national populists and more of their supporters showing up at the polls. Whether these divisions become a sufficiently existential threat to those making up the *über* class to induce a significant adjustment in their relations with everyone else, or instead produce mostly structural adjustments within that class (as we saw in the Soviet Union and see in China) remains the great imponderable of the age.

On the whole, the crisis to date has undermined rather than bolstered international governance. The most prominent technocratic international agency, the World Health Organization, has come under fire for its supposed slow response to the crisis and feckless loyalty to China. Its issuance of confusing and contradictory guidance hasn't helped its case. Cooperation over sharing medical supplies, such as protective gear and hospital equipment, largely has broken down, notwithstanding free-trade rules.<sup>87</sup> Borders have closed around the world, including within Europe's Schengen Zone. The information needed to be shared to combat the virus has been closely held for parochial reasons. At first blush and subject to learning by doing, the essentially global nature of the threat appears to have triggered more neighbor-begging than international cooperation.

Further shifts away from international sovereignty, however, do not mean the end of international cooperation or even the death of international law. In the aftermath of the COVID-19 pandemic, states conceivably might react to the current retrenchment by identifying new areas where greater

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85. E.g., Carolyn Y. Johnson & Eva Dou, *The Global Race for a Coronavirus Vaccine Could Lead to This Generation's Sputnik Moment*, WASH. POST (June 3, 2020), <https://www.washingtonpost.com/health/2020/06/03/coronavirus-vaccine-global-race> (describing nationalist moves by United States, China, and United Kingdom).

86. See Jack L. Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, THE ATLANTIC (Apr. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549> (pandemic has accelerated the acquisition of data resources by data-aggregating firms); Clara Hendrickson & Mark Muro, *The Avenue—Will COVID-19 Rebalance America's Uneven Economic Geography? Don't Bet On It.*, BROOKINGS (Apr. 13, 2020), <https://www.brookings.edu/blog/the-avenue/2020/04/13/will-covid-19-rearrange-americas-uneven-economic-geography-dont-bet-on-it>.

87. See *supra* note 55.

transparency and accountability to other states might generate greater benefits for broad domestic political interests. What we might expect is more piecemeal steps undertaken with greater caution, compared to where we were at the end of the twentieth century.

#### V. CONCLUSION

The general point is that the present crisis over sovereignty reflects deep economic trends that have reshaped the world economy, generated enormous wealth, raised hundreds of millions out of extreme poverty, but also reinforced inequality and prompted a widespread global backlash. The pandemic has made things worse. There is no good reason to believe that these clashes and the resulting instability will go away any time soon.

All these developments are likely to reduce the domain of international sovereignty in the near and mid-term without necessarily strengthening the authority of most nation-states. Even if we succeed in muddling through, our experience is likely to make us see the allocation of sovereignty in the emerging new world as more clearly contestable and contingent, rather than baked into historically inevitable and universally desirable governance structures. We may create new illusions in the days to come, but the inevitability of liberal democratic cosmopolitanism is not likely to be among them.