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Special Economic Zones in the United States: From Colonial Charters, to Foreign-Trade Zones, Toward USSEZs

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INTRODUCTION

Look at a globe or map of the world. What do you see? More likely than not, you see many various countries, each filled in with an even patch of color—blue, pink, or perhaps light green. Cartographers typically portray nation states that way. As a likely consequence, we typically think of them that way, too.

In truth, however, we do not live in a coloring-book world. Nation states are not smooth, even swathes of political authority. Instead, almost every country in the world includes one or more special jurisdictions—places where the country’s usual rules do not apply. In such zones, host

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governments offer lower taxes, streamlined services, lighter regulations, or other localized benefits. Sometimes, the host country goes still further, and allows the special jurisdiction considerable local autonomy in regulatory, economic, administrative, and legal matters.¹ Rather than showing India as a smooth swath of orange, therefore, cartographers might do better to show the country sprinkled with 202 operational special economic zones (SEZs),² coloring them gold to indicate where the government has eased up on its usual, somewhat more burdensome regulations.³

If conventional globes and maps show the world in the style of a coloring book, this Article shows it in the style of an impressionistic video, revealing the many degrees and variability, over time and over space, of political power. From this Olympian vista, we see the special jurisdictions adapting to their environment like an animal species, their population and distribution in flux. Recent centuries have seen zones flourish, die back, and then resurge. Special jurisdictions have grown more variegated and complex, too. They began as simple free ports. Now zones range in size and complexity, from a single factory exploiting a customs loophole, to entire

1. For an explanation of the relation between this four-fold set of attributes and the next generation of special zones, see John Fund, *Honduras Says Yes to LEAP Zones*, NAT'L REV. (July 28, 2014), <http://www.nationalreview.com/article/383899/honduras-says-yes-leap-zones-john-fund> (interview with Mark Klugmann).

2. See INDIAN MINISTRY OF COMMERCE AND INDUS., DEP'T OF COMMERCE, *List of Operational SEZs of India as on 02.09.2016* (2016), <http://www.sezindia.nic.in/writereaddata/pdf/ListofoperationalSEZs.pdf> (listing 202 operational SEZs as of Sept. 2, 2016). Or perhaps cartographers should show the 405 approved Indian SEZs. See INDIAN MINISTRY OF COMMERCE AND INDUS., DEP'T OF COMMERCE, *Formal Approvals Granted in the Board of Approvals After Coming into Force of SEZ Rules as on 07.09.2016* (2016), <http://www.sezindia.nic.in/writereaddata/pdf/ListofFormalapprovals.pdf> (listing 405 zones as of Sept. 7, 2016); INDIAN MINISTRY OF COMMERCE AND INDUS., DEP'T OF COMMERCE, *Special Economic Zones Established/Notified Prior to SEZ Act, 2005* (2009), <http://www.sezindia.nic.in/about-asi.asp> (listing nineteen zones). Many of those approved zones will likely not be developed, however.

3. See generally *Special Economic Zones Established/Notified Prior to SEZ Act, 2005*, *supra* note 2, at *Introduction*, <http://www.sezindia.nic.in/about-introduction.asp> (last visited Oct. 17, 2016).

cities housing millions and largely self-governed.

From the facts about SEZs disclosed in these pages, we win a more realistic perspective on the momentous changes currently sweeping through, to use an entirely positive phrasing, the governing *services industry*. For many centuries, nation states have monopolized the market, such as it was, for governing services. In this guise, at their best, they protected human rights, provided succor to those in need, and maintained the rule of law. Could nation states have done better? Certainly. The lulling effects of monopoly power do not encourage close attention to the demands of the citizen-consumers of governing services. That seems likely to change, however. Now, increasingly, nation states have begun to share their burdens with other entities, creating a species of competition between governing services. Special economic zones exemplify that trend.

True to the “Special” built into “SEZ,” these delegations of state power have occurred only in select locations and under certain conditions. Not every such experiment has worked, but many have, and the body politic has gradually converged on improved forms of self-organization. This quiet and gentle revolution has been transforming nation states from the inside out.

Recent decades have seen the advent of something like a Jurassic Age in the evolution of governing institutions.⁴ SEZs have spread across the globe, exploding in number, territory, and types. Though not without their risks, these large scale and long-term changes can, if understood and guided, redound to the benefit of all.

The United States, in particular, has a special role to play in showing the world how special jurisdictions can promote economic growth, human welfare, and individual freedom. The United States was born from a cluster of proto-

4. This term coheres with the analogy made below between dinosaur-like nation states and mammal-like SEZs, and describes an era that saw rapid evolution of the political world order. *See infra* Part I.B.

SEZs, has long dealt with the jurisdictional complications posed by various states and Indian reservations, and in recent years has created hundreds of flourishing Foreign Trade Zones (FTZs). Looking forward, this Article describes the next generation of special jurisdictions: United States SEZs (USSEZs).

* * *

This Article has three main parts. Part I describes SEZs in the world today. It begins by defining its subject—“SEZ” here stands for a wide variety of special jurisdictions where political authorities relax and delegate their power—and then reports on the burgeoning spread and growth of SEZs in recent decades. This results in some telling charts of the global boom in special jurisdictions.

Part II describes the complicated history of SEZs in the United States. The country can trace its roots back to the proto-SEZs that arose when Old World kings sold charters to entrepreneurs, who sought to profit from founding private settlements in the New World, such as Jamestown and New Amsterdam. The United States has long since moved away from its origins as a cluster of crude but daring special zones, of course. It still reveals its bold ancestry, though. Even today, the United States hosts a large and growing number of FTZs, which exempt select companies from federal customs duties and excise taxes, as well as state and local *ad valorem* (i.e., assessed on the value of property) taxes.

In offering those special exemptions, FTZs resemble a sort of SEZ popular elsewhere in the world. SEZs can do much more than offer mere tax breaks, though. Consider the special zones that spread from Hong Kong throughout China, lifting hundreds of millions out of poverty,⁵ or the huge

5. In support of the sole numerical claim made here, see Jin Wang, *The Economic Impact of Special Economic Zones: Evidence from Chinese Municipalities*, 101 J. DEV. ECON. 133, 137 fig.2 (2013) (showing only twenty-six prefectures or prefecture-level cities not comprising or within a Chinese SEZ). Combined, those non-SEZs areas hold about 40 million of China's over 1300 million residents (author's estimate, based on data on file with author).

private developments now taking root in Africa, Arabia, and India, which envision whole cities owned and governed by their residents. Granted, those examples show SEZs benefitting relatively underdeveloped areas. Can SEZs benefit a relatively wealthy country like the United States? Perhaps.

Consider that the United States does have relatively underdeveloped areas: vast stretches of federal lands that currently lay empty and largely fallow. If the United States wanted to develop those areas, the right kind of SEZs might help. To that end, Part III proposes United States SEZs (USSEZs).

USSEZs would arise on federally owned property—on a fraction of the many millions of acres that the Bureau of Land Management currently manages, for instance, or on decommissioned military land. The enabling grant of each USSEZ would limit federal law, easing the burden of certain regulations and taxes within the zone, and would completely preempt the mandatory effect of state laws therein. This freedom would allow streamlined forms of civil administration, attracting investment and spurring economic growth. The USSEZ program would generate revenue for the federal government, which it would share with states bordering zones, improving public finances, and extinguishing a long-burning conflict between the federal government and the states over access to public lands.⁶ Unlike FTZs, USSEZs would have residents. Because USSEZs could not claim governmental immunity to civil liability and because they would have to compete with other communities to attract and retain residents, the zones would have strong incentives to respect individual rights. Done right, USSEZs would combine the best foreign and domestic policies to create a new and quintessentially American kind

6. For a survey of that conflict, see Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148—The Transfer of Public Lands Act*, 2013 BYU L. REV. 1133, 1135–38.

of special jurisdiction.

I. SPECIAL ECONOMIC ZONES (SEZs) IN THE WORLD TODAY

Like them or not, SEZs have become a force to reckon with. This Part, by documenting the nature and extent of SEZs in the world today, shows why. SEZs have not always brought promised economic growth, and have sometimes raised allegations of abuse, but they have also radically improved the lives of hundreds of millions, as when Hong Kong set an example followed first in Shenzhen and thereafter throughout China.⁷ Part I.A. defines the terms of discussion, adopting the same broad definition of SEZ offered by the leading authorities, and explains why even power-hungry politicians sometimes see fit to relax their control in special jurisdictions. Part I.B. documents how SEZs have in recent decades exploded in number, size, and sophistication—a quiet revolution that has begun transforming government from the inside out.

A. *The “What?” and “Why?” of Special Economic Zones*

When it comes to definitions of “Special Economic Zone,” this Article follows the World Bank, which has called SEZs “demarcated geographic areas contained within a country’s national boundaries where the rules of business are different from those that prevail in the national territory.”⁸ The World Bank’s definition of SEZs continues by clarifying that the

7. See RONALD COASE & NING WANG, *HOW CHINA BECAME CAPITALIST* 59–63 (2012).

8. Thomas Farole & Gokhan Akinci, *Introduction* in WORLD BANK, *SPECIAL ECONOMIC ZONES: PROGRESS, EMERGING CHALLENGES, AND FUTURE DIRECTIONS* 3 (Thomas Farole & Gokhan Akinci eds., 2011), <http://documents.worldbank.org/curated/en/2011/01/14813550/special-economic-zones-progress-emerging-challenges-future-directions> (quoting Claude Baissac, *Brief History of SEZs and Overview of Policy Debates*, in SPECIAL ECONOMIC ZONES IN AFRICA: COMPARING PERFORMANCE AND LEARNING FROM GLOBAL EXPERIENCE 23 (Thomas Farole ed., 2011), <http://documents.worldbank.org/curated/en/2011/01/13887813/special-economic-zones-africa-comparing-performance-learning-global-experience> [hereinafter SPECIAL ECONOMIC ZONES IN AFRICA]).

different rules of business “principally deal with investment conditions, international trade and customs, taxation, and the regulatory environment; whereby the zone is given a business environment that is intended to be more liberal from a policy perspective and more effective from an administrative perspective than that of the national territory.”⁹ Through SEZs, in other words, a government creates exceptions to its own rules—select havens from the status quo that prevails elsewhere in the national territory.

SEZs come in many types. Again, the World Bank provides guidance, listing these species of SEZ in rough order of increasing size and scope of operations:

1. Free trade zones, ranging in size from single factories to larger areas;
2. Export processing zones (EPZs), again ranging from single factories to larger areas; and
3. Hybrid EPZ freeports or wide-area SEZs, typically large and sometimes city-sized.¹⁰

A free trade zone might offer nothing more than duty-free warehousing of goods in transit, for instance, while a wide-area SEZ might provide an alternative governance regime for an entire metropolitan area. In this taxonomy, the FTZs so popular in the United States most resemble something between free trade zones and EPZs.¹¹ The USSEZs proposed later in this Article, in contrast, would introduce a more advanced kind of special jurisdiction to the American market, one covering a wider area and range of services.¹²

What motivates governments to moderate taxes and regulations within SEZs? Well-reasoned arguments by

9. Baissac, SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8.

10. Farole & Akinci, *supra* note 8, at 2 tbl.1.1. The terminology used here also borrows from Baissac, SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8, at 27–30.

11. *See infra* Part II.C.

12. *See infra* Part III.

proponents of liberalization and concern for residents' welfare perhaps drive some such reforms. One hopes so. But it seems more likely—indeed, it approaches a tautology—that politicians willingly relax their power within SEZs as a means for winning still greater power. They might for instance see SEZs as a way to encourage economic growth and, thus, potential rents. These prospective gains might come from taxes, as would follow if SEZs helped a country back down the Laffer curve, moving it toward lower net taxes, but higher net government revenue.¹³ Or the political rents of SEZ-induced growth might come through less formalized channels, such as in bribery or graft.¹⁴ A successful SEZ might generate jobs and increase local wealth, too, creating happy—or at least not riotously malcontented—residents, citizens, and (crucially, in democracies) voters.

In addition to easing tax and regulatory burdens within SEZs, politicians have also increasingly seen fit to delegate the development and operation of SEZs to private parties.¹⁵ Again, this likely reflects not simple ideological preferences but a hard-nosed recognition of what works. The World Bank Group's review of the data "suggests that private zones are less expensive to develop and operate than their public counterparts (from the perspective of the host country), and yield better economic results."¹⁶

13. See *The Laffer Curve*, THE LAFFER CTR. AT THE PAC. RESEARCH INST., <http://www.laffercenter.com/the-laffer-center-2/the-laffer-curve> (last visited Oct. 1, 2016).

14. See Lotta Moberg, *The Political Economy of Special Economic Zones*, 11 J. INSTITUTIONAL ECON. 167, 176–77 (2015) (applying a public choice analysis to special economic zones, with particular emphasis on forces that might make them malfunction).

15. Thomas Farole, *Introduction to SPECIAL ECONOMIC ZONES IN AFRICA*, *supra* note 8, at 18 ("One notable trend in worldwide SEZ development over the past 15 years has been the growing importance of zones that are privately owned, developed, or operated."). See also Baissac, *SPECIAL ECONOMIC ZONES IN AFRICA*, *supra* note 8, at 37–39 (discussing historical development of privately run SEZs).

16. FOREIGN INV. ADVISORY SERV., WORLD BANK GRP., *SPECIAL ECONOMIC ZONES: PERFORMANCE, LESSONS LEARNED, AND IMPLICATIONS FOR ZONE*

The seeming paradox of political actors choosing to decrease state power dissipates under the unstinting glare of public choice theory. The state can act only through individuals, be they politicians, bureaucrats, or other government officials. Here as elsewhere, the interests of principal and agent may diverge, leading the latter to act contrary to the interests of the former.

Under certain conditions, individuals serving the state can pursue policies that redound to their benefit while ultimately decreasing the size and power of the state itself. Thus, for instance, might a politician launch an SEZ program that gives her good press while ultimately eroding the state's control over the economy.¹⁷ The rest of us should not necessarily condemn that effect. The state itself wins such justification as it can (which on close scrutiny, is not a lot) only by dint of how well it serves those under its sway—its citizens and residents, at the very least, but also, arguably, the world at large.¹⁸ If SEZs can do a better job of promoting economic growth, human welfare, and personal freedom than the nation state does, we should promote and indeed celebrate that effect.¹⁹

Whatever their motives and means, politicians across many eras and in many countries have found good reason to set aside special areas governed by special rules. SEZs have proven especially popular in recent decades, growing in number, size, and sophistication. The next section surveys this remarkable transformation in governing services.

DEVELOPMENT 4 (2008), <http://documents.worldbank.org/curated/en/2008/04/9915888/special-economic-zone-performance-lessons-learned-implication-zone-development>.

17. See Moberg, *supra* note 14, at 176–77.

18. Granted, fascists would disagree, instead arguing that the State's power justifies itself. As civilized people (and victors over fascism), however, let us pass over that view as a historical aberration and artifact.

19. The USSEZ program described below, *infra* Part III, does just that.

B. *Spread and Growth of SEZs Worldwide*

Though not special economic zones in the modern sense, zones governed by special rules have existed almost as long as government itself. These zones have co-evolved with the nation state, usually cooperating, but sometimes competing with it. At least in terms of military power, the nation state today has become the dominant form of international institution. Special jurisdictions never died out, though, and have resurged. This section offers a quick history of the SEZs now quietly transforming nations states from the bottom up and inside-out.

The antecedents of modern SEZs date from 166 B.C.E., when Roman authorities made Delios a free port, exempting traders from the usual tolls in order to stimulate local commerce.²⁰ The Hanseatic League, a confederation of trading cities chartered and loosely governed by the Holy Roman Empire, effectively ruled northern Europe from around 1200 to 1600 C.E., hunting down pirates and defeating kings in battle.²¹ Early types of special economic zones next appeared among many various and far-flung European colonial outposts, formed as quasi-sovereign sub-governments and typically granted unique trading privileges. Examples include Macau (founded in 1557),²² Hong Kong (1842),²³ and the over eighty treaty ports, established throughout China from the mid-1800s, through which it leased territory and granted broad concessions to Britain, France, Germany, Russia, and other countries.²⁴

20. Baissac, SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8, at 31.

21. *See generally* HELEN ZIMMERN, THE HANSA TOWNS (Kraus Reprint Co., 1969).

22. ERNEST S. DODGE, ISLANDS AND EMPIRES: WESTERN IMPACT ON THE PACIFIC AND EAST ASIA 226 (1976).

23. FRANK WELSH, A BORROWED PLACE: THE HISTORY OF HONG KONG 1 (1993).

24. JOHN KING FAIRBANK & MERLE GOLDMAN, CHINA: A NEW HISTORY 201–03 (2d ed. 2006) (discussing the many various treaty ports, first five and later over eighty, that China established for countries from across the globe). The largely standardized terms of these treaties included low tariffs. *Id.* at 203. *See generally*

(Through that era, China provided something like a hothouse environment for SEZs, a role it took up again in the late twentieth century.)

Some antediluvian ancestors of modern SEZs arose from the charters that royal authorities in Europe granted to private parties in the New World. These charters encouraged the entrepreneurial settlements, Jamestown, New Amsterdam, and the Massachusetts Bay Colony among them, that developed first into colonies, then into fledgling countries, and finally into the United States.²⁵ A patriot might well boast that the United States arose from the boldest SEZs the world has ever seen. Regardless of the merits of that claim, the United States (like China) has a long and complicated history with SEZs.

After the Enlightenment-era explosion of special jurisdictions, the nation state began its rise, crushing the proto-SEZs much as dinosaurs crushed the Therapsid reptiles.²⁶ From the Napoleonic Empire, through two world wars, to the collapse of the communist regimes, the nation state ruled the globe. Special jurisdictions got pushed to the margins. They reached their nadir somewhere around 1900, when the world had only about eleven free ports.²⁷ Functionally, these differed little from the free port of ancient Delios. SEZs seemed headed for extinction.

What brought SEZs back from the brink? The United States should get some of the credit. Its FTZ program, launched in 1934, offered special exemptions from federal

EN-SAI TAI, *TREATY PORTS IN CHINA: A STUDY IN DIPLOMACY* (1918).

25. *See infra* Part II.A.

26. Therapsid reptiles—a.k.a. “mammal-like” reptiles—eventually bounced back, evolving into the mammals that, as represented in human form, now rule the Earth. *See*, John Nobel Wilford, *Standing There at a Turning Point in Evolution; Is a Reptile on the Verge of Being a Mammal*, N.Y. TIMES, Nov. 2, 1982, at C1 (concluding that therapsids “may have lost a major battle for survival to the dinosaurs but through a clever guerrilla action, at night when the dinosaurs weren’t looking, managed to win the war”).

27. Baissac, *SPECIAL ECONOMIC ZONES IN AFRICA*, *supra* note 8, at 32 (citing seven free trade zones in Europe and four in Asia).

excise taxes and duties. This proved convenient for transshippers and others who, legally speaking, wanted to be within the jurisdiction of the United States while remaining outside its customs territory.²⁸ As documented below, FTZs have thrived and spread.²⁹ The United States boosted SEZs again in 1948, when Operation Bootstrap made Puerto Rico a free trade zone for U.S. companies engaged not just in trade, the traditional focus of FTZs, but also production.³⁰

Despite those precedents, most commentators date the modern SEZ movement from the industrial free zone established in Shannon, Ireland, in 1959.³¹ That early example certainly did seem to set off a wave of similar innovations.³² Since about the mid-1980s, “the number of newly established zones has grown rapidly in almost all regions, with dramatic growth in developing countries.”³³ Today’s most populous nation state, China, proved especially prolific in generating SEZs, going from zero in 1980 to at least 295 today.³⁴ As the following charts attest, about 75% of the world’s countries now host SEZs, which easily number over four thousand, and on some counts, nearly ten

28. *Id.* at 32–33.

29. *See infra* Part II.C.

30. Baissac, SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8, at 32–33.

31. *See, e.g.*, Farole & Akinci, *supra* note 8, at 3. The authors admit, “[h]owever, a form of industrial free zone was established in Puerto Rico as early as 1948.” *Id.* at 19 n.1 (internal citation omitted). For reasons difficult to discern, Farole and Akinci do not evidently consider FTZs in their survey of special economic zones.

32. Ironically or not, the European Union’s ongoing campaign to quash jurisdictional competition among its member countries will soon curtail the benefits offered by the Shannon Free Zone. WILLEMIJN DE JONG, LIBRARY OF THE EUROPEAN PARLIAMENT, ESTABLISHING FREE ZONES FOR REGIONAL DEVELOPMENT 3 (2013), [http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130481/LDM_BRI\(2013\)130481_REV1_EN.pdf](http://www.europarl.europa.eu/RegData/bibliotheque/briefing/2013/130481/LDM_BRI(2013)130481_REV1_EN.pdf).

33. Farole & Akinci, *supra* note 8, at 5.

34. Wang, *supra* note 5, at 136, 138 (counting 295 prefecture/municipal level Chinese SEZs). That figure alone arguably underrepresents the total, given the nested structure of Chinese SEZs; Wang also counts 222 state-level and 1346 province-level zones embedded within those 295 prefecture/municipal zones. *Id.* at 136.

thousand.

Figure 1: Trend in Percentage of Countries with SEZs or Similar Zones³⁵

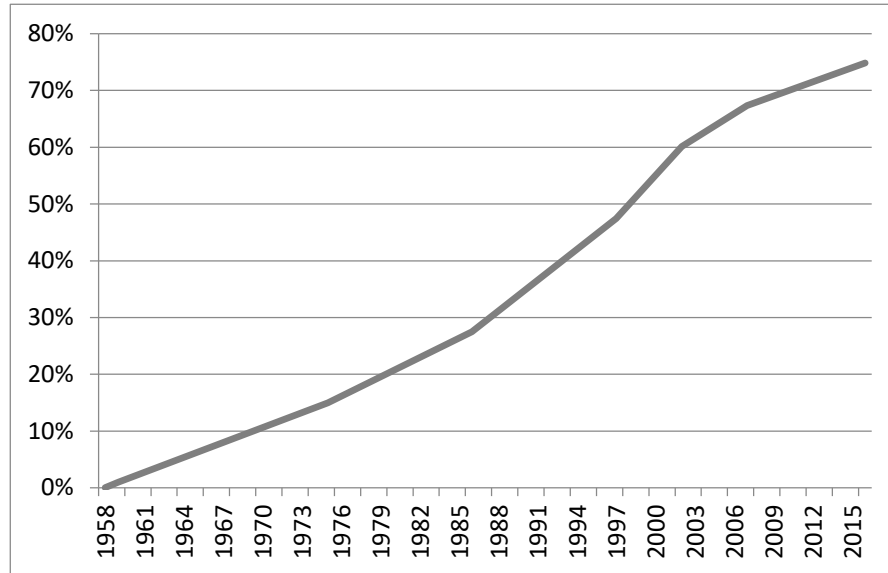


Figure 1 needs little explaining, though it perhaps bears observing that the curve follows the same sort of S-shape that tracks the population of a new species as it expands into new environments. Here as there, the curve naturally flattens out as it nears 100%. Some nation states may never host SEZs; few species can inhabit every possible niche.

35. Source material on file with author.

Figure 2: Trends in Number of SEZs and Similar Zones in the World³⁶

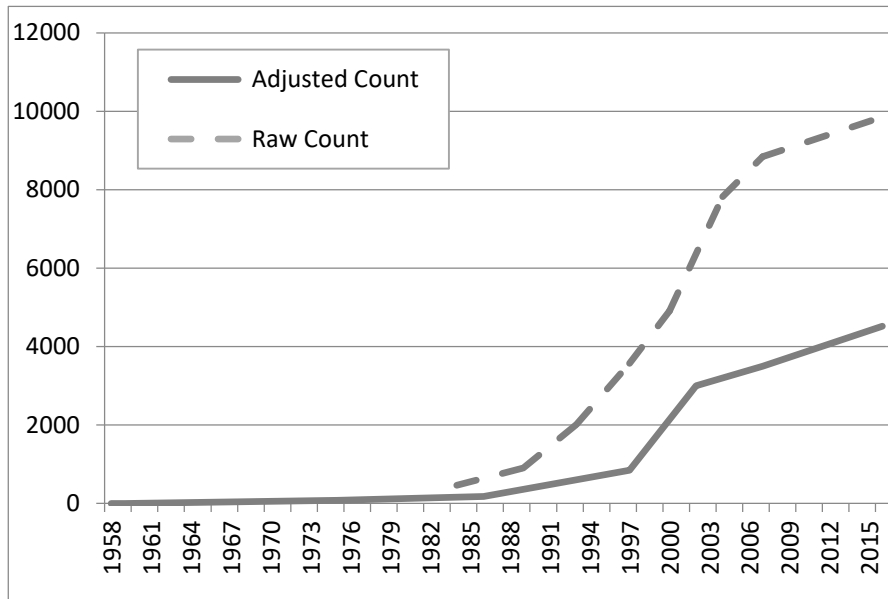


Figure 2 shows two curves, one tracking a Raw Count of SEZs and the other an Adjusted Count. The Raw Count covers all the zones enumerated by the International Labour Organization (ILO) in its 2007 census of export processing and similar zones, a standard database in the field.³⁷ Though the ILO census included Bangladeshi single-factory zones, it evidently excluded them from its total count of SEZs.³⁸ The reasons for that special treatment and the exact calculations used remain unclear.³⁹ Perhaps the multitude of

36. Source material on file with author.

37. Jean-Pierre Singa Boyenge, *ILO Database on Export Processing Zones (Revised) 2* (Int'l Labour Org. Sectoral Activities Programme, Working Paper No. 251, 2007), http://www.ilo.org/public/libdoc/ilo/2007/107B09_80_engl.pdf.

38. The ILO evidently excludes these micro-SEZs from its summary estimate of 3500 "EPZs or similar types of zones," because it separately numbers the Bangladeshi zones at 5341. *Id.* at 1, 8.

39. The ILO offers an aside about "bonded warehouses in Bangladesh throughout the country under EPZ-like conditions without being in a zone," but does not clarify why that disqualifies them from the overall zone census count.

Bangladeshi single-factory zones threatened to swamp other observations of more interest to the ILO, or perhaps the zones simply seemed too inconsequential to matter. A biologist taking a census of animals would not want to neglect the smallest and simplest, however; indeed, those often provide the most interesting cases. Or perhaps as mere bonded warehouses, the Bangladeshi single-factory zones did not seem special enough to qualify as SEZs. A bonded warehouse represents a genuine exception to a country's generally prevailing customs laws, however: a zone (albeit small) where merchandise can be stored, manipulated, or transformed through manufacturing operations without payment of otherwise applicable duties.⁴⁰ Figure 2 thus offers both a Raw Count of all zones, from smallest and simplest to largest and most complex, and, out of respect for the ILO's approach, an Adjusted Count, which represents the Raw Count minus bonded warehouse zones.

While an academic might, and indeed should, quibble over the exact numbers tracked in these charts, readers can confidently regard them as fair summaries of the large scale and long-term structural changes sweeping through nation states across the globe. The percentage of countries hosting SEZs and number of SEZs worldwide will almost certainly increase in coming years too. Afghanistan recently announced plans to convert eight air bases formerly used by the United States' military forces into SEZs, for example.⁴¹ Botswana, too, has taken steps to host its first SEZs.⁴² Still

Id. at 1. A further clue perhaps lies in the database's reference to unnumbered maquilas in Honduras and maquiladoras in Mexico, *id.* at 13, both flagged as zones "considered as export processing zones or bonded warehouses." *Id.* at 24 nn.26–27 (containing same text in both). Perhaps the ILO census undercounts those zones too.

40. See, e.g., U.S. CUSTOMS AND BORDER PROTECTION, BONDED WAREHOUSE (2010), https://www.cbp.gov/sites/default/files/documents/bonded_20wh2_2.pdf (describing bonded warehouses).

41. Lynne O'Donnell, *Afghan Airfields Built for War Seen as Economic Hubs*, ASSOCIATED PRESS (Aug. 31, 2015), <http://bigstory.ap.org/article/edb04e066868499da6f91ccf7ba67799/afghan-airfields-built-war-seen-economic-hubs>.

42. Calviniah Kgautlhe, *Botswana: Special Economic Zones to Strengthen*

other countries that may soon have SEZs include Ethiopia,⁴³ Libya,⁴⁴ and Papua New Guinea.⁴⁵

A trend toward increasingly larger and more sophisticated SEZs, though less readily quantified, also bears noting. Zones have in recent years begun shifting away from encouraging international trade with relatively simple financial incentives—exemptions from customs obligations, typically—toward “multiuse developments encompassing industrial, commercial, residential, and even tourism activities.”⁴⁶ Consider King Abdullah Economic City (KAEC), a development being built and operated by private parties under a charter from Saudi Arabia that allows the metropolitan area to operate under a form of government especially designed to encourage growth.⁴⁷ When finished, KAEC will constitute an entirely new city the size of Washington, D.C., with a population of two million.⁴⁸

Developers plan to build several city-sized special jurisdictions across the world in coming years, including:

Export Earnings, BOTSWANA DAILY NEWS (Aug. 2, 2015), <http://allafrica.com/stories/201508030140.html> (reporting on bill to introduce SEZs to Botswana).

43. *Extensive Development of Industrial Parks*, ETHIOPIAN INV. COMM'N, <http://www.investethiopia.gov.et/investment-opportunities/strategic-sectors/industry-zone-development> (last visited Sept. 13, 2016).

44. *Special Economic Zones North West Suez Canal*, COMESA REG'L INV. AGENCY, *Special Economic Zones North West Suez Canal*, <http://www.comesaria.org/opportunities/special-economic-zones-north-west-suez-canal.155.250.html> (last visited Sept. 13, 2016).

45. *Papua New Guinea Special Economic Zone*, INT'L FIN. CORP., WORLD BANK GRP., http://www.ifc.org/wps/wcm/connect/region_ext_content/regions/east+asia+and+the+pacific/countries/png+special+economic+zone (last visited Sept. 13, 2016).

46. Farole & Akinci, *supra* note 8, at 6.

47. *About*, KING ABDULLAH ECONOMIC CITY, <http://www.kaec.net/about/> (last visited Sep. 13, 2016) (explaining that the city offers “privileged regulations, including: 100% foreign ownership for individuals and organizations, seaport and bonded zone regulations, and ease of access to permits and licenses related to residing, working, operating businesses, and owning and managing properties”).

48. Stanford Graduate School of Business, *Fahd Al-Rasheed: Building a New City from the Ground Up*, YOUTUBE (May 12, 2015), <https://www.youtube.com/watch?v=epZ37AdRnsE#t=2260>.

Cyberjaya, Malaysia;
Iskandar Malaysia, Malaysia;
Jazan Economic City, Saudi Arabia;
King Abdullah Economic City, Saudi Arabia;
Konza Technology City (KTC), Kenya;
Masdar City, Abu Dhabi;
Songdo IBD, South Korea; and
Yachay Knowledge City, Ecuador.⁴⁹

If things go according to plan, by the year 2035, those cities will cover over 2612 square kilometers, have cost over \$300 billion to build, and have close to 6 million residents.⁵⁰

At the same time that they have begun to resemble conventional cities in terms of scale, population, and services, SEZs have tended to become privately owned, developed, and operated.⁵¹ Marking the farthest limit of that trend, Honduras has created a framework for special jurisdictions called Zonas de Empleo y Desarrollo Económico (Spanish for “Zones of Employment and Economic Development” and designated by the acronym, ZEDE), in which private parties under government supervision will provide education, infrastructure, security, courts, and other services formerly provided (or not) by Honduras.⁵² The more that SEZs look like traditional political institutions, in other words, the more they rely on private rights.

Does that pose a paradox? Not at all; the trends work in concert.⁵³ Extant polities, sheltered from competition and saddled with histories of financial mismanagement, evidently lack the incentives and capital required to create

49. ADAM CUTTS, NEW CITIES FOUND., *NEW CITIES AND CONCEPTS OF VALUE: PLANNING, BUILDING, AND RESPONDING TO NEW URBAN REALITIES* 25, 28, 31–32, 34, 38, 41 (2016), <http://bit.ly/Cityquest2015>. This list represents all the New Cities represented in the study that were designed as special jurisdictions. It does not include new cities that merely host special jurisdictions.

50. *See id.*

51. Farole & Akinci, *supra* note 8, at 7.

52. Tom W. Bell, *Startup City Redux*, FOUND. FOR ECON. EDUC. 1–4 (June 27, 2013), <http://fee.org/articles/startup-city-redux/> (offering background and summary of ZEDE legislation).

53. *See* FOREIGN INV. ADVISORY SERV., WORLD BANK GRP., *supra* note 16, at 3.

large, new, world-class communities from scratch. For that, public institutions have sought help from the private sector, giving birth to an entire industry devoted to making money by making cities.

Practice has demonstrated what theory would predict: politicized voting processes do not work as well as mutually consensual, profit-seeking ones when it comes to providing services. Few people disagree with that assessment as applied to the provision of other services, ranging from dry cleaning, to accounting, to religious ceremonies, to news reporting. Unsurprisingly, the same principle applies to the provision of governing services. Simply put, profit-seeking governments tend to work better than power-seeking ones do.

II. PRECURSORS TO SEZs IN THE UNITED STATES

The United States has a long and tangled past with special economic zones. To some degree, the United States can thank proto-SEZs for its very existence; the nation's roots run back to charters issued by Old World royalty to New World entrepreneurs. Part II.A. compares these precursors to modern SEZs. In more modern times, domestic politicians have proposed various schemes to encourage economic growth in depressed areas by favoring them with tax incentives and grants. These Enterprise Zones and their ilk have not proven great successes, as Part II.B. explains. In contrast, the United States' Foreign-Trade Zone (FTZ) program has a long record of helping local companies manage the impact of customs duties and excise taxes, and wholly escape state and local *ad valorem* taxes, thereby reducing the costs of doing business and stimulating regional commerce. Part II.C. explains how FTZs work and documents their growth.

Before diving into this study of a few particular types of United States special jurisdictions—ones selected to guide the shape of USSEZs—it bears noting that, as a more general matter, the United States has spun off an astonishing

number and variety of overlapping and sometimes conflicting jurisdictions. The very name of the United States shows its refusal to vest all political power in a single entity. The Civil War gave brutal witness to how far this native resistance to monolithic authority can go; the successful founding of West Virginia and the unsuccessful founding of the Free State of Winston, both of which arose out of that conflict, offer less cataclysmic examples of the same tendency.⁵⁴ Americans' enthusiasm for punching holes in political conformity has driven them abroad; consider Henry Ford's ill-fated attempt to export a Midwestern city, government and all, to the Brazilian Amazon.⁵⁵

Even today, the United States includes many areas that, while nominally within its jurisdiction, constitute special zones beyond the full force of its laws. Generally speaking, residents and local corporations in the territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands have no obligation to pay federal income or excise taxes.⁵⁶ Indian reservations operate in theory under their own sovereign powers and, as such, escape the reach of many state and federal laws.⁵⁷

54. See *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39 (1871) (implicitly ratifying the secession of the state of West Virginia from the Commonwealth of Virginia); CHRISTOPHER LYLE MCILWAIN, *CIVIL WAR ALABAMA* 62 (2016) (describing the near-creation of the somewhat fabled Free State of Winston).

55. For some background about Ford's bold but ill-fated project, see Tom W. Bell, *Fordlandia: Henry Ford's Amazon Dystopia*, FOUND. FOR ECON. EDUC. (Feb. 19, 2013), http://www.fee.org/the_freeman/detail/fordlandia-henry-fords-amazon-dystopia.

56. STAFF OF THE JOINT COMM. ON TAXATION, 112TH CONG., *FEDERAL TAX LAW AND ISSUES RELATED TO THE UNITED STATES TERRITORIES* 2 (May 14, 2012), <https://www.jct.gov/publications.html?func=startdown&id=4427>. I thank Ron Rotunda for bringing this particular wrinkle of the tax code to my attention.

57. *United States v. Kagama*, 118 U.S. 375, 381–82 (1886) (“[Indians] were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; . . . and thus far not brought under the laws of the Union or of the State within whose limits they resided.”); CONFERENCE W. ATTORNEYS GEN., *AMERICAN INDIAN LAW DESKBOOK* 10–11 (2015) (“[A]s extra-constitutional political bodies, Indian tribes are not subject to the constraints imposed upon the federal government and the states by the Bill of Rights, and

Nothing could be more American than special zones of relative freedom—places where taxes take less money and regulations waste less time. Sometimes, these zones enjoy a measure of autonomy; sometimes, they enjoy great heaps of it. The discussion now turns to considering three particular examples of the American enthusiasm for special jurisdictions: the proto-SEZs in its family tree; so-called empowerment zones; and FTZs. These prove especially apt models to consider in designing the next generation of special zones for the United States: USSEZs.

A. *The Proto-SEZs that Created the United States*

The roots of the United States run back through the centuries to private, for-profit settlements that operated under the authority of European royal charters.⁵⁸ In this way, through communities like Jamestown (founded in 1607),⁵⁹ Plymouth (1619),⁶⁰ New Amsterdam (1626) (now New York),⁶¹ and the Massachusetts Bay Company (1629),⁶² the Old World seeded the one it had just discovered. We might fairly call these, the few cells from which the United States grew, *proto-SEZs*.

It bears noting that even the most successful of those early entrepreneurial communities, in terms of present-day wealth and population, was not a success for its investors.

they maintain broad, largely unreviewable powers over internal tribal matters.”).

58. Also called “patents” in English usage of the day.

59. JAMES HORN, *A LAND AS GOD MADE IT: JAMESTOWN AND THE BIRTH OF AMERICA* 34–37 (2005) (describing the grant of a royal patent to Jamestown’s founders in 1606 followed by the colony’s founding the year after).

60. NATHANIEL PHILBRICK, *MAYFLOWER: A STORY OF COURAGE, COMMUNITY, AND WAR* 19 (2006) (describing the process by which the Pilgrims obtained a subsidiary, or “particular,” patent from the same Virginia Company that had obtained a patent to found Jamestown).

61. RUSSELL SHORTO, *THE ISLAND AT THE CENTER OF THE WORLD* 55 (2004) (describing documentation about the purchase of Manhattan by the West India Company as, “in effect, New York City’s birth certificate”).

62. BROOKS ADAMS, *THE EMANCIPATION OF MASSACHUSETTS* 15 (Houghton, Mifflin & Co. 1899).

The Dutch West Indies Company lost money on its New Amsterdam settlement, and eventually handed it over to the English with something close to relief.⁶³ That rough start hardly prevented New York from eventual glory, though. Its neighbor, the Massachusetts Bay Company, generated similar results in Boston and wider New England.⁶⁴

The Virginia Company of London, which governed lands that later became the states of Virginia and North Carolina, likewise went bankrupt, the land formerly under its control becoming the first royal colony in the New World.⁶⁵ The Virginia Company of Plymouth, which held a charter to colonize modern-day New England, went out of business even faster.⁶⁶ This was not for want of mercenary instincts; both of the Virginia Companies, having found that they lacked the resources to themselves settle the New World, sought gain in subdividing their royal patents and reselling them to other parties, such as the Pilgrims.⁶⁷ The New World was not an easy place to survive, much less make money in. Roanoke failed utterly and mysteriously, all of its settlers either dying or disappearing.⁶⁸

As Roanoke exemplified, and as all the entrepreneurial settlements demonstrated, trying to launch a New World settlement entailed not just financial risks, but the perils of shipwreck, disease, and war. Yet as in contemporary Silicon Valley, some of those who helped build these U.S. proto-SEZs made out handsomely. Untold thousands of European settlers found freedom and prosperity in the lands opened up by the Dutch West Indies Company, the Virginia Company

63. *See id.* at 190–92.

64. *See* JAMES E. MCWILLIAMS, BUILDING THE BAY COLONY: LOCAL ECONOMY AND CULTURE IN EARLY MASSACHUSETTS 4–6 (2007).

65. PAUL S. BOYER ET AL., 1 THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE 35–36 (8th ed. 2014).

66. *Id.*

67. PHILBRICK, *supra* note 60, at 19.

68. BOYER ET AL., *supra* note 65, at 34.

of London, and the Massachusetts Bay Company. Even today, religious institutions still coast on the revenue generated by properties—now sitting in the thick of New York City—that they hold under titles traceable back to the days of Dutch administration.⁶⁹

With startup communities as with startups generally, entrepreneurs do us a favor when they throw serious money at hard problems. Call them heroes or gamblers as you see fit; just make sure to give entrepreneurs credit for generating public benefits while bearing private losses. Most such economic risk-takers fail. Their failures help the rest of us, though, because they demonstrate what *not* to do. And some failed startups, such as the Dutch West Indies Company, generate positive externalities the size of New York, Boston, and their environs.⁷⁰

The manifold failures of the proto-SEZs that grew into the United States—failures financial, material, and moral—reflect an era when forms of government were beginning to mutate rapidly. As in nature, many such innovations died away. A few—the United States, for instance—survived. Like the reptiles that predated the dinosaurs, proto-SEZs ruled their world, in their day. In some sense, they passed from history in the service of a greater good: the evolution of governing institutions. The USSEZs described below continue that trend.

B. *Empowerment Zones and Similar Special Regulatory Zones*

Beginning in 1993, the federal government experimented with various programs that targeted select areas of the country for special regulatory treatment. For the

69. See JERRY L. ANDERSON & DANIEL B. BOGART, PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES 130–31 (2014).

70. It seems fair to credit New Amsterdam as the origin not just of New York, New York, but the rest of the state, too. Indeed, we might fairly include a quite large chunk of the surrounding Northeastern United States. See SHORTO, *supra* note 61, at 256 (reproducing the “Jansson-Visscher” map).

most part, these federal programs aimed merely to redouble the efforts of local, tribal, and state governments to assist their most distressed communities—often urban, but sometimes rural—within their jurisdictions.⁷¹ In addition to grants, these federal programs relied on tax credits, deductions, accounting devices, and investment incentives to encourage economic development in qualifying areas.⁷² Called Empowerment Zones, Enterprise Communities, Enterprise Zones, or Renewal Communities, these federal programs differed in detail while sharing general aims and means.⁷³

All such special regulatory zones (as we might call them) terminated on December 31, 2014.⁷⁴ Their passing was evidently not cause for much grief. Ideally, they would have lifted communities out of bad times, leaving them strong enough to face the same tax code that applies everywhere else. It seems more likely, though, that the press and policy makers noticed that the zones did little more than encourage a few businesses to move, generate a lot of red tape, and provide opportunities for graft.⁷⁵ A survey of the literature

71. See *Welcome to the Community Renewal Initiative*, OFFICE OF CMTY. RENEWAL, U.S. DEP'T OF HOUS. AND URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/economicdevelopment/programs/rc (relating the various enactments, extensions, and ultimate expirations of Empowerment Zone (EZ), Enterprise Community (EC), and Renewal Community (RC) Initiatives) (last visited Sept. 13, 2016).

72. See OFFICE OF CMTY. RENEWAL, U.S. DEP'T OF HOUS. AND URBAN DEV., EMPOWERMENT ZONE TAX INCENTIVES SUMMARY CHART (2013) http://portal.hud.gov/hudportal/documents/huddoc?id=ez_tis_chart.pdf (summarizing the various federal tax incentives enjoyed by Enterprise Zones).

73. See OFFICE OF CMTY. RENEWAL, U.S. DEP'T OF HOUS. AND URBAN DEV., EMPOWERMENT ZONES, ENTERPRISE COMMUNITIES, AND RENEWAL COMMUNITIES INITIATIVES (2013), <https://www.hudexchange.info/resources/documents/EZ-RC-EC-Program-Overview.pdf>.

74. *Welcome to the Community Renewal Initiative*, *supra* note 71, at 2.

75. See, e.g., Gregory Korte, *Audit Says Cincinnati Wasted Much of Empowerment Grant*, CINCINNATI ENQUIRER (Feb. 4, 2003), http://enquirer.com/editions/2003/02/04/loc_empower04.html (reporting that federal government was defunding empowerment zones on grounds that “no convincing evidence” showed \$10 million a year in federal grants had produced

suggests that Empowerment and other special regulatory zones had no noticeable economic impacts or, on net, negative ones.⁷⁶

Why did these zones fail? Most likely because they offered relatively little relief from federal authority—only some rather convoluted tax breaks, for the most part, and those at the cost of considerable red tape.⁷⁷ It evidently takes sturdier shelter from the full force of federal power to create the conditions for a special jurisdiction to flourish. FTZs, discussed next, provide more complete protection against federal power, and thus, a kind of special jurisdiction better adapted to the environmental conditions that currently prevail in the United States.

C. *Foreign-Trade Zones*

First created in 1934, United States Foreign-Trade Zones exempt their occupants from the payment of federal customs duties and excise taxes.⁷⁸ Practically speaking, FTZs are secure areas under the supervision of U.S. Customs and Border Protection officials.⁷⁹ Legally speaking, though, the zones lie outside the customs territory of the United States for many purposes.⁸⁰ This can make them attractive

results).

76. See, e.g., LEGISLATIVE OFFICE OF ECONOMIC AND DEMOGRAPHIC RESEARCH, STATE OF FLORIDA, LITERATURE REVIEW AND PRELIMINARY ANALYSIS OF THE IMPACT OF ENTERPRISE ZONES ON STATE & LOCAL REVENUE COLLECTIONS 6–8 (2010), <http://edr.state.fl.us/Content/special-research-projects/economic/EnterpriseZoneAnalysis.pdf> (reviewing various studies of zones).

77. See Shikha Dalmia, *Rand Paul Won't Be Able to Save Detroit: Economic Freedom Zones Can't Survive the Regulatory State*, REASON (Dec. 15, 2013), <http://reason.com/archives/2013/12/15/rand-pauls-non-plan-to-save-detroit>.

78. See Foreign-Trade Zones Act, amended by 19 U.S.C. §§ 81(a)–81(u) (2012); 15 C.F.R. § 400 (2016).

79. FOREIGN-TRADE ZONES BD., *Preface to 76TH ANNUAL REPORT OF THE FOREIGN-TRADE ZONES BOARD TO THE CONGRESS OF THE UNITED STATES* (2015), <http://enforcement.trade.gov/ftzpage/annualreport/ar-2014.pdf>.

80. *Id.*

venues for certain services and industries.⁸¹

In addition to offering shelter from federal customs duties and excise taxes, an FTZ affords other benefits. If a zone processor works imported materials into goods destined to enter the rest of the United States, thus triggering an obligation to pay customs, the processor can choose to have the duties assessed on either the value of the imported materials or the value of the finished goods—an option useful for accounting reasons.⁸² Another device businesses find useful: merchandise moved into the zone for eventual shipment abroad can for federal excise tax and drawback purposes be counted as exported immediately, before it physically leaves the United States.⁸³ Also, personal property stored in the zone escapes state and local *ad valorem* taxes.⁸⁴

The Foreign-Trade Zone Board, the federal body that administers FTZs, has approved zone status for a great many locations scattered all across the country. The location types include *zones*, which tend to cover large areas of ports or international airports, *subzones*, a now-disfavored classification for isolated and relatively small extensions of existing zones, like off-site factories, and *alternative sites*, relatively small and mutable areas created under a new and streamlined regulatory framework that offers the benefits of subzone classification with less paperwork.⁸⁵ As Figure 3

81. For a rare and now somewhat dated legal academic discussion of FTZs, see John Patrick Smirnow, Comment, *From the Hanseatic Cities of the 19th Century Europe to Canned Fish: The Radical Transformation of the Foreign Trade Zones Act of 1934*, 10 COOLEY L. REV. 697 (1993). For a trenchant and apparently futile critique of FTZs, see William G. Kanellis, Comment, *Reining in the Foreign Trade Zones Board: Making Foreign Trade Zone Decisions Reflect the Legislative Intent of the Foreign Trade Zones Act of 1934*, 15 NW. J. INT'L L. & BUS. 606 (1995).

82. Kanellis, *supra* note 81, at 618.

83. *Id.* at 610, 618–19.

84. 19 U.S.C. § 81o(e) (2012).

85. *What are the Types of Zone Sites?*, ENF'T AND COMPLIANCE, INT'L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/zonetypes.html> (last visited

illustrates, the Board has approved slightly over a thousand such special jurisdictions over the years. In effect, each of these areas lies within the United States but outside of many of its laws.

Figure 3: U.S. Foreign-Trade Zones, Subzones, or Alternative Sites Approved, Net of Terminations, 1934–2014⁸⁶

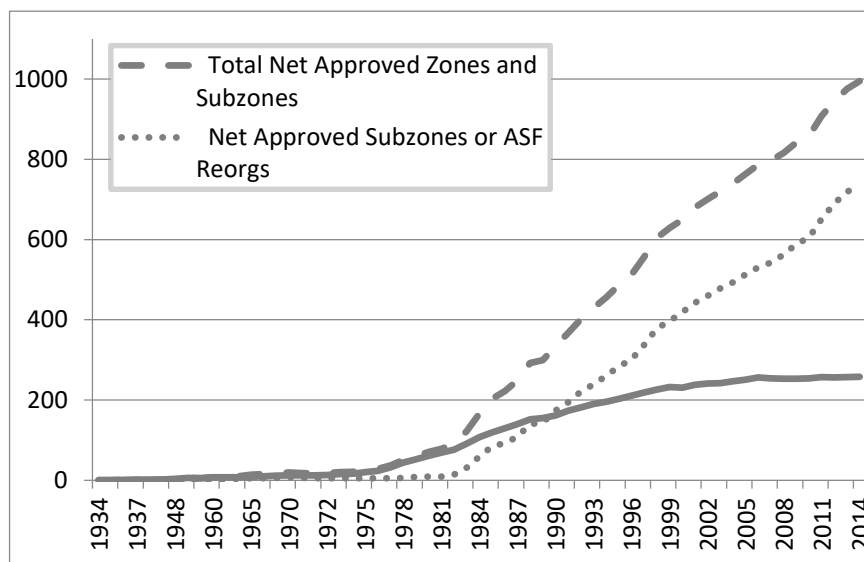


Figure 3 tells a story, but not the whole story. It traces something like mere enthusiasm for FTZs. The Board cannot approve an application on its own, after all. Applications come from applicants—in the case of FTZs, from public or private corporations (typically, tax-exempt ones).⁸⁷

A corporation granted the privilege of operating a zone

Sept. 13, 2016); *What is the ASF?*, ENFT AND COMPLIANCE, INT'L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/asf.html> (last visited Sept. 13, 2016).

86. Sources consist of Foreign-Trade Zone Board orders and reports too numerous to mention here, which are on file with the author. Note: temporary zones are not included in this count. The figure charts approved locations, not necessarily active ones. Of the 258 Approved Zones shown in 2014, for instance, the Board classified 179 zones as active. See Figure 4.

87. See 19 U.S.C. §§ 81a(d)–(g) (2012). See also 15 C.F.R. § 400.12 (2016) (defining eligible applicants for FTZs).

must make it available as a public utility.⁸⁸ Far from freeriding on existing government services, a zone's operator must pay the costs of any customs services required in the zone.⁸⁹ The zone must also provide quarters and facilities for any federal, state, or municipal officers or employees whose duties require their presence in the zone.⁹⁰ The federal government does not build or manage FTZs, nor provide their utilities; in these matters as more generally, zone operators must take care of themselves.

It is thus perhaps not surprising that approved FTZs outnumber active ones. Some zones never get started. Others launch, falter, and fail. That shows a culling effect at work, helping to ensure that only strong FTZs survive. It also indicates that the FTZ Board has not made applying for an FTZ so costly as to scare away all applicants except those absolutely certain of success. It makes for a relatively fluid and adaptable system. Perhaps that explains the overall spread and growth of the FTZ system.

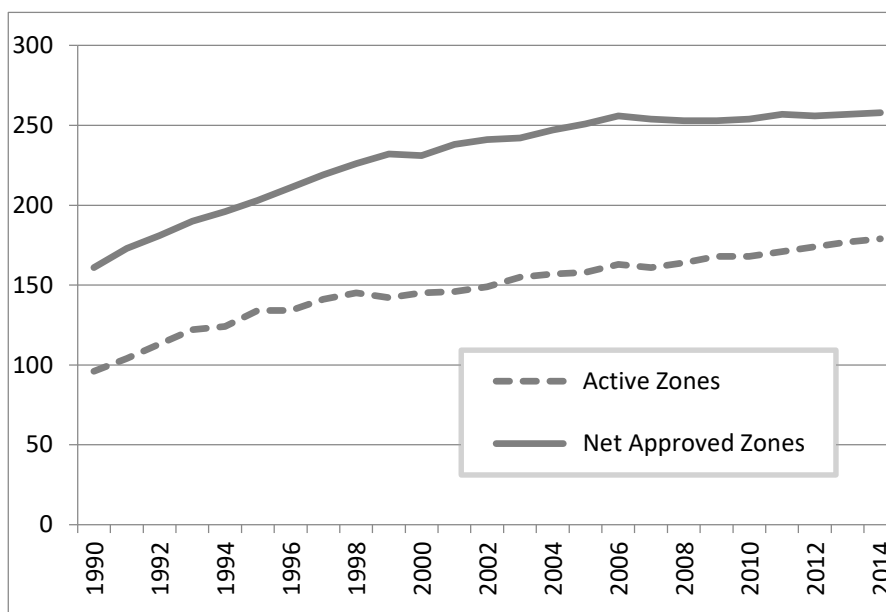
What percentage of approved FTZs become and remain active? Figure 4 charts the relative numbers of approved and active zones from 1990, the earliest year in which the Board began reporting the number of active zones. It shows a persistent and wide margin between approved FTZs and active ones. About a third fail.

88. 19 U.S.C. § 81n (2012).

89. *Id.*

90. 19 U.S.C. § 81l(e) (2012).

Figure 4: U.S. Foreign-Trade Zones, Approved and Active, Net of Terminations, 1990–2014⁹¹



Notwithstanding the gap between approved and active zones, and as Figure 4 also illustrates, the United States has come to host a surprisingly large population of FTZs, as well as very many subzones or alternative sites. In the aggregate, these have significant economic effects. The FTZ Board reported in 2014 that approximately 2700 firms employed about 420,000 people in FTZs (up from 390,000 the year before).⁹² The Census Bureau reports that 12.5% of all imports in 2014—manufactured and non-manufactured commodities valued at \$293,021,800,000—passed through FTZs.⁹³ That same year, overall shipments into zones, from

91. Data retrieved from FOREIGN-TRADE ZONES BD., 56TH–76TH ANNUAL REPORTS OF THE FOREIGN-TRADE ZONES BOARD TO THE CONGRESS OF THE UNITED STATES (1995–2015), <http://enforcement.trade.gov/ftzpage/annual-report.html>.

92. FOREIGN-TRADE ZONES BD., *supra* note 79, at 1.

93. BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, U.S. INTERNATIONAL TRADE IN GOODS AND SERVICES 42 exhibit 2a (2014), <https://www.census.gov/foreign-trade/Press-Release/2014pr/12/ft900.pdf>.

both domestic and foreign sources, totaled over \$789 billion in value.⁹⁴

There are FTZs in every state, as well as in Puerto Rico.⁹⁵ They appear not only at traditional ports of entry, such as Los Angeles or New York City, but also at locations far from the coast and connected to international trade only by river or air.⁹⁶ Examples include: FTZ number 161 in Sedgwick County, Kansas; FTZ No. 240 in Martinsburg, West Virginia; and FTZ No. 280 in Ada and Canyon Counties, Idaho.⁹⁷

FTZs need only be sited at a U.S. Customs and Border Protection (CBP) port of entry—locations of which there were, at last count, 328, scattered far across the United States.⁹⁸ A site can qualify for zone status if it is within sixty miles or a ninety-minute drive of a CBP port of entry.⁹⁹ *Actually*, a zone’s influence can reach even farther away—if the applicant can “ensure that proper oversight measures are in place” to the satisfaction of the local CBP Port Director.¹⁰⁰ FTZs could in theory lie sprinkled across vast swaths of the United States.

94. FOREIGN-TRADE ZONES BD., *supra* note 79, at 1.

95. *Where are Zones Currently Located?*, ENF’T AND COMPLIANCE, INT’L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/location.html> (last visited Sept. 13, 2016).

96. *See U.S. Foreign-Trade Zones*, ENF’T AND COMPLIANCE, INT’L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/letters/ftzlist-map.html> (last updated Aug. 16, 2016).

97. *Id.*

98. U.S. CUSTOMS AND BORDER PROTECTION, CBP’S ROLE IN STRENGTHENING THE ECONOMY (2014), <http://www.cbp.gov/sites/default/files/documents/401784%20CBPs%20Role%20in%20Strengthening%20the%20Economy.pdf>.

99. 19 U.S.C. § 81b(a) (2012) (authorizing FTZ Board to grant privileges of establishing zones “in or adjacent to ports of entry under the jurisdiction of the United States.”); 15 C.F.R. § 400.11(b)(2)(i) (2016) (specifying that a general-purpose zone is “adjacent” if the “site is located within 60 statute miles or 90 minutes’ driving time . . . from the outer limits of a port of entry boundary”).

100. *Where Can a Zone Be Located?*, ENF’T AND COMPLIANCE, INT’L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/adjacency.html> (last visited Sept. 13, 2016). *See also* 15 C.F.R. § 400.11(b)(2)(ii) (authorizing the creation of sub-zones, which typically consist of single factory sites, almost anywhere in the United States).

Constitutional scholars might wonder how the exemption from federal customs duties and excise taxes afforded by FTZs could possibly satisfy the plain language of the Uniformity Clause: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States."¹⁰¹ On the face of it, after all, and by deliberate design, each FTZ represents a special jurisdiction wherein federal duties and excise taxes differ from those elsewhere applicable, making them not uniform throughout the United States.

The long and apparently unchallenged existence of FTZs offers something like proof of their constitutionality. Theorists of a certain stripe might excuse that as consistent with the alleged aim of the Uniformity Clause: to "cut off all undue preferences of one State over another."¹⁰² Because FTZs exist in every state, they hardly show that sort of geographical bias. Pragmatic lawyers can simply rest their defense of FTZs on *United States v. Ptasynski*,¹⁰³ wherein the Supreme Court effectively gave lawmakers free rein to allocate duties, impost, and excise taxes as they see fit—so long as the laws speak in functional rather than geographic terms (and often even when they speak in geographic terms).¹⁰⁴ FTZ laws and regulations, because they define the areas exempt from customs duties or excise taxes in terms of who applies for and receives permission from the FTZ Board, and not in geographic terms, therefore do not violate the Uniformity Clause under the interpretation now fashionable before the Supreme Court.

* * *

Before taking leave of this topic, a terminological issue:

101. U.S. CONST. art. I, § 8, cl. 1.

102. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 706 (Boston, Little, Brown, & Co., 5th ed. 1891).

103. 462 U.S. 74 (1983).

104. *Id.* at 84–86.

Their common acronym, “FTZ,” risks causing confusion between the Foreign-Trade Zones peculiar to the United States and the more general class of free trade zones found worldwide. The Foreign-Trade Board describes FTZs as “the U.S. variation on the general ‘free trade zone’ concept,” suggesting that the native version makes only modest changes to the world standard. In fact, however, foreign and domestic FTZs differ in important ways.¹⁰⁵ Because “little consistency exists in the denomination and classification of zones,” taking note of these terminological issues might improve the study of special jurisdictions.¹⁰⁶

In most formulations, a free trade zone does little more than ease cross-border transactions at a port of entry.¹⁰⁷ In contrast, U.S. Foreign-Trade Zones support not just commerce but manufacture, and not just at ports of entry, but miles away from such ports and in isolated factories.¹⁰⁸ Elsewhere, special jurisdictions with those features would more likely sport the names “Export Processing Zones” (EPZs) and “Single Unit EPZs,” respectively.¹⁰⁹ In the law of the United States, in contrast, those would respectively constitute “Foreign-Trade Zones” and “Subzones” (formerly) or “Alternative Sites” (currently).

* * *

By whatever name, FTZs have spread far and wide across the United States, sheltering services and manufacture from the full brunt of federal, state, and

105. FOREIGN-TRADE ZONES BD., 74TH ANNUAL REPORT OF THE FOREIGN-TRADE ZONES BOARD TO THE CONGRESS OF THE UNITED STATES (2013), <http://enforcement.trade.gov/ftzpage/annualreport/ar-2012.pdf>. See FOREIGN-TRADE ZONES BD., *supra* note 79.

106. Baissac, SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8, at 24.

107. See Farole & Akinci, *supra* note 8, at 2 tbl.1.1. See also Baissac, SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8, at 24.

108. Regarding the placement of zones, see *supra* notes 95–100 and accompanying text. Regarding—and criticizing—the expansion of zone’s functions, see Kanellis, *supra* note 81, at 622–27.

109. Farole & Akinci, *supra* note 8, at 2 tbl.1.1; Farole, *Overview* to SPECIAL ECONOMIC ZONES IN AFRICA, *supra* note 8, at 4.

municipal laws. FTZs are approved by a federal board but run by public or private corporations. About a third of all approved FTZs fail—an indication that, far from enjoying subsidies at taxpayer expense, FTZs have had to earn the success they have enjoyed. FTZ operators must even pay for the customs services that they use. In all these ways, FTZs provide an apt model—followed in some areas, diverged from in others—for the United States Special Economic Zones proposed next.

III. UNITED STATES SPECIAL ECONOMIC ZONES (USSEZS)

This Part introduces the United States Special Economic Zone (USSEZ). The following sections discuss the primary features of USSEZs, where they would be sited, their administration, some questions of political economy, and how to protect civil liberties in USSEZs. USSEZs represent a characteristically American kind of special jurisdiction—the natural offspring of a country born from proto-SEZs and peppered with FTZs.

USSEZs face long odds. As the historical review above shows, however, special jurisdictions have had a subtle but surprisingly powerful influence on nation states, across the ages and around the globe.¹¹⁰ The political culture of the United States, in particular, has time and again sought to balance a monolithic political power against more polycentric forms of government. The ideas put forth here, far from radical, are not even very original. They instead arise from examples both deep in history and in current, flourishing use. Politicians and commentators have already called for setting aside parts of the United States for special protection from the full brunt of state and federal laws.¹¹¹ Indeed, as

110. *See supra* Part II.C.

111. *See, e.g.*, RODNEY LOCKWOOD, BELLE ISLE: DETROIT'S GAME CHANGER 5–7 (2013) (proposing to privatize governance in one part of Detroit); Senator Rand Paul, *Economic Freedom Zones*, <http://www.paul.senate.gov/files/documents/EconomicFreedomZones.pdf> (proposing “Economic Freedom Zones” with low flat federal taxes, educational vouchers, eased immigration rules, and exemptions

the burgeoning spread of FTZs demonstrate, they have made it official U.S. policy.

By way of preview, and recognizing that their flexible structure permits many variations on these themes, the USSEZs described here:

1. Offer exemptions from many federal and all state laws and regulations;
2. Arise on select federal lands, with grants allocated by competitive bidding;
3. Raise revenue for federal and state governments;
4. Encourage innovative governance under federal oversight; and
5. Face powerful legal and market pressures to respect residents' rights.

The next few sections explain.

A. *What Makes a USSEZ “Special”?*

Like United States FTZs, USSEZs would offer exemptions from federal and state laws. The enabling grant of each USSEZ would limit the effect of select federal laws within the zone, ease the burden of a wide range of regulations and taxes, and completely preempt the effect of local state laws.¹¹² Fundamental constitutional rights would of course remain unaffected; federal lawmakers have no power to negate those. It also seems best, for legal and political reasons explained below, to not extend to USSEZs the exemption from customs already enjoyed by FTZs. Beyond that, the exact contours of the USSEZ's exemptions would remain subject to political bargaining—a good thing, in this context—as it helps to ensure that lawmakers can shape USSEZs to satisfy vital constituencies.¹¹³

from certain environmental and labor rules).

112. The federal government enjoys the power to preempt the effect of state law on federal lands thanks to the Supremacy Clause. U.S. CONST. art. VI, cl. 2.

113. For an example of how customizing the contours of USSEZs exemptions

USSEZs would follow their forebears, FTZs, in arising from individual initiative and imposing no net costs on the governing agencies tasked to supervise them.¹¹⁴ Just as FTZs have to pay for any additional customs services that their zones require, USSEZs would have to pay for the burdens, if any, they impose on federal and state governments. If the zone remains subject to EPA regulation, for instance, and its newly opened factories require inspections, the zone would pay for the extra trouble thereby imposed on the EPA. Again, that simply mirrors current FTZ practices.

Unlike FTZs, which typically arise on private or municipal property, USSEZs would arise on lands, typically vacant, owned by the federal government. The government would lease or sell these lands, their bounds defined by statute, to private parties paying valuable consideration for the right to create and run USSEZs on the lands.¹¹⁵ Unlike FTZs, therefore, USSEZs would generate much-needed revenue for public coffers.

FTZs benefit government finances only indirectly. By foregoing customs duties and excise taxes, the theory goes, FTZs stimulate economic activity, such as employment or trade, that the government *does* tax. In contrast, USSEZs would benefit government finances directly. Prospective developers would have to pay up-front and on a continuing basis for the sale or lease of federal lands, together with the licenses, concessions, and covenants necessary to exempt the zone from select taxes, laws, and regulations. As discussed more fully below, this revenue structure would win the USSEZ program allies among both national and regional politicians.¹¹⁶

can help survive politically, see *infra* Part III.D. (arguing for leaving USSEZs exposed to federal customs obligations).

114. See 19 U.S.C. § 81n (requiring FTZ operator to cover costs of additional customs services required under law).

115. *Infra* Part II.B.

116. *Infra* Part II.D.

Though enjoying exemptions from a great many federal laws, regulations, and taxes, USSEZs would probably do better without the same exemption from customs duties and excise taxes that FTZs already enjoy. Why? First, because foregoing that privilege would allow USSEZs to also forego the burden of close supervision by CBP officials that is required for FTZs.¹¹⁷ Because FTZs lie outside the customs territory of the United States, legally speaking, they cannot admit the free entry and exit of people or merchandise, but instead must qualify as secure areas under Customs control.¹¹⁸ USSEZS could avoid the regulatory overhead costs of Customs oversight and link themselves more closely to neighboring communities by accepting the same customs and excise tax obligations that apply generally in the United States. And if a USSEZ wanted a customs-and-excise-tax-free area, as might hold true if the zone's international airport qualified as a CBP port of entry, it could presumably host an FTZ just like any other place in the United States. Second, subjecting USSEZs to custom duties and excise taxes would avoid turning the FTZ lobby, which logically might regard another such zone as a competitor, into a potential foe of the program.¹¹⁹ Third, though admittedly a somewhat academic point, by accepting the burdens of customs duties and excise taxes, USSEZs would avoid the claim that a zone exempt from those duties would violate the plain language of the Uniformity Clause—a claim precluded only by the Supreme Court's current, somewhat tortured interpretation of the Constitution.¹²⁰ It is not a legal foundation designed to

117. See FOREIGN-TRADE ZONES BD., *supra* note 79.

118. See, e.g., Memorandum from Elizabeth G. Durant, Exec. Dir., Trade Programs Office of Field Operations, U.S. Customs Serv., to Foreign-Trade Zone Operators (undated), <http://enforcement.trade.gov/ftzpage/security.html> (advising zone operators to take security measures to ensure monitoring and control of persons and merchandise entering and exiting zones) (last visited Oct. 2, 2016).

119. Indeed, the prospect that USSEZs might come to host FTZs, as suggested above, might turn the lobby into an ally.

120. See *infra* notes 121–26 and accompanying text (discussing the application

give long-term investors great comfort.

Among other exemptions they enjoy, USSEZs would ideally enjoy exemptions from federal income taxes, which by most accounts impose considerable regulatory overhead on those forced to calculate and pay them.¹²¹ On the face of it, that should pose no legal problem. The Uniformity Clause, which in theory threatens the exemption from customs duties and excises enjoyed by FTZs, does not even mention taxes (such as those imposed on corporate and individual income).¹²² Granted, some commentators read the 1916 case of *Brushaber v. Union Pacific Railroad Co.*¹²³ to have classified income taxes as constitutionally equivalent to excises, thus making income taxes subject to the clause.¹²⁴ That claim looks suspect on two grounds, however. First, a careful reading of *Brushaber* shows that it could not have held that geographically non-uniform income taxes are constitutionally forbidden because it conceded that the tax under the Court's consideration was not of that type, leaving the issue outside the binding scope of the opinion.¹²⁵ Second,

of the Uniformity Clause to FTZs).

121. See, e.g., JASON J. FICHTNER & JACOB M. FELDMAN, MERCATUS CTR., THE HIDDEN COSTS OF TAX COMPLIANCE 8, 10 tbl.2 (2013), http://mercatus.org/sites/default/files/Fichtner_TaxCompliance_v3.pdf (estimating accounting and compliance costs of Internal Revenue Code to range between \$215 billion to \$987 billion each year).

122. Recall the context of the Uniformity Clause: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST., art. I, § 8, cl. 1. The interpretative principle of *expressio unius est exclusio alterius* compels the conclusion that taxes need not be uniform throughout the United States.

123. 240 U.S. 1 (1916).

124. *Id.* at 18–19 (reading the 16th Amendment's grant of power to lay and collect taxes on income without apportionment to require that income taxes be included with duties, impost, and excises in the Uniformity Clause); ERIK M. JENSEN, THE TAXING POWER: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 88 (2005) (admitting that "[t]he constitutional language may not mandate that result," but concluding that "after *Brushaber*, it is hard to imagine that" income taxes could be exempt from the Uniformity Clause).

125. *Brushaber*, 240 U.S. at 24.

the national government has already rendered federal income taxes geographically non-uniform as part of a policy of speeding economic recovery in areas struck by natural disasters,¹²⁶ a practice that evidently qualifies as constitutional under both common practice and Supreme Court precedents.¹²⁷ USSEZs could thus constitutionally enjoy exemptions from federal income taxes.

Without the full panoply of federal and state laws, regulations, and taxes in force, would not the USSEZs devolve into anarchy? Not likely. In the first place, it will cost money to win the right to develop and administer a zone, and investors do not much care for anarchy. In the second place, every USSEZ would remain subject to federal oversight via a Board operating much like the FTZ Board does now.

USSEZs will largely produce their own laws, regulations, and, if not *taxes*, various means of paying for the governing services. These, they might provide in-house, or by contract with other private firms or local sovereigns. The exact form of these governing systems will depend on federal constraints, developer creativity, and market demand. In large part, though, and by deliberate design, the USSEZ program will clear a jurisdictional space where entrepreneurs can compete to offer—within specified limits and subject to continuing oversight by federal authorities, of course—the sorts of streamlined legal and administrative services most likely to attract residents and investors to the zones. These local pockets of freedom would spur economic

126. See INTERNAL REVENUE SERV., TAX LAW CHANGES RELATED TO NATIONAL DISASTER RELIEF (2009), <https://www.irs.gov/pub/irs-news/fs-09-08.pdf> (summarizing tax effects of National Disaster Relief Act of 2008); INTERNAL REVENUE SERV., TAX LAW CHANGES RELATED TO MIDWESTERN DISASTER AREAS (2008), <https://www.irs.gov/uac/tax-law-changes-related-to-midwestern-disaster-areas> (same with regard to Heartland Disaster Tax Relief Act of 2008).

127. See Ellen P. Aprill & Richard Schmalbeck, *Post-Disaster Tax Legislation: A Series of Unfortunate Events*, 56 DUKE L.J. 51, 79–84 (2006) (reviewing arguments that geographically targeted income tax laws violate the Uniformity Clause but finding they fail in the face of precedent both as to merits and standing).

and cultural growth, driving not just technical innovation but innovation in forms of self-government, too.

B. *Where to Locate USSEZs*

USSEZs would arise on federal lands. In theory, that includes quite a lot of the United States. The federal government owns and manages roughly 640 million acres of land—about 28% of the country's total acreage.¹²⁸ It tends to own more land in the West than in the East; the extremes of federal ownership range from 84.9% of Nevada's territory to 0.3% of New York's and Connecticut's.¹²⁹

Not all federal lands would provide suitable environments for USSEZs. Nobody wants to see factories built in Yosemite National Park. The federal government owns considerable acreage that lies fallow mostly for want of use, however. Consider the lands administered by the Bureau of Land Management (BLM), which it already makes available for various productive uses; it administers 247.3 million acres, about 11% of the United States—far, far more than any private party and much more than any other federal agency.¹³⁰ Land administered by the National Forest Service (NFS), which likewise permits certain productive uses, opens the prospect of another 192.9 million acres to USSEZs.¹³¹ Recent base closures have also made some relatively smaller areas, formerly used for military purposes, available for sale or lease to the public.¹³²

Extant laws limit to various degrees the authority of federal agencies to sell or lease public lands. Federal law generally limits all agencies in the sale of public lands;

128. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 3 (2014).

129. *Id.* at 4–5 tbl.1.

130. *Id.* at 8.

131. *Id.* at 9.

132. *See generally* R. CHUCK MASON, CONG. RESEARCH SERV., R40476, BASE REALIGNMENT AND CLOSURE (BRAC): TRANSFER AND DISPOSAL OF MILITARY PROPERTY (2013).

promisingly for USSEZs, however, it allows for the sale of select lands if “disposal of such tract will serve important public objectives, including but not limited to, expansion of communities and economic development.”¹³³ Also, although Congressional approval is required for sales of public land in excess of 2500 acres, no such limitation applies to leases.¹³⁴

The BLM has relatively broad authority to dispose of its property by sale or lease, whereas the NFS faces tighter constraints.¹³⁵ Even in the case of the BLM, however, statutory amendments would probably be necessary to makes USSEZs possible, as existing laws limit the terms by which the Department of the Interior, which manages such lands, can dispose of them, as well as to whom they can be sold or leased.¹³⁶ Sales of closed military facilities must jump through various legal and administrative hoops. So far as leasing goes, however, the Department of Defense appears to enjoy considerable latitude in setting the terms by which it makes closed facilities available to private parties.¹³⁷

These observations go mostly to show that USSEZs would require only incremental changes to existing laws—not that statutory amendments would be entirely unnecessary. The United States has a long history both of making public land available for lease or rent and of creating special jurisdictions exempt from the full force of its

133. 43 U.S.C. § 1713(a)(3) (2012). The quoted passage continues, “which outweigh other public objectives and values, including, but not limited to, recreation and scenic values.” *See also* 43 C.F.R. § 2710.0–3(a)(2) (2015) (adopting same standard for sales by the Department of the Interior).

134. 43 U.S.C. § 1713(c) (2012).

135. CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., RL34273, FEDERAL LAND OWNERSHIP: ACQUISITION AND DISPOSAL AUTHORITIES 1 (2015).

136. *See* 43 U.S.C. § 869(a) (2012) (authorizing the Secretary of the Interior to dispose of public lands within its purview subject to various conditions); 43 U.S.C. § 869–1 (“The Secretary of the Interior may . . . (c) sell such land [as specified in § 869] to a nonprofit corporation or nonprofit association, . . . or (d) lease such land to a nonprofit corporation or nonprofit association . . . , for a period up to twenty years, and, at the discretion of the Secretary, with a privilege of renewal for a like period.”).

137. *See* MASON, *supra* note 132, at 11–12.

authority. USSEZs merely combine those two practices.

C. *Administration of the USSEZ System*

The administration of the FTZ system offers a rough-and-ready model for USSEZs. How is the FTZ system run? By statute, the Foreign-Trade Zones Board is made up of the Secretary of Commerce, who acts as chair, and the Secretary of the Treasury.¹³⁸ In actual practice, the Commissioner of U.S. Customs and Border Protection plays an advisory role and the Board delegates much authority to a Committee of Alternates “composed of the Assistant Secretary of Commerce for Enforcement and Compliance and the Deputy Assistant Secretary of the Treasury for Tax, Trade, and Tariff Policy.”¹³⁹

This FTZ model could perhaps work well for USSEZs, with a few tweaks. Instead of advisement by the Commissioner of U.S. Customs and Border Protection it would probably work better, assuming as suggested above that USSEZs do not enjoy an exemption from federal customs duties and excise taxes,¹⁴⁰ and that they arise on BLM lands,¹⁴¹ to have not Customs but the Department of Interior play an advisory role. Taking only the FTZ system as the model and making those relatively minor edits gives this result for the administration of USSEZs: a USSEZ Board made up of the Secretary of Commerce, who chairs, and the Secretary of the Treasury, with a Committee of Alternates exercising broad delegated powers and a representative of Secretary of the Department of the Interior advising.

FTZs differ from USSEZs in significant ways, however—ways that might make the FTZ Board less than a perfect

138. 19 U.S.C. § 81a(b) (2016) (defining “Board”).

139. *Who Is on the Foreign-Trade Zones Board?*, ENFT AND COMPLIANCE, INT’L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/board.html> (last visited Oct. 2, 2016).

140. *See infra* Part III.D.

141. *See supra* Part III.B.

administrative model for USSEZs. Consider, for instance, that FTZs provide exemptions from little more than customs obligations, excise taxes, and state or local *ad valorem* taxes,¹⁴² whereas USSEZs would offer exemptions from a wide swath of laws, regulations, and taxes (though not, in the suggested formulation, from federal customs duties or excise taxes). Consider, too, that FTZs are forbidden to have any residents beyond crucial on-site officials,¹⁴³ whereas USSEZs expressly aim at filling entire cities with residents. Also, whereas FTZs perform few delegated governing functions beyond audited self-monitoring in substitution of direct oversight by a customs officer,¹⁴⁴ USSEZs would perform or contract out for the provision of most government services, such as health and safety regulations, police protection, courts, and so forth.

USSEZs would thus enjoy broader exemptions, perform more functions, and host larger populations than FTZs. Rather than United States Foreign-Trade Zones, these distinctions make USSEZs somewhat resemble Honduran Zonas de Empleo y Desarrollo Económico (ZEDEs).¹⁴⁵ What are ZEDEs, then?

Honduras passed legislation authorizing the creation of ZEDEs in June of 2013, designing them to have wide ranging autonomy to pass and administer their own laws, regulations, and taxes.¹⁴⁶ As such, ZEDEs represent the most

142. *Information Summary*, ENF'T AND COMPLIANCE, INT'L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/summary.html> (last visited Aug. 29, 2016) (summarizing benefits of FTZs).

143. 19 U.S.C. § 810(a) (2012) (“No person shall be allowed to reside within the zone except Federal, State, or municipal officers or agents whose resident presence is deemed necessary by the Board.”).

144. 19 C.F.R. § 146.3 (2016).

145. *Zonas de Empleo y Desarrollo Económico*, REPUBLIC OF HOND., <http://zede.gob.hn/> (last visited Oct. 2, 2016).

146. Decree No. 33,222, *Ley Orgánica de las Zonas de Empleo y Desarrollo Económico (ZEDE)*, at 57, Septiembre 6, 2013, LA GACETA [L.G.] (Hond.) [hereinafter ZEDE Law]. For an unofficial translation of the statute, see <https://goo.gl/zyU8uj> (last visited Oct. 2, 2016).

advanced form of special jurisdiction the world has seen—one that offers not just special economic rules but administrative and legal ones, too. Rightly crediting a great deal of Hong Kong's success to its effective importation of the common law to an island in the Pearl River delta, and aiming to create something like that thriving metropolis in Central America, the Hondurans designed ZEDEs to import governing principles different from those that apply in the rest of the country.¹⁴⁷ The enabling legislation requires ZEDE courts to follow the common law, for instance—a striking innovation in a country that has historically followed the civil law.¹⁴⁸ The ZEDE statute also includes a number of provisions designed to ensure that zones respect their residents' constitutional and human rights.¹⁴⁹

Within broad limits, each zone administers its own governing functions.¹⁵⁰ Granted wide latitude to innovate in governance, and subject to continuing oversight, the ZEDE offers an apt model for the administration of USSEZs. How, then, does Honduras administer the ZEDE system?

A Committee for the Adoption of Best Practices (CAMP from its Spanish name, "Comité para la Adopción de Mejores Prácticas"), made up of notables from Honduras and the

147. For background about ZEDEs, see BELL, *supra* note 52, at 1–4; Brian Doherty, *The Blank Slate State*, REASON (June 2013), <http://reason.com/archives/2013/05/13/the-blank-slate-state>; *Special Economic Zones: Political Priority, Economic Gamble: Free-trade Zones Are More Popular Than Ever—with Politicians, if not Economists*, THE ECONOMIST (Apr. 4, 2015), <http://www.economist.com/news/finance-and-economics/21647630-free-trade-zones-are-more-popular-everwith-politicians-if-not>.

148. ZEDE Law, *supra* note 146, art. 14.

149. *Id.* art. 9 (requiring equal rights and freedom from discrimination with the ZEDE); *id.* art. 10 (guaranteeing protection of constitutional and human rights); *id.* art. 16 (establishing special courts to enforce human rights), *id.* art. 33 (requiring freedom of conscience, religion, labor protection, and freedom of association within the ZEDE); *id.* art. 35 (protecting labor rights); *id.* art. 41 (requiring criminal sanctions against human trafficking, genocide, terrorism, child pornography, child exploitation and organized crime); *id.* art. 43 (protecting the property rights of indigenous peoples and special communities of descendants of escaped slaves).

150. *Id.* art. 12.

world, most of them from the private sector, oversees the ZEDEs in much the way that a board of trustees oversees a college or charity.¹⁵¹ The CAMP approves or rejects applications, supervises ZEDE operations, and wields the power to appoint or remove each zone's head administrative official, its Technical Secretary.¹⁵²

On a day-to-day basis, each ZEDE's Technical Secretary administers its operations.¹⁵³ The authority delegated to the zone, and exercised through its Technical Secretary, includes passing and enforcing internal legislation, police powers, and other governing services. As the ZEDE Act makes clear, however, the zones remain an inalienable part of Honduras, subject to its constitution and the national government on core issues of sovereignty such as territory, national defense, foreign affairs, and passports.¹⁵⁴

The ZEDE, a bold Honduran approach to special jurisdictions, remains for the moment untested; the government only recently specified the requirements for an application to create a ZEDE and began inviting submissions.¹⁵⁵ Even as mere plans, though, these Honduran super-SEZs have something to teach USSEZs. Note in particular how the power to approve or remove a zone's Technical Secretary gives the CAMP only a somewhat hands-off power over a zone, leaving internal matters largely under local control. Note, too, how the supervising board includes non-government officials. These features might suit the administration of USSEZs, too.

151. See *Appointment of Members of CAMP*, REPUBLIC OF HOND., <http://zede.gob.hn/?p=502> (last visited Aug. 29, 2016). Note, however, that a translation quirk, identifies Mark Klugman as "Mark Wiseman" in the English version.

152. ZEDE Law, *supra* note 146, art. 11.

153. ZEDE Law, *supra* note 146, art. 12.

154. ZEDE Law, *supra* note 146, art. 1.

155. *Zonas de Empleo y Desarrollo Económico: Admission Requirements*, REPUBLIC OF HOND., http://zede.gob.hn/?page_id=16 (last visited Aug. 29, 2016).

D. *Revenue Flow and Political Economy of USSEZs*

USSEZs would generate revenue for the federal government, which it would in turn share with states bordering the zones. How would the USSEZ program raise money? By the sale or lease of select public lands to zone developers, together with covenants exempting the zone from certain laws, regulations, and taxes. The lands and covenants associated with each USSEZ would go to the highest qualifying bidder at a public auction. In addition to a large up-front payment, a zone operator would make periodic payments in the form of a lease or concession.¹⁵⁶ This financial structure would incentivize current and future political actors at national and local levels to support the launch and success of USSEZs.

Why provide for sharing USSEZ revenues between federal and state governments? In the first place: simple fairness. Both levels of government would have to bear costs if the zones succeed; the federal government would have to cede both its property rights and some of the privileges of authority to the zones, whereas state and local governments would have to deal with people and goods passing through their territories while in transit to or from adjoining zones. If both federal and state governments have to bear the costs of hosting USSEZs, both should also enjoy the benefits of doing so.

In the second place, by sharing USSEZ revenues, the national government could calm a long-smoldering conflict over state claims to federal lands.¹⁵⁷ Especially in western

156. The federal government already has experience in similar transactions. See, e.g., *Leasing*, BUREAU OF OCEAN ENERGY, DEP'T OF THE INTERIOR, <http://www.boem.gov/Leasing/> (last visited Aug. 29, 2016).

157. For background about this dispute, as well as proof that even scholars disagree about who has the better of the arguments, compare Robert B. Keiter & John C. Ruple, *A Legal Analysis of the Transfer of Public Lands Movement* 1–2 (Wallace Stegner Center for Land, Resources and the Environment, White Paper No. 2014-2, Oct. 27, 2014), with Donald J. Kochan, *Public Lands and the Federal Government's Compact-Based "Duty to Dispose": A Case Study of Utah's H.B. 148–*

states, this conflict has engendered a great deal of passion, and even broken out in violence.¹⁵⁸ Like any workable political compromise, the USSEZ program would demand sacrifices from all parties: the states would not get title to the lands they crave but the federal government would finally open some of its vast holdings to uses beneficial to local and regional economies.

A third argument for federal sharing of USSEZ revenues: pure politics. Public choice considerations counsel getting buy-ins from both the federal and state governments, either of which might otherwise have considerable power to stymie USSEZs. To belabor the obvious, states will more likely support zones if they benefit from them financially. The revenue sharing plan described here thus satisfies principles of fairness, concern for peaceful federal-state relations, and the pragmatic counsels of political expediency.

Note that the USSEZ developers' comparatively large up-front payments might mean a lot to the program's success. Politicians often have short time horizons, not looking very far beyond the next election. Many of the most powerful political agents rationally expect to enjoy long tenures, of course, but the USSEZs will more likely win political support if they can generate revenue soon and in abundance. These revenues will moreover have the virtue of appearing out of thin air, as it were, liquidating the value of assets that have hitherto been locked out of circulation (fallow federal lands) or not even considered as potentially subject to market valuation (exemptions from select laws, regulations, and taxes).

With regard to raising revenue, USSEZs less resemble U.S. FTZs than they resemble Honduran ZEDEs. Whatever their other benefits, FTZs do not contribute directly to public

The Transfer of Public Lands Act, 2013 BYU L. REV. 1133, 1133 (2014).

158. See, e.g., John Rosam & Conrad Wilson, *FBI: Standoff Continues, Release Video of Fincum Death*, OPB.ORG (Jan. 28, 2016), <http://www.opb.org/news/series/burns-oregon-standoff-bundy-militia-news-updates/fbi-standoff-continues-release-video-of-fincum-death/>.

coffers in any meaningful way. Applications cost in the mere thousands of dollars,¹⁵⁹ and FTZs do not evidently pay continuing concession fees for the privileges they enjoy. Perhaps as a consequence, the Foreign-Trade Zones Board is not self-funding. Honduran ZEDEs, in contrast, will contribute money to public coffers by express design; each zone must pay the national government 12% of all tax revenues collected in the zone.¹⁶⁰ Each zone must by statute distribute these revenues evenly between five trusts, each created for one of five constituencies: the judiciary, departmental governments, the executive branch, municipalities, and the armed forces.¹⁶¹

So far as paying their own way goes, USSEZs would take inspiration not from U.S. FTZs but Honduran ZEDEs. Even the Honduran approach risks encouraging legal quibbles and micromanagement, however. A zone's Technical Secretary might for instance disagree with the national government about whether a port fee qualifies as a tax or a service charge, leading the government to challenge the zone's management.

The USSEZ system proposed here, because it asks only that zone developers and managers pay the agreed-to price for federal lands and concessions, would not give the parties similar grounds for dispute. In addition to encouraging comity, this hands-off approach would leave ample room for innovative new approaches to the age-old problem of funding public goods. Perhaps, USSEZs will discover that taxes are not as inevitable as death, after all.

E. *Protection of Civil Liberties in USSEZs*

Unlike federal FTZs, USSEZs will admit residents. With

159. *FAQ: Is There a Fee to Apply?*, ENF'T AND COMPLIANCE, INT'L TRADE ADMIN., <http://enforcement.trade.gov/ftzpage/info/fees.html> (last visited Aug. 29, 2016).

160. ZEDE Law, *supra* note 146, art. 44.

161. *Id.*

those residents will come the obligation to respect civil liberties. It will not matter exactly how residents of USSEZs get classified by federal authorities; whether natural born citizens, permanent residents, or undocumented immigrants, all people within the territory of the United States enjoy constitutional protections of their fundamental rights.¹⁶² Ample experience, for better or worse, already demonstrates how state and federal governments fulfill that mandate. History offers less evidence about the performance of private governing services, though. Would USSEZ's respect civil liberties?

This subsection addresses that question in two steps. In the first step, it analyzes the application of the doctrines of state action and waiver to USSEZs and concludes that a zone could obtain enforceable waivers of many if not all constitutional rights. That may sound troubling—it should—but it does not mark USSEZs as markedly worse than traditional polities. The subsection's second step explains how the absence of governmental immunity and competitive pressure from competing services will tend nonetheless to ensure that USSEZs respect their residents' civil liberties.

1. How State Action and Waiver Doctrines Affect Civil Liberties in USSEZs

Even though a privately governed USSEZ might perform many of the same services as a conventional political community, it does not automatically follow that the zone would face the same legal constraints against infringing the fundamental civil liberties of its residents as a conventional political community would. The problem does not and could

162. *Plyler v. Doe*, 457 U.S. 202, 210 (1982) (“Aliens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The fourteenth amendment to the constitution is not confined to the protection of citizens [Its] provisions are universal in their application, to all persons within the territorial jurisdiction . . .”).

not arise by statute; federal lawmakers have no just power to negate constitutional rights. The problem instead arises because private communities generally do not engage in state action subject to constitutional limits and, even if they do, they can in many cases obtain waivers of those limits.

The Fourteenth Amendment makes (most of) the Bill of Rights applicable to states, and through them to municipalities, because like the federal government those entities engage in state action.¹⁶³ Under prevailing law, however, homeowners' associations and other private communities, despite offering many governing services, do not generally qualify as state actors.¹⁶⁴ This alone suggests that USSEZs might pose unique risks to civil liberties.

It would not remove that risk to simply treat the zones as state actors, as lawmakers might do by stipulation in the USSEZs' enabling statute. Why not? Because the doctrine of waiver gets particular traction in private communities.

Those who lay just claim to constitutional rights—criminal suspects in police custody, for instance—also generally have the power to waive those rights.¹⁶⁵ Because they give the public largely unfettered access to streets and

163. U.S. CONST. amend. XIV, § 1.

164. See *Fearing v. City of Lake St. Croix Beach*, No. Civ. 04-5127, 2006 WL 695548, at *8 (D. Minn. Mar. 4, 2006), *aff'd on other grounds*, 253 F. App'x 621 (8th Cir. 2007); *Barr v. Camelot Forest Conservation Ass'n., Inc.*, 153 F. App'x 860, 862 (3d Cir. 2005); *Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n.*, 929 A.2d 1060, 1063 (N.J. 2007) (reversing decision to treat HOA as a state actor); Aaron R. Gott, Note, *Ticky Tacky Little Governments? A More Faithful Approach to Community Associations Under the State Action Doctrine*, 40 FLA. ST. U. L. REV. 201, 203 (2012) ("As private actors not held subject to the constitutional limitations that constrain municipal, state, and federal governments, community associations may intrude upon" constitutional rights "with but a few exceptions.").

165. See *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972) (due process notice rights); *Illinois v. Allen*, 397 U.S. 337, 342–43 (1970) (right to be present at trial); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (rights to counsel and against compulsory self-incrimination); *Fay v. Noia*, 372 U.S. 391, 439 (1963) *overruled in part by* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (habeas corpus); *Rogers v. United States*, 340 U.S. 367, 371 (1951) (right against compulsory self-incrimination).

other government-owned areas, political communities cannot credibly attribute waiver to their residents and guests. Private communities, in contrast, can admit members of the public more selectively. This allows them to require enforceable waivers of constitutional rights from those who enter their property, as when a homeowners' association limits First Amendment rights by regulating the display of signs on subject properties.¹⁶⁶

The willingness of courts to uphold waivers of constitutional rights in private communities varies across jurisdictions and according to particular circumstances.¹⁶⁷ Most cases to address the issue, however, have held that private communities, not being state actors, cannot violate the First Amendment.¹⁶⁸ Moreover, the doctrine of *Shelley v. Kraemer*,¹⁶⁹ under which judicial enforcement of a private covenant might qualify as state action,¹⁷⁰ evidently does not reach beyond restrictions that aim to effectuate racial discrimination.¹⁷¹ On that reasoning, a homeowner's association would not violate the First Amendment if it sought a court order against, say, an unwelcome parade on its private thoroughfares.

166. See *Comm. for a Better Twin Rivers*, 929 A.2d at 1073 (upholding restriction on signs displayed with private community). Notably, the New Jersey Supreme Court upheld these restrictions despite its somewhat exceptional willingness to scrutinize private action in such contexts, stating “we have not followed the approach of other jurisdictions to require some state action before the free speech and assembly clauses under our constitution may be invoked.” *Id.* at 364–65.

167. See Robin Miller, *Restrictive Covenants or Homeowners' Association Regulations Restricting or Prohibiting Flags, Signage, or the Like on Homeowner's Property as Restraint on Free Speech*, 51 A.L.R.6th 533, 533 (2010).

168. See, e.g., *Barr*, 153 F. App'x at 862 (holding that prohibition on “for sale” signs on development properties is not a violation of First or Fourteenth Amendments); *Fearing*, 2006 WL 695548, at *8, *aff'd on other grounds*, 253 F. App'x 621 (8th Cir. 2007) (finding the homeowners' association was not acting under color of state law when it removed signs).

169. 334 U.S. 1 (1948).

170. *Id.* at 21.

171. *Loren v. Sasser*, 309 F.3d 1296, 1303 (11th Cir. 2002).

This prevailing deference to the sanctity of private covenants has its limits. If a private community too closely resembles a conventional political community in terms of scope and access, the venerable case of *Marsh v. Alabama*¹⁷² suggests that it might also get treated like a conventional political community in terms of constitutional rights.¹⁷³ The Court in *Marsh* overturned the trespass conviction of a woman caught passing out religious pamphlets in defiance of the notices that Gulf Shipbuilding Corporation had posted in its company town—a suburb of Mobile, Alabama, known as Chickasaw. As the Court described it, Chickasaw looked very much like any town.

The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobile County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office.¹⁷⁴

It was not just the size or functions of Chickasaw's government that convinced the Court to treat it like a political institution, however; the Court took special note that nothing clearly marked off the city as private.

There is nothing to stop highway traffic from coming onto the business block and upon arrival, a traveler may make free use of the facilities available there. In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.¹⁷⁵

In general, the Court held, "[t]he more an owner, for his advantage, opens up his property for use by the public in

172. 326 U.S. 501 (1946).

173. *Id.* at 508 (limiting the power of a company town to restrict speech on its property).

174. *Id.* at 502–03.

175. *Id.* at 503.

general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”¹⁷⁶

Taken as a whole, therefore, extant case law suggests that a privately run USSEZ might obtain legally enforceable waivers of constitutional rights from its residents or guests. Zone operators could avoid the mistake made by Chickasaw, the company town in *Marsh*, by clearly marking the borders between their territories and neighboring areas. Only by giving clear notice to visitors that they have entered an area where different rules apply could a zone justify imposing those rules.¹⁷⁷ In that case, entering and remaining in the zone would show the visitor’s implied consent to its rules. Still better, the zone might obtain from invitees their express consent to its rules, as when an amusement park guest buys a ticket with attached terms or a toll road user signs up for electronic billing.¹⁷⁸ That approach might not have been feasible for Chickasaw to implement in the 1940s, but technological advances have since brought great efficiencies to access controls for large numbers of people and large, conditionally bounded areas.¹⁷⁹

It thus seems likely that a USSEZ, as a community developed and managed by private parties, might have not just the legal power but the practical ability to require guests and residents to waive certain of their constitutional rights.

176. *Id.* at 506.

177. Residents, owners, lease holders, and the like do not present the same challenge, as the zone would presumably win their consent to its rules by express and written agreement.

178. For an explanation of the relative merits of implied and express consent in justifying social institutions, see Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. L. REV. 17, 34–39, 58–63 (2010).

179. See, e.g., Dignia Sys., Ltd., *Index*, <http://www.dignia.com/> (describing large-scale, technologically sophisticated border, access, and crowd control systems) (last visited Mar. 1, 2016); THALES TRANSP. SYS., CONTACTLESS FARE COLLECTION IN AN INTEROPERABLE, MULTI-OPERATOR AGE 5 (2006), https://www.thalesgroup.com/sites/default/files/asset/document/lb_fare_collection_va_web.pdf (last visited Aug. 28, 2016) (advertising automated fare control services).

Which rights? Not all of them, certainly.¹⁸⁰ The Thirteenth Amendment flatly forbids slavery, after all (except as criminal punishment).¹⁸¹ Assuming, as suggested below, that USSEZs not be given the power to incarcerate, this would put the zones ahead of federal and state governments in terms of eschewing involuntary servitude.¹⁸²

Query whether the Seventh Amendment's ban on "cruel and unusual punishment" likewise qualifies as unwaivable. Innocents may blanch at the thought of prisoners opting for an official lashing or mutilation in lieu of suffering a lengthy imprisonment, but no objective observer of the criminal justice system could call the scenario inconceivable or even necessarily on net less kind. Penitentiaries already qualify as torture in any humane sense of the word; few penitents make it through without some kind of scarring—literal, psychological, or both. And as those who have studied it most closely will attest, "[i]t is waiver of rights that permits the system of criminal justice to work at all."¹⁸³ Exactly how far those waivers should reach courts will have to resolve later, under consideration of all the then-pertinent factors.

Does the possibility that USSEZs might be able to enter into legally enforceable agreements concerning the waiver of certain constitutional rights make them more of a threat to civil liberties than conventional political communities? No. First of all, note that the enforcement of legally enforceable agreements, such as those embodied in a private community's servitudes, leases, or licenses, itself qualifies as the defense of vital civil liberties, including the freedoms of property, contract, privacy, and association. Second, note

180. The question is not settled by reference to "unalienable" rights in the Declaration of Independence. That term does not equate to "unwaivable"—indeed, the nation's existence has relied on patriots willing to sacrifice their rights to life, liberty, and the pursuit of happiness by serving in the military.

181. U.S. CONST. amend. XIII, § 1.

182. See *infra* Part III.E.2.

183. Michael E. Tigar, Foreword, *Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 (1970).

that conventional political communities, notwithstanding their paper commitments, have a decidedly mixed record of respecting fundamental constitutional rights.¹⁸⁴

Free people should surely have the right to decide for themselves whether to trust generous but insincere political promises over less generous, but honest, private ones. If citizen-customers choose private USSEZs over competing political governments, who are we to second-guess them? As the next step in this subsection's analysis argues, thanks to USSEZs' lack of governmental immunity and to competition from other jurisdictions, zones will have strong incentives to show great respect for residents' civil liberties. So far as protecting individual rights goes, therefore, USSEZs could compete with the best nation states.

2. How Exposure to Liability and Competition Protect Civil Liberties in USSEZS

The prior subsection revealed that private communities generally escape the burdens that follow from engaging in state action, and that they can likely obtain enforceable waivers of those constitutional rights that still apply against a USSEZ government. That raises the concern that USSEZs might pose a peril to civil liberties. And, indeed, if that were the whole of the picture, it might. But as this subsection discusses, other legal and economic forces look likely to force USSEZs to respect individual rights. Why? First, like other private communities, but unlike political ones, USSEZs would not claim the privilege of governmental immunity. Second, competition from other communities, both political and private, would force USSEZs to respond to the demands of citizen-customers that their rights receive the utmost respect.

Anyone who thinks it somehow unfair that private

184. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 217–19 (1944) (holding constitutional the forced internment of Americans of Japanese ancestry during World War II).

communities do not engage in state action under prevailing law should consider that private communities have to forego one of the main perquisites claimed by political communities at all levels in the United States: governmental immunity. That doctrine, despite shaky historical, legal, and ethical foundations, affords political entities and their agents complete or partial exemption from liability for their civil wrongs.¹⁸⁵ Thanks to governmental immunity, a state and its officers can violate a person's constitutional rights without suffering an obligation to pay for the damages they thereby caused.¹⁸⁶ Neither private communities nor their agents enjoy a similar privilege. They instead face full civil liability for all legal wrongs against others' persons or property.¹⁸⁷ That prospect of liability would give USSEZs and their agents a powerful incentive to respect individual rights.

USSEZs would also face the ultimate check on any government's power: competition from other governments. Arising on vacant land, a zone would in the first instance have to lure its residents away from traditional political communities. Zones would also have to compete with each other to attract the sorts of workers, creators, and managers who make an economy hum.

We do not have to guess how jurisdictional competition would shape the way that USSEZs treat their citizen-

185. See, e.g., Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 1–3 (1924); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN L. REV. 1201, 1201–03 (2001); Donald Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 443 (2011); George W. Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 LA. L. REV. 476, 476 (1953); Rodolphe J.A. de Seife, *The King Is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 HOFSTRA L. REV. 981, 1032–40 (1996).

186. See, e.g., *Engblom v. Carey*, 677 F.2d 957, 957 (2d Cir. 1982) (finding no state or individual liability for violation of Third Amendment rights).

187. See Tom W. Bell, *Unconstitutional Quartering, Governmental Immunity, and Van Halen's Brown M&M Test*, 82 TENN. L. REV. 497, 510–14 (2015) (contrasting the liability of private communities to political ones and concluding, “[c]ompared to private parties, governments have it good when they do bad”).

customers; a close study of history and theory reveals that when governing services cannot assume the allegiance of captive subjects they have to offer these sorts of features to remain viable:

1. Respect for the consent of parties within the zone's jurisdiction;
2. Protection of individual rights;
3. Dispute resolution by truly independent bodies; and
4. "Freedom of exit."¹⁸⁸

Exactly how zones would supply those and other attributes of good government remains a question of entrepreneurship and innovation. It seems likely, though, that like other privately managed communities, a USSEZ would rely on covenants, leases, and licenses to ensure that it has the express consent of all parties within its jurisdiction. The zones would doubtless promise to respect a long list of rights; on that point, after all, they would have to compete with the U.S. Constitution's Bill of Rights. More than just a list, though, smart USSEZs might offer their residents a "most free person" guarantee, thereby committing to respect individual liberty at least as well as any number of competing jurisdictions. Also, as mentioned above, USSEZs would like other private communities bear full civil liability to residents or others who suffer legal wrongs—a powerful deterrent to violating individual rights.

So far as providing dispute resolution by truly independent bodies goes, USSEZs could of course follow conventional polities by providing its own judges and courts. But while that might provide objective dispute resolution in cases between residents, it could not be trusted to decide cases brought against the zone itself. No party should be allowed to judge its own case.¹⁸⁹ On that front USSEZs could

188. Tom W. Bell, *Principles of Contracts for Governing Services*, 21 GRIFFITH L. REV. 472, 475 (2012).

189. *Id.* at 486–87.

outcompete traditional nation states by relying on same method used to resolve international trade disputes and in other contexts where the parties seek truly independent adjudicative bodies: Each party chooses an arbitrator and those two arbitrators choose a third.¹⁹⁰

What about freedom of exit? Lawmakers could best provide for that by expressly denying USSEZs the imprisonment power. Zones would have to deal with criminals by cleverer and gentler means, such as prevention, civil liability, and exile. That is not to say that zones would have to answer wrongdoing with passivity; it is only to say that, as private actors, USSEZs would be limited to the sort of responses that other private actors can rightfully take in defense of their persons and property.¹⁹¹

CONCLUSION

For the last several centuries, nation states have dominated the political environment. But the political environment is not as simple—not as uniform and unchanging—as it once was. Special jurisdictions, long relegated to the margins of history, have in recent decades grown in number, diversity, and influence. SEZs worldwide and FTZs in the United States exemplify that trend. The USSEZs described in this Article represent the next step in the evolution of special jurisdictions.

This Article began by offering an overview of SEZs. It then gave a quick history of special jurisdictions, revealing not only their long and complicated relationship with nation

190. See UNCITRAL Model Law on International Commercial Conciliation art. 11(3)(a), U.N. Doc. A/40/17 (1985), <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998.pdf>. See also AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-12(b), R-13 (2013), <http://www.limaarbitration.net/pdf/arbitraje-comercial/Reglamento-Arbitraje/aaa-ingles.pdf> (setting forth similar procedures).

191. See, e.g., RESTATEMENT (SECOND) OF TORTS § 65 (AM. LAW INST. 1963) (specifying limits on privilege of defense of self); *id.* at § 76 (specifying limits on privilege of defense of others). See generally JOHN P. GILROY, THE LAW OF ARREST FOR MERCHANTS AND PRIVATE SECURITY PERSONNEL (2014).

states generally but also the role they have played in the development of the United States. From the proto-SEZs that gave birth to it, to the FTZs now sprinkled generously across its territory, to the plurality encompassed by its very name, the United States had a long, complicated, and rich relationship with special jurisdictions.

This Article concluded by proposing a new and characteristically American generation of special economic zone: USSEZs. These would arise on fallow federal lands exempted from all state and many federal laws, regulations, and taxes. For the most part self-governing and privately run, USSEZs would permit innovation in government, attracting investment and creating jobs. The program would also raise money for public coffers through the auction of zone lands and concessions. The federal government would share these revenues with states both for reasons of fairness, because zones would impose costs on the infrastructure and services of adjoining states, and of politics, because revenue sharing would win USSEZs national and local allies. Another beneficial side-effect of USSEZs: by finally putting neglected public lands to productive use, it would bring peace to a long-running conflict between the federal government the states.

Unlike FTZs, but like special zones elsewhere in the world, USSEZs would have residents. Unlike political governments, but like other private communities, USSEZs would bear full liability for all civil wrongs. This check on power would, if enforced by truly independent courts, give the zones powerful incentives to respect residents' rights. Furthermore, each USSEZ would face competition from traditional polities and other zones, making fair treatment of citizen-customers a paramount concern. For these and other reasons, USSEZs would likely protect residents' civil liberties at least as well as federal and state governments.

Theorists say that biological evolution proceeds not at a steady pace, but instead as a series of punctuated equilibria, like a mountain stream flowing from a pool through a

cascade to another pool.¹⁹² Combining the larger historical picture with recent trends suggests that the nation state likewise faces stretches of turbulent waters. USSEZs offer a way to navigate those rapids, channeling the potential of special jurisdictions in the service of the greater good.

192. *See generally* STEPHEN JAY GOULD, PUNCTUATED EQUILIBRIUM (2007).