

## Charter Cities

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## CHARTER CITIES

Lan Cao\*

### INTRODUCTION

Globalization has produced a mongrelized, hybrid, and heterogeneous reality that transcends national territory. For example, in today's globalized world, corporate products are frequently globally sourced and produced. "A Pontiac Le Mans, ostensibly a General Motors product of American nationality, is in fact a globally composite product involving South Korean assembly; Japanese engines, transaxles and electronics; German design and style engineering; Taiwanese, Singaporean, and Japanese small components; British advertising and marketing; and Irish and Barbadian data processing."<sup>1</sup> Is this an American product or not? "Products appear to be made everywhere and also nowhere in particular, as shown on the following computer circuit label: 'Made in one or more of the following countries: Korea, Hong Kong, Malaysia, Singapore, Taiwan, Mauritius, Thailand, Indonesia, Mexico, Philippines. The exact country of origin is unknown.'"<sup>2</sup>

Even national governance has become more hybridized under the influence of the forces of globalization.<sup>3</sup> The domestic autonomy of states must now contend

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<sup>1</sup> Lan Cao, *Corporate and Product Identity in the Postnational Economy: Rethinking U.S. Trade Laws*, 90 CALIF. L. REV. 401, 432 (2002).

<sup>2</sup> *Id.* at 403.

<sup>3</sup> See, e.g., SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 28 (1996) ("The state itself has been a key agent in the implementation of global processes, and it has emerged quite altered by this participation."); Eric C. Ip, *Globalization and the Future of the Law of the Sovereign State*, 8 INT'L J. CONST. L. 636, 638 (2010) ("[I]t is largely uncontroversial to suggest that globalization has exerted an immense impact on the sovereign state."); see generally THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (updated & expanded ed. 2006) (discussing the reach and rapid impact of globalization on states).

with exogenous pressures from international norms and forces, such as human rights laws, international trade and capital markets, international organizations, and other markers of the new international order.<sup>4</sup> As the price of membership in the globalized world order, states are responsible for providing a growing list of public goods for their populations, such as security, health and education, and infrastructure, among others.<sup>5</sup> A state's failure to provide one or more of these public goods impacts the overall quality of life for its people and its level of economic development.<sup>6</sup> In an intensely networked world, such failure can lead to public shaming at the international level, even if traditional state sovereignty protects governments from accountability.<sup>7</sup>

Not surprisingly, states have become more willing to look for creative solutions for the delivery of public goods, even at the expense of conceding some aspects of domestic autonomy. A number of governments have turned to public-private partnerships for large projects, partnering with foreign contractors to complete infrastructure projects that were previously undertaken wholly by the public sector.<sup>8</sup> In such partnerships, multinational enterprises (MNEs), nongovernmental organizations (NGOs), development agencies, or other private actors collaborate with the state to meet the demand for public goods.<sup>9</sup>

In the BOT (build, operate, transfer) or BOOT (build, own, operate, transfer) models of public-private partnerships, the state provides the land on which the domestic or foreign private partners finance, develop, construct, market, and operate the infrastructure.<sup>10</sup> The private parties then transfer the facilities to the government after a set period of time, typically ranging from twenty to ninety-nine years.<sup>11</sup> However,

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<sup>4</sup> See SASSEN, *supra* note 3, at 29 (“Sovereignty remains a feature of the [international] system, but it is now located in a multiplicity of institutional arenas: the new emergent transnational private legal regimes, new supranational organizations (such as the WTO and the institutions of the European Union) and the various international rights codes. All these institutions constrain the autonomy of national states; states operating under the rule of law are caught in a web of obligations they cannot disregard easily . . . .”); Ip, *supra* note 3, at 639 (“Complex economic, humanitarian, health, and environmental problems no longer heed the artificial boundaries imposed by states” as the “state is ‘obliged’ to share power with other groups within complicated, multilayered networks of political power”).

<sup>5</sup> See Mansour Esmail Zaei, *Globalization of National Policy-Making: An International Perspective*, 13 PUB. POL’Y ADMIN. 331, 331–32 (2014).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> David A. Levy, *BOT and Public Procurement: A Conceptual Framework*, 7 IND. INT’L & COMP. L. REV. 95, 95–96 (1996).

<sup>9</sup> BARBARA WEBER, MIRJAM STAUB-BISANG & HANS WILHELM ALFEN, *INFRASTRUCTURE AS AN ASSET CLASS: INVESTMENT STRATEGY, SUSTAINABILITY, PROJECT FINANCE AND PPP* 87–89 (2d ed. 2016).

<sup>10</sup> Andrew B. Wyatt, *The Privatisation of Public Infrastructure in Transitional Southeast Asian Economies*, in COLLECTIVE GOODS, COLLECTIVE FUTURES IN ASIA 122–24 (Sally Sargeson ed., 2002).

<sup>11</sup> *Id.*

during the concession period, the facilities and land are no longer fully within the state's domestic autonomy.<sup>12</sup>

There are numerous examples of BOT or BOOT projects worldwide. For instance, Hong Kong's Western Harbor Crossing is owned by a private consortium for a thirty-year concession period.<sup>13</sup> India has entered into numerous BOT road-construction projects with foreign partners.<sup>14</sup> Vietnam has contracted with Japanese firm Marubeni and the state-owned South Korean utilities provider, Korea Electric Power, to construct a thermal power plant.<sup>15</sup>

Public services can also be globally sourced. In a growing worldwide trend, governments are outsourcing the delivery of many services by engaging in transnational public-private partnerships. In Nigeria, private schools have flourished as a response to the inadequacy of government-provided education.<sup>16</sup> In Kenya and Uganda, hybrid NGOs and private businesses are working together to deliver electricity to areas not covered by the governments.<sup>17</sup> Such transnational partnerships transform governance by interjecting their own rules and regulations into the host country as a kind of "soft law."<sup>18</sup> As a result of these transnational partnerships, local government law is perforated by international influences and values brought in by foreign partners. In the globalized world, state sovereignty and domestic autonomy have become hollowed out by international partnerships and influences.

It is not just products and services that are globally sourced with multiple origins; even cities and territories can reflect this modern reality. We tend to think of cities as entities within sovereign nation-states with laws passed by legislatures at the national, state, and local level. But there are startup or charter cities that challenge, for better or for worse, this national-international boundary, and are instead mongrelized,

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<sup>12</sup> *Id.*

<sup>13</sup> UNIVERSITY COLLEGE LONDON, PROJECT PROFILE: HONG KONG, WEST HARBOUR CROSSING 39 (2014); C. M. Tam, *Build-Operate-Transfer Model for Infrastructure Developments in Asia: Reasons for Successes and Failures*, 17 INT'L J. PROJECT MGMT. 377, 377–82 (1999).

<sup>14</sup> See generally Satyanarayan N. Kalidindi & L. Boeing Singh, *Financing Road Projects in India Using PPP Scheme*, Proceedings of the 2009 Mid-Continent Transportation Research Symposium, INST. TRANSP. IOWA. ST. U. (2009) (discussing the efficiencies and benefits of PPPs in upgrading India's road network).

<sup>15</sup> Atsushi Tomiyama, *Vietnam to Ask Marubeni with Help Constructing \$2.5bn Thermal Plant*, NIKKEI ASIAN REV. (Nov. 8, 2017), <https://asia.nikkei.com/Politics/Vietnam-to-ask-Marubeni-with-help-constructing-2.5bn-thermal-plant> [<https://perma.cc/4VCH-SG32>].

<sup>16</sup> Danielle Carter Kushner, Lauren M. MacLean & Jeffery W. Paller, *Do Public Goods Have to Be Public? Not in Some African Countries*, WASH. POST (Sept. 23, 2015), [https://www.washingtonpost.com/news/monkey-cage/wp/2015/09/23/five-things-you-should-know-about-the-politics-of-public-goods-in-africa/?utm\\_term=.9dabc4d34162](https://www.washingtonpost.com/news/monkey-cage/wp/2015/09/23/five-things-you-should-know-about-the-politics-of-public-goods-in-africa/?utm_term=.9dabc4d34162) [<https://perma.cc/FX5X-44YA>].

<sup>17</sup> *Id.*

<sup>18</sup> Andrea Liese & Marianne Beisheim, *Transnational Public-Private Partnerships and the Provision of Collective Goods in Developing Countries*, in GOVERNANCE WITHOUT A STATE? POLICIES AND POLITICS IN AREAS OF LIMITED STATEHOOD 115, 117 (Thomas Risse ed., 2011).

hybrid, and heterogeneous. For example, Madagascar explored unconventional ways of attracting foreign investment, leasing a large tract of land on its territory to Daewoo, a South Korean corporation, for ninety-nine years.<sup>19</sup> Daewoo, and Madagascar's neighbor Mauritius (acting as trustee), would administer the export-processing zone on Malagasy territory.<sup>20</sup> Although the deal did not go through because the President of Madagascar was ousted in a coup, it nonetheless represented the concept of the public-private sector—a national-international partnership using innovative, but controversial, arrangements to jump-start economic development.<sup>21</sup>

In recent years, cities have become innovative global actors participating in the international arena in their own right, even as they retain their subordinate status within the nation. For example, the cities of New York, Houston, Miami, and San Francisco committed to the goals of the Paris agreement despite the United State's national decision to withdraw in 2017.<sup>22</sup> London, New York, and Tokyo are well established as "world cities" that serve as international economic actors and command centers of the global economy.<sup>23</sup> For such world cities, international influences compete with national laws as the cities adopt objectives of "best practices" or "good governance models."<sup>24</sup> According to Professors Gerald Frug and David Barron, the incremental transformation of cities, especially world cities, into international actors has given rise to the hybrid entity of the "private city," where the objective of private economic development drives city power.<sup>25</sup>

Some scholars have argued that public land and sovereign functions should be viewed as commodities in an international market.<sup>26</sup> At the height of the Greek debt crisis, two German MPs gave an interview in which they suggested that Greece sell some of its islands and the Acropolis to reduce its debt.<sup>27</sup> Although the proposal was

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<sup>19</sup> Song Jung-a, Christian Oliver & Tom Burgis, *Daewoo to Cultivate Madagascar Land for Free*, FIN. TIMES (Nov. 19, 2008), <https://www.ft.com/content/6e894c6a-b65c-11dd-89dd-0000779fd18c> [<https://perma.cc/HMJ5-MP25>].

<sup>20</sup> Sebastian Mallaby, *The Politically Incorrect Guide to Ending Poverty*, ATLANTIC (July/Aug. 2010), <https://www.theatlantic.com/magazine/archive/2010/07/the-politically-in-correct-guide-to-ending-poverty/308134> [<https://perma.cc/F5D8-N5S3>].

<sup>21</sup> *See id.*

<sup>22</sup> Oliver Milman, Richard Luscombe & Tom Dart, *The Fight Against Climate Change: Four Cities Leading the Way in the Trump Era*, GUARDIAN (June 12, 2017, 6:00 AM), <https://www.theguardian.com/cities/2017/jun/12/climate-change-trump-new-york-city-san-francisco-houston-miami> [<https://perma.cc/Q4NU-SK2F>].

<sup>23</sup> Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1, 8–9 (2006).

<sup>24</sup> *Id.* at 3–4.

<sup>25</sup> *Id.* at 4.

<sup>26</sup> Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 243 (2014).

<sup>27</sup> Nicole Itano, *Germans to Debt-Ridden Greeks: Sell the Acropolis. And a Few Islands*, CHRISTIAN SCI. MONITOR (Mar. 4, 2010), <https://www.csmonitor.com/Business/2010/0304/Germans-to-debt-ridden-Greeks-Sell-the-Acropolis.-And-a-few-islands> [<https://perma.cc/GL4T-Z6EZ>].

rejected as an attempt to humiliate the nation,<sup>28</sup> the idea of selling sovereignty is not new. Professor Joseph Blocher points out that the Louisiana Purchase, Alaska Purchase, and Treaty of Guadalupe Hidalgo shaped the United States through the sale of territory.<sup>29</sup> During the Cold War, developing nations conceded aspects of state sovereignty in exchange for foreign aid dollars or protection from a superpower.<sup>30</sup> Today, market transactions for aspects of sovereignty are commonplace. For example, Taiwan provides foreign aid to countries that grant it official recognition.<sup>31</sup>

Along this continuum described above, in recent years, a relatively well-worn concept, Special Economic Zones (SEZs), have reemerged and have been catapulted into the discourse on economic development and rule of law projects.<sup>32</sup> Building on the concept of SEZs popularized by China's experiment with Shenzhen, the economist Paul Romer has been credited by some with developing a new theory in development economics known as "Charter Cities."<sup>33</sup> Charter Cities are essentially hyperkinetic variants of the old SEZs.<sup>34</sup> SEZs generally refer to special geographic areas in a country that have been set aside for special economic regulations, different from those that apply to the rest of the country.<sup>35</sup> These areas are designed to attract foreign investment or create conditions deemed most conducive to economic development and growth.<sup>36</sup> Proponents of charter cities consider such entities to be a kind of "mega SEZ" that functions as a "private micro-state."<sup>37</sup>

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<sup>28</sup> Simon Shuster, *Greece May Have to Sell Islands and Ruins Under Its Bailout Deal*, TIME (July 13, 2015), <http://time.com/3956017/greece-bailout-selloff> [<https://perma.cc/5M43-R7ZR>].

<sup>29</sup> See Blocher, *supra* note 26, at 245–46.

<sup>30</sup> Daniel W. Drezner, *Sovereignty for Sale*, FOREIGN POL'Y (Nov. 18, 2009, 6:20 PM), <https://foreignpolicy.com/2009/11/18/sovereignty-for-sale> [<https://perma.cc/D9QG-UAA7>].

<sup>31</sup> *Id.*

<sup>32</sup> See generally WORLD BANK, SPECIAL ECONOMIC ZONES: AN OPERATIONAL REVIEW OF THEIR IMPACTS (2017) (explaining the impact of Special Economic Zones).

<sup>33</sup> Carlo Dade, *Foreword* to BRANDON FULLER & PAUL ROMER, SUCCESS AND THE CITY: HOW CHARTER CITIES COULD TRANSFORM THE DEVELOPING WORLD at i (The MacDonald-Laurier Institute 2012), <https://www.macdonaldlaurier.ca/files/pdf/How-charter-cities-could-transform-the-developing-world-April-2012.pdf> [<https://perma.cc/8RV5-YGF4>] ("While the idea is not new in the sense of never having been seen, it is new in the sense of uncovering the importance and potential of something that has been overlooked."). For a critique of Romer's ideas, see Aditya Chakraborty, *Paul Romer Is a Brilliant Economist—But His Idea for Charter Cities Is Bad*, GUARDIAN (July 27, 2010, 2:00 AM), <http://www.theguardian.com/science/2010/jul/27/paul-romers-charter-cities-idea> [<https://perma.cc/TU8H-FZZU>] ("Romer's right, in a way. This idea isn't prompted by dreams of a new imperialism—because this California economist doesn't know enough imperial history.").

<sup>34</sup> Dade, *supra* note 33, at i–ii.

<sup>35</sup> WORLD BANK, *supra* note 32, at 1–2.

<sup>36</sup> *Id.*

<sup>37</sup> Brian Hutchinson, *Year in Ideas: Professor Touts Special Economic Zones Known as "Charter Cities"*, NAT'L POST (Dec. 27, 2012, 10:17 AM), <http://nationalpost.com/news/year-in-ideas-professor-touts-special-economic-zones-known-as-charter-cities> [<https://perma.cc/TG65-YTAJ>].

As a special reform zone, the charter city “extends the concept of a special economic zone by increasing its size to the scale of a city and expanding the scope of its reforms.”<sup>38</sup> To appeal to investors, the charter city would function as:

a tax-free, special reform zone that would attract millions of opportunity-seekers from the developing world. Most would be employed in factories, at least initially. Everyone would receive basic services and enjoy universal rights and freedoms. All infrastructure—including schools and hospitals—would be owned and operated by private investors and developers.<sup>39</sup>

A recent example is Honduras, in which a large area of mostly uninhabited land along the coast would be set aside and designated as a special region called a *Región Especial de Desarrollo (RED)*.<sup>40</sup> These “special development regions” would be governed by a newly created legal framework under which a charter city could be created.<sup>41</sup> Honduran reformers pushed for the formation of REDs, offering low taxes, good governance, a streamlined regulatory environment, and safeguards against political interference.<sup>42</sup> The vision was for a robust city of ten million, built from scratch and thus not constrained by weak institutions, old paths (referred to as path dependency), old frameworks, or old rules.<sup>43</sup> The REDs were to have flexibility and far-reaching authority to experiment with principles of public administration, commercial law, common law courts, and police forces.<sup>44</sup> They never took off because the Honduran Supreme Court held that REDs constituted an unconstitutional abrogation of Honduran sovereignty and territorial integrity.<sup>45</sup>

But the general idea remains appealing and has gone through a few incarnations. In 2013, Honduras announced new plans to build a port in Amapala, a customs zone, and processing plants for exports.<sup>46</sup> These projects would all be financed by private investors lured by the prospect of “employment and economic development zones”

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<sup>38</sup> BRANDON FULLER & PAUL ROMER, *SUCCESS AND THE CITY: HOW CHARTER CITIES COULD TRANSFORM THE DEVELOPING WORLD 3* (The MacDonald-Laurier Institute 2012).

<sup>39</sup> Hutchinson, *supra* note 37.

<sup>40</sup> FULLER & ROMER, *supra* note 38, at 1.

<sup>41</sup> *Id.*

<sup>42</sup> TOM W. BELL, *YOUR NEXT GOVERNMENT? FROM THE NATION STATE TO STATELESS NATIONS 50* (2018) [hereinafter BELL, *YOUR NEXT GOVERNMENT?*].

<sup>43</sup> Hutchinson, *supra* note 37.

<sup>44</sup> Tom W. Bell, *No Exit: Are Honduran Free Cities DOA?*, FOUND. ECON. EDUC. (Nov. 26, 2012), <https://fee.org/articles/no-exit-are-honduran-free-cities-doa> [<https://perma.cc/8XAQ-WCRK>] [hereinafter Bell, *No Exit*].

<sup>45</sup> *Id.*

<sup>46</sup> *Honduras Experiments with Charter Cities*, ECONOMIST (Aug. 12, 2017), <https://www.economist.com/the-americas/2017/08/12/honduras-experiments-with-charter-cities> [<https://perma.cc/22R4-THKG>] [hereinafter ECONOMIST, *Honduras Experiments with Charter Cities*].

(ZEDEs), whose reach and scope would be much more ambitious than that of conventional SEZs.<sup>47</sup> The Amapala ZEDE would function as an “independent jurisdiction[] with [its] own laws, courts and police.”<sup>48</sup> The ZEDE charter city would “have its own political, judicial, economic and administrative system based on free market capitalism in running its own eight sectors—logistics, business courts, service sectors, renewable energy, commerce, agriculture, tourism and mining.”<sup>49</sup> This is a radical concept—a city, backed by foreign investors, built on Honduran territory not as Honduran entities, but rather quasi-sovereign entities, like city-states—with administrative autonomy and governed by international or best-practices rules.<sup>50</sup>

Honduras is considering proposals for additional ZEDEs, and as of August 2017, its government has signed more than ten memoranda of understanding with investors.<sup>51</sup> Many projects are development-ready, meaning land has been bought and transferred to the investor group, maps drawn and investment capital raised.<sup>52</sup> Proposals being considered may include smaller projects, such as call centers, and larger projects, some as large as an entire city.<sup>53</sup> As an example of the latter, the Honduran government is launching a tourism-related ZEDE project that will encompass several existing fishing villages, factories, and a customs center.<sup>54</sup> Some other ZEDEs are to be part of a so-called master plan drawn by the global consultancy firm McKinsey.<sup>55</sup> These plans include creating 600,000 jobs by enacting private rules that would lure vehicle assembly, call centers, and other industries from Asia.<sup>56</sup> As of October 2017, eight international businesses—Energy Transfer, Port Royal, Lacthosa, Emco Group, Lamericom,

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> Yi Whan-woo, *Honduras Takes Korea as Economic Model*, KOREA TIMES (July 11, 2014), [http://www.koreatimes.co.kr/www/news/special/2014/07/178\\_160821.html](http://www.koreatimes.co.kr/www/news/special/2014/07/178_160821.html) [<https://perma.cc/N4QQ-8J2T>].

<sup>50</sup> Maya Kroth, *Under New Management*, FOREIGN POL’Y (Sept. 1, 2014, 9:00 AM), <http://foreignpolicy.com/2014/09/01/under-new-management> [<https://perma.cc/8VKD-XMY8>]. Other experiments may allow a different kind of hybrid reality—not necessarily premised on a large-scale charter city like the Honduras proposal in which a city will be managed, controlled, and governed by international rather than national rules. More limited but innovative experiments abound in which special zones are exempt from the uniformity of national laws and regulations in a way that proponents claim increase jurisdictional competition and wealth. *See, e.g., About Foreign-Trade Zones and Contact Info*, U.S. CUSTOMS & BORDER PROTECTION (May 29, 2018), <https://www.cbp.gov/border-security/ports-entry/cargo-security/cargo-control/foreign-trade-zones/about> [<https://perma.cc/U59J-8WBR>]. In the United States, for example, Foreign Trade Zones which are often located near ports of entry, function essentially as free-trade zones where certain commercial merchandise are exempt from tariffs and other *ad valorem* tax. *Id.*

<sup>51</sup> ECONOMIST, *Honduras Experiments with Charter Cities*, *supra* note 46.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*



Dong Ju, Rapton Minning, and Wonder Foods—have formally expressed interest in the ZEDE arrangement.<sup>57</sup> The idea is that the charter cities will institute a framework that appeals to investors because it can override or bypass everything business-unfriendly about the local environment—bad laws, bad practices, bad norms, bad institutions, and bad infrastructure—that had shackled development in the past.<sup>58</sup> According to the ZEDE’s law, ninety percent of the charter city zone’s workers must be Honduran nationals and must receive eighty-five percent of all wages.<sup>59</sup>

Honduras has the highest murder rate in the world and sixty-five percent of its people live in poverty.<sup>60</sup> This dire situation—economic free fall, natural disasters, violence, and political instability—has meant mass migration of Hondurans fleeing distress and dysfunction at home.<sup>61</sup> For example, by 2000, the number of illegal Honduran migrants in the United States had doubled from a decade earlier—to 283,000—and as of 2014, stood at around 500,000.<sup>62</sup> It is hoped that a city operating under foreign supervision and presumably better rules would make it easier to attract investment and establish security, and for rich countries, to stem the flow of hundreds of thousands of unwanted migrants into their territory.<sup>63</sup> Given the crime rate and corruption level in Honduras, it is possible that private security firms will be relied upon to protect the population in charter cities established there.<sup>64</sup> Alternatively, if the host country—in this case, Honduras—were to partner with a developed, foreign-country partner, most of “the services could be provided by fee. For example, if Canada were a partner nation, the city could pay the Royal Canadian Mounted Police to provide police training for the city’s new law enforcement organs.”<sup>65</sup>

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<sup>57</sup> *Honduran Employment Zones Draw Interest from International Businesses*, CISION PR NEWSWIRE (Oct. 26, 2017, 5:53 PM), <https://www.prnewswire.com/news-releases/honduran-employment-zones-draw-interest-from-international-businesses-300544566.html> [<https://perma.cc/GD2T-XAFY>].

<sup>58</sup> See Kroth, *supra* note 50.

<sup>59</sup> *Id.*

<sup>60</sup> Jordana Timerman, *What Would It Be Like to Live in a Town Run by Investors?*, CITYLAB (Oct. 16, 2014), <https://www.citylab.com/equity/2014/10/what-would-it-be-like-to-live-in-a-town-run-by-investors/381532> [<https://perma.cc/VUG5-ZVH4>].

<sup>61</sup> Randal C. Archibold, *Hope Dwindles for Hondurans Living in Peril*, N.Y. TIMES (Aug. 2, 2014), <https://nyti.ms/1oj6CSu>.

<sup>62</sup> *Id.*

<sup>63</sup> *Hong Kong in Honduras*, ECONOMIST (Dec. 10, 2011), <https://www.economist.com/international/2011/12/10/hong-kong-in-honduras> [<https://perma.cc/2YAP-KQ6K>] [hereinafter ECONOMIST, *Hong Kong in Honduras*].

<sup>64</sup> *Id.* (“Honduras is one of the world’s more corrupt countries, in 129th place out of 183 in a survey of outsiders’ perceptions by Transparency International, a Berlin-based lobby group. It also has the region’s highest murder rate.”).

<sup>65</sup> Michael R. Castle Miller, *The Ciudades Modelo Project: Testing the Legality of Paul Romer’s Charter Cities Concept by Analyzing the Constitutionality of the Honduran Zones for Employment and Economic Development*, 22 WILLAMETTE J. INT’L L. & DISP. RESOL. 271, 276–77 (2015).

Under the charter-city model, swaths of land would be ceded to international investors, and developed into autonomous cities, replete with their own police forces, taxes, labor codes, trade rules, and legal systems.<sup>66</sup> Advocates believe that such cities are needed to sidestep the stranglehold of vested interests, inefficiency, bad law, and corruption.<sup>67</sup> The United Arab Emirates, Hong Kong, and Singapore could be viewed as startups that coaxed foreign investment in ways that bettered the lives of the people who lived there.<sup>68</sup> In the United Arab Emirates, “Dubai created a number of micro-cities—one of which, for instance, is governed by a system resembling English common law with judges from Britain, Singapore and New Zealand.”<sup>69</sup>

Charter cities are particularly appealing in rapidly urbanizing countries because they can be used as a catalyst for fast-track change. A charter city can be analogized to a civic startup, allowing different societies to experiment with new rules without the imposition of new layers of bureaucratic regulation on pre-existing regulation. Poor countries tend to be “saddled with laws and, crucially, customs that prevent new ideas from taking shape.”<sup>70</sup> Such countries can either “undo their invidious systems (corruption, oppression of minorities, bureaucracy) and create an environment more conducive to business. Or they could just start from scratch.”<sup>71</sup>

Hong Kong often has been invoked as a model. Although in some ways it is an apt example, using Hong Kong as a model has unnecessarily injected a neocolonial whiff into the debate. It is true that the British used gunboat diplomacy to wrest Hong Kong from China and ruled the city as colonial overseers. However, in the process, the British established a model economic enclave governed by a newly instituted charter, informed by, economically speaking, enlightened rules: low taxes, minimal regulations, rule-of-law protection for property, and contract rights, for example.<sup>72</sup> It is also true, however, that in an attempt to institute market reforms in the 1980s, China copied Hong Kong and initiated its own Hong Kong–like enclave in Shenzhen, proving that Hong Kong’s appeal extended beyond its colonial origin and could be replicated elsewhere.<sup>73</sup>

China created copycat Hong Kongs first in the nearby city of Shenzhen, and then in other special economic zones (SEZs) along the western and northern parts of the Pacific coast, unleashing a great export boom that lifted an estimated 100 million

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<sup>66</sup> See *id.* (explaining the benefits of an autonomous charter city).

<sup>67</sup> Adam Davidson, *Who Wants to Buy Honduras?*, N.Y. TIMES MAG. (May 8, 2012), <https://nyti.ms/2vkaXjD>.

<sup>68</sup> See *id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Mallaby, *supra* note 20.

<sup>73</sup> Paul Romer, *Interview on Urbanization, Charter Cities and Growth Theory*, PAUL ROMER (Apr. 29, 2015), <https://paulromer.net/interview-on-urbanization-charter-cities-and-growth-theory/index.html> [<https://perma.cc/6M39-W74P>].

Chinese above the one-dollar-a-day subsistence.<sup>74</sup> Shenzhen, once only a small market town in the Pearl River Delta, was created pursuant to Deng Xiao Ping's policy of "reform and opening," established in late 1979.<sup>75</sup> It was chosen to be a SEZ because of its proximity to Hong Kong, serving as an experimental laboratory for the institution of market capitalism or "socialism with Chinese characteristics."<sup>76</sup> Its spectacular success allowed Deng to continue his open-door policy despite vociferous resistance from conservative segments of the Communist Party.<sup>77</sup> Deng Xiao Ping favored SEZs because of their efficiency.<sup>78</sup> They allowed him to open up the Chinese economy without "long argument and contention about what types of change to pursue and how to pursue them."<sup>79</sup> The success of Shenzhen also allowed Deng to accelerate and expand reform into other parts of the country.<sup>80</sup> As the economist Paul Romer, who first proposed that charter cities be seriously studied, stated: "In a sense, Britain inadvertently, through its actions in Hong Kong, did more to reduce world poverty than all the aid programs that we've undertaken in the last century."<sup>81</sup>

Even after British handover in 1999, Hong Kong retained its autonomy under the principle of "one country, two systems."<sup>82</sup> The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China delineates the special relationship Hong Kong has with China, allowing it to function as an enclave with property rights and other liberal market policies.<sup>83</sup> Nonetheless, whether or not Hong Kong is summoned as an example, the notion that developing countries would set up special administrative zones—to be run by foreign technocrats as managers and controlled by shareholders and a board of directors—inevitably evokes charges of neocolonialism. Instead of colonial officials, the new overlords would be multinational or corporate technocrats versed in the language of economic efficiency and rule of law.<sup>84</sup>

<sup>74</sup> Mallaby, *supra* note 20.

<sup>75</sup> See Rick Gladstone, *Shenzhen: The City Where China's Transformation Began*, N.Y. TIMES (Dec. 21, 2015), <https://nyti.ms/1ZIECmt>; see also *The Second Long March*, ECONOMIST (Dec. 11, 2008), <https://www.economist.com/briefing/2008/12/11/the-second-long-march> [<https://perma.cc/JRZ4-VMGB>].

<sup>76</sup> Donald Senese, *China's Free Enterprise Experiment*, FOUND. ECON. EDUC. (July 1, 1987), <https://fee.org/articles/chinas-free-enterprise-experiment> [<https://perma.cc/2JT3-LDNF>].

<sup>77</sup> John F. Burns, *China's 'Open Door' to West Begins to Close*, N.Y. TIMES (Aug. 4, 1985), <https://nyti.ms/2GfpBmF>; Romer, *supra* note 73.

<sup>78</sup> Romer, *supra* note 73.

<sup>79</sup> *Id.*

<sup>80</sup> He Yan, *20 Years on, Deng Xiaopeng's Legacy of Reforms Lives on in Shenzhen*, CGTN (Feb. 19, 2017, 12:03 PM), [https://news.cgtn.com/news/3d6b7a4d30556a4d/share\\_p.html?t=1487477034173](https://news.cgtn.com/news/3d6b7a4d30556a4d/share_p.html?t=1487477034173) [<https://perma.cc/E4XR-HXTR>].

<sup>81</sup> Mallaby, *supra* note 20.

<sup>82</sup> Miller, *supra* note 65, at 277.

<sup>83</sup> *Id.*

<sup>84</sup> See Voxi Heinrich Amavilah, *Romer's Charter Cities v. Colonization, Imperialism, and*

But in reality, charter or startup cities, or special zones, can be formed anywhere and to accomplish myriad objectives, not just to maximize economic efficiency and attract foreign investment. Indeed, they can be set up not just in developing countries but “in any country that wants to implement reforms, even a developed country like the United States.”<sup>85</sup> The state of California, for example, has allowed the establishment of charter cities since the 1870s, when it amended its constitution during a time of economic crisis to grant municipalities more “freedom to set their own rules about elections, salaries and contracts.”<sup>86</sup> In some cases, this has meant great flexibility and exemption from certain state-imposed rules, such as prevailing union rates, state-mandated salary limits, or limits on city layoffs of its employees, sometimes resulting in success and other times not.<sup>87</sup> It has also been suggested that starting a new charter city today in the United States could result in different kinds of beneficial innovation.<sup>88</sup> For example, a new charter city could implement a new transportation system that would not be feasible in an established city, such as requiring that all vehicles be computer-controlled, autonomous vehicles.<sup>89</sup>

Differences in economic, historical, political, and cultural contexts might result in different types of charter cities with different objectives. For example, on March 4, 1681, William Penn was granted a charter by King Charles II of England to experiment with a then-radical new concept of religious freedom.<sup>90</sup> The grant was made to repay a debt the King owed Penn’s father, an admiral in the British Navy.<sup>91</sup> The tract granted to Penn was 45,000 square miles of land, almost as large as England.<sup>92</sup> Penn named the capital the “City of Brotherly Love” in order “to reflect his desire that his colony serve as a haven for Quakers and other oppressed Christians seeking religious freedom,” such as “French Huguenots, English and Irish Catholics, Lutherans from Catholic German states, Swiss Amish, German Mennonites.”<sup>93</sup> Penn sought the consent of Lenape chiefs, seeking permission “to enjoy the land with your love and consent so that we may always live together as neighbors and friends” and

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*Colonialism: A General Characterization*, 11–13 (Munich Personal RePEc Archive, Paper No. 29974, 2011), [http://mpra.ub.uni-muenchen.de/29974/1/MPRA\\_paper\\_29974.pdf](http://mpra.ub.uni-muenchen.de/29974/1/MPRA_paper_29974.pdf) [<https://perma.cc/GJ9T-MP2T>] (examining similarities and differences between colonialism and Romer’s charter cities).

<sup>85</sup> Romer, *supra* note 73.

<sup>86</sup> Tamara Audi, Bobby White & Max Taves, *California’s ‘Charter’ Cities Are Under the Microscope*, WALL ST. J. (July 18, 2012, 11:34 PM), <https://www.wsj.com/articles/SB10001424052702303612804577531181167707276> [<https://perma.cc/23JL-F6H3>].

<sup>87</sup> *Id.*

<sup>88</sup> Romer, *supra* note 73.

<sup>89</sup> *Id.*

<sup>90</sup> FULLER & ROMER, *supra* note 38, at 7; *The Vision of William Penn*, EXPLOREPAHISTORY, <http://explorepahistory.com/story.php?storyId=1-9-3> [<https://perma.cc/D222-QA2V>].

<sup>91</sup> EXPLOREPAHISTORY, *supra* note 90.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

signed a treaty under a large tree at the Shackamaxon.<sup>94</sup> Penn's zone could be viewed as a charter city designed to engage in a "Holy Experiment," one whose founding document "Voltaire called the 'only treaty between the Indian nations and the Christians that was not ratified by oath, and was never broken' at least in Penn's lifetime."<sup>95</sup>

A different objective for a charter city could very well be environmentalism and sustainable development. With a growing middle class in China interested in clean air, one could imagine the establishment of a new city in China that would compete for residents by offering the cleanest air. The city's charter could ban diesel fuel, coal, or the combustion of all liquid and solid fuel. It could also allow only nuclear, wind, solar power, or natural gas as fuel sources. This could be done "without having to have in place a very intrusive and complicated system of regulation and inspection of individual cars like the one we use in the United States."<sup>96</sup>

Currently, different charter cities are being formed for vastly different purposes. For example, Agile Solutions, a Brazilian software firm, is planning the construction of a \$200 million "startup village" in Tegucigalpa, Honduras, which would serve as a "blank slate," which the company could use as a laboratory for new approaches to health care, education and tax.<sup>97</sup> Similarly, a different form of public-private partnership ZEDE is being considered which would involve the creation of an "energy district" in Olancho, with the participation of Canadian investors to harvest wood for fuel.<sup>98</sup> The scale of the ZEDE is projected to be massive—reaching an area constituting eight percent of Honduras with a population of 380,000 people; health care and education for this area is to be provided by HOI, a Christian NGO based in the United States.<sup>99</sup>

A charter-city-like concept, dubbed "free havens," has also been suggested to address the global refugee crisis.<sup>100</sup> Under international law, refugees have the right to leave war-torn countries, but few countries are willing to accept them.<sup>101</sup> Consequently, many languish in refugee camps under tight restrictions and control of the host countries.<sup>102</sup> Long-term refugee camps have become an entrenched reality in many

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Romer, *supra* note 73.

<sup>97</sup> ECONOMIST, *Honduras Experiments with Charter Cities*, *supra* note 46.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Alexander Betts, *Is Creating a New Nation for the World's Refugees a Good Idea?*, GUARDIAN (Aug. 4, 2015, 7:33 AM), <https://www.theguardian.com/global-development-professionals-network/2015/aug/04/refugee-nation-migration-jason-buzi> [<https://perma.cc/WVC8-LTBL>]; Pieter Cleppe, "Start Up Cities" for Refugees: A Long-Term Solution to the Migration Crisis?, CAPX (July 28, 2016), <https://capx.co/start-up-cities-for-refugees-a-long-term-solution-to-the-refugee-crisis> [<https://perma.cc/H845-W2NB>].

<sup>101</sup> Dara Lind, *The Right to Asylum: Why Europe Has to Take in People Fleeing Persecution*, VOX (Sept. 18, 2015, 2:06 PM), <https://www.vox.com/2015/4/22/8464623/asylum-refugees-law-europe> [<https://perma.cc/X2EK-DNBQ>].

<sup>102</sup> Betts, *supra* note 100.

parts of the world where millions of people are stuck, even as many countries in the developed world increasingly lack the desire and political will to accept the ever-growing numbers of refugees globally.<sup>103</sup> For example, the more than 100,000 Burmese refugees living in Thailand are prohibited from leaving their camps, subject to travel and work constraints, and dependent on external help via the United Nations Relief and Works Agency for basic needs.<sup>104</sup> Similarly, Lebanon's "more than 470,000 Palestinian refugees, of whom over 50 percent live in twelve refugee camps,"<sup>105</sup> are faced with all kinds of restrictions—by law, Palestinians cannot become Lebanese citizens, nor can they inherit property or pursue certain professions.<sup>106</sup> They are not subject to the Lebanese governance system and instead are entangled in the labyrinth of various Palestinian factions who exercise de jure and de facto authority.<sup>107</sup>

Free havens could be formed to provide refugees with not only camps where they are warehoused, but also territorial zones where there is the promise of the rule of law as well as economic investment and opportunities. Some have called Hong Kong a refugee zone, subject to British rule of law, and for years, a haven for those seeking to escape mainland China's totalitarian rule.<sup>108</sup> Uninhabited land, even in more remote areas of a state, could be set aside as free havens for refugees. There is enough underdeveloped land in the world that, according to Jason Buzi, the proponent of Refuge Nations, it should not be politically infeasible to house twenty million refugees in a world of more than seven billion people.<sup>109</sup> The aim involves a "rethinking of the political geography of asylum"<sup>110</sup> using a concept that has also been referred to as a Refugee Nation: "buy an under-populated area of land somewhere in the world and turn it into a territory for the world's refugees to begin a new life."<sup>111</sup> Proponents argue that a drastic solution is needed to address the global refugee crisis and that the solution lies in abandoning the current framework, because "NGOs and international bodies are financially beholden to the current system, even if it is failing and the situation is clearly getting worse."<sup>112</sup>

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<sup>103</sup> *Id.*

<sup>104</sup> See Alisa Tang, *After 30 Years in Thailand, a Glimmer of Hope for Refugees from Myanmar*, REUTERS (May 11, 2016, 2:00 AM), <http://news.trust.org/item/20160511000400-s9tp7> [<https://perma.cc/38EK-P9Q9>].

<sup>105</sup> Mat Nashed, *Palestinian Refugees Struggle with Drugs*, ALJAZEERA (Aug. 30, 2014), <https://www.aljazeera.com/news/middleeast/2014/03/palestinian-refugees-20143411657852453.html> [<https://perma.cc/7NPH-FFW6>].

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* (explaining the competing factions in the Palestinian camps in Lebanon).

<sup>108</sup> Pieter Cleppe & Nathan Smith, *Free Havens for Refugees*, OPEN BORDERS (Apr. 29, 2015), <https://openborders.info/blog/tag/charter-cities> [<https://perma.cc/KL7J-46G9>].

<sup>109</sup> Betts, *supra* note 100.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Adam Taylor, *A Silicon Valley Mogul Wants to Solve the Global Refugee Crisis by Creating a New Country*, WASH. POST (July 23, 2015), <https://www.washingtonpost.com/news>

A state could even be financially compensated for setting aside a zone within its territory for this purpose. Although the details are varied, some proponents of the concept believe that the crux lies in self-governance: “Implicit in [the] Refugee Nation idea is the notion that refugees could govern their own affairs” for their own political and economic development, rather than rely on humanitarian assistance.<sup>113</sup>

Under the right set of incentives, companies could be attracted to such free-haven zones for trade and investment. NGOs, private sector, and supranational organizations, such as agencies of the United Nations and the European Union (EU), could work together to create and support such free havens—“refugee zones but then with rule of law, protection and opportunities for economic investment, where refugees can actually build up a life and aren’t condemned to wasting their precious time.”<sup>114</sup> Rather than be faced with a deluge of refugees on its own territory, the EU could establish such offshore free havens with special rule of law and investment missions. Refugees who wish to move out of camps and to these free havens may voluntarily choose the latter.<sup>115</sup> These refugee free havens would operate essentially under the same principles as those proposed for charter cities—existing in the territory of the host country, but allowed a large degree of autonomy with their own legal and economic policies, provided basic rights are met.<sup>116</sup>

Consent must be a key feature of such zones, and they would operate on the basis that:

[i]n a globalised world, given freedom of choice, people ultimately want to choose where they live, and are likely to seek to move to where their friends, family and greatest opportunities lie. . . . To be workable, a Refugee Nation idea would need to be based on freedom of choice and the lure of opportunity.<sup>117</sup>

Smaller-scale SEZs such as those established in Jordan to address the displacement of Syrian refugees could also work as an alternative to refugee camps.<sup>118</sup> The

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/worldviews/wp/2015/07/23/a-silicon-valley-mogul-wants-to-solve-the-global-refugee-crisis-by-creating-a-new-country/?utm\_term=.a882d7d278e8 [https://perma.cc/JT8V-2UMX].

<sup>113</sup> Betts, *supra* note 100.

<sup>114</sup> See Cleppe & Smith, *supra* note 108.

<sup>115</sup> Accepting refugees into the EU has become a politically unpopular act, and alternatives have been explored. For example, given the strains placed on domestic national systems, Tony Blair had proposed offshore asylum centers to deterritorialize asylum claims. See Karin Fathimath Afeef, *The Politics of Extraterritorial Processing: Offshore Asylum Policies in Europe and the Pacific* 5–6 (Refugees Stud. Ctr. Working Paper Series, Paper No. 36, 2006).

<sup>116</sup> ALEXANDER BETTS ET AL., *REFUGEE ECONOMIES: FORCED DISPLACEMENT AND DEVELOPMENT* (2016) (ebook); Betts, *supra* note 100.

<sup>117</sup> Betts, *supra* note 100.

<sup>118</sup> Alexander Betts & Paul Collier, *Jordan’s Refugee Experiment*, FOREIGN AFF. (Apr. 28,

King Hussein Bin Talal Development Area (KHBTDA), a SEZ for Syrian refugees, has been established and funded with more than 100 million dollars by the Jordanian government to allow Syrian refugees to receive training and to work.<sup>119</sup> The EU and other countries could provide incentives for companies to invest in the refugee SEZ, and perhaps change trade rules to permit trade concessions and allow goods from such zones to enter Europe and other countries at a lower tariff rate.<sup>120</sup> Governments in the area have pledged two billion dollars in aid and investment to the refugee SEZ, with Jordan itself also pledging to grant 150,000 work permits to Syrian refugees to work in such SEZs.<sup>121</sup> Asda, a subsidiary of Walmart, and IKEA have expressed support, and the World Bank has considered infrastructural financing.<sup>122</sup> The former Prime Minister of the United Kingdom, Gordon Brown, suggested that SEZs should be created in Lebanon, Jordan, and Turkey, to be funded by oil revenues and managed by a new Middle East Development Bank.<sup>123</sup>

Some of Jordan's existing SEZs are underutilized because Jordan's large educated working class is not interested in many of the lower-wage, labor-intensive manufacturing jobs available in most SEZs.<sup>124</sup> Regional conflicts have affected the level of foreign direct investment Jordan can attract.<sup>125</sup> Consequently, although the KHBTDA boasts proximity to a modern railway and highway system and state-of-the-art physical infrastructure, it is underutilized and has been operating at a tenth of its capacity.<sup>126</sup> To address the refugee problem, the international community created the Jordan Compact, which pledged \$2.1 billion to Jordan and an additional \$1.9 billion if it provided Syrian refugees with job opportunities via work permits and the creation of SEZs where refugees can learn new skills and work.<sup>127</sup> Tight labor laws at the national level have resulted in the exclusion of refugees from the labor market,<sup>128</sup> offering "investors a better business environment than the surrounding area through better

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2016), <https://www.foreignaffairs.com/articles/middle-east/2016-04-28/jordans-refugee-experiment> [<https://perma.cc/5DV6-4M48>].

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* See DEMETRIOS G. PAPADEMETRIOU & SUSAN FRATZKE, BEYOND CARE AND MAINTENANCE: REBUILDING HOPE AND OPPORTUNITY FOR REFUGEES 13 (2016).

<sup>121</sup> Betts & Collier, *supra* note 118.

<sup>122</sup> *Id.*

<sup>123</sup> Gordon Brown, *The Syrian Refugee Crisis Calls for a New Marshall Plan*, GUARDIAN (Feb. 4, 2016, 1:00 AM), <https://www.theguardian.com/commentisfree/2016/feb/04/gordon-brown-syrian-refugee-crisis-marshall-plan> [<https://perma.cc/JCX3-CC8E>].

<sup>124</sup> Ryan Lasnick, *Reimagining Refugee Integration: Economic Burden or Boon?*, PROSPER CSIS (June 1, 2016), <https://csisprosper.com/2016/06> [<https://perma.cc/8Q7W-8M9D>].

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Taina Renkonen, *Special Economic Zones: A Sustainable Solution?*, ARAB RENAISSANCE DEMOCRACY & DEV. (Feb. 25, 2016), <https://ardd-jo.org/blogs/special-economic-zones-sustainable-solution> [<https://perma.cc/ATX4-NEEP>].



quality and more efficient delivery of public services, reduced bureaucracy, and high-quality infrastructure.”<sup>129</sup>

Special zones can also be created for what we would consider to be illiberal purposes.<sup>130</sup> In the 1990s, France created a special transit zone called the *zones d’attente* specifically to avoid its obligations as a signatory to the 1951 Convention and Protocol Relating to the Status of Refugees (Refugee Convention).<sup>131</sup> For example, as a signatory,<sup>132</sup> France is not allowed to expel asylum seekers—if expulsion would put their life or liberty at risk—because of race, religion, or other identifiers.<sup>133</sup> Claiming that those showing up at Charles de Gaulle Airport and other ports of entry were not refugees but economic migrants, France prevented them from setting foot on French territory by creating special zones that the government declared were not part of France—even if they were, in fact, on French territory.<sup>134</sup> The government wanted to deny even temporary admittance to those seeking asylum, as well as the possibility of making a claim that they were refugees.<sup>135</sup> Thus, “within the transit zone, [France could] enforce immigration controls without the constraints that [it] would normally have within a liberal democratic system.”<sup>136</sup> The so-called transit zone was also extended beyond the area in the airport or a port of entry.<sup>137</sup> Thus, the French government took “liberties in creating what might be call[ed] . . . smooth spaces, and then in some situation[s] including nearby hotels, nearby detention centers, even a court many miles away from the actual airport and still . . . maintaining this idea . . . [that] this is part of an airport transit zone.”<sup>138</sup>

The French civil code expanded the “*zone d’attente* to any place the unwanted alien must go for administrative procedures, such as to attend an off-site asylum hearing, or ‘in case of medical necessity.’”<sup>139</sup> Thus:

the French designated certain vehicles as *floating international zones* and used them to transport the patients to a local hospital,

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<sup>129</sup> *Precedents*, REFUGEE CITIES, <https://refugeecities.org/about-the-project/precedents> [<https://perma.cc/RT63-6HBA>].

<sup>130</sup> Tom W. Bell, *Special International Zones in Practice and Theory*, 21 CHAP. L. REV. 273, 289–92 (2018) [hereinafter Bell, *Special International Zones*].

<sup>131</sup> U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Bell, *Special International Zones*, *supra* note 130, at 289.

<sup>132</sup> U.N. Convention Relating to the Status of Refugees, *supra* note 131, at 138.

<sup>133</sup> *Id.* art. 33; Bell, *Special International Zones*, *supra* note 130, at 282–83.

<sup>134</sup> Bell, *Special International Zones*, *supra* note 130, at 275.

<sup>135</sup> *Id.* at 283.

<sup>136</sup> ‘*Transit Zones’ Can Extend Beyond Airports*, NPR (July 3, 2013, 4:30 PM), <https://www.npr.org/templates/story/story.php?storyId=198444067> [<https://perma.cc/9GL4-E77E>].

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Bell, *Special International Zones*, *supra* note 130, at 283 (quoting Code de l’entrée et du séjour des étrangers et du droit d’asile [Code of entry and stay of foreigners and of the right to asylum] art. L221-2 (Fr.)).

relevant parts of which they also designated as *temporary international zones*. This entire archipelago of fixed, floating, and temporary zones, specially created to let foreign nationals stay within the geographic borders of France but outside of its immigration or asylum territory, lawmakers called *zones d'attente pour personnes en instance* (“ZAPI” or “zones d’attente”).<sup>140</sup>

Other countries have followed the French example—Australia has “migration zones or excised territory,”<sup>141</sup> Hungary has transit zones,<sup>142</sup> and the United States has exempted its territorial waters, long considered under international law to be a part of the territory of a country, from the reach of applicable asylum laws.<sup>143</sup>

To return to the example of Honduras—because it has taken the most significant steps to implement charter cities—charter cities as currently conceived are generally subject to a governance structure that allows the ZEDE projects to bypass Honduran laws.<sup>144</sup> The ZEDE law passed by Honduras assures investors that control is vested in their hands and in a Honduran national who is designated a “technical secretary” to administer a ZEDE zone.<sup>145</sup> An “independent commission for best practices”<sup>146</sup> (CAMP, or “*Comite para la Adopcion de Mejores Practicas*”)<sup>147</sup> will be formed, and will promulgate standards dealing with topics such as labor and environmental concerns.<sup>148</sup> CAMP is charged with “approving regulations and recommending judges in a ZEDE, and setting aside areas for a zone’s future expansion, in accordance with an undefined set of ‘international best practices.’”<sup>149</sup> CAMP norms are analogous to international norms, thus bypassing national regulations and laws.<sup>150</sup> The CAMP Committee has oversight of ZEDEs in a way analogous to a board of trustees having oversight of a university.<sup>151</sup> CAMP thus not only supervises ZEDE operations but even has the power, under Article 11 of the ZEDE Statute, to remove each ZEDE’s head, the Technical Secretary.<sup>152</sup>

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<sup>140</sup> *Id.* at 275.

<sup>141</sup> *Id.* at 275–76.

<sup>142</sup> *Id.* at 275.

<sup>143</sup> *Id.* at 276.

<sup>144</sup> Danielle Marie Mackey, “*I’ve Seen All Sorts of Horrific Things in My Time. But None as Detrimental to the Country as This.*”, *NEW REPUBLIC* (Dec. 14, 2014), <https://newrepublic.com/article/120559/ive-seen-sorts-horrific-things-time-none-detrimental-country-this> [<https://perma.cc/7WCE-PVRP>].

<sup>145</sup> *ECONOMIST*, *Honduras Experiments with Charter Cities*, *supra* note 46.

<sup>146</sup> *Id.*

<sup>147</sup> BELL, *YOUR NEXT GOVERNMENT?*, *supra* note 42, at 52.

<sup>148</sup> Mackey, *supra* note 144.

<sup>149</sup> Kroth, *supra* note 50.

<sup>150</sup> BELL, *YOUR NEXT GOVERNMENT?*, *supra* note 42, at 52.

<sup>151</sup> *Id.*

<sup>152</sup> Ley Orgánica de las Zonas de Empleo y Desarrollo Económico (ZEDE), art. II(3) (2013) [hereinafter ZEDE Statute].

Special ZEDE courts, not the pre-existing national courts, adjudicate civil and criminal cases in the zone, and ZEDE judges can be foreign judges empowered to hear such cases.<sup>153</sup> There is also “[a] ‘tribunal of individual rights’” operating in accordance with international conventions whose “decisions can be appealed to international courts” which will be formed to protect residents.<sup>154</sup> Whatever the details, the general framework for charter cities is that private law, much like a corporate charter, will be a substitute for national law: “The investing company must write the laws that govern the territory, establish the local government, hire a private police force, and even has the right to set the educational system and collect taxes.”<sup>155</sup>

The charter city concept has many critics.<sup>156</sup> Despite promises that they will turn poor countries into Hong Kong and Dubai,<sup>157</sup> some believe they will become a sort of modern slavery outpost, a neocolonial, razor-wired port of convenience.<sup>158</sup> Labor and environmental rights might be violated by corporations.<sup>159</sup> National sovereignty is wrongly subsumed under international capital in the name of development.<sup>160</sup> As a local fisherman bemoaned: “They will allow investors to kidnap the state.”<sup>161</sup>

Critics are concerned that encroachment on national sovereignty, substitution of private law for public law, power concentration in foreign investors, and undemocratic principles or the absence of democratic safeguards will mean that the experiment will be “little more than predatory, privatized utopias, with far-reaching, negative implications for Honduran sovereignty and the well-being of poor communities.”<sup>162</sup>

That the charter cities are enthusiastically supported by U.S. conservatives and libertarians has made the project all the more controversial, provoking fear among liberals that “the plan [is] yet another instance of neocolonial collaboration between U.S. and Central American elites—one that’s sold as ‘development,’ but only concentrates wealth,” as evidenced by the infamous intervention of the United Fruit Company into Honduras in the early 1900s.<sup>163</sup> Some residents in the proposed ZEDE areas worry that the substitution of private for public law will leave them with little control over developments in the area.<sup>164</sup> Latin America, for instance, has historically “been a place for imported economic experiments, but experiments aren’t exciting for the people who live [t]here; it’s different when it’s your house that’s being

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<sup>153</sup> ECONOMIST, *Honduras Experiments with Charter Cities*, *supra* note 46.

<sup>154</sup> *Id.*

<sup>155</sup> Mackey, *supra* note 144.

<sup>156</sup> *Id.*

<sup>157</sup> *See* Davidson, *supra* note 67.

<sup>158</sup> Mackey, *supra* note 144.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> Kroth, *supra* note 50.

<sup>163</sup> Mackey, *supra* note 144.

<sup>164</sup> *Id.*

experimented with.”<sup>165</sup> Professor Paul Romer, one of the most enthusiastic supporters of charter cities,<sup>166</sup> has stated that he is nonetheless “‘concerned that the far-reaching delegation of what really are powers of government to private entities and foreign, private individuals is taking place without sufficient debate’ between the government and [its] critics.”<sup>167</sup>

The lack of a formal property titling system in many parts of the country has also led many long-time residents to worry that they will be evicted from the land because they have no formal proof of title.<sup>168</sup> Fishermen who have been in zones potentially subject to the ZEDE fear they would be deemed illegal squatters and thus subject to dispossession.<sup>169</sup>

Some Hondurans have looked at the economies of Costa Rica and Panama and noted that neither country has needed to resort to ZEDEs, because instead of resorting to “model cities,” they have focused on constructing “a model Supreme Court, a model Congress, and a model government.”<sup>170</sup> In other words, according to these critics, what Honduras or any country needs is development and a robust rule of law.<sup>171</sup> Why some countries are able to embark on such a path and some are not is a perennial question that has been analyzed and dissected.<sup>172</sup> But of course, the issue here is whether charter cities can be a spark that jump-starts model laws.

The purpose of this Article is to examine and evaluate charter cities and their varying permutations. More attention has been given to charter cities formed to attract foreign investment and establish or accelerate market reform.<sup>173</sup> This may be due to the success of China’s economic laboratory begun in Shenzhen.<sup>174</sup> But this Article shows that the concept is much broader and can be applied to different contexts. Part I of

<sup>165</sup> *Id.*

<sup>166</sup> *Charter Cities: Q & A with Paul Romer*, CTR. GLOBAL DEV. (May 3, 2010), <https://www.cgdev.org/article/charter-cities-qa-paul-romer> [<https://perma.cc/ES2A-LPVP>].

<sup>167</sup> Kroth, *supra* note 50.

<sup>168</sup> *See id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *See id.*

<sup>172</sup> *See* ROBERT D. COOTER & HANS-BERND SCHÄFER, SOLOMON’S KNOT: HOW LAW CAN END THE POVERTY OF NATIONS 6 (2012) (“Sustained growth in developing countries occurs through innovations in markets and organizations, innovation poses a problem of trust between innovators with ideas and financiers with capital, and the best solution are necessarily legal. Nonexistent, weak or underenforced laws hobble economies . . . .”); HERNANDO DE SOTO, THE MYSTERY OF CAPITAL 153–206, 153–54 (2000) (noting that “governments in developing countries have tried for 180 years to open up their property systems to the poor,” and examining the misconceptions leading to failure); HERNANDO DE SOTO, THE OTHER PATH 177–87, 185 (trans. June Abbot) (1989) (“All the evidence suggests that the legal system may be the main explanation for the difference in development that exists between the industrialized countries and those, like [Peru], which are not industrialized.”).

<sup>173</sup> Kroth, *supra* note 50.

<sup>174</sup> *See id.*

the Article introduces the concept of charter cities. It also discusses and evaluates charges against charter cities as neocolonial experiments that are contrary to liberal democratic norms. Part II examines the potential impact posed by this radical privatization trend and asks what impact it poses to the people who live in such cities. What rights do nationals have in zones that have been set aside and are not subject to the host country's laws? Part II also explores principles of coercion, consent, and democratic accountability. How should such zones be formed in order to maximize consent and minimize, if not eradicate, coercion? Is voluntary mobility rather than democratic accountability a sufficient proxy for consent? Part II lays out conditions that charter cities should meet so that they can be considered legitimate under international law.

### I. WHAT ARE CHARTER CITIES, AND WHY FORM THEM?

#### A. *Investment Charter Cities*

The rapid pace of urbanization worldwide will mean that mass migration into cities will create major challenges for those existing cities.<sup>175</sup> The migration crisis, in Europe and in the United States, caused an influx of migrants from the Middle East and Central America respectively,<sup>176</sup> resulting in renewed interest in the living conditions that fueled migration. That so many would risk everything to leave their homes for an uncertain future elsewhere also demonstrates the need for better living conditions in their home countries.<sup>177</sup> An alternative is the establishment of new charter cities that those seeking a better life could migrate to.<sup>178</sup> Most proponents of charter cities cite the ability to move freely into and out of charter cities as a foundational principle of the charter.<sup>179</sup> Because the city is chartered on uninhabited land, new charter rules are not forced on existing residents because only people who agree to live under charter rules would move into the charter city.<sup>180</sup> This “process of self-selection ensures that the social norms of the residents map more smoothly to the formal rules in the city’s charter and that the rules have the legitimacy that comes from universal consent.”<sup>181</sup>

Start-up cities have advantages that existing cities do not have; one of them is the advantage of starting from scratch.<sup>182</sup> Typically, charter cities can be founded by the enactment and adoption of a charter that commits the city to “key principles of reform.”<sup>183</sup> “If the charter specifies good rules (or in our professional jargon, good

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<sup>175</sup> CTR. GLOBAL DEV., *supra* note 166.

<sup>176</sup> See Archibold, *supra* note 61; Betts, *supra* note 100.

<sup>177</sup> See Taylor, *supra* note 112.

<sup>178</sup> CTR. GLOBAL DEV., *supra* note 166.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> Romer, *supra* note 73.

<sup>183</sup> *Charter Cities*, MARRON INST. URB. MGMT., <https://marroninstitute.nyu.edu/initiatives/charter-cities> [https://perma.cc/XRU4-KPT9].

institutions) millions of people will come together to build a new city.”<sup>184</sup> But why not simply eliminate bad rules and pass good rules in pre-existing cities? The evidence suggests that, for reasons such as inertia, path dependency, and interest-group capture:

many societies are stuck with bad rules. Moving from bad rules to better ones may be much harder than most economists have allowed. The construct of a charter city is a suggestion about how we can change the dynamics of rules. It is a way to speed up the rate of improvement in the rules.<sup>185</sup>

An analogy can be drawn from the corporate-law context.<sup>186</sup> Improvements in corporate-law rules are more likely to take place with the entry of new organizations.<sup>187</sup> An organization with good internal rules that worked in one setting but not in a new, changing context is more likely to adapt and adopt new rules if it is faced with new entries.<sup>188</sup> For example, new organizations such as Intel and Apple spurred the adoption of new rules and transformed the dynamics in an industry once dominated by IBM, and rules that worked well for interfacing with big corporations and data centers, but not necessarily optimal for speeding up change in the industry.<sup>189</sup> As such, “[i]t is good to have competition between firms in an industry—competition both in the sense of a variety of existing firms that someone can choose from, and . . . in the sense that a new firm can enter and do things differently.”<sup>190</sup> Charter cities can be “a way to bring the power of entry and choice to the dynamics of the rules for cities.”<sup>191</sup>

Different charters can emphasize different arrangements depending on the needs of the cities at issue and depending on the context.<sup>192</sup> Once a new city is chartered and started up, anyone who agrees to live under the charter’s principles can show consent by moving there or staying there.<sup>193</sup> In that respect, there can be “reform without coercion.”<sup>194</sup> Though the specifics of reform depend on the local context, charter cities should share two foundational principles: freedom of movement and equality.<sup>195</sup> In

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<sup>184</sup> *Can “Charter Cities” Change the World? A Q&A with Paul Romer*, FREAKONOMICS (Sept. 29, 2009, 11:24 AM), <http://freakonomics.com/2009/09/29/can-charter-cities-change-the-world-a-qa-with-paul-romer> [<https://perma.cc/8HJX-UM3V>].

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Romer, *supra* note 73.

<sup>191</sup> FREAKONOMICS, *supra* note 184.

<sup>192</sup> *Id.*

<sup>193</sup> *See* Romer, *supra* note 73.

<sup>194</sup> *Id.*

<sup>195</sup> MARRON INST. URB. MGMT., *supra* note 183.

other words, “people must be free to choose whether [to move to the charter city,] and those who do must [be guaranteed] equality under the law.”<sup>196</sup>

Moreover, in charter cities, different rules enshrined in the charter can be used to experiment with new, even unorthodox forms of governance.<sup>197</sup> Some charter cities “draw on the expertise of different national or municipal governments, engaging reputable partners in an effort to attract residents, businesses, and investors.”<sup>198</sup> Different jurisdictions have already experimented with different types of innovative practices, importing them when deemed necessary.<sup>199</sup> For example, before the Beijing Olympics, the Chinese government imported services from the Federal Aviation Administration of the United States (FAA), asking the FAA to revise its aviation safety rules.<sup>200</sup> In addition, Mauritius has imported the services provided by the Supreme Court of Britain,<sup>201</sup> and as part of an aid package struck between the two governments, the Solomon Islands have imported police and judicial services from Australia.<sup>202</sup>

A number of countries have begun experimenting with this concept.<sup>203</sup> As mentioned previously, for example, Madagascar explored unconventional ways of attracting foreign investment, for example, leasing a large tract of land on its territory to “Daewoo, a South Korean corporation, for 99 years.”<sup>204</sup> Under the proposal, Daewoo and Madagascar’s neighbor, Mauritius (acting as trustee), would “administer [the] export-processing zone on Malagasy territory.”<sup>205</sup> The deal did not go through,<sup>206</sup> but it still serves as an interesting case study of a modern-day charter city-trusteeship concept.<sup>207</sup>

<sup>196</sup> *Id.*

<sup>197</sup> Romer, *supra* note 73.

<sup>198</sup> MARRON INST. URB. MGMT., *supra* note 183.

<sup>199</sup> *Id.*

<sup>200</sup> *Unbundling the Nation State*, ECONOMIST (Feb. 7, 2014), <https://www.economist.com/international/2014/02/07/unbundling-the-nation-state> [<https://perma.cc/N8G2-UHWL>].

<sup>201</sup> *The Judicial Committee of the Privy Council*, JUD. COMM. PRIVY COUNCIL, <https://www.supremecourt.uk/docs/beginners-guide-to-the-jcpc.pdf> [<https://perma.cc/7HK9-F45C>] (“The Judicial Committee of the Privy Council (JCPC) is the highest court of appeal for a number of commonwealth countries, crown dependencies and United Kingdom overseas territories.”). Many countries such as Jamaica and Mauritius, among others, still opt to keep the JCPC as their highest court of appeal. *See id.*; Robert Mendick & Joshi Eichner Herrmann, *Britain’s Top Judges—and Their Wives—Move Court to Mauritius for a Week*, TELEGRAPH (June 26, 2010, 9:00 PM), <https://www.telegraph.co.uk/news/uknews/law-and-order/7855991/Britains-top-judges-and-their-wives-move-court-to-Mauritius-for-a-week.html> [<https://perma.cc/WZG2-GZT7>]; *see also* Paul Romer, *Charter Cities and Reform Zones*, PAUL ROMER (July 16, 2014), <https://paulromer.net/charter-cities-and-reform-zones> [<https://perma.cc/UE7E-TJPA>].

<sup>202</sup> Joseph D. Foukona, *Regional Intervention in Solomon Islands*, 9 J. S. PAC. L. (2005), <http://www.paclii.org/journals/fJSPL/vol09no1/4.shtml> [<https://perma.cc/NXQ4-38GG>].

<sup>203</sup> MARRON INST. URB. MGMT., *supra* note 183.

<sup>204</sup> Mallaby, *supra* note 20.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *See id.*

Established in 2006, Masdar City in the United Arab Emirates has become “an emerging global clean-technology cluster” with the objective of establishing a “sustainable urban development powered by renewable energy.”<sup>208</sup> Pursuant to the city’s charter, plans were adopted to institute policies aimed at achieving “zero waste, sustainable transport, building energy efficiency standards, biodiversity strategy policies, and renewable energy requirements.”<sup>209</sup> Masdar City will use renewable resources to “obtain 100% of its energy, relying on photovoltaics, solar power, wind, and the conversion of waste to energy.”<sup>210</sup> “Businesses and homes [are linked to] green data centers which use [only] energy-saving servers.”<sup>211</sup> The results expected included better air quality indoors and outdoors; “green job creation”; and “reduction[] in greenhouse gas emissions, water consumption, and landfill waste.”<sup>212</sup>

This Article focuses on charter cities, and particularly those being formed in Honduras, because the Honduran example demonstrates that the concept has moved from theoretical and scholarly discussions to reality.<sup>213</sup> But it is important to note that there are also alternative forms of hybrid zones being discussed and considered, such as legal, economic, administrative, and political jurisdictions (LEAP zones); free cities; and startup cities.<sup>214</sup> Mark Klugmann, the founder of Legal, Economic, Administrative, and Political Jurisdictions, explains that unlike SEZs, which he calls “chair[s] with one leg,”<sup>215</sup> LEAP zones do not concentrate only on economics but more comprehensively on legal, administrative, and political development<sup>216</sup> (although one could add that in all fairness, neither do charter cities). The legal development agenda requires a focus on judges and judicial independence as well as on alternative dispute resolution, including international arbitration.<sup>217</sup> LEAP zones are essentially supported by rule-of-law development, with an emphasis on minimizing corruption and increasing stability and transparency.<sup>218</sup>

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<sup>208</sup> *Masdar City Special Economic Development Zone*, PARTNERSHIPS FOR THE SDGS, <https://sustainabledevelopment.un.org/partnership/?p=2036> [<https://perma.cc/6V2Q-2388>].

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> See Mackey, *supra* note 144.

<sup>214</sup> WORLD BANK, SPECIAL ECONOMIC ZONES: PROGRESS, EMERGING CHALLENGES, AND FUTURE DIRECTIONS 5 (Thomas Farole & Gokhan Akinci eds., 2011), <http://documents.worldbank.org/curated/en/752011468203980987/pdf/638440PUB0Exto00Box0361527B0PUBLIC0.pdf> [<https://perma.cc/SA7L-C7CR>] (indicating that in 2006 there were more than 3,500 SEZs estimated to exist in 130 countries).

<sup>215</sup> Mark Klugmann, *LEAP Zones: Faster Growth with Less Conflict*, CAYMANIAN FIN. REV. (July 12, 2013), <https://www.caymanfinancialreview.com/2013/07/12/leap-zones-faster-growth-with-less-conflict> [<https://perma.cc/JRR8-CZFN>].

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (“In its finest expression it will mean a responsive system of governance that assures



Startup cities take a substantially different approach than the other models. The model does not recommend, much less require, the adoption of specific institutions or principles.<sup>219</sup> Rather, as the name implies, the model proposes treating municipal governments similar to startup technology companies; specifically, municipal governments are vested with broad authority and able to experiment with various policies.<sup>220</sup> Thus, much like a technology company, the success or failure of a municipality largely depends on its ability to create a desirable system, and attract citizens and investors.<sup>221</sup>

In essence, charter cities expand the scope and scale of reforms in SEZs to catalyze social and economic development in countries with poor rules.<sup>222</sup> A fully developed charter city has yet to be established, if at all,<sup>223</sup> thus, the following provides a basic overview of the model. The next section includes a discussion of the elements common to charter cities. Section I.C. discusses the development-orientation of charter cities and explains why they can be an effective method of stimulating development.

### *B. Characteristics of the Charter City*

A rigid definition of charter city is elusive because of the model's intentional flexibility and limited application.<sup>224</sup> However, there are four key principles that proponents of charter cities such as Romer espouse: (1) undeveloped land; (2) a charter of basic rules; (3) freedom of choice; and (4) equal treatment under the law for all citizens.<sup>225</sup>

Charter cities, at least as originally envisioned by Romer, require a previously undeveloped piece of land large enough to support an entire city.<sup>226</sup> Second, the city must have a charter generally specifying the rules necessary to attract investors and

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stability and transparency under rule of law. At a minimum it must mean that the system is not at risk of being up-ended every time there is a change in the national government.”).

<sup>219</sup> MARRON INST. URB. MGMT., *supra* note 183.

<sup>220</sup> Jack Preston, *Startup Cities: Can Entrepreneurship Save Politics?*, VIRGIN (July 28, 2014), <https://www.virgin.com/entrepreneur/startup-cities-can-entrepreneurship-save-politics> [<https://perma.cc/BGG5-HBXW>] (“Startup Cities is a new approach to reform that uses small, highly autonomous municipalities to pilot reform projects before they are scaled to the national level.”).

<sup>221</sup> *Id.*

<sup>222</sup> FULLER & ROMER, *supra* note 38, at 1; Paul Romer, *Why the World Needs Charter Cities at TED Global 2009*, TED 00:44, 09:33 (July 2009) [hereinafter Romer, *Why the World Needs Charter Cities*] (transcript available at [http://www.ted.com/talks/paul\\_romer](http://www.ted.com/talks/paul_romer) [<https://perma.cc/5TY9-CSKJ>]).

<sup>223</sup> Dade, *supra* note 33, at ii (“What Paul Romer and Brandon Fuller propose is an experiment and there remain details to be ironed out.”).

<sup>224</sup> FULLER & ROMER, *supra* note 38, at 7 (explaining that a charter should be broad and flexible).

<sup>225</sup> *Id.*; Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 09:33.

<sup>226</sup> FULLER & ROMER, *supra* note 38, at 7 (“A good target size is 1,000 square kilometers, roughly the size of Hong Kong and Singapore.”); Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 08:15.

residents.<sup>227</sup> Ideally, the charter should not be so specific as to limit experimentation and innovation in the city.<sup>228</sup> Third, citizens and leaders must be ensured a broad commitment to choice reflected in the ability to opt in or out depending on whether a citizen finds the policies adopted favorable.<sup>229</sup> Fourth, all citizens must be guaranteed equal application of the law; this principle is necessary to offer legitimacy to the charter city's government and attract citizens—much the same way religious freedom was integral to attracting citizens in Pennsylvania.<sup>230</sup>

Moreover, there are three distinct roles that actors can play, including: *host*, *source*, and *partner*.<sup>231</sup> The *host* country provides land, the *source* country provides citizens, and the *partner* country helps ensure legitimacy by promising enforcement of laws and equality under the charter.<sup>232</sup> However, a single country can play all three roles—thus creating a charter city internally—provided the existing government is credibly able to commit to enforcing the charter equally.<sup>233</sup> Notably, these concepts are interconnected and must function together. For example, the freedom of choice provided to leaders is demonstrated through the decision to develop a charter city.<sup>234</sup> Further, developing the city on undeveloped land demonstrates that citizens are free to choose to opt in or out rather than being forced to remain in their existing home in a charter city or leave.<sup>235</sup> Finally, both choices help legitimize the authority of the charter city government to would-be residents and investors who can thereby rely on the local government and foreign partner to enforce the charter equally.<sup>236</sup>

<sup>227</sup> FULLER & ROMER, *supra* note 38, at 7.

<sup>228</sup> *Id.* (“Of course, a charter should not specify a centralized economic plan. Nor should it contain rules for a detailed spatial plan for the city, one that specifies what people can do in every specific location. The rules that will encourage economic opportunities and vibrant city life will be those that leave broad scope for experiments and let competition and choice determine which experiments persist.”).

<sup>229</sup> *Id.* at 1 (“In a charter city, legitimacy derives from residents’ decisions to opt-in to the new rules as well as the social inclusion that follows from equal application of the rules to all residents.”); Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 09:33 (“You start from uninhabited territory. People can come live under the new charter, but no one is forced to live under it.”).

<sup>230</sup> FULLER & ROMER, *supra* note 38, at 6–7 (“In a charter city, legitimacy derives from . . . the social inclusion that follows from equal application of the rules to all residents. For example, William Penn’s charter for Pennsylvania (which inspired the term, charter city) was a critical step in the development of rules that enforce a separation between church and state. His legal guarantee of freedom of conscience attracted people from all over Europe. It had instant legitimacy for the immigrants at a time when religious tolerance in Europe and the United States was extremely controversial.”).

<sup>231</sup> *Id.* at 7.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* (“The key to going it alone is the ability of the central government to credibly commit to would-be residents and investors that the special rules in a new reform zone will be upheld.”).

<sup>234</sup> *See id.*

<sup>235</sup> *See id.*

<sup>236</sup> *See id.*

Even though the Honduran reform was based only partially on charter cities,<sup>237</sup> and although its major proponent Paul Romer no longer supports the project,<sup>238</sup> it provides a strong example of what a charter city should—and, perhaps more accurately, should not—resemble. La Región Especial de Desarrollo (RED), the doomed precursor to ZEDE, was originally intended to offer citizens better choices by establishing a city on a previously undeveloped area of land in Honduras.<sup>239</sup> Originally, Honduras was to work cooperatively with an international partner to ensure provision and enforcement of better rules.<sup>240</sup> First, the RED was to work cooperatively with Mauritius to establish an external court of appeal.<sup>241</sup> Second, the RED was supposed to include a nine-person Transparency Commission serving as pro tempore members.<sup>242</sup> Further, the President would appoint a governor; thereafter, the Transparency Commission would select the replacement until the Commission relegated the election authority to the citizens of the RED.<sup>243</sup> Additionally, the Commission would have authority to audit actions of the RED officials, whether financial or otherwise, and appoint their own replacements.<sup>244</sup> The Commission's authority would be checked by the ability of the Honduran Legislature to alter the zone by a qualifying vote.<sup>245</sup>

Several realities of the Honduran system led Romer to withdraw his support for the project, and these realities should serve as a cautionary tale to all such experiments.<sup>246</sup>

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<sup>237</sup> Dade, *supra* note 33, at ii (“The government of Honduras is working to establish a special development region that is based in part on the idea of a charter city.”).

<sup>238</sup> Elisabeth Malkin, *Plan for Charter City to Fight Honduras Poverty Loses Its Initiator*, N.Y. TIMES (Sept. 30, 2012), <https://nyti.ms/2QQhvLa>.

<sup>239</sup> FULLER & ROMER, *supra* note 38, at 8 (“To bring economic opportunities closer to home, the Honduran National Congress recently defined a new legal entity, the Special Development Region, known locally as la Región Especial de Desarrollo (RED).”); Tom W. Bell, *Startup City Redux: Honduras: From RED to ZEDE to . . . Freedom?*, FOUND. ECON. EDUC. (June 27, 2013), <https://fee.org/articles/startup-city-redux> [<https://perma.cc/7AKV-JCYM>] [hereinafter Bell, *Startup City Redux*].

<sup>240</sup> FULLER & ROMER, *supra* note 38, at 9 (“[T]he government is looking to its allies for partners that can help provide the rule of law necessary to generate investment, jobs, and safety in the first RED.”).

<sup>241</sup> *Id.* at 11 (“Just as the strength and integrity of the Mauritian court system has been key to enhancing growth and development in Mauritius, the governments in Honduras and Mauritius believe that this historic agreement will ensure an independent judiciary in the RED and will provide important assurances to potential residents and investors.”).

<sup>242</sup> *Id.* at 9–10.

<sup>243</sup> *Id.* at 10.

<sup>244</sup> *Id.* at 9–10.

<sup>245</sup> *Id.* at 9 (“The Transparency Commission will be largely independent of future governments in Honduras. To change the enabling legislation that specifies the powers of the Transparency Commission, the Honduran Congress would need a two-thirds majority vote of approval *as well* as an approval by referendum among the residents of the RED. This procedure serves two purposes: it provides a check on the conduct of the Transparency Commission, but it also sets a very high hurdle for any future Honduran government that wishes to interfere in the reform zones.”).

<sup>246</sup> Bell, *No Exit*, *supra* note 44 (explaining that “[t]hanks to his fame as a respected academic

Romer withdrew from the reform shortly after the assassination of a Honduran human rights attorney, who was responsible for bringing a constitutional challenge to the RED legislation prompting the questionable removal of four Supreme Court justices who posed a threat to the reform.<sup>247</sup> Romer attributes his withdrawal to opaque decision-making by the Honduran government, without the approval of the Transparency Commission required under the RED legislation, which charter cities are intended to remedy.<sup>248</sup> Regardless, the result has been a new reform and widespread criticism regarding his theoretical approach for being detached from the violent realities of Honduran politics.<sup>249</sup>

### C. *The Inspiration for Charter Cities*

Law and development scholarship has shown that one of the reasons rule-of-law projects have not succeeded is because pre-existing poor rules and institutions impede development. Charter cities allow development to take place from a clean slate, with

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and successful entrepreneur, many came to see Romer as the genius behind the Honduran RED project. He wasn't, but it must be admitted that citing Romer's work—including his very convincing TED talk—helped the Lobo administration sell REDs to the Honduran Congress. Romer visited Honduras, advised the government, and evidently viewed the REDs as an opportunity to implement charter cities. It was not to be, however.”); Arthur Phillips, *Charter Cities in Honduras?*, OPEN DEMOCRACY (Jan. 7, 2014), <http://www.opendemocracy.net/opensecurity/arthur-phillips/charter-cities-in-honduras> [<https://perma.cc/ZF2J-KECJ>] (describing a new law that has replaced the RED legislation, which includes implementing zones in currently occupied territories, unlike in the charter cities proposal).

<sup>247</sup> Emma Feltes, ‘*Charter Cities*’ and Escalating Human Rights Violations in Honduras: Will Canadian Investment Continue?, RABBLE.CA (Oct. 5, 2012), <http://rabble.ca/news/2012/10/charter-cities-honduras-crumble-human-rights-violations-escalate-will-canada-keep-inves> [<https://perma.cc/H8MZ-PJ7W>] (“Although no mention of the violence and political controversy shrouding the Charter Cities initiative has been made, Romer’s withdrawal immediately follows the assassination of Trejo-Cabrera. At their own peril, human rights organizations throughout Honduras have long been battling Charter Cities, and Trejo-Cabrera had received numerous death threats since filing a Constitutional challenge to the project. These persisted up until his assassination last week.”); Phillips, *supra* note 246.

<sup>248</sup> Brian Doherty, *Honduran Private City Plan Shot Down by Its Supreme Court*, REASON (Oct. 4, 2012, 11:38 am), <https://reason.com/blog/2012/10/04/honduran-private-city-plan-shot-down-by> [<https://perma.cc/L4PR-9SM6>] (explaining that Romer stated that he left the project after the Honduran government signed a memorandum of understanding with its first investor without properly informing the Transparency Commission).

<sup>249</sup> Keane Bhatt, *Reporting on Romer’s Charter Cities: How the Media Sanitize Honduras’ Brutal Regime*, N. AM. CONG. LATIN AM. (Feb. 19, 2013), <https://nacla.org/news/2013/2/19/reporting-romer%E2%80%99s-charter-cities-how-media-sanitize-honduras%E2%80%99s-brutal-regime> [<https://perma.cc/5TSB-KSQT>] (describing how “Romer’s lofty theories . . . remained utterly detached from the brutal nature of the [Honduran] government”). See Bell, *Startup City Redux*, *supra* note 239 (“The first effort to establish in Honduras what have been called ‘startup cities’ thus died. But Honduran reformers did not give up.”); Whan-woo, *supra* note 49 (explaining how South Korea is providing economic support to the ZEDE).

reforms implemented not piecemeal but on an appropriately large scale to achieve the desired result.<sup>250</sup> Take as an example this hypothetical, but entirely realistic, example of an African student who has a cell phone but studies under a street light because he cannot access electricity in his home.<sup>251</sup> The student lacks electricity because policies in the country provide several energy subsidies and fix the price such that the electric company loses money for every new customer it takes.<sup>252</sup> Although the president has tried to have the national policies changed so energy companies would have an incentive to take new customers, the individuals already benefiting from low-cost electricity are able to impede changes by exploiting the difficulty of changing national-level rules and raising sufficient opposition.<sup>253</sup> Fixing poor rules often requires entirely new sets of institutions, and the scale of change has to be large enough to create a significant change and small enough that it is replicable and sustainable.<sup>254</sup> Large-scale charter cities can provide the institutions necessary to stimulate change at an effective level.

First, charter cities are an especially effective mechanism for harnessing what has been called the “Urbanization Project” in development aid.<sup>255</sup> Shlomo Angel,

<sup>250</sup> FULLER & ROMER, *supra* note 38, at 4–5.

<sup>251</sup> Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 00:00–00:21. See generally Roger Nord, *Reforming Energy Subsidies Is Critical for Realizing Africa’s Growth Potential*, IDEAS FOR DEV. (May 13, 2013), <http://ideas4development.org/en/reforming-energy-subsidies-is-critical-for-realizing-africas-growth-potential> [<https://perma.cc/A44Q-AXNR>].

<sup>252</sup> Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 00:44; Nord, *supra* note 251 (“In Sub-Saharan Africa, direct energy subsidies averaged close to 3 percent of GDP in 2012—as much as public health spending in many countries. They are costly to the budget and crowd out other spending, including on much-needed infrastructure and social services. And this estimate does not include the cost of environmental externalities, which would add a further ½ percent of GDP. With many low-income countries in Africa facing tight budget constraints, energy subsidies divert resources away from many more productive and deserving spending programs.”).

<sup>253</sup> Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 00:21; Nord, *supra* note 251 (“Energy subsidies persist, in part, because they are a convenient fiscal tool, requiring little administrative capacity, to provide benefits to the population. Lack of public support for subsidy removal is in part due to a lack of confidence that governments would use the savings from removal of subsidies for programs that would benefit the poor or address pressing economic and social needs. For these reasons, many countries have had difficulty reforming subsidies.”).

<sup>254</sup> Dade, *supra* note 33.

<sup>255</sup> FULLER & ROMER, *supra* note 38, at 3 (“Roughly 10,000 years ago, humans began a remarkable undertaking, what Shlomo Angel has called ‘the Urbanization Project.’ Ever since, we have been drawing together in dense urban areas. This project is roughly halfway done; about 3.5 billion people now live in cities. By the end of this century, total population will likely stabilize at 10 to 11 billion, and most societies will converge in urban areas at rates of 70 to 80 percent.”). See also UNITED NATIONS DEP’T OF ECON. & SOC. AFFAIRS, *WORLD URBANIZATION PROSPECTS: THE 2009 REVISION 1* (2010) (“Between 2009 and 2050, the world population is expected to increase by 2.3 billion, passing from 6.8 billion to 9.1 billion. At the same time, the population living in urban areas is projected to gain 2.9 billion, passing from 3.4 billion in 2009 to 6.3 billion 2050. Thus, the urban areas of the world are expected to absorb all the

Professor of City Planning at the New York University Stern Urbanization Project, explained “[w]e should care about urban expansion if we want the new areas to be productive, [and] to be integrated into the metropolitan economy.”<sup>256</sup> Further, he argued that urban growth should be prepared for as “these expansion areas need to be connected to the metropolitan economy in order for the city to be productive.”<sup>257</sup>

Angel therefore proposed that policies should be directed to supporting efficient urban expansion, rather than trying, pointlessly, to contain them.<sup>258</sup> Thus, the urbanization project is a unique opportunity for the development field to harness rapidly increasing urban populations in charter cities.<sup>259</sup>

Second, development projects must manage political risk—which appears in two different forms—to provide better rules for citizens and leaders.<sup>260</sup> The first political risk involves situations where the government is dysfunctional and cannot attract citizens or investors because it cannot commit to properly enforcing laws.<sup>261</sup> Notably, developing countries could overcome this impediment by creating partnerships with countries whose commitment to ensuring the equal application of laws provided in a charter would offer legitimacy to the host country’s promise.<sup>262</sup> The second form of political risk involves a government with institutions incapable of protecting itself from exploitation by third parties.<sup>263</sup> In those circumstances, better institutions, implemented with the help of foreign partners could again address the conditions of underdevelopment and poverty which have allowed predatory entities to exploit state institutional weakness.<sup>264</sup> Through charter cities, the promise by a host government equally and effectively to enforce charter provisions encouraging socially and economically beneficial entities to invest in the area could be deemed to be more credible by investors.<sup>265</sup>

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population growth expected over the next four decades while at the same time drawing in some of the rural population.” (citation omitted)).

<sup>256</sup> Alex Rogala, *Solly Angel on How Cities Make Room Now for Growth Tomorrow*, THE CITY FIX (Jan. 17, 2018), <http://thecityfix.com/blog/solly-angel-on-how-cities-can-make-room-now-for-growth-tomorrow-alex-rogala> [<https://perma.cc/5D67-LMXT>].

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> FULLER & ROMER, *supra* note 38, at 14 (“No other time has or will see such an enormous demand for urban life. It would be a tragedy if new urban settlements simply replicate the defective forms of governance from which people are so eager to escape. Reform zones can meet the demands for both urban living and better governance.”).

<sup>260</sup> *Id.* at 4.

<sup>261</sup> *Id.* at 4; Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 04:09.

<sup>262</sup> FULLER & ROMER, *supra* note 38, at 4, 7.

<sup>263</sup> *Id.* at 4 (“A more pernicious form arises when a government is too weak to prevent socially harmful opportunism by predatory firms. Where such risks are high, firms that are efficient and honest stay away. The firms that remain, those that specialize in exploiting institutional weakness, end up limiting competition and opposing reform.”).

<sup>264</sup> *Id.* at 4, 7.

<sup>265</sup> *Id.* (“The political risks inherent in weak governance, along with related problems such as crime and violence, are enough to keep potentially lucrative and socially beneficial infrastructure investment away from the parts of the world that need it most.”).

Third, charter cities could harness urbanization at an effective scale.<sup>266</sup> Specifically, a substantial number of the world's poor would willingly move to an area with better rules if they had the option.<sup>267</sup> Unfortunately, countries with better rules often either cannot or will not accept such individuals,<sup>268</sup> and even if they do, transferring many of the benefits back to an individual's country is difficult.<sup>269</sup> By establishing cities on undeveloped land, rules in the charter city could differ substantially from those elsewhere in the country,<sup>270</sup> thereby providing the benefits of better rules to citizens who choose to opt in, while substantially reducing the costs associated with immigrating to the territory and transferring benefits home.<sup>271</sup> Instituting reforms at the city level would provide a significant impact by requiring surrounding cities to adopt better policies to compete for citizens at a scale capable of being replicated elsewhere in the country without the difficulty and cost of reforming policies nationally.<sup>272</sup> Finally, the cost of developing such cities would be substantially less than the potential increase in economic output that would follow from offering an entire city's worth of people more opportunities.<sup>273</sup>

#### *D. Honduras as Hong Kong*

As mentioned, supporters of charter cities point to Hong Kong and to other SEZs in China as examples of how better institutions can help produce good rules and

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<sup>266</sup> *Id.* at 5–6.

<sup>267</sup> *Id.* at 5 (“The world’s poor are well aware that better rules prevail elsewhere. Gallup reports that 630 million people would like to move permanently to another country. If such migration were allowed, more would surely follow as people in the developing world began to learn of opportunities elsewhere through their increasingly global social and familial networks.”).

<sup>268</sup> *Id.* at 6.

<sup>269</sup> Dade, *supra* note 33, at i–6 (“More than just money, these diasporas are also sending and bringing home new ideas for businesses, for education, and understanding and expectations for how societies and rules should function to allow economic growth and freedom. Though these transfers are having impacts at the family, neighbourhood, and village levels the impacts are still too disaggregated, too slow, and too atomized to have impact at the national or even regional level and to create macro level self-sustaining change.”).

<sup>270</sup> FULLER & ROMER, *supra* note 38, at 6.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* (“To grow, new cities will have to attract new residents by offering good rules. In doing so, successful new cities will give existing cities stronger incentives to reform. This competitive dynamic suggests a very different way to think about development policy.”).

<sup>273</sup> *Id.* at 5–6 (explaining that the gain derived from providing better choices for billions of people would be “large enough even to dwarf the cost of building the new cities where they could move. To put this gain in context, consider that, by most estimates, further reductions in barriers to trade would increase worldwide income by less than a few percentage points. The estimated gain from letting all people move to places with good rules? An increase in worldwide income of 50 to 150 percent”).

economic development.<sup>274</sup> For example, although China was at one point a world leader responsible for developing several important technological advances, including steel, printing, and gunpowder—its obsolete rules cut it off from the rest of the world, preventing it from capitalizing on the spread of these technologies until the 1970s—when its economy hit a period of rapid growth.<sup>275</sup> Romer, for example, argues that adopting British institutions and markets in Hong Kong during this period stimulated massive growth and poverty reduction in China.<sup>276</sup> Further, the institutions in Hong Kong at the time were substantially different from those elsewhere in China, but were nonetheless legitimized in part by China’s partnership with the British, resulting even in the establishment in Hong Kong, after its reversion to China, of an external court of appeal composed of foreign judges.<sup>277</sup>

Moreover, the scale at which China adopted British institutions substantially influenced growth.<sup>278</sup> Specifically, by adopting reforms at the city level, China recognized the value of better institutions implemented at a significant scale while preserving legitimacy by not imposing reforms throughout the entire country.<sup>279</sup> The scale of the experiment also allowed citizens simply to migrate or travel to Hong Kong to obtain benefits of its economic success, and allowed institutions to be easily replicated and transplanted to SEZs and eventually fourteen coastal cities.<sup>280</sup> One could argue that the British inadvertently did more in Hong Kong to stimulate development than any aid program

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<sup>274</sup> Dade, *supra* note 33, at i. See also FULLER & ROMER, *supra* note 38, at 12; Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 04:52, 07:38 (“Now, China dramatically demonstrates both the potential and the challenges of working with rules.”).

<sup>275</sup> Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 04:52 (“And [China] soon adopted rules which slowed down innovation and cut China off from the rest of the world. So as other countries in the world innovated, in the sense both of developing newer technologies, but also developing newer rules, the Chinese were cut off from those advances. Income there stayed stagnant, as it zoomed ahead in the rest of the world.”).

<sup>276</sup> *Id.* at 06:05 (explaining that Hong Kong for most of the twentieth century operated under structures based on working market economies run by the British).

<sup>277</sup> FULLER & ROMER, *supra* note 38, at 12 (“To guarantee the credibility and independence of [the Chinese Court established after regaining control of Hong Kong], China, through a treaty with Britain, agreed that justices for this new court could be recruited from other common law jurisdictions.”).

<sup>278</sup> Dade, *supra* note 33, at i.

<sup>279</sup> FULLER & ROMER, *supra* note 38, at 14–15. See also Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 07:04 (“But Deng Xiaoping instinctively understood the importance of offering choices to his people. So instead of forcing everyone in China to shift immediately to the market model, they proceeded by creating some special zones that could do, in a sense, what Britain did: make the opportunity to go work with the market rules available to the people who wanted to opt in there.”).

<sup>280</sup> Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 07:38 (“So after the four special zones, there were 14 coastal cities [sic] that were open in the same sense, and eventually demonstrated successes in these places that people could opt in to, that they flocked to because of the advantages they offered. Demonstrated successes there led to a consensus for a move toward the market model for the entire economy.”).



throughout the last century, suggesting that similar elements could be implemented in charter cities, beyond economic reforms, to stimulate growth in developing nations.<sup>281</sup>

In a nod to Hong Kong, the Honduran government has established what it calls *model cities* to provide its citizens with “alternative jurisdictions in which they can find safety and opportunities.”<sup>282</sup> The concept is designed “to overcome stagnation in public policy . . . [through] a public-sector analogue to startup businesses” whereby charter cities compete with existing governments,<sup>283</sup> becoming a catalyst for change in the same way that new startups in the business world shake things up. For example, an established firm like IBM, whose business culture has historically been geared towards serving institutional customers looking for mainframe computers, was not nimble enough to adapt and adjust to the rise of noninstitutional, individual computer customers.<sup>284</sup> Because changing IBM’s culture and reforming old rules were difficult, a void appeared which allowed smaller startups like Apple and Dell to enter the market and compete for household consumers.<sup>285</sup>

Established businesses even spawn new versions of themselves deliberately, creating “experimental subsidiaries known as ‘skunkworks’”<sup>286</sup> that function as the internal equivalent of startups. Target is an example. The retailer Dayton Company created it as a spin-off company with its own charter, using new rules that were so successful that the Dayton Company itself opted to use Target’s formula.<sup>287</sup> The aim is as follows: charter cities could jump-start development in the cities themselves but also in the country in which they are chartered as well as in surrounding countries. “If companies can change themselves by setting up subsidiaries with new rules, countries could do the same with charter cities.”<sup>288</sup> Law and development projects have traditionally focused on creating change from within developing countries—that is, spurring change from within.<sup>289</sup> Charter cities operate on a different presumption—that “[c]hange from without comes more easily than change from within. Industrial progress comes from new entrants and new experiments, not from the slow process of changing established corporate bureaucracies.”<sup>290</sup>

Following the Hong Kong and Singapore model, Honduras would set aside land upon which to establish charter cities and the cities would own the land, leasing out

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<sup>281</sup> See FULLER & ROMER, *supra* note 38, at 14 (“By creating the conditions that let a new city emerge in Hong Kong, Britain can claim credit for the single most effective program of development assistance ever undertaken.”).

<sup>282</sup> See Miller, *supra* note 65, at 272.

<sup>283</sup> *Id.* at 275–76.

<sup>284</sup> *Id.* at 278.

<sup>285</sup> Mallaby, *supra* note 20.

<sup>286</sup> *Id.*

<sup>287</sup> *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

portions to private parties and investors and collecting revenues from such leases.<sup>291</sup> The investors could build on the land, own the structures they built or rent or sell them as they wish.<sup>292</sup> Initially, legislators used language in the Honduran Constitution to authorize the creation of Special Development Regions.<sup>293</sup> Honduras then chose a 1,000 square kilometer plot of land to establish a charter city but an indigenous group opposed the plan on grounds that the land belonged to them.<sup>294</sup> The Supreme Court of the Republic of Mauritius, a small African island nation that is in the British Commonwealth, consented to serve as an appellate court for the RED's courts, which would apply the common law.<sup>295</sup> Cases that further appeal holdings issued by the Supreme Court of Mauritius could be heard by the Privy Council in the United Kingdom,<sup>296</sup> an arrangement that would bestow a sense of legitimacy and impartiality to RED courts.<sup>297</sup>

This arrangement did not come into fruition, and because of internal struggles in Honduras, the justices on the Honduran Supreme Court who had held the RED laws unconstitutional<sup>298</sup> were removed and a different law called the ZEDE was enacted to rectify potential Constitutional infirmities.<sup>299</sup> The ZEDE legislation was vehemently opposed by Honduran municipalities, "which feared competition from the new entities," even though those municipalities could themselves become ZEDES and get all the attendant advantages.<sup>300</sup> The new President of Honduras emphasized that ZEDE charter cities would not be run as a "race to the bottom" zone where investors came merely for cheap labor, but rather would be model cities that also offered a host of other real benefits, including four critical factors referred to as LEAP factors: legal, economic, administrative, and political.<sup>301</sup> Unlike prior SEZs that are primarily

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<sup>291</sup> See Miller, *supra* note 65, at 277.

<sup>292</sup> See *id.*

<sup>293</sup> CONSTITUCIÓN POLÍTICA DE LA REPUBLICA Jan. 20 1982, art. 329 (Hond.), translated in *Honduras's Constitution of 1982 with Amendments Through 2013*, CONSTITUTE PROJECT (July 31, 2018), [https://www.constituteproject.org/constitution/Honduras\\_2013.pdf?long=en](https://www.constituteproject.org/constitution/Honduras_2013.pdf?long=en) [<https://perma.cc/3YE9-PPKN>] ("The state promotes economic and social development, which must be subject to strategic planning. The law shall regulate the system and process of planning with the participation of the state powers, and political, economic and social organizations shall be duly represented.").

<sup>294</sup> ECONOMIST, *Hong Kong in Honduras*, *supra* note 63; Phillips, *supra* note 246.

<sup>295</sup> FULLER & ROMER, *supra* note 38, at 11.

<sup>296</sup> See Owen Bowcott & Maya Wolfe-Robinson, *Honduras May Appeal to London Courts*, GUARDIAN (July 22, 2012, 11:36 AM), <http://www.guardian.co.uk/law/2012/jul/22/honduras-london-courts> [<https://perma.cc/5ALK-5YF7>].

<sup>297</sup> See FULLER & ROMER, *supra* note 38, at 11.

<sup>298</sup> Constitutional infirmities were related to provisions that granted too much authority to the REDs, causing concerns about Honduran sovereignty. Miller, *supra* note 65, at 298–99.

<sup>299</sup> *Id.*

<sup>300</sup> Bell, *Startup City Redux*, *supra* note 239.

<sup>301</sup> *Inaugurating New President, Honduras Prepares Special Zones to Offer Investors and Workers World Standards for Rule of Law*, PR NEWSWIRE (Jan. 26, 2014, 6:58 AM), <http://>

focused on special economic rules, the ZEDE aims to achieve what law and development practitioners and scholars have advocated for years: “rule of law, efficiency, security, and transparency.”<sup>302</sup> ZEDE touts itself as offering advantages that are unique to the Central American Free Trade Agreement region, such as “[i]nternational legal standards, dispute resolution mechanisms and institutions, using Common Law, mandatory arbitration, and special judges.”<sup>303</sup>

Under the ZEDE, which was enacted following a constitutional amendment known as the ZEDE Amendment,<sup>304</sup> Honduras was authorized to create zones that are exempt from, or supplement, Honduras’s laws and judicial system with special laws and courts,<sup>305</sup> except in the areas of international relations.<sup>306</sup> Note that the ZEDE Amendment, though radical in creating comprehensive special zones, take care to ensure that Honduran territoriality remains intact and unquestioned in order to preempt criticism based on constitutional-infirmary grounds.<sup>307</sup> Therefore, it is important to note that the ZEDEs do not create, as often claimed, Honduran-free space subject to the radical will of foreign investors.<sup>308</sup> Rather, ZEDEs are subject to the Constitution of Honduras except in cases where certain constitutional provisions have been amended to be inapplicable to ZEDE zones.<sup>309</sup> For example, ZEDEs are subject to Articles 11, 12, 13, 15, and 19 of the Constitution, which deal with, among other items, the inalienability of Honduran territorial integrity, sovereignty, and independence.<sup>310</sup> Articles 8 and 41 of the ZEDE Statute state that laws in the ZEDE

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[www.prnewswire.com/news-releases/inaugurating-new-president-honduras-prepares-special-zones-to-offer-investors-and-workers-world-standards-for-rule-of-law-242128401.html](http://www.prnewswire.com/news-releases/inaugurating-new-president-honduras-prepares-special-zones-to-offer-investors-and-workers-world-standards-for-rule-of-law-242128401.html) [https://perma.cc/3AME-ZEZJ].

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> Decreto No. 236-2012, Diario Oficial de la República de Honduras [La Gaceta] 2013, <http://extwprlegs1.fao.org/docs/pdf/hon131571.pdf> [https://perma.cc/F3GE-PL7C], translated in *Honduras’s Constitution of 1982 with Amendments Through 2013*, CONSTITUTE PROJECT (July 31, 2013), [http://www.constituteproject.org/constitution/Honduras\\_2013.pdf?lang=en](http://www.constituteproject.org/constitution/Honduras_2013.pdf?lang=en) [https://perma.cc/RL9D-MLAV] [hereinafter ZEDE Amendment]. Article 329 of the ZEDE Amendment specifically states that ZEDEs are subject to those provisions of the Constitution of Honduras. *Id.* art. 329.

<sup>305</sup> The ZEDE Amendment added this language to Article 303 of the Constitution: “The judicial branch consists of a Supreme Court of Justice, the Court of Appeals, the courts, by tribunals with exclusive competence in special regimes, . . . and additional offices specified by law.” *Id.* art. 303.

<sup>306</sup> Miller, *supra* note 65, at 287.

<sup>307</sup> *Id.* at 288–89.

<sup>308</sup> *Id.* at 302–03.

<sup>309</sup> ZEDE Statute, *supra* note 152, art. 8, Decreto No. 120-2013.

<sup>310</sup> CONSTITUCIÓN DE LA REPÚBLICA, Jan. 20, 1982, art. 11 (Hon.) (providing for the parameters involved in determining the extent of Honduras’s territory); *id.* art. 12 (providing for State sovereignty of airspace, subsoil, territorial seas, continental shelf, and similar areas); *id.* art. 13 (providing that the territory of the State is inalienable); *id.* art. 15 (incorporating

are subject to the following sources of authority: the Honduran Constitution; treaties that Honduras has ratified; the ZEDE Statute; Honduran laws that relate to the national anthem, the flag, and other national symbols; Honduran laws respecting the territorial sea and contiguous zone; Honduran criminal laws, unless they have been superseded by the ZEDE laws, particularly those dealing with drug and human trafficking, money laundering, genocide, terrorism, child pornography, and child exploitation; and all internal regulations issued by the ZEDE.<sup>311</sup>

Nonetheless, ZEDEs are unique in that they are created as “autonomous municipalities administered by corporations,” as stated in Article 1 of the ZEDE Amendment, which amended Article 294 of the Honduras Constitution.<sup>312</sup> Autonomy means that ZEDEs also are required to have their own internal security apparatus, including police, criminal investigation bodies, criminal prosecution, and prison system.<sup>313</sup> There are built-in protections that are provided in the ZEDE Amendment.<sup>314</sup> The aim of ZEDE is “to realize the function of promoting economic and social development,” as stated in Article 329.<sup>315</sup> In pursuit of this goal while simultaneously minimizing displacement of current inhabitants, Article 1 of the ZEDE Amendment amends Article 329 of the Honduras Constitution to allow the application of special ZEDE laws to zones in Honduras with low population density, such as rural zones.<sup>316</sup> Article 1 of the ZEDE Amendment also requires that residents participate in a plebiscite approved by two-thirds within the proposed zone, unless the zone at issue has a population density lower than the average population density for rural areas.<sup>317</sup> Article 1 also grants legal status to ZEDEs, with the capability to incur obligations and sign contracts as well as possess functional and administrative autonomy with the duties and powers of ordinary municipalities.<sup>318</sup>

To insulate the judicial system from tampering and corruption, Article 1 of the ZEDE Amendment grants the power of judicial appointment to the Judicial Council or Council of the Judicature, not Congress.<sup>319</sup> Article 1 also states that ZEDE courts may mandate arbitration, as well as adopt foreign laws and traditions, as long as they

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international law and providing for enforceability of international arbitral and judicial awards); *id.* art. 19 (criminalizing as treason violations of territorial integrity, sovereignty, or independence of the Republic).

<sup>311</sup> ZEDE Statute, *supra* note 152, art. 8, 41.

<sup>312</sup> ZEDE Amendment, *supra* note 304, art. 1.

<sup>313</sup> ZEDE Statute, *supra* note 152, art. 22.

<sup>314</sup> ZEDE Amendment, *supra* note 304, art. 1.

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* (amending Article 329 of the Constitution to allow for ZEDE, applying special provisions to ZEDEs with low population density).

<sup>317</sup> ZEDE Statute, *supra* note 152, art. 45 (requiring a referendum or plebiscite for people living in the area if the population exceeds 100,000).

<sup>318</sup> ZEDE Amendment, *supra* note 304, art. 1.

<sup>319</sup> *Id.*

meet international human rights standards or provide more protection than the Honduran system.<sup>320</sup>

Article 15 of the ZEDE Statute provides for the appointment of ZEDE judges from a list of candidates proposed by the Committee for the Adoption of Best Practices.<sup>321</sup> Article 14 of the ZEDE Statute recognizes that ZEDEs are special jurisdictions and thus would have “autonomous and independent courts with exclusive competence in all instances on matters that are not subject to binding arbitration.”<sup>322</sup> “Articles 14–15 of the [ZEDE Statute] authorize the creation of courts having special and exclusive jurisdiction, operated under the common law or Anglo-Saxon tradition” and “staffed by judges appointed by the judicial counsel of the Honduran judiciary from a list of candidates provided by the CABP,” otherwise known as the “Committee on the Adoption of Best Practices.”<sup>323</sup> Article 18 of the ZEDE Statute grants ZEDE courts jurisdiction over matters in equity or at law.<sup>324</sup> Decisions by ZEDE courts “constitute binding precedent,” and if permitted by the Committee for the Adoption of Best Practices, ZEDE courts may also use precedents from other jurisdictions or foreign law.<sup>325</sup> The ZEDE Statute also mandates that ZEDE courts are to exercise their functions independently.<sup>326</sup> “It also affirms, however, that parties under ZEDE law ‘may contractually agree to submit [their dispute] to arbitration or a jurisdiction different from the ZEDE.’”<sup>327</sup>

ZEDEs also have a Court for Protection of Individual Rights to protect ZEDE inhabitants against violations; judges on such courts are appointed by the Committee for the Adoption of Best Practices.<sup>328</sup> Article 16 of the ZEDE Statute also provides that appeals from final judgments of such courts can be made to “international tribunals.”<sup>329</sup>

What is additionally new and different about the Honduran ZEDE Statute is the fact that it specifically envisions other forms of charter cities, not just the conventional investment-centered kinds. Article 2 states that the ZEDE zones can take on a variety of forms, including “International Financial Centers, International Logistics Centers, Autonomous Cities, International Business Courts, Special Investment Districts, Renewable Energy Districts, Special Economic Zones, . . . Special Agribusiness Areas, Special Tourism Zones, Mining Association Areas, Forest Association Areas,” or any combination thereof.<sup>330</sup> This provision leaves open the possibility that ZEDEs

<sup>320</sup> *Id.*

<sup>321</sup> ZEDE Statute, *supra* note 152, art. 15.

<sup>322</sup> *Id.* art. 14.

<sup>323</sup> Bell, *Startup City Redux*, *supra* note 239.

<sup>324</sup> ZEDE Statute, *supra* note 152, art. 18.

<sup>325</sup> *Id.*

<sup>326</sup> *Id.* art. 19.

<sup>327</sup> Bell, *Startup City Redux*, *supra* note 239.

<sup>328</sup> ZEDE Statute, *supra* note 152, art. 16.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* art. 2.

can be created to experiment with different development objectives, including noneconomic, pro-refugee zones discussed above, in which special ZEDE laws are implemented to attract refugees who would otherwise be languishing in refugee camps.<sup>331</sup>

In such an unconventional experiment as charter cities where sovereignty seems to be relinquished in favor of corporate governance, it is also important to note that ZEDEs contain numerous protections that are, at least on paper, reassuring for those concerned about basic human rights. Article 9 of the ZEDE Statute mandates equal rights and freedom from discrimination within ZEDEs.<sup>332</sup> Article 10 guarantees constitutional and international human rights protection, referring to “universal moral principles.”<sup>333</sup> Article 33 states that ZEDEs “are allowed to establish their own systems of education, health, social security, and promotion of science,” and at the same time also “guarantee freedom of conscience, religion, labor protection, and freedom of association.”<sup>334</sup> Article 35 emphasizes labor protections, obligating compliance with standards set by the International Labor Organization and other labor treaties ratified by Honduras.<sup>335</sup> Article 36 provides that all employers in the ZEDE must ensure that at least ninety percent of their workforce are Honduran nationals, who must receive at least eighty-five percent of wages ZEDE companies pay.<sup>336</sup> Article 41 imposes criminal sanctions on human trafficking, genocide, terrorism, exploitation of the child, and organized crime.<sup>337</sup> And Article 43 guarantees property-rights protection for indigenous peoples and descendants of escaped slaves such as the Garifuna.<sup>338</sup> ZEDEs are encouraged to work with such groups on collaborative and respectful terms.<sup>339</sup>

At the same time, it should be emphasized that the ZEDE Statute does not provide for transition to democracy but instead envisions that ZEDE zones will be governed by a body of appointed overseers and an individual possessing both executory and legislative power.<sup>340</sup> The ZEDE zone is governed by a Committee of twenty-one members responsible for the Adoption of Best Practices.<sup>341</sup> These members are supposed to be “persons of recognized integrity, leadership, executive capacity, and international reputation in the private or nonprofit sector, in academia, or in the public sector.”<sup>342</sup> They are appointed by the President of Honduras and ratified

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<sup>331</sup> Chris Campbell, *Refugee Crisis Solved: Free Havens*, LASSIEZ FAIRE (Aug. 1, 2016), <https://lfb.org/refugee-crisis-solved-free-havens> [<https://perma.cc/J7JN-NT54>] (discussing “free havens” as a potential solution to the refugee crisis).

<sup>332</sup> ZEDE Statute, *supra* note 152, art. 1.

<sup>333</sup> *Id.* art. 10.

<sup>334</sup> *Id.* art. 33.

<sup>335</sup> *Id.* art. 35.

<sup>336</sup> *Id.* art. 36.

<sup>337</sup> *Id.* art. 41.

<sup>338</sup> *Id.* art. 43.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* art. 11.

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

by the National Congress.<sup>343</sup> The twenty-one member ZEDE committee then appoints a five-member standing committee responsible for day-to-day operations.<sup>344</sup>

The ZEDE committee has many responsibilities, including establishing policy guidelines particularly for domestic policy and transparency; providing a list of ten recommended judges to the Judicial Council to fill vacancies on ZEDE courts; planning ZEDE expansion; hiring an internationally recognized audit firm to audit zone functions; and most importantly, working with the Technical Secretary—the highest executive and legal representative of the ZEDE—who functions as the equivalent of a governor.<sup>345</sup> The ZEDE committee is tasked with the most important task of appointing and removing the Technical Secretary,<sup>346</sup> and overseeing—including approving or disapproving—his actions and conduct.<sup>347</sup>

The Technical Secretary must be a Honduran national by birth, and recognized as someone with “integrity, ability, and merit sufficient for the office entrusted to him.”<sup>348</sup> He serves a term of seven years which is renewable as well as revocable.<sup>349</sup> He also has executive and legislative functions.<sup>350</sup> For example, Article 12(6) states that the Technical Secretary is to enact legislation for the ZEDE and submit it for approval or disapproval by the ZEDE Committee.<sup>351</sup> He also executes and applies ZEDE rules pursuant to Article 12(7).<sup>352</sup> Under Article 12(4), the Technical Secretary is also tasked with management duties, and under Article 12(8), is able to appoint ad hoc secretaries to assist with the administration of ZEDEs.<sup>353</sup> There is no provision in the ZEDE that calls for either the Technical Secretary or the Standing Committee to be subject to democratic elections.<sup>354</sup> The authority to make law remains vested in one person, with ratification authority vested in the Standing Committee.<sup>355</sup>

With respect to finances, Article 23 of the ZEDE Statute states that ZEDEs shall have their own “separate financial scheme,” in which financial revenues will be used exclusively for their own purposes, yet may also be subject to transfer “to authorities in the rest of the country.”<sup>356</sup> Article 23 also requires a balanced budget and that ZEDEs “avoid deficits.”<sup>357</sup> The official ZEDE mandate is “a policy of low taxes,”

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<sup>343</sup> *Id.* art. 11(10).

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* art. 11–12.

<sup>346</sup> *Id.* art. 11(3).

<sup>347</sup> *Id.* art. 11(2), (5).

<sup>348</sup> *Id.* art. 12.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.* art. 12(6).

<sup>352</sup> *Id.* art. 12(7).

<sup>353</sup> *Id.* art. 12(4), 12(8).

<sup>354</sup> *See id.* art. 11, 12.

<sup>355</sup> Miller, *supra* note 65, at 291–92.

<sup>356</sup> ZEDE Statute, *supra* note 152, art. 23.

<sup>357</sup> *Id.*

which means that if levied, they cannot exceed specified rates as stated in Article 29.<sup>358</sup> For example, there can be no more than a twelve-percent tax on individual income, a sixteen-percent tax on business income, and a five-percent sales or value-added tax.<sup>359</sup> Article 30 prohibits the imposition of currency-exchange controls or any restraints on capital inflow and outflow, specifically providing that currencies that circulate within ZEDEs are to be “freely convertible.”<sup>360</sup> Article 31 prohibits restrictions on trade, and favors free trade and competition, with guarantees for the movement of goods and capital.<sup>361</sup> Article 32 provides that imports are to enter ZEDE zones without taxes, tariffs, fees, or any other charges.<sup>362</sup> It also specifies that twelve percent of all tax revenues be deposited in trusts to benefit different branches of the Honduran government<sup>363</sup>—for example, to strengthen the judiciary; establish community projects as designated by the National Congress; promote development, infrastructure, and security in accordance with guidelines by the ZEDE Technical Secretary; and strengthen the Honduran military to protect national sovereignty.<sup>364</sup> Thus, “[e]ach zone in the ZEDE system has to contribute to the public 12 percent of all tax revenues it collects.”<sup>365</sup> The ZEDE’s authority to impose and collect taxes means that they are to be fiscally independent, with the power to set their own budget, run their own services, enter into contracts, and incur their own debt without approval from the national government.<sup>366</sup>

If a ZEDE is established in an urban area, the statute provides that it must recognize private titles to real estate holdings, but that it is also authorized to impose and collect property taxes payable on the market value of such real estate.<sup>367</sup> However, in rural areas with a low population, the Honduran government acquires the land, and places the ZEDE in charge of its administration.<sup>368</sup> The government is empowered to expropriate land and pay the owner an amount “based on market reference values of equal quality real estate outside of the special regime.”<sup>369</sup> Arbitration is the dispute-resolution mechanism for those opposed to expropriation.<sup>370</sup> In cases where title is in dispute, “the compensation value determined by a commission of experts must be deposited in a trust whose beneficiary is the successful bidder of

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<sup>358</sup> *Id.* art. 29.

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* art. 30.

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* art. 32

<sup>363</sup> *Id.* art. 44.

<sup>364</sup> *Id.*

<sup>365</sup> BELL, YOUR NEXT GOVERNMENT?, *supra* note 42, at 53.

<sup>366</sup> ZEDE Statute, *supra* note 152, art. 4, 23.

<sup>367</sup> *Id.* art. 24.

<sup>368</sup> *Id.* art. 25.

<sup>369</sup> *Id.*

<sup>370</sup> *Id.* art. 28.



the right to compensation in accordance with the relevant judgment.”<sup>371</sup> If ZEDEs are established in areas where there is a prior claim to ownership, whether via informal norms or via the official titling system, the question of valuation and compensation of property becomes of primary importance.

To ensure stability of ZEDEs, Article 45 of the ZEDE states that in accordance with Article 329 of the Constitution, the ZEDE Act can be modified, interpreted, amended or repealed only by two-thirds of Congress.<sup>372</sup>

## II. POTENTIAL PROBLEMS AND OTHER CONSIDERATIONS

As the preceding section demonstrates, the fact that ZEDEs are autonomous regions with their own policies, regulations, and courts has led to concerns that ZEDEs are privatized zones with a neocolonial whiff.<sup>373</sup> Critics are concerned that ZEDEs will pursue a “shock doctrine” policy of “development controlled by the domestic and international elite whose investments have impoverished them for centuries. They worry that the ZEDEs will go even further—stripping them of the most basic rights and protections they possess as Honduran citizens.”<sup>374</sup> Although today’s charter cities do not approximate the level of domination imposed by the Dutch in East India, the French in Indochina, and the British in Hong Kong, it is also important to recognize that in each of these empires it was not only physical coercion that was used to dominate indigenous groups. Although Honduran ZEDEs currently do not provide for foreign partners acting as guarantors, under Romer’s original vision, host countries are encouraged to partner with foreign partners in order to boost the credibility of the host.<sup>375</sup> Indeed, some already have raised concerns regarding disproportionate bargaining power between developing countries and even foreign government guarantors or businesses entering into agreements with them.<sup>376</sup> Similarly, one could also conceive of a charter city in which a foreign partner, or perhaps a transparency commission, would be able to dominate the policies of a charter city.

A reasonable response to these concerns is that the ZEDE Statute was established to allow the government of Honduras to charter special cities, and as such,

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<sup>371</sup> *Id.*

<sup>372</sup> *Id.* art. 45.

<sup>373</sup> See *supra* notes 147–52 and accompanying text.

<sup>374</sup> Lauren Carasik, *Hondurans Don’t Need Yet Another Neoliberal Boondoggle*, ALJAZEERA AM. (July 20, 2014, 7:45 AM), <http://america.aljazeera.com/opinions/2014/7/honduras-neoliberal-economic-development-corruption-violence.html> [<https://perma.cc/AZH9-AT6A>].

<sup>375</sup> See *supra* notes 211, 277–79 and accompanying text.

<sup>376</sup> E.g., Thierry Ogier, *Concerns Over China’s ‘Asymmetric Bargaining Power’*, GLOBAL CAP. (Sept. 24, 2011), <https://www.globalcapital.com/article/yvxl42jq2swg/concerns-over-china-asymmetric-bargaining-power> [<https://perma.cc/9ST9-NLAA>] (“Some feel that African governments are not as capable as negotiating as the Chinese, so that they may end up getting a deal that is not necessarily in their favour [sic]. But I think that is a question of the negotiation. If we can help improve or strengthen the bargaining power of African governments, that would be in their interest.”).

this is “an act of law rather than force”<sup>377</sup> in which the sovereign, realizing its limitations and inability to jump-start development, granted certain control over its territory to a ZEDE. Hence, “the voluntary nature of the undertaking”<sup>378</sup> combined with the fact that the creation of the charter itself—even if it results in a diminution of Honduran sovereignty—is itself a legitimate exercise of sovereignty. In this way, one can say that a charter city is not the same as:

an international trusteeship, created by, and deriving its authority from the writ of the international community, which authorizes the intervention with a view to protecting vulnerable populations and remedying state failure. As such, we can say that a charter city embodies the concept of sovereignty whereas a trusteeship embodies a derogation of the same.<sup>379</sup>

As Romer put it:

charter cities are based entirely on voluntary actions. Only a country that wants to establish a charter city will do so. Only people who want to live and work under the rules specified in the city’s charter will move there. Free choice is essential for the legitimacy of the rules in a charter city. It is also what makes a charter city very different from colonial occupation.<sup>380</sup>

To ensure that free choice is paramount, Romer’s vision emphasizes that charter cities cannot be established under conditions involving foreign troops.<sup>381</sup> Thus, a country such as Haiti would not be a good candidate for the establishment of charter cities because of the pre-existence of foreign troops already on Haitian soil; in this case, the project would resemble “a humanitarian military occupation. This approach is fraught with risks that the concept of a charter city is designed to avoid.”<sup>382</sup>

Second, because the very appeal of charter cities is founded on the export of a particular version of economic and political principles that are dominant in the West, critics are concerned that the project’s assumptions are taken for granted, without critical reflection.<sup>383</sup> Terms such as “rule of law” or “good governance” are used as if they are apolitical, technocratic, and neutral terms:

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<sup>377</sup> Rahul Sagar, *Are Charter Cities Legitimate?*, 24 J. POL. PHIL. 509, 511 (2016).

<sup>378</sup> *Id.* at 510.

<sup>379</sup> *Id.* at 511.

<sup>380</sup> CTR. GLOB. DEV., *supra* note 166.

<sup>381</sup> Paul Romer, *Charter Cities Versus Humanitarian Military Interventions*, MARRON INST. URB. MGMT. (Jan. 17, 2010), <http://marroninstitute.nyu.edu/blog/charter-cities-versus-humanitarian-military-occupation> [<https://perma.cc/T76T-U5Y6>].

<sup>382</sup> *Id.*

<sup>383</sup> *See, e.g.*, Carasik, *supra* note 374.

The virtues of good governance are apparently self-evident. But the meaning of the terms remains open and contestable and these institutions attempted to use an amended version of human rights law to further their neoliberal policies in the guise of “good governance,” rather than enabling real empowerment of Third World citizens.<sup>384</sup>

ZEDEs certainly do embody a particular vision of development that is politically, not merely technocratically, grounded.

Honduran ZEDEs are also not democratic because there are no elections in the ZEDEs.<sup>385</sup> The gestalt of ZEDEs is defined by the technocratic dimensions of development, instead of the political dimensions, which are messier and more contested.<sup>386</sup> Of course, the very fact that ZEDEs are meant to bypass local and national politics is itself part of the appeal. Democracy is in the realm of politics and as such, ZEDEs bypass democracy as there are no democratic elections promised or held in Honduran ZEDEs.<sup>387</sup> Neither Romer’s vision nor the Honduran ZEDEs require a commitment to “multi-party, electoral democracy.”<sup>388</sup>

Critics are thus concerned about “the anti-democratic control of foreign corporate interests,”<sup>389</sup> and have warned of “authoritarian governance.”<sup>390</sup> The obvious democratic deficit is a cause of concern, and questions arise over whether this deficit can be compatible with liberal democratic norms. The central issue here is whether legitimacy can only be found in structures that are infused with liberal democratic norms. The age-old question about democratic legitimacy is especially relevant for charter cities run by investors who are not democratically elected. As one commentator put it, “[t]he conventional view, which hardly needs elaboration, is that in view of the equality and autonomy of individuals a regime is legitimate only when those over whom it rules have consented to be subject to its laws and commands.”<sup>391</sup>

What institutional safeguards regarding consent must exist and be implemented before charter cities can be deemed legitimate? For Romer, consent is foundational.<sup>392</sup>

<sup>384</sup> Antony Anghie, *The Evolution of International Law: Colonial and Postcolonial Realities*, 27 *THIRD WORLD Q.* 739, 749 (2006).

<sup>385</sup> See *supra* notes 311–26 and accompanying text.

<sup>386</sup> See *supra* notes 219–22 and accompanying text.

<sup>387</sup> See *supra* note 311 and accompanying text.

<sup>388</sup> Sagar, *supra* note 377, at 513.

<sup>389</sup> Belen Fernandez, *Partitioning Honduras: The Advent of Charter Cities*, AL JAZEERA (July 14, 2012), <https://www.aljazeera.com/indepth/opinion/2012/07/2012711121224166933.html> [<https://perma.cc/2K2A-BY6C>].

<sup>390</sup> Annie Bird, *Privately Owned “Charter Cities” in Honduras: Entire Urban Areas Handed over to Corporations*, GLOBAL RES. (Sept. 15, 2012), <https://www.globalresearch.ca/privately-owned-charter-cities-in-honduras-entire-urban-areas-handed-over-to-corporations/5304672> [<https://perma.cc/KM3Z-G5NL>].

<sup>391</sup> Sagar, *supra* note 377, at 516.

<sup>392</sup> Romer, *Why the World Needs Charter Cities*, *supra* note 222, at 8:49, 9:33, 11:22.

As John Locke observed, “[m]en being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent.”<sup>393</sup> Even David Hume, often regarded as posing pragmatic opposition to Locke’s position on consent, argued:

My intention here is not to exclude the consent of the people from being one just foundation of government. Where it has place, it is surely the best and most sacred of any. I only contend that it has very seldom had place in any degree, and *never almost in its full extent*, and that, therefore, some other foundation of government must also be admitted.<sup>394</sup>

Romer’s model includes principles intended to ease exit by allowing citizens freely to opt in or out of the charter city—a manifestation of consent theory in practice.<sup>395</sup> There must be “choice, backed by both voluntary entry and free exit for all residents, employers, and investors.”<sup>396</sup> Further, the model suggests providing citizens with a demonstrable set of promises regarding governance within the charter city.<sup>397</sup> As we have seen, ZEDEs include provisions to ensure the independence and neutrality of the judiciary, and there is no provision that would restrict the free movement of people in or out of the zones.<sup>398</sup> Thus, it would seem that Romer’s proposal includes several mechanisms for creating a more consent-rich system of governance. For example, Bell explains that “[i]n the real world, of course, freedom of exit comes only by degrees.”<sup>399</sup> Similarly, Albert Hirschman argued that “[a]s a rule . . . loyalty holds exit at bay and activates voice.”<sup>400</sup> This would likely have posed a particular issue for citizens in the RED who would have had little outlet for exercising voice because authority to elect individuals did not immediately vest in citizens.<sup>401</sup> Stated simply, Bell demonstrates that consent and government justification are more aptly described in degrees rather than in terms of presence or absence.<sup>402</sup>

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<sup>393</sup> JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* § 95 (J. W. Gough ed., 1948) (1689).

<sup>394</sup> David Hume, *Of the Original Contract*, in 1 *ESSAYS MORAL, POLITICAL AND LITERARY* 49, 51 (University of Chicago Press, 1987) (1752) (emphasis added).

<sup>395</sup> FULLER AND ROMER, *supra* note 38, at 7.

<sup>396</sup> *Id.*

<sup>397</sup> *Id.*

<sup>398</sup> See *supra* notes 291–97, 303–05 and accompanying text.

<sup>399</sup> Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 *CASE W. RES. L. REV.* 17, 64 (2010) [hereinafter Bell, *Graduated Consent*].

<sup>400</sup> Orly Lobel, *Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations*, 97 *CALIF. L. REV.* 433, 433 (2009) (quoting ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 78 (1970)) (alterations in original).

<sup>401</sup> *ECONOMIST*, *Hong Kong in Honduras*, *supra* note 63.

<sup>402</sup> Bell, *Graduated Consent*, *supra* note 399, at 63 (“Recognizing that consent comes by degrees encourages us to seek marginally more of it.”).

Thus, from even a fundamentally pragmatic approach, the substantial value of consent as it relates to governance is well recognized. However, Hume's assertion demonstrates the difficulty sometimes inherent in identifying consent, and even greater, the relative degree of such consent.<sup>403</sup> In law, one can think of consent not just in terms of approval or disapproval but also in terms of relative degrees of consent or unconsent.<sup>404</sup> Consent can be broken down into express, implied, or hypothetical consent; the former two being differentiated by forms of expression, and the latter being based on a presumption.<sup>405</sup> In contract law, for example, express consent relies on some form of communicative act, and can be broken down into two additional categories—negotiated exchanges and standardized exchanges.<sup>406</sup> Alternatively, implied consent generally binds an individual failing to object to a default rule expressly, and includes three types, each embedded by implication.<sup>407</sup> Hypothetical consent is based on what an individual would have done without regard to his actual preference and includes two types.<sup>408</sup> Essentially, unconsent involves the same relative categories regarding expressions and presumptions that an individual does or does not consent.<sup>409</sup> Even in these terms, the various categories themselves cannot be viewed categorically, but are a matter of degrees.<sup>410</sup>

An in-depth discussion on the nature of consent in political systems is beyond the scope of this Article. Suffice it to say that many scholars have observed that few regimes satisfy consent theory, that consent is indeed a matter of degrees, and even that democracies can be seen as failures given deeply embedded social and political inequalities which cast doubt on political participation.<sup>411</sup> Indeed, even in liberal

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<sup>403</sup> See Hume, *supra* note 394, at 51.

<sup>404</sup> Bell, *Graduated Consent*, *supra* note 399, at 19–21.

<sup>405</sup> *Id.* at 34.

<sup>406</sup> *Id.* at 34, 36 (“In addition, contract law recognizes a distinction between dickered and form agreements, treating negotiated exchanges with more respect than standardized ones. Express consent thus includes two subtypes: consent to negotiated exchanges and consent to standardized exchanges.” (citation omitted)).

<sup>407</sup> *Id.* at 34, 37–38 (“Contract law recognizes subtle shadings within implied consent, distinguishing between terms implied by performance under the agreement, terms implied by past dealings between the parties, and terms implied by usage in the trade.” (citations omitted)).

<sup>408</sup> *Id.* at 34, 39 (“Universal hypothetical consent proves easier to establish, and weaker in effect, than hypothetical consent premised on what a particular individual would have done.” (citation omitted)).

<sup>409</sup> *Id.* at 34, 40.

<sup>410</sup> *Id.* at 44 (“In fuzzier but more practical terms, the scale of consent affords a rough measure of how justified we regard a particular transaction. For instance, we typically treat an expressly consensual transaction as justified, not only respecting its terms, as when tort law treats consent as a defense to battery, but often even helping to enforce them, as when contract law imposes expectation damages for breach.”).

<sup>411</sup> *Id.* at 64; Sagar, *supra* note 377, at 517 (“A number of scholars, including John Simmons, Allen Buchanan, and Russell Hardin, have pointed out that few, if any, regimes can satisfy consent theory because social and political inequalities raise a question mark over the quality

democratic states such as the United States, the low turnout in elections has called into question the meaning of democratic consent.<sup>412</sup> For example, the Pew Research Center ranked the United States—with a fifty-three percent voting rate in 2012 and thirty-six percent voting rate in 2014—a low thirty-first out of thirty-five countries for voter turnout among countries that make up the Organization for Economic Co-operation and Development.<sup>413</sup>

This issue of what form of government is legitimate has been a source of debate among democracy scholars. The point here is merely to observe that serious debate exists among scholars on the question of legitimacy and democracy, and that this debate is particularly relevant in the context of charter cities, given their deliberately nondemocratic character. Professor Buchanan, for example, observed that political systems that are not liberal democratic can still be legitimate if they prevent slippages into anarchy, and if there are “minimal standards for protecting individual’s rights by processes and policies that are themselves at least minimally just and is not a usurper.”<sup>414</sup> For Buchanan, however, *full* legitimacy can only be attained once the system has laid the foundations for a transition to democracy.<sup>415</sup> Others such as John Rawls believe that not all societies have to be democratic if they opt for a different system, and the principle of self-determination should serve to insulate such societies from criticism, as long as the society at issue is “decent”—that is, respects basic rights, consults with its citizens, pursues the common good as that society defines it, and allows political dissent.<sup>416</sup> Other accounts of legitimacy rest on systems of government that, though nondemocratic, can produce “more desirable consequences than any plausible alternative could.”<sup>417</sup> These systems of government, though nondemocratic, would be judged based on what has been commonly referred to as “output legitimacy.”<sup>418</sup>

Plausible indicators of “output legitimacy” may reasonably be found in the United Nations Human Development Reports, which track development-related data such as per capita income, infant mortality, literacy, and life expectancy.<sup>419</sup> Hong Kong

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of consent that citizens can offer, and moral and political differences lead to disagreement over what is reasonable for citizens to even hypothetically consent to.”).

<sup>412</sup> Bell, *Graduated Consent*, *supra* note 399, at 57 n.192.

<sup>413</sup> Michael D. Regan, *Why Is Voter Turnout So Low in the U.S.?*, PBS (Nov. 6, 2016, 12:40 PM), <https://www.pbs.org/newshour/politics/voter-turnout-united-states> [<https://perma.cc/H3NL-QWVG>].

<sup>414</sup> Sagar, *supra* note 377, at 517 (quoting Allen Buchanan, *Political Legitimacy and Democracy*, 112 ETHICS 689, 718–19 (2002)).

<sup>415</sup> *Id.* at 518.

<sup>416</sup> *Id.* at 519.

<sup>417</sup> *Id.* at 520.

<sup>418</sup> *Id.* at 520–21.

<sup>419</sup> *Human Development Index*, U.N. DEV. PROGRAMME, <http://www.hdr.undp.org/en/content/human-development-index-hdi> [<https://perma.cc/FV9Z-C7B8>].

and Singapore, for example, are top examples of nondemocratic systems that nonetheless, are largely devoid of grave abuses, do a very decent job of safeguarding basic rights, and provide economic well-being to their citizens.<sup>420</sup>

Charter cities therefore are defensible despite their nondemocratic character if they meet the legitimacy indicators described above.<sup>421</sup> The provisions of ZEDE regulations guarantee rule of law and observance of basic rights such as those enshrined in the Universal Declaration of Human Rights.<sup>422</sup> There are built-in protective mechanisms designed to ensure adherence to basic international human rights norms, as noted.

Other legitimacy concerns have rested on the presence of foreign investors, or in some cases foreign guarantors (under Romer's original model).<sup>423</sup> This concern is understandable given the history of colonialism in the Third World. But as Rahul Sagar observed, the main issue should be not on the presence of foreign involvement but the consequences of such involvement "as measured by widely endorsed measures of governance."<sup>424</sup> If foreign involvement does not create positive results, but rather, for example:

we see a charter city doling out lucrative policing contracts to the same guarantor but witness little or no reduction in crime rates—then we would have reason to wonder whether the choice to involve foreigners was in fact the product of free choice (or if it was in fact the product of bribery or subtle forms of coercion).<sup>425</sup>

History is replete with examples of positive foreign involvement, particularly when host countries delegate certain functions to foreign actors. One example is the 2003 delegation agreement between the Solomon Islands and Australia in which Australian soldiers, pursuant to the Australian Regional Assistance Mission, participated in establishing the rule of law in the Islands before leaving ten years later.<sup>426</sup> Professor Sagar pointed to other examples, such as the Genoan response to internal factionalization, which bypassed gridlock by outsourcing the administration of the city to a non-Genoese chief magistrate.<sup>427</sup> More recently, to access international

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<sup>420</sup> See, e.g., *Hong Kong, China (SAR): Human Development Factors*, U.N. DEV. PROGRAMME, <http://hdr.undp.org/en/countries/profiles/HGK> [<https://perma.cc/9CRZ-6FZ6>]; *Singapore: Human Development Factors*, U.N. DEV. PROGRAMME, <http://hdr.undp.org/en/countries/profiles/SGP> [<https://perma.cc/RZ6K-2EWU>].

<sup>421</sup> See Sagar, *supra* note 377, at 510.

<sup>422</sup> Miller, *supra* note 65, at 288.

<sup>423</sup> Sagar, *supra* note 377, at 510.

<sup>424</sup> *Id.* at 523.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 524.

<sup>427</sup> *Id.*

capital markets, the Ottoman Empire was willing to rely on foreign experts to staff the Ottoman Public Debt Administration because foreign presence was an assurance to debtors that loans would be efficiently serviced.<sup>428</sup> Another historical example of foreign involvement in the administration of local institutions can be found during the Qing Dynasty, in which the Chinese Maritime Customs Service, tasked with collecting revenues from overseas trade, was primarily staffed by the British after Qing Dynasty officials were deemed unsatisfactory in carrying out their functions.<sup>429</sup> So laudable was the performance of the Service that even after the success of the nationalist-led Chinese Revolution of 1911, it was retained rather than disbanded.<sup>430</sup>

One way to evaluate foreign involvement is to look at whether there is monopolistic or self-dealing behavior on the part of the foreign party. Professor Sagar suggested a strategy of separation of powers as a safeguard mechanism to ensure division of labor.<sup>431</sup> Thus, one foreign country could be involved in helping the host state with policing, while another country could supervise the judicial system, ensuring that the law-enforcement function is separated to prevent monopoly, even sacrificing efficiency if needed.<sup>432</sup>

Another way to forestall foreign self-dealing or monopoly is through external audits, as provided for in the ZEDEs, by auditors who are “internationally respected individuals free from conflicts of interest vis-à-vis the foreign guarantors and corporations involved.”<sup>433</sup> The main purpose would be to evaluate the performance of the foreign guarantor or experts, although Professor Sagar realized that there are limitations to what the audit board can truly accomplish if there is an “absence of judicial power,”<sup>434</sup> which is not the case for Honduran ZEDEs.

Another safeguard against foreign predatory behavior may be via referendum that is subject to international supervision. Charter city residents would be empowered, under this principle, to decide whether to continue the existing charter relationship.<sup>435</sup> Sagar suggested that referendums be used in conjunction with international audits to ensure the integrity of both processes.<sup>436</sup> For example, he proposed that referendums be triggered when there are three successive negative audit reports—a proposal that would give teeth to auditors whose role might otherwise be purely precatory.<sup>437</sup>

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<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 525–26.

<sup>432</sup> *Id.* at 526.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

<sup>435</sup> Of course, this is in addition to the separate question of consent—that is, residents can express consent by staying, or dissent by leaving, via the principle of free movement of people.

<sup>436</sup> *Id.*

<sup>437</sup> *Id.*



## CONCLUSION

Charter cities are an intriguing mix of national and international elements, providing a novel approach to development through the establishment of a city on a previously undeveloped piece of land or a sparsely populated area. Although charter cities are subject to the sovereignty of the nation-state that creates them, they are also special zones that opt out of the conventional understanding of sovereignty—opting into, instead, a more limited sovereignty restrained by an international charter governed by certain principles. These principles can vary depending on the type of zone at issue—zones designed as foreign-investment vehicles, refugee havens, environmentally “green” areas, or laboratories for legal, economic, administrative, or political experimentation. Regardless of the type of zone, at the core of each charter are the principles of freedom of choice and equality.<sup>438</sup>

This Article has focused on the Honduran special economic development zone, created to attract investment into a country that is one of the poorest and most violent in Central America. The Honduran ZEDE Statute stands as an important stepping stone for Honduras to host various forms of charter cities without being limited to the conventional investment-centered form. Notably, ZEDEs are not democratic territories but are instead governed by a body of appointed overseers and an independent judicial counsel.<sup>439</sup> Consequently, the fact that ZEDEs are autonomous regions with their own policies and regulations have raised concerns regarding neocolonialism. Furthermore, critics have also commented on the inherently Western constructs being developed within charter cities, and the consequences to human rights that result from such constructs.

Ultimately, the ZEDE charter is an act of law rather than force, based on Honduras’s desire to charter special cities. The voluntary nature of this undertaking provides a defense for charter cities despite their nondemocratic character, provided the cities are established through legitimate channels. Furthermore, external audits, and the preservation of legitimacy through the use of foreign states would address many of the concerns raised by critics. Thus, the use of charter zones remains an effective way to bring about necessary development.

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<sup>438</sup> See Sagar, *supra* note 377, at 511.

<sup>439</sup> See ECONOMIST, *Hong Kong in Honduras*, *supra* note 63.