THE CARTOGRAPHIC COURT

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Over the past few decades, the Supreme Court of the United States has adopted an exceedingly narrow view of tribal civil jurisdiction, establishing doctrines that restrict the circumstances in which Native Nations can exercise their regulatory and adjudicative powers. While most scholarship in federal Indian law has assessed this judicial trend towards tribal disempowerment by focusing on the Court's treatment of tribal sovereignty, this Note centers the Court's manipulation of tribal territory. It argues that the Court has constructed three territorial incongruities—non-Indian fee lands, public access, and loss of "Indian" character—to justify the disallowance of tribal authority over significant portions of tribal reservations. In so doing, the Court relies on a spatial imaginary of territorial sovereignty, or the notion that sovereign power must be commensurate with sovereign domain, to present certain spaces as falling outside of a Native Nation's territory and, accordingly, as beyond the reach of its jurisdictional power.

By illuminating the spatial imagination of the Supreme Court, this Note identifies a key practice employed by the Court that is central to empires past and present—cartography. The Court superimposes its own imagined legal geography upon the preexisting system of territorial division, redrawing the jurisdictional boundaries that separate states and Native Nations. This practice of spatial manipulation is cartographic in that it allows the Court to determine and limit the territory of tribal rule; to expand the areal authority of state jurisdiction; and to project its particular vision of reservation lands—a vision defined by notions of ownership, accessibility, and character—upon Indian country. These cartographic tactics of territorial acquisition and control are in direct furtherance of the American colonial project. They fragment tribal regulatory regimes, reify Indigenous life, and transfer congressional power to the Court to diminish tribal reservations. These practices of fragmentation, reification, and de facto diminishment are continuations of the repudiated but never-undone federal policy of allotment, although the main perpetrator is now the Court rather than Congress.

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By turning to critical legal geography and theories of space and power, this Note reveals a Supreme Court that is highly imaginative, overtly spatial, and problematically cartographic in nature, engaged in a project of colonial expansion across its tribal civil jurisdiction cases.

INTRODUCTION

"Just as none of us is outside or beyond geography, none of us is completely free from the struggle over geography. That struggle is complex and interesting because it is not only about soldiers and cannons but also about ideas, about forms, about images and imaginings."

—Edward W. Said, 1944[1]

In 1999, Philip P. Frickey declared that "[t]he Court has, in effect, embraced a common law for our age of colonialism."[2] This statement still rings true today. Through federal common-lawmaking, the Court divests Native Nations of inherent sovereignty and narrows the scope of their territorial domains in the absence of authoritative textual controls or explicit congressional action—which, under the Court's interpretative practice, is often.[3] According to the Court, Native Nations have very little authority over nonmembers, even within their

[1] EDWARD W. SAID, CULTURE AND IMPERIALISM 7 (1994).

[2] Philip P. Frickey, *A Common Law for Our Age of Colonialism: The Judicial Divestiture of Indian Tribal Authority over Non-Members*, 109 YALE L.J. 1, 58 (1999).

[3] Frickey argues that the Court employs two basic strategies to limit tribal authority. *Id.* at 16. One method is to reexamine the location of reservation boundaries, and another is to find that non-members are immune from tribal power even when found on a reservation. *Id.*

reservations, as a consequence of their domestic dependent status.[4] And to the extent that the treaty-protected borders of Indian country offer some protection to Native Nations from unwanted state intrusions, the borders are becoming increasingly thin and porous—or altogether irrelevant—under the Court's jurisdictional doctrines.[5] These two legal strategies of implicit divestiture and territorial diminishment operate in tandem to truncate tribal authority.

Most recently, in *Oklahoma v. Castro-Huerta*, the Court proclaimed that "as a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."[6] The statement stands in sharp contrast to the Court's decision in *McGirt v. Oklahoma*—announced only two years earlier—which recognized the distinctiveness of tribal reservations, specifically the Creek Nation's reservation, as resting "outside both the legal jurisdiction and geographic boundaries of any State."[7] Although the Court's statement in *Castro-Huerta* was largely dicta, it was an attempt to extend the Court's strategies of disempowerment to the very heart of tribal sovereignty. The Court sought to subsume the jurisdiction of Cherokee Nation within that of Oklahoma, rendering the former a mere private organization subject to the power of the latter. It also sought to render the territorial borders of Indian country legally incognizable, as simply a territorial component

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Both strategies involve a mere pretense of a nod to statutory interpretation when in reality, the Court is embracing a common law methodology to achieve these results. *Id.* at 27.

[4] *See id.* at 43.

[5] *See, e.g.*, *id.* at 71 (noting that the doctrine of congressional plenary power presumes that Indian reservation boundaries are "irrelevant" to territorial regulation); *see also* 18 U.S.C. § 1151 (defining the term "Indian country" without clearly stating that Indian borders can ward off state intrusion).

[6] 597 U.S. 629, 636 (2022). Although *Castro-Huerta* is a criminal case and this Note is concerned with civil cases, it is an important illustration of the Court's current thinking on tribal jurisdiction, particularly in relation to the states. *Castro-Huerta* also comes after *McGirt v. Oklahoma*, 591 U.S. 894 (2020), which many commentators saw as a positive development in the Court's federal Indian law jurisprudence. *See, e.g.*, Jack Healy & Adam Liptak, *Landmark Supreme Court Ruling Affirms Native American Rights in Oklahoma*, N.Y. Times (July 9, 2020), https://www.nytimes.com/2020/07/09/us/supreme-court-oklahoma-mcgirt-creek-nation.html [https://perma.cc/XJK4-HMDS] (describing *McGirt* as "one of the most consequential legal victories for Native Americans in decades"). *McGirt* affirmed the reservation borders of the Muscogee (Creek) Reservation, recognizing significant swaths of Oklahoma as "Indian country." *McGirt*, 591 U.S. at 932 (noting that the Court's holding may place as much as half of Oklahoma's land in Indian country). In *Castro-Huerta*, however, the Court revisited similar jurisdictional questions and failed to support tribal sovereignty as it did in *McGirt*. Notably, the Court's composition changed between *McGirt* and *Castro-Huerta*. In *McGirt*, Justice Gorsuch wrote the majority opinion, joined by Justices Ginsburg, Sotomayor, Breyer, and Kagan. In *Castro-Huerta*, Justice Gorsuch dissented. Justice Barrett, who joined the Court in the intervening years, joined Justice Kavanaugh's majority opinion alongside Chief Justice Roberts and Justices Thomas and Alito.

[7] 591 U.S. 894, 902 (2020).

of the state's broader area of authority. The Court's proclamation is unfounded as a matter of law, history, and precedent.[8] It is, however, symptomatic of a broader phenomenon in the Court's federal Indian law doctrines: The Court's gradual erosion of the sanctity of reservation boundaries and its extension of state power into Indian country—the lands of other sovereign nations—constitutes colonialism by other means.[9]

Naturally, many legal scholars writing on the Supreme Court's development of federal Indian law, particularly its jurisdictional doctrines, have tried to make sense of the incoherent case law, fitting the disjointed pieces into the clearest doctrinal picture they can present.[10] This work has been integral to understanding the Court's doctrines as generally moving towards tribal disempowerment.[11] This Note looks

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[8] *See generally* Gregory Ablavsky, *Too Much History:* Castro-Huerta *and the Problem of Change in Indian Law*, 2023 SUP. CT. REV. 293 (critiquing the decision as a matter of history); Gregory Ablavsky & Elizabeth Hidalgo Reese, Opinion, *The Supreme Court Strikes Again—This Time at Tribal Sovereignty*, WASH. POST (July 1, 2022, 7:00 AM), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty [https://perma.cc/HES3-KABP] (noting that *Castro-Huerta* relies on "cherry-picked ancillary cases and late-19th-century arguments with subsequently overruled foundations").

[9] *See* Frickey, *supra* note 2, at 58; *see also* W. Tanner Allread, *The Specter of Indian Removal: The Persistence of State Supremacy Arguments in Federal Indian Law*, 123 COLUM. L. REV. 1533, 1591–1607 (2023) (arguing that *Castro-Huerta* is the latest iteration of state supremacy in federal Indian law). *Cf. McGirt*, 591 U.S. at 928–31 (finding that for purposes of the Major Crimes Act, and contrary to the colonialist ambitions of the Oklahoma state court, land throughout much of eastern Oklahoma reserved for the Creek Nation since the nineteenth century remains a Native American territory).

[10] *See, e.g.*, Frickey, *supra* note 2, at 7 ("The coherence that underlies the doctrinal confusion in the cases is a strong, albeit largely unarticulated and undefended, judicial aversion to basic claims of tribal authority over nonmembers that is implicitly projected upon Congress as well."); Matthew L.M. Fletcher, *A Unifying Theory of Tribal Civil Jurisdiction*, 46 ARIZ. ST. L.J. 779 (2014); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623 (2011); Katherine J. Florey, *Beyond Uniqueness: Reimagining Tribal Courts' Jurisdiction*, 101 CALIF. L. REV. 1499 (2013); Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 433 (2005) (analyzing the incoherence of federal Indian law). We may not necessarily want to force the Court's decisions into a legally coherent explanation, as the lack of coherency might signal that there is something else driving the Court's reasoning beyond the law. *See* Philip P. Frickey, *Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997) (criticizing efforts to bring coherence to the field of federal Indian law).

[11] *See* Frickey, *supra* note 2, at 6, 8–16 (arguing that the Supreme Court has undercut the traditional assumption that "tribes have geographical sovereignty over their reservations and all persons found there"); *see generally* Maggie Blackhawk, *Federal Indian Law as Paradigm Within Public Law*, 132 HARV. L. REV. 1787 (2019) (advocating for a new paradigm of federal constitutional law that centers federal Indian law and colonialism).

not only to the Court's legal reasoning but also to its spatial analysis.[12] It brings a geographical lens to the Court's tribal civil jurisdiction cases in order to conceptualize the relationship between space and power. A geographical approach centers the Court's treatment of territory, whereas federal Indian law literature has tended to focus on the Court's treatment of sovereignty.[13] A narrow focus on sovereignty tells only half the story; the Court's constriction of tribal power occurs as much through its manipulation of tribal territory as it does through its divestiture of tribal sovereignty. Indeed, by examining the Court's jurisdictional cases geographically, this Note locates a throughline in the Court's analysis rooted not in the law per se but in a prevailing imaginary of political space as territorial sovereignty.

Territorial sovereignty refers to the idea that sovereign power should be defined and limited by territorial borders; territory is the space by which the state defines itself, and sovereignty is the legitimizing force behind a state's territorial claim.[14] As Chief Justice Marshall has succinctly said, "A state claims the right of sovereignty, commensurate with her territory . . . ."[15] Territorial sovereignty operates as an imaginary of political space in that it is a shared assumption about how political institutions, particularly states as sovereign units, are structured and organized in space.[16] This imaginary is an instituting and constitutive

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12 Fundamentally, legal geography calls for greater "spatial sensitivity in law as well as an attention to legal practice in geography." *See* Luke Bennett & Antonia Layard, *Legal Geography: Becoming Spatial Detectives*, 9 Geography Compass 406, 407 (2015). This Note takes up this call by illuminating the ways in which the Court considers space, either implicitly or explicitly, in its adjudications of jurisdictional disputes.

13 *See, e.g.*, L. Scott Gould, *Tough Love for Tribes: Rethinking Sovereignty After* Atkinson *and* Hicks, 37 New Eng. L. Rev. 669 (2003); Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 New Eng. L. Rev. 641 (2003); Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 Or. L. Rev. 1109 (2004); Angela R. Riley, *(Tribal) Sovereignty and Illiberalism*, 95 Calif. L. Rev. 799 (2007).

14 *See* Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Rights*, 31 Am. Indian L. Rev. 291, 294–95 (2007). Territorial sovereignty has a particular meaning in international law that goes beyond the principle of commensurability between sovereignty and territory that is the focus of this Note. *See* Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS Rev. 11, 11 (2006) ("Since the end of World War II, the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries.").

15 Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 591 (1832).

16 *See* Bernard Debarbieux, Social Imaginaries of Space 49 (Sheila Malovany-Chevallier trans., 2019) (explaining that an "imaginary of space" perfuses state territoriality, which is a "condition of existence" for states); John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 Rev. Int'l Pol. Econ. 53, 55 (1994) (describing how modern international political systems rely on the territorial state as a representation of space); John Agnew, *Sovereignty Regimes: Territoriality and*

element of our political geography even if it does not accurately capture our material reality.[17]

As a preliminary matter, this Note establishes that the Supreme Court operates against a backdrop of territorial sovereignty. For example, it assumes that its decisions, as a general matter, have no force beyond the borders of the United States. The power of the Court, as an institution of the state, is limited to the reach of that state's territory. In the context of tribal civil jurisdiction, this translates to the principle that Native Nations, like any other state or sovereign, cannot exercise their authority over places that are not within their territories. Accordingly, this Note argues that the Court relies on the construction of territorial incongruities as a justification for limiting the spatial reach of tribal sovereignty. Territorial incongruities are spaces within a tribal reservation that the Court has deemed incompatible with the tribe's domain. These incongruous spaces come in three forms: non-Indian fee lands, public access, and loss of "Indian" character. They have roots in features of the material landscape, but their legal significance to a tribe's territorial sovereignty is a matter of judicial construction. As a result, these spaces, despite being located inside the exterior boundaries of a reservation, are effectively wrested from the tribe's control and excised from its territory. Under the Court's doctrines, the borders of Indian country are thus constantly in flux, shifting according to changing notions of ownership, accessibility, and identity.

Moreover, by drawing the territorial boundaries of Native Nations and determining the spatiality of their jurisdictional power, the Supreme Court is acting as a cartographer. Cartography is the practice of drawing maps; it is a way of visually making claims to distant lands, anticipating and creating territories, and representing particular places, people, and spatial relations, thereby bringing them within the cartographer's control.[18] Cartography is thus a vital instrument of empire in that it

State Authority in Contemporary World Politics, 95 Annals Ass'n Am. Geographers 437, 437 (2005) ("Implicit in all claims about state sovereignty as the quintessential form taken by political authority are associated claims about distinguishing a strictly bounded territory from an external world and thus fixing the territorial scope of sovereignty . . . .").

[17] Borders are oftentimes porous to law and necessarily so. Private property, for example, is not impregnable to state and federal regulations. A nation-state is also part of a broader, international community and may be subject to duties and laws that originate from outside its own territory. This Note does not argue, as a normative matter, for an embrace of nationalism or a sanctification of the border. Rather, it is interested in how assumptions about where law should stop and begin inform the Supreme Court's treatment of tribal jurisdiction.

[18] *See generally* Christopher Tomlins, *The Legal Cartography of Colonization, the Legal Polyphony of Settlement: English Intrusions on the American Mainland in the Seventeenth Century*, 26 Law & Soc. Inquiry 315 (2001) (examining American colonial charters and their impact on cartography in the legal claims-making of the British Empire); Shankar Raman,

allows for both legal claims-making and control over the observed and objectified.[19] The Court's practice of spatial manipulation—by which it superimposes its own imagined legal geography upon the preexisting system of territorial division—employs these same tactics of cartographic acquisition and control. The Court both determines the territorial limits of tribal rule, while expanding the areal authority of state jurisdiction, and projects its own vision of reservation lands upon Indian country.

This cartographic practice is in direct furtherance of the American colonial project. It fragments tribal territory, making it difficult for Native Nations to enact cohesive regulatory regimes and therefore self-govern; it imposes an essentialist, static conception of what is an Indian reservation upon the dynamic lived reality of tribal life and governance; and it vests congressional power to the Court to diminish tribal reservations. Fragmentation, reification, and diminishment are all continuations of the never-undone federal policy of allotment, although the key driver of the assimilationist vision is no longer Congress but rather the Court.[20]

Ultimately, this Note is a narrow intervention in the rich literature on tribal civil jurisdiction. Thus, it is important to establish the limits of its arguments from the outset. First, since this Note is focused on the Supreme Court as the central actor, it does not address the varied ways in which Native Nations exercise sovereignty on the ground. The significance of such expressions in drawing alternative lived geographies in and against those of the Court cannot be overstated, but they are beyond the scope of this paper.[21] Moreover, when this Note refers to sovereignty, it is referring specifically to sovereignty as a legal term of

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Framing "India": The Colonial Imaginary in Early Modern Culture (2002) (arguing that early European cartographic practices rendered India a "colonial space" subject to legal possession).

[19] For discussions of the relationship between cartography and empire, see generally Thomas J. Bassett, *Cartography and Empire Building in Nineteenth-Century West Africa*, 84 Geographical Rev. 316 (1994); Matthew H. Edney, Mapping an Empire: The Geographical Construction of British India, 1765–1843 (2d ed. 1997); Raymond B. Craib, *Cartography and Power in the Conquest and Creation of New Spain*, 35 Latin Am. Rsch. Rev. 7 (2000); D. Graham Burnett, Masters of All They Surveyed: Exploration, Geography, and a British El Dorado (2000); Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400–1900 (2010); Michael Biggs, *Putting the State on the Map: Cartography, Territory, and European State Formation*, 41 Compar. Stud. Soc'y & Hist. 374 (1999).

[20] *See* Jessica A. Shoemaker, *Like Snow in the Spring Time: Allotment, Fractionation, and the Indian Land Tenure Problem*, 2003 Wis. L. Rev. 729, 736–40 (2003) (discussing the history and policy of allotment).

[21] For a discussion of tribal sovereignty in practice, how it is affected by Supreme Court decisions, and why it matters, see generally Krakoff, *supra* note 13.

art within jurisdictional doctrines. It refers to the legal sovereignty of Native Nations, rather than the broader concept of self-determination as exercised by Native Nations and Indigenous peoples.[22] Even more narrowly, this Note is primarily interested in sovereignty as expressed through jurisdictional power. A sovereign has many powers at its disposal, but the focus of this paper is on a sovereign's power to regulate and to adjudicate in the civil context. Second, this Note does not purport to present a complete doctrinal picture of tribal civil jurisdiction; in fact, it only works with a subset of the Court's tribal jurisdiction cases. Although doctrine is the site of inquiry, it is not this paper's focus. This Note is primarily concerned with the geographical imagination of the Supreme Court and focuses on the spatial imaginings underlying the Court's decisions, not necessarily the doctrine itself.

This Note begins in Part I with a brief introduction of spatial imaginaries and their role within the law, before articulating the ways in which the notion of territorial sovereignty has been bound up with our precedents and legal understandings. Part II excavates three forms of territorial incongruities—non-Indian fee lands, public access, and loss of "Indian" character—established by the Supreme Court in its tribal jurisdictional doctrines to justify limitations in tribal territorial sovereignty. It concludes with a discussion of the Court's role as a cartographer in spatializing sovereign authority. Lastly, Part III presents the stakes of the Court's cartographic practice by showing how it undermines tribal self-governance by posing problems of administrability, creates an imaginative geography that reifies Indian country, and allows the Court to seize Congress's exclusive power to diminish tribal reservations.

I
The Spatial Imaginary of Territorial Sovereignty

Imaginaries are the representations and practices that structure sociopolitical orders.[23] Imaginaries play a role in constituting and

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[22] For discussions on the meaning of self-determination, see generally Catherine J. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, 24 Case W. Rsrv. J. Int'l L. 199 (1992); Maivân Clech Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 Cornell Int'l L.J. 603 (1992); Mary Ellen Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 Cornell Int'l L.J. 579 (1992).

[23] *See* Debarbieux, *supra* note 16, at 1–3. As a concept, the "imaginary" has a long and complex genealogy, but two of its most notable theorists are Cornelius Castoriadis and Charles Taylor. *See id.* The term "social imaginary" originates in Castoriadis's *The Imaginary*

maintaining a particular way of seeing for a defined community. They establish the contours and content of a community's worldview, creating a shared set of values and ideas that help community members make sense of their individual and collective existence. The invisible hand of the market, for example, is an imaginary that guides how some societies conceive of and organize their economic relations. The imaginary of the invisible hand translates into lived policies with material consequences regardless of whether the market at issue actually has independent force. Another prominent example is the social contract.[24] Citizens of a nation do not actually sign a detailed and complex contract with one another or with their government outlining the terms of their relations; and yet, this notion that individual freedom is exchanged for state protection, with deference to authority and duty to the people as bargained-for consideration, shapes the expectations we have of our political order. It rears its head in times of social tensions to structure our political conversations. Such imaginaries are imagined in that they are contingent and derive meaning from social subjects, but they are nevertheless *real* in that they have concrete effects and, through the actions of individuals and collectives, shape and structure the material world.[25] These imaginaries exist in dialogue, stories, images, myths, and legends, woven into the textual and discursive fabric of communities, societies, and nations.

To the extent imaginaries shape our world, they also inform the spatial. The relation between imaginaries and space is well-established and arguably best exemplified by Edward Said's "the Orient" and, more broadly, his concept of imaginative geographies.[26] In *Orientalism*,

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Institution of Society, which focuses on the role that the imaginary plays in instituting and maintaining a "singular way of living, of seeing and of conducting [our] own existence" for each historical period. *See* Cornelius Castoriadis, The Imaginary Institution of Society 3, 145 (Kathleen Blamey trans., Polity Press 1987). Taylor similarly defines the social imaginary as "the ways people imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations that are normally met, and the deeper normative notions and images that underlie these expectations." Charles Taylor, Modern Social Imaginaries 23 (2004). Importantly, the social imaginary is not only constituting but also constituted; it does not "appear in the absence of some society it helps bring about (while ruling other societies out)," but is actively made and remade by the society, including the people, institutions, and ideologies of which it is a part. *See* Samuel Moyn, *Imaginary Intellectual History*, *in* Rethinking Modern European Intellectual History 112 (Darrin M. McMahon & Samuel Moyn eds., 2014).

[24] *See generally* Jean-Jacques Rousseau, The Social Contract and the First and Second Discourses 149–256 (Susan Dunn ed., Yale Univ. Press 2002) (discussing the possibility of a social contract in which people receive republican liberty in exchange for their independence).

[25] *See supra* note 22.

[26] *See* Edward W. Said, Orientalism 49–73 (Vintage Books ed., 1979) [hereinafter Said, Orientalism].

Said argues that the Orient is an imagined place constructed through discourse and practice upon which Europeans and Americans ("the West") project their fears, desires, and fantasies. The Orient is understood as both distant and unfamiliar to the West in terms of geography and culture; it is imagined as distinctly other to and apart from the world that Europeans inhabit. Whereas the West is seen as civilized, rational, and modern, the Oriental East is dangerous, religious, and backwards. Despite its durability as an idea, and its presence within the minds, cultural texts, and vocabulary of the West, the Orient is not an objective phenomenon—it is not a place that can be visited. Rather, it is a geographic construction that acquires legitimacy through a repetitive process of ascribing meaning to space:

> The objective space of a house—its corners, corridors, cellar, rooms—is far less important than what poetically it is endowed with, which is usually a quality with an imaginative or figurative value we can name and feel: thus a house may be haunted, or homelike, or prisonlike, or magical. So space acquires emotional and even rational sense by a kind of poetic process, whereby the vacant or anonymous reaches of distance are converted into meaning for us here.[27]

To the extent the social imaginary plays a role in binding societies together and in forming a notion of the collective, the Orient serves a similar purpose as a spatial imaginary. It consolidates the West's sense of self and contrasts it with the imagined inferiority of the "Oriental Other," creating a hierarchy of subordination that is both reflected in and generated by the West's imperial pursuits.[28] Said's articulation of the imaginary is thus explicitly tied to relationships of power: The imaginary of the Orient both institutes and is instituted by Western imperialism.

This Note similarly focuses on spatial imaginaries that further imperial projects, but its site of inquiry is the law—specifically, legal doctrines—rather than culture. Indeed, the law is filled with spatial imaginaries. Gerald L. Neuman has written on anomalous zones, "territorially limited enclave[s]" within which governments temporarily suspend fundamental norms in response to perceived necessity.[29] Some examples include Guantanamo Bay and red-light districts. These places

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[27] *Id.* at 55.

[28] *See id.* at 55, 72 (noting that imaginative geography dramatizes the distance and difference between the imaginer and the imagined, and explaining that the Orient served as an "always symmetrical . . . and yet diametrically inferior" imaginary for the West).

[29] Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1197 (1996).

are imagined in that they require the ascription of meaning to space—the perceived necessity that Neuman describes—in order to justify the limitation of constitutional law within them. The public-private divide, a crucial axis of liberal legalism, is also a spatial phenomenon.[30] Conceptually, the public-private divide separates the world into two distinct spheres. A judge who designates a particular place as public as opposed to private imbues that space with specific legal attributes, drawing a legal boundary between otherwise undifferentiated areas of social life. The judge, in so doing, can be understood as a "geographer[], to the extent that [her] interpretations and edicts make space."[31] Similarly, judges who limit the reach of constitutional principles by certain imagined boundaries, such as those surrounding Neuman's anomalous zones, are shifting the legal geography of this country. Thus, in many important ways, American law is both highly imaginative and highly spatial.

The spatial legal imaginary at the heart of this Note is that of territorial sovereignty. Territorial sovereignty refers to the commensurability of a state's sovereignty with its territory. A state has a claim to power within its territorial domain, but where its territory ends, so does its power. Territorial borders thus determine the metes and bounds of state power. Conversely, the sovereign power of a state also relies on territoriality for its expression and its legitimacy. Indeed, territoriality is central to our conceptions and understandings of the state.[32] Since at least the seventeenth century, the modern state has been conceptualized as an essentially spatial phenomenon—a territorial-based organization.[33] It is control over a geographically defined area

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[30] Legal historian Morton J. Horwitz has argued that the division originates in English law with the separation of lands as either non-alienable Crown lands or feudalistic private property. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982). Public and private spheres thus have roots in the most material of spaces—physical land—although they now extend to cover bodies, homes, and intangibles such as speech.

[31] Nicholas Blomley & Joshua Labove, *Law and Geography*, *in* 13 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 474, 476 (James Wright ed., 2d ed. 2015).

[32] *See* Charles S. Maier, *Consigning the Twentieth Century to History: Alternative Narratives for the Modern Era*, 105 AM. HIST. REV. 807, 816–25 (2000) (arguing that the "overarching spatial imagination" of the nineteenth and twentieth centuries was a strong "territorial imperative"); STUART ELDEN, THE BIRTH OF TERRITORY (2013) (tracing the West's understanding of how territoriality reifies the state from ancient Greek myth to Russeau); *cf.* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 846, 866–97 (1999) ("[J]urisdiction is [not] a timeless feature or foundation of government. Instead, jurisdiction was invented at a specific historical moment and deployed to advance certain identifiable projects.").

[33] *See* DEBARBIEUX, *supra* note 16, at 50.

that, in part, gives rise to a state's claim of sovereignty, and it is through, over, and within this bounded area that a state exercises its power and establishes its political, economic, and cultural existence.

Territorial sovereignty may not necessarily capture the complexity of state spatiality, particularly within a federalist system of layered and overlapping jurisdictions, but it does operate as an imaginary that structures legal thinking about state and space. Indeed, this notion of commensurability between state power and state territory is deeply bound with our legal precedents.[34] A case familiar to all law students, *Pennoyer v. Neff*, stands, in part, for the proposition that a state's jurisdiction is all-encompassing within its borders but not an inch beyond.[35] All-powerful within, totally impotent without. Even as *International Shoe Co. v. Washington* and its progeny expanded the reach of jurisdictional power beyond state borders, the Supreme Court continued to insist on the importance of the boundaries that divide and separate the several states; there was a persistent impulse, tempered by the realities of economic interdependence, to limit the reach of personal jurisdiction by some notion of physical geography.[36]

For Native Nations, the principle of territorial sovereignty found its fullest juridical expression in *Worcester v. Georgia* with Justice Marshall's defense of the Cherokee Nation against the intrusion of Georgia's laws.[37] This vision of exclusivity has faded over time, as subsequent cases have allowed for greater state intrusion into tribal reservations. But, as evidenced by the Court's statement in *Castro-Huerta*, this idea that

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[34] Despite its prevalence, territorial jurisdictions—"the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions"—are still a relatively new phenomenon and developed alongside modern cartography. *See* Ford, *supra* note 32, at 843. Previously, jurisdiction largely followed relationships of status, and it continues to do so in some areas of American law. *See id.*

[35] 95 U.S. 714, 722 (1878) ("[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.").

[36] 326 U.S. 310, 316–17 (1945) (noting the historical importance of territorial jurisdiction and developing the minimum contacts test to reflect a modern understanding of territorial power); *see also, e.g.*, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291–92 (1980) (explaining that limitations on personal jurisdiction reflect territorial limitations on state power). *See generally* Arthur M. Weisburd, *Territorial Authority and Personal Jurisdiction*, 63 Wash. U. L.Q. 377 (1985). A similar impulse exists in the context of criminal law and liability. Emma Kaufman has written on the territoriality principle: "[A] bedrock principle of American criminal law that the authority to try and punish someone for a crime arises from the crime's connection to a particular place." Emma Kaufman, *Territoriality in American Criminal Law*, 121 Mich. L. Rev. 353, 353 (2022). She argues that the tie between criminal law and geographic boundaries has loosened over the past century. *See id.* Yet, the principle remains central to criminal law ideology.

[37] 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . .").

a sovereign must have absolute and exclusive control of its territory persists—except in *Castro-Huerta*, it is what animates Oklahoma's push to reach inside Indian country, claiming it as part of its own area of authority while denying the existence of tribal sovereignty.[38]

Both *Worcester* and *Castro-Huerta* evince a cartographic vision. In *Worcester*, the jurisdictional power of Cherokee Nation dominates within its bounded territory and its sovereignty is coterminous with its reservation lands. In *Castro-Huerta*, the boundary line separating state and tribe shifts to fully envelop reservation lands within the territorial jurisdiction of Oklahoma. Both visions rely on an assumption of territorial sovereignty but they each adopt a different conception of territory: Across these two cases, the reservation lands transform, for the purposes of jurisdiction, from tribal to state. These decisions materialize the Court's imagining of territorial division as the jurisdictional landscape. They are thus legal enactments of the Court's cartographic visions.

In so doing, the Court is engaged in mapmaking. In its most basic form, mapmaking refers to the constitutive act of drawing lines on a paper—of imagining a territory. This produces a "conceptual space" for jurisdiction, an area with terrestrial limits that can be ascribed with the legal authority of an expanding empire.[39] Through its jurisdictional doctrines, the Court similarly engages in line-drawing, manipulating this conceptual space to exclude pockets of incongruous lands from tribal authority while authorizing the expansion of state terrestrial limits. The Court, however, has the benefit of not actually having to draw lines on a paper. Its cartographic practice is purely imaginative in nature: The Court does not have to issue a new map or send state militias to claim new lands. It can instead alter the legal meaning of sovereign spaces by simply reimagining their jurisdictional significance. Indeed, its *modus operandi* of assessing the territorial limits of sovereign power in a case-by-case,

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[38] 597 U.S. 629, 636 (2022). Importantly, then, territorial sovereignty is neither inherently protective nor degradative of tribal sovereignty, at least not when both notions of territory and sovereignty are in flux. To the extent tribal sovereignty is conceptualized as subordinate to state sovereignty, or non-existent altogether, this notion of territorial sovereignty can provide dangerous support for state supremacy. *See* Allread, *supra* note 9, at 1563. However, a robust conception of tribal sovereignty may support a vision of territorial sovereignty that respects the power of Native Nations to govern exclusively, if they so choose, within tribal territories. This Note does not offer a normative vision of territorial sovereignty. Instead, its purpose is to illustrate the ways in which territorial sovereignty, and specifically its two determinants of territory and sovereignty, have been used by the Supreme Court to limit tribal jurisdiction. Notably, however, across the Court's doctrinal inconsistencies is the consistency of its power. Regardless of whether the state or tribe wins in exercising its jurisdiction, the Court "always wins" in making the call—in determining the metes and bounds of sovereigns. Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. 97, 98 (2022).

[39] Ford, *supra* note 32, at 867.

piecemeal manner—guided by malleable tests and inchoate doctrines—allows it the flexibility to refashion political landscapes as it deems fit, whenever it deems appropriate. Understanding the ways in which the Court employs its spatial imagination is thus integral to understanding the changing geographies of power in this country. Part II discusses in detail the judicial construction of these incongruous spaces before returning to the Court's cartographic practice.

II
Colonial Cartography: Redrawing the Territorial Boundaries of Indian Country

Neither the sovereignty nor territory of Native Nations is absolute. In the Marshall Trilogy—a trio of early nineteenth century cases laying out the foundational principles of federal Indian law—Chief Justice Marshall declared that by virtue of European "discovery" and conquest, Native Nations lost their status as complete sovereigns.[40] In particular, the Court determined that they were not sovereigns in the international realm, with no power to engage in external relations with foreign nations. Their engagements were limited to those with the United States. However, as "domestic dependent nations," they retain territorial sovereignty over their reservation lands, absent any clear treaty cession or congressional act divesting them of their sovereign prerogatives.[41] Within their "territorial boundaries," "their authority is exclusive" and "the laws of [a state] can have no force."[42]

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[40] *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 556 (1832); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823). These foundational cases explicitly recognize the sovereignty of Native Nations. Moreover, this sovereignty is enshrined in the U.S. Constitution: "Indian tribes" are listed alongside other sovereigns, foreign nations and the states, in the Commerce Clause. U.S. Const. art. I, § 8, cl. 3.

[41] The term "domestic dependent nation" first appears in Justice Marshall's opinion in *Cherokee Nation v. Georgia*. 30 U.S. (5 Pet.) at 17. Its meaning remains unclear: Native Nations are not foreign nations, nor are they private organizations. They are sovereigns, but of a limited kind. According to the Court, their dependent status divests them of powers inconsistent with the authority of the United States, such as the power to engage in governmental relations with foreign powers or the power to alienate land to non-Indians. *See* Washington v. Confederated Tribes of the Colville Indian Rsrv., 447 U.S. 134, 153–54 (1980). Whether their dependent status divests them of more powers beyond these two is an area of great debate. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 211 (1978) (concluding that tribal criminal jurisdiction over non-members was inconsistent with the tribe's status as a domestic dependent nation); *see also* Frickey, *supra* note 2, at 28 (arguing that "the Court has failed to articulate a principled and coherent understanding of" cases regarding tribal jurisdiction over non-members).

[42] *Worcester*, 31 U.S. (6 Pet.) at 557, 561.

Importantly, then, their dependent status is in relation to the federal government, not the states. The Supreme Court, however, has gradually eroded this notion of exclusivity by allowing the application of state law and taxes inside Indian country.[43] It has also diminished the retained inherent sovereignty of tribes by deeming certain exercises of their power—particularly those over nonmembers of the tribe, even when found inside reservation boundaries—as inconsistent with their status as "domestic dependent nations."[44] The Court has thus reduced tribal sovereignty to the governance of internal affairs and relegated relations with nonmembers to the realm of the external. As a consequence, the Court has carved out a place for itself in the government-to-government relationship between Native Nations and the United States to determine the contents of tribal sovereignty.[45]

Territory has also been the subject of splintering. Within a tribal reservation, there are generally three types of lands: fee lands, trust lands, and tribal lands.[46] Fee lands are lands owned in fee simple by either members or nonmembers of the tribe.[47] Trust lands are lands that the federal government holds in trust for the benefit of a tribal member or the tribe.[48] Tribal lands refer to all lands within a reservation that are either owned in fee by a tribal member or held in trust for the tribe or a tribal member. It does not include fee lands owned by nonmembers. The existence of such non-tribal lands within a tribal reservation is a consequence of the federal government's official policy of allotment during the late nineteenth century.[49] The purpose of allotment was to dismantle tribal self-government and assimilate individual tribal members into settler society. Complete assimilation would thereby

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43 *See* Frickey, *supra* note 2, at 43, 48.

44 *Id.* at 36, 43–44.

45 For an examination of the origins of the federal government's exclusive authority over Indian affairs, see generally Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L.J. 1012, 1023 (2015). In *United States v. Kagama*, the Supreme Court declared that federal power over Indian affairs was not only exclusive but also plenary, and that Native peoples were "wards of the nation . . . dependent on the United States." 118 U.S. 375, 379–80, 383–84 (1886). As a consequence, the federal government has the authority to fully "govern [Native Nations] by acts of Congress." *Id.* at 382. For more on the federal-tribal relationship, see generally Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. Pa. L. Rev. 195 (1984).

46 *See* Jessica A. Shoemaker, *An Introduction to American Indian Land Tenure: Mapping the Legal Landscape*, 5 J. L. Prop. & Soc'y 1, 33–44 (2019).

47 *Id.* at 34.

48 *Id.* at 36.

49 *Id.* at 20–25. For more on the history of allotment, see generally *History of the Allotment Policy: Hearings on H.R. 7902 on the Readjustment of Indian Affairs Before the H. Comm. on Indian Affs.*, 73d Cong. 428–32 (1934) (statement of D. S. Otis).

render obsolete the need for reservation lands to which Native Nations had been confined.[50] It largely operated through the General Allotment Act of 1887, which redistributed reservation lands to individual tribal members and redesignated the remaining lands as "surplus" lands to be sold to homesteading settlers.[51] Redistribution transformed the collective governance of tribal lands into the individual ownership of property rights. Redesignation not only resulted in the significant loss of tribal lands but also the enduring presence of settlers in Indian country.[52] Indeed, millions of acres of lands within the exterior borders of tribal reservations continue to be owned by nonmembers today.[53] Although the federal government later repudiated its allotment policy in 1934, it never created a means for the restoration of lost lands or the resolution of the "checkerboarding" problem.[54] Instead, the fracturing of tribal territory left a gap to be largely filled by the courts: How should tribal sovereignty be spatialized across a fragmented domain?

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[50] Mattz v. Arnett, 412 U.S. 481, 496 (1973) ("When all the lands had been allotted and the trust[] expired, the reservation could be abolished."); *see also* D. S. Otis, The Dawes Act and the Allotment of Indian Lands 32 (1973) (explaining that philanthropists and land seekers agreed that "allotment was first of all a method of destroying the reservation and opening up Indian lands"); Janet A. Mcdonnell, The Dispossession Of The American Indian 1887–1934 (1991).

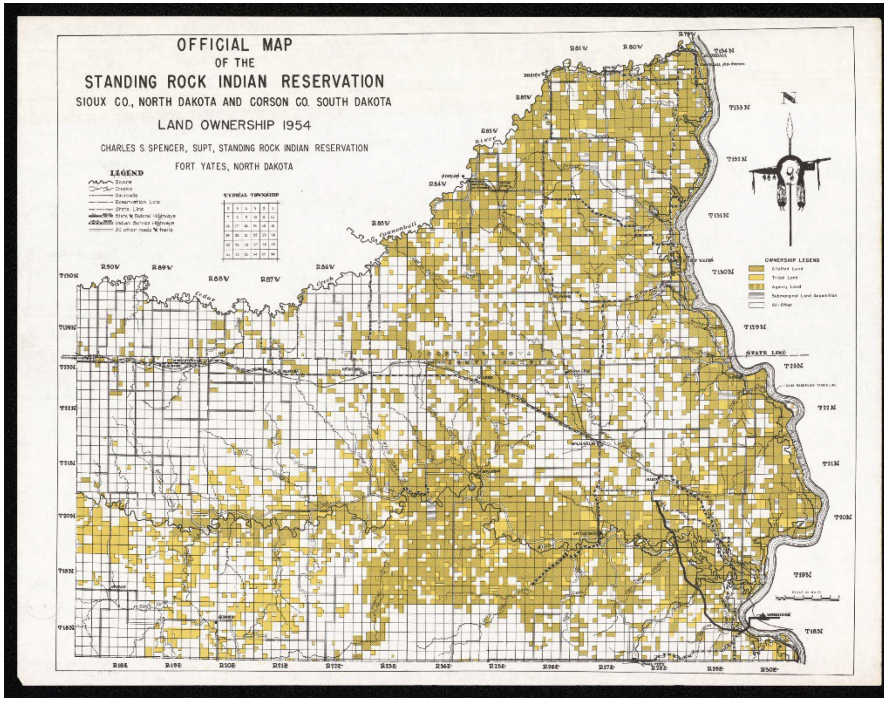
[51] 24 Stat. 388 (codified as amended at 25 U.S.C. § 331).

[52] *See* Judith V. Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 6 (1995) (discussing the dissolution of tribal lands as an effect of allotment and assimilation policies); Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 436 n.1 (1989) ("About 90 million acres of tribal land were alienated through allotment and sale of surplus lands by 1934, amounting to approximately two-thirds of the total land held by Indian tribes in 1887.").

[53] *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645, 648, 650 n.1 (2001).

[54] *See* Shoemaker, *supra* note 46, at 26 ("After such a strong—and failed—effort to assimilate Indian people into the dominant U.S. society, a new effort arose in the 1930s to reverse allotment's negative effects and promote instead group self-determination and preservation of Indian culture."). The Indian Reorganization Act of 1934 formally ended the allotment policy and extended the trust status of remaining allotments indefinitely. Wheeler-Howard Act, ch. 576, § 2, 48 Stat. 984, 984 (1934) (codified as amended at 25 U.S.C. §§ 461–494 (2012)). As a consequence, a "mixed or checkerboard pattern of different property tenure types . . . exist[s] across the surface of most modern reservations." Shoemaker, *supra* note 46, at 33; *see also* Solem v. Bartlett, 465 U.S. 463, 471 n.12 (1984) (describing "checkerboard" land tenure patterns).

FIGURE 1. MAP OF LAND OWNERSHIP WITHIN THE STANDING ROCK INDIAN RESERVATION, 1954[55]



This map depicts yellow squares with and without diagonal stripes. The darker, yellow squares with diagonal stripes represent the allotment of lands between 1889 and 1930. This map illustrates how the lands within a reservation are subject to various forms of ownership. To the extent any of these allotted lands are owned by nonmembers, they create a checkerboard pattern of tribal and non-tribal ownership.

This Part examines the ways in which the Court has mediated the relationship between territory and sovereignty in the context of federal Indian law, where both determinants of territorial sovereignty are fragmented and in flux. While legal scholars tend to focus on the Court's treatment of sovereignty, this Note pays particular attention to the Court's imagining of territory. In Section II.A, this Note argues that the Court has transformed three features of the legal landscape—non-Indian fee lands, public access, and loss of "Indian" character—into territorial incongruities, or places where tribal sovereignty cannot

[55] *Section 6: Standing Rock Reservation*, N.D. STUDS., https://www.ndstudies.gov/gr8/content/unit-iii-waves-development-1861-1920/lesson-1-changing-landscapes/topic-4-reservation-boundaries/section-6-standing-rock-reservation [https://perma.cc/HK2K-NJ3V].

extend.[56] For each of the three incongruities, this paper begins with *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*.[57] *Brendale* is a particularly insightful case because it illustrates the judicial production of all three incongruities, while also demonstrating how they operate in tandem to dispossess a Native Nation of sovereign authority within its own reservation boundaries. In each subsection, a more contemporary case—*Plains Commerce Bank v. Long Family Land & Cattle Co.* for non-Indian fee lands, *South Dakota v. Bourland* for public access, and *City of Sherrill v. Oneida Indian Nation of New York* for loss of "Indian" character—follows to emphasize the durability of these incongruities and how their jurisdictional significance has subsequently been understood.[58] Section II.B argues that in spatializing sovereign authority across these cases, the Court is acting as a cartographer.

A. The Construction of Territorial Incongruities

The production of territory, like any other space, can be understood along three dimensions: the perceived, the lived, and the conceived.[59] The first captures the physical, material spaces of state territory, from the land and rivers to borders and barriers.[60] The second refers to the social and political practices that mediate the experience of the territory as a particular kind of place.[61] The third relates to representations of territory, which are largely ideological conceptions of state spatiality as projected upon the empirical world.[62] The Court's production of territorial incongruities—or the unmaking of a space as territory—can similarly be understood along these three dimensions: The Court perceives a material feature of the landscape, identifies its social or political attributes, and then conceives of its jurisdictional significance, rendering it either a part of or outside of tribal territory. This process of ascribing meaning to space can be understood as a form of cartography. By altering the jurisdictional meaning of various material features,

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[56] Although these features might pre-exist the Court's decisions, it is through the Court's decisions that they become legally salient for the purposes of jurisdiction. Thus, their incongruity in the context of territorial sovereignty is a judicial construction even if the physicality of these features is not.

[57] 492 U.S. 408 (1989).

[58] 554 U.S. 316 (2008); 508 U.S. 679 (1993); 544 U.S. 197 (2005).

[59] *See* Henri Lefebvre, The Production of Space 38–39 (Donald Nicholson-Smith trans., 1991).

[60] *See id.* at 45 (describing a physical network of road as the kind of space that falls under the perceived category).

[61] *See id.* at 188 (providing an example of lived space as one that is "mediated yet directly experienced").

[62] *See id.* at 41 (explaining that conceived space is "shot through with a knowledge . . . i.e. a mixture of understanding . . . and ideology").

the Court is changing the existing legal relations between sovereigns: A reservation border that might have once delineated the separation of sovereigns is replaced by a feature of the Court's choosing and, accordingly, the boundaries that divide the domains of sovereigns are redrawn.

None of these three dimensions of space should be taken for granted. A landscape consists of a variety of potentially significant features, and yet the Court focuses on some over others. The salience of particular social and political attributes, as well as their relevance to tribal territorial sovereignty, requires explanation. And it is not obvious the jurisdictional significance of any of these factors. Consider, for example, California. Within the boundaries of its territory, California has lands owned in fee by foreigners and non-citizens, public parks and recreational areas open to both out-of-state and out-of-country access, and places that may appear incongruous with the Californian ethos; yet California does not lose its sovereign authority over these spaces by virtue of their incongruity. Indeed, these features are not conceptualized as incongruities at all when they appear inside a state's domain. Part of the explanation may be that states and tribes are different. But a significant reason why these features matter for tribes but not for states is because the Court has actively constructed the incompatibility of ownership, accessibility, and integration with tribal territorial sovereignty.[63] This section uncovers that construction.

1. Non-Indian Fee Lands

In *Brendale*, the Court considered "whether the Yakima Indian Nation or the County of Yakima ha[d] the authority to zone fee lands owned by nonmembers of the Tribe located within the boundaries of the Yakima Reservation."[64] The plurality decision consisted of three distinct opinions. Justice White, writing for four of the Justices, held that "the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land" owned by nonmembers.[65] Justice Stevens's controlling opinion decided that the Tribe could zone nonmember land in the closed area of the reservation, where almost all of the land was Indian trust land, but the Tribe had no power to zone nonmember land in the open part of the reservation, where eighty

[63] *See Plains Commerce*, 554 U.S. at 340 ("The sovereign authority of Indian tribes is limited in ways state and federal authority is not."); *see also* Gregory Ablavsky, *Sovereign Metaphors in Indian Law*, 80 MONT. L. REV. 11, 20–27 (2019) (discussing historical and modern analogies between states and Native nations).

[64] 492 U.S. 408, 414 (1989).

[65] *Id.* at 430.

percent of the residents were nonmembers.[66] Lastly, Justice Blackmun, writing for three of the Justices, argued that the Tribe has the authority to zone throughout the reservation, including fee lands in both the open and closed areas.[67]

All three opinions relied on *Montana v. United States*, a seminal case decided eight years earlier.[68] *Montana* held that, as a general matter, Native Nations do not have the authority to regulate nonmembers within a reservation on lands owned in fee by nonmembers.[69] The *Montana* Court, however, drew an important distinction between nonmember activity on reservation *fee* lands and nonmember activity on reservation *tribal* lands (including trust lands) by allowing tribal regulation of the latter.[70] A key determinant of the jurisdictional question was thus the ownership status of the land in question. In attempting to justify the denial of tribal authority over nonmembers, the Court emphasized that Native Nations cannot exercise their power "beyond what is necessary to protect tribal self-government or to control internal relations."[71] Relations with nonmembers were deemed to be an external matter, beyond the scope of the diminished sovereignty of Native Nations. The Court's theory of sovereignty drew a distinction between nonmember and member relations, but it did not clearly address the legal distinction between nonmembers on non-Indian *fee* versus *tribal* lands, both within reservation boundaries.[72]

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66 *Id.* at 444–45.

67 *Id.* at 468.

68 450 U.S. 544 (1981).

69 *Id.* There are two exceptions to this general rule: Native Nations "may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members" and "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.* at 565–66. The application of the second exception was a key issue of disagreement among the three opinions in *Brendale*. A strong argument can be made that both White and Stevens incorrectly applied the second *Montana* exception by giving it an overly narrow meaning. *See* Joseph William Singer, *Sovereignty and Property*, 86 Nw. U. L. Rev. 1, 36–37 (1991) (arguing that both White and Stevens "adopt[ed] an incredibly narrow substantive standard to determine whether the County's zoning decision harms tribal interests").

70 *See Montana*, 450 U.S. at 557 ("[T]he Tribe may prohibit nonmembers from hunting or fishing on land belonging to the Tribe or held by the United States in trust for the Tribe . . . .").

71 *Id.* at 564.

72 It is possible that the Court found it sufficient to claim that activities on fee lands lie "beyond what is necessary to protect tribal self-government or to control internal relations," unlike activities on trust lands. *Id.* This is what the Court is doing as a doctrinal matter, but it does not adequately explain the jurisdictional distinction the Court draws between these two types of lands.

Justice White's opinion in *Brendale* reveals what may implicitly be guiding the Court's reasoning—a theory of territory, in conjunction with the Court's conceptions of tribal sovereignty. Notably, to understand the effect of sale and inheritance on the reservation lands, White turned to the Allotment Act. Both of the lands at issue—one owned by Philip Brendale and the other by Stanley Wilkinson, both of whom are nonmembers—had been alienated under the Act.[73] White discussed the Act specifically in the context of what it meant for Yakima Indian Nation's treaty rights, or whether the Nation maintained its exclusive authority over all reservation lands in light of the subsequent alienation of those lands.[74] In finding that the Yakima Indian Nation did not, White argued that the lands, by virtue of the context of their sale, carried with them the "avowed purpose of the allotment policy" which was "the ultimate destruction of tribal government."[75] That purpose ran with the land to authorize the removal of those territories—55 years after the end of allotment—from the Tribe's area of authority, as part of a broader, repudiated scheme of assimilation. Irrelevant to White was the fact that those territories remain bound within reservation borders, that there has been no finding of diminishment or disestablishment of those borders, and that Congress has explicitly renounced its policy of allotment.[76] The nature of their sale during allotment altered their political status decades later in 1989. As a result, White employed the same legal tactic he accused Stevens of improperly adopting: The creation of an equitable servitude, "wholly unsupported by precedent," attached to the lands at issue, albeit for White the encumbrance was the loss of tribal authority.[77] White saw fee simple ownership as transforming the political status of the land.

When considering any recourse that might exist for Yakima Indian Nation, White argued: "The Tribe in this case, as it should have, first appeared in the county zoning proceedings, but its submission should have been, not that the county was without zoning authority over fee land within the reservation, but that its tribal interests were imperiled."[78] This statement is extraordinary in that it recasts Yakima Indian Nation from a sovereign asserting its power to zone to a petitioner seeking accommodation within another sovereign's regime: The Yakima Indian

73 *Brendale*, 492 U.S. 408, 423 (1989).

74 *Id.* at 422.

75 *Id.* at 423 (quoting *Montana*, 450 U.S. at 560 n.9).

76 *Id.*

77 *Id.* at 442 ("[T]he Tribe's power to zone is like an equitable servitude; the burden of complying with the Tribe's zoning rules runs with the land without regard to how a particular estate is transferred.").

78 *Id.* at 431.

Nation must appeal to the authority of another sovereign to regulate lands within its own reservation, and if the nonmember's land use is to be abated, it is out of consideration for the Nation's interests, not in recognition of the Nation's authority over the activity. The question becomes one of balancing competing interests and uses, rather than one of power: Who has the authority to regulate this land? For White, this power rests with the state, and the Native Nation can only plead its case and bargain with the county under the terms of the county's zoning regime.

Moreover, by directing the Yakima Indian Nation to seek relief before a zoning tribunal, White equates the Nation's claim of territorial sovereignty—of regulatory authority over land within its reservation—with a private individual's claim of nuisance. The Yakima Indian Nation is not a sovereign who can exercise its zoning authority to the exclusion of the county, but rather a property-owner operating like any other individual within the county's zoning regime, whose claim is effectively one of nuisance against a malfeasant neighbor.[79] Accordingly, though Yakima Indian Nation's claims of land use might require mediation, its claims of territorial control are ultimately assimilable to those of individual citizens. Under White's analysis, the allotment-era sale and subsequent inheritance of reservation lands fundamentally altered that lands's relationship to the rest of the Tribe's territory. It became a private domain, isolated and distinct from the Tribe's domain, and, in turn, the Tribe's relationship with that land changed from sovereign to neighbor. A theory of tribal territoriality emerges from this reasoning: Nonmember ownership in effect transforms sovereign domain into a private enclave, a jurisdictional carveout from the Tribe's territory.

Drawing on Lefebvre's conception of space, this Note argues that the unmaking of territorial spaces is a threefold process. The Court identifies non-Indian fee lands as a material feature of the tribal landscape that is jurisdictionally significant. Its features of propertization and privatization, in particular, support the Court's perception of these lands as incongruous with the rest of the Tribe's lands: The propertization of the land erases its sovereign nature, and its privatization creates an imagined distance from the surrounding territory. It is in this third step, where material dimensions of space take on ideological meaning, that the Court acts as a cartographer. It no longer simply describes or relies on perceived features of the landscape, but rather actively

[79] *See* Singer, *supra* note 69, at 6 ("When tribes would benefit from being classified as property holders, the courts often treat them as sovereigns. . . . On the other hand, when tribes would benefit from being classified as sovereigns, the Court often conceptualizes tribes as private associations.").

constructs the significance of these features for determining the limits of tribal authority. Although the propertization and privatization of land through purchase is intuitive, its subsequent removal from the governing sovereign's authority is not. Again, to bring up California: If a New York resident purchased a beach house in Malibu, that purchase does not necessarily wrest the land from California and, in turn, render it subject to New York zoning laws. Indeed, the ability for individuals to bring their state's laws with them as they move across territorial borders and settle in the lands of another sovereign would be an extraordinary power. Yet, that is the kind of power that White envisions nonmember land purchasers as exercising within Indian country.

However extraordinary, this power is not unprecedented. It has found expression in imperial contexts with the movement of settlers and conquerors. European settlers arriving on American shores carried with them the laws of their nations and used those laws to lay the foundations for their political communities.[80] Conquerors, when incorporating new lands into their domain, sought to impose their own laws upon the acquired territory, replacing what existed before.[81] Consistent across these movements is an imagining of the lands as *terra nullius* upon arrival, as capable of inscription with new laws by a new sovereign due to their inherent lawlessness or as a benefit of conquest.[82] White's imagining of the movement of nonmembers is not dissimilar. As sovereign individuals, these nonmembers carry with them their originating state's jurisdiction as they move across reservation borders. Their settlement within Indian country subsequently allows them to carve out a distinct domain and superimpose their state's laws upon those of the Native Nation. Implicit in this theory is at best a

[80] *See* Peter Charles Hoffer, Law and People in Colonial America 1–46 (1992) (arguing that early English colonizers, traveling to the Americas, brought with them formal and informal sources of law—some of which were adopted as the basis of colonial constitutions and others adapted to the vastly different setting of the New World).

[81] *See* Emer de Vattel, The Law of Nations: Or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origin and Nature of Natural Law and on Luxury 129 (Béla Kapossy & Richard Whitmore eds., Liberty Fund 2008) ("When a nation takes possession of a distant country, . . . that country, though separated from the principal establishment, . . . naturally becomes a part of the state . . . . Whenever therefore the political laws . . . make no distinction between them, every thing said of the territory of a nation, must also extend to its colonies."); *see also* Sally Engle Merry, *Law and Colonialism*, 25 L. & Soc'y Rev. 889, 890 (1991) ("Colonialism typically involved the large-scale transfer of laws and legal institutions from one society to another . . . .").

[82] *See generally* Patrick Wolfe, *Settler Colonialism and the Elimination of the Native*, 8 J. of Genocide Rsch. 387 (2006) (discussing how settler colonialism is a system motivated by access to territory and "variants on the theme of *terra nullius*").

subordination of tribal sovereignty to that of the state and at worst a radical rejection of the sovereignty of Native Nations.[83]

The incongruity of non-Indian fee lands is further developed in *Plains Commerce Bank v. Long Family Land & Cattle Company*.[84] Plains Commerce Bank, a non-Indian bank, sold land it owned in fee within the Cheyenne River Sioux Indian Reservation to non-Indian individuals. The Longs, an Indian couple, sued the bank in Tribal Court claiming that the bank discriminated against them by offering the land to non-Indians on terms more favorable than those offered to them, thereby violating tribal tort law.[85] The bank brought a challenge to the Tribal Court's jurisdiction. The District Court, affirmed by the Eighth Circuit, held that tribal court jurisdiction was proper because the Tribe had authority to regulate the business conduct of persons voluntarily dealing with tribal members; this is activity that falls within the first category of tribal civil jurisdiction over nonmembers established in *Montana*.[86] The Supreme Court reversed in an opinion written by Chief Justice Roberts, holding that the Tribal Court did not have jurisdiction to adjudicate the "discrimination claim because the Tribe lacks the civil authority to regulate the Bank's sale of its fee land."[87] A tribe's adjudicative jurisdiction cannot exceed its legislative or regulatory jurisdiction.

To reach this conclusion, the Court had to get around the first *Montana* exception. In *Montana*, the Court held that a "tribe may regulate . . . the activities of nonmembers who enter consensual

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[83] A more generous reading of White's treatment of non-Indian fee lands is that he adopted a status-based approach to jurisdiction, rather than one trained on locus. Despite its grip on the Western legal imagination, the rise of territory, or location, as the basis of jurisdiction is still a fairly new phenomenon. As previously noted, it was not until the seventeenth century that the modern state became a territorial-based organization. Richard T. Ford has argued that "[i]n pre-modern Europe, what appear[s] to modern eyes to be territorial communities were in fact simply groups united by kinship, common interests and customs." Ford, *supra* note 32, at 872. A sovereign's jurisdiction followed the people subject to its rule, not necessarily the territory over which it governed. *Id.* at 873 (arguing that modern territorial sovereignty would not arrive until the fifteenth century with the concurrent rise of the cartographic sciences). Thus, White's focus on the nonmember status of Wilkinson and Brendale, over and above the location of their lands within a tribal reservation, is not unusual when situated in the long history of jurisdiction.

[84] 554 U.S. 316 (2006). After *Brendale* but before *Plains Commerce*, the Court decided *Nevada v. Hicks* and indicated that the presumption against tribal civil authority over nonmembers on non-Indian lands in *Montana* might extend to cases arising out of tribal lands as well. Nevada v. Hicks, 533 U.S. 353, 359–60 (2001). Still, *Plains Commerce* illustrates the particular skepticism with which the Court regards non-Indian fee lands.

[85] *Plains Commerce*, 554 U.S. at 322.

[86] *Id.* at 323.

[87] *Id.* at 330.

relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[88] The activity at issue in *Plains Commerce* appears to fall within this category. The nonmember bank entered into consensual relationships with the tribe and its members by providing them with financial and commercial services, thereby opening the bank up to tribal regulation over its activities, such as its sale of property.[89] The Court, however, was unpersuaded by this relatively straightforward application of *Montana* and instead created an exception to the exception, drawing on the distinct status of the lands at issue.

The Court identified a key feature of the lands in dispute—like the properties in *Brendale*, they were alienated from the tribe and converted into fee simple parcels as part of Congress's project of allotment.[90] As with the *Brendale* properties, the Court decided that these non-Indian fee lands had become jurisdictional enclaves as a consequence of the sale, carved out from the Tribe's authority despite the fact that they remain within tribal borders.[91] Such lands are not only distinct from the rest of the Tribe's territory but also divested of tribal authority by virtue of their non-Indian and fee status. They have "ceased to *be* tribal land."[92] In so deciding, the majority in *Plains Commerce* eschewed the functionalist approach of Stevens, which would have allowed some non-Indian fee lands to be subject to tribal jurisdiction depending on the circumstances, and instead embraced the formalist rule of White: "[T]he tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land."[93]

The Court did not stop here. It went further beyond *Brendale* to read the exceptional status of non-Indian fee lands into one of the *Montana* exceptions—which allow tribes to regulate nonmembers in limited circumstances—further narrowing its applicability. When determining the meaning of "activities" for the purposes of the first *Montana* exception, the Court distinguished between "conduct taking place on the land" and "the sale of the land" as "two very different

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88 Montana v. United States, 450 U.S. 544, 565 (1981).

89 The bank had "lengthy on-reservation commercial relationships with the Long Company." *Plains Commerce*, 554 U.S. at 338 (quoting Brief for Respondents at 40).

90 *Id.* at 331 ("The acres at issue here were alienated from the Cheyenne River Sioux's tribal trust and converted into fee simple parcels as part of the . . . 1908 Allotment Act.").

91 *Id.* at 328 ("[O]nce tribal land is converted into fee simple, the tribe loses plenary jurisdiction over it.").

92 *Id.* at 336.

93 Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 430 (1989).

things."[94] Whereas the former is subject to the exception, and thus could be regulated when conducted by nonmembers in a consensual relationship with the tribe or its members, the latter is an exception to the exception and lies beyond the bounds of tribal authority.[95] Thus, even when non-Indian fee lands might fall within tribal jurisdiction as a consequence of the landowner's relationship with the tribe, it does so only for the purposes of certain activities not including alienation. To the extent a consensual relationship bridges the gap between nonmember and member, rendering the "non-Indian" aspect of the land less incongruous with the rest of the tribe's territory, the land's fee status still controls. It works to differentiate these lands as exceptional places where "the jurisdictional consequences of that [consensual] relationship cannot extend."[96]

Plains Commerce illustrates how the Court's manipulation of tribal territory is not as straightforward as simply carving out enclaves; the Court does not necessarily remove lands from tribal jurisdiction wholesale, but rather conditions the relationship of such lands to the tribe. The same plot of land may be subject to differing legal regimes and fall within tribal jurisdiction for some matters but not for others.[97] The relationship between the territory and tribal sovereignty is thus indeterminate and largely a matter of judicial discretion. Moreover, although *Plains Commerce* largely relies on the same reasoning as White's opinion in *Brendale*—that non-Indian fee lands are jurisdictionally distinct—its significance cannot be overlooked. Such decisions may not displace tribal authority overnight, but they do contribute to a steady erosion of tribal territorial sovereignty, creating the conditions for sea-change statements such as that of the majority in *Castro-Huerta*. The

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94 *Plains Commerce*, 554 U.S. at 340.

95 The Court tried to justify the distinction based on precedent. It argued that the Court has never found that *Montana* authorized a tribe to regulate the sale of non-Indian fee land and, thus, *Montana* could not authorize such regulation. It is not clear why the fact that "activities" had not yet been considered in the context of alienation meant that "activities" could not include alienation. Three justices, dissenting in part, rightfully pointed out the various difficulties in the Court's logic. *Id.* at 342–45 (Ginsburg, J., concurring in part and dissenting in part).

96 *Id.* at 338.

97 The Court emphasized that the Longs' discrimination claim was a "novel" one and "surely not a typical regulation." *Id.* Rooted in "Cheyenne River Sioux tradition and custom," it was not the sort of regulation that could have been anticipated by the Bank, despite the Bank's long relationship with the tribe and its members. *Id.* Thus, underlying the Court's reasoning is a sense that the tribal tort law is too foreign and strange to be applied to a non-Indian entity. Although the Court disavows making jurisdictional decisions based "on the desirability of a particular regulation," the Court's reasoning in effect allows for such considerations. *Id.* at 340. The Court can choose between substantive laws under the guise of making a procedural determination.

gradual restriction of tribal authority to less and less of tribal territory creates the grounding for later, more brazen attempts at usurpation.

2. *Public Access*

Returning to *Brendale*, in his controlling opinion, Justice Stevens relied closely on the facts of the record, arguing that they "dictate a different answer as to the two tracts of land at issue."[98] In a 1954 resolution, the Tribal Council had declared that "the open range and forested area of the Yakima Indian Reservation [was] to remain closed to the general public."[99] Entry to this area was tightly restricted and well-guarded.[100] Most of the land inside the closed area was forested and protected for tribal use, and only 25,000 of the 807,000 acres were owned in fee.[101] Brendale's property was "located in the heart of this closed portion of the reservation" and as a consequence, he had to litigate with the federal government to establish a right of access to his property over Bureau of Indian Affairs roads.[102] For all intents and purposes, this area was firmly closed to the public (or, at least, the non-tribal public). The open area in which Wilkinson's property was located was not likewise restricted. According to the Court, "the Tribe ma[de] no attempt to control access to the open area" and the District Court found that "non-tribal members move[d] freely throughout the area."[103] Many of the roads in the area were constructed and maintained by the county, which made them accessible to both tribal members and the general public alike.[104] And over eighty percent of the population in the open area were nonmembers.[105] The open area was thus not only publicly accessible, but also subject to significant, transformative, and permanent non-tribal use.

Stevens rendered accessibility jurisdictionally significant by tying it to the tribal power to exclude. An inherent power of Native Nations is "the sovereign power of exclusion," or the authority of Native Nations to limit or condition access to the reservation.[106] Land use regulation

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98 *Brendale*, 492 U.S. at 433.

99 *Id.* at 438.

100 *See id.* at 439. ("The Tribe operates a 'courtesy permit system' that allows selected groups of visitors access to the closed area. . . . Tribal police and game officers enforce the courtesy permit system by monitoring ingress and egress at four guard stations and by patrolling the interior of the closed area.").

101 *Id.* at 438.

102 *Id.* at 440.

103 *Id.* at 445 (quoting Yakima Indian Nation v. Whiteside, 617 F. Supp. 750, 752 (E.D. Wash. 1985)).

104 *Id.* (describing the county's construction and maintenance of 487 miles of road).

105 *Id.*

106 *Id.* at 435.

was a corollary of this power in that Native Nations could set conditions on entry that would govern the activities on and uses of reservation land.[107] Importantly, Stevens saw this power as something that could be diminished by federal statute or voluntarily surrendered by the Tribe itself.[108] Indeed, the cessation of this sovereign power could happen implicitly: "Once Brendale obtained title to his land that land was no longer off limits to him; the tribal authority to exclude was necessarily overcome by, as Justice Stevens puts it, an 'implici[t] grant' of access to the land."[109] Although this statement came from White, its language is reflected in Stevens's opinion. For Stevens, the Yakima Indian Nation no longer had the authority to zone the Wilkinson property, which was located in the open area, but retained its regulatory power over the Brendale property in the closed area. The Yakima Indian Nation in effect ceded its power to exclude—and the attendant power to regulate—by allowing the open area to become accessible. Indeed, when describing the openness of the area surrounding the Wilkinson property, Stevens emphasized that "[a]lthough the Tribe . . . asserted that it ha[d] the authority to regulate land use in the three incorporated towns [within the reservation], it . . . never attempted to do so."[110] By not fully exercising and enforcing its power of exclusion, the Tribe effectively surrendered it, and the resulting material changes in the reservation landscape, as identified and interpreted by the Court, justified the related change in the jurisdictional landscape.

Thus, territory that was not sufficiently subject to the control of the Tribe, according to the Court's standard, was territory lost. The unmaking of territory occurs again in Stevens's opinion: The material feature of the landscape that Stevens relies on is the closed and open distinction between two areas of the reservation, and the attribute that is of jurisdictional significance to him is the accessibility of these areas to nonmembers. In linking this attribute of accessibility to the loss of tribal power, Stevens is projecting a vision of tribal territoriality upon the reservation. Tribal lands must remain bounded and distinct from surrounding polities, and tribes must actively maintain and enforce their borders against neighboring states. The sharp contrast between tribal and state lands that Stevens requires is not a geographical feature implicit in the landscape, but rather one he actively imagines and seeks to construct by making it a prerequisite for tribal lands to remain tribal lands at all. He is shaping the landscape, not simply interpreting it.

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107 *See id.* at 433.
108 *See id.* at 433–37.
109 *Id.* at 424.
110 *Id.* at 445.

The jurisdictional question in *Brendale* thus depended on where the land fell on a continuum between absolute exclusion and full accessibility. Stevens's turn to exclusion-accessibility, as the marker that determines the spatial limits of tribal authority, raises significant challenges. First, it assumes that the sovereign status of Native Nations relies on their ability to maintain a level of distinctiveness and separation from non-tribal society; this necessarily fixes them in space and time as existing outside of the networks and continuities that structure the rest of society.[111] Second, it propertizes tribal domain. To the extent accessibility is a jurisdictional determinant, it allows for a strange form of adverse possession. The continued use and occupation of reservation lands, and the Tribe's non-enforcement of its power to exclude, can lead to the taking of the land and its incorporation within the jurisdiction of another sovereign. Importantly, property law bars the adverse possession of government lands at both the state and federal level out of recognition of their sovereign status.[112] By allowing for the loss of jurisdiction through public use and access, Stevens is treating tribal land not as sovereign territory but as private property.[113]

Public accessibility also served to distinguish tracts of tribal territory as out of bounds in *South Dakota v. Bourland*.[114] In *Bourland*, the Supreme Court considered whether the Cheyenne River Sioux Tribe could regulate nonmember hunting and fishing in a federal recreation area located on the reservation but open to the general public. The federal statute creating the recreation area, the Flood Control Act of 1944, and subsequent acts did not clearly resolve the issue.[115] The case was distinguishable from *Montana* and *Brendale* in that it concerned nonmember activity on *federal land*, not non-Indian fee land, although in

111 *See infra* Section III.B.

112 *See* JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 335 (3d ed. 1989); 48 U.S.C. § 1489 (prohibiting adverse possession or prescription of United States land). *Cf.* Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J. L. REFORM 939, 939 (1996) (arguing that "in practice, the land of many states is subject to loss by adverse possession").

113 In its original jurisdiction cases concerning state border disputes, the Court has recognized that "[a]s between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory." City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 218 (2005) (citing Ohio v. Kentucky, 410 U.S. 641, 651 (1973)). Notably, however, in these cases the two parties are both states and the dispute is between sovereigns. In *Brendale*, the Court insinuates that *individual non-members* can alter the jurisdictional boundary lines between states and tribes by evoking the tribe's alleged acquiescence to their presence and its failure to exercise its sovereign prerogative to exclude them. 492 U.S. at 422–24. Although some states do *allow* private parties to acquire state land by way of adverse possession, they are not *forced* to do so by the Court. *See* Latovick, *supra* note 112, at 940.

114 508 U.S. 679 (1993).

115 *See id.* at 683–84.

both cases, the lands at issue were located within the exterior boundaries of the reservation. The case appeared to involve the question of whether, in the absence of clear congressional guidance, the Court could further diminish tribal territory. But Justice Thomas, rather than admitting to filling a void left by Congress, found that Congress *had* resolved the issue. Thomas stepped into the realm of diminishment cases to consider whether Congress had intended to diminish the reservation of the Cheyenne River Sioux Tribe—except, Thomas did not fully adhere to this doctrine either.[116] Instead of finding "clear congressional intent" as required in diminishment cases,[117] Thomas decided that "effect" was sufficient: "[W]hen Congress has broadly opened up [reservation] land to non-Indians, the *effect* of the transfer is destruction of preexisting Indian rights to regulatory control."[118] Thomas thus carved his own doctrinal path to find a loss of tribal territorial sovereignty, while also subtly shifting the blame from the Court to Congress.[119]

Thomas's *Bourland* opinion is a continuation of Stevens's *Brendale* logic. In both, the opening of reservation lands to nonmembers played a significant role in the Court's finding that tribal territorial sovereignty had been diminished. Thomas linked public accessibility to loss of tribal jurisdiction rather explicitly: "In taking tribal trust lands and other reservation lands . . . and broadly opening up those lands for public use, Congress . . . eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe."[120] At first blush, it is difficult to locate the rationale for Thomas's finding that public accessibility is incompatible with tribal authority.[121] Markers and checkpoints would have been sufficient to address any concerns of nonmembers

116 The diminishment cases refer to a line of cases decided by the Supreme Court in which it considers whether Congress, through legislative action, had diminished or disestablished a tribal reservation. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463 (1984). These cases are distinct from those in which the Court considers the tribe's civil jurisdiction over nonmembers.

117 *See id.* at 476, 478 (declining to find diminishment "in the absence of some clear statement of congressional intent to alter reservation boundaries").

118 *Bourland*, 508 U.S. at 692 (emphasis added).

119 *See* Frickey, *supra* note 2, at 47 (describing Thomas's doctrinal move as a "judicial sleight of hand, creating a rule of law to trump the legal effect of the clear-statement canon").

120 *Bourland*, 508 U.S. at 689.

121 Thomas's finding might share some kinship with First Amendment doctrines, under which the designation of space as a public forum does alter the state's authority to regulate it. Like here, the public nature of the space changes its relationship to its governing sovereign. However, a key difference is that the state, in the First Amendment context, does not lose its regulatory authority over the space altogether—nor does another state subsequently gain control over that same space—but rather its absolute control is diminished in consideration of constitutional rights. In the tribal jurisdiction context, the Native Nation is not simply told that it cannot regulate in certain ways, but rather that it has lost its authority and control over these lands—to the benefit of another governing sovereign.

stumbling into tribal territory unknowingly; indeed, people move across jurisdictional lines all the time, from county to state to federal, across states, national borders, and private-public divides. Signs or changes in environment are usually enough to satisfy the reasonable expectations of travelers. Moreover, as the dissent points out, "Congress' purpose was simply to build a dam."[122] The fact that non-Indians can also access the area for "recreational purposes" is "perfectly consistent with continued tribal authority to regulate hunting and fishing by non-Indians."[123] What might begin to explain Thomas's and Stevens's imagined incompatibility of accessibility with tribal authority is a dual notion of tribal land as both exceptional and mundane.

Tribal territory is exceptional in that it requires near absolute exclusion for its maintenance. There is a level of congruity that the Court expects of tribal territory in order for it to remain under tribal jurisdiction. There is also an expectation that Native Nations actively maintain such congruity by exercising their power of exclusion. Both non-Indian fee lands and public access are conceptualized as anomalies that break up the homogeneity of the reservation landscape, and public accessibility, in particular, is seen as a transgression of the tribal power to exclude. The boundary-crossing activities of nonmembers are interpreted by the Court as erasing those boundaries altogether.[124] This notion of territorial sovereignty—as diminishable through transgressions—is increasingly and problematically incompatible with a changing, interdependent world.

The mundanity of tribal territory comes from the Court's treatment of it as property as opposed to sovereign domain. Private purchase and public use can nullify a tribal sovereign's jurisdictional

122 *Bourland*, 508 U.S. at 702.

123 *Id.*

124 Explanation for the Court's jurisdictional treatment of nonmembers might be found in *Calvin's Case*, a 1608 English legal decision which has significantly influenced American legal thought. In *Calvin's Case*, the royal judges of England held that the King's subjects outside of England would, in some circumstances, have access to English common law. English law thus could follow those subjects even as they moved to territories outside of England. Calvin's Case (1608) 77 Eng. Rep. 377, 388; 7 Co. Rep. 1 a, 9 b (KB). As Daniel Hulsebosch has explained, Sir Edward Coke, one of the royal judges, wished to provide English subjects with "some legal protection" in the form of "English liberties [that] might travel with Britons outside England . . . ." Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 L. & Hist. Rev. 439, 440 (2003). This decision reflected an anxious desire to provide colonists with some guarantee about the new legal environment to which they were moving. Similarly here, the Court might have deemed it so unimaginable that nonmember U.S. citizens be subject to the "foreign" jurisdiction of Native Nations when on "American" soil that they sought to provide those citizens with a legal "care package," allowing them to bring with them the laws of the state even as they moved into tribal lands. These citizens could thus rely on the benefits of state law while occupying tribal territory (and evading tribal law).

claim to its territory. Tribal territory is thus treated no differently than the property of everyday citizens, subject to seizure by the states and alienation among individuals. A key difference, though, rests in *who* can engage in this seizure and alienation: nonmembers, with the backing of the Supreme Court. Outside of the tribal context, state sovereigns are the ones who can take land for public use, divesting the owners of their rights to that property, and purchase foreign lands through treaties, incorporating those territories within their domain. These activities of sovereigns can and do alter jurisdictional landscapes. In Indian country, however, the Court seems to adopt the idea that private individuals can do the work of sovereigns when operating on tribal lands.[125] This dual nature of tribal territory, as both exceptional and mundane, provides significant discretion to the Court to alter the jurisdictional status of reservation lands according to perceived changes in conditions.

3. Loss of "Indian" Character

The Court is at its most imaginative in its treatment of the "Indian" character of land. Returning once again to *Brendale*, both Justices White and Stevens attempted to paint a vivid picture of the Yakima Indian Nation reservation, or at least a significant portion of the reservation, as decidedly not "Indian" to justify the County's exercise of zoning authority. According to them, lands that were no longer "Indian" in character could not be tribal lands at all.[126] White dedicated several pages of his opinion to seemingly immaterial descriptions of the landscape: For example, he notes how one of the properties sits "on a slope overlooking the Yakima Municipal Airport and the city of Yakima."[127] It is not clear the significance of this information other than to gesture at the property's close proximity to the state and, thus, its distance from the reservation, despite being within the reservation. Stevens went into much greater detail and introduced a theory of tribal territory as contingent on tribal identity. He argued that the power to exclude serves an important purpose: the determination and preservation of "the essential character" of an area.[128] To the extent this character was

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125 This is not to suggest that private ownership in non-tribal domains do not affect a state's ability to regulate. For example, individuals can severely limit a state's authority to enforce anti-discrimination laws within places that they privately own. However, unlike in the tribal context, there is no confusion in those cases over the sovereign status of the places in question, nor does the extinguishment of the state's authority allow another to come in and regulate in its stead.

126 *See* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 448 (1989).

127 *Id.* at 418.

128 *Id.* at 433.

lost, so was the tribe's power to exclude; the two were interdependent. Thus, when determining the spatiality of tribal jurisdiction, Stevens asked whether the reservation at issue "still maintain[ed] [its] status as [a] distinct social structure[]" or whether it "ha[d] become integrated in other local polities."[129] Tribal identity was what determined the geographical boundary of tribal territory.

In making this determination, Stevens examined the economic and cultural attributes of the landscape. He described the closed area of the reservation as having a "pristine character," which the Tribe had a "historic and consistent interest in preserving . . . ."[130] As a preliminary matter, the lands of Native Nations, both prior to and after European arrival, have never been "pristine" but rather subject to human contact, management, and intervention.[131] Yet, this idea that the lands of Native peoples were once a pure and pristine wilderness persists as an imaginary: "Wilderness is a term that evokes a collective imaginary of 'wild' landscapes, areas vast and uninhabited by humans . . . . Most often we think of these spaces as being 'pristine' or untouched by humans."[132] As many critical social scientists have pointed out, wilderness is neither an innocent nor objective material reality but rather an idea—a human creation that reflects and serves particular sociopolitical values.[133] It is an idea that has deep roots in the settler colonial imagination, used to justify the dispossession and violent removal of Native peoples from their lands, while creating a *terra nullius* upon which the conquering nation could lay claim.[134] It has also been used to equate indigeneity with savagery; wilderness was an imagined form of underdevelopment that required civilizing alongside the people that were deemed to exist

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129 *Id.* at 447.

130 *Id.* at 440.

131 *See* William M. Denevan, *The Pristine Myth: The Landscape of the Americas in 1492*, 82 Annals of the Ass'n of Am. Geographers 369, 369 (1992) ("There is substantial evidence . . . that the Native American landscape of the early sixteenth century was a humanized landscape almost everywhere.").

132 Kim Ward, *For Wilderness or Wildness? Decolonising Rewilding*, *in* Rewilding 35 (Nathalie Pettorelli, Sarah M. Durant & Johan T. du Toit eds. 2019).

133 *See, e.g.*, William Cronon, *The Trouble with Wilderness: Or, Getting Back to the Wrong Nature*, 1 Env't Hist. 7, 7 (1996) ("Far from being the one place on earth that stands apart from humanity, [wilderness] is quite profoundly a human creation—indeed, the creation of very particular human cultures at very particular moments in human history.").

134 *See* Ward, *supra* note 132, at 34 ("In Western environmental narratives . . . , the 'wilderness idea' was led by Euro-American men within the historical-cultural context of patriarchal colonialism, and wilderness preservation is . . . an artefact of colonialism that can (and has) act as a vehicle for the exclusion and erasure of people and their histories from the land." (internal citations removed)). *See generally* Mark David Spence, Dispossessing the Wilderness: Indian Removal and the Making of the National Parks (1999) (arguing that visions of pristine, uninhabited nature inspired policies of Indian removal).

as part of it.[135] Although Stevens attached new legal significance to this wilderness imaginary, he was not the first to assume that tribal lands must embody a "pristine character" or to evoke it to serve a particular purpose. Moreover, Stevens's reliance on this notion of wilderness illustrates the imaginative nature of the characteristics upon which the Court relies. The Court is not simply identifying wilderness and attaching to it jurisdictional significance, but rather *constructing* a notion of wilderness from the reservation in order to justify the allowance of tribal jurisdiction in some areas but not others.

For Stevens, when tribal lands lost their wilderness character, according to the Court's imagining of what a wilderness is in the first place, those lands fell out of the tribal territory altogether. Stevens described the open area, in sharp contrast to the closed, as "marked by residential and commercial development," for it included three incorporated towns and was "largely devoted to agriculture."[136] Whereas the closed area was "an undeveloped refuge of cultural and religious significance, a place where tribal members 'may camp, hunt, fish, and gather roots and berries in the tradition of their culture,'" the open area had "lost its character as an exclusive tribal resource" and was thus indistinguishable from the surrounding state territory.[137] The open area had become an integrated part of the county, despite existing within reservation borders, and accordingly, jurisdiction over it shifted from the tribe to the county.

The Yakima Indian Nation effectively lost its sovereign control over the open area because it had become "an integrated community that [was] not economically or culturally delimited by reservation boundaries."[138] Its lack of "Indian" characteristics—as determined by the Court—rendered it in effect state territory, at least for zoning purposes. Although public accessibility contributed to this loss in "Indian" character, the former remains a distinct incongruity in that it can operate independently. In *Bourland*, the recreation area was still largely forested and culturally significant, but its openness to nonmember access was sufficient to deprive the Tribe of jurisdiction over the area. According to Stevens, the open area at issue in *Brendale* was incongruous as a matter of both accessibility and character.[139] Thus, not only did Stevens decide

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[135] *See generally* A. A. den Otter, Civilizing the Wilderness: Culture and Nature in Pre-Confederation Canada and Rupert's Land (2012) (exploring the concepts of "civilizing" and "wilderness" within an 1850s Euro-British North American context).

[136] Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 444–46 (1989) (internal quotations omitted).

[137] *Id.* at 441, 447.

[138] *Id.* at 444.

[139] *See supra* Section II.A.2.

which characteristics mattered for the purposes of jurisdiction, he also determined the tipping point at which tribal territory fell from tribal jurisdiction into state jurisdiction. Accordingly, the territory of a Native Nation became commensurate with the Court's imagined construction of its essential identity.

To justify the hinging of jurisdiction on territorial identity, Stevens once again turned to property law, specifically the "change of neighborhood" doctrine.[140] Under the "change of neighborhood" doctrine, an equitable servitude—a condition which runs with the land, such as the Tribe's power to zone, according to Stevens—lapses when its application to an area "become[s] outmoded" or "inequitable to enforce."[141] For Stevens, the equities shifted in favor of the nonmembers when the lands surrounding them became indistinguishable from state lands, making it unjust for them to be governed by the zoning laws of another sovereign. Moreover, this notion of becoming outmoded again assumes that tribal lands exist out of time—they exist in a time of pre-development, and thus any subsequent development renders them no longer tribal in status.

Stevens's adoption of this doctrine in the tribal jurisdiction context perpetuates the intertwined logics of assimilation and fossilization. It is assimilative in that tribal territories that become economically and culturally integrated with surrounding polities lose their status as tribal territories altogether; they continue to exist within reservation boundaries but are subject to state rather than tribal jurisdiction. Integration is interpreted as depriving Native Nations of their full territorial sovereignty, and the slow creep of state jurisdiction can work to eventually engulf reservations in full, rendering any borders between states and tribes ineffective. Stevens's logic also fossilizes tribal existence by requiring it to persist in a particular manner—as culturally distinct and environmentally undeveloped. To the extent it loses its distinctiveness, it becomes imagined as part and parcel of state territory for the purposes of regulatory jurisdiction.

This imaginative reconstruction of tribal territory as state territory not only diminishes a tribe's territorial sovereignty but also prevents its re-establishment—the jurisdictional consequences of the "loss of Indian character" are permanent. In *City of Sherrill v. Oneida Indian Nation of New York*, the Court considered whether the Oneida Indian Nation of New York could revive its "ancient sovereignty" over parcels of land

140 *Brendale*, 492 U.S. at 447.

141 *Id.* (citing Roger A. Cunningham, William B. Stoebuck & Dale A. Whitman, The Law of Property §§ 8.20, 482–83 (1984)).

it had gained through open-market purchases.[142] Notably, these parcels fell within the boundaries of the reservation originally occupied by the Oneidas.[143] Both the Oneida Nation and the United States argued that through purchase, the Nation had unified fee and aboriginal title within its reservation and could once again assert sovereign dominion over the parcels.[144] In other words, the Nation could reassert its sovereignty, in the form of regulatory jurisdiction, over lands it had brought back within the folds of its territory. To the extent these lands had been carved out from the Nation's jurisdiction as a consequence of their non-Indian fee status, their change in status could justify their reincorporation. The Court, in a majority opinion written by Justice Ginsburg, rejected this theory, relying on the "longstanding, distinctly non-Indian character of the area and its inhabitants."[145]

The Court's rationale evoked both notions of identity and accessibility, and their shared incompatibility with tribal territory. First, the Court pointed to the "dramatic changes in the character of the properties" as evidence that tribal jurisdiction over these lands would cause significant disruption to the settled landscape.[146] The lands had been "converted from wilderness to become part of cities like Sherrill" and "development of every type imaginable ha[d] been ongoing for more than two centuries."[147] The incompatibility of these developments with tribal jurisdiction was presumed by the Court to be self-evident when it was in fact a matter of judicial construction. The Court relied on an imagined idea of tribal territory as perpetually primordial, as existing outside of the passage of time, in order to contrast it with the metropolitan landscape before the Court in the present. The Court thus believed that tribal territory must remain undeveloped, removed from modern life, and distinctly ahistorical, in order for it to remain tribal in character and, accordingly, tribal in status. The conversion of these developed properties into tribal territories would disrupt this illusion, challenging the settled expectations of nonmembers who have come to associate tribal territory with some distant wilderness far from urban life. The wilderness imaginary underlying Stevens's opinion in *Brendale* thus reappears in Ginsburg's decision in *Sherrill*, over fifteen

142 544 U.S. 197, 202 (2005).

143 *Id.* at 211. The Court in *Oneida II* recognized the Oneidas' aboriginal title to their ancient reservation land. *See* Cnty. of Oneida v. Oneida Indian Nation of New York (*Oneida II*), 470 U.S. 226, 231 (1985).

144 *Sherrill*, 544 U.S. at 213.

145 *Id.* at 202.

146 *Id.* at 216–17.

147 *Id.* at 215, 219 (quoting Oneida Indian Nation v. Cnty. of Oneida, 199 F.R.D. 61, 92 (N.D.N.Y. 2000)).

years later. Whereas the imaginary was used in *Brendale* to dispossess Yakima Indian Nation of jurisdiction over lands within its reservation, it was evoked in *Sherrill* to perpetuate the ongoing dispossession of Oneida Nation over its lands, even those it had repurchased and sought to reincorporate.

Second, the Court evoked the "long history of state sovereign control over the territory" and particularly the failure of both the federal government and the Nation to contest this control as cutting against territorial unification.[148] It is true that the federal government actively participated in the policy and practice of removal that led to the dislocation of Native peoples from the east coast.[149] This argument does not sit as comfortably, however, when lobbied against Oneida Nation, whose alleged acquiescence to state control is better understood as a consequence of their forced removal rather than as consent to their own dispossession. This argument does sound, however, in Stevens's *Brendale* logic whereby sovereignty can be lost through its lack of exercise. In *Brendale*, the Tribe's failure to exclude non-Indians from their lands worked to justify their loss of jurisdiction over those lands as the lands became increasingly accessible to nonmembers.[150] In *Sherrill*, the Nation's failure to contest the City of Sherrill's control similarly "preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold."[151] These territories, once relinquished (even if due to coercion) and brought within the state's domain, could not be reclaimed.

This gestures to an asymmetry in the Court's treatment of the movement of non-Indians and Native peoples. Non-Indians can traverse sovereign borders and bring with them their state's regulatory powers, since their ability to access tribal lands is jurisdictionally relevant. Their presence on the lands of another sovereign is evidence enough of their state's claim to those properties as its territory. For tribal members, although they can reestablish their presence over their ancestral lands, they do not bring with them their nation's authority—they move as private citizens rather than as sovereign representatives. Jurisdictional control does not flow with their reentry upon their lands. Their ability to access reclaimed tribal lands is not jurisdictionally relevant. They, like non-citizens or out-of-state residents, continue to exist within the jurisdiction of another sovereign, subject to its laws—a notion that the

148 *Id.* at 214.

149 *Id.* ("In fact, the United States' policy and practice through much of the early 19th century was designed to dislodge east coast lands from Indian possession.").

150 *See supra* Section II.A.2.

151 *Sherrill*, 544 U.S. at 214.

Court considered unimaginable when it came to nonmembers living within a reservation.

More broadly, under the Court's approach to tribal territory, nonmembers have immense power to alter jurisdictional landscapes. In *Brendale*, the individual property owners, through the purchase and inheritance of land, ousted the tribe of jurisdiction over properties within the tribe's reservation, and allowed the neighboring state to extend its power into the territory of another sovereign.[152] In *Plains Commerce*, the non-Indian bank was immune from tribal regulation and tribal adjudication, despite its longstanding relationship with the tribe and its members.[153] It could operate within the reservation while evading tribal laws—at least as they pertain to the activity of alienation—and thereby deny the tribe its power of enforcement. In *Bourland*, the persistent movement of nonmembers across reservation boundaries was found to eliminate those boundaries altogether, at least for the purposes of tribal regulatory jurisdiction.[154] Across these cases, nonmembers seem to operate in a privileged position relative to tribal nations, as their activities and movements help to determine the contours of tribal territory.

Territorial sovereignty, then, extends only in one direction. The acquisition of territory comes with it dominion over those lands but only for state sovereigns, not Native Nations. Similarly, for the United States, territorial acquisition through the purchase of lands from Native Nations, or through treaty cessations, came with the presumption that the lands would subsequently fall within the federal government's control.[155] This method of conquest through purchase, however, seems to be reserved for the conqueror. For Native Nations, the incommensurability of their sovereignty with their territory persists; even when lands are repurchased and brought back within a tribe's control, they remain subject to the jurisdiction of another sovereign. The perceived incongruity of these lands with the Court's imagining of tribal territory endures even when these lands become legally reinscribed as tribal once more.

The territorial sovereignty of Native Nations is thus largely at the whims of the Supreme Court, which can manipulate both determinants—territory and sovereignty—to disempower Native Nations. Across these cases, although the Court oftentimes refers to the limited nature of tribal sovereignty to justify its decisions, it also

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152 *See supra* text accompanying notes 68–74.

153 *See supra* text accompanying notes 79–88.

154 *See supra* text accompanying notes 113–18.

155 Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 585 (1823) (holding that "the exclusive right to purchase from the Indians resided in the government").

frequently evokes the metes and bounds of tribal territory to determine the limits of tribal power. Lands owned by nonmembers within a reservation are jurisdictional enclaves and set apart from the rest of the Native Nation's territory. Areas within a reservation that are publicly accessible to nonmembers are no longer part of the Native Nation's territory as a matter of implicit cessation. Lands that do not retain a distinctly "Indian" character are excised from the Native Nation's territory and effectively incorporated by the surrounding state for the purpose of regulatory jurisdiction. These three spaces are incongruous with tribal territory as a matter of ownership, accessibility, and identity and thus fall outside the tribe's domain of authority.

Justice Blackmun's dissent in *Brendale*, however, stands apart as providing a robust conception of tribal territorial sovereignty: "[O]nce the tribe's valid regulatory interest is established, the nature of land ownership does not diminish the tribe's inherent power to regulate in the area. . . . The Court has affirmed and reaffirmed that tribal sovereignty is in large part geographically determined."[156] In the eyes of Blackmun, none of the three features identified by White and Stevens—nonmember ownership, public accessibility, nor loss of "Indian" character—were jurisdictionally significant, and Yakima Indian Nation retained its authority over the entirety of its reservation territory. Blackmun's affirmation of the territorial sovereignty of Native Nations—of the importance of ensuring their authority remains commensurate with their territory—echoes Chief Justice Marshall's words in *Worcester v. Georgia*.[157] Despite not being the prevailing view of the Court, Blackmun's vision serves as a reminder that the territorial incongruities relied on by the Court to restrict tribal power are judicial constructions. They are neither permanent nor preexisting landmarks on the jurisdictional landscape, but rather judicially imagined and imposed in a process not dissimilar to mapmaking.

B. The Court as Cartographer

Mapmaking is a powerful tool of empire.[158] By modeling and anticipating the world that the conqueror seeks to bring about,

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156 Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 457 (1989) (Blackmun, J., dissenting).

157 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation, then, is a distinct community, occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force . . . ."), *abrogated by* Organized Vill. of Kake v. Egan, 369 U.S. 60 (1962).

158 *See* Bassett, *supra* note 19, at 316 (arguing that nineteenth century mapping of West Africa promoted, assisted, and legitimated the extension of the French and British empires into the region).

mapping can be "a lethal instrument to concretize the projected desire on the earth's surface."[159] It can also facilitate control by reducing people and places to representations subject to state manipulation. The act of drawing lines on paper, however, is not the only way in which mapmaking functions to further colonialism. Cartography can take far more subtle and abstract forms while employing the same tactics of construction and control to dispossess and disempower. This Section focuses on the cartographic practices of the Supreme Court. To begin, however, it briefly discusses the ways in which critical geographers have understood the cartographic practices of empires.

Maps are visual representations of the distinct territories of various sovereigns. Maps, however, are by no means neutral or objective: "[M]aps must be understood as social constructions laden with value, as cultural and class productions that serve interests, express intentions, and naturalize a particular ideological position."[160] As constitutive products, maps are neither static descriptions of reality nor simply subjective interpretations of the spatial. They play an active role in constructing the world that they presume to reveal.[161] J.B. Harley, a leading figure of critical cartography, has written extensively on the ways in which cartography supported the colonization of the Americas.[162] Specifically, cartography allowed for the construction of an "anticipatory geography" which could then "create what followed": a New Spain for possession and settlement, for example.[163] Cartography thus plays a vital role in legal claims-making. It creates the visual and conceptual space of jurisdiction by appropriating lands as territories. Although a pictorial depiction is not enough to translate desire into reality, it does lay the groundwork for subsequent legislative or military action to physically capture what has already been visually and presumptively claimed.

Examples of such anticipatory geographies abound. In 1784, Thomas Jefferson drew a map of fourteen states carved from the lands stretching between the Appalachian Mountains and the Mississippi River.[164] The Jefferson-Hartley map, consisting of empty spaces evenly

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159 Thongchai Winichakul, Siam Mapped: A History of the Geo-Body of a Nation 130 (1994).

160 Craib, *supra* note 9, at 13.

161 *Id.*

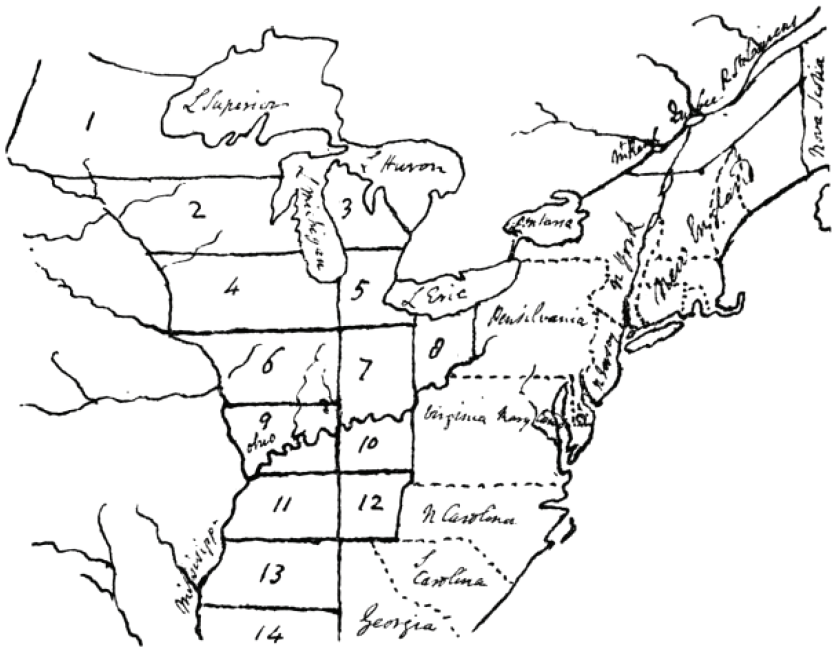
162 *See, e.g.*, J. Brian Harley, *Rereading the Maps of the Columbian Encounter*, 82 Annals of the Ass'n of Am. Geographers 522 (1992) [hereinafter Harley, *Rereading the Maps*]; J.B. Harley, *Maps, Knowledge, and Power*, *in* The Iconography of Landscape: Essays on the Symbolic Representation, Design, and Use of Past Environments 277 (Denis Cosgrove & Stephen Daniels eds., 1988).

163 Harley, *Rereading the Maps*, *supra* note 163, at 532.

164 *See* Michael Witgen, *A Nation of Settlers: The Early American Republic and the Colonization of the Northwest Territory*, 76 Wm. & Mary Q. 391, 391 (2019).

divided by straight and authoritative lines, primed the American political imagination for the taking of Indigenous lands and their reinscription with statehood. It rendered these lands comprehensible and gave material form to a settler-colonial vision of gradual expansion that would later find legal footing in the Northwest Ordinance.[165] The map played a vital role in constituting a "tangible order" for the developing nation.[166] Thus, cartography both precedes and sets the stage for the coalescence of sovereign authority and its extension to new people and places.

FIGURE 2. JEFFERSON-HARTLEY MAP[167]



The act of mapmaking is also an act of control, a process by which places and people are translated into objects susceptible to comprehension, colonization, and consumption.[168] The ability to "see"

165 *Id.* at 391 ("The map, in effect, performs the ideological work imagined by the ordinances. It erases the presence of Native peoples and inscribes indigenous land with new meaning, as nascent states poised to enter the union on an equal footing with the original thirteen.").

166 Craib, *supra* note 19, at 15–16 ("The hope [of cartography] was that a geometric survey . . . would make the new lands comprehensible and provide tangible order for a developing empire. Such undertakings were designed to help conceptualize a unified empire and assume visual and symbolic possession of new spaces under its control.").

167 Witgen, *supra* note 164, at 392 fig.2.

168 Craib, *supra* note 19, at 14 ("Maps are powerful instruments that allow for the perception and conceptualization of totality, of macrospace, while aiding in the control

people and places in their totality, through a panoptic lens, lends itself easily to the ability to "possess" the observed. For example, consider the Imperial Federation Map, published in 1886 as part of the Colonial and Indian Exhibition, "a showcase for the wealth and industrial development of the British Empire."[169] The purpose of the map was not to provide a tool of navigation, but rather to serve as propaganda for the empire, visually representing and projecting its power. Around the perimeter of the map are drawings of people subject to the British Empire, all of whom are turned to face Britannia in the center, sitting atop of the world. This center-periphery relationship is reinforced by the sea routes drawn across the map which connect Britain, also at the heart of the display, to its various possessions shaded in pink. The map is more aspirational than it is descriptive—it is a fantastical imagining of the unified and absolute control that Britain seeks to exert on the ground. Maps such as these project a vision of a cohesive, centralized, and unified empire—with the metropolis at its center, and power extending outwards in an orderly and routinized manner—that obscures the unevenness and heterogeneity of empire on the ground.[170] Yet in controlling their representations, the cartographer controls how these people and places are to be understood by a Western audience. Control of representations then bleeds into control of the represented as the British Empire seeks to consolidate the rule it asserts, closing the gap between the cartographic and the real.

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of space and populations without requiring direct experience. At least theoretically, maps create a landscape of legibility and control, a simplified space amenable to a single set of eyes." (citations omitted)).

169 Walter Crane, *Imperial Federation Map of the World Showing the Extent of the British Empire in 1886*, Persuasive Maps: PJ Mode Collection, https://digital.library.cornell.edu/catalog/ss:3293793 [https://perma.cc/VW7X-W8RA].

170 *See* Benton, *supra* note 19, at 2 ("Even in the most paradigmatic cases, an empire's spaces were politically fragmented; legally differentiated; and encased in irregular, porous, and sometimes undefined borders. . . . and not at all consistent with the image produced by monochrome shading of imperial maps.").

FIGURE 3. IMPERIAL FEDERATION MAP OF THE WORLD SHOWING THE EXTENT OF THE BRITISH EMPIRE IN 1886[171]

In its tribal jurisdiction doctrines, the Supreme Court acts as a cartographer by spatializing sovereign authority, employing the same tactics of claims-making and control. It operates against a general presumption that sovereign authority follows territorial lines:

> Looking at any wall map or atlas, we see a world composed of states. The earth's surface is divided into distinct state territories. Each is demarcated by a linear boundary, an edge dividing one sovereignty from the next. The division is accentuated when each territory is blocked out in a separate color from neighboring states, implying that its interior is a homogeneous space, traversed evenly by state sovereignty. Our world is a jigsaw of territorial states . . . .[172]

This presumption is in part why tribal-state jurisdictional conflicts arise. To the extent a state thinks non-Indian fee lands within a tribal reservation—or, more generally, the tribal reservation in its entirety—fall within its territory, it would presume that it has authority over those

171 Crane, *supra* note 169.
172 Biggs, *supra* note 19, at 374.

lands. A Native Nation which recognizes reservation lands as tribal territories distinct and apart from the state would presume that its jurisdiction controls. The Court, in mediating such disputes, has near unbridled power to decide what constitutes tribal territory, as opposed to state territory, for purposes of regulatory and adjudicative jurisdiction. In other words, territory, as the conceptual space of jurisdiction, is what the Court manipulates to determine the spatialization of tribal power.

The Supreme Court alters the boundaries separating sovereigns when it reimagines the territories of Native Nations. In *Brendale*, for example, the Court imbued the boundaries of Brendale's and Wilkinson's properties with jurisdictional significance, transforming lines that might divide private neighbors into international borders separating sovereigns.[173] The Court in essence created an internal border, according to notions of ownership, where one did not previously exist as a matter of territorial division. Thus, in determining the metes and bounds of tribal power, the Court redrew the boundaries that separate and divide sovereigns: Yakima Indian Nation's power ended where Wilkinson's property began, and Yakima County's power began where the Nation's ended. Moreover, through a single case, it shifted the distribution of state and tribal power over reservation lands: The Court allowed state power to reach within the Yakima Indian Nation's reservation borders to the non-Indian fee lands located inside, while it withheld the Nation's authority over areas within its exterior boundaries. As a consequence of the Court's manipulations, the lines that demarcate the areal authority of sovereigns on a standard map provide little guidance as to the actual geography of either's power.[174] The Court's practice generates a map that relies less on bounded homogeneous areas for determining the spatial organization of sovereigns and more on shifting notions of ownership, accessibility, and identity. As a result, the territories on the Court's map are constantly in flux. Jurisdiction becomes less reliant on physical territory and the borders drawn by mapmakers, and more reliant on judicial discretion, specifically the Court's jurisdictional treatment of perceived incongruities in the tribal landscape.

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173 *See supra* Section II.A.

174 Indeed, it is not clear if, under the Court's practice, tribal jurisdiction can be deemed a form of territorial jurisdiction at all, for the Court has revised three of territorial jurisdiction's fundamental characteristics. As a general matter, territorial jurisdictions are "defined by area"; "definitely bounded" in the sense that the "geographic boundaries of a jurisdiction are a 'bright line' rule, never a flexible standard"; and "abstract and homogeneously conceived." Ford, *supra* note 32, at 852–53. Tribal jurisdiction, in the hands of the Court, is defined by attributes and conditions, malleable and variable according to shifting standards, and fact-specific and uneven as state and tribal jurisdictions overlap and commingle.

The resultant product is not unlike the Jefferson-Hartley map—an anticipatory geography. With each incongruity, the Court carves an inroad within a tribal reservation for state power to follow. With each jurisdictional enclave, the Court reduces the territorial sovereignty of Native Nations and expands the extraterritorial application of state laws. The gradual erosion of Native territories and these encroachments on reservation borders anticipate a future landscape in which Native Nations are subsumed within state authorities. The Court's practice thus dispossesses in the same way as Jefferson's map: They both presume the existence of lands unencumbered by tribal authority and ready them for state taking, whether through jurisdictional challenges or violence.

The Court's practice is also an exercise of control. In the same way that the cartographer of the Imperial Federation Map exercised control over the represented, the Court decides the essential identity of tribal territories, and ties tribal power to the maintenance of such character. The Court freezes in time an image of tribal lands, and renders territory legally legible as tribal territory when it conforms to such an image.

The Court's resolution of state-tribal jurisdictional disputes, by haphazardly reconfiguring jurisdictional boundaries, also reveals the limits of its spatial imagination, consistent with the limited imagination of a Cartesian map. The Jefferson-Hartley map, for example, embodies a particular kind of a spatial imagination: an emerging union comprised of sovereign states each exclusively occupying their own distinct and neatly divided plot of land. This kind of spatial imagination, particularly when enacted as land policy, forecloses alternative, more creative visions of power as existing in shared, layered, and overlapping configurations. Like the translation of a rich complex world into the flat landscape of a pictorial map, the Court's one-dimensional shifting of tribal-state boundaries similarly fails to account for the existence and possibility of multidimensional relations. Arrangements of shared or concurrent power that might have developed through political processes involving Congress, states, and Native Nations either fall to the wayside—flattened by the Court's manipulations—or never emerge due to the Court's blunt interventions.

The Court's practice differs from those of cartography, however, in an important regard. Whereas the Imperial Federation Map was largely visual in nature and thus created an inconsistency between the power it projected and the power its sponsor could claim, the jurisdictional mapping of the Court has direct material consequences on the spaces it visualizes. The lands it deems insufficiently tribal in character fall out of the tribe's control altogether, making the gap between the geography of power envisioned by the Court and the one exercised on the ground exceedingly narrow. Thus, by controlling the space of tribal authority,

the Court renders cartography and conquest not only concurrent and related pursuits, but an intertwined process: The boundaries of tribal territory that the Court draws are the metes and bounds by which tribal power must abide.

III
The Colonial Consequences of a Cartographic Court

A cartographic court is thus a powerful court. The cartographic practices of construction and control, which have served empires past and present, allow the Court to manipulate the imagined territoriality of Native Nations to divest them of jurisdiction over their reservation lands. The consequences of this practice, beyond the direct limitations on the sovereign powers of Native Nations and the constriction of their territorial sovereignty, are threefold. Section III.A. discusses the problems of administrability posed by the Court's checkerboarding of jurisdiction, specifically the difficulty of tribal governance within a fragmented jurisdictional landscape and the related burden of spatial fixes. This Note then considers in Section III.B. the imaginative geography that emerges from the Court's cartographic practice and the ways in which it reifies Indigenous life. Lastly, in Section III.C., this Note argues that the Court's approach to tribal jurisdiction allows it to circumvent the need for clear congressional intent in the diminishment of tribal reservations, for it can effectuate *de facto* diminishment by manipulating the spatial bounds of tribal sovereignty. These three consequences highlight the colonial nature of the Court's cartographic practice.

A. Tribal Administration

An immediate consequence of the Court's practice is the checkerboarding of jurisdiction. In the aftermath of allotment, reservation lands developed a "checkerboard" appearance from the dispersion of both Indian and non-Indian owned lands within a reservation.[175] The Court has since checkerboarded jurisdiction as well, as tribal and state regulatory regimes must co-exist within a single reservation and vie for control parcel-by-parcel. The lack of regulatory cohesion across a reservation, as well as the uncertainty that comes with the Court's case-by-case jurisdictional determinations, makes it

175 *See supra* note 54 and accompanying text (describing checkerboarding).

difficult for Native Nations to regulate in a comprehensive manner.[176] This difficulty is most obvious in the context of zoning.

The power to control land-use, including the power to zone lands for various uses, is an essential power of local government.[177] For Native Nations, this power to zone is an essential power of self-government, inherent to their sovereignty. The power to zone allows a government to control and regulate development across the entirety of its territory, while taking into account public welfare, economic needs, and resource availability and conservation.[178] This type of comprehensive planning presumes the concentration of zoning power in a single authority responsible for the population and resources it governs.[179] Competing authorities seeking to regulate the same or adjacent lands can lead to incompatible uses or undermine broader, comprehensive schemes, causing practical problems for both governments involved. The serious burdens posed by the disaggregation of zoning authority did not stop the Court in *Brendale*, however, from creating jurisdictional enclaves subject to state zoning authority within the reservation of Yakima Indian Nation.

Imagine the following: A Native Nation, heavily reliant on the lumber industry for its income, seeks to protect a significant portion of its forested reservation lands from residential and commercial development and, thus, zones those lands accordingly. Several nonmembers own plots of land within that restricted area. Each seeks to develop their property into a sawmill. The Native Nation's zoning designation of the area disallows such land use, but the surrounding county's laws do not. After

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176 *See* City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 200 (2005) ("[A] checkerboard of state and tribal jurisdiction . . . would 'seriously burde[n] the administration of state and local governments'. . . ." (quoting Hagen v. Utah, 510 U.S. 399, 421 (1994))). The fracturing of authority can also occur in the context of adjudicative, rather than regulatory, jurisdiction. In *Plains Commerce*, the practical effect of the Court's distinction between alienation and activities was that the use of land might be governed by tribal law, but the sale of land would not be. Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316 (2008). The same piece of property would be subject to two different legal regimes, and various disputes concerning the property would need to be brought in different courts. This poses a different kind of administrability problem for Native Nations, as well as states, as it generates uncertainty as to which sovereign's legal system will govern, making it difficult for any party involved to plan and invest in their operations and affairs.

177 Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390–95 (1926) (recognizing the legitimacy of a locality's state-delegated right to impose zoning ordinances as a way of regulating land-use).

178 *Id.* at 394 (recognizing that zoning could uphold the government's important interests in peaceful residential environments, noise reduction, and increased pedestrian safety).

179 For example, the federal government has "complete power" over federal lands and resources, preempting the application of state laws. Kleppe v. New Mexico, 426 U.S. 529, 541–42 (1976) (holding a state law regarding wildlife management on federal lands was preempted by a competing federal statute).

prolonged litigation, the Court finds that those properties are subject to the country's zoning jurisdiction, despite their location within the tribe's reservation, and thus the individual property-owners are permitted to convert their forested plots into commercial properties. This is a slightly modified version of the land-use conflict at the heart of *Brendale*, but it is useful for illustrating two immediate consequences that flow from the checkerboarding of jurisdiction.

First, although the Court might have drawn a fictional border between tribal lands and private properties as a matter of regulatory jurisdiction, such borders do little to prevent the effects of development from spilling over and affecting surrounding tribal lands, which presumably remain under tribal jurisdiction as protected zones. The detrimental effects are myriad: The developments would likely disrupt soil conditions, deteriorate the air quality, alter drainage patterns, destroy trees, natural vegetation, and wildlife habitat, increase human activity and disruption in the area, leading to more traffic and increased infrastructural developments, such as roads and waste disposal systems to support the sawmill, in the area.[180] None of these consequences would be cabined to the carved-out properties alone; they would necessarily disrupt the Native Nation's plan to conserve and protect that forested region for its own economic use and sustainability. Resource conservation is also an area in which comprehensive and cohesive land-use regulation is particularly important as disruptions to one part of an ecosystem necessarily affect the ecosystem as a whole.[181] Thus, the carving out of jurisdictional enclaves not only undermines the broader policy goals of Native Nations, undermining their self-determination and ability to govern within their own reservations, but also restricts their ability to exercise an essential governmental power as sovereign nations.

Restrictions on tribal zoning authority also pose a problem for the Court's division of tribal powers along the internal-external axis: The inherent sovereignty of Native Nations "generally extends only to what is necessary to protect tribal self-government or to control *internal relations*, and is divested to the extent . . . it involves the tribe's *external relations* with nonmembers . . . ."[182] What happens when the tribe's external relations pose problems for its ability to control internal

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[180] Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 445, 420 n.5 (1989) (noting the district court made such findings with respect to Brendale's proposed development).

[181] *See* Craig A. Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. Land Use & Env't L. 441, 510–11 (2007) (discussing the many ways in which land use regulations have been used and may be used in ecosystem protection).

[182] *Id.* at 409–10 (citing Montana v. United States, 450 U.S. 544, 564 (1981)).

relations? In the aforementioned conflict, the sawmill operations presumably fell within the "external" category, and thus outside of tribal authority, and yet many of its consequences would be felt internally as an impediment to the tribe's ability to achieve its conservation goals and protect the health and welfare of its citizens.[183] To sustain its external-internal division, the Court must construct and maintain a legal fiction that threats and harms stop at judicially constructed borders, or dismiss them altogether as inconsequential. In either case, the Court is privileging the needs and desires of nonmembers over those of Native Nations by allowing the divestiture of a tribe's power to regulate "external" affairs to trump its inherent and retained power to control its "internal" affairs. In other words, the nonmember's desire to be free of tribal regulation weighs heavier on the Court's mind than the tribal nation's claim to regulate as a sovereign. The internal-external distinction ultimately acts as a formalistic cover for the balancing of interests that the Court is conducting, between the interests of individual nonmembers and those of sovereign tribes, in which the scales seem to tip almost invariably towards the former.

Second, in allowing a state to penetrate a tribal reservation with its laws and regulations, the Court is authorizing a form of spatial fix.[184] Spatial fixes provide openings for continued accumulation in new spaces and territories when previously fixed spaces become either untenable—i.e., incapable of generating further value—or insufficient, as the need for new markets, labor, resources, and economic opportunities grows.[185] It provides a useful framework for understanding the relations of exploitation that the Court's cartographic practice generates. Consider, again, the sawmill example. The nonmembers' operations of sawmills within a tribal reservation allow them to take advantage of another sovereign's lands to produce lumber—thereby fixing the need for expansion by taking over new spaces—while largely externalizing the

183 This is perhaps an area where the second *Montana* exception would control, which allows for tribal jurisdiction over nonmember activity when it threatens the tribe's political integrity, economic security, and health and welfare. *See supra* note 69 and accompanying text (describing the exception). Yet, the Court has applied this exception in exceedingly narrow circumstances, and largely dismissed the concern in *Brendale*, 492 U.S. at 428–29 ("[T]hat the so-called second *Montana* exception is prefaced by the word 'may' . . . indicates to us that a tribe's authority need not extend to all conduct . . . but, instead, depends on the circumstances.").

184 *See* David Harvey, *Globalization and the "Spatial Fix"*, 2 Geographische Revue 23, 24 (2001). David Harvey, a Marxist economic geographer, first deployed the term "spatial fix" to describe "capitalism's insatiable drive to resolve its inner crisis tendencies by geographical expansion and geographical restructuring." *Id.* at 24. Harvey's idea of the spatial fix is a continuation and reconstruction of Marx's writings on the geography of accumulation, and it explains both the spatial and temporal dynamics of capitalism. *Id.* at 25.

185 *Id.* at 25–26.

health and environmental effects of such production to the surrounding tribal community. The same strategy can be employed by states to extract oil, minerals, or any other resource from tribal reservations, so long as the Court is ready to nullify any tribal regulations that might stand in the way by shifting jurisdiction to the state. These spatial fixes accumulate to generate an uneven geography of development in which tribal lands are the new frontier of capital accumulation, allowing benefits to flow to the states while harms concentrate in tribal lands and bodies. At the heart of this operation is the Court which produces new spaces for capitalist imperatives by altering the jurisdictional boundaries between sovereigns.

B. Imaginative Geography

The Court, in constructing territorial incongruities, has also conceptualized the congruous—an imagining of how Indian country *should* appear to render ownership, accessibility, and various characteristics incompatible. This congruous landscape is an imagined geography, a product and way of othering lands and peoples that both reflects and enables relations of power. To construct such a geography, the Court engages in the "universal practice of designating in one's mind a familiar space which is 'ours' and an unfamiliar space beyond 'ours' which is 'theirs.'"[186] The making of such geographical distinctions does not require the prior existence or actual formation of distinct lands and territories; their durability relies on the boundaries this practice constructs in the Court's perception of tribal territoriality, and the subsequent ways in which the Court treats "theirs" differently from "ours."

To draw such distinctions, the Court endows the material dimensions of a space—the land ownership structure, its accessibility to outsiders, and its distinctiveness from surrounding polities—with legal meaning, transforming them into markers on a jurisdictional landscape. Fee simple ownership by non-Indians marks lands as distinctly non-tribal for it disrupts the homogeneous population that the Court envisions for Native Nations. The presence of non-Indians within a reservation further represents a tribe's failure to exclude and protect the integrity of their polity, leading to the diminishment of the tribe's authority over the places such non-Indians frequent. In the Court's eyes, Native peoples occupy some distant land out there, separate, and distinct from the rest of society—and to the extent there is commingling, the essential character of the tribe is lost and assimilated with the surrounding populous.

186 SAID, ORIENTALISM, *supra* note 26, at 54.

Integral to the Court's imagining of Indian country is its perception of tribal lands as part of a primordial pristine wilderness. This imagined pre-modern character of tribal territories distinguishes them, in the eyes of the Court, from the surrounding cosmopolitan and developed cities. The result is an imaginative geography of Indian country as a homogeneous, isolated, separate, wild, and undeveloped place. These values, attributed to the space by the Court, dramatize the distance and difference between *their* lands and *our* lands. They also legitimize the out-of-place nature of non-Indian fee lands, publicly accessible places, and "non-Indian" spaces in order to justify their differential treatment.

The Court's jurisdictional practice thus essentializes Indian country as having a distinct set of attributes necessary to its identity: homogeneity, isolation, and underdevelopment. Beyond the fact that "these characteristics betray a stereotyped and almost patronizing view of Indians and reservation life," they also have a temporal dimension.[187] They require a place to remain static in time and unchanging so as to preserve the integrity of these characteristics. To the extent the material dimensions of Indian country no longer map onto the Court's imagined geography, they create an uncomfortable dissonance between the tribal territory that the Court envisions and the one that actually exists. The Court reconciles this difference by excising those changed territories from Indian country, and in doing so, the Court preserves the essentialism that it constructs. This process, however, fails to recognize the dynamism of Native Nations, and instead confines them to an atemporal and imagined conception of indigeneity. Native Nations must maintain exclusionary borders and forgo economic development in order to abide by the Court's view of what is characteristically "Indian." This is a denial of the self-determination of Native Nations, or their autonomy to determine the contours of their own societies and polities. The result is an empowered Court that can forcefully reproduce the Indian country it imagines each time it deems a perceived incongruity in the tribal landscape jurisdictionally relevant.

C. Territorial Diminishment

Lastly, the Court's cartographic practice allows it to engage in a form of *de facto* diminishment, and thereby venture into legal territory that belongs exclusively to Congress. Diminishment refers to the legal process by which Congress can reduce the size of an Indian reservation.[188]

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[187] Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 464–65 (1989) (Blackmun, J., dissenting).

[188] *See* Solem v. Bartlett, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries.").

This power of diminishment rests exclusively with Congress, and its exercise requires a clear expression of congressional intent.[189] This is a fundamental principle of federal Indian law that is both rooted in the U.S. Constitution and affirmed by decades of precedent.[190] Yet, the Court, in shifting the territorial bounds of tribal sovereignty, has effectively seized this power for itself.

The diminishment of reservation borders is bound by *Solem v. Bartlett* and its progeny.[191] In *Solem*, the Court found that the borders of the Cheyenne River Sioux Reservation, as specified in a nineteenth-century treaty, survived the enactment of a federal statute opening the reservation for non-Indian homesteading.[192] The reservation borders persisted through allotment, and those lands remained reservation lands. In writing for a unanimous court, Chief Justice Marshall emphasized:

> When both [the statute] and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening.[193]

In subsequent cases, the Court has deviated from this strict principle by going beyond the congressional text to examine post-enactment fact and circumstance in order to infer tribal diminishment.[194] This shift in methodology from strict statutory interpretation to ad-hoc common-lawmaking has allowed the Court significant discretion to adjust the formal, treaty-protected borders of tribal reservations.[195] The role that the Court has carved out for itself in matters of diminishment,

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189 *See id.* ("Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.").

190 *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. Accordingly, only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be 'clear and plain.'" (citations omitted)).

191 465 U.S. 463 (1984).

192 *Id.* at 464.

193 *Id.* at 472.

194 *See, e.g.*, Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 604–05 (1977) ("The longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use [may create] justifiable expectations . . . ."); Hagen v. Utah, 510 U.S. 399, 421 (1994) (explaining that "jurisdictional history" and "the current population situation . . . demonstrat[e] a practical acknowledgment" of reservation diminishment; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" (internal quotation marks omitted)).

195 *See* Frickey, *supra* note 2, at 21 ("In short, the Court implicitly embraced a common-law-like approach that displaced statutory interpretation.").

however, was explicitly disclaimed in *McGirt v. Oklahoma*.[196] Writing for the majority, Justice Gorsuch returned the Court to the formalist approach established in *Solem*: "To determine whether a tribe continues to hold a reservation, there is only one place we may look: the Acts of Congress."[197] Extratextual considerations, such as historical practices or current demographics, do not suffice to disestablish or diminish reservations; explicit congressional intent is required.[198] Thus, *McGirt* can be understood as foreclosing the pathway created by the Court in earlier cases for *judicial*, as opposed to congressional, diminishment.

Whereas *Solem* and subsequent diminishment cases concern the formal boundaries of tribal reservations, the Court's civil jurisdiction cases, such as *Brendale*, *Plains Commerce*, *Bourland*, and *Sherrill*, pertain to a tribe's power to regulate or adjudicate within its reservation.[199] Although *McGirt* has made it more difficult for the Court to rely on the former line of cases to diminish a reservation, the latter line of cases allows the Court to achieve substantially the same result—a sort of *de facto* diminishment. In its jurisdictional cases, when the Court designates land within Indian country as outside the bounds of tribal authority, the Court is in effect diminishing the boundaries of tribal reservations. By stripping a tribe of jurisdiction, it prevents the tribe from regulating portions of its reservation lands, or from applying its laws to cases and controversies that arise from those lands, and in so doing, shifts control over those lands to a neighboring state. Even if the land nominally remains a part of Indian country, it is subject to the control of another sovereign and, effectively, lost to the tribe. Thus, each time a conflict arises between a state and tribe, each seeking to assert its own laws, the Court has an opportunity to assess the metes and bounds of the tribe's power and determine where the tribe's territory begins and ends for the purposes of regulation. The Court can thus effectuate diminishment in a case-by-case manner, carving out piecemeal portions of a tribe's reservation each time. And, through this process, the Court creates a role for itself in the adjustment of reservation borders.

Conclusion

The Supreme Court, in drawing the legal boundaries between sovereigns and determining the spatiality of their jurisdictional power, is acting as a cartographer. It is superimposing a new order of sovereign

196 591 U.S. 894 (2020).
197 *Id.* at 2462.
198 *Id.* at 2469.
199 *See* City of Sherrill v. Oneida Indian Nation of New York, 544 U.S. 197, 215 (2005) (noting that diminishment is a "different, but related, context").

relations on our existing system (however flawed) of territorial division. With each decision, the Court in effect sanctifies a particular set of state and tribal borders and determines the rules of their revision. And across cases, the Court constructs a legal geography that is increasingly unmoored from physical space. Thus, the borders that might serve to delineate the metes and bounds of Native Nations on a standard map do not provide accurate guidance as to the reach of tribal authority. Importantly, however, this does not mean that territory is no longer a relevant determinant of jurisdictional reach, but rather that it is subject to judicial manipulation. Material features of the landscape—non-Indian fee lands, public access, and changing characteristics and demographics—take on jurisdictional significance in the hands of the Court and become incongruities in need of excision from a Native Nation's sovereign domain. This process is imaginative in that it involves the ascription of meaning to space, but that does not make it any less real. As the Court wrests more and more land out from the authority of Native Nations, it constricts their territorial sovereignty, limiting the spaces in which they can exercise their sovereign powers. The goal is not simply the gradual or slow erosion of jurisdiction, but indeed the complete subsumption of Native Nations within the territorial sovereignty of the states. The Court's cartographic practice thus functions as colonialism by other means.