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Property, Sovereignty, and Governable Spaces

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Abstract

This Article responds to the controversy surrounding the recent U.S. Supreme Court decision in *Michigan v. Bay Mills Indian Community*[1] regarding off-reservation assertions of tribal sovereignty. Although the *Bay Mills* Court upheld tribal sovereign immunity over land purchased outside reservation boundaries, opinions about whether the decision was worth the risk of pursuing certiorari in an increasingly hostile judicial climate are decidedly mixed. This Article uses the debates about *Bay Mills* as an opportunity for critical analysis of the most common way tribes attempt to assert sovereignty outside the reservation: by purchasing land in fee. Recognizing the limitations of the "fee-to-trust" approach, this Article uses critical legal geography to question the underlying assumption that property rights in land are necessary for asserting sovereignty. In doing so, the Author offers the model of "governable spaces" as an alternative way of conceptualizing sovereignty as spatially contingent and socially malleable, in order to explore strategic alternatives to the fee-to-trust approach. Specifically, the Author argues that usufructuary rights, contract rights, and consultation rights concomitantly generate governable spaces through which tribes can expand sovereignty outside their reservations without purchasing land in fee. Beyond illuminating ways to avoid litigation, the Author posits that the governable spaces model is a more sustainable

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1. 134 S. Ct. 2024 (2014).

approach to advancing off-reservation sovereignty claims because it can flexibly address a broader range of traditionally competing interests.

Introduction

Recent Supreme Court Indian law jurisprudence regarding tribal sovereignty illustrates a moment of conflict.[2] As tribes engage in nation-building,[3] in part by seeking opportunities beyond reservation boundaries to improve the economic, social, and cultural livelihoods of Native people, they are met by an increasingly hostile Supreme Court that favors state and federal interests.[4] Whereas the Court has long affirmed "defensive" claims of sovereignty to protect tribal interests from encroachments by state and federal governments, it has yet to affirm "offensive" claims that assert sovereignty outside reservation boundaries.[5] To the contrary, recent cases suggest that tribes' attempts to transcend the limits of their reservations in pursuit of the kind of economic and social recovery that is often impossible within those federally imposed boundaries, trigger at least the consideration that the offensive assertion of tribal sovereignty should be avoided altogether.

The recent Supreme Court decision in *Michigan v. Bay Mills Indian Community*[6] can be viewed as both an illustration of this phenomenon and a call for Indian-law scholars and advocates alike to consider strategies to address the current sovereignty paradigm. In *Bay Mills*, the Court reviewed the Tribe's claims that, pursuant to the doctrine of tribal sovereign immunity, the

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2. *See* Frank Pommersheim, *At the Crossroads: A New and Unfortunate Paradigm of Tribal Sovereignty*, 55 S.D. L. REV. 48 (2010).

3. "Nation-building" refers to the approach that successful tribes and Indigenous communities have used to pursue economic, cultural, and political development for their people. *See* Stephen Cornell & Joseph P. Kalt, *Two Approaches to the Development of Native Nations: One Works, the Other Doesn't*, *in* REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT 3, 18–32 (Miriam Jorgensen ed., 2007). It can be summarized as an approach where Native nations assert decision-making power, back up that power with effective institutions that match Indigenous political culture, and engage in strategic decision making, and where leaders are both nation-builders and community mobilizers. *Id.* This Article uses the concept of nation-building broadly to refer to a comprehensive mode of governance that seeks socio-economic and institutional growth in favor of Native people. For a full discussion of nation-building, see REBUILDING NATIVE NATIONS: STRATEGIES FOR GOVERNANCE AND DEVELOPMENT (Miriam Jorgenson ed., 2007).

4. Pommersheim, *supra* note 2, at 54.

5. *Id.* at 55.

6. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014).

State of Michigan could not sue it over the construction of a casino on land purchased in fee well outside the reservation boundaries and brought into trust as "Indian Land" under the Michigan Indian Land Claims Settlement Act (MILCSA).[7] In the months leading up to the decision, leaders from throughout Indian country feared that the case would mean the judicial unraveling of tribal sovereign immunity and tribal sovereignty more generally.[8]

The Court's ultimate affirmation of tribal sovereign immunity in its five-four decision inspired a collective sigh of relief across Indian country. However, the narrow win in *Bay Mills* should encourage tribal advocates to think carefully about how they use sovereignty as a tool to transcend reservation boundaries in the spirit of nation-building. Purchasing land outside reservation boundaries to expand tribal sovereignty is not only judicially precarious,[9] but also limited by significant legal and bureaucratic hurdles.[10] Acquiring fee title in land may be financially difficult or politically problematic for any number of practical reasons that would pose obstacles to a purchase. Even if a tribe can purchase land, it must then petition the Secretary of the Interior to bring the land into trust for the tribe, and the best-case scenario secures only a beneficial interest that falls short of

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7. *Id.* at 2029 (citing Michigan Indian Land Claims Settlement Act (MILCSA) of 1997, Pub. L. No. 105-143, § 107(a)(3), 111 Stat. 2652, 2658).

8. Matthew L.M. Fletcher, *(Re)Solving the Tribal No-Forum Conundrum:* Michigan v. Bay Mills Indian Community, 123 YALE L.J. ONLINE 311, 314–15 (2013).

9. *Id.* at 314 ("[I]t appears the Supreme Court, to the horror of Indian Country and tribal interests, might now resolve this question with a broad stroke. Both the National Congress of American Indians (NCAI) and the Native American Rights Fund, collectively representing hundreds of Indian tribes nationally, have expressed deep concern about the potential for the Supreme Court to undermine tribal sovereign immunity for all Indian tribes, not only the Bay Mills Indian Community.").

10. Acquiring fee title alone is not enough to reassert sovereignty over lands outside reservation boundaries, and the process for bringing land into trust is often not an option for tribes. *See* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 202–03 (2005) (holding that the Oneida Indian Nation could not avoid local property taxes on fee land, despite its location within the original boundaries of the Reservation, because such avoidance would disrupt state and local governance); *see also* Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465 (2012) (creating the process by which land is brought into trust for the benefit of tribes); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2202–03 (2012) (allowing private suit to proceed against the government where a party challenged the Secretary of the Interior's decision to take land into trust, and expanding the implications of *Carcieri v. Salazar*); Carcieri v. Salazar, 555 U.S. 379, 382–83 (2009) (holding that tribes that were not federally recognized prior to 1934 are not eligible to have land brought into trust under the IRA); Land Acquisitions, 25 C.F.R. § 151 (2012) (establishing that the Secretary of the Interior may deny a request to bring land into trust).

full legal title.[11] Thus the bullet dodged in the *Bay Mills* case should be considered less of a triumph than an opportunity to identify other ways tribes can negotiate reservation boundaries without risking further judicial erosion of tribal sovereignty.

This Article uses *Bay Mills* as an opportunity for a critical analysis[12] of the most common way that tribes assert their sovereignty outside reservation boundaries: by acquiring fee title ownership in land (the "fee-to-trust" approach).[13] The legal principles giving rise to this state of affairs trace their origins to the Marshall Court.[14] In *Worcester v. Georgia*, the Court declared that Indian tribes are "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."[15] In that case, the Marshall Court upheld tribal sovereignty in its most honest form: protecting Native lands against state encroachments and implying full jurisdictional control over any non-Indians who entered those lands.[16] In so finding, the Court also recognized that those preexisting rights to land justified upholding tribal sovereignty.[17]

Ironically, this justification has been historically demonstrated through the reciprocal practice of dispossession, which has been the primary means by which the federal

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11. *See Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2202–03.

12. Scholarship on this case is nascent and generally focuses on the implications of the holding on state-tribal relations. *See, e.g.*, *Federal Indian Law—Tribal Sovereign Immunity*—Michigan v. Bay Mills Indian Community, 128 HARV. L. REV. 291, 301 (2014) ("While the Court's decision is a victory for those who feared the abrogation of tribal immunity, its suggestion that states seek remedies in state law signals approval of leaving the resolution of legal questions central to state-tribe disputes to the states, even when the question concerns the extent of Indian land. Such a view would be inconsistent with recent trends generally favoring greater federal control and congressional support for tribal self-determination, and could result in actions that are detrimental to tribes.").

13. *See* IRA, 25 U.S.C. § 465 (describing the Secretary of the Interior's authority to acquire and to hold in trust lands for Indian tribes); *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2202–03 (describing the Match-E-Be-Nash-She-Wish Band's attempt to reacquire sovereign lands under the IRA); *Carcieri*, 555 U.S. at 383–87 (discussing the Narragansett Indian Tribe's struggle to regain its land); *City of Sherrill*, 544 U.S. at 203–12 (explaining the Oneida Indian Nation of New York's efforts to regain its sovereign land); 25 C.F.R. § 151 (setting forth the "authorities, policy, and procedures" by which the United States can acquire land to be held in trust for Indians).

14. Worcester v. Georgia, 31 U.S. 515 (1832).

15. *Id.* at 557.

16. Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 9 (1991); *see infra* Part II.B.

17. *See Worcester*, 31 U.S. at 557.

government, backed by the Court, systematically stripped tribes of their sovereign rights.[18] Thus, while the fee-to-trust approach attempts to rectify past historical wrongs through the reacquisition of land largely as a response to historical dispossession, it also implicitly adopts the potentially harmful understanding that property is necessary for expanding sovereignty. More broadly then, this Article seeks to reevaluate the assumption that property, as fee ownership in land, necessarily defines *if* or *where* tribes can express sovereignty as a formal jurisdictional matter.[19]

The theoretical framework guiding this inquiry draws on critical legal geography (CLG) as a way to interrogate the conventional bounds of property and sovereignty as they typically operate in law.[20] CLG scholarship rejects the belief that law reflects any preexisting or natural division of people or place and

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18. *See* Singer, *supra* note 16, at 1–2; *see also, e.g.*, Kristen A. Carpenter, Sonia K. Katyal, & Angela R. Riley, *In Defense of Property*, 118 YALE L.J. 1022, 1060–61 (2009) (citing *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), to illustrate the Court's role in dispossession); Kristen A. Carpenter, *A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Nonowners,* 52 UCLA L. REV. 1061, 1066 (2005) (discussing how courts have used property law to legitimize the dispossession of Indian lands).

19. What sovereignty is, or, moreover, what sovereignty *means* for Native people has been the source of a vast and rich body of scholarship, much of which seeks to deemphasize the role of federal law in defining tribal sovereignty as a strict matter of jurisdiction. For example, Sarah Krakoff has defined tribal sovereignty as "a protective shell around tribal life and culture." Sarah Krakoff, *The Virtues and Vices of Sovereignty*, 38 CONN. L. REV. 797, 804 (2006). Stephen Cornell and Joseph Kalt have described sovereignty as "de facto sovereignty," or the real control over internal affairs and resources. Stephen Cornell & Joseph P. Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, *in* WHAT CAN TRIBES DO? STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 1, 14 (Stephen Cornell & Joseph P. Kalt eds., 1992). Indeed, scholars have defined sovereignty as many things, including "cultural sovereignty," "intellectual sovereignty," "experiential sovereignty," and "practical sovereignty." *See* Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109, 1139, 1191, 1195 (2004) (describing how scholars have used each of those terms). This Article treats sovereignty broadly as a threshold for governance. As will be discussed, the purpose of this Article is not to assess what sovereignty may mean to individual communities, but rather to consider how it can exist, as an initial matter, with respect property rights in land.

20. *See* DAVID DELANEY, THE SPATIAL, THE LEGAL, AND THE PRAGMATICS OF WORLD-MAKING: NOMOSPHERIC INVESTIGATIONS (2010) [hereinafter DELANEY, THE SPATIAL, THE LEGAL, AND THE PRAGMATICS OF WORLD-MAKING] (presenting the convergence of socio-legal and critical geographic scholarship as a theoretical framework for critical legal geography); THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE (David Delaney et al. eds., 2001) (discussing the connection between law and geography, and demonstrating the value of geographical perspective to the theory and practice of law).

argues that law and space are mutually and inexorably generative of each other.[21] In the context of Indian law, reservation boundaries are neither fixed nor physical, but instead reflect a series of relationships shaped by a violent history of interactions between people, place, and property law.[22] This is especially relevant because the federal government largely fabricated whatever boundaries do exist through the process of removal and the imposition of the reservation system.[23] Here, CLG offers a useful theoretical basis because it calls into question the remedial effect that property may have for affirming tribal sovereignty in terms of the law, while also illuminating the correlative socio-spatial aspects of property that can help guide advocates toward strategies that avoid risky litigation.

Geographers Nikolas Rose and Michael Watts have argued for an alternative to the intransigency of property and sovereignty as it relates to nation-building through the model of governable spaces.[24] Governable spaces are the "modalities in which a real and material governable world is composed, *terraformed*[,] and populated."[25] Rather than viewing governance as a system of laws that reflects some real spatial phenomenon that preexisted society, the governable spaces model describes governance as a fully relational grid resulting from a continually malleable imbrication of law, land, and polity.[26]

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21. *See* DELANEY, THE SPATIAL, THE LEGAL, AND THE PRAGMATICS OF WORLD-MAKING, *supra* note 20; THE LEGAL GEOGRAPHIES READER, *supra* note 20.

22. Nicholas Blomley, *Law, Property, and the Geography of Violence: The Frontier, the Survey, and the Grid*, 93 ANNALS ASS'N AM. GEOGRAPHERS 121, 123 (2003) [hereinafter Blomley, *Law, Property, and the Geography of Violence*].

23. This in no way seeks to discount the active role that tribes played in affirmatively negotiating treaties and reservation boundaries; however, it is likely safe to say that most tribes would have elected to remain unbounded with respect to any affirmative rights to land ceded to the broader settler-state. The role of property, boundaries, and Native dispossession in the making of the modern United States is discussed further in Part II.B.

24. *See* NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT (1999) [hereinafter ROSE, POWERS OF FREEDOM]; Nikolas Rose & Mariana Valverde, *Governed by Law?*, 7 SOC. & LEGAL STUD. 541 (1998); Michael J. Watts, *Antinomies of Community: Some Thoughts on Geography, Resources and Empire*, 29 TRANSACTIONS INST. BRIT. GEOGRAPHERS 195 (2004) [hereinafter Watts, *Antinomies of Community*]; Michael Watts, *Development and Governmentality*, 24 SING. J. TROPICAL GEOGRAPHY 6 (2003); Michael Watts, *The Sinister Political Life of Community: Economies of Violence and Governable Spaces in the Niger Delta, Nigeria*, *in* THE SEDUCTIONS OF COMMUNITY: EMANCIPATIONS, OPPRESSIONS, QUANDARIES 101 (Gerald W. Creed ed., 2006) [hereinafter Watts, *The Sinister Political Life of Community*].

25. ROSE, POWERS OF FREEDOM, *supra* note 24, at 32 (emphasis added).

26. *See id.* at 31–32.

> To govern is to cut experience in certain ways, to distribute attractions and repulsions, passions and fears across it, to bring new facets and forces, new intensities and relations into being . . . [and] involves novel ways of cutting up time in order to govern productive subjects: [W]e must learn to count our lives by hours, minutes, seconds, the time of work and the time of leisure, the week and the weekend, opening hours and closing time. . . . It is also a matter of space, of the making up of governable spaces: populations, nations, societies, economies, classes, families, schools, factories, individuals.[27]

The law may limit tribal sovereignty through traditional interpretations of reservation boundaries as dispositive of civil and regulatory jurisdiction. But CLG and the model of governable spaces suggests that the law, vis-à-vis property, may also afford opportunities to transcend these limitations when pursuing nation-building beyond reservation boundaries.

Practically speaking, CLG and the model of governable spaces illuminate other ways tribes can expand their sovereignty and pursue off-reservation interests without acquiring fee title ownership in land. In employing these concepts, this Article challenges the traditional role of property as something that is necessarily generative or limiting of tribal sovereignty to promote a shift from a land-based and jurisdictional understanding of sovereignty toward a relational mode of governance.[28] This Article further aims to inspire discussions about the role of CLG in Indian-law advocacy and property-law scholarship alike.

To advance these claims, this Article is organized into four major parts. Part I traces the conventional fee-to-trust approach to offensive off-reservation sovereignty claims through case law and points out the practical and theoretical limitations of the approach. Part II introduces the CLG framework and the concept of governable spaces as an alternative way of conceptualizing the relationship between property and sovereignty. Part III applies the governable spaces model for exploring strategic alternatives to the fee approach to expanding tribal sovereignty through the lens of resource management. Specifically, it looks at three types of

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27. *Id.* at 31.

28. This Article in no way seeks to diminish the significance of tribally owned lands for the cultural, political, and economic survival of tribal communities. To the contrary, this Article fully supports the proposition that tribally owned lands are an inextricable part of sustaining Native cultures and achieving economic growth—and it even recognizes that the relationship Native people maintain with traditional lands is an expression of tribal sovereignty in and of itself. The goal here is to address a fundamental limiting factor of tribal sovereignty from a judicial perspective, while also addressing how communities that have been left out of the traditional property-as-sovereignty paradigm may engage in nation-building.

rights: (1) usufructuary rights, as in the case of off-reservation hunting and fishing treaty rights and common-law, non-owner property rights; (2) contract rights, as in contractual co-management agreements and conservation easements with land trusts; and (3) consultation rights, as in national laws governing cultural heritage and the environment and international laws governing human rights. Part III examines these rights as a means for advancing tribal interests outside reservation boundaries, while laying the groundwork for cooperative arrangements that trigger fewer dangerous legal interactions. Finally, Part IV concludes by providing examples outside the natural resources context of how tribes engage in governance beyond reservation boundaries and addresses potential critiques.

I. *Bay Mills* and the Conventional Approach to Property and Sovereignty

A. Michigan v. Bay Mills Indian Community

The Bay Mills Indian Community ("Bay Mills") is a federally recognized Tribe with a reservation that falls within the northern borders of the State of Michigan.[29] In 1997, Congress enacted the Michigan Indian Land Claims Settlement Act (MILCSA)[30] to compensate the Bay Mills and four other Michigan tribes for lands ceded through two treaties in the 1800s.[31] As part of MILCSA, Congress directed that twenty percent of the monies awarded to Bay Mills be placed in a Land Trust Fund, where all earnings would "be used exclusively for improvements on tribal land or the consolidation and enhancement of tribal landholdings through purchase and exchange . . . [and where a]ny land acquired with funds from the Land Trust shall be held as Indian lands are held."[32]

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29. Respondent's Brief in Opposition at 2, Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024 (2014) (No. 12-515) [hereinafter Brief in Opposition].

30. Michigan Indian Land Claims Settlement Act (MILCSA), Pub. L. No. 105-143, 111 Stat. 2652 (1997).

31. Treaty of Mar. 28, 1836, 7 Stat. 491; Treaty of Aug. 2, 1855, 11 Stat. 631; *see also* Brief in Opposition, *supra* note 29, at 3 (stating that inadequate compensation was originally awarded by the Indian Claims Commission pursuant to the Indian Claims Commission Act of 1946, 25 U.S.C. §§ 70–70n-2).

32. Brief for Respondent at 11, *Bay Mills*, 134 S. Ct. 2024 (No. 12-515) [hereinafter Brief for Respondent] (quoting MILCSA § 107(a)(3)).

In August of 2010, Bay Mills used earnings from the Land Trust Fund to purchase a plot of land in Vanderbilt, Michigan, about 125 miles outside its reservation boundaries.[33] Bay Mills then opened a small gaming facility on the parcel, believing that the land purchased with the earnings from the Land Trust Fund would automatically be eligible for gaming under the Indian Gaming Regulatory Act (IGRA),[34] and thus would be subject to the Tribe's sovereign jurisdiction "as Indian lands are held."[35] Michigan sued Bay Mills in federal court, alleging that the gaming facility violated federal and state gaming laws, as well as the Tribe's gaming compact with the State, because the Vanderbilt property was "located outside Indian lands."[36]

On certiorari, the Supreme Court reviewed whether the doctrine of sovereign immunity shielded Bay Mills from being sued for gaming activities on the purchased lands.[37] In ruling in favor of tribal immunity, the Court reasserted that general principles of immunity are one of the "core aspects of sovereignty that tribes possess"[38] and "a necessary corollary to Indian sovereignty and self-governance."[39] Writing for the Court, Justice Kagan reiterated the long-established standard that the only way the Tribe would lose immunity from suit would be if the Tribe waived it or if Congress abrogated[40] some aspect of it through legislation.[41] According to the majority opinion, this standard applies regardless of whether the activity giving rise to the suit took place outside reservation boundaries.[42]

Thus, in reviewing whether the Tribe was immune from suit, the Court revisited whether Congress had abrogated immunity for gaming activity outside reservation boundaries under IGRA § 2710(d)(7)(A)(ii), and, if not, whether the Court should reverse the prior precedent established in *Kiowa Tribe of Oklahoma v.*

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33. *Id.* at 12.

34. 25 U.S.C. § 2703(4)(B) (2012).

35. Brief for Respondent, *supra* note 32, at 11.

36. *Bay Mills*, 134 S. Ct. at 2029.

37. *Id.* at 2030.

38. *Id.*

39. *Id.* (quoting Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C., 476 U.S. 877, 890 (1986)).

40. Congress retains plenary power over Indian affairs and the exclusive authority to abrogate tribal sovereignty through legislation. United States v. Lara, 541 U.S. 193, 200 (2004).

41. *Bay Mills*, 134 S. Ct. at 2031 (citing Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 756 (1998)).

42. *Id.* at 2033.

Manufacturing Technologies, Inc.[43] that preserved immunity from suit for commercial activities outside reservation boundaries.[44] The Court ruled in favor of Bay Mills on both issues.[45] First, it found that, although IGRA abrogates immunity from suit for disputes over state-tribal gaming compacts for facilities operating within the reservation boundaries, the statute does not expressly do so for disputes arising on off-reservation lands.[46] And as an institutional matter, whatever "anomaly" the text of IGRA creates, it is up to Congress, and not the Court, to remedy.[47]

Second, the Court declined to overturn *Kiowa Tribe*, holding that no special circumstances existed to justify ignoring stare decisis in this case.[48] Despite Michigan's argument that "tribes increasingly participate in off-reservation gaming and other commercial activity, and operate in that capacity less as governments than as private businesses,"[49] the Court preserved the *Kiowa Tribe* precedent, and therefore tribal immunity from suit for commercial activities outside reservation boundaries.[50] Again, the Court stated that Congress must be the one to revise immunity from suits arising from off-reservation commercial activities.[51]

There are a few ways to assess the legal significance of the *Bay Mills* decision. By affirming *Kiowa Tribe*, the Court upheld immunity from suit as one of the fundamental tenets of tribal sovereignty, even with respect to commercial activities outside reservation boundaries.[52] At the same time, however, the Court left open some important questions about the future of tribal immunity. The Court did little to resolve the "non-forum conundrum" associated with issues of immunity,[53] and included

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43. *Id.*
44. *Id.* at 2032.
45. *Id.* at 2039.
46. *Id.* at 2033–34.
47. *Id.*
48. *Id.* at 2036.
49. *Id.*
50. *Id.* at 2037.
51. *Id.*
52. The Tenth Circuit recently applied *Bay Mills* to bar the state of Oklahoma from suing the Kialegee Tribal Town for a gaming facility constructed outside reservation lands. Oklahoma v. Hobia, 771 F.3d 1247, 1248 (10th Cir. 2014).
53. The "non-forum conundrum" is where tribal sovereign immunity leaves plaintiffs with no forum to hear their claims because a tribe has not established a functioning tribal judicial system. Fletcher, *supra* note 8, at 312; *see* Frank Pommersheim, *The Crucible of Sovereignty: Analyzing Issues of Tribal Jurisdiction*, 31 ARIZ. L. REV. 329, 347–51 (1989); *see also* Katherine J. Florey, *Indian Country's*

some strongly worded dicta urging Congress to legislate and, perhaps not so subtly, to limit the application of tribal immunity for off-reservation commercial activities.[54] So depending on how Congress and the lower courts treat this dicta and the unanswered questions in *Bay Mills*, tribes seeking to expand their sovereign authority outside reservation boundaries may be in a less secure position than they would have been should the Court have declined to grant certiorari at all.

From a conceptual perspective, both Michigan and the Court seemed less disturbed by the general concept of tribal sovereign immunity than by *where* and *for what* the tribe asserted it. Neither the Court nor disputing stakeholders were arguing about the application of sovereignty as a discrete principle of law derived from fee-title ownership in land alone. Instead, they appeared to be discussing sovereignty as a proxy for justifying (or not) relationships of control among Native and non-Native neighbors.[55] Perhaps more important than the doctrinal implications of an immunity ruling, the decision would have profound implications

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Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty, 51 B.C. L. REV. 595 (2010) (discussing the consequences of the Court's decisions to limit tribal-court jurisdiction while protecting tribal sovereign immunity); Peter Nicolas, *American-Style Justice in No Man's Land*, 36 GA. L. REV. 895 (2002) (proposing solutions to the non-forum conundrum).

54. *Bay Mills*, 134 S. Ct. at 2038–39 ("And Congress repeatedly had done just that: It had restricted tribal immunity 'in limited circumstances' . . . . [W]e act today against the backdrop of a congressional choice: to retain tribal immunity (at least for now) in a case like this one. . . . Having held in *Kiowa* that this issue is up to Congress, we cannot reverse ourselves because some may think its conclusion wrong. Congress of course may always change its mind—and we would readily defer to that new decision.").

55. Courts are increasingly using demographics and other extra-judicial sources to divest tribes of some aspects of sovereignty. This appears most blatantly in the "diminishment" or "disestablishment" cases where courts have used demographic indicators to change the boundaries of reservations. *See, e.g.*, Solem v. Bartlett, 465 U.S. 463, 471–72 (1984) ("Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto,* if not *de jure*, diminishment may have occurred. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment, we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." (citations omitted)); Charlene Koski, *The Legacy of* Solem v. Bartlett*: How Courts Have Used Demographics To Bypass Congress and Erode the Basic Principles of Indian Law*, 84 WASH. L. REV. 723 (2009). Courts also use demographics and these extra-judicial sources in criminal and other tribal jurisdiction cases. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) (citing various historical sources to support its conclusion that tribal courts should not have criminal jurisdiction over non-Indians); Samuel E. Ennis, *Implicit Divestiture and the Supreme Court's (Re)construction of the Indian Canons*, 35 VT. L. REV. 623 (2011) (criticizing the Court's use of these extra-judicial sources).

on who, from a political and racial standpoint, would be able to assert control over whom. This highlights the socio-spatial and relational aspect of off-reservation sovereignty disputes. *Bay Mills* was not just about sovereignty as a matter of right, but rather was about the power to decide who can do what, with what, and where.

Consider Michigan's attempt to resuscitate Justice Stevens's dissent in *Kiowa Tribe*, where he argued that the Court has "never considered whether a tribe is immune from a suit that has no meaningful nexus to the *tribe's land or its sovereign function*."[56] *Bay Mills* generated a common skepticism from Indian Country, the State of Michigan, and the Court alike about the applicability of sovereign immunity over lands purchased outside reservation boundaries for activities not popularly associated with tribal self-governance. The Stevens dissent in *Kiowa Tribe*, Michigan's argument in *Bay Mills*, and skepticism about off-reservation claims to sovereignty more generally rely on the assumption that there *must be* some "meaningful nexus"[57] between the tribe's land and sovereign function. This assumption simultaneously guides the conventional fee-to-trust approach used by many tribes to expand their sovereign authority, like in *Bay Mills*, and begs heightened scrutiny from courts.

B. A Critique of the Fee-to-Trust Approach

In *City of Sherrill v. Oneida Indian Nation of New York*,[58] the Oneida Indian Nation purchased in fee two parcels of land that were originally within the Tribe's reservation boundaries in an attempt to offensively assert its sovereign authority against the State of New York by increasing its property holdings in land.[59] The Tribe opened a gas station, a convenience store, and a textile factory on the purchased land, and refused to pay state property taxes over the parcels in question.[60] The Tribe claimed that, by purchasing former Oneida land on the open market, it had revived its exempt status as a sovereign.[61] On review, the Supreme Court rejected "the unification theory of [the Tribe] and the United States and [held] that 'standards of federal Indian law and federal

56. Kiowa Tribe of Okla. v. Mfg. Techs., Inc., 523 U.S. 751, 764 (1997) (Stevens, J., dissenting) (emphasis added).

57. *Id.*

58. 544 U.S. 197 (2005).

59. *Id.* at 210–12.

60. *Id.* at 211.

61. *Id.*

equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold."[62] In other words, property rights could not justify tribal control over non-members.[63]

In *City of Sherrill*, like in *Bay Mills*, the type of property rights the Oneida Indian Nation retained in the parcels was the dispositive issue.[64] Because the Tribe purchased the land on the open market, but the Secretary of the Interior had not brought the land into trust for the Tribe under the Indian Reorganization Act (IRA),[65] the Court found that the Tribe had no sovereign authority over the land.[66] Instead, the Court applied the state-law doctrines of laches, impossibility, and acquiescence to hold that "unilateral reestablishment of present and future Indian sovereign control, even over land purchased at the market price, would have disruptive practical consequences," especially because the parcels in question were inhabited by mostly non-Indians.[67] Courts have used the *Sherrill* reasoning to dismiss several similar tribal-land claims in the years following the decision.[68]

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62. *Id.* at 214.

63. This outcome is largely inconsistent with private property rights afforded to non-Natives. For a comprehensive discussion of the inconsistent treatment of Native and non-Native property rights as it relates to political power and tribal sovereignty, see Singer, *supra* note 16, at 3–4 ("On the contrary, fee interests owned by non-Indians are subject to various kinds of legal protection which the Court denies to tribal property and to restricted trust allotments owned by tribal members. Although the courts accord the forms of property associated with non-Indian traditions a high degree of legal protection, property interests traditionally held by Indian nations and tribal members are often treated as a commons available for non-Indian purposes when needed by non-Indians. The commitment to individual dignity and restraint of tyrannical governmental power purportedly underlying non-Indian property law does not appear to extend fully to Indian owners. The usual restraints on tyrannical government power work haphazardly or not at all when federal power over Indians is concerned.").

64. *City of Sherrill*, 544 U.S. at 211–12.

65. Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465 (2012); 25 C.F.R. § 151.10(f) (2012). *Contra* Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2029 (2014) (applying a specific statute, MILCSA, causing the land to be considered "Indian lands").

66. *City of Sherrill*, 544 U.S. at 221.

67. *Id.* at 219–20 (citation omitted).

68. *See* Matthew L.M. Fletcher, Kathryn E. Fort & Nicholas J. Reo, *Tribal Disruption and Indian Claims*, 112 MICH. L. REV. FIRST IMPRESSIONS 65, 67 (2014); *see also* Cayuga Indian Nation of N.Y. v. Pataki, 413 F.3d 266, 268 (2d Cir. 2005) (applying *Sherrill* to hold that laches barred the tribe's land claim); Kathryn Fort, *Disruption and Impossibility: The New Laches and the Unfortunate Resolution of the Modern Iroquois Land Claims,* 11 WYO. L. REV. 375 (2011) (discussing the Second Circuit Court of Appeal's decisions on this issue); Kathryn E. Fort, *The New Laches: Creating Title Where None Existed*, 16 GEO. MASON L. REV. 357 (2009) (arguing that the post-*Sherrill* decisions created a new laches defense that could quash Indian land claims).

City of Sherrill demonstrates one of the major legal limits to the fee-to-trust approach for expanding tribal sovereignty: Acquiring fee title alone is not enough to reassert sovereignty over lands outside reservation boundaries.[69] Successfully expanding sovereign authority through purchase requires either specific statutory authority that automatically converts purchased fee land into "Indian land," like with MILCSA in *Bay Mills*,[70] or Secretarial approval to bring purchased land back into trust under the IRA.[71] Before the Secretary of the Interior may bring land into trust for a tribe, he or she must consider "the tribe's need for additional land"; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls"; and the "[j]urisdictional problems and potential conflicts of land use which may arise."[72] With the growth of Indian gaming and continuing conflict over regulatory, tax, planning, and zoning disputes with surrounding states and communities, the trust acquisition process has become increasingly precarious and fraught with opposition.[73]

Beyond the adversarial trend in and internal deficiencies of the land-into-trust process itself,[74] the Court's recent interpretation of the IRA in *Carcieri v. Salazar*[75] further limited the Secretary of the Interior's discretion under that statute.[76] In *Carcieri*, the Court held that only tribes under federal jurisdiction in 1934 are eligible under the IRA.[77] In that case, the Narragansett Tribe, whose land is surrounded by the state of Rhode Island, petitioned the Secretary to bring thirty-one acres of

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69. *See City of Sherrill*, 544 U.S. at 214.

70. *See Bay Mills*, 134 S. Ct. at 2029.

71. Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465 (2012); 25 C.F.R. § 151 (2012).

72. *City of Sherrill*, 544 U.S. at 221 (alteration in original) (quoting 25 C.F.R. § 151.10(f)).

73. *See* Kelsey J. Waples, *Extreme Rubber-Stamping: The Fee-to-Trust Process of the Indian Reorganization Act of 1934*, 40 PEPP. L. REV. 251, 253 (2012).

74. For a full account of the problems with the land-into-trust process, see Amanda D. Hettler, *Beyond a* Carcieri *Fix: The Need for Broader Reform of the Land-into-Trust Process of the Indian Reorganization Act of 1934*, 96 IOWA L. REV. 1377 (2011); *see also* Frank Pommersheim, *Land into Trust: An Inquiry into Law, Policy, and History*, 49 IDAHO L. REV. 519, 541 (2013) (exploring Supreme Court cases which involve the land-into-trust doctrine).

75. Carcieri v. Salazar, 555 U.S. 379 (2009).

76. Hettler, *supra* note 74, at 1390 ("The Secretary, however, delegated this authority to an Assistant Secretary, who then delegated it to the Bureau of Indian Affairs . . . .").

77. *Carcieri*, 555 U.S. at 383.

land it had purchased in fee into trust under the IRA.[78] The Tribe sought to construct a housing project on the purchased land, and a dispute arose about whether the project needed to comply with the local building code.[79] The Secretary approved the Narragansett Tribe's petition to bring the purchased land into trust, thereby exempting the housing project from local laws pursuant to tribal sovereignty, and the State of Rhode Island appealed the Secretary's decision.[80]

On certiorari,[81] the Court reviewed the meaning of IRA § 479.[82] The Court found that "the term 'now under Federal jurisdiction' in § 479 unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."[83] In other words, after *Carcieri*, any tribe seeking to bring fee land into trust under the IRA must have been recognized by the federal government in 1934, at the time the IRA was passed. This seriously limits the fee-to-trust approach to expanding tribal sovereignty over lands outside reservation boundaries because it may exclude many tribes that were not recognized until after 1934.[84]

In addition to the legal limitations of the fee-to-trust approach, there may be some practical reasons why purchasing lands to expand sovereign authority would not work. Tribes may lack money to purchase more land on the open market; they may lack the internal institutional or political support to do so; or it may be impractical to buy certain lands, such as those that are environmentally contaminated. Even non-disruptive attempts to

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78. *Id.* at 385. The Tribe's argument—that because it had had purchased the land outright it should automatically be deemed Indian Country as a "dependent Indian community under 18 U.S.C. § 1151—ultimately failed." *Id.*

79. *Id.*

80. *Id.*

81. *Id.* Petitioners initially brought suit under the Administrative Procedure Act, 5 U.S.C. § 702. *Carcieri*, 555 U.S. at 387. The U.S. District Court for the District of Rhode Island granted summary judgment in favor of the Secretary of the Interior and the Tribe. Carcieri v. Norton, 290 F. Supp. 2d 167, 169 (D.R.I. 2003). The First Circuit Court of Appeals affirmed in panel, Carcieri v. Norton, 423 F.3d 45 (2005), and en banc, 497 F.3d 15 (2007), and the Supreme Court ultimately granted certiorari, Carcieri v. Kempthorne, 552 U.S. 1443 (2008).

82. *Carcieri*, 555 U.S. at 387–93 (citing 25 U.S.C. § 479).

83. *Id.* at 395.

84. *Carcieri* and the land-into-trust process was further limited by *Match-E-Be-Nash-She-Wish Band of Pottowatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). *See* J. Matthew Martin, *The Supreme Court Erects a Fence Around Indian Gaming*, 39 OKLA. CITY U. L. REV. 45 (2014) (discussing the implications of the decision).

expand sovereign authority over lands outside reservation boundaries have proven unsuccessful in a post-*Sherrill*, post-*Carcieri* climate.[85]

For example, in *Onondaga Nation v. New York*, the Onondaga Nation attempted to regain control over their sacred Onondaga Lake by alleging that any title that may have passed to the lake was null for violating various treaties and the Trade and Intercourse Act.[86] In that case, the Tribe did not attempt to purchase the land in fee, but rather tried to prove that the titles of those who had were invalid.[87] The U.S. District Court for the Northern District of New York ruled against the Tribe,[88] and the Second Circuit Court of Appeals affirmed by applying the reasoning in *Sherrill*.[89] The Second Circuit held that, because the current inhabitants of the land at issue were predominantly non-Indian, and because so much time had passed, the current landowners had justifiable expectations, and the "doctrines of laches, acquiescence, and impossibility," applied.[90] But the Onondaga Nation filed the suit in part to prevent fee owners from further polluting the sacred lake and to compel them to clean it up.[91] In this way, *Ononodaga* demonstrates perhaps *the* major reason why tribes seek to assert sovereignty over lands outside reservation boundaries through the fee-to-trust approach: to expand tribal authority to govern.[92] This is not just governance for governance's sake, but the means by which tribes can preserve tribal values in nation-building.

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85. *See* Fletcher, *supra* note 8, at 314–15 (noting the low "win rate" for tribes in cases in which they are parties before the Supreme Court).

86. Onondaga Nation v. New York, No. 5:05-CV-0314 (LEK/RFT), 2010 WL 3806492, at *2 (N.D.N.Y. Sept. 22, 2010), *aff'd*, 500 F. App'x 87 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 419 (2013).

87. Plaintiff's Supplemental Memorandum in Opposition to Motions to Dismiss, *Onondaga Nation*, No. 5:05-CV-0314, 2007 WL 4659828.

88. *Onondaga Nation*, 2010 WL 3806492, at *1.

89. Onondaga Nation v. New York, 500 F. App'x 87, 89 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 419 (2013).

90. *Id.*

91. *Onondaga Nation*, 2010 WL 3806492, at *2.

92. *See, e.g.*, Joyce Tekahnawiiaks King, *The Value of Water and the Meaning of Water Law for the Native Americans Known as the Haudenosaunee*, 16 CORNELL J.L. & PUB. POL'Y 449, 471 (2007) ("The legendary titleholder Tadadaho, Sid Hill, stated, 'The incomplete plan to clean up Onondaga Lake is only the latest example of the New York State and federal authorities' inability to care for our land . . . . In asserting our land rights, we insist that polluted areas be cleaned up and that the lands and waters be protected for generations to come.'").

The latent assumption in these cases—that fee ownership is necessary to assert the sovereign authority to govern—can be traced back as early as the Marshall Court.

> According to Chief Justice Marshall, the original understanding of the sovereignty and property rights of Indian nations was that Indian tribes would retain both an absolute right of occupancy of their lands and a sovereign power to exercise governmental authority within their territory, until voluntarily ceded to the United States.[93]

Although the reciprocal conclusion—that fee ownership also delimits tribal authority to govern—is legally questionable,[94] courts have used that assumption to divest tribes of their ability to govern over fee lands owned by non-Indians, even within reservation boundaries.[95] The idea that a sovereign's authority to govern originates in property ownership has been used to justify the historical physical and political divesture of tribes by the federal government.[96] Following suit, the conventional fee-to-trust approach tribes use to regain or expand their sovereign authority outside reservation boundaries positions property as the remedial thread for righting past wrongs.

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93. Singer, *supra* note 16, at 14.

94. *See id.* at 24 ("To argue that the tribe cannot determine the basic character of the area because it does not own all the property on the Reservation makes no sense." (discussing the Court's reasoning in *Brendale v. Confederated Tribes*, 492 U.S. 408 (1989)).

95. From a legal perspective, this includes limiting a tribe's ability to govern vis-à-vis civil regulatory jurisdiction. *E.g.*, South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (holding that the Cheyenne River Sioux could not regulate hunting and fishing by nonmembers on Tribal trust land); Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 422 (1989) (holding that the Yakima Tribe could not zone unrestricted "open" fee lands within reservation boundaries); Montana v. United States, 450 U.S. 544, 566–67 (1981) (holding that the Crow Tribe could not regulate hunting and fishing by nonmembers on land owned by nonmembers within the reservation unless two narrow exceptions applied). This also includes civil and criminal adjudicatory jurisdiction. *See* Sarah Krakoff, *Tribal Civil Judicial Jurisdiction over Nonmembers: A Practical Guide for Judges*, 81 U. COLO. L. REV. 1187 (2010) (discussing judicial jurisdiction within reservation boundaries); M. Gatsby Miller, *The Shrinking Sovereign: Tribal Adjudicatory Jurisdiction over Nonmembers in Civil Cases*, 114 COLUM. L. REV. 1825 (2014) (discussing the relationship between tribal civil regulatory jurisdiction and adjudicatory jurisdiction over nonmembers within reservation boundaries).

96. *See, e.g.*, Singer, *supra* note 16, at 32 ("Property rights may constitute a *source* of sovereignty; ownership of property may seem to entail the right to use and develop that property unless those rights are limited by regulations promulgated by a democratic government with which the owner has a social contract."); *see also* Blomley, *Law, Property, and the Geography of Violence*, *supra* note 22 (discussing how property ownership relates to power).

The conventional approach, however, sees both the sovereignty problem and its solution in terms of the law. This Article introduces the critical legal geography framework to reexamine the assumption that property in land necessarily presupposes and delimits sovereignty by viewing the construction of space and law as mutually and concomitantly generative of each other. This approach deemphasizes fee acquisition as a necessary step to expanding sovereign authority to govern, and it opens new strategic and theoretical discussions about how tribes can circumscribe the "unfortunate paradigm" of tribal sovereignty.

II. Critical Legal Geography and the Concept of Governable Spaces

A. The Discipline

Traditionally, lawyers study law, and geographers study space.[97] Critical legal geography argues that the conventional understanding of space and law as separate categories relies in part on the implicit differences between the disciplines.[98] Adhering to these disciplinary categories does not reflect any real boundaries, but rather fabricates them, lending an incomplete understanding of both spatial and legal processes and reifying entrenched ways of understanding either.[99] But space is not a discernable external or acultural entity; the material or lived character of space is produced by our reactions to it.[100] Legal norms shape these reactions by categorizing, naming, prohibiting, or encouraging certain interactions among people[101] according to legally delineated spaces.[102] The law writes and re-writes social

97. Nicholas K. Blomley, *Text and Context: Rethinking the Law-Space Nexus*, 13 PROGRESS HUM. GEOGRAPHY 512, 512–13 (1989) [hereinafter Blomley, *Rethinking the Law-Space Nexus*].

98. *Id.*

99. Nicholas K. Blomley & Joel C. Bakan, *Spacing Out: Towards a Critical Geography of Law*, 30 OSGOODE HALL L.J. 661, 663 (1992).

100. *See* HENRI LEFEBVRE, THE PRODUCTION OF SPACE (Donald Nicholson-Smith trans., 1991); DOREEN MASSEY, SPATIAL DIVISIONS OF LABOR: SOCIAL STRUCTURES AND THE GEOGRAPHY OF PRODUCTION 52 (1984); Raka Shome, *Space Matters: The Power and Practice of Space*, 13 COMM. THEORY 39 (2003).

101. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 7–8 (1983).

102. *See, e.g.*, DELANEY, THE SPATIAL, THE LEGAL, AND THE PRAGMATICS OF WORLD-MAKING, *supra* note 20, at 5–8; Vera Chouinard, *Geography, Law and Legal Struggles: Which Ways Ahead?*, 18 PROGRESS HUM. GEOGRAPHY 415, 430 (1994) ("Law's space not only threads its way throughout our daily lives, often in the 'background' of our consciousness, but it is also a material and conceptual

relations of power by anchoring them in space and time, mutually constituting both.[103] Understanding the law as an isolated, a-spatial matter of discourse equally obscures the spatial relationships of power and ignores "how law is everywhere in space . . . [and] space is everywhere in law."[104]

In the early 1990s, theorists in the fields of law and geography joined forces and created a standalone trans-disciplinary framework, which gained momentum in the new millennium.[105] Early scholarship focused primarily on the spatio-legal nexus of cities through issues such as zoning, landlord-tenant relationships, and vagrancy.[106] Today, the discipline has changed to reflect new synergies between critical geography and critical legal theory in order to tackle larger questions of land reform, geopolitical order,[107] social justice, political economy, and environmental studies.[108] Increasingly, legal scholars have used critical legal geography as an analytical framework for understanding both the operation of law as an institution and its operation in practice.[109] As a whole, critical legal geography stands

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medium through which people fight for the control and use of space itself."); Desmond Manderson, *Interstices: New Work on Legal Spaces*, 9 L. TEXT CULTURE 1, 1 (2005) ("Admittedly, law understands itself as spatially delimited.").

103. Nicholas Blomley, *Landscapes of Property*, 32 L. & SOC'Y REV. 567, 569–70 (1998) [hereinafter Blomley, *Landscapes of Property*].

104. Igor Stramignoni, *Francesco's Devilish Venus: Notations on the Matter of Legal Space*, 41 CAL. W. L. REV. 147, 184 (2004).

105. Hari M. Osofsky, *The Geography of "Moo Ha Ha": A Tribute to Keith Aoki's Role in Developing Critical Legal Geography*, 90 OR. L. REV. 1233, 1238–39 (2012) [hereinafter Osofsky, *The Geography of "Moo Ha Ha"*].

106. *See* THE LEGAL GEOGRAPHIES READER, *supra* note 20.

107. *See id.*

108. Alexandre Kedar, *On the Legal Geography of Ethnocratic Settler States: Notes Towards a Research Agenda,* 5 CURRENT LEGAL ISSUES 401, 405–06 (2003); Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. 421, 432–34 (2007); *see also, e.g.*, Ruth Buchanan, *Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place*, *in* THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE 285 (David Delaney et al. eds., 2001) (political economy); Leila M. Harris & Helen D. Hazen, *Power of Maps: (Counter) Mapping for Conservation*, 4 ACME 99 (2006) (conservation).

109. *See, e.g.*, Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996) (using critical legal geography to assess intellectual property protections across borders); Keith Aoki, *Space Invaders: Critical Geography, the "Third World" in International Law and Critical Race Theory*, 45 VILL. L. REV. 913 (2000) (discussing the use of political geography in Critical Race Theory); Deborah G. Martin, Alexander W. Scherr & Christopher City, *Making Law, Making Place: Lawyers and the Production of Space*, 34 PROGRESS HUM. GEOGRAPHY 175 (2010) (proposing a framework for practicing lawyers' participation in legal geography research); Osofsky, *The*

for the proposition that the conventional separation of the law from the lived, or physical, characteristics of space is not only inadequate, but skews toward deliberate and deep-rooted structures of power.[110]

Critical legal geography aids in understanding how tribes can expand their interests outside reservation boundaries without necessarily acquiring fee title to property because it recasts the relationship between property and sovereignty as one that is spatially contingent and socially malleable. From this perspective, "property rights do not constitute a pre-existing socio-spatial order" that the law describes.[111] Properties are made; and they are made to order the world by mandating who can do what, with what, and where.[112] Because property as a legal construct concomitantly generates the space that upholds it, tribes can use property to negotiate categories of space and law that exceed both the physical boundaries of reservations and the legal categories of property rights.

To fully understand this potential, however, it is important to consider the relationship between property and sovereignty in the context of the political and economic project in which the relationship originates. The following tells one story[113] of the origins of property based in CLG and broader social theory, with specific reference to Karl Polanyi's *The Great Transformation*.[114]

Geography of "Moo Ha Ha," supra note 105, at 1245 (lauding Professor Keith Aoki's exploration of "the intersection of power, inequality, and law, especially with respect to sovereignty and property" using critical legal geography).

110. Chouinard, *supra* note 102, at 415.

111. Joe Bryan, *Walking the Line: Participatory Mapping, Indigenous Rights, and Neoliberalism*, 42 GEOFORUM 40, 40 (2011).

112. *See* Blomley, *Law, Property, and the Geography of Violence*, *supra* note 22.

113. It is important to acknowledge that there are different approaches to the evolution of the theory of property that may challenge or enhance this version of the story. For a survey of differing accounts, see GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY (2012).

114. KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (Beacon Press 2d ed. 2001) (1944). Karl Polanyi (1886–1964) was a Hungarian-American social theorist who is most famous for his work challenging liberal economic thought by highlighting the role of culture in the formation of markets and the role of markets in the formation of nation-states. *Karl Polanyi*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/biography/Karl-Polanyi (last visited Feb. 7, 2016). Although Polanyi received little acclaim during his life, his theoretical approach to understanding modern political economy has become significant in recent years as popular economists such as Joseph Stieglitz have used Polanyi's work to justify critiques of the self-regulating market. *See, e.g.*, Joseph E. Stiglitz, *Foreword to the Second Edition* of KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME, at vii (Beacon Press 2d ed. 2001) (1944).

B. The Remedial Thread: A Critical Legal Geography Take on Property

Although the concept of "property" can be attributed to a "complicated set of relations that would stretch back in time," the early reference to property as a systematically acquirable legal construct be traced to the late seventeenth-century works of John Locke.[115] In 1690, Locke published his seminal work *Of Property* as the fifth chapter of the second treatise in his *Two Treatises of Government* as an attempt to justify the link between ownership in land and labor.[116] He argued that God gave the world to men in common, and that individuals could secure ownership over land at the exclusion of others by working it.[117] However, Locke's theory of property must be considered as a direct response to the growing class of poor, landless peasants who were increasingly pushed into wage labor as a result of the enclosures in England.[118]

Beginning in the fourteenth century, in what is known as the English enclosures, the wealthy class fenced off parcels of land in the countryside that had historically been held in common, physically, and often violently, excluding the rural class.[119] The self-proclaimed "owners" of these lands then converted them from agricultural use to pasture, largely to raise sheep for the production and sale of wool, but they also harvested iron, coal, or whatever other resources might exist on the land.[120] The enclosures peaked during the sixteenth and seventeenth centuries when an increasingly international market caused the price of wool to skyrocket, as did the legitimacy of property rights in British common law.[121]

The enclosures introduced the idea of land as something that could be privately owned and, moreover, is valuable and alienable in terms of money—a critical invention for the free market.[122] The value of property in land was calculated by what could be produced from it, fundamentally shaping how the landscape is viewed in terms of resources today.[123] Property grew hand in hand

115. STUART ELDEN, THE BIRTH OF TERRITORY 2, 305 (2013) [hereinafter ELDEN, THE BIRTH OF TERRITORY].

116. *Id.* at 305.

117. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (1689), *reprinted in* LOCKE'S TWO TREATISES OF GOVERNMENT 285, 305–06 (Peter Laslett ed., 1967).

118. ELDEN, THE BIRTH OF TERRITORY, *supra* note 115, at 304–07.

119. *See* POLANYI, *supra* note 114, at 36–42.

120. *Id.*

121. *Id.*

122. *Id.* at 36–44.

123. *Id.* at 42–44.

with the free market, which continuously fractionated nature into individual resources that were equally able to be owned, to be sold, and to exclude the societal forces that produced them.[124] Any understanding of property or environmental management today thus must acknowledge how resources came to be viewed as manageable commodities through, and as properties valued on, the market.[125]

The disaster that befell the English countryside as a result of the enclosures and the increasing exploitation of land and labor inspired Locke's understanding of property as a necessary solution to safeguard the commons.[126] William Blackstone solidified Locke's understanding of property in the British common law with his treatise, *Commentaries on the Law of England*.[127] Like Locke, Blackstone also described the evolution of property from a state of pristine nature where God bequeathed ownership over all things to mankind alone.[128] Blackstone also largely wrote in response to an increasingly frightening scenario in the British countryside, where individualistic rights of possession were conflicting. For Blackstone, law co-evolved with government to protect those rights and to maintain order through property.[129] What resulted for Blackstone, and consequently for the common law, was a notion of property as the "sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."[130]

What Locke and Blackstone failed to understand, at least from Polanyi's perspective, is that the risk of the destruction of the commons likely had less to do with the propensity of man than it did with the propensity of markets. Polanyi argued that it was the market that required an institutional separation of society and economy to allow for the transformation of land, labor, and money into commodities that could be bought, sold, or *owned*.[131] Because land, like labor and money, is a fictitious commodity, it is uniquely vulnerable to exploitation by the market and therefore requires legal intervention to protect it.[132]

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124. *Id.* at 43–44.

125. *Id.*

126. *Id.* at 42.

127. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (Chicago Press ed. 1979) (1765–1769).

128. *Id.* at 2–3.

129. *Id.* at 2.

130. *Id.*

131. POLANYI, *supra* note 114, at 43–44.

132. *Id.*

Whereas Locke, Blackstone, and Polanyi may disagree on the forces driving the destruction of the commons, they agreed that it was a necessary function of government to protect property.[133] The state played an equally active role in sustaining market expansion in Europe, which required finding new places of accumulation and new spaces in which to invest surplus capital in order to keep the political economy going.[134] Property proved the fundamental mechanism by which Europe colonized the Americas: a multi-faceted enterprise in search of commodities, accumulation, and religion.[135]

The essential role of property in driving market expansion in the New World embeds any understanding of property—Native or otherwise—in a history of cultural violence.

> Whether the colonist needs land as a site for the sake of the wealth buried in it, or whether he merely wishes to constrain the [N]ative to produce a surplus of food and raw materials, is often irrelevant; nor does it make much difference whether the [N]ative works under the direct supervision of the colonist or only under some form of indirect compulsion, for in every and any case the social and cultural system of [N]ative life must be first shattered.[136]

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133. Unlike Locke or Blackstone, Polanyi argued that the state was equally as interested in protecting property to preserve the commons as it was with protecting landed interests and the functioning of the free market. POLANYI, *supra* note 114, at 137. In other words, property proved reciprocally generative of markets, and vice-versa, which necessitated the development of an active state as an overarching regulating force to mitigate the destruction of land and labor by the market. This is what Polanyi described as the "double-movement." *Id.* at 136. As the market economy continued to grow through improved trade technology and the Industrial Revolution, it was met by an equally strong social countermovement to check market expansion and protect against the complete annihilation of land and labor. *Id.* Although the double-movement originated in society—and primarily in the landed classes—it spurred reciprocal actions by the state to solidify the "instruments of intervention" in the form of protective legislation. *Id.* at 138–39. Applying Polanyi's double-movement to property thus positions it as a state-protected regulation that was both necessary for organizing land and labor in terms of commodities and the expansion of the free market, but also as an intervention to protect against it. *See id.* at 138. The double movement frames the dualistic nature of property as both an inherently destructive and protective mechanism at its core. *See id.* at 137. For Polanyi, the best mechanism by which to mitigate the destructive effects of the free market was the state. *See id.* at 138. However, examining the role of property as protective and generative of the market mechanism during colonialist expansion in North America calls Polanyi's ultimate recommendation into question.

134. *See* DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY (2001).

135. *See, e.g.*, ROBERT WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (describing the West's conquest and colonization of land and people in the New World).

136. POLANYI, *supra* note 114, at 187–88.

Here, Polanyi uses colonialism to demonstrate how the market economy requires the destruction of the traditional *embeddedness* of society and economy.[137] Colonialism, as an originally capitalist endeavor, must begin by violently breaking up traditional patterns of kinship and culture through the commodification of land and the creation of property.

Although colonialism may not have started out as a racially motivated project, it quickly became one. Under the guise of progress and political disputes, colonists used race to justify the shattering of Native lifeways by deeming them "primitive" or "backwards."[138] To be clear, because property, government, and the free market were born as a singular and reciprocal movement, progress was largely viewed in terms of economic growth. This necessitated and justified the imposition of market mechanism through property in the colonies that was based on race.[139] Thus the very idea of progress discursively produced a racial understanding of the Native as the inferior "other."[140] "Western notions of property . . . in a colonial geography, are a white mythology, in which the racialized figure of the savage plays a central role."[141] The racial "othering" of Native people further justified the hierarchy of rights afforded to settlers as "legitimate" property owners and anchored perceived racial differences in the landscape.

Natives' traditions and their resistance to the state-backed market mechanism in the New World generated a system of laws cloaked in a violent record of genocide, conquest, and racial ordering.[142] The legal mechanism of property equally enacted and obscured those acts of violence. Under that mechanism, the literal taking of Native lands can be justified as a mere transfer of title; thus, the law mutes the lived effects of disembedding people from the land. Further, the system of rights that property does afford reifies the racial project of "othering." The origins of property and motivations for colonialism were largely dictated by the (White) wealthy class of Europe, which laid the foundation for the systematic exclusion of ethnic minorities from holding the same property rights.[143] For Native people, even as property owners, the

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137. *Id.*
138. HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 185–86 (1951).
139. *See id.*
140. *See, e.g.*, WILLIAMS, *supra* note 135.
141. Blomley, *supra* note 22, at 124.
142. *See* WILLIAMS, *supra* note 135, at 6.
143. *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–

law only offers a particular set of rights based on individual ownership, which may efface traditional ways of using lands and resources to maintain a collective way of life.[144]

In other words, property may protect Native lands and resources from the market, but it does not protect them from the state. Within this framework, if Native people were to use property to counter-act encroaching interests or to offensively assert new interests through the law alone, they would be required to do so within the political framework of the nation-state; and property may do more to reinforce colonial hegemonies than to reverse them.[145] So on the one hand, this framework demonstrates some of the broader limitations of the conventional fee-to-trust approach to sovereignty outside reservation boundaries. On the other, it suggests that tribes may be able to re-appropriate some aspects of property, namely, its relational capacity to govern, to carve out spaces of governance both within and outside the broader framework of the state.

III. The New Model: Property, Sovereignty, and Governable Spaces

The birth of property in the late seventeenth century marked the epitome of colonial imperialism; the birth of the modern nation-state, which was largely attributed to the 1648 Treaty of Westphalia; and the nascent inklings of the modern capitalist economic structure.[146] All of these developments largely stemmed from conflicts over land.[147] The number of conflicts over land in Europe was increasingly matched by the number of conflicts in colonial nation-states in the New World. Property—violent, racist, and persuasive—became the central medium for securing rights to land from others.[148] Property provided the political means for profiting from land in the budding market economy, and territory secured the sovereign jurisdiction of newly competing nation-states, allowing them to govern the colonies.[149]

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16 (1993).

144. *See* Carpenter, Katyal & Riley, *supra* note 18.

145. *See* Joel Wainwright & Joe Bryan, *Cartography, Territory, Property: Postcolonial Reflections on Indigenous Counter-Mapping in Nicaragua and Belize*, 16 CULTURAL GEOGRAPHIES 153, 162–63 (2009).

146. *See* POLANYI, *supra* note 114, at 5–7.

147. *See id.*

148. *See* Harris, *supra* note 143, at 1714 ("The origins of [W]hiteness as property lie in the parallel systems of domination of Black and Native American people out of which were created racially contingent forms of property and property rights.").

149. ELDEN, THE BIRTH OF TERRITORY, *supra* note 115, at 329.

Before one can understand how property can function as a tool of governance, it is important to disambiguate property, space, place, and territory. "Property," as discussed earlier,[150] refers to the legal means by which states ordered social relations spatially: by disembodying land from man, by excluding others from that land, and by ultimately transforming land and resources into commodities for sale on the free market.[151] Space and place help define or interpret these relationships. Although the precise meanings of "space" and "place" are the source of much scholarly debate among geographers, this Article treats "place" as a physical location that can be interchangeable with land, and "space" as physical *or* non-physical spheres of relations.[152] These concepts constantly overlap both experientially and discursively.

"Territory," on the other hand, embodies a uniquely political connotation that is inherently related to, by incorporating concepts of space and place, yet distinct from, property.[153] By the end of the scientific revolution, budding nation-states employed territory as the primary political technology to define and extend their power.[154] Territory refers to a geographic area made legible, and therefore governable, through the technical and juridical metrics of the broader state.[155] Because territory was born as a political

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150. *See supra* Part II.B.

151. *See, e.g.*, EDWARD W. SOJA, ASS'N OF AM. GEOGRAPHERS, THE POLITICAL ORGANIZATION OF SPACE: COMMISSION ON COLLEGE GEOGRAPHY RESOURCE PAPER NO. 8, at 9–10 (1971).

152. *See* John A. Agnew, *Space and Place*, *in* THE SAGE HANDBOOK OF GEOGRAPHICAL KNOWLEDGE 316 (John Agnew & David N. Livingstone eds., 2011) (examining the relationship between the concepts of space and place "[g]iven that both space and place are about the 'where' of things and their relative invocation has usually signaled different understandings of what 'where' means"); Stuart Elden, *Land, Terrain, Territory*, 34 PROGRESS HUM. GEOGRAPHY 799 (2010) [hereinafter Elden, *Land, Terrain, Territory*].

153. Elden, *Land, Terrain, Territory*, *supra* note 152, at 804–05 (reviewing the etymological and political-economic influences which create a conceptual link between "property" and "territory").

154. ELDEN, THE BIRTH OF TERRITORY, *supra* note 115, at 322–28 (discussing the extension of the state in the seventeenth century through new cartographic technologies which defined territory); *see also* David Delaney, Geographies of Judgment: Legal Reasoning and Geopolitics of Race, 1836–1948, at 1–2 (1995) [hereinafter Delaney, Geographies of Judgment] (unpublished Ph.D. dissertation, University of Wisconsin Madison) (on file with the University of Wisconsin Library) ("[I]n theory, geographies are inextricably involved in the constitution of social power . . . and . . . political actors themselves are aware of the spatial constitution of power relations.").

155. *See* Bryan, *supra* note 111, at 40 ("[T]he practice of producing and using maps involves negotiating a spatially complex terrain shaped by multiple and overlapping forms of territory and authority. Insofar as mapping involves

technology for sovereign state-making, it is largely understood as the spatial mechanism by which sovereigns extend their power over people vis-à-vis control over space.[156] Territory—and, thus, sovereignty—can be established with property, but it does not have to be, and property can exist within territory in multiple forms.

Thus, property and the development of the modern nation-state are reciprocal and mutually generative of the legal interventions that order social relationships according to space, create territories, and discipline territorial expressions to facilitate governance. The relationship between property, territory, and governance has been the source of a wide range of inquiries in both law and geography.[157] This Article next looks at how property functions as a tool of governance from the perspective of CLG as it relates to the model of governable spaces of inclusion and exclusion.

A. Property as Spaces of Inclusion and Exclusion

Although property grants a variety of rights to owners, and although the right to exclude is tempered by conflicting rights of non-owners and by legislation, the right to exclude weighs heavily

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movement through this terrain, it engages multiple spatialities that inform assessments of the potential for legal recognition and critically awareness of its constraints.").

156. ELDEN, THE BIRTH OF TERRITORY, *supra* note 115, at 283–85.

157. *See, e.g.*, DELANEY, THE SPATIAL, THE LEGAL, AND THE PRAGMATICS OF WORLD-MAKING, *supra* note 20, at 8 ("This is our topic: world and space; space and meaning; meaning and experience; experience, power, and embodiment, as bound, and unbound, through what we call law."); ROSE, *supra* note 24, at 34 ("Central to modern governmental thought has been a territorialization of national spaces: states, countries, populations, societies."); Blomley, *Law, Property, and the Geography of Violence*, *supra* note 22, at 121 (arguing "that there is an intrinsic and consequential geography to law's violence as it relates to private property"); Bryan, *supra* note 111, at 40 ("[M]apping as practice provides a means of understanding how indigenous political understandings of space are shaped relationally by multiple and overlapping forms of territory and authority."); Sara Keenan, *Property as Governance: Time, Space and Belonging in Australia's Northern Territory Intervention*, 76 MODERN L. REV. 464, 464 (2013) [hereinafter Keenan, *Property as Governance*] ("[P]roperty is productive of temporal and spatial order and so can function as a tool of governance."); Sarah Keenan, *Subversive Property: Reshaping Malleable Spaces of Belonging*, 19 SOC. & LEGAL STUD. 423, 424 (2010) [hereinafter Keenan, *Subversive Property*] ("[A] spatialized understanding of property [can be used for] an alternative political agenda for property."); Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. 453, 454 (2002) (exploring "the nature of property from the point of view of how property rights are defined and enforced"); Wainright & Bryan, *supra* note 145, at 153 (calling "for a closer examination of the role of the law in the emergence of indigenous mapping through a discussion of the ways in which maps are used to advance legal claims to land").

on the public consciousness and daily defines the contours of social relationships. Private property owners can use lethal force on uninvited people entering their homes; city councils can pass ordinances to prohibit homeless people from living on city-owned streets; the federal government can fine Native people for collecting berries in national forests.[158] The law codifies hierarchies of rights based on the principle of exclusion and orders what certain people can or cannot do in certain places. In the words of one scholar, "property is productive of temporal and spatial order and so can function as a tool of governance."[159]

Property grants individuals the right to exclude others from spaces, relationships, and things. The state legitimates individual property rights and, therefore, the rights of individual property owners to exclude others. The right to exclude diffuses the power of the sovereign through individual rights holders to maintain control and facilitate governance.[160] The law does not govern the juridical subject as a threshold for asserting a political voice, but rather it governs the subversive embodiment of complex and interrelated systems of power, which are both promulgated and produced through the disciplinary mechanisms of modern institutions.[161] The law is a deep-rooted structural technique for expanding disciplinary control over individual bodies and, in turn, it facilitates the management of people as a group. Property, as a function of the law, consolidates multiple understandings of the world into a single narrative that is used to order society.[162]

Property scholars, however, often place the right to exclude on the opposite end of the property spectrum from the broader systems of governance actuated by the state.[163] Whereas the right to exclude limits what can be done, the state, broadly construed, can also regulate property to prescribe how people use certain places or things. Thus, property also governs as a space of inclusion. It operates through individuals as a rubric for mass

158. For discussions of the right to exclude in these and other contexts, see THE LEGAL GEOGRAPHIES READER, *supra* note 20.

159. Keenan, *Property as Governance*, *supra* note 157, at 464.

160. *See* MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE 1977–1978 (Michel Senellart et al. eds., Graham Burchell trans., 2007).

161. *See id.*

162. *See id.*

163. *See, e.g.*, Smith, *supra* note 157, at 455 ("[E]xclusion and governance are strategies that are at the poles of a continuum of methods of measurement, which we can add to the more familiar continuum from private property through the commons to open access.").

normalization. "There is not the legal age, the disciplinary age, and then the age of security"; rather, the "technologies" or "apparatuses" of security arrange society in such a way that what we do, or do not do, is neutral and normalized.[164] Law (the right to exclude) tells us what must not be done, discipline (regulation) tells us what must be done, and security (the broader state) regulates the population as a whole.[165]

Viewing exclusion and regulation on two ends of a property spectrum, however, fails to recognize that property is necessarily both. Property simultaneously excludes and includes in order to mediate the market, to legitimate the broader state, and to contravene all of it.[166] The double-movement of property creates spaces of *inclusive exclusion* to govern both as a way to diffuse power and discipline individual bodies, and as a way to establish an overarching framework of regulation.[167] The modern state actuates these relationships of control materially through property. Property operates as a tool of governance by simultaneously including and excluding people and organizing their relationships between each other and with place. In this way, property can be considered a spatially contingent relationship of belonging.[168] As one commentator has noted: "Property thus has the power to govern beyond the direct control that a subject exerts over her object. The space that property produces governs the conceptual, social, and physical shape of the various elements which constitute it."[169]

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164. FOUCAULT, *supra* note 160, at 8.

165. *Id.*

166. *See* POLANYI, *supra* note 114, at 36–42.

167. *See* Keenan, *Subversive Property*, *supra* note 157.

168. *See id.*

169. Keenan, *Property as Governance*, *supra* note 157, at 490–91. Consider Sarah Keenan's recent work on Australia's 2007 Northern Territory National Emergency Response Act (NTNERA) as an example. Keenan, *Property as Governance*, *supra* note 157. NTNERA granted the federal government long-term leases over aboriginal lands so the government could enact legislation to combat the alleged widespread sexual abuse of children. *Id.* at 465–67. The government used this power to ban alcohol, mandate income management for welfare recipients, install anti-pornography filters on public computers, and more. *Id.* The curious aspect of these leases was that the federal government never actually exercised its right to exclusive possession; this fact thereby challenged the dominant way of understanding the use of property as centering on the propertied subject's right to exclude. *Id.* at 464–65. Instead, "what was at stake in the contested leases was not so much possession of land, as it was the time and space of belonging that property produces." *Id.* at 465. In this way, property functions as a spatially, temporally, and socially contingent tool of governance that functions by indirectly producing spaces of belonging and exclusion. *Id.*

B. Sovereignty as Governable Spaces

As demonstrated in case law, legal scholarship, and geography scholarship, explanations about how property functions as a tool of governance have traditionally focused on the way in which government thought is anchored in land to establish sovereign control. The assumption that landed property is always necessary for generating governable spaces limits attempts to expand governance to the fee-to-trust approach to off-reservation sovereignty claims. However, a truly relational and spatial understanding of property deemphasizes the conventional focus on the propertied subject and accompanying rights of exclusion according to the law, and it adopts a more holistic understanding of property. If property functions as a tool of governance by creating spaces of inclusive exclusion, then property is spatially and temporally malleable and can create new spaces that may exceed the significance of reservation boundaries as a limit on tribal nation-building.

Nikolas Rose's concept of governable space,[170] later adopted by Michael Watts,[171] proposes a model that provides an alternative to the fee title approach to sovereignty. Governable spaces are produced by the multiple interactions between identity, land, and resources.[172] These spaces are contingent on the territorializing, or anchoring of government thought and practice to an identifiable parcel of land, and they are equally constrained and morphed on multiple scales by the political economy of resource development.[173] These spaces are not just reflective of the economic or legal framework of resource development; they are also generative of diverse and contested "forms of rule, conduct, and imagining."[174]

Multiple factors contribute to the formation of different types of governable spaces, namely, political economy, legal complex, cultural traditions, and ethnic identities.[175] But a traditional understanding of governable spaces requires a visible land base.[176] The specific amalgamations of territory, subject identity, and rule leads to different group geographies, be it physical, social, or

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170. *See* Rose & Valverde, *supra* note 24, at 549.

171. Watts, *Antinomies of Community*, *supra* note 24, at 195.

172. *Id.* at 199 ("[G]overnable spaces [are] differing sorts of community . . . in which differing sorts of identities, forms of rule and territory come into play.").

173. Watts, *The Sinister Political Life of Community*, *supra* note 24, at 107–08.

174. Watts, *Antinomies of Community*, *supra* note 24, at 205.

175. *Id.* at 200.

176. *Id.*

ideological.[177] Such amalgamations do not just reflect institutional techniques of power, but generate new sites that produce different ways of being and seeing the world.[178] Tools of governance define spaces where political ideologies and personal conduct are anchored to a recognizable land base and control population vis-à-vis geospatially discernable districts. In this way, property heterogeneously territorializes control over groups to create governable enclaves dependent on conceptions of space and time prescribed through the institutional, disciplinary, and legal techniques of governance.

Although the governable-spaces approach originally analyzed specific interactions with land, the theoretical underpinnings of the model suggest broader applications. Imbuing the concept of governable spaces with the idea that property has the power to govern beyond the propertied subject suggests that property can be used to create new spaces of governance that are not contingent on fee rights to land. Territorial jurisdiction, as a symbol for sovereign governance, is "simultaneously a material technology, a built environment[,] and a discursive intervention."[179] In other words, other types of legal rights relating to property in land that fall short of fee title can generate governable spaces across, without consideration of, or in spite of landed boundaries delimited by fee-title ownership. More broadly, the spatio-legal effects of property can create governable spaces that are purely social, altogether negating the role of land as a necessity for expressing tribal sovereignty.

C. Governable Spaces and Off-Reservation Claims to Sovereignty

From a legal standpoint, alternatives to the fee-to-trust approach to asserting offensive claims to sovereignty over off-reservation lands fall within one of three general—though often overlapping—categories: usufructuary rights, contract rights to participate in the governance of such lands, and statutory rights to be consulted regarding their development. In each case, the assertion of legal rights exceeds the normative framework of the law and generates new spaces of governance for tribes to express

177. *See* Watts, *The Sinister Political Life of Community*, *supra* note 24.

178. *See id.*

179. Richard Ford, *Law's Territory (A History of Jurisdiction)*, *in* THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE 200, 201 (David Delaney et al. eds., 2001).

their roles as sovereigns. This Article focuses specifically on issues of resource management as a proxy for evaluating the governable spaces model to off-reservation sovereignty claims.[180]

1. Usufructuary rights

The governable spaces model demonstrates how tribes can expand tribal sovereignty without acquiring fee title by establishing usufructuary rights through resource management, i.e., by asserting off-reservation hunting and fishing treaty rights,[181] and through other common-law property rights as non-owners.[182] By asserting property rights that fall short of fee-title ownership in land, usufructuary rights create new spaces of governance by reordering socio-spatial relationships. This approach does not just expand sovereignty for sovereignty's sake, but also creates a framework for nation-building that works to ease traditionally contentious relationships with non-Native neighbors.

When many tribes ceded their territory to the United States, they negotiated the right to continuously hunt and fish on their aboriginal territories outside reservation boundaries.[183] Courts have affirmed these rights in varying capacities; for example, the Court has held that tribes have the right to access lands held in fee by private owners and the right to manage tribe members' use of resources from that land.[184] In the landmark case *United States v. Winans*, the Court held that the 1855 Treaty with the Yakimas guaranteed the continued right of the Tribe to fish at its "usual and accustomed places."[185] The *Winans* Court ruled that a treaty establishing rights to access off-reservation fisheries created an easement over private lands, which protected the Tribe's rights

180. Other potential applications and implications for further scholarship are addressed in Part V.

181. *See* Alex Tallchief Skibine, *Tribal Sovereign Interests Beyond the Reservation Borders*, 12 LEWIS & CLARK L. REV. 1003, 1017–18 (2008) (describing the interaction of tribal hunting and fishing rights guaranteed by treaty and by state regulations).

182. *See* Carpenter, *supra* note 18, at 1091 ("In historical and contemporary times, nonowners have had rights and owners have had obligations [at common law].").

183. *See, e.g.*, United States v. Winans, 198 U.S. 371, 381 (1905) ("[Indians] were given 'the right of taking fish at all usual and accustomed places.'"); United States v. Williams, 898 F.2d 727, 728 (9th Cir. 1990) (discussing the rights established by a treaty with the Nez Perce Tribe); Settler v. Lameer, 507 F.2d 231, 232 (9th Cir. 1974) (citing the Treaty with the Yakimas, art. III, 12 Stat. 951, 953 (1855), as granting the tribe the "exclusive right of taking fish").

184. *Winans*, 198 U.S. at 381–82.

185. *Id.* at 381.

from underlying changes in property ownership or use.[186] In *Winans*, this meant preventing non-Indian holders of a state license on private land from operating a fish wheel that interfered with the Tribe's right to take fish.[187]

From a legal perspective, off-reservation treaty rights provide two primary non-fee means for tribes to participate in governing hunting, fishing, and gathering outside traditional reservation boundaries. The tribe with the treaty right has the power to regulate member hunting and fishing off-reservation as part of its sovereign authority to self-govern.[188] This provides tribes with an actionable right to prevent private development that may interfere with a tribe's ability to hunt, fish, or gather on the off-reservation lands specified in the treaty.[189] Although tribal authority to manage treaty-secured hunting and fishing resources on off-reservation lands is notably limited,[190] from a CLG perspective, usufruct treaty rights allow tribes to move beyond traditional limitations of governance over land by reordering social relationships.

Even without off-reservation treaty rights, tribes may be able to assert certain property rights as non-owners in order to exercise some regulatory control outside reservation boundaries.[191] For example, tribes who have continuously used and occupied certain resources on federal lands may be able to assert common-law property rights to continue to use and occupy those resources through prescriptive easements. If tribes can establish "actual, open and notorious, continuous and uninterrupted" possession of the property for a statutorily determined period of time, they can

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186. *Id.* at 384.

187. *Id.* at 382.

188. *See Settler*, 507 F.2d at 241–42.

189. Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553, 556 (D. Or. 1977); *see also* Lindsay Halm, *Putting Flesh on the Bones of* United States v. Winans*: Private Party Liability Under Treaties That Reserve Actual Fish for the Tribal Taking*, 79 WASH. L. REV. 1181, 1191 (2004) ("Tribes secure injunctive and declaratory relief in federal court to defend their treaty fishing rights against governmental and private projects that, if developed, would interfere with the exercise of fishing rights.").

190. The federal government may abrogate tribes' treaty rights; states may regulate off-reservation hunting, fishing, or gathering rights for the purpose of conservation; and treaty rights do not reserve a right to directly regulate non-member resource-use. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 18.04(3), at 1178–84 (Nell Jessup Newton ed., 2012) [hereinafter COHEN'S HANDBOOK OF FEDERAL INDIAN LAW].

191. Carpenter, *supra* note 18, at 1092; *see also* Mary Christina Wood, *The Tribal Property Right to Wildlife Capital (Part II): Asserting a Sovereign Servitude To Protect Habitat of Imperiled Species,* 25 VT. L. REV. 355, 359 (2001).

assert a right to a prescriptive easement to continue to use that land.[192] Although prescriptive easements are mostly utilized against private property owners, 43 U.S.C § 1068 establishes a narrow exception for actionable possession claims against the federal government.[193] Like with off-reservation treaty rights, a prescriptive easement may allow tribes to assert some forms of regulatory control over resource use by prohibiting certain activities which interfere with their usage rights.[194]

Usufruct rights broadly operate around a theory of access to land and resources, which highlights the spatial and relational aspects of property as a tool of governance. In the case of treaty rights, the right to hunt and fish on ceded lands outside reservations is held "in common" with non-Indians.[195] In the case of servitudes, Native people retain a non-possessory right to access lands owned in fee by non-Natives. These legal rights overlap where Natives and non-Natives access the same places. Using the landscape in accordance with legal rights concomitantly generates the social space that upholds them.[196] Thus, such rights may equally create new governable spaces for tribes to participate in governance outside reservation boundaries, while simultaneously cultivating better relationships among Native and non-Native groups.

Off-reservation usufruct rights can be the impetus for negotiations among multiple stakeholders, including tribes; private landholders; and state, federal, or international governments, outside tribally owned lands.[197] For example, U.S.

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192. Carpenter, *supra* note 18, at 1095 (quoting United States v. Platt, 730 F. Supp. 318, 323 (D. Ariz. 1990)).

193. *Id.* at 1098 n.234.

194. *Id.* at 1096.

195. United States v. Winans, 198 U.S. 371, 378 (1905).

196. *See* Blomley, *Landscapes of Property*, *supra* note 103.

197. *See, e.g.*, Peter Erlinder, Minnesota v. Mille Lacs Band of Chippewa*: 19th Century U.S. Treaty-Guaranteed Usufructuary Property Rights, the Foundation for 21st Century Indigenous Sovereignty*, 33 LAW & INEQ. 143, 206–07 (2015) (discussing state-tribal co-management of resources protected by usufructuary rights); Peter Erlinder, *Treaty-Guaranteed Usufructuary Rights:* Minnesota v. Mille Lacs Band of Chippewa Indians *Ten Years On*, 41 ENVTL. L. REP. NEWS & ANALYSIS 10921, 10922 (2011) (same); Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 349 (2000) (noting that "four Indian tribes, three states, and two federal agencies" jointly developed the Columbia River Fisheries Management Plan); Wenona T. Singel & Matthew L.M. Fletcher, *Indian Treaties and the Survival of the Great Lakes*, 2006 MICH. ST. L. REV. 1285, 1287 ("Indian treaty jurisprudence [should be integrated] into the strategy for saving the Great Lakes.");

tribes entered into dozens of treaties with the federal government, ceding title to millions of acres of lands in the Great Lakes region, but maintaining usufruct treaty rights to continue to access the same places where they had hunted, fished, and lived since time immemorial.[198] As state and federal efforts to preserve the environmental integrity of the Great Lakes continue to fail, tribes and Canadian First Nations people have begun discussing cooperative ways to preserve the traditional watershed by leveraging their usufruct rights as the juridical hook for negotiations with non-Native stakeholders.[199] As a result of these discussions, tribal and First Nations people drafted the Tribal and First Nations Great Lakes Water Accord and succeeded in having some of their rights to the Great Lakes incorporated into the compact regulating use of those waters.[200] Although the compact has arguably not yet incorporated the full extent of tribal rights,[201] this sphere of negotiation demonstrates how usufruct rights generate new governable spaces for tribes to participate in governing land they do not own in fee. Furthermore, this model advances better relationships and better management. In the words of one environmental manager: "inter-governmental and other partnerships allow the parties to achieve public benefits that no one partner could achieve alone."[202]

2. Contract rights

Tribes can generate governable spaces by asserting contract rights to manage off-reservation land and resources. Two ways tribes have done this are (1) contractual co-management agreements with surrounding state, local, and federal governments,[203] and (2) conservation easements with land trusts.

Eric Smith, *Some Thoughts on Comanagement*, 14 HASTINGS W.-N.W. J. ENVTL. L. & POL'Y 763, 767 (2008) (describing various models of co-management between Indigenous people and state actors).

198. Singel & Fletcher, *supra* note 197, at 1291.

199. *Id.* at 1295–96.

200. *See* Jacqueline Phelan Hand, *Protecting the World's Largest Body of Fresh Water: The Often Overlooked Role of Indian Tribes' Co-Management of the Great Lakes*, 47 NAT. RES. J. 815 (2007) (discussing in detail tribal participation in the compact and in other agreements regulating the Great Lakes environment).

201. *Id.* at 833–34.

202. *The Great Lakes Regional Collaboration Strategy: Hearing Before the Subcomm. on Water Res. & the Env't of the H. Comm. on Transp. & Infrastructure*, 109th Cong. 159 (2006) (statement of James E. Zorn, Executive Administrator of the Great Lakes Indian Fish and Wildlife Commission).

203. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENVTL. L. REV. 475, 481 (2007) ("[T]ribes may

Co-management describes a system of shared responsibility between the state and federal governments and tribal resource-users.[204] "Co-management may offer a pathway for resource users to obtain a proprietary share in the authority and decision-making powers that underwrite management."[205] Contractual co-management describes the best practices for codifying a shared management system, where the specific rights and responsibilities are delegated through a legally binding document giving rise to potential causes of action in the occasion of breach.[206] Although the actual efficacy of co-management agreements at improving resource management regimes remains contested,[207] contract rights securing tribal management roles generate new spaces of inclusion for tribes to participate in governance outside reservation boundaries.

The utility of contracting for governance through co-management agreements is especially relevant in the context of managing resources on federal lands. Under the Tribal Self Governance Act (TSGA),[208] federal agencies can enter into Public Law 93-638 contracts with tribes to manage projects on federal

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negotiate on a government-to-government basis with the [National Park Service], but the substantive programs look more like contracting than co-management.").

204. Fikret Berkes, *Evolution of Co-Management: Role of Knowledge Generation, Bridging Organizations and Social Learning*, 90 J. ENVTL. MGMT. 1692, 1692 (2009).

205. Alfonso Peter Castro & Eric Nielsen, *Indigenous People and Co-Management: Implications for Conflict Management*, 4 ENVTL. SCI. & POL'Y 229, 231 (2001).

206. Alison Rieser, *Property Rights and Ecosystem Management in U.S. Fisheries: Contracting for the Commons?*, 24 ECOLOGY L.Q. 813, 827–28 (1997).

207. *Compare, e.g.*, Berkes, *supra* note 204 (analyzing the ways in which social learning and bridging organizations can make co-management agreements more effective), *and* Castro & Nielsen, *supra* note 205, at 231 ("Although [the] stakeholders [in the co-management agreements] may hold different interests, the fundamental assumption is that sharing authority and decision making will enhance the process of resource management, making it more responsive to a range of needs."), *with* PAUL NADASDY, HUNTERS AND BUREAUCRATS: POWER, KNOWLEDGE, AND ABORIGINAL-STATE RELATIONS IN THE SOUTHWEST YUKON 1–2 (2003) (arguing that, in Canada, "land claims and co-management are something of a mixed blessing for First Nations people" because they require First Nations people to "learn completely new and uncharacteristic ways of speaking and thinking" and to restructure their communities to become more bureaucratic in order to act as sovereign states alongside the Canadian government), *and* King, *supra* note 203, at 481 (criticizing the National Park Service's interpretation of the Tribal Self-Governance Act (TSGA) of 1994, 25 U.S.C. §§ 458aa–hh, as "narrow," and stating that, consequently, "[i]t is not clear that the TSGA provides a sovereign nation with any more programmatic control and decision-making authority than a contractor").

208. 25 U.S.C. §§ 458aa–hh (2012).

lands.[209] There are two primary ways tribes can participate in public land management under the TSGA.[210] "First, [the TSGA] establishes a government-to-government negotiation process that obligates agencies to negotiate," even though they are not required, as the Bureau of Indian Affairs (BIA) is, to enter into agreements with tribes.[211]

The second way the TSGA expands tribes' ability to manage public land is by allowing them to exercise congressionally delegated federal authority through Annual Funding Agreements (AFAs). AFAs are instruments negotiated pursuant to the TSGA that govern the transfer of federal programs and funds to tribes. Although the delegation of federal authority to tribes is not new, the TSGA may, for the first time, permit the delegation of authority over federal programs and federal land.[212]

AFAs are regulatory agreements that allocate federal funds to tribes to implement federal programs on federal lands,[213] thereby extending tribal regulatory control over resource management outside reservations to encompass federal lands. At the very least, although the TSGA neither establishes nor reflects a possessory right to manage natural resources on federal lands, it does mandate that tribes be able to participate in decisions and manage programs of "special geographic, historical, or cultural significance."[214] Thus, the TSGA expands a tribe's role as a sovereign through governable space.

In addition, new synergies between tribes and land trusts demonstrate how asserting contract rights to manage conservation easements can generate governable spaces without acquiring fee rights in land to expand sovereign authority.[215] "[A] land trust is a non-profit organization that, as all or part of its mission, actively works to acquire land or conservation easements for the purpose of conserving natural, recreational, scenic, historical[,] or other productive resources."[216] Conservation easements are legally binding agreements between the property owner and a land trust

209. *See* King, *supra* note 203, at 476.

210. *Id.* at 477–78.

211. *Id.*

212. *Id.*

213. *Id.* at 478.

214. 25 U.S.C. § 458cc(c) (2012).

215. For an in-depth discussion about relationships between tribes and land trusts, see BETH ROSE MIDDLETON, TRUST IN THE LAND: NEW DIRECTIONS IN TRIBAL CONSERVATION (2011).

216. Marc Campopiano, *The Land Trust Alliance's New Accreditation Program*, 33 ECOLOGY L.Q. 897, 902 (2006).

that restrict use in accordance with the goals of the land trust in exchange for certain tax and zoning incentives.[217] With conservation easements, title remains with the landowner where development rights are transferred to the conservator. "Easements are often referred to as 'partial interests' in land because they do not transfer the property itself to the conservator but merely transfer the right to enforce prohibitions against future development."[218] Conservation easements secure the rights for the conservator to govern the property as a matter of contract without disturbing the underlying fee title. Thus, they are not exactly real property rights, and are not exactly easements, but are rather a statutorily created anomaly[219] that Carol Rose would describe as "property on the outside, contract (or norms) on the inside."[220] Tribes can utilize this framework for expanding sovereignty by contracting with or creating their own land trusts to administer or set the terms of conservation easements outside reservation boundaries.[221]

This model could be particularly useful for conceptualizing ways for federally unrecognized tribes to engage in nation-building. Although tribal sovereignty is an inherent right that is not delegated by the United States, but rather predates it,[222] the federal government only acknowledges the sovereignty of tribes that have been federally recognized.[223] This incongruity all but moots the utility of the fee-to-trust approach to expanding tribal sovereignty for unrecognized tribes. If a tribe were to purchase land in fee on the open market, it would be ineligible to apply to

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217. James Boyd, Kathryn Caballero & R. David Simpson, *The Law and Economics of Habitat Conservation: Lessons from an Analysis of Easement Acquisitions*, 19 STAN. ENVTL. L.J. 209, 215 (2000).

218. *Id.*

219. Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. U. L. REV. 1077, 1080 (1996).

220. Rieser, *supra* note 206, at 828 n.78 (quoting Carol M. Rose, Predicting Property, Address at the American Association of Law Schools Conference on Property Law 34–35 (June 7, 1997)).

221. For a full account of how tribes are using conservation easements to extend governance outside reservation boundaries, see MIDDLETON, *supra* note 215.

222. Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2030 (2014) ("Unless and 'until Congress acts, the tribes retain' their historic sovereign authority." (citations omitted)); *id.* at 2039 ("Indian tribes exercise sovereignty subject to the will of the Federal Government."); Singer, *supra* note 16, at 35.

223. Harry S. Jackson III, *The Incomplete Loom: Exploring the Checkered Past and Present of American Indian Sovereignty*, 64 RUTGERS L. REV. 471, 476, 490 (2012) (noting that a tribe may be recognized by treaty, "by Act of Congress," "by the administrative procedures set forth in part 83 of the Code of Federal Regulations," or "by a decision of a United States court." (citations omitted)).

have the land brought into trust under the IRA if it could not prove it was federally recognized in 1934.[224] Furthermore, unrecognized tribes lack standing to sue over any initial sale of lands that may have been in violation of the Indian Non-Intercourse Act.[225] In either case, it would be exceedingly difficult for an unrecognized tribe to purchase land in fee, or to nullify fee title for illegally purchased land, and thus be able to assert the full spectrum of sovereign rights in terms of tribal governance.

Consider the recent work of the federally unrecognized Amah Mutsun Band of Ohlone People of Northern California as an example of using contractual rights to generate governable space to engage in sovereign nation-building. The Amah Mutsun have occupied the greater Monterey Bay area for thousands of years, predating European contact, and are the living descendants of the Mutsun- and Awaswas-speaking peoples.[226] The Amah Matsun, who have no recognized land base, are recognized by state and municipal governments, but not by the federal government, and they have therefore struggled to find ways to participate in preserving their cultural life-ways and environments.[227] In a landmark agreement, the Amah Mutsun Band of Oholone People partnered with the Sempervirens Fund, California's oldest land trust, to take control over a conservation easement of ninety-six acres between Davenport and Pescadero on the Pacific coast of Northern California.[228] The ninety-six acres include several culturally significant archeological sites and an ecosystem of marine terraces that is currently threatened by encroaching coastal shrubs and Douglas firs.[229] Local conservation groups have recognized the value of Amah Mutsun traditional knowledge and the tribe's linguistic history of the area to restore ecosystemic

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224. *See* Carcieri v. Salazar, 555 U.S. 379, 382 (2009).

225. Mark D. Myers, *Federal Recognition of Indian Tribes in the United States*, 12 STAN. L. & POL'Y REV. 271, 276 (2001) (citing 25 U.S.C. § 177).

226. Jason Hoppin, *Amah Mutsun Tribe Lands First Land Preservation Agreement*, SANTA CRUZ SENTINEL (Aug. 22, 2013, 12:01 AM), http://www.santacruzsentinel.com/general-news/20130822/amah-mutsun-tribe-lands-first-land-preservation-agreement.

227. *Id.*

228. *Sempervirens Fund Partners with the Amah Mutsun Tribal Band, Costanoa Lodge To Protect Land Near Big Basin Redwoods and Año Nuevo State Parks*, SEMPERVIRENS FUND, https://sempervirens.org/sempervirens-fund-partners-with-the-amah-mutsun-tribal-band-costanoa-lodge-to-protect-land-near-big-basin-redwoods-and-ano-nuevo-state-parks/ (last visited Oct. 20, 2015) [hereinafter *Sempervirens Fund Partners with the Amah Matsun Tribal Band*].

229. *Id.*

balance to the land.[230] As a result, the Tribe and the Sempervirens Fund (with the support of a grant from the Christensen Fund) contracted for the American Land Conservancy to transfer the conservatorship, along with $43,000, to the Amah Mutsun Tribe.[231] The underlying fee title to the land will remain in the hands of the landowner, Costanoa Lodge, but the Tribe will serve as the sole conservator—retaining the right determine how the land will be used.[232]

The Amah Mutsun case study demonstrates an alternative to the fee approach to expanding tribal sovereignty by generating governable spaces through contract, and deemphasizes the role property rights in land play in determining the extent of tribal sovereignty. The Tribe has no actual property rights in the ninety-six acres, but rather, it has Tribe-acquired contract rights to administer the easement and, therefore, manage and restrict how the property is used. This approach does not necessarily allow the Tribe to assert every aspect of sovereignty that a federally recognized tribe would be able to, such as immunity from suit. However, acquiring rights to the easement allows the Tribe to generate a new governable space without owning the land in fee. Additionally, under this system, cooperation between Natives and Non-Natives fosters better relationships among those living in the community, which suggests a more sustainable model of nation-building.

3. Consultation Proceedings

Tribes also generate governable spaces to assert themselves as sovereigns without acquiring title in fee by leveraging consultation proceedings. The federal land laws of the 1970s created new environmental and cultural preservation laws that included provisions mandating consultation between tribes and federal agencies.[233] "By the 1990s, all of the major federal land management agencies such as the Bureau of Land Management, National Park Service, U.S. Forest Service, and U.S. Fish and Wildlife Service were promoting federal-tribal ecosystem management approaches."[234] The 1997 Secretarial Order *American*

230. *Id.*

231. Hoppin, *supra* note 226.

232. *Sempervirens Fund Partners with the Amah Matsun Tribal Band*, *supra* note 228.

233. David Suzuki & Peter Knudston, *Ecosystem Co-Management Plans: A Sound Approach or a Threat to Tribal Rights?*, 27 VT. L. REV. 421, 436 (2003).

234. *Id.*

Indian Tribal Rights, Federal-Tribal Trust Responsibility, and the Endangered Species Act required federal agencies to consult tribes about decisions affecting their lands and resources, and encouraged co-management agreements between tribal and federal agencies to protect endangered species and their habitats.[235] In 2000, Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, called for regular and meaningful consultation and collaboration with tribal officials when developing policies that would impact tribes.[236]

Under the National Historic Preservation Act (NHPA), for example, tribes retain the right to "consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to [impacted] propert[ies]."[237] The NHPA was initially enacted in 1966[238] to protect historical resources and information about the past by managing "federally owned, administered, or controlled historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations."[239] The 1966 NHPA attempted to achieve these goals primarily through § 106, which requires federal agencies to address the impact of federal projects on historic properties that are either listed, or eligible to be listed[240] on the National Historic Register. The meaning of consultation in § 106 proceedings, however, has been construed narrowly and generally does not require that the tribe consent to a particular project; rather, the statute requires federal agencies to go through the "procedure" of consultation—which has little substantive impact.[241]

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235. OFFICE OF THE NATIVE AM. LIAISON, U.S. FISH & WILDLIFE SERVS., SECRETARIAL ORDER 3206: AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT (1997).

236. Exec. Order No. 13175, 65 Fed. Reg. 67,249, "Consultation and Coordination with Indian Tribal Governments" (Nov. 6, 2000).

237. 54 U.S.C. § 302706(b) (2014).

238. National Historic Preservation Act, Pub. L. No. 89-665, 80 Stat. 915 (1966) (codified as amended at 16 U.S.C. § 470 (2012)).

239. National Historic Preservation Act, 16 U.S.C. § 470-1(3) (2012).

240. *Id.* § 106.

241. *See, e.g.*, Narragansett Indian Tribe v. Warwick Sewer Auth., 334 F.3d 161, 166–67 (1st Cir. 2003) (holding that the sewage authority fulfilled § 106 consultation requirements where historic property was not previously identified); Nat'l Mining Ass'n v. Fowler, 324 F.3d 752, 755 (D.C. Cir. 2003) (holding that § 106 consultation proceedings are procedural and "impose[] no substantive standards on agencies"); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 805 (9th Cir. 1999) (noting that § 106 consultation requires agencies to "stop, look, and listen," but not to reach an agreement with a tribe); *see also* 36 C.F.R. § 800.3 (2012) (outlining the initiation of the § 106 process).

Nonetheless, tribes have achieved success in leveraging NHPA consultations to derail federal projects that may deleteriously affect off-reservation resources. For example, in *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior*, the Quechan Tribe sued the Department of the Interior to enjoin a solar project on federally owned land after the Bureau of Land Management failed to properly consult the Tribe under NHPA and various other federal laws.[242] The court enjoined the project, finding that the BLM had failed to properly and timely consult the Tribe, which divested the Tribe of a procedural right under the law, and that allowing the project to proceed would irreparably harm "hundreds of known historical sites on the land [to many, if not most of which,] the Tribe attaches cultural and religious significance."[243]

In addition to statutorily mandated consultation proceedings, new developments in international law provide another legal hook for generating governable spaces to expand tribal sovereignty. The United Nations Declaration on the Rights of Indigenous Peoples recognizes the right to free, prior, and informed consent in decisions that may affect the sociocultural life, lands, or resources of Indigenous peoples.[244] The "free, prior, and informed consent" ("FPIC") language appears in Articles 10 (relocation),[245] 11 (cultural property),[246] 19 (legislative or administrative decision

242. Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of the Interior, 755 F. Supp. 2d 1104, 1106–07 (S.D. Cal. 2010).

243. *Id.* at 1120.

244. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007). International Labour Organization Convention No. 169 similarly guarantees the right to consent "whenever consideration is being given to legislative or administrative measures which may affect them directly." International Labour Organisation [ILO], *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ILO Convention No. 169, art. 6 (June 27, 1989).

245. G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, art. 10 (Sept. 13, 2007) ("Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior[,] and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.").

246. *Id.* at art. 11 ("Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. . . . States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior[,] and informed consent or in violation of their laws, traditions and customs.").

making),[247] 29 (environmental protection),[248] 30 (military activity),[249] and 32 (development).[250] Although the exact meaning, content, and processes for achieving affirmative consent are still developing in international and domestic forums, the internationally recognized right to FPIC provides another tool for tribes and other Indigenous groups to extend their roles as sovereigns through governable spaces.[251]

For example, in *Sarayaku v. Ecuador*, the Inter-American Commission on Human Rights (IACHR) held that, during a ten-year saga of environmentally unsound oil exploration, the Ecuadorian government failed to properly consult the Kichwa Sarayaku People, which violated the Tribe's right to property and the accompanying rights to personal life, personal integrity, and culture.[252] In addition to monetary and remedial damages, the IACHR ordered that Ecuador incorporate the right to free, prior, and informed consent into domestic law in a way that "establishes in detail how consultation should be undertaken: in good faith, using culturally-appropriate procedures . . . aimed at reaching an

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247. *Id.* at art. 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior[,] and informed consent before adopting and implementing legislative or administrative measures that may affect them.").

248. *Id.* at art. 29 ("Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. . . . States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior[,] and informed consent. . . . States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.").

249. *Id.* at art. 30 ("Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned. . . . States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.").

250. *Id.* at art. 32; *see* Jacquelyn A. Jampolsky & Kristen A. Carpenter, *Indigenous Rights*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL AND BEHAVIORAL SCIENCES 795, 801 (James D. Wright ed., 2d ed. 2015).

251. For a full analysis of the current moment and prospective effect of international Indigenous rights law, see Kristen A. Carpenter & Angela Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 173 (2014).

252. Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Judgment, Inter-Am Ct. H.R. (ser. C) No. 245 (June 27, 2012).

agreement. Thus, exploration or extraction of natural resources cannot be done at the expense of an Indigenous community's means of physical or cultural survival on their own land."[253] Although most of the land affected by the oil exploration legally belonged to the Sarayaku People,[254] about thirty-five percent of it did not.[255] The Sarayaku People were thus able to leverage the consultation proceedings to force clean up on lands outside their legally recognized land base.

Like with usufructuary rights and contract rights, consultation rights provide Native communities with a juridical hook for participating in governance over lands they do not necessarily own in fee. Those legal rights require discussions among Native and non-Native stakeholders, and generate new social spaces for Native people to engage as sovereigns—regardless as to how the law may interpret those proceedings. By engaging in consultation proceedings, Native and non-Native communities co-create a governable space where both interact as sovereign. This could lead to more sustainable approaches to nation-building by fostering better relationships among neighbors.

IV. Broader Implications and Critiques

A. Examples Outside the Natural Resources Context

More broadly, tribes have been expanding their off-reservation sovereignty through governable spaces by forging new synergies with local communities, states, and the federal government that transcend the legal categories afforded by property law. For example, in 2010, the Saginaw Chippewa Tribe signed a monumental settlement agreement with the State of Michigan after five years of litigation regarding the boundaries of its reservation.[256] Where remedy in law seemed impossible to the parties,[257] the settlement agreement not only declared all lands within the reservation as Indian country, but also settled disputes over governance "regarding criminal jurisdiction, environmental regulation, taxes, land use, and public safety" outside reservation

253. *Id.* ¶ 177.

254. It is unclear whether the Sarayaku People owned the land in fee.

255. Carol Y. Verbeek, *Free, Prior, Informed Consent: The Key to Self-Determination: An Analysis of the* Kichwa People of Sarayaku v. Ecuador, 37 AM. INDIAN L. REV. 263, 274 (2013).

256. Saginaw Chippewa Indian Tribe v. Granholm, No. 05-10296-BC, 2010 WL 5185114, at *2–*3 (E.D. Mich. Dec. 17, 2010).

257. Fletcher, Fort & Reo, *supra* note 68, at 71–72.

boundaries, and, "[i]n exchange, the defendants received what they wanted—certainty in jurisdictional questions, cooperation from the Tribe, and resources to implement the agreement."[258] Federal, state, local, and tribal governments used the pending litigation as the legal hook to generate new spaces of inclusive exclusion, both within and outside reservation boundaries, which largely exceed the rights afforded by fee title alone.

In addition to participating in multi-faceted settlement negotiations involving the delegation rights as between sovereigns,[259] tribes have been expanding sovereignty outside reservation boundaries through agreements to share certain rights that are traditionally afforded to state or tribal governments. In California, the Shingle Springs Rancheria Tribal Court has partnered with the El Dorado County Superior Court to create the first-ever joint-jurisdictional Wellness Court for cases involving Tribal juveniles.[260] Recognizing the harmful and inefficient effect of split or overlapping proceedings, the state court judge and Tribal court judge share jurisdiction over certain cases to allow "one unified proceeding designed to better address the issues which brought the families into the court system."[261] Although this court is still in its very nascent phases, such a partnership demonstrates how tribes are expanding governance outside reservation boundaries through governable spaces to express perhaps the most contentious aspect of sovereignty—adjudicatory jurisdiction. In this example, neither *where* the dispute happened nor *whom* the dispute involved is exclusively dispositive of whether the state or Tribal court will exercise jurisdiction.[262] Instead, and perhaps more poignantly, state and Tribal court

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258. *Id.* at 70.

259. For other examples of settlement negotiations between sovereigns, see Fletcher, Fort & Reo, *supra* note 68.

260. SUZANNE KINGSBURY ET AL., SHINGLE SPRINGS BAND OF MIWOK INDIANS & EL DORADO CTY., CA. JOINT JURISDICTIONAL COURT 2014, THERAPEUTIC JUSTICE: LESSONS FROM THE SHINGLE SPRINGS-EL DORADO COUNTY JOINT JURISDICTION HEALING TO WELLNESS COURT (2014), http://www.tribal-institute.org/2014/A12PP.pdf.

261. *Shingle Springs Tribal Court and Superior Court of El Dorado County Will Team Up To Hear Juvenile and Family Law Cases Involving Youth up to 24 Years Old*, MARKETWIRE NEWSROOM (June 6, 2014), http://www.marketwired.com/pressrelease/shingle-springs-tribal-court-superior-court-el-dorado-county-will-team-uphear-juvenile-1918287.htm (quoting Suzanne Kingsbury, Presiding Judge of the Superior Court of El Dorado County).

262. The jurisdictional hook is that the dispute must involve a tribal member twenty-four years or younger; however, the court then uses a "wrap-around" approach to bring in other family members who may also have pending cases related to the dispute. *See* KINGSBURY ET AL., *supra* note 260.

judges will consider those factors together and, where appropriate, will jointly share jurisdiction. Again, this deemphasizes the role of property as the determinative factor for delineating the scope of tribal sovereignty and suggests how the governable spaces model could be strategically useful.

B. The Critique: Tribal Gaming

Although the governable spaces model provides conceptual and strategic insights for how sovereigns can expand their role outside reservation boundaries, the major limitation of this approach brings us back to *Bay Mills* and the issue of tribal gaming. The line of reasoning in the landmark case affirming tribal gaming rights, *California v. Cabazon*,[263] affirmed the ability of tribes to participate in gaming, in spite of state regulations, as an extension of sovereignty originating from tribal land ownership.[264] Today, tribes must construct gaming facilities on "Indian lands," defined as "all lands within the limits of any Indian reservation,"[265] and "any lands title to which is either held in trust by the United States . . . or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."[266] Furthermore, IGRA requires that tribes retain "sole proprietary interest" in the gaming facility when negotiating financing and management contracts.[267] Thus, property rights in land are essential to tribal gaming activities as a threshold matter of right, as a practical matter for development, and as a social matter in terms of the likely success of any gaming institution and of general acceptance by Native and non-Native community members.[268]

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263. California v. Cabazon, 480 U.S. 202, 207 (1987).

264. Alan E. Brown, *Ace in the Hole: Land's Key Role in Indian Gaming*, 39 SUFFOLK U. L. REV. 159, 176 (2005) ("The *Cabazon* Court viewed tribal land ownership as the fundamental basis for tribal sovereignty.").

265. 25 U.S.C. § 2703(4)(A) (2012).

266. *Id.* § 2703(4)(B); *see also* 25 C.F.R. § 502.12(a)–(b) (2015) (defining "Indian lands" similarly); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 190, § 12.02, at 876–77 (employing the "Indian lands" definitions set forth by 25 U.S.C. § 2703 and 25 C.F.R. § 502.12).

267. IGRA, 25 U.S.C. § 2710(b)(2)(A) (2012); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 190, § 12.02, at 877 (noting that Indian tribes must be the primary beneficiary of a gaming operation when negotiating with outside contractors seeking to do business in Indian gaming).

268. *See* Brown, *supra* note 264, at 176.

Frankly, the governable spaces model offers little to overcome the necessity of fee rights for federally recognized tribes seeking to construct gaming facilities on Indian lands. However, new contours of the tribal gaming industry, namely, the potential rights of state-recognized tribes and internet gaming, suggest the model may still be useful.[269] Tribes not recognized by the federal government, and therefore not recognized as sovereign nations by virtue of their land rights within the federal system, may still be able to engage in gaming activities where negotiated with a state.[270] In this case, federally unrecognized tribes may negotiate with state governments amenable to tribal gaming activities, thereby generating a new governable space in which to engage as a sovereign. Because this negotiation falls outside the scope of the IGRA, theoretically, agreements could even allow the construction of gaming facilities on land leased or otherwise managed by the tribe that the tribe does not own in fee and that remains under state jurisdiction.[271]

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269. There are also instances of creative management contracting and leasing provisions that may deemphasize the role of fee-title in tribal gaming, but the intricacies of IGRA fall outside the scope of this Article. For a better understanding of IGRA from a lawyering perspective, see Kevin K. Washburn, *The Mechanics of Indian Gaming Management Contract Approval*, 8 GAMING L. REV. 333 (2004).

270. *See* Alexa Koenig & Jonathan Stein, *Lost in the Shuffle: State-Recognized Tribes and the Tribal Gaming Industry*, 40 U.S.F. L. REV. 327, 330 (2006) ("We explain that (1) the regulation of gaming is generally a state right, (2) state tribes are sovereign governments with the right to game, except as preempted by the federal government, (3) federal law does not preempt gaming by state tribes, and thus states have the intrinsic power to enter into gaming compacts with the state tribes they recognize, (4) state tribal gaming does not violate equal protection guarantees, much as gaming by federally-recognized tribes complies with Fourteenth Amendment mandates, and (5) significant policy arguments weigh in favor of permitting gaming by state tribes under state law.").

271. The Author is not aware of any examples of this, but proposes the idea as an untested theoretical approach that begs further research. In fact, in an analogous context, even federally recognized tribes have been able to maneuver the gaps between state and federal statutes to engage in economic development in the context of Internet payday lending. Although this practice is both relatively new and incredibly controversial, tribes have asserted immunity to shield partners from state consumer protection laws to allow for more flexible lending schemes where federal law is still lacking. *See* Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes: Are Both Tribal Sovereignty and Consumer Protection at Risk?*, 69 WASH. & LEE L. REV. 751 (2012); Adam Mayle, *Usury on the Reservation: Regulation of Tribal-Affiliated Payday Lenders*, 31 REV. BANKING & FIN. L. 1053 (2012); Jennifer H. Weddle, *Nothing Nefarious: The Federal Legal and Historical Predicate for Tribal Sovereign Lending*, 61 FED. L. 58 (2014).

This potential becomes equally relevant in the context of internet gaming.[272] Online gambling is a largely a-spatial activity where neither proprietor nor patron relies on physical place. Although online gaming requires the construction of some material facility, where that facility lies on the landscape is not dispositive of economic success. In fact, it may be even more advantageous for tribes seeking to engage in nation-building through internet gaming to do so outside reservation boundaries as it would not be regulated under IGRA, and could provide more flexibility for tribes to negotiate with states.[273] Tribal online gaming laws are still very much in flux from federal, state, and tribal vantage points.[274] A recent opinion from the U.S. Department of Justice has affirmed that regulatory authority for internet gaming lies in the hands of individual states, which opens up a new frontier for negotiating potential benefits and challenges for tribes.[275] This creates new governable spaces, which are not necessarily contingent on tribal property rights in land, through which tribes can engage in nation-building as sovereigns.[276]

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272. The legal framework regulating Internet gaming is complex and constantly evolving in both tribal and non-tribal contexts, and it falls outside the scope of this Article. For a summary of the current federal and state frameworks regulating online gaming, see generally Charles P. Ciaccio, Jr., *Internet Gambling: Recent Developments and State of the Law*, 25 BERKELEY TECH. L.J. 529 (2010); David B. Jordan, *Rolling the Dice on the Cyber-Reservation: The Confluence of Internet Gaming and Federal Indian Law*, 24 AM. INDIAN L. REV. 455 (2000); Joseph M. Kelly, *Internet Gambling Law*, 26 WM. MITCHELL L. REV. 117 (2000); Heidi McNeil Staudenmaier, *Off-Reservation Native American Gaming: An Examination of the Legal and Political Hurdles*, 4 NEV. L.J. 301, 316 (2004); Nelson Rose & Rebecca Bolin, *Game on for Internet Gambling: With Federal Approval, States Line Up To Place Their Bets*, 45 CONN. L. REV. 653, 675–84 (2012).

273. Missouri *ex rel.* Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1104–05 (8th Cir. 1999). However, this subjects the legality of internet gaming facilities to state law.

274. Joseph M. Kelly, *U.S. Land-Based and Internet Gambling: Would You Bet on a Rosy Future?*, 17 VILL. SPORTS & ENT. L.J. 339, 354–55 (2010).

275. Keith C. Miller, *The Internet Gambling Genie and the Challenges States Face*, 17 J. INTERNET L. 1, 28 (2013) ("Indian tribes stand to gain very little from Internet gambling."); Rose & Bolin, *supra* note 272, at 675.

276. These concepts apply to economic development outside the gaming context, as tribes continue to engage in nation-building as savvy market actors within tribal, state, and national borders. Whether engaging in economic development as a tribal government, a tribal enterprise, a tribe- or member-owned non-profit, a formal or informal economic exchange, or a member or non-member owned business, Native people re-work traditional social relationships by engaging with the law vis-à-vis property (by selling goods, owning a business, managing properties, etc.) through economic development and generate new governable spaces in which to engage as sovereigns. *See* Lorie M. Graham, *An Interdisciplinary Approach to American Indian Economic Development*, 80 N.D. L.

Conclusion

In each of these examples, property functions as a tool of governance by creating new social spaces for tribes and other governments to engage in as sovereigns beyond the confines of fee title. In the context of tribal resource management, gaming and economic development, expansive settlement agreements, or shared jurisdictional courts, state and tribal governments enact new social narratives around property that deemphasize the role of fee rights in land as necessary for defining tribal sovereignty. This Article demonstrates how the governable spaces model permits a broader understanding of sovereignty as a more diffuse mode of governance, and attempts to free strategic and conceptual conversations about sovereignty from fee-title in land. In doing so, the Article seeks to inspire future scholarship that will go beyond judicial or political understandings of property and sovereignty as means for securing separate governmental rights, and begins to address the socio-spatial and relational aspects of property as a means for fostering better communities.

REV. 597 (2004); Alan P. Meister, Kathryn R.L. Rand & Steven Andrew Light, *Indian Gaming and Beyond: Tribal Economic Development and Diversification*, 54 S.D. L. REV. 375 (2009).