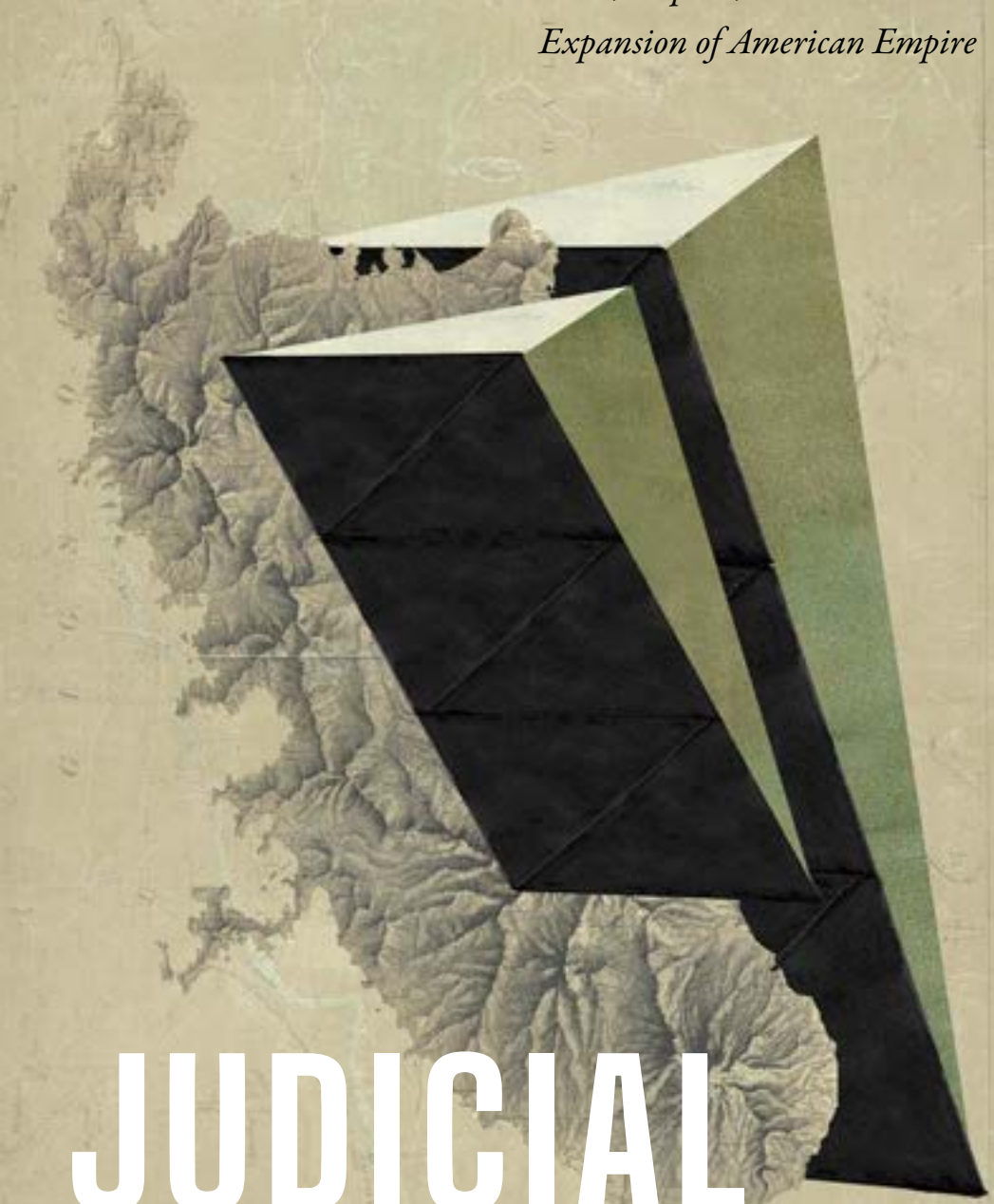
SHAINA POTTS

Law, Capital, and the Expansion of American Empire



JUDICIAL TERRITORY

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SHAINA POTTS

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For Margaret FitzSimmons (1947–2023)

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Introduction

In February and November 2012, the District Court for the Southern District of New York ruled in favor of a handful of Wall Street hedge funds against the Republic of Argentina. Judge Thomas Griesa did not simply say that Argentina owed these hedge funds, widely referred to as "vulture funds," payment on the defaulted sovereign bonds they held—a common enough occurrence in such litigation. In a far more unusual move, he held that, unless it paid these funds first, Argentina was forbidden from paying any of its *other* creditors. He backed this up by prohibiting any financier *anywhere in the world* except in Argentina from helping the country make such payments.[1] In June 2014, the US Supreme Court allowed the decision to stand.[2] When Argentina defied the US court orders by refusing to pay the vulture funds, it was forced into a "technical" default on all its foreign loans, exacerbating an already deteriorating domestic economic situation and blocking the country from accessing new credit.[3] After a fraught election, in which the topic of vulture funds played a significant role, Argentina eventually settled with the funds for more than $10 billion. For those funds at the center of the case, this amounted to massive returns of at least 400 and possibly as much as 1,500 percent.[4]

The case sparked outrage from governments, activists, economists, and legal commentators around the world, with the most critical accusing the United States of legal and financial imperialism and extraterritorial overreach.[5] For those used to thinking about the world as composed of at least formally equal nation-states, such a blatant extension of the authority of one country over another seemed to breach the normal rules of territorial sovereignty.

Yet, the Argentina litigation is both more and less significant than these critics suggested. On the one hand, the transnational exercise of US judicial power beyond US borders is neither new nor unusual. US courts rule on transnational cases, including those involving foreign sovereign governments, all the time. On the other hand, it is precisely because this *is* so common that the case is even more important than most critics realized. Griesa's decisions were only possible because of a long history of gradually expanding US judicial authority over foreign state activities within and beyond US borders. Today, *many* significant economic decisions of other governments are subject to oversight by US law and courts.

It has not always been this way. A century ago, US courts nearly always refused to claim jurisdiction over foreign state officials, acts, or property even within US borders, let alone abroad. By the 1960s, however, this began to change. US courts were now willing to assert authority over what they understood as the "commercial" acts or property of foreign governments. This included things like operating state-owned enterprises or signing government-funded development contracts. Yet, other activities, like issuing public debts or expropriating US property, were still seen as sovereign acts, beyond US judicial reach. Moreover, even in commercial cases, courts required substantial spatial links between the matter at hand and the United States. By the 1990s, things had changed again. Courts readily extended authority over sovereign debt relations and other government acts that had previously been classified as sovereign and immune—and they required far fewer direct ties to the United States to do so.

What changed in the 2010s was not *that* US courts exercised authority over a foreign government, but how far they were willing to go to enforce their decisions. In the Argentina litigation, US courts ruled that the whole world, except for Argentina, was at least potentially subject to US legal authority. And where litigants and judges in previous decades had continually moved the boundary around what constituted protected sovereign activity, judges now questioned whether sovereigns should be treated differently from private corporations at all.[6] Finally, the case revealed a new and significant rupture between the views of the executive and the judiciary over the proper extent of US judicial reach. From the 1940s on, the executive branch had been a strong proponent of the extension of US judicial power over foreign sovereigns, and as late as the 1990s, US courts had, in turn, regularly referenced US foreign policy views in such cases.[7]

In the recent Argentina litigation, in contrast, the courts ruled in favor of the vulture funds in the face of direct opposition from the Obama Administration, dismissing the executive's "political" concerns not only with indifference, but with scorn.[8]

This book explores how we got from a world in which US domestic law and courts were largely confined within US borders to one in which they regularly operate beyond them; from a world in which US courts refused to adjudicate the acts of foreign sovereigns to one in which they freely pronounce judgment on and expect obedience from those sovereigns; and from a world in which foreign governments are considered to have special legal status to one in which they are increasingly treated just like private corporations.

The growing complexity of cross-border jurisdictional claims since the mid-twentieth century is well documented.[9] It is often interpreted as a natural and apolitical corollary of increasing economic integration. Law, according to this view, has become more flexible in the age of globalization, rendering the traditional identification of jurisdiction with the territorial boundaries of the nation-state obsolete. This book argues in contrast that the law has not become divorced from territoriality but rather remapped it; and that it has not simply followed globalization but actively produced it.

More specifically, the book traces the expansion of US judicial authority over the economic decisions of foreign sovereign governments within and beyond US borders to show how this has led to a re-territorialization of US and foreign state space via a judicial modality of American power. The extension of what I refer to as "judicial territory"—by which I mean that space within and beyond official US borders over which US courts exercise authority—has been a crucial, yet hitherto unacknowledged, pillar of post–World War II American empire and the liberal international order so closely connected to it. It has promoted private property rights and investments over all other considerations, and it has supported transnational capital by undermining national economic sovereignty, especially that of those Third World states attempting to pursue alternative development models.[10] Far from merely reflecting underlying economic changes, it has played a key role in constituting what we now think of as "the economy" and in forging a particular kind of (neoliberal) globalization. The increasing flexibility of law has not affected all states equally, nor has it merely followed the inevitable march of capital across borders.

On the contrary, law has helped make the whole world part of *US* economic space.

Although these arguments depend in large part on technical legal evidence, this book is not intended for a specialized legal audience. Rather, it aims to bring a history that has been almost entirely unexamined outside legal circles into broader social science conversations about territorial sovereignty, (neo)liberal capitalism, and US empire. The idea that law is too technical or complex for those without legal training to comprehend has itself been a source of great power for law and legal professionals.[11] Yet, law has never been separable from central concerns in human geography, political economy, anthropology, and other fields. Leaving law to the "experts" has too often left gaps in our understanding of important social processes. Moreover, it has allowed dominant narratives about law to depoliticize and normalize contemporary legal practices, obscuring critical questions about law, capital, and empire and about what sovereignty actually means in this nominally postcolonial world. Destabilizing the work of law today requires engaging with and exposing these standard narratives, not just to point out their flaws, but to show how they themselves are constitutive of both American power and global capitalism.

In the rest of this introduction, I first clarify the empirical scope of the project, defining transnational US commercial law and then briefly introducing the two main legal doctrines whose transformations have made the extension of US judicial reach over foreign governments possible. I then introduce my concept of judicial territory and explain why I use this term rather than jurisdiction or extraterritoriality. In the following pages, I clarify the book's main arguments. First, I sketch out a brief timeline of the role of judicial territory in promoting US empire and global capitalism since World War II. Next, I explain how this overarching historical argument emerges from a detailed analysis of the seemingly esoteric spatio-legal minutiae that enabled the transformation of foreign sovereign immunity and act of state rules. Specifically, I explain how the iterative redefinition of key legal dichotomies has been fundamental to extending US judicial territory over foreign government acts in and beyond US borders. This process has simultaneously effected a redefinition of territorial sovereignty and helped institutionalize a neoliberal understanding of the economy. Finally, I offer some comments on how I have approached reading and interpreting common law cases, before providing a brief outline of the structure of the book.

TRANSNATIONAL US COMMERCIAL LAW

This book focuses on the extension of US judicial authority over economic relationships between private (usually US) companies and foreign sovereign governments. This is one subset of "transnational commercial law," which plays a key role in governing the global economy. It overlaps with but is distinct from (sub)national and international law.

International law, which many associate with global economic governance, is a common but fuzzy term. Sometimes called "public international law," it refers to rules and norms agreed on between and among sovereign states or other official international actors. This includes bi- and multilateral treaties, the rules of international institutions, and the more amorphous "customary" or "general" principles of international law. Together, these create a patchy if important set of rules governing state decisions, including economic policies.[12] Bilateral and multilateral trade treaties are especially significant for "legally locking in pro-business market reforms," though not in the equalizing way many standard accounts of "free market" globalization assume.[13] As geographer Matthew Sparke explains, "Contrary to flat-world visions, the so-called level playing field of so-called free trade actually relies upon a complex patchwork of bilateral, regional, and global agreements that re-regulate rather than deregulate trade."[14]

In addition to these properly inter- or supranational rules, some aspects of cross-border economic transactions are still governed by the national or subnational laws of the host states within which they occur. These laws can, of course, vary greatly among countries. Yet, since World War II, the "Americanization" of other legal systems, sometimes referred to as the global "harmonization" of law, has meant that countries around the world have increasingly reshaped their own domestic laws, particularly commercial laws, to mirror those of the United States.[15]

Transnational commercial law is less widely known beyond law and business circles than either national or international law. Yet, it is even more important for governing cross-border economic transactions between private companies or between companies and governments, with major effects on the global distribution of wealth and resources.[16] The precise definition of transnational commercial law remains elusive.[17] It consists of a wide variety of customary and codified rules. Sometimes overlapping with "private international law," this includes the important but often ambiguous "lex mercatoria, consisting of the unwritten customs and usages of merchants and general principles of commercial law."[18] It

also includes the rules of international arbitration, in which contracting parties submit disputes to independent tribunals that are not technically subsumed within any one nation-state, though in practice they are dominated by Anglo-American training and jurists.[19]

One of the most important components of transnational law, however, is the transnational application of the *domestic* laws of economically powerful countries. Such laws are based in national legislatures and judiciaries, but they govern economic relationships occurring in whole or in part beyond those states' borders. This body of law, based most importantly in England and New York, is, as Pistor explains, "the backbone for global capitalism."[20] The courts of these jurisdictions, which are considered to be the most capital and creditor friendly in the world, claim authority over huge numbers of transnational economic transactions, while other states regularly recognize and enforce these foreign rules.[21]

In this book, I use the terms *transnational US law* or *transnational US commercial law* to refer to the national and subnational US laws used to govern economic relations that extend beyond official US borders. This law, of which New York state and federal US law are key components, itself takes several forms. It includes explicitly extraterritorial laws, such as US anti-trust statutes and other legislation whose transnational application usually depends on claims about a foreign act's "effects" on the United States.[22] Yet, it is also extended in much more sweeping ways. In some cases, courts base transnational jurisdictional claims on what are known as conflict of laws analyses of which of multiple jurisdictions has the most substantial claim over an activity. More straightforward is the use of governing law clauses, which allow contracting parties to select which jurisdiction will govern their own transaction. These have become nearly ubiquitous in major commercial contracts since the 1970s. New York and English law remain the favored choices in these clauses, especially for financial contracts, *even when those contracts have little or no connection to the United States or the United Kingdom.*[23] Together, conflict of laws analyses and governing law clauses extend US legal space over huge swathes of transnational economic relations between private parties. Bringing the economic acts of foreign *governments* under US judicial authority, however, has required an extra step. It has required rewriting the two US legal doctrines most closely concerned with defining the sovereignty of foreign states—foreign sovereign immunity and the act of state doctrine.

FOREIGN SOVEREIGN IMMUNITY AND THE ACT OF STATE DOCTRINE

Since its founding, the United States has regularly intervened in the affairs of other sovereign countries. Yet, throughout the nineteenth and early twentieth centuries, such interventions were considered the domain of the executive branch and foreign policy, not of the judiciary. During this period, foreign sovereign governments were protected from US *courts* by two main common law doctrines. Foreign sovereign immunity rules ensured that even foreign government entities (e.g., diplomats or naval ships) *within* US borders would be immune from suit in US courts in most circumstances. Meanwhile, the act of state doctrine prevented US courts from questioning the validity of the acts of foreign governments in their *own* territories. This, for instance, prevented US citizens who had travelled abroad from using US courts to sue foreign governments for seizure of property or other mistreatment. Until the mid-twentieth century, strict or "absolute" versions of each doctrine dominated. After World War II, however, both underwent major transformations. Most importantly, both were gradually restricted to exclude what were understood to be the private, commercial acts of foreign governments—allowing US courts to assert authority over such acts in ways they would not have done previously.

The transformations of these doctrines have overlapping but distinct timelines. Support for the "restrictive" theory of foreign sovereign immunity began in the early twentieth century. Yet, the doctrine only really began to change in the 1950s, as a "commercial exception" was elaborated in State Department policy and US common law. This transition was strengthened with the passage of the Foreign Sovereign Immunities Act (FSIA) in 1976, which codified the commercial exception and introduced new, more flexible spatial rules for extending US jurisdiction not only within US borders but over foreign government acts with "direct effects" on the United States.[24] Since then, the range of government activities considered merely commercial and thus *not* immune from US judicial reach has continued to expand more gradually.[25]

The restriction of the act of state doctrine only began in the early 1960s, as attention shifted from the traditional territorial bases of the doctrine to maintaining a proper separation of powers within the US government. This paved the way for the gradual restriction of the doctrine with respect to acts that are seen as unlikely to interfere with the executive's US foreign

policy interests. It eventually led to several specific exceptions to the act of state doctrine, including a contested but still significant common law exception for commercial activities. This has enabled US courts to claim authority in some cases even over foreign government economic acts carried out in that government's *own* territory.[26]

Neither foreign sovereign immunity nor the act of state doctrine are prominent in scholarship on transnational commercial law. Conversely, work on these doctrines tends to focus either on those issues still considered to be "political" matters and thus beyond US judicial reach or on the liminal cases in which the boundaries of judicial power remain actively contested. It rarely considers situations in which these doctrines no longer apply because the acts in question are *now* seen as merely private and commercial; the role of the transformation of these doctrines in *making* such cases "apolitical" is overlooked. Yet, it is only because such activity has been rendered merely economic that it can be seen as coming under US jurisdiction in the same way any other transnational commercial activity might. It was the restriction of these doctrines that enabled many foreign government acts today to be treated as private economic acts that can be adjudicated by US courts, rather than as foreign policy issues for the executive to handle. "The private cloak turns what would otherwise be significant inroads into, and infractions of, territorial sovereignty into unexceptional economic activity that leaves territorial sovereignty perfectly intact."[27]

In doing so, the restriction of foreign sovereign immunity and act of state rules has extended the power not just of any legal system, but of the most capital-friendly jurisdiction in the world. Conversely, even as judicial expansion bolsters US and global capitalism, transnational US law is dependent on US and especially New York economic power. Each step in the expansion of this law has been challenged by foreign governments. Yet, once judicial decisions are made, most foreign governments do obey them most of the time. This is true even though transnational law is not backed directly by the enforcement power of the police the way domestic law is. Rather, this obedience is due primarily to the importance of the US economy—foreign governments simply cannot afford to be locked out of US markets or legal services.[28] The transnational extension of US judicial power rests on US economic dominance.

JUDICIAL TERRITORY

I use the concept of judicial territory to refer to the entire space, within and beyond official US borders, over which US courts regularly exercise authority. This concept partially overlaps with common terms like *jurisdiction* and *extraterritoriality*. Yet, it captures empirical and theoretical dimensions of legal space missing from dominant understandings of those terms.

Legal scholars and jurists are well aware of the growing importance of transnational law. The common story is that while jurisdiction, territory, and sovereignty were coterminous in the Westphalian era, this spatial identity broke down in the second half of the twentieth century, as the territorial bases of law were supplemented or replaced by other jurisdictional criteria. Complicated cross-border supply chains, integrated financial markets, and the rise of cyberspace have indisputably led to complex jurisdictional questions. Prolific scholarship on these issues provides useful insights into the detailed operations of transnational law today.[29]

By and large, however, such accounts stop at noting or describing these tendencies toward jurisdictional complexity or flexibility, without considering how and why *particular* spatio-legal changes are produced. Indeed, such work often presents these transformations in aspatial and apolitical ways. Even as scholars acknowledge the dominance of New York and English courts in extending domestic laws transnationally, for example, they tend to overlook the significance of unequal power relations in shaping this particular geography. The importance of these courts is simply noted or described, while so-called political analyses of this importance are either rejected or deferred.[30] Existing differences among states, moreover, are often presented as transitory—that is, as in the process of becoming harmonized or homogenized and giving way, however gradually, to an emerging international consensus.[31] While all this work may register particular extensions of US legal reach over foreign governments, it fails to emphasize the uneven geographical and geopolitical dimensions of these processes.

Commercial law texts and treatises tend not to probe the conceptual or political implications of the transition from Westphalian to more complex bases for asserting jurisdiction at all.[32] Other legal scholars do discuss jurisdictional changes in more sophisticated ways, considering, for example, what they mean for the status of the nation-state, as well as for

conceptions of sovereignty and the constitution of political subjectivity.[33] Yet, even here, the tendency is to talk about changes in the relationship between jurisdiction and "states" in general terms, rather than to emphasize the ways that *particular* states are positioned in relation to these changes.[34] Moreover, a normative focus in much of this work on what a more cosmopolitan, pluralist jurisdictional regime *could* look like tends to elide the continued highly unequal geopolitical economic context in which these jurisdictional changes are actually being made.

In contrast to much of this work, a small number of more critical legal scholars have theorized jurisdiction in ways that do center power and space, arguing, for example, that it is "a legal mechanism for organizing how political power is exercised, spatialized, and contested."[35] Mariana Valverde shows that while jurisdiction appears as a neutral legal technology, it is in fact crucial to organizing not only the who and what, but also the *how* of governance. Moreover, one function of jurisdiction has been to obscure the messiness of overlapping, often contradictory, and contested legal spaces.[36] Such analyses are helpful for analyzing the transnational extension of US judicial authority and showing how formal legal tools are both power-laden and depoliticizing.

Yet, in general, the tendency, even in more critical work on jurisdiction, to see the growing flexibility of law in terms of the extension of jurisdiction *beyond* territory, limits the explanatory potential of this concept for understanding the increasingly transnational character of US law in general and its extension over the economic activities of foreign governments in particular. This tendency reflects the widespread but simplistic assumption that territory is a nationally bounded spatial container within which the sovereign is supposed to operate. Transnational legal practices are then viewed as flexible, extraterritorial, or even de-territorializing, and, correspondingly, as making traditional Westphalian sovereignty and borders obsolete.[37] Yet, Westphalian territoriality has *always* been a myth, if a materially significant one. Powerful states have long exercised authority beyond their formal borders, and even domestically the power of states has always been fragmentary, contested, graduated, and incomplete.[38]

In contrast to most work on jurisdiction, the concepts of judicial territory and territoriality recenter space and power to offer a very different account of the history and operation of transnational law and its role in governing foreign state economic decisions—one that foregrounds not legal harmonization and leveling, or mere complexity, but rather the geopolitical and geographical *unevenness* of radical transformations in

jurisdictional rules since the mid-twentieth century, as well as their implications for reconfiguring state borders and sovereignty.

Even the term *extraterritorial* does not fully capture such dynamics. That term applies generally to the "competence of a state to make, apply, and enforce rules of conduct in respect of persons, property or events beyond its territory."[39] Like the flexibilization of jurisdiction, the growth of extraterritoriality is often assumed to be "an inevitable—and either a desirable or innocuous—byproduct of globalization."[40] Legal scholars agree that the United States has been dominant in driving the expansion of extraterritoriality. Yet, while some criticize the outsize power of the United States in this domain, many others present this in essentially apolitical terms.[41] Moreover, across this literature, extraterritoriality is usually understood to apply only to limited cases of exceptional transnational reach in contrast to the supposed normal operations of domestic law. Focusing on US statutes and explicitly extraterritorial claims, this work neglects the much more widespread operation of ordinary transnational commercial law, which is seen as too mundane to merit the title of extraterritoriality. The term is rarely used in relation to governing law clauses,[42] or to cases brought under US jurisdiction via the restriction of act of state and foreign sovereign immunity rules. I therefore use the term *extraterritorial* in this book only when quoting others or to refer to explicitly extraterritorial rules or arguments.[43]

In addition to the empirical limits of the term, I also prefer territorial to extraterritorial because the latter suggests a static and identifiable national boundary that has been transgressed. This sits in some tension with conversations about flexible jurisdiction, instead reifying the idea that law still *is* normally contiguous with state borders. This reinforces a binary distinction between "inside" and "outside" that fails to capture the complex spatial logics of transnational cases in which defining the in/out boundary is precisely the question. While US courts sometimes assert explicit extraterritorial authority, we will see that they more often redefine the public/private distinction to justify the extension of US judicial power abroad or rewrite the definitions of home and foreign altogether to make transnational processes "domestic."[44]

The concepts of territory and territoriality also help capture other important characteristics of transnational US legal space missing from most discussions about either extraterritoriality or jurisdiction.[45] As political geographers have long emphasized, what makes something territorial is not the official demarcation of lines on a map, but the centrality of power to strategies for gaining spatial control. Territoriality—the struggle

to establish the boundaries of and control over particular spaces—is a simultaneously material and discursive practice that structures and governs the management of boundaries, determining who can and cannot move in which ways, and whose authority applies in which spaces. [46] Territory, in turn, can be understood as an "effect" of territorial struggles.[47] Though territorial formations are usually relatively stable in the short term, they are never fixed. Rather, they are relational and processual.[48] They are best understood as referring to historically specific relationships among states, governance, resources, and people organized in space.[49] Furthermore, while not all territory is state space, and not all state space is territorial, territory remains fundamental to state power and constitutes both an object of governance and a political technology.[50]

Transnational US law as a whole is usefully understood as operating territorially in all these ways. Law always remains, at root, "an expression of state power,"[51] and it is an important but largely overlooked component of constituting the state itself as "an inescapably fluid and pluri-centred ensemble . . . an ongoing process of 'state work' and 'state effects' rather than a static thing."[52] This is particularly true for the extension of US judicial authority produced by the redefinition of foreign sovereign immunity and act of state rules. The subjection of foreign *governments* to governance by US courts directly implicates both US and foreign state space. More specifically, judicial expansion selectively distributes distinct modalities of US state power across space for strategic geopolitical and geoeconomic ends.[53]

Like all territorial struggles, moreover, the extension of US judicial reach has been based on repeated processes of border delineation and contestation. All common law develops through litigation, which is to say through disagreement and conflict. The cases through which US judicial power is extended over foreign governments frequently involve explicit debates over the proper contours of US and foreign territory and sovereignty—concepts that are still understood, in the legal cases documented here, as closely interlinked. Debates over the conceptual boundaries between public and private, political and legal, foreign and domestic are also key to judicial expansion—and, as I show throughout the book, are themselves entangled in more fundamental debates about territorial sovereignty. The centrality of struggle to transnational law is not captured in terms like jurisdictional flexibility or extraterritoriality alone.

Of course, the territorial formations produced in these processes have been neither homogeneous nor static. The map of judicial territory varies not only over time, but also by type of judicial power (e.g., judgment,

discovery, injunction, attachment) and by subject matter (e.g., shipping, nationalizations, debt). Judicial territory is (like many legal and territorial formations) fragmented, overlapping, and differentiated, and its borders cannot be clearly drawn on any map.[54] Nevertheless, the history documented in this book makes the general contours clear: the United States has extended its own territorial claims over many transnational economic relations with foreign governments, encroaching on the territorial sovereignty of other, especially postcolonial, states. Its ability to do so cannot be explained simply by technical arguments about efficient, practical, or so-called necessary changes in jurisdictional rules. Rather, US judicial authority abroad is always dependent, at root, on US political and economic power, and on the strategic control of variegated legal space. Judicial territory and US power have evolved together.

JUDICIAL TERRITORY, US EMPIRE, AND THE POSTWAR INTERNATIONAL ORDER

The overarching argument of this book is that US judicial territory has been a potent tool of the linked projects of postwar American empire and the production of global capitalism. While the extension of US law over transnational relationships between two or more private companies remains far more common, litigation between private parties and foreign *governments* often has consequences for entire populations. This can be true for particular cases, as the example of the vulture funds that sued Argentina shows. But it is also true beyond individual cases insofar as US judicial decisions promote or hinder certain *kinds* of government economic activity altogether.

Histories of foreign sovereign immunity and act of state rules reflect the same aspatial and apolitical tendencies as broader conversations about jurisdiction and extraterritoriality. The restriction of each doctrine is usually explained as a natural response to changing economic conditions—in this case, not to "globalization" per se, but to the *growing* role of states in cross-border economic activity in the mid-twentieth century, which is seen as making it "necessary" to reduce states' "privileges" in global markets. Because these doctrines involve foreign governments directly, their political significance, where they still apply, is often noted. Yet, their transformations are presented overwhelmingly as technical, rather than political developments. The importance of geopolitical economic dynamics in spurring these changes is barely discussed. The Cold War, for example, is mentioned

in histories of foreign sovereign immunity only in passing, while the relevance of Third World economic practices is rarely remarked at all.[55]

Yet, as I show in this book, the expansion of US judicial territory over the economic acts of foreign sovereign governments was motivated, first and foremost, by the desire of private corporations and US state actors to limit and tame what were seen as the interventionist economic practices of socialist and postcolonial states. Subjecting these states to US legal rules and courts has served both private and national US interests since World War II, though the substantive content of these cases and the details of how judicial territory operates have changed over time.

In short, as formal colonization and blatant interventions in other countries became illegitimate after World War II, the United States sought new ways to protect its economic interests and perpetuate access to foreign capital and resources. In this context, litigants, jurists, and politicians gradually learned to redefine foreign sovereign immunity and act of state rules for these purposes. Using this highly technical and seemingly mundane legal approach in place of more obvious interventions allowed the judiciary and the executive branch to cloak the pursuit of US geopolitical and geoeconomic goals (always entangled to a large degree with private corporate interests) in the guise of the "rule of law." This made it easier to project a judicial modality of US power while simultaneously professing commitment to a postimperial world composed of sovereign nation-states.

Yet, while all transnational law disrupts the idea that nation-states are at least formally fully sovereign within their own territories, this challenge is even more acute when governments themselves are subject to the authority of foreign judges. Expanding US judicial reach met with strong resistance, particularly from postcolonial states attempting to pursue economic programs that did not line up with American visions of the "rules-based" liberal capitalist international order. The clash between private US capital and these foreign governments produced the litigation that, piece by piece, created the conditions for the extension of US judicial territory.

In the 1940s through the 1960s, much of this litigation emerged from Third World countries' interventionist economic practices. These decades were characterized by what Gillian Hart calls "Cold War Era (CWE) national projects of accumulation and hegemony,"[56] which included social democratic and welfare policies in Europe and America, as well as large-scale planning and development projects throughout the Third World.[57] In this context, US courts, litigants, and the Department of State sought to protect US capital from both the Soviet Union and its satellites and from

Third World developmental states, while still allowing the United States to maintain a nominally anti-colonial position. Litigation in US courts during this period was particularly focused on figuring out how to deny immunity in relation to foreign state-owned enterprises, government development contracts, and official aid programs.

As US empire and the position of Third World states changed over the ensuing decades, the precise forms and functions of judicial territory changed as well. After the Cuban Revolution, expanding judicial reach became one of many tools used by the United States to contest Cuban expropriations of US property. This was linked to broader efforts to combat Third World support for a New International Economic Order (NIEO) that would challenge the US-dominated status quo by promoting not only formal but substantive economic equality. The ability to expropriate property held by multinational companies was a key component of NIEO plans.

Figuring out how to use US domestic law to respond to all these challenges was a fumbling and inconsistent process. At times there were disagreements between the executive and the judiciary. But from the late 1940s through the mid-1970s, both branches supported revising foreign sovereign immunity and act of state rules—literally changing the rules of national sovereignty—to bring the so-called commercial acts of foreign governments within US judicial oversight. This effort continued from the 1970s on, even as the global political economy and US power underwent major transformations.

By the late 1960s and early 1970s, the national development projects that had characterized the postwar decades were coming under increasing pressure, as was the international system of stable exchange rates and capital restrictions established after World War II. Although this was a moment of crisis for US power and legitimacy, the United States eventually emerged even stronger than it had been, on the basis of an expanded global role for the US dollar and US finance in a newly flexible and volatile international monetary system.[58] All this went hand in hand with the neoliberal counterrevolution of the 1970s and 1980s, which cemented the undoing of the Keynesian welfare state at home and dealt the death blow to Third World attempts to construct an alternative to either Soviet-style Communism or US-style capitalism abroad. Panitch and Gindin sum up the effects of all this as leading "to the realization by the end of the 20th century of a global financial order with New York as its operational centre, and with the American imperial state as its political carapace."[59]

The continued extension of US judicial territory during this period worked in tandem with these geopolitical economic changes. Alongside

structural adjustment programs and debt restructurings managed by the International Monetary Fund (IMF), US law became an especially important tool for imposing neoliberal discipline on indebted countries in the context of the Third World debt crises of the 1980s, while simultaneously bolstering the interlinked power of Wall Street and US empire. The authority of US courts over foreign debtors solidified in the 1990s, just as the Clinton administration decisively embraced the dismantling of welfare states and the deregulation of finance at home and abroad.[60]

The legal terrain created in the last quarter of the twentieth century, in turn, set the terms for the further expansion of US judicial territory in the twenty-first century. The War on Terror brought the label of US empire back into common use and focused widespread attention on US military and executive power. Yet, US judicial power has also continued to expand during this period. At the same time, new tensions between the executive and judicial branches now raise questions about the relationship between judicial power and US empire going forward.

REASONING BY DICHOTOMY

The sweeping historical argument just laid out depends on other far more technical arguments about the spatio-legal operations of transnational US law. As I show throughout the book, a primary mechanism for extending US judicial territory has been the rewriting of key legal dichotomies.[61] Beginning in the 1940s, foreign government acts previously classified as "public" and "political" issues to be governed by the executive branch in the domain of foreign policy were reclassified as "private," "legal," and "commercial" matters to be governed by the judiciary. From the 1970s on, the foreign/domestic distinction was also redefined, with many acts previously seen as outside US borders being recoded as "in" or having "effects" on the United States. These legal minutiae are critical to understanding how judicial territory has not only operated as a US geopolitical economic instrument but has also reconfigured territorial sovereignty and helped construct "the" neoliberal economy in the process.

In focusing on these legal technicalities, I build on a rich body of critical work on dichotomies in Anglo-American law and liberalism,[62] while bringing the project of denaturalizing these distinctions to a domain and scale of law that has received little attention so far. In doing so, I also contribute more broadly to analyses of what Appel calls the "as ifs" of the lib-

eral capitalist project—the constitutive fictions which allow capitalism to reproduce itself.[63] Producing and maintaining these fictions takes a lot of work. But acting as if public and private, political and legal, foreign and domestic are separable has been an important tool for perpetuating global capitalism in the face of its own actual messiness and of concerted resistance from those seeking alternatives. The point is not simply to show *that* these distinctions are artificial, or to offer so-called better or more accurate definitions. Rather, the point is to show *how* these dichotomies are continually redefined and with what geopolitical economic implications.

First and foremost, I show that these seemingly esoteric legal changes are inseparable from the deployment of US law as a geopolitical tool in the struggle between American-led capitalism and alternative economic approaches. The recategorization of key legal dichotomies in cases involving foreign governments has contributed to a shift in the modality of US empire operating abroad. By redefining certain activities as private and commercial, *rather* than public and political, US courts shifted responsibility for transnational economic issues from the executive to the judiciary. As we will see, this occurred for the most part with the explicit support of the executive and relieved that branch of responsibility for managing often messy diplomatic conflicts. It also increased and regularized the transnational extension of US state power by replacing ad hoc foreign policy decisions with more generalized legal rules.

This transfer of power from the executive to the judiciary resonates with the far more well-documented processes of "judicialization" and of the demise of the "political question doctrine" in the US domestic context. Both terms refer to the growing tendency of courts to weigh in on or even invalidate the decisions of the other branches in cases previously understood as political rather than legal matters.[64] Whether characterized as providing important checks on government power or as judicial supremacy, these processes, like the extension of US judicial territory abroad, raise questions about the rule of law, the separation of powers, and democratic accountability.[65] Yet, neither judicialization nor the political question doctrine are commonly analyzed in relation to transnational law or to economic questions.[66] Furthermore, the transfer of authority to the judiciary in transnational affairs involving foreign governments is unique in raising questions not only about politics, but about *geo*politics—and in complicating widespread assumptions about national territorial sovereignty.

By redefining key legal categories in order to claim authority over foreign government acts, US courts have promoted private corporate interests

by formally restricting the economic autonomy of foreign governments within and beyond their own borders. This entails more than the de facto exercise of unequal power relations between corporations and countries, and between rich and poor states. It amounts to rewriting the *juridical* rules of territory and sovereignty in a process that took off just as the resolution of World War II led to international assertions about the sanctity of state borders and just as many postcolonial governments gained formal sovereign status for the first time. The fact that this re-territorialization of state space has occurred through the technical operations of law in ways that are illegible to all but a small number of legal and business experts has only made it more effective.

In addition to serving the geopolitical economic interests of US empire and rewriting the juridical terrain on which states interact in the postwar period, the reclassification of legal dichotomies at the heart of the extension of US judicial territory has simultaneously helped create the postwar international economic order of which the United States was the founder. It has done so by contributing to a neoliberal model of globalization in which state interventions in the economy in the name of society are devalued, even as state support for global markets becomes more entrenched than ever. Markets are never independent of state rules and institutions. Yet, the *attempt* to separate the economic from the political has been central to modern liberal market society.[67] Despite the ultimate futility of this endeavor, the politics/economics distinction is more than mere rhetoric—it is a powerful performative fiction.[68] Even as state and market remain constantly entangled, this fiction has been embodied in their "institutional separation" in rules and procedures, with significant material effects.[69] Transnational US common law has been an important, yet understudied component of this process. Through perpetuating a sharp public/private distinction and expanding the category of private, commercial activity, the extension of judicial territory has been key to managing the boundary between state and market, while expanding the domain of the latter. In doing so, it has helped institutionalize a neoliberal vision of the economy as a bounded sphere.[70]

Focusing on US judicial territory also shifts our usual understanding of the timeline of neoliberal change. While the emergence of neoliberal *ideas* in the early twentieth century is well documented, the neoliberal project is frequently seen as waiting in the wings until the crises of the 1970s.[71] Yet, attending to US judicial expansion shows that, even as social welfare

programs became available to many in the United States and Europe after World War II, what we can now recognize as early neoliberal tendencies were already being implemented transnationally. Redefining foreign government acts from public and political to private, legal, and commercial was key to undermining economic practices of socialist and postcolonial states from the 1940s on. The depoliticization of the economy widely associated with the neoliberal turn of the 1970s was not on hold during the Bretton Woods era—it was actively wielded across the Third World in the fight between US-style capitalism and alternative economic approaches.[72]

It is also in light of this history that the relationship between judicial territory and globalization should be understood. It is not only that judicial territory has been extended more and more widely, if always incompletely and unevenly, since World War II. Even more importantly, by institutionalizing a sharp politics/economics distinction, undermining alternative economic models, supporting US financial power, and fostering the neoliberalization of Third World societies, the expansion of judicial territory has helped produce the particular form of American-led globalization that characterized the second half of the twentieth century and shaped the terrain on which the geopolitical economic shifts of the twenty-first century are playing out. Like the five hundred years of transnational economic integration that preceded it, this era of globalization has not been characterized primarily by homogenization or leveling, but rather by variegated processes of integration, differentiation, and uneven and combined development—that is, not only by the (re)production of differences of many kinds, but also by their exploitation in the service of capital accumulation.[73] This is the form of globalization that the increasingly global instrument of judicial territory has helped promote.

In short, the cases examined here matter not only for their effects on the countries involved, but also because of what they reveal about *how* law constitutes American empire, on the one hand, and sovereignty, territoriality, and neoliberal capitalism, on the other. Far more attention has been paid to the postwar US military-industrial complex, US military interventions since the end of the Cold War, and the growth of executive power associated with these processes. But alongside these obviously imperialist adventures and the blatant violations of foreign sovereignty they entail, the extension of judicial territory has been chugging along too, bolstering US power and global capitalism in ways that are arguably just as important, if much, much quieter.

Geopolitical and macroeconomic relations are always constituted through the mundane, daily practices of state and nonstate actors.[74] This includes legal practices. Law, in this sense, is a good example of what Agnew calls "low" or "hidden" geopolitics—terms that call attention to a wide range of practices not captured in most studies of official foreign-policymaking, but which are critical to constituting world politics and its complex imbrications with global economic relations.[75] That the geopolitical role of such practices has been largely unexamined is no accident, but part of how they actively obscure their geopolitical salience.

The iterative, mundane, and technocratic character of common law change makes it particularly difficult to determine the precise effects of any one case on a foreign country (the Argentine example at the start of this chapter is unusually clear in this regard). Moreover, the extension of US judicial authority never operates in isolation from other constraints on Third World states' behavior, including in the form of diplomatic pressure, aid conditionalities, economic threats, international treaties, and more. United States common law has operated alongside and in combination with these other geopolitical economic tools.

Yet, even where the direct consequences of litigation cannot be clearly measured, changes in the transnational operation of US law are significant far beyond the specific parties to any particular case. As law professor Tonya Putnam puts it in a discussion of US extraterritoriality:

> Because strategic behavior involves anticipating the costs of complying with various rules, and also the likelihood and magnitude of punishment for noncompliance . . . even a small number of decisions altering, (or clarifying) the reach of U.S. law, and concomitantly the jurisdiction of courts to decide related claims, can influence the character of transnational conduct in the issue area concerned.[76]

In other words, law, including transnational law, shapes the actions not only of those involved in litigation, but of all those who potentially could be. The "shadow of the law" is long.[77]

It is not only the text of the law, moreover, but *how* law works that matters. While never separable from wider social practices and ideologies, legal practices have their own specific modes, logics, and temporalities, which cannot be reduced to market, imperial, or other logics. Indeed, variations in legal practices across space and over time help explain important changes in

capitalism itself.[78] Having some understanding of the legal modes and logics most relevant to the extension of judicial territory is, therefore, critical to the analysis in this book.

Common law, which developed in Britain and is now used in many former British colonies, refers to a system of law shaped by legal cases and past decisions (case precedent) over time. Civil law systems, in contrast, are determined primarily by authoritative texts, legal codes, and statutes. In practice the United States and many common law systems are now better understood as hybrids in which common law operates in combination with legislative power. The prevalence of common law within this complex whole nevertheless gives the system distinctive features. One fundamental characteristic of US common law is the tendency, described above, to reason by dichotomy.[79] This has been central to my own approach to reading and interpreting the cases discussed in this book, and I explore the centrality of dichotomies to law and liberalism more fully in chapter 2. Here, I identify other important characteristics of US common law that have informed my methodological choices and analyses.

Common law is necessarily produced through litigation or struggle. This struggle is shaped by litigants (in this book, mostly large-scale investors and Third World governments),[80] interested third parties, and lawyers, most of whom have been trained in elite US law schools.[81] Lawyers, in turn, draw heavily on case precedent and published legal authorities. Thus, neither judges nor litigants are isolated agents of common law change. This agential complexity is further compounded by temporal ambiguities. Though successive decisions may be debated and criticized, they typically only depart widely from earlier precedent when new ways of thinking have become acceptable *enough* for some judges to embrace them. Changes in what is or is not acceptable may, in turn, result from broader social shifts, developments in legal theory, personal interests and motivations, or some combination of the above. This means the origins of legal change cannot be ascertained from case documents alone.

Despite these ambiguities, case documents and judicial decisions can be understood as important points of articulation in broader socio-legal struggles. Moreover, the moment of formalization is materially significant; only when a legal interpretation is adopted by a judge can it officially determine the outcome of future cases. At the same time, previous decisions do not determine future cases in any easily predictable way. A case may not be cited in later cases at all, or it may hardly be cited for years and then suddenly become important. Furthermore, even commonly referenced cases

are interpreted in different ways, both within the same case and over time. Case precedent thus conditions, rather than determines, possibilities for future legal change.

In this book, I do not do justice to the full agential and temporal complexity of the expansion of transnational US law. Instead, I attempt to map its primary coordinates. Rather than trying to identify every case involving foreign governments, or to find obscure or hidden cases, I thus focus on cases that have been especially important in driving changes in US foreign sovereign immunity and act of state rules, seeing these as turning points at which more nebulous shifts in interests and legal views coalesce. Within these cases, I focus primarily on final judicial decisions and, for some, on briefs submitted by litigating parties, the executive branch, and other important participants. These documents alone cannot capture all the dynamics shaping legal change, nor do they allow insight into the domestic politics of litigating governments. However, limiting attention to these documents allows for broader coverage and makes it possible to see the arc of judicial expansion as a whole.

The cases examined come from a variety of US states, but by far the most important courts for the expansion of US judicial territory have been the District Court for the Southern District of New York, the Second Circuit Court of Appeals (located in Manhattan), and the US Supreme Court. This is due largely to New York's economic dominance and the fact that so many transnational contracts are written under New York law—New York economic power has been central to the production of US judicial territory. As we will see, New York judges even sometimes justify decisions on the grounds of supporting New York commercial interests. Yet, New York courts do not represent New York power or interests alone. Cases involving foreign governments are heard in federal rather than state courts. These courts are located in particular states, but they are established under the authority of the Constitution, and they apply a *combination* of federal and state law.[82] This raises important questions about the intersection of US and New York legal power and interests, only some of which I address in this book.

Focusing on the most important cases in the history of foreign sovereign immunity and the act of state doctrine means that many of the cases I discuss have been analyzed at length by legal scholars and jurists. This secondary literature has been important for bolstering my own empirical understanding and for allowing me to see how these cases have been con-

strued and deployed by legal professionals. However, I read these cases very differently from such scholars. Most importantly, I read them spatially and historically.

Critical legal scholars have long critiqued the reifications and abstractions of law. Yet, for a long time, this critique operated primarily through temporal analyses focused on historicizing and thus denaturalizing legal categories, but paid little attention to space. In the early 1990s, a small number of geographers, most notably Nicholas Blomley, David Delaney, and Richard Ford, founded the still small but now well-established field of legal geography.[83] More recently, there has been a spatial turn within legal studies as well.[84] Together, these scholars have shown that law is always spatially defined and that legal practices produce space. Moreover, both law and geography are simultaneously discursive and material. Legal ideas are not inscribed on material space. Rather, society is constituted in important ways through spatio-legal discursive practices.[85] Here, I take these lessons to heart, investigating the ways that transnational US law is co-constituted with the production and manipulation of key spatial distinctions and strategies.

Like traditional critical legal scholars, furthermore, I read the cases in this book historically, but in a way that is simultaneously geographically relational,[86] situating them with respect to a much broader geopolitical economic context than is usually done. Historical and relational contextualization is necessary both for denaturalizing common assumptions about law today and for refusing bounded understandings of legal acts, instead identifying links between and among people, places, and discourses at multiple spatio-temporal scales. It is also particularly important because of the ways in which common law actively *de*-contextualizes, tending to minimize or reject the significance of the broader social, political, and economic conditions in which legal cases are situated. Although, at first glance, the practice of case precedent seems to preserve the past, it does so selectively, privileging isolated components of past cases, while obscuring others. This continual erasure of its own contingent and historical development is part of law's "frozen politics."[87] Reading contextually is central to combatting both the historical amnesia produced in this process and, relatedly, the fiction of legal "closure," in which law is presented as an autonomous and technical domain, requiring legal expertise to understand. Examining how law both shapes and is shaped by other sociopolitical processes is critical to resisting this fiction, which is itself a key source of law's power.[88]

STRUCTURE OF THE BOOK

The complexities of common law change belie any simple idea of a decades-long unified strategy of judicial expansion. Nevertheless, that expansion has been remarkably continuous, if irregular, and it has been produced through the repeated deployment of a limited set of legal tactics. This tension between coherence and contingency can be partly resolved by distinguishing among the goals, mechanisms, and more or less unintended effects of common law decisions. Neither litigants, judges, nor the US executive set out to expand the spatial reach of US judicial power per se. They did, however, aim to protect US companies by containing or resisting anything that smelled vaguely of Communism or simply of non- or "more-than" capitalist developmental efforts,[89] and they explicitly sought to depoliticize conflicts with Third World governments and to bolster US financial and dollar power. Once the legal mechanism of redefining the public/private, political/legal, and foreign/domestic distinctions turned out to be useful for accomplishing these goals, litigants and judges learned to deploy this mechanism again and again. The effects of this included rewriting the rules of territorial sovereignty, bolstering American empire, and helping define the contours of "the economy" at the global scale. This book tracks these goals, mechanisms, and effects through a chronological examination of the expansion of US judicial territory and its role in mediating the relationship between private (mostly US) capital and Third World states.

Chapter 1 situates judicial territory in relation to broader conceptualizations of capitalism and imperialism and summarizes the changing role of law in this relationship over time. I suggest that different forms of law have been important to different imperial strategies. These legal forms, moreover, have distinct spatialities and have, in turn, helped constitute the variegated geographies of both empire and capitalism. By contrasting post–World War II US judicial territory with the territoriality of earlier imperial formations, I show that the messy irregularity of judicial territory today does not mark a simple rupture with obsolete Westphalian "national" geographies, but rather a continuation by new means of previous *imperial* ones.

The rest of the book examines key phases in the extension of US judicial territory. Chapters 2 and 3 investigate the period from the end of World War II through the mid-1970s, when judicial expansion was shaped most importantly by the threats of Cold War Communism, on the one hand, and anti-colonial economic practices, on the other. More specifi-

cally, chapter 2 focuses on the shift from an absolute to a restrictive theory of foreign sovereign immunity. I show that introducing a commercial exception to the doctrine required not only asserting *that* commercial acts were no longer immune, but first redefining all commercial acts as private for the first time and then gradually expanding the category of what counts as commercial. In the context of the Cold War, postcolonial economic practices, and growing Third World support for the NIEO, this expansion of the category of commercial activity was used to subject state-owned enterprises, government infrastructure contracts, and official aid programs to business-friendly governance by US laws and courts. This shifted responsibility for many fraught geopolitical issues from the executive to the judiciary, depoliticizing significant questions about how the economy should be governed, just as defining the proper relationship between political and economic sovereignty was becoming *the* most heated geopolitical question of the era. With the codification of the commercial exception in 1976, sovereign immunity was even further restricted by the weakening of explicitly spatial rules about how much of a connection between a foreign state's activity and the United States is required for investors to bring suit.

Chapter 2 takes a broad-brush approach to the emergence of the restrictive theory of foreign sovereign immunity, considering dozens of cases involving Communist and postcolonial governments in the postwar decades. The remaining chapters of the book are more focused, each considering only a few especially transformative cases. Chapter 3 examines how the act of state doctrine was weakened in response to Cuban nationalizations of US private property after the Cuban Revolution. The right to nationalize property and the question of whose laws should determine compensation were at the heart not only of US-Cuba hostilities, but of the NIEO and Third World efforts to regain control of national resources in the 1960s and 1970s. Although foreign nationalizations are still legally defined as public, sovereign acts, the Cuban nationalizations eventually spurred the adoption of a (partial) common law commercial exception to the act of state doctrine and the redefinition of what we could call nationalization-adjacent activities as private and commercial. Together with bilateral investment treaties (BITs) and international arbitration, these domestic US legal changes reduced the usefulness of nationalizations for all Third World states. The restriction of the act of state doctrine, which concerns the acts of foreign sovereigns in their *own* territory, was more heavily contested than was the restriction of foreign sovereign immunity. Its

implications for redefining territorial sovereignty, I show, were correspondingly profound.

Bringing state-owned enterprises, government infrastructure contracts, official aid programs, and aspects of nationalizations within US judicial reach did not make them illegal, but it did make them less useful to foreign states by stripping them of the protections that had previously shielded most government acts from US courts and by subjecting them to the probusiness commercial rules of the United States. The upshot was that, just as many Third World countries gained formal sovereign status for the first time, this newfound sovereignty was undermined not just by growing US economic dominance and informal influence, but by the *juridical* extension of US power. As internal Third World tensions, structural crises in the Global North,[90] and the neoliberal counterrevolution of the 1970s put an end to the NIEO and other Third World developmental projects and led to the reconfiguration of US empire on new grounds, judicial territory was repurposed to meet new ends.

Chapter 4 shows how the form and function of US judicial territory shifted to address the Third World debt crises of the 1980s. In this context, both foreign sovereign immunity and act of state rules were further weakened to give US courts and private creditors more control over foreign sovereign debtors. The mechanisms for this new expansion of judicial territory included new rules for defining the foreign/domestic distinction in the context of intangible property, as well as the further reification of the public/private divide and the continued expansion of the category of private, commercial activity. Together, these changes undermined debtor governments' ability to manage national monetary and fiscal stability, strengthening private creditors and contract fundamentalism, while also helping institutionalize neoliberal market logics at the transnational scale. This occurred both through the direct application of transnational US domestic law and through the ways in which creditor litigation worked in tandem with IMF structural adjustment programs to impose neoliberal policies on debtors. The role of US courts in this process both depended on and further strengthened the growing power of New York finance and the US dollar.

Chapter 5 focuses on the creditor litigation against Argentina with which this introduction opened. It shows that the expansion of US judicial authority over more and more foreign government economic activities has continued in the twenty-first century, with US courts now claiming more authority than ever before—including, in some cases, over the entire world except the country being sued. In the process, courts have built on the case

precedent discussed in previous chapters, while simultaneously breaking new ground by not only further expanding the categories of commercial and domestic, but even challenging their relevance altogether. This has led to significant tensions between the executive and the judiciary over the proper extent of US judicial reach for the first time. While US courts had long been respectful of and sometimes even directly deferred to the views of the executive in past moments of judicial expansion, in the Argentina litigation, the courts dismissed the executive's concerns altogether. When it comes to cases it understands as commercial, the judiciary no longer shows any interest in the executive's opinions or in the possible political implications of these cases.

These emerging tensions between the executive and the judiciary should not be overstated. Yet, they do raise important questions about the future of US judicial territory and its relationship to global capitalism, on the one hand, and US empire, on the other. The US has lost considerable legitimacy, if not yet its global dominance, in the past two decades. At the same time, the mutual interdependence of US economic and legal power is as relevant today as it was in the 1950s or 1970s. While the growing power of China and the expanding legal territories of jurisdictions like Singapore, Malaysia, and Hong Kong make the continued expansion of US judicial territory more fraught, in the conclusion I suggest that, as long as New York remains a global financial center, US courts and domestic law will remain globally important—even if they no longer serve the foreign policy interests of the US government as clearly as they once did.

NOTES

INTRODUCTION

1 Order, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Feb. 23, 2012) (No. 08 Civ. 6978 (TPG)); Amended February 23, 2012 Order, *NML Capital, Ltd. v. Republic of Argentina* (S.D.N.Y. Nov. 21, 2012) (No. 08 Civ. 6978 (TPG)).

2 *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2819 (2014) (cert. denied).

3 See, among many other sources on the Argentine default, restructuring, and litigation, Cantamutto and Ozarow, "Serial Payers, Serial Losers?"; Potts, "(Re-)Writing Markets"; Roos, *Why Not Default?*; Guzman, "Analysis"; López and Nahón, "Growth of Debt."

4 Schumacher, Trebesch, and Enderlein, "Sovereign Defaults in Court."

5 See, e.g., Hudson, "Vulture Funds Trump Argentinian Sovereignty"; Sassen, "Short History of Vultures"; Guzman, "Wall Street's Worst."

6 See, e.g., Transcript of Oral Argument, *Republic of Argentina v. NML Capital, Ltd.* (U.S. Apr. 21, 2014) (No. 12–842).

7 See, e.g., *Pravin Banker Assocs., Ltd. v. Banco Popular del Peru,* 109 F.3d 850 (2d Cir. 1997).

8 This was even more pronounced in a related Supreme Court decision (*Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134) issued on the same day on which the Supreme Court declined to review the better-known case described here. See chapter 5 for an extended analysis of both cases.

9 See, e.g., Allen et al., *Oxford Handbook of Jurisdiction*; Berman, "Globalization of Jurisdiction"; Slot and Bulterman, *Globalisation and Jurisdiction.*

10 I follow scholars in the Third World Approaches to International Law (TWAIL) tradition in using the term *Third World* not to suggest homogeneity across a radically diverse set of countries, but rather to call attention to a shared history of subjection to colonialism and the "structures and processes of global capitalism." Chimni, "Third World Approaches," 4. See also Achiume and Bâli, "Race and Empire." This is not intended to obscure violence perpetrated by postcolonial governments themselves. TWAIL scholars eschew "simplistic visions of an innocent third world, and a colonizing and dominating first world," while arguing that modern

forms of domination cannot be separated from their imperial origins. Gathii, "TWAIL," 34.

11 Blomley, *Law, Space.*

12 For a basic overview, see Shaw, "International Law."

13 Sparke, *Introducing Globalization,* 182.

14 Sparke, *Introducing Globalization,* 183.

15 Dezalay and Garth, *Internationalization of Palace Wars*; Panitch and Gindin, *Making of Global Capitalism.*

16 Kohl, "Territoriality and Globalization."

17 For an overview of recent attempts to pin down the definition of transnational law, see Cotterrell, "What Is Transnational Law?" For comprehensive treatments of transnational commercial law, see Heidemann, *Transnational Commercial Law*; Goode, Kronke, and McKendrick, *Transnational Commercial Law.* And for contested definitions, issues, and debates in transnational law beyond commercial topics, see Zumbansen, *Oxford Handbook of Transnational Law.*

18 Goode, Kronke, and McKendrick, *Transnational Commercial Law,* lxv.

19 Anghie, *Imperialism.*

20 Pistor, *Code of Capital,* 18.

21 See also Kahraman, Kalyanpur, and Newman, "Domestic Courts."

22 Raustiala, *Does the Constitution Follow the Flag?*

23 Potts, "Reterritorializing Economic Governance."

24 Foreign Sovereign Immunities Act, 28 U.S.C. §1602 et seq. (1976).

25 For a detailed comparative history of US and foreign sovereign immunity rules, see Fox and Webb, *Law of State Immunity.*

26 For a general history of the act of state doctrine, see Patterson, "Act of State Doctrine."

27 Kohl, "Territoriality and Globalization," 306.

28 An explanation commonly provided to the supposed puzzle of why foreign states obey US and other powerful courts is that the reputational costs of failing to do so can cause economic difficulties. This is a depoliticized way of saying that current economic and legal structures force countries to choose between obeying foreign rulings or risking economic damage. See Roos, *Why Not Default?* for an excellent overview and critique of the way the "enforcement problem" is usually understood in relation to sovereign debt.

29 On the traditional "triangular" relationship between jurisdiction, sovereignty, and territory, and the turn toward more fluid and flexible bases of jurisdiction in the face of contemporary challenges, see Allen et al., *Oxford Handbook of Jurisdiction*; Berman, "Globalization of Jurisdiction"; Gerber, *Global Competition*; Slot and Bulterman, *Globalisation and Jurisdiction*; Raustiala, *Does the Constitution Follow the Flag?*; Buxbaum, "Territory, Territoriality." Note that the growing complexity of jurisdictional rules does not mean that the *idea* of a congruence between physical

territory, jurisdiction, and sovereignty is now irrelevant. This Westphalian conception remains central to many imaginaries of and debates about (inter)national law and sovereignty. Basaran, "Journey Through Law's Landscapes."

30 See, e.g., Whytock, "Domestic Courts and Global Governance"; Quintanilla and Whytock, "New Multipolarity in Transnational Litigation"; Putnam, *Courts without Borders*, 2016; Kahraman, Kalyanpur, and Newman, "Domestic Courts."

31 See, e.g., Goode, Kronke, and McKendrick, *Transnational Commercial Law,* though see also Kahraman, Kalyanpur, and Newman, "Domestic Courts"; Quintanilla and Whytock, "New Multipolarity in Transnational Litigation" for work that is less caught up in this narrative.

32 See, e.g., Goode, Kronke, and McKendrick, *Transnational Commercial Law*; Heidemann, *Transnational Commercial Law;* Mills, *Party Autonomy.*

33 I cannot do justice to the huge literature on this topic here, but for key examples, see Berman on the "Globalization of Jurisdiction" and the more recent compilation in Allen et al.'s *Oxford Handbook of Jurisdiction.*

34 Although reconceptualizing jurisdiction is not their primary analytical focus, Gerber and Raustiala are important exceptions to this tendency. Gerber, *Global Competition;* Raustiala, *Does the Constitution Follow the Flag?* Gerber, who uses the term *unilateral jurisdictionalism* to refer to the US imposition of competition law beyond US borders, is especially frank in his descriptions of the arrogance and parochialism of US views on the topic and of the resentments of other (European) countries regarding this extraterritorial overreach.

35 Pasternak, "Jurisdiction," 178.

36 Valverde, "Jurisdiction and Scale"; Valverde, "Deepening the Conversation between Socio-Legal Theory and Legal Scholarship about Jurisdiction."

37 In contrast to the well-documented tendency toward "methodological nationalism" in popular and academic analyses, this is a good example of "methodological globalism," or "the tendency for social scientists to prioritize the analysis of globalization processes over and above knowledge of the variety of socio-spatial structures, processes and practices that shape state forms and functions at various territorial scales." Moisio et al., *Changing Geographies of the State,* 14.

38 See Agnew, "Sovereignty Regimes"; Barkan, "Sovereignty"; Benton, *Search for Sovereignty;* Burbank and Cooper, *Empires in World History*; Mountz, "Political Geography I"; Sparke, "Globalizing Capitalism"; Ong, "Graduated Sovereignty in South-East Asia" for critiques of the myth of a clear progression from Westphalian to modern territoriality and the idea that sovereignty ever implied total, neatly demarcated control over a given area.

39 Kamminga, "Extraterritoriality." The term is also used to refer to earlier "consular courts" in places like nineteenth-century China or the Ottoman

empire, in which Western imperial subjects would be tried not by Chinese or Ottoman law, but by the laws of their own home states. Benton, *Law and Colonial Cultures*; Burbank and Cooper, *Empires in World History*; Kayaoğlu, *Legal Imperialism*; Raustiala, *Does the Constitution Follow the Flag?* The United States now has similar deals with countries in which its military bases are located.

40 Parrish, "Reclaiming International Law," 820.

41 Putnam, for example, rejects "political" as well as economic explanations for US extraterritorial law, instead arguing that US courts selectively assert extraterritorial jurisdiction in order to support "the integrity or operation" of domestic *US* law or to prosecute violations of "a short list of rights at the core of American political identity." Putnam, *Courts without Borders,* 2016, 4. Raustiala's study of US extraterritoriality is more ambivalent. While he notes that US extraterritorial law relies on and promotes US economic dominance, and while he refers variously to US empire and US hegemony, he nonetheless argues that the primary function of US extraterritorial law is to "manage and minimize legal difference." Raustiala, *Does the Constitution Follow the Flag?*, 21. In contrast, Parrish emphasizes the dangers extraterritorial law poses to democratic accountability, while Mattei and Lena identify US extraterritorial practices as a form of "legal imperialism." Parrish, "Reclaiming International Law"; Mattei and Lena, "U.S. Jurisdiction," 382.

42 Though see Colangelo's "What Is Extraterritorial Jurisdiction?" for an important exception.

43 The term is also often used defensively to criticize what one state sees as the *over*extension of another's jurisdiction. Buxbaum, "Territory, Territoriality."

44 As Basaran writes in a different context, complex, interscalar, and overlapping legal spaces show "how law's territory is distinct from physical territory, how inside and outside are susceptible to changes, and how borders shift through law." Basaran, "Journey Through Law's Landscapes," 24. Note that the extension of judicial territory occurs alongside strategic *suspensions* of or *limits* to US judicial reach—for example, with respect to offshore financial centers or Guantánamo Bay. Yet, these exclusions, too, remain territorial in that they are precisely about strategically (re) defining boundaries between American and non-American legal spaces. "Offshore" spaces are never defined as "nowheres," but rather as particular "elsewheres." Appel, *Licit Life of Capitalism*; Maurer, "Cyberspatial Sovereignties"; Palan, *Offshore World;* Potts, "Offshore."

45 A few legal scholars have embraced these concepts as well. While Hannah Buxbaum emphasizes the concept of territori*ality,* she sees territory as a static "factual input" that is no longer as relevant as it once was. Buxbaum, "Territory, Territoriality," 635. Other legal scholars, in contrast, define territory too in more relational ways and thus, like me, argue for

its continued salience. See, e.g., Brighenti, "On Territory as Relationship"; Kohl, "Territoriality and Globalization."

46 Sack, "Human Territoriality."

47 Brenner and Elden, "Henri Lefebvre." See also Painter, "Rethinking Territory," and compare Mitchell, "Society, Economy"; Koch, "'Spatial Socialization'"; Moisio et al., *Changing Geographies of the State* on the "state effect."

48 Ford, "Law's Territory"; Agnew, "Still Trapped in Territory?"; Agnew, "Territorial Trap."

49 Agnew, *Globalization and Sovereignty*; Brenner and Elden, "Henri Lefebvre."

50 Elden, "Land, Terrain, Territory"; Elden, "How Should We Do the History of Territory?"; Elden, *The Birth of Territory.*

51 Deakin et al., "Legal Institutionalism," 190. See also Knuth and Potts, "Legal Geographies of Finance"; Potts, "Beyond (De)Regulation."

52 Moisio et al., *Changing Geographies of the State,* 5.

53 Sparke cautions against the widespread tendency to see geopolitics and geoeconomics as dominant in discontinuous eras or in "distinct spaces of statecraft." Sparke, "Globalizing Capitalism," 485. Rather, he argues, they are best understood as dialectically entangled and as reflecting the underlying tensions of uneven development within capitalism. This dialectical relationship is inseparable from the production of territory today. The two domains are not associated with opposing territorial tendencies, as is sometimes assumed—rather, "territorial logics, either territorial fixity or fluidity, are products of geopolitical and geoeconomic processes . . ." Lee, Wainwright, and Glassman, "Geopolitical Economy," 421.

54 Think, for example, of US government authority over Indian reservations or overseas territories like Puerto Rico and Guantánamo Bay and see, also, Benton, *Search for Sovereignty*, for a detailed examination of the peculiar geographies of colonial Spanish and Portuguese territorial claims. Note also significant resonances with widespread practices of "border externalization," through which powerful Western states project migration control policies far beyond their own official borders, into both ocean spaces and foreign territories. Mountz, "Enforcement Archipelago"; Mountz, *The Death of Asylum;* Casas-Cortes, Cobarrubias, and Pickles, "'Good Neighbours Make Good Fences'"; Miller, *Empire of Borders.* All these spaces call to mind Boaventura de Sousa Santos' classic concept of "interlegality." de Sousa Santos, "Law."

55 For examples regarding foreign sovereign immunity, see Fox and Webb, *Law of State Immunity*; Bradley and Helfer, "International Law"; Damrosch, "Changing the International Law"; Goode, Kronke, and McKendrick, *Transnational Commercial Law.* For examples regarding the act of state doctrine, see Patterson, "Act of State Doctrine"; Schlossbach, "Arguably Commercial, Ergo Adjudicable"; Hoagland, "Act of State Doctrine";

Ireland-Piper, "Outdated and Unhelpful." Though see Diaz, "Territoriality Inquiry."

56 Hart, "Why Did It Take So Long?," 242.

57 See also Hart, "D/Developments after the Meltdown."

58 Panitch and Gindin, *Making of Global Capitalism*; Gowan, *Global Gamble*; Hart, "Why Did It Take So Long?"

59 Panitch and Gindin, "Finance and American Empire," 47.

60 Hart, "Why Did It Take So Long?"

61 See also Potts, "Law as Geopolitics." As Delaney puts it, law "constitutes much of modern reality through its relentless, if inconsistent, reiterations of divisions between 'the public and private,' 'the domestic and foreign,' 'the domestic and international,' 'subjects and objects' . . . and so on." Delaney, "Legal Geography I," 98.

62 The public/private, politics/economics, and law/politics distinctions have been the object of particular critique by critical legal scholars. See, e.g., Anghie, *Imperialism*; Horwitz, "History of the Public/Private Distinction"; Horwitz, *Transformation of American Law, 1870–1960*; Horwitz, *Transformation of American Law, 1780–1860*; Unger, "Critical Legal Studies Movement"; Ehrenreich, *The Reproductive Rights Reader*; Boyd, *Challenging the Public/Private Divide.* Geographers have contributed further insights into the spatial constitution of such legal dichotomies. See, e.g., Blomley, Delaney, and Ford, *Legal Geographies Reader*; Blomley, *Law, Space*; Blomley and Bakan, "Spacing Out"; Christophers and Niedt, "Resisting Devaluation"; Potts, "Law as Geopolitics"; Blomley, "Flowers in the Bathtub"; Cuomo and Brickell, "Feminist Legal Geographies."

63 Appel, *Licit Life of Capitalism*.

64 Judicialization refers more specifically to the increasing subjection of "political" issues to judicial oversight or to the growing power of judiciaries over other branches of government. Tate and Vallinder, *Global Expansion of Judicial Power*; Hirschl, "Judicialization of Politics"; Hirschl, "New Constitutionalism." The "political question doctrine" refers to a longstanding legal theory preventing US courts from intervening in issues over which the Constitution or another authority has relegated power to the executive. Tushnet, "Law and Prudence"; Barkow, "More Supreme than Court?"

65 For critics of growing judicial power, see, e.g., Tushnet, *Taking the Constitution Away*; Hirschl, "Judicialization of Mega-Politics"; Hirschl, "New Constitutionalism." For proponents, see, e.g., Thornhill, "Mutation of International Law." While judicial review can be used for either liberal or conservative ends, the rightward shift in US courts in the past few decades means it is often associated with the latter. Tribe, "Politicians in Robes"; Tribe and Lewin, "Rightwing US Supreme Court"; Greenhouse, *Justice on the Brink*.

66 Even those critical of growing judicial power have accepted a definition of the political that excludes economic questions a priori (foreground-

ing instead things like citizenship, voting rights, or electoral outcomes). Thus, even in the very occasional analyses that do consider these concepts transnationally (see, e.g., Cohen, "A Politics-Reinforcing Political Question Doctrine"), the types of "economic" cases analyzed in this book are excluded—thus missing the ways in which such issues are *made* nonpolitical.

67 Polanyi, *Great Transformation,* 74. See also, Block and Somers, *Power of Market Fundamentalism.*

68 MacKenzie, Muniesa, and Siu, *Do Economists Make Markets?*

69 Polanyi, *Great Transformation.* As Greta Krippner persuasively argues, while the concept of "disembeddedness" is more widely used, Polanyi's "own preferred terminology of 'institutional separation'" is more powerful. Krippner, "Polanyi for the Age of Trump," 249.

70 On the power of such a bounded conception of the economy, as well as the analytical and political importance of a "processual and relational understanding [that] refuses to take as given discrete objects, identities, places and events," see Hart, "Geography and Development," 98. While the impossibility of actually separating states from markets means neoliberalism can only ever be "impure," this very unattainability gives the *pursuit* of market purity significant power. Peck, *Constructions of Neoliberal Reason,* 22.

71 Among the most comprehensive and powerful treatments of neoliberalism are Brown, *Walled States, Waning Sovereignty*; Peck, *Constructions of Neoliberal Reason*; Foucault, *Birth of Biopolitics*; Slobodian, *Globalists*; Harvey, *Brief History of Neoliberalism.* On the co-constitution of law and neoliberalism, see also Britton-Purdy et al., "Building"; Grewal and Purdy, "Introduction."

72 In *Globalists,* Slobodian makes a major contribution to debates about neoliberalism by showing how concerns about decolonization fueled the development of neoliberal ideas.

73 See, especially, Harvey, *Limits to Capital*; Smith, *Uneven Development*; Sheppard, "Globalizing Capitalism's Raggedy Fringes"; Sheppard, "Thinking Geographically"; Sparke, *Introducing Globalization.*

74 On the co-constitution of the micro (including the intimate and embodied) and the macro, see, especially, feminist scholars like Hoang, *Dealing in Desire;* Klinger, *Rare Earth Frontiers;* McGranahan, "Empire Out of Bounds"; Lutz, "Empire Is in the Details"; Greenburg, *At War with Women*; Appel, *Licit Life of Capitalism*; Brickell and Cuomo, "Feminist Geolegality"; Hyndman, "Towards a Feminist Geopolitics."

75 Agnew, "Low Geopolitics"; Agnew, *Hidden Geopolitics.*

76 Putnam, "Courts without Borders," 2009, 483.

77 This phrase was popularized by Mnookin and Kornhauser, "Bargaining." Whytock extends it to transnational law, arguing that "the global governance functions of domestic courts matter not only because of

their direct impact on litigants, but also—and perhaps even more importantly—because of their influence beyond borders and beyond the parties to particular lawsuits." Whytock, "Domestic Courts and Global Governance," 72.

78 Potts, "Law's place in economic geography."

79 Potts, "Law as Geopolitics."

80 It is Third World governments (through their lawyers), and not Third World societies, that are directly involved in contesting US transnational law. These governments themselves are, of course, always the product of internal and often conflicting social and political pressures, but such dynamics are largely invisible during litigation. In this way, litigation contributes to producing the appearance or "effect" of a coherent, unitary state. See Appel, *Licit Life of Capitalism;* Mitchell, "Society, Economy, and the State Effect."

81 Pistor, *Code of Capital*; Coates, *Legalist Empire*; Dezalay and Garth, *Internationalization of Palace Wars.*

82 Federal courts include the US Supreme Court, as well as 13 US Courts of Appeals, and 94 US District Courts.

83 For key examples, see Blomley, *Law, Space*; Delaney, *Race, Place, and the Law, 1836–1948*; Ford, "Law's Territory." By the early twenty-first century, legal geography had become an established subfield, resulting, for example in important edited volumes like Blomley, Delaney, and Ford, *Legal Geographies Reader*; Holder and Harrison, "Law and Geography"; Braverman et al., *Expanding Spaces of Law.*

84 See, e.g., Brighenti, "On Territory"; Butler, "Critical Legal Studies"; Raustiala, "Geography of Justice"; Valverde, "Jurisdiction and Scale"; Valverde, "Analyzing the Governance of Security."

85 As Delaney explains, "'To legally constitute some entity X' (space, the home, the corporation, appropriate sex, persons, events) means much more than to shape or influence it. In the strongest sense it is to call it into being or modify its social significance through the distinctive practices of naming, classifying, ruling, governing, or ordering associated with law most broadly conceived." Delaney, "Legal Geography I," 98.

86 Hart, "Relational Comparison Revisited."

87 Blomley and Bakan, "Spacing Out," 688. Baxi, relatedly, argues that "No error in the doing of comparative legal studies is more egregious than that which remains complicit with the politics of organized amnesia of law as a form of conquest." Baxi, "Colonialist Heritage," 59.

88 Blomley, *Law, Space.*

89 Sheppard, "Globalizing Capitalism's Raggedy Fringes."

90 Throughout the book, I sometimes use the terms *North* and *South* as shorthand to refer, respectively, to the Global North and the Global South.