

LAW AND BORDERS

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I'd like to take you on a tour of many different borders—some well-established and bold, others newly drawn and sketchy; some imagined, and others—only memories. Here's the itinerary: the first stop is cyberspace, which it turns out was once located on an oil platform in the North Sea off the shore of England. The second stop is nearby—in fact about ten miles from here just outside Tuscaloosa, Alabama—a sort of non-place that people call Holt. The third stop, Siam, represents another non-place that later gave birth to a place—a territorial organization known as Thailand. And finally Detroit, Michigan, a real, honest-to-goodness place whose borders were strong enough to rein in the United States Constitution.

I. CYBERSPACE: VIRTUAL BORDERS

According to *Wired* magazine, the hottest internet start-up may well be HavenCo, Ltd., a business that is currently building a state-of-the-art, if no-frills, internet server site on an old anti-aircraft deck in the North Sea, about three miles off the British Isles.¹ On this platform is scrawled the name "Sealand." *Wired* reports that the facility

isn't much to look at It consists of a rusty steel deck sitting on two hollow, chubby concrete cylinders that rise 60 feet above the churn of the North Sea. Up top there's a drab building and a jury-rigged helicopter landing pad . . . [but] [t]he server's location on Sealand means [that potential customers] won't have to worry about fires, earthquakes, tornadoes, thefts, bomb threats, industrial sabotage, or killer-bee attacks.²

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1. Simson Garfinkel, *Welcome to Sealand. Now Bugger Off.*, WIRED MAGAZINE (July 2000), <http://www.wired.com/wired/archive/8.07/haven.html>.

2. *Id.*

According to its British owner and the young entrepreneurs of HavenCo, Sealand would have one overwhelming advantage over the competition: its 6,000 square feet of concrete were to be the sole territory of an independent micro-sovereign.³ Businesses operating from Sealand will do so outside the jurisdiction of any nation state, free from national regulation of content but with ready access to the people of all nations and their nationally stabilized currency through the world wide web.

[C]ompanies using Sealand to house their data can choose to operate according to the special laws of Sealand, and those laws will be particularly lax . . . So if you run a financial institution that's looking to operate an anonymous and untraceable payment system—HavenCo can help. If you'd like to send old-fashioned, adults-only pornography into a grumpy country like Saudi Arabia—HavenCo can help there, too.⁴

Sealand reflects a trend in much of the turn-of-the-century discourse of the internet. There was a tendency to describe the internet as something more than a sophisticated medium of communication—an almost supernatural discovery. In this discourse—the discourse of “cyberspace”—each computer is a portal to an undiscovered country; online communications and transactions take place in a digitally conjured parallel domain, an “e-elsewhere.” The infrastructure of “cyberspace”—physically located servers, fiber optic and old-fashioned copper cables that run underneath city streets, and modems and computers sitting on desks and kitchen tables—is, of course, much more pedestrian, if not mundane, and rarely figures in the discussions that present the internet as a space.

But of course this physical infrastructure *is* cyberspace, stripped of its metaphysical pretensions, and this physical infrastructure lies very much in the jurisdiction of territorial sovereigns.⁵ And so HavenCo’s Sealand promises to fulfill the dream of the internet as autonomous space.

“Cyberspace” proved fertile ground for the imagination. Like any new frontier, cyberspace offers the hope of leaving constricting social conventions, mores, and laws behind and starting from a clean slate. The internet became the repository for all manner of utopian and dystopian fantasy. From *Wired* magazine to online chat rooms to the pages of the

3. *Id.*

4. *Id.*

5. The telecommunications companies that increasingly administer the internet know this very well: they have lobbied hard for federal regulation of telecommunications, not in order to keep government out of the internet, but to secure governmental intervention in the physical world that is favorable to their interests.

nation's law reviews, the political aspiration was not democratic self-governance but non-governmental self-regulation—a freedom from law.

Consider the libertarian position of David Johnson and David Post:

The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating entirely new phenomena that . . . cannot be governed, satisfactorily, by any current territorially based sovereign. . . .

Because events on the Net occur everywhere but nowhere in particular, are engaged in by online personae who are both “real” . . . and “intangible[,]” . . . and concern “things” . . . that are not necessarily separated from one another by any physical boundaries, no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws.

. . . .

Many of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct “place” for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the “real world.”⁶

And having conceived of the internet as a territory—as analogous to the territory of existing sovereigns—we then must respect its autonomy and grant it self governance:

The problem with using existing territorial governments as the source of rules for activity on the Internet is . . . that no existing sovereign possesses the legitimate authority to make such rules. This traditional model of governance represents, in effect, an extraterritorial power grab when transposed to the Internet, a form of colonialism long rejected (and rightly so) in the nonvirtual context . . . because any sovereign’s rules for on-line conduct, even if arrived at democratically, do not take into account the interests of all of those [who are] affect[ed] [by those rules when] they [a]re implemented in the on-line world . . . [—]no country’s efforts to “plant its flag” on the Internet and in effect declare sovereignty over the Internet are more clearly grounded in legitimacy than any other’s, and [will]—and should—be met with fierce resistance.⁷

6. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1375–76, 1378 (1996).

7. David R. Johnson & David G. Post, *And How Shall the Net Be Governed?: A Meditation on the Relative Virtues of Decentralized, Emergent Law*, in COORDINATING THE INTERNET 62, 70 (Brian Kahin & James H. Keller eds., 1997).

This remarkable passage rests the full weight of its argument on the rather thin analogy between the internet and the territory of nations (hence talk of “colonialism”), an analogy made even less sturdy by the authors’ own insistence elsewhere that the internet is *not* like a physical territory.⁸ The cyberspace discourse rests not on a useful analogy, but on a radical contradiction: activity on the net is so unlike all that has gone before in “real space” that it cannot be governed by existing territorial sovereigns; but, at the same time, it is so similar to a physical territory that we can make casual and yet confident assertions that regulation by existing sovereigns or international institutions is a form of “colonialism.”

Other commentators also took the spatiality of the internet for granted. For instance, Jerry Kang argued that:

[T]he concepts of location, borders, and distance translate into a cyber-geography. Location in cyberspace can map to a unique Internet Protocol (IP) address and any associated domain names, which exist for each computer on the Internet. . . . A cyber space can also have clear borders that explicitly notify visitors about the nature of the place they are about to enter. Borders can also be secured, not by installing barbed wire, but by requiring registration and passwords to gain entry. . . . Finally, even distance translates to cyberspace although it must be understood in transaction cost, not physical, terms.⁹

Similarly, Larry Lessig wrote:

Cyberspace is a place. People live there. They experience all the sorts of things that they experience in real space there. . . .

While they are in that place, cyberspace, they are also here. They are at a terminal screen, eating chips, ignoring the phone. . . . They live this life there, while here, and then at some point in the day they jack out and are only here. They rise from the machine, in a bit of a daze, and turn around. They have returned.¹⁰

Against Jack Goldsmith’s contention that cyberspace presents few if any new legal issues, only new incidents of old conflict-of-laws problems, Lessig writes: “We have not had a time when we could say that people are actually living in two places at once This is the challenge that we will face in the future.”¹¹

8. *Id.* at 62, 69.

9. Jerry Kang, *Cyber-Race*, 113 HARV. L. REV. 1130, 1186–87 (2000).

10. LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 190 (1999).

11. *Id.* at 193.

But this seems less likely with each passing day. The idea of cyberspace as a distinctive place now seems quite out of date—a sort of dilapidated future—like the mid-twentieth century future of polished white formica, flying cars, time travel, and transporter beams. For its part, HavenCo seems to have gone the way of plans to colonize Mars: businesses stayed away in droves; in 2006 a fire destroyed most of the platform; and as of 2008, the company seemed to have no customers and almost no web activity.¹² Why didn't the internet become cyberspace? It's tempting to say that the prophets of cyberspace just got it wrong: the internet is not a place—it is a medium of communication. After all, no one speaks in terms of "television space" (TV Land notwithstanding), "telephone space," or "newspaper space," even though one can lose oneself in all of these media as easily as on the internet. And of course territorial sovereigns reasserted their control with a vengeance—states very much want to tax and regulate internet transactions.¹³

But perhaps the reason for the failure of cyberspace is that few people had the incentive to make it work. My claim in this talk will be that territories are made, not found. Creating space is hard work, and so far no one has been willing to make a sufficient effort to map cyberspace, mark out its borders, and create the sense of place and identification that territory building entails.

What do I mean by this? For now I can only sketch what should be a longer theoretical and historical argument.¹⁴

Almost anything that is organized territorially could be organized in some other way. For instance, territorially defined local governments generally have jurisdiction over land use, property taxation, health and safety regulation, traffic and parking, and law enforcement—as well as authority to provide a host of public services such as sanitation, parks and recreation, maintenance of roads, and public education. Even when one or more of these services is provided by a specialized district or authority rather than a "general purpose" local government, they tend to be organized territorially: a school district may not coincide with municipal boundaries, but it is still a territorially defined entity.

But all of these services could, in theory, be provided statewide or nationwide or, in theory, worldwide, and be organized according to some other criterion. The national public education bureau could administer schools and assign students in order to promote race and class integration, or segregate them according to scores on IQ tests. The Park Services

12. *HavenCo "data center" offline?*, SECURITY AND THE NET (Nov. 18, 2008), <http://securityandthe.net/2008/11/18/havenco-data-center-offline/>.

13. See Johnson & Post, *supra* note 7, at 65–73.

14. See Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH L. REV. 843 (1999).

Administration could take over Central Park, Golden Gate Park, Amherst Commons—all parks—and run them as federal parks. Law enforcement could be performed by a vastly expanded federal police, organized according to type of crime or the identity of victims or perpetrators; the DEA could handle all drug-related offenses, or we could have a federal Violence Against Women unit to deal with domestic violence offenses.

One might object that the issues are still “really” physically located, regardless of how they are organized administratively. A drug deal or an act of violence takes place *somewhere* as well as against *someone*. We could choose to assign jurisdiction based on the status of the victim (our imagined Violence Against Women Special Force), or the type of weapon used (The Bureau of Alcohol Tobacco and Firearms), or the likely motivation of the perpetrator (create a division of the FBI to handle all hate crimes), but that is simply a choice—it doesn’t make the activity any less *located*. But this is just my point: the habit of organizing the administration of policy in any particular way is a choice. The practice of organizing activities as first and foremost occurring in a place defined by its borders is a habit, not a necessity.

We get into this habit by looking at maps—a spatial depiction of human social organization. A spatial depiction is a stylized mode of representation. It reflects an epistemology—a way of knowing that is only one among many possible ways of knowing. This does not mean that a spatial representation is “wrong” or “distorting,” but it is also not “right” in the sense of telling us the truth, the whole truth, and nothing but the truth. A spatial representation can be extremely accurate on its own terms, but it is still accurate *only* on its own terms. There are other terms, other ways of being accurate that can tell us something more, something else.

Take, for example, a spatial depiction of a biological family: the classic family tree. The chart will show us the biological and legal relationships between a group of people: mothers and fathers, siblings, aunts and uncles, in-laws, etc. It is much easier for most people to understand family relationships by looking at a family tree than it is to hear or read a lengthy narrative containing the same information. But the family tree is a stylized representation of these relationships because, of course, the *spatial* connections it depicts are entirely conceptual. The spatial depiction makes solid what could otherwise seem somewhat vaporous; it reifies relationships that may be contingent or ambiguous. It silently incorporates the laws of marriage and adoption as they existed at some time and place or at several different times and places. It takes Aunt Lizzy’s word about the legitimacy of Cousin Jake even though everyone thought Jake looked a lot like the mailman; it omits Thomas Jefferson’s children with Sally Hemmings.

Similarly, territories define a relationship between the government and individuals, mediated by space. Territory is, in this sense, a container that holds a bundle of individuals and resources, just as fee simple ownership of real property consists of a bundle of rights. Moreover, the relationship between a territory and the individuals and resources it “holds” is not a natural or necessary correspondence. It is not a relationship of empirical fact but one of positive design. The first-year student of property law learns that a subterranean gas reservoir “belongs” to a given piece of property only due to a set of contingent legal rules. The resources can be severed from ownership of the land on the surface, and its status as property may depend on factors other than the status of the land immediately above it.

The contingency of the relationship between individuals and territory is much more pronounced. Individuals move more easily than most subterranean resources. An individual may occupy several cities within the course of a day and own property in several states or nations or “do business” in a number of jurisdictions. The assertion that an individual “belongs” to a particular jurisdiction for a particular purpose relies on a host of potentially controversial premises and arrives through scores of leaps of faith and logic.

In short, when we say that a particular resource or person is “present” in a jurisdiction, we mean both more and less than physical presence. It may be that the legally present individual is physically absent (as in the case of the fugitive from justice or the absentee voter), or that the physically present individual is legally absent (as in the case of the homeless person without formal domicile or the undocumented alien). Jurisdictional presence is not physical but *metaphysical*. It is a relationship that refers to the physical and is analogous to the physical, but is something other than physical.

Legal presence does not simply follow from physical presence. For instance, in the United States, for the purposes of taxation, voting, and access to most public services, the metaphysical presence at issue is formally defined as domicile or residence. One is metaphysically present in the jurisdiction of her domicile even when she is actually walking the streets of a foreign city. Her presence in the place of residence is real for legal purposes. The physical location of her body is irrelevant. The notion of residence operates by analogy to physical presence. We assume that people are usually at home, that they care most about home, that they identify with home, and therefore we “find” them at home for legal purposes even if they are physically somewhere else. It is “as if” a New Yorker were always in New York—where she resides—even when she is physically in Los Angeles.

The principle that the franchise and many other local rights and privileges may be limited to residents of a jurisdiction establishes a

jurisdictional status or identity. The theory of residence is premised on a correspondence between residence and membership in a political community. But, as a matter of political theory, there is no reason that these two must correspond. The meaning of residence is over-determined. Residential presence may indicate a decision to join a political community, but it may also reflect a fungible investment in property; it may reflect agreement with the values and priorities currently dominant in the jurisdiction or a desire to intervene in changing those values and priorities.

Residence does not reflect natural connections between individuals, groups, and territory. Nor does it simply formalize the voluntary choices of autonomous individuals. Instead, residence is a concept that stabilizes, by fiat, a necessarily uneasy relationship between mapped territories and an increasingly mobile and unknowable population.

II. HOLT: A TALE OF TWO BORDERS

Now I promised I'd bring you close to home. It's convenient that we are here at The University of Alabama because one of my favorite examples of the contingency of borders involves your hometown of Tuscaloosa and the neighboring community of Holt.

Holt is a small, largely rural, unincorporated community located on the northeastern outskirts of Tuscaloosa, . . . Alabama. Because the community is within the three-mile police jurisdiction circumscribing Tuscaloosa's corporate limits, its residents are subject to the city's "police [and] sanitary regulations." Holt residents are also subject to the criminal jurisdiction of the city's court, and to the city's power to license businesses, trades, and professions.

. . . [The Holt residents] claimed that the city's extraterritorial exercise of police powers over Holt residents, without a concomitant extension of the franchise on an equal footing with those residing within the corporate limits, denies [them] rights secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.¹⁵

*Holt Civic Club v. City of Tuscaloosa*¹⁶ presents a seemingly intractable problem: What non-tautological justification exists for any particular limitation of the franchise? How are we to define the limits of the community within which a majority will rule?

15. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 61–62, 63 (1978) (internal citations omitted).

16. *Id.*

At first glance there would seem to be only two possibilities: the relevant political community either includes the residents of Holt as well as those of Tuscaloosa, or it only includes the residents of Tuscaloosa. There are in fact three possible answers.

Answer One: The political community must be the *police* jurisdiction of Tuscaloosa (including Holt). The exercise of even limited police power over the residents of Holt is determinative: those subject to a direct exercise of the police power must be enfranchised to control that power. Notice that this is the same argument that Johnson and Post made concerning cyberspace—it's unjust for any territorial sovereign to exercise control over outsiders. The Holt litigation, like "cyberspace," is an attempt to create a new space with different borders.

Answer Two: The political community is the corporate jurisdiction of the City of Tuscaloosa (excluding Holt). Tuscaloosa's exercise of control over residents of unincorporated Holt is immaterial. As the majority opinion points out, any "city's decisions inescapably affect individuals living immediately outside its borders. . . . Yet no one would suggest that nonresidents . . . have a constitutional right to participate in the political processes bringing [them] about."¹⁷ This provides an answer to Johnson and Post as well: all territorial sovereigns affect outsiders.¹⁸

One might object that Holt residents are *directly* affected by Tuscaloosa's regulations. But this does not distinguish those living in Holt from a host of other non-Tuscaloosans who may own property in Tuscaloosa or who enter Tuscaloosa to work, shop, visit friends, etc. They too are subject to Tuscaloosa's police power. They may pay Tuscaloosa's property taxes and be subject to its land use planning; drive through Tuscaloosa streets (and be subject to arrest by its police officers); patronize Tuscaloosa's business (and indirectly pay its business taxes and benefit from and bear the costs of its regulations); and yet they are denied the right to influence its government through the ballot box. Local decisions affect outsiders because people trade and socialize across jurisdictional lines.

Perhaps the Court could have held that local autonomy, the constitutional recognition of a solemn political union, justified the jurisdictional arrangement at issue in *Holt*. But there is no constitutional principle of local autonomy.¹⁹ For constitutional purposes local governments are not solemn political associations, but rather subdivisions of state government. No constitutionally recognized value protected the integrity of Tuscaloosa's boundaries. The state could expand the corporate jurisdiction to include the citizens of Holt or reduce the police jurisdiction

17. *Id.* at 69.

18. *Id.*

19. See *id.* at 71.

to coincide with the corporate jurisdiction—with or without the consent of the government or the people of Tuscaloosa.

This brings us to the improbable but dispositive third answer: The political community is neither the corporate nor the police jurisdiction of Tuscaloosa, but rather the jurisdiction of the state of Alabama. The *Holt* majority ultimately concludes: “this Court does not sit to determine whether *Alabama* has chosen the soundest or most practical form of internal government possible. Authority to make those judgments resides in the state legislature, and Alabama citizens are free to urge their proposals to that body.”²⁰

First, the *Holt* Court describes the local jurisdiction not in terms of political community or local solidarity, but instead as a “form of internal government,”²¹ a “convenient agenc[y] for exercising such of the governmental powers of the state as may be entrusted to [it].”²² Local government boundaries are simply another set of state laws, subject to the state political process.

Second, it then follows that the only relevant political process occurs at the statewide level. All Alabama citizens, Holt residents and Tuscaloosans alike, are equally entitled to vote in Alabama elections and can “urge their proposals”²³ to change the local jurisdictional arrangement at that level of government. If the Holt residents lose in the statewide political process, too bad: they have no constitutional claim to a different outcome.

On the one hand, we have a conception, advanced by the *Holt* dissent, of jurisdiction as a self-validating and foundational unit of government, the political community that is premised on the “reciprocal relationship between the process of government and those who subject themselves to that process by choosing to live within the area of its authoritative application.”²⁴ Although the *Holt* majority rejects this conception of jurisdiction for local government, it tacitly employs it in understanding the political process of the *state* government.

On the other hand we have a diametrically opposed conception, advanced by the *Holt* majority in its description of Tuscaloosa, of jurisdiction as “a governmental technique,”²⁵ a simple policy tool no different than any other agency created by law and vindicated by the political process.

Both of the common understandings of jurisdictional subdivisions foreclose any consideration of a border itself as a governmental institution:

20. *Id.* at 73–74 (emphasis added).

21. *Id.* at 74.

22. *Id.* at 71 (emphasis added) (quoting *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907)).

23. *Id.* at 74.

24. *Id.* at 82 (Brennan, J., dissenting).

25. *Id.* at 72 (describing the extraterritorial exercise of municipal power).

either the jurisdiction is simply an arm of the state, of no particular interest except as a matter of narrow administrative technique (is it “efficient”?), or the jurisdiction is an organic political community, a self-validating form of democratic self-rule. *Holt* is disquieting because it upsets these easy ideological descriptions.²⁶ The hybrid Tuscaloosa police jurisdiction, this dangerous jurisdictional supplement, foregrounds the significance of jurisdictions for democratic ideals.²⁷

Performing Territory: Jurisdiction as a Social Practice

Perhaps it is best to think of territorial jurisdiction as *a set of social practices*, a code of etiquette. Social practices must be learned and communicated to others. In one sense they exist in the realm of discourse; they are *representations* of approved behavior as well as the behavior itself.

For example, the social practice called “the Tango” is a combination of the *notation* that “maps” the steps and the actual movement of individuals in rhythm (hopefully) and to music (“When dancing the tango, the man leads and the lady follows, each partner should move according to the diagram.”²⁸). These representations have material consequences: they determine who leads and who follows, as well as where one places her feet. It is both an actual spatial practice and the graphical representation of that practice. One could learn to dance the Tango just by watching people actually dance, but the diagrams standardize the learning process and thereby in a real sense define the dance itself. Note that it would be absurd

26. *Holt* may seem aberrational, but it does not deal with an aberrational form of government; at the time of the decision, thirty-five states allowed municipal governments to exercise extraterritorial jurisdiction. *Id.*

27. This opposition between jurisdiction as foundational and jurisdiction as a mere “technique” is closely related to the distinction that the *Holt* opinion makes between those jurisdictions that are thought inherently to possess sovereignty and those jurisdictions that are thought only to exercise power derived from a greater sovereign entity. *Id.* at 72. In *Holt*, the majority opinion is premised on the established legal principle that local governments do not exercise independent power, but only that power that state governments allow them to exercise (this is the necessary implication of majority’s suggestion that disgruntled Alabamians may “urge their proposals” to limit Tuscaloosa’s extraterritorial jurisdiction to the state legislature). *See id.* at 74.

For the most part, this Article will focus on jurisdictions that are formally subordinate to larger “sovereigns.” But we must not overstate the distinction. A sharp distinction between sovereign and subordinate jurisdictions is overly formalistic and misleading. For instance, we may intuitively believe that nation states are sovereign jurisdictions while the subdivisions of the nation states are subordinate. But in those nations, like the United States, where representation in federal government is determined by jurisdictional subdivisions, one could assert that the combination of subdivisions is sovereign. It is often difficult to determine whether a sovereign jurisdiction chronologically or normatively precedes its jurisdictional subdivisions, or whether it is simply the sum of its subdivisions.

Further, many “subordinate” jurisdictions are explicitly modeled as minor sovereigns rather than as instruments of larger jurisdictions. For example, despite their formally subordinate status, a common conception of American local governments is that of “imperium in imperio”: a sovereignty within a sovereign.

28. Ford, *supra* note 14, at 855.

to describe dance notation as “ideology” or “legitimation” as if it misled us as to the nature of the practice, yet it would also be incomplete to think of it as a innocent description as if the graphical representation only describes and has nothing to do with *perpetuating and regulating* the “actual practice.”

Similarly, territory is a function of its graphical and verbal descriptions. It is a set of practices that are performed by individuals and groups who learn to “dance the jurisdiction” by reading descriptions of jurisdictions and by looking at maps. This does not mean that jurisdiction is “mere ideology”—that the lines between various nations, cities and, districts aren’t “real.” Of course the lines are real, but they are real because they are constantly being *made* real by county assessors levying property taxes, by police pounding the beat (and stopping at the city limits), and by registrars of voters checking identification for proof of residence. Without these practices, the lines would not be “real”—the lines don’t preexist the practices.

Of course each of these practices can be described as “responding” to the lines or working within the lines rather than making them. When we think of the practices as happening “within the lines” and imagine that the boundary lines exist independently of the practices that give them significance we think of jurisdiction in the abstract, removed from any particular social content. Thinking in this way we imagine that jurisdiction is the space drawn on a map, rather than a collection of rules that can be represented graphically as a map.

III. FROM SIAM TO THAILAND: A HISTORY OF JURISDICTION

Territorial jurisdiction may appear to be as natural and inevitable as the ground we stand on—a natural outgrowth of the very existence of government. But jurisdiction is not a historical fixture of political organization. Instead, the emergence of jurisdiction is the product of the coincidence of two innovations, one technological—the science of cartography—and one normative—the ideology of rational, humanist government. Each development was necessary. Cartography created the conceptual space of jurisdiction, while the aspirations of rational government provided the incentive to direct the ordering potential of the map inwards—towards national consolidation and the administration of government—as well as outwards—towards defense and conquest. Therefore we can speak of jurisdiction as a technology that was “invented” or “introduced” in a given social setting at a particular time.

From Status to Locus

Nineteenth-century Thailand (then called Siam by English speakers) provides a striking illustration of the historical emergence of jurisdiction. The history of Thailand is one of rapid transition from a non-bounded, fluid, and ambiguous notion of territory to a system of strictly delimited and objectively defined national and sub-national jurisdictions.

The Thai example is convenient because of an especially sophisticated and detailed study of the history of Thai national geography produced by Thongchai Winichakul.²⁹ According to Winichakul, the Thai state did not develop a concept of territorial jurisdiction until the latter part of the nineteenth century.³⁰ Until then, Siam had none of the characteristics of jurisdictional authority.³¹ It did not control a contiguous territory defined by fixed and objective borders.³² Instead, it controlled a set of specific, non-adjacent places according to their proximity and usefulness to Bangkok: it controlled specific resources, trade routes, or populations.³³ It did not conceive of its authority in terms of territory. Instead, political authority operated by status hierarchy, with the elites in Bangkok at the top and various minor rulers occupying tiers in a dynastic pyramid.³⁴ Hierarchical relations between various rulers and subjects, not control over continuous territory, defined Siam:

In the existing system of provincial control, which was based on the hierarchical network of lordship among local rulers under the nobles in Bangkok, a small town could request a change of dependence on one lord to another The new lord might be the ruler of a town which was not adjacent to it. The domain of a regional lord could even be discontinuous.³⁵

Territory that was neither occupied nor the source of a valuable resource was simply not “claimed” by any authority—in effect, there was nothing to rule. Even the border between the bitter enemies Siam and Burma was not sharply defined in areal terms: “[B]oth sides regarded the [border] towns as rich sources of food and manpower for fighting”³⁶ Borders were defined by concrete landmarks or in narrative terms rather

29. See THONGCHAI WINICHAKUL, SIAM MAPPED: A HISTORY OF THE GEO-BODY OF A NATION (1997).

30. See *id.* at 121.

31. *Id.* at 75–76.

32. *Id.*

33. See generally *id.* at 74–80.

34. *Id.* at 120.

35. *Id.*

36. *Id.* at 62.

than in the abstract cartographic terms of a coordinate grid. As a result, boundaries were not thin demarcating lines but rather substantial regions or zones. Moreover, boundaries were indeterminate, even potentially mobile: “[one] boundary was identified . . . by teak forests, mountains upon mountains, muddy ponds where there were three pagodas, Maprang trees, three piles of stones, the space between the White Elephant (?) and the Nong River . . .”³⁷

This state of affairs persisted until the end of the nineteenth century when Siamese rulers began to negotiate with the British and French colonial powers, which insisted on definite jurisdictional boundaries.³⁸ In the course of negotiation and conflict with the European colonial powers, the Bangkok elites came to understand that borders were a powerful tool.³⁹ The map set the terms of negotiation and of conflict; cartography became the very language in which power and resources were described.⁴⁰ As the geographical border grew in terms of significance to the rulers in Bangkok, the regime supplanted its narrative, concrete understanding of its realm with a jurisdictional one: “the transition from a time when the frontier towns were known by name to a time when they were known by a map . . . took place in rather a short period: the final two decades of the nineteenth century.”⁴¹

Bangkok needed both territorial control and coherence in order to guard against external threats.⁴² And the elites quickly discovered that borders would also serve the internal needs of a rapidly modernizing society.⁴³ Externally, the British insisted on a strict demarcation and centralization of authority in order to negotiate binding trade agreements,⁴⁴ while the French threatened to forcibly take control of ambiguously held towns in the northern Mekong region.⁴⁵ As the Siamese elites employed European cartographic technologies, they increasingly understood their government in jurisdictional terms:

For the first time the [Thai] regime was attempting to know the units which comprised the realm in territorial terms. Undoubtedly,

37. *Id.* at 70.

38. *Id.* at 128.

39. See *id.* at 129–31.

40. *Id.* at 129 (“[Modern cartography was] a new geographical ‘language’ by which information originated and the new notion of the realm of Siam was conceived. It became a framework for thinking, imagining, and projecting the desired realm . . .”).

41. *Id.* at 119–20.

42. *Id.* at 121.

43. See Peter Vanderveest & Nancy Lee Peluso, *Territorialization and State Power in Thailand*, 24 THEORY AND SOCIETY 385, 398 (1995).

44. *Id.* at 396.

45. See WINICHAKUL, *supra* note 29, at 109–12, 121.

this was a consequence of the new vision created by the modern geographical discourse of mapping. Mapping was both a cognitive paradigm and a practical means of the new administration. It demanded the reorganization and redistribution of space to suit the new exercise of administrative power on a territorial basis.⁴⁶

The Siamese elites remade the regime, changing it from a state based on an aspatial network of local rulers linked to their subjects and to the center (Bangkok) by status obligations, to a government organized by technical expertise and mapped territory.⁴⁷ Once the nation was mapped, it was divided into regions that could be administered by agents of the state who reported back to Bangkok.⁴⁸ The sharing of information that resulted allowed for functional specialization, a governmental division of labor.⁴⁹

Territorial administration facilitated the collection of revenue in money form or in goods rather than in labor obligations. This allowed Bangkok to participate more effectively in trade as well as to eliminate the last vestiges of the older system of patronage obligations. Local elites, once referred to with honorific titles denoting status, were transformed into positions such as “the commander protecting territorial integrity . . .”⁵⁰ In this way, the regime transformed itself into a modern, administrative state defined by territorial boundaries and organized by functional divisions:

Income from [trade] monopolies and tax farms allowed the monarchy to eliminate its reliance on serf obligations and slavery [(incidents of the older system of patronage and status rule)] almost entirely . . .

. . . The monarchy in effect transformed layers of nobles and local lords into salaried officials. Bangkok ministries were reorganized by functional specialization . . .

. . . [T]he principalities outside of Bangkok were incorporated into the administrative hierarchy of the Ministry of Interior. The lords of the principalities were displaced by provincial governors who took over local administration.⁵¹

46. *Id.* at 120.

47. See *id.* at 120 (“[T]he whole country began to shift from the traditional hierarchical relationships of rulers to the new administration on a territorial basis.”); Vandergeest & Peluso, *supra* note 43, at 398.

48. See Vandergeest & Peluso, *supra* note 43, at 398–99.

49. *Id.* at 398 (“Bangkok ministries were reorganized by functional specialization: . . . the Ministry of Interior[,] . . . the Ministry of Finance[, and the] [n]ew functional Ministries (Agriculture, Education, Defense, Public Works, and others) were also created . . .”).

50. WINICHAKUL, *supra* note 29, at 106.

51. Vandergeest & Peluso, *supra* note 43, at 398 (footnote omitted).

Although “[t]he tempo, tactics, problems, and solutions varied from place to place . . . the final outcomes were the same: the control of revenue, taxes, budgets, education, the judicial system, and other administrative functions by Bangkok . . .”⁵² Modern cartography thus ushered in a new type of government: an administrative state animated by the ideals of synoptic knowledge and competent management of its domain.⁵³

IV. MILLIKEN

Now on to Detroit, where borders contained the reach of the U.S. Constitution. In 1971, a federal district court held that Detroit’s public schools were racially segregated, in violation of the Fourteenth Amendment.⁵⁴ The district court found that because Detroit’s entire school district was already predominantly black, “relief of segregation in the Detroit public schools cannot be accomplished within the corporate geographical limits of the city . . .”⁵⁵ Accordingly, the court devised a desegregation plan that included the surrounding suburbs of Detroit.⁵⁶ Affirming, the Sixth Circuit Court of Appeals noted that “[i]f we hold that school district boundaries are absolute barriers to a Detroit school desegregation plan, we would be opening a way to nullify *Brown v. Board of Education* . . .”⁵⁷

Apparently unafraid of blazing this trail, the Supreme Court reversed. In *Milliken v. Bradley*,⁵⁸ the majority held that because “[t]he record . . . contain[ed] evidence of *de jure* segregated conditions only in the Detroit schools,”⁵⁹ only Detroit could be required to remedy the segregation—even though it was conceded that Detroit alone could not do so.⁶⁰

Significantly, Justice Stewart argued in concurrence that “the mere fact of different racial compositions in contiguous districts does not itself imply or constitute a violation . . . in the absence of a showing that such disparity was imposed, fostered, or encouraged by the State or its political subdivisions . . .”⁶¹ Stewart asserted that segregation was “caused by

52. WINICHAKUL, *supra* note 29, at 102.

53. See Vanderveest & Peluso, *supra* note 43, at 398–401.

54. See *Bradley v. Milliken*, 338 F. Supp. 582, 592 (E.D. Mich. 1971), *aff’d*, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974).

55. *Bradley v. Milliken*, 345 F. Supp. 914, 916 (E.D. Mich. 1972), *aff’d in part, vacated in part*, 484 F.2d 215 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974).

56. *Id.* at 918.

57. *Bradley v. Milliken*, 484 F.2d 215, 249 (6th Cir. 1973), *rev’d*, 418 U.S. 717 (1974).

58. 418 U.S. 717 (1974).

59. *Id.* at 745.

60. *Id.* at 767 (White, J., dissenting).

61. *Id.* at 756 (Stewart, J., concurring).

unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears⁶²

But state laws created local governments; local jurisdictional formation is, as Justice Rehnquist put it in *Holt*, “a governmental technique.”⁶³ To say that desegregation remedies are responsible for white flight is to confuse a catalyst with a cause. It may be that desegregation makes the cities less attractive to whites who, for whatever reason, prefer segregation. But the creation of autonomous suburbs (suburbs that, thanks to the Court’s decision in *Milliken*, are isolated from economic or social responsibility for the inner cities) makes white flight possible and attractive.

V. CONCLUSION

We have covered a lot of territory in a short time. I have argued that borders are a way of doing government—creating a border is not an act of recognizing a difference but one of making a distinction. Borders do their work by making the distinctions seem natural and inevitable. In the case of cyberspace, it is now clear that the attempt to create borders was an act of assertion—and not of recognition—because the project was a failure; the idea of a border between cyberspace and the terra firma where computers, web servers, and fiber optic links sit seems bizarre. In the case of *Holt*, we saw that the law considers territorial borders to be a governmental technique. In the history of Siam becoming Thailand, we saw that borders were a technology of power—a new way of organizing governmental authority. Finally in *Milliken v. Bradley*, the borders make the distinctions they create seem inevitable and justify a form of inequality and segregation that the law could not have tolerated had it been more overt.

62. *Id.* at 756 n.2.

63. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 72 (1978).