

UNIVERSITY *of* PENNSYLVANIA LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

© 2014 by the University of Pennsylvania Law Review

VOL. 162

JANUARY 2014

NO. 2

ARTICLE

SELLING STATE BORDERS

JOSEPH BLOCHER[†]

| | |
|--|------|
| INTRODUCTION | 242 |
| I. THE CASE FOR SELLING STATE BORDERS | 249 |
| A. <i>Sovereign Territory and Public Land</i> | 249 |
| B. <i>Why States Might Want to Buy or Sell Borders</i> | 254 |
| 1. Economic Benefit | 254 |
| 2. Political Responsiveness | 256 |
| 3. Correcting Historical Errors and Responding to | |
| | Text |

[†] Associate Professor, Duke Law School. The Eugene T. Bost, Jr. Research Professorship of the Cannon Charitable Trust No. 3 at Duke Law School provided invaluable support for the production of this Article. Many thanks to Stuart Benjamin, Curt Bradley, Aaron Caplan, Josh Chafetz, Guy Charles, Stephen Clowney, Allan Erbsen, Mitu Gulati, Laurence Helfer, Eugene Kontorovich, Kim Krawiec, Margaret Lemos, Marin K. Levy, Dana Remus, Jim Salzman, Neil Siegel, and workshop participants at Loyola Law School and Rutgers School of Law–Camden for enlightening comments, and to Mary Pat Dwyer, John Long, and Daniel Rice for research assistance.

| | |
|--|-----|
| Exogenous Shocks | 259 |
| a. <i>Surveying Errors</i> | 259 |
| b. <i>Historical Oddities</i> | 260 |
| c. <i>Accretion and Avulsion</i> | 263 |
| 4. Bargaining and Dispute Resolution | 264 |
| C. <i>The History and Persistent Echoes of the American Market for Sovereign Territory</i> | 267 |
| II. THE BOUNDARIES OF THE MARKET AND POSSIBLE EXPLANATIONS FOR ITS ABSENCE | 269 |
| A. <i>Constitutional Limitations</i> | 270 |
| 1. Structural Rules | 270 |
| a. <i>State Borders and Law in the Founding Era</i> | 270 |
| b. <i>Interstate Treaties, Agreements, and Compacts</i> | 273 |
| c. <i>Federalism</i> | 281 |
| 2. Individual Rights | 284 |
| a. <i>Political Rights</i> | 284 |
| b. <i>Economic Rights</i> | 286 |
| B. <i>Political and Economic Costs</i> | 289 |
| 1. Reliance Interests and the Value of the Status Quo | 289 |
| 2. Self-Determination and the Secession Analogy | 291 |
| 3. Principal-Agent Problems | 292 |
| 4. Externalities | 294 |
| 5. Solutions: Minimizing Costs Through Transaction Design | 296 |
| C. <i>Inalienability</i> | 299 |
| 1. Fairness | 300 |
| 2. Corruption | 302 |
| CONCLUSION: FROM STATUS TO CONTRACT | 305 |

INTRODUCTION

The relationship between state sovereignty and state territory in the United States is more complex, interesting, and unstable than the reassuring familiarity of an American map might suggest.¹ State borders move as a

¹ Cf. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1877 n.104 (1987) (“A map is not the territory’ . . .” (alteration in original) (quoting ALFRED KORZYBSKI, *SCIENCE AND SANITY: AN INTRODUCTION TO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS* 750 (4th ed. 1958))).

result of wandering rivers,² interstate border compacts,³ and even newly discovered surveying errors.⁴ States and the federal government also buy and sell proprietary interests in vast tracts of public land,⁵ while effectively leasing their sovereign functions to private parties.⁶ This Article argues that those threads—mobile state borders and active markets for public land and sovereign functions—can and should be woven together to create an interstate market for sovereign territory.

The absence of a market for state borders is puzzling for many reasons: the market has a historical pedigree, would not face insurmountable legal barriers, and could help solve a variety of pressing problems. Among other things, such a market might facilitate the resolution of interstate border disputes, which remain surprisingly common. North and South Carolina, for example, are currently adjusting their border southward to correct a two hundred-year-old surveying error.⁷ This change will be costly for the thirty affected households, whose residents will have to pay new taxes, change car insurance and schools, and might well find it harder to dance the shag with tar on their heels.⁸ Simple Coasean bargaining suggests that if such costs outweigh the benefits of correcting the surveying error, then the

² See, e.g., *New Jersey v. New York*, 523 U.S. 767, 783-84 (1998) (discussing common law rules relating to accretion and avulsion).

³ See, e.g., Interstate Compact Defining the Boundary Between the States of Arizona and California, Pub. L. No. 89-531, 80 Stat. 340 (1966) (designating fixed latitudinal and longitudinal points along the Colorado River as demarcating much of the Arizona-California border); VA. CODE ANN. § 7.1-10.1 (Supp. 1998) (establishing the boundary between Loudoun County, Virginia, and Jefferson County, West Virginia, at the watershed line of the Blue Ridge Mountains).

⁴ See, e.g., Shaila Dewan, *Georgia Claims a Sliver of the Tennessee River*, N.Y. TIMES, Feb. 22, 2008, at A14 (describing the correction of an 1818 survey error that deprived Georgia of a portion of the Tennessee River); Kim Severson, *Untangling a Border Could Leave a Mess for Some*, N.Y. TIMES, Apr. 5, 2012, at A10 (discussing an initiative to rectify centuries-old surveying errors in the boundary between North Carolina and South Carolina).

⁵ See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 11-20 (6th ed. 2007) (describing the market for public land, including the multi-billion dollar markets for minerals under, and timber on, public land).

⁶ See, e.g., David Segal, *Our Town Inc.: Taking the People's Business Private*, N.Y. TIMES, June 24, 2012, at BU1 ("Since the day it incorporated, Dec. 1, 2005, [Sandy Springs, Georgia,] has handed off to private enterprise just about every service that can be evaluated through metrics and inked into a contract.").

⁷ See Severson, *supra* note 4.

⁸ See *id.*; see also S.C. CODE ANN. § 1-1-665 (1976) ("The shag is the official dance of the State [of South Carolina]."); William S. Powell, *What's in a Name? Why We're All Called Tar Heels*, UNC U. LIBRS., <http://www2.lib.unc.edu/ncc/tarheel.html> (last visited Nov. 22, 2013) (describing the history of the nickname "Tar Heels" for North Carolina residents).

Old North State should simply sell the equivalent of a quitclaim, thus leaving the border where it has always been in practice.⁹

Other utility-enhancing deals are not hard to imagine. States facing bankruptcy could raise revenue by selling territory to wealthier neighbors—an idea that has already been floated at the international level¹⁰—while others might capture gains in metropolitan areas that straddle state borders but could be more efficiently administered by a single state.¹¹ One scholar has suggested that Camden and Philadelphia be joined;¹² a side payment to or from New Jersey could help bring that about. Even holding aside the financial gains, an active interstate market for sovereign territory could encourage useful competition between states by allowing the “laboratories”¹³ to come to the people, rather than requiring the people to go to the laboratories. The next time Killington, Vermont, votes to join New Hampshire because it prefers the latter’s tax system,¹⁴ or Martha’s Vineyard votes overwhelmingly to leave Massachusetts in response to unfavorable redistricting in the state

⁹ There are complications, of course, including the concentration of costs in the thirty households, the diffusion of any benefits of a sale, and the fact that such a sale would need to be concluded between the two states, rather than between North Carolina and the impacted residents. See *infra* subsection II.B.5 (describing the difficulties of properly structuring a sale).

¹⁰ See Nicole Itano, *Germans to Debt-Ridden Greeks: Sell the Acropolis. And a Few Islands.*, CHRISTIAN SCI. MONITOR (Mar. 4, 2010), <http://www.csmonitor.com/Business/2010/0304/Germans-to-debt-ridden-Greeks-Sell-the-Acropolis.-And-a-few-islands> (reporting two German government officials’ remarks that Greece should sell its islands to decrease its debt).

The law, politics, and history of property acquisition and transfer differ dramatically at the international level. Thus, this Article does not address in any depth the international market for sovereign territory. The obvious exceptions are purchases made by the United States itself, which are briefly discussed in Section II.A. Nevertheless, many of the issues raised in this Article, particularly the political and ethical questions discussed in Part II, are directly relevant to intercountry sales. I plan to explore those issues, along with the applicable international law, in a future article.

¹¹ See *infra* subsection I.B.1. Indeed, sovereign *functions*—schools, law enforcement, and the like—are already the subject of many interstate compacts. See Susan Welch & Cal Clark, *Interstate Compacts and National Integration: An Empirical Assessment of Some Trends*, 26 W. POL. Q. 475, 477 & n.11 (1973) (observing increased use of interstate compacts, including “those that relate to such state services as crime control, health, education and welfare, and reciprocal taxation policies”).

¹² See generally Richardson Dilworth, *American Cities as Firms in the 21st Century—Or, Should Philadelphia Move to New Jersey?*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 99 (2010) (suggesting why and how Philadelphia and Camden should unite).

¹³ *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a simple courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹⁴ *Killington, Vt., Voters Choose to Secede*, FOX NEWS (Mar. 2, 2004), <http://www.foxnews.com/story/0,2933,113108,00.html>.

legislature,¹⁵ compensation could facilitate the moves (or forestall them, depending on which state is willing to pay). Sales of state borders could even *strengthen* state identity in areas where residents' identities are more closely tied to a state other than the one in which they live.¹⁶ If, for example, wealthy residents of Greenwich, Connecticut—many of whom earned their fortunes in Manhattan—would prefer to be New Yorkers, why not let them buy their way out?

The idea of an intergovernmental market for sovereign territory is not simply the fever dream of a law and economics scholar with too much political theory on his nightstand. Historically, that market was relatively robust, and echoes and elements of it persist today.¹⁷ The United States as we know it was shaped by land sales: the Louisiana Purchase,¹⁸ Alaska Purchase,¹⁹ and Treaty of Guadalupe Hidalgo²⁰ together account for more

¹⁵ Mike Seccombe, *Talkin' About a Revolution*, MARTHA'S VINEYARD MAG. (Sept.–Oct. 2007), <http://www.mvmagazine.com/2007/september-october/secession.php> (describing why and how residents of Nantucket, Martha's Vineyard, and the Elizabeth Islands voted to secede from Massachusetts in 1977). A similar complaint inspired Staten Island's recent effort to secede from New York. See Richard Briffault, *Voting Rights, Home Rule and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 783–85 (1992) (discussing ties between the secession movement and the battle over voting power in New York's Board of Estimate).

¹⁶ Cf. Frank B. Cross, *The Folly of Federalism*, 24 CARDOZO L. REV. 1, 39 (2002) (noting that “states themselves have arbitrary boundaries that do not reflect any sort of natural community” and many metropolitan areas “are located near the conjunction of state lines, and those multi-state metropolitan areas form more of a natural political community than does joining the city with the rest of the state not part of that metropolitan area.” (quoting John Randolph Prince, *Caught in a Trap: The Romantic Reading of the Eleventh Amendment*, 48 BUFF. L. REV. 411, 500–01 (2000))).

¹⁷ See *infra* Section I.C.

¹⁸ The United States paid France \$15,000,000 for 900,000 square miles of territory. See JON KUKLA, *A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA* 335 (2004).

¹⁹ The United States paid Russia \$7,200,000 for 586,412 square miles of territory. See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.–Russ., art. VI, Mar. 30, 1867, 15 Stat. 539; *Alaska Purchase*, ENCYC. BRITANNICA, <http://www.britannica.com/EBchecked/topic/12326/Alaska-Purchase> (last visited Nov. 22, 2013); see also *Treaty with Russia for the Purchase of Alaska*, LIBR. CONGRESS (Apr. 18, 2012), <http://www.loc.gov/rr/program/bib/ourdocs/Alaska.html> (collecting primary documents relating to the sale).

²⁰ Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.–Mex., Feb. 2, 1848, 9 Stat. 922 (declaring an end to the Mexican–American War and providing for a major land purchase). For 525,000 square miles of territory, the United States paid Mexico \$15,000,000 and agreed to assume claims against Mexico by private citizens living in that territory. See *id.* art. XII–XIII; see also *Treaty of Guadalupe Hidalgo*, LIBR. CONGRESS (July 30, 2010), <http://www.loc.gov/rr/program/bib/ourdocs/Guadalupe.html> (collecting sources related to the treaty).

than half of the nation's landmass,²¹ and they are not the only territory whose sovereign control has been bought and sold.²² In fact, the Constitution specifically contemplates the "purchase[]" by the federal government of "Places" within states,²³ and at the time of the Founding, states were quite willing to put a price on their own borders. Consider North Carolina's 1784 cession of twenty-nine million acres to help repay the nation's war debts²⁴ and Georgia's cession of its western territories in exchange for \$1,250,000.²⁵

Even this brief overview highlights the nature and scope of the puzzle. Despite its historical pedigree and potential desirability, the national market for sovereign territory seems to have frozen up, and the interstate market never really got started.²⁶ And yet essential elements of a market for state borders persist. States continue to alter their boundaries through interstate compacts, proving that state borders are not set in stone.²⁷ States and the

²¹ The three purchases comprise 1,940,212 of the nation's 3,531,905 square miles. See *supra* notes 18-20; *State & County Quickfacts: USA*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated June 27, 2013).

²² This partial list excludes such notables as the Adams-Onís Treaty and, of course, the apocryphal story of the purchase of Manhattan for beads and trinkets. See Treaty of Amity, Settlement, and Limits, Between the United States of America and His Catholic Majesty, U.S.—Spain, Feb. 22, 1819, 8 Stat. 252 (conferring Florida to the United States); David Graeber, *Beads and Money: Notes Toward a Theory of Wealth and Power*, 23 AM. ETHNOLOGIST 4, 4 (1996) (recounting the story of Manhattan's purchase).

²³ U.S. CONST. art. I, § 8, cl. 17 (granting Congress the power "to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be").

²⁴ That generous but ill-fated gesture led to the short, unhappy, and largely forgotten life of the State of Franklin. See Michael Toomey, *State of Franklin*, N.C. HIST. PROJECT, <http://www.northcarolinahistory.org/commentary/99/entry> (last visited Nov. 22, 2013) (discussing the history of the three western counties of the North Carolina territory that briefly organized themselves as the state of Franklin in the 1780s).

²⁵ PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 54-55 (1968).

²⁶ There are examples that come close. West Virginia's acceptance into the union was premised on the payment of an equitable portion of Virginia's debt. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 738-39 (1925). After years of litigation, this resulted in a 1919 cash payment and the issuance of bonds to Virginia that totaled nearly \$15,000,000. *Id.* Vermont owes its very existence to something like a purchase. In 1794, the soon-to-be-state paid New York \$30,000 to extinguish the latter's claim over its territory. *Id.* at 738 n.85; see also Earl M. Maltz, *The Constitution and the Annexation of Texas*, 23 CONST. COMMENT. 381, 393-94 (2006) (reviewing the legal issues posed by New York's claims over the territory that would become part of Vermont).

²⁷ For present purposes I assume that the *number* of states is fixed, so none of this discussion addresses the possibilities of secession leading to a new state, merger of parts of two states into a new state, or merger of two states into one. Many of the same arguments explored here would apply to these sales, though they would also have to satisfy Article IV's rules regarding the addition or subtraction of states. See U.S. CONST. art. IV, § 3 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.").

federal government participate actively in the vast market for public land, which involves hundreds of thousands of square miles and hundreds of billions of dollars every year and whose existence shows that public land is not inalienable.²⁸ States have also increasingly privatized sovereign functions such as education, law enforcement, and defense,²⁹ demonstrating that some aspects of sovereignty itself can be marketized. If both territory and sovereignty are for sale, why not sovereign territory?

Of course, all markets, particularly those involving “public” goods and actors, are subject to limitations and regulations, and the market for state borders would be no different in that regard. At least three categories of constraint—constitutional, political-economic, and ethical—provide potential explanations for why that market has not been more active, as well as useful lenses through which to evaluate its desirability. The salience of these constraints has changed over time, which may help to explain why the market has frozen up. They also help to identify the kinds of sales that would and should occur in a robust and well-governed market for state borders. But as a conceptual matter they do not resolve the puzzle, for none can explain the total absence of state border sales.

The first set of considerations is embedded in the Constitution.³⁰ Though perhaps underappreciated now, the Constitution’s prohibition of state treaties³¹ and its requirement that Congress consent to interstate agreements or compacts³² were both designed in part to govern state border negotiations. And even where such negotiations either receive or are exempt from congressional consent, they must still respect the constitutional requirements of federalism, as well as individual rights derived from the Due Process, Takings, and Contracts Clauses—and perhaps even the ever-beguiling Guarantee Clause.

²⁸ That is not to say that such land is absolutely alienable, either. The public trust doctrine, for example, provides that “there are some resources, notably tidal and navigable waters and the lands under them that are forever subject to state ownership and protection in trust for the use and benefit of the public.” See Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 699 (2006).

²⁹ See generally GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009) (reviewing and evaluating the trend of outsourcing government functions to private contractors at the state and federal levels).

³⁰ See *infra* Section II.A. As Allan Erbsen notes in his thoughtful and comprehensive treatment of the subject, “scholars have not systemically analyzed . . . the Constitution’s identification, definition, and integration of the physical spaces in which it applies.” Allan Erbsen, *Constitutional Spaces*, 95 MINN. L. REV. 1168, 1169 (2011).

³¹ U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . .”).

³² *Id.* cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . .”).

Second, the sale of state borders raises complex issues of democratic theory and political economy.³³ The transaction costs of a sale might be extremely high, given the reliance interests and strong endowment effects that arise with regard to borders.³⁴ Border sales could also threaten the self-determination rights of the transacted territory's residents by forcing them to relinquish state citizenship.³⁵ Moreover, border sales could prove either too attractive to politicians hoping for financial or political gain, or too unattractive to those who would lose their offices. Properly constructing a deal so as to balance these potentially competing interests would be a major challenge, but not necessarily an insurmountable one.³⁶

Finally, even assuming that legal and political obstacles could be overcome, perhaps there is simply something *wrong* with marketizing sovereign territory. Like other anticommodification and inalienability intuitions, this argument could be based on fears of either unfairness or corruption.³⁷ As to the former, perhaps there is reason to fear that—as with sales of sex or organs—proper consent will not, or even cannot, be obtained.³⁸ The United States' shameful history of land deals with Native American tribes demonstrates that the fairness concern is not simply a matter of theory.³⁹ And even if fairness objections can be overcome in practice, marketization might still corrupt the basic value of the thing being sold.⁴⁰ After all, if private citizens cannot sell aspects of their political identity⁴¹—votes and compulsory military service, for example—why should states be any different?

It is impossible to provide a single answer to all of these questions; their resolution depends on specific considerations like the size of a sale, whether the relevant citizens approve, whether Congress consents, and so on. What is clear is that simple assumptions and explanations are insufficient, and that

³³ See *infra* Section II.B.

³⁴ Conversely, these same interests would argue in *favor* of sales designed to restore borders to their expected locations following an external shock such as a wandering river or discovery of a surveying error. See *infra* subsection I.B.3.

³⁵ As noted below, this objection may prove too much, as it would also suggest the existence of a right to secede. See *infra* subsection II.B.2.

³⁶ See *infra* subsection II.B.5 (proposing basic considerations).

³⁷ See generally MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012) (describing fairness- and corruption-based objections to marketization of certain activities like killing endangered animals, buying naming rights for national parks, and gambling on terrorist attacks).

³⁸ See *infra* notes 355-357 and accompanying text.

³⁹ See *infra* notes 358-362 and accompanying text.

⁴⁰ See *infra* Section II.C.

⁴¹ See Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 936 (1985) ("Restraints on alienation are also imposed when people perform their responsibilities as citizens.").

a market for state borders might be an idea whose time has come again. This Article provides a roadmap to the process of remapping.

I. THE CASE FOR SELLING STATE BORDERS

Despite the clarity with which maps depict them, borders are complicated. They represent the lines dividing political entities, and thus theoretically should be susceptible to precise measurement and at least as much stability as the governments whose reach they represent. But in fact borders—the limits of a sovereign’s territory⁴²—are geographically and conceptually volatile. This Part first explores the complex relationship between sovereign and proprietary interests in public land. It then explains, with illustrative examples, why state governments have incentives to acquire sovereign territory—what, in other words, would be the sources of demand in a market for sovereign territory.

A. *Sovereign Territory and Public Land*

Governments can “own” land in at least two capacities: as proprietors and as sovereigns.⁴³ In the former role, governments function much (although not exactly⁴⁴) like any other landowner. They can exclude trespassers, convey interests in land, and so on. These are the sticks that comprise the traditional bundle of rights known as property,⁴⁵ and governments often buy and sell them. In the latter role, states’ relationship to land is different—land is their sovereign territory, rather than their property. In this role, governments function *as* governments, regulating, taxing, conferring

⁴² See BLACK’S LAW DICTIONARY 208 (9th ed. 2009) (defining a “border” as “[a] boundary between one nation (or a political subdivision) and another”); see also Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 843 (1999) (defining “territorial jurisdictions” as “the rigidly mapped territories within which formally defined legal powers are exercised by formally organized governmental institutions”).

⁴³ See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 541 (1857) (McLean, J., dissenting) (explaining, of a United States territory, “[i]n both of these senses it belonged to the United States—as land, for the purpose of sale; as territory, for the purpose of government”). See generally Michael L. Rosen, *Public and Private Ownership Rights in Lands Under Navigable Waters: The Governmental/Proprietary Distinction*, 34 U. FLA. L. REV. 561 (1982) (describing the history and implications of the governmental/proprietary distinction in the context of ownership of the land beneath navigable waters).

⁴⁴ The qualifier is needed in part because governments’ power to use or convey land can be limited by their constitutions. In the United States for example, a public official, unlike a private landowner, generally cannot exclude a person from public land based on that person’s viewpoint or race.

⁴⁵ See J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 713 n.8 (1996) (tracing the development of the “bundle of rights” metaphor).

citizenship, and performing other sovereign functions.⁴⁶ The power to exercise these functions is generally coextensive with the borders of the state itself, which is one reason states place such importance on maintaining power within their own physical jurisdictions. But that power might also include the authority to relinquish it altogether, by ceding sovereign territory to another government.⁴⁷

This seemingly straightforward distinction, however, obscures at least two major tensions. First, the relationship between sovereign authority and sovereign territory is far more nuanced than the simple story might suggest. On the one hand, the concepts are so closely intertwined that they are often used interchangeably, and it seems to be a basic principle of government that the reach of a sovereign's power is strongest, if not always entirely exclusive, within its borders.⁴⁸ The importance of this relationship helps explain the intensity with which governments oppose the exercise of sovereign functions by other states within their borders.⁴⁹ Indeed, it was a deep appreciation of the relationship between sovereignty and territory that inspired Bo and Luke Duke to head for the county line when they were in trouble with the law, and Boss Hogg to curse when they made it.⁵⁰

But just because sovereignty and borders generally coincide does not mean the relationship between them is straightforward. Even within its own borders, a nation's sovereign powers may be limited or shared, as in the United States and other federalist systems.⁵¹ Consider the Constitution's

⁴⁶ See BLACK'S LAW DICTIONARY 1523 (9th ed. 2009) (defining "sovereign power" as "[t]he power to make and enforce laws").

⁴⁷ See, e.g., Seokwoo Lee, *Continuing Relevance of Traditional Modes of Territorial Acquisition in International Law and a Modest Proposal*, 16 CONN. J. INT'L L. 1, 8 (2000) (defining cession "as 'the transfer of sovereignty over state territory by the owner-state to another state' or '[t]he peaceful transfer of territory from one sovereign to another'" (alteration in original) (footnote omitted)).

⁴⁸ See *Island of Palmas (Neth. v. U.S.)*, 2 R.I.A.A. 829, 839-40 (Perm. Ct. Arb. 1928) (noting that sovereignty involves "the exclusive right to display the activities of a State" and the "continuous and peaceful display of the functions of State within a given region"); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1520 (2007) ("The principle that states are territorially bound polities permeates the Constitution and finds explicit textual manifestation in the New State Clause's protection of an existing state's territory.").

⁴⁹ See, e.g., *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power.").

⁵⁰ See *Dukes of Hazzard Original TV Series*, HAZZARDNET.COM, <http://www.hazzardnet.com/blog/dukes-of-hazzard-original-tv-series> (last visited Nov. 22, 2013); see also Ford, *supra* note 42, at 844 (invoking similar examples from *THE SOUND OF MUSIC* (Twentieth Century Fox 1965) and *SMOKEY AND THE BANDIT* (Universal 1977)).

⁵¹ See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1260-64 (2009) (describing the predominant theories of "dual" and "cooperative" federalism, and proposing an alternative construction synthesizing the two in order to more

Enclave Clause, which specifically gives Congress power to “exercise exclusive Legislation in all Cases whatsoever” over the District of Columbia “and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be.”⁵² The power to “exercise exclusive Legislation” is clearly sovereign, not merely proprietary.⁵³ But despite the word “exclusive,”⁵⁴ the Clause permits states to convey to the federal government some aspects of sovereignty while withholding others. For example, states ceding land to the federal government often reserve sovereign powers such as those regarding service of process⁵⁵ or the authority to tax private property within the enclave.⁵⁶

The second dimension that requires unpacking is the relationship between proprietary and sovereign authority, concepts that appear distinct⁵⁷ but are thoroughly intertwined.⁵⁸ “Property and sovereignty, as every student knows, belong to entirely different branches of the law,” Morris Cohen once

adequately reflect federal–state relations); *see also* *Boumediene v. Bush*, 553 U.S. 723, 770–72 (2008) (holding that the Suspension Clause applies to a U.S. Navy base on land leased from Cuba over which the United States exercised “complete and total control”). *See generally* ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (1989) (describing the varying forms of federal control over American territories, from possessions like Guam to the largely self-governing Northern Marianas).

⁵² U.S. CONST. art. I, § 8, cl. 17.

⁵³ *See* David E. Engdahl, *State and Federal Power over Federal Property*, 18 ARIZ. L. REV. 283, 296–97 (1976) (noting the distinction between the jurisdiction granted by Article I, which is “by constitutional prescription exclusive,” and that given in Article IV, in which “the United States had only a limited power akin to that of a proprietor”).

⁵⁴ *See, e.g.*, *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 532 (1885) (offering, in a discussion of federal jurisdiction, the example that “[w]hen the title [to land on which public buildings are built] is acquired by purchase by consent of the Legislatures of the States, the federal jurisdiction is exclusive of all State authority”).

⁵⁵ *See, e.g., id.* at 528 (quoting the act “ced[ing] jurisdiction to the United States over the territory of the Fort Leavenworth Military Reservation,” in which Kansas reserved “the right to serve civil or criminal process”).

⁵⁶ *See, e.g., id.* at 542 (determining that the “right of the State to subject the railroad property to taxation exists as before the cession”); *see also* Adam S. Grace, *Federal–State “Negotiations” Over Federal Enclaves in the Early Republic: Finding Solutions to Constitutional Problems at the Birth of the Lighthouse System*, 75 MISS. L.J. 545, 558–59 (2006) (discussing how some states reserved certain sovereign rights when ceding lighthouses to the federal government, even though that “tool” of conditioning jurisdictional consent was “not explicitly provided to them” by the Constitution).

⁵⁷ *See* CHARLES G. FENWICK, *INTERNATIONAL LAW* 403 (4th ed. 1965) (noting that a state’s territorial jurisdiction is “a right of political control, of ultimate authority” rather than a “right of property”); Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 15 (1989) (“Territorial sovereignty and property ownership are not necessarily the same thing.”).

⁵⁸ *See* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 DUKE L.J. 1127, 1270 (2000) (arguing that any distinction between proprietary and sovereign state actions “may be neither doctrinally sound nor easy to administer”).

put it with something of a wink.⁵⁹ If a North Carolina citizen sells his house in Durham to a citizen of a different state, the proprietary interests in the land will change, but the sovereign control over it will not. North Carolina law will govern the house, just as it did before.⁶⁰ The same is true if the entities selling proprietary interests happen to be sovereigns.⁶¹ Conversely, transferring sovereignty need not alter proprietary interests. For example, when North and South Carolina finish adjusting their borders, at least thirty households and a gas station will become subject to a new sovereign authority.⁶² They will not, however, lose title to their land.⁶³

Again, the Constitution itself provides a perfect illustrative example. The reach of congressional power under the Property Clause⁶⁴ has been the subject of a sustained and at times fiery debate.⁶⁵ As Marla Mansfield explains, the “[t]wo competing models of the Property Clause . . . may be labeled the ‘proprietor’ and the ‘sovereign.’”⁶⁶ The former, sometimes known as the “classical” model, holds that the federal government has only proprietary authority over land it holds through the Property Clause.⁶⁷ This

⁵⁹ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 8 (1927). *But see id.* at 13-14 (showing that property does in fact confer a form of sovereignty).

⁶⁰ See Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1, 39 (1991) (“Private land sales cannot ordinarily divest a government of jurisdiction. If a citizen of Arizona sells his estate to a citizen of New York, the territory of Arizona is not diminished, nor is the territory of New York enlarged.” (quoting RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, *THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY* 177 (1980))).

⁶¹ See Brilmayer, *supra* note 57, at 15 (“New York’s purchase of property in Connecticut does not make New York sovereign over that land.” (citing *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1923))).

⁶² Severson, *supra* note 4.

⁶³ Intersovereign border sales might not *always* preserve individual titles, of course. But in the contexts addressed by this Article, the existence of a superior sovereign (the federal government) and various constitutional guarantees (the Full Faith and Credit, Takings, and Due Process Clauses) ensures that they will. I am grateful to Allan Erbsen for pushing me on this point.

⁶⁴ U.S. CONST. art. IV, § 3, cl. 2 (“The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .”).

⁶⁵ For a helpful overview, see Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 805-12 (1993). The more thorough standard reference is COGGINS ET AL., *supra* note 5.

⁶⁶ Mansfield, *supra* note 65, at 806.

⁶⁷ See, e.g., Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 706-15 (1981) (tracing the legal and political development of the United States from a proprietor of public lands into a sovereign); Engdahl, *supra* note 53, at 296, 361-62 (summarizing classical Property Clause doctrine); Robert E. Hardwicke et al., *The Constitution and the Continental Shelf*, 26 TEX. L. REV. 398, 426-32 (1948) (denouncing the federal government’s holding of intrastate land for nongovernmental purposes).

was essentially the model embraced by the Sagebrush Rebellion,⁶⁸ County Supremacy Movement,⁶⁹ and other political coalitions that have opposed federal governance of public lands. But scholars have challenged the central legal and historical claims of the classical model,⁷⁰ and the Supreme Court has effectively rejected it.⁷¹

The point of this brief discussion is not to explain fully the Enclave and Property Clauses, but rather to show the differences between sovereign authority and sovereign territory on the one hand, and between sovereign and proprietary ownership on the other. These are old and intractable complications—the stuff of political philosophy and property class hypotheticals.⁷² Simply highlighting them, however, unsettles basic assumptions about the relationship between systems of property and systems of government. Lawyers and geographers generally treat borders as prepolitical,⁷³ economists often take it for granted that borders are fixed,⁷⁴ and some political theorists

⁶⁸ See generally Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83 U. COLO. L. REV. 123, 158-68 (2011) (providing background on the Rebellion and opposition to federal regulation of federally owned public land).

⁶⁹ See generally Alexander H. Southwell, *The County Supremacy Movement: The Federalism Implications of a 1990s States' Rights Battle*, 32 GONZ. L. REV. 417 (1996-1997) (describing the origins and arguments of the County Supremacy Movement).

⁷⁰ See, e.g., Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 9 (2001) ("The Property Clause, properly understood, recognizes the United States as both proprietor and sovereign over its property."). See generally Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985) (challenging the classical Property Clause model on historical and theoretical grounds); Dale D. Goble, *The Myth of the Classic Property Clause Doctrine*, 63 DENV. U. L. REV. 495 (1986) (same).

⁷¹ See *Kleppe v. New Mexico*, 426 U.S. 529, 538-40 (1976) (rejecting the argument that "Congress' rights in its land are only the rights of an ordinary proprietor," and holding that under the Property Clause, "Congress exercises the powers both of a proprietor and of a legislature over the public domain" (emphasis added) (internal quotation marks omitted)). For further evidence, see *United States v. San Francisco*, 310 U.S. 16, 29-30 (1940); *Light v. United States*, 220 U.S. 523, 537 (1911); and *Camfield v. United States*, 167 U.S. 518, 525-26 (1897). Another example can be found in the tremendously well-named *Hunt v. United States*. See 278 U.S. 96, 100-01 (1928) (upholding culling of deer on federal property in violation of state game laws, thus demonstrating that the United States has powers beyond that of a private landowner).

⁷² See, e.g., Brilmayer, *supra* note 57, at 14 (considering the relationship between social contract theory and territorial sovereignty).

⁷³ Nicholas Blomley, *From 'What?' to 'So What?': Law and Geography in Retrospect*, ("Space is imagined [by geographers] as an abstract and prepolitical surface, a world of passivity and measurement that is deemed separate from society. Law (both liberal and critical) is no exception, long embracing an historical imagination." (footnote and internal quotation marks omitted)) in *LAW AND GEOGRAPHY* 17, 21 (Jane Holder & Carolyn Harrison eds., 2003).

⁷⁴ James Buchanan, *The Domain of Constitutional Economics*, 1 CONST. POL. ECON. 1, 6 (1990) ("A third reason for economists' general failure to extend their analytical apparatus to the

assume the existence or desirability of a strict separation between the political and economic spheres.⁷⁵ As the preceding discussion has shown, the relationship between property and sovereign territory defies these efforts to divide them.

B. *Why States Might Want to Buy or Sell Borders*

The previous Section identified and unpacked a toolkit, showing what it means for governments to buy and sell land, and the many different forms that such transactions might take. But the market for sovereign territory will only function if demand exists. This Section aims to show that it might; Part II considers potential explanations—none of them fully satisfying—as to why that market has not been active. The discussion relies heavily on domestic examples because the idea that borders must bend to political will was not interred at Appomattox, nor confined below the Mason–Dixon line.

1. Economic Benefit

Perhaps the most straightforward incentive for states to buy or sell sovereign territory is the same one that motivates private property owners: gain from trade. A buying state would acquire territory that it valued more than the seller did; the selling state would add the proceeds of the sale to its public fisc. This of course is the basic mechanism of Coasean bargaining, through which (at least in a world of costless transactions and perfect information) property ends up being held by the party that values it most.⁷⁶ The idea of treating state land as an economically valuable resource is anything but foreign—indeed, it is one of the animating principles behind the vast market in public land.⁷⁷ To be sure, the market for public land generally involves only the conveyance of proprietary interests, not alteration of borders or transfer of sovereign authority. But as discussed above, the division between proprietary and sovereign ownership is not always as clear as one might suppose.

derivation of institutional-constitutional structure is to be found in their presumption that structural constraints are not, themselves, subject to deliberative choice, and, hence, to change.”).

⁷⁵ See, e.g., KARL POLANYI, *THE GREAT TRANSFORMATION* 71 (1957) (“A self-regulating market demands nothing less than the institutional separation of society into an economic and political sphere. Such a dichotomy is, in effect, merely the restatement, from the point of view of society as a whole, of the existence of a self-regulating market.”).

⁷⁶ See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (describing this theory).

⁷⁷ See, e.g., Robert H. Nelson, *Our Languishing Public Lands*, POL’Y REV., Feb.–Mar. 2012, at 45, 47–48 (surveying public land management and noting that the most important historical use of the national forests has been timber harvesting).

Consider a recent development: in the western United States, entire towns are putting themselves up for sale. In April 2012, Buford, Wyoming—the nation’s “smallest town,” albeit complete with its own zip code and post office—was auctioned off to two Vietnamese businessmen for \$900,000.⁷⁸ Many other towns have followed suit.⁷⁹ Such sales do not exactly convey governing authority,⁸⁰ but as one enthusiastic town owner put it, “You can come in and name it after yourself if you want and be the mayor, chief of police and secretary of the interior all at the same time.”⁸¹ Morris Cohen would surely nod his approval of the point. If buyers seem motivated by the promise of sovereignty, sellers are driven by a straightforward desire for profit. So far, those sellers have all been private individuals, but it is not hard to imagine that at some point borders themselves could be put up for sale—voluntarily or not—by debt-distressed states. Indeed, the idea has already been floated at the international level.⁸²

⁷⁸ See Jim Spellman, *Vietnamese Businessmen Scoop Up Smallest U.S. Town for \$900,000*, CNN (Apr. 5, 2012), http://articles.cnn.com/2012-04-05/us/us_wyoming-town-auction_1_buford-town-cheyenne (describing Buford’s auction-style sale). The town has since been rebranded as PhinDeli Town Buford, and will be used as a trading post for PhinDeli coffee. Nina Strohlic, *America’s Tiniest Town Is Sold and Renamed PhinDeli Town Buford, Wyoming*, DAILY BEAST, Oct. 17, 2013, <http://www.thedailybeast.com/articles/2013/10/17/america-s-tiniest-town-is-sold-and-renamed-phindeli-town-buford-wyoming.html>.

⁷⁹ See, e.g., Gary Dinges, *Owner of Austin-Based Bikinis Buys, Rebrands Central Texas Town*, STATESMAN.COM (July 17, 2012), <http://www.statesman.com/business/owner-of-austin-based-bikinis-buys-rebrands-central-2418026.html> (describing the sale of Bankersmith, Texas, for an undisclosed price to the owner of a bar and restaurant chain, who subsequently renamed the town Bikinis, Texas); Colleen Kane, *Towns That Are for Sale*, HUFFPOST BUS. (Aug. 9, 2012), http://www.huffingtonpost.com/2012/08/09/towns-for-sale_n_1761217.html (providing an overview of the sale of towns and villages during the first six months of 2012); Susanna Kim, *NC Set of ‘The Hunger Games’ Among 11 Towns for Sale*, ABCNEWS (Apr. 9, 2012), <http://abcnews.go.com/Business/11-towns-sale-hunger-games-town/story?id=15827223> (noting that Henry River Mill Village, North Carolina, where a recent major motion picture was filmed, is up for sale for \$1.4 million); Chuck Raasch, *Tiny Towns Go Up for Sale*, USA TODAY (Apr. 3, 2012), <http://www.usatoday.com/news/nation/story/2012-04-02/buford-wyoming-town-for-sale/53951218/1> (identifying towns sold in Montana and South Dakota); Ben Tracy, *Montana Town for Sale, Just \$1.4 Million*, CBS THIS MORNING (May 10, 2012), [http://www.cbsnews.com/8301-505263_162-57431590/montana-town-for-sale-just-\\$1.4-million](http://www.cbsnews.com/8301-505263_162-57431590/montana-town-for-sale-just-$1.4-million) (describing the circumstances that led Pray, Montana, population eleven, to put itself up for auction).

⁸⁰ See Karen Aho, *How to Buy a Town: Have Plenty of Cash—And Patience*, MSN REAL ESTATE, <http://realestate.msn.com/article.aspx?cp-documentid=13107850> (last visited Nov. 22, 2013) (“A town that’s for sale is legally either an abandoned town or an unincorporated rural community, meaning it might receive some county services. An individual merely happens to have acquired much of the platted town site.”).

⁸¹ *Id.*

⁸² Read chronologically, the headlines alone tell the story: Oana Lungescu, *Greece Should Sell Islands to Cut Debt—Merkel Allies*, BBC NEWS (Mar. 4, 2010), <http://news.bbc.co.uk/2/hi/8549793.stm>; Robert Mackey, *Greece Won’t Sell Islands to Cover Debts*, N.Y. TIMES LEDE (Mar. 5, 2010), <http://thelede.blogs.nytimes.com/2010/03/05/greece-wont-sell-islands-to-cover-debts>; and Elena

Gains from trade are not the only potential economic benefit of a border sale. Some economic studies suggest that the drawing of borders has an important influence on a nation's economic and political success,⁸³ and there is some reason to believe that this would be true at the domestic level as well.⁸⁴ Alteration of state borders might permit economies of scale in the provision of public services, more efficient governance of resources, and the like.⁸⁵ The potential benefits from such combinations are perhaps most apparent in the context of metropolitan areas that straddle borders and might be more effectively administered by a single state. Philadelphia and Camden provide a particularly useful example in this regard because a proposal for their combination has already been put forward⁸⁶ and has gained some public attention.⁸⁷ A monetary transfer might be the simplest way to effectuate the change.

2. Political Responsiveness

The existence of a market for state borders need not be motivated exclusively by economic concerns. Political responsiveness and representation are arguably even more important, at least from a democratic perspective. For example, a region within a state may have distinct policy preferences that align more closely with those of a different state, or might strongly believe that it is being treated unfairly with regard to representation or some other structural matter. The following discussion provides examples of

Moya, *Greece Starts Putting Island Land Up for Sale to Save Economy*, GUARDIAN (June 24, 2010), <http://www.guardian.co.uk/world/2010/jun/24/greece-islands-sale-save-economy>.

⁸³ See, e.g., Alberto Alesina et al., *Artificial States*, 9 J. EUR. ECON. ASS'N 246, 267-71 (2011) (analyzing the impact of politically formed, artificial state borders on economic growth); William Easterly & Ross Levine, *Africa's Growth Tragedy: Policies and Ethnic Divisions*, 112 Q.J. ECON. 1203, 1213-14 (1997) (arguing that the borders of African nations were drawn in ways that have impeded their economic growth).

⁸⁴ Other economic benefits might accrue from changing the number of states. See Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 2 (2011) ("While the optimal number of states in a federal system will ultimately depend on geography, legal culture, and technology, the available data suggest that the ten provinces of Canada may be too few, but the fifty states of the United States may well be too many.").

⁸⁵ See G. ETZEL PEARCY, *A THIRTY-EIGHT STATE U.S.A.*, at iv (1973) ("A more efficient administration at lower cost not only could, but probably would result from a regroupment of states.").

⁸⁶ See Dilworth, *supra* note 12, at 104-07 (explaining how Philadelphia could be annexed to New Jersey).

⁸⁷ See, e.g., Joseph N. DiStefano, *Why Philadelphia Should Leave PA and Join NJ*, PHILLY.COM (Oct. 17, 2013), http://www.philly.com/philly/blogs/inq-phillydeals/Why_Philadelphia_should_leave_PA_and_join_NJ.html (reviewing and praising the Dilworth proposal).

each, suggesting that the sale of state borders could help address these issues by inspiring desirable political competition, offering voters increased alternatives, and even giving elected officials the incentive to govern well.

Political responsiveness and representation are well-established principles embedded deeply in American law and politics,⁸⁸ and they translate relatively easily to the market for state borders. For example, the Tiebout Hypothesis, widely viewed as one of the more attractive normative justifications for our federalism, suggests that states should be free to experiment precisely because “consumer voters” can vote with their feet by moving to the states whose laws they prefer.⁸⁹ States, in turn, have incentive to govern themselves well so as not to lose taxpayers or political support. Many scholars celebrate this vision, at least to the degree that it permits parties to choose the law that best meets their needs and simultaneously incentivizes states to create attractive legal regimes.⁹⁰ One problem with the Tiebout Hypothesis, of course, is that residence is sticky—emotional, financial, and other costs distort the market.⁹¹ But what if instead of moving to the state whose laws they preferred, citizens could bring the state to them?⁹²

The residents of Killington, Vermont—located right in the middle of the Green Mountain State—have repeatedly voted to secede—not because they want to start their own breakaway republic, but because they would rather “Live Free” as citizens of New Hampshire.⁹³ Their complaint is effectively a

⁸⁸ See, e.g., *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁸⁹ See generally Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956) (arguing that, like retail consumers, voters will choose a “community whose local government best satisfies [their] set of preferences”).

⁹⁰ This literature is probably best recognized in the areas of corporate and environmental law. See, e.g., Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435 (1992) (discussing state charter competition); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

⁹¹ ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 130 (2000) (“In reality, however, mobility is costly and jurisdictions are limited in number. Like transaction costs, mobility costs obstruct movements toward efficiency.”); Briffault, *supra* note 15, at 837 (“Movement is constrained by a variety of economic and social factors that tend to affect poorer people more than affluent ones.”).

⁹² Cf. COOTER, *supra* note 91, at 140 (“Almost everyone agrees that democratic states should provide citizens with a right of free mobility, thus allowing people to move to more efficient jurisdictions. In time almost everyone may agree that democratic states should provide local governments with a right of free contract with other governments, thus allowing jurisdictions to move to people.”). Something akin to this is already happening at the international level. See Adam Davidson, *Who Wants to Buy Honduras?*, N.Y. TIMES (May 8, 2012), <http://www.nytimes.com/2012/05/13/magazine/who-wants-to-buy-honduras.html> (describing the rise of charter cities with “open immigration policies”).

⁹³ See *Killington*, *supra* note 14.

political one: that Vermont's property tax system is too burdensome.⁹⁴ They remain trapped, however, because they cannot leave Vermont without approval from the state legislature—approval it does not seem inclined to give.⁹⁵ But what if they, or New Hampshire itself, offered to *buy* their way out? Killington might have to pay a high premium for the creation of a New Hampshire exclave in the middle of Vermont, but if the people of Killington value New Hampshire citizenship more than Vermont values Killington, it should be possible in theory to structure a transaction that would leave everyone better off. Indeed, in one of the Vermont proposals, Killington's exit was premised upon payment of "exit fees for stranded assets of the state."⁹⁶ Had it passed, Killington would have in some sense bought its freedom.

Another example comes from Massachusetts—not considered a hotbed of secessionism, at least since the late 1700s. In the 1970s, Massachusetts underwent a statewide redistricting to correct perceived imbalances among its voting districts.⁹⁷ The result was that Dukes County (which includes Martha's Vineyard and the Elizabeth Islands) and Nantucket were to lose their representatives and merge with Cape Cod's voting district.⁹⁸ Dukes County and Nantucket objected, insisting that they had each been promised a representative when they joined the Bay State back in the 1600s.⁹⁹

Their response was to vote overwhelmingly in favor of secession from Massachusetts.¹⁰⁰ A flag, secessionist anthem, and even a passport were soon created.¹⁰¹ But the islands did not want to go it alone. Other states quickly lined up as suitors,¹⁰² attempting to woo them by promising—as the governors of Connecticut and Vermont did—their own representatives in the state legislature, or—as Vermont's governor also did—a half gallon of maple

⁹⁴ *Id.*

⁹⁵ Kevin Forrest, *Killington Secession Not Too Popular in VT*, NHPR (Mar. 16, 2005), <http://info.nhpr.org/node/8429> (reporting legislative and popular backlash against Killington's secession proposal). The proposal actually made some headway in both Vermont's and New Hampshire's legislatures, each of which created a commission to effect the process and terms of an interstate agreement on the matter. See H.R. 672, 2005 Leg., 2005–2006 Leg. Sess. (Vt. 2006); H.R. 288, 2005 Leg., 2005 Sess. (N.H. 2005).

⁹⁶ H.R. 426, 2005 Leg., 2005–2006 Leg. Sess. (Vt. 2005) (proposing penalties for secession).

⁹⁷ Seccombe, *supra* note 15.

⁹⁸ *Id.*

⁹⁹ *Id.* The islands had previously been governed by New York; an act of Parliament transferred them to Massachusetts in 1692. See WILLIAM FRANCIS MACY, *THE STORY OF OLD NANTUCKET* 32 (1915).

¹⁰⁰ See Seccombe, *supra* note 15.

¹⁰¹ *Id.*

¹⁰² See *id.* (describing overtures from Connecticut, Rhode Island, Vermont, and New Hampshire, as well as sympathy from Maine and Hawaii); see also John Kifner, *Massachusetts Isles Wave Secession Flag*, N.Y. TIMES, Apr. 6, 1977 (same).

syrup and solidarity with the “salty castoffs.”¹⁰³ Yet the islands could not accept any of these overtures without the Massachusetts legislature’s approval, which was not forthcoming. In the end, Massachusetts essentially bought back the islands by promising them various “sweeteners,” including free long-distance calls to their new representative in Cape Cod.¹⁰⁴ It is worth asking, however, whether Bay Staters might have permitted the change had they, and not the residents of the islands, been offered maple syrup or outright cash. If so, then perhaps selling the islands would have improved the lots of everyone involved.

3. Correcting Historical Errors and Responding to Exogenous Shocks

Thus far, interstate sales of sovereign territory have been described in proactive terms—as a means to improve the status quo. But such sales can also help maintain or restore the status quo when it is threatened by exogenous shocks, such as surveying errors, historical oddities, and river accretion.

a. *Surveying Errors*

At least four states are currently renegotiating their borders to correct centuries-old surveying errors. As noted briefly above, North and South Carolina are adjusting their border slightly southward, a move that will bring approximately thirty households and a gas station into the Old North State.¹⁰⁵ Georgia’s claim against Tennessee is somewhat more significant. Although Tennessee’s border was fixed at the 35th parallel upon its admission to the Union, the hapless surveyor charged with demarcation was not provided with the tools he needed and placed the line approximately one *mile* south of where it should be.¹⁰⁶ The result is that the strains of “Rocky

¹⁰³ See Secombe, *supra* note 15.

¹⁰⁴ *Id.* Whether this attempt to buy back the islanders’ loyalty succeeded is debatable; the islanders seemed to know they would never successfully overcome the will of the people of Massachusetts. *Id.* Indeed, the islands’ attempted secession was probably, even for most of its supporters, simply a playful political statement. A few years later, the Florida Keys picked up the tune by proclaiming the Conch Republic (motto: “We Seceded Where Others Failed”) to protest a federal roadblock on U.S. Route 1, which connects the Keys to the mainland. On the day of the secession, Key West Mayor Dennis Wardlow broke a loaf of Cuban bread over the head of a man dressed in a U.S. Navy uniform, then immediately surrendered, requesting one billion dollars in aid to rebuild the beleaguered Republic. See *A Brief History of the Conch Republic*, CONCH REPUBLIC, <http://www.conchrepublic.com/history.htm> (last visited Nov. 22, 2013).

¹⁰⁵ Severson, *supra* note 4.

¹⁰⁶ Inasmuch as equities are relevant, it was Georgia that failed to provide him with the necessary equipment. See Dewan, *supra* note 4.

Top” carry onto what should theoretically be Georgian soil. Georgia’s legislature has made claims on Tennessee, but to no avail. As Chattanooga’s mayor put it, “I saw [the sponsor of the Georgia bill] grumbling that we didn’t seem to be taking it seriously. Well, I’m sorry, we’re not.”¹⁰⁷

Assuming for present purposes that North Carolina and Georgia have valid claims on their neighbors’ sovereign territory, it is nevertheless unclear whether altering borders is the best solution—especially given the reliance interests that have developed in the centuries since the original errors were made.¹⁰⁸ Changing borders will impose costs upon the residents of the affected areas, as they will be required to change car insurance, schools, voter registration, and the like.¹⁰⁹ If the costs to South Carolina and Tennessee (or to the residents themselves) outweigh the benefits to North Carolina and Georgia, then fixing the surveying errors will truly be more trouble than it is worth.

Avoiding that trouble could be as easy as structuring a sale to keep the borders where they are. After all, Georgia and North Carolina probably see no reason to simply relinquish their legally rightful claims. But neither will they necessarily benefit as much from adding the territories as Tennessee and South Carolina would benefit from retaining them. The latter should therefore have sufficient incentive to purchase the equivalent of a quitclaim from the former. The residents in the affected territory—because they would be the primary beneficiaries—might even be given the option of paying a special assessment to raise a portion of the purchase price.

b. *Historical Oddities*

A recent article on the shape and size of the American states concludes that “[t]he boundary lines of the fifty American states are mostly the result of very arbitrary and almost random occurrences.”¹¹⁰ A quick glance at a map reveals many puzzling examples—the “notch” in West Virginia (a fertile area taken from the recently seceded Virginia);¹¹¹ the odd finger of Virginia that dangles from Maryland (the result of an intercolony mediation

¹⁰⁷ *Id.*

¹⁰⁸ See *infra* subsection II.B.1 (discussing reliance interests and costs of change).

¹⁰⁹ Severson, *supra* note 4, at A16 (“Taxes, of course, are the biggest issue for many who are facing higher bills. But other questions abound. Will a handful of children be forced to change school districts? Will football loyalties have to change? And worse, will South Carolinians fond of that state’s mustard-based barbecue sauce have to learn to sop their pork in the peppery vinegar sauce preferred in the state to the north?”).

¹¹⁰ Calabresi & Terrell, *supra* note 84, at 3.

¹¹¹ See MARK STEIN, HOW THE STATES GOT THEIR SHAPES 295-96 (2008).

by the English government combined with a surveying error);¹¹² Maryland's extremely skinny "neck" (the consequence of a surveying error and cause of an intercolony border conflict);¹¹³ or "Bubbleland," an exclave of Kentucky that is surrounded by Missouri and reachable only through Tennessee or Missouri (a bubble blown by an unanticipated bend in the Mississippi River).¹¹⁴ The Upper Peninsula, which is contiguous with Wisconsin, became part of Michigan largely because Michigan achieved the requisite population for statehood before Wisconsin did.¹¹⁵ That the resident "Yoopers" have made multiple attempts to secede from Michigan over the past 150 years suggests that the match is not entirely perfect.¹¹⁶

Many of these historical oddities would make natural candidates for a welfare-enhancing border adjustment, which an interstate market for territory could facilitate. Indeed, some of them are the *result* of something looking very much like a purchase. The Western cessions are an obvious example,¹¹⁷ as are awards of public land to the states from the federal government after the Revolutionary War.¹¹⁸ Missouri's "boot heel" took its shape because a wealthy cattleman who owned that land was able to negotiate a backroom deal that kept his ranch out of Arkansas, where he feared its value would suffer.¹¹⁹ If such borders were drawn in the first place based on random factors or even on financial ones, what is wrong with using financial means to unwind and improve them?

If these examples seem too far-fetched, consider a recent, small-scale, and nearly successful effort to redraw a state line—a straight one, as it

¹¹² *Id.* at 130-31.

¹¹³ *Id.* at 132.

¹¹⁴ Matt Soniak, *Welcome to Bubbleland: Life on a Strange Little Chunk of Kentucky*, MENTAL FLOSS (Sept. 21, 2011), <http://mentalfloss.com/article/28816/welcome-bubbleland-life-strange-little-chunk-kentucky>. Because it does not involve a state-state dispute, this short list omits the Northwest Angle—a small part of Minnesota accessible by land only through Canada—which has repeatedly threatened to secede from the United States. See Amy Radil, *The Northwest Angle*, MINNESOTA PUBLIC RADIO (Aug. 17, 1998), http://news.minnesota.publicradio.org/features/199808/17_radila_angle-m.

¹¹⁵ See STEIN, *supra* note 111, at 141-44.

¹¹⁶ Nathan Dorn, *The State of What?? U.S. States That Never Made the Cut*, LIBR. CONGRESS (May 10, 2012), <http://blogs.loc.gov/law/2012/05/the-state-of-what-u-s-states-that-never-made-the-cut> (describing "the State of Superior—a long-standing aspiration among the inhabitants of Michigan's Upper Peninsula, one which appeared as early as 1858").

¹¹⁷ By this I mean those territories—mostly West of the colonies but East of the Mississippi—ceded to the federal government in the late 18th and early 19th centuries. FRANKLIN K. VAN ZANDT, U.S. DEP'T OF THE INTERIOR, *BOUNDARIES OF THE UNITED STATES AND THE SEVERAL STATES* 1-2 (1976).

¹¹⁸ See Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 882 n.66 (1970).

¹¹⁹ See STEIN, *supra* note 111, at 158.

happens—to better reflect local realities. In 2001, the United States House of Representatives passed a bill prospectively approving the alteration of the Utah–Nevada border so as to combine the towns of Wendover and West Wendover, then “divided socially, economically, and politically by the location of the Utah–Nevada State boundary.”¹²⁰ Speaking in favor of the bill, Representative James V. Hansen said, “For as long as I can remember, and through the changes in administration of local officials, it has been sort of a running joke that one way to correct a lot of these problems is just to redraw the State boundary to put Wendover, Utah, into Nevada.”¹²¹ The House bill was predicated on the approval of the two states’ legislatures, of Congress itself, and of a majority vote of the residents of both cities called during an election for federal office.¹²² The latter was apparently the sticking point, as residents of West Wendover—who benefited from, among other things, taxes on alcohol and gambling, which are legal in Nevada but restricted in Utah¹²³—were unenthusiastic about combining with their poorer cousins across the state border.¹²⁴

Because the Wendoverians were “divided socially, economically, and politically” by the state border, the simplest solution would have been, as Representative Hansen suggested, to simply redraw it.¹²⁵ The deal ultimately fell apart because the comparatively wealthy West Wendoverians saw no benefit and effectively vetoed it. But why not simply buy them out? If Utah or Nevada were to offer funding for schools, police, and other public services—defraying the increased demands brought on by the East Wendoverians—the deal might have gone through, thereby resolving the “problems” described by Representative Hansen.

¹²⁰ See 148 CONG. REC. 9997 (2002) (statement of Rep. James V. Hansen); H.R. REP. NO. 107-469 (2002); H.R. 2054, 107th Cong. (2001). I am indebted to Richardson Dilworth for the example. See Dilworth, *supra* note 12, at 112-13.

¹²¹ See *Proposed Change of Utah–Nevada State Boundary: Hearing on H.R. 2054 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 107th Cong. 20 (2002).

¹²² See H.R. REP. NO. 107-469, at 2 (2002) (“Consent to Agreement or Compact”).

¹²³ Appropriately enough, the town’s casino was called the Stateline. See *Stateline Casino*, WIKIPEDIA, http://en.wikipedia.org/wiki/Stateline_Casino (last visited Nov. 22, 2013).

¹²⁴ Tom Gorman, *2 Towns’ Great Divide: Poor Utah City Wants to Unite with Its Richer Nevada Half. To Work, the State Line Will Have to Be Shifted a Bit*, L.A. TIMES, May 28, 2001, at A12 (cited in Dilworth, *supra* note 12, at 113) (finding resistance and reluctance among West Wendover residents to unite with Wendover).

¹²⁵ See 148 CONG. REC. 9997 (2002).

c. *Accretion and Avulsion*

Inconveniently drawn state borders are not always the result of surveying errors or historical mistakes. Sometimes nature itself intervenes, and an interstate purchase of territory could provide a workaround.

As a matter of law, state borders that are based on rivers stay put in the case of avulsion (a sudden change in the river's course) but move in the case of accretion (a gradual change).¹²⁶ The application of these rules, however, does not always lead to desirable results. Perhaps two states would be better off redrawing their borders so as to account for major avulsion. Or perhaps accretion moves a river's boundaries so that State *A* comes to possess land that is far more valuable to State *B*. In either case, the states and their citizens—who would be affected just as the South Carolina and Tennessee residents described above—would prefer to maintain their position prior to the border change. An offer to buy back land that a river has taken away might be the easiest way to restore it.

Again, American history is full of fascinating illustrations. Part of the border between South Dakota and Nebraska is established by the wanderlust-afflicted Missouri River. Among other things, the river's movement has brought part of what used to be Nebraska into South Dakota, making it subject to South Dakota's resident-only duck-hunting law.¹²⁷ But while it lost the ducks, Nebraska gained an island; St. Helen Island now finds itself on the Nebraska side of the river.¹²⁸ Nebraska's Elk "Island" retaliated by ceasing to be an island at all, fusing itself to the South Dakota bank, even while its residents continued paying taxes across the river to Nebraska.¹²⁹

Kaskaskia, the first capitol of Illinois, provides an even more extraordinary example.¹³⁰ It was largely destroyed by an 1881 flood, during which the Mississippi River shifted to an eastward channel, fully separating the town from Illinois but—because the flood was an avulsion—leaving the state border in place. Accordingly, Kaskaskia is now reachable by land only from

¹²⁶ See *Nebraska v. Iowa*, 143 U.S. 359, 360-61 (1892).

¹²⁷ See Lynn Garthwaite, *A River Runs Through It and Around It*, LYNN GARTHWAITE BLOG (Oct. 4, 2011), <http://lynngarthwaiteblog.wordpress.com/2011/10/04/a-river-runs-through-it-and-around-it> (discussing the increase in prominence of the bill as the Nebraska-South Dakota line shifted).

¹²⁸ *Id.*

¹²⁹ *Id.* Congress approved an interstate compact clarifying the boundary and committing each state to renegotiate if the river should wander again. See *South Dakota-Nebraska Boundary Compact*, Pub. L. No. 101-183, 103 Stat. 1328 (1989).

¹³⁰ The capital moved to Springfield in the 1830s thanks largely to the efforts of an ambitious local lawyer and eight of his associates—known collectively, because of their height, as the Long Nine. See DAVID HERBERT DONALD, *LINCOLN* 60-62 (1995).

Missouri. Though its twenty-or-so residents are still technically citizens of Illinois, which maintains its roads, the town has a Missouri area code and zip code.¹³¹

Other examples are not hard to find. Civil procedure buffs likely recall Carter Lake—the only city in Iowa located west of the Missouri River—whose odd location gave the Supreme Court an opportunity to clarify the law of ancillary jurisdiction.¹³² In situations like these, a sale of sovereign territory could recognize or even restore the status quo, rather than disturb it. For those who fear that an interstate market for sovereign territory would upset reliance interests and introduce uncertainty,¹³³ accretion and avulsion create attractive opportunities. They demonstrate that costly border changes can sometimes be *avoided* through sale.

4. Bargaining and Dispute Resolution

Another reason states might want to buy and sell borders is simply that marketizing sovereign territory could make it easier to resolve border disputes and conclude interstate compacts.

Border disputes between states were and are surprisingly common, and although they are generally nonviolent, the Civil War is not the only exception to that rule.¹³⁴ In the 1830s, Ohio and the soon-to-be-state of Michigan fought the “Toledo War” over a five-to-eight mile wide strip of land including, appropriately enough, what is now Toledo, Ohio.¹³⁵ The conflict came to a head in 1835 when Michigan sheriff Joseph Wood attempted to arrest Major Benjamin Stickney for voting in an Ohio election, and was promptly stabbed by the younger of Stickney’s incomparably named sons, One and Two.¹³⁶ As if to demonstrate the commodifiability of

¹³¹ See Ted Gregory, *Kaskaskia Comeback a Precarious Distinction*, CHI. TRIB. (Mar. 9, 2011), http://articles.chicagotribune.com/2011-03-09/news/ct-met-kaskaskia-second-place-20110309_1_french-settlement-smallest-town-census (explaining the predicament of Kaskaskia residents who have mailing addresses in St. Mary, Missouri, but drivers licenses and other maintenance services from Illinois).

¹³² The case was *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). The Court also considered the issue in *Nebraska v. Iowa*. See 143 U.S. 359, 370 (1891) (finding that the city remained part of Iowa even after an avulsive 1877 flood connected it to Nebraska).

¹³³ See *infra* Section II.B.

¹³⁴ See Rob Lammle, *8 Secessionist Movements in American History*, MENTAL FLOSS (Oct. 14, 2008), <http://www.mentalfloss.com/blogs/archives/19276> (describing other domestic secession movements).

¹³⁵ See Bob Garrett, *Toledo, Michigan?*, SEEKING MICHIGAN (May 4, 2010), <http://SeekingMichigan.org/look/2010/05/04/Toledo-Michigan>.

¹³⁶ *Id.*

sovereign territory, Congress effectively purchased Michigan's consent to Ohio's claim by promising it statehood and the Upper Peninsula.¹³⁷

Border disputes persist across the country, generally in much less colorful form, and often end up in the Supreme Court, which is ill-suited to resolve them. As late as the 1990s, New Jersey and New York were still arguing about ownership of "filled land" surrounding Ellis Island. The Court awarded the land to New Jersey, despite New York's ownership of the island itself,¹³⁸ but—as it has on other occasions¹³⁹—encouraged the states to resolve their disputes through negotiation.¹⁴⁰ The Court's awareness of its limitations in this context is nothing new. In a 1920 case, the Justices admonished Minnesota and Wisconsin, with seeming exasperation, "It seems appropriate to repeat the suggestion . . . that the parties endeavor with consent of Congress to adjust their boundaries."¹⁴¹

The method of adjustment to which the Court referred was that of the interstate compact, which permits states to enter into agreements or compacts with the consent of Congress.¹⁴² As explained in more detail below,¹⁴³ such compacts would probably be the proper vehicle for any border-altering sales between states and have certainly been used that way in the past.¹⁴⁴ Michael Greve notes that "[p]rior to 1921, thirty-six compacts between states were

¹³⁷ *Id.* Echoes of the dispute lasted at least until a 1973 Supreme Court case. *See Michigan v. Ohio*, 410 U.S. 420 (1973) (per curiam) (settling, over the exceptions filed by Michigan, the boundary line between the states of Ohio and Michigan in Lake Erie). Astoundingly, Ohio governor Robert Lucas, who played an important role in the Toledo War, went on to become governor of Iowa. There he helped spark the Honey War—a border dispute with Missouri that *also* found its way to the Supreme Court. *See Missouri v. Iowa*, 48 U.S. 660, 674 (1849) (settling the disputed northern boundary-line of Missouri and the southern boundary of Iowa). *See generally* Craig Hill, *The Honey War*, 14 PIONEER AM. 81 (1982) (tracing the history of the Honey War).

¹³⁸ *See New Jersey v. New York*, 523 U.S. 767, 770-71 (1998) (holding that a foundation contract between New Jersey and New York did not give New York jurisdiction over filled land subsequently added to Ellis Island).

¹³⁹ *See, e.g., Oklahoma v. New Mexico*, 501 U.S. 221, 241 (1991) ("[T]he Court has often expressed [a] preference that, where possible, States settle their controversies by mutual accommodation and agreement . . ." (alteration in original) (internal quotation marks omitted)).

¹⁴⁰ *See New Jersey*, 523 U.S. at 811-12 (surveying other state boundary litigation to bolster the argument that courts prefer negotiation between interested states).

¹⁴¹ *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1920) (internal citation omitted); *see also* Frankfurter & Landis, *supra* note 26, at 696 ("The Supreme Court itself has more than once adverted to the inadequacy of the judicial process, and counselled the parties to this more fruitful method of settlement.").

¹⁴² U.S. CONST. art. I, § 10, cl. 3.

¹⁴³ *See infra* subsection II.A.1.b.

¹⁴⁴ *See Frankfurter & Landis, supra* note 26, at 696 ("Boundary disputes . . . have been the most continuous occasions for invoking the Compact Clause."); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 671 (2001) ("A classical use of compacts has been to resolve border disputes.").

put into effect with the consent of Congress; virtually all of these settled boundaries between contiguous states.”¹⁴⁵ In fact, the only compact that did not settle a “narrow boundary dispute” involved a huge one: the division of Virginia and West Virginia.¹⁴⁶ Compacts have grown in number over the past century,¹⁴⁷ but as a proportional matter, fewer of them focus on borders.¹⁴⁸ From 1783 to 1969, boundary compacts went from representing 71% of total compacts to just 9%; service compacts made up most of the difference, increasing from 3% to 58%.¹⁴⁹

And yet the negotiation of interstate compacts is not an ideal solution to border disputes—it has been described as “a slow and cumbersome process at best.”¹⁵⁰ One thing that seems to be missing from the equation, at least directly, is money. As Jonathan Horne notes in a recent study of water compacts, “two recent authoritative and encyclopedic sources from respected scholars detailing issues in the negotiation of Compacts (‘how to’ guides for states on negotiating Compacts) fail even to mention side-payments.”¹⁵¹ Such payments appear equally absent in border compact negotiations. This absence is “puzzling” precisely because side payments provide the standard mechanism to compare otherwise incommensurable goods, and to conclude deals when traded goods are not of precisely equal value. If a straight trade

¹⁴⁵ Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 288 (2003) (citing Brevard Carihfield, *Interstate Compacts, 1783–1977: An Overview*, in 22 THE BOOK OF THE STATES: 1978–1979, at 580 (1978)).

¹⁴⁶ See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3–4 & n.14 (1997) (noting that the other thirty-five compacts settled boundary disputes).

¹⁴⁷ David E. Engdahl, *Characterization of Interstate Arrangements: When Is a Compact Not a Compact?*, 64 MICH. L. REV. 63, 63 (1965) (referring to increasing use of compacts as “one of the most significant developments in American federalism during the past forty, and especially the past twenty, years”); Resnik, *supra* note 144, at 671–72 (“The use of compacts increased during the twentieth century, and a greater number and more varieties (including interstate agreements that do not result in formal legal compacts) are likely in the coming years.”).

¹⁴⁸ Greve, *supra* note 145, at 288 (counting the number of compacts now in effect that cover a broad range of issues).

¹⁴⁹ See Welch & Clark, *supra* note 11, at 478 tbl.1; see also Patricia S. Florestano, *Past and Present Utilization of Interstate Compacts in the United States*, 24 PUBLIUS: J. FEDERALISM 13, 21 (1994) (“Compacts began as border devices, but since the 1920s, they have been principally regional in scope.”).

¹⁵⁰ See VINCENT V. THURSBY, *INTERSTATE COOPERATION: A STUDY OF THE INTERSTATE COMPACT* 138 (1953) (explaining that the long negotiation times of interstate compacts are one of the most significant drawbacks to their use).

¹⁵¹ Jonathan Horne, *On Not Resolving Interstate Disputes*, 6 N.Y.U. J.L. & LIBERTY 95, 156 (2011). Horne, of course, does explore the possibility of side payments, and explains their “puzzling absence” in terms of bargaining theory—specifically, that the Supreme Court’s broad “aggressive remedial approach” discourages states from bargaining prior to litigation. *Id.* at 155, 182–83.

of goods (or territory itself) is not feasible because the goods are not equally valued, the parties can balance the scales by offering money—the basic mechanism of modern economic trade.¹⁵² The “economy” of interstate compacts might well run more smoothly if states moved away from bartering and towards currency.

C. *The History and Persistent Echoes of the American Market for Sovereign Territory*

The preceding Sections sketched the idea of a market for borders—what it would mean and why states might want to participate in it. But the discussion need not be entirely theoretical, because the market for sovereign territory was active for much of American history and is largely responsible for what John Marshall called our “vast republic, from the St. Croix to the Gulph of Mexico, from the Atlantic to the Pacific.”¹⁵³ The Louisiana Purchase,¹⁵⁴ the Adams–Onís Treaty,¹⁵⁵ the Alaska Purchase,¹⁵⁶ the Gadsden Purchase,¹⁵⁷ and other lesser-known acquisitions¹⁵⁸ created the nation as we know it.

That history is important for present purposes because it helps legitimate the purchase of borders as a part of American history, law, and politics. Furthermore, echoes of the national market can still be heard at the state level, where the basic ingredients of a market for sovereign territory are very much present. Borders continue to change, public land remains for sale, and sovereignty itself is treated as an alienable good. On one level, revitalizing the market for sovereign territory would simply mean weaving

¹⁵² See generally NIALL FERGUSON, *THE ASCENT OF MONEY: A FINANCIAL HISTORY OF THE WORLD* 5-6 (2009) (describing the role of money in the modern economy).

¹⁵³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 408 (1819).

¹⁵⁴ See generally KUKLA, *supra* note 18.

¹⁵⁵ See Treaty of Amity, Settlement, and Limits, Between the United States of America, and His Catholic Majesty, *supra* note 22.

¹⁵⁶ See Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, *supra* note 19; see also Frank A. Golder, *The Purchase of Alaska*, 25 AM. HIST. REV. 411, 413 (1920) (explaining why Russia sold the Alaskan territories to the United States).

¹⁵⁷ See Treaty with Mexico, U.S.–Mex., art. I, Dec. 30, 1853, 10 Stat. 1031 (detailing the land to be ceded to the United States by Mexico).

¹⁵⁸ The United States purchased the Virgin Islands from Denmark in 1916 for \$25 million. See *A Brief History of the Danish West Indies, 1666–1917*, STATENS ARKIVER, http://www.virgin-islands-history.dk/eng/vi_hist.asp (last visited Nov. 22, 2013). There is a nice historical continuity in this, since William H. Seward—architect of the Alaska Purchase, also known as “Seward’s Folly”—had previously bid on the Islands. See Aïssatou Sy-Wonyu, *The Purchase of the Virgin Islands: W.H. Seward’s Vision of Economic Strategy in the Late 19th Century*, CERCLES, no. 5, 2002, at 11, 17 (describing Seward’s strategy in bidding for the Virgin Islands).

these threads back together. Indeed, their persistence goes a long way towards answering some of the basic objections that might be raised against the idea of that market.

First, borders remain malleable, which means that they can be transferred from one state to another—perhaps the most fundamental and necessary ingredient of a market for sovereign territory. As noted above, state borders can and do change as a result of factors as unplanned as wandering rivers or inaccurate surveyors.¹⁵⁹ But they have also been purposefully moved by interstate compacts, from the colonial era¹⁶⁰ up through modern times.¹⁶¹

Showing that state borders are malleable is not enough to create a market, however. A market for sovereign territory would involve *sales* of state land, not simply accretion and discovery of surveying errors. And yet, echoes of that market are apparent, for governments are already deeply involved in buying and selling public land. In the United States, the federal and state governments have vast proprietary landholdings. The federal government alone “has disposed of approximately 1.2 billion acres of land, more than one-half of the land area of the contiguous United States,”¹⁶² and still holds title to roughly one-third of the nation’s land mass.¹⁶³ States also own public property. Some of these holdings were acquired from the federal government upon admission to the Union or by legislation thereafter.¹⁶⁴ And some of that property may be leased, sold, or otherwise conveyed to private parties—for the purposes of grazing land¹⁶⁵ or water,¹⁶⁶ for example. Of course,

¹⁵⁹ See *supra* subsections I.B.3.a–c.

¹⁶⁰ See Albert S. Abel, *Interstate Cooperation as a Child*, 32 IOWA L. REV. 203, 205 (1947) (“Between 1789 and 1830, one of the three compacts approved by Congress and four of the five which did not receive such approval were similarly concerned with resolving boundary disputes and incidental questions.”); Comment, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1417 (1966) (“In colonial times and throughout the nineteenth century, compacts were used to fix boundaries and attack small-scale problems through cooperative action.”).

¹⁶¹ See Florestano, *supra* note 149, at 21 tbl.3 (counting the use of compacts for boundary disputes from 1783 to 1992).

¹⁶² Scalia, *supra* note 118, at 884 (footnote omitted).

¹⁶³ See Carolyn M. Landever, *Whose Home on the Range? Equal Footing, the New Federalism and State Jurisdiction on Public Lands*, 47 FLA. L. REV. 557, 561 (1995). That ownership is not evenly distributed across the country and is heavily concentrated in western states. See *id.* at 560–61 & n.16; Robert G. Natelson, *Federal Land Retention and the Constitution’s Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327, 329 n.4 (2005) (placing the federal ownership of lands in Nevada and Utah at 89.5% and 64.2%, respectively).

¹⁶⁴ See JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, *NATURAL RESOURCES LAW AND POLICY* 118–19 (2d ed. 2009) (describing the federal government’s disposition of its lands).

¹⁶⁵ See *id.* at 1015 (discussing the leasing of school trust lands for grazing purposes).

¹⁶⁶ See *id.* at 825–30 (describing the concept of “water federalism,” which deals with the allocation of water rights and regulation between the states and the federal government). Whether

selling timber rights is quite different from altering a border, and the market for public land shows only the existence of the former—not the possibility or desirability of the latter.

But states *also* directly alienate their own sovereign functions. That, after all, is the basic idea behind privatization. When a state permits a private company to run its schools, prisons, law enforcement, and so on, it effectively sells sticks from its bundle of sovereignty. Consider Sandy Springs, Georgia, which has approximately 100,000 residents and just seven public employees.¹⁶⁷ Nearly every public function—trash collection, business licensing, zoning, and even 911 dispatching—is performed by private actors.¹⁶⁸ A *New York Times* story on the town noted, “the city’s court, which is in session on this May afternoon, next to the revenue division, is handled by a private company, the Jacobs Engineering Group of Pasadena, Calif.”¹⁶⁹ If the Jacobs Engineering Group can be paid to provide these services, why not hire Atlanta instead?¹⁷⁰ It would, after all, be no *more* removed from Sandy Springs’ voters than a corporation headquartered in Pasadena and might well have a great deal more relevant experience.

The purpose of this discussion is not to suggest that the interstate market for sovereign territory persists in different guises, nor even that these elements would, if taken together, fully revitalize it. The point is simply that many, if not most, of the essential ingredients for such a market still exist, and that many of the apparent objections to such a market—that it would involve changing state borders, or transacting public land, or selling sovereign functions—might actually support it. Those horses are out of the barn. Whether they can be made to run together is a different question, which the following Part begins to address.

II. THE BOUNDARIES OF THE MARKET AND POSSIBLE EXPLANATIONS FOR ITS ABSENCE

Understanding a market means knowing not just its history and the interests of its participants—the focus of Part I—but also the legal, political, and ethical frameworks that govern it. This Part sketches those frameworks. In doing so, the discussion has both positive and normative goals: to explain

states “own” water or simply regulate its use is a complicated question. *Id.* (describing statutes and cases that deal with the issue of water rights).

¹⁶⁷ Segal, *supra* note 6.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Cf.* COOTER, *supra* note 91, at 140 (“In principle, a community could vote to contract with a government to supply a local public good.”).

the contemporary absence of an interstate market for sovereign territory, as well as to explore the ways in which a revitalized market might be properly limited. It concludes that, although some sales would undoubtedly be unconstitutional, unattractive, or even unethical, a core set of potential sales—including many of those described above—would pass through each of these filters.

A. Constitutional Limitations

Markets are bounded by legal prohibitions: rules that govern when, how, and what sales can happen. This is no less true of a market for state borders than of those involving securities, drugs, and other potential forms of property. For state border sales, the Constitution itself provides many relevant restrictions, the most important of which are described below.¹⁷¹ But as the discussion demonstrates, none of these constitutional rules flatly prohibits interstate border sales.¹⁷² In fact, by providing useful limits on those sales, they may well make the market more attractive.

1. Structural Rules

Because alteration of state borders would potentially change the balance of power between the states and the federal government, and even among the states themselves, “structural” constitutional law provides an important set of guiding principles. Many of those principles are easily recognizable; others involve doctrines whose importance and historical influence perhaps need to be rediscovered.

a. State Borders and Law in the Founding Era

Though it may be difficult to imagine now, the malleability of state borders was one of the issues that helped shape the Declaration of Independence, the substance of the Constitution, and the early development of the nation.¹⁷³ As then-Professor Antonin Scalia put it in a 1970 article, “Our present society contains no institution, with the possible exception of the federal

¹⁷¹ See discussion *infra* subsection II.A.1.b.

¹⁷² See discussion *infra* subsection II.A.1.b.

¹⁷³ Cf. THE FEDERALIST No. 7, at 60-61 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting that states, having “discordant and undecided claims between several of them,” might go to war over “vast tract[s] of unsettled territory within the boundaries of the United States”); Appel, *supra* note 70, at 16 (“[T]he Declaration of Independence cited this transfer of land [from the colonies to Quebec], as well as other limitations that the British had placed upon alienability of land in the West, among its justifications for severing ties with Britain.”).

income tax, whose importance to the federal government and whose effect upon the course of national development remotely approximates the dominating influence of the public lands during the nineteenth century.”¹⁷⁴ Facing interstate competition, an enormous national debt, and major border disputes,¹⁷⁵ states were willing and sometimes eager to sell their land. They ceded massive amounts of sovereign territory to the Confederation government,¹⁷⁶ which in turn sold it to other states and private parties. Indeed, “the public domain was regarded at this time wholly from the point of view of revenue.”¹⁷⁷

The Articles of Confederation proved insufficient to coordinate the states’ changing borders,¹⁷⁸ and the drafters of the Constitution tried to do better. But because state borders were so much in flux, they could not simply freeze the existing arrangements. As Allan Erbsen explains, “[t]he Framers could therefore go no further than defining the basic components for future mapmakers to assemble over time.”¹⁷⁹ These tools included some notable changes, such as elimination of the Articles’ provision regarding Canada’s accession to the Union.¹⁸⁰ This omission arguably left the Constitution without a specific mechanism by which the nation could acquire more

¹⁷⁴ Scalia, *supra* note 118, at 882.

¹⁷⁵ See Frankfurter & Landis, *supra* note 26, at 692 (“As the populations of bordering colonies began to impinge upon one another the settlement of boundaries became one of their predominant problems.”); see also *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 723-24 (1838) (noting that at the time of the Revolutionary War, eleven of the thirteen colonies were involved in border disputes); Appel, *supra* note 70, at 17 (“First, the boundaries between the states were not clear. . . . Second, the states disputed the boundaries of their western claims.”); Landever, *supra* note 163, at 566 (“The United States almost did not come into being because of bitter conflicts over land.”).

¹⁷⁶ Scalia, *supra* note 118, at 882 n.66 (“[P]roduction of revenue was . . . a prominent purpose, if not the foremost goal, of early federal land-grant legislation Prior to 1789 there was indeed no other resource with which the national debt could be paid. The Confederation had no taxing power, but had received cessions of the western claims of five of the original thirteen states.”).

¹⁷⁷ AMELIA CLEWLY FORD, *COLONIAL PRECEDENTS OF OUR NATIONAL LAND SYSTEM AS IT EXISTED IN 1800*, at 92 (Porcupine Press 1976) (1910) (cited in Landever, *supra* note 163, at 568); see also Nelson, *supra* note 77, at 45 (describing the “19th-century ‘era of disposal’” during which “[t]he overriding policy goal was to transfer the lands out of federal ownership to private owners and to the states . . . a first step in putting them to productive use”). This does not mean that the deals always paid off. Southwell, *supra* note 69, at 440 n.142 (“[O]wing to extremely lenient credit terms and a high default rate, not much money was raised.”).

¹⁷⁸ See Greve, *supra* note 145, at 297 (“These arrangements . . . proved inadequate to prevent disruptive controversies over ill-defined boundaries, discrimination by some states against sister states, and infringements on the United States through state treaties and agreements . . .”).

¹⁷⁹ Erbsen, *supra* note 30, at 1173 n.14.

¹⁸⁰ ARTICLES OF CONFEDERATION of 1777, art. XI (“Canada acceding to this Confederation . . . shall be admitted into, and entitled to all the advantages of this union”); see also Murray G. Lawson, *Canada and the Articles of Confederation*, 58 AM. HIST. REV. 39 (1952) (discussing the reasoning and historical context behind Article XI in the Articles of Confederation and the founders’ initial concern with Canada).

sovereign territory,¹⁸¹ but not without designs to do so. As Alexander Hamilton put it in a letter to George Washington, “We must remain in a position to take advantage of circumstances, we must be prepared to acquire Florida, and to annex Louisiana, and we must even wink further south.”¹⁸² By the turn of the century, the question of Congress’s constitutional authority to acquire territory took on enormous dimensions—828,000 square miles, give or take a few.¹⁸³ That, of course, was the size of the land the French proposed to sell to the United States under the terms of what became known as the Louisiana Purchase,¹⁸⁴ the acquisition of which raised serious constitutional objections at the time¹⁸⁵ but whose legality is generally accepted by now.¹⁸⁶

The omission of a specific means of land acquisition was not the Constitution’s only major border-related alteration. It also did away with the Articles’ elaborate provisions for the settlement of interstate boundary disputes.¹⁸⁷ Instead, Article III gave the Supreme Court jurisdiction over “Controversies between two or more States,”¹⁸⁸ language that has been interpreted to cover border disputes.¹⁸⁹ Equally important, the Supreme Court eventually held that states can sue one another in federal court for

¹⁸¹ See, e.g., John Gorham Palfrey, *The Growth of the Idea of Annexation, and Its Breaking Upon Constitutional Law*, 13 HARV. L. REV. 371, 373 (1900) (arguing that “it is not likely that the later Constitution was meant to be less [expansive than the Articles in this regard]”).

¹⁸² *Id.* at 372.

¹⁸³ See H.R. REP. NO. 108-161, at 1 (2003) (commemorating the Louisiana Purchase and noting that it “doubled the size of the country overnight” by adding “827,987 square miles” of territory).

¹⁸⁴ Palfrey, *supra* note 181, at 377 (“After the original thirteen states had ratified the Constitution, Louisiana was the first land which was presented for annexation, and in that connection for the first time was the constitutional power to annex territory called in question. Some writers have expressed a doubt as to our right to the northwest territory at the time the Constitution went into effect; that at all events is a preconstitutional question” (footnote omitted)). See generally KUKLA, *supra* note 18.

¹⁸⁵ President Jefferson himself wrote: “The Constitution . . . has made no provision for our holding foreign territory, still less for our incorporating foreign nations into our Union. The executive in seizing the fugitive occurrence which so much advances the good of the country have done an act beyond the Constitution.” Palfrey, *supra* note 181, at 379.

¹⁸⁶ See John Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 528 (1951) (“If there were doubts as to the power of the United States to acquire [lands], these have been resolved decisively in favor of the Federal government, not only by the Supreme Court but by the people through their elected representatives in the Congress and the presidency.”). *But see* Robert Knowles, *The Balance of Forces and the Empire of Liberty: States’ Rights and the Louisiana Purchase*, 88 IOWA L. REV. 343, 348-49 (2003) (arguing that the Purchase was an unconstitutional infringement upon states’ rights).

¹⁸⁷ ARTICLES OF CONFEDERATION of 1777, art. IX.

¹⁸⁸ U.S. CONST. art. III, § 2.

¹⁸⁹ See, e.g., *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657 (1838); Engdahl, *supra* note 147, at 80-81.

alleged breaches of interstate compacts¹⁹⁰—as explained below, the mechanism by which borders could be consensually changed—and that specific performance is a possible remedy.¹⁹¹ Though the Court frequently bemoans its own limitations in policing these agreements,¹⁹² it has had a relatively steady diet of them over the past two centuries.¹⁹³

b. *Interstate Treaties, Agreements, and Compacts*

Taken together, these changes laid the legal groundwork for an interstate market for sovereign territory. But perhaps the most relevant constitutional text is that providing the *mechanism* through which sales of state borders could take place. Specifically, the first clause of Article I, Section 10 (regarding “Powers prohibited of States”) reads simply, “No State shall enter into any Treaty, Alliance, or Confederation,”¹⁹⁴ while the third clause of that same section provides that “No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State.”¹⁹⁵ These provisions have received relatively little scholarly attention,¹⁹⁶ but would be profoundly important to the governance of an interstate market for sovereign territory. The following discussion describes the provisions and their significance in some detail, but the core conclusion is straightforward: They do not establish a flat prohibition on the sale of state borders.

The Interstate Treaty Clause and Interstate Compact Clause effectively create three categories of interstate agreements, which are subject to different rules. States may not enter into “treaties”—strengthening the Articles’ more qualified limitation¹⁹⁷—and must get congressional consent before entering into “agreements or compacts.”¹⁹⁸ Agreements that fall into neither category are, absent some other constitutional limitation, permitted

¹⁹⁰ See, e.g., *Virginia v. West Virginia*, 246 U.S. 565, 591 (1918).

¹⁹¹ See, e.g., *Kentucky v. Indiana*, 281 U.S. 163, 178 (1930); see also *South Dakota v. North Carolina*, 192 U.S. 286, 321-22 (1904) (requiring North Carolina to sell its shares of stock in the North Carolina Railroad Company at public auction upon default of payment owed to South Dakota).

¹⁹² Frankfurter & Landis, *supra* note 26, at 646.

¹⁹³ See generally JOSEPH F. ZIMMERMAN, *INTERSTATE DISPUTES: THE SUPREME COURT’S ORIGINAL JURISDICTION* (2006).

¹⁹⁴ U.S. CONST. art. I, § 10, cl. 1.

¹⁹⁵ *Id.* cl. 3.

¹⁹⁶ Engdahl, *supra* note 147, at 63 (noting “relative lack of attention which the subject has received from legal scholars”); Greve, *supra* note 145, at 289 n.16 (“The literature on the Compact Clause is slim.”); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717, 719 (2007) (connecting the “general scholarly disinterest in the law of interstate compacts” to the “surprising lack of precision” in the law itself).

¹⁹⁷ ARTICLES OF CONFEDERATION of 1777, art. VI.

¹⁹⁸ *Virginia v. Tennessee*, 148 U.S. 503, 519-20 (1893).

even without congressional consent. These three categories are the basic constitutional frameworks for analyzing interstate border sales. If such sales are treaties, they are banned. If they are agreements or compacts, they are permitted only with congressional consent. If they are regular agreements, then they are permitted whether or not Congress consents (assuming, of course, that no other constitutional limitation applies).

The first question, then, is into which category a sale of state borders would fall. Unfortunately, the line between treaties and compacts is anything but clear, at least as a matter of historical record. The Supreme Court has noted that “[t]he records of the Constitutional Convention . . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause.”¹⁹⁹ Distinguished scholars have had no more luck in this quest than the Justices.²⁰⁰ As Justice Story noted in his *Commentaries on the Constitution of the United States*, “What precise distinction is here intended to be taken between *treaties*, and *agreements*, and *compacts* is nowhere explained.”²⁰¹ Nevertheless, the distinction itself is significant,²⁰² and various efforts have been made to explain it.

The most influential of these appear in the *Commentaries* themselves. Story concluded that the treaty prohibition applies to agreements “of a political character,”²⁰³ while the qualified limitation on compacts applies to agreements involving “mere private rights of sovereignty.”²⁰⁴ The latter includes “questions of boundary; interests in land, situate in the territory of each other; and other internal regulations for the mutual comfort, and convenience of states, bordering on each other.”²⁰⁵ Chief Justice Marshall later echoed this “political” explanation: “A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are . . . with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the constitution.”²⁰⁶

Story’s account has been harshly criticized. David Engdahl, who has produced the leading modern scholarship on interstate treaties and compacts,

¹⁹⁹ U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 460-61 (1978).

²⁰⁰ Greve, *supra* note 145, at 310 (“No record exists on the distinction between treaties and compacts.”).

²⁰¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 270 (Cambridge, Brown, Shattuck & Co. 1833).

²⁰² See Holmes v. Jennison, 39 U.S. (14 Pet.) 540, 571-72 (1840) (“[A]s these words could not have been idly or superfluously used by the framers of the Constitution, they cannot be construed to mean the same thing with the word treaty.”).

²⁰³ STORY, *supra* note 201, at 271.

²⁰⁴ *Id.* at 272.

²⁰⁵ *Id.*

²⁰⁶ Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 249 (1833).

writes that Story “made no pretensions of having deduced this interpretation . . . from any source other than his own imagination.”²⁰⁷ Engdahl argues that the distinction between treaties and compacts can instead be drawn from Emer de Vattel’s *The Law of Nations*.²⁰⁸ Specifically, “the term ‘treaty’ in its more proper sense designates those international arrangements which oblige a party to perform repeated acts as specified occasions arise.”²⁰⁹ By contrast, “‘compacts’ or ‘agreements’ are perpetual; a right surrendered to another by ‘compact’ no longer belongs to the one who surrendered it and can never be reclaimed.”²¹⁰ As Vattel put it, treaties are “made with a view to the public welfare, by the superior power, either for perpetuity, or for a considerable time.”²¹¹ Agreements, on the other hand, “have temporary matters for their object” and “are accomplished by one single act, and not by repeated acts . . . [they] are perfected in their execution once and for all: treaties receive a successive execution whose duration equals that of the treaty.”²¹²

On either Story’s account or Engdahl’s influential alternative, there is no reason to think that all interstate land transactions would fall afoul of the treaty prohibition. Story himself apparently surmised that *cessions* of territory would be prohibited as treaties, while boundary *settlements* would be permitted as compacts.²¹³ As he put it, agreements and compacts include “questions of boundary[,] interests in land, situate in the territory of each other,” while treaties include “cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges.”²¹⁴ It follows that if a border sale amounted to a boundary settlement rather than a cession, it would be permissible under Story’s approach. At the very least, this would permit states to settle boundary disputes by purchase, as private parties often do.

Moreover, even though Story’s rule might seem to prohibit outright sales of territory, at least to the degree that they are “cessions,” there is

²⁰⁷ Engdahl, *supra* note 147, at 65.

²⁰⁸ *Id.* at 75-81; see also Leslie W. Dunbar, *Interstate Compacts and Congressional Consent*, 36 VA. L. REV. 753, 758 (1950) (preceding Engdahl on this point).

²⁰⁹ Engdahl, *supra* note 147, at 76.

²¹⁰ *Id.* at 77.

²¹¹ EMER DE VATTEL, *THE LAW OF NATIONS* 338 (Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1758) (quoted in Duncan B. Hollis, *Unpacking the Compact Clause*, 88 TEX. L. REV. 741, 774 (2010)).

²¹² VATTEL, *supra* note 211, § 153, at 339 (quoted in Hollis, *supra* note 211, at 774).

²¹³ Engdahl, *supra* note 147, at 65-66; see also David P. Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 188-1910*, 52 U. CHI. L. REV. 867, 873 n.39 (1985) (including “boundaries” as among the “private rights of sovereignty” covered by Story’s compacts language).

²¹⁴ STORY, *supra* note 201, at 271-72.

reason to question the accuracy of that rule. As Engdahl points out, “Story included treaties of cession under the absolute prohibition of the first clause, yet we know of cessions by states to the general government, as well as to one another, even after the Constitution was ratified.”²¹⁵ Vattel would probably have agreed.²¹⁶ In the early years of the Republic, “at least three boundary settlements were concluded between various states without any congressional approval, and their validity was never questioned.”²¹⁷ Therefore there is some reason to think that border sales would avoid the treaty prohibition, despite Story’s possible suggestion to the contrary.

As for Engdahl, he specifically classifies boundary settlements as compacts or agreements, rather than prohibited treaties.²¹⁸ This classification is based on Engdahl’s animating concern with avoiding problems of horizontal federalism, an issue that apparently did not bother Story but has been emphasized by later commenters.²¹⁹ According to Engdahl, “[i]t is understandable that mere boundary arrangements between particular states would not have been thought potentially harmful to the other states.”²²⁰ This is a welcome conclusion for the legality of a market for sovereign territory, but its accuracy is not obvious. Boundary arrangements, after all, can be extremely harmful to other states. Indeed, the Supreme Court faced this very argument in an 1837 case involving the Interstate Compact Clause: “By the compact of 1820, Tennessee acquired nearly half a million of acres . . . [I]f she could go ten miles north, she might two hundred, and purchase out a sister state, sapping the foundations of the Union.”²²¹

To be sure, these are not the only possible approaches to differentiating treaties from compacts. Another explanation is one drawn directly from

²¹⁵ Engdahl, *supra* note 147, at 65 (footnote omitted).

²¹⁶ Hollis, *supra* note 211, at 775 (“Vattel would view a boundary settlement as an agreement, since, although irrevocable, the settlement arises through the single act in which the two sides agree to the boundary.”); *see also id.* (“In contrast, Vattel would regard a commercial pact as a treaty where it calls for acts of performance (e.g., national treatment of goods exchanged) that must be constantly repeated over time.”); Engdahl, *supra* note 147, at 76-77 (attributing to Vattel the view that treaties “contemplate repeated acts of performance,” while compacts are “perpetual”).

²¹⁷ Engdahl, *supra* note 147, at 66.

²¹⁸ *See id.* at 101.

²¹⁹ *See, e.g., id.* at 68 (“[B]oundary ‘compacts’ as a class are a prime example of arrangements capable of disrupting the political balance of the Union.”); Greve, *supra* note 145, at 293 (“State compacts . . . may not only enhance efficiency and federalism; they may also compromise those values. While states are capable of cooperating *with* one another, they are also capable of—and prone to—doing very bad things *to* one another.”).

²²⁰ Engdahl, *supra* note 147, at 80.

²²¹ *Poole v. Fleegeer’s Lessee*, 36 U.S. (11 Pet.) 185, 206 (1837) (John Catron, counsel for defendant in error) (quoted in Engdahl, *supra* note 147, at 81 n.82). To be sure, Article IV’s protection of equal representation in the Senate would help buttress these “foundations.” *See infra* note 268 and accompanying text.

Vattel. Michael Greve, whose account of interstate compacts has much in common with Engdahl's but also diverges in important respects, suggests that "the most natural interpretation is that treaties (and the like) are something more formal, lasting, and consequential than mere 'agreements and compacts.'"²²² This is something of an all-things-considered test, whose flexibility makes it simultaneously appealing and difficult to apply in the abstract. Even minor border adjustments, after all, are "formal" and "lasting," but clearly are not constitutionally prohibited. (Indeed, on Vattel's account, their lastingness is precisely what makes them compacts.) Perhaps the real work is done by the word "consequential," and only *major* land sales would be prohibited by the treaty provision on Greve's account. This seems plausible too, though obviously what counts as "consequential" would be a matter of much debate.²²³

Even limiting the analysis to these few possible definitions of "treaty," it is apparent that there is no simple way to classify *all* interstate land sales as constitutionally impermissible. Some would be significant enough to threaten federal power, while others would not; some would contemplate repeated acts of performance, while others would not. Moreover, Story specifically countenances them, as does Engdahl, particularly when buttressed by alternative readings of Vattel. Greve's approach, too, would seem to permit at least some border changes.

Assuming, then, that some interstate land sales would fall outside of the Constitution's prohibition of interstate treaties, the next taxonomical question is whether they would amount to "agreements or compacts" for which congressional consent is required, or would instead be considered simple garden variety agreements free from federal oversight. As with treaties and compacts, the line between the former (which in standard usage are referred to jointly as "compacts") and garden variety agreements is anything but clear. Again, the records of the Convention are silent on the issue,²²⁴ and the Federalist Papers are of little help, either. The latter mention the Interstate Compact Clause only once, in Madison's seemingly offhand remark that the reasons for its inclusion in the Constitution are

²²² Greve, *supra* note 145, at 314 n.128.

²²³ By way of comparison, many state laws place a population cap on municipalities seeking to voluntarily dissolve—1000 residents, for example. See Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1380 (2012).

²²⁴ See Frankfurter & Landis, *supra* note 26, at 694 (noting that "[t]he records of the Constitutional Convention furnish no light as to the source and scope" of the Interstate Compact Clause).

“either so obvious, or have been so fully developed, that they may be passed over without remark.”²²⁵

Whatever the exact intentions of its drafters, the most widely accepted (though perhaps flawed) view of the Interstate Compact Clause has been that it exists to prevent the states from accumulating too much power vis-à-vis the federal government. In his *Commentaries*, Story concluded that the congressional consent requirement would “check any infringement of the rights of the national government.”²²⁶ Seventy years later, in *Virginia v. Tennessee*, the Supreme Court—relying somewhat awkwardly on Story²²⁷—concluded that *only* those interstate agreements that threaten federal supremacy require congressional consent.²²⁸ The case itself involved an agreement resolving a border dispute between the two states, the legitimacy of which was challenged by Virginia on the basis that congressional consent was required but never obtained.²²⁹ The Court rejected Virginia’s argument, concluding that “the object of the constitutional provision” was “directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.”²³⁰ The Court drew a line between agreements “to which the United States can have no possible objection or have any interest in interfering with” and those that “may tend to increase . . . the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States.”²³¹ Congressional consent is required (i.e., a compact exists) only in the latter scenario: where an agreement between states might²³² interfere with federal authority.²³³

For present purposes, the rule of *Virginia v. Tennessee* is important because it would exempt from congressional supervision any interstate land sale that did not increase, vis-à-vis the federal government, the political power of the

²²⁵ THE FEDERALIST NO. 44, at 283 (James Madison) (Clinton Rossiter ed., 1961).

²²⁶ See STORY, *supra* note 201, at 272.

²²⁷ 148 U.S. 503, 519 (1893); see also Engdahl, *supra* note 147, at 65-66 (“In a curious feat of judicial doubletalk, Story’s distinction between ‘treaties’ and ‘agreements or compacts’ was applied to the new task of exempting all but a narrow class of ‘agreements or compacts’ from the requirement of congressional consent.”).

²²⁸ 148 U.S. at 519-20.

²²⁹ *Id.* at 517.

²³⁰ *Id.* at 519.

²³¹ *Id.* at 518.

²³² See, e.g., *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 472 (1978) (concluding that “the pertinent inquiry” under *Virginia v. Tennessee* “is one of potential, rather than actual, impact upon federal supremacy”).

²³³ See *Virginia*, 148 U.S. at 519-20. Michael Greve notes that although it has come to be regarded as a holding, this whole passage appears to be dictum, since the Court actually found that Congress had impliedly approved the compact. Greve, *supra* note 145, at 300-01.

compacting states. The Court itself distinguished between agreements regarding the process by which a boundary line would be drawn—which would *not* require congressional consent—and the actual agreement regarding the line, which would.²³⁴ But, the Court went on to say, congressional consent could “hardly be deemed essential” to other situations, and indeed could be “the height of absurdity.”²³⁵ As an illustrative example, the Court indicated that Congress need not consent if a state were to purchase from another state “a small parcel of land” lying within its boundaries:

If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land.²³⁶

Precisely why this hypothetical example would be exempt from the congressional consent requirement is somewhat unclear. Perhaps the important factor is that it seems to involve a proprietary rather than sovereign interest.²³⁷ That would be consistent with the Court’s later holding in *Stearns v. Minnesota*, which distinguished “agreements or compacts . . . in reference to political rights and obligations” from “those solely in reference to property belonging to one or the other” state.²³⁸ The Court there concluded that “different considerations may underlie the question as to the validity of these two kinds of compacts or agreements,”²³⁹ and that only the former raise the kind of considerations requiring congressional consent.²⁴⁰

But that does not mean that *all* sales of sovereign territory would amount to compacts requiring congressional consent. In *New Hampshire v. Maine*,²⁴¹ the Court determined that an agreement defining a “true and

²³⁴ *Virginia*, 148 U.S. at 520; see also Andrew A. Bruce, *The Compacts and Agreements of States with One Another and with Foreign Powers*, 2 MINN. L. REV. 500, 514-15 (1917).

²³⁵ *Virginia*, 148 U.S. at 518.

²³⁶ *Id.*

²³⁷ See Bruce, *supra* note 234, at 514 (“Though the transaction may involve a negotiation and perhaps an agreement or compact, it is an exercise of a corporate and property-owning rather than a governmental power.”).

²³⁸ 179 U.S. 223, 244 (1900).

²³⁹ *Id.* at 244-45 (suggesting that “equality may forbid any agreement or compact limiting or qualifying political rights and obligations; whereas, on the other hand, a mere agreement in reference to property” would be acceptable).

²⁴⁰ See Greve, *supra* note 145, at 294 n.37 (“The prevailing view . . . holds that the Compact Clause extends only to compacts that involve the exercise of sovereign state power.” (citing Engdahl, *supra* note 147, at 88 n.131)).

²⁴¹ 426 U.S. 363 (1976).

ancient boundary” is not a compact requiring congressional approval, but that an agreement involving “alienation of territory” is.²⁴² Under this approach, side payments to resolve boundary disputes could be exempt from congressional supervision, at least so long as they involve the demarcation of a true and ancient boundary, while any effort to purchase changes to those boundaries would require congressional intervention.

The Court has basically adhered to *Virginia v. Tennessee*,²⁴³ even while recognizing its manifest weaknesses,²⁴⁴ which suggests that it would provide the governing rule for interstate border sales. And even if, per *New Hampshire v. Maine*, some interstate sales of sovereign territory would be exempt from the congressional approval requirement, it seems likely that many, if not most, would be classified as compacts. But this need not be a serious deterrent to the smooth operation of the market, for although congressional approval may be slow in arriving,²⁴⁵ in practice it is freely given, and “no court, at any level, has ever found an interstate agreement lacking congressional approval to encroach on federal supremacy.”²⁴⁶ The approval for such deals can be given in any number of ways, even post hoc, “by authorizing joint state action in advance or by giving expressed or implied approval to an agreement the States have already joined.”²⁴⁷

The preceding discussion has attempted to show that the prohibition on interstate treaties would not bar all interstate sales of sovereign territory, nor would all such sales be subject to congressional approval as compacts. Even for those that are, such approval should not be all that difficult to obtain. It follows that at least *some* interstate sales of sovereign territory would satisfy the Constitution’s regulation of interstate treaties and compacts. The sales most likely to navigate these obstacles with success are those that do not contemplate repeated performance and do not threaten federal

²⁴² *Id.* at 369-70 (quoting *Virginia v. Tennessee*, 148 U.S. 503, 522 (1893)).

²⁴³ *See, e.g.*, *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 473 (1978) (“[T]he test is whether the Compact enhances state power *quoad* the National Government.”).

²⁴⁴ *See id.* at 466-67 (noting that the rule of *Virginia v. Tennessee* appears to be dictum and that the case presents a misreading of Justice Story’s *Commentaries*).

²⁴⁵ *See* Hasday, *supra* note 146, at 19 (“[W]riters frequently cite studies indicating that compacts take between four and nine years to enact and lament that the states and Congress have not been able to proceed more rapidly.”).

²⁴⁶ Hollis, *supra* note 211, at 766; *see also* Engdahl, *supra* note 147, at 69 (“[I]n every case since *Virginia v. Tennessee* in which an interstate arrangement has been challenged for lack of congressional consent, it has been held exempt from the consent requirement.”); Greve, *supra* note 145, at 289 (“[I]t appears that no court has ever voided a state agreement for failure to obtain congressional consent.”).

²⁴⁷ *Cuyler v. Adams*, 449 U.S. 433, 441 (1981); *see also* *Virginia v. West Virginia*, 78 U.S. (11 Wall.) 39, 59-61 (1871) (holding that Congress had “intended to consent” to an interstate boundary agreement).

supremacy, which might trigger the Compact Clause and perhaps even a denial of congressional consent.²⁴⁸

c. *Federalism*

State border sales that satisfy the Treaty and Compact Clauses are not necessarily constitutional. There are some agreements that Congress cannot approve,²⁴⁹ or that are unconstitutional for reasons other than their being treaties or lacking congressional assent. There are, in other words, structural constitutional constraints besides the Treaty and Compact Clauses.

Perhaps the most important among these derive from the “structure federal union” itself.²⁵⁰ Most prominent is the background principle of federalism. It might seem odd to invoke federalism as a reason to prevent states from voluntarily entering into mutually beneficial transactions. Federalism, however, exists for reasons other than the promotion of state autonomy.²⁵¹ It also protects “the people”²⁵² and other states, the latter being arguably the very entities that the Compact Clause was meant to protect. Forty years before *Virginia v. Tennessee*, Chief Justice Roger Taney wrote that the purpose of the Clause is “to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others.”²⁵³ But, as noted above, the Court’s Compact Clause jurisprudence (such as it is) focuses on threats to federal authority rather than on concerns of horizontal federalism.²⁵⁴

²⁴⁸ See CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER’S GUIDE* 36-49 (2006) (suggesting that Congress may withhold consent if a compact would lead to “imprudent combinations, dangerous joint action, or intrusion on traditional federal matters” or would have “the potential to alter the balance of power between the states and federal government”).

²⁴⁹ See Engdahl, *supra* note 147, at 67 (concluding that agreements which “upset[] . . . the political balance of the Union, or encroach[] upon the free exercise of federal authority” are treaties and therefore cannot be approved by Congress); Greve, *supra* note 145, at 314 n.128 (“At some point, state agreements may effect such a departure from the original constitutional design that even Congress may not permit them.”).

²⁵⁰ CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 11 (1969).

²⁵¹ See *New York v. United States*, 505 U.S. 144, 182 (1992) (employing an “analogy to the separation of powers among the branches of the Federal Government”).

²⁵² *United States v. Lopez*, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring) (arguing that federalism protects individual liberty).

²⁵³ *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855).

²⁵⁴ See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 *DUKE L.J.* 75, 117-21 (2001) (discussing “horizontal aggrandizement”); Metzger, *supra* note 48, at 1471 (“Any system of government based on a union of otherwise ‘sovereign’ entities must address the relationship among those entities. The resultant rules and doctrines governing interstate relationships are the horizontal dimension of federalism.”).

Many scholars have followed the Court's lead.²⁵⁵ And this is problematic, for as Greve argues, "[a] 'federalism' that celebrates the exercise of state sovereignty, in derogation of the Constitution and at the risk of diminishing both political accountability and the rights of non-compact states, is federalism fubar—[messed] up beyond all recognition."²⁵⁶

An interstate market for sovereign territory would bring these issues of horizontal federalism to the fore. Story himself noted in the *Commentaries* that "[e]ngagements might be entered into by different states, utterly hostile to the interests of neighbouring or distant states; and thus the internal peace and harmony of the Union might be destroyed, or put in jeopardy."²⁵⁷ If, for example, large and powerful states were to acquire territory from smaller and weaker ones, and then continue to grow (perhaps benefitting from economies of scale in the provision of public services), the end result would be a few superstates and many tiny ones.²⁵⁸ Indeed, these problems of inequality might be even more intractable than in other types of markets, for the practical and constitutional barriers to entry are significant. States could buy and trade the existing stock of sovereign territory, but unless the federal government acquired more of it, that stock would remain set. Additionally, new entrants could not compete in the market unless the affected states and Congress itself were to agree.²⁵⁹

The sale of state borders could cause unintended and unexpected ripple effects throughout the constitutional order. Commerce Clause doctrine, for example, gives Congress the power to regulate the channels and instrumentalities of interstate commerce, as well as activities substantially affecting such commerce.²⁶⁰ This power is especially evident in large metropolitan areas straddling state borders—their residents cross state borders on the way

²⁵⁵ See Schleifer, *supra* note 196, at 719 ("[T]he jurisprudence of the Interstate Compact Clause has demonstrated a surprising lack of precision, which in turn has begotten a capacious, and perhaps even cavalier, approach to this field that seems to ignore entirely concerns of horizontal federalism.")

²⁵⁶ Greve, *supra* note 145, at 294 (alteration in original); see also Frankfurter & Landis, *supra* note 26, at 693-95 (detailing the Framers' balancing of interstate settlements and national safeguards).

²⁵⁷ STORY, *supra* note 201, at 218.

²⁵⁸ I am assuming that the number of states is fixed. If states could fully acquire others, the problems laid out here could be magnified. But as Steve Clowney pointed out to me, small states might have some *advantages* over larger ones, since they could be especially responsive and dynamic while retaining equal representation in the Senate.

²⁵⁹ U.S. CONST. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.")

²⁶⁰ *United States v. Lopez*, 514 U.S. 549, 558-59 (1995).

to work, and perhaps even on the way to lunch. If, however, bordering states were to reach agreements by which the entire metropolitan area ended up in one state,²⁶¹ this web of transactions would be one step removed from the Commerce power, and reachable only to the degree that it substantially affected interstate commerce.²⁶²

These forces could work in precisely the opposite direction as well, if states bought and sold enclaves and exclaves of territory rather than shifting contiguous boundaries. If Killington were ever to buy its way out of Vermont, for example,²⁶³ and other municipalities were to follow suit, the national map could become a polka-dotted picture of enclaves and exclaves, increasing the total number and length of state borders. Assuming that ongoing commerce remained relatively constant, the number of channels, instrumentalities, and activities intertwined with those boundaries would increase almost as a matter of definition, thereby increasing Congress's Commerce Clause authority. For precisely the same reasons, state border sales would alter the reach and relevance of the Dormant Commerce Clause doctrine, which prohibits state laws that unduly burden interstate commerce.²⁶⁴ If states consolidated or "simplified" their borders, the doctrine might become less relevant; if they splintered, it would become much more so.

In the abstract, it is difficult to say just how much weight these concerns should have, and what the proper venue is for resolving them. Congress's power to approve and oversee interstate compacts provides one particularly important mechanism for protecting these federalism values. At least in theory, Congress is better situated than any individual state to represent the interests of the states as a whole.²⁶⁵ But even if Congress were to formally approve a border sale, the Supreme Court might strike down on federalism grounds any interstate sales of territory that greatly altered the balance of power between the federal government and the states, or among the states themselves.

²⁶¹ Cf. Engdahl, *supra* note 147, at 63-64 (describing interstate arrangements for the administration of certain metropolitan affairs).

²⁶² *Lopez*, 514 U.S. at 558-59.

²⁶³ See *supra* notes 93-96 and accompanying text.

²⁶⁴ *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007).

²⁶⁵ See Mark D. Rosen, *Why the Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 950-51 (2006) ("Congress comprises all interested parties and therefore is more likely to take account of all costs that a given rule imposes on states.").

2. Individual Rights

Principles of structural constitutional law would not be the only relevant limitations on interstate border sales. After all, a state's territory is generally occupied by people, and their rights—and perhaps their very identities—are in many ways defined by it.²⁶⁶ Assuming for the moment that their political interests are well represented in the process leading up to a sale (an issue discussed in the following Section), those people may have independent constitutional rights that could serve as side constraints on the market for sovereign territory.

a. Political Rights

Perhaps the most important set of these rights derives from the political identity of the individuals residing in the transacted territory. From their perspective, a border sale is in effect a forced secession, stripping residents of their citizenship and subjecting them to a new sovereign's laws. It seems reasonable to ask, then, whether those people might have some political rights regarding the transaction—what, in international law, is known as self-determination.²⁶⁷

Domestic constitutional law does not have a single principle to capture this concept, but various constitutional provisions seem to invoke it. Perhaps most intriguing is the Guarantee Clause, which provides in relevant part that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government[.]”²⁶⁸ The precise meaning and impact of the Clause remains largely undetermined. John Adams once commented that “the word *republic* as it is used, may signify anything, everything, or nothing,” claimed “that he ‘never understood’ what the guarantee of republican government meant,” and added for good measure that “I believe no man ever did or ever will.”²⁶⁹ In any event, if private citizens attempted to bring a Guarantee Clause claim to block a state border sale, courts would probably

²⁶⁶ Erbsen, *supra* note 30, at 1171 (“[S]paces are important because they have boundaries, and those boundaries are important because they create an inside and outside and define people as insiders or outsiders.”). Cf. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959 (1982) (arguing that some owned “objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world”).

²⁶⁷ See *infra* subsection II.B.2 (defining self-determination and relating it to state succession).

²⁶⁸ U.S. CONST. art. IV, § 4.

²⁶⁹ *Risser v. Thompson*, 930 F.2d 549, 553 (7th Cir. 1991) (quoting WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 13 (1972)).

decline to decide the issue on the grounds that it concerns a political question.²⁷⁰

But this does not mean that no Guarantee Clause claim could ever succeed. As Justice O'Connor noted in *New York v. United States*, “[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”²⁷¹ The U.S. Court of Appeals for the First Circuit has recently explained that “[i]f there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government.”²⁷² This means “a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law.”²⁷³ A state border sale could conceivably violate this principle by interfering with the power of the people to elect representatives. Some states require legislators to have been resident in the state for some period of time prior to their election.²⁷⁴ Officials in newly acquired territory would therefore be unable to serve as political officials in their new state,²⁷⁵ and that might well raise a justiciable and colorable Guarantee Clause claim.

One could argue instead that the Constitution simply prohibits involuntary changes in citizenship.²⁷⁶ But that cannot be entirely correct. All state border changes, including the many described above, involve changes in state citizenship. Moreover, local political boundaries—and therefore local citizenship—also change quite frequently as a result of annexations, dissolutions, and the like. The impact on citizens can be disruptive, requiring them to pay new taxes, attend new schools, and so on. And yet there is no

²⁷⁰ See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849) (establishing the political question doctrine under the Guarantee Clause).

²⁷¹ 505 U.S. 144, 185 (1992).

²⁷² *Largess v. Supreme Judicial Court*, 373 F.3d 219, 227 (1st Cir. 2004).

²⁷³ *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1928 (1993)); see also *Risser*, 930 F.2d at 553 (“James Madison, in *The Federalist No. 39*, had defined ‘republic’ as ‘a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their office during pleasure, for a limited period, or during good behavior.’”).

²⁷⁴ See, e.g., *2012 Elected Officials Qualifications*, MO. SEC’Y OF STATE, http://www.sos.mo.gov/elections/elect_qualification.asp (last visited Nov. 22, 2013) (providing that state senators and representatives must have been registered Missouri voters for three and two years, respectively, and that all elected county officials must have resided in the state for one year).

²⁷⁵ A similar objection was raised regarding Texas’s annexation as a state. See Maltz, *supra* note 26, at 389 (noting that no Texan could meet the residency requirement for service in the Senate or have representatives, since Texas was previously part of Mexico).

²⁷⁶ In *Trop v. Dulles*, the Supreme Court found that the Eighth Amendment prohibited stripping an army deserter of his federal citizenship. 356 U.S. 86, 101 (1958). But that decision was limited to “denationalization” for purposes of punishment. *Id.* at 94, 98-99.

constitutional right to citizenship in a particular local government unit,²⁷⁷ nor is it apparent where such a right would be found with regard to state citizenship.

Rights attendant to political citizenship could, however, place some constraints on the transfer of territory from one state to another.²⁷⁸ The Supreme Court has, for example, treated the rule of one person, one vote as a fundamental constitutional requirement.²⁷⁹ The reallocation of voters from one state to another would raise novel questions for that familiar principle.²⁸⁰ If Pennsylvania were to acquire Camden and add it to one of the voting districts that currently includes Philadelphia, the population of that district would swell to 790,000,²⁸¹ far more than the state average of 710,000.²⁸² At least until the next census and redistricting, voters in the newly expanded district would essentially have their votes diluted vis-à-vis other districts in the state.

b. *Economic Rights*

Political rights are not the only individual constitutional rights that citizens might seek to assert in the context of a state border sale. Perhaps equally thorny would be the problems raised by individual economic interests, some of which could be constitutionally salient.

The Contracts Clause provides that “[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts.”²⁸³ The Supreme Court has found the Clause applicable to municipal dissolution²⁸⁴ and interstate compacts,²⁸⁵ so it would presumably be relevant in the case of a border sale

²⁷⁷ Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 & n.9 (1990).

²⁷⁸ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring) (invalidating on Equal Protection grounds a municipal boundary change that attempted to fence citizens of certain races into different voting precincts).

²⁷⁹ *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

²⁸⁰ Cf. *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 1, 1-2 (2012) (holding that voting districts for the House of Representatives need not be of identical population).

²⁸¹ *Camden Population and Demographics*, AREACONNECT, <http://camdenj.areaconnect.com/statistics.htm> (last visited Nov. 22, 2013) (reporting 80,000 residents as of the 2000 U.S. census).

²⁸² KRISTIN D. BURNETT, U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, 2010 CENSUS BRIEFS NO. C2010BR-08, CONGRESSIONAL APPORTIONMENT 2 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf>.

²⁸³ U.S. CONST. art. I, § 10, cl. 1.

²⁸⁴ *Gomillion v. Lightfoot*, 364 U.S. 339, 344 (1960) (“[T]his Court ha[s] refused to allow a State to abolish a municipality . . . without preserving to the creditors of the old city some effective recourse for the collection of debts owed them.”).

²⁸⁵ See *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 92-93 (1823).

as well.²⁸⁶ Consider again the Camden example. Many residents of Camden work for the state of New Jersey, and some of their contracts require that they be New Jersey residents.²⁸⁷ If a teacher signs a two-year contract to teach in a New Jersey school, and then the teacher's residence becomes part of Pennsylvania, the contract itself would presumably be void or voidable.²⁸⁸ Likewise, many companies have ongoing business relationships with the state of New Jersey that are tied to the provision of sovereign functions like running schools.²⁸⁹ Those contracts would also be threatened if New Jersey were to sell to another state the prisons and hospitals subject to the contracts. There are ways to address these concerns, however. The states engaged in the transaction could simply make provisions for existing contracts, just as two firms engaged in a merger or acquisition might do. For example, New Jersey could either take on or buy out the contracts that would be implicated by the move, thus not "impairing" the relevant contractual obligations.

A related set of claims could arise from the Takings or Due Process Clauses. Both clauses protect "property" from deprivation by the government,²⁹⁰ and the Supreme Court has held that such property is created by state law, not the Constitution itself.²⁹¹ Say, for example, that State *A* bans fireworks, while State *B* allows them. A person—we'll call him Pedro—sets up a business south of the border in State *B*, selling fireworks to State *A*'s citizens.²⁹² His business flourishes. States *A* and *B* then enter into a

²⁸⁶ Cf. Briffault, *supra* note 15, at 792 n.90 (suggesting that the Contracts Clause might be implicated by Staten Island's secession to the degree that it "impairs the security of New York City's bondholders").

²⁸⁷ Matt Friedman, *Gov. Christie Signs Bill Requiring All New Public Employees to Move to N.J. Within Year of Hire*, NJ.COM (May 19, 2011), http://www.nj.com/news/index.ssf/2011/05/gov_christie_signs_bill_requir.html.

²⁸⁸ Missouri played a similar card to wipe out an incipient secessionist movement in "The McDonald Territory," declaring that "state employee retirement pension payments would be suspended for McDonald County, all current state employees would be fired, and all state funding would be withheld." Lammle, *supra* note 134.

²⁸⁹ Chris Megerian, *Gov. Christie to Unveil Public-Private School Partnership Plan*, NJ.COM (June 9, 2011), http://www.nj.com/news/index.ssf/2011/06/gov_christie_to_unveil_public.html.

²⁹⁰ U.S. CONST. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."); *id.* amend. V ("[N]or shall private property be taken for public use, without just compensation.").

²⁹¹ See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.").

²⁹² See generally SOUTH OF THE BORDER, <http://www.thesouthoftheborder.com> (last visited Nov. 22, 2013) (displaying the official website of South Carolina's South of the Border, represented by its mascot "Pedro" and famous for providing fireworks—and, once upon a time, alcohol—to North Carolina residents who could not legally access them at home).

transaction that would bring Pedro's business into State *A*, meaning that he can no longer sell the product that is the heart of his business. Pedro would have a plausible regulatory takings claim on the basis that the law has changed in a way that renders his business worthless.²⁹³

But the Takings Clause provides a power as well as a limitation. Governments can use it to condemn and take private property for "public use," so long as "just compensation" is paid.²⁹⁴ State *B* could simply condemn and pay for Pedro's business, then turn around and sell the land to State *A*. State *B* would have to demonstrate a "public use" in doing so, but, at least after *Kelo v. City of New London*, that would probably not be an insurmountable hurdle.²⁹⁵ If transferring property from one private party to another for the sake of the public fisc is a "public use,"²⁹⁶ then transferring it from a private party to a different government for the same reason seems equally permissible.

The point of this discussion is not to suggest that these constitutional concerns either permit or prohibit all interstate sales of sovereign territory. The constitutionality of any particular sale would depend on the specifics of the deal itself. Nevertheless, some general guidelines have emerged. Small-scale land sales are unlikely to violate structural constitutional law principles, though they would probably require (and receive) congressional approval. Large-scale sales face a more difficult road. They might be classified as treaties, would almost certainly require congressional consent, and, even if they receive it, might run afoul of federalism principles. Sales of any size are vulnerable to a wide array of individual rights claims. Even assuming that they are justiciable, however, none of these claims are sure to prevail. For example, Guarantee Clause and political rights claims can be addressed through proper structuring of the deal; Contract Clause claims are moot so long as contracts are paid; and the Takings Clause might facilitate sales more than it blocks them.

²⁹³ See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (holding that an action could constitute a taking if the action causes an unreasonably negative impact on the owner's investment-backed expectations). For a more immediate example, see Severson, *supra* note 4 (describing the impact of a border change on a gas station whose business model is predicated on its location just south of the Carolinas' border, where it is easier to sell gas cheaply).

²⁹⁴ U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

²⁹⁵ 545 U.S. 469 (2005) (upholding use of takings power to transfer of property from one private party to another).

²⁹⁶ See *id.* at 483-84.

B. Political and Economic Costs

Constitutional prohibitions are not the only forces that could, or perhaps should, limit the functioning of an interstate market for sovereign territory. As Felix Frankfurter and James Landis explained, referring to the intractability of interstate border disputes, “Social traditions, political loyalties, and extensive economic interests begin to manifest themselves, which are wholly absent in a case of *Doe v. Roe*.”²⁹⁷ The same would undoubtedly be true of border sales. This Section explores some of those social, political, and economic interests.

1. Reliance Interests and the Value of the Status Quo

One of the most obvious downsides to selling state borders is that it may upset significant reliance interests.²⁹⁸ A shift in borders would require residents to change driver’s licenses, update car insurance, change public schools, begin paying out-of-state tuition, obtain new professional accreditations, and learn about a new set of state laws and elected officials. The reach of diversity jurisdiction and application of choice of law principles would change as well, creating some degree of legal instability.

Moreover, those costs would be multiplied by something akin to a strong version of the endowment effect,²⁹⁹ at least inasmuch as people assign higher value to land—and, perhaps, citizenship—that is currently in their possession than to land that could be.³⁰⁰ Such costs might partially reflect inertia or lack of imagination, but there are also good reasons to prefer the status quo.³⁰¹ As Cass Sunstein explains:

A high degree of stability is necessary to allow people to plan their affairs, to reduce the effects of factional or interest group power in government, to promote investment, and to prevent the political process from breaking down by attempting to resolve enormous, emotionally laden issues about who is entitled to what.³⁰²

²⁹⁷ Frankfurter & Landis, *supra* note 26, at 706.

²⁹⁸ Cf. Nelson, *supra* note 77, at 59 (noting that selling public land to reduce national debt “might have been a good idea . . . [b]ut too many years have now passed, creating implicit historic entitlements that will have to be recognized”).

²⁹⁹ See generally Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193, 194 (1991) (describing the endowment effect as individuals’ tendency to demand more “to give up an object than they would be willing to pay to acquire it”).

³⁰⁰ See Cass R. Sunstein, *On Property and Constitutionalism*, 14 CARDOZO L. REV. 907, 931 (1993) (“[A]ny initial allocation of an entitlement . . . may well have effects on preferences.”).

³⁰¹ *Id.* at 933 n.60 (“It is by no means clear that status quo bias is irrational.”).

³⁰² *Id.* at 916.

Sunstein's remarks refer to the particular virtues of a stable system of private property, but those virtues apply to state borders as well.³⁰³ In either case, stability helps people "plan their affairs," politically and otherwise.

By disturbing that stability, the sale of state borders could impose costs not only on the parties to a transaction, but also on the political system as a whole.³⁰⁴ For example, the very possibility of selling sovereign territory could—like the possibility of secession—have destabilizing effects.³⁰⁵ At the very least, a market for sovereign territory would make it easier for subterritories to leave (willfully or not) larger ones. In Albert Hirschman's influential terminology, facilitating "exit" disincentivizes "voice" and "loyalty,"³⁰⁶ which can in turn discourage political engagement³⁰⁷ and "[t]rue political and cultural pluralism."³⁰⁸

Such costs are important to recognize and are likely to be especially high in cases involving the creation of enclaves and exclaves. But that does not mean that they will always be prohibitive, nor even that they count against the desirability of a market for sovereign territory. After all, the United States is already dotted with exclaves.³⁰⁹ The costs of change must be paid no matter what the cause, and as noted above, state borders continue to move for reasons having nothing to do with people's voluntary choices. In those cases, the existence of such reliance-based costs could be an argument in *favor* of selling state borders because it would make it easier for states to reestablish boundaries moved by exogenous shocks like river accretion or newly discovered boundary errors.

³⁰³ In international law, the doctrine of *uti possidetis* functions to preserve the stability of borders in cases of secession or dissolution of states. See generally Steven R. Ratner, *Drawing a Better Line: Uti Possidetis and the Borders of New States*, 90 AM. J. INT'L L. 590, 590 (1996) ("[U]ti possidetis provides that states emerging from decolonization shall presumptively inherit the colonial administrative borders that they held at the time of independence.").

³⁰⁴ See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1376 (1993) ("By prohibiting or regulating land sales to strangers, a village can help ensure its future close-knittedness.").

³⁰⁵ Cf. Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633, 639 (1991) ("Constitutional provisions may be facilitative in quite another sense: a decision to take certain issues off the ordinary political agenda may be indispensable to the political process.").

³⁰⁶ See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (exploring the options available to members of an organization who are dissatisfied with it).

³⁰⁷ See Heather K. Gerken, *The Supreme Court 2009 Term: Forward: Federalism All the Way Down*, 124 HARV. L. REV. 4, 13-14 (2010) (explaining that "exit options" can make individuals into outsiders and isolate them from policymaking).

³⁰⁸ Briffault, *supra* note 15, at 844 ("True political and cultural pluralism is advanced not by the separation of different groups into distinct municipalities but through political structures that promote interaction and require mutual accommodation to different perspectives.").

³⁰⁹ See *supra* notes 114 & 131 (discussing Bubbleland and Kaskaskia, respectively).

2. Self-Determination and the Secession Analogy

A second objection would focus not solely on the reliance interests of the residents in the effected territory, but also on the residents' presumed right to govern themselves. In international law, this is known as "self-determination,"³¹⁰ which has become "the central principle of modern acquisition" of territory.³¹¹ The basic idea of self-determination is that groups have some right, albeit a limited one, to determine their own sovereignty and political identity.³¹² One might argue that a similar principle is embedded in our constitutional system of self-government, and that residents would therefore need to consent to any border sale.³¹³

The best way to get traction when addressing this claim is to begin with one that is more familiar: that of secession.³¹⁴ The same issues relevant to

³¹⁰ See LEE C. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 9 (1978) (noting that "self-determination" is a historical concept that, for some, "invokes panoramic connotations while others perceive in it surprisingly little by way of indisputable denotation"); MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 14 (1982) (finding that "self-determination" always begins with feelings that continued rule cannot be tolerated); A. RIGO SUREDA, *THE EVOLUTION OF THE RIGHT TO SELF-DETERMINATION* 95 (1973) (tracing the origin of the modern legal right to "self-determination" to World War I rhetoric).

³¹¹ John C. Duncan, Jr., *Following a Sigmoid Progression: Some Jurisprudential and Pragmatic Considerations Regarding Territorial Acquisition Among Nation-States*, 35 B.C. INT'L & COMP. L. REV. 1, 7 (2012).

³¹² See Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177, 184 (1991) (stating that the tradition of self-determination relies on "democratic principles of consent and popular sovereignty").

³¹³ The question is of course rhetorical, but it bears noting that in the international context, at least, such approval is *not* required:

The hardship involved for the inhabitants of the territory who remain and lose their old citizenship and are handed over to a new sovereign whether they like it or not, created a movement in favour of the claim that no cession should be valid until the inhabitants had by a plebiscite given their consent to the cession. . . . But it cannot be said that international law makes it a condition of every cession that it should be ratified by a plebiscite.

¹ OPPENHEIM'S INTERNATIONAL LAW 684 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (footnote omitted) (cited in Lee, *supra* note 47, at 19).

³¹⁴ Secession efforts are more common in the United States than many people probably realize. See Lammle, *supra* note 134 (providing snapshots of eight secession movements in American history); Josh Levin, *How Is America Going to End? Who's Most Likely to Secede?*, SLATE (Aug. 5, 2009), http://www.slate.com/articles/news_and_politics/the_end_of_america/2009/08/how_is_america_going_to_end_3.html (describing possible results if American territories pursued secession). President Obama's reelection prompted hundreds of thousands of signatures on secession petitions. See, e.g., Manny Fernandez, *White House Rejects Petitions to Secede, but Texans Fight On*, N.Y. TIMES (Jan. 15, 2013), <http://www.nytimes.com/2013/01/16/us/politics/texas-secession-movement-unbowed-by-white-house-rejection.html> (citing to the White House's response to a petition of more than 100,000 signatures asking the President to allow Texas to secede).

secessionist movements are also directly relevant (albeit inversely so) to the market for sovereign territory. If citizens can be forced to maintain state citizenship that they do not want, what is so different—from a political perspective—about forcing them to change it? As the question suggests, the self-determination objection to the market for sovereign territory proves too much. If territories have the right to *refuse* transfer to another state, then it would seem that they would also have the right to *force* such a transfer—in other words, to secede. And that cannot be correct, for “no serious scholar or politician now argues that a right to secede exists under American constitutional law.”³¹⁵

Perhaps the self-determination argument is really something more akin to a Due Process argument: that local governments and their residents must have a voice.³¹⁶ This kind of concern is undoubtedly valid and important, but it is one of process, not a substantive prohibition on interstate sales. So long as a deal were properly structured—perhaps by requiring a supermajority of the impacted area’s residents to approve the sale—then it should be able to proceed notwithstanding the objections of a minority.³¹⁷

3. Principal–Agent Problems

Self-determination concerns are not the only difficult questions of political design. A third set of problems could arise from outright corruption or the influence of private interest groups,³¹⁸ particularly those that are geographically concentrated.³¹⁹ If, for example, the comparatively wealthy citizens of Boca Raton were to decide that they would like to be a part of New York (from whence many of them hail, and which might be happy to have their high property values and reliably Democratic votes) rather than Florida (the comparatively conservative government of which might be happy to see

³¹⁵ Sunstein, *supra* note 305, at 633. Sunstein addresses secession of states from the federal government, but the point is even stronger for cities, which, after all, are simply creatures of state law. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (defining municipal corporations as political subdivisions of the state, reliant on the state power as the provider of their authority).

³¹⁶ See Briffault, *supra* note 15, at 791 (“The principal federal constitutional question raised by a local secession is the right to vote in secession referenda.”).

³¹⁷ Subsection II.B.5 considers such design questions in more detail.

³¹⁸ See Hasday, *supra* note 146, at 24–25 (“Capture by private economic interests is also a perennial problem [for interstate compacts], although its extent appears to be highly contextual . . .” (footnote omitted)).

³¹⁹ See THE FEDERALIST NO. 10, at 77–78 (James Madison) (Clinton Rossiter ed., 1961) (arguing that a benefit of a nation with a large geographic area is that this design will dilute the power of factions).

them leave),³²⁰ they could facilitate the deal by employing the usual tools of interest groups: campaign contributions, commercials, or perhaps even a direct gift to the state of Florida to buy their way out.

One response to this possibility would be to shrug. After all, the possibility of “federalism-all-the-way-down” is arguably a feature, not a bug, of such an interstate market for state borders.³²¹ If some committed faction is willing and able to buy its way out of a state, Coaseans should smile, for the transacted territory would simply become a part of a state where the land and its citizens are more valued. Of course, as with any other major political issue, it could well be the case that enormous sums of money would be spent by one side or the other to win political support. But that is not a problem unique to the market for sovereign territory.

Perhaps the relevant concern is less with politics and more akin to an agency problem of properly aligning the incentives of the interested parties. This difficulty exists in many dimensions at once: between voters and elected officials; between the area being sold and the larger governmental unit(s) of which it is a part; and among voters and concerted factions thereof. Assume, for example, that such a deal would have to be approved by the voters of State *A* (the seller) and of State *B* (the buyer), and by supermajorities of the voters in the territory being exchanged and the subterritory of State *B* to which it would be joined. Each of these groups has different interests and incentives for supporting the deal. The relevant elected officials also have diverse incentives, which might or might not align with those of the voters they represent.

Consider the elected officials who represent the voters of the territory being sold. Even if voters strongly favor the deal, those officials might not. After all, they would presumably lose their jobs if the political units they represent were to disappear. Conversely, if the representatives of the district stood to gain in some way from the sale—perhaps because they are well connected to the political leadership of the new state, or because they are trying to extract agreements from their current state leaders by threatening to leave—they might be more enthusiastic about the sale than the citizens they represent.

These misalignments are exacerbated by the differing time horizons of elected officials and voters. Politicians tend to be biased towards their

³²⁰ Cf. Dilworth, *supra* note 12, at 113 (suggesting that “annexing Philadelphia to New Jersey [rather than Camden to Pennsylvania] would work in the interests of different factions in both states, most notably Democrats in New Jersey and Republicans in Pennsylvania”).

³²¹ See Gerken, *supra* note 307, at 8 (using “the term ‘federalism-all-the-way-down’ to describe the institutional arrangements that our constitutional account too often misses—where minorities rule without sovereignty”).

immediate success—towards the next election rather than to long-term investments. Officials might therefore be inclined to sell off property for immediate gain, even if it would not otherwise be in the best interests of the state.

Suppose that a small town could be sold to a neighboring state for \$10 million. The residents of the town oppose the sale, but so long as it goes through, that is not the problem of the selling state's politicians.³²² Meanwhile, the proceeds of the sale would allow those politicians to lower taxes, upgrade schools, or hire more police—all the things that help incumbents win elections. Making matters worse, residents of the transacted territory would not necessarily benefit from the sale of their own land. Their former fellow citizens in State *A* would enjoy the lower taxes; indeed, they might vote for the transfer precisely because of this benefit.

These agency concerns are undoubtedly difficult and demand close and careful consideration. But they are not *sui generis*. A great many political and economic questions are complicated by misalignments of incentives. Indeed, identifying and resolving these misalignments is the basic project of public choice theory.³²³ Where those misalignments are simply too difficult to remedy—where, for example, it is impossible to obtain “consent” or trust that it has validly been given—the exchange or action may simply be banned.³²⁴ For the most part, though, the solution is a political one: to structure a deal so that all the relevant parties are able to give the necessary agreements.³²⁵

4. Externalities

Even assuming that all of the immediately affected parties within the two (or more) transacting states could have their concerns properly addressed, another category of political consideration remains: the externalities that a sale of state borders would impose on other states, and perhaps on the system as a whole.³²⁶ This fourth problem could also exist along many different dimensions.

³²² It might, of course, be a problem for the purchasing state's politicians, but it is not hard to imagine that the anger of the territory's citizens would be directed at the state that sold them rather than at the state that wanted to buy them.

³²³ See JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE* 25-29 (1997) (discussing the debate on public choice theory's effect on political practitioners and scholars).

³²⁴ See *infra* subsection II.C.1 (discussing consent-based arguments for inalienability).

³²⁵ Subsection II.B.5 suggests the same.

³²⁶ See Frankfurter & Landis, *supra* note 26, at 695 (“[E]ven the permissive agreements may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved.”).

As the earlier discussion of horizontal federalism and the Compact Clause suggested, the inequality that almost inevitably accompanies any form of marketization could lead to a troubling imbalance of power between states. States with thriving economies could translate their financial strength into further political strength simply by buying up more sovereign territory. Such purchases would expand the reach of the state's sovereign authority, its tax base, its population for purposes of the House of Representatives,³²⁷ and so on. The existing imbalance in Senate representation³²⁸ could also be further exacerbated. If Wyoming were to sell part of itself to a more populous neighbor, for example, then Wyoming's current overrepresentation in the Senate would become all the more pronounced.

The resulting inequality would be complex. Consider the possibility and impact of a "fire sale" in the market for sovereign territory. A state with substantial internal inequality faces a large amount of distressed debt. To avoid bankruptcy, the state decides to sell off some of its territory. The only part of that land that interests buyers is that with wealthy inhabitants. So the state sells it, thereby remaining solvent. The immediate crisis has been avoided, with the result that the state is now temporarily flush with cash but more uniformly poor. The hydraulics of economic balkanization could just as easily lead to analogous political balkanization.³²⁹ If Massachusetts purchased Durham, North Carolina, the Bay State would grow more liberal,

³²⁷ See Greve, *supra* note 145, at 323 ("A bilateral bargain through which the Commonwealth of Virginia acquires half of West Virginia's territory may be best for all concerned (at least in the party states), but it would also affect the allocation of seats in the House of Representatives.").

The impact would not be limited to the compacting states, as demonstrated in the following comments from Mel Watt—a representative from North Carolina, which was on the verge of losing a representative to Utah—to the sponsor of a bill that would have moved a Utah town into Nevada:

Mr. Watt: I just wanted to ask a quick facetious question. Can we do this quick enough to get those people in Wendover out of the State so that we can keep the congressional district in North Carolina?

Mr. Hansen: Mr. Watt, I think the problem we have got, there is not enough.

Mr. Watt: You mean, it is not that many.

Mr. Hansen: No.

Mr. Watt: I have got to vote against it then.

Proposed Change of Utah–Nevada State Boundary: Hearing on H.R. 2054 Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary, 107th Cong. 23 (2002).

³²⁸ See SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION* 49–62 (2006) (arguing that the system of equal representation by state in the U.S. Senate leads to variance in representation).

³²⁹ Racial balkanization might also result. See Anderson, *supra* note 223, at 1411–12 (describing racial implications of municipal dissolution).

and the Tar Heel State more conservative.³³⁰ That might make the voters of each state happier in the short run, but it could also lead to more polarized national politics in the long run.

5. Solutions: Minimizing Costs Through Transaction Design

The costs described in the previous subsections cannot all be avoided, but many of them can be minimized through proper structuring of the transaction itself. This final subsection suggests a nonexclusive list of tools and mechanisms that might be used by transacting states to lower the costs of a border sale—things like requirements of local consent and caps on the size of the transfer.

It is important to note at the outset that Congress can condition its approval of a border-changing compact on the use of these mechanisms. For example, the House of Representatives' "prospective ratification" of the redrawing of the Utah–Nevada border was predicated on the approval of voters in both cities.³³¹ Speaking in support of the proposal, Representative James V. Hansen explained, "The wisdom of this approach is that whatever agreement is reached . . . would inherently be acceptable to both sides, [and] this approach removes Congress and the Federal Government from getting involved in the financial details of what is essentially a State and local matter."³³²

At the same time, the legislation limited the scope of Congress's approval. It read, "The consent of the Congress of the United States is given to Utah and Nevada to enter into an agreement or compact that . . . does not result in the transfer to Nevada of more than a total of 10,000 acres of lands that are located within Utah" ³³³ Because the interstate compact machinery is flexible enough to permit such conditional approvals, Congress could effectively permit a sale while allowing the states to negotiate the details. For example, since state laws prohibiting politicians in the transferred territory from holding office in the new state might raise Guarantee Clause problems, Congress could make eligibility a condition of the sale.³³⁴

³³⁰ 2012 Presidential Election Results, WASH. POST, <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president> (last visited Nov. 22, 2013) (reporting that President Obama won 76% of votes in Durham and 61% of votes in Massachusetts).

³³¹ H.R. 2054, 107th Cong. § 1 (2001), as amended by H.R. REP. NO. 107-469, at 2 (2002) (conditioning prospective congressional consent of the agreement on the consent of "a majority of the registered qualified electors" in each city).

³³² 148 Cong. Rec. 9997-98 (2002).

³³³ H.R. 2054 § 1.

³³⁴ Many thanks to Allan Erbsen for making this point.

States could also address the self-determination concern by setting up their internal machinery so as to give relevant groups a voice in the process. Of course, it is difficult to define the “self” in self-determination,³³⁵ but as a constitutional matter, it seems that states would be entitled to substantial deference in deciding that question for themselves.³³⁶ The Supreme Court has noted that “[a] city’s decisions inescapably affect individuals living immediately outside its borders” yet “no one would suggest that nonresidents likely to be affected by” such actions “have a constitutional right to participate in the political processes bringing it about.”³³⁷ The Court has, for example, upheld residency restrictions for voting on the basis that they are “necessary to preserve the basic conception of a political community.”³³⁸ The question thus becomes not what the Constitution mandates, but what states should do.

One relatively straightforward move would be to seek approval, perhaps through a referendum, from the residents of the territory being transferred and the legislatures of the states involved.³³⁹ This would essentially echo the multi-stage procedure for municipal secession advocated by Richard Briffault: conduct a referendum in the area seeking to secede, require the consent of the municipality from which it seeks to secede, and then provide a state-level “overall public interest” review.³⁴⁰ This is not a radical suggestion; it is the kind of thing that states do all the time. For example, thirty-seven

³³⁵ Briffault, *supra* note 15, at 800 (“[T]he concept of self-government says nothing about who is the ‘self’ that does the governing.”); *id.* at 778 (“All three parties to the emerging conflict over secession—Staten Islanders, the City of New York, and the State of New York—have sought to wrap themselves in the mantle of local self-determination.”).

³³⁶ *Id.* at 794.

³³⁷ *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 69 (1978). *But see* ROBERT A. DAHL, *AFTER THE REVOLUTION? AUTHORITY IN A GOOD SOCIETY* 64 (1970) (“Everyone who is affected by the decisions of a government should have the right to participate in that government.”).

³³⁸ *Dunn v. Blumstein*, 405 U.S. 330, 343-44 (1972); *see also* *City of New York v. State*, 562 N.E.2d 118, 120 (N.Y. 1990) (upholding limitation that allowed only Staten Island residents to vote in a referendum on the Island’s secession, though noting that the referendum gave them no unilateral right to actually secede). The Court has, however, rejected the idea that durational residency requirements are necessary to “impress upon . . . voters the local viewpoint.” *Dunn*, 405 U.S. at 354-55.

³³⁹ Some scholars have suggested similar ideas in the context of interstate water compacts. *See, e.g.*, JEROME C. MUYS, *NAT’L WATER COMM’N, INTERSTATE WATER COMPACTS: THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT* 366 (1971) (“[S]ome weighted representation would seem to be in accord with the Supreme Court’s gradual extension of the ‘one man, one vote’ rule . . .”).

³⁴⁰ *See* Briffault, *supra* note 15, at 818-19; *see also* Gerald E. Frug, *Is Secession from the City of Los Angeles a Good Idea?*, 49 *UCLA L. REV.* 1783, 1783 (2002) (noting that secession efforts in Los Angeles “will be decided by voters in the area seeking to secede and voters in the City of Los Angeles as a whole”).

states have provisions governing the voluntary dissolution of municipalities.³⁴¹ These generally provide that the voters must give their approval in a general or special election, and that the dissolution can be initiated by a petition or vote of the governing body.³⁴² Since interstate territorial sales would raise many of the same basic considerations and concerns as municipal dissolutions (e.g., alteration of borders and self-determination), a similar structure seems appropriate.

Because border alterations are so fundamental, it might also be worthwhile for states to impose a supermajority requirement. The Supreme Court has previously upheld such a requirement,³⁴³ though it noted in doing so that the requirement at issue did not privilege particular “group characteristics” such as “group location.”³⁴⁴ Assuming that a supermajority requirement would not run afoul of that rule in the specific context of a border sale, it might be a good way to better ensure that the community approving the sale is speaking with an “authentic voice.” When Nantucket voted to secede from Massachusetts, for example, the vote was 1725 in favor and 404 against.³⁴⁵ Of course, even a supermajority requirement would not solve all democratic concerns. Perhaps a discrete and insular minority of the area’s residents oppose the sale and are powerless to stop it. The congressional consent requirement provides an additional safeguard in such situations, but the problem is to some extent unavoidable, as it is in any democratic system.

These are all mechanisms for addressing the self-determination objection. But if instead it were thought that the most important problem is the misalignment of incentives between politicians and affected residents, or that the residents of the transferred territory would have to bear an unfair share of the transaction costs, then the solution would lie in the financial structure of the deal rather than the mechanisms of approval. Affected residents could, for example, receive some extra share in the proceeds of the sale—tax breaks, increased government services, and the like. Perhaps 75% of the money from the sale could be received by the residents of the transacted territory, with the remaining 25% going to the state’s general operating budget.

It is somewhat harder to address the objections based on balkanization and instability because the costs they impose will be borne largely by nonparty states. (As discussed in the following section, that might be a

³⁴¹ Anderson, *supra* note 223, at 1377.

³⁴² *Id.* at 1378.

³⁴³ See *Gordon v. Lance*, 403 U.S. 1, 7 (1971) (upholding a 60% supermajority requirement for issuance of bonds).

³⁴⁴ *Id.* at 4.

³⁴⁵ Lawrence Fellows, *Might It Be Nantucket, Conn.?*, N.Y. TIMES, July 24, 1977.

reason to treat borders as inalienable.³⁴⁶) By incorporating a national-level check, the congressional approval requirement for interstate compacts should prevent some of these harms. But party states can also help keep such costs in check by limiting the size and significance of the territory they sell. The municipal dissolution provisions discussed above often include a size cap.³⁴⁷ A similar restriction in the market for sovereign territory would permit the Carolinas to resolve their comparatively minor border dispute with a side payment, while barring the sale of Camden to Pennsylvania.

The political considerations discussed here are weighty, both descriptively and normatively. But as with the constitutional concerns discussed in the previous Section, they do not tell a fully satisfying story. Surely there are *some* interstate sales that would be both politically expedient and desirable—of uninhabited territory, for example, or with the overwhelming support of both states' citizens, elected officials, and the transacted territory's residents. After all, states do change borders with some frequency. A justification for why they do not do so for money, then, must lie elsewhere.

C. Inalienability

The discussion thus far has effectively assumed that there is nothing inherently objectionable about a market for sovereign territory. But this is not necessarily true. Perhaps states do not “own” their borders,³⁴⁸ or own them but cannot sell them. Or perhaps we simply do not want to “invite[] markets to fill the social universe”³⁴⁹ in this particular way. These objections are simultaneously hard to define and hard to answer; they form a strong intuitive argument against selling state borders.

State borders are clearly alienable, at least to some degree, for they can and do change hands.³⁵⁰ That does not mean, however, that they are *market*

³⁴⁶ See, e.g., Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972) (arguing that the existence of externalities can justify inalienability rules); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970 (1985) (same).

³⁴⁷ See Anderson, *supra* note 223, at 1380 (“In many states, population is a significant determinant of eligibility for dissolution.”).

³⁴⁸ Cf. Greve, *supra* note 145, at 323 (“Coasean bargains presume that actors bargain with what they own. . . . ‘States’ rights,’ however, are not so defined, and cannot be so defined.”).

³⁴⁹ Radin, *supra* note 1, at 1851; see also Terrance McConnell, *The Nature and Basis of Inalienable Rights*, 3 LAW & PHIL. 25, 27 (1984) (“That which is inalienable . . . is not transferable to the ownership of another.”); Rose-Ackerman, *supra* note 41, at 931 (defining inalienability as “any restriction on the transferability, ownership, or use of an entitlement”).

³⁵⁰ See Rose-Ackerman, *supra* note 41, at 931 (discussing the theoretical justifiability of inalienability).

alienable—that is, transferable in exchange for money.³⁵¹ These concepts interact with sovereign authority in complex ways. On the one hand, “unfettered market processes may be incompatible with the responsible functioning of a democratic state.”³⁵² But given that governments already sell both public land and sovereign functions, what could be wrong with combining the two into a sale of sovereign land? Two potential answers to that question—helpfully distinguished in Michael Sandel’s recent work on the limits of markets³⁵³—involve issues of fairness and corruption.

1. Fairness

As Sandel notes, some objections to market alienability rest on “fairness” concerns: a fear that sellers either have not given or cannot legitimately give their consent to certain kinds of economic transactions.³⁵⁴ For example, many people find the idea of a market for sex unsettling precisely because they worry that women will be improperly coerced into selling their bodies.³⁵⁵ A similar concern is sometimes thought to underlie the Thirteenth Amendment’s prohibition on slavery, and the corollary rule (demonstrated most prominently in the peonage cases) that a person cannot sell himself into slavery “voluntarily.”³⁵⁶

It is not hard to imagine how fairness objections might play out in the context of sovereignty markets. Even assuming that consent can formally be given by some political body that legitimately speaks for all interested parties, there could be good reasons to question whether it speaks with an “authentic voice.”³⁵⁷ Just as individuals might be pressured into selling things they would not otherwise want to sell, so too might sovereigns be coerced into selling their “bodies.” Weak or poor states, for instance, could

³⁵¹ See Radin, *supra* note 1, at 1853 (“Nongiveability and nonsalability are subsets of nontransferability.”); Rose-Ackerman, *supra* note 41, at 935 (“Under the concept of *modified inalienability*, sales are forbidden, but gifts are permitted and may even be encouraged by state policy.”).

³⁵² Rose-Ackerman, *supra* note 41, at 933.

³⁵³ See generally SANDEL, *supra* note 37 (arguing that increasing societal reliance on markets can result in morally objectionable consequences).

³⁵⁴ *Id.* at 111. The Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), has reinvigorated scholarly interest in consent and coercion. See *id.* at 2606 (holding that Congress’s conditioning of Medicaid funding on states’ consent to the expanded program was an unconstitutional use of the spending power because it crosses the line from encouragement to coercion).

³⁵⁵ SANDEL, *supra* note 37, at 111-13.

³⁵⁶ *Bailey v. Alabama*, 219 U.S. 219, 243-44 (1911) (invalidating a criminal statute that punished the violation of a peonage contract); *Clyatt v. United States*, 197 U.S. 207, 217-18 (1905) (holding that the Thirteenth Amendment grants Congress the power to enforce criminal penalties for holding another in peonage).

³⁵⁷ Allen Buchanan, *Toward a Theory of Secession*, 101 ETHICS 322, 339-40 (1991).

be pressured into selling parts of themselves to stronger and richer states. Taking borders for granted may be valuable precisely because it avoids this kind of coercive spiral.

Such gunboat diplomacy may seem unimaginable in the domestic context, but again American history provides sobering evidence to the contrary. The Treaty of Paris recognized American “jurisdiction and ultimate sovereignty over the lands as far as the Mississippi,”³⁵⁸ and it became the Washington administration’s stated policy that “[t]he Indians being the prior occupants, possess the right of the soil. It cannot be taken from them unless by their free consent,” and “they should not be divested thereof, but in consequence of open treaties, made under the authority of the United States.”³⁵⁹

But no one pretended (even if some treaties’ preambles suggested) that land-cession transactions were fair to the Indians who nominally agreed to them. Washington himself predicted in 1783 that “the Indians . . . will ever retreat as our settlements advance upon them, and they will be as ready to sell, as we are to buy.”³⁶⁰ Indians’ readiness to “sell” was not matched by an equal readiness on the part of the United States to respect the terms of those sales. In 1955, Justice Stanley Reed wrote for a majority of the Court that “[e]very American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty . . . it was not a sale but the conquerors’ will that deprived them of their land.”³⁶¹ As a scholar later put it, the United States engaged in “ruse, subterfuge, circumvention, and outright fraud to achieve through chicanery, under the cloak of voluntary cooperation,” continued cessions.³⁶²

The shameful political and economic history of the tribal land “purchases” is impossible to ignore; it casts a shadow over any effort to revive a market

³⁵⁸ FRANCIS PAUL PRUCHA, *AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY* 226 (1994).

³⁵⁹ Letter from Henry Knox to George Washington (June 15, 1789) (quoted in PRUCHA, *supra* note 358, at 227). The holding of *Johnson v. M’Intosh*, 21 U.S. (8 Wheat.) 543, 585 (1823), that private purchases could not divest Indians of their land, follows from this sentiment.

³⁶⁰ Letter from George Washington to James Duane (Sept. 7, 1783), in 10 *THE WRITINGS OF GEORGE WASHINGTON* 303, 307 (Worthington Chauncey Ford ed., New York, G.P. Putnam’s Sons 1891) (quoted in Eric Kades, *The “Middle Ground” Perspective on the Expropriation of Indian Lands*, 33 *LAW & SOC. INQUIRY* 827, 833 (2008)).

³⁶¹ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 289-90 (1955).

³⁶² MICHAEL D. GREEN, *THE POLITICS OF INDIAN REMOVAL: CREEK GOVERNMENT AND SOCIETY IN CRISIS* 50 (1982); see also Eric Kades, *The Dark Side of Efficiency: Johnson v. M’Intosh and the Expropriation of American Indian Lands*, 148 *U. PA. L. REV.* 1065, 1119-20 (2000) (noting that William Henry Harrison used similarly deceptive tactics against the Kaskaskia Indians in southern Illinois). The tribe’s name lives on in the hapless former capital of the state, discussed above. See Gregory, *supra* note 131.

for sovereign territory today.³⁶³ But the sins of the past do not necessarily have intergenerational force, and as Sandel notes, the argument from fairness “offers no basis for objecting to the commodification of goods . . . in a society whose background conditions are fair.”³⁶⁴ Coercive economic relationships are unlikely to arise between two states. Their sophistication, constitutional protection, and political power preclude it, not to mention the power of Congress to withhold consent to any coercive border compact. Moreover, the remedies for any such inequality lie in the proper structuring of sales, not in their prohibition. In international law, for example, the 1969 Vienna Convention on the Law of Treaties held that “[a] treaty is void if its conclusion has been procured by the threat or use of force.”³⁶⁵ The fairness objection, then, can be answered by procedural mechanisms that address background inequalities.

2. Corruption

The corruption objection is in some sense more fundamental, precisely because it is less contextual. As Sandel explains, “[t]he fairness argument . . . objects to buying and selling goods against a background of inequality severe enough to create unfair bargaining conditions. . . . The corruption argument, by contrast, focuses on the character of the goods themselves and the norms that should govern them.”³⁶⁶ The heart of the corruption objection lies in the particular values that are inherent in sovereign territory and threatened by its sale.

First, sales of sovereign territory could arguably corrupt the relationships between states and their citizens. States, after all, have different duties to their citizens than firms have to their shareholders. A state that tried to sell off a low-performing asset, whether it be a town or some riverfront property, might violate its duty to preserve public rights of access and the like. A firm that *failed* to do so might violate its fiduciary duties to maximize shareholder wealth.³⁶⁷ Indeed, firms are often legally forbidden to base decisions on the

³⁶³ Tribal land complicates the picture in other ways as well. For example, the sovereign authority of tribes would add another layer to any interstate sales involving, say, a reservation that straddles state borders. Resolving such complications involves issues of Indian law that I cannot address here.

³⁶⁴ SANDEL, *supra* note 37, at 113.

³⁶⁵ Vienna Convention on the Law of Treaties art. 52, May 23, 1969, 1155 U.N.T.S. 331.

³⁶⁶ SANDEL, *supra* note 37, at 113.

³⁶⁷ See *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985) (describing fiduciary duties of care and loyalty that directors owe their corporation and shareholders), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

kinds of factors—social justice, for example³⁶⁸—that governments are arguably bound to consider. Some version of these intuitions seems to underlie various nonconstitutional property rules that limit the government’s ability to behave as a property owner.³⁶⁹ The public trust doctrine, for example, mandates that some resources be held by the government with a restricted title that prevents their conveyance to private parties.³⁷⁰ Inasmuch as powers of governance are held in trust for the people, they are just as inalienable as property held in such a trust.³⁷¹

Second, the explanation might lie not in individual interests, but in those of the system as a whole, since some sales of sovereign territory could arguably degrade the very fabric of democracy. Sovereign territory is “relational and systemic,” just like some individual rights,³⁷² and thus—like those rights—might be inalienable for the simple reason that the states that “possess” it are not the only intended beneficiaries. A person cannot sell his vote,³⁷³ nor pay another person to perform military service or jury duty in his stead,³⁷⁴ in part because those rights are valuable not only to their holders, but to the functioning of the larger political system. As Margaret Radin points out, such rights “seem to be moral or political duties related to a community’s normative life; they are subject to broader inalienabilities

³⁶⁸ See *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969) (describing the test for determining whether a corporation’s charitable gift violates fiduciary duties).

³⁶⁹ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 720 (1986) (“[T]here lies outside purely private property and government-controlled ‘public property’ a distinct class of ‘inherently public property’ which is fully controlled by neither government nor private agents.”).

³⁷⁰ See COGGINS ET AL., *supra* note 5, at 80-89 (identifying the basic premise of the public trust doctrine as being that “public access to important public resources is so fundamental to society that courts should imply restrictions when private development threatens to destroy public use”); Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 U. CHI. L. REV. 799 (2004) (describing the history of the American public trust doctrine).

³⁷¹ Justice Field made this exact analogy in the seminal public trust case *Illinois Central Railroad Co. v. Illinois*. 146 U.S. 387, 453-54 (1892) (comparing the divestment of public trust land to the divestment of police power).

³⁷² See Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 (1985).

³⁷³ See *Brown v. Hartlage*, 456 U.S. 45, 54 (1982) (prohibiting political candidates from “giving, or promising to give, anything of value to a voter in exchange for his vote or support”). See generally Richard L. Hasen, *Vote Buying*, 88 CALIF. L. REV. 1323 (2000) (describing the implications of “vote buying” in political and corporate elections); Rose-Ackerman, *supra* note 41, at 963 (“Vote selling is widely recognized to be inconsistent with egalitarian, democratic principles because it biases political decisions in favor of the wealthy.”).

³⁷⁴ See 50 U.S.C. app. § 458 (2006) (prohibiting the use of bounties, substitutes, and payments in the drafting process).

that preclude loss as well as transfer.”³⁷⁵ The same argument might be made with regard to state borders.

And yet even with these seemingly straightforward examples, the corruption concern is more complicated and nuanced than it might at first appear. For although selling one’s vote for \$500 is considered morally repugnant and flatly illegal, there is nothing necessarily wrong with voting for a candidate who promises to reduce one’s taxes by \$500.³⁷⁶ Moreover, as noted above, governments have historically bought and sold sovereign territory, apparently without violating shared ethical commitments against anticommodification. There may be strong arguments against the laudability of the Louisiana Purchase, but few people argue that it was unethical simply *because* it was a purchase. Moreover, and perhaps more fundamentally, sovereigns continue to buy and sell sovereign authority, albeit to private parties rather than to each other. That, after all, is precisely what privatization is all about: governments permitting private actors to perform traditionally sovereign roles such as operating prisons, maintaining schools, and even performing some military functions, in exchange for money.³⁷⁷

A final set of commodification-related costs involves the mere invocation of market rhetoric. Radin argues that even when items are not actually for sale, referring to them as if they are is a form of commodification.³⁷⁸ If during a first date a person says happily, “I would pay \$100 to see you again,” the night is probably going to end early. The date is cheapened for having been valued. So, too, could it be that putting a price tag—even if not a for sale sign—on a piece of sovereign territory would work a harm by suggesting that the value of sovereign territory can be reduced to dollars and cents.

The market rhetoric concern is a sensible place to conclude because, if it is valid, then this Article has already inflicted the harm whose possibility it means to explore. Of course, I hope and believe that it is not valid in this particular setting, and that indeed the only way to understand the relationship between markets and state borders is to explore the constitutional, political, and ethical frameworks that govern them. The limits of commodification, including of state borders, “ultimately rest[] on our best conception of human flourishing.”³⁷⁹ There is no magic formula that will delineate those

³⁷⁵ Radin, *supra* note 1, at 1854.

³⁷⁶ See SANDEL, *supra* note 37, at 116-17 (stating the same proposition).

³⁷⁷ See generally David Shearer, *Outsourcing War*, 112 FOREIGN POL’Y 68 (1998) (describing the implications of privatizing state military functions).

³⁷⁸ See Radin, *supra* note 1, at 1859 (“Broadly construed, commodification includes not only actual buying and selling, but also market rhetoric, the practice of thinking about interactions as if they were sale transactions . . .”).

³⁷⁹ *Id.* at 1937.

limits with certainty, nor fix them against future change.³⁸⁰ As with continuing debates over the sale of blood,³⁸¹ babies,³⁸² and sex,³⁸³ the sale of borders raises difficult questions and does not provide easy answers.

CONCLUSION: FROM STATUS TO CONTRACT

Henry Maine famously observed that “the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”³⁸⁴ But the borders of some of those progressive societies—American states, at least—are still treated as creatures of status,³⁸⁵ assumed to be sunk permanently into the ground. History has not shared those assumptions, and they do not deserve unquestioning adherence now. The very notion of a market for state borders opens up long-forgotten possibilities, unsettles longstanding assumptions about the connection between property and sovereignty, and illuminates the relationship between governments and markets.

All markets and contractual relations are subject to legal, political, and ethical limitations, and the market for state borders is no different in that regard. As an explanatory matter, these constraints help account for the functional absence of such a market—the constitutional hurdles could seem significant, and in many cases political support might be insufficient to overcome transaction costs. They cannot, however, justify the *total* lack of interstate territory sales. If the political will and imagination could be summoned to activate the market for state borders, the constraints discussed here would provide important limits on its reach, but would not eliminate it entirely. In sum, the legal, political, and ethical considerations here suggest a map to the market for state borders.

³⁸⁰ As Radin notes, “[C]hild labor and public offices used to be bought and sold. They passed through a period of contest and were decommmodified.” *Id.* at 1856 n.33 (citing V. ZELIZER, *PRICING THE PRICELESS CHILD* (1985), and William E. Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship Between Structure and Style in American Administrative History*, 10 *LAW & SOC’Y REV.* 187 (1976)).

³⁸¹ Compare RICHARD M. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1971) (arguing against the commodification of blood), with Kenneth J. Arrow, *Gifts and Exchanges*, 1 *PHIL. & PUB. AFF.* 343 (1972) (arguing in favor).

³⁸² Compare Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 *J. LEGAL STUD.* 323 (1978) (arguing in favor of commodifying babies), with J. Robert S. Prichard, *A Market for Babies?*, 34 *U. TORONTO L.J.* 341 (1984) (arguing against).

³⁸³ See Kimberly D. Krawiec, *A Woman’s Worth*, 88 *N.C. L. REV.* 1739, 1745 (2010) (“Prostitution as an institution, of course, remains the subject of frequent criticism and debate . . .”).

³⁸⁴ HENRY SUMNER MAINE, *ANCIENT LAW* 170 (Transaction Publishers 2002) (1866).

³⁸⁵ See Ford, *supra* note 42, at 845 (“[T]erritorial identities are in an important sense remnants of the era before the modern hegemony of contractual social relations chronicled by Sir Henry Maine.”).