ARTICLE

SELLING STATE BORDERS

JOSEPH BLOCHER†

INTRODUCTION ................................................................. 242
I. THE CASE FOR SELLING STATE BORDERS ...................... 249
   A. Sovereign Territory and Public Land .......................... 249
   B. Why States Might Want to Buy or Sell Borders ............ 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. Surveying Errors ........................................................... 259
b. Historical Oddities ......................................................... 260
c. Accretion and Avulsion .................................................. 263
4. Bargaining and Dispute Resolution ............................... 264
C. The History and Persistent Echoes of the American Market
   for Sovereign Territory .................................................... 267
II. THE BOUNDARIES OF THE MARKET AND POSSIBLE
EXPLANATIONS FOR ITS ABSENCE ....................................... 269
A. Constitutional Limitations ................................................ 270
   1. Structural Rules ............................................................ 270
      a. State Borders and Law in the Founding Era ................. 270
      b. Interstate Treaties, Agreements, and Compacts .......... 273
      c. Federalism .............................................................. 281
   2. Individual Rights .......................................................... 284
      a. Political Rights ........................................................... 284
      b. Economic Rights ......................................................... 286
B. Political and Economic Costs ........................................... 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. Inalienability ................................................................. 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. State borders move as a

   ("A map is not the territory . . . ." (alteration in original) (quoting ALFRED KORZIBSKYI,
   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

---

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).
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.
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).


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”).


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.”).

legislature, 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. 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. The United States as we know it was shaped by land sales: the Louisiana Purchase, Alaska Purchase, and Treaty of Guadalupe Hidalgo together account for more

---


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).


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, and they are not the only territory whose sovereign control has been bought and sold. In fact, the Constitution specifically contemplates the “purchase[]” by the federal government of “Places” within states, 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 debts and Georgia’s cession of its western territories in exchange for $1,250,000.

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. 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. 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 (confering 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).


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, 728–39 (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. Malz, 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.\footnote{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).} States have also increasingly privatized sovereign functions such as education, law enforcement, and defense,\footnote{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).} 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.\footnote{See infra Section II.A. As Allan Erbsen notes in his thoughtful and comprehensive treatment of the subject, “scholars have not systematically 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).} Though perhaps underappreciated now, the Constitution’s prohibition of state treaties\footnote{U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation . . . .’”).} and its requirement that Congress consent to interstate agreements or compacts\footnote{Id. cl. 3 (“No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . .’”).} 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.
Second, the sale of state borders raises complex issues of democratic theory and political economy. The transaction costs of a sale might be extremely high, given the reliance interests and strong endowment effects that arise with regard to borders. Border sales could also threaten the self-determination rights of the transacted territory's residents by forcing them to relinquish state citizenship. 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.

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. 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. The United States' shameful history of land deals with Native American tribes demonstrates that the fairness concern is not simply a matter of theory. And even if fairness objections can be overcome in practice, marketization might still corrupt the basic value of the thing being sold. After all, if private citizens cannot sell aspects of their political identity—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 territory—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.\(^\text{43}\) In the former role, governments function much (although not exactly\(^\text{44}\)) 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,\(^\text{45}\) 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”).


\(^{44}\) 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.

citizenship, and performing other sovereign functions. 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.

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. The importance of this relationship helps explain the intensity with which governments oppose the exercise of sovereign functions by other states within their borders. 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.

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. 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 ‘the 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. 1236, 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

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.”).
put it with something of a wink. 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. The same is true if the entities selling proprietary interests happen to be sovereigns. 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. They will not, however, lose title to their land.

Again, the Constitution itself provides a perfect illustrative example. The reach of congressional power under the Property Clause has been the subject of a sustained and at times fiery debate. As Marla Mansfield explains, the “[t]wo competing models of the Property Clause . . . may be labeled the ‘proprietor’ and the ‘sovereign.’” 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. 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).


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.

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

---


71 See Kleppe v. New Mexico, 426 U.S. 539, 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. 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. 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. 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.").


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.\(^82\)

---


\(^80\) 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/8547993.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, and there is some reason to believe that this would be true at the domestic level as well. Alteration of state borders might permit economies of scale in the provision of public services, more efficient governance of resources, and the like. 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 forward and has gained some public attention. 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.

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).

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.”).

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.”).

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

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 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. 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.

One problem with the Tiebout Hypothesis, of course, is that residence is sticky—emotional, financial, and other costs distort the market. But what if instead of moving to the state whose laws they preferred, citizens could bring the state to them?

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.

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”).
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. They remain trapped, however, because they cannot leave Vermont without approval from the state legislature—approval it does not seem inclined to give. 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.”

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. 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. Dukes County and Nantucket objected, insisting that they had each been promised a representative when they joined the Bay State back in the 1600s.

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

94 Id.
96 See supra note 15.
97 Id.
98 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).
99 Id. See Seccombe, supra note 15.
100 See Seccombe, supra note 15.
101 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.” 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. 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. 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. The result is that the strains of “Rocky

103 See Seccombe, 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.”

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. 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. 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.” A quick glance at a map reveals many puzzling examples—the “notch” in West Virginia (a fertile area taken from the recently seceded Virginia); 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.
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.


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


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.” 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.” 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. 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 Utah—were unenthusiastic about combining with their poorer cousins across the state border.

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. 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.


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).

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). 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-affected 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. But while it lost the ducks, Nebraska gained an island; St. Helen Island now finds itself on the Nebraska side of the river. 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.

Kaskaskia, the first capital of Illinois, provides an even more extraordinary example. 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).
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. 1528 (1989).
130 The capital moved to Springfield in the 1870s 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

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.
136 Id.
sovereign territory, Congress effectively purchased Michigan’s consent to Ohio’s claim by promising it statehood and the Upper Peninsula.\(^\text{137}\)

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,\(^\text{138}\) but—as it has on other occasions\(^\text{139}\)—encouraged the states to resolve their disputes through negotiation.\(^\text{140}\) 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.”\(^\text{141}\)

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.\(^\text{142}\) As explained in more detail below,\(^\text{143}\) 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.\(^\text{144}\) Michael Greve notes that “[p]rior to 1921, thirty-six compacts between states were

---

\(^\text{137}\) 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).


\(^\text{139}\) 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)).

\(^\text{140}\) 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).

\(^\text{141}\) 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.”).

\(^\text{142}\) U.S. CONST. art. I, § 10, cl. 3.

\(^\text{143}\) See infra subsection II.A.1.b.

\(^\text{144}\) 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.”).

In fact, the only compact that did not settle a “narrow boundary dispute” involved a huge one: the division of Virginia and West Virginia.\footnote{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).} Compacts have grown in number over the past century, but as a proportional matter, fewer of them focus on borders.\footnote{David E. Engdahl, Characterization of Interstate Arrangements: When Is a Compact Not a Compact?, 64 Mich. L. Rev. 63, 65 (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.”).} 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%.\footnote{Greve, supra note 145, at 288 (counting the number of compacts now in effect that cover a broad range of issues).}

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.”\footnote{See Welch & Clark, supra note 11, at 478 tbl.1; see also Patricia S. Florestano, Past and Present Utilisation 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.”).} 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.”\footnote{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).} 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...
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. 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.” The Louisiana Purchase, the Adams–Onís Treaty, the Alaska Purchase, the Gadsden Purchase, and other lesser-known acquisitions 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

---

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).
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. But they have also been purposefully moved by interstate compacts, from the colonial era up through modern times.

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,” and still holds title to roughly one-third of the nation’s land mass. States also own public property. Some of these holdings were acquired from the federal government upon admission to the Union or by legislation thereafter. And some of that property may be leased, sold, or otherwise conveyed to private parties—for the purposes of grazing land or water, 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 1922).
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 18-19 (2d ed. 2009) (describing the federal government’s disposition of its lands).
165 See id. at 105 (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).
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. Nearly every public function—trash collection, business licensing, zoning, and even 911 dispatching—is performed by private actors. 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.” If the Jacobs Engineering Group can be paid to provide these services, why not hire Atlanta instead? 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
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. But as the discussion demonstrates, none of these constitutional rules flatly prohibits interstate border sales. 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. As then-Professor Antonin Scalia put it in a 1970 article, “Our present society contains no institution, with the possible exception of the federal
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.\footnote{Scalia, supra note 118, at 882.}

Facing interstate competition, an enormous national debt, and major border disputes,\footnote{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.”).} states were willing and sometimes eager to sell their land. They ceded massive amounts of sovereign territory to the Confederation government,\footnote{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.”).} 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.”\footnote{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.”).} The Articles of Confederation proved insufficient to coordinate the states’ changing borders,\footnote{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 . . . .”).} 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.”\footnote{Erbsen, supra note 30, at 173 n.14.} These tools included some notable changes, such as elimination of the Articles’ provision regarding Canada’s accession to the Union.\footnote{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 (1953) (discussing the reasoning and historical context behind Article XI in the Articles of Confederation and the founders’ initial concern with Canada).}
sovereign territory, 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.”

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. 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, the acquisition of which raised serious constitutional objections at the time but whose legality is generally accepted by now.

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. Instead, Article III gave the Supreme Court jurisdiction over “Controversies between two or more States,” language that has been interpreted to cover border disputes. 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.


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

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,” 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.” These provisions have received relatively little scholarly attention, 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 limitation—and must get congressional consent before entering into “agreements or compacts.” 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).
192 Frankfurter & Landis, supra note 26, at 646.
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.
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,

---

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.
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 239 (quoted in Hollis, supra note 211, at 774).
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 commentators.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 (“Boundary ‘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. Fleeger’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.’”\textsuperscript{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.\textsuperscript{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,\textsuperscript{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

\textsuperscript{222} Greve, supra note 145, at 314 n.128.

\textsuperscript{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).

\textsuperscript{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 might interfere with federal authority.232

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

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. 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.” 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.

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. 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. The Court there concluded that “different considerations may underlie the question as to the validity of these two kinds of compacts or agreements,” and that only the former raise the kind of considerations requiring congressional consent.

But that does not mean that all sales of sovereign territory would amount to compacts requiring congressional consent. In New Hampshire v. Maine, 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)).
ancient boundary” is not a compact requiring congressional approval, but that an agreement involving “alienation of territory” is.\textsuperscript{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 \textit{Virginia v. Tennessee},\textsuperscript{243} even while recognizing its manifest weaknesses,\textsuperscript{244} which suggests that it would provide the governing rule for interstate border sales. And even if, per \textit{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,\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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 \textit{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

\begin{itemize}
\item \textsuperscript{242} \textit{Id. at} 369-70 (quoting \textit{Virginia v. Tennessee}, 148 U.S. 503, 522 (1893)).
\item \textsuperscript{243} \textit{See}, e.g., \textit{U.S. Steel Corp. v. Multistate Tax Comm’n}, 434 U.S. 452, 472 (1978) (“[T]he test is whether the Compact enhances state power \textit{quoad} the National Government.”).
\item \textsuperscript{244} \textit{See id. at} 466-67 (noting that the rule of \textit{Virginia v. Tennessee} appears to be dictum and that the case presents a misreading of Justice Story’s \textit{Commentaries}).
\item \textsuperscript{245} \textit{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.”).
\item \textsuperscript{246} \textit{Hollis, supra note} 211, at 766; \textit{see also} \textit{Engdahl, supra note} 147, at 69 (“[I]n every case since \textit{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.”); \textit{Greve, supra note} 145, at 289 (“[I]t appears that no court has ever voided a state agreement for failure to obtain congressional consent.”).
\item \textsuperscript{247} \textit{Cuyler v. Adams}, 449 U.S. 433, 441 (1981); \textit{see also} \textit{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).
\end{itemize}
supremacy, which might trigger the Compact Clause and perhaps even a denial of congressional consent.\textsuperscript{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,\textsuperscript{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.\textsuperscript{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.\textsuperscript{251} It also protects “the people”\textsuperscript{252} and other states, the latter being arguably the very entities that the Compact Clause was meant to protect. Forty years before \textit{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.”\textsuperscript{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.\textsuperscript{254}

\textsuperscript{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”).

\textsuperscript{249} See \textit{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, \textit{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.”).

\textsuperscript{250} CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 11 (1969).


\textsuperscript{253} Florida v. Georgia, 58 U.S. (17 How.) 478, 494 (1855).

\textsuperscript{254} See LYNN A. BAKER & ERNEST A. YOUNG, FEDERALISM AND THE DOUBLE STANDARD OF JUDICIAL REVIEW, 31 DUKE L.J. 75, 117-21 (2000) (discussing “horizontal aggrandizement”); Metzger, \textit{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. 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.”

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.” 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. 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.

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 instrumentalties of interstate commerce, as well as activities substantially affecting such commerce. 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.”).
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,\textsuperscript{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.\textsuperscript{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,\textsuperscript{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, instrumentalties, 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.\textsuperscript{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.\textsuperscript{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.

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

\textsuperscript{262} Lopez, 514 U.S. at 558-59.

\textsuperscript{263} See supra notes 93-96 and accompanying text.

\textsuperscript{264} United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338-39 (2007).

\textsuperscript{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.  

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.

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[.]” 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.” 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 Riser 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.\textsuperscript{270}

But this does not mean that no Guarantee Clause claim could ever succeed. As Justice O’Connor noted in \textit{New York v. United States}, “[m]ore recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiab\textsuperscript{le} political questions.”\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{274} Officials in newly acquired territory would therefore be unable to serve as political officials in their new state,\textsuperscript{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.\textsuperscript{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

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

\textsuperscript{271} 505 U.S. 144, 185 (1992).

\textsuperscript{272} \textit{Largest v. Supreme Judicial Court}, 373 F.3d 219, 227 (1st Cir. 2004).

\textsuperscript{273} Id. (quoting \textit{Webster’s Third New International Dictionary} 1928 (1993)); see also \textit{Risser}, 930 F.2d at 553 (“James Madison, in \textit{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.’”).

\textsuperscript{274} See, e.g., 2012 \textit{Elected Officials Qualifications}, MO. SEC’Y OF STATE, http://www.sos.mo.gov/elections/electqualification.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).

\textsuperscript{275} A similar objection was raised regarding Texas’s annexation as a state. See \textit{Maltz}, \textit{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).

\textsuperscript{276} In \textit{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, 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. The Supreme Court has, for example, treated the rule of one person, one vote as a fundamental constitutional requirement. The reallocation of voters from one state to another would raise novel questions for that familiar principle. 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, far more than the state average of 710,000. 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.” The Supreme Court has found the Clause applicable to municipal dissolution and interstate compacts, so it would presumably be relevant in the case of a border sale

---

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.”).
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.\footnote{Cf. Briauff, 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”).} 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.\footnote{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.} 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.\footnote{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.} 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,\footnote{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.”).} and the Supreme Court has held that such property is created by state law, not the Constitution itself.\footnote{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.”).} 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.\footnote{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).} His business flourishes. States $A$ and $B$ then enter into a
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.\textsuperscript{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.\textsuperscript{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 \textit{Kelo v. City of New London}, that would probably not be an insurmountable hurdle.\textsuperscript{295} If transferring property from one private party to another for the sake of the public fisc is a "public use,"\textsuperscript{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.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{293}] See \textit{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, \textit{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).
\item[\textsuperscript{294}] U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").
\item[\textsuperscript{295}] 545 U.S. 469 (2005) (upholding use of takings power to transfer of property from one private party to another).
\item[\textsuperscript{296}] See id. at 483-84.
\end{itemize}
\end{footnotesize}
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”).
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. 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. For example, the very possibility of selling sovereign territory could—like the possibility of secession—have destabilizing effects. 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,” which can in turn discourage political engagement and “[t]rue political and cultural pluralism.”

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. 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) (“Uti 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).


308 BRUFF, 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,” which has become “the central principle of modern acquisition” of territory. The basic idea of self-determination is that groups have some right, albeit a limited one, to determine their own sovereignty and political identity. 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.

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

---


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).


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.

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.”

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. 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.

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, particularly those that are geographically concentrated. 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).
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. 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 Getken, 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.\textsuperscript{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 \textit{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 \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{326} This fourth problem could also exist along many different dimensions.

\textsuperscript{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.

\textsuperscript{323} See \textsc{Jerry L. Mashaw, Greed, Chaos, and Governance} 25-29 (1997) (discussing the debate on public choice theory’s effect on political practitioners and scholars).

\textsuperscript{324} See \textit{infra} subsection II.C.1 (discussing consent-based arguments for inalienability).

\textsuperscript{325} Subsection II.B.5 suggests the same.

\textsuperscript{326} See Frankfurter \& Landis, \textit{supra} note 26, at 695 (“\textsc{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 over-representation 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.”).

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. 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. 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.”

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 . . . .” 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.

---


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, but as a constitutional matter, it seems that states would be entitled to substantial deference in deciding that question for themselves. 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." 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." 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. 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. 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) ("Some 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.\textsuperscript{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.\textsuperscript{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,\textsuperscript{348} or own them but cannot sell them. Or perhaps we simply do not want to “invite[] markets to fill the social universe”\textsuperscript{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.\textsuperscript{350} “That does not mean, however, that they are market


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

\textsuperscript{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.”).

\textsuperscript{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”).

\textsuperscript{350} See Rose-Ackerman, supra note 41, at 931 (discussing the theoretical justifiability of inalienability).
alienable—that is, transferable in exchange for money. 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.” 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 markets—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. 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. 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.”

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.” 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).

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,” 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.”

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.” 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.” 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.

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

---

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.
for sovereign territory today. 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.” 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.” 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.” 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. 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.


366 SANDEL, supra note 37, at 113.

kinds of factors—social justice, for example—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. 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. Inasmuch as powers of governance are held in trust for the people, they are just as inalienable as property held in such a trust.

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, 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, nor pay another person to perform military service or jury duty in his stead, 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

---


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).


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.”).

that preclude loss as well as transfer.” 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. 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.

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. 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.” 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).
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 decommodified.” 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)).
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 . . . .”).
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.”).