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Article

Constitutional Spaces

Allan Erbsen[†]

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Scholarship about the Constitution’s meaning generally focuses on four core features of the document: the rights that it creates, the obligations that it imposes, the institutions that it empowers, and the relationships that it structures. These concepts are clearly important. But understanding how these concepts translate into doctrine requires considering an aspect of

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the Constitution that scholars have not systemically analyzed. This overlooked dimension is the Constitution's identification, definition, and integration of the physical spaces in which it applies. Spatial precision is essential because knowing *how* the Constitution addresses a particular problem often requires knowing *where* the problem arises. The text remains the same, but its significance varies as one travels between, for example, Maryland, the District of Columbia, Puerto Rico, Guantánamo Bay, and Afghanistan. Yet despite the importance and pervasiveness of spatial references in the Constitution, commentators have not analyzed these references collectively.

This Article fills that gap in the literature by considering each of the fourteen spaces that the Constitution identifies, as well as several that it overlooks, to reveal patterns in the text's approach to delineating the physical domain in which it applies. The analysis shows that many discrete problems on which scholars have focused—such as the rights of U.S. military detainees abroad and the extraterritorial reach of state law—are manifestations of a broader phenomenon that exists because of indeterminacy in the Constitution's typology of spaces. Considering these spaces together highlights this indeterminacy, provides new perspectives on commonly discussed problems, and exposes additional puzzles that have escaped scrutiny. The Article thus provides a foundation for future scholarship addressing a wide range of constitutional questions linked to the boundaries and status of discrete spaces.

The importance of spatial distinctions emerges from three of the Constitution's signature features: its bifurcation of sovereignty, its recognition of fifty semi-autonomous subnational units, and its enumeration of individual rights. The fragmentation of regulatory authority raises vexing allocation problems: the Constitution must allocate power vertically between the federal and state governments, and horizontally among the states.¹ Compounding these problems is the fact that the allocation of power is sometimes exclusive and sometimes concurrent. A conclusion that one entity (such as Congress or a state) possesses a given power does not foreclose further inquiry into whether the same power resides in another entity, and if so

1. See Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 504–05 (2008) (explaining how vertical federalism and horizontal federalism problems overlap).

how those overlapping powers operate in tandem.² The Constitution's enumeration of rights and the historical importance of territorial limits on institutional authority add further complexity when thinking about the text's spatial distinctions. Each constitutionally defined space has at least one corresponding governing entity and governed community that may have more or less power, or more or fewer rights, when acting within or beyond a particular place. In essence, most people are citizens in some places and aliens in others, and governments are sovereign in some places and foreign in others. The permissibility of particular interactions between people and governments can therefore vary depending on the relationship between them, the territorial scope of the government's authority, and the territorial reach of individual rights.³ Fragmented regulatory authority and enumerated rights thus combine to create a central question of constitutional law: Which unit(s) of government, if any, may exercise binding power with respect to particular matters?

The Constitution takes three distinct approaches to answering the "which unit" question by focusing, variously, on *who* is acting, *what* they are doing, and *where* they are doing it.⁴ For example, if the relevant actor is a foreign ambassador, federal courts possess adjudicative authority that might otherwise lie in state courts.⁵ If the actor is instead a private citizen engaging in interstate commerce, Congress possesses legislative authority that it might otherwise lack.⁶ And if the actor's noncommercial conduct occurs in a national forest, federal power may exist to a greater degree than if the conduct occurred on land belonging to a state.⁷

Most scholarship about the Constitution's allocation of regulatory authority focuses on the *who* and *what* aspects by considering whether the federal or state governments should

2. See generally Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051 (2010) (analyzing evolving understandings of when powers are or should be exclusive or concurrent).

3. See *infra* notes 33–34 (discussing how law shapes and is shaped by notions of territory).

4. A fourth question—*when* conduct occurred—is relevant when constitutional amendments or nonretroactive changes in controlling precedent draw a temporal line between otherwise indistinguishable acts.

5. See U.S. CONST. art. III, § 2.

6. See *id.* art. I, § 8, cl. 3.

7. See *infra* Part I.G.

have authority to regulate various kinds of actors or activities.⁸ But the *where* question merits closer scrutiny because of the Constitution's haphazard approach to defining physical spaces and assigning significance to those spaces.

The key to understanding the *where* question in constitutional law is to recognize that spaces 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. These inside/outside distinctions animate a broad range of constitutional doctrines. Judges must constantly consider what must and cannot happen in certain spaces, who decides what may happen in these spaces, and whether the force of particular powers and rights varies with the physical context of their assertion or the affiliation of actors and the people they affect. Opinions thus emphasize whether conduct happened *in* a particular space, whether a regulator is *of* a particular space, or whether an actor is *from* a particular space. Of course, the empirical prominence of spatial boundaries in constitutional analysis does not mean that analysis based on spatial distinctions is normatively sound. The extent to which lines on a map should determine government prerogatives and individual entitlements is debatable.⁹ But for better or worse, "the People" who "ordain[ed] and establish[ed]" the Constitution organized themselves within overlapping spaces marked by physical borders that play at least some role in structuring relationships between and among political units and their constituencies.¹⁰ This Article explores that role by considering multiple permutations of the "where" question in constitutional law.

Thinking about how to apply the *where* component of constitutional law (as opposed to the *who* and *what* components)

8. For examples of articles discussing aspects of the "where" question, see *infra* notes 33–34. One can ask similar who/what/when questions from a different perspective. Instead of focusing on how the Constitution applies to private conduct (who is acting, what are they doing, where are they doing it, and when did it happen), one can focus on how the Constitution constrains government officials (who is the official that is violating the Constitution, how did the violation occur, and when did it occur). For an example of this latter approach, see Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1211 (2010) ("[J]udicial review should begin by asking *who has violated the Constitution?*" and then consider "*when was the Constitution violated?*," because "the answer to *when* follows inexorably from the answer to *who*").

9. See *infra* notes 33–34.

10. U.S. CONST. pmbl.

requires answering two questions. First, we need to know how a particular location in physical space maps onto constitutional space. In other words, what is the formal constitutional status of the places where the conduct occurs, or an actor or object is located? For example, the place might be within a state, a territory, the high seas, or a foreign country. Second, once we know what kind of place we are dealing with, we need to know what consequences (if any) flow from that categorization. We therefore must consider which entities possess power to regulate the space, whether the space's unique identity limits that power, whether the power applies uniformly to all people and entities within the space, and whether any mechanisms exist for resolving competing assertions of concurrent authority.¹¹ The initial source of answers to both the formal categorization and functional analytical questions is the Constitution, which supplies the basic rules for allocating power among the entities that it creates (the national government), that created it (the people), and that preceded it (the states). Yet the Constitution does not explicitly answer many salient questions about the contours and characteristics of constitutional space.¹² This indeterminacy helps explain why disputes about the scope and allocation of institutional authority have proven so vexing for over 230 years.¹³

11. I have framed the questions in terms of government power over places rather than individual rights within places to highlight the importance of federalism. However, one could also reframe the issue as implicating the extent to which a person's presence in a particular space confers a right that might not exist if the person were located elsewhere. *Cf.* Erbsen, *supra* note 1, at 562–66 (noting a distinction between limits on a government's capacity to regulate and rights constraining that capacity).

12. This Article's emphasis on the Constitution's text—both on what the Constitution includes in numerous scattered clauses and what it omits—illuminates connections between seemingly distinct doctrinal questions related to regulation of physical spaces. The insights from such “structural analysis” can support further inquiry and normative conclusions using a wide range of interpretative methods. Erbsen, *supra* note 1, at 530. In a prior article, I discussed the value of “mapping the terrain” by reading the Constitution “systemically” through a particular prism as a precursor to “further scholarship incorporating originalist, textualist, or normative methods in the context of specific fact patterns and doctrines,” *id.*, although I noted reasons to be cautious when relying on the Constitution's structure as a source of meaning, *see id.* at 530 nn.122–23.

13. Thinking about gaps in the Constitution fits within a line of scholarship analyzing the consequences of placing extensive weight on a short document produced over only a few months by a small group that could not anticipate and provide for all contingencies. *See generally* BRUCE A. ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS* (2005); SANFORD LEVINSON, *OUR*

The Constitution creates the foundation for drawing a map of the domain that it governs by creating components (such as states, districts, and territories) that each generation of leaders could add or rearrange as the nation evolved.¹⁴ Unfortunately, the Framers did not fully define these components. Labels on a map therefore do not communicate complete information about the legal significance of the places that they represent. Rather than thinking through the “where” component of federalism holistically, the Framers addressed the issue in a piecemeal fashion throughout the Constitution. The document lacks a “Geography Clause” that systematically defines each kind of legally relevant place subject to regulation by actors in the federal system, the relationship of each place to other places, and the legal significance of boundaries between these places. Instead, the Constitution introduced and elaborated upon different kinds of places as the need arose based on the context of the moment.

The drafters’ ad hoc approach to the nation’s constitutive DNA created four problems that plague modern attempts to construct a coherent account of how the different pieces of the constitutional order fit together. First, the Constitution identifies some places by name without fully defining their physical scope, leading to confusion about whether a particular point in space is within or beyond the place’s borders. Second, some places have boundaries that are easily determined, but those boundaries have an ambiguous significance that leads to confusion about why the existence of a particular place matters and about how it should be regulated. Third, many constitutionally defined places physically overlap, yet the Constitution often does not explain how to handle the conflicts that inevitably arise when the same space exists within multiple regulatory regimes. Fourth, the Constitution does not mention some places at all, despite the fact that they clearly exist in physical space

UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006); Symposium, *Constitutional Stupidities*, 12 CONST. COMMENT. 139 (1995).

14. The Framers themselves could not draw a permanent map because fixing boundaries for and within the new nation would have been impractical: the Framers could not have known which states would be part of the initial union (up to four of the thirteen states could have refused to join), see U.S. CONST. art. VII, could not have anticipated the borders of federal units such as districts, and would have faced cartographical obsolescence due to expansion of the Union through the addition of new states and territories. The Framers could therefore go no further than defining the basic components for future mapmakers to assemble over time.

and pose difficult legal problems that would benefit from a constitutional solution. The Constitution thus creates a typology of spaces that only partially addresses the questions intrinsic to the “where” component of federalism while leaving many pivotal questions unanswered.

This Article explores the Constitution’s typology of spaces in two steps. Part I analyzes each of the fourteen spaces that the Constitution specifically enumerates. The goal is not to definitively explain what each relevant clause means, but rather to expose ambiguity about the scope and significance of each space and to illustrate how similar ambiguities reappear in multiple contexts. Reading the Constitution through this spatial prism highlights connections between clauses that are rarely analyzed together, and that scholars often overlook entirely. Part II then considers spaces that the Constitution does not expressly address, such as tribal lands and what I call “Adjacent Spaces” that are above, below, beside, or between the spaces that the Constitution enumerates. Each of these spaces presents questions about the role of federal and state authority that have confounded courts in part because of the Constitution’s silence.

Parts I and II illustrate four basic points on which future scholarship can build. First, although the Constitution creates a typology of spaces that relies on formal categories, the categories often have little utility in resolving specific questions. The text’s description of the physical contours of spaces and the legal significance of their borders is too imprecise to permit a jurisprudence of labels that converts lines on a map into “bright line” rules of decision. Determining where in physical space a problem arises is therefore a necessary but insufficient prerequisite to determining which government entities can address the problem and how they may respond. Second, constitutionally defined places routinely overlap, such that a point in physical space can map onto several points in constitutional space. Drawing conclusions about how the Constitution regulates particular spaces in particular contexts therefore requires developing rules for allocating concurrent authority and resolving competing claims. Third, even when spaces do not physically overlap, events in one space routinely have consequences in others, residents of a space routinely act in others, and agents of an entity that controls a particular space often operate in other spaces. These spillovers raise questions about when entities (such as states, the United States, and tribes) can regulate

beyond borders that would normally cabin their jurisdiction. The parameters of a constitutionally defined place are thus not necessarily coextensive with the reach of an entity governing that place. Finally, the same questions tend to recur in multiple spatial contexts. For example, who decides the boundary of a space and by what standards, when can federal courts create common law governing a space, and when does the text's explicit enumeration of a space's attributes imply by negative implication the absence of other attributes? Exposing how these questions arise in multiple contexts reveals subtle dimensions of problems that can go unnoticed when viewed in isolation. The pervasive and overlooked "where" question in constitutional law therefore merits systemic scrutiny.

I. THE LAND OF THE LAW: THE CONSTITUTION'S AD HOC TYPOLOGY OF PHYSICAL SPACES

This Part discusses the constitutional clauses that address the physical spaces in which the Constitution applies. The fourteen spatial categories that the Constitution creates are: "the Land," the "United States," "States," "Territory," "territory," "Places," "places," "Property," "possessions," a "District," the "Seat," "districts," the "high Seas," and "admiralty and maritime Jurisdiction."¹⁵ These constitutional spaces are not the only spaces in the federal system. For example, federal statutes define judicial "circuits,"¹⁶ administrative "regions,"¹⁷ foreign trade "zones,"¹⁸ enterprise "communities,"¹⁹ historic "sites,"²⁰

15. The Constitution also refers to other tangible spaces with either fixed or transient locations, such as "houses," U.S. CONST. amends. III, IV, and "ports," "ships," and "vessels," *id.* art. I, §§ 9, 10. These spaces are important in the contexts in which they appear and generate related jurisprudence. *See, e.g.,* *United States v. Dunn*, 480 U.S. 294, 296 (1987) (distinguishing a "house" from the "curtilage" surrounding it). "Houses" are particularly interesting because their physical borders create a metaphorical domestic sphere that distorts the operation of otherwise applicable legal norms. *See* DAVID DELANEY, TERRITORY 7–8 (2005) (discussing rules governing privacy and self-defense as examples of how legal regimes attach significance to territorial boundaries surrounding homes). *See generally* JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY (2009) (analyzing the evolution of legal rules governing conduct in homes). Nevertheless, these tangible spaces are not analogous to the spaces that I discuss. My focus is on the political dimensions of space within a federal system—i.e., how the Constitution allocates government authority over various physical expanses—rather than on the status of various structures within that space.

16. 28 U.S.C. § 41 (2006).

17. 6 U.S.C. § 317 (2006) (creating homeland security "region[s]").

18. 19 U.S.C. § 81b (2006).

and the “special maritime and territorial jurisdiction of the United States,”²¹ which extends both extraterritorially and extraterrestrially.²² State statutes similarly define various municipal²³ and “sublocal”²⁴ divisions. Likewise, courts have defined spaces to aid in applying constitutional provisions that lack a clear physical scope, including “public forums” under the First Amendment²⁵ and “open fields” under the Fourth Amendment.²⁶ Even the shape of spaces normally under discretionary state control—such as voting districts,²⁷ school districts,²⁸ and cities²⁹—can have constitutional significance if their boundaries meander based on suspicious criteria. Although these statutory and common law spaces are interesting, their existence and contours are ephemeral compared to the spaces that comprise the Constitution’s relatively immutable

19. 26 U.S.C. § 1391(b)(1) (2006).

20. 49 U.S.C. § 303 (2006).

21. 18 U.S.C. § 7 (2006).

22. *See, e.g., id.* § 6 (encompassing vehicles in “Outer Space”); *id.* § 9(B) (encompassing privately owned land in foreign countries “used” in connection with diplomatic missions).

23. Examples include towns, villages, parishes, cities, boroughs, and counties, which might be further fragmented or sorted into various administrative units, such as school and irrigation districts. *See generally* 1 EUGENE MCQUILLIN, *MUNICIPAL CORPORATIONS* ch. 2 (3d ed. 2010).

24. Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 508 (1997) (discussing Tax Increment Finance Districts, Business Improvement Districts, Special Zoning Districts, and Enterprise Zones).

25. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

26. *Oliver v. United States*, 466 U.S. 170, 173 (1984) (“The ‘open fields’ doctrine . . . permits police officers to enter and search a field without a warrant.”).

27. *See Miller v. Johnson*, 515 U.S. 900, 913 (1995) (“Shape [of a voting district] is relevant not because bizarreness is a necessary element of the constitutional wrong or a threshold requirement of proof, but because it may be persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines.”); *Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (noting the states’ interest in drawing voting districts that are “compact” and “contiguous”).

28. *See Haney v. Cnty. Bd. of Educ.*, 410 F.2d 920, 924–25 (8th Cir. 1969) (noting that school district boundaries are “lines of convenience” that cannot “deny federal rights,” and that the Constitution prohibits racial “gerrymandering” and reliance on “geographic structuring” tainted by prior segregation regimes).

29. *See Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (holding that the Constitution barred the Alabama legislature from redrawing a city’s borders into “a strangely irregular twenty-eight-sided figure” that exiled “all save four or five of its 400 Negro voters while not removing a single white voter”).

infrastructure. This Article therefore focuses solely on constitutionally defined spaces.

The goal of this section is to highlight the utility of concurrently considering all the spaces that the Constitution mentions. The discussion of each space is therefore not intended to be comprehensive—nor could it be, given that there are fourteen spaces to cover in a single Article. Instead, this section highlights salient features and ambiguities of each space and notes some of the interesting and overlapping issues that each relevant clause raises. This analysis suggests the existence of patterns that can add new dimensions to evolving scholarship about the many areas of constitutional doctrine linked to the clauses discussed below.

Generating insights about constitutional law by adopting a spatial perspective is consistent with and reinforces observations in the emerging field of law and geography. Academic geographers have developed a rich methodology and vocabulary for analyzing the public and private ordering of physical space.³⁰ Scholarship considers, for example, the cultural, political, economic, and legal regimes that animate, divide, and transcend distinct kinds of spaces and the communities and ecosystems within them.³¹ Insights from this field help explain the

30. “Geography studies the way in which place, space, and scale interact over time.” Hari M. Osofsky, *The Geography of Climate Change Litigation Part II: Narratives of Massachusetts v. EPA*, 8 CHI. J. INT’L L. 573, 583–84 (2008). These terms have a nuanced and contested meaning within the field. *See id.* at 584–86. A simpler lexicon suffices for my purpose of highlighting overlooked spatial themes in the Constitution’s text. I use “space” in the colloquial sense of “a physical expanse” and recognize that law defines certain spaces in a manner that organizes them into “places.” However, the terms are intended merely to be helpful and do not have any formal significance in my analysis. I do not directly engage the concept of scale—essentially, the level of abstraction with which one considers nested spaces and places. The Constitution itself provides scale in the clauses that create spatial distinctions (e.g., enclaves nested within states nested within the United States). This ordering raises a question for future scholarship about whether ostensibly discrete types of constitutionally defined spaces warrant distinct legal treatment, or are merely smaller or larger variations of an archetype operating at multiple scales. *Cf.* Dennis R. Judd, *The Case of the Missing Scales: A Commentary on Cox*, 17 POL. GEOGRAPHY 29, 30 (1998) (contending that analysis of scale must account for missing levels of government that *could* exist, and whose absence distorts the operation of the levels that remain).

31. *See, e.g.*, NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER (1994); NEIL BRENNER, NEW STATE SPACES: URBAN GOVERNANCE AND THE RESCALING OF STATEHOOD (2004); GEOGRAPHY’S INNER WORLDS: PERVASIVE THEMES IN CONTEMPORARY AMERICAN GEOGRAPHY (Ronald F. Abler et al. eds., 1992); PETER JACKSON, MAPS OF MEANING: AN INTRODUCTION TO

persistence, utility, and dysfunction of spatial categories and suggest creative responses to recurring questions of public policy.³² Scholars have extended these insights to constitutional law by considering how uncritical assumptions about the significance of territorial borders and national affiliation influence legal fictions such as jurisdiction and citizenship.³³ This analy-

CULTURAL GEOGRAPHY (1989); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989).

32. See, e.g., DAVID DELANEY, RACE, PLACE, AND THE LAW 1836–1948 (1998) (analyzing race relations in the context of political and social ordering of physical space); LAW AND GEOGRAPHY (Jane Holder & Carolyn Harrison eds., 2002) (collecting essays on spatial dimensions of recurring questions affecting disparate fields such as antitrust law, environmental law, and family law); Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 933–34 (2010) (analyzing “spatial inequality” that arises when city boundary lines are drawn to create adjacent “unincorporated urban areas” that lack access to essential services); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293, 1318–22 (1996) (considering how the flow of information across national borders challenges the nexus between a government’s territorial sovereignty and its definition and protection of intellectual property); Daniel A. Farber, *Stretching the Margins: The Geographic Nexus in Environmental Law*, 48 STAN. L. REV. 1247, 1249–57 (1996) (examining how the connection between a potential plaintiff and a place where environmental harm occurs should affect the plaintiff’s standing to sue about the harm); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844–45 (1994) (discussing the relationship between segregation, “racially identified space,” and “political geography—the position and function of jurisdictional and quasi-jurisdictional boundaries”); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201–06 (1996) (exploring how otherwise applicable legal norms can go unenforced in spaces that resist the extension of government authority or individual entitlements either by design or systemic quirk); Myron Orfield & Thomas F. Luce, Jr., *Governing American Metropolitan Areas: Spatial Policy and Regional Governance*, in MEGAREGIONS: PLANNING FOR GLOBAL COMPETITIVENESS 250 (Catherine L. Ross ed., 2009) (discussing challenges of governing regions encompassing numerous spaces defined at different scales, such as distinct local governments within adjacent, yet competing, states); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789, 1802 (2005) (considering the “web of place-based relationships” underlying climate change litigation); Robert R.M. Verchick, *Critical Space Theory: Keeping Local Geography in American and European Environmental Law*, 73 TUL. L. REV. 739, 742–50 (1999) (analyzing how critical theory can inform solutions to problems of transborder environmental management). See generally DELANEY, *supra* note 15, at 4–5 (noting that “innumerable complex territorial configurations and assemblages . . . shape human social life, relationships, and interactions,” including “micro-territories of everyday life” and “macro-territories of global politics”).

33. See LAUREN BENTON, A SEARCH FOR SOVEREIGNTY: LAW AND GEOGRAPHY IN EUROPEAN EMPIRES 1400–1900 (2010) (exploring the European antecedents of territorial concepts of sovereignty that influence modern U.S. law); Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV.

sis of how law and space intersect provides a useful lens for evaluating specific doctrines, such as rules governing immigration, the extraterritorial application of U.S. law, and the property rights of indigenous tribes.³⁴ The approach in this Article adds a new dimension to the literature by examining broader questions about how the Constitution defines and fragments the physical domain where it operates, how the many types of constitutional spaces overlap, how each space raises similar questions about the allocation of regulatory power and scope of entitlements, and how considering these spaces collectively can potentially inform our understanding of each.

A. THE “LAND”

A threshold question when thinking about how the Constitution regulates particular matters is “where does the Constitution apply?” We know that the Constitution creates “supreme Law,”³⁵ but it is not supreme everywhere on Earth. For example, it is not the supreme law of the various islands comprising

311, 424 (2002) (contending that “jurisdictional rules reflect and construct social conceptions of space”); Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 636 (2009) (exploring how “claims of territoriality and extraterritoriality resonate differently” in distinct legal systems that view jurisdiction through “different lenses”); Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 851 (1999) (“The logic of government is the logic of jurisdiction—question it and all that is solid melts into air.”); Peter S. Onuf, *Federalism, Republicanism, and the Origins of American Sectionalism*, in ALL OVER THE MAP: RETHINKING AMERICAN REGIONS 11 (Edward L. Ayers et al. eds., 1996) (discussing the role of sectional rivalries in the design and operation of the U.S. federal system); Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 518 (2009) (analyzing “how the combination of laws, customs, and physical borders creates and shapes . . . ‘Geographies of Displacement,’ which in turn affect the exercise of fundamental personal liberties”).

34. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996) (examining how the Constitution applies to citizens and aliens within and outside states and territories); KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009) (analyzing the “extraterritoriality” and “intraterritoriality” of constitutional provisions that have different effects within and beyond U.S. territory and between different types of U.S. territory); Hari M. Osofsky, *The Geography of Justice Wormholes: Dilemmas from Property and Criminal Law*, 53 VILL. L. REV. 117 (2008) (discussing federal power to detain enemy combatants within the United States and to expropriate land belonging to Native Americans); Kermit Roosevelt III, *Guantánamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017, 2060 (2005) (critiquing the “mechanical” equation of “sovereignty” with “geography” in “territorialist” theories of the Constitution’s scope).

35. U.S. CONST. art. VI, cl. 2.

the United Kingdom. If it were, the Constitution would have been the culmination of a coup rather than a war of independence.³⁶ Given that the Constitution is not supreme everywhere, it must be supreme only somewhere, and as readers we would benefit from knowing where that somewhere is. For example, does it govern only within the borders of the states comprising the “United States,” or also in possessions beyond those borders (such as a naval base in Cuba), or anywhere that an agent or instrumentality of the United States happens to be? And if the Constitution (or a portion of it) does apply, does it apply differently in different types of places?

The Constitution appears to explicitly tell us where it applies, albeit unhelpfully and misleadingly. According to Article VI, the Constitution is “supreme” only with respect to “the Land.”³⁷ The use of the definite article “the” and the capital “L” seems to imply that “the Land” is a specific place and that the Constitution is not merely a treatise on real estate—the “supreme law of land.”³⁸ This reading suggests that if an event occurs at a physical point located within “the Land” then the Constitution applies, and if the event occurs outside “the Land” then the Constitution is irrelevant. All we would need to know to determine whether the Constitution applies is how far “the Land” extends (including whether “Land” is a term of art that also encompasses water³⁹ and airspace⁴⁰). But it turns out that this binary inside/outside interpretation of “the Land” oversimplifies the complex problem of territoriality in constitutional law and that the real meaning of “the Land” is elusive and unilluminating.

36. The Constitution acknowledges its limited geographic scope by recognizing the existence of “foreign” entities that are presumably beyond its control. *Id.* art. I, § 8, cls. 3, 5; *id.* § 9, cl. 8; *id.* § 10, cl. 3; *id.* art. III, § 2.

37. *Id.* art. VI, cl. 2.

38. The capitalization of the “L” on its own would not be dispositive because the Constitution uses “Land” to refer to private parcels, *id.* art. III, § 2, and generic physical expanses, *id.* art. I, § 8, cl. 11 (referring to captures on “Land”). *But cf.* *id.* art. I, § 8, cl. 14 (referring to military “land” forces). For a discussion of the important and sometimes inscrutable role of grammar and punctuation in constitutional interpretation, see Vasani Kesavan & Michael Stokes Paulsen, *Is West Virginia Unconstitutional?*, 90 CALIF. L. REV. 291, 334–41 (2002) (explaining the importance of a semicolon in Article IV).

39. The text is inconsistent about how it uses “Land” in the context of water. The Constitution presumably must be the supreme law of Lake Tahoe even though that portion of “the Land” is covered by water, yet the Constitution elsewhere expressly distinguishes between “Land and Water.” U.S. CONST. art. I, § 8, cl. 11.

40. *See infra* Part II.B.

The phrase “the Land” has received virtually no attention from courts and commentators. But what little information there is suggests that the Framers’ decision to link the Constitution to “the Land” did not resolve questions about the Constitution’s geographic scope and has complicated several recurring questions in constitutional law. Two approaches to interpreting “the Land” seem plausible, but neither is helpful in resolving specific doctrinal problems. One option is that “the Land” is an abstract idea rather than a physical place, and the other is that “the Land” has a physical dimension but that its scope varies depending on the legal context. Either way, the Supremacy Clause would provide only minimal guidance about where the Constitution is supreme.

The first problem with interpreting “the Land” in Article VI is that the words may be subsumed into the broader phrase “Law of the Land” and thus reflect an abstract idea about the nature of law rather than defining a physical place. The Constitution’s drafters adapted the phrase “law of the land” from the Magna Carta,⁴¹ where it was used to identify a set of rules and entitlements that constrained the King and thus functioned as “higher” law trumping royal prerogative.⁴² The Framers apparently transformed the idea of higher law into “supreme” law. They accented the point by clarifying that the Constitution (and derivative laws and treaties) play a similar role in the United States that the “law of the land” played in England.⁴³ Read from this perspective, the Supremacy Clause includes redundant language—it would have been sufficient to say either that the Constitution was “supreme law” or the “law of the land” without using both constructions. But, redundant or not, the phrase “the Land” would be a historic artifact that has nothing to say about the geographic scope of the Constitution’s operation. If this interpretation of “the Land” is correct, then

41. See *Magna Carta*, ch. 29 (1225), reprinted in RALPH TURNER, *MAGNA CARTA THROUGH THE AGES* 231 (2003).

42. Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 599, 622–40 (2008) (discussing the founding generation’s awareness of the “law of the land” concept in the Magna Carta and scholarly commentary); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (Souter, J., concurring) (“[W]e are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons’ insistence, confined executive power by ‘the law of the land.’”); 1 WILLIAM BLACKSTONE, *COMMENTARIES* *134–35.

43. Cf. THE FEDERALIST NO. 33, at 204–05 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (observing that the supremacy of federal law is a necessary consequence of binding distinct governments into a union).

the Framers did not even try to expressly define the Constitution's geographic reach and left open the question of *where* the Constitution was supreme.

This omission of a general spatial referent should not be surprising because the question of where the Constitution applies is a red herring when asked outside of a specific doctrinal context. Certain constitutional provisions apply everywhere. For instance, if the President visits the Queen of England in Buckingham Palace, he is still the President. He retains his Article II powers (the military must follow his lawful orders even if he issues them while in England), and he cannot use his presence beyond the United States as an excuse to act contrary to Article II's limits (for example, by appointing a Supreme Court Justice without Senate consent while the Senate is in session).⁴⁴ Likewise, some constitutional provisions apply only to specific places, such as the clause authorizing District of Columbia residents to vote in presidential elections.⁴⁵ The question of where the Constitution "applies" therefore is challenging only when asked in a context where the text might yield different conclusions depending on spatial factors. For instance, states, tribes, and Congress might have power to regulate in some places but not in others, and the vitality of particular rights might vary based on where people assert them. The Constitution thus lacks a uniform spatial reach. Rather, specific components have distinct zones of applicability, and so one should not expect to find a general clause that defines the Constitution's reach in all circumstances.

Another set of problems arises if we assume that "the Land" does in fact refer to specific physical spaces. First, there

44. Article II might have a spatial limit if the President's location made him "unable to discharge the powers and duties of his office." U.S. CONST. amend. XXV, § 4. For example, if the President decided to travel on the space shuttle or to the moon under circumstances where he could not reliably communicate with Earth, one could imagine the Vice President and principal cabinet officers removing the President from power for the duration of his voyage. *See id.*

45. *See id.* amend. XXIII. The right to vote presumably also authorizes casting absentee ballots outside the District, but the right remains geographically limited in the sense that absentee voters must retain some affiliation with the District. *See* D.C. CODE § 1-1001.02(2)(C) (2001) (requiring prospective voters to "maintain a residence in the District for at least 30 days preceding the next election"); *id.* § 1-1001.02(16)(A) ("The term 'residence', for purposes of voting, means the principal or primary home or place of abode of a person."); *cf.* *Carrington v. Rash*, 380 U.S. 89, 91 (1965) ("[States have] unquestioned power to impose reasonable residence restrictions of the availability of the ballot.").

is no authoritative account of the Land's contours. The text is silent about how far "the Land" extends, the Supreme Court has never tried to interpret "the Land,"⁴⁶ and commentators analyzing the phrase "Law of the Land" generally focus on the content of the "Law"⁴⁷ rather than the scope of the "Land."⁴⁸ Second, there is no proxy for "the Land" elsewhere in the Constitution's typology of places. In particular, "the Land" is not synonymous with the borders of the "United States" or its possessions because the Constitution authorizes action with respect to places that are not physically within the broad ambit of the United States. For example, Congress may regulate certain acts "committed on the high Seas"⁴⁹ and the conduct of military service members on foreign battlefields.⁵⁰ The Constitution thus extends beyond any plausible definition of U.S. boundaries.⁵¹

Third, the fact that the Constitution may apply in some lands for only limited purposes (e.g., on the high seas for the purpose of combating piracy and other felonies) suggests that the Supremacy Clause does not really mean what it appears to say. The Constitution is not in fact the "supreme" law of the lands where it applies because it applies on the high seas and foreign battlefields and yet is not the supreme law of the Atlan-

46. Justice Harlan, writing in dissent, suggested that the Land "manifestly embraced all the peoples and all the territory, whether within or without the states, over which the United States could exercise jurisdiction or authority." *Downes v. Bidwell*, 182 U.S. 244, 383 (1901) (Harlan, J., dissenting). The emphasis on "jurisdiction" of a governing entity suggests that constitutional supremacy is partly a function of who is acting and what they are doing in addition to where the action occurs.

47. See, e.g., Raoul Berger, "Law of the Land" Reconsidered, 74 NW. U. L. REV. 1, 1 (1979); Gedicks, *supra* note 42, at 594–95; Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 618 (2008).

48. For rare examples of scholarship mentioning "the Land's" geographic component, see J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 GEO. L.J. 463, 509 (2007) (stating that the Constitution is the supreme law of a specific land and not "any other place"); Zick, *supra* note 33, at 530 (observing that "Land" may reference a physical place, but not attempting to define that place).

49. U.S. CONST. art I., § 8, cl. 10.

50. *Id.* art. I., § 8, cl. 14; 10 U.S.C. § 805 (2006) (stating that the Uniform Code of Military Justice "applies in all places").

51. The high seas and U.S. territory may overlap to a limited extent, but the bulk of the high seas extends far beyond the United States. See 43 U.S.C. § 1332(2) (2006) (preserving "the character of the waters above the outer Continental Shelf as high seas").

tic Ocean and Afghanistan.⁵² A more accurate reading would be that the Constitution is the supreme law of the places where it applies, to the extent that it applies, for the duration of its application.⁵³

This more nuanced reading of the Supremacy Clause suggests that the scope of “the Land” and the content of the “Law” are interdependent. If the Constitution’s application to a particular territory is context-sensitive, then “the Land” is not a fixed place. It has a stable core, but at the margins it is a constantly evolving set of locations that ebbs and flows with the movement of people and institutions subject to constitutional

52. “The Land” can even overlap with the boundaries of a foreign country if that country consents. For example, in the nineteenth century the United States often negotiated agreements with foreign nations that allowed it to operate consular courts with broad criminal and civil jurisdiction over U.S. citizens. *See, e.g.*, Act of June 22, 1860, ch. 179, 12 Stat. 72 (authorizing consular courts in Japan, China, and Siam); Act of Aug. 1, 1956, ch. 807, 70 Stat. 773 (repealing statutory authorization for consular courts upon confirmation by the President that the last such court, in Morocco, would relinquish jurisdiction). The United States even went so far as to create “the United States Court for China.” Act of June 30, 1906, ch. 3934, 34 Stat. 814, 814. This unusual court had judges appointed by the President (with Senate consent), applied “the common law and the law as established by the decisions of the courts of the United States,” and issued decisions appealable to the Ninth Circuit and Supreme Court; yet, it sat in Shanghai and exercised territorial jurisdiction throughout China. *Id.* §§ 1, 3–4, 6, 34 Stat. at 814–16. The court responded to the dearth of directly applicable sources of U.S. law either by citing general “American law” or by deeming the District of Columbia Municipal Code to bind U.S. citizens in China. *See* Milton J. Helmick, *United States Court for China*, 14 FAR E. SURV. 252, 253 (1945) (article by former judge of the court noting that “every American lawyer in China had a D.C. Code on his desk”). These malleable choice of law principles enabled the court and related officials to exercise broad authority. For example, the court adjudicated a criminal nuisance action brought under U.S. common law by the U.S. “district attorney” for China against U.S. nationals who operated “houses of ill-fame” in Shanghai; the U.S. marshal even arrested and physically detained the defendants, including some who initially claimed not to be U.S. citizens. Note, *Extraterritoriality and the United States Court for China*, 1 AM. J. INT’L L. 469, 478 (1907) (observing that the “shameless” defendants solicited patrons with “invitations decorated with American flags”). The court’s territorial jurisdiction and the police powers of U.S. officials in a sense made China part of “the Land,” yet the Constitution was supreme only in the limited context that the treaty and enabling legislation permitted. For a history of the court, see Note, *The United States Court for China*, 49 HARV. L. REV. 793 (1936).

53. *Cf.* Patrick Allen Flynn, *The Constitution Abroad: The Operation of the Constitution Beyond the Continental Limits of the United States*, 32 TEX. L. REV. 58, 58 (1953) (“The problem [of how the Constitution applies abroad] is perhaps better stated in this manner: to what extent does the fundamental law apply to territories subject to varying degrees of political control and to peoples of diverse allegiance and heritage when acted upon by various instruments of the United States government?”).

oversight.⁵⁴ Asking where “the Land” is and what the “Law” is with respect to any particular legal question therefore forces us to think about which kinds of powers can be exercised in which kinds of places regarding which kinds of people for which kinds of purposes and with which kinds of limits. The oft-repeated slogan that “the Constitution follows the flag”⁵⁵ is thus misleading because it presupposes an undefined set of rules governing where the flag is, where it may go, and what baggage it carries on each journey.

The geographic indeterminacy of the Constitution’s scope helps to explain the intensity and duration of disputes about how the Constitution applies to particular places and people. If we recognize that the content of the “Law” and the scope of “the Land” are interdependent, then every geographic permutation of a legal problem may have a unique solution. Thus, unsurprisingly, courts and scholars have for centuries debated questions about the rights of aliens in the United States, of U.S. citizens abroad, of Indians living on and off tribal lands, and of people in incorporated and unincorporated territories acquired by treaty or force.⁵⁶ Even in the recent past, questions have persisted on basic issues about the rights of alien detainees held by the United States in places with varying degrees of connection to the core of “the Land,” such as a military base on territory leased from Cuba yet beyond Cuba’s effective sovereignty,⁵⁷ a relatively temporary base in Afghanistan,⁵⁸ and “black site” detention facilities that exist in a grey area where the United States exercises influence, but not necessarily control.⁵⁹ More

54. This view is consistent with Justice Harlan’s interpretation of “the Land,” although he did not explore the idea of “supremacy” in a spatial context. *See supra* note 46.

55. For a history of this idea, see RAUSTIALA, *supra* note 34.

56. For a thorough discussion of how the scope of government power is often a function of the place where it is exercised and people whom it affects, see NEUMAN, *supra* note 34; RAUSTIALA, *supra* note 34; Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002).

57. *See Boumediene v. Bush*, 553 U.S. 723, 770–72 (2008) (holding that the Suspension Clause applied to a U.S. Navy base on land leased from Cuba over which the United States exercised “complete and total control”).

58. *See Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010) (holding that the Suspension Clause did not apply to Bagram Air Force Base in part because “there is no indication of any intent to occupy the base with permanence, nor is there hostility on the part of the ‘host’ country”).

59. *Cf. United States v. Ghailani*, No. S10 98 Crim. 1023 (LAK), 2010 WL 1839030, at *5 n.33 (S.D.N.Y. May 10, 2010) (holding that the alleged abuse of a defendant by the CIA at a foreign site would not justify dismissal of the in-

generally, courts continue to struggle with questions about when Congress may regulate extraterritorially and how strongly the judiciary should presume that Congress has not chosen to do so.⁶⁰

Uncertainty about the scope and status of “the Land” illustrates a basic point that will emerge repeatedly throughout this Article. The Constitution seems to identify a physical space with contours that are legally significant, but the boundaries and implications of the space are too ill-defined to foreclose debate on recurring questions about the scope of government power in a system of divided domestic and international sovereignty. We cannot know how far “the Land” extends without knowing something about what the “Law” is, and we cannot know what the “Law” is without knowing something about the type of “Land” at issue. Law is in part a function of place, yet places are creations of law.

B. THE “UNITED STATES”

Most lawyers in the United States presumably know *what* the United States is, but few probably realize that they do not know *where* it is. The Constitution does not tell us explicitly, instead offering incomplete information about the physical space encompassed by the label “United States.”⁶¹ Even if the

dictment and therefore not reaching the question of whether such abuse would violate the Fifth Amendment).

60. See *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’ This [canon] . . . serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.” (citations omitted)); CHARLES DOYLE, CONG. RESEARCH SERV. 94–166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW 4–7 (2010) (discussing potential due process constraints on the extraterritorial extension of U.S. criminal law); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT’L L.J. 121, 136–58 (2007) (discussing potential structural constraints on Congress’s power to punish extraterritorial crimes); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 117–20 (2010) (discussing “unilateralism,” “territorialism,” “interests balancing,” and “dual-illegality” approaches to interpreting “geoambiguous” federal statutes); Austen Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455, 1493 (2008) (advocating “a return to territoriality” in considering the geographic scope of Congress’s power); *supra* notes 33–34; *infra* Part I.B.

61. The Framers could not have defined the physical parameters of the “United States” because its scope would not be known until after ratification

Constitution clearly defined the United States' geographic scope, questions would still arise about the practical significance of its boundaries. The physical and legal contours of the institution at the Constitution's heart are thus indeterminate, which raises several puzzling questions.⁶²

The Constitution uses the term "United States" in three distinct ways: as shorthand for the aggregation of states joined into a Union, as the name of a legal entity, and as a place. First, the "United States" is a literal term that describes the set of states that joined together to form a larger government unit. This usage is evident in the Eleventh Amendment, which refers to "one of the United States,"⁶³ likely appears in the Preamble as well,⁶⁴ and was foreshadowed in both the Declaration of In-

and then would likely evolve. *See supra* note 14. The treaty that ended the Revolutionary War purported to define the boundaries of the United States as it then existed. *See* Treaty of Paris art. 2, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80, 81-82, T.S. No. 104. These boundaries encompassed land that was not part of any state, and yet was part of the new sovereign entity whose existence the treaty confirmed. *See* C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 370 (1899). According to James Madison, the lands that the treaty delineated were within "the actual dimensions of the Union" (although he did not specifically discuss non-state territories or attach any significance to their existence). THE FEDERALIST NO. 14, *supra* note 43, at 101 (James Madison).

62. Scholars generally have not attempted to systemically define the term "United States" in all the forms where it appears in the Constitution. For a rare example of such an attempt, see Langdell, *supra* note 61, at 365 ("What extent of territory do the United States of America comprise? In order to answer this question intelligently, it is necessary to ascertain the meaning of the term 'United States.'"); *cf.* Sanford Levinson, *Why the Canon Should Be Expanded to Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241, 248 (2000) ("[O]ne might think that the question as to what constitutes 'the United States' that is, after all, presumptively structured by the Constitution would have a clear constitutional answer, but that, just as obviously, is untrue.").

63. U.S. CONST. amend. XI. The Constitution is inconsistent when describing the aggregation of states, which sometimes are referenced as elements of the "Union" rather than one of the "United States." *See id.* art. I, § 2, cl. 3 ("the several States which may be included within this Union"); *id.* art. IV, § 4 ("every State in this Union").

64. The Constitution purports to have been authorized by the "People of the United States." *Id.* pmbl. The "United States" in this context presumably means the aggregation of the original thirteen states because the relevant people were those who were legally associated with the states holding ratifying conventions rather than members of an extended polity that transcended state borders. *See id.* art. VII; *cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 565 (Max Farrand ed., 1937) [hereinafter FARRAND] (reprinting an early draft of the "We the People" Clause that listed each state in lieu of mentioning the "United States"); Langdell, *supra* note 61, at 366 (noting, without citing the Preamble's drafting history, that an early rationale for using the term "United States" was to avoid "enumerating the thirteen

dependence⁶⁵ and Articles of Confederation.⁶⁶ Second, the “United States” is also the term for the larger unit that the states created, which has a unique legal identity; the whole is distinct from the aggregation of its founding parts.⁶⁷ The United States therefore is capable of having citizens, possessing institutions, and creating instruments (that are “of”⁶⁸ or “under”⁶⁹ the “United States”), can take actions (“by”⁷⁰ or “from”⁷¹ the “United States”), and can be the object of action (“against the United States,”⁷² or as a “Party”⁷³ to litigation). Finally, and most importantly for present purposes, the “United States” is a place: events can occur “in,”⁷⁴ “within,”⁷⁵ or “throughout”⁷⁶

States by name”); *id.* at 372 n.2 (observing that the Preamble could not list the states in the Union because the nation’s composition had not yet been confirmed by ratification).

65. See THE DECLARATION OF INDEPENDENCE (U.S. 1776) (referring to “the thirteen united States of America” in the title). The Declaration’s subsequent reference to “[r]epresentatives of the [U]nited States of America” is more ambiguous: it could again refer to thirteen states that were united, or to a broader entity. *Id.* para. 32; see also Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701, 721–62 (2001) (contending that the Declaration created a national entity); Donald S. Lutz, *The Declaration of Independence as Part of an American National Compact*, 19 PUBLIUS 41, 50 (1989) (noting that the Declaration foreshadowed constitutional federalism by acknowledging the “simultaneous presence of two orders of government”).

66. See ARTICLES OF CONFEDERATION of 1781, art. IV, § 2 (“any of the United States”); *id.* art. IX (“each of the United States”). The Articles also used the term “United States of America” as the name for the “confederacy” that it created. *Id.* art. I.

67. *Cf.* U.S. CONST. art. I, § 8, cl. 16 (distinguishing the “United States” from the “States respectively”); *id.* amend. X (same); *id.* art. II, § 2, cl. 1 (distinguishing the “Navy of the United States” from the “Militia of the several States”); *id.* art. VI, cl. 3 (distinguishing officers “of the United States” and “of the several States”).

68. *Id.* art. I, § 1 (“Congress of the United States”), § 2 (“Citizen of the United States”), § 6 (“Treasury of the United States”), § 8, cl. 6 (“Coin of the United States”), § 8, cl. 18 (“Government of the United States”); *id.* art. III, § 1 (“Power of the United States”); *id.* art. VI, cl. 2 (“Authority of the United States”). The Constitution also idiosyncratically references the “Laws of the Union.” *Id.* art. I, § 8, cl. 15.

69. *Id.* art. I, § 6, cl. 2 (“Office under the United States”).

70. *Id.* amend. XIX (limiting actions “by the United States” with respect to the right to vote).

71. *Id.* art. II, § 1, cl. 7 (“Emolument from the United States”).

72. *Id.* § 2, cl. 1 (“Offences against the United States”).

73. *Id.* art. III, § 2, cl. 1.

74. *Id.* amend. XIV, § 1 (“persons born or naturalized in the United States”).

75. *Id.* art. II, § 1, cl. 5 (person “who shall not have been . . . fourteen Years a Resident within the United States” is ineligible to be President); *id.* amend. XIII, § 1 (slavery shall not exist “within the United States”).

it. The definition of that place is a term of domestic legal art. No matter how far the “United States” may extend for purposes of constitutional provisions linked to its borders, it could have distinct contours for purposes of international law.⁷⁷

The fact that the United States is a place has four sets of significant implications that the Constitution’s text for the most part ignores. First, there is a question about whether all aspects of the Constitution apply with equal force and effect to all areas within the United States. In other words, does the United States exist at a single level of abstraction or does it contain subsidiary components subject to distinct legal regimes? This is essentially the same question discussed in the prior section about how the “Law” applies in “the Land.”⁷⁸ The absence of an explicit answer helps explain why courts and commentators cannot agree about how the Constitution might apply to different categories of places even if such places are assumed for the sake of argument to in some sense be “in” the United States and not part of “States” (which have a special status relative to other kinds of domestic places).⁷⁹ Variants of this problem arose in the nineteenth and early twentieth centuries in the *Insular Cases* (which considered how the Constitution applied in unincorporated and incorporated territories),⁸⁰

76. *Id.* art. I, § 8, cl. 1 (“all Duties, Imposts and Excises shall be uniform throughout the United States”), § 8, cl. 4 (authorizing a “uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States”); *id.* art. II, § 1, cl. 4 (“Congress may determine . . . the Day on which [electors] shall give their Votes; which Day shall be the same throughout the United States.”).

77. For example, one can imagine an argument that, say, Guam is not “in” the United States for purposes of the Fourteenth Amendment’s provision governing birthright citizenship, *see infra* notes 93, 228, but that it is in the United States for purposes of the U.N. Charter’s prohibition against “the threat or use of force against the territorial integrity . . . of any state,” U.N. Charter art. 2, para. 4. *Cf. Fleming v. Page*, 50 U.S. (8 How.) 603, 615 (1850) (noting that the status of land in Mexico occupied by the United States Army was different under U.S. law, which treated the land as foreign territory, and international law, which treated it as U.S. territory).

78. *See supra* Part I.A.

79. *See infra* Part I.C (discussing “States”).

80. *See generally* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1–30 (Christina Duffy Burnett & Burke Marshall eds., 2001) (collecting essays discussing and critiquing the *Insular Cases*). For an account of the *Insular Cases* contending that “whether a place was within or outside the ‘United States’ did not reliably determine whether a constitutional provision applied there,” *see* Christina Duffy Burnett, Untied States: American Expansion and Territorial Deannexation, 72 U. CHI. L. REV. 797, 816 (2005).

and continue to arise in the twenty-first century in cases addressing how the Constitution applies to U.S.-controlled military facilities located beyond the United States' "de jure sovereignty" but within its "de facto sovereignty."⁸¹ Second, there is a question about which constitutionally defined powers and rights operate with less force when relevant actors or events are clearly outside the United States. Courts have struggled with this question because the Constitution's text often provides little or no guidance: it defines a place, but provides only limited information on why the definition of that place matters.⁸² Third, there is a general issue that arises whenever the definition of a place creates an inside and outside, and thus potentially defines people as insiders or outsiders and attaches consequences to those distinctions. The law and geography literature discussed above offers perspective on this issue of how, why, and to what extent boundary lines should be significant in defining individual rights and obligations.⁸³

Finally, thinking of the United States as a place highlights the fact that a few specific provisions of the Constitution attach importance to defining the contours of that place. For example, rules governing three subjects ("Naturalization," "Bankruptcies," and "Duties, Imposts and Excises") must be "uniform" "throughout" the United States,⁸⁴ Congress cannot deny citizenship to people who are born both "in" the United States and subject to its "jurisdiction,"⁸⁵ and no person can become Presi-

81. *Boumediene v. Bush*, 553 U.S. 723, 754–56 (2008).

82. *See, e.g., Reid v. Covert*, 354 U.S. 1, 5–14 (1957) (plurality opinion) (holding that wives of American service members had constitutional right to a jury trial in criminal actions on U.S. military bases in Europe); *In re Terrorist Bombings of U.S. Embassies in E. Afr.*, 552 F.3d 157, 167 (2d Cir. 2008) ("[T]he Fourth Amendment's warrant requirement does not govern searches conducted abroad by U.S. agents; such searches of U.S. citizens need only satisfy the Fourth Amendment's requirement of reasonableness."). *See generally* RAUSTIALA, *supra* note 34, at 28–29; Zick, *supra* note 33, at 525 ("The geographic borders of the United States are critical legal and constitutional markers—in terms of diplomacy, trade, national defense, and claims to individual privileges and liberties.").

83. *See supra* text accompanying notes 30–34. An odd twist on this problem of insiders and outsiders is the "entry fiction" in immigration law, which posits that an alien who is physically within the United States but has not formally entered the country can be treated as if she were still outside national borders. Brian G. Slocum, *The War on Terrorism and the Extraterritorial Application of the Constitution in Immigration Law*, 84 DENV. U. L. REV. 1017, 1023–25 (2007) (criticizing the "entry fiction").

84. U.S. CONST. art. I, § 8, cls. 1, 4.

85. *Id.* amend. XIV, § 1.

dent unless he or she was a “Resident” “within” the United States” for at least fourteen years.⁸⁶ A coherent account of what physical spaces are within and beyond the United States would be helpful to understanding how the Constitution applies in these contexts, yet this account is difficult to construct.

The place “United States” is difficult to define for two reasons: the different meanings of United States may not be coextensive, and there are several plausible permutations of what the United States may encompass. First, the scope of the United States as an entity need not be coextensive with its scope as a place because an entity can own or exercise control over places that are not physically within itself. The Constitution seems to recognize this fact in at least two provisions. The Thirteenth Amendment refers to conduct “within the United States, or any place subject to their jurisdiction,”⁸⁷ and the Eighteenth Amendment (now repealed) referred to imports and exports “into” and “from” the “United States and all territory subject to the jurisdiction thereof.”⁸⁸ A place can thus be affiliated with the United States in a constitutionally meaningful way without being “in” it,⁸⁹ and so the term “United States” may have dis-

86. *Id.* art. II, § 1, cl. 5.

87. *Id.* amend. XIII, § 1. The use of “their” rather than “its” creates an interpretative problem by suggesting that the Amendment’s drafters used the term “United States” to refer to the aggregation of states rather than to the entity “the United States.” However, it is difficult to see how the aggregation of states could exercise “jurisdiction” over any land other than through the mechanism of the entity “the United States,” and thus the use of “their” seems sloppy rather than revealing. A similar quirk exists in Article II, which forbids the President from receiving certain “Emolument[s] from the United States, or any of them.” *Id.* art. II, § 1, cl. 7.

88. *Id.* amend. XVIII, § 1, *repealed by* U.S. CONST. amend. XXI, § 1. The word “territory” is not capitalized, which suggests that the term is more generic than the formal concept of “Territory” in Article IV, § 3. *See infra* Part I.G.

89. Christopher Langdell’s thorough article about the meaning of “United States” seems to miss the subtle distinction between territory within a sovereign and territory under a sovereign’s control. According to Langdell, if the term “United States” in the Thirteenth Amendment was intended to describe an entity encompassing “territory,” then the phrase “or any place subject to their jurisdiction” was redundant. Langdell, *supra* note 61, at 377. However, if we assume that the Amendment’s drafters intended to eradicate slavery in every place where the United States possessed authority to enforce its preferences, then it follows that some of those places could be outside its borders as those borders were defined by domestic constitutional law (as distinct from international law, which might have a different definition of “United States,” *see supra* note 77). For example, the Amendment could be interpreted to require that the U.S. Army free slaves in foreign territory that it formally occupied, or that slaves would become free if brought into other kinds of peripheral places that arguably might not be within the constitutional definition of the

tinct context-sensitive definitions depending on whether it refers to an entity or a place.⁹⁰ Moreover, asking whether a given place is a physical component of the United States rather than merely subject to its control (i.e., is it “in” the United States or “of” the United States) may often be pointless because there is no reason to think that the distinction matters beyond a few exceptional issues noted below.⁹¹ Thus, for example, there might be no reason to develop legal fictions about whether the land under a particular federal installation is on U.S. soil,⁹² or whether a ship flying a U.S. flag is an “island” of the United States.⁹³ What matters is how a particular place relates to the

United States, such as embassies (which was not a far-fetched concern given that Thomas Jefferson had brought slaves to the United States embassy in Paris). See ANNETTE GORDON-REED, THOMAS JEFFERSON & SALLY HEMINGS: AN AMERICAN CONTROVERSY 1 (1997); cf. *Fleming v. Page*, 50 U.S. (8 How.) 603, 614–15 (1850) (stating that military “conquest” could bring lands under U.S. “dominion” without adding them to “the boundaries of this Union”); Cleveland, *supra* note 56, at 197 (observing that the Thirteenth Amendment might apply to “forts, consuls, or vessels abroad”); *infra* Part I.F.

90. Federal statutes, like the Constitution, can define places that are subject to U.S. control even though they are not in the United States. For example, the “special maritime and territorial jurisdiction of the United States,” 18 U.S.C. § 7 (2006), includes “[a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States,” *id.* § 7(7). See also *id.* § 7(9)(B) (extending U.S. jurisdiction to “residences in foreign States . . . irrespective of ownership . . . used by United States personnel assigned to [diplomatic] missions or entities”).

91. See *infra* text accompanying notes 100–03.

92. The Supreme Court confirmed in *Boumediene v. Bush* that determining the Constitution’s geographic scope requires “functional” rather than “formal” analysis. 553 U.S. 723, 763–65 (2008). However, *Boumediene*’s analysis was functional only in a narrow sense. The Court held that the Suspension Clause’s applicability to the Guantánamo Bay naval base depended on the relative “control” and “sovereignty” that the United States and Cuba exercised over the base, and not the formal fact that Cuba owned the land and leased it to the United States. *Id.* at 753–54, 770–72. Yet “sovereignty” is an inherently formal concept, and foreign “control” over a base is a formality if in practice there are portions of the base where U.S. officials have unfettered discretion. This formality led the D.C. Circuit to hold that the Suspension Clause did not apply to Bagram Air Force Base in Afghanistan due to differences in the nature of the “leasehold interest[s]” that the United States possessed at Guantánamo and Bagram, even though U.S. officials allegedly supervised the challenged activities on both bases. See *Al Maqaleh v. Gates*, 605 F.3d 84, 97 (D.C. Cir. 2010).

93. *United States v. Smiley*, 27 F. Cas. 1132, 1134 (C.C.N.D. Cal. 1864) (No. 16,317) (Field, Circuit Justice) (analogizing a nation’s loss of sovereignty over a sunken ship to loss of sovereignty “over an island which should sink into the sea”); see also *id.* (“The constructive territory of the United States embraces vessels sailing under their flag”); Jon D. Peppetti, *Building the Global Maritime Security Network: A Multinational Legal Structure to Combat Transnational Threats*, 55 NAVAL L. REV. 73, 103 (2008) (“Flag state control of

United States, which may not exclusively be a function of the place's location.

Second, because the Constitution defines many types of places, there are numerous permutations of these places that may collectively comprise the "United States." For example, the "United States" might merely be the sum of all land in the "States," or may also include land in the "Territories," the "District" constituting the seat of government, and/or federal "possessions."⁹⁴ The Constitution is silent about which permutation is accurate. The Supreme Court addressed the void by opining that the "term" "United States" "is the name given to our great republic, *which is composed of States and territories.*"⁹⁵ This

its ships is premised on the theory that a ship is a national of a state or an extension of its territory; essentially, a floating island."). The fiction that a ship is an island becomes untenable (assuming that it is initially coherent) when one realizes that islands generally do not move, and thus do not raise the conflict of competing legal regimes that arises when a foreign ship sails into a nation's territorial waters. *Cf.* Gustavus H. Robinson, *Legal Adjustments of Personal Injury in the Maritime Industry*, 44 HARV. L. REV. 223, 231 (1930) ("If [a foreign-flagged vessel] floats in territorial waters, the law of the waters traditionally speaks more loudly than that of the ship."). Modern law still attaches importance to a vessel's flag, but emphasis on the "island" fiction appears to have waned, although not disappeared. *Compare* *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923) (noting that flag-state jurisdiction over vessels "partakes more of the characteristics of personal than of territorial sovereignty"), *and* United Nations Convention on the Law of the Sea art. 92(1), Dec. 10, 1982, 1833 U.N.T.S. 397, 433 (requiring that "[s]hips shall sail under the flag of one State only and . . . shall be subject to its exclusive jurisdiction on the high seas," but not invoking the territory metaphor), *with* *NLRB v. Dredge Operators, Inc.*, 19 F.3d 206, 212 (5th Cir. 1994) ("[A] United States flag vessel is considered American territory . . .").

If U.S.-flagged vessels were technically "in" the United States, as then-Judge Alito has suggested, an implication would be that people born on them would become U.S. citizens. This perk could inspire enterprising mariners to create floating birthing centers that would ply foreign ports selling the prospect of a U.S. passport. *See* U.S. CONST. amend. XIV, § 1; *Cruz v. Chesapeake Shipping, Inc.*, 932 F.2d 218, 237–38 (3d Cir. 1991) (Alito, J., dissenting) (contending that "the United States" "consists of all the States, Territories, and possessions" and that its territory encompasses "[v]essels flying the American flag"). Current jurisprudence forecloses this possibility. *See* *Lam Mow v. Nagle*, 24 F.2d 316, 317–18 (9th Cir. 1928) (rejecting a citizenship claim by a person born on a U.S.-flagged merchant vessel because such vessels are only metaphorically, rather than actually, "in" the United States).

94. *See infra* Parts I.D, I.G, I.H. The "District" is in the United States because it "was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession." *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933); *see also* *Downes v. Bidwell*, 182 U.S. 244, 261 (1901) (noting that after cession the District "remained a part of the United States").

95. *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319 (1820) (emphasis added).

statement appears correct insofar as it defines the United States as more than merely the sum of the states because the District of Columbia seems clearly in the United States even though it is not part of any state.⁹⁶ But the Court did not purport to treat all territories equally, nor did it purport to exclude other types of places from the ambit of the United States even if these arguably could not be classified as “territories” (such as embassies, military bases on foreign soil, U.S.-flagged ships, and the exclusive economic zone that extends 200 miles from the U.S. coast⁹⁷).⁹⁸ The Court’s dicta thus adds little to our knowledge about what places are in the United States and what places are outside it.⁹⁹

In addition to the interesting theoretical questions noted above, the indeterminacy of the United States raises several practical puzzles about the application of particular constitutional provisions. For example, suppose that a U.S. military officer has a child who also becomes a military officer and spends most of her life living on various military bases located on what

96. See *infra* Part I.D. More generally, the Framers were aware that the new nation would be the steward of western lands ceded from the states, and may have understood the “United States” to encompass this territory and territories that would be acquired in the future. See Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155, 159–61 (1899) (suggesting that the Northwest Ordinance of 1787 may have required treating the covered territories as part of the United States).

97. See Proclamation 5030, 48 Fed. Reg. 10,605, 10,605 (Mar. 10, 1983) (claiming the exclusive economic zone pursuant to international law). The zone is “larger than the combined land area of all fifty states.” U.S. COMM’N ON OCEAN POLICY, AN OCEAN BLUEPRINT FOR THE 21ST CENTURY 30–31 (2004).

98. The Court’s statement also does not indicate whether the physical place “the United States” has the same definition in each clause in which it is mentioned. Reading the same words to have the same meaning everywhere they appear in the Constitution is a useful method of interpretation, but is not always appropriate if meaning depends on context. See Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 799 (1999) (“[T]he same words sometimes sensibly mean different things in different contexts. . . . Even when the intratextual tool can generate interpretive leads and clues, we still need other tools of interpretation to finally assess the plausibility of any reading suggested by intratextualism.”).

99. Statutes from the post-Founding era replicated the Constitution’s imprecision by using the term “United States” to identify a place whose borders had significance without defining the scope of that place. See, e.g., Act of July 6, 1798, ch. 66, 1 Stat. 577, 577 (governing “alien enemies” “within the United States”); Act of Sept. 1, 1789, ch. 11, 1 Stat. 55, 55 (establishing a system for registering vessels “built within the United States”); Act of July 31, 1789, ch. 5, 1 Stat. 29, 45 (repealed 1790) (regulating collection of duties on tonnage and stating that goods “shall not be relanded in any port or place within the limits of the United States”).

would otherwise be foreign land. Upon turning thirty-five, the child wants to become a presidential candidate. Would the candidate's time living on military bases on foreign soil constitute residence "within" the United States, or would she instead be ineligible for the presidency?¹⁰⁰ And if we think that such a person should be eligible, does that mean that birthright citizenship also extends to any person born "in" such bases?¹⁰¹ More generally, should a person born in Guam, which is a U.S. territory, automatically be a U.S. citizen, even if Congress

100. A permutation of the problem would arise if the candidate previously served as an ambassador residing in various embassies on foreign soil after a childhood spent mostly outside the United States. The residence qualification for the Presidency has not received scholarly attention. In contrast, the textually adjacent "natural born Citizen" qualification has generated substantial debate in light of questions about where and under what circumstances various Presidents and candidates were born. See William T. Han, *Beyond Presidential Eligibility: The Natural Born Citizen Clause as a Source of Birthright Citizenship*, 58 DRAKE L. REV. 457, 464–66 (2010); Gabriel J. Chin, Commentary, *Why Senator John McCain Cannot Be President: Eleven Months and a Hundred Yards Short of Citizenship*, 107 MICH. L. REV. FIRST IMPRESSIONS 1, 5–10 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/chin.pdf>; Peter J. Spiro, Commentary, *McCain's Citizenship and Constitutional Method*, 107 MICH. L. REV. FIRST IMPRESSIONS 42, 42–48 (2008), <http://www.michiganlawreview.org/firstimpressions/vol107/spiro.pdf>; cf. Langdell, *supra* note 61, at 375 (asserting without explanation that the Residence Clause refers to the "United States" as the aggregation of its member states, and is thus equivalent to a requirement that a prospective President reside "in one or more of the United States").

101. Few commentators have considered whether birth on a U.S. military base located within a foreign country would constitute birth "in" the United States for purposes of the Fourteenth Amendment. The consensus is that such births would not confer automatic citizenship. See 7 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 92.03(2)(d) (rev. ed. 2010) ("The far flung foreign interests and operations of the United States in the modern world may also raise questions concerning the status of children born in American installations in foreign countries. It seems quite clear that such installations cannot be regarded as part of the United States for the purposes of the Fourteenth Amendment . . ."); Sarah Helene Duggin & Mary Beth Collins, *'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It*, 85 B.U. L. REV. 53, 103 (2005) ("[C]ontrary to popular belief, birth in United States embassies, consulates, or United States military facilities, does not result in United States citizenship in the absence of another basis for citizenship."). Even if the Constitution does not confer automatic citizenship to children born on U.S. military bases abroad, citizenship can exist by statute, raising a question about whether such children are "natural born" citizens for purposes of eligibility to serve as President. U.S. CONST. art. II, § 1, cl. 5; see also Christina S. Lohman, *Presidential Eligibility: The Meaning of the Natural-Born Citizen Clause*, 36 GONZ. L. REV. 349, 367 (2000) (arguing for presidential eligibility in this context because children of active-duty service members are "within the allegiance" of the United States); *supra* note 100.

would prefer otherwise.¹⁰² And must the same “uniform” bankruptcy rules apply in Puerto Rico as in Texas, even though Congress’s legislative discretion with respect to territories is generally broader than with respect to states?¹⁰³ The fact that these questions lack definitive textual answers again illustrates the lack of systemic focus during the Founding and the subsequent amendment process on the “where” component of

102. Courts have held that birth in unincorporated territories does not automatically confer citizenship under the Fourteenth Amendment. *See Nolos v. Holder*, 611 F.3d 279, 283–84 (5th Cir. 2010) (holding that birth in the Philippines while it was a U.S. territory did not confer citizenship); *Valmonte v. INS*, 136 F.3d 914, 920 (2nd Cir. 1998) (same); *Rabang v. INS*, 35 F.3d 1449, 1453 (9th Cir. 1994) (same); *cf. Langdell, supra* note 61, at 376 (contending that birthright citizenship applies only to births within states because the Fourteenth Amendment: (1) was not intended to limit Congress’s power to define the significance of events in territories; and (2) did not contemplate the existence of birthright citizens who were not also state citizens). Children born in territories that Congress has expressly incorporated into the United States presumably do have birthright citizenship, but the issue is “unsettled.” *Duggin & Collins, supra* note 101, at 92. In practice, questions about the constitutional status of people born in incorporated territories are likely moot. First, a birth in the only current incorporated territory (Palmyra Atoll) is unlikely because the island is isolated and has only a small transient population of scientists and visitors. *See Palmyra Atoll National Wildlife Refuge*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/palmyraatoll/management.html> (last visited Jan. 22, 2011). Second, Congress retroactively granted citizenship to people born in Alaska and Hawaii—the two most recent incorporated territories—during the period between incorporation and statehood. *See* 8 U.S.C. §§ 1404–1405 (2006). The status under the Fourteenth Amendment of children born in incorporated territories could therefore arise only in bizarre circumstances. For example, one can imagine: (1) a Mexican citizen giving birth to a daughter in the Arizona territory prior to statehood in 1912; (2) the daughter then returns to Mexico without otherwise acquiring U.S. citizenship; (3) the daughter then resides in the United States for at least five years (including at least two after the age of fourteen); (4) the daughter then gives birth to a child in Mexico. The child born in Mexico would arguably be a U.S. citizen based on its mother’s birth in the incorporated Arizona territory and subsequent temporary U.S. residence. *See* 8 U.S.C. § 1401(g) (2006) (setting conditions for citizenship of children born outside the United States to a parent who is a U.S. citizen and former U.S. resident).

103. *See* U.S. CONST. art. IV, § 3, cl. 2 (Congress may “make all needful Rules and Regulations respecting the Territory belonging to the United States”). Congress has mooted the question of whether it must apply the Bankruptcy Code to territories by doing so voluntarily. *See, e.g.*, 11 U.S.C. § 101(55) (2006) (“The term ‘United States’, when used in a geographical sense, includes all locations where the judicial jurisdiction of the United States extends, including territories and possessions of the United States.”). In other contexts, the Court has held that territories are not “in” the United States for purposes of the Uniformity Clauses. *See Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (Congress could lawfully impose a nonuniform duty upon imports from Puerto Rico).

the Constitution's allocation of power. As a result, a critical place—the United States—has borders with indeterminate contours and indeterminate meaning.

C. "STATES"

A third category of constitutionally defined places are "States," which like the "United States" are both ethereal entities¹⁰⁴ and physical locations in space.¹⁰⁵ The "State" designation has always been highly coveted in U.S. politics. Attaining statehood signified that a territory and its people were full and equal members of the nation.¹⁰⁶ In contrast, exclusion from statehood created a second-class status, rendering people federal "subjects" rather than national "citizens."¹⁰⁷ Territories therefore aspired to eventual statehood even before the Constitution was ratified.¹⁰⁸ Yet notwithstanding the importance of statehood, the legal significance of state borders is strikingly ambiguous.¹⁰⁹

104. See, e.g., U.S. CONST. art. I, § 2 (states have a "People," a "Legislature," and an "Executive Authority"); *id.* art. II, § 2, cl. 1 (states have a "Militia"); *id.* art. III, § 2, cl. 1 (states have "Citizens"); *id.* art. III, § 2, cl. 2 (states can be a "Party" in court); *id.* art. VI, cl. 2 (states have "Laws").

105. See, e.g., *id.* art. I, § 2, cl. 2 (states can have "Inhabitant[s]"); *id.* art. I, § 8, cl. 17 (states possess "Places" that they can sell to the United States); *id.* art. I, § 9, cl. 1 (states can "admit" persons into their territory); *id.* art. I, § 9, cl. 6 (vessels can travel "from" or "to" states); *id.* art. III, § 2, cl. 1 (states can "Grant" "Lands"); *id.* art. III, § 2, cl. 3 (trials can be held "in" and crimes committed "within" a state); *id.* art. IV, § 2, cl. 2 (fugitives can be "found in" states); *id.* amend. XII (electors "meet in" states).

106. Of all the places in the Constitution with a corresponding governing entity, only states have a reservoir of preexisting ("reserved") powers that do not require specific enumeration. *Id.* amend. X. States admitted into the union after 1789 did not necessarily have a prior sovereign status that could be "reserved," but nevertheless have been deemed to exist on an "equal footing" with the original states. *Coyle v. Smith*, 221 U.S. 559, 567–68 (1911); see also Erbsen, *supra* note 1, at 507–08 (discussing the equal footing doctrine). The Constitution contains only one exception to state equality: the original ("now existing") states could permit the importation of slaves until 1808, while subsequent states could not. U.S. CONST. art. I, § 9, cl. 1.

107. PETER S. ONUF, STATEHOOD AND UNION 69 (1987). Statehood is still an aspiration for some residents of Puerto Rico. See Mireya Navarro, *Looking Beyond Vote in Puerto Rico After 'None of the Above' Is Top Choice*, N.Y. TIMES, Dec. 15, 1998, at A16, available at 1998 WLNR 2977400 (discussing a referendum in which 46.5 percent of voters in Puerto Rico favored statehood).

108. See ONUF, *supra* note 107, at 44–87 (discussing the path to statehood of the Northwest Territories).

109. The Constitution does not expressly accord special status to local components of states, and thus spatial questions are usually binary: the fact that an event occurred within or outside a state is generally more important than

States are unique places in the constitutional order because the first thirteen states preexisted the Union. The original states are therefore the only places in the federal system that the Constitution *recognizes* rather than *creates*.¹¹⁰ There was no need for the Framers to define these states' physical boundaries because borders were already fixed. Indeed, the Convention rejected a proposal that "a map of the U.S. be spread out, that all the existing [state] boundaries be erased, and that a new partition of the whole be made into 13 equal parts."¹¹¹ The borders of future states likewise could not be specified because they were unknowable and would emerge over time through the mechanism for admitting new states.¹¹² Moreover, unlike with "the Land" and the "United States," there are no constitutionally defined spaces that are outside a state and yet subject to its general authority¹¹³ (in contrast to authority that Congress delegates¹¹⁴ or borrows,¹¹⁵ authority

where in the state it occurred. *See* Ford, *supra* note 32, at 1862–65 (discussing how local action equates with state action); *cf.* Allan Erbsen, *Impersonal Jurisdiction*, 60 EMORY L.J. 1, 29–30 (2010) (noting that personal jurisdiction doctrine provides constitutional protection only to defendants compelled to travel across state rather than local boundaries, and suggesting possible constitutional limits on intrastate venue rules).

110. The "high Seas" preexisted the Constitution in the sense that the oceans were present, but they lacked a formal status until the Constitution provided it. U.S. CONST. art. I, § 8, cl. 10. "Indian Tribes" and "foreign Nations" also existed, but the Constitution treats these primarily as entities rather than places. *Id.* § 8, cl. 3; *see also infra* Part II.A.

111. *See* 1 FARRAND, *supra* note 64, at 177 (noting this suggestion by delegate Brearly); *id.* at 184, 199, 275, 321 (discussing repartitioning the states); 3 *id.* at 613 (reprinting notes of a draft of the New Jersey Plan that proposed "consolidat[ing]" all state and federal "Lands" into a single "Body or Mass" that would be divided into thirteen or more "integral Parts" called "Districts").

112. *See* U.S. CONST. art. IV, § 3.

113. The Constitution references only two types of spaces under state control, both of which seem to fall within state borders: "ports" and "Places" for holding elections. *Id.* art. I, §§ 4, 9. The Constitution also refers to state "Jurisdiction," but there is no indication that this reference contemplated any unique physical space outside the existing constitutional typology of places. *Id.* art. IV, § 2, cl. 2 (requiring extradition of fugitives "to the State having Jurisdiction of the Crime"); *id.* art. IV, § 3 ("no new State shall be formed or erected within the Jurisdiction of any other State"); *id.* amend. XIV, § 1 (a state may not "deny to any person within its jurisdiction the equal protection of the laws"). Article IV refers to "Claims" that states may have on prospective federal territory, but does not accord any distinct formal status to land subject to such claims. *Id.* art. IV, § 3, cl. 2.

114. *See infra* Part II.B (noting that Congress has granted states regulatory authority over some rivers adjacent to their territory).

115. *See* 18 U.S.C. § 13(a) (2006) (acts committed in federal enclaves are federal crimes if they violate the criminal law of the state in which the enclave

that follows state citizens acting extraterritorially,¹¹⁶ or context-sensitive authority that arises over certain extraterritorial transactions affecting the state¹¹⁷). The states thus had or would have relatively determinate physical boundaries that in case of doubt (which was often)¹¹⁸ would be subject to clarification by compact¹¹⁹ or adjudication.¹²⁰ Most scholarship about

is located); 43 U.S.C. § 1333(a)(2)(A) (2006) (deeming federal law to incorporate portions of state civil and criminal law in the region between a state's outer coastal boundary and the outer national boundary).

116. See *Skiriotes v. Florida*, 313 U.S. 69, 76–77 (1941) (holding that state law may regulate the extraterritorial conduct of state citizens). The extent to which state law follows its citizens is unclear. For example, the issue might arise if states acquired authority to ban abortions and then attempted to bar their citizens from circumventing state law by obtaining abortions in other states. See Mark D. Rosen, “Hard” or “Soft” Pluralism? Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers, 51 ST. LOUIS U. L.J. 713, 745–47 (2007).

117. See *infra* note 136.

118. Border disputes were common in the Founding era due to ambiguities in colonial charters, ineffective methods of marking territory, and incomplete knowledge of geography. See *Virginia v. Tennessee*, 148 U.S. 503, 516 (1893) (noting that state commissioners had initially “marked” the border by making “five chops . . . in the form of a diamond” on a line of trees, and that the border eventually became “indistinct”); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724 (1838) (“[A]t the adoption of the constitution, there were existing controversies between eleven states respecting their boundaries, which arose under their respective charters”); Note, *Congressional Supervision of Interstate Compacts*, 75 YALE L.J. 1416, 1422 n.47 (1966) (“[O]ften the lines drawn on the basis of antique charts and maps bore no relation to the actual lie of the land.”). Disputes could also arise from the natural evolution of river boundaries. Rivers seem like useful fixed reference points for drawing borders, yet they have an inconvenient tendency to change their course over time. In extreme situations, land that used to be on one side of a river can wind up on the other side. The Supreme Court has addressed this problem by developing the doctrines of accretion (gradual changes in a river’s course do not alter the river’s status as a border) and avulsion (the prior bed of a river remains the border after the river moves to a new bed). See, e.g., *New Jersey v. New York*, 523 U.S. 767, 784 (1998) (noting that state territory can expand through the addition of landfill at the edge of a water boundary); *Ohio v. Kentucky*, 444 U.S. 335, 340 (1980) (“Situations where land of one State comes to be on the ‘wrong’ side of its boundary river are not uncommon.”); *Nebraska v. Iowa*, 143 U.S. 359, 360–61 (1892) (discussing accretion and avulsion). Whatever the cause, border disputes could be a significant source of interstate friction. See Erbsen, *supra* note 1, at 514–15. For an interesting example of a political conflict between states that almost escalated to military conflict, see DON FABER, THE TOLEDO WAR (2008) (discussing the “Toledo War,” which arose when Ohio and the Michigan Territory claimed the same land, resulting in standoffs between armed militias until the federal government helped broker a settlement).

119. The Compacts Clause permits states, with congressional approval, to negotiate agreements that resolve border disputes. U.S. CONST. art. I, § 10, cl. 3; Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3–4 (1997) (“[C]ompacts resolve state

“States” in a constitutional sense therefore focuses on their status as legal entities rather than places, considering the extent to which they are sovereign, the limits on their authority, and their amenability to federal regulation. But states are also interesting as places because: (1) the permanency of their borders may be less clear than commonly imagined, and (2) the overlap between state and federal territory and the coequal status of states helps to explain the persistence of intractable federalism problems.

First, state borders may be less permanent than commentators generally assume. The Constitution makes state borders difficult to change.¹²¹ But the framework protecting the integrity of state borders has an unexplored loophole: treaties might be able to jettison portions of a state without the state’s consent. For example, having purchased Alaska from Russia, perhaps the United States can sell some of it back. This deannexation scenario does not seem likely today, but any comfort we have in the permanence of state borders may be a product of fortune rather than constitutional design. The United States has had sufficient military, economic, and political strength to avoid being forced into a position where the loss of state land would be an expedient means of protecting national interests. Yet history could have turned out differently: the United States might have lost the War of 1812 and been asked to surrender New Hampshire, or lost the Mexican-American War and been asked to surrender Texas, or lost the Spanish-American War and been asked to surrender Florida. Even if the United States were not forced into sacrificing land, one can imagine the President and Senate concluding that trading land for cash or some other concession (such as a promise of peace) might be worth

boundary disputes. Indeed, this was the purpose of all but one of the thirty-six compacts enacted before 1921.”).

120. See, e.g., *New Jersey*, 523 U.S. at 770–71 (State Controversies Clause permitted the Supreme Court to exercise original jurisdiction in a dispute between New York and New Jersey regarding sovereignty over Ellis Island); *Moore v. McGuire*, 205 U.S. 214, 219 (1907) (Land Grant Clause permitted federal jurisdiction in a private civil action that required the court to determine the location of the Arkansas/Mississippi border). *But cf.* Jonathan Horne, *On Trying and Failing to Resolve Interstate Disputes*, 5 N.Y.U. J. L. & LIBERTY (forthcoming 2011) (arguing that the Court should reconsider the scope of its remedial authority in suits between states, including suits regarding boundary lines).

121. See, e.g., U.S. CONST. art. IV, § 3, cl. 1 (“[N]o 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.”).

the cost. Whether these kinds of transfers would be constitutional presents an interesting and unexplored question that tests traditional assumptions about state sovereignty.¹²²

Deannexing an entire state would arguably be unconstitutional, but deannexing portions of a state might be allowed (even if ill-advised). The Constitution protects state borders from interference by: (1) requiring a state's consent to the joining of all or some of its land into a new state, to the cession of its land for the seat of government, and to the sale of its land for use as federal "Places" (such as forts);¹²³ (2) compelling the United States to protect states from "Invasion" and "domestic Violence";¹²⁴ and (3) limiting the effect of federal eminent domain power over state property.¹²⁵ None of these protections explicitly address whether the United States may expel an unconsenting state. But there are four reasons to doubt such power: (1) the Constitution does not provide a formal mechanism for expulsion; (2) Congress's enumerated power to "dispose of" "Territories" might foreclose an unenumerated power to dispose

122. Legal or not, deannexation might have been unavoidable if a foreign country physically occupied U.S. territory. Such an occupation actually happened, albeit temporarily. British forces seized portions of Maine (which at the time was part of Massachusetts) for five months during the War of 1812. The Supreme Court held that British control "suspended" all U.S. "sovereignty" in the occupied zone such that "laws of the United States could no longer be rightfully enforced." *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254 (1819) (holding that the United States could not retroactively collect customs duties on goods imported during the occupation). The legality of any deannexation might also be a "political question" on which the courts would not opine. *See Jones v. United States*, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges . . .").

123. *See* U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 1. For a discussion of the ambiguity in Article IV's consent requirement due to a stubbornly inscrutable semicolon, see Kesavan & Paulsen, *supra* note 38, at 295–96. States may also voluntarily adjust their borders by interstate compact. *See* Hasday, *supra* note 119, at 3.

124. U.S. CONST. art. IV, § 4.

125. "The United States can . . . exercise its eminent domain power to take title to state property." *Block v. North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 291 n.26 (1983). When the United States takes state land without the state's consent, it holds the land as an "ordinary proprietor" and does not possess the "exclusive" jurisdiction that state consent would provide. *Paul v. United States*, 371 U.S. 245, 264 (1963). The seized land thus remains subject to a greater degree of state control than lands that states cede to the federal government under the Enclave Clause. *See infra* Part I.I.

of “States”;¹²⁶ (3) expelling a state from the Union would impinge its “equal Suffrage in the Senate” and therefore might require its consent;¹²⁷ and (4) the states’ duty to remain in the Union over their objection—some states lost a war over their attempt to secede—suggests a correlative obligation for the Union not to expel states without their consent (and possibly not to expel them even with their consent).¹²⁸

Some of these objections fade if the issue is whether a treaty can transfer *part* of a state, thus shrinking the state without eliminating it. Such a treaty would raise a conflict between the broad federal power over foreign affairs and the general presumption that a state’s territory is immutable without its con-

126. U.S. CONST. art. IV, § 3, cl. 2. Although the plain meaning of “dispose” suggests that Congress can completely sever U.S. ties with Territories, other interpretations are possible. See *Downes v. Bidwell*, 182 U.S. 244, 314 (1901) (White, J., concurring) (“I cannot resist the belief that the theory that the disposing clause relates as well to a relinquishment or cession of sovereignty as to a mere transfer of rights of property, is altogether erroneous.”).

127. U.S. CONST. art. V. The consent requirement appears in the context of the process for amending the Constitution, but the text does not explicitly limit the requirement to that context. The word “equal” in the Equal Suffrage Clause is undefined. It could set a baseline of equality that precludes any departure, and thus would preclude deannexation. Alternatively, it could mean that each state must have the same representation in the Senate as all other states, which would not be an obstacle to deannexation because the unrepresented entity would no longer be a state.

128. On the other hand, the rule against contested secession may merely reflect deference to national will, such that the Union’s desire *either* to expel or keep a state would trump a contrary state preference. For a discussion of whether the Constitution permits secession, see ABRAHAM LINCOLN, *First Inaugural Address* (Mar. 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 218 (Don E. Fehrenbacher ed., 1989) (“[N]o State, upon its own mere motion, can lawfully get out of the Union”); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS, 1845–1861*, at 230–37 (2005) (analyzing Civil War era arguments for and against secession); DANIEL FARBER, *LINCOLN’S CONSTITUTION* 70–91 (2003) (same); WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 295–310 (Buffalo 2d ed. 1829) (defending states’ right to secede); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 499, 506–08 (1994) (suggesting that secession might be permissible if approved by the national populace, rather than unilaterally by a single seceding state’s polity). Ironically, the Articles of Confederation purported to form a “perpetual” union that nevertheless quickly dissolved, while the Constitution contains no such explicit aspiration and yet may forge bonds that are legally permanent. ARTICLES OF CONFEDERATION of 1781, art. XIII, para. 1; cf. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1868) (dicta that the “more perfect Union” clause in the Preamble makes the United States “indissoluble”), *overruled on other grounds* by *Morgan v. United States*, 113 U.S. 476 (1885); *id.* (“The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.”).

sent. A large literature analyzes when the Treaty power can circumvent other aspects of the Constitution limiting federal authority over subjects that would ordinarily be under state control.¹²⁹ But this literature has not addressed whether treaties may transfer portions of unconsenting states.¹³⁰ The Supreme Court likewise has never directly engaged the question.¹³¹ The answer is not obvious. Many states encompass land

129. See *Missouri v. Holland*, 252 U.S. 416, 432–33 (1920) (upholding federal power to regulate by treaty a subject that the Court assumed Congress could not regulate by statute); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 191 (2d ed. 1996) (“[W]hatever is within [the treaty power’s] scope is not reserved to the states: the Tenth Amendment is not material. Many matters, then, may appear to be ‘reserved to the States’ as regards domestic legislation if Congress does not have power to regulate them; but they are not reserved to the states so as to exclude their regulation by international agreement.”); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 460 (1998) (“[T]here is a strong case—based on history, doctrine, and policy—for subjecting the treaty power to the same federalism limitations that apply to Congress’s legislative powers.”); Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1868, 1875 (2005) (“This Article endeavors to demonstrate that *Missouri v. Holland* is wrong.”); David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963, 1975–88 (2003) (contending that the treaty ratification process protects state interests and may obviate content-based constraints on federal power); cf. *Fort Leavenworth Ry. Co. v. Lowe*, 114 U.S. 525, 541 (1885) (noting that the United States, deeming it necessary, sought Maine’s participation in treaty negotiations about their mutual northern boundary with Great Britain, but not holding that this was required). A related question is whether the President and Senate can use the treaty power to alienate federal land that is not part of the states, or if instead Congress must enact legislation authorizing loss of federal title. See *Edwards v. Carter*, 580 F.2d 1055, 1056 (D.C. Cir. 1978) (rejecting a challenge by members of the House of Representatives to a treaty transferring the Panama Canal to Panama).

130. *But cf.* Burnett, *supra* note 80, at 804–05 (contending that incorporated territories are a permanent part of the Union, but not specifically focusing on the treaty power).

131. The Court has assumed in dicta without analysis that “the tie that bound the States . . . to the Constitution could not be dissolved” without their “consent.” *Downes v. Bidwell*, 182 U.S. 244, 261 (1901). Three concurring Justices took a more nuanced position. They acknowledged that “from the exigency of a calamitous war or the necessity of a settlement of boundaries, it may be that citizens of the United States may be expatriated by the action of the treaty-making power.” *Id.* at 317 (White, J., concurring). However, a “mere act of sale” would not be permissible. *Id.* Two Justices subsequently suggested that incorporation of territories (and presumably states as well) permanently extends constitutional protection, but the full Court has not considered the question. See *Rasmussen v. United States*, 197 U.S. 516, 529–30 (1905) (Harlan, J., concurring) (“Congress cannot suspend the operation of the Constitution in any territory after it has come under the sovereign authority of the United States, nor, by any affirmative enactment, or by mere non-action, can Congress prevent the Constitution from being the supreme law for any peoples subject

that the United States acquired through treaties.¹³² The Supreme Court views “cession” of land via such treaties as ingrained in “the law of nations, recognized by all civilized states.”¹³³ This broad view of national prerogative suggests that any limit on the ability of the United States to shrink itself by treaty would be inconsistent with the general principles that led to U.S. expansion. The Court could of course hold that the Constitution modifies international law by making cession a one-way ratchet once land is incorporated into states: the United States can expand but cannot contract. But the Constitution’s text does not expressly compel this result. Thus, for example, if Russia demanded the Aleutian Islands in exchange for concessions on national security matters, it is not clear that Alaska’s objection could derail the deal. The transfer might be unwise as a matter of policy, Alaska might deserve compensation for its loss,¹³⁴ and U.S. citizens in the affected territory

to the jurisdiction of the United States.”); *id.* at 536 (Brown, J., concurring) (contending that the extension of the Constitution to territories is “irrevocable”).

The scant commentary from the Founding era does not indicate a consensus on whether treaties could alienate states. There is some evidence that Alexander Hamilton was amenable to deannexation, but that Thomas Jefferson and George Washington were opposed. *See Downes*, 182 U.S. at 315–17. Fears of deannexation were briefly discussed during ratification debates and met with inconsistent responses. *Compare* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 501 (Jonathan Elliot ed., 2d ed. 1891) [hereinafter ELLIOT’S DEBATES] (statement of James Madison in Virginia) (“The power of making treaties does not involve a right of dismembering the Union.”), *with id.* at 507–08 (statement of George Mason in Virginia) (“If, in the course of an unsuccessful war, we should be compelled to give up part of our territories, or undergo subjugation if the general government could not make a treaty to give up such a part for the preservation of the residue, the government itself, and consequently the rights of the people, must fall. Such a power must, therefore, rest somewhere. . . . I conceive, therefore, that there is nothing in that Constitution to hinder a dismemberment of the empire.”).

132. *See, e.g.*, Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico art. V, U.S.-Mex., Feb. 2, 1848, 9 Stat. 922 (California and southwestern states); Treaty with Great Britain, U.S.-Gr. Brit., June 15, 1846, 9 Stat. 869 (Oregon); Treaty of Amity, Settlement, and Limits, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252 (Florida); Treaty Between the United States of America and the French Republic, U.S.-Fr., Apr. 30, 1803, 8 Stat. 200 (Louisiana Territory); Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 81 (territory south of Canada).

133. *Jones v. United States*, 137 U.S. 202, 212 (1890).

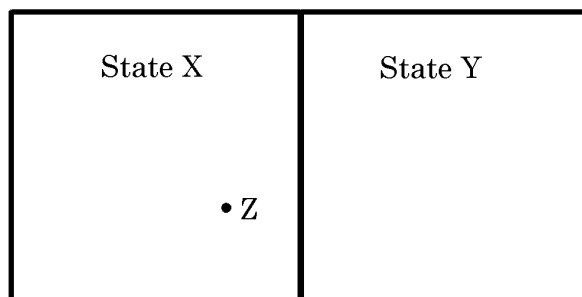
134. *Cf. Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508, 534 (1941) (“The fact that land is owned by a state is no barrier to its condemnation by the United States. There is no complaint that any property owner will not receive just compensation for the land taken.” (citation omitted)).

would probably have exit rights by virtue of their citizenship.¹³⁵ Yet the treaty might nevertheless be constitutional unless there is a compelling reason to believe that state borders are inviolable. The extent to which the treaty power allows deannexing states or portions of states thus presents future scholars with a fascinating and overlooked question of constitutional balancing between the power of two entities (the United States and a state) over a single space.

Second, even if states' physical boundaries are secure from federal alteration, the legal significance of these boundaries is ambiguous because the Constitution defines overlapping spaces subject to overlapping authority. To see why, imagine a simplified variant of the federal system that consists entirely of the United States and two states (*X* and *Y*). Point *Z* is within State *X*, as illustrated below.

135. Russian citizens enjoyed exit rights when Alaska was transferred to the United States. 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 art. III, U.S.-Russ., Mar. 30, 1867, 15 Stat. 539 (allowing Russian citizens to leave Alaska within the first three years after its transfer to the United States). The transfer of state land to a foreign country might seem to violate the Constitution by depriving residents of a "Republican Form of Government." U.S. CONST. art. IV, § 4. The federal "guarantee" of such government applies "to every State in this Union." *Id.* The word "State" encompasses its "people." *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868) (applying this construction to the Guarantee Clause), *overruled on other grounds by Morgan v. United States*, 113 U.S. 476 (1885). State residents might therefore have an entitlement to avoid being transferred to a foreign power. However, the text is ambiguous about the clause's temporal scope, creating a question for future scholars: is the guarantee limited to the duration of statehood, or does it create an obligation that could require preserving statehood? If the Guarantee Clause limits federal authority to deannex state land, then presumably such deannexation would be constitutional if the acquiring country offered a republican form of government. Indeed, the United States potentially could fulfill its "guarantee" by including a clause in the treaty requiring the acquiring government to preserve republican rule. Other countries have imposed similar requirements in treaties with the United States. See Treaty of Amity, Settlement, and Limits art. V, U.S.-Spain, Feb. 22, 1819, 8 Stat. 252 (enumerating exit rights with respect to Florida); Treaty Between the United States of America and the French Republic, *supra* note 132, art. III, 8 Stat. at 202 ("The inhabitants of [Louisiana] shall . . . [have] enjoyment of all the rights, advantages and immunities of citizens of the United States.").

The United States



The boundary line between *X* and *Y* in theory should have meaning, as should the fact that *Z* is within *X* and outside *Y*. But if we want to know which government entity regulates events in *Z*, the boundaries alone provide insufficient information. It is possible that: (1) *X* exclusively regulates events at *Z* because they occur within *X*; (2) the United States exclusively regulates events at *Z* because they occur within the United States; (3) the United States and *X* concurrently regulate events at *Z* because it is within both places; and (4) *Y* regulates events at *Z* concurrently with *X* (and with federal oversight) to the extent that those events are of legitimate concern to *Y*.¹³⁶ State borders are therefore merely relevant rather than dispositive when trying to determine whether the location of an event has regulatory significance. The most that we can conclude from knowing that *Z* is in *X* is that *X* probably is the sole regulator because federal power is limited and the extraterritorial application of other states' laws is relatively unusual.¹³⁷ But a

136. Examples of why *Y* might care about conduct at *Z* include: (1) a factory at *Z* spews pollution into *Y*; (2) a car accident at *Z* injures a passenger from *Y*; (3) a distributor at *Z* ships dangerous products into *Y*; or (4) a resident of *Y* earns income from an employer at *Z*. The Supreme Court has repeatedly held in these and similar circumstances that states can regulate extraterritorial conduct by taxing it, applying statutory and common law regulations, and exercising adjudicative jurisdiction. See generally Erbsen, *supra* note 1; Katherine Florey, *State Courts, State Territory, State Power: Reflections on the Extraterritoriality Principle in Choice of Law and Legislation*, 84 NOTRE DAME L. REV. 1057 (2009); Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987); Mark D. Rosen, *State Extraterritorial Powers Reconsidered*, 85 NOTRE DAME L. REV. 1133 (2010).

137. See Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4, 168 (2001) (“[S]tates still do most of the actual governing in this country, and the important objects of daily life are still chiefly matters of state and local, not federal, cognizance.”). State law applies extraterritorially more often than

more precise answer requires information about *who* is acting at *Z*, *what* they are doing, and *where* the effects of that conduct arise. For example, is the actor a citizen of *X*, *Y*, or elsewhere, does the conduct implicate one of Congress's enumerated powers that has generated legislation or dormant preemption, and does the conduct have a nexus with *Y* that might justify applying *Y*'s law or permitting *Y*'s courts to exercise adjudicative jurisdiction?

Thinking about these “who” and “what” questions in the context of the “where” question illustrates a dilemma of federalism. In a system of unitary sovereignty, the answer to the “where” question can moot the “who” and “what” questions because a single government has authority over all events within its components. That government may choose to delegate its power to subsidiary units, but it remains the ultimate source of authority within its physical realm.¹³⁸ Yet in a system of fragmented sovereignty, the where question cannot be dispositive because conduct occurs in and causes effects in spaces that exist simultaneously within multiple constitutionally defined entities. The “who” and “what” questions therefore become important and create a multivariable regulatory calculus that is notoriously complex and resists formulaic resolution.¹³⁹

is commonly assumed, but still far less often than it applies locally. See Rosen, *supra* note 2, at 1108.

138. Delegation within a system of formal unitary sovereignty can create complicated federalism issues when regional subdivisions have ill-defined guarantees of autonomy. See Charles E. Ehrlich, *Democratic Alternatives to Ethnic Conflict: Consociationalism and Neoseparatism*, 26 BROOK. J. INT'L L. 447, 470–71 (2000) (“The Constitution of 1978 divided Spain into seventeen autonomous communities However, the Constitution also spoke of the unity of the Spanish State, in the process denying any right to self-determination in the traditional sense of sovereignty. The arrangement was meant to allow each region or ‘nationality’ autonomy and local self-government As a trade-off, the principle of ‘self-determination’ was applied to the Spanish state in its entirety.” (footnotes omitted)); Ford, *supra* note 33, at 852 n.20 (“It is often difficult to determine whether a sovereign jurisdiction chronologically or normatively precedes its jurisdictional subdivisions, or whether it is simply the sum of its subdivisions.”).

139. Expanding analysis of federalism beyond the traditional focus on state and federal actors adds additional complexity. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 6, 22 (2010) (contending that “a broad-gauged, democratic account of how . . . nested governmental structures ought to interact” should address “the special purpose institutions (juries, school committees, zoning boards, local prosecutors’ offices, state administrative agencies) that constitute states and cities”); *supra* notes 31–32; *infra* note 318.

The relationship between the who, what, and where questions suggests that constitutional law governing federalism can in part be understood as a byproduct of legal geography. The Constitution fragments “the Land” into multiple components, including two overlapping places (“States” and “the United States”) governed by entities that have a hierarchical relationship under the Supremacy Clause. Doctrine is therefore necessary to allocate power over this shared space.¹⁴⁰ Likewise, conduct in one place can affect other similarly defined places that share an equivalent legal status of “statehood.” Doctrine is therefore necessary to determine when states may resist or must submit to the extraterritorial reach of other states’ laws or institutions. Accordingly, “vertical” federalism doctrine that manages hierarchical federal/state relationships and “horizontal” federalism doctrine that manages coequal state/state relationships are reactions to the incomplete role that state borders play in preserving and confining state authority.¹⁴¹

D. THE “DISTRICT” AND THE “SEAT”

The Constitution creates a “District” about which it says very little. This District: (1) “become[s] the Seat of the Government”; (2) derives from the “Cession of particular States” upon “Acceptance of Congress”; (3) can be no larger than “ten Miles square”; (4) is subject to the “exclusive” power of Congress in “all Cases whatsoever”; and (5) may appoint presidential and vice-presidential electors.¹⁴² The District’s physical scope is ambiguous. The Constitution limits the District’s maximum size,¹⁴³ but does not establish its minimum size,¹⁴⁴ location,¹⁴⁵

140. For a rare example of the Supreme Court framing federalism problems in spatial terms, see *Ableman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858) (“[T]he powers of the General Government, and of the State, *although both exist and are exercised within the same territorial limits*, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.” (emphasis added)). The Constitution’s only explicit reference to the federal and state governments’ shared authority over places is the now-repealed Eighteenth Amendment, which granted the United States and states “concurrent power” over prohibition. U.S. CONST. amend. XVIII, § 2, *repealed by* U.S. CONST. amend. XXI.

141. For a discussion of how vertical and horizontal federalism doctrines overlap, see Erbsen, *supra* note 1, at 504–05.

142. U.S. CONST. art. I, § 8, cl. 17; *id.* amend. XXIII.

143. This limit might not be as clear as the “ten Miles square” language suggests because the District has contended that it may operate government facilities outside its boundaries. See *Virginia v. Reno*, 955 F. Supp. 571, 578–80 (E.D. Va. 1997) (holding that the Property Clause permits Congress to ac-

or permanency (the District has shrunk over time).¹⁴⁶ Arguably, the District's very existence is not required. The Constitution

quire land in Virginia on which the District may operate a prison), *vacated as moot*, 122 F.3d 1060 (4th Cir. 1997).

144. The Framers wanted buffer space between the states and federal institutions to ensure that the District would be secure, autonomous, and protected from parochial state influences. See THE FEDERALIST NO. 43, *supra* note 43, at 272 (James Madison) ("Without [exclusive federal jurisdiction over the District,] not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of the government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence equally dishonorable to the government and dissatisfactory to the other members of the Confederacy."); 3 ELLIOT'S DEBATES, *supra* note 131, at 439 (statement of Edmund Pendleton in Virginia) (arguing that exclusive federal jurisdiction over the nation's capital was necessary to give Congress "power over the local police of the place, so as to be secured from any interruption in their proceedings"); 4 ELLIOT'S DEBATES, *supra* note 131, at 220 (statement of James Iredell in North Carolina) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . It is to be hoped such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself.").

145. By not specifying the District's location, the Framers sidestepped a delicate political question that was entangled with conflicts between free and slave states and competition between states hoping that proximity to the capitol would foster economic development. See Whit Cobb, *Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital*, 99 DICK. L. REV. 527, 534–49 (1995).

146. The District originally consisted of land ceded from Maryland and Virginia, but Congress retroceded the portion from Virginia. See Act of July 9, 1846, ch. 35, § 1, 9 Stat. 35, 35–36. The "present" district is the "permanent seat of government," 4 U.S.C. § 71 (2006), but there is no apparent constitutional limit on Congress changing its mind, retroceding the entire District, and accepting a new District elsewhere. The Constitution says merely that a District may exist; it never explicitly says where it must be or how long it must persist. Cf. *Phillips v. Payne*, 92 U.S. 130, 134 (1875) (holding that the plaintiff was "estopped" from challenging the constitutionality of retrocession because Virginia had long exercised "*de facto*" control of the retroceded territory, but not considering whether retrocession was constitutional at the time it occurred). The Twenty-Third Amendment seems to support the District's ephemeral status by referring generically to "the District constituting the seat of Government" rather than specifically to "the District of Columbia." But see OFF. OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL: THE QUESTION OF STATEHOOD FOR THE DISTRICT OF COLUMBIA 23 (1987) (contending that retrocession may be unconstitutional in part because a new or reduced District could have insufficient population to justify three electoral votes, which suggests that the Amendment's drafters intended to freeze the District at its current dimensions). Congress could conceivably retrocede the District and then reacquire a portion as a "Place" under the Enclave Clause, see *infra* Part I.I; this would render the Twenty-Third Amendment moot by eliminating the District to which it refers. See Neuman, *supra* note 32, at 1223 (noting this possibility). Finally, if the District is a subset of federal "Property," then Congress may have power to "dispose" of it, which further

provides only that Congress “may” “[a]ccept[.]” an offer of land for the District,¹⁴⁷ and there is no mechanism for compelling states to provide such land.¹⁴⁸ Moreover, the seat of government—which is both a concept and place¹⁴⁹—apparently can be anywhere that Congress specifies, and briefly was in Pennsylvania.¹⁵⁰ The District is thus yet another constitutional space with tenuous physical boundaries.

suggests that the District is not permanent. U.S. CONST. art. IV, § 3, cl. 2; *see infra* note 212.

147. U.S. CONST. art. I, § 8, cl. 17.

148. Congress can seize state land by eminent domain, but would not acquire the kind of full sovereignty over seized land that it possesses over the voluntarily ceded District. *See supra* note 125.

149. The “seat” must exist somewhere because the Constitution requires Electoral College members to send their ballots “to” that place (addressed to the Senate President). U.S. CONST. amend. XII. It is unclear why Article I refers to the “Seat” while the Twelfth Amendment refers to the “seat.” One possibility is that the “Seat” is an abstract entity (the District “become[s]” the Seat), *see id.* art. I, § 8, cl. 17, while the “seat” is shorthand for the place where that entity is (ballots are sent “to” the seat), *see id.* amend. XII.

The Seat has two additional spatial dimensions. First, legislators “going to and returning from” legislative sessions (which presumably occur in the Seat) enjoy broad freedom from “Arrest” in the states that they transit. U.S. CONST. art. I, § 6, cl. 1 (creating exceptions for “Treason, Felony and Breach of the Peace”). Second, “Speech or Debate *in* either House” may “not be questioned in any other *Place*.” *Id.* (emphasis added). The fact that these clauses do not apply to all travel or all speech by members of Congress suggests a special status for the Seat that creates an extraterritorial immunity for local conduct.

150. The statute authorizing the District as the future “permanent seat of the government” specified Philadelphia as the interim location for “all offices attached to the seat” between 1790 and 1800. Act of July 16, 1790, ch. 28, §§ 1, 5, 1 Stat. 130, 130. The seat was also briefly in New York, which was the final seat under the Articles of Confederation and carried over to the new government. *See* 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 523 (1937) (reporting the September 12, 1788, resolution calling for the first Congress under the new Constitution to convene at the “present seat” of government). Presumably, if the District were occupied by foreign invaders or destroyed (as was a risk during the Cold War), the seat of government could relocate without need to await cession of a new District. *Cf.* Ted Gup, *The Ultimate Congressional Hideaway*, WASH. POST MAG., May 31, 1992, at W11 (discussing a secret bunker under the Greenbrier resort in West Virginia intended to house the government in case of nuclear attack). Article I never mentions the Seat and allows Congress to “sit[.]” in “any” “Place” to which both houses consent. U.S. CONST. art. I, § 5, cl. 4. The text does not indicate whether any such place outside the District formally becomes a new “seat” of government. In practice, however, Congress must have authority to designate a new seat when circumstances require, otherwise there would be nowhere for the Electoral College to send its ballots (or nobody to open them if sent to the old seat). *See supra* note 149. Less clear is whether the President can select a meeting place outside the seat when he or she “on extraordinary Occasions” orders Congress to “convene.” U.S. CONST. art. II, § 3. On the one hand, there

More generally, the sparse description creates a mystery about how the District is different from other kinds of constitutionally defined spaces and about the legal significance of those differences. Constitutional powers and rights that refer to spaces such as States and Territories therefore may or may not apply to the District depending on how one situates the District within the broader typology of federal spaces.

The District is a unique space and entity, and thus any effort to consider its constitutional significance requires engaging with its Districtness. At first glance, the “District” looks like a “Territory.”¹⁵¹ It was initially called the “territory of Columbia,”¹⁵² the Constitution uses similarly expansive language to describe federal power over both the District and the Territories,¹⁵³ and the Twenty-First Amendment arguably treats it as a “Territory.”¹⁵⁴ Yet the District differs from other Territories in that it is the “seat” of government, it has a more “permanent” status than Territories,¹⁵⁵ the Constitution allows its res-

is little reason to permit the President to order Congress to meet in an inconvenient place (such as Crawford, Texas, or Hyannis Port, Massachusetts) when meeting in the ordinary seat would be feasible. On the other hand, in a true emergency in which the seat was occupied or destroyed, the President’s power to convene Congress presumably includes the power to select a venue (at least if the two houses cannot agree on an alternative). For a discussion of separation of powers concerns arising from the President’s role in legislative procedure, see Aaron-Andrew P. Bruhl, *If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?*, 85 NEB. L. REV. 960, 1003–07 (2007).

151. See U.S. CONST. art. IV, § 3, cl. 2.

152. Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96.

153. Compare U.S. CONST. art. IV, § 3, cl. 2 (Congress may “make all needful Rules and Regulations” for Territory), with *id.* art. I, § 8, cl. 17 (Congress may “exercise exclusive Legislation in all Cases whatsoever” for the District).

154. The Twenty-First Amendment applies to “any State, Territory, or possession of the United States.” *Id.* amend. XXI, § 2. There is no reason to believe that the drafters intended to exclude the District from the Amendment’s coverage. The District is not a state, and so if the Amendment applies to the District then the District must be a “Territory” or “possession.” The “Seat of Government” seems to have a higher status than “possession” implies, leaving “Territory” as the only option. See *infra* Part I.H (discussing the meaning of “possession”). The D.C. Circuit reached a different conclusion without considering the foregoing analysis. The Court held that the Twenty-First Amendment applies to the District “as if it were a state.” *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 199 (D.C. Cir. 1996) (noting that Congress intended the District to function like a state for purposes of regulating alcohol). This seems to be the weakest of the possible arguments: the District is not a State, so either the Amendment does not apply, or the District is a Territory or possession.

155. *O’Donoghue v. United States*, 289 U.S. 516, 538 (1933).

idents to vote in presidential elections,¹⁵⁶ and it was once part of a state, such that wisps of its prior status may linger.¹⁵⁷ These attributes make the District look a bit like a State. But the District is not a State. It was not one of the original states to ratify the Constitution and it was never added to the “Union” by the only mechanism for admitting new states.¹⁵⁸ Indeed, if the entire District were to become a state, a question would arise about whether it could continue to be the District.¹⁵⁹ The District is therefore neither exactly like a Territory nor exactly like a state.¹⁶⁰ However, the District’s uniqueness has not stopped courts from relying on metaphors. Courts have found the District-as-state meme sufficiently tantalizing to justify applying to the District some, but not all, constitutional provisions that nominally apply only to “States.” The District is thus

156. See U.S. CONST. amend. XXIII.

157. See *O'Donoghue*, 289 U.S. at 540; Langdell, *supra* note 61, at 382. The District’s status as a nonstate carved from a state is currently unique, with the possible exception of federal enclaves. See *infra* Part I.I. However, shortly after the Founding, the United States acquired some territory that had previously been part of a state. For example, a six-year gap separated North Carolina’s cession of the Southwest Territory and Tennessee’s statehood. See Act of June 1, 1796, ch. 47, 1 Stat. 491 (admitting Tennessee into the Union); Act of May 26, 1790, ch. 14, 1 Stat. 123 (organizing the Southwest Territory); Act of April 2, 1790, ch. 6, 1 Stat. 106 (accepting cession of the Southwest Territory); see also UNITED STATES PUBLIC LAND COMMISSION, THE PUBLIC DOMAIN 74–75 (1881) (reprinting the May 1800 cession of Connecticut’s claims to the Western Reserve in what later became Ohio); Georgia: Cession of Western Land Claims, in 5 THE TERRITORIAL PAPERS OF THE UNITED STATES 142–45 (Clarence Edwin Carter ed., 1937) (ceding Georgia’s claims to western lands that eventually became Alabama and Mississippi). One can in theory imagine according this territory special status, although in practice the issue does not appear to have arisen during the territory’s brief existence.

158. See U.S. CONST. art. IV, § 3, cl. 1. Maryland and Virginia would have had to consent to contemporaneous formation of a new state from their territory, see *id.*, although consent to subsequent admission of the ceded territory is probably unnecessary due to intervening nonstate status of the land between cession and statehood.

159. For example, if Congress “admitted” the District as a state under Article IV, could Congress retain “exclusive jurisdiction” over the District under Article I? The answer seems to be no because the existence of federal plenary power is inconsistent with states having “reserved” powers. *Id.* amend. X. However, proposals for D.C. statehood typically do not apply to all of D.C.: the District would continue to exist as a “smaller” place while its residential areas would become a state. Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 163 (1991).

160. The District is also not like a “Place” under the Enclave Clause. See Raven-Hansen, *supra* note 159, at 171.

like a state for purposes of the Commerce Clause¹⁶¹ and the Full Faith and Credit Clause,¹⁶² but not the Equal Protection Clause¹⁶³ and Diversity Clause.¹⁶⁴ There is also a heated political and legal campaign centered around whether the District is sufficiently like the “States” referenced in Article I to receive representation in Congress without a constitutional amendment.¹⁶⁵ Beyond the constitutional context, an extensive jurisprudence has evolved to determine when statutory and treaty references to “states” and “territories” encompass the District.¹⁶⁶

The indeterminacy surrounding the District’s legal status illustrates two points about the Constitution’s typology of spaces. First, geographic labels are often an obstacle to reasoned analysis of how physical spaces and related entities exist within legal regimes. The District is unique, yet we are forced to think about it by reference to other categories of places because

161. See *Milton S. Kronheim & Co. v. Dist. of Columbia*, 91 F.3d 193, 198 (D.C. Cir. 1996) (“[W]e apply to local legislation of the District the same interstate commerce analysis as we would to state laws.”).

162. See *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (“[C]ourts of the District are bound, equally with courts of the States, to observe the command of the full faith and credit clause . . .”).

163. See *Bolling v. Sharpe*, 347 U.S. 497, 498–99 (1954).

164. See *Hepburn & Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445, 452–53 (1805). Oddly, D.C. citizens are state citizens for purposes of the diversity *statute* because three Justices who believed that Article I allowed Congress to vest jurisdiction that would be unavailable under Article III formed a majority with two Justices willing to overrule *Hepburn*. See *Nat’l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949) (opinion of Jackson, J., joined by Black and Burton, JJ.); *id.* at 625–26 (Rutledge J., joined by Murphy, J., concurring). Seven Justices affirmed *Hepburn*. See *id.* at 586–88 (opinion of Jackson, J., joined by Black and Burton, JJ.); *id.* at 653 (Frankfurter, J., joined by Reed, J., dissenting); *id.* at 645 (Vinson C.J., joined by Douglas, J., dissenting).

165. In 2007, Congress considered the District of Columbia House Voting Rights Act, which would have given the District one seat in the House of Representatives. See S. 1257, 110th Cong. (2007); H.R. 1905, 110th Cong. (2007). The bill passed the House but failed in the Senate. See 153 CONG. REC. S11,631 (daily ed. Sept. 18, 2007); 153 CONG. REC. H3,593 (daily ed. Apr. 19, 2007). For analysis of the bill, see *Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary*, 110th Cong. (2007); *District of Columbia House Voting Rights Act of 2007: Hearing on H.R. 1433 Before the H. Comm. on the Judiciary*, 110th Cong. (2007); Jonathan Turley, *Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress*, 76 GEO. WASH. L. REV. 305 (2008); see also *Adams v. Clinton*, 90 F. Supp. 2d 35, 59 (D.D.C. 2000) (three-judge court) (rejecting theory that District residents were entitled to representation in Congress or entitled to vote in Maryland), *aff’d*, 531 U.S. 941, (2000).

166. See *Dist. of Columbia v. Carter*, 409 U.S. 418, 420 (1973).

the Constitution itself refers to those categories in circumstances that arguably should encompass the sparsely defined District. These forced analogies produce bizarre opinions about when the District sufficiently resembles something else such that it functionally is the thing that it formally is not.¹⁶⁷ Second, creating a typology of defined spaces endows those spaces with meaning and generates a need for precision that the text does not always fulfill. It is possible that every reference to states in the Constitution was intended to exclude the District, but some may have been oversights.¹⁶⁸ Likewise, it is

167. See *supra* note 164 (discussing *Tidewater*, in which a majority of the Justices disagreed with the reasoning underlying the Court's holding about how the Diversity Clause applies to District residents). A similar phenomenon of strained analogies exists in civil rights jurisprudence. See Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 285 (1994) (discussing the "discourse of equivalents" that asks "whether sexual orientation is sufficiently 'like' race, gender, disability, religion, or national origin, to merit the legal protection of civil rights laws"); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 962 (2002) ("Precisely as analogies dramatize similar features of different practices, they work both to illuminate and occlude. The race/gender analogy no doubt helped the Court see features of sex discrimination which, to that point in history, it had not seen. But the Court relied upon the race/gender analogy in ways that ultimately worked to limit the critical acuity and constitutional legitimacy of the emergent law of sex discrimination.").

168. Alexander Hamilton's unsuccessful proposal to amend the District Clause at the New York ratifying convention illustrates the spatial imprecision in Founding era views of the District. Hamilton proposed that upon attaining a sufficient population, the "District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body." 5 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962). This proposal can be read to support either of two contradictory conclusions about the District's status: (1) the District was a distinct entity whose residents could not vote absent a Constitutional amendment; or (2) the District was a "parcel" of the granting state, and thus its residents could vote in their capacity as state citizens even without an amendment (the amendment would be necessary only to give the District a separate congressional delegation). The proposal is also ambiguous about what sort of representation the District would have. For example, Hamilton did not indicate that the District would be treated like a state and granted two senators; he merely sought an unspecified form of "Representation" and did not indicate how much discretion Congress had in structuring that representation. See *generally Adams*, 90 F. Supp. 2d at 51 (noting Hamilton's proposal and discussing other evidence of the Framers' attitude toward and awareness of the District's status). The record does not indicate why Hamilton, who attended the Philadelphia Convention, waited until the New York ratifying convention to raise his concerns about the District. Cf. Cobb, *supra* note 145, at 533 n.19 (speculating that Hamilton may have hoped that the District would be carved from New York, and thus that his proposal would increase his home region's representation in Congress).

possible that the drafters who coined the term “District” had an intended meaning that was broader than what they actually conveyed.¹⁶⁹ Readers are thus left to draw conclusions from words that may not fully communicate the ideas that the text is supposed to embody.¹⁷⁰ The result is a jurisprudence that inevitably will be unsatisfying to observers hoping that formal labels and territorial boundary lines can produce conceptual clarity. Indeed, the more spaces we study as this Part progresses, the more we see that reliance on labels and borders provides either confusion or false comfort.

E. “DISTRICTS”

The Sixth Amendment’s Vicinage Clause provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.”¹⁷¹ The legal significance of district borders is therefore relatively straightforward: when a defendant commits a crime in a district, he is entitled to a jury from that district whenever the clause applies. Unfortunately, the word “district” appears in a context that fails to account for the subtleties of federal geography. The physical contours of districts are therefore indeterminate in ways that highlight several latent ambiguities in the vicinage requirement.

First, the literal language of the Sixth Amendment makes an important category of criminal prosecutions impossible because of the text’s inattention to geography. Article III states that “all” federal crimes (other than impeachment) require trial by jury.¹⁷² Venue for such trials is appropriate in either of two places: if the crime was “committed” “within” a state, then trial must occur in that state; but if the crime was committed out-

169. See sources cited *supra* note 166 (discussing Founding era commentary about the District).

170. This disconnect between language and concepts is a problem that pervades all aspects of constitutional interpretation. The problem is especially acute when considering novel spaces that the Constitution created from scratch. For example, the “high Seas” and “admiralty” were spaces that international or English law already recognized; those spaces may have a unique constitutional definition, but readers at least benefit from a point of reference. See *infra* notes 282–92, 300. In contrast, the “District” is a novel feature of a novel federal system—a federal island in a sea of states—and thus lacks a preexisting frame of reference.

171. U.S. CONST. amend. VI.

172. *Id.* art. III, § 2, cl. 3.

side the states, then trial can occur wherever Congress “direct[s].”¹⁷³ The Sixth Amendment adds a requirement that in “all” federal “criminal prosecutions” the jury must be “of the State and district wherein the crime shall have been committed.”¹⁷⁴ The problem is that unlike Article III, the Sixth Amendment fails to recognize that some federal crimes are not committed in states. The literal combination of rules requiring trial of “all” crimes by jury and “all” juries to be from the state where the crime occurred means that crimes committed outside of states cannot be prosecuted. This result would have made the “wild west” much wilder, but was obviously untenable and required an interpretative fix.¹⁷⁵ The Supreme Court thus held, without explanation, that the Vicinage Clause “applies only to the case of offences committed within the limits of a State.”¹⁷⁶ The holding makes sense only as a matter of expediency because it ignores the fact that the Vicinage Clause expressly applies to “all criminal prosecutions” and that the rest of the Sixth Amendment can apply to crimes committed outside of states.¹⁷⁷ This act of interpretative desperation would have been unnecessary if the drafters had focused more carefully on

173. *Id.*

174. *Id.* amend. VI.

175. See Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 31 (1989) (“Giving meaning to each word of a statute or the Constitution also requires not interpreting the statute or Constitution to mandate absurd results.”).

176. *United States v. Dawson*, 56 U.S. (15 How.) 467, 487 (1853); see also *Cook v. United States*, 138 U.S. 157, 181–83 (1891); *Jones v. United States*, 137 U.S. 202, 211 (1890). The district-vicinage requirement presumably must fall along with the state-vicinage requirement in cases involving crimes committed outside states. First, many such crimes do not occur in federal districts. For example, “piracy” on the “high seas” is a federal crime under 18 U.S.C. § 1651 (2006), but there is no district physically encompassing international waters. *Cf. id.* § 3238 (establishing venue, but not vicinage, rules for criminal trials involving crimes on the high seas). Second, even if Congress defined a district that included nonstate outlying areas, those places often would lack a population who could be compelled to appear as jurors, or the population would reside sufficiently far from the event to defeat the point of a vicinage requirement.

177. There is no indication that federal “criminal prosecutions” in Article III courts against defendants who acted outside of states need not be “speedy and public,” or that defendants can be deprived of the right to counsel and to confront witnesses. See *Reid v. Covert*, 354 U.S. 1, 5–10 (1956) (plurality opinion). However, conduct outside of states (as well as within states) can raise a separate issue about what constitutes a federal “criminal prosecution” to which the Sixth Amendment applies. See *Middendorf v. Henry*, 425 U.S. 25, 42 (1976) (holding that the amendment does not apply to summary court martials); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (stating that there is no “right to demand a jury” in “trials by military commission”).

the existence of different types of spaces within the constitutional order.¹⁷⁸

Second, the requirement that “district” boundaries “shall have been previously ascertained by law” creates another interpretative oddity.¹⁷⁹ If “previously” refers to creating a district prior to the trial rather than the crime, then Congress can create ad hoc districts tailored to individual cases, which seems to defeat the point of requiring fixed district boundaries. Yet if “previously” refers to the crime, then changes to district boundaries between the time of the crime and the time of an arrest could eliminate the ability to empanel a jury: the crime would have been committed in a district that no longer exists, and the district that does exist was not “previously” defined. Congress has generally avoided this problem by preserving the boundaries of modified districts to account for crimes that may have already been committed but have not yet been prosecuted.¹⁸⁰ The same physical space can thus simultaneously be within both the old and new district. This is one of only two examples of a point in space arguably being able to exist within two units of the same category of constitutionally defined place (the other is interstate boundary waters under the “concurrent jurisdiction” of two states).¹⁸¹ However, Congress has not always pre-

178. Article III required a similar interpretative fix. Criminal conduct often spans multiple states, and thus the reference to “the State” (singular) “wherein” the crime was “committed” cannot mean what it literally says (unless one gives “committed” a very formal meaning that requires arbitrarily assigning a single locus to every crime). Congress finessed this geographic oversight by providing that “any offense . . . committed in more than one district, may be . . . prosecuted in any district in which such offense was begun, continued, or completed.” 18 U.S.C. § 3237(a) (2006). The Supreme Court upheld this approach, holding that the word “district” in the Sixth Amendment really means “district or districts,” such that a single crime can be “committed” in multiple places. *United States v. Anderson*, 328 U.S. 699, 704–05 (1946).

179. The meaning of this clause is “shrouded in obscurity.” *Zicarelli v. Dietz*, 633 F.2d 312, 321 (3d Cir. 1980) (“[D]iligent research into the leading sources of Sixth Amendment analysis has disclosed no discussion or reference to the ‘previously ascertained’ clause.”). The ratifiers presumably had an initial set of districts in mind given that Congress had already defined several. *See* Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 801, 858–60 (1976).

180. 18 U.S.C. § 3240 (2006) (“Whenever any . . . territory is transferred from one district . . . to another . . . prosecutions for offenses committed within such . . . territory prior to such transfer, shall be commenced and proceeded with the same as if such . . . territory had not been transferred . . .”).

181. *See infra* Part II.B. Overlaps between constitutional spaces typically involve different categories of places, such as water that is within both the federal admiralty jurisdiction and a state, or land that is within both a state and the United States.

served prior districts, and thus there has been at least one case where a court was forced to decide whether the transfer of territory from one district to another precluded prosecution of crimes committed in the defunct district. The court allowed the prosecution to proceed in the new district despite the fact that the new district was not defined prior to the crime.¹⁸² This holding is an affront to plain meaning interpretation, but sensibly avoided creating zones of U.S. territory beyond the scope of federal criminal law. Such interpretative gymnastics were necessary because the Constitution's text (and Congress's legislation pursuant to that text) did not think through the implications of a district's evolving physical contours.

Third, the permissible size of a district is also ambiguous. Districts need not be coextensive with states because otherwise the phrase "State and district" would be redundant. But how much smaller or larger can they be? Small districts probably do not raise concerns unless they are so small that they lack a sufficient population to fill a neutral jury.¹⁸³ Indeed, some members of the first Congress (which voted on the Bill of Rights) apparently hoped that statutes would define small districts that minimized travelling by jurors.¹⁸⁴ In contrast, districts should not be larger than states, although the issue is debatable. *First*, making districts larger than states would be pointless because the requirement that jurors come from *both* the "State and district" would render the out-of-state portions of a district superfluous. *Second*, there is no administrative reason for districts to be larger than states because such districts exist only for the purpose of vicinage and therefore need not be coextensive with other kinds of federal regions, such as judicial districts.¹⁸⁵ *Finally*, permitting districts to extend beyond states would make them functionally illimitable. One could imagine a "district of the United States" that avoided the need for Con-

182. See *United States v. Louwsma*, 970 F.2d 797, 800–02 (11th Cir. 1992); Brian C. Kalt, *The Perfect Crime*, 93 GEO. L.J. 675, 681 (2005) (critiquing *Louwsma*).

183. Cf. Kalt, *supra* note 182, at 678 (explaining how a venire might be unavailable in the District of Wyoming, which includes sparsely populated sections of Montana and Idaho).

184. See, e.g., 1 ANNALS OF CONG. 784 (1789) (statement of Rep. Livermore) ("We have heard cases spoken of, to arise under the mountains of Carolina, and be dragged down to the sea-shore; but the inconvenience of three or four hundred miles is nothing compared with what may take place under this system.").

185. Federal vicinage districts are in fact coextensive with the jurisdictional "districts" that Congress defined while creating "inferior" federal courts, but this syllogism was not constitutionally required. U.S. CONST. art. I, § 8, cl. 9.

gress to carefully define district boundaries. Alternatively, if the text's reference to "the" relevant district implies the existence of more than one, we can instead imagine a "district of the East" and "district of the West." Such an expansive scope would presumably defeat the point of having distinct vicinage districts, yet there is no discernable principle limiting Congress's discretion to define district borders once such borders span state lines. Two districts have in fact crossed state lines.¹⁸⁶ Courts have never considered whether such districts violate the Vicinage Clause, nor is it clear that a defendant could challenge the district if jurors were drawn only from the portion in the appropriate state.¹⁸⁷ The permissible geographic scope of districts therefore remains unknown, despite the fact that size is the only meaningful feature that districts possess.

Finally, the reference to districts complicates the question of whether the Vicinage Clause binds state courts. Unlike most other components of the Sixth Amendment, the vicinage requirement currently applies only to federal prosecutions.¹⁸⁸ However, some commentators believe that the clause should be incorporated against the states.¹⁸⁹ That prospect raises a puzzle

186. See 28 U.S.C. § 131 (2006) (creating a district encompassing "Wyoming and those portions of Yellowstone National Park situated in Montana and Idaho"); Judiciary Act of 1801, ch. 4, § 21, 2 Stat. 89, 96 (creating the "district of Potomac," which consisted of portions of Maryland, Virginia, and the "territory of Columbia").

187. A postconviction challenge would likely fail because the error would be harmless. See *Washington v. Recuenco*, 548 U.S. 212, 218–19 (2006) (stating that "harmless" constitutional violations require reversal only "in rare cases" where a "structural" error makes the "trial fundamentally unfair" or "unreliable" (internal quotation marks and citation omitted)). A pretrial challenge would also likely fail because the remedy for potential error associated with an overly broad district would be to call jurors from the district's constitutional portion, rather than to suspend all criminal trials pending congressional action. Overbroad laws prohibiting conduct can have undesirable chilling effects that may justify invalidating them entirely even if portions are permissible, see *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003), but there is no equivalent adverse effect from the mere existence of an overbroad vicinage district.

188. See 6 WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 22.2(e) (3d ed. 2007) (noting that the Supreme Court has not decided whether the Vicinage Clause binds states, but that the "weight" of lower court authority is against incorporation); 1 *id.* § 2.6(b) (noting that the Court has incorporated most of the Sixth Amendment against states); see also *Johnson v. Louisiana*, 406 U.S. 356, 371, 376 (1972) (Powell, J., concurring) (providing fifth vote for the proposition that the Sixth Amendment requires a unanimous jury verdict in federal prosecutions but not in state prosecutions).

189. See, e.g., Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1707–08 (2000) ("There is no reason

because incorporation would require one of three unsatisfying conclusions. *First*, states might be obligated to respect the boundaries of federal districts, which would give Congress an unusually invasive and dubious role in state criminal procedure.¹⁹⁰ *Second*, states might be required to define their own districts. This rule would make districts the only constitutionally defined spaces whose boundaries are a function of both state and federal law.¹⁹¹ That odd result merits considering whether “districts” might have a uniquely federal character that state law cannot alter.¹⁹² *Third*, perhaps only the state-vicinity and not the district-vicinity requirement would apply to the states. But this interpretation is dubious because it: (1) requires driving a wedge between the seemingly integrated “State and district” language; (2) would likely serve little or no purpose because the Constitution already limits states’ ability to draw jurors from out-of-state;¹⁹³ and (3) would entail the questionable conclusion that the Constitution requires the federal legislature to consider drawing sub-state districts without

to think that the Fourteenth Amendment should not respect some understanding of the Vicinage Clause.”).

190. *Cf.* Pa. Dep’t of Pub. Welfare v. Davenport, 495 U.S. 552, 564 (1990) (noting that the Court generally tries not to “conclude lightly that Congress intended to interfere with States’ administration of their criminal justice systems”); Younger v. Harris, 401 U.S. 37, 43 (1971) (“Since the beginning of this country’s history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts.”).

191. The location of state boundaries generally presents a federal question, although state property law can apply to disputes regarding access to water at the state’s borders. *See* Oregon *ex rel.* State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 370–71 (1977); Cissna v. Tennessee, 246 U.S. 289, 291, 296 (1918) (discussing “the law of interstate boundaries”); 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, 972 (2006) (noting the “well-established body of federal common law” governing border disputes).

192. *But see* 1 LAFAVE, *supra* note 188, § 2.6(b) (assuming implicitly that states would have discretion to define their own districts).

193. The Due Process Clause requires states to have at least some connection with potential jurors sufficient to create personal jurisdiction; otherwise, the summons for jury duty would be unenforceable. *See, e.g.*, Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 806–07 (1985) (noting that a state cannot “make a binding judgment against a person with whom the State had no contacts, ties, or relations”). Incorporating a state-vicinity rule against the states would be meaningful only if the Sixth Amendment’s vague requirement that jurors be “of the State” imposes a tighter nexus requirement than current due process limits on the summons power.

imposing the same obligation on state legislatures.¹⁹⁴ If none of these conclusions are plausible, then thinking about vicinage districts as spaces can clarify an unsettled question of incorporation doctrine. Once again, “the Land” shapes the “Law.”¹⁹⁵

The uncertain parameters of districts is another example of how imprecise usage of spatial terms can complicate constitutional interpretation. Paying attention to geography in the context of words like “district” illuminates questions not only about the location, size, and significance of particular places, but also about which entities (states or the United States) must create and respect those definitions.

F. “PLACES” AND “TERRITORIES”

The Constitution’s use of the words “place” and “territory” is an example of nomenclature run amuck and highlights the document’s lack of a comprehensive and precise geographic vocabulary. These words again illustrate how physical spaces can have indeterminate scope that depends on their relationship to a governing entity.

The word “place” (with a lowercase p)¹⁹⁶ appears in the Thirteenth Amendment, which prohibits slavery “within the United States, or any place subject to their jurisdiction.”¹⁹⁷ We

194. For example, Congress may allow defendants from southern Maine to be judged by jurors from northern Maine, but it must do so through the political process of enacting vicinage legislation. That process presumably ensures consideration (or at least airing) of all relevant perspectives and forces legislators into making a choice. If the “district” and attendant “previously ascertained by law” requirements did not apply to states, then Maine would not need to specify any limits on vicinage. Statewide vicinage could thus arise by default without legislators having to engage the issue through the political process.

195. See *supra* Part I.A.

196. See *infra* Part I.I (discussing “Places”).

197. U.S. CONST. amend. XIII. The word also appears in the Fourth Amendment, which requires warrants to describe the “place to be searched.” *Id.* amend. IV. This use of “place” seems to refer generically to any type of space and does not have the same territorial connotation as “place” in the Thirteenth Amendment. This generic ambit is consistent with the principle that “the Fourth Amendment protects people, not places,” such that courts will not decide whether “a given ‘area,’ viewed in the abstract, is ‘constitutionally protected.’” *Katz v. United States*, 389 U.S. 347, 351 (1967). Instead, the protection that the Fourth Amendment accords to activity within a space is a function of the relation between that space and the affected person. See *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (“[T]he extent to which the Fourth Amendment protects people may depend upon where those people are.”); *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (“[C]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the [claimant] has a legitimate expectation of privacy in the invaded place.”).

know from the “or” that wherever “places” are, they are not in the “United States.” We can also infer that “place” has the broadest possible scope both because of the preceding “any” and the fact that the abolitionists who drafted the Amendment did not intend to preserve enclaves of slavery in particular spaces.¹⁹⁸ But that inference does not tell us anything about the geographic boundaries of “places” because of the caveat that “places” must be subject to U.S. “jurisdiction,” which is an undefined and amorphous term.¹⁹⁹ The physical contours of a “place” are thus a function of the legal reach of the entity “the United States.” This linkage confirms the point above about how the “Law” and “the Land” often cannot be defined independently.²⁰⁰

The imprecision of “place” takes on a new importance when we consider the word “territory” (with a lowercase t),²⁰¹ which appears only in the Eighteenth Amendment’s clause prohibiting “the manufacture, sale, or transportation of intoxicating liquors within . . . the United States, and all territory subject to the jurisdiction thereof.”²⁰² As with “place,” we know from context that “territory” is not “within” the “United States.” But a puzzle arises from the use of the new word “territory” rather than the previously established “place”: Is “all territory” coextensive with “any place,” or narrower?²⁰³ Neither answer is satisfying. If “all territory” and “any place” are coextensive, then there was no reason to use different words. Yet if “all territory” and “any place” are not coextensive, there is no apparent criteria for distinguishing between them. For example, courts have ruled that a vessel flying a U.S. flag in international waters is not a “territory” in which the Eighteenth Amendment applies,²⁰⁴ but is a “place” in which the Thirteenth Amendment

198. See *Slaughter-House Cases*, 83 U.S. 36, 69 (1872) (describing the Thirteenth Amendment as “this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this government”); Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1039–46 (2002) (contending that the Amendment should have a broad extraterritorial application).

199. See sources cited *supra* notes 33–34 (discussing the concept of “jurisdiction”).

200. See *supra* Part I.A.

201. See *infra* Part I.G (discussing “Territory”).

202. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend XXI.

203. Territory is not broader because we already surmised that “any place” has the broadest possible meaning. See *supra* note 198 and accompanying text.

204. See *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 123 (1923).

applies.²⁰⁵ Yet the use of ships to circumvent U.S. law is a concern in each context, and both locations are subject to U.S. jurisdiction, so it is not clear why the scope of federal power varies.²⁰⁶

Moreover, the imprecision of “jurisdiction” as a modifier for “territory” could have created problems if prohibition had survived through World War II. After the war, the United States occupied and exercised substantial civil authority over areas of Germany (to the point where the President created a “United States Court for Berlin”).²⁰⁷ The Supreme Court has suggested in an analogous context that such occupation likely confers a form of U.S. jurisdiction.²⁰⁸ If U.S. jurisdiction in fact existed within occupied areas of Germany, then the United States presumably would have had to close local bars, which would have created practical enforcement and morale problems in the midst of a recovering war zone. One could respond that military occupation zones are beyond U.S. “jurisdiction,” but that conclusion takes us back to the Thirteenth Amendment, which also applies only where the United States has “jurisdiction.” It seems untenable that the United States could tolerate slavery and involuntary servitude in zones that it occupies, and thus such zones would be “places” within its jurisdiction,²⁰⁹ forcing

205. See *In re Chung Fat*, 96 F. 202, 203–04 (D. Wash. 1899) (“[I]f . . . the petitioners are being coerced to labor on board an American vessel against their will . . . they are being subjected to involuntary servitude within the United States, in violation of the thirteenth amendment . . .”). The practical scope of this protection is limited because the Supreme Court has held that sailors who sign maritime employment contracts can be forcibly returned to their ships if they desert. See *Robertson v. Baldwin*, 165 U.S. 275, 282–83 (1897).

206. One could argue that “territory” implies a nexus with land that a ship lacks, while “places” can be anywhere. If so, one wonders what was so important about land that made the drafters not want to extend prohibition beyond it.

207. See *United States v. Tiede*, 86 F.R.D. 227, 229–35 (U.S. Ct. Berlin 1979) (discussing history of the court and the rules applicable in a criminal prosecution of a German defendant who hijacked a Polish airplane in German airspace).

208. See *Fleming v. Page*, 50 U.S. (8 How.) 603, 615 (1850) (stating that when land in Mexico “was in the exclusive and firm possession of the United States, and governed by its military authorities, acting under the orders of the President,” it was “subject to the sovereignty and dominion of the United States,” although not a “part” of the United States); cf. *Boumediene v. Bush*, 553 U.S. 723, 754–55 (2008) (noting that the United States exercises “complete jurisdiction” over its naval base in Guantánamo Bay even though the base is subject to Cuba’s “*de jure* sovereignty”).

209. Cf. Wolff, *supra* note 198 (contending that the Thirteenth Amendment has a broad extraterritorial scope, but not considering its application in a military occupation zone). The Emancipation Proclamation that preceded the Thirteenth Amendment explicitly relied for enforcement on the federal “mili-

us to consider again whether they are also “territories” where prohibition would have applied. The Eighteenth Amendment’s imprecision and use of a novel vocabulary thus suggests its drafters did not think carefully about the Constitution’s existing typology of spaces and about the role of geography as a limit on government power.²¹⁰

The contours of “places” and “territories” remain a mystery, albeit one that would become relevant only if U.S. officials encounter involuntary servitude in areas under their control. Unfortunately, such encounters are not impossible given the prevalence of human trafficking and other forms of enslavement that could test the definition of “places” within federal jurisdiction.²¹¹

G. “TERRITORY” AND “PROPERTY”

Article IV provides that “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.”²¹² The word “Territory” reappears in the Constitution once (as a space in which the Twenty-First Amendment applies),²¹³ while Property (with a capital P) never reappears.²¹⁴

Both Territory and Property present interpretative puzzles because the Constitution does not explain how these spaces differ from each other, whether these spaces have a uniform legal status or instead fragment into different subtypes with distinct regulatory implications, and what rights people have within these spaces. The Constitution’s imprecision makes Territory

tary” in the occupied South. ABRAHAM LINCOLN, A PROCLAMATION (Jan. 1, 1863), *reprinted in* 12 Stat. 1268, 1269. This occupied territory obviously had a closer nexus with the United States than does occupied territory in foreign nations, but the Proclamation at least established that the military’s status as an occupying force is compatible with being a liberating force.

210. It is possible that the drafters deliberately used the word “territory” because it was narrower than “place” and would therefore avoid the unforeseeable inconveniences that might arise from extending prohibition too far afield. If so, the drafters’ choice of terminology did not make their intentions clear.

211. *See* DAVID WEISSBRODT & ANTI-SLAVERY INT’L, OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, ABOLISHING SLAVERY AND ITS CONTEMPORARY FORMS 11–40, U.N. Doc. HR/PUB/02/4 (2002) (discussing myriad forms of persisting slavery).

212. U.S. CONST. art. IV, § 3, cl. 2.

213. *See id.* amend. XXI, § 2.

214. The Due Process and Takings Clauses mention “property” in a conceptual sense, rather than as the label for a particular region. *See id.* amends. V, XIV, § 1.

and Property gray areas in which Congress has ostensibly plenary power that is subject to undefined limits. Efforts to identify these limits have generated a convoluted and controversial jurisprudence based on tenuous distinctions between different categories of spaces invented by judicial fiat.

The first puzzle is how Territory differs from Property. If the two words encompassed entirely distinct ideas, we would expect the Constitution to reference “Territory or Property.” The fact that it instead references “Territory or *other* Property” suggests that Territory is a subtype of Property: all Territory is Property, but some Property is not Territory.²¹⁵ In normal English usage, the reason to distinguish a subtype of a thing from the thing itself is because the subtype has some special significance worth highlighting.²¹⁶ So categorizing a space as a Territory rather than mere Property could be legally meaningful. Yet the text grants Congress identical powers over both Territory and Property and never mentions either space in another context that suggests a difference between them.²¹⁷ Creative interpreters can try to fill the void by manufacturing possible distinctions. For example, some commentators have argued that the United States governs “Territory” as a sovereign and “other Property” as a proprietor.²¹⁸ But these kinds of atextual dich-

215. The word “Property” is sufficiently broad to encompass even intangible federal assets. *See, e.g.*, *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 330 (1936) (holding that the Property Clause covered the federal government’s interest in “electrical energy” generated by a dam).

216. The conclusion might be different if the list were longer. For example, the Enclave Clause applies to “Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. CONST. art. I, § 8, cl. 17. The listed subtypes of buildings, which all relate to the military, do not individually appear to have special significance and may serve merely to illustrate and clarify “needful Buildings.” Interestingly, these illustrations have not had any limiting effect on judicial analysis; the Supreme Court has interpreted the Enclave Clause to authorize more than just military buildings, and even to encompass vast expanses of unimproved land. *See Bowen v. Johnston*, 306 U.S. 19, 29–30 (1939) (holding that the Enclave Clause applied to a national park); *James v. Dravo Contracting Co.*, 302 U.S. 134, 142 (1937) (rejecting a “narrow construction” of the Enclave Clause that would permit only “structures for military purposes”).

217. The Twenty-First Amendment appears to apply equally to Territory, which it mentions explicitly, and Property, which it mentions implicitly as a subset of “possession.” *See infra* Part I.H.

218. Compare Albert W. Brodie, *A Question of Enumerated Powers: Constitutional Issues Surrounding Federal Ownership of the Public Lands*, 12 PAC. L.J. 693, 708–11 (1981) (relying on the sovereign/proprietor distinction to critique current doctrine giving Congress broad authority under the Property Clause), with Eugene R. Gaetke, *Refuting the ‘Classic’ Property Clause Theory*, 63 N.C. L. REV. 617 (1985) (arguing that the United States is not a mere proprie-

tomies are not illuminating because their formalism overlooks the fact that the status of the United States as a sovereign influences its powers and immunities as a proprietor.²¹⁹ The Constitution thus frustrates efforts to interpret Article IV because it simultaneously equates Territory with Property while implying that a distinction exists.²²⁰

tor of public lands within states). For a discussion of the Property Clause's origins, see Robert G. Natelson, *Federal Land Retention and the Constitution's Property Clause: The Original Understanding*, 76 U. COLO. L. REV. 327 (2005).

219. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529, 540 (1976) ("Congress exercises the powers both of a proprietor and of a legislature over the public domain."); *Van Brocklin v. Tennessee*, 117 U.S. 151, 174–75 (1886) (holding that federal property is immune from state taxation without Congress's consent).

220. The Supreme Court suggested in dicta that "territory" was a synonym for "colony" or "province," but has not developed this idea or considered its implications. *O'Donoghue v. United States*, 289 U.S. 516, 537 (1933). Contemporary public usage of the term territory could help explain how it differed from property, but the historical record is unclear and would not easily translate to the modern era. For example, the Continental Congress had established federal "Territory" before the Constitution was written. Northwest Ordinance of 1787, *reprinted in* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51. The Framers often used the word "Territory" in a context suggesting that they envisioned space similar to what the Ordinance covered—i.e., land located adjacent to or near existing states that would eventually be formed into new states. See THE FEDERALIST NO. 2, *supra* note 43, at 38 (John Jay) ("It has often given me pleasure to observe that independent America was not composed of detached and distant territories, but that one connected, fertile, wide-spreading country was the portion of our western sons of liberty."); THE FEDERALIST NO. 43, *supra* note 43, at 274 (James Madison) (discussing the Territory Clause in the context of "the Western territory"). But this may not have been the exclusive Founding era vision of Territory; the record is too ambiguous to permit a definitive conclusion. See generally PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775–1787 (discussing Founding era attitudes regarding various disputed territories). Moreover, the Framers apparently did not envision that the United States would replicate Britain's role as an imperial power and thereby acquire distant lands that bore little resemblance to the Northwest Territory. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 356 n.66 (2009) ("The Framers saw America as a small country, akin to Holland and other small states—a country facing constant threat from the power and wealth of larger, imperial countries such as England, France, and Spain."); Daniel J. Hulsebosch, *The Founders' Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 209 (2008) ("For a generation after the Revolution, the United States remained a provisional and peripheral actor in the Atlantic world."). The Founding era perception of Territory, even if clear, therefore would not easily translate into subsequent eras when the United States acquired the Philippines, Puerto Rico, and various "Guano Islands" scattered throughout the ocean. See Act of Aug. 16, 1856, ch. 164, § 1, 11 Stat. 119, 119 (empowering private citizens, subject to presidential approval, to claim on behalf of the United States "any island, rock, or key" containing guano and not under foreign jurisdiction); Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, in LEGAL

The Supreme Court has responded to textual imprecision with doctrinal imprecision. Opinions confirm that both Territory and Property encompass “land” but do not explain what distinguishes the lands that fall under each heading.²²¹ The Court often either does not attempt to characterize spaces as Territory or Property or uses “property,” “territory,” and “possession” indiscriminately and interchangeably.²²² Beyond blurring textual distinctions, the Court has implied that the Territory Clause is superfluous because Congress’s “right to govern” territory is an “inevitable consequence” of its “right to acquire territory” and inherent in its “general right of sovereignty” over possessions.²²³ Any subtle distinctions that the use of Territory and Property may have conveyed have thus been lost in a haze of atextual rhetoric.

BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS 187, 192 (Mary Dudziak & Leti Volpp eds., 2006) (noting that Congress sought to sidestep questions about how the Constitution would apply to the Guano Islands by characterizing such islands as “appertaining” to the United States rather than becoming federal “territory” subject to United States “sovereignty”).

The Court once held that the word “the” before “Territory” in Article IV implied a reference to only the specific lands that the United States held at the time the Constitution was ratified. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 436 (1856). This thinly reasoned analysis was part of a convoluted attempt to deny Congress’s power to regulate slavery on the eve of the Civil War, *see id.* at 442, and has since been abandoned, *see Nguyen v. United States*, 539 U.S. 69, 71 (2003) (noting that Congress established Guam as a new “Territory” in 1950).

221. *See United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840) (“The term territory [in Article IV] is merely descriptive of one kind of property; and is equivalent to the word lands.”); *Light v. United States*, 220 U.S. 523, 536 (1911) (holding that the Property Clause conferred broad federal power over “land” within a national forest).

222. *See, e.g., Domenech v. Nat’l City Bank of N.Y.*, 294 U.S. 199, 204 (1935) (referring to Puerto Rico as “an island possession” that is “like a territory”); *Jones v. United States*, 137 U.S. 202, 224 (1890) (concluding that the United States had “exclusive jurisdiction” over a Caribbean island claimed under the Guano Islands Act without considering whether the island was Territory or Property); *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 42–43 (1890) (noting that various “territories” acquired by the United States were “property” within its “domain”). The Court has been more precise when interpreting statutes. For example, when interpreting a federal criminal statute that applied within federal “jurisdiction” but excluded “territories,” the Court held that “territories” encompassed places where Congress had “organized” a “civil government[.]” with “an executive, a legislative, and a judicial system.” *In re Lane*, 135 U.S. 443, 447 (1890).

223. *Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 543, 546 (1828); *see also De Lima v. Bidwell*, 182 U.S. 174, 196 (1901) (holding that “authority” over territories does “not necessarily” stem from “the territorial clause,” but may arise “from the necessities of the case”).

A second puzzle arises because the Constitution imposes a uniform terminology on a diverse landscape. Lands that fall within the Territory and Property labels are dissimilar and yet have the same formal status. That mismatch raises a question about whether these express terms have implied components that may merit distinct treatment. We already know that Property fragments into two meaningful subtypes (“Territory” and “other”), but this list is not necessarily exhaustive. Additional subtypes of Property may exist within the “other” category, and one subtype (Territory) may have its own sub-subtypes. Article IV may therefore encompass many different kinds of places in which Congress has varying power, state or territorial governments have varying residual authority, and people have varying rights.²²⁴ One can imagine several factors that could helpfully differentiate types of federal land, including:

- Location in the Federal System (within a state v. outside the states)
- Future Prospects (eventual statehood v. perpetual possession)
- Manner of Acquisition (treaty, cession, or purchase v. occupation)

224. A broad reading of the word “respecting” in the Property Clause could mean that one subtype of affected land is not even federally owned. Conduct outside of federal land can cause effects within it, just as conduct in one state can cause effects in other states. *See supra* note 136. We already saw that these spillover effects justify extraterritorial regulation by states. *See id.* The power to regulate “respecting” federal property suggests that Congress has similar extraterritorial authority, although federalism concerns may limit its scope. *See Kleppe v. New Mexico*, 426 U.S. 529, 538 (1976) (“[T]he power granted by the Property Clause is broad enough to reach beyond territorial limits.”); *Camfield v. United States*, 167 U.S. 518, 525–26 (1897) (noting that federal land cannot be “completely at the mercy of state legislation” and that Congress therefore has limited “police power” on state land adjacent to federal land); Peter A. Appel, *The Power of Congress “Without Limitation”: The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 124–25 (2001) (contending that Congress can regulate land use in the vicinity of national parks). The potentially broad scope of “respecting” raises a question about why Article I gives Congress power “over” the District and federal enclaves. U.S. CONST. art. I, § 8, cl. 17. There is no policy rationale for giving Congress less extraterritorial authority to protect critical lands covered by Article I (such as the seat of government and “forts”) than to protect lands covered by Article IV (such as parks and forests). *Id.* The distinction between “respecting” and “over” is therefore either: (1) meaningless (which ignores the subtle geographic distinction between the two words); (2) poorly considered; or (3) moot because the District and federal enclaves are subtypes of Article IV “Property” and therefore covered by the “respecting” clause (and thus also covered by the “disposal” clause, which further suggests that the Constitution does not make the District permanent, *see supra* note 146).

- Legitimate Expectations (promised some autonomy v. not promised anything)
- Location (contiguous with states v. isolated)
- Self-Sustainability (many resources v. few resources)
- Nature of Use (narrow specified purpose v. general community)
- Permanence of Population (long term v. transient)
- Prior Status (autonomous v. controlled from abroad)

The problem is that the Constitution offers no guidance about whether these descriptively useful factors have any normative significance. Instead, the text creates a one-size-fits-all regulatory solution. As far as the text reveals, Puerto Rico has the same legal status as Howland Island: both are subject to Congress's broad power under Article IV. Yet Puerto Rico houses a vibrant community with nearly four million people and a \$60 billion GDP,²²⁵ while Howland Island is an uninhabited rock.²²⁶

The fact that federal power applies equally to residents of Puerto Rico and transient visitors to Howland Island is a symptom of the Constitution's imprecision in creating a typology of spaces and corresponding regulatory architecture. That symptom might not be disturbing if people on both islands had a robust set of individual rights that limited federal power. After all, the Constitution does not distinguish between Las Vegas and the uninhabited Nevada desert, so there is nothing inherently wrong with treating two dissimilar places equally. Yet a concern arises because courts often treat two similar places unequally. Population centers in states exist under one legal regime, while population centers in federal possessions exist within an alternative regime that is less protective.

The concern about unequal treatment of similar spaces leads to a third puzzle. The fact that Territory and Property exist outside the states means that the people in these spaces are outsiders to the normal relationship that the Constitution creates between the government and the governed. A recurring and vexing question is what this outsider status means in prac-

225. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2010 tbls.1277, 1287, available at <http://www.census.gov/compendia/statab/2010/2010edition.html>.

226. The United States acquired Howland Island in 1857 under the Guano Islands Act and continues to claim sovereignty over it. See 16 U.S.C. § 1802(35) (2006). The island is so isolated that federal officials visit it only "about every 2 years." *Howland Island National Refuge*, U.S. FISH & WILDLIFE SERVICE, <http://www.fws.gov/howlandisland> (last visited Feb. 20, 2011).

tice. The Constitution does not expressly answer this question. It defines “Citizens” of states and the United States, explains the rights of these citizens, and distinguishes them from “foreign” citizens.²²⁷ But the Constitution does not create a unique status for people in federal territories (e.g., there are no “territorians”). This omission might not pose a problem if residents of U.S. territories were automatically U.S. citizens at birth (and thus had a constitutionally recognized status), yet current jurisprudence does not extend birthright citizenship under the Fourteenth Amendment to unincorporated territories.²²⁸ Congress therefore has a choice about whether to extend the benefits of citizenship to people under its control, and sometimes chooses not to do so.²²⁹ Moreover, as discussed above with respect to the District, the Constitution defines many rights in reference to the states and therefore creates doubt about whether these rights apply elsewhere.²³⁰ This textual uncertainty has created room for the Supreme Court to hold that people living under federal control outside states lack many rights that they would possess if they lived within states. For example, the *Insular Cases* and subsequent decisions based on them held that people in Territories that Congress chose not to “incorporate” into the United States lack a Fifth Amendment right to a grand jury,²³¹ a Sixth Amendment right to a jury trial,²³² the right to a “one man, one vote” electoral system,²³³ and

227. U.S. CONST. art. III, § 2; *id.* art. IV, § 2; *id.* amend. XIV, § 1.

228. See *supra* text accompanying notes 83–103 (discussing phrase “born in the United States” in the Citizenship Clause); *supra* note 102 (citing cases which held that birth in the Philippines, while it was a United States territory, did not create citizenship under the Fourteenth Amendment).

229. For example, Congress never extended statutory birthright citizenship to the Philippines. See Act of Aug. 29, 1916, ch. 416, § 2, 39 Stat. 545, 546. In contrast, people born in Puerto Rico are United States citizens, although some born between 1899 and 1941 were granted citizenship retroactively. See 8 U.S.C. § 1402 (2006). People born in American Samoa are United States “nationals,” but not United States citizens. *Id.* § 1408(1) (2006).

230. See *supra* Part I.D.

231. See *Ocampo v. United States*, 234 U.S. 91, 98 (1914) (Philippines); *Hawaii v. Mankichi*, 190 U.S. 197, 217–18 (1903) (Hawaii).

232. See *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922) (Puerto Rico); *Dorr v. United States*, 195 U.S. 138, 148 (1904) (Philippines).

233. *Rayphand v. Sablan*, 95 F. Supp. 2d 1133, 1139–40 (D.N. Mar. I. 1999) (“Since it is clear that the ‘one man, one vote’ principle is not a right that is the ‘basis of all free government,’ it need not be applied in and to an unincorporated territory such as the Commonwealth [of the Northern Mariana Islands].”), *aff’d mem.*, *Torres v. Sablan*, 528 U.S. 1110 (2000).

the right to avoid non-uniform taxes on exports.²³⁴ In contrast, people in “incorporated” territories possess a broader set of rights commensurate with residents of states.²³⁵ The rationale for the incorporated/unincorporated distinction was opaque because neither term appears in the Constitution.²³⁶ Language in the opinions suggests that the Court’s categorical reasoning may have reflected discomfort with inhabitants of island territories, who the Court described as “alien races” with “modes of thought” that departed from “Anglo Saxon principles.”²³⁷

The jurisprudence according second-class status to people in outlying territories has attracted substantial criticism.²³⁸

234. See *Downes v. Bidwell*, 182 U.S. 244, 287 (1901) (holding that Congress could lawfully impose a duty upon imports from Puerto Rico, despite the Revenue Clauses in the Constitution providing that all duties, imposts, and excises shall be uniform throughout the United States).

235. See *Rasmussen v. United States*, 197 U.S. 516, 525 (1905) (holding that the Sixth Amendment applied in Alaska before it became a state).

236. See Levinson, *supra* note 62, at 249 (“The doctrine of ‘unincorporated territories,’ one may confidently assert, was the product . . . of the perceived exigencies of the moment, which made Puerto Rico and the Philippines at once highly desirable as possessions of the United States yet, it was thought, unsuitable for genuine membership in the American Union.”); Rogers M. Smith, *The Bitter Roots of Puerto Rican Citizenship*, in *FOREIGN IN A DOMESTIC SENSE*, 373, 376–80 (Christina Duffy Burnett & Burke Marshall eds., 2001) (outlining the incorporated/unincorporated distinction’s evolution and noting its foundation in turn-of-the-century debates about colonialism and race). Whether a territory is incorporated can depend on the Court’s subjective assessment of congressional intent, rather than explicit use of the word “incorporated” in a statute or treaty. See *Rasmussen*, 197 U.S. at 522–23.

237. *Downes*, 182 U.S. at 287 (discussing Puerto Rico); see also *id.* at 278 (expressing “serious” concerns about extending United States citizenship to “savages”).

238. An astute contemporary observer noted that, “[A]s near as I can make out the Constitution follows the flag—but doesn’t quite catch up with it.” STUART CREIGHTON MILLER, ‘BENEVOLENT ASSIMILATION’: THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899–1903, at 157 (1982) (quoting Secretary of War Elihu Root). See generally Levinson, *supra* note 62, at 246–47 (“The importance of the *Cases* did not lie in the particular resolution of tariff policy, but, rather, in deciding whether the United States could emulate the European nations and conquer and possess colonial territories.”); sources cited *supra* note 80 (critiquing the *Insular Cases*). For a general discussion of how the Constitution structures governance in the Territories, see ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* (1989); U.S. GOV’T ACCOUNTING OFFICE, *GAO/OGC-98-5, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION* (1997).

In addition to criticizing the status of residents of territories under U.S. law relative to the status of state residents, scholars have noted other constitutional problems with how the United States structures territorial governance. See, e.g., MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 54–56 (2d ed. 1990) (criticizing doctrine

This criticism resonates with the point discussed above that the Constitution's typology of spaces is so physically and legally indeterminate that a jurisprudence of labels keyed to formal categories of spaces is likely to be unsatisfying. Determining how the existence of a power intersects with the boundaries of a place and the rights of a person requires analyzing the rationale for the power, the reason for defining the place, and the nature of the right. This is a subtle exercise that the Supreme Court's categorical approach could not accommodate. The need for this subtlety might have been more apparent if the Constitution was more precise in explaining how the Constitution applies in different spaces. Instead, the text creates labels that overly formalist courts²³⁹ often cannot resist imbuing with dispositive meaning despite the imprecise contours and significance of the underlying spaces.

H. "POSSESSIONS"

The Twenty-First Amendment adds "possession" as a new category of space in the constitutional typology. The undefined term again highlights the imprecision with which the Amendment's drafters approached the "where" question of federalism. Section 2 of the Amendment provides that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."²⁴⁰ The

permitting Congress to create territorial courts that do not comply with Article III); Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1166–84 (2009) (considering whether Puerto Rico's self-governance complies with the Appointments Clause and with elements of international law incorporated into U.S. law under the Supremacy Clause).

239. The judiciary's penchant for attaching legal implications to distinctions between spatial categories can fairly be described as formalist in the sense that it denies the existence of available normative choices. The categories exist as a matter of literal constitutional language, but the language does not directly communicate information about which constitutional norms do and do not permeate spatial boundaries. Opinions deeming legal conclusions to follow inexorably from the status of a particular place as a "Territory" (or a "State" or "District") therefore mask the broad range of choices that judges have when considering which norms define the significance of spatial borders and which norms transcend those borders. See Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 511–20 (1988); see also Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 272–79 (1996) (noting "formalist" and "instrumentalist" strands of reasoning in the *Insular Cases*).

240. U.S. CONST. amend. XXI, § 2.

“or” tells us that possessions are neither states nor Territories, while the “thereof” indicates that possessions are regions of space with their own “laws.”²⁴¹ Beyond that, we know very little. The Supreme Court has never defined “possession” and the legislative history is unilluminating.²⁴²

The puzzle is whether “State, Territory, or possession” is collectively different than “territory” (with a lowercase t), which was the undefined word referencing the space in which the Eighteenth Amendment applied until repealed by the Twenty-First Amendment. States and Territories seem to fall clearly within “territory,”²⁴³ so the only issue is whether “possession” and the remainder of “territory” are coextensive. Neither word appears in the original Constitution, and thus both were novel appendages to the constitutional typology that lacked an established meaning. We can isolate the interpretative issue by considering whether the Twenty-First Amendment would have a different scope if it mimicked the Eighteenth Amendment by providing that: “The transportation or importation into any territory subject to the jurisdiction of the United States for delivery or use therein of intoxicating liquors, in violation of the laws of such territory, is hereby prohibited.” The revised language would arguably be broader than the current language because it would more clearly encompass the District of Columbia. The District’s status under the “possession” language is unclear because it may be an internal component of the United States—like states and territories—rather than an external

241. “Thereof” apparently refers to each word in the phrase “State, Territory, or possession” and not just to the “United States,” such that each listed place can have specific “laws” governing it that are distinct from generally applicable federal law. *See* *Granholtz v. Heald*, 544 U.S. 460, 484 (2005) (holding that the Twenty-First Amendment empowers states to enact laws that might otherwise be unconstitutional). The Amendment’s application to Territories is complicated by the fact that Territories do not have plenary legislative power. They therefore might be unable to regulate liquor, even despite the Amendment, due to the limited scope of Congress’s grant of authority under the relevant organic act. *See* *Norman’s on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018–19 (3d Cir. 1971) (discussing the Amendment’s effect in the Virgin Islands); *Sancho v. Corona Brewing Corp.*, 89 F.2d 479, 481 (1st Cir. 1937) (discussing the Amendment’s effect in Puerto Rico).

242. *See* *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274–75 (1984) (“[W]e have recognized the obscurity of the legislative history of § 2. No clear consensus concerning the meaning of the provision is apparent.” (citation omitted)). The statute implementing the Amendment uses a distinct set of spatial references, applying in any “State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof.” 27 U.S.C. § 122 (2006).

243. *See supra* Part I.F.

space that the United States possesses.²⁴⁴ However, beyond this possible difference, “possessions” and the portion of “territory” outside states and Territory appear coextensive. Indeed, courts often use the two terms interchangeably.²⁴⁵

The potential overlap between “territory” and “possessions” raises a question about why the Twenty-First Amendment introduced a new spatial designator when there was already a catch-all available that the Eighteenth Amendment used in the same context of liquor regulation. There are three possibilities. First, the drafters may not have intended any difference in meaning, and thus their use of a different word would highlight the Constitution’s haphazard approach to defining the spaces where it operates. Second, the drafters may have deliberately used “possession” as a narrower word that avoided some of the complexities that arise when regulating at the outer edge of federal “territory.”²⁴⁶ If so, they seem not to have considered the possible effect their linguistic shift would have on the District, which would again illustrate an inattention to spatial issues. Finally, the drafters may have intended a broader scope than what “territory” would have provided. If so, they seem to have failed because it is difficult to imagine any space with its own “laws” that is a “possession” of the United States but not part of its “territory.”²⁴⁷ The word “possession” thus joins “territory” and “place” as broad references to spaces that amendments to the Constitution introduce without defining and without any apparent comparative assessment.

I. “PLACES”

Article I’s Enclave Clause introducing the unimaginatively named category of “Places” neatly illustrates how the Constitution fails to establish a systemic and meaningful typology of spaces.²⁴⁸ The word is so imprecise that it verges on pointless-

244. *See supra* note 154.

245. *See supra* note 222.

246. *See supra* Part I.F.

247. If such nonterritorial possessions exist, they presumably are “places” under the Thirteenth Amendment, suggesting that the Thirteenth Amendment has a broader reach than the Eighteenth Amendment. *See supra* text accompanying notes 201–12.

248. The Constitution also mentions “Places” that are not federal enclaves. These references are not to regions or fixed points in space, but rather address temporary locations linked to specific events. *See* U.S. CONST. art. I, § 4 (“Places . . . of holding Elections”); *id.* § 5 (“Place” where Congress may “adjourn”); *id.* § 6 (“Place” where Senators and Representatives may “not be ques-

ness and so ambiguous that it simultaneously has inconsistent meanings. The clause provides that Congress may “exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.”²⁴⁹ The phrase “like Authority” references adjacent text granting Congress power to “exercise exclusive Legislation in all cases whatsoever” over the District constituting the seat of government.²⁵⁰

The Enclave Clause appears to serve four purposes: (1) permitting the United States to own buildings, (2) specifying Congress’s power to regulate these buildings, (3) establishing the manner of acquiring these buildings, and (4) explaining how these buildings’ status as federal enclaves affects their status as parts of States. Closer scrutiny reveals that the clause is either unnecessary or insufficient to fulfill any of these goals.

First, there was no need for the Enclave Clause to authorize ownership of the specified structures because the Necessary and Proper Clause coupled with other Article I powers already established such proprietary authority.²⁵¹ The power to “support Armies”²⁵² presumably included the power to build “Forts, Magazines, [and] Arsenals,” and the power to “maintain a Navy”²⁵³ presumably included the power to build “dock-Yards.”²⁵⁴ More generally, the power to construct unspecified “needful Buildings” was inherent in the existence of three branches of government. Even without the Enclave Clause, the Constitution surely would not have contemplated courts without courthouses, a Congress without a capitol, and an executive branch whose officials would wander nomadically for want of

tioned” under the Speech and Debate Clause); *id.* art. III, § 2 (“Places” for holding criminal trials).

249. *Id.* art I, § 8, cl. 17.

250. *Id.*

251. *Id.* § 8, cl. 18.

252. *Id.* cl. 12.

253. *Id.* cl. 13.

254. A contrary interpretation would lead to untenable results because the Enclave Clause applies only on land that is or was “in” a State, *id.* cl. 17, and thus could not authorize buildings in other kinds of federal spaces. Disallowing such buildings would bar Congress from protecting federal territory by constructing forts, which the Framers must have realized would be reckless given the proximity of potentially hostile powers. See THE FEDERALIST NO. 25, *supra* note 43, at 163 (Alexander Hamilton) (“The territories of Britain, Spain, and of the Indian nations in our neighborhood encircle the Union from Maine to Georgia. The danger, though in different degrees, is therefore common.”).

offices to house them.²⁵⁵ Unsurprisingly, the Supreme Court has interpreted the Necessary and Proper Clause to authorize construction and use of federal buildings,²⁵⁶ rendering this aspect of the Enclave Clause superfluous.

Second, the Enclave Clause was unnecessary if its goal was to authorize Congress to regulate federal buildings. The Property Clause in Article IV served the same purpose by permitting Congress to “make all needful Rules and Regulations respecting . . . Property belonging to the United States.”²⁵⁷ The Property and Supremacy Clauses thus collectively make federal law the supreme law governing federal buildings, such that this aspect of the Enclave Clause is redundant.

Third, the Enclave Clause seems to be pointless if its goal was merely to specify a mechanism (“purchase[]” from a “Consent[ing]” State) for acquiring Places from states because that mechanism is both obvious and not exclusive. The power of Congress and the states to bargain with each other over land is likely inherent in the nature of their authority and did not require enumeration.²⁵⁸ Moreover, the Supreme Court has held

255. In theory, one can imagine a regime in which federal agents must rely on state hospitality, especially if states withhold “consent” to the transfer of land under the Enclaves Clause. Federal judges would thus work in state courthouses, the federal army would sleep in state barracks, and so on. In practice, however, there is no evidence that the Framers anticipated this sort of federal dependence on state beneficence.

256. See *Kohl v. United States*, 91 U.S. 367, 371–72 (1876) (noting that the federal government’s authority to acquire land for “forts” and other buildings by eminent domain is “necessary for the exercise of [its enumerated] powers”); see also David P. Currie, *The Constitution in Congress: The Second Congress, 1791–1793*, 90 NW. U. L. REV. 606, 636 n.174 (1996) (noting Founding era belief that “the purchase of land and the construction of buildings [for a mint] were necessary and proper to the coining of money, which of course they were”).

257. U.S. CONST. art. IV, § 3, cl. 2. The word “Property” could in theory apply only to federal land and not to the structures on top of it. But that would be a strained reading that the Court has never endorsed. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 330 (1936) (holding that the Property Clause created a federal property interest in a dam, the “water power” it produced, and the resulting “electrical energy”).

258. See *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 541 (1885) (noting in the context of a voluntary cession of land by Kansas to the United States that “the State and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution”). The Articles of Confederation had contained a clause providing that “no State shall be deprived of territory for the benefit of the United States.” ARTICLES OF CONFEDERATION OF 1781, art. IX. This obstacle to the acquisition of state land seems limited to the context in which it appeared: a conflict of interest rule preventing federally appointed “commissioners” from using their status as ar-

that the Enclave Clause does not bar Congress from taking land from an unconsenting state by eminent domain.²⁵⁹ The combined effect of these two observations is that the Enclave Clause allows Congress to acquire land from states through a procedure that would have existed even without the clause, yet does not prevent Congress from acquiring land from states through other procedures despite the clause. The Enclave Clause therefore does not actually structure the relationship between Congress and the states with respect to transfers of land.

Finally, the only remaining role that the Enclave Clause could serve is to explain whether states have any residual control over the Places that Congress acquires through the specified mechanism (consent by a state) for the specified purpose (constructing buildings). This question of state authority was important for the Framers, who wanted to ensure that Congress could prevent state interference with federal operations on federal land.²⁶⁰ This ambiguity is important in practice because it determines, for example, whether states can tax activity within Places and whether people who live within Places are residents of states, and thus whether they can vote in state elections, attend state schools, get driver's licenses, obtain divorces, and be a state citizen for purposes of diversity jurisdiction.²⁶¹

Ambiguity about states' residual control over spaces arises because the Enclave Clause authorizes purchasing Places from the state "in which the same shall be." The temporal reference for this phrase is unclear: "be" could refer to the time either be-

biters in state boundary disputes to aggrandize the federal government at state expense. *Id.*

259. See *supra* note 125 (discussing limits on federal eminent domain power over state lands).

260. See THE FEDERALIST NO. 43, *supra* note 43, at 273 (James Madison) ("The public money expended on [federal enclaves], and the public property deposited in them, require that they should be exempt from the authority of the particular State. Nor would it be proper for the places on which the security of the entire Union may depend to be in any degree dependent on a particular member of it."). A countervailing concern motivating the state consent requirement was that Congress might "enslave any particular State by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience." 2 FARRAND, *supra* note 64, at 510 (reporting statement of Elbridge Gerry).

261. For a discussion of the practical problems that the exclusion of enclaves from state territory created, see REPORT OF THE INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES: PART I, at 23–27 (1956).

fore or after purchase. The clause therefore could encompass places that *were* in states until Congress acquired them or that *still are* in states even after Congress acquired them. Both interpretations are plausible. On the one hand, the proximity of the Enclave Clause to the District Clause and their shared use of language granting “exclusive” federal jurisdiction suggests that Places have the same status as Districts: both encompass land that is no longer within the states from which they were acquired. Places can thus revert to state control only by retrocession (just as portions of the District reverted to Virginia in 1846).²⁶² On the other hand, Congress acquires the District by “cession” but acquires Places by “purchase,” suggesting that its title over Places may not displace state authority as fully as its title over the District.²⁶³ Places also are inherently more ephemeral than the District: the seat of government has remained in the District of Columbia for more than two centuries while forts and other federal buildings have come and gone. This impermanence suggests that the Enclave Clause may have envisioned a relatively fluid reassertion of state control over Places when Congress no longer required exclusive jurisdiction.

262. See *supra* note 146.

263. Chief Justice Marshall overlooked this linguistic distinction when he characterized (in dicta) the District and Enclave Clauses as both involving “cession of territory.” *United States v. Bevens*, 16 U.S. (3 Wheat.) 336, 388 (1818). The precise significance of Article I’s distinction between “cession” and “purchase” is unclear, especially given that Congress has “like Authority” over lands obtained through both mechanisms. U.S. CONST. art. I, § 8, cl. 17; see also THE FEDERALIST NO. 43, *supra* note 43, at 272–73 (James Madison) (discussing the District and Enclave Clauses without highlighting the cession/purchase distinction, and noting that enclaves should be “exempt” from state “authority”). However, the use of different words in close proximity to describe the manner of acquiring land presumably was not a drafting accident. Indeed, two different words in the Constitution addressing “the same subject” generally “cannot be construed as synonymous with one another” because “every word must have its due force, and appropriate meaning.” *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570–71 (1840). “Cession” therefore may have been a contemporary term of art implying a more complete transfer of sovereignty than a mere purchase. *Cf. De la Croix v. Chamberlain*, 25 U.S. (25 Wheat.) 599, 600 (1827) (describing the acquisition of Florida from Spain as a “purchase and cession”); *Bevens*, 16 U.S. (3 Wheat.) at 388–89 (stating that “cession of territory” is “essentially the same” as surrendering “general jurisdiction”; in contrast, when the federal government acquires “jurisdiction” over state territory that has not been ceded—as in this case of admiralty jurisdiction over state waters—the state retains “residuary powers of legislation”); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 571–72 (5th ed. 1904) (discussing the consequences of cession).

Congress has often—but not always—avoided the need for resolving questions about residual state jurisdiction by disclaiming the full extent of its Enclave power. Federal statutes permit states to retain some concurrent jurisdiction over the Places that they sell²⁶⁴ and expressly authorize some state regulations to apply on federal land.²⁶⁵ Yet Congress can still assert exclusive jurisdiction when states consent, which has forced the Supreme Court to consider whether states that grant such consent possess any residual jurisdiction over federal Places. Sometimes states demand such jurisdiction (such as when they try to tax enclave residents),²⁶⁶ and sometimes they disclaim it (such as when they try to avoid providing social services to enclave residents).²⁶⁷

The Court's decisions addressing whether Places remain in states have been inconsistent and highlight the text's ambiguity on a fundamental question about which entities control which places in the United States. In *S.R.A., Inc. v. Minnesota*, the Court held that if Congress purchases a Place under the Enclave Clause with a state's unconditional consent, then the United States acquires "complete sovereignty," the Place is no longer within the state's "territorial jurisdiction," and the Place is thus beyond the state's taxing power.²⁶⁸ But when Congress ceases using the land as an enclave and resells it to a private purchaser, the land magically reverts to state control even if Congress never retroceded it, and thus the state regains power

264. See 40 U.S.C. § 3112(a) (2006) (disclaiming "exclusive jurisdiction" as a prerequisite for acquiring enclaves); 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, 559–69 (2006) (discussing reservations on states' cession of land for use as federal lighthouses). The Supreme Court has held that the Enclave Clause permits such conditional transfers. See *James v. Dravo Contracting Co.*, 302 U.S. 134, 148–49 (1937).

265. See 4 U.S.C. §§ 105–106 (2006) (state sales and use taxes apply in "Federal area[s]"); 16 U.S.C. § 457 (2006) (state wrongful death and personal injury laws apply "within a national park or other place subject to the exclusive jurisdiction of the United States"); 40 U.S.C. § 3172(a) (2006) (state workers' compensation laws apply to federal "land and premises").

266. See *infra* text accompanying note 268.

267. See *Bd. of Chosen Freeholders v. McCorkle*, 237 A.2d 640, 643–45 (N.J. Super. Ct. Law Div. 1968) (rejecting county's effort to deny child guardianship and adult mental health care to residents of a military base).

268. *S.R.A., Inc. v. Minn.*, 327 U.S. 558, 562–63 (1946); see also *Pac. Coast Dairy v. Dep't of Agric.*, 318 U.S. 285, 294 (1943) (characterizing enclaves as "federal territory" in which state law is "without force").

to tax the land.²⁶⁹ This arrangement challenges our ordinary understanding of words. It is difficult to see how Congress has “complete sovereignty” over property it cannot sell without losing its authority over the underlying territory, and how a place is not in a state’s territory and yet can become subject to the state’s territorial power without any formal retrocession. Yet the reversion rule is sensible because otherwise resale of enclaves would create “isolated islands of federal jurisdiction” that are beyond the reach of state law and yet do not involve any federal activity.²⁷⁰ An implied reversion interest neatly avoids the inconvenience and mischief that these pockets of quasi-private, semi-federal land could create. However, the Court took a different approach nine years after *S.R.A.* in *Howard v. Commissioners of the Sinking Fund*.²⁷¹ In *Howard*, the Court held without any analysis that federal enclaves remain within the “geographic structure” of the state that sold them.²⁷² The reversion fiction was therefore unnecessary (and unmentioned by the Court) because states retained residual authority to tax “the federal area within its boundaries, so long as there is no interference with the jurisdiction asserted by the Federal Government.”²⁷³ *Howard* never cited *S.R.A.* and never attempted to explain how a Place could be outside a state’s “territorial jurisdiction” yet within its “geographic structure.”

Subsequent opinions have echoed aspects of both *S.R.A.* and *Howard* without reconciling them or contributing additional analysis. Thus, liquor transactions in federal enclaves are beyond a state’s “territorial jurisdiction,”²⁷⁴ yet people who live in enclaves are treated as state residents for purposes of voting in state elections.²⁷⁵ The Court has also held that aspects of

269. See *S.R.A. Inc.*, 327 U.S. at 563–64 (holding that the federal sale “re-vest[s] sovereignty in the states”).

270. *Id.* at 563.

271. 344 U.S. 624 (1953).

272. *Id.* at 626.

273. *Id.* at 627.

274. *United States v. State Tax Comm’n*, 412 U.S. 363, 378 (1973).

275. See *Evans v. Cornman*, 398 U.S. 419, 421–22 (1970) (holding that residents of the National Institute of Health campus could vote in Maryland). The *Evans* holding treats enclave residents as state residents, which was not necessarily the Founding era view. The evidence from this era is scant, but Justice Story’s review of the record led him to believe that “the inhabitants of [ceded enclaves] cease to be inhabitants of the State, and can no longer exercise any civil or political rights under the laws of the State.” 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1227 (1833); see also *Opinion of Justices*, 42 Mass. (1 Met.) 580, 583 (1841) (“[P]ersons re-

state law operate as federal common law in enclaves, enabling a form of state regulation over land that might not technically be in the state.²⁷⁶ Enclaves thus are functionally in states when

siding within [enclaves] do not acquire the civil and political privileges, nor do they become subject to the civil duties and obligations of inhabitants of the towns within which such territory is situated.”).

The pragmatism in *Evans* may foreshadow how the Court would approach another awkward question related to residual state authority: How can enclave residents get divorced if neither spouse wants to leave the enclave? If they are not state residents then state family law may not directly apply. Compare *Chaney v. Chaney*, 201 P.2d 782, 784 (N.M. 1949) (holding that residents of Los Alamos enclave could not obtain divorce in New Mexico), with *Hansford v. District of Columbia*, 617 A.2d 1057, 1067 (Md. 1993) (citing *Evans* and overruling a prior decision that had barred enclave residents from obtaining a divorce in Maryland). Yet there is no generally applicable federal law governing marital dissolution. Divorces are therefore available to enclave residents only if state law binds residents or if federal common law governing the enclave borrows state family law. The Court presumably would be just as unwilling to hold that enclave residents cannot divorce as it was to hold that they cannot vote, and thus would find a way to apply state law. Cf. *Evans*, 398 U.S. at 424 (observing that enclave residents could obtain divorces in Maryland, but not considering whether the Constitution required this result).

²⁷⁶ This rule is not entirely clear and not fully thought through. In *James Stewart & Co. v. Sadrakula*, the Court explained that:

The Constitution does not command that every vestige of the laws of the former [state] sovereignty must vanish [when Congress purchases land for use as an enclave]. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights. . . .

. . . [O]nly the law in effect at the time of the transfer of jurisdiction continues in force, future statutes of the state are not a part of the body of laws in the ceded area.

309 U.S. 94, 99–100 (1940) (footnote omitted). The Court did not identify the mechanism by which state law applied. Given that state law did not apply of its own force and that Congress did not enact a statute expressly adopting state law, the only plausible explanation is that state law constitutes federal common law that courts may apply until Congress adopts a statutory replacement. Cf. *Mater v. Holley*, 200 F.2d 123, 124–25 (5th Cir. 1953) (holding that civil actions invoking the residual state law that applies in enclaves “arise under” federal law). The Court has needlessly limited the effectiveness of this common law by stifling its evolution through a rule that adopts post-cession changes in state law only if they do not alter the “basic scheme” of pre-cession law. *Paul v. United States*, 371 U.S. 245, 269 (1963). Federal common law thus remains frozen at an increasingly archaic point. A more sensible rule would permit courts to apply contemporary state law in enclaves as federal common law to the extent that state law is consistent with federal interests. This rule would capture the benefits of state innovation while avoiding state overreaching. For a general discussion of when and why federal common law borrows from state law, see Radha Pathak, *Incorporated State Law* (unpublished manuscript) (on file with author); cf. Michael C. Dorf, *Dynamic Incorporation*

there is a good reason to adopt that fiction (i.e., to avoid disenfranchising people and to allow states to impose taxes to which Congress would be unlikely to object), but are functionally outside states when treating enclaves as state land would undermine federal interests.

In a practical sense, the Court's periodic fixation on and vacillation about whether states have "territorial" jurisdiction over enclaves is pointless. Even if enclaves are state territory, Congress has plenary power over them that preempts state law. Accordingly, the only practical effect of deeming enclaves to lie outside states is to consign enclave residents to a grey area of nonstate citizenship without access to many state services. A more sensible regime would posit that: (1) enclaves are physically within states, but (2) most state law is preempted. This arrangement is essentially what *Howard* suggested, albeit without a clear explanation that would definitively settle the question.

The imprecise constitutional text and jurisprudence governing Article I "Places" illustrate the quantum indeterminacy of federalism: Places exist both as federal space and state space depending on the observer and context. The jurisprudence that produces this duality is a byproduct of the Constitution's inattention to the legal significance of the typology of spaces that it created. Justice Story inadvertently highlighted this imprecision when he opined that a state's consent to federal jurisdiction over enclaves is a "virtual surrender and cession of its sovereignty over the place."²⁷⁷ The word "virtual" is rhetorical sleight of hand that masks ambiguity behind a veneer of certainty and perfectly describes the fragmented transfer of state power over enclaves. *Virtual* cession is apparently not quite the same as *actual* cession, leaving room for interpretative creativity when reviewing specific regulations affecting specific people in specific ways. The legal significance of deeming a space to be a Place is thus yet another question of constitutional geography that resists formulaic resolution linked to labels and lines on a map.

ration of Foreign Law, 157 U. PA. L. REV. 103, 126 (2008) (noting that federal law can incorporate "future" developments in state law).

277. *United States v. Cornell*, 25 F. Cas. 646, 648 (C.C.R.I. 1819) (No. 14,867) (Story, Circuit Justice).

J. THE “HIGH SEAS”

The Constitution identifies two regions consisting of water,²⁷⁸ mentioning each only once. Congress may “define and punish Piracies and Felonies committed on the high Seas,”²⁷⁹ and the “judicial Power” extends to “all Cases of admiralty and maritime Jurisdiction.”²⁸⁰ This section analyzes the high seas, while the next section analyzes admiralty jurisdiction.

The high Seas are a region that illustrates the complex interactions between powers, places, and people that pervade constitutional space, as well as the physical and legal indeterminacy endemic to sparsely defined spaces. First, the Constitution does not define the “high Seas.”²⁸¹ This imprecision raises a tricky interpretative question that courts seem not to have noticed: is the “high Seas” a uniquely constitutional space, or does the Constitution incorporate international law’s definition of a place with the same name?²⁸² And if the Constitution does look elsewhere for guidance, to *when* does it look: the definition in 1789 or today?²⁸³ These questions hinge in part on the extent

278. Congress may also regulate “Captures on Land and Water,” but the text does not define any particular region or subtype of water. U.S. CONST. art. I, § 8, cl. 11. Courts have not identified any water to which the clause does not apply. *Cf. Brown v. United States*, 12 U.S. (8 Cranch) 110, 126 (1814) (noting that the clause applies to both “extraterritorial” and domestic captures).

279. U.S. CONST. art. I, § 8, cl. 10.

280. *Id.* art. III, § 2.

281. The term could potentially encompass or exclude a wide array of areas, such as different types of tidal and non-tidal inland waters (rivers, inlets, harbors, bays, etc.), and coastal waters extending various distances from land. *See generally* 1 THOMAS SCHOENBAUM, ADMIRALTY & MARITIME LAW §§ 2-13 to 2-17 (4th ed. 2008) (noting the existence of several formal categories of waters, including “internal waters,” “the territorial sea,” “the contiguous zone,” “the exclusive economic zone,” and “the continental shelf”).

282. In practice, domestic and international law may differ. For example, piracy in territorial waters is generally not within the “high seas” under international law, but might be within the “high Seas” under U.S. law (based on old precedent that has not been overruled). *Compare* United Nations Convention on the Law of the Sea, *supra* note 93, art. 101, 1833 U.N.T.S. at 436 (piracy occurs either “on the high seas” or “outside the jurisdiction of any State”), *and id.* art. 86, 1833 U.N.T.S. at 432 (high seas excludes “territorial sea[s]”), *with* *United States v. Furlong*, 18 U.S. 184, 200 (1820) (“Nor can it be objected that [the piracy] was within the jurisdictional limits of a foreign State” and thus beyond the “high seas”). *See also* discussion *infra* at note 287.

283. The analytical approach that courts have taken in the related context of admiralty suggests that definitions of spaces can evolve over time. *See* *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1851) (rejecting earlier decisions limiting the scope of admiralty jurisdiction); *N.J. Steam Navigation Co. v. Merchants’ Bank of Boston*, 47 U.S. (6 How.) 344, 386 (1848) (holding that the constitutional definition of admiralty jurisdiction is broader

to which evolving international standards can inform constitutional interpretation.²⁸⁴ The Framers' indeterminacy with respect to the definition of a space that already existed in an international context thus presents uncertainty about both semantic meaning and interpretative method. Second, the high Seas is a place over which Congress has power, yet most of that place is not "in" the United States.²⁸⁵ This disconnect highlights the distinction discussed above between an entity (here, the United States), the space of which it consists, and the broader space where it operates.²⁸⁶ Third, the "high Seas" arguably can

than the Founding era English definition); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 27–28 (2006) ("The admiralty cases . . . explicitly reject the proposition that constitutional admiralty jurisdiction should be tied to English law at the time the Constitution was adopted, in favor of asserting the role of the U.S. courts . . . as participants in the recognition and development of an evolving general transnational jurisprudence of admiralty.").

Some theories of interpretation contend that words in the Constitution should have a fixed semantic meaning defined by usage at the time of ratification. A fixed meaning would not necessarily imply that the scope of the high Seas remains static because the semantic meaning of a phrase can include the possibility of evolution within the category that the phrase creates. The "high Seas" thus could refer either to specific waters that in 1789 were encompassed in the international law definition of high seas, or generically to the international law category of high seas such that the domestic category evolves along with the international category. Choosing between these interpretations would require analysis of context and contemporary usage. See generally Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552–54 (2009); Randy E. Barnett, *Is The Constitution Libertarian?*, 2009 CATO SUP. CT. REV. 9, 19 ("[T]he meaning of a written constitution is the semantic meaning of its words in context.").

284. International law can intersect with constitutional law in three ways that have generated controversy. International law can have: (1) *persuasive* force if it informs judicial understanding of the Constitution's text, (2) *preemptive* force if the Supremacy Clause requires federal courts to apply it and states to obey it unless and until Congress displaces it, and (3) *preeminent* force if the Constitution incorporates international standards. See generally *Agora: The United States Constitution and International Law*, 98 AM. J. INT'L L. 42 (2004); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Cleveland, *supra* note 283; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Symposium, *The Debate over Foreign Law in Roper v. Simmons*, 119 HARV. L. REV. 103 (2005).

285. There is no plausible definition of the United States as a physical location that would encompass, for example, a Somali pirate in a skiff on the Gulf of Aden. Cf. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440–41 (1989) (stating that "high Seas" are generally not within the United States' "territorial jurisdiction").

286. See *supra* Parts I.A–B.

extend into the sovereign waters of other nations.²⁸⁷ Yet Article I elsewhere refers to certain legal entities as “foreign.”²⁸⁸ A constitutionally defined space (the high Seas) can thus exist within the territory of a different constitutionally defined entity (foreign nations), much like a federal “Place” can exist within a “State.”²⁸⁹ Fourth, federal authority over the “high Seas” extends further than merely regulating felonies and piracy. For example, Congress’s powers under the Foreign Commerce Clause extend to vessels at sea,²⁹⁰ and the President is the “Commander in Chief” of the “Navy” while it is deployed.²⁹¹ The text’s delineation of a place in the context of a specific power thus does not preclude the exercise of different powers over the place by the same or another federal actor. Fifth, Congress has power under the Necessary and Proper Clause to define felonies on land (otherwise there would be virtually no federal criminal law).²⁹² This additional authority confirms that the enumeration of power over one place (the high Seas) does not preclude the exercise of that power over a different place. Sixth,

287. See 3 STORY, *supra* note 275, § 1163 (“The phrase [high Seas] embraces . . . waters on the sea-coast . . . whether within the territorial boundaries of a [foreign] nation, or of a domestic state.”). *But see* Eugene Kontorovich, *Beyond the Article I Horizon: Congress’s Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1237 (2009) (contending that “the Define and Punish Clause has no application in foreign waters”). Even if U.S. law follows the high Seas into foreign territory, the United States might be unwilling to enforce federal law in that territory absent authorization under international law. See Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating a Global Solution*, 59 AM. U. L. REV. 1449, 1474 (2010) (discussing the limited scope of U.N. Security Council resolutions authorizing foreign warships to pursue pirates in Somali waters).

288. See U.S. CONST. art. I, § 8 (“foreign Nations”), § 9 (“foreign State”), § 10 (“foreign Power”).

289. See *supra* Part I.I.

290. See U.S. CONST. art. I, § 8, cl. 3; *Lord v. Steamship Co.*, 102 U.S. 541, 544 (1880) (“[W]hile on the ocean, [a vessel is] engaged in commerce with foreign nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress.”).

291. U.S. CONST. art. II, § 2, cl. 1.

292. The only specific references to non-aquatic federal crimes in the Constitution address counterfeiting, treason, the “Law of Nations,” and conduct underlying impeachment. *Id.* art. I, §§ 3, 8; *id.* art. III, § 3. For a discussion of Congress’s power to define crimes under the Necessary and Proper Clause, see John S. Baker, Jr., *State Police Powers and the Federalization of Local Crime*, 72 TEMP. L. REV. 673, 700–01 (1999); Kathleen F. Brickey, *The Commerce Clause and Federalized Crime: A Tale of Two Thieves*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 27, 28 (1996) (“In contrast with the 17 crimes that formed the entire body of federal criminal law two centuries ago, there are now more than 3000 federal crimes on the books today.”).

states have some power to apply their criminal law on the high Seas.²⁹³ This overlapping authority suggests that the Constitution's allocation of power over a place to one entity does not automatically preclude similar regulation by another entity. Finally, the fact that the United States exercises power on the high Seas raises a question about what limits apply to that power and what rights belong to various targets of that power, such as U.S. citizens being searched or Haitian migrants being interdicted. Courts therefore must consider how the Constitution applies at the intersection of a government power, a defined place, and an affected people.²⁹⁴ Similar analysis also operates in other kinds of spaces, such as unincorporated territories and military bases abroad.²⁹⁵

The foregoing observations are interesting in their own right, and they also collectively highlight the limits of the canon of interpretation known as *expressio unius est exclusio alterius*—to express or include one thing implies the exclusion of the other.²⁹⁶ The observations show that the High Seas Clause: (1) creates federal power that states may partially exercise, (2)

293. See *Skiriotes v. Florida*, 313 U.S. 69, 77 (1941) (“If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress.”). The Framers may not have envisioned the application of state criminal law on the high Seas because of contemporary beliefs about the territorial limits of state power. See Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 27 (1996).

294. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 267 (1990) (discussing application of the Constitution outside the United States and noting that there is “no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens . . . in international waters”). Sometimes the conclusion is that noncitizens lack any rights. See *Haitian Refugee Ctr. v. Baker*, 953 F.2d 1498, 1513 (11th Cir. 1992) (“[T]he interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States.”); Louis Henkin, *Immigration and the Constitution: A Clean Slate*, 35 VA. J. INT’L L. 333, 334–35 (1994) (“Given the Court’s opinion in the *Chinese Exclusion Case* (an embarrassing title), the Constitution does not apply to the admission of persons to the United States. Congress may establish any criteria for admission or non-admission, however irrational or invidious, including blatant racial, ethnic, and religious distinctions. Because the Constitution does not apply, the United States can seize individuals outside its territory and forcibly return them to another country in order to keep them from entering the United States: Witness the Haitian interdiction program and the recent policy toward Cubans.” (footnotes omitted)).

295. See *supra* Parts I.B, I.G.

296. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995).

gives Congress power over a place without barring exercise of the same power in other places, (3) creates a power over a place that is not exclusive of other powers over the same place, (4) empowers Congress to act in a place without disempowering the President, and (5) defines a place under federal control that is concurrently under foreign control. This non-exclusive interaction between different constitutional clauses reminds us that canons of interpretation that presume systemic consistency are often inadequate when the underlying typology is haphazard.²⁹⁷ The Constitution's typology of spaces is extremely haphazard, which should make interpreters wary of placing excessive weight on its categorical distinctions.

K. "ADMIRALTY AND MARITIME JURISDICTION"

Analyzing "admiralty" as a space sheds new light on contemporary debates about the Admiralty Clause's meaning by highlighting how the Framers created a place that they did not assign to a regulator. The only reference to admiralty in the Constitution is the extension of the "judicial Power" to "all Cases of admiralty and maritime Jurisdiction."²⁹⁸ This "Jurisdiction" at first seems more like a concept than a place. Yet one reason that cases can fall within admiralty jurisdiction is that the underlying conduct occurs in a physical space to which that jurisdiction extends.²⁹⁹ Indeed, the Supreme Court often determines the extent of federal and state regulatory power over events connected to water by reference to whether challenged activity was within or beyond the spatial limits of admiralty jurisdiction.³⁰⁰ It is thus coherent to ask both "*what* is federal

297. See David M. Golove, *Against Free-Form Textualism*, 73 N.Y.U. L. REV. 1791, 1815–16 (1998) (critiquing the *expressio unius* canon and noting its limited applicability).

298. U.S. CONST. art. III, § 2.

299. The "locality" of an event is neither necessary nor sufficient to confer admiralty jurisdiction. *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972). In tort cases, the event must "bear a significant relationship to traditional maritime activity." *Id.* In contract cases, an agreement reached on land falls within the jurisdiction if it addresses maritime issues (colloquially, such agreements have a "salty flavor"). *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961).

300. For example, in *United States v. Flores*, the defendant argued that the enumeration of Congress's power to regulate crimes on the "high Seas" precluded Congress from regulating crimes on extraterritorial waters that were beyond the high seas. 289 U.S. 137, 146–47 (1933). The Court rejected this argument and held that the Admiralty Clause "conferr[ed] on Congress" regulatory power over various categories of waters, including a port in the Belgian Congo. *Id.* at 148. For other examples of the Court treating admiralty as a

admiralty jurisdiction?” and “*where* is federal admiralty jurisdiction?” The two questions overlap because Congress can enact statutes that convert admiralty claims into ordinary common law claims.³⁰¹ An event that physically occurs *in* admiralty jurisdiction therefore does not necessarily arise *under* admiralty jurisdiction.

Deciphering admiralty’s content and location is difficult because admiralty jurisdiction is the only space that the Constitution mentions without any express indication of who controls it or what should happen within it. The Constitution’s imprecision helps to explain why three puzzles about admiralty have intrigued commentators while resisting a satisfying resolution. First, the Supreme Court has held that Congress can regulate the “entire subject” of admiralty.³⁰² This conclusion raises a question about why federal legislative power exists over a place that the Constitution mentions only in Article III in the context of judicial power.³⁰³ Second, the Court has held that the judiciary may create common law governing admiralty cases even absent statutory authorization.³⁰⁴ This raises a question about why a clause expressly granting courts adjudicative jurisdiction somehow silently grants them regulatory ju-

constitutionally defined place, see *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205 (1971) (identifying the “locality of the accident” rule that shapes admiralty jurisdiction in tort cases); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 453 (1851) (holding that the scope of Article III admiralty jurisdiction “depends upon the place” where activity occurred). The physical scope of admiralty jurisdiction has expanded over time. See *id.* at 457 (rejecting earlier decisions that limited admiralty jurisdiction to tidal waters).

301. See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 388 (1924).

302. *Id.* at 386 (“Although containing no express grant of legislative power over the substantive law, the [Admiralty Clause] was regarded from the beginning as implicitly investing such power in the United States. . . . [T]here is no room to doubt that the power of Congress extends to the entire subject.”); see also *Crowell v. Benson*, 285 U.S. 22, 55 n.18 (1932) (“This power [to amend and revise the maritime law] is distinct from the authority to regulate interstate or foreign commerce and is not limited to cases arising in that commerce.”).

303. See Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349, 1364 (1999) (discussing “bootstrapping theory that bases Congress’ ‘admiralty’ power on judicial jurisdiction”); Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1230–37 (1954) (discussing the history of Congress’s role in admiralty law).

304. See *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 95–96 (1981) (“We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law.”).

risdiction.³⁰⁵ Finally, the Court has held that federal power over admiralty can displace state law even absent congressional action. In effect, the states are powerless to regulate certain admiralty matters.³⁰⁶ This raises a question of why states lack concurrent authority over waters within their borders absent express legislative preemption³⁰⁷ or dormant constitutional preemption in cases implicating foreign affairs.³⁰⁸ All these questions arise because the Constitution omits critical information about admiralty jurisdiction. The Constitution recognizes that admiralty is a place where events happen that might gen-

305. See REDISH, *supra* note 238, at 140–41 (critiquing the existence of federal common law regarding maritime commerce in light of the absence of such common law governing commerce on land); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1334 (1996) (challenging the legitimacy of judge-made admiralty rules that “govern matters within the traditional legislative competence of the states,” but defending judge-made law in prize cases and cases implicating foreign relations where state law may be inapplicable or preempted); Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367 (2000) (contending that Congress delegated common lawmaking authority to courts in admiralty cases); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 620–26, 633–38 (2006) (suggesting that the need for uniformity in foreign policy and an implied delegation of authority from Congress may justify judicial creation of common law in admiralty cases); Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM., 523, 554–57 (2004) (arguing that courts can create common law in admiralty cases to protect national policy interests); Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 521 (2004) (critiquing exceptionalism that pervades admiralty law and noting that “admiralty must be normalized and subjected to normal constitutional rules like *Erie*”).

306. See *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 (1996) (“[I]n several contexts, we have recognized that vindication of maritime policies demanded uniform adherence to a federal rule of decision, with no leeway for variation or supplementation by state law.”); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (“It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.”).

307. See Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 274–75 (1999) (noting that admiralty is “the only area in which ‘general’ common law is routinely held to preempt contrary state law without any action by Congress. This problem of maritime preemption—the relationship of the general maritime law to state law governing marine events—has given rise to over fifty Supreme Court decisions since 1917 and a set of doctrines that Professor David Currie aptly called ‘the Devil’s Own Mess.’”).

308. See Clark, *supra* note 305, at 1357 (noting that the application of judge-made admiralty law in state territorial waters may fill a void left by constitutional preemption of state laws that “interfere with the conduct of foreign relations”).

erate litigation, but it does not identify the source of substantive rules that should apply in such litigation.

A seemingly easy answer to vexing questions about federal admiralty power could be that they are red herrings. In contrast to Territories and enclaves, admiralty arguably is not a special place requiring a specific regulator and therefore justifying federal legislative power in spaces traditionally subject to state control. Instead, the Constitution makes admiralty a place only insofar as relevant to determining whether federal courts can adjudicate cases about activities within it. The scope of federal regulatory power over that place is an entirely different issue. Article I addresses this issue in the Interstate and Foreign Commerce Clauses by giving Congress broad power over water forming “channels of commerce” within and beyond the United States.³⁰⁹ Congress can thus regulate “maritime commerce” to the same extent that it can regulate “commerce by plane or truck.”³¹⁰ Article III may also provide further guidance about who regulates within admiralty’s space by linking jurisdiction to the existence of general “maritime” law and thereby authorizing federal courts to apply that law unless and until Congress modifies it by statute.³¹¹ On this view, modern

309. *United States v. Lopez*, 514 U.S. 549, 558–59 (1995); *see supra* note 290. Reframing Congress’s control over admiralty as a subset of its commerce power would not create new limits on federal authority over purely intrastate waters because those are already exempt from admiralty jurisdiction. *See* THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-3, at 14–15 (4th ed. 2004) (explaining that admiralty jurisdiction extends only to “navigable waters,” which are defined as waters connecting to a “continuous highway” between states, or beyond the United States).

310. *Young*, *supra* note 305, at 480. Of course, planes and trucks did not exist in 1789. The modern regime giving special status to admiralty thus merges an ambiguous text with an uncritical acceptance of tradition.

311. Admiralty courts during the post-Founding era applied established principles of maritime law, which they perceived as a form of general law that was enforceable despite not being rooted in the authority of any particular sovereign. *See Am. Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 545–46 (1828) (“A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. . . . [T]he law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1551–53 (1984). The idea that this general law is a species of federal common law that binds the states is a modern innovation. *See* John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 252 (1997). General maritime law might have a legitimate modern role, even after *Erie Railroad. Co. v. Tompkins*, 304 U.S. 64 (1938), if it fills a regulatory void that would otherwise exist due to the inap-

constitutional law governing admiralty is misguided because it removes admiralty from the standard Article I framework for thinking about the allocation of regulatory power between the state and federal governments. Yet this view has not gained traction in case law.³¹² Some early decisions invoked the Interstate and Foreign Commerce Clauses, without mentioning admiralty jurisdiction, to uphold federal statutes governing activity on navigable waters.³¹³ But the Court subsequently treated Congress's power over admiralty as distinct from Congress's power over commerce³¹⁴ and has not reconsidered whether Congress's enumerated powers over channels of commerce preclude assertion of unenumerated power over admiralty.³¹⁵

plicability or preemption of state law and the absence of a federal statute supplying a rule of decision. See Young, *supra* note 305, at 508–09.

312. For discussion of how the commerce power may justify congressional regulation of admiralty and maritime law, see REDISH, *supra* note 238, at 141 n.167; George W. Healy, III, *Remedies for Maritime Personal Injury and Wrongful Death in American Law: Sources and Development*, 68 TUL. L. REV. 311, 312 (1994); Young, *supra* note 303, at 1364.

313. See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870) (upholding a federal statute that required licensing of ships in navigable waters); *Moore v. Am. Transp. Co.*, 65 U.S. (24 How.) 1, 39 (1861) (commenting in dicta that the federal statute governing liability of ship owners “can apply to vessels only which are engaged in foreign commerce, and commerce between the States”); *N.J. Steam Navigation Co. v. Merchants’ Bank of Bos.*, 47 U.S. (6 How.) 344, 392 (1848) (noting briefly that admiralty jurisdiction might not extend to waters beyond the scope of federal “commercial” power); cf. 3 STORY, *supra* note 275, § 1672 (noting the need for federal oversight of admiralty matters because of their nexus with “commerce and navigation” “abroad” and “at home”).

314. See *In re Garnett*, 141 U.S. 1, 12 (1891) (“It is unnecessary to invoke the power given to Congress to regulate commerce with foreign nations, and among the several states, in order to find authority to pass the [maritime] law in question.”). The Court’s treatment of admiralty and commerce as two distinct objects of legislative power may have arisen in part because of admiralty doctrine’s pedigree in English common law, which was unconstrained by any requirement for a nexus with interjurisdictional commerce. Cf. *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 106 n.a (1820) (discussing the pre-constitutional history of criminal jurisdiction over admiralty matters due to its potential relevance to U.S. law). The Court may also have been concerned that linking admiralty to the Commerce Clause might create complications due to the potentially limited reach of federal commerce power in the nineteenth century. Cf. *The Thomas Swan*, 23 F. Cas. 1011, 1013 (S.D.N.Y. 1872) (No. 13,931) (holding that the Commerce Clause did not permit Congress to impose fire safety rules for a barge on an interstate river because the passengers were travelling between points within a single state).

315. See *Kaiser Aetna v. United States*, 444 U.S. 164, 173–74 (1979) (discussing Congress’s broad commerce power over waters, but not considering whether this power obviated scrutiny of Congress’s authority under the Admiralty Clause); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451–52 (1851) (raising the possibility that the Commerce Clause might substi-

The foregoing confusion arises because Admiralty is an orphan space that the Constitution references but does not assign to a regulatory parent. Greater attention to admiralty's spatial dimension by the Framers would have revealed the need to specify who regulates admiralty and what regulations they can adopt. Likewise, greater attention to spatial issues by the Supreme Court might have avoided admiralty's exceptionalism by fitting admiralty law into the framework for dealing with other kinds of spaces, such as enclaves, that are governed by a mix of federal legislation, federal common law, and state law.

II. THE LAW OF THE LANDLESS: UNENUMERATED SPACES

Part I explored how the Constitution defines fourteen discrete spaces that influence the allocation of government power and the scope of individual rights. These spaces often have imprecise physical contours and ambiguous legal significance. But they at least have an express constitutional status that creates a foundation for thinking about their scope. In contrast, the Constitution never mentions many kinds of spaces that nevertheless have been or could be important in the development of constitutional law. Disputes over the boundaries and status of these spaces have forced courts to create a federal common law of national geography. These rules affect constitutional powers and rights without the benefit of explicit constitutional text defining the relevant space.³¹⁶

The existence of unenumerated spaces sheds further light on the ad hoc nature of the Constitution's typology of enumerated spaces. The typology provides neither a comprehensive account of the spaces it defines nor an exhaustive list of the spaces that are constitutionally important. The typology is therefore

tute for the Admiralty Clause in justifying congressional regulation of certain waters, but not reaching the question because Congress had not invoked its commercial authority and the case presented an issue of adjudicative jurisdiction rather than legislative power).

316. All judicial decisions interpreting constitutional text are a form of common law. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14, 17 (1975). The cases discussed in Part I are therefore part of the same overall body of geographic common law as the cases discussed in Part II. The difference lies in the extent to which the two bodies of law can plausibly claim to be rooted in an explicit grant of constitutional authority to make rules governing the boundaries of spaces and the nature of government authority within them.

a helpful starting point for thinking about the “where” question in constitutional law, but cannot provide the ending point.

This Part briefly introduces two types of unenumerated physical³¹⁷ spaces that present vexing constitutional questions in part because they are unenumerated: Indian lands and “Adjacent Spaces” along the borders of enumerated spaces.³¹⁸ The goal is to create a foundation for future scholarship by illustrating how recurring issues in constitutional law are a symptom of a broader problem of indeterminacy in the Constitution’s treatment of spaces.

A. INDIAN TERRITORY

The law governing jurisdiction over Indian territory is a convoluted mess. Confusion arises because tribes retain vestiges of their prior sovereignty, yet operate within a constitutional regime that does not explicitly recognize that sovereignty.³¹⁹

317. This Article focuses on physical spaces that existed at the time of the Founding and subsequent amendments, and therefore does not discuss “cyberspace.” For analysis of how constitutional provisions written for a tangible world translate into cyberspace, see Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1007 (2010) (seeking “to map the protections of the Fourth Amendment from physical space to cyberspace”); Lawrence Lessig, *Reading the Constitution in Cyberspace*, 45 EMORY L.J. 869 (1996); cf. Julie E. Cohen, *Cyberspace As/And Space*, 107 COLUM. L. REV. 210, 213 (2007) (“The important question is not what kind of space cyberspace is, but what kind of space a world that includes cyberspace is and will become.”).

318. Other examples of unenumerated physical spaces that raise interesting questions about the extent and relative scope of state and federal power are local government units (such as cities and counties) and foreign embassies and property within the United States. See generally MYRON ORFIELD, *AMERICAN METROPOLITICS: THE NEW SUBURBAN REALITY* (2002) (discussing legal and policy issues arising from transboundary interactions in metropolitan regions); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1122 (1996) (suggesting a need for “more permeable local boundaries and regionally bounded local governments”); Anderson, *supra* note 32 (discussing legal regimes governing counties and multijurisdictional regions); Vienna Convention on Diplomatic Relations arts. 22–23, 30, 41, 45, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 (enumerating a receiving nation’s obligations with respect to the “premises” of a foreign mission); 28 U.S.C. §§ 1609–1611 (2006) (defining foreign property’s immunity from attachment and execution); *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 135 (1812) (conducting “the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel [belonging to the French Navy], found within the waters of the United States”).

319. See *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 326–29 (2008) (noting tribes’ “residual sovereignty”). The convoluted character of rules and explanations for the allocation of authority over tribes

Land that is nominally under tribal control is therefore not exclusively under tribal control. Wherever there is nonexclusivity there is concurrence, and wherever there is concurrence there are questions about how to allocate shared authority.³²⁰ Courts and commentators have for centuries noted the vexing problems arising from concurrent jurisdiction between the United States, individual states, and tribes over Indian lands.³²¹ But they have not linked the issue to the broader question of how the Constitution treats physical spaces. Thinking about Indian lands in this broader context highlights the consequences of having a federal system in which the Constitution makes geography important, but only partially defines the legal landscape.

The Constitution mentions “Indians” only three times. All three references contemplate a special status for Indians, but none indicates how that status might affect the land that Indians occupy. The two Apportionment Clauses treat Indians as people who might live “in” states but enjoy an exemption from taxation that would partially remove them from the state’s political community.³²² This outsider status reappears in the Indian Commerce Clause, which recognizes that “Indian[s]” col-

also stems in part from the fact that tribes’ current status traces back to federal conquest of tribal lands. Building jurisprudence on a foundation of conquest is an awkward enterprise because “the rule of law cannot be easily harmonized across the colonial-constitutional divide.” Philip P. Frickey, *(Native) American Exceptionalism in Federal Public Law*, 119 HARV. L. REV. 431, 436 (2005).

320. See Rosen, *supra* note 2, at 1135–40 (discussing mechanisms for resolving conflicts within regimes authorizing concurrent authority).

321. See Barbara Ann Atwood, *Fighting over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989); Vanessa J. Jiménez & Soo C. Song, *Concurrent Tribal and State Jurisdiction Under Public Law 280*, 47 AM. U. L. REV. 1627 (1998); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and the Methods of Marbury v. Madison to Tribal Courts’ Criminal Jurisdiction*, 36 ARIZ. ST. L.J. 77 (2004); Laurie Reynolds, *Adjudication in Indian Country: The Confusing Parameters of State, Federal, and Tribal Jurisdiction*, 38 WM. & MARY L. REV. 539 (1997); Mark D. Rosen, *Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act*, 69 FORDHAM L. REV. 479 (2000).

322. U.S. CONST. amend. XIV, § 2 (“Indians not taxed” do not count as members of the state’s population for purposes of apportionment). This language amended Article I, which had similarly excluded “Indians not taxed” from state populations without explicitly saying that such Indians lived “in” states. *Id.* art I, § 2; see also Robert N. Clinton, *There Is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 125 (2002) (“[The exclusion from apportionment] constituted a recognition that Indians, while geographically located within territory claimed by the United States, were not in any political sense part of the nation and should not be counted for representational purposes.”).

lectively form “Tribes” and that commerce “with” these tribes is distinct from commerce “with foreign Nations, and among the several States.”³²³ Indians thus exist within a constitutional gray area—not quite foreign, but not quite domestic. This gray area is tangible because Indians and Tribes occupy physical space.³²⁴ The existence of such space raises questions about who controls it (the Tribes, the states, or the United States) and what can, cannot, or must happen within it.³²⁵ The Constitution does not explicitly answer these questions because it does not include tribal land within its typology of spaces. There is no equivalent of the Territory, Property, or Enclave Clauses explaining how tribal lands might become annexed to the United States and discussing how tribes, states, and the United States would exercise jurisdiction over such lands. Indian lands are thus squeezed into a legal regime that does not expressly preserve a role for tribal self-government.

The absence of any constitutional provision addressing Indian lands arose from the Framers’ belief that Congress would define the status of such lands when the need arose using its powers over federal territory, commerce, and foreign affairs.³²⁶ The problem with this approach is that, as we saw in Part I, none of Congress’s enumerated powers definitively resolve the federalism concerns that arise in a system of divided sovereign-

323. U.S. CONST. art. I, § 8, cl. 3.

324. For a demographic and geographic breakdown of the Indian population in the United States, see Indian Entities Recognized and Eligible To Receive Services From the U.S. Bureau of Indian Affairs, 75 Fed. Reg. 60,810 (Oct. 1, 2010); U.S. CENSUS BUREAU, WE THE PEOPLE: AMERICAN INDIANS AND ALASKA NATIVES IN THE UNITED STATES (2006); U.S. DEP’T OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, AMERICAN INDIAN POPULATION AND LABOR FORCE REPORT (2005). For a history of how tribes acquired their current legal status, see COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.03–.07 (2005).

325. For example, can tribes regulate nonmembers on tribal land, or members outside tribal land? Can states tax activities on tribal land, or tax extra-territorial activities by tribal businesses? Who regulates crimes on tribal land: the tribes, the states, the United States, or some combination?

326. The Framers anticipated that tribes “would soon either move West, assimilate, or become extinct,” which made them an external force to be negotiated with rather than a core internal component of the Union. Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195, 200 (1984); see also Matthew L.M. Fletcher, *Preconstitutional Federal Power*, 82 TUL. L. REV. 509, 562 (2007). Congress barred future treaty-making with tribes in 1871, leaving development of Indian law to other regulatory devices. See 25 U.S.C. § 71 (2006) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty . . .”).

ty over shared spaces. Adding a third sovereign (tribes) to the mix further complicates the problem. It was thus inevitable that conflicts would arise between federal, state, and tribal efforts to regulate activity on tribal land, and that courts would need to develop doctrines for resolving competing claims of jurisdiction under a web of statutes and treaties. The rules (including federal common law)³²⁷ that have evolved to address these jurisdictional issues have constitutional overtones because they implicate the allocation of power between the national and state governments. State regulation of tribal affairs affect federal interests,³²⁸ while tribal autonomy is the mirror image of state disempowerment.

The result of this predictable complexity is that tribal lands have a bizarre status. Tribes are treated as “domestic dependant nations,”³²⁹ which is a double oxymoron: nations generally are neither domestic nor dependant. Congress has codified this unusual terminology in statutes referring to “Indian country.”³³⁰ The practical meaning of this nation-within-a-nation and country-within-a-country status is uncertain because the land that tribes occupy bears little resemblance to anything in the Constitution’s typology of spaces. Formally, tribal lands lie within states’ territory,³³¹ although until recently this was unclear and courts often characterized tribal lands as if they were outside the states.³³² In addition to being in

327. See COHEN’S HANDBOOK, *supra* note 324, § 4.02[1]; Frank Pommerheim, *Tribal Courts and the Federal Judiciary: Opportunities and Challenges for a Constitutional Democracy*, 58 MONT. L. REV. 313, 328 (1997) (“[T]he Court now recognizes a judicial plenary power to parse the limits of tribal court authority based on federal common law.”).

328. The “trust relationship” between the United States and tribes creates a federal interest in tribal affairs. *United States v. White Mountain Apache Tribe*, 537 U.S. 464, 476 n.3 (2003).

329. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831).

330. 18 U.S.C. § 1151 (2006) (defining the term).

331. See *Nevada v. Hicks*, 533 U.S. 353, 361 (2001) (“State sovereignty does not end at a reservation’s border.”).

332. See *McClanahan v. Ariz. State Tax Comm’n*, 411 U.S. 164, 168–69 (1973) (reviewing history of the Court’s treatment of tribal lands as beyond state control); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states . . .”). The Court went so far as to deem tribes beyond federal jurisdiction for purposes of the Fourteenth Amendment’s provision granting citizenship to “[a]ll persons born . . . in the United States, and subject to the jurisdiction thereof.” *Elk v. Wilkins*, 112 U.S. 94, 101–03 (1884) (quoting U.S. CONST. amend. XIV, § 1) (denying citizenship to an Indian born in the United States). The Court has never overruled *Elk*. Congress has mooted the issue by granting citizenship to Indians born in the

states, tribal lands are also within the tribe's "territorial jurisdiction"³³³—sort of. Tribal jurisdiction is incomplete because it often does not extend to nonmembers.³³⁴ The upshot is a form of concurrent jurisdiction in which the states and tribes each have partially overlapping and partially exclusive authority subject to broad federal power to preempt state and tribal law.³³⁵

Indian lands thus raise many of the same issues as the spaces discussed in Part I, but in a more complicated context with less explicit textual guidance. The Constitution does not expressly anticipate the acquisition of tribal lands and therefore does not integrate these lands into the national regime of divided sovereignty.³³⁶ Including tribal lands within the typology of spaces would not have eliminated the need to make difficult choices in particular cases involving competing claims of power and autonomy, but at least would have structured congressional and judicial discretion. Absent such a formal struc-

United States. See 8 U.S.C. § 1401(b) (2006); cf. Levinson, *supra* note 62, at 262 (“[T]o this day the Constitution does not truly follow the flag in regard to Indian nations within the territorial United States. The Bill of Rights has never been formally ‘incorporated’ against Indian nations, and even the Indian Civil Rights Act, which extends most of the protections of the Bill of Rights to members of Indian tribes, nonetheless omits the Establishment Clause of the First Amendment.”).

333. Okla. Tax Comm’n v. Sac & Fox Nation, 508 U.S. 114, 126 (1993).

334. See *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (“[A]bsent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances.”); Katherine J. Florey, *Indian Country’s Borders: Territoriality, Immunity, and the Construction of Tribal Sovereignty*, 51 B.C. L. REV. 595, 602 (2010) (“[T]he U.S. Supreme Court’s Indian law jurisprudence of the last fifty years . . . has made identity of *parties*, rather than *location*, the basis for tribal jurisdiction in both its adjudicative and regulatory aspects.”).

335. Further complexity arises because a statutory regime known as Public Law 280 allows the relative scope of state and federal power over tribes to vary from state to state. See 18 U.S.C. § 1162, 25 U.S.C. § 1321, 28 U.S.C. § 1360 (delegating federal regulatory authority to several, but not all, states with tribal populations). For a comprehensive discussion of how concurrent jurisdiction operates in practice, see COHEN’S HANDBOOK, *supra* note 324, §§ 5–6.

336. Some national constitutions do attempt to account for semi-autonomous enclaves housing indigenous populations, although these efforts post-date the U.S. Founding era. See, e.g., Kirsten Matoy Carlson, *Does Constitutional Change Matter? Canada’s Recognition of Aboriginal Title*, 22 ARIZ. J. INT’L & COMP. L. 449, 450 (2005) (discussing section 35 of Canada’s Constitution); Gonzalo Aguilar et al., *The Constitutional Recognition of Indigenous Peoples in Latin America*, 2 PACE INT’L L. REV. ONLINE COMPANION 44, 75–81 (2010), <http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1017&context=pilronline> (comparing constitutional treatment of indigenous land claims in fifteen countries in Central and South America).

ture, future scholarship should consider whether analogizing Indian lands to other kinds of constitutional spaces can suggest helpful ways of conceptualizing particular doctrinal problems, such as the role of state law on tribal land and tribal law on state land, the preemptive force of federal law, and the content and legitimacy of federal common law. The goal would be to situate Indian law within a broader constitutional landscape rather than to view it solely as an idiosyncratic silo of doctrine.

B. ADJACENT SPACES: ABOVE (THE AIR), BELOW (UNDERGROUND RESOURCES), BESIDE (COASTAL WATERS AND SUBMERGED LANDS), AND BETWEEN (BOUNDARY RIVERS)

The Constitution's typology of spaces envisions interjurisdictional boundaries as two-dimensional. Imaginary lines on a map mark the limits of each space. This approach to spatial definition creates two problems. First, the Constitution contemplates spaces with breadth, but does not necessarily consider their depth or height. Second, the boundaries between spaces often run along natural landmarks without an obvious beginning and end. A border line can thus mutate into a border zone that straddles two distinct spaces, creating confusion about the legal significance of events that occur within that zone. Both problems implicate what I call Adjacent Spaces: the unmentioned spaces that are above, below, beside, and between the spaces that the Constitution explicitly references. One can imagine an argument that Adjacent Spaces do not really exist; they may simply be part of the places they touch. References to a "state" and "the air above the state" accordingly might both encompass the same constitutional place.³³⁷ But in practice Adjacent Spaces often have a special status, such that events occurring within them do not merit the same treatment as similar events occurring in their attached counterparts. Thinking about Adjacent Spaces as distinct spaces, or at least as distinct subtypes of spaces, can therefore illuminate problems regarding the extent of government power and individual rights within these spaces.

The Constitution has little to say about Adjacent Spaces, once again requiring courts to create common law with minimal textual guidance. Likewise, scholars have never systematically analyzed Adjacent Spaces. A comprehensive account of these

337. Cf. Ford, *supra* note 33, at 854 ("The modern world is divided into jurisdictions. Gaps or zones of unclaimed or ambiguously apportioned territory are anomalous.").

spaces is beyond the scope of this Article, but a brief discussion can lay a foundation for future exploration. This section therefore briefly addresses three types of Adjacent Spaces: the air, underground resources, and rivers that run along state borders. These often-overlooked regions have an indeterminate constitutional status that requires considering many of the same types of questions that Part I addressed about the contours of spaces, the content and source of rules governing spaces, and the allocation of concurrent regulatory authority. More generally, the overlapping state and federal interests within each of these spaces further challenge the utility of relying on physical boundary lines and categorical labels to structure government power and individual rights.

First, consider the air above the United States. The air is essentially a modern analogue to admiralty jurisdiction—a channel of transportation and commerce shared by actors moving between multiple jurisdictions under circumstances requiring uniform rules. But unlike admiralty, the Constitution never mentions the air (which is unsurprising given that air travel was not viable in 1789). Thinking about air as a space within the constitutional framework raises at least three interesting questions about how air overlaps with other spaces. *First*, is the air above a state also within that state? Courts have uncritically assumed that states have territorial control over their airspace in cases where states tried to exercise personal jurisdiction over defendants served on airplanes.³³⁸ Yet state jurisdiction must end somewhere. For example, it does not extend to orbiting satellites.³³⁹ So there may be an altitude beyond which the fiction of territorial jurisdiction evaporates.³⁴⁰

338. See *Grace v. MacArthur*, 170 F. Supp. 442, 444 (E.D. Ark. 1959). A similar issue of legislative jurisdiction would arise if a person committed a tort on an aircraft.

339. See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. II, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 605 (establishing that outer space is beyond national “sovereignty”). If states lack power over space, there is a question of how much power they possess over “spaceports” on Earth. See Joanne Irene Gabrynowicz, *One Half Century and Counting: The Evolution of U.S. National Space Law & Three Long-Term Emerging Issues*, 4 HARV. L. & POL’Y REV. 405, 421 (2010).

340. That altitude cannot be so low as to prevent property owners from building upon and using their land. See *United States v. Causby*, 328 U.S. 256, 264 (1946) (“We have said that the airspace is a public highway. Yet it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere.”); *id.* at 266 (“Flights over private land are not a taking, unless they are so low and

Second, even if state territory extends vertically, there is a question about whether Congress and the federal judiciary have the same legislative and common law authority over the air that they have over admiralty. The air is a channel of commerce in which Congress can preempt state law,³⁴¹ and over which Congress has claimed “exclusive” national “sovereignty.”³⁴² However, it is not clear that dormant federal preemption over navigable airspace is as strong as dormant preemption over navigable waters, and thus the role of federal common law is uncertain.³⁴³ *Third*, the mirror image of the question about whether state power over land encompasses some of the appurtenant air is whether federal power over air encompasses some

so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”). A similar problem arose at the dawn of air travel when nations were forced to consider whether air was an extension of national territory or was instead analogous to oceans that all nations could access. See STUART BANNER, WHO OWNS THE SKY? 42–68 (2008) (discussing how lawyers structured early legal regimes governing air travel).

341. See *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 107 (1948) (“[Air] travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past.”).

342. 49 U.S.C. § 40103(a)(1) (2006). “Federal Acts regulating air commerce are bottomed on the commerce power of Congress, not on national ownership of the navigable air space, as distinguished from sovereignty.” *Braniff Airways, Inc. v. Neb. State Bd. of Equalization & Assessment*, 347 U.S. 590, 596 (1954).

343. Cf. Nancy Lee Firak & Kimberly A. Schmaltz, *Air Rage: Choice of Law for Intentional Torts Occurring in Flight Over International Waters*, 63 ALB. L. REV. 1, 120 n.893 (1999) (“Even though Congress has not acted to make aviation tort law uniform, the federal common law is evolving in that direction.”); Justin T. Barkowski, Comment, *Managing Air Traffic Congestion Through the Next Generation Air Transportation System: Satellite-Based Technology, Trajectories, and—Privatization?*, 37 PEPP. L. REV. 247, 254 n.28 (2010) (discussing history of concurrent state and federal regulation of airspace); Note, *Third Party Liability of the Private Space Industry: To Pay What No One Has Paid Before*, 41 CASE W. RES. L. REV. 503, 533–35 (1991) (comparing space common law and admiralty common law, and its relation to laws surrounding airspace). The Framers obviously did not devote the same attention to air commerce that they did to maritime commerce, which raises a question about how to translate their fixation with navigable waters to the advent of navigable airspace. A similar issue arises in the context of discussions about whether Congress’s authority to raise “Armies” and a “Navy” and regulate “land and naval” forces, U.S. CONST. art. I, § 8, cls. 12, 14, renders the Air Force unconstitutional even though it was not foreseen and therefore could not have been intentionally precluded. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of “This Constitution,”* 72 IOWA L. REV. 1177, 1232–33 (1987); Samuel Issacharoff, *The Elusive Search for Constitutional Integrity: A Memorial For John Hart Ely*, 57 STAN. L. REV. 727, 727 (2004); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1203 (1993).

of the appurtenant land. This question arises because air travel requires airports, and thus federal power over airspace may extend to the lands that planes use to access this space.³⁴⁴ The extent of federal power over land as an incident to its power over the air remains an open question.³⁴⁵ The air thus hovers above us as an unenumerated space in the “public domain” lacking “precise limits” and a clear legal status.³⁴⁶

Second, the land beneath states also presents fascinating federalism questions because state law currently determines property rights in oil and gas resources extracted from underground deposits.³⁴⁷ State primacy makes sense from the perspective of someone looking down on a two-dimensional map: the resources emerge from underneath the place marked on the map as a state, and so the state’s government decides how to allocate them. But if we think about federal space from a three-dimensional perspective and imagine a lateral view of the United States, we would see the air on top, the ground in the middle, and a large area below. The middle area is generally under state control. But if the air is possibly a unique space subject to federal control despite being appurtenant to the state, then subterranean space might have a quasi-federal status as well. While this underground space is not navigable, like the air, another aspect implicates federal interests. When liquid or gaseous resource deposits span state lines, extraction in one state depletes supplies available to the others.³⁴⁸ Whether

344. In an analogous context, Congress has recognized the nexus between land and maritime commerce by regulating seaports. See Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.* (2006); Ports and Waterways Safety Act, 33 U.S.C. § 1221 *et seq.* (2006).

345. Cf. Paul Stephen Dempsey, *Local Airport Regulation: The Constitutional Tension Between Police Power, Preemption & Takings*, 11 PENN ST. ENVTL. L. REV. 1, 17–20 (2002) (discussing federal preemption of state authority to regulate airports); Jeffrey A. Berger, Comment, *Phoenix Grounded: The Impact of the Supreme Court’s Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 NW. U. L. REV. 941, 963–71 (2003) (discussing federal statutes governing airports).

346. *United States v. Causby*, 328 U.S. 256, 266 (1946).

347. See generally 1 HOWARD R. WILLIAMS & CHARLES J. MYERS, OIL & GAS LAW § 201 (2005) (providing an overview of how states conceptualize property rights in oil and gas); Bruce M. Kramer & Owen L. Anderson, *The Rule of Capture—An Oil and Gas Perspective*, 35 ENVTL. L. 899, 900–05 (2005) (discussing history of oil and gas regulation in U.S. states).

348. To see why, imagine two people sharing the same milkshake through two straws. Even if each person keeps their straw on “their half” of the glass, each is capable of fully consuming the milkshake (thus denying the other their just desert).

this zero-sum situation is sufficient to convert subterranean transborder resource deposits into a distinct space meriting a special regulatory regime is debatable.³⁴⁹ On the one hand, a race between states or their citizens to capture scarce shared resources could create interstate conflict meriting preemptive federal intervention.³⁵⁰ Technological innovations that open subterranean spaces to new uses likewise might generate interstate friction requiring a federal solution. For example, carbon sequestration—which involves diverting atmospheric carbon dioxide into underground containment mechanisms—raises numerous questions to which appurtenant states may have dif-

349. Even if such deposits are not a novel form of federal space, Congress presumably still could play a role in their management given the commercial nature of extraction operations and the interstate character of the harvested resources. See *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 953–54 (1982) (holding that groundwater pumped from an interstate aquifer is an “article of commerce” that Congress can regulate); Blake Hudson, *Commerce in the Commons: A New Conception of Environmental and Natural Resource Regulation Under the Commerce Clause*, 35 HARV. ENVTL. L. REV. (forthcoming 2011) (“Since the ‘object of regulation’ of privatized commons resources is the act of appropriation, which is an economic transaction, these acts can be aggregated for the purpose of finding a substantial effect on interstate commerce.”); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. 545, 579 (2007) (noting that the Supreme Court’s recent skepticism about federal commerce power in cases involving natural resources has focused on Congress’s efforts to regulate “seemingly local activities”).

350. For example, in *Oklahoma v. Texas*, the Supreme Court noted that Texas and Oklahoma had each granted conflicting rights to the same land along their disputed border, creating a “danger of armed conflict between rival claimants” seeking to drill for oil beneath that land. 256 U.S. 70, 84 (1921). The Court resolved the conflict over drilling rights by determining the location of the interstate border. See *id.* at 92. In theory, the conflict could have festered if the field spanned both states but was accessible only from wells on one side of the border, but that apparently was not an issue in the litigation. Many states have rules governing “unitization” and “pooling” which give landowners rights to prevent adjacent owners from capturing all the resources from a subterranean field spanning multiple parcels. Jacqueline Lang Weaver & David F. Asmus, *Unitizing Oil and Gas Fields Around the World: A Comparative Analysis of National Laws and Private Contracts*, 28 HOUS. J. INT’L L. 3, 6 n.2 (2006). But these regimes are creatures of state law, raising a question about whether federal law should mandate some form of unitization when resources span state lines and are at risk of capture from a single aggressive driller in one of the states.

A different federalism problem could arise from slant drilling—i.e., the drilling of a well in state A that spans diagonally into a field located entirely beneath state B. States have developed responses to slant drilling when it occurs entirely within the state; for example, when one landowner siphons resources from beneath an adjacent parcel. See generally Owen L. Anderson, *Subsurface ‘Trespass’: A Man’s Subsurface Is Not His Castle*, 49 WASHBURN L.J. 247 (2010). However, scholars do not appear to have considered the choice of law and preemption issues that might arise if the well crosses a state line.

ferent answers.³⁵¹ To resolve or prevent conflict over extraction or injection of transborder resources, one could imagine preempting state law with a federal common law or statutory regime, or creating a scheme of concurrent state jurisdiction analogous to the rules that govern surface-level boundary rivers.³⁵² Yet invasive federal oversight might be unnecessary because states have mutual incentives to prevent disputes by agreeing in advance about how to allocate resources. Indeed, states have acted proactively by adopting interstate compacts to address oil and gas drilling³⁵³ and the analogous problem of water allocation in river systems that span state lines (where upstream uses have downstream effects).³⁵⁴ An additional fac-

351. See, e.g., Thomas R. Decesar, *An Evaluation of Eminent Domain and a National Carbon Capture and Geologic Sequestration Program: Redefining the Space Below*, 45 WAKE FOREST L. REV. 261, 275 (2010) (describing how carbon sequestration programs implicate state property law, but not addressing the issues of interstate conflict or choice of law); Alexandra B. Klass & Elizabeth J. Wilson, *Climate Change, Carbon Sequestration, and Property Rights*, 2010 U. ILL. L. REV. 363 (considering the possible role of federal law in governing property rights in deep “pore space” where carbon could be stored beneath states). Another innovation involving insertion rather than extraction of resources into transborder fields is hydraulic fracturing, which entails injecting fluids into coal or shale beds in the hope of improving their productivity. See Hannah Wiseman, *Untested Waters: The Rise of Hydraulic Fracturing in Oil and Gas Production and the Need to Revisit Regulation*, 20 FORDHAM ENVTL. L. REV. 115, 157–67 (2009) (discussing conflicting state regulatory regimes without considering how state law would apply to interstate fields). For a general discussion of how new technologies may require expanding federal control over underground spaces, see John G. Sprankling, *Owning the Center of the Earth*, 55 UCLA L. REV. 979, 1032–33 (2008).

352. See *infra* text accompanying notes 356–63.

353. See Interstate Compact to Conserve Oil and Gas, Aug. 27, 1935, ch. 781, 49 Stat. 939. For a description of the compact and the commission that it creates, see INTERSTATE OIL AND GAS COMPACT COMMISSION, <http://www.ioGCC.state.ok.us/> (last visited Jan. 5, 2011).

354. See, e.g., Jessica A. Bielecki, *Managing Resources with Interstate Compacts: A Perspective from the Great Lakes*, 14 BUFF. ENVTL. L.J. 173 (2007); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006). If states cannot agree about the disposition of interjurisdictional water resources, federal common law can fill the void. See *Kansas v. Colorado*, 206 U.S. 47 (1907) (establishing the doctrine of equitable apportionment); J.B. Ruhl, *Equitable Apportionment of Ecosystem Services: New Water Law for a New Water Age*, 19 J. LAND USE & ENVTL. L. 47 (2003). For a general discussion of how surface and sub-surface water systems create federalism problems by intersecting with each other and spanning state lines, see John D. Leshy, *Interstate Groundwater Resources: The Federal Role*, 14 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 1475 (2008). For a summary of how state laws governing surface waters and groundwaters vary, see James H. Davenport, *Less is More: A Limited Approach to Multi-State Management of Interstate Groundwater*

tor complicating federalizing management of underground resources is that the existence of state-created property interests means that a new federal regulatory regime for subterranean spaces would implicate the Takings Clause.³⁵⁵ Accordingly, mapping subterranean space into constitutional space presents interesting theoretical and policy questions meriting further study, especially if new technologies reveal deficiencies in the current model positing that states extend downward.

Third, many states share borders along rivers. Sometimes the border follows the shoreline,³⁵⁶ and sometimes it follows the middle of the river's channel.³⁵⁷ Either way, practical problems arise because activities on land spill into the river, and activities on one side of the river spill across its middle.³⁵⁸ Congress has often addressed these problems in statutes defining state borders by granting two states "concurrent jurisdiction" over rivers constituting a "common boundary."³⁵⁹ These rivers there-

Basins, 12 U. DENV. WATER L. REV. 139, 160 (2008) (presenting a table that summarizes each state's water apportionment system).

Bi- and multi-lateral agreements have likewise been a mechanism for resolving disputes in the analogous context of transnational resource deposits. *See, e.g.*, Joseph W. Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747, 750–61 (2007) (discussing the "unusually complicated amalgam of international, interstate and interprovincial, national, and state law" governing water rights in the Great Lakes along the U.S./Canada border); Paul Stanton Kibel, *A Line Drawn in Water: Aquifers Beneath the Mexico-United States Border*, 12 U. DENV. WATER L. REV. 191 (2008) (discussing the legal framework for addressing extraterritorial effects of U.S. water management decisions); Karla Urdaneta, *Transboundary Petroleum Reservoirs: A Recommended Approach for the United States and Mexico in the Deepwaters of the Gulf of Mexico*, 32 HOUS. J. INT'L L. 333 (2010) (discussing bilateral agreements governing oil and gas deposits spanning the U.S./Mexico border).

355. *See* U.S. CONST. amend. V. Merely modifying the scope of state common law or statutory property rights to address interstate externalities of private conduct would not automatically constitute a taking, but could raise constitutional questions depending on the nature and effect of the new federal rule. *See generally* Kramer & Anderson, *supra* note 347, at 915; Deborah Clarke Trejo, *Identifying and Valuing Groundwater Withdrawal Rights in the Context of Takings Claims—A Texas Case Study*, 23 TUL. ENVTL. L.J. 409 (2010). For example, different analytical frameworks would apply depending on whether federal preemption of state law entirely eliminated a private property right or merely imposed conditions on the property's use. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322–23 (2002).

356. *See* Act of June 15, 1836, ch. 100, § 1, 5 Stat. 50, 51 (Arkansas' border with Texas extends to the "north bank" of the Red River).

357. *See* Act of Mar. 6, 1820, ch. 22, § 2, 3 Stat. 545, 545 (eastern border of Missouri runs to the "middle" of the Mississippi River).

358. *See infra* text accompanying notes 360–61.

359. Act of Feb. 14, 1859, ch. 33, § 2, 11 Stat. 383, 383 (Oregon); Act. of

fore have an oddly indeterminate status. They simultaneously are part of a state, subject to the power of a different state, and subject to broad federal power over commerce and admiralty. Overlapping authority covering a single space complicates analysis of state power to, for example, prosecute crimes, apply civil law, and exercise personal jurisdiction with respect to activities on boundary rivers.³⁶⁰ The extension of state jurisdiction to boundary rivers also raised theoretical questions before the Civil War about whether a free state could liberate slaves on passing boats.³⁶¹ More generally, the prospect that one state can have federal statutory jurisdiction over the territory of another state raises a puzzle about where these rivers are and who is really regulating them. The rivers in a sense may be both federal and state territory, or they may be state territory where state law does not apply of its own force, but rather because Congress has incorporated it into federal law.³⁶² Boundary rivers thus illustrate that state borders are often zones rather than lines, and that the Constitution may tolerate flexi-

Feb. 26, 1857, ch. 60, § 2, 11 Stat. 166, 166 (Minnesota); Act of Aug. 6, 1846, ch. 89, § 3, 9 Stat. 56, 57 (Wisconsin); Act of Mar. 3, 1845, ch. 48, § 3, 5 Stat. 742, 743 (Iowa); Act of Mar. 6, 1820, ch. 22, § 2, 3 Stat. 545, 546 (Missouri); Act of Apr. 18, 1818, ch. 67, § 2, 3 Stat. 428, 429 (Illinois); Act of Apr. 19, 1816, ch. 57, § 2, 3 Stat. 289, 289 (Indiana).

360. See, e.g., *Brown v. State*, 159 S.W. 1132 (Ark. 1913) (upholding Arkansas' authority to prosecute gambling that occurred on a houseboat on Missouri's side of the St. Francis River); *Phillips v. People*, 55 Ill. 429 (1870) (affirming conviction in Illinois stemming from an assault on the Mississippi River despite the fact that the defendant had already been convicted of the same crime in Iowa, which shared jurisdiction over the river); *State v. Mullen*, 35 Iowa 199 (1872) (holding that Iowa could prosecute proprietors of a floating "house of ill-fame" that had run aground on the opposite bank of the Mississippi River); *Christian v. Birch*, 763 N.W.2d 50, 60 (Minn. Ct. App. 2009) (upholding personal jurisdiction over a person within the state's "concurrent jurisdiction" even if she was not within its territory); *Sanders v. St. Louis & N.O. Anchor Line*, 10 S.W. 595, 596–97 (Mo. 1889) (upholding application of Missouri law in an action for the wrongful death of a steamboat deck hand despite the fact that the accident occurred on Illinois' side of the Mississippi River).

361. See, e.g., *State v. Hoppess*, 1845 WL 2675 (Ohio Feb. 1845) (declining to interfere with navigation of the Ohio River by freeing a slave on a boat temporarily docked in Ohio).

362. The Supreme Court has never explored the constitutional basis for granting two states concurrent jurisdiction over the same place. Cf. *Miller v. McLaughlin*, 281 U.S. 261, 263 (1930) ("The grant of concurrent jurisdiction to Iowa does not deprive Nebraska of power to legislate with respect to its own residents within its own territorial limits."); *Wedding v. Meyler*, 192 U.S. 573, 585 (1904) ("The conveniences and inconveniences of concurrent jurisdiction [over rivers] both are obvious, and do not need to be stated. We have nothing to do with them when the law-making power has spoken.").

ble approaches to unusual spaces that do not fit neatly within its formal typology.³⁶³

CONCLUSION

Physical spaces are real—they have substance and dimension. But legal spaces are merely fictions that facilitate the public ordering of interactions in the physical world. These fictions have no intrinsic content or value and convey only as much meaning as lawmakers provide and observers perceive. The Constitution’s drafters constructed many fictional spaces, but endowed the distinctions between them with less meaning than is commonly assumed. A systemic approach to constitutional spaces reveals that categorical labels and lines on a map often cannot resolve dilemmas arising from the fragmentation and overlap of sovereignty over spaces containing a transient mix of insiders and outsiders. Many constitutional spaces lack precise boundaries, and even when boundaries are apparent the extent and allocation of government authority within particular spaces is unclear. Scholars have noticed this imprecision in numerous discrete contexts that they often treat as isolated phenomena. A broader survey of the constitutional landscape reveals that these phenomena share common features.

The indeterminacy of spatial labels pervades the Constitution and complicates analysis of basic questions discussed above, such as: When do outsiders have rights within a space and when do insiders carry their rights outside a space? Which spaces are amenable to regulation by states, the United States, tribes, or some combination? When should a place that is not in a state (such as the District or a Territory) be treated as if it were in a state; and when should a place that is in a state (such as an enclave, tribal reservation, boundary river, or navigable

363. A similar border zone exists when state land abuts a coastline, although in that context the issues are how far into the ocean (and how deep) state authority extends and the extent to which federal law preempts that authority even within state territory. See *United States v. California*, 332 U.S. 19, 38–40 (1947) (holding that the United States rather than California had “dominion” over submerged land beneath “marginal sea” extending three miles from the state’s coastline); Submerged Lands Act, 43 U.S.C. §§ 1301–1356 (2006) (responding to *California* by extending state borders three miles beyond the coast, granting states property rights over submerged lands within that three-mile zone, and extending federal authority seaward from the outer edge of the three-mile zone to “outer Continental Shelf”). For a discussion of the complex federalism issues that arise from attempts to exploit coastal resources, see Rachael E. Salcido, *Offshore Federalism and Ocean Industrialization*, 82 TUL. L. REV. 1355 (2008).

water) be treated as if it were not? When is federal law's control over a space so overwhelming that it preempts any state regulation, to the point where courts may create federal common law to fill the void? When should spatial rules be functional and when should they be formal?³⁶⁴ Should the contours and significance of spatial boundaries change over time, and if so what factors influence intertemporal variations in constitutional meaning?³⁶⁵ When does authority over territory—whether it be a state, the United States, Property, Indian Country, or airspace—include authority over extraterritorial events implicating that territory? And who decides the answers to the foregoing questions with respect to particular spaces: courts, Congress, individual states, or the political process?

Recognizing that these and other questions arise in many spatial contexts can promote clearer thinking about each individual question and identify complexity, analogies, and recurring themes that might otherwise evade critical scrutiny. The analysis in this Article can thus help generate insights about myriad doctrines implicating the geographic scope of government power and individual rights.

364. For example, the Guantánamo Bay naval base is within the United States in the functional sense that the Suspension Clause applies, but not in the formal sense that people born in it are United States citizens. *See supra* notes 92, 101.

365. One can imagine a wide variety of demographic, technological, and conceptual innovations that arguably could affect constitutional law governing particular spaces. For example, extraterritorial regulation may be more appropriate today than in the past given the relative ease with which conduct in one space can affect other spaces, individual rights may now require a broader ambit in light of greater individual mobility and the longer reach of government actors, overlapping regulatory authority may be more pervasive and tolerable than originally anticipated, spaces may have evolved in scope (such as the high Seas and admiralty jurisdiction), and the functional character of particular spaces may have transformed to an extent requiring reconsideration of their formal status (such as the District, enclaves, and Indian lands).