

THE RIGHTS OF FOREIGN STATES IN THE UNITED STATES LEGAL SYSTEM

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In an important sense they do not have any.

Professor Wuerth's article is a significant piece of scholarship. This brief comment is devoted, not to the article's many strengths, but to its principal doctrinal conclusion, with which I disagree. In my view, the Due Process Clause of the Fifth Amendment allows Congress to provide any rules it chooses regarding service of process on and personal jurisdiction over foreign sovereigns. That is true, at least, insofar as the judgments of U.S. courts are to be enforced against foreign sovereign assets located in the United States. The rules about personal jurisdiction over foreign sovereigns in the Foreign Sovereign Immunities Act therefore are consistent with the Fifth Amendment. The statement that foreign sovereigns are not persons within the meaning of the Amendment may not be strictly correct, but it captures the substance of the rules regarding their status as parties in U.S. courts.

As I will also argue, these conclusions are likewise consistent with Article III of the Constitution. Professor Wuerth points to two features of Article III in support of her thesis concerning foreign sovereigns. The concepts of judicial power and of cases may have built into them some requirements of personal jurisdiction and appropriate service of process; it is possible that only a proceeding meeting such requirements counts as a case within judicial power.¹ She also relies on the appearance of suits involving foreign states on Article III's jurisdictional list, inferring that foreign states therefore have capacity in the U.S. legal system that is not wholly within Congress's control. Article III does indeed so read, but I will argue that it does not yield the conclusions Professor Wuerth embraces. None of the features to which she points limits Congress's ability to prescribe rules of personal jurisdiction and service of process for foreign states.

The conclusions I advance rest on premises about the interactions between sovereigns, which in crucial ways involve consent, and the role of consent in rules about personal jurisdiction and notice, and the idea of a case.

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1. Controversies are a subset of cases, so I refer to cases to include both of the kinds of disputes listed in Article III.

The first conclusion is about the Due Process Clause of the Fifth Amendment. As I will explain, familiar principles of international law, personal jurisdiction, and notice, combined with the rules of sovereign relations, imply that the rules established by the United States for adjudication of cases against foreign sovereigns are consistent with any limitations regarding personal jurisdiction and notice that may be found in the Due Process Clause.

The first premise that leads to this conclusion is that sovereignty is territorial and exclusive. One and only one state is the sovereign in any place.² From the paramount authority of the territorial sovereign follows another basic principle that involves consent: one sovereign exercises authority as such in the territory of another only with the territorial sovereign's permission.³ That permission can be subject to the conditions set out by the sovereign of the place. From that principle follows another involving consent: by exercising its authority in the territory of, with the permission of, and on the terms set by, another sovereign, the exercising state consents to the conditions the territorial state imposes.⁴

2. *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) (Marshall, C.J.). "The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Id.*

3. *See id.* "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source." *Id.*

4. *The Schooner Exchange* concluded that foreign public armed vessels were not subject to seizure by U.S. courts. *Id.* at 146–47. Although that conclusion recognized immunity for the non-territorial sovereign, the Court's reasoning rested on the premise that the presence of one sovereign in the territory of another rests on the consent of both. Chief Justice Marshall, after noting that the territorial sovereign could consent to relaxing its absolute authority and allow another sovereign to enter, *id.* at 136 ("all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers"), reasoned that the non-territorial sovereign would enter another state's territory only with the assurance of immunity from the territorial state's jurisdiction:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him. *Id.* at 137.

The visiting sovereign's immunity thus was not a first principle, but the result of mutual consent—consent by the territorial sovereign that another enter its territory, and consent by the visiting sovereign to the conditions imposed. The assumption that the latter consent would be given only on terms of immunity concerns the likely decisions of sovereigns.

[A]ll exemptions from territorial jurisdiction, must be derived from the consent of the sovereign of the territory, that this consent may be implied or expressed, and that when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act. *Id.* at 143.

Should a non-territorial sovereign's interests dictate a different result, in which it allows some jurisdiction over its property held in a foreign state, Chief Justice Marshall's reasoning would entail a limit on the immunity of a non-territorial sovereign.

The next step in the reasoning uses another familiar principle of international law: the civil capacity of a sovereign is itself an exercise of sovereignty.⁵ Civil capacity is the collection of legal advantages that make possible ordinary activities with respect to the legal system. Owning property and exercising the rights of an owner and making contracts and exercising the rights of a contracting party are central examples.⁶ Just as important is access to the court system. Being a plaintiff who can seek and obtain recovery is obviously an important advantage; primary rights are of limited use if judicial remedies are not available to vindicate them. Perhaps less obvious is that being a defendant is also an important advantage, at least *ex ante*. Someone whose promises the courts will not enforce is often a less attractive contracting party than is someone who can be sued.⁷

Civil capacity is an aspect of legal personality—being the kind of entity that the legal system recognizes in the various roles of property owner, contracting party, plaintiff, defendant, and so forth. The paradigmatic example of a legal person is an adult natural person. Minors are often not fully legal persons, as they often lack some civil capacities.⁸ Building on the model of natural persons, the American legal system like many others

In a passage that anticipates some of the issues raised by the current restrictive theory of sovereign immunity, Chief Justice Marshall responded to the teaching of “Bynkershoek, a jurist of great reputation,” who had

maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the property of an ordinary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant. Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction, he may be considered as so far laying down the prince, and assuming the character of a private individual, but this he cannot be presumed to do with respect to any portion of that armed force, which upholds his Crown and the nation he is entrusted to govern. *Id.* at 145–46.

In the days of personal sovereignty, Bynershoek’s conclusion could be explained by a distinction between Emperor Napoleon I and M. Bonaparte (the vessel at issue was of the French Empire). Today, it would be explained by the distinction between the sovereign and proprietary functions of states.

5. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 206 (1987) (states as such have “status as a legal person, with capacity to own, acquire, and transfer property, to make contracts . . . and to pursue, and be subject to, legal remedies”).

6. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981) (stating that natural persons have capacity to make contracts unless they are under guardianship, infants, mentally ill or defective, or intoxicated).

7. The Federal Rules of Civil Procedure deal expressly with the capacity of parties to sue and be sued, providing that for natural persons suing on their own behalf the federal courts are to apply the capacity rules of the person’s domicile, FED. R. CIV. P. 17(b)(1), and that for corporations they are to apply the capacity rules of the law under which the corporation was organized, *id.* 17(b)(2).

8. For example, under the general law of contract, the contracts of minors are voidable, so that they lack the capacity fully to commit themselves. RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

recognizes artificial legal persons such as corporations. The property of a corporation is owned by the corporation, not the shareholders, suits against corporations are not suits against the shareholders, and recovery in court from a corporation is from the separate assets of the corporation, not the personal assets of the shareholders.⁹

Sovereigns are a distinct kind of legal person, with distinctive civil capacities. Probably the most familiar distinction is the principle, found in international and U.S. domestic law, that in general sovereigns may not be made defendants without their consent.¹⁰ The civil capacities of sovereigns as such are thus an aspect of sovereignty. Sovereigns exercise sovereign authority within one another's territory only with the consent of and on the terms set by the territorial sovereign. Hence non-territorial sovereigns own property, make contracts, are proper plaintiffs and defendants, and otherwise exercise legal personality, only with the consent of and on the terms set by the territorial sovereign. That consent can be subject to conditions, and by exercising legal capacities the non-territorial sovereign accepts those conditions.

This consent-based relationship of sovereigns in one another's legal systems has important implications for the Due Process Clause of the Fifth Amendment. Those implications hold even if an important question about the clause, which Professor Wuerth discusses, is resolved in a way that makes the clause more constraining. As she explains, according to one familiar reading, the clause (insofar as it relates to procedure and related matters like personal jurisdiction) has no content of its own, but reiterates the rule of law.¹¹ On this view, due process of law is the process called for by the sub-constitutional law, and the clause does not add anything. According to an opposed view, which the Supreme Court has adopted, the clause does impose constraints that would not arise without it because not everything the sub-constitutional law calls for qualifies as due process. The latter view is the more constraining. If the former is correct, then of course Congress may provide the rules it chooses for the personal jurisdiction of the federal courts and the notice that must be given when that jurisdiction is to be exercised.

Even on the more demanding reading, jurisdiction and notice to which a sovereign defendant has consented satisfy the clause. At the time of the framing, sovereigns could be sued in their own courts only with their own consent.¹² That consent established what is today called personal

9. See, e.g., DEL. CODE ANN. tit. 8, §§ 121–122 (giving Delaware corporations power to hold property, make contracts, sue, and be sued).

10. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 451 (1987) (states are immune from the adjudicative jurisdiction of other states except with regard to claims arising out of non-sovereign conduct).

11. See Ingrid Wuerth, *The Due Process and other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 683 (2019).

12. “Traditionally, courts could not command un-consenting states to appear at the behest of an individual.” Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1565 (2002).

jurisdiction; a sovereign could be called into court when it allowed itself to be.¹³ When sovereigns allowed suit against themselves, they could specify the way in which jurisdiction over them was to be exercised.¹⁴ The consequences of a sovereign's consent were thus well established. If a foreign sovereign was required to consent to jurisdiction in return for permission to exercise sovereign authority in another's territory, it could do so.¹⁵

The consent-based analysis I have presented may strike many readers as outmoded, not to mention wooden and rigid. It smacks of the rights-privilege distinction: my argument is that for foreign sovereigns, legal capacity is in the U.S. legal system a privilege and not a right, and that therefore the territorial sovereign may impose any conditions it likes on receipt of the privilege—conditions the non-territorial sovereign consents to by accepting the benefit.

In major decisions concerning the procedural aspect of the Fourteenth Amendment's Due Process Clause, however, the Supreme Court has rejected the application of rights-privilege logic. In *Goldberg v. Kelly*,¹⁶ the Court held that welfare benefits were property within the meaning of that clause, so that the state could take them away only with due process.¹⁷ The fact that the state did not have to provide such benefits in the first place did not keep them from being property for procedural purposes. A few years later, in *Cleveland Board of Education v. Loudermill*,¹⁸ the Court found that the procedure required to take public benefits away is not necessarily identical

13. "For members of the Founding generation who believed in sovereign immunity, the concept was relevant to *personal* jurisdiction rather than *subject matter* jurisdiction." *Id.* As Professor Nelson explains, the terminology that clearly distinguishes personal from subject matter jurisdiction is a post-framing development. *Id.* n.23.

14. "It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals, or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." *Beers v. Arkansas*, 61 U.S. 527, 529 (1858).

15. Consent by a foreign sovereign to the exercise of the territorial sovereign's jurisdiction to adjudicate, or to the mode of notice prescribed by the territorial sovereign, does not constitute waiver of a constitutional right. For that reason, saying that a foreign sovereign may give such consent does not assume that it has a constitutional right that is being waived. The Sixth Amendment, for example, creates a constitutional right that may be waived by its holder; a criminal defendant may demand a jury trial and also may decide to forego that process. Sovereigns' immunity from one another's jurisdiction arises from international law, not the Constitution. When a sovereign waives its immunity in return for civil capacity in another's territory, it does not give up any right secured to it by the U.S. Constitution.

16. 397 U.S. 254 (1970).

17. *Id.* at 261–63.

18. 470 U.S. 532 (1985).

with the procedure set out in the statute that creates the benefit.¹⁹ In moving many benefits to the rights side of the rights-privilege line, the Court implicitly rejected one of the standard arguments for distinguishing so-called new property from old property. According to that argument, the government is not required to create such benefits and so may structure them as it wishes. On the individual's side, any possible constitutional difficulties with the conditions the legislature imposes are obviated by consent; just as the government does not have to create benefits, private people do not have to accept them. The Court has rejected that line of reasoning as to the Fourteenth Amendment's Due Process Clause. Surely the Court today could not embrace with respect to personal jurisdiction under the Fifth Amendment an antiquated understanding of due process that it rejected with respect to procedure under the Fourteenth.

Surely it could, and can, and I think should and probably will, though perhaps it will not do so by explicitly embracing the rights-privilege distinction. Whatever may be true with respect to private people, and entities through which they act, rights-privilege reasoning that rests on consent is unexceptionable with respect to relations between sovereigns. The first step toward treating foreign sovereigns' legal capacity as a privilege is familiar from traditional rights-privilege reasoning: the United States is not obliged to allow foreign sovereigns to operate in its domestic legal system. Participating in the American legal system thus is not a right of foreign states in that no principle of American law confers it on them irrespective of what Congress provides. Traditional rights-privilege reasoning would go on to say that because Congress has the greater power of denying capacity altogether, it has the lesser power of offering it on terms. That reasoning is of course unsound; the power to deny a benefit altogether or to grant it on conditions is in fact the greater, and not the lesser, power.

The error built into that line of reasoning, however, does not mean that conclusions along those lines never follow. Rather, once the non-right status of an interest has been established, the next question is to ask whether any relevant norm limits the conditions that may be imposed on receipt of the interest. For a federal statute, any limits would have to come from the Constitution. That it sometimes imposes such limits is a familiar principle of American constitutional law. Congress does not have to support the arts, but the First Amendment places limits on the conditions it may set on receiving federal support.²⁰ To say that the Constitution sometimes limits the conditions that may be attached to a benefit—that there are unconstitutional conditions—is not, however, to say which conditions are impermissible.

19. *Id.* at 538–41 (explaining that once a statutory interest is identified as property, the procedures for deprivation of it are governed by the Constitution, not just the statute creating the interest).

20. *See, e.g.,* *NEA v. Finley*, 542 U.S. 569 (1998) (federal funding for the arts subject to First Amendment scrutiny).

As the arts funding example illustrates, conditions may be unconstitutional because of their effect on some individual decision that the Constitution protects from government control. The First Amendment, for example, limits the government's authority to restrict individual choice regarding speech by threatening imprisonment.²¹ First Amendment doctrine includes an unconstitutional-conditions feature on the grounds that sometimes other incentives the government creates concerning speech are similar enough to those created by threatened criminal punishment to justify limiting the government's ability to create those incentives by imposing conditions on benefits.

Whether the freedoms referred to in the First Amendment include activities of foreign sovereigns in this country—whether foreign sovereigns have First Amendment rights—is in my view quite doubtful. The question of the protection by the Constitution of foreign states outside the context of judicial proceedings is important, and Professor Wuerth's exploration of it is valuable.²² The legal interests at stake in personal jurisdiction and service of process, however, are different in kind from the liberties of conduct protected by the First Amendment. Those interests fall into the category of property rather than liberty. When sued in U.S. courts, foreign sovereigns face loss of bank account balances and vessels and other assets.²³ The due process issue is about those deprivations, not about jailing a foreign sovereign for criticizing the U.S. government.

When a condition is unconstitutional because of the First Amendment or some other protection of liberty of conduct, the limitation on the legislature's authority to impose conditions arises to protect the private interest in liberty. By analogy, a condition on receipt of some legal benefit, like a property right, would be unconstitutional when that restriction on the legislature protects an individual interest in having the property-like interest. That reasoning, which analogizes property and liberty, is at work in the Court's cases involving procedural due process and government benefits—the so-called new property. The Court's conclusion that legislatures, in creating benefits, may not attach such procedures as they choose, derives from its earlier conclusion that some benefits constitute property for purposes of the Due Process Clause. When it embraced the latter conclusion in *Goldberg v. Kelly*, the Court explained that due process requirements attach to government decisions that involve "important rights" and threaten "grievous loss," which termination of welfare benefits does.²⁴ The Court gave that explanation after rejecting the distinction between rights and privileges.²⁵ Its reasoning was

21. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (Ohio criminal syndicalism statute, which imposed criminal sanctions, unconstitutional as applied).

22. See Wuerth, *supra* note 11, at 686–89.

23. For example, in *Ex parte Republic of Peru*, 318 U.S. 578 (1943), a private plaintiff sought to seize a vessel owned by the Republic of Peru in order to enforce an alleged contractual obligation.

24. *Goldberg*, 397 U.S. at 261–63.

25. *Id.* at 262.

that so-called privileges are like rights in their importance, and so the two fall into the category of property for due process purposes.

The Court's reasoning concerning new property had as an uncontested baseline the constitutional treatment of old property under the Due Process Clause. Whatever public assistance may be, real estate, for example, is property. Even more fundamental for natural people than their specific holdings is their capacity to hold; they can acquire rights.²⁶ Foreign sovereigns, by contrast, as an initial matter have no such capacity. They participate in another sovereign's domestic legal system only on the sufferance of the territorial sovereign. With respect to foreign sovereigns, the reasoning underlying *Goldberg* and *Loudermill* lacks its necessary starting point: limits on the government's authority to impose conditions on the receipt of new property arise from new property's similarity to a kind of interest that is not subject to conditions. Foreign sovereigns hold no such interest. In a sense they have no property within the meaning of the Due Process Clause, even though they have property interests insofar as they are accorded legal capacity by the United States. In a sense they are not persons under the Due Process Clause, even though they have such existence in the U.S. legal system as they are given.

Professor Wuerth discusses Article III as well as the Due Process Clause.²⁷ That provision explicitly contemplates suits in which foreign states are parties. Moreover, the concept of a case or controversy may have built into it some minimal rules regarding the issues bound up with service of process: it is possible that a legal proceeding qualifies as a case or controversy only if the court has authority to decide with respect to the defendant and only if the defendant has received notice to some extent.

Article III does extend the judicial power of the United States to controversies between States of the United States and citizens thereof and foreign states.²⁸ Article III does not, however, confer civil capacity on foreign states or anyone else. The rules of civil capacity come from elsewhere; Article III assumes but does not supply them. A person who comes within one of Article III's party-based heads of jurisdiction may nevertheless lack legal capacity and hence not be a proper party in federal court. For example, in the 19th century, the general rule was that during hostilities, enemy nationals did not have access to the courts of the state with

26. For example, the Civil Rights Act of 1866, enacted to ensure that freed slaves would have the same basic legal capacities—the same civil rights—as white citizens, secured them the rights “to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property” Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (codified as amended at 18 U.S.C. § 242 (2006) and 42 U.S.C. §§ 1981–1982 (2000)). The power to make a contract is necessary for, and more basic than, the rights created by any particular contract, just as the right to hold property is necessary for, and more basic than, ownership of any particular asset.

27. See Wuerth, *supra* note 11, at 653–61.

28. U.S. CONST. art. III.

which their sovereign was at war. During the Civil War, the Supreme Court of the United States applied that principle to residents of states in rebellion, without regard to their personal loyalty: a U.S. and state citizen who resided in rebel-controlled territory could not sue in federal court, even if the requirements of diversity jurisdiction were otherwise satisfied.²⁹ In similar fashion, minors have access to the diversity jurisdiction only pursuant to the rules that govern their civil capacity.³⁰ Article III extends the judicial power to controversies involving foreign states insofar as those states have legal capacity. The extent to which they do is up to Congress, acting on behalf of the United States in its relations with foreign sovereigns.

Article III assumes and does not supply certain legal rules, notably the rules governing capacity. One fundamental question about it, one that Professor Wuerth probes insightfully, concerns the extent to which Article III might supply certain rules, specifically rules about adjudicative authority and notice, through its use of the concepts of judicial power and cases.³¹ The Article III menu of cases and controversies is of course very important but is not as basic as the ideas of judicial power and of cases. The latter involve definitive features of the institution that Article III empowers. A court may or may not have jurisdiction over a particular description of lawsuits, but as a court it has jurisdiction over lawsuits and not, for example, purely academic debates.

That feature of Article III may have important implications, including for questions concerning foreign sovereigns. It is natural to say, for example, that a case or controversy is as a conceptual matter a proceeding in which the court has jurisdiction over the parties, and that judicial power, again as a conceptual matter, is exercised only as to parties and not non-parties.³² Courts are not legislatures, the reasoning goes, and jurisdiction to adjudicate operates differently from jurisdiction to prescribe. If some requirement of personal jurisdiction is thus built into the relevant concepts, the next question is whether the concepts simply accept the output of other bodies of law, like the non-constitutional law of personal jurisdiction, or whether they include some limits of their own. If a proceeding about which the supposed defendant has never in fact heard is not a case, or cannot be decided with judicial power, then some notice requirement is intrinsic to Article III. It is also possible that the concepts of judicial power and cases or controversies simply take the rules of personal jurisdiction as they find those rules.

29. *See, e.g.,* *Mrs. Alexander's Cotton*, 69 U.S. 404, 421 (1864) ("Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist.").

30. *See* FED. R. CIV. P. 17(c) (minors may sue in federal court only through already-appointed representatives or through a guardian ad litem).

31. *See* Wuerth, *supra* note 11, at 657–61.

32. *See* Nelson, *supra* note 12, at 1565 (explaining that at the time of the framing, cases were thought to include only proceedings in which the parties appeared voluntarily or could be brought into court pursuant to the court's authority).

This question is of considerable interest and importance, but I think it need not be resolved in order to assess the conditions that the United States can impose on the exercise in its territory of foreign sovereign authority. If Article III does include some requirements concerning personal jurisdiction, those requirements are satisfied by any personal jurisdiction rules to which a foreign sovereign consents. The fundamentally territorial character of sovereignty not only was well known at the time of the framing, it is built into the Constitution itself, which assumes that the United States and its States are territorial entities.³³ The need for consent of the territorial sovereign for another to act as such within its territory follows from that feature of states and was also itself well known when the Constitution was adopted.³⁴ Whatever may be true as to personal jurisdiction and Article III in general, the federal judicial power can operate as to foreign sovereigns pursuant to any rule of personal jurisdiction the United States prescribes for them, and when a foreign sovereign is brought into court pursuant to such a rule, a case or controversy exists under Article III.

Personal jurisdiction over foreign sovereigns exercised pursuant to the Foreign Sovereign Immunities Act is consistent with the Constitution. In this respect, Congress can deal with other sovereigns as it thinks the interests of the United States require.

33. For example, the Constitution provides for extradition of persons accused of crime “who shall flee from justice, and be found in another State.” U.S. CONST. art. IV, § 2. Fugitives can be found in one of the States because they are territorial entities.

34. See *supra* notes 2–4 (discussing *The Schooner Exchange* in further detail).