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Constitutional Displacement

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CONSTITUTIONAL DISPLACEMENT

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This Article examines the intersection between territory and constitutional liberty. Territoriality, as defined by Robert Sack, is the attempt to affect, influence, or control people, phenomena, and relationships by delimiting and asserting control over a geographic area. Territoriality affects constitutional liberty in profound ways. These effects have been apparent in certain infamous historical episodes, including the territoriality of racial segregation, the geographic exclusion and internment of Japanese-Americans during World War II, early state migratory exclusions, and isolation of the sick and mentally ill. Today, governments are resorting to territorial restrictions in an increasing number of circumstances, including detention of enemy combatants at Guantanamo Bay, attempted expulsion of illegal immigrants from local communities, banishment of convicted sex offenders from vast geographic areas, exclusion of homeless persons from public spaces, and proposed isolation and quarantine of victims of pandemics and bio-terrorist attacks. These and other measures have produced what the Article refers to as Geographies of Justice, Membership, Punishment, Purification, and Contagion. Within these geographies, persons and groups are subject to constitutional displacement—the territorial restriction or denial of fundamental liberties. The displacements examined in the Article substantially restrict or deny basic liberties including access to justice, migration, movement, communal and political membership, and the ability

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to be present in places of one's own choosing. The Article demonstrates that the Constitution provides less than robust protection from certain forms of territorial displacement. Analyzing the Constitution itself as a spatial framework, one that relies upon place, geography, and territory for various purposes, the Article shows that displacement arises from extra-territorial and intra-territorial "spatial gaps" in text and structure. The Article proposes that these spatial gaps be narrowed or closed.

TABLE OF CONTENTS

I. INTRODUCTION 517
II. TERRITORIALITY, CONSTITUTION, AND GOVERNANCE 523
A. *Place, Geography, and Territory* 524
B. *Territoriality's Primary Constitutive Functions* 526
1. *Territory, Sovereignty, and Governance* 526
2. *Territory and Constitutional Domain* 530
3. *Territoriality and Political Community* 532
4. *Territoriality, Presence, and Privileges* 534
5. *Territoriality and Police Powers* 536
III. GEOGRAPHIES OF DISPLACEMENT 541
A. *Some Antecedent Territorial Measures* 541
1. *Racial Segregation and "Hyper-Territoriality"* 541
2. *Territory, Security and Loyalty* 544
3. *Migration and Membership* 546
4. *Early Urban Purification Measures* 548
5. *Controlling Contagion Territorially* 550
B. *Five Contemporary Geographies of Displacement* 553
1. *The Geography of Justice* 554
2. *The Geography of Membership* 562
3. *The Geography of Punishment* 569
4. *The Geography of Purification* 576
5. *The Geography of Contagion* 583
IV. CONSTITUTIONAL DISPLACEMENT AND SPATIAL GAPS 589
A. *Constitutional Displacement* 589
B. *External and Internal Spatial Gaps* 593
C. *Narrowing or Closing Constitutional Gaps* 596
1. *De-Spatializing Justice* 596
2. *The Spatialization of Domestic Liberty* 600
V. CONCLUSION 607

I. INTRODUCTION

In ways not always fully appreciated, constitutional liberty and spatiality are inextricably linked. The geography of cyberspace does not currently permit much in the way of official spatial regulation.[1] On firmer ground, however, spatiality remains a powerful regulatory tool. Geographic and territorial borders determine membership in polities, such that mere physical presence within a territory gives rise to certain rights and privileges. Expulsion or removal extinguishes these claims. Spatial restrictions on ingress or egress affect locomotion, mobility, and migration. Restrictions on the places or territories in which a person may reside, work, or recreate affect fundamental interests in choice of community, pursuit of livelihood, and the basic dignity associated with freedom of movement. Spatial restrictions also affect liberties we do not routinely associate with place or geography, including access to judicial process, equality, and rights of association and expression.[2] In many respects, there is no more fundamental liberty than the freedom to choose one's own place.[3] The loss of that freedom can result in severe forms of not only personal, but constitutional, displacement.

Spatiality is a useful, necessary, and often legitimate organizing and constituting principle. Governments rely upon borders and boundaries in carrying out a host of ordinary functions, including defense of sovereignty, distribution of privileges and benefits, and maintenance of public order.[4] But as we shall see, governmental control over and manipulation of place, geography, and territory can be very dangerous to individual liberty.[5]

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1. That does not mean, however, that cyberspace is not subject to substantial private ordering. Dan Hunter, *Cyberspace As Place and the Tragedy of the Digital Anticommons*, 91 CAL. L. REV. 439 (2003).

2. *See generally* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006) (examining relationship between spatial regulations and First Amendment liberties); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439 (2006) (discussing expressive aspects of place) [hereinafter Zick, *Space, Place, and Speech*].

3. The social justice effects of geography and territory are examined in DAVID M. SMITH, GEOGRAPHY AND SOCIAL JUSTICE (1994). On territory and its relationship to membership, see MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

4. *See* discussion *infra* Part II.B.

5. Sometimes the danger is not immediately apparent. For example, the Los Angeles Police Department recently unveiled a plan to geographically map Muslim communities within the city to purportedly combat radicalization in religious enclaves. The plan raised serious equal protection and religious free exercise concerns. More disturbingly, in the event of a terrorist threat or other emergency, such mapping might also have been used to restrict community members' liberty of movement. *See* Neil MacFarquhar, *Protest Greets Police Plan to Map Muslim Angelenos*, N.Y. TIMES, Nov. 9, 2007, at A23. After sustained public outcry, officials decided to scrap the plan. Associated Press, *California: Police Shelve Muslim Mapping Plan*, N.Y. TIMES, Nov. 15, 2007, at A24.

The geographer Robert Sack refers to the strategic use of space as *territoriality*, which he defines as "the attempt by an individual or group to affect, influence, or control people, phenomena, and relationships, by delimiting and asserting control over a geographic area."[6] Working from that basic definition, this Article examines the intersection of territoriality and liberty, and the effect of that intersection on certain persons and groups—namely, war on terrorism detainees, undocumented and other immigrants, released sex offenders, the destitute and homeless, and those who are either afflicted with a contagious disease or believed to be so. These illustrative examples will show how governments use territory to map and enforce distinct legal geographies, both within and outside the territorial boundaries of the United States. They will demonstrate how the combination of laws, customs, and physical borders creates and shapes what the Article describes as distinct "Geographies of Displacement," which in turn affect the exercise of fundamental personal liberties.[7]

By manipulating territory and moving enemy detainees just outside the geographic boundaries of the United States, the United States has been able for some time to effectively suspend the rule of law with regard to a class of detainees who have been designated "enemy combatants."[8] The Supreme Court partially closed this particular territorial gap, at least as a matter of constitutional interpretation, in the recent decisions in *Boumediene v. Bush* and *Al Odah v. United States*.[9] There the Court held that aliens detained in Guantanamo Bay, Cuba, a territory over which the United States exercises complete jurisdiction and control but not legal sovereignty, are entitled to the protections of the writ of habeas corpus.[10] Although some of the majority opinion's statements are open to broad interpretations, the Court did not directly address the extraterritorial reach of the Constitution in other territories or contexts.[11] Guantanamo Bay, while certainly the most visible territorial manipulation, is not the only "legal black hole"[12] the government has sought to create by manipulating

6. ROBERT DAVID SACK, HUMAN TERRITORIALITY: ITS THEORY AND HISTORY 19 (1986).

7. *See* NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 7–8 (1994) (arguing that law of place is constitutive of political and social relations).

8. Hamdan v. Rumsfeld, 548 U.S. 557, 570–71 & n.1 (2006) (discussing designation and status of "'enemy combatants'"). *See also* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2031 (2007) (discussing legal and constitutional status of "enemy combatants").

9. 128 S. Ct. 2229 (2008).

10. *Id.* at 2262.

11. The questions left open by *Boumediene* are discussed in Gerald L. Neuman, *The Extraterritorial Constitution after* Boumediene v. Bush, 81 S. CAL. L. REV. (forthcoming 2009).

12. Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT'L & COMP. L.Q. 1, 1 (2004).

territory. "Black sites" and destinations of "extraordinary rendition" have also been used to situate detainees outside the protection of legal processes.[13] Primarily as a result of the war on terrorism, a new *Geography of Justice* has taken shape.[14]

Immigration policies are by their very nature territorial; among other things, they determine rightful presence within a particular territory. Here, too, territorial tactics are increasingly prevalent. Congress has appropriated funds to supplement existing federal immigration laws with a massive steel fence along the Mexican border.[15] This grand architecture of exclusion will physically and territorially separate America from its southern neighbors. As well, federal immigration officials have been redefining the very notion of the "border," in some cases moving the legal border into areas within the United States.[16] Meanwhile, numerous states and localities have enacted their own territorial exclusions, ostensibly to combat unlawful immigration.[17] Some have threatened to enforce trespassing laws against illegal immigrants, thus criminalizing their mere presence in a territory.[18] Other localities have sought to expel day laborers from public areas like street corners and parking lots, through anti-loitering laws and official harassment.[19] A host of local immigration measures—supplemented or in some cases supplanted by recent

13. *See* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333, 1336 (2007) (defining "extraordinary rendition"). To prevent this practice, several countries recently ratified a treaty. International Convention for the Protection of All Persons from Enforced Disappearance, Feb. 6, 2007, http://untreaty.un.org/English/notpubl/IV_16_english.pdf. The United States refused to sign the agreement on the ground that it failed to meet U.S expectations. Molly Moore, *U.S. Declines to Join Accord on Secret Detentions*, WASH. POST, Feb. 7, 2007, at A14. The practice of transferring detainees to black sites is discussed in Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition Under International Law*, 37 CASE W. RES. J. INT'L L. 309 (2006).

14. *See generally* Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005) (discussing the importance of territory in recent Supreme Court terrorism cases) [hereinafter Raustiala, *The Geography of Justice*]. Professor Raustiala explores the relationship between geography and legal rights in greater detail in KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? TERRITORIALITY AND EXTRATERRITORIALITY IN AMERICAN LAW (forthcoming 2009) [hereinafter RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?].

15. The Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (2006) (codified as passed in scattered sections of 8 U.S.C.), authorizes the construction of the border fence.

16. *See* Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 3 STAN. J. CIV. RTS. & CIV. LIBERTIES 165, 167 (2007) (discussing the flexibility and malleability of the legal territorial border).

17. *See* Julia Preston, *Immigration is at Center of New Laws Around U.S.*, N.Y. TIMES, Aug. 6, 2007, at A12 (noting surge in state and local immigration laws).

18. *See* Pam Belluck, *Novel Tack on Illegal Immigrants: Trespass Charges*, N.Y. TIMES, July 13, 2005, at A14 (describing local arrests).

19. *See* Fernanda Santos, *Village Officials Harassed Day Laborers, Judge Rules*, N.Y. TIMES, Nov. 21, 2006, at B3 (noting that in one community police engaged in discriminatory harassment).

aggressive federal enforcement raids—have sought to prohibit illegal immigrants from working or living in certain territories and communities.[20] These laws impose fines on landlords who rent to undocumented aliens, and penalize businesses that employ workers without proper proof of immigration status.[21] Through such measures, municipalities seek to create undocumented-immigrant-free zones. Owing to their breadth, however, some of these measures may operate to displace legal resident aliens as well as those unlawfully present. Across the United States and at its fortified borders, a new *Geography of Membership* has taken shape.

Among the recently displaced, no group of persons is more reviled than convicted sex offenders. Once released into the community, they face an intricate system of territorial restrictions designed to exclude them from entire communities—sometimes great portions of entire states.[22] State and local laws forbidding convicted sex offenders from living within a specified distance of schools, churches, bus stops, and other "anchor points" effectively preclude them from living in many of a state's most populous areas.[23] The effect of such measures on individual liberty and human dignity can be profound.[24] Banishment-by-exclusion, or "internal exile," prevents convicted offenders (regardless, in many cases, of the specific nature of their offenses) from living with their families, attending their churches, taking part in public recreation, or maintaining their livelihoods.[25] Other, less systematic territorial measures have also been imposed on this group. Sex offenders, along with some persons who have merely expressed a sexual interest in children, have been consigned to house boats and mobile housing units,[26] indefinitely precluded from being

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20. *See* Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 799–807 (2008) (describing state and local immigration measures).

21. The ordinance adopted by Hazleton, Pennsylvania, is typical of such measures. *See, e.g.*, Hazleton, Pa., Ordinance 2006-18 (July 13, 2006), *available at* http://www.hazletoncity.org/090806/2006-18%20_Illegal%20Alien%20Immigration%20Relief%20Act.pdf [hereinafter Hazleton Ordinance 2006-18]; Hazleton, Pa., Ordinance 2006–13 (Aug. 15, 2006), 2006-13, *available at* http://www.hazletoncity.org/090806/2006-13%20_Landlord%20Tenant%20Ordinance.pdf [hereinafter Hazleton Ordinance 2006-13].

22. Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101 (2007).

23. Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 7, 5–13 (2006) (describing recent state and local sex offender exclusion measures).

24. In Miami, for example, the local residency exclusion law forced released sex offenders to live under a bridge. *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at A22.

25. Yung, *supra* note 22, at 122–26 (describing state and local exclusion laws).

26. Corey Kilgannon, *Suffolk County to Keep Sex Offenders on the Move*, N.Y. TIMES, Feb. 17, 2007, at B3.

present in community parks and other public places,[27] and ordered not to come within a specified distance of any child.[28] A distinct *Geography of Punishment* has been developed by state and local officials to exert control over sex offenders and others deemed a threat to children.

Most Americans live in urban areas.[29] Urban officials have long relied upon territoriality to maintain public order, safety, and aesthetics. They have increasingly turned to criminal laws to prohibit certain behaviors, such as sleeping in public places and panhandling, typically engaged in by poor and homeless persons.[30] These contemporary descendants of earlier "broken windows" measures, often billed as efforts to clean up public places like streets, sidewalks, and parks, make it difficult or impossible for the homeless and other undesirable populations to remain in certain geographic areas.[31] Laws banning or spatially restricting sleeping and panhandling are only the most common example. Increasingly restrictive territorial measures have been enacted to displace marginal populations from certain urban areas.[32] For example, a recently adopted Los Angeles ordinance criminalized the mere presence of the homeless in designated public places during certain times of day.[33] Other localities have adopted measures that prohibit *feeding* homeless persons in parks and other public places.[34] This evolving *Geography of Purification* substantially displaces those who live or spend a substantial amount of time in public places.

Finally, in an age of new and virulent communicable diseases and threats from bioterrorism, measures aimed at protecting public health and safety may also displace persons territorially. Quarantine and isolation, two of the principal measures often relied upon to deal with exposed populations, are expressly territorial in nature.[35] Although the authority to

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27. *See* Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004) (upholding local order barring released sex offender from all public park properties).

28. *Man Who Put Girls' Photos on Internet Plans to Move*, N.Y. TIMES, Aug. 27, 2007, at A13.

29. *See* U.S. DEP'T OF TRANSP., FED. HIGHWAY ADMINISTRATION, CENSUS 2000 POPULATION STATISTICS, *available at* http://www.fhwa.dot.gov/planning/census/cps2k.htm (last visited Dec. 26, 2008) (indicating that 79% of Americans live in urban areas).

30. *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996) (discussing homelessness laws).

31. GEORGE L. KELLING & CATHERINE M. COLES, FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES (1996).

32. *See* Katherine Beckett & Steve Herbert, *Dealing With Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 10–16 (2008) (discussing recent innovations in urban social control, including use of trespass laws, parks exclusion laws, and "off-limits orders").

33. *See* Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006) (invalidating ordinance).

34. *See* Randal C. Archibold, *Please Don't Feed Homeless in Parks, Las Vegas Says in Ordinance*, N.Y. TIMES, July 28, 2006, at A18.

35. On the history and practice of quarantine in the United States, see Felice Batlan, *Law in the Time of Cholera: Disease, State Power, and Quarantines Past and Future*, 80 TEMP. L. REV. 53, 62–

impose health-related territorial restrictions is well established, governments have been shoring up their authority to address new contagions territorially.[36] Liberties of movement, property, and judicial process will be substantially affected, in some cases as a matter of public necessity, by this developing *Geography of Contagion.*

Territorial regulations like these raise substantial constitutional concerns. Constitutional scholars have generally engaged territoriality episodically and non-systematically. For example, some scholars have analyzed the constitutional right to travel among state territories.[37] The importance of geography and territory to constitutional jurisdiction has also received some scholarly attention, particularly in response to geo-military strategies associated with the war against terrorism.[38] Immigration scholars have of course long been aware of the special power of territoriality to affect individual rights.[39] Finally, some scholars have critically examined extraterritorial exercises of state governmental authority.[40] While each of these lines of inquiry has exposed certain features of American territoriality, the intersection of territory and constitutional liberty deserves to be more systematically examined. This Article frames constitutional liberty as a distinctly spatial and territorial concern. It highlights the manner in which laws shape geographies and territories, in the process affecting some of our most fundamental individual liberties.

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67 (2007).

36. *See* Control of Communicable Diseases, 70 Fed. Reg. 71,892 (proposed Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70, 71); HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA: IMPLEMENTATION PLAN (2006), *available at* http://www.whitehouse.gov/homeland/nspi_implementation.pdf; *Bush Authorizes Use of Quarantine Powers in Cases of Bird Flu*, N.Y. TIMES, Apr. 2, 2005, at A10 (noting that executive order lists several communicable diseases subject to quarantine). The exercise of federal quarantine powers has received some recent media attention. *See, e.g.*, Lawrence K. Altman & John Schwartz, *Near Misses Allowed Man With Tuberculosis to Fly to and From Europe, Health Officials Say*, N.Y. TIMES, May 31, 2007, at A13.

37. *See* Saenz v. Roe, 526 U.S. 489, 498 (1999) (discussing right to travel interstate). *See, e.g.*, Jide Nzelibe, *Free Movement: A Federalist Reinterpretation*, 49 AM. U. L. REV. 433 (1999) (discussing travel jurisprudence).

38. Raustiala, *The Geography of Justice*, *supra* note 14. The literature on constitutional scope is substantial. *See, e.g.*, 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); J. Andrew Kent, *A Textual and Historical Case Against A Global Constitution*, 95 GEO. L.J. 463 (2007).

39. *See generally* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW (1996) (examining significance of territory and geographic borders to constitutional citizenship); *see also* Shachar, *supra* note 16, at 165 (noting recent developments in border regulation and control).

40. *See, e.g.*, Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, The Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451 (1992).

Part II briefly introduces and, for purposes of this Article, distinguishes the spatial concepts of place, geography, and territory. It then describes the principal constitutive and governance functions of territoriality. Part III describes and analyzes the intersection of territory and liberty in a variety of past and present legal Geographies of Displacement. It begins with selected antecedent displacements—the territoriality of Jim Crow racial segregation, World War II exclusion and internment policies, early state and federal immigration restrictions, and the displacement of the sick, the contagious, and other vulnerable groups. Part III then examines the five contemporary Geographies of Displacement referenced above—Justice, Membership, Punishment, Purification, and Contagion—and summarizes the constitutional implications of these geographies. This examination shows that constitutional displacement—the territorial restriction or denial of constitutional liberties—often occurs within rather prominent external and internal spatial gaps in our constitutional structure. Part IV examines the substantial and sometimes devastating effects of contemporary territorial and constitutional displacements, offers some general observations regarding the process by which antecedent spatial gaps have been narrowed or closed, and concludes with some specific suggestions for narrowing or closing the particular spatial gaps identified in this Article.

II. TERRITORIALITY, CONSTITUTION, AND GOVERNANCE

The spatial regulation of persons and behaviors often affects some combination of *place*, *geography*, and *territory*. In order to assess how and to what degree spatiality affects constitutional liberty, it will be helpful to first identify and distinguish among these spatial concepts. As geographers, sociologists, and other social scientists know, there are myriad possible conceptions and definitions for these terms.[41] For the sake of clarity and simplicity, this Article generally treats place as local and everyday lived space, geography as primarily an organizational or structural concept, and territory as the product of strategic governmental regulation.[42]

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41. *See, e.g.*, TIM CRESSWELL, PLACE: A SHORT INTRODUCTION 51 (2004) (describing various approaches to the concept of "place").

42. The concept of primary interest in this Article is territory. For a detailed examination of the concept of place as it relates to First Amendment liberties, see TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES (2008).

Each of these spatial dimensions is critical in constitutional terms. Although it is not generally conceptualized by scholars or courts as such, the Constitution itself rests upon a distinct spatial framework.[43] Spatiality, in particular its territorial aspects, affects the Constitution's scope or reach, provides for the national defense, establishes fundamental terms and conditions of governance, and affects the recognition and scope of individual liberties. The Constitution structures, punishes, immunizes, and legitimizes in express or implied spatial terms. Our understanding of the Constitution's ideal of personal liberty, and for more immediate purposes our understanding of how various Geographies of Displacement have arisen, developed, thrived, and in some cases dissipated, will be significantly enhanced by a clearer understanding of how the Constitution itself frames matters of territory and spatiality.

A. Place, Geography, and Territory

We live our everyday lives in a variety of different local places—homes, workplaces, public accommodations, private social institutions, schools, and communities. A variety of rules, laws, customs, and even constitutional principles affect relationships and personal liberties within many of these places. For example, airports, public buildings, shopping malls, and many other local places are subject to special First Amendment regimes.[44] Strong privacy rights exist in places like homes and (to a lesser extent) schools.[45] Equality guarantees, like those in anti-discrimination statutes, apply in public and even some private social places.[46] As discussed below, however, the Constitution is rather opaque with regard to specific liberties *of place* (with the exception of the home). For rather obvious reasons, geography and territory were far more fundamental concerns at the time of the framing.

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43. One very notable exception is Akhil Amar, who emphasizes the framers' "geostrategic vision" regarding the new union of states. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 48 (2005). Amar observes that part of the Framers' brilliance lay in their recognition of the need for geographic unity for purposes of, among other things, national defense and trade. *Id.* at 46–48 (discussing Framers' various geostrategic considerations).

44. *See* Zick, *Space, Place, and Speech*, *supra* note 2, at 479–81 (discussing expressive liberties in "non-places" like airports and shopping malls).

45. *See* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (recognizing right to engage in consensual sodomy in the home); Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 830 (2002) (recognizing limited privacy interests for students in public school setting). *See also* Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833 (2007) (assessing associational and other rights in the various places between home and school).

46. *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 618–22 (1984) (holding that there is no associational right to exclude women from membership in organization).

Our everyday places are situated within geographies—nations, regions, states, cities, counties, towns, and neighborhoods. Fundamentally, these geographies clarify where we—and our places—are physically located. As a constitutional construct, geography identifies and bounds governance regimes and legal jurisdictions. These boundaries, of course, have profound constitutional significance. At the state and national levels, for example, geography defines and limits sovereignty.[47] 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. As discussed below, local geographies—states, cities, and counties—indicate separate, internal sovereign boundaries. These spatial jurisdictions have some, but not ultimate, governance authority within their geographic borders. Their authority outside territorial boundaries is limited; and it is subject to override by a distant (geographically speaking) central authority.[48]

A territory, by comparison, is neither an ordinary local place nor a mere geographic location. According to Robert Sack:

> [I]t is important to distinguish between a territory as a place and other types of places. Unlike many ordinary places, territories require constant effort to establish and maintain. *They are the results of strategies to affect, influence, and control people, phenomena, and relationships*. Circumscribing things in space, or on a map, as when a geographer delimits an area to illustrate where corn is grown, or where industry is concentrated, identifies places, areas, or regions in the ordinary sense, but does not by itself create a territory. *This delimitation becomes a territory only when its boundaries are used to affect behavior by controlling access*.[49]

Thus, Sack identifies territories according to the following general characteristics: (1) a classification by area, (2) a form of communication by boundary, and (3) a form of enforcement or control.[50] Territory is a species or type of place or geography (as I have previously defined these terms); ultimately, however, it is different from both these things. It is different, as Sack suggests, owing to the exertion of control—not only

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47. *See generally* Timothy Zick, *Are the States Sovereign?*, 83 WASH. U. L.Q. 229 (2005) (discussing territorial and other aspects of state sovereignty).

48. *See* U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

49. SACK, *supra* note 6, at 19 (emphasis added).

50. *Id.* at 21–22. Although Sack mentions control of access as a territorial characteristic, control over both ingress and egress are apparently contemplated.

over place and geography but, critically, over people, relationships, behavior, and phenomena.[51] In sum, places, geographic regions, and other physical areas become territories when boundaries "are used by some authority to mold, influence, or control activities."[52]

This Article examines a variety of legal geographies that meet Sack's general definition of territory. As we shall see in Part III, the legal geographies of Justice, Membership, Punishment, Purification, and Contagion all represent efforts to create, through communicated and legally enforced borders, conditions of control over certain persons (detainees, immigrants, sex offenders, the poor and homeless, and the sick), relationships, and behaviors.[53]

B. Territoriality's Primary Constitutive Functions

Territory serves several basic functions insofar as governments are concerned. As discussed in this part, it legitimizes and enforces claims to sovereignty, defines the Constitution's scope or jurisdiction, determines eligibility for membership in political communities, serves as a basis for distributing benefits and privileges, and provides a means for removing or isolating dangerous and threatening persons and behaviors. In the abstract, these basic territorial functions are not subject to any overarching normative objection. Territory is undeniably necessary to effective governance and collective goods such as national defense. Defining sovereign boundaries, enforcing the rule of law, and protecting public health, order, and safety are all legitimate governance functions. As we shall see, however, in certain applications territoriality can and does substantially restrict and even extinguish constitutional liberties.

1. Territory, Sovereignty, and Governance

Territory and sovereignty are intimately related. This is true even in the postmodern world, where boundaries and borders can seem less and less significant.[54] Sovereigns use territory to control access to the critical prize

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51. *Id.* at 19.

52. *Id.*

53. Although this Article uses Sack's basic definition of territoriality, the focus will be somewhat narrower. For example, Sack's conception of territoriality does not distinguish among the various persons or institutions that exercise control territorially. This Article focuses solely upon strategic and other productions of territory by governments and officials. Moreover, although Sack's definition of territoriality is broad enough to encompass *non-human* subjects, the Article is concerned only with territorial displacement of persons.

54. There is a rich literature in geography and political science examining territory and its

of membership or citizenship.[55] As discussed below, lawful presence inside a territory determines membership in a political community and legitimizes certain claims to rights and privileges that accompany this status.[56] Residence and citizenship may be prerequisites to the right to vote, to run for and hold political office, and to obtain certain jobs. Governments also enforce territorial boundaries as a means of internal and external defense. Within its territory, for example, a sovereign is empowered to prosecute violations of its laws.[57] To enforce the spatiality of citizenship and membership, sovereigns must possess the authority to control territorial borders—to repel and expel.

The United States Constitution is a spatial framework in this and many other critical governance respects. The Framers focused intently on territorial boundaries in forming a special kind of geopolitical Union.[58] They were defining—physically and otherwise—a new nation. The nation's sovereignty was defined, first and foremost, by reference to the new government's control over territory. This intersection of sovereignty and territory was critical in post-founding eras as well. Thus, as Sarah Cleveland has noted, "[t]erritoriality was integral to nineteenth century concepts of sovereignty because, under international law principles, a sovereign's jurisdiction to legally regulate conduct was coterminous with its territory."[59] Despite the effects of globalization, and in particular the rise of new governance structures throughout the world, today territory and sovereignty remain intricately linked.[60] As we shall see, this traditional relationship has created new opportunities for territorial manipulation by governments—and new challenges to constitutional liberty.

With respect to matters of internal governance, the Constitution frames and organizes in explicit spatial terms. The Framers used place,

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relation to sovereignty. *See, e.g.*, JOHN A. AGNEW, PLACE AND POLITICS: THE GEOGRAPHICAL MEDIATION OF STATE AND SOCIETY (1987); EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY (1989).

55. For a discussion of the significance of territorial presence as it relates to immigration law and policy, see generally Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES L. 389 (2007).

56. *See, e.g.*, U.S. CONST. amend. XIV, § 1 (defining citizenship by reference to place of birth or naturalization).

57. *See* Munaf v. Geren, 128 S. Ct. 2207 (2008) (holding that Iraq has authority to prosecute alleged crimes by United States citizens who voluntarily traveled to Iraq and allegedly committed crimes on Iraqi soil).

58. *See* AMAR, *supra* note 43, at 45–51 (discussing Framers' strategic thinking with regard to geography and territory).

59. *See* Cleveland, *supra* note 38, at 23.

60. *See* RAUSTIALA, *supra* note 14.

geography, and territory to establish the location, permanence, and stability of governance institutions. The central government itself was situated in a specially constituted territory—the District of Columbia. As the seat of federal power, the District was (and in many respects remains) subject to congressional control.[61] It is a unique territory-within-a-territory. The Framers also established the separate chambers of Congress as distinct places of governance. They gave each House the power to make its own rules of procedure and internal organization.[62] The Houses are in many respects spatial enclaves—places of immunity from various legal prosecutions and liabilities.[63] The Framers also granted legislators immunity from being "questioned *in any other Place*" with regard to statements made in Congress.[64] Finally, the Framers established the territorial permanence of the legislature by providing that neither House may adjourn to "*any other Place* than that in which the two Houses shall be sitting."[65] The Framers were thus acutely aware of the utility and power of place, geography, and territory when it came to constituting a permanent locus of central governmental power.

Of course, the biggest spatial challenge facing the Framers was not to establish governance institutions, but to bind the former colonies together into a new Union. The Framers used natural geography and territory as special binding agents. In The Federalist No. 2, Publius described America as "one connected . . . country" with a "succession of navigable waters form[ing] a kind of chain round its borders, as if to bind it together."[66] With regard to commerce, broadly defined, the Framers envisioned "a demilitarized interstate free-trade zone."[67] But they also sought to preserve the states' own territorial boundaries. Thus, the Constitution's spatial blueprint expressly provides that "no new State shall be formed or erected within the Jurisdiction of any other State"; nor may any state be joined with another absent the consent of both states and Congress.[68] Chief Justice Marshall famously summarized the union's political geography: "No political dreamer was ever wild enough to think of breaking down the

61. U.S. CONST. art. I, § 8, cl. 17.
62. *Id.* art. I, § 5, cl. 2.
63. *See id.* art. I, § 6 (Speech and Debate Clause).
64. *Id.* (emphasis added).
65. *Id.* art. I, § 5, cl. 4 (emphasis added).
66. THE FEDERALIST No. 2, at 38 (John Jay) (Clinton Rossier ed., 1961).
67. AMAR, *supra* note 43, at 47.
68. U.S. CONST. art. IV, § 3, cl. 1.

lines which separate the states, and of compounding the American people into one common mass."[69]

The constitutional principle of dual sovereignty is, of course, based in large part upon preservation of state territorial boundaries. In both physical and conceptual terms, the Constitution grants a space of residual sovereignty to the states.[70] Within their own spaces, the states retain fundamental internal sovereign prerogatives.[71] They choose their own (republican) forms of government, hold elections, and determine the qualifications of those who may vote and be elected.[72] With regard to internal governance, the Framers provided that Congress may alter the time, place, and manner of state elections; but it was not permitted to alter "*the places* of choosing Senators."[73] In sum, the states were to be locally sovereign territories, subject of course to override by all federal laws made in pursuance of the Constitution—"the supreme Law of *the Land*."[74] By thus mixing separate central and state territories, the Framers used spatiality in ingenious ways—to check and balance the powers granted in the Constitution, and to plant the seeds of territorial connection (national, state, regional, and local) that exist to this day.[75]

Of course, this structure and organization would all be for naught if the new government was imperiled by threats from within or outside the new territory of the United States. In matters of internal defense, the Framers once again turned to geography and territory to "insure domestic Tranquility."[76] In general, the Framers had what Akhil Amar refers to as a "geostrategic vision" with regard to both internal and external defense, one that Professor Amar says "informed much of the antebellum Constitution's overall structure and many of its specific words."[77] The Constitution's intricate web of spatial relations—including its prohibition on standing armies, the preservation of state militias, and the requirement that states be protected against territorial invasion[78]—was "designed to bind Americans

69. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 198 (1819).

70. U.S. CONST. amend. X (reserving powers not delegated to the United States nor prohibited to the states to the states or the people).

71. *See* Zick, *supra* note 47, at 288–93 (discussing attributes of internal state sovereignty).

72. U.S. CONST. art. I, § 4.

73. *Id.* (emphasis added). The Constitution does not refer to more local polities or communities such as counties, towns, boroughs, villages, or cities. These territories are governed by states as a function of their residual sovereignty.

74. *Id.* art. VI, cl. 2. (emphasis added).

75. *See* SACK, *supra* note 6, at 153 (observing that framers conceived of territory "as a means of defining and molding social relations").

76. U.S. CONST. pmbl.

77. AMAR, *supra* note 43, at 51.

78. U.S. CONST. art. I, § 10, cl. 3; *id.* amend. II; *id.* art. IV, § 3.

of different regions together and thus prevent the parts from ever warring against one another or against the whole."[79] Of course, as the Civil War attests, the geographic and other bonds of Union could become dangerously strained. Still, one must marvel at the extent to which the Framers' ingenious geo-strategic framework has generally preserved internal and external security in and for the United States.

The Constitution's essential blueprint demonstrates that the Framers were acutely aware of the legitimating, binding, stabilizing, and protective functions of geography and territory. But the foregoing discussion merely sketches the original spatial skin of the constitutional corpus. After massive territorial expansions and the growth of government itself, the "Land" now governed by the Constitution is characterized by thick membranes of overlapping and intersecting territories.[80] As we shall see, constitutional liberties are profoundly affected by these various intersections and by the spatial gaps left open at the original and later framings.

2. Territory and Constitutional Domain

As the discussion of sovereignty suggests, one of the primary functions of territory is to define the scope or domain of a sovereign's authority. For all their brilliance and prescience, however, the Framers failed to answer some very basic but critical questions regarding the Constitution's domain: *where* and *to whom* does the Constitution apply? As Gerald Neuman has observed: "Defining the domain of constitutionalism has major practical implications for immigration policy, the conduct of foreign affairs, military action, and the participation of American citizens in an increasingly global society."[81] Issues of constitutional scope or jurisdiction will be discussed in more detail in Parts III and IV. As we shall see, the Constitution's conflicting statements regarding scope or jurisdiction have generated confusion regarding the relationship between territorial presence and constitutional liberties, as well as various strategic opportunities for territorial and constitutional displacement.[82]

The Framers of the Constitution did not speak very clearly at all with regard to the relationship between territory and constitutional scope. As

79. AMAR, *supra* note 43, at 51.

80. U.S. CONST., art. VI (Supremacy Clause).

81. NEUMAN, *supra* note 39, at 3.

82. For a comprehensive treatment of issues of constitutional scope or domain, see RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?, *supra* note 14.

Gerald Neuman has observed, "[t]he domain of U.S. constitutionalism has always been contested, and it has grown as the nation has grown."[83] Certain individual rights, such as those protected by Article IV's Privileges and Immunities Clause, are plainly available only to persons who are citizens of and reside within state territories.[84] The Constitution contains a few other hints of localism as well. The Supremacy Clause states that the Constitution and all laws made "in Pursuance thereof" shall be the "supreme Law of *the Land*,"[85] suggesting to some interpreters that constitutional liberties are limited to the physical area within United States borders.[86] Other hints of localism are evident in the Preamble, which reads: "We the People *of the United States*, in Order to . . . secure the Blessings of Liberty *to ourselves and our Posterity*, do ordain and establish this Constitution *for the United States of America*."[87] This language suggests to some that only native-born persons physically present on U.S. soil have legitimate claims to constitutional liberties.[88]

As scholars have noted, however, the constitutional text also appears to be universal in scope or domain.[89] For example, the Constitution's express limits on governmental powers do not contain any explicit territorial parameters.[90] Moreover, the liberties enumerated in the Bill of Rights and elsewhere are afforded generally to "persons" or "the people."[91] As Sarah Cleveland has observed, "most of the Constitution's provisions are not textually restricted by either the population or the geographic area to which they apply. Instead, they define the general powers of the national government or impose general limits on the exercise of these powers."[92] Thus, for example, Article I *unqualifiedly* prohibits the suspension of habeas corpus and the adoption of ex post facto laws or bills of attainder.[93]

We shall return to the rather complicated and contested subject of constitutional domain later. At least as a textual matter, to the extent the

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83. NEUMAN, *supra* note 39, at 3.

84. U.S. CONST. art. IV, § 2; *see also id.* amend. XIV, § 1 ("[N]or [shall any state] deny to any person within its jurisdiction the equal protection of the laws.").

85. *Id.* art. VI, cl. 2 (emphasis added).

86. *See* Kent, *supra* note 38, at 466 (arguing against constitutional universalism, but conceding that the framing materials do not speak clearly with respect to territorial scope).

87. U.S. CONST. pmbl (emphasis added).

88. Kent, *supra* note 38, at 510.

89. *E.g.*, Cleveland, *supra* note 38, at 19.

90. U.S. CONST. art. I, § 9 (setting forth limits on central power).

91. *Id.* amend. V, XIV, X. From a very early time, aliens have been considered "persons" for purposes of the Fourteenth Amendment. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (applying Equal Protection Clause to claims of aliens).

92. Cleveland, *supra* note 38, at 19.

93. U.S. CONST. art. I, § 9.

Framers addressed matters of scope or jurisdiction, their language was arguably more universal than expressly local.[94] Still, currents of constitutional localism remain quite strong, and in some sense are also inscribed in text. As we shall see, broader structural principles and constitutional values have increasingly been relied upon to resolve textual uncertainties with regard to domain and to settle jurisdictional conflicts.

3. Territoriality and Political Community

At every level of government, territorial borders are enforced in order to control access to certain benefits and privileges. Lawful presence within a territory signifies an intention to be bound by the law of the land; residence advances one toward fuller acceptance of the social compact (citizenship). Movement into territory may be discouraged, or expulsion sought, in order to conserve certain benefits for those deemed legitimately present, to uphold the rule of law, and to generally ensure that persons are rightfully entitled to be in a particular territory.

In contrast to the general subject of constitutional scope, the Framers spoke with considerable clarity regarding the territorial requisites for obtaining full membership in the nation's political communities. With regard to the privileges of election and governance, for example, the Framers relied heavily upon geographic and territorial rules. Eligibility for election to both Houses of Congress is based, in part, upon citizenship and residency.[95] One's place of birth determines eligibility for the office of the Presidency; only "natural born" United States citizens (and those who have "been fourteen Years a Resident within the United States") may seek the office.[96] Birth within the United States entitles one to the privileges and immunities of United States citizenship.[97] Place of residence determines state citizenship, with its corresponding rights and privileges.[98]

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94. A somewhat superficial textual examination does not, of course, address the considerable gloss of history or the policies in favor of or against a universalist interpretation of the Constitution. It is worth noting that even those who read the text as exhibiting a narrow scope concede that the framing materials shed very little light on the matter of constitutional domain. *See* Kent, *supra* note 38, at 466 (finding little explicit evidence for universalist or localist approaches in the ratification debates). The point of this discussion is simply to flag instances in which the Framers appear to have at least considered the Constitution's general scope or domain.

95. U.S. CONST. art. I, § 2, cl. 2; *id.* art. I § 3, cl. 3.

96. *Id.* art. II, § 1, cl. 5. Some have been quite critical of this particular spatial limitation. *See, e.g.*, SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 152–54 (2006) (critiquing the geographic and territorial aspects of eligibility for presidential office).

97. U.S. CONST. amend. XIV, § 1.

98. *Id.*

In sum, under the original geography of membership persons not properly anchored to United States geography and territory were not entitled to full membership privileges.

Why did the Framers adopt such a specific focus on geographic and territorial nexus with respect to political membership? For one thing, the ratification of the Constitution was intended to ensure that Americans would no longer be governed by masters from distant lands.[99] The Framers may also have believed that connection to territory generally served as an accurate proxy for loyalty, local knowledge of customs and conditions, and democratic representation. Territorial presence and residence were thought to signify intent to enter the nation's social compact, as well as acceptance of uniquely American ideals and values.[100] Fear that radical ideologies would be imported from other territories also influenced the Constitution's distinct geography of governance.[101] Finally, in more pragmatic terms, territorial residency rules prevented interstate manipulation of state elections.[102] For these and other reasons, the Framers required that governors and governed share a connection to state territories as well as to the new territory of the United States.

Some scholars have argued that placing such substantial weight on territorial attachments has resulted in serious political and societal harms. Sanford Levinson, for example, decries what he calls the "bias toward localism" inherent in the Constitution's territorial rules.[103] Levinson and other scholars trace the rampant regionalism of the Civil War era, as well as the contemporary political geography ("red state"/"blue state"), to the Framers' glorification of territorial localism.[104] One might add to such costs the seemingly pervasive fear and distrust of those deemed to be territorial "outsiders." As we shall see, some of the Geographies of Displacement discussed in Part III are rooted in these founding principles of territorial localism.

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99. AMAR, *supra* note 43, at 69–70 (noting sentiment that "aliens owing allegiance to foreign nations and foreign lords could not properly lead America").

100. *See* NEUMAN, *supra* note 39, at 9–13 (discussing the importance of social contract theory to principles of membership and alienage).

101. *Id.*

102. *See* AMAR, *supra* note 43, at 70 (observing that state residency requirement prevented "wealthy candidates from gaming the system").

103. LEVINSON, *supra* note 96, at 147–48.

104. *See* MARK A. GRABER, *DRED SCOTT* AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006) (tracing regionalism of politics in 1850s and 1860s to constitutional localism).

4. Territoriality, Presence, and Privileges

As the foregoing discussion of political membership demonstrates, one of the fundamental functions or utilities of territory is to preserve certain privileges and benefits for those lawfully present in a territory. Access to these privileges is often determined by restrictions on presence within a territory. This entails regulation of both ingress to and egress from a sovereign's territory.

Although they were not silent on the matter, the Framers spoke with less than ideal clarity regarding authority over ingress at the nation's territorial borders. Congress was granted power to regulate foreign commerce and to determine a "uniform Rule of Naturalization."[105] Moreover, the central government's responsibility for national defense necessarily granted some implied authority over territorial borders. Still, the colonies and early states aggressively policed their own borders, excluding and expelling various persons and groups whose presence they considered harmful, threatening, or repugnant to the community.[106] By the late nineteenth century, however, the federal government had essentially occupied the field of national immigration as an aspect of its own sovereignty.[107] Since that time, federal restrictions on territorial ingress have been imposed in furtherance of policies of national security, foreign relations, and domestic well-being.[108] With regard to those already present, expulsion or deportation is, of course, a territorial response to violation of a sovereign's laws or norms. Among other things, expulsion results in a denial of all privileges associated with presence and membership. Within very broad limits, federal authorities are now able to condition access to a multitude of benefits by controlling territorial ingress and physical presence.

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105. U.S. CONST. art. I, § 8, cl. 3, cl. 4.

106. *See* Batlan, *supra* note 35, at 62–67 (discussing colonial and early state quarantine laws); *see also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 29 (1824) (singling out state quarantine laws as valid state regulations of commerce).

107. *See* Cleveland, *supra* note 38, at 100–12 (discussing path to federal control of immigration).

108. Some restrictions on territorial ingress raise serious and, in some cases, unresolved constitutional questions. For example, the federal government has denied, and continues to deny, entry to the United States to certain speakers on national security and other grounds. *See* Kleindienst v. Mandel, 408 U.S. 753, 770 (1972) (holding that government need only provide "a facially legitimate and bona fide reason" for refusal to grant alien speaker a waiver of excludability). Exclusions of alien speakers that are based on ideological grounds raise substantial First Amendment concerns. Steven R. Shapiro, *Ideological Exclusions: Closing the Border to Political Dissidents*, 100 HARV. L. REV. 930 (1987). The nation's borders have sometimes been treated as constitutional non-places, where certain liberties apply differently or not at all. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 150 (1925) (excluding border searches from Fourth Amendment restrictions).

As critical as they are to political membership and its attendant privileges, territory and geography are not always determinative of access to local privileges and largesse. In certain critical respects the Constitution, explicitly or through longstanding judicial interpretation, actually *submerges* geography and territory. For example, by unambiguous design and longstanding judicial interpretation, the Constitution prohibits governments from making certain territorial distinctions in order to preserve unity, ensure comity, and even protect fundamental liberties like the right to vote.[109] More generally, the Constitution substantially limits (although it does not entirely prohibit) state and local efforts to link governmental benefits to territory. Thus, for example, when they seek to reward or encourage territorial presence or residence by providing additional welfare payments or other subsidies, governments must respect a limited but fundamental "right to travel" across state borders.[110] Article IV's Privileges and Immunities Clause and the so-called Dormant Commerce Clause similarly circumscribe state and local authority to discriminate against territorial outsiders in favor of local residents.[111]

Within these general limits, however, states and localities can and do preserve certain benefits for those lawfully within their territorial borders. Local tax laws, business subsidies, and public works projects often serve this purpose.[112] In addition, many states and localities expressly condition receipt of certain local benefits, opportunities, and privileges upon territorial residence. For example, some local governments require that public officials or employees live within a particular district or regional territory as a condition of their employment.[113] Local zoning laws can also indirectly but substantially control population influx into certain

109. *See, e.g.*, U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause); *id.* § 2 (Extradition Clause). *Cf.* Reynolds v. Sims, 377 U.S. 533, 558 (1964) (holding that "one person, one vote" rule generally forbids legislatures from apportioning the franchise with reference to geography).

110. Shapiro v. Thompson, 394 U.S. 618, 630 (1969) (holding that durational residency requirement for welfare benefits violated equal protection and right to interstate travel). *See also* Saenz v. Roe, 526 U.S. 489, 500–02 (1999) (discussing scope and contours of right to travel); Edwards v. California, 314 U.S. 160 (1941) (invalidating state law impeding interstate travel of indigent persons).

111. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978) (striking down state protectionist measure). *See generally* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986) (discussing limits of anti-protectionism principle).

112. *See, e.g.*, White v. Massachusetts Council of Const. Employers, Inc., 460 U.S. 204, 214 (1983) (holding that mayoral order requiring that half of work force for city-funded project must consist of local residents did not violate the commerce clause).

113. *See* Wright v. City of Jackson, Miss., 506 F.2d 900, 903 (5th Cir. 1975) (upholding requirement that all municipal employees live within boundaries of city).

territories.[114] As we shall see, states and localities often impose expulsive measures on criminals and other marginal populations, effectively depriving them of basic local benefits. These and similar measures can significantly affect the freedom to be present and liberty of movement within local territories.

Finally, governments sometimes seek to limit *egress* from territories. At the federal level, for example, the United States government imposes extraterritorial travel restrictions for reasons of national security or foreign policy.[115] Recreational and other benefits associated with travel abroad may thus be denied owing to countervailing national interests. In an effort to extend the geographic reach of local laws and policies, states sometimes seek to indirectly limit egress from their territories. A state may do so by purporting to deny its citizens benefits available in other territories. It might, for example, refuse to recognize a same-sex marriage procured by one of its citizens in another state, or seek to punish its citizens for procuring abortions elsewhere.[116] In these and other instances, governments seek to extend their control over benefits and privileges extraterritorially.

5. Territoriality and Police Powers

As used in this Article, the concept of territory is not limited to control of geographic areas that constitute states or nation-states. Territory also has an important *local* dimension. Incident to their police powers, local authorities routinely use territorial displacement to protect communities from dangerous or threatening persons, behaviors, and events. Here, again, the Constitution speaks only faintly with regard to the propriety of territorial restrictions.

As Michel Foucault noted in several works, control over place or territory can be a very effective means of disciplining and controlling populations and behaviors.[117] Foucault noted that place, as he conceived

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114. *See* Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 795 (1969) (discussing equal protection doctrine as applied to exclusionary or "snob" zoning).

115. *See generally* Daniel A. Farber, *National Security, The Right to Travel, and the Court*, 1981 SUP. CT. REV. 263 (discussing restrictions on international travel).

116. *See* Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 856–60 (2002) (describing state laws with extraterritorial effects).

117. *See generally* MICHEL FOUCAULT, MADNESS AND CIVILIZATION (Richard Howard trans., R.D. Laing ed., 1967) [hereinafter FOUCAULT, MADNESS AND CIVILIZATION]; MICHEL FOUCAULT, THE BIRTH OF THE CLINIC (A.M. Sheridan trans., R.D. Laing ed., 1976); MICHEL FOUCAULT,

it, is useful in serving the first need of government—namely, to maintain order.[118] As he observed, spatial measures tend to "perfect the exercise of power" by restricting a person's locomotion and mobility.[119] This particular use of territory is quite common. To take the most obvious example, as of 2005 over two million people were incarcerated in the United States.[120]

As this example illustrates, spatial segregation and exclusion may be wholly legitimate responses to public safety concerns. Imprisonment is a sanctioned use of territoriality—a form of deserved spatial, legal, and (partial) constitutional displacement. In other instances, however, segregation and other means of displacement may serve as a pretext for discriminatory treatment of vulnerable or unpopular persons. Foucault examined how officials routinely use spatiality to separate ailing communities from healthy ones, the sane from the insane, and men of higher ranks from those of lower ranks.[121] Some of the territorial measures discussed in this Article use territory in precisely this fashion; these restrictions can result in substantial losses of individual liberty.[122]

Territoriality can be a very subtle form of control. As Foucault emphasized, most territorial measures are imposed without resort to visible force or violence.[123] As a result, although they may be quite dangerous to personal liberty, the power and effects of territorial measures are in some cases not obvious or wholly apparent. We shall encounter several subtle but substantial forms of displacement in the discussion of the Geographies of Displacement (Parts III and IV). As Foucault also observed, resort to spatiality or territory often produces more than mere regulation of populations and behaviors. Displacement sometimes has a *communicative function*; it may brand those who are displaced.[124] The

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DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) [hereinafter FOUCAULT, DISCIPLINE AND PUNISH].

118. *See* FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 117, at 174 (noting that through the power of place, the state could impose "an exact geometry" upon disorder and dissent).

119. *Id.* at 206.

120. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONERS IN 2005 (Nov. 2006), http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf.

121. *See* FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 117, at 199.

122. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990) (describing effects of police tactics on right to move within territory).

123. *See* FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 117, at 177 (noting that control was exercised through "the laws of optics and mechanics, according to a whole play of spaces, lines, screens, beams, [and] degrees").

124. *Id.* at 199.

spatial division, segregation, and restriction of movement occasioned by certain exercises of police powers may communicate to the public at large that a person or class of persons is morally flawed, dangerous, or contagious. In this respect territoriality speaks, through segregation or expulsion, to things like status and human dignity.

The Constitution does not speak very clearly with regard to liberties of mobility and choice of place—the liberties most affected by territorial restrictions imposed pursuant to traditional police powers. Indeed, on only a few occasions did the Framers expressly use geography or territory to delineate the bounds of individual liberty. For example, Article III simultaneously respects state sovereignty and protects personal liberty by requiring that the trial of all crimes be held only in the state where the crime was committed.[125] The Sixth Amendment requires the use of geographic districts for the empanelment of representative juries.[126] These defensive or negative references to place are additional examples of the Framers' geo-strategic governance structure.

But what of the affirmative rights to move about the country, to choose places and geographies, to change one's place, and to remain in place? What are the limits of state and local police powers with respect to these and related spatial liberties?

Historically, there was some explicit support for treating some such liberties as fundamental. Blackstone referred to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."[127] The Articles of Confederation expressly provided for liberty of movement among the states.[128]

But the Constitution does not specifically address this or other aspects of personal movement or mobility in explicit terms. Zechariah Chafee, among others, has suggested that the omission of migratory freedom in particular merely indicates that the Framers believed this liberty to be located elsewhere in the text.[129] But colonial and early state migratory exclusions and expulsions, discussed earlier, would seem to suggest some

125. U.S. CONST. art. III, § 2, cl. 3. Where the crime is not committed in any state, the trial shall be held "at such Place or Places as the Congress may by Law have directed." *Id.*

126. *Id.* amend. VI.

127. WILLIAM BLACKSTONE, 1 COMMENTARIES *130.

128. *See* ARTICLES OF CONFEDERATION art. IV ("[T]he people of each state shall have free ingress and regress to and from any other state. . . .").

129. ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 185 (1956).

ambivalence toward explicit recognition of such migratory freedom.[130] In 1867, however, a majority on the Supreme Court did indeed recognize a right to migrate among the states.[131] The Court has never settled on a constitutional home for this liberty.[132] Thus, it remains the case that one must ultimately *infer* constitutional recognition of even the most basic spatial liberty—to "remov[e] one's person to whatsoever place one's own inclination may direct."[133]

In certain respects it seems that the Framers of the Constitution envisioned a private, parochial, and rather sedentary people. Only one specific place—the home—was singled out for special constitutional treatment. The home is a consecrated constitutional location, one expressly shielded from various official intrusions. The Third Amendment prohibits the quartering of soldiers during peacetime "in any house" without the owner's consent;[134] the Fourth Amendment expressly protects the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures";[135] and the Fifth Amendment prohibits the taking of any home (or other private property) without just compensation.[136] The Second Amendment's right to "bear Arms," which the Supreme Court recently interpreted to include a right of self-defense in the home, may also indicate regard for the sanctity of both person and residence.[137]

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130. In certain respects, the Constitution's overall spatial framework seems to contemplate an open and unified geography. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to regulate commerce among the several states); *id.* § 10, cl. 2 (prohibiting states from imposing duties on imports or exports unless "absolutely necessary").

131. Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867).

132. *See* Christopher S. Maynard, *Nine-Headed Caesar: The Supreme Court's Thumbs-Up Approach to the Right to Travel*, 51 CASE W. RES. L. REV. 297, 298 (2000) (noting that right to travel has been located in no less than ten constitutional provisions).

133. BLACKSTONE, *supra* note 127, at *124. Nor did the framers address whether liberty of travel might be offended by restrictions on travel to territories *outside* the United States. *See* Farber, *supra* note 115, at 285.

134. U.S. CONST. amend. III.

135. *Id.* amend. IV. The Fourth Amendment's prohibition of "unreasonable" seizures, as well as the Due Process Clause, may also provide some limited protection for liberties of presence and movement. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972) (invalidating anti-vagrancy law).

136. U.S. CONST. amend. V.

137. *Id.* amend. II. *See* District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (invalidating gun control statutes in part because they denied persons the ability to defend the home). Other liberties associated with the home have been located in the First and Fourteenth Amendments. *See, e.g.*, Frisby v. Schultz, 487 U.S. 474 (1988) (upholding ordinance prohibiting targeted picketing of home); Lindsey v. Normet, 405 U.S. 56, 82 (1972) (describing home as "sanctuary"). As the Supreme Court recently stated, the "liberty" referred to in the Fourteenth Amendment's Due Process Clause is comprised of both "*spatial*" and "transcendent" dimensions. Lawrence v. Texas, 539 U.S. 558, 562 (2003) (emphasis added).

Americans, of course, have never been a home-bound people. The urges to traverse, explore, and conquer open spaces and territories are central to the American ethos.[138] Moreover, although *privacy* has become a contemporary buzzword, Americans have always lived a substantial part of their lives in public places. Yet the Framers seem to have scarcely contemplated the exercise of personal liberties in the public sphere. The First Amendment protects the people's right "peaceably to assemble" and to "petition the Government for a redress of grievances."[139] But it does not say *where* those liberties may lawfully be exercised, or whether there is a right to some public place for these (or other) purposes.[140] Moreover, even assuming one recognizes some degree of migratory liberty, there is no express or implied guarantee that one may remain in any particular place. Nor does the Constitution address whether those without private homes enjoy any right to be present—to exist, in other words—in public places or territories. In sum, the Constitution does not clearly address the substantive legitimacy of a myriad of local police power measures that impose different forms of territorial expulsion. As in other contexts, it contains some rather significant spatial gaps.

To summarize, the principal constitutive functions of territory are to structure and legitimize sovereignty; define constitutional scope or domain; determine eligibility for membership in political communities; facilitate distribution and allocation of certain benefits and privileges; and segregate and control persons or behaviors considered threatening to public health, order, or safety. To varying degrees, the United States Constitution addresses each of these functions geographically or territorially. Given the most pressing concerns of the moment, the Framers of the Constitution exhibited the greatest spatial clarity with respect to matters of internal governance and territorial defense. As a result, they bequeathed to future generations some rather challenging questions regarding the relevance or importance of territory to matters such as constitutional domain and individual liberties.

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138. FREDERICK JACKSON TURNER, THE FRONTIER IN AMERICAN HISTORY (1921).

139. U.S. CONST. amend. I.

140. The Supreme Court has indicated that at least some public places—streets and parks—must be held open for assembly and speech activities. Hague v. Comm. for Indus. Orgs., 307 U.S. 496 (1939); *see also* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (noting that public streets and sidewalks have "time out of mind" been used for public assembly and debate).

III. GEOGRAPHIES OF DISPLACEMENT

Given the connection between territory and some of the principal needs and functions of government, it should come as little surprise that officials have often used territory to control events, populations, and certain behaviors. Historical episodes of racial segregation, internment, immigration exclusion and restriction, and segregation of the sick and infirm were explicit territorial responses to perceived threats of the day. Today, governments are responding territorially to a very similar list of perceived threats—alien enemies and suspected terrorists, illegal immigrants, sex offenders, the destitute and homeless, and the contagious. The territorial regulation of these populations and their behaviors is mapping distinctive legal Geographies of Displacement both within and outside the borders of the United States.

A. Some Antecedent Territorial Measures

Territory and constitutional liberty have intersected throughout American history. Systematic racial segregation, wartime exclusion and internment, exclusion of migrants and immigrants, and displacement of sick and marginalized persons were critical episodes in our nation's constitutional history. In these instances governments segregated, disciplined and controlled persons and behaviors through territory. They limited access to justice, equality, mobility, and other core constitutional liberties. Further, through these territorial measures officials communicated something distinct about the character of those displaced—for example, their lack of dignity or loyalty. The selection and discussion of specific antecedent displacements in this part is not intended to suggest a moral or other normative equivalence with the more contemporary displacements described in the next part. As we shall see, however, there are some instructive parallels and useful lessons to be learned from this history.

1. Racial Segregation and "Hyper-Territoriality"

Perhaps the most infamous example of territorial displacement is the post-emancipation segregation and exclusion imposed upon blacks. At its very core, segregation was a spatial and territorial institution. Official policies, coupled with local customs, imposed what the geographer David

Delaney has described as the "geopolitics of race and racism."[141] Whites were deeply threatened by the prospect that newly emancipated blacks would soon be living among them, in "their" territories. Denied the power of institutional slavery, whites enforced their vision of power and status by asserting control over local territories.

From the late 1800s to the mid-1960s, Black Codes and Jim Crow laws created an extraordinary form of territorial segregation.[142] Southern and border-state territorial measures enforced strict and well-defined territorial boundaries with respect to all aspects of society.[143] The infamous Black Codes denied blacks access to both private and public places and territories. Under the Codes, and later pursuant to pervasive Jim Crow legislation, racial segregation and exclusion were enforced "in the courts, schools, and libraries, in parks, theaters, hotels and residential districts, in hospitals, insane asylums—everywhere, including on sidewalks and in cemeteries."[144] This spatial-racial segregation extended well beyond places of public accommodation. In some instances, blacks were forbidden to appear in public *at all*—other than as menial servants.[145] Vagrancy laws restricted their right to appear on the public streets. Even prostitutes of different races were made to work separate streets, districts, and localities.[146] Private residential segregation was also strictly enforced, through public laws and private racially restrictive covenants.[147] In urban and residential areas the imposition of "municipal apartheid" through zoning codes prevented blacks from living in certain neighborhoods.[148]

David Delaney characterizes this history as a "process of fanatical hyper-territoriality."[149] Vast geographies were reshaped in this fashion, on explicit racial-territorial terms. As Delaney explains, this process

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141. DAVID DELANEY, RACE, PLACE, AND THE LAW 1836–1948, at 3 (1998).

142. *See generally* C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1955). *See also* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

143. *See* DELANEY, *supra* note 141, at 96–97 (discussing segregation measures during Jim Crow era).

144. IX C. VANN WOODWARD, ORIGINS OF THE NEW SOUTH 1877–1913, at 212 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1951). *See also* J. HARVIE WILKINSON III, FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 17–18 (1979).

145. *See* WILKINSON, *supra* note 144.

146. *Id.* at 18.

147. *See* Rachel D. Godsil, *Race Nuisance: The Politics of Law in the Jim Crow Era*, 105 MICH. L. REV. 505 (2006) (discussing use of private restrictive covenants).

148. DELANEY, *supra* note 141, at 105.

149. *Id.* at 96.

> presupposed the creation of more or less durable lines and spaces or the addition of an increment of meaning to existing lines and spaces. It entailed the assignment of consequences to the crossing of lines. It was constituted by ensembles of stationary space, such as rooms, toilets, buildings, parks, and cemeteries, and by movable spaces such as streetcars, trains, and later buses and airplanes. In some situations segregation was effected by duplication of functional spaces: schools, parks, cemeteries, bars, YMCAs, libraries, washrooms, phone booths, and elevators; in other situations, by subdivision or compartmentalization, as in waiting rooms, jails, theaters, some hospitals, streetcars, and so on. In many instances segregation meant the simple denial of facilities.[150]

The exclusion and displacement effected through racial "hyper-territoriality"[151] were devastating to personal liberties. There was, of course, the denial of basic rights of equality, liberty of movement, and public presence. More generally, and with even more devastating effects, race-based territoriality communicated blacks' fundamental inferiority and lack of human dignity; it signified their legal and societal expulsion. Of course, as Delaney notes, "[e]xclusion and inferiority were integral to the entire system of radical segregation."[152]

Remarkably, much of this systematic race-based displacement occurred in the face of the Fourteenth Amendment's explicit guarantee of "equal protection" to all "persons" residing within a state's territory.[153] Despite this textual command of individual equality, an enormous spatial gap in constitutional coverage stubbornly persisted in America. In the late nineteenth century, the Supreme Court infamously approved de jure race-based displacement. In *Plessy v. Ferguson*, the Court upheld a Louisiana statute requiring separate but equal accommodations for white and black railway passengers.[154] *Plessy* and other decisions of the long segregationist era refused to acknowledge the damage produced by this territorial and

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150. *Id.* at 96–97.
151. *Id.* at 96.
152. *Id.* at 97.
153. U.S. CONST. amend. XIV.
154. 163 U.S. 537, 550–51 (1896). From the time of emancipation, these and other local spatial limitations were often supplemented with additional territorial restrictions. For example, immediately after emancipation, exit from the system of racial-spatial discrimination was made difficult by the passage, in both Northern and Southern states, of laws prohibiting or restricting the migration of newly freed slaves. *See* NEUMAN, *supra* note 39, at 34–40 (discussing antebellum restrictions on black migration).

constitutional displacement.[155] Not until 1954, in *Brown v. Board of Education*, did the Supreme Court formally recognize that the spatial scheme of "separate but equal" stigmatized and unconstitutionally delegitimized an entire race of people.[156] Of course, the formal rejection of de jure displacement was merely a beginning. It would take a civil rights *era* to further narrow the spatio-equality gap in which segregation thrived. The effects of that gap persist to some extent even today.

2. Territory, Security and Loyalty

As noted in Part II, territoriality is intimately related to security and national defense. As it was at the framing, securing the homeland from external (and internal) enemies is one of the principal governance functions of territoriality. As also noted earlier, territory both enforces sovereign boundaries and protects public health and safety.

The operation of the prison at Guantanamo Bay is only the most recent example of the territorial displacement of those perceived to be hostile to the United States. During the winter of 1942, in the first months of America's war with Japan, Americans of Japanese descent living on the nation's Pacific Coast were subject to mass physical and constitutional displacement.[157] The federal government adopted two forms of territorial displacement to deal with what it apparently believed to be a disloyal population. First, through a series of executive orders, followed later by congressional approval, persons of Japanese descent were excluded from areas near certain military assets.[158] This displacement was based on the belief that the ancestry of those excluded made subversion and sabotage likely.[159] The exclusion orders authorized officials to restrict the right of persons to enter, leave, or remain in the designated exclusion zones. Second, executive orders authorized mass evacuation and internment of persons of Japanese and other ancestries.[160] The United States ultimately ordered some 120,000 people of Japanese ancestry to report to assembly

155. For a comprehensive examination of the courts' treatment of racial segregation in the United States, see KLARMAN, *supra* note 142.

156. 347 U.S. 483, 488 (1954).

157. For accounts of the exclusion and internment policies and their effects, see ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II (2007); GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS (2d ed. 2003).

158. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

159. *See* Korematsu v. United States, 323 U.S. 214, 216–17 (1944) (noting national defense interests supporting exclusion orders).

160. *See id.* at 223–24 (upholding internment order).

centers, from which they would ultimately be transferred to ten internment camps located in the interior United States.[161]

Although the displacement of persons of Japanese descent was officially predicated upon national security concerns, exclusion and internment demonstrated the perils of using territoriality as a weapon during times of war. First, territory was used as a blunt means of segregating persons deemed *presumptively* disloyal and dangerous.[162] We now know that this presumption was based in part upon invidious racial prejudice.[163] General Dewitt, one of the military commanders in charge of administering the internments, summarized the military's insidious geo-strategic objective: "[W]e must worry about the Japanese all the time until he is wiped off the map."[164]

Second, the effect of territorial exclusion and, in particular, internment was to banish Japanese Americans from their communities and to render them essentially invisible. Internment was a particularly harsh form of displacement, imposed without benefit of even minimal legal process. The internees, two-thirds of whom were American citizens, were transported from assembly centers on the West Coast to relocation centers.[165] For two to as many as four years, internees were forced to live in barbed-wire-enclosed camps.[166] Military sentries patrolled camp perimeters. Internees bunked in horse stalls, tar-paper shacks and other makeshift accommodations.[167] They endured horrible conditions, including "brutal heat and bitter cold, filth, dust and open sewers."[168] As a result of their displacement, the internees lost most or all of their possessions, as well as contacts with friends and neighbors in their communities.[169]

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161. United States v. Hohri, 482 U.S. 64 (1987).

162. Exclusion and internment were used in other countries as well, to similar effect. *See* Mona Oikawa, *Cartographies of Violence: Women, Memory, and the Subjects of the "Internment,"* 15 CAN. J.L. & SOC'Y, No. 2, at 39, 40 (examining internment of Japanese Canadians).

163. *See* Korematsu v. United States, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984) (finding that government had withheld information regarding claim of military necessity and citing findings of racial prejudice by Commission on Wartime Relocation and Internment of Civilians).

164. *See* WILLIAM M. WIECEK, 12 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 348 (2006).

165. *See Korematsu*, 323 U.S. at 214, 223–24 (upholding orders to report to assembly centers).

166. For a poignant description of the internment camps, see MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS (University of Washington Press 1996) (1976).

167. Dinitia Smith, *Photographs of an Episode That Lives in Infamy*, N.Y. TIMES, Nov. 6, 2006, at E1.

168. *Id.*

169. COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 2–3 (1982).

Constitutional challenges to both the exclusion and internment orders ultimately reached the Supreme Court. Although the Court acknowledged that heightened judicial scrutiny of the orders was warranted under the Equal Protection Clause (in light of the government's explicit reliance on race), it ultimately deferred to the concerns of military authorities and upheld both the exclusion and internment orders.[170]

Once again, the Constitution's equality guarantee had failed to protect persons located *within* United States territory against an invidious form of racial-spatial segregation. Years later, of course, America came to look upon these particular constitutional displacements with a deep sense of national shame.[171] Supreme Court precedents associated with the era, although never expressly overruled, have been largely discredited.[172] As we shall see, however, six decades later territory would once again become a central means of defending the American homeland.

3. Migration and Membership

As noted in Part II, territorial sovereignty permits nations to set the basic rules for entry, presence, and citizenship. Prior to the 1870s, the United States had relatively open borders. This does not mean that state and federal laws imposed no barriers to immigration; rather, as immigration scholars have noted, what we now recognize as a system of immigration laws did not yet exist.[173]

Not surprisingly, there have always been some restrictions on migration and territorial entry into the United States. Indeed, exclusionary legislation was expressly authorized under the Articles of Confederation, which denied "paupers, vagabonds and fugitives" the right to enter and leave the confederated states.[174] Various migratory restrictions were imposed following ratification of the Constitution. For example, early state poor laws, modeled on British legislation, imposed internal restrictions on

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170. *See Korematsu*, 323 U.S. 214 (upholding exclusion and internment orders); Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding curfews and exclusion order).

171. Later, it became clear that the internees posed no security risk whatsoever. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (overturning Korematsu's conviction based in part on suppression of evidence). In 1988, Congress enacted a formal apology and provided for reparations of $20,000 to each survivor of internment or their heirs. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 904 (codified at 50 U.S.C. app. § 1989b (2000)).

172. *But see* Grutter v. Bollinger, 539 U.S. 306, 351–52 (2003) (Thomas, J., dissenting) (suggesting current validity of decisions upholding exclusion and internment orders).

173. *See* NEUMAN, *supra* note 39, at 19–20 (addressing what the author calls the "open-borders myth").

174. ARTICLES OF CONFEDERATION art. IV.

the territorial entry and migration of certain persons—paupers, convicts, freed Blacks, diseased persons, and other undesirables.[175] Dumping of destitute persons by foreign countries was a particular concern.[176] The courts initially upheld these state exclusions as valid exercises of local police powers; only later did the Supreme Court hold that these laws conflicted with Congress's power to control foreign commerce and immigration.[177]

Since the 1870s, Congress has held exclusive—and what is often referred to as "plenary" or absolute—power over immigration.[178] Over the years, Congress has used that extraordinary power to selectively include and exclude aliens from various countries, generally without judicial oversight. Throughout the nation's history, various groups have been subjected to territorial exclusions and expulsions based upon factors such as public disapproval, political unpopularity, homophobia, religious discrimination, and blatant racism.[179] With regard to the latter, Congress used its plenary power over immigration to enact the Chinese Exclusion Act of 1882, and before that the Page Law of 1875, and the Naturalization Act of 1870, which excluded the Chinese on racial, gender, and other invidious grounds.[180] Territorial expulsions—deportations—have also been used to displace and detain persons residing (both legally and illegally) in the United States. During and particularly after World War I, communists who were resident aliens were subject to territorial isolation and expulsion. During the infamous Palmer Raids, thousands of suspected communists and anarchists were arrested and detained within the United States without trial.[181] Offices and homes of more than 200 resident aliens were raided without warrants or probable cause; those seized were placed on board a ship bound for the Soviet Union.[182] At various times in our nation's history, territorial restrictions on ingress into and egress from the

175. *See* NEUMAN, STRANGERS TO THE CONSTITUTION, *supra* note 39, at 21–40 (describing early state and federal "immigration" laws).

176. *See id.* at 23–29 (describing experiences in Massachusetts and New York with paupers).

177. *See* Cleveland, *supra* note 38, at 100–12 (discussing early immigration precedents).

178. Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1, 5–7 (1998) (discussing "plenary power" doctrine).

179. *Id.* at 6–7.

180. *See* Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641 (2005) (examining Chinese immigration exclusions); *see also* ANDREW GYORY, CLOSING THE GATE: RACE, POLITICS, AND THE CHINESE EXCLUSION ACT (1998).

181. *See* CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA (2007).

182. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES 42–44 (1999).

United States have also been imposed on national security and ideological grounds.[183]

Numeric quotas have also been used to determine eligibility for residence and citizenship in the United States.[184] For example, in 1921 Congress passed the Emergency Quota Act, which established national quotas on immigration based upon national origin.[185] The quotas were based on the number of foreign-born residents of each nationality who were living within the United States as of the 1910 census. With passage of the Immigration Act of 1924,[186] a more complex quota plan replaced this "emergency" system. Immigration quotas have been revised over the years, and are still enforced.[187]

In sum, entry into the political community of the United States has always been determined with reference to territoriality—through the recognition and enforcement of national borders. Early in the nation's history, when national territorial borders were generally open, states and localities filled gaps by excluding certain unwanted populations. Since the middle of the nineteenth century, Congress has occupied the territorial field relating to political membership. As bluntly described by Justice Frankfurter, judicial deference to Congress's exercise of plenary power over territorial ingress and egress has been nearly complete: "[W]hether immigration laws have been crude and cruel, whether they have reflected xenophobia in general or anti-Semitism or anti-Catholicism, the responsibility belongs to Congress."[188]

4. Early Urban Purification Measures

State and local police powers have historically been used to isolate and exclude certain unwanted persons and marginal populations from particular places and territories. At least since Plato urged the banishment of beggars, officials have sought to expel beggars and homeless persons from public spaces.[189] During the late nineteenth and early twentieth

183. Farber, *supra* note 115; *see also* Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PA. L. REV. 933 (1995).

184. *See generally* JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925 (4th ed. 2002) (recounting political history surrounding adoption of quota system).

185. Pub. L. No. 5, 42 Stat. 5 (1921).

186. Pub. L. No. 139, 43 Stat. 153 (1924).

187. *See* Immigration and Naturalization Act, § 202(a), 66 Stat. 163 (1952) (current version at 8 U.S.C. § 1152 (2000)).

188. Harisiades v. Shaughnessy, 342 U.S. 580, 597 (1952) (Frankfurter, J., concurring).

189. *See* II PLATO, LAWS, BOOK XI, at 465 (T.E. Page et al. eds., R.G. Bury trans., Harvard

centuries, isolation, quarantine, and other territorial measures were routinely enforced against the homeless.[190] Homeless persons suspected of carrying smallpox were often detained, isolated for sometimes lengthy periods of time, and forcibly vaccinated.[191]

Governmental attempts to cleanse or purify public places have taken broader forms as well. For example, the homeless and other vagrants have historically been displaced through enforcement of public order (vagrancy and anti-loitering) laws and discretionary police actions.[192] The poor and homeless have not been the only unpopular groups subject to territorial purification measures. Prostitutes, drug addicts, and other marginalized persons have also been driven out of public places in order to cleanse them for general public use.[193] The insane and the mentally ill have likewise historically been subjected to displacement measures, including involuntary commitment, institutionalization, and expulsion.[194]

During the nineteenth and the better part of the twentieth centuries, legal protections from this form of territorial displacement were essentially non-existent.[195] Due process was not robustly protected, and police operated with fairly wide discretion in public spaces. As a result, for a substantial time in our nation's history local territories were largely under the discretionary control of the police and other local officials.[196] In the name of public health and safety, local officials were empowered to create purified territories.

After World War II, commentators and courts began to look with disfavor upon vagrancy and other laws that had been used to displace the homeless and other marginal persons.[197] In the 1960s and 1970s, several courts invalidated vagrancy laws under the Equal Protection Clause, the Eighth Amendment's ban on "Cruel and Unusual Punishments," and the

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University Press 1961) ("There shall be no beggar in our State; . . . he shall be driven across the border by the country-stewards, to the end that the land may be wholly purged of such a creature.").

190. *See* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631, 638–40 (1992) (discussing measures used to displace the homeless).

191. For a description of public health measures during this time, see WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA (1996).

192. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972) (reviewing history of anti-vagrancy laws targeting homeless). *See generally* LEONARD C. FELDMAN, CITIZENS WITHOUT SHELTER: HOMELESSNESS, DEMOCRACY, AND POLITICAL EXCLUSION (2004).

193. Beckett & Herbert, *supra* note 32, at 13–16.

194. *See generally* FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 117.

195. Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 643–47 (1956).

196. Simon, *supra* note 190, at 638–39.

197. *Id.* at 642 & n.71.

Due Process Clause.[198] Other courts during this time invalidated vagrancy and loitering laws on the ground that they infringed liberties of travel or movement.[199] In 1972, the Supreme Court condemned vagrancy and loitering laws as "archaic classifications"; in striking down Jacksonville, Florida's vagrancy ordinance on due process grounds, the Court emphasized that such laws interfere with liberty of movement.[200] As we shall see, local purification measures would take a different form in the 1980s and 1990s. Although contemporary territorial displacements of vulnerable groups tend to be more subtle in form, the homeless and other marginal groups continue to experience substantial interference with basic liberties of public presence and movement.

5. Controlling Contagion Territorially

As discussed in Part II, preservation of public health and safety is a critical governance function of territoriality. The territorial measures of isolation and quarantine have deep historical roots.[201] Indeed, as Michel Foucault has noted, one of government's earliest uses of spatiality was as a means of separating healthy populations from those that were sick or infirm.[202]

Nineteenth century state laws excluded, quarantined, and detained persons believed to be diseased and contagious at ports and other borders.[203] In the early twentieth century, officials continued to segregate

198. *See* Wheeler v. Goodman, 306 F. Supp. 58, 62 (W.D.N.C. 1969) (invalidating criminal vagrancy law), *vacated*, 401 U.S. 987 (1971); Goldman v. Knecht, 295 F. Supp. 897, 907 n.29 (D. Colo. 1969) (holding that vagrancy statute invited selective enforcement and utilized unconstitutional classifications based on poverty); Smith v. Hill, 285 F. Supp. 556, 560 (E.D.N.C. 1968) (same); *see also* Decker v. Fillis, 306 F. Supp. 613, 617 (D. Utah 1969) (finding vagrancy ordinance invalid under due process clause); *Wheeler*, 306 F. Supp. at 62 (holding that statute punished economic status without mens rea).

199. *See, e.g.*, People v. Berck, 300 N.E.2d 411, 415 (N.Y. 1973) (holding that loitering statute violated Privileges and Immunities Clause by restricting free movement of citizens through state); Hayes v. Mun. Ct. of Okla. City, 487 P.2d 974, 979 (Okla. Crim. App. 1971) (invalidating nighttime wandering ordinance as unconstitutionally overbroad on ground that it infringed liberty of movement); City of Portland v. James, 444 P.2d 554, 557–58 (Or. 1968) (invalidating loitering ordinance); *see also* Decker v. Fillis, 306 F. Supp. 613, 617 (D. Utah 1969) (finding that enforcement of ordinance would "certainly chill the liberty of lawful movement, presence and physical status").

200. Papachristou v. City of Jacksonville, 405 U.S. 156, 161–62, 164 (1972).

201. *See, e.g.*, Batlan, *supra* note 35, at 62–68 (discussing history of quarantine in United States). Isolation and quarantine are somewhat distinct measures. Isolation refers to the physical segregation of those diagnosed with a communicable disease. Quarantine is used to segregate healthy persons who are believed to be contagious. Ernest A. Abbott, *Law, Federalism, the Constitution, and Control of Pandemic Flu*, 9 ASIAN-PAC. L. & POL'Y J. 185, 195 (2008).

202. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 117, at 199.

203. *See* NEUMAN, *supra* note 39, at 31–34 (discussing early quarantine laws).

sick and contagious persons from the general public. The infected were sometimes physically confined to the home; at other times those believed to be a public health threat were confined in facilities or displaced to remote locations. In 1907, for example, New York officials forcibly (and famously) placed Mary Mallon—"Typhoid Mary"—in isolation for life on North Brother Island on New York's East River to prevent the spread of typhoid fever.[204]

Quarantines sometimes operated at the community-wide level. For example, at the turn of the twentieth century San Francisco imposed quarantine on all Chinese Americans after some persons of Chinese descent were found to have contracted the plague.[205] Affected persons were not permitted to leave the Chinatown area for more than three months.[206] Before and during this time, quarantine of vessels was also common at ports in the United States and across the globe.[207] After the worldwide flu pandemic of 1918–1919, many state legislatures drew up detailed rules prohibiting all persons suspected of being infectious from going to certain public places—including schools, theaters, and stores.[208]

During these early periods, the principle of public necessity generally provided the legal basis for isolation and quarantine orders.[209] Owing generally to a lack of medical knowledge and expertise, courts were quite reluctant to second-guess the medical judgments underlying public health orders. So long as such orders were not arbitrary or unreasonable, they were generally upheld.[210]

By the middle of the twentieth century, however, governments had begun to rely somewhat less on territorial displacement as a means of protecting public health. Scientific advances in diagnosis, treatment, and containment of disease allowed officials to use means other than

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204. *See* JUDITH WALZER LEAVITT, TYPHOID MARY (1996).

205. Batlan, *supra* note 35, at 105–06.

206. *See* Joan B. Trauner, *The Chinese as Medical Scapegoats in San Francisco, 1870–1905*, 57 CALIFORNIA HISTORY 70 (1978).

207. Batlan, *supra* note 35, at 63–67. The Supreme Court upheld New York's nineteenth century exclusion of paupers arriving by ship in the city's port in *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837), *overruled in part by* Edwards v. California, 314 U.S. 160, 177 (1941).

208. *See* Richard J. Hatchett, Carter E. Mecher & Marc Lipsitch, *Public Health Interventions and Epidemic Intensity During the 1918 Influenza Pandemic*, 104 PROC. OF THE NAT'L ACAD. OF SCI. 7582 (2007), *available at* http://www.pnas.org/content/104/18/7582.full.pdf.

209. *E.g.*, People v. Robertson, 134 N.E. 815, 817 (Ill. 1922).

210. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upholding compulsory vaccination of adults against smallpox). In addition, constitutional jurisprudence did not yet reflect robust protection for liberty and due process. The Bill of Rights had not yet been applied to state and local authorities. State constitutions also offered little protection, particularly in the face of widespread confusion, panic, and public hysteria.

widespread and lengthy quarantines. Courts were also beginning to more rigorously review the basis and breadth of public health orders. In the early 1950s, for example, tuberculosis patients mounted a successful challenge to a public quarantine order.[211]

With the discovery of HIV and AIDS in the early 1980s, however, quarantine proposals resurfaced.[212] With little objective and scientific knowledge about AIDS then available, some states enacted legislation empowering executives to impose even large-scale quarantines if they were deemed necessary to preserve the public health.[213] As the incidence of AIDS rose, so did public hysteria. In the early 1980s, more than a quarter of the American public held the opinion that HIV-infected individuals should be quarantined.[214]

In 1985, a New York state judge was incredulous that New York City health officials did not quarantine *all* HIV-infected adults.[215] In 1986, Lyndon LaRouche placed Proposition 64, the "Prevent AIDS Now" Initiative, on the California ballot.[216] The measure would have required statewide mandatory and reportable AIDS testing, banned anyone who tested positive or had AIDS from working at or attending schools or food-handling occupations, and imposed quarantine on persons infected by the AIDS virus or ill with AIDS. Although Proposition 64 ultimately failed, several cities did move to close gay bathhouses, limit employment opportunities for AIDS patients, prohibit carriers from serving in the military, and suspend the rights of HIV-infected children to attend public schools.[217]

Some public health efforts in the mid-1980s focused on regulation and displacement of populations at high risk for AIDS. In 1987, New York City officials placed a male prostitute who had been arrested sixty-six

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211. *See* Moore v. Draper, 57 So. 2d 648 (Fla. 1952).

212. Edward A. Fallone, Note, *Preserving the Public Health: A Proposal to Quarantine Recalcitrant AIDS Carriers*, 68 B.U. L. REV. 441 (1988); *see also* Wendy E. Parmet, *Aids and Quarantine: The Revival of An Archaic Doctrine*, 14 HOFSTRA L. REV. 53 (1985); Kathleen M. Sullivan & Martha A. Field, *AIDS and the Coercive Power of the State*, 23 HARV. C.R.-C.L. L. REV. 139 (1988).

213. *See* Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1281–83 (1986) (discussing public health response to AIDS).

214. *Id.* at 1281.

215. *Judge in AIDS Hearing Asks About Quarantine for Adults*, N.Y. TIMES, Oct. 1, 1985, at B7.

216. *See* Robert Steinbrook & Kevin Roderick, *Medical Experts Assail Initiative on AIDS: Officials Dismiss Claims Made by Supporters of Larouche-Backed Prop. 64*, L.A. TIMES, Aug. 3, 1986, at 3.

217. Note, *supra* note 213, at 1274; *see also* Steven H. Aden, *A Tale of Two Cities in the Gay Rights* Kulturkampf*: Are the Federal Courts Presiding Over the Balkanization of America?*, 35 WAKE FOREST L. REV. 295, 307 (2000).

times under a criminal quarantine order of indefinite duration.[218] Similar orders were routinely issued against female prostitutes, on the ground that it was reasonably likely they were afflicted with some contagious condition.[219]

The hysteria surrounding AIDS was also related to some degree to public and official attitudes regarding homosexuality.[220] In such cases, purification and contagion were actually closely related. Displacement through quarantine signaled something beyond possible contagion. The territorial response to AIDS and sexually transmitted diseases indicated that both public health and individual morality were at issue. In sum, in these instances territory was used not only for physical security, but also as a type of normative communication regarding deviance.

With regard to diseases like AIDS, scientific advances have lessened official resort to blunt territorial measures. But as we shall see, proposals to isolate and quarantine infected persons have now surfaced in response to threats of bioterrorism and highly resistant viruses. Territorial measures remain critical aspects of governmental planning for future epidemics and contagions.

B. Five Contemporary Geographies of Displacement

This part turns to several contemporary legal Geographies of Displacement, all of which are firmly rooted in the foregoing antecedents. Today's public order and safety challenges—enemy aliens captured in the global war on terrorism, unauthorized (illegal) immigration, released sex offenders, persistent homelessness, and public health threats from more virulent strains of disease—have given rise to distinct and, in some cases, still-developing Geographies of Displacement. As discussed in the previous part, antecedent displacements—racial segregation, race-based internment, restrictions on local migration, some discretionary public policing measures, and use of large-scale quarantines as initial responses to contagion—have been largely condemned or criticized. But contemporary Geographies of Displacement have produced new questions regarding constitutional scope and exposed new threats to constitutional

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218. *Man Exposed to AIDS Put Under Quarantine*, N.Y. TIMES, Feb. 13, 1987, at B4.

219. *See, e.g.*, *Ex parte* Clemente, 215 P. 698 (Cal. 1923) (holding that quarantine of prostitute was justified on grounds of necessity); *Ex parte* Dayton, 199 P. 548 (Cal. 1921) (upholding jailing of woman pending examination owing to suspicion she was a prostitute).

220. SUSAN CRADDOCK, CITY OF PLAGUES: DISEASE, POVERTY, AND DEVIANCE IN SAN FRANCISCO 3 (2000) (observing that officials sometimes use their power to regulate disease to define deviance).

liberty. As we shall see, the Constitution speaks in rather uncertain terms regarding the government's authority to create the contemporary Geographies of Displacement.

1. The Geography of Justice

Territoriality has been a critical element of the Bush administration's prosecution of the global war on terrorism. In the name of national security—protecting the homeland—the administration has strategically constructed a unique Geography of Justice.[221] Policies regarding the detention and treatment of persons labeled "enemy combatants" have been expressly premised on territorial displacement. Essentially, rather than intern detainees on United States soil, the government has sought to effect their territorial, legal, and constitutional displacement by detaining them beyond U.S. borders.

Detention of enemy aliens at Guantanamo Bay, Cuba, is without question the most visible part of this new Geography of Justice. The Bush administration's decision to hold detainees at Guantanamo was explicitly premised on the idea that the Constitution and laws of the United States do not apply outside U.S. territory.[222] At least, the administration believed, constitutional guarantees of due process and habeas corpus would not extend to Guantanamo Bay, Cuba.

There seemed to be both factual and legal support for this constitutional position. According to a lease agreement, Cuba retains "'ultimate sovereignty'" with regard to the island.[223] If, as earlier precedents had suggested, national borders were determinative of or defined national sovereignty, then detainees outside the United States would have no recourse to the Constitution.[224] The Guantanamo Bay

221. *See generally* Raustiala, *The Geography of Justice*, *supra* note 14 (discussing importance of territory in recent Supreme Court terrorism cases).

222. *See* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11 (2005); *see also* JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER (2006).

223. Raustiala, *The Geography of Justice*, *supra* note 14, at 2540 (quoting lease, and discussing lease and U.S relationship to Guantanamo territory).

224. Previous wartime precedents appeared to support the administration's position. *See, e.g.*, Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (noting that habeas corpus protection did not apply to prisoners because "at no relevant time were [they] within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States"). *But see* Boumediene v. Bush, 128 S. Ct. 2229, 2257–58 (2008) (rejecting argument that *Eisentrager* established a formal territorial test regarding the scope of habeas corpus jurisdiction).

Naval Base itself, however, has been under the "complete jurisdiction and control" of the United States since 1903.[225]

In these somewhat ambiguous circumstances, the United States government brought prisoners to Guantanamo from Iraq, Afghanistan, and elsewhere around the world. It steadfastly insisted that the habeas statutes and the Constitution did not apply there because the United States was not sovereign in the territory.[226] In essence, outside United States territory, the President asserted *absolute* legal dominion over suspected terrorists. Guantanamo was thus expressly conceived as a law-free zone; as one lawyer for the Bush administration suggested, it was "the legal equivalent of outer space."[227]

The question was thus whether, by simply placing 400 or so prisoners a mere 400 miles from the coast of the United States, the government could effectively make them disappear. Despite several legal setbacks, most notably those discussed immediately below in the Supreme Court, the United States government has been largely successful in denying the Guantanamo detainees access to justice and the benefits of the rule of law by territorially displacing them.[228] The most important—and as yet not fully and finally answered—questions in the detainee litigation are expressly territorial: Where, precisely, does the writ of habeas corpus (and perhaps other constitutional guarantees) actually run? Can the United States avoid constitutional and other legal constraints and processes by holding detainees outside United States territory?[229]

To fully appreciate the continued significance of territory in the fight against terrorism and more generally, let us briefly review the detainee cases recently decided by the Supreme Court. In *Rasul v. Bush*, the Supreme Court held that alien Guantanamo detainees captured in Afghanistan and Pakistan were entitled to statutory habeas corpus review

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225. Raustiala, *The Geography of Justice*, *supra* note 14, at 2540. The United States pays rent under the lease. Under its terms, Cuba could not terminate the agreement without U.S. consent. *Id.* at 2537.

226. *See id.* at 2540 ("[T]he U.S. position was and remains that [Cuban sovereignty] disposes of any constitutional claims of the detainees.").

227. John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 30 (quoting former Bush administration lawyer). The position that Guantanamo Bay was outside the sovereign control of the United States preceded the events of September 11, 2001. *Boumediene*, 128 S. Ct. at 2252.

228. Only very recently have some detainees been granted access to judicial process and achieved some success in challenging their detentions. *See* William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1.

229. *See* Fallon & Meltzer, *supra* note 8 (analyzing recent habeas and detention cases); *see also* James E. Pfander, *The Limits of Habeas Jurisdiction and the Global War on Terror*, 91 CORNELL L. REV. 497 (2006) (same).

under then-existing laws.[230] Rejecting the basic premise of the Bush administration's territorial strategy in the war on terrorism, *Rasul* held that *control* over the island territory was sufficient to support habeas jurisdiction over detainees' claims.[231] *Rasul* did not express any opinion, however, regarding whether habeas review was required under the Constitution, thus opening the door to future congressional restrictions.[232] The *Rasul* Court also declined to opine whether its habeas ruling extended to aliens held in territories in other places throughout the world.[233] In these critical respects, the Court avoided the general question of the Constitution's territorial scope.

In *Hamdi v. Rumsfeld*, a plurality found that the Executive had the authority to detain, without resort to criminal process, an American citizen captured on the battlefield in Afghanistan—first at Guantanamo and then later at American naval brigs.[234] But the plurality also said that as a United States citizen, Hamdi was entitled to some form of due process *regardless of location*, and that the process used to determine Hamdi's status as an "'enemy combatant'" was constitutionally deficient.[235] Thus, as a United States citizen, Hamdi was entitled to at least some minimal due process protections, including notice and an opportunity to rebut the government's allegations before a neutral decision maker.[236] At least with regard to American citizens and in certain limited terms, the Constitution appeared to follow the flag to Guantanamo Bay.

In *Hamdan v. Rumsfeld*, the Court held that an enemy alien detained at Guantanamo could not be tried under the Bush administration's framework for military tribunals, as those tribunals failed to comply with international laws of war and procedures required under federal statutes for courts martial.[237] Like *Rasul*, *Hamdan* rested largely on statutory

230. 542 U.S. 466 (2004).

231. *See id.* at 481–82 (noting common law rule that habeas ran to territories under control of the Crown).

232. The Court did, however, hint at a constitutional habeas holding in a footnote. *See id.* at 483 n.15.

233. *Id.* at 484. *See generally* Baher Azmy, Rasul v. Bush *and the Intra-Territorial Constitution*, 62 N.Y.U. ANN. SURV. AM. L. 369 (2007) (discussing scope of *Rasul* decision); Elizabeth A. Wilson, *The War on Terrorism and "The Water's Edge": Sovereignty, "Territorial Jurisdiction," and the Reach of the U.S. Constitution in the Guantánamo Detainee Litigation*, 8 U. PA. J. CONST. L. 165 (2006) (same).

234. 542 U.S. 507 (2004) (plurality opinion).

235. *Id.* at 510.

236. *Id.* at 533.

237. 548 U.S. 557, 670 (2006).

grounds.[238] Thus, the Court once again avoided questions regarding the Constitution's territorial scope or reach.

Shortly after *Hamdan* was decided, Congress presented its own answer regarding territorial scope or jurisdiction. Overruling *Rasul*, the Military Commissions Act of 2006[239] purported to strip federal courts of habeas jurisdiction to hear detention challenges by enemy aliens held at Guantanamo—and elsewhere outside United States territorial boundaries.[240]

The issue was now at last joined: Assuming it had done so in the Military Commissions Act, could Congress and President Bush effectively suspend the writ of habeas corpus as to aliens detained at Guantanamo Bay? The Constitution permits suspension of the writ of habeas corpus only "in Cases of Rebellion or Invasion."[241] In a case involving several Guantanamo detainees who had been designated enemy combatants, the District of Columbia Circuit held that the Military Commissions Act stripped the federal courts of the statutory habeas jurisdiction that the Supreme Court had recognized in *Rasul*; the court further held that this denial of habeas review to Guantanamo detainees satisfied any constitutional requirements.[242] The court's constitutional holding was based on three basic propositions: (1) the Suspension Clause only protects the right of habeas as it existed in 1789, (2) the common law in 1789 did not provide any habeas right to aliens held by the government outside the sovereign's territory, and (3) Guantanamo is outside United States territory for constitutional purposes.[243]

The Bush Administration was once again rebuffed in the Supreme Court. While conceding that the scope of the Suspension Clause is limited, at a minimum, to its scope as of 1789 and that Guantanamo was located outside United States territory, the Court, in *Boumediene v. Bush* and *Al Odah v. United States*, nevertheless held that alien Guantanamo detainees are constitutionally entitled to pursue writs of habeas corpus.[244] Writing

238. The Court held that the military commission violated the Uniform Code of Military Justice and the Geneva Conventions. *Id.* at 567.

239. Pub. L. No. 109-366, 120 Stat. 2600 (2006).

240. *Id.* § 7, 120 Stat. 2600, 2635. The Act, which amends the earlier Detainee Treatment Act of 2005, allows detainees to challenge the fact of their detention, although not the conditions thereof, in the United States Court of Appeals for the District of Columbia Circuit. *Id.* § 3, 120 Stat. 2600, 2622.

241. U.S. CONST. art. I, § 9, cl. 2. Article I, Section 9, clause 2 of the Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." *Id.*

242. Boumediene v. Bush, 476 F.3d 981, 990 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008).

243. *Id.* at 988–92.

244. 128 S. Ct. 2229 (2008).

for the majority, Justice Kennedy first determined that Congress had in fact suspended the writ of habeas corpus.[245] After surveying the geographic scope of the writ as of 1789, Justice Kennedy announced that while "informative," the history was not dispositive.[246] The majority rejected the government's core argument—that alien combatants held at Guantanamo were not entitled to the writ because Cuba, not the United States, was legally sovereign there.[247] The Court stated that in discerning the geographic scope of the writ, it was appropriate "to inquire into the objective degree of control the Nation asserts over foreign territory."[248] As it had in *Rasul*, the Court noted that the United States exercises complete jurisdiction and control over the base at Guantanamo, and "maintains *de facto* sovereignty over this territory."[249] The majority interpreted *Reid v. Covert*,[250] *Johnson v. Eisentrager*,[251] and other precedents that had seemingly adopted a narrower and more formalist view of constitutional scope to support the proposition that the geographic scope of the writ ought to be based upon the particular circumstances and "practical necessities" of each case.[252]

Eschewing a formal legal sovereignty test, Justice Kennedy announced a functional test for determining the geographic scope of the writ (and possibly other provisions in the Constitution).[253] In addition to practical concerns relating to access to the writ, the Court held that three factors are relevant in determining the geographic scope of the writ: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ."[254] Given that the status of the detainees in *Boumediene* and *Al Odah* was in dispute, there had been no trial by military commission, the United States exercised absolute and indefinite control over the naval base at Guantanamo, the detainees were isolated in a secure facility, and

245. *Id.* at 2244.
246. *Id.* at 2249.
247. *Id.* at 2252.
248. *Id.*
249. *Id.* at 2253.
250. 351 U.S. 487 (1956).
251. 339 U.S. 763 (1950).
252. *Boumediene*, 128 S. Ct. at 2255.
253. *Id.* at 2258 ("Nothing in *Eisentrager* says that *de jure* sovereignty is or has ever been the only relevant consideration in determining the geographic reach of the Constitution or of habeas corpus.").
254. *Id.* at 2259.

adjudication of the writ would cause no friction with Cuba itself, the Court held that the writ applied to the detainees.[255]

Critical to the Court's adoption of this multifaceted functional approach was the Bush administration's attempted manipulation of territory and its effect on the constitutional separation of powers. In particular, the Court was concerned that permitting the government to avoid constitutional constraints through what amounted to creative leasing of territory would permit the "political branches to govern without legal constraint."[256] In the most poignant passage of his opinion, Justice Kennedy elaborated:

> Our basic charter cannot be contracted away like this. *The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.* Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."[257]

Exercising what it believed to be its judicial prerogative, the Court held that the Suspension Clause "has full effect at Guantanamo Bay."[258] It further held that the government had failed to provide an adequate substitute for habeas review.[259]

As strong as the majority's statements and convictions appear, the contours of the functional approach are far from clear.[260] The decision is based to a large degree upon the unique status of Guantanamo and the

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255. *Id.* at 2260–62.

256. *Id.* at 2259.

257. *Id.* (citations omitted) (emphasis added) (quoting Murphy v. Ramsey, 114 U.S. 15, 44 (1885); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

258. *Id.* at 2262.

259. *Id.* at 2274.

260. *See* Neuman, *supra* note 11 (discussing some of the important questions regarding constitutional scope left open by *Boumediene*).

United States' de facto sovereignty over this territory. What about other territories and locations? Aliens detained by the executive outside United States territorial borders and in places not under exclusive and indefinite United States control would appear to remain beyond the geographic reach of the Suspension Clause.[261] How much "control" is necessary to give rise to the writ? What specific constitutional rights do aliens detained in the covered territories and jurisdictions actually enjoy? What specific issues may they raise with regard to the conditions of their confinement?[262] Finally, what, if anything, does the Court's opinion suggest with regard to constitutional provisions other than the Suspension Clause? Are these too now subject to the functional standard for determining geographic scope?

Of course, Guantanamo is merely the most visible and contested evidence of the developing Geography of Justice. A limited number of detainees have been more radically displaced. Several reports have indicated that the Central Intelligence Agency has been operating secret detention facilities, or "black sites," in various places throughout the world.[263] In these facilities, persons are ghost detainees—literally the disappeared. As little as we know about treatment and process at Guantanamo Bay, we know even less about activities at these secret detention facilities. Certainly these special detainees have received no trials or other legal process. Given the lack of transparency and the seeming absence of any legal framework, the duration of detention is even more uncertain than it is for the Guantanamo detainees. Until they are released or moved to some more visible territory, these detainees remain outside the reach of the Constitution and the rule of law.

Still other detainees have found themselves in law-free zones by virtue of a United States policy known as "extraordinary rendition."[264] Margaret Satterthwaite has defined this practice as "the transfer of an individual, without the benefit of a legal proceeding in which the individual can challenge the transfer, to a country where he or she is at risk of torture."[265]

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261. *See* Fallon & Metzger, *supra* note 8, at 2056.

262. *See* Paracha v. Bush, 374 F. Supp. 2d 118 (D.D.C. 2005) (raising treatment and other issues relating to detention).

263. *See* Stephen Grey & Doreen Carvajal, *Secret Prisons in 2 Countries Held Qaeda Suspects, Report Says*, N.Y. TIMES, June 8, 2007, at A12 (reporting confirmation of clandestine prisons in Romania and Poland); *see also* Mark Mazzetti & David S. Cloud, *C.I.A. Held Qaeda Leader In Secret Prison for Months*, N.Y. TIMES, Apr. 28, 2007, at A9.

264. Satterthwaite, *supra* note 13, at 1336.

265. *Id.* As one unnamed United States official bluntly explained: "We don't kick the [expletive] out of them. We send them to other countries so *they* can kick the [expletive] out of them." Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: 'Stress and Duress' Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2001, at A1.

Under the rendition program, persons have been seized by CIA agents and other United States personnel and forcibly removed to other countries, where some claim to have been tortured. Owing to claims that trials would divulge state secrets or place national security at risk, no person subject to rendition has thus far been afforded an opportunity to obtain a remedy in the United States.[266]

President Bush's public remarks indicate that he believes current United States law authorizes rendition of suspected terrorists to territories abroad.[267] Like detainees held in secret detention facilities, those rendered to another country's territory for interrogation purposes have no habeas or other rights to judicial process.[268] Certain treaties expressly prohibit the practice of rendition, at least without following certain safeguards.[269] The Bush administration has taken the position that these treaties, like the Constitution itself, do not extend beyond the territorial boundaries of the United States.[270]

Although practices like rendition are not entirely new, largely as a result of the United States' war on terrorism a distinct Geography of Justice has recently been mapped through governmental manipulation of territory. The concept of the "homeland" is itself an integral part of a geo-strategy for national defense. Guantanamo is a central element of that geographic strategy, but it is only one part. Territory has been strategically manipulated to create legal black holes and black sites. At the same time, the United States government has taken the position that it is empowered to detain some enemy combatants *within* United States borders indefinitely.[271]

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266. A few rendered detainees have sought recourse in court after their release, but to no avail. *See* Adam Liptak, *U.S. Appeals Court Upholds Dismissal of Abuse Suit Against C.I.A., Saying Secrets Are At Risk*, N.Y. TIMES, Mar. 3, 2007, at A6; *see also* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (dismissing German national's claims against the CIA for injuries incurred during extraordinary rendition on grounds of state secrets privilege).

267. President George W. Bush, President Discusses Creation of Military Tribunals to Try Suspected Terrorists (Sept. 6, 2006), *available at* http://whitehouse.gov/news/releases/2006/09/20060906-3.html. The United States has not acted alone in making these detainees disappear. A recent report by the European Parliament concluded that many European governments cooperated, either passively or actively, in the U.S. rendition program. The report indicates that at least 1245 CIA-operated flights passed through Europe's airspace or stopped at its airports. Brian Knowlton, *Report Rejects European Denial of C.I.A. Prisons*, N.Y. TIMES, Nov. 29, 2006, at A15 (detailing European involvement).

268. Many treaties, some to which the United States is a signatory, prohibit torture and other mistreatment of detainees. Most of these are not self-executing and thus cannot be enforced in a court of law. Satterthwaite, *supra* note 13, at 1365 .

269. The treaties are discussed *id.* at 1350–79.

270. *Id.* at 1358–59.

271. A sharply divided Fourth Circuit recently held the government has the power to detain

The effect of all this territorial manipulation on individual liberty has been pronounced. Despite several Supreme Court rulings in their favor, detainees have been held for several years with minimal or no due process, limited access to counsel and other support, and subjected to indeterminate terms of isolation and confinement. Only recently has the Supreme Court directly addressed issues of constitutional scope and territoriality relating to these detentions. As noted, the ultimate effects the Court's decisions may have on the contours of the Geography of Justice are not yet clear. The political branches are proceeding with military commission proceedings, a process that may drag on for several more years.[272] And even in the event of an acquittal, it is far from certain that any former enemy combatant will actually be released.[273]

2. The Geography of Membership

As noted in Part II, geographic boundaries identify and designate sovereign territories. Sovereigns are of course entitled to regulate access to their territories and, with such access, rights to legal citizenship, membership in political communities, and access to certain benefits and privileges.[274] Governments do this by drawing and, as necessary, re-drawing territorial borders and boundaries.

The manner in which a nation exercises this territorial power speaks in some sense to its commitment to openness and opportunity.[275] Despite certain historical episodes of exclusion and expulsion, discussed earlier, the United States has generally taken great pride in the maintenance of relatively open borders. That commitment has been strained of late by controversy surrounding the presence of approximately twelve million illegal aliens within U.S. territory.[276]

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indefinitely a person lawfully resident in the United States, so long as sufficient process has been provided in determining his status as an enemy combatant. Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (en banc), *cert. granted*, 2008 WL 4326485.

272. William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19.

273. *See* Ross Tuttle, Comment, *Rigged Trials at Gitmo*, THE NATION, Mar. 10, 2008, at 4 (suggesting possibility that no acquittals would be allowed and that detainees who were victorious would not be released).

274. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (discussing political membership and territorial borders).

275. LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP (2006).

276. JEFFREY S. PASSEL, PEW HISPANIC CENTER, SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE UNITED STATES (Mar. 7, 2006), http://pewhispanic.org/reports/report.php?ReportID=61.

America has a complex and, at present, dysfunctional immigration system. Mexican and other immigrants continue to cross the border. Meanwhile, a volatile combination of economic uncertainty, racism, demagoguery, nationalism, partisanship, and legitimate concern for the rule of law has made illegal or undocumented immigration one of the most hotly contested political issues of the day. A deeply divided Congress has been able to accomplish next to nothing in terms of substantive immigration reform.[277]

This failure to produce comprehensive reform has led to reliance on more blunt forms of territoriality. The most obvious example is congressional authorization for the construction of a massive fence along the nation's 2100-mile southern border. The Secure Fence Act of 2006 authorizes construction of the border fence—more than 300 miles of which have already been built—and appropriates $1.2 billion for an array of border protection measures.[278] In addition to fence construction, the appropriated funds can also be used for vehicle barriers, lighting, and surveillance equipment (a virtual fence).[279] Whether ultimately effective or not, the border fence will certainly be a potent symbol of territorial defense and exclusion.

Although we tend to assume that legal borders are physically fixed by geography, this is not actually the case. Both federal and local laws expressly or functionally alter the location of the border. For example, by law and regulation federal immigration officials have established immigration borders *within* the United States. As Ayelet Shachar has explained, federal officials have legally shifted the location of the border, such that many aliens already within the country are treated as if they never crossed the cartographic border at all.[280] More generally, several recent changes in immigration law and policy contract and extend the border in a manner that extinguishes rights (such as due process) that

277. The most recent legislative efforts in this regard faltered. *See* Randal C. Archibold, *Bill Dies, Views Divide and Immigrants Work On*, N.Y. TIMES, June 30, 2007, at A1 (describing fallout from Senate failure to advance immigration bill).

278. Pub. L. No. 109-367, 120 Stat. 2638 (2006). According to the Department of Homeland Security, Customs and Border Control, more than half of the 670 miles of fencing were completed as of June 2008. *See* U.S. Dep't of Homeland Security, U.S. Customs and Border Protection, SBI Timeline (Nov. 10, 2008) http://www.cbp.gov/xp/cgov/border_security/sbi/about_sbi/sbi_timeline.xml. For an updated map of construction, see http://www.cbp.gov/linkhandler/cgov/newsroom/highlights/fence_map.ctt/fence_map.pdf (last visited Jan. 11, 2009).

279. *See* Randal C. Archibold, *28-Mile Virtual Fence Is Rising Along the Border*, N.Y. TIMES, June 26, 2007, at A12 (describing technological aspects of the Secure Border Initiative).

280. *See* Shachar, *supra* note 16, at 167 (referring to the "shifting border of immigration regulation") (emphasis omitted).

would normally accrue to those physically present within United States territory.[281] As Shachar notes, "the border itself has become a moving barrier, a legal construct that is not tightly fixed to territorial benchmarks."[282] In this instance, the malleability of the border imperils certain domestic individual liberties by de-spatializing them.

Congress's failure to produce a more systematic plan has also caused a proliferation of *local* territorial measures.[283] In a certain sense, this has produced another inward movement of the country's territorial borders. Increasingly, local communities are seeking to determine and adjudicate the lawfulness of presence within their own territories. According to the National Conference of State Legislatures, 240 laws relating to immigration were enacted by state legislatures in 2007—triple the number enacted in 2006.[284] Many localities across the country have also enacted immigration measures in the past few years.[285]

Many recently enacted state laws and local ordinances are somewhat reminiscent of early state exclusions of paupers, vagabonds, and other unwelcome persons. The specific use of territoriality has varied by locality. For example, some localities have threatened to enforce trespassing laws against illegal immigrants.[286] Thus, the mere presence in the community of anyone without proper documentation would be deemed a criminal offense.[287] Other localities, distressed that day laborers (many, if not most, of whom are presumed to be undocumented aliens) occupy parking lots, street corners, and other public places as they seek work, have sought to remove them through expulsion ordinances or official harassment.[288] Street corners and parking lots may not seem worthy of this sort of effort and attention. To those who gather there, however, these places are critical to pursuit of livelihood and presence in the community.[289] Indeed, expulsion from these local places makes it difficult

281. *Id.* at 169 (noting new distinction between "entry" and "admission," expedited removal procedures, and collection of biometric information).

282. *Id.* at 167. *See also* Bosniak, *supra* note 55, at 403 (noting malleability of "the border").

283. *See generally* Huntington, *supra* note 20 (examining local immigration measures and the intersection of local and federal authority in immigration context).

284. NAT'L CONFERENCE OF STATE LEGISLATURES, IMMIGRANT POLICY PROJECT, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION (2008).

285. Huntington, *supra* note 20, at 803–04.

286. *See* Belluck, *supra* note 18.

287. Commentators have noted the increased reliance on criminal justice models in addressing immigration. *See, e.g.*, Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

288. *See* Fernanda Santos, *Village Officials Harassed Day Laborers, Judge Rules*, N.Y. TIMES, Nov. 21, 2006, at B5 (invalidating policy of discriminatory treatment).

289. *See* Steven Greenhouse, *On Dusty Corner, Laborers Band Together for More Pay*, N.Y.

if not impossible for some to remain in the community at large. That, of course, may be precisely the point.

Many states and localities have adopted broader territorial measures. These laws and ordinances are designed to prevent unlawful immigrants from being present in local communities and to restrict their access to local largesse.[290] In general, these laws prohibit the employment and harboring of undocumented persons.[291] Under hundreds of recently enacted state and local ordinances, landlords found to be renting space to improperly documented aliens typically may be fined; businesses found to be hiring illegal aliens may be penalized and possibly shut down; and legal employees may sue businesses for employment lost during any shutdown.[292] These laws generally require business owners, landlords, and local officials to verify, at their substantial peril, the immigration status of all those seeking to live and work in the community.[293]

These state and local laws are efforts to address problems purportedly related to illegal immigration, including higher crime rates and lower property values. The apparent hope is that by controlling access to places like residences and workplaces, local territories will become illegal-immigrant-free zones. The nature and character of these local reforms raise the concern, however, that all aliens in the community will feel unwelcome and will perhaps be forced to move elsewhere.[294] Employers and landlords—who are hardly expert at determining immigration status—are now being called upon to make hiring and rental decisions that may disfavor aliens *as a class*. Constant official suspicion and surveillance may also inhibit even legal aliens from requesting services or appearing in public places.[295] Meanwhile, the federal government has stepped up its own immigration enforcement efforts, conducting numerous well-

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TIMES, July 14, 2006, at A1 (describing effort by day laborers to remain on corner in one community).

290. *See supra* Part II.B.4.

291. American Civil Liberties Union, Local Anti-Immigrant Ordinance Cases, http://www.aclu.org/immigrants/discrim/27848res20070105.html (last visited Nov. 22, 2008) (ACLU website collecting information on pending challenges). *See, e.g.*, Hazleton Ordinance 2006-18, *supra* note 21; Hazleton Ordinance 2006-13, *supra* note 21.

292. American Civil Liberties Union, *supra* note 291.

293. *Id.*

294. *See* Nina Bernstein, *Promise of ID Cards is Followed by Peril of Arrest for Illegal Immigrants*, N.Y. TIMES, July 23, 2007, at B1 (reporting effects of federal crackdown on immigrant community).

295. Responding to such concerns, localities like New Haven, Connecticut, have expressed a willingness to accept displaced aliens, without regard to citizenship status. Jennifer Medina, *New Haven Welcomes Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, at B1. California, meanwhile, has prohibited localities from enacting territorial defense measures like those prevalent in other states. *See* Randal C. Archibold, *State Strikes Balance on Immigration*, N.Y. TIMES, Oct. 14, 2007, at A27.

publicized raids of homes and businesses.[296] This has led to substantial disruption and fear in many communities across the United States.[297]

Aliens, of course, have no constitutional right to enter the United States. As the Supreme Court has said, "[a]dmission of aliens to the United States is a privilege granted by the sovereign."[298] The Constitution does not expressly preclude a territorial lockdown. Thus, no alien may legally challenge the general militarization of the United States border, or demand membership in the political community.[299] Nor, given the federal government's plenary power over immigration, would it appear that challenges to agency alterations of the border have any real chance of success.[300] (Of course, whether these measures are normatively attractive as aspects of the nation's immigration policy is another question.)

Recently enacted state and local immigration measures may have profound effects on the liberty of persons already present (some for many years) within the United States. The question is what sort of protection the Constitution affords to those who are subjected to these local territorial displacements.

Thus far, threats to enforce trespass laws seem to have amounted to just that—mere threats. At this point, a few courts have addressed the constitutionality of recently adopted local territorial measures. In extreme cases, aggressive efforts to sweep unlawful residents from the streets, sidewalks and parking lots have been judicially condemned. For example, a group of laborers in one New York community successfully challenged their displacement from public territories under the Equal Protection Clause.[301] Officials in that case were found to have aggressively targeted day laborers, many of them legal residents, for discriminatory treatment over the course of several months. The case is unusual in several respects, including the overwhelming evidence of systemic official harassment.[302]

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296. Steven Greenhouse, *Immigrant Crackdown Upends a Slaughterhouse's Work Force*, N.Y. TIMES, Oct. 12, 2007, at A1. Federal officials have engaged in aggressive sweeps in "sanctuary" localities, arresting and deporting illegal residents. *See* Jennifer Medina, *Arrests of 31 in U.S. Sweep Bring Fear in New Haven*, N.Y. TIMES, June 8, 2007, at B1.

297. *See* Samuel G. Freedman, *Immigrants Find Solace After Storm of Arrests*, N.Y. TIMES, July 12, 2008, at A9 (reporting disruption and fear after immigration raids and arrests).

298. United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

299. *See* Graham v. Richardson, 403 U.S. 365, 378 (1971) (regulation of aliens is "constitutionally entrusted to the Federal Government").

300. Agency measures that define or alter internal borders are discussed *infra* Part IV.C.2.

301. Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520 (S.D.N.Y. 2006) (holding that day laborers had demonstrated official campaign of police harassment).

302. *Id.* at 535–39 (describing systemic police harassment).

Subtler forms of official harassment—like frequent patrols and surveillance—are likely to go unchecked.[303]

Day laborers have also successfully invoked the First Amendment in certain limited contexts. Insofar as access to traditional public forums like sidewalks and streets are concerned, the First Amendment provides limited protection against territorial displacement.[304] Thus, for example, a Redondo Beach, California, ordinance that prohibited day laborers from soliciting work in most public places was invalidated on First Amendment grounds.[305] Many less sweeping measures, including limits on location or place as opposed to outright prohibitions, would likely survive constitutional scrutiny.

Thus, day laborers have enjoyed some limited successes in challenging local territorial displacements. But intentional and aggressive official harassment and sweeping bans on the public presence of day laborers are indeed exceptional. Contemporary territorial displacements are often far more subtle in form. In the ordinary case, courts must labor to bend and stretch the Constitution to address even something as fundamental as the right to be *present* in public places for the purposes of offering one's labor to the public.[306] The Equal Protection Clause and the First Amendment are rather unwieldy tools for combating these and other local territorial displacements.

More comprehensive local territorial reforms, including those that regulate employment of aliens, were recently called into question after a federal district court invalidated several Hazleton, Pennsylvania, ordinances.[307] In the closely watched case, the court held that Hazleton's housing and employment ordinances were preempted by federal laws.[308]

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303. As well, unofficial acts of hostility as well as attitudes of neighbors and community members may establish territorial controls beyond the reach of the Constitution and laws.

304. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983) (describing standards for determining whether government has unconstitutionally excluded a speaker from a forum).

305. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952, 966 (C.D. Cal. 2006) (invalidating ordinance banning street and sidewalk solicitation by day laborers on First Amendment grounds).

306. Moreover, these few reported victories mask some rather significant practical concerns. It is a particularly heavy burden for those with little means, little or no knowledge regarding the local justice system, and a general (and understandable) wariness of local authorities to challenge these sorts of territorial measures in the courts. In many cases, simply moving to another territory may be a far more attractive alternative.

307. Lozano v. City of Hazleton, 496 F. Supp. 2d 477 (M.D. Pa. 2007). *See* Julia Preston, *Judge Voids Ordinances on Illegal Immigrants*, N.Y. TIMES, July 27, 2007, at A14 (describing decision as a "resounding legal blow" to local efforts to regulate immigration).

308. *See Lozano*, 496 F. Supp. 2d at 519, 523, 529. For an analysis of preemption doctrine, see generally Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000).

The court also held that the ordinances failed to provide employers, employees, and landlords with adequate notice and opportunity for hearing prior to deprivation of their respective interests, in violation of the Due Process Clause.[309] Specifically, the court held that the ordinances were vague with regard to what sort of documentation an employer or landlord must review, and an employee must provide, in order to comply with the law.[310]

While it may appear to be a serious blow to local efforts to create undocumented-free zones, the *Hazleton* decision does not actually extend substantial constitutional protection to undocumented aliens in local communities. Although the district court noted on several occasions that illegal aliens were not stripped of *all* constitutional protections,[311] this merely establishes constitutional jurisdiction; it does not establish the scope or substance of any liberties aliens might possess.[312] The *Hazleton* decision rests primarily upon structural principles of preemption and federalism, rather than substantive liberty guarantees. Other courts, including the Supreme Court, may of course take a different view of the preemptive scope of federal employment and housing laws.[313] Congress could also amend federal laws to provide localities with the necessary authority to address local employment and housing issues. As more and more immigration control devolves to the states, this is not as unlikely as it may once have seemed.[314] As well, federal immigration enforcement raids may have the same general effect as laws like Hazleton's—to flush out undocumented employees. Finally, insofar as the *Hazleton* decision rests on individual due process rights, the procedural infirmities identified by the court can easily be remedied.[315]

Ultimately, nothing in the *Hazleton* court's decision suggests that undocumented aliens have any right to be free from discriminatory

309. *Lozano*, 496 F. Supp. 2d at 536, 538.

310. *Id.* at 536.

311. *Id.* at 498–99, 514, 534.

312. *See* Plyler v. Doe, 457 U.S. 202, 215–16 (1982) (noting fact that illegal aliens could claim the benefit of the Equal Protection Clause did not establish whether clause had in fact been violated).

313. *See* De Canas v. Bica, 424 U.S. 351 (1976) (upholding state law regulating employment of illegal aliens).

314. *See* Huntington, *supra* note 20 (discussing federalism aspects of immigration law); *see also* Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, *in* IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE (Ariane d'Appollonia & Simon Reich eds., 2008).

315. This assumes that other courts will agree that illegal aliens have protected property interests in employment and rental properties. Although none of the cases relied upon by the district court involved rights of *undocumented* aliens, the court held that even illegal aliens have protected interests in their employment and rental agreements. *Lozano*, 496 F. Supp. 2d at 533–34, 537–38.

enforcement measures, to avoid the stigma of disparately harmful laws, or otherwise to remain in a territory in which they are simply not wanted. Indeed, rejecting an equal protection challenge to the Hazleton ordinances, the district court held that the measures were "rationally related to the aim of limiting the social and public safety problems caused by the presence of people without legal authorization in the City."[316] Under the deferential rational basis standard, the city was not required to actually demonstrate any such effects—merely to allege them. Although immigrants won an important victory in the *Hazleton* case, courts in other jurisdictions have subsequently upheld similar measures aimed at punishing employers and property owners who extend offers of employment or residence to undocumented persons.[317] Aliens thus cannot necessarily rely upon the Constitution's structural division of authority or individual rights provisions to combat local displacements.

The Geography of Membership is dynamic and is still taking shape. Unlike (most) enemy aliens, undocumented immigrants already reside within the physical territory of the United States. Unable to prevent their migration entirely, federal and local officials will likely continue to manipulate and regulate the territorial borders to effectuate exclusions and expulsions.[318] Absent comprehensive reform, it is likely that a patchwork Geography of Membership will continue to develop across the country. Federal and local efforts to roust undocumented aliens from places of employment, residences, and public spaces will continue in many jurisdictions, with the Constitution barring only the most aggressive and harassing federal and local initiatives. Ultimately, many immigrants—both documented and undocumented—will either be displaced to sanctuary localities with less restrictive laws, or be forced to leave the country (in many cases after lengthy prison terms).

3. The Geography of Punishment

As reviled as suspected terrorists and undocumented aliens may be, today the group subject to the greatest public opprobrium—and perhaps the most substantial territorial and constitutional displacement—is

316. *Id.* at 542. Plaintiffs contended that the crime rate had actually *fallen* since immigrants began arriving in Hazleton. *Id.* at 542 n.69.

317. Julia Preston, *In Reversal, Courts Uphold Local Immigration Laws*, N.Y. TIMES, Feb. 10, 2008, at A22.

318. *See generally* Shachar, *supra* note 16 (noting the dynamism and recent reshaping of U.S. territorial borders).

released sex offenders.[319] Numerous states, cities, towns, and other local communities have recently imposed strict territorial controls on such persons in the name of public safety and health. These laws, which resemble early state exclusionary measures targeting convicted criminals, generally establish sex offender-free zones within states and localities.[320] Combined with certain less systematic displacements, discussed below, these laws are creating a new Geography of Punishment.[321]

More than twenty states and hundreds of localities have recently adopted laws that prohibit convicted sex offenders from living, working, or even being present within a specified distance of various "anchor points"—schools, school bus stops, churches, playgrounds, day care centers, camps, parks, libraries, public swimming pools, gymnasiums, video arcades, theaters, convenience stores, and other places.[322] The laws impose spatial restrictions of various sizes and dimensions. Sex offender-free zones typically extend from 500 feet to 3000 feet beyond the designated public facilities, with many states opting for a 1000-foot buffer zone.[323] A few states and localities have adopted a tiered approach under which high-risk offenders cannot live within 3000 feet of most anchor points, moderate-risk individuals cannot live with 2500 feet of such places, and low-risk offenders are subject to a 1000-foot exclusion zone.[324] In most states and localities, violation of the applicable zoning restrictions constitutes a felony.[325]

The sex offender exclusion zones can produce severe physical and territorial displacements.[326] Under the terms of some zoning measures, an

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319. *See* ADAM SAMPSON, ACTS OF ABUSE: SEX OFFENDERS AND THE CRIMINAL JUSTICE SYSTEM 124 (1994) (noting public hatred of sex offenders).

320. *See* Logan, *supra* note 23, at 5–13 (describing residency exclusion laws). The sex offender exclusion laws are just one aspect of an extensive regulatory system for sex offenders. *See generally* ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE (2006) (describing post-release sex offender restrictions).

321. Such laws are tolerated, in part, because they are not considered penal under constitutional standards. They are not, for example, considered by courts to be unconstitutional ex post facto punishments. Even if that is technically so, there is still a significant sense in which these laws punish convicted sex offenders by effectively displacing them from their homes and communities.

322. Logan, *supra* note 23, at 7.

323. *Id.*

324. *Id.*

325. Many of these laws and ordinances exclude sex offenders regardless of the specific circumstances of their crimes. *Id.* at 8.

326. Scholars have observed a similar phenomenon with regard to other convicted offenders. Beckett and Herbert have studied the use of off-limits laws and orders, including Stay Out of Drug Area (SODA) orders. Their data indicate that persons convicted of drug and prostitution offenses can be banned from large portions of cities under these orders. Beckett & Herbert, *supra* note 32, at 13–14. The use of geographic exclusions has increased markedly in some cities. *See id.* at 15 (noting increase

offender is excluded or banished from entire cities—and in certain instances sizeable portions of entire states.[327] In many instances, there is no individualized process for challenging one's status and consequent displacement.[328] Sex offender residency exclusion zones make it difficult or impossible for released offenders to remain in the community of their choice.

In practical effect, sex offender exclusion laws may force offenders to live in remote areas with sparse populations, to cluster in certain neighborhoods, or simply to leave the state altogether. The most restrictive of these laws impose a form of modern-day banishment or "internal exile" through territoriality.[329] The effects of such displacements have been quite severe for some released offenders. For example, a Miami-Dade County, Florida, exclusion law at one point forced five convicted sex offenders to live (with the county's express permission) under a highway bridge.[330]

Although they are the most comprehensive, territorial exclusion zones are not the only measures that have been implemented to control the presence, mobility, and behavior of sex offenders. For example, one town proposed housing sex offenders on a boat docked in a local marina.[331] Suffolk County, New York, officials at one point announced plans to put sex offenders in trailers that would then be moved about the county.[332] The trailers were to be parked for several weeks at a time on public lands, some distance from residential areas. Not surprisingly, many local politicians were concerned about having these mobile sex offender trailers parked in their districts.[333]

In addition, some courts have imposed territorial exclusions in individual criminal cases—either as punishment or as a condition of parole.[334] Offenders have been ordered to stay out of a particular territory for as many as a dozen years.[335] Local governmental officials have imposed other unique territorial exclusions. For example, local parks

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in Seattle drug cases of geographic conditions in probation cases—from 7.1% in 2001 to 30.1% in 2005).

327. *See* Doe v. Miller, 405 F.3d 700, 706–07 (8th Cir. 2005) (describing effects of Iowa law).

328. Logan, *supra* note 23, at 14 (discussing lack of individual determination of dangerousness under Iowa exclusion law).

329. Yung, *supra* note 22, at 111 (describing effect of sex offender exclusions as "internal exile").

330. *Sex Offenders Living Under Miami Bridge*, N.Y. TIMES, Apr. 8, 2007, at A22.

331. Kilgannon, *supra* note 26.

332. *Id.*

333. *Id.*

334. *See* Vesna Jaksic, *A New Type of Sentence for Criminal Offenders: Exile*, NAT'L L.J., Dec. 10, 2007, *available at* http://www.nlj.com (noting recent increase in "banishment" or "exile" sentences).

335. *Id.*

officials in Lafayette, Indiana, banished a convicted sex offender *for life* from all city park properties, including community schools, city parks, golf courses, swimming pools, and sports stadiums.[336]

The use of territory to control released sex offenders is part of a broader trend involving the spatialization of crime control.[337] Prostitution-free zones, gang-free zones, and drug dealer-free zones are also part of the developing Geography of Punishment.[338] As noted earlier, many contemporary territorial measures are deeply rooted in early state laws excluding and displacing vagabonds, paupers, and other unwanted persons in an effort to purify urban spaces.[339]

Although sex offender exclusion measures implicate a seemingly impressive array of constitutional provisions, to date they have proven mostly impervious to constitutional challenge.[340] *Doe v. Miller*[341] is the lead case involving the constitutionality of sex offender exclusion zones.[342] *Doe* upheld an Iowa statute that prohibited convicted sex offenders from residing within two thousand feet of any school or child-care facility.[343] According to the lower court's findings, the Iowa law severely limited the places where convicted offenders could legally reside.[344] Released offenders were excluded from Des Moines and Iowa City, the two largest cities in the state.[345] They were also excluded from many smaller towns and cities.[346] Indeed, according to the district court,

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336. *See* Doe v. City of Lafayette, 377 F.3d 757 (7th Cir. 2004) (upholding order).

337. Logan, *supra* note 23, at 11; *see also* Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (examining various methods by which territory and architecture control crime).

338. Terence R. Boga, Note, *Turf Wars: Street Gangs, Local Governments, and the Battle for Public Space*, 29 HARV. C.R.-C.L. L. REV. 477 (1994); Peter M. Flanagan, Note, *Trespass-Zoning: Ensuring Neighborhoods a Safer Future by Excluding Those with a Criminal Past*, 79 NOTRE DAME L. REV. 327 (2003); Sandra L. Moser, Comment, *Anti-Prostitution Zones: Justifications for Abolition*, 91 J. CRIM. L. & CRIMINOLOGY 1101 (2001); Robert L. Scharff, Note, *An Analysis of Municipal Drug and Prostitution Exclusion Zones*, 15 GEO. MASON U. CIV. RTS. L.J. 321 (2005).

339. For an analysis of new forms of social control in urban places, including territorial exclusions of persons convicted of drug or prostitution offenses, see Beckett & Herbert, *supra* note 32, at 13–15.

340. Several state appellate courts have upheld sex offender exclusion laws. *See* Boyd v. State, 960 So. 2d 722 (Ala. 2006); ACLU of New Mexico v. City of Albuquerque, 2006-NMCA-078, 139 N.M. 761, 137 P.3d 1215 (N.M. Ct. App. 2006); Nasal v. Dover, 169 Ohio App. 3d 262, 2005-Ohio-5584, 862 N.E.2d 571 (Ohio Ct. App. 2006).

341. 405 F.3d 700 (8th Cir. 2005).

342. The Eighth Circuit applied the same analysis to Arkansas's sex offender exclusion law in *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006).

343. *Miller*, 405 F.3d at 704–05.

344. *See id.* at 706–07 (discussing lower court findings with regard to the law's displacing effects).

345. Doe v. Miller, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004), *rev'd*, 405 F.3d 700 (8th Cir. 2005).

346. *Id.*

offenders were essentially relegated to isolated rural or industrial areas within the state.[347] Even in zones within the state that were not affected by the exclusion law, moreover, released offenders were not guaranteed available and affordable housing.[348]

Plaintiffs pursued a host of constitutional claims, all of which were rejected. The Eighth Circuit held that the exclusion law was not unconstitutionally vague, even though it was difficult to identify the location of schools and child care facilities in many of the state's communities.[349] Nor, according to the court, were plaintiffs entitled to any sort of individualized determination of dangerousness prior to the residency exclusion going into effect.[350] Under the Due Process Clause, the Iowa legislature was required to draw only a rational classification; the court was satisfied it had done so.[351]

Adopting a narrow view of the Supreme Court's precedents involving rights to associate with family members,[352] the court held that the Iowa law did not "directly regulate the family relationship or prevent any family member from residing with a sex offender in a residence that is consistent with the statute."[353] If the offender was forced to move to a rural area, the court reasoned that the family unit could be preserved intact by having other family members move as well.[354]

The court also rejected plaintiffs' arguments that the residency exclusion law violated rights to interstate travel or intrastate movement.[355] Sex offenders from outside the state, the court reasoned, were still free to move into Iowa so long as they abided by the residency exclusion.[356] With regard to barriers to *intrastate* movement, the Eighth Circuit correctly noted that the Supreme Court has not expressly recognized any fundamental right to travel within a state.[357] Although the court acknowledged that some circuits had indeed recognized such a right, it did not reach the question.[358] It was sufficient, said the court, that the Iowa

347. *Id.*

348. *See Miller*, 405 F.3d at 724 (Melloy, J., concurring and dissenting) (noting that unrestricted areas in Des Moines included "some of the city's newest and most expensive neighborhoods").

349. *Id.* at 708 (majority opinion).

350. *Id.* at 709.

351. *Id.*

352. *See id.* at 709–10 (discussing fundamental privacy rights).

353. *Id.* at 711.

354. *Id.*

355. *Id.* at 711–13.

356. *Id.* at 712.

357. *Id.*

358. *See id.* at 712–13 (discussing sister circuit rulings on right to intrastate travel).

residency exclusion imposed no *direct* barrier to intrastate movement—even within the exclusion zones.[359]

Noting the Supreme Court's reluctance to interpret substantive due process expansively, the court summarily dismissed the argument that plaintiffs possessed a fundamental right to "live where [they] want."[360] The court also held that the Iowa residency exclusions did not impose a retroactive punishment for offenses committed prior to the law's enactment in violation of the Ex Post Facto Clause.[361] It specifically rejected the contention that the residency exclusion law was a form of "banishment" or punitive expulsion from the community.[362] The court reasoned that the Iowa residency exclusion merely affected where an offender could reside *within* the zones; it did not banish or expel him from any excluded area.

Less systematic, but no less burdensome, displacements on sex offenders have also been upheld. In *Doe v. City of Lafayette*,[363] for example, the Seventh Circuit, sitting en banc, upheld an administrative parks department order that excluded a convicted sex offender permanently from all city park properties.[364] The territory covered by the ban was substantial; it included a golf course, a zoo, a sports stadium, city pools, and several public parks.[365] Doe was convicted of violating the order when he appeared at a public park and entertained "thoughts" about sexual contact with a group of older children there.[366]

Doe brought several constitutional challenges to the order, all of which the Seventh Circuit rejected. Regarding his First Amendment claims, the court noted that Doe had not engaged in any expressive activity and was not using the parks for expressive purposes.[367] Even if Doe had engaged in some form of expression, the court alternatively held, such expression constituted "incitement" and/or "obscenity," and was thus not protected by the First Amendment.[368] The court also rejected Doe's argument that the

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359. *Id.* at 713.

360. *Id.* at 713–14.

361. *See* U.S. CONST. art. I, § 10; *Miller*, 405 F.3d at 723. The court also rejected plaintiffs' argument that the law violated their Fifth Amendment right against self-incrimination. *See id.* at 716.

362. *Id.* at 719–20. On the analogy between residency exclusion laws and banishment, see generally Yung, *supra* note 22.

363. 377 F.3d 757 (7th Cir. 2004).

364. *Id.* at 774.

365. *Id.* at 760 & n.1. The order was entered without any notice whatever to Doe, and without any opportunity for him to contest it. Doe did not challenge the order on procedural due process grounds.

366. *Id.* at 760 (noting that Doe testified that although he was having sexual urges toward children the night he went to the park, "[t]hey were just thoughts").

367. *Id.* at 763–64.

368. *Id.* at 764 n.7. These holdings are simply unsupportable on the facts. Doe had not displayed

order violated the First Amendment by excluding him from public places based solely on his private thoughts or beliefs[369] (although in doing so it made repeated references to Doe's status as a convicted sex offender and his apparent intention to interact with children at the park).[370]

The Seventh Circuit also rejected Doe's claim that the exclusion order violated his right to intrastate movement or travel. The court concluded that Doe was minimally burdened in terms of movement, as he was free to roam the community so long as he avoided all of the proscribed areas.[371] Finally, the court refused to recognize any fundamental right to enter the park properties simply to loiter or for other innocent purposes.[372] The right to be present in a public park was not, said the court, "implicit in the concept of ordered liberty."[373] Finally, the court stated that the right to be present in public places was not fundamental to Doe's "personhood."[374]

Released sex offenders have had some limited success challenging exclusion laws. For example, the Georgia Supreme Court recently invalidated that state's sex offender residency exclusion law, which required that a registered sex offender move from his home or business any time a school, child care facility, or other anchor place was located within 1000 feet of the home or business.[375] Under the law, offenders were forced to move from their homes even if a protected facility such as a daycare moved within a specified distance of the home long after the offender had taken up residence there.[376] The court held that this form of territorial banishment amounted to an uncompensated regulatory taking in violation of the Fifth Amendment.[377] It reasoned that the residency-

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any obscene or child pornography materials and was not engaged in any obscene conduct. *See* Osborne v. Ohio, 495 U.S. 103 (1990). Nor did he incite imminent lawless action of any kind. In fact, he did not even *speak* to anyone. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (requiring advocacy of lawless action and likelihood it will occur).

369. *City of Lafayette*, 377 F.3d at 765–67.

370. *Id.* at 758, 762, 763–64.

371. *Id.* at 770–71.

372. *Id.* Although no such right was claimed, the court first rejected any right "to enter parks to prey on children." *Id.* at 770 n.11.

373. *Id.* at 770 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)). The Court rejected Doe's claim that he had a fundamental right to be in public for the purpose of loitering or loafing. *But see* City of Chicago v. Morales, 527 U.S. 41, 53 (1999) (plurality opinion) (noting that freedom to loiter is protected by the Due Process Clause of the Fourteenth Amendment).

374. *City of Lafayette*, 377 F.3d at 771. The court oddly reasoned that Doe's claimed right to be present in the public parks could hardly be "fundamental," given that he had last exercised it a decade or so prior to the order. *Id.* The court did not cite any authority for the proposition that one waives a liberty interest by failing to frequently exercise it. *Id.*

375. Mann v. Georgia Dep't of Corr., 653 S.E.2d 740, 741 (Ga. 2007).

376. *Id.* at 742.

377. *Id.* at 745.

exclusion law acted as a physical ouster of plaintiff from his residence, extinguishing any investment-backed expectations.[378] Of course, a ruling based on the Takings Clause does not prevent the state from enforcing its exclusion law and ousting the property owner in pursuit of some public purpose; the Takings Clause is a liability rule that merely requires the government pay fair market value for the property.

Other territorial displacements of released sex offenders have not yet been challenged in the courts. It is not clear, for example, whether a county or municipality may confine sex offenders to houseboats or traveling mobile homes.[379] Nor do we know whether the Miami-Dade County law, which effectively forced offenders to live under a bridge, meets constitutional requirements.[380] With the exception of the somewhat anomalous and unique takings decision by the Georgia Supreme Court, however, precedent strongly suggests that extensive territorial displacements can be imposed upon sex offenders consistent with present interpretations of constitutional liberty. Internal exile is thus a very attractive option for policy makers faced with a population of released sex offenders.

Sex offenders remain vulnerable to serious territorial and constitutional displacements. In addition to public laws enforcing territorial exclusions, some courts have also upheld private property arrangements like restrictive covenants, which similarly operate to exclude convicted offenders from entire communities.[381] People convicted of a range of sex offenses may find it difficult indeed to choose their own place.

4. The Geography of Purification

Like the local immigration and sex offender-exclusion laws, contemporary efforts to purify public places by displacing or removing convicted drug offenders, the homeless, and other marginalized persons are also deeply rooted in our nation's history.[382] During the past two decades or so, a distinct Geography of Purification has developed in urban areas across America.[383] This legal geography is grounded in urban

378. *Id.* at 744.

379. *See* Kilgannon, *supra* note 26.

380. *See Sex Offenders Living Under Miami Bridge*, *supra* note 24.

381. *See* Mulligan v. Panther Valley Prop. Owners Ass'n, 766 A.2d 1186, 1192 (N.J. Super. Ct. App. Div. 2001) (upholding restrictive covenant barring sale to convicted sex offender).

382. *See generally* Simon, *supra* note 190 (discussing history of homelessness measures).

383. *See* Beckett & Herbert, *supra* note 32, at 5 ("[I]t is clear that municipal governments across the United States are implementing new legal tools aimed at cleaning up contested urban spaces.").

management principles and sociological theories which generally hold that controlling social disorder requires first controlling public places and territories.[384]

Territoriality lies at the heart of many recent urban purification efforts.[385] Some urban officials have relied upon concentration of the homeless in particular geographic areas like "Skid Rows."[386] These are merely quasi-territorial measures, however, since the homeless are not technically required to stay there. The principal territorial strategies, commonly pursued since the early 1990s, have been spatial dispersal and exclusion of the homeless and other unwanted populations from public places.[387] In particular, public officials have imposed various limitations on where the destitute, homeless, and other marginalized persons can legally be, and what they can do in places they are permitted to occupy.[388]

As homelessness, in particular, has persisted in many cities, officials have resorted to measures that ban and criminalize activities like sleeping, loitering, erecting structures, and asking for alms in public places.[389] These measures became particularly prevalent in the early 1990s, as cities began to address what many then felt was intolerable disorder in public places.[390] Public officials like then-mayor Rudolph Giuliani of New York City implemented policies based on the "broken windows" theory of public order.[391] The approach, advanced in a 1982 article in *The Atlantic Monthly* by James Q. Wilson and George L. Kelling, was based on the premise that disorder and crime were inextricably linked.[392] If a window in a building is not repaired, the basic theory holds, soon all of the windows in that building will be broken. And there goes the neighborhood.

By analogy and extension, homeless persons, vagrants, and other marginalized individuals have been treated as broken windows. Controlling their location has become a critical strategy for preserving the safety and aesthetics of local neighborhood territories. As a result, begging

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384. *See* Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1 (2004) (discussing approaches to imposing order in urban spaces).

385. *See generally* Ellickson, *supra* note 30 (examining use of public places by the homelessness).

386. *Id.* at 1202; *see id.* at 1202–09 (describing origination and use of Skid Rows in urban areas).

387. Beckett & Herbert, *supra* note 32, at 8–10.

388. *Id.* at 10–16 (describing recent innovations in urban social control, including use of trespass laws and "off limits" orders).

389. *Id.* at 8–9 (describing use of "broken windows" policing and civility laws).

390. *See* Ellickson, *supra* note 30, at 1167 (noting increased disorderliness by early 1990s).

391. *See* Mike Allen, *Crackdown Turns the Village Quiet but Wary*, N.Y. TIMES, Apr. 27, 1998, at A1 (discussing then-Mayor Giuliani's focus on quality-of-life crimes and its repercussions).

392. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC MONTHLY, Mar. 1982, 29–31. *See generally* KELLING & COLES, *supra* note 31.

and other public acts by the homeless are treated as symptoms of public disorder and public nuisance.[393] To make communities and local territories safer and more palatable to the general public, beggars and other purportedly disruptive persons have often been systematically removed from certain locations.[394] In some cities, ordinances prohibiting trespassing, loitering in certain public places, interference with pedestrian traffic, vagrancy, and disorderly conduct have been enforced in such a manner that the homeless are simply removed from certain territories altogether.[395] In addition, territorial sweeps, innovative and aggressive use of trespass laws, enforcement of broad exclusion laws in public parks, and even changes to physical places and architectures have effectively created homeless-free zones in many cities.[396]

One of the most common measures relied upon to regulate the homeless has been the adoption and enforcement of begging-free zones. Many local laws and ordinances ban appeals for assistance in various public areas including beaches, sidewalks near banks and sports stadiums, public places near tourist attractions, and areas near sidewalk cafes.[397] Some states and localities have enacted blanket bans prohibiting begging in all public places.[398] Some states adhere to a common law rule that prohibits begging in any public place by any person who is "able to work."[399] Still other state and local laws prohibit "loitering for the purpose of begging" in any public place.[400] Other measures prohibit "aggressive"

393. *See* Beckett & Herbert, *supra* note 32, at 9 (noting prevalence of laws restricting "sitting or lying on sidewalks or in bus shelters, sleeping in parks and other public spaces, placing one's personal possessions on public property for more than a short period of time, camping, urinating or drinking in public, selling newspapers and other written materials in public spaces, and begging.").

394. *See generally* DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003).

395. *See* Beckett & Herbert, *supra* note 32, at 10–16 (describing effects of exclusionary laws).

396. *See id.* at 10–13 (discussing trespass and parks exclusion laws); *see also* MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES 235 (1990) (describing the "bum-proof" bench and other socio-spatial strategies used by Los Angeles officials). For a sociological account of how these limits are experienced, see MITCHELL DUNEIER, SIDEWALK (1999).

397. *See* Tracy A. Bateman, Annotation, *Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons*, 7 A.L.R. 5TH 455 (2006); *see also* NAT'L LAW CENTER ON HOMELESSNESS AND POVERTY, PUNISHING POVERTY: THE CRIMINALIZATION OF HOMELESSNESS, LITIGATION, AND RECOMMENDATIONS FOR SOLUTIONS (May 2003), http://www.nlchp.org/content/pubs/Punishing%20Poverty.pdf [hereinafter PUNISHING POVERTY]. The First Amendment implications of anti-begging laws are discussed in Helen Hershkoff & Adam S. Cohen, Commentary, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991).

398. Laws and ordinances relating to homelessness are described in Bateman, *supra* note 397, § 2.

399. *Id.*

400. *Id.*

panhandling, which generally consists of following, harassing, or accosting others while making an appeal for assistance.[401]

In some cities with increasing homeless populations, even these territorial measures have not been deemed adequately purifying. Responding to decades of frustration with an intractable homeless problem, Los Angeles officials enacted an ordinance described by a federal judge as "one of the most restrictive municipal laws regulating public spaces in the United States."[402] Section 41.18(d) of the Los Angeles Municipal Code provided: "No person shall sit, lie or sleep in or upon any street, sidewalk or other public way."[403] Violations of the ordinance were punishable by a fine of up to $1000 and/or imprisonment of up to six months.[404] Public order laws typically limit infractions to situations in which the person actually obstructs a public way or engages in proscribed conduct during certain hours of the day.[405] The Los Angeles ordinance was different, in part because it contained no such restrictions.[406] Given its breadth, the ordinance effectively criminalized the *public presence* of thousands of homeless persons within the territory of Los Angeles.

Localities continue to experiment with new ways to purify public places. Some have even criminalized *feeding* the homeless in certain public places, including parks. According to one advocate for the homeless, a Las Vegas ordinance makes it illegal "to offer so much as a biscuit to a poor person in a city park."[407] Other localities have enacted laws which limit the time, place, and manner of distributing meals to the homeless.[408] Officials have indicated that they are concerned that congregating homeless populations will undermine expensive efforts to beautify public spaces.[409] They also maintain that the intent of the laws is to encourage the homeless to visit social service organizations, rather than receive assistance in public areas.[410] The effect in some localities, however, is to displace the homeless from places in which they regularly gather and receive basic assistance.

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401. *Id.* § 3(b).
402. Jones v. City of Los Angeles, 444 F.3d 1118, 1123 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).
403. L.A., CAL., MUNICIPAL CODE ch. IV, art. 1, § 41.18(d) (2005).
404. *Id.*
405. *See Jones*, 444 F.3d at 1123 (describing laws in other jurisdictions).
406. *Id.*
407. Archibold, *supra* note 34.
408. *Id.*
409. *Id.*
410. *Id.*

What constitutional protection exists against these various forms of territorial purification? In light of the First Amendment, one might at least assume that the right of the homeless and other destitute persons to be in public places for the purpose of communicating with the public must be protected. Even this liberty, however, is far from certain. The primary message the homeless appear to be communicating is one of destitution and helplessness.[411] Whether begging actually constitutes a form of protected expression has not been definitively answered. Some argue that panhandling is more akin to conduct constituting a public nuisance than expression.[412] Others claim that begging is expression that lies at the core of several First Amendment concerns and values.[413] Although the Supreme Court has recognized that organized charities enjoy expressive liberties, it has not yet opined on individual begging.[414] Lower courts have disagreed regarding whether begging is entitled to First Amendment protection.[415]

Even if panhandling or begging cannot be flatly banned, most beggar-free zones are likely to satisfy the First Amendment. Targeted beach areas, spaces near sidewalk cafes and banks, public spaces near monuments, and other public places can often be purified consistent with current First Amendment standards. Under the time, place, and manner standard, localities can readily justify these measures as being related to public order and safety. So long as they constitute reasonably tailored regulations, courts are likely to uphold limited begging-free zones.[416]

What of stricter purification enactments that ban sustenance activities like sleeping or resting in public places? Of course, no one has an absolute constitutional right to be in any particular public place or territory for any purpose. The Constitution does, however, impose minimal limits on the power of government to displace persons from public areas based solely upon their status. The Eighth Amendment's Cruel and Unusual Punishments Clause has been interpreted to substantively limit what

411. *See* Hershkoff & Cohen, *supra* note 397, at 913 (discussing message of panhandling).

412. *See, e.g.*, Ellickson, *supra* note 30, at 1179–84 (discussing "chronic" panhandling).

413. *See* Hershkoff & Cohen, *supra* note 397, at 913–15.

414. *See* Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc., 487 U.S. 781 (1988); Sec'y of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984); Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

415. *See* Hershkoff & Cohen, *supra* note 397, at 897 n.6 (discussing cases). The Second Circuit has actually taken both sides of this issue. *Compare* Young v. New York City Transit Auth., 903 F.2d 146, 156 (2d Cir. 1990) (describing begging as more conduct than speech and "a menace to the common good"), *with* Loper v. New York City Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (treating begging as protected expression).

416. *See* Ward v. Rock Against Racism, 491 U.S. 781, 794 (1989) (noting that under the time, place, and manner doctrine, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity.").

governments may criminalize.[417] Specifically, the clause prohibits criminalization of conditions like disease, mental illness, or addiction.[418] Such "status" punishments are considered "cruel and unusual" under the Eighth Amendment because they penalize involuntary conditions rather than voluntary conduct. Voluntary actions, by contrast, can be criminalized. Thus, although alcoholism itself cannot be criminalized, the act of appearing in certain public places intoxicated can be punished.[419] In sum, a person can be displaced—jailed, fined, or excluded—based upon what she does but not solely for who she is.

Homelessness is somewhat problematic under this constitutional rubric. For one thing, there is disagreement regarding whether "the homeless" is even an accurate descriptor of any discrete population.[420] Moreover, some are not convinced that homelessness is in fact a wholly involuntary status.[421] Regardless, insofar as efforts to purify public places are concerned, governments may certainly regulate certain public acts engaged in by the homeless or those living on the streets. With regard to some such conduct—bathing, urinating, sleeping, and storing possessions—the truly homeless of course have no alternative place.[422] An outright ban on any of these things is thus tantamount to a ban on public presence. In other words, there is a point at which the distinction between status and conduct seems ultimately to disappear.

Notwithstanding the stark reality of laws criminalizing public presence and sustenance activities, some localities have successfully defended rather broad territorial displacements against Eighth Amendment challenges.[423] According to the Ninth Circuit, however, Los Angeles simply went too far with its ordinance, described above, prohibiting homeless persons from simply being in certain public places.[424] The court

417. U.S. CONST. amend. VIII.

418. *See* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that status of drug addict could not be basis for criminal conviction).

419. *See* Powell v. Texas, 392 U.S. 514, 533 (1968) (plurality opinion) (upholding conviction for public drunkenness).

420. *See* Ellickson, *supra* note 30, at 1191–94 (distinguishing between the truly "homeless" and "street people").

421. *See id.* at 1187 (disagreeing that the destitute generally lack choices with regard to where to eat and sleep, and stating that begging "is an option, not an inevitability").

422. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 311 (1991).

423. *See, e.g.*, Joyce v. City & County of San Francisco, 846 F. Supp. 843, 851–53 (N.D. Cal. 1994) (denying injunction with respect to enforcement of comprehensive homelessness program on Eighth Amendment grounds). *But see* Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (holding that arresting homeless for harmless, *involuntary* conduct violates Eighth Amendment).

424. *See supra* notes 402–06 and accompanying text.

invalidated the ordinance on the ground that it punished the "status" of being homeless in violation of the Eighth Amendment.[425]

A careful reading of the Ninth Circuit's opinion, however, shows that the homeless have no protected "right to the city."[426] First, the Ninth Circuit emphasized the plaintiffs' "substantial showing" that they simply had no choice but to be on the streets owing to a lack of shelter beds.[427] Presumably, had shelter been available at the time of enforcement, and had plaintiffs failed to avail themselves of it, their displacement from public areas would have been constitutional. Thus, under the court's interpretation, a person's choice to remain on the streets rather than go to a shelter receives no constitutional protection.

Second, what little protection the Ninth Circuit granted homeless persons to choose their own place may well lack solid support under controlling Eighth Amendment precedents. The Supreme Court has never held that conduct *derivative* of a person's status cannot be criminalized.[428] As noted above, a person may be rendered homeless owing to a host of circumstances that have nothing to do with an involuntary condition. Additionally, part of what creates the condition in the first place is government's failure to provide the necessary shelter. The Constitution, however, does not generally provide any remedy for the government's failure to provide a benefit. Finally, homelessness is different from other conditions in that it may afflict a person intermittently. Those who are not permanently homeless may not qualify for protection under the Supreme Court's status/conduct distinction. In sum, the Cruel and Unusual Punishments Clause does not provide any clear or robust protection for a right to be present in a public place.

The most recent purification measures—those banning the feeding of indigent and homeless persons in public places—have not yet been fully tested in the courts. Classifications based upon indigence are subject to mere rationality review.[429] As noted earlier, local officials argue that public order and health are best maintained when the homeless are served at facilities that offer more structured assistance—a purpose that generally would meet the deferential rationality standard. Some of the feeding laws

425. Jones v. City of Los Angeles, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).

426. MITCHELL, *supra* note 394.

427. *Jones*, 444 F.3d at 1136.

428. *See, e.g.*, *Joyce*, 846 F. Supp. at 855–57 (rejecting view that precedents protect acts "derivative" of homeless status).

429. *See* Maher v. Roe, 432 U.S. 464, 478 (1977) (upholding denial of Medicaid funds for two indigent women's elective, non-therapeutic abortions under rational basis).

do not define "indigence" with sufficient specificity, which may leave the measures vulnerable to vagueness and other procedural challenges. The feeding bans also raise associational, assembly, and speech concerns. Assuming, however, that the definitional and coverage issues can be resolved, limits on the number of persons who may be fed, the specific location of the charitable activity, or the time of day in which it may take place may well be upheld against First Amendment and other constitutional challenges.

The public presence and activities of homeless, destitute, and other marginalized persons are inconsistent with a vision of the purified public square. These individuals presently occupy precarious constitutional ground. The Constitution permits their substantial territorial displacement, subject to certain outer boundaries: a First Amendment concept of "expression" that may or may not include begging for assistance in public; an amorphous status/conduct distinction under the Eighth Amendment's Cruel and Unusual Punishments Clause; and a less than robust liberty to receive charity in the public places of their choosing.

5. The Geography of Contagion

As noted in Part II, outbreaks of disease have historically given rise to territorial restrictions. Although there have been extraordinary medical advances in the twentieth and twenty-first centuries, there may be occasions in the near future in which territorial restrictions will be imposed upon persons infected (or believed to be infected) with communicable diseases.

A bioterrorist attack or an outbreak of sudden acute respiratory syndrome (SARS), avian flu, anthrax, smallpox, or multi-resistant strains of communicable diseases may require that governments consider imposing substantial restrictions on movement, public presence, and public activities. The two principal public health strategies used to combat contagion—isolation and quarantine—are explicitly territorial in nature.[430] Isolation is used for the demonstrably sick or infected. The person is placed under observation in a specific place and cannot leave until the isolation order is lifted.[431] Quarantine is the compulsory sequestration of

430. *See* generally Mark A. Rothstein, *Are Traditional Public Health Strategies Consistent with Contemporary American Values?*, 77 TEMP. L. REV. 175 (2004) (explaining quarantine, isolation, and other public health measures).

431. LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 210 (2000).

groups of possibly exposed persons or confinement of such persons within certain geographic areas.[432]

Isolation has been used on occasion to segregate infected individuals from the general public. For instance, a twenty-seven-year-old Phoenix resident was recently confined to a county jail cell for more than a year to protect the public from a resistant strain of tuberculosis.[433] In a more prominently reported instance, a patient who traveled to Europe for his wedding (apparently against the advice of federal health officials) was subject to a federal isolation order upon his return.[434]

There has not been a large-scale quarantine in the United States since the early twentieth century. Nevertheless, quarantine remains a likely response in the event of a modern public health emergency. Indeed, during some recent bioterrorism exercises, large-scale geographic quarantines were imposed by participating officials.[435] The potential use of isolation and quarantine to protect public health and safety raises the prospect that a Geography of Contagion may develop.

Territorial isolation and quarantine are sometimes necessary public health measures. Current federal and state laws provide officials with ample authority to isolate and quarantine individuals believed to be infected with, or to have been in contact with those infected with, a variety of communicable diseases.[436] Under current federal laws and regulations, health officials have the authority to detain and examine any individual believed to be infected with a communicable disease and traveling to or from a foreign land or from one state to another.[437] Federal health officials also have the authority to aid or enforce local quarantines in the event of a public health emergency.[438] Violation of a federal quarantine order is a criminal misdemeanor, and courts are empowered to order injunctive relief to prevent such violations.[439]

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432. *Id.* at 209–10.

433. Chris Kahn, *TB Victim is Locked Up in Arizona*, ASSOCIATED PRESS, Apr. 2, 2007, *available at* http://cbc.ca/health/story/2007/04/03/tuberculosis-prison.html (noting that Texas had placed seventeen people in isolation).

434. Lawrence K. Altman & John Schwartz, *Near Misses Allowed Man with Tuberculosis to Fly to and from Europe, Health Officials Say*, N.Y. TIMES, May 31, 2007, at A13.

435. John D. Blum, *Too Strange to be Just Fiction: Legal Lessons from a Bioterrorist Simulation, the Case of TOPOFF 2*, 64 LA. L. REV. 905 (2004).

436. *See generally* ANGIE A. WELBORN, CONG. RESEARCH SERV., FEDERAL AND STATE ISOLATION AND QUARANTINE AUTHORITY, REPORT FOR CONGRESS NO. 31333 (2005) (describing state and federal quarantine and isolation laws).

437. *See* 42 U.S.C. § 264 (2000) (granting federal Centers for Disease Control authority to isolate, quarantine, and examine persons).

438. WELBORN, *supra* note 436.

439. *Id.*

Recently proposed federal homeland security plans and health agency regulations—the first proposed changes in federal quarantine authority in twenty-five years—would extend the government's isolation and quarantine authority in the face of a public health threat.[440] The Centers for Disease Control has proposed revisions to the federal quarantine regulations that would allow the government, under a procedure called "provisional quarantine," to detain sick airline and other passengers for up to three business days without any administrative hearing.[441] The regulations would also permit various forms of surveillance with regard to those considered at risk of infection, and would authorize the federal government to seize private property under certain circumstances.[442]

Although they must generally yield to any conflicting federal laws and directives, state officials may also impose isolation and quarantine. State laws currently provide varying degrees of regulatory and judicial process for isolated and quarantined persons.[443] Most of the laws have not received legislative attention in years; many are between forty and 100 years old. Some states are, however, beginning to reassess their quarantine and other public health laws.[444] A Model State Emergency Health Powers Act was recently drafted by The Centers for Law and the Public's Health at Georgetown and Johns Hopkins Universities.[445] The Model Act attempts to specify, among other things, appropriate limits on state use of quarantine and isolation.

Territorial restrictions implemented as part of public health strategies may be quite substantial. In light of new and particularly virulent public health threats, even indefinite detentions are a possibility.[446] As in the past, restrictions and public health orders may deny persons access to public places like movie theatres, transit stations, and schools. Borders may be closed to immigration and migration. Certain public gatherings may be banned. Households or entire neighborhoods may have to be quarantined

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440. *See* Batlan, *supra* note 35, at 110–19 (describing proposed federal regulations).

441. *See* Control of Communicable Diseases, 70 Fed. Reg. 71892 (proposed Nov. 30, 2005) (to be codified at 42 C.F.R. pts. 70, 71); Batlan, *supra* note 35, at 114 (describing "'provisional quarantine'" procedure).

442. Batlan, *supra* note 35, at 111–14.

443. Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59 (1999). For a fifty-state survey of state quarantine provisions, see TRUST FOR AMERICA'S HEALTH, STATE QUARANTINE AND ISOLATION LAWS (2004), http://healthyamericans.org/reports/bioterror04/Quarantine.pdf.

444. Batlan, *supra* note 35, at 118.

445. CTRS. FOR LAW & THE PUBLIC'S HEALTH, MODEL STATE EMERGENCY HEALTH POWERS ACT (Dec 21, 2001), *available at* http://www.publichealthlaw.net/MSEHPA/MSEHPA.pdf.

446. Batlan, *supra* note 35, at 117.

for weeks, perhaps even longer. Officials will likely feel pressured to act very quickly, and to retain spatial and geographic restrictions for as long as possible.[447]

Like other territorial measures, isolation, detention, and quarantine may impact spatial liberties such as personal mobility, migration, public presence, and access to homes and other properties.[448] Constitutional issues arising from these displacements will include due process requirements relating to detention, liberties of interstate and intrastate travel, rights of association and privacy,[449] equal protection, and rights to compensation for any condemned properties.[450]

Constitutional limitations on isolation and quarantine have not been rigorously analyzed by scholars or tested in the courts. Undoubtedly, the federal and state governments have very broad authority under the Constitution and health and welfare statutes to respond to public health threats. Particularly in an emergency situation, state and federal authorities would have wide latitude to impose isolation, detention, and quarantine on affected persons and populations.[451]

Broad challenges based upon lack of constitutional or statutory authority would likely be unsuccessful, particularly during a public health emergency. The general standard with regard to public health emergencies remains Justice Holmes's early-twentieth-century formulation, which requires merely that public health laws not be "unreasonable, arbitrary, or oppressive."[452] Of course, much has occurred since this standard was announced, including the judicial recognition of fundamental constitutional rights to privacy and liberty as well as remarkable advances in medicine and science. Broadly speaking, these developments will provide some gloss on reasonableness. History demonstrates, however,

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447. According to a recent study of public health responses to the 1918 influenza pandemic in the United States, the earlier officials lock down public territories, and the longer they keep restrictions in place, the lower the death count. *See* Hatchett, Mecher & Lipsitch, *supra* note 208, at 7584 (reporting results of analysis of 1918 influenza pandemic).

448. Batlan, *supra* note 35, at 112.

449. *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) (noting rights of "intimate association" like family); Shelton v. Tucker, 364 U.S. 479, 488–90 (1960) (invalidating statute requiring disclosure of organizational memberships). Proposed federal plans and regulations would likely result in increased surveillance activities relating to such things as passenger screening. Batlan, *supra* note 35, at 112.

450. *See* U.S. CONST. amend. V (requiring "just compensation" for takings).

451. *See, e.g.*, Bernadette Meyler, *Economic Emergency and the Rule of Law*, 56 DEPAUL L. REV. 539 (2007) (examining operation of Takings Clause and other constitutional provisions in emergencies).

452. Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905).

that protection against territorial and some forms of constitutional displacement wanes considerably during public health emergencies.[453]

In more specific terms, the process due in the event of forcible detainments and isolations will likely depend upon the process feasible—which may be rudimentary in an emergency involving an unknown or rapidly evolving threat.[454] In an emergency, governments will likely be permitted to detain and isolate individuals without a hearing for several days while the threat is assessed. A several-day detention order, with some avenue provided for administrative appeal, would probably satisfy constitutional due process requirements. Detention and other forms of displacement beyond such a limited time frame would obviously raise more serious concerns. At the least, assuming legal institutions are open and operating, habeas corpus review must be made available to those subject to isolation or quarantine orders.[455]

Isolation and quarantine orders may impact mobility—sometimes severely. As noted earlier in the context of sex offender laws, courts are divided as to whether there is any fundamental right to intrastate mobility or travel.[456] Even if a court were to recognize such a right, an isolation or quarantine order would likely survive judicial scrutiny. The interest in preserving public health would likely be deemed compelling. The government would also likely be given substantial leeway in tailoring the territorial restrictions of any quarantine order. With regard to broader travel rights, the Supreme Court has indicated that the right to foreign travel can be restricted where it would threaten the public health.[457] Of course, some safeguards must be in place to ensure that evacuation, quarantine, and isolation orders can be altered, in terms of time and geographic area, as circumstances change and information is gathered. Lengthy isolations and broad quarantines would also interfere with associational liberties, such as the right to live with family members. In sum, governments would have to ensure that these displacements were tailored to the emergency.

As antecedent quarantines of Asian Americans, prostitutes, and AIDS carriers have shown, officials can be particularly insensitive to equality

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453. *See* Batlan, *supra* note 35, at 119 (noting substantial deference courts have given to authorities during past epidemics).

454. *See id.* at 117 (questioning whether procedures contemplated under federal plans and proposed regulations would be sustainable in the event of an outbreak).

455. *See id.* at 116 (noting that proposed rules provide for habeas corpus challenges).

456. *See supra* notes 357–58 and accompanying text.

457. *See* Zemel v. Rusk, 381 U.S. 1, 15 (1965) (upholding limits on right to travel abroad).

concerns during public health emergencies.[458] The temptation to use race or ethnicity as proxies for infection may be quite high. Quarantine for avian flu victims, for example, may target or disparately impact Asian Americans.[459] Written standards and other measures should be in place to protect persons who are infected—or are from places affected by a bioterrorist attack or pandemic—from discrimination by officials and health care providers. Given the concern with stigmatic harms arising from displacement, authorities ought to pay particular attention to the manner in which spatial segregation and quarantine are imposed.[460] Controls and preventive measures are critical in light of the fact that absent invidious intent, territorial displacements that disparately affect certain minorities or classes will likely withstand equal protection and other constitutional challenges.[461]

Finally, some properties, including homes and businesses, may have to be condemned and destroyed in the event of a pandemic or bioterrorist attack. Assuming a public health necessity, no compensation would likely be required under the Fifth Amendment's Takings Clause.[462] In some cases properties may also have to be monitored for continuing threats to public safety. Access to homes may be denied for extended periods of time. Assuming, again, the presence of an actual public health emergency, none of these measures would likely require that compensation be paid to the property owner or lessee.

Like the other legal geographies discussed in this part, a Geography of Contagion, which will be based principally upon territorial isolation and quarantine, will raise substantial liberty concerns. The Constitution will not cease to apply or operate within this specific geography. Neither, however, will it likely prevent substantial territorial displacements from being enacted and enforced.

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458. *See* Batlan, *supra* note 35, at 60 ("[I]n the past, quarantines have been infused with issues of race, class, and gender placing the greatest hardships on those who failed to conform to white middle-class norms of behavior.").

459. *See* James G. Hodge, Jr., *Implementing Modern Public Health Goals Through Government: An Examination of New Federalism and Public Health Law*, 14 J. CONTEMP. HEALTH L. & POL'Y 93, 104 (1997) (noting danger of discriminatory treatment during public health emergencies).

460. *See* Batlan, *supra* note 35, at 60 (noting stigmatic effects of past quarantines).

461. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (absent proof of discriminatory intent, a generally applicable law with disparate effects does not violate the Equal Protection Clause).

462. Prevention of harm or nuisance has been considered to negate the compensation requirement. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485–93 (1987); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593 (1962).

IV. CONSTITUTIONAL DISPLACEMENT AND SPATIAL GAPS

As Part III demonstrated, territorial displacements implicate an expansive array of constitutional provisions—the limitation on suspension of habeas corpus,[463] the Equal Protection Clause,[464] the Due Process Clause,[465] the Eighth Amendment's Cruel and Unusual Punishments Clause,[466] the Privileges or Immunities Clause,[467] the Ex Post Facto Clause and Bill of Attainder Clause,[468] the Takings Clause,[469] and the First Amendment.[470] Protection against certain territorial displacements may also be found in constitutional structures like the Dormant Commerce Clause, the citizenship principles of Article IV and the Fourteenth Amendment, and the Supremacy Clause.[471]

Nevertheless, as we have seen protection against territorial and corresponding constitutional displacements remains rather thin, particularly with respect to certain disfavored persons and groups. As the antecedent and contemporary displacements discussed in Part III show, the Constitution contains some rather significant extra-territorial and intra-territorial spatial gaps. Legal Geographies of Displacement take root in these fissures, with serious and, in some cases, continuing effects on personal liberty. Although we cannot close these spatial gaps entirely, this final Part examines the general process of constitutional gap closure and suggests several avenues toward at least narrowing some of our contemporary gaps. To better understand why such measures are necessary, however, we must first take full measure of the scope and effect of the constitutional displacement brought about by territorial laws and tactics.

A. Constitutional Displacement

In a world in which borders are sometimes said to be less and less relevant, territory remains critical to both governance and constitutional liberty. Territorial displacement continues to be an expedient governmental response to real and, in some cases, merely perceived

463. U.S. CONST. art. I, § 9, cl. 2.
464. *Id.* amend. XIV.
465. *Id.* amend. V; *id.* amend. XIV.
466. *Id.* amend. VIII.
467. *Id.* amend. XIV, § 1.
468. *Id.* art. 1, § 9, cl. 3.
469. *Id.* amend. V.
470. *Id.* amend. I.
471. *Id.* art. IV, § 2; *id.* amend. XIV; *id.* art. VI, § 2.

societal threats. From the perspective of lawmakers, territorial displacement is often a viable and even attractive option, in part because the displaced lack any effective political representation. It is no mere coincidence that from Jim Crow to Guantanamo, legal and constitutional displacements have been imposed on persons already in some sense alien to and displaced from the Constitution's protective orbit.

Many of the territorial displacements discussed in Part III came about as a result of public fear and demonization—of, for example, African Americans during Jim Crow, aliens and the foreign-born during wartime, and the diseased during periods of scientific uncertainty. Cyclical economic downturns seem always to increase public awareness of and focus upon migrants and immigrants, who officials then seek to remove or displace owing to their alleged connection to depressed wages, unemployment, and other social ills. As demonstrated by early state migratory exclusion laws, criminals—including most recently the derided class of released sex offenders—have always been targets of territorial displacement. The urge to banish and displace them, through imprisonment or other means, has always been strong. The poor, as well, have historically engendered a substantial degree of public antipathy; displacement has been used to situate them out of public sight and mind.

Although the specific means of displacement have changed, the general pattern of displacement has been remarkably consistent over time. Nothing as blunt and sweeping as what David Delaney described as the "hyper-territoriality" of racial segregation presently exists.[472] But new, more subtle, methods of displacement have arisen which similarly diminish or exterminate constitutional protections for certain purportedly troublesome populations. Contemporary lines are often more narrowly drawn to exclude or expel; but they are often no less effective at displacing persons and groups. Individuals and groups subjected to racial segregation, internment, territorial expulsion, "internal exile,"[473] purification, and isolation have been treated as if they exist somewhere beyond the Constitution's domain. As we have seen, the effects of territoriality on constitutional liberty can be quite severe.

Fundamental physical liberties are, of course, substantially affected by territorial restrictions. The displaced are denied—by legal and physical barriers and sometimes force—the liberty to choose their own place. For example, the territoriality of racial segregation denied black citizens the

472. DELANEY, *supra* note 141, at 96.
473. Yung, *supra* note 22, at 111.

right to occupy the same territory on an equal basis with white citizens. Internment of Japanese Americans, involuntary confinement of the destitute, sick, and mentally ill, and extended quarantines of those believed to be contagious all denied people the most basic liberty—to be free from physical restraints unless and until due process is provided. Today, detention at Guantanamo Bay and other less visible sites of displacement affect the same fundamental liberty. Restrictions on migration, whether by citizens or aliens, also affect freedoms of mobility and inter-territorial movement. Residency exclusions for sex offenders may preclude both locomotion and presence in chosen communities. Urban purification measures affect the basic liberty to be present in designated public places, and the right to choose one's own place.

We have seen that existing constitutional concepts, doctrines, and modes of reasoning do a rather poor job of capturing the breadth and depth of harms associated with territorial displacement. Narrow legalistic conceptions of liberty—freedom of movement or freedom from physical restraint—tend to focus mostly on displacement's effects on the body. But the harms associated with the territorial displacements examined in this Article extend well beyond such physical effects.[474] In addition to their basic physical effects, each of the Geographies of Displacement discussed in Part III limits the most fundamental of personal choices: where and with whom to live; where and how to work; where one may recreate; which, if any, institutions of justice are available; and even which acts of basic sustenance one may perform in a public place.

Territorial displacements also have a substantial *communicative* element. As noted earlier, for decades courts turned a blind eye to the symbolic or communicative aspect of systematic racial-spatial segregation—in particular, the deep stigma that accompanied displacement on racial grounds. Racial segregation was harmful not merely because of its severe effects on the body—the denial of freedom of movement and limits on physical presence—but because of what it indicated with respect to African Americans' personhood and dignity.[475] Territorial displacements such as racial segregation, internment, and even quarantine

474. We must not, however, minimize those effects. In some instances, it is not an overstatement to say that the right to *exist* is at stake. As Jeremy Waldron has observed, urban purification measures affect not only constitutional liberties like the right to beg, but interests that are "basic to the sustenance of a decent or healthy life, in some cases *basic to the sustenance of life itself*." Waldron, *supra* note 422, at 320 (emphasis added).

475. For an insightful discussion of race and dignity, see Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669 (2005).

have all communicated something negative with regard to personal status, worth, and belonging.[476]

Ouster from a territory also entails denial of membership in a community. To be cast out of a territory is to be denied a measure of one's personhood. The geographer Don Mitchell treats the harm caused by displacement of the homeless owing to urban purification as a form of social delegitimization.[477] Mitchell's discussion of the homeless accurately conveys the type and degree of harm visited upon many other displaced persons as well. Measures that segregate, exclude, expel, and isolate territorially often brand persons as inferior.[478] Displaced persons are not only physically, but also symbolically, cast out of various geographies and places: entire continents, states, communities, workplaces, residences, streets, public parks, and even local parking lots. The intent, if not the actual effect, is to cause their physical, legal, and juridical disappearance. As noted in Part III, the Constitution, as presently interpreted, often fails to account for these deeper effects of territoriality.

Finally, as we have seen, territorial restrictions tend to cast a rather wide net insofar as constitutional liberties are concerned. Exile, internment, and detention often affect a range of fundamental liberties—freedom of association, freedom of expression and assembly, access to the courts, and pursuit of a calling or profession. Spatial liberties thus cannot be assessed in isolation; they are often necessary prerequisites for the enjoyment of a variety of constitutional liberties.[479] In this sense, as well, liberties of place are constitutive of full personhood. In sum, territoriality's effects on constitutional liberty are often far deeper and more severe than traditional constitutional analysis recognizes.

These effects are often magnified where governments operate in response to crises and emergencies. As the discussion of antecedent and contemporary displacements in Part III showed, territorial displacement is often imposed in response to troubling economic, social, and political events. The fact that territorial displacement tends to be associated with what we might call "emergency governance"—official acts taken during times of war and social strife—may help explain the diminished constitutional protection sometimes granted to those displaced.[480] But this

476. *See, e.g.*, Batlan, *supra* note 35, at 60 (noting stigmatic effect of quarantines).

477. *See* MITCHELL, *supra* note 394, at 136–37.

478. FOUCAULT, DISCIPLINE AND PUNISH, *supra* note 117, at 199.

479. *See* Zick, *Space, Place, and Speech*, *supra* note 2 (noting primacy of place to First Amendment freedoms).

480. *See generally* Meyler, *supra* note 451 (discussing emergency governance).

is only a partial explanation. As demonstrated in Part III and explained below, constitutional displacement is only possible owing to the presence of substantial spatial gaps in constitutional structures and rights provisions.

B. External and Internal Spatial Gaps

As we have seen, the Constitution has been successfully invoked in certain instances to combat particular territorial displacements. In the main, however, the constitutional tools for dealing with territorial displacement are either absent or rather ill-suited to the task. The Constitution contains what we might refer to, and conceptualize as, spatial gaps.

As explained in Part II, the Framers of the Constitution were acutely sensitive to certain spatial matters. Indeed, in some respects, they were masters of geo-strategy. Thus, for example, the Framers provided clear spatial directives concerning the importance of territory to matters such as sovereignty, internal governance, and defense.[481] They were far less clear, however, with regard to the importance of territory to constitutional scope and individual liberties. Fashioned without the "prolixity of a legal code," the Constitution leaves many critical spatial and territorial issues unresolved.[482] Moreover, the Framers acted at a time when cartographic borders were generally considered to be fixed—matters of brute, as opposed to social and political, fact. As a result of these and other factors, the Framers bequeathed to future generations a variety of vexatious *extra-territorial* and *intra-territorial* spatial gaps.

The Constitution's extra-territorial gaps have been widely noted and commented upon, including in the recent group of Guantanamo detention cases.[483] The issue is fundamentally one of constitutional scope or domain. As noted in Part II, the Framers did not speak with a clear voice with regard to whether the Constitution "follows the flag" when the United States acts beyond its territorial borders.[484] As Gerald Neuman has observed: "Defining the domain of constitutionalism has major practical implications for immigration policy, the conduct of foreign affairs, military action, and the participation of American citizens in an

481. *See, e.g.*, *supra* notes 76–79 and accompanying text.

482. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 200 (1819).

483. *See, e.g.*, NEUMAN, *supra* note 39; Cleveland, *supra* note 38; Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, 23–24 (1985); Kent, *supra* note 38; Raustiala, *The Geography of Justice*, *supra* note 14.

484. RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG?, *supra* note 14.

increasingly global society."[485] The geographies of justice and membership, in particular, bear this out.

There are myriad positions with regard to constitutional scope or domain. At one extreme, scholars argue that the Constitution's limitations "appear to apply to the national government, regardless of where, and against whom, it acts."[486] But other scholars and commentators reject universal application of the Bill of Rights; they deny that the Constitution follows the flag to *any* territory outside United States borders.[487] Still others stake out a middle ground, arguing that some, but not all, constitutional guarantees apply outside our borders.[488] The Supreme Court has not definitively settled the matter of the Constitution's geographic domain—even as to United States citizens.[489] As a result of this uncertainty, persons detained or otherwise subject to United States authority abroad cannot be sure of the scope or extent of their constitutional liberties.

This lack of clarity with regard to constitutional scope or domain has created certain incentives and opportunities for governmental manipulation of territory. Thus, for example, in recent years the Bush administration has simultaneously argued both that displacement of enemy aliens to Guantanamo Bay extinguishes constitutional liberties and that mere presence of an enemy alien on United States soil does not itself guarantee any basic constitutional liberties.[490]

In *Boumediene*, the Supreme Court appeared to reject a narrowly territorial definition of constitutional domain.[491] The Court applied a functional standard for determining the geographic scope of the

485. NEUMAN, *supra* note 39, at 3.

486. Cleveland, *supra* note 38, at 19. *See* LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS 99–100 (1990) (arguing that Bill of Rights embodied a "universal human rights ideology").

487. *See* Kent, *supra* note 38 (making textual and historical arguments against universal application of constitutional rights).

488. As Gerald Neuman observes, courts and scholars have adopted several theoretical approaches to constitutional scope. NEUMAN, *supra* note 39, at 5–8 (discussing universalism, membership, mutuality, and global due process approaches).

489. *See id.* at 93–94 (noting lack of consensus on Court); *see also* INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (majority of the Court assumed that illegal aliens who enter United States territory have Fourth Amendment rights); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment did not apply to search of Mexican residence of Mexican citizen who had no voluntary attachment to the United States); United States ex rel. Turner v. Williams, 194 U.S. 279 (1904) (holding that excludable alien is not entitled to First Amendment rights).

490. With regard to the latter position, see Al-Marri v. Pucciarelli, 534 F.3d 213 (4th Cir. 2008) (per curiam), *cert. granted*, 2008 WL 4326485.

491. Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008).

Suspension Clause.[492] Under that test, territory still matters—but only as one of several factors, including a range of "practical" considerations associated with extending the domain of habeas corpus.[493] While this narrows the territorial gap somewhat, it is difficult to tell just how much and, as noted earlier, with regard to which specific constitutional guarantees.[494] The Constitution's extra-territorial gaps will undoubtedly be the subject of future litigation—by aliens and detainees located both abroad and within the United States. If *Boumediene*'s functional approach is any indication, we shall likely continue to see the Constitution's domain decided in an ad hoc, case-by-case fashion.

In considering the Constitution as a unique spatial framework, less noted intra-territorial gaps also become readily apparent. For example, the constitutional status of aliens located within United States territory has always been somewhat uncertain. Presence within certain territories, such as states, explicitly entitles all persons to certain liberties.[495] But as we have seen, presence on United States soil is not the brute fact the Framers appear to have assumed it to be. As well, with very few exceptions—notably that of the home—the Framers' conception of liberty related primarily to persons rather than places.[496]

Although they obviously contemplated that persons would migrate from territory to territory, the Framers failed to elaborate with any precision the parameters of one's right to mobility or migration. Nor did they articulate any fundamental right to public presence. Indeed, the Constitution very nearly failed to mention *public* places at all.[497] And it does not, of course, contain any explicit recognition of human dignity or personhood. As a result of these omissions, those who are displaced through territorial exclusion, internal exile, purification, isolation, and quarantine often fall squarely within some of the Constitution's internal spatial gaps.

My primary goals have been to highlight the critical intersection of territory and constitutional liberty and, in particular, to demonstrate the many ways in which territoriality restricts or denies certain liberties. This Article does not offer any grand gap-closing constitutional method or theory. But once we recognize the dangers constitutional displacement

492. *Id.* at 2259 (articulating several important factors).
493. *Id.*
494. *See generally* Neuman, *supra* note 11 (discussing the issues left undecided by *Boumediene*).
495. *See, e.g.*, U.S. CONST. amend. XIV (granting certain liberties to all "persons" within a state).
496. *See supra* notes 134–37 and accompanying text.
497. *See supra* notes 139–40 and accompanying text.

poses to liberty and liberal democracy, the next logical step is to begin to think about how we might narrow the Constitution's spatial gaps. The final part of the Article offers some general ideas in pursuit of this limited goal.

C. Narrowing or Closing Constitutional Gaps

Before briefly addressing some narrowing suggestions, we should note that history contains important lessons regarding what might be considered the *process* by which the Constitution's spatial gaps are narrowed or closed. Among other things, the course of the antecedent displacements discussed in Part III shows that we cannot look solely, or even primarily, to the courts in seeking to fill external and internal spatial gaps.

As the courses of racial territoriality and Japanese internment (to take just two examples) show, gap narrowing or closure is a complex legal, social, and political process. While judicial decisions have certainly been catalysts in this process, social and political forces have arguably been as, or more, significant in extending liberty and constitutional personhood to the previously displaced. In particular, the passage of time—and with it, the emergency or perceived threat—and marked changes in societal attitudes have been essential elements of prior spatial gap closings. In some instances, notably racial segregation and internment, the nation has come to regret territorial and constitutional displacements. Once the purported emergency has passed, polities have reconsidered the morality and effectiveness of displacement. In the case of World War II internments, actual remedial measures were adopted, although well after the fact.

While gap closure or narrowing can often be a lengthy and involved social, political, and constitutional process, there are steps we can take to encourage and hasten the filling of some of the more prominent spatial gaps in constitutional coverage. In short, because of territory's connection to fundamental liberties and the substantial harm that attends its manipulation by government, we ought to *de-emphasize* territory abroad and *re-emphasize* it in various domestic contexts.

1. De-Spatializing Justice

The Framers drafted a constitutional framework that incorporated a particular conception of cartographic borders. Those borders were primarily, although not exclusively, necessary to support claims of sovereign status on behalf of the new nation. In a pre-globalized world,

cartographic borders were self-evident. At least, they were apparent enough to make physical presence within the states and the United States (and its territories) determinative of rights and status in some limited circumstances. The Framers did not, of course, map territorial boundaries for all time and purposes.[498] But neither did they foresee the ease with which those boundaries could be manipulated. Initially through physical expansion (empire-building), and more recently as a result of globalization, it has fallen to the Framers' "posterity" to resolve pressing questions of constitutional domain.[499]

As noted in Part II, the Framers did not make a clear choice among "territorial," "universal," or other approaches to constitutional domain or scope.[500] Courts and scholars have struggled with issues of constitutional domain for decades, with no position gaining universal acceptance. Questions of whether and, if so, to what extent constitutional liberties extend to persons located in territories outside the United States' borders are far too complex to be fully engaged in this Article. But certain lessons regarding constitutional gap narrowing or closure and the de-spatialization of justice can be gleaned from the legal, moral, and political battles relating to Guantanamo Bay and other war-on-terror displacements.

For some time now, there has been general support in the legal academy for closing Guantanamo's constitutional "loophole."[501] Some of this movement relates to rejection of the narrow territorial conception of the Constitution's domain.[502] Beyond this, however, the war on terrorism has demonstrated to many that the spatialization of justice is inconsistent with basic social, legal, and moral precepts. Professor Kal Raustiala has argued that "legal spatiality"—the notion that constitutional liberty varies with location—"is at odds with contemporary concepts of jurisdiction, with the intensifying trend of globalization, and with our most cherished principles of constitutionalism."[503] As Professor Raustiala demonstrates, territorial sovereignty has been gradually eroding across various legal and

498. For example, new states may be admitted to the union. *See* U.S. CONST. art. IV, § 3.

499. U.S. CONST. pmbl.

500. NEUMAN, *supra* note 39, at 5–8 (discussing four prominent approaches to constitutional domain).

501. Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 50 (2004) (arguing against power to manipulate physical location in order to exploit right-less territories); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 252 (2006).

502. *See, e.g.*, Henkin, *supra* note 483, at 23–24 (arguing for a universalist approach). The literature on universalism is summarized in Kent, *supra* note 38, at 481–84.

503. Raustiala, *The Geography of Justice*, *supra* note 14, at 2504.

political fronts. As a result, he says, "where one sits does not necessarily determine what legal rules one sits under."[504]

Still, as Professor Raustiala also notes, "the federal courts continue to cling to the notion that American law is tethered to territory—that simply by moving an individual around in space, the rights that individual enjoys wax and wane."[505] It is not only courts, but executive and legislative officials, who continue to cling to the spatialization of justice. Guantanamo, black sites, and the practice of rendition are all examples of a legal spatiality firmly rooted in the territorial conception of constitutional scope.

The pressure that had been building in the courts for some time to squarely address hyper-spatialization of the rule of law reached a crescendo in *Boumediene*. There the Court, in the face of a blatant attempt by the executive and legislative branches to not merely regulate but *manipulate* territory, partially de-spatialized constitutional liberty by granting geographically distant detainees a right of access to the courts.[506] In effect, the Court narrowed one significant spatial gap in constitutional domain—access to habeas corpus.

Owing to the considerable complications that would attend outright globalization of *all* constitutional rights, including demands for such rights by wartime detainees captured and detained in places other than Guantanamo, it should come as no surprise that the *Boumediene* Court did not simply adopt a universalist interpretation of constitutional domain. But the Court's functional approach to territory and constitutional scope may turn out to be quite significant in terms of extending constitutional liberty to those detained outside the United States. The Court made it clear that blatant territorial manipulation by the executive and legislative branches would not be tolerated. As discussed in Part III, it adopted an objective approach that asks, among other things, whether the United States exercises "effective control" over a territory.[507] Whether this approach extends the rule of law to territories other than Guantanamo Bay remains to be determined.

The Court has not acted in isolation, of course. Extra-judicial aspects of constitutional gap narrowing have also been at work. In particular, the

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504. *Id.* at 2512.

505. *Id.* at 2504. *See also* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that Fourth Amendment does not apply to search of property in foreign country belonging to nonresident alien); Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), *rev'd*, 128 S. Ct. 2229 (2008) (limiting habeas rights to U.S. territory).

506. *Boumediene*, 128 S. Ct. 229.

507. *Id.* at 2244.

passage of time and constant reporting on topics such as detainee treatment, torture, and legal process, may have caused some decline in public support for the Guantanamo detention scheme (as well, it should be noted, for the more aggressive aspects of the war on terrorism).[508] Broader shifts in political and societal attitudes, both in the United States and abroad, also appear to be occurring. Supreme Court decisions rejecting various aspects of the Bush administration's territorialism strategy have likely been catalysts in this regard. But in a larger sense, this is a matter of stepping back from contemporary legal spatiality and reflecting on its morality and its consistency with national values.

Although it may not have initially been readily apparent to many, spatialization of detainee rights shares a historical lineage with the spatialization of race. As Sarah Cleveland has noted, the present-day logic of extra-territorial detention is rooted in "a peculiarly unattractive, late-nineteenth-century nationalist and racist view of American society and federal power."[509] Professor Cleveland is referring in particular to the rationale for the *Insular Cases*, which refused to extend full constitutional protections to some U.S. territories based largely on the view that the inhabitants of those territories were not sufficiently "civilized."[510] Like those cases, the developing Geography of Justice, including the Guantanamo detention system, is based upon justifications that often "parade as enumerated text without any recognition either of the international law origins of the principles or the racist, illiberal ideology on which they are based."[511] Gerald Neuman has stated the matter more bluntly: "Maintaining [the detainees] as rightless outlaws because of their captive status revives the logic of slavery . . . ."[512]

Assuming we have collectively rejected territorial manipulation as a national defense, it may indeed be possible, as one anti-universalist commentator suggests, for alien detainees and those rendered to other territories to be protected "by diplomacy, treaties, the law of nations (today's customary international law), and nonconstitutional policy choices of the political branches."[513] Treaties and diplomacy will only

508. During the recent presidential election, President-elect Obama pledged to close Guantanamo Bay and condemned U.S. torture of detainees. James Traub, *Is (His) Biography (Our) Destiny?*, N.Y. TIMES MAGAZINE, Nov. 4, 2007, at 650.

509. Cleveland, *supra* note 38, at 14.

510. *Id.* at 219.

511. *Id.* at 278.

512. Neuman, *supra* note 501, at 50.

513. Kent, *supra* note 38, at 465.

work, of course, if American officials agree to be bound by these processes.[514]

Of course, the most direct way to close the Guantanamo loophole, and thus to narrow the extra-territorial gap in which it sits, is for the executive branch to voluntarily close it. As this Article was going to print, President Obama issued executive orders indicating his intention to close the prison at Guantanamo Bay within a year and to end the program of secret detentions for enemy combatants..[515] In a relatively short span of time, one of the Constitution's territorial gaps has been substantially narrowed. In historical terms, the pace of this particular aspect of the de-spatialization of justice has been remarkably rapid. Still, it remains to be seen whether the pressures associated with fighting terrorism will lead to other forms of displacement during the present administration. One of the most important questions, yet unanswered, is the extent to which constitutional domain will be interpreted in future cases to extend outside United States territorial boundaries. As others have noted, however it occurs, the de-spatialization of justice for "enemy combatants" and others detained under United States policies and authority would be welcome. As Owen Fiss has observed, "it must be remembered that the issue is not just the survival of the nation—of course the United States will survive—but rather the terms of survival."[516]

2. *The Spatialization of Domestic Liberty*

The responses to the Constitution's extra-territorial gaps show that gap narrowing or closure is a product of political, social, and legal forces. The same is true of the various responses to the Constitution's internal spatial gaps—those that affect what we might call *domestic* spatial liberties. Within our (cartographic) borders, certain persons fall within spatial gaps in constitutional protection. Given the variety of interests at stake, including those of undocumented aliens, sex offenders, the destitute, and the sick, narrowing these spatial gaps is in many respects a more complicated endeavor than narrowing the gaps arising from a strictly territorial conception of the Constitution's domain.

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514. *See* Satterthwaite, *supra* note 13, at 1400 (noting how Bush Administration has avoided treaty limits on rendition).

515. *See* Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantanamo*, N.Y. TIMES, Jan. 21, 2009, A1.

516. Fiss, *supra* note 501, at 256.

Here, again, we ought to remember that even the most pernicious territorial abuses in our history—racial segregation and internment—ultimately took many decades to address and were not resolved by courts alone. In the interim, however, certain spatial adjustments may serve to narrow some of the Constitution's internal gaps. Briefly, these gap-narrowing measures consist of (1) increased oversight regarding the official manipulation of United States borders; (2) recognition of limited, implicit spatial liberty interests; (3) more careful attention to and application of the Constitution's spatial structure, especially its federalism aspects; and (4) constitutional theory-building that begins to incorporate notions of territorial disadvantage. Each of these aspects of what should obviously be considered a rudimentary spatialization agenda is discussed briefly in this final part.

There is one particular context in which the Constitution's extra-territorial and intra-territorial gaps intersect. Owing to the territorial conception of constitutional domain, the legal mapping of geographic borders can be determinative of access to fundamental liberties like due process and equality. But as Ayelet Shachar has recently noted, the "legal boundaries of inclusion and exclusion" no longer correlate neatly with U.S. "cartographic" borders.[517] Recent legal and policy changes at the federal level have altered the location of the nation's borders, "at times penetrating into the interior, in other circumstances extending beyond the edge of the territory."[518]

For purposes of determining legal admission, Congress has stated that the territorial border is not fixed but is to be "designated by the Attorney General."[519] By replacing fixed and static borders with dynamic and moveable ones, policymakers can often manipulate the border in a manner "that best suits the goal of restricting access."[520] In certain instances, this means that even those aliens who are physically present within the United States will be treated as if they never entered; as a result, even minimal rights of due process and equality explicitly granted by the Constitution to those on United States soil will not apply.[521]

Whatever its flaws, at least the formalistic territorial approach granted aliens a degree of certainty with regard to basic constitutional liberties. In

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517. Shachar, *supra* note 16, at 166. *See also* LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

518. Shachar, *supra* note 16, at 166.

519. 8 U.S.C. § 1182(a)(6)(A)(i) (2000).

520. Shachar, *supra* note 16, at 167.

521. *See id.* at 171 (comparing physical act of "entry" to evolving legal concept of "admission").

more general terms, as Linda Bosniak has argued, political and communal membership are properly treated as matters of social fact rather than legal formality.[522] What Bosniak calls "ethical territoriality"—the idea that liberties and recognition ought to extend to all persons within a particular territory—is, as she says, more consistent with "the egalitarian and anti-caste commitments to which liberal constitutionalism purports to aspire."[523]

If United States territory is no longer static and cartographic but is more accurately described, according to Shachar, as a "complex, multilayered, and ever-transforming border, one that is drawn and redrawn, through the words of law and acts of regulatory agencies, to better [calibrate] the admitting state's exclusion lines in response to new global changes,"[524] then government will effectively be empowered to displace aliens more or less at will. This, however, is one instance in which the Framers were quite clear with regard to territory's connection to domestic liberties. In at least some respects, the Framers themselves aspired to ethical territoriality.[525]

The (re-)spatialization of domestic justice and liberty in this particular respect will require, at a minimum, a more robust judicial role in setting limits on immigration policy and enforcement. Like many immigration measures, the recent alterations to the country's "legal border" are based in Congress's plenary power over immigration.[526] The plenary power doctrine largely immunizes federal immigration and naturalization measures from constitutional scrutiny. As T. Alexander Aleinikoff and others have argued, however, the doctrine of plenary power rests on a rather shaky foundation.[527] The doctrine is based, at least in part, upon norms of deference to the political branches.[528] Professor Aleinikoff casts serious doubt on the notion that the usual constitutional norms governing judicial avoidance of "political questions" support a plenary power over immigration.[529] The malleability of the concept of "the border" provides one more reason for courts to more actively scrutinize immigration laws

522. Bosniak, *supra* note 55, at 392.

523. *Id.* at 392.

524. Shachar, *supra* note 16, at 193.

525. There were, of course, some instances in which the Framers fell far short of this aspiration—slavery being the most obvious instance.

526. Chin, *supra* note 178.

527. *See* T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP 151–81 (2002).

528. *See id.* at 154–59 (discussing institutional deference rationale).

529. *See id.* at 160 (discussing political question doctrine).

and policies. Given recent events, judicial skepticism with regard to agency territorial claims is certainly warranted. Again, the Bush administration simultaneously insisted on a static notion of territory in one context (detention of combatants), while relying on a far more dynamic and flexible approach in another (immigration). Basic notions of fairness dictate that courts inquire whether and, if so, under what circumstances, constitutional liberties expressly tied to territorial presence ought to be decoupled from expedient redefinitions of "the border."

As we have seen, the constitutional tools available for analyzing many domestic territorial displacements—the First Amendment, the Cruel and Unusual Punishments Clause, the Ex Post Facto Clause, the Equal Protection Clause, etc.—are often rather unsuited to the task. Thus, for example, the Constitution's liberty provisions have been interpreted not to preclude a lifetime ban on a sex offender's presence in certain public places, sex offender exclusion zones that require people to live in isolated areas, or a requirement that the destitute sleep in shelters rather than on the streets.[530] Some relief has been granted those who wish to occupy local territory for specific purposes, such as speech or charitable association; as noted in Part III, in one extraordinary case day laborers prevailed under the Equal Protection Clause on a claim of official harassment.[531] As noted below, constitutional structures such as federalism may provide another limited avenue for relief with respect to certain local displacements.

One thing that is missing, by and large, from judicial and scholarly analyses of contemporary territorial displacements is recognition of certain *implied* spatial liberty interests. Recognition and enforcement of basic liberties like locomotion, public presence, and intrastate movement would help spatialize domestic liberty and narrow certain internal constitutional gaps. Most of us quite naturally take such basic liberties for granted. For those affected by the Geographies of Punishment, Purification, and Contagion, however, these liberties are either substantially diminished or, in some cases, denied altogether.

Justice Douglas once referred to the basic right to locomotion—walking, strolling, wandering, and loafing—as one of the Constitution's "unwritten amenities."[532] Although Justice Douglas was speaking in particular of the exercise of First Amendment rights, the concept may be

530. *See supra* notes 340–74, 424–28 and accompanying text.

531. Doe v. Village of Mamaroneck, 462 F. Supp. 2d 520 (S.D.N.Y. 2006).

532. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972). *See also* City of Chicago v. Morales, 572 U.S. 41, 53 (1999) (plurality opinion) (noting that "freedom to loiter" is protected by the Due Process Clause of the Fourteenth Amendment).

applied more broadly. Although the Constitution does not speak in explicit terms of the right to make basic choices regarding place or location, as explained earlier this amenity is indeed critical to full constitutional personhood. Measures that threaten immigrants with trespass citations for merely being in a particular place, exclude day laborers from parking lots and street corners, deny released sex offenders the liberty to move about in public, and cleanse or purify certain public areas of the homeless and destitute affect the spirit as well as the body. This is not to suggest that anyone has a right to be in or traverse a particular place without regard to public needs like safety or health. Territorial displacements ought to be enacted and reviewed, however, with the full breadth of their negative effects on personal independence, self-confidence, and dignity firmly in mind.

One of the more glaring domestic spatial gaps in the Constitution relates to liberty of access to public places. Some of the territorial displacements discussed in this Article appear to be premised on the notion that there is no right to simply be present in public places. In one case, the Seventh Circuit expressly held that the right to be in a public park, even for wholly innocent purposes, is not "fundamental."[533] In another, the Ninth Circuit indicated that the destitute have no right to remain in public so long as the government has made shelter available for them.[534] There is indeed nothing explicit in the text of the Constitution regarding the right to occupy public places or territories. This fact has occasionally given rise to the "libertarian fantasy"—a property regime in which all places are effectively privatized.[535]

Putting aside any "unwritten amenities," however, the Constitution's text strongly suggests that this is indeed pure fantasy. The First Amendment guarantees to "the People" liberty to "peaceably assemble" and to "petition" government.[536] This contemplates some *public* venue in which to assemble and from which to present grievances. Moreover, the Supreme Court has stated that government holds quintessential public places like streets and parks "in trust" for the people.[537] Expressly or implicitly privatizing all public places is incompatible with that trust arrangement. Finally, our history and traditions most certainly support a

533. Doe v. City of Lafayette, 377 F.3d 757, 770 (7th Cir. 2004).

534. Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006).

535. Waldron, *supra* note 422, at 300 (noting that some libertarians propose to sell the streets to private interests). *See also* MURRAY N. ROTHBARD, FOR A NEW LIBERTY 201–02 (1973) (advocating privatization of all land areas).

536. U.S. CONST. amend. I.

537. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

general right to public presence. The American Revolution, the Civil Rights Movement, and countless other watershed events have taken place in public areas and territories—and in full public view.[538] The right to be and remain in public places for legitimate, lawful purposes ought not to be narrowly limited to expressive exercises.[539] Nor ought it to be deemed contingent upon the government failing to designate some other, more "suitable," place to which the destitute or other marginalized persons must relocate.

The liberty to move about within states and localities ought also to be considered one of the Constitution's "unwritten amenities." Americans are a mobile people, and local movement is critical to activities like pursuit of livelihood, intimate association, and even recreation. Again, recognition of such a liberty interest would not mean that a person has the right to go anyplace she wishes. It would, however, require that state and local officials justify territorial restrictions that deter migration. This might, in turn, deter some localities from enacting restrictive measures regarding matters like immigration and sex offender exclusion. It might also temper or limit the scope of contagion measures like quarantine. It makes no logical sense to deny a state the power to prohibit the movement of paupers or other unwanted populations across its borders,[540] but to grant towns and counties that same basic authority. The Supreme Court ought to finally recognize a fundamental right to local migration. In the meantime, however, lower courts remain free to and ought to do so.

Greater attention must also be given to the serious *structural* issues raised by certain local territorial displacements. For example, Wayne Logan has suggested that sex offender residency exclusion zones offend collectivist principles associated with the Dormant Commerce Clause.[541] As more jurisdictions essentially banish their own sex offenders, tens of thousands of individuals are likely to be forced to migrate elsewhere. Those displaced are likely to face similar residency restrictions in other states. If this trend continues, a segment of society may effectively be rendered "stateless." As noted earlier, the Framers expressly demanded that territorial localism be submerged in favor of structural interests like

538. Public expressive activity, including mass political contention, from colonial times to the present is described in ZICK, *supra* note 42, at 25–64.

539. Public presence itself advances claims to identity, recognition, and communal belonging. *See generally* MITCHELL, *supra* note 394 (examining benefits to homeless of public presence).

540. *See* Edwards v. California, 314 U.S. 160 (1941) (invalidating state law impeding interstate travel of indigent persons).

541. Logan, *supra* note 23, at 23–31.

national unity.[542] In the likely event states and localities cannot be convinced to bend to collective interests, Congress (or the courts) must provide a remedy.[543] Similar considerations apply with respect to the recent rash of local immigration measures, which are creating a patchwork of displacements across the United States. Undocumented aliens have no right to stay. Even if we are not prepared to welcome undocumented aliens into the national political community, however, a uniform solution to the matter is preferable to a system of local territorial defense measures and sanctuary cities. Insofar as territorial displacements affect such collective interests, we ought to look to the Constitution's structural principles for political and judicial remedies.

Finally, some concerted effort ought to be made to further incorporate territorial displacements into constitutional and political theories. For instance, displacement often creates castes of second-class citizens through territorial delegitimization. This was certainly clear with regard to antecedent displacements of African Americans and Japanese Americans. As Part III showed, however, today disfavored status applies to undocumented immigrants, sex offenders, and the homeless; it may also conceivably affect victims of certain pandemics. Through territory, certain persons are being rendered legal and societal "pariahs."[544]

As defined by Professors Farber and Sherry: "To be a pariah is to be shunned and isolated, to be treated as if one had a loathsome and contagious disease."[545] Farber and Sherry's claim is that imposing "pariah" status on a person or group is a quintessential violation of constitutional equality. To be sure, Farber and Sherry state that the pariah principle is "at its strongest when the individuals so targeted are not responsible for their status."[546] But they also state that the principle "has force even where the individual bears some responsibility."[547] At least in its most extreme forms, constitutional displacement gives rise to the same fundamental concern at the heart of the pariah principle, namely the ability of those displaced to "participate in civil society."[548] Territoriality can make such participation extraordinarily burdensome or even impossible.

Theories of social justice might also inform analysis of territorial and constitutional displacements. Each Geography of Displacement distributes

542. *See supra* notes 109–11 and accompanying text.
543. *See* Logan, *supra* note 23, at 31–35 (discussing possible remedies).
544. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257 (1996).
545. *Id.* at 266.
546. *Id.* at 268.
547. *Id.*
548. *Id.* at 272.

rights to social and political participation through the good of territory. As Michael Walzer observed in *Spheres of Justice*, communities have a basic right to determine the rules and regulations of membership.[549] Walzer noted, however, that in liberal societies this right must sometimes be constricted. In particular, liberalism requires that needy populations like the homeless not be entirely excluded.[550] Even the sex offender, whatever else he has forfeited, has not waived membership and participation in civil society altogether or indefinitely. In more general terms, scholars and policymakers ought to consider the critical social justice implications of territorial and constitutional displacement.[551]

In sum, we can improve constitutional analysis of domestic territorial restrictions by spatializing domestic liberty in various respects. Scrutinizing the government's manipulation of the cartographic border may preserve explicit territorial liberties. Basic liberty interests in locomotion, presence, and intrastate movement ought also to be recognized. Limits on territorial displacement, including those that are implicit in the Constitution's spatial framework, ought to be respected. Finally, as we think about the implications of territorial governance, we ought to incorporate displacement into constitutional, political, and social justice theories. These alterations will, of course, not prevent territorial or constitutional displacements from occurring. They are, however, important first steps for a liberal democracy.

V. CONCLUSION

Locational and spatial liberties, including freedom of movement and choice of place, are so fundamental to dignity and personhood that most of us simply take them for granted. In the United States, national, state, and local territorial borders have taken on an increasingly illiberal character. Polities, communities, and persons are being defined and regulated with regard to various zones of legal, social, and political exclusion. Territoriality is being used by governments to punish, control, restrict, segregate, brand, demonize, and de-legalize certain persons and groups. The territorial and resulting constitutional displacements raise fundamental questions regarding the rule of law, membership in social and political communities, the limits of punishment, and concepts like constitutional

549. MICHAEL WALZER, SPHERES OF JUSTICE 31–63 (1983).

550. *Id.* at 45.

551. *See generally* DAVID M. SMITH, GEOGRAPHY AND SOCIAL JUSTICE (1994) (examining intersection between place and social justice concerns).

personhood and dignity. There are historical, social, political, and constitutional explanations for the increasing resort to territorial displacement. With regard to the last, this Article demonstrates that the Constitution's own spatial framework contains troubling extra-territorial and intra-territorial gaps in protection for basic liberties. It highlights the critical intersection between territory and liberty, and urges more careful attention to the manner in which laws create and alter territorial borders. Respect for the rule of law, commitment to principles of liberal democracy, and concern for social justice all require that we work toward narrowing these spatial gaps.