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The Dark Side of Territoriality

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The Dark Side of Territoriality

by Tim Zick

I want to join others in congratulating Kal on the publication of his outstanding book. I also want to thank the OJ contributors for inviting me to visit their territory.

Issues of spatiality — place, geography, and territory — have been largely under-examined in legal scholarship. This book is an invaluable synthesis and examination of a critical aspect of legal spatiality.

One of the most intriguing parts of the evolutionary path Kal charts is the consistently instrumental use of territory to further national goals. I think territorial instrumentalism, in all its various forms, is quite dangerous to constitutional liberty and equality. In a [recent work](#), I examined how officials have resorted to territory and geography in a variety of internal (e.g., sex offender exclusion zones) and external (e.g., Guantanamo) contexts as a means of controlling different populations and behaviors. Historical antecedents of this form of territoriality abound, of course; they include the territoriality of racial segregation and the exclusion and internment of Japanese-Americans. The Constitution too often permits officials to engage in this sort of territorial manipulation, I argue, because it contains various “spatial gaps” in coverage.

Kal's book shows how the U.S. has exploited, or in some cases has attempted to exploit, similar gaps in a variety of intra- and extra-territorial contexts. Guantanamo is merely the most obvious and most recent example. As presented in the book, however, territorial instrumentalism seems to be an almost benign phenomenon. It serves what at one time or another were considered perfectly respectable and legitimate national objectives — i.e., empire-building, territorial expansion, national security, protection of citizens abroad. There is a much darker side to territoriality, however, that might have warranted greater attention and critical analysis in the book. I am referring, of course, to the blatant racism and xenophobia that led to the unequal treatment of residents of U.S. territories, Chinese and other immigrants, American Indians, and others. As Sarah Cleveland and others have claimed, Guantanamo itself may be rooted in this unsavory territorial history. Describing the concern as one relating to the “uncivilized” nature of certain populations, or more particularly the civility of their judicial processes, seems to elide a significant aspect of our nation's territorial history. In many instances, territoriality has served invidious purposes.

That is not to suggest that racism and xenophobia are ignored in the book. And it was surely not the point of the book to engage in a critical analysis of immigration policy, for example. But perhaps as important to this story as the liberties and freedoms territoriality has *provided* to U.S. citizens, both at home and abroad, are the equality and rights that have been *denied* to the “other.” And perhaps some part of the evolution of territoriality can be traced to our collective rejection of such invidious distinctions.

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