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Constitutional Domain and the Court

by Tim Zick

In reading Kal's description of territoriality's ebb and flow, I was particularly interested in the evolution in judicial thinking with regard to constitutional scope or domain. His description of the path from *In re Ross*, which stated emphatically that the Constitution does not follow the flag, to *Reid* and *Boumediene*, which give some extra-territorial force to the Bill of Rights and other constitutional guarantees, is excellent. The evolution has obviously been gradual, even glacial. Within this narrative, there are some fascinating examples of courts dramatically pushing constitutional boundaries outward, including the United States Court for Berlin's (post-*Reid* but pre-*Verdugo*) application of the right to jury trial to an alien outside U.S. borders (a story engagingly told on pp. 151-53). There have also been some relatively recent lower court decisions that expanded the territorial scope of constitutional rights. But in the Supreme Court, there has been very little expansion of the Constitution's domain over time. This is so despite the fact that the evolutionary path cuts across some periods associated with an active and rights-enforcing judiciary, and despite the fact that American power has expanded dramatically in geographic terms.

Even more remarkable than the lack of expansion has been the lack of constitutional clarity. Although the scope of extraterritoriality in the statutory context seems now to be well settled, a great deal of confusion and uncertainty remains in the constitutional context. As Kal correctly states, "[t]he courts of the United States rarely give a big answer when a smaller answer will suffice." (243) Judicial minimalism is certainly a partial explanation. But I wonder why, in more specific terms, the Court has had such a devil of a time historically with questions of constitutional domain. Try explaining the Constitution's extraterritorial scope to a relative, or a student, and you will quickly find yourself hedging and qualifying. *Verdugo* offers multiple approaches. *Boumediene* actually may leave more questions unanswered than it answers, and may ultimately tell us next to nothing about the Constitution's domain. If so, this will essentially leave us with *Reid* and *Verdugo* (and the puzzles of the *Insular Cases*). Are territorial domain issues simply more difficult and sensitive than other constitutional questions? Are the stakes simply higher? Is the Court uncertain of its expertise, or its competence to fashion some workable rule? Has it been waiting for some political judgment or settlement?

Whatever becomes of detainees in both ongoing and future wars, the issue of constitutional domain will not go away. Do you expect that a reader who picks up the book in 10 or even 20 years will learn all there is to know about the subject of constitutional domain? Or do you think the Court will revisit this issue and attempt some clarification?

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