BETWEEN THE DOMESTIC AND THE FOREIGN: CENTERING THE NATION'S EDGES

LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS. Mary L. Dudziak[1] and Leti Volpp,[2] eds. Johns Hopkins University Press. 2006. Pp. viii + 421. $19.95 (paper).

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> *"Every theory addresses some questions as its central questions, and thereby makes other questions peripheral."*[4]

Contemporary American constitutional thought is largely inward-looking. Most U.S. constitutional law scholarship "assumes the state," as Alex Aleinikoff recently noted,[5] and this means, among other things, that constitutional discourse focuses on relations among already-presumed members in an already-constituted national space. The subjects and location of constitutionalism, the "we" and the "here," are presupposed and unproblematized.

The fact that they are reflects a longstanding habit of insular thinking in the field. Constitutional scholarship's unwavering focus has long been the national self. And as this approach is conventionally practiced, there is not much world beyond this self. The American nation—with its myriad internal complexities and fascinations—is cast as the world entire.

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4. JOAN TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 13 (1994).

5. T. ALEXANDER ALEINIKOFF, SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE AND AMERICAN CITIZENSHIP 4 (2002).

Although rarely acknowledged in explicit terms, this insularity—this self-absorption—reflects a dominant tradition in Anglo-American normative political thought. Rawls' theory of justice presupposed a conception of "a democratic society [that is] a complete and closed social system."[6] In his early work, he aimed to develop principles for "the basic structure of society conceived for the time being as a closed system isolated from other societies."[7] Much constitutional scholarship in recent decades has treated the American nation as a kind of Rawlsian island.

Yet Rawls himself later recognized that the insularity premise is ultimately implausable and limiting,[8] and it appears American constitutional law scholarship is gradually coming to understand this as well. Today, the fields of comparative constitutionalism, foreign affairs and international law are growth areas—a trend that reflects increasing awareness that our constitutional community is one among many others rather than a universe unto itself. Some constitutional scholars are also beginning to place globalization of economic and social life on the intellectual agenda, recognizing the need to understand the national self as located in a broader transnational field. Getting beyond insularity, no doubt, will take time. Not infrequently, the world beyond the national self elicits more lip service than analytic integration. Still, there is little doubt that the comparative, the international, the global, are pressing in. The constitutional community's location in a broader world, and the fact of its imbrications with outside others, are increasingly shaping constitutional thought—as they must if it is to be of real theoretical and practical value in coming decades.

On the other hand, the problem of perspectival insularity cannot be remedied simply by recognizing the nation's global situatedness and its relations with legal actors and regimes beyond our own. It is not enough, that is, to supplement inward-looking constitutionalism by ensuring more air time for outward-oriented approaches—by adding more courses and conferences and SSRN websites on the global and diplomatic and comparative dimensions of constitutional studies. Although essential, this supplementation strategy only takes us part of the way. What it entails, in effect, is the posting of additional sentries at the fron-

6. JOHN RAWLS, POLITICAL LIBERALISM 40 (1993).

7. JOHN RAWLS, A THEORY OF JUSTICE 8 (1971).

8. *See* JOHN RAWLS, THE LAW OF PEOPLES (1999), in which Rawls turns his attention to relationships among political communities.

tier between the domestic and the foreign, with the new enlistees aiming outward rather than inward.

The problem with this image is that it presumes the existence of a firm divide between national-self and outside-other, between the domestic and the foreign, that doesn't hold up. Certainly, some issues fall neatly on one side of the line or the other, thus justifying a division of labor between inward and outward-looking constitutionalism. But it is also true that the national self and its others *converge* in a multiplicity of moments and manners and locations, and these convergences complicate the presumed divide between the in-here and the out-there. The domestic and the foreign often run up against each other. Whether formally or informally, violently or uneventfully, they interact; they mutually engage.

Notably, those occasions and locations of interaction between the domestic and the foreign are themselves neither entirely domestic nor entirely foreign; they are interstitial spaces, characterized by what anthropologists call liminality.[9] Whether arising at the nation's geographic frontiers or its figurative ones, they require their own attention as an analytical matter.

And, indeed, attention is now being paid in many disciplines, via the subfield of "border studies."[10] The consistent analytical premise of border studies is that the boundaries between the domestic and the foreign themselves constitute a sphere or set of spheres with their own distinct set of dynamics, their own ecologies, which require their own scholarly focus.

Purely for empirical reasons, then, making sense of the contemporary legal and political and social landscape requires attending not just to the national inside and the national outside, but to those domains of interaction at the border between them. Yet once again the significance of attending to these liminal spaces and moments is more than additive. The border between the domestic and the foreign is not merely a "third space" which demands attention in its own right[11]—although it does. A focus on national boundaries makes clear, additionally, that there are really no unalloyed domestic and foreign spaces after all. The nation's inside and its outside are always interpenetrated, always

9. *See generally* VICTOR TURNER, *Betwixt and Between: The Liminal Period in Rites de Passage*, *in* THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL (1967).

10. Partly because it is interdisciplinary, the literature is vast. For one synthetic, introductory treatment with a focus on the social sciences, see Emmanuel Brunet-Jailly, *Theorizing Borders: An Interdisciplinary Perspective*, 10(4) GEOPOLITICS, 633–49 (2005).

11. *See generally* HOMI BHABBHA, THE LOCATION OF CULTURE (1994).

marbled through with one another. Border studies anatomize these domains of interface; and in the process, allow us to see how the domestic and the foreign are constantly making and remaking one another.

One implication is that attending to the nation's edges, wherever those are located, is of essential importance even for those whose primary interest remains inward-looking, domestic constitutional law.[12] For it turns out that the constitutional inside is comprised not merely by matters of "ruling and being ruled" and other issues conventionally understood to lie at the heart of the field,[13] but by all of the rules and practices that govern the scope—personal and territorial—of the community *within which* people are ruling and being ruled. Policies and practices regarding immigration and citizenship status, extraterritorial jurisdiction, military occupation, management of territorial possessions, assignment of enemy combatant status in war, rights of noncitizens, status of refugees and escapees—all of these infuse and give shape to the presumptive "who" and "where" which serve as backdrop to many of the questions that are conventionally considered to lie at the core of constitutional inquiry.

This excellent volume of essays directs its gaze precisely at the domains of interaction between the foreign and the domestic in the context of the American nation-state. Originally published as a special issue of the *American Quarterly*, it is a collection of articles by scholars in law, literature and history who are devoted to making sense of the United States by way of its legally constructed edges. Sometimes these edges are located at the nation's geographic frontier, but just as often they can be found on the other side of the world or in very heart of the nation's territory. And it is often in, and through, the bodies and minds of persons—whether they happen to be territorially inside or not—that these edges are most consequential. As the collection's editors Mary Dudziak and Leti Volpp write in their introduction, the volume's essays address not only "spaces on the edge of American sovereignty," but also "internal places at the heart of American identity" (p. 2). These are the legal "borderlands" of the volume's title.

Dudziak, a legal historian, and Volpp, a culturally-minded legal scholar, have drawn together a set of essays that produc-

12. *See* PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS ch. 4, § II (5th ed. 2006).

13. *Cf.* T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197 (2000).

tively transverse traditional disciplinary boundaries. The literary and historical chapters are legally grounded, while the legal chapters are richly historical and culturally-informed. Reading them reminds us how and why interdisciplinarity can be so rewarding. The interdisciplinarity works well here because, for the most part, the diverse approaches are linked by common substantive questions about America's national edges, as refracted through issues of identity, responsibility, power and membership. Thus, there are essays on wartime internment, on immigration and naturalization policy, on military occupation, on extraterritorial jurisdiction, on sovereignty, on statelessness and on nativism.

Not surprisingly given the essays' range, the framing idea of "borderland" here can sometimes seem overworked. In an early chapter in the volume, Austin Sarat writes of the "uncertain boundaries of the rule of law itself" (p. 34). Here, the idea of borderlands is used purely metaphorically, to reference questions about the scope of law and legal concepts.[14] Elsewhere in the volume, the idea of "border" is employed to refer to generic issues of "internal" inclusion and exclusion, via the concepts of "sexual borderlands" and "racial borderlands." These uses of the term, while perhaps valuable in other contexts, distract in the context of this particular volume. The intellectual significance of this collection of essays, it seems to me, lies in its focus on *national* borders and on the borders of the American nation state, in particular. These are borders that constitute America not merely as a society but as a national polity located in the wider world. When the terms "borders" and "borderlands" are used without specific reference to national bordering, they can appear jargonish, and their use serves to undercut the analytical contribution the volume otherwise makes.

That is not to say that the study of "internal" forms of status exclusion, like racism, are beyond the proper scope of this volume. On the contrary, race has to figure centrally in any study of the construction of the nation. And this volume contributes significantly to analyzing the tangled linkages between nation and race. Some of the most powerful chapters in the book specifically conjoin a study of classically internal forms of status exclusions, like those associated with race, with construction of national borders

14. Austin Sarat, *At the Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality* (pp. 19–39). Sarat writes: "[T]he rule of law is replete with gaps, fissures and failures, places where law runs up against national interest of sovereign prerogative. Its boundaries are unclear, uncertain, unchartable" (p. 34).

and the national domestic/foreign divide. For example, in a chapter entitled "Racial Naturalization," legal scholar Devon Carbado powerfully characterizes his experience of induction into American national membership as a young black immigrant. In a pair of encounters with the LA police department—one while driving, the other in an erroneous apartment search—he and his brothers sought to invoke their "foreignness" to exempt themselves from assigned inclusion in the category of American black criminality, but to little avail. Although the police officers involved found themselves confused by the British accents and the lack of submissive "racial etiquette," they ultimately imbued the young men with black American identity through imposition of demeaning racialized law enforcement rituals. In this respect the brothers were "naturalized," not in the "formal and doctrinal" sense (p. 45), but in a metaphoric sense: "our race had naturalized us" into American national identity (p. 44). Their inclusion in the nation precisely entailed, and was marked by, racial subordination.[15]

In reflecting upon these experiences, Carbado proposes a way of thinking about the relationship between equality and belonging, between "the color line" and the territorial border-line, that is analytically useful. The matrices of equality/inequality and inclusion/inclusion are related paradoxically, he argues: "To racially belong to America as a nonwhite is to experience racial inequality"—that is, to experience exclusion (p. 47). In this regard, racism not only divides us as Americans; it also binds us as a nation in a multiracial hierarchy, via a longstanding regime of "inclusive exclusion" (p. 60). Here, the theoretical linkage explored between "internal border" and national border advances our study of the modalities of American otherness.

If, moreover, some of the metaphorical uses of the border concept threaten to thin it out too much, an insistence on a narrower, literal usage is no antidote. The volume's contribution derives precisely from its spacious interpretation of the national

15. This is an argument made by Toni Morrison in a well-known essay some years ago. Morrison wrote that the "most enduring and efficient rite of passage into American culture [is] negative appraisals of the native-born black population. Only when the lesson of racial estrangement is learned is assimilation complete." Toni Morrison, *On the Backs of Blacks*, *in* ARGUING IMMIGRATION: THE DEBATE OVER THE CHANGING FACE OF AMERICA 97 (Nicolaus Mills ed., Touchstone 1994). In response, Carbado writes, "Morrison's analysis might lead one to conclude that the episode she describes figures [the Greek immigrants'] but not the shoe shiner's Americanization. My own view, however, is that the encounter naturalizes the shoe shiner as well. More than merely reflect the shoe shiner's black American identity, the encounter actually produces it." (p. 60).

border concept. As a group, these essays make clear that national borders are not merely physical frontiers at the edges of nation-state territory. Borders are legal regimes within states that work to police membership, and they are sites of power claimed by states that operate in physical spaces far afield from the nation's geographic "home." Borders defend but they also contain; they divide but they also join. National borders have both instrumental and expressive content. The collection as a whole captures all of these facets, making its broad usage of the "border" concept valuable overall.

A number of these essays are especially relevant to American constitutional thought today. Christina Burnett's chapter, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands* (pp. 187-211), serves as an instructive counterpoint to the fast-growing literature on the constitutional status of unincorporated territories.[16] Unlike Puerto Rico, a territory cast in the *Insular Cases* as "foreign in a domestic sense," Palmyra (one of the Guano Islands) "is the only 'incorporated' territory of the United States." (p. 187). In the course of recounting how a series of tiny islets in the South Pacific (graced with a copious reserve of dried bird droppings considered valuable as fertilizer), came to possess such a unique and comparatively privileged status, Burnett provides a rich legal history of American extra-territorial expansion in the 19th century. In the course of the analysis, she highlights the key legal distinction between territories deemed to *belong to,* without being a *part of,* the United States (e.g., Puerto Rico) and those which are indeed considered a part of the United States such that the Constitution "follows the flag" there. As the Guano Islands highlight, the distinction is difficult to justify in formal and practical terms, yet it is highly consequential. For if Palmyra had any inhabitants to speak of, they would be entitled to full constitutional protections against American power, as the millions of residents of Puerto Rico—deemed "foreign . . . in a domestic sense"[17]—are not.[18]

16. This is a literature Burnett herself has importantly helped to nurture and to which she has contributed. *See* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Burnett and Burke Marshall, eds. 2001).

17. *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring). Christina Burnett co-edited an important collection of essays on the constitutional status of Puerto Rico in 2001. *See* Burnett & Marshall, *supra* note 16.

18. Per the *Insular* cases, "nonfundamental" constitutional rights and limitations do not apply in Puerto Rico or other incorporated territories, but truly "fundamental" rights and limitations (whatever these are, exactly) do. For discussion, see Gerald L. Neuman, *Constitutionalism and Individual Rights in the Territories*, in Burnett & Marshall, *supra* note 16, at 182–208.

But of course, if Palmyra is not Puerto Rico, neither is it a state of the union; it is some kind of intermediate, hybrid creature. Burnett reads this hybridity, and its relation to the distinct hybridity of the unincorporated territories, by reference to sovereignty and its manipulations. She makes clear that the history of American imperialism is as much about the disclaiming as the assertion of sovereignty. Sovereignty carries burdens as well as benefits, she writes; and "[t]he practice of imperialism . . . has relied on the creation of legal categories that do their work by withholding, retracting, and assiduously delimiting national power, as well as by increasing and extending it" (p. 208) precisely in order to avoid obligations conventionally regarded as appurtenant to rule.

Efforts by the United State to assert control while disclaiming sovereignty, of course, have notoriously framed recent debates over the nation's detention facilities in Guantánamo Bay. Amy Kaplan's essay, entitled *Where Is Guantánamo?* (pp. 239-66), examines the ways in which the United States has sought to construct and exploit the disjuncture between control and responsibility in Guantánamo Bay. Guantánamo is a hybrid in its own distinct way—"an animal" with "no other like it"—in Justice Ginsburg's words[19]—where coercive state power is deployed not merely beyond the formal territory of the state but "outside the rule of law" itself (p. 240). The Supreme Court in *Rasul* did repudiate government efforts to maintain Guantánamo as a space outside "the rule of domestic law" (p. 241). Yet the prison persists as a "legal black hole" (p. 239). And the best the *Rasul* majority could muster in any event was the argument that Guantánamo should be read in light of the *Insular Cases*, thus placing it "in an indefinite legal borderland between the domestic and the foreign" (p. 255)—hardly a mortal blow, she points out, against empire.

Much of this chapter narrates what Kaplan calls the "long imperial history" of the U.S. in Guantánamo (pp. 242-45). At one time, Guantánamo served a way-station in the African slave trade, and in the trade of sugar and molasses produced by slave labor. The U.S. gained control in 1903 in the wake of the Spanish American War pursuant to a lease agreement signed with Cuba—one which effectively forced Cuba "to cede sovereignty over part of the territory it never controlled" (p. 244). Thereafter, Guantánamo served as a "coaling station, a naval base, a

19. Quoted at (p. 239). At oral argument in the *Rasul* case, Justice Ginsburg stated, "I think Guantánamo, everyone agrees, is an animal, there is no other like it." Justice Ruth Bader Ginsburg, Oral Arguments, *Rasul v. Bush*, 542 U.S. 466 (2004). Transcript of Oral Argument are available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf.

cold war outpost and a detention center for unwanted refugees" (p. 240) before it became a notorious prison camp. Meanwhile, since the mid-20th century, the residential portions of the base have been portrayed as a kind of transplanted small-town America, and even today, with its "bowling alleys, video rental shops, golf courses and McDonald's restaurants" (p. 246), it is still described by military personnel as "Mayberry RFD with bad neighbors"(p. 246)[20] (although, as Kaplan notes, it is unclear whether the bad neighbors referred to are "the Cubans kept out by barbed wire fences and military guards or the prisoners encaged by barbed wire inside the base" (p. 246).)

Kaplan's point in providing this context is to situate the debates over Guantánamo in a larger social and political field than the usual legal accounts provide. Kaplan makes two arguments: First, Guantánamo needs to be read as part of a larger history of American imperialism. Most legal discussions of the prison camp there focus on matters of human rights, national security, extra-territorial jurisdiction and the scope of international law. While these elements are obviously crucial, "the legal space of Guantánamo today has been shaped and remains haunted by its imperial history" (p. 241) and needs to be understood in these terms.[21] Her account—which includes detailed and perceptive readings of the *Rasul* and *Hamdan* decisions—impels us to reflect on how it has come to pass that this tiny slice of island, so close and yet so far from the United States, "occupies a transitional political space, where a prison housed in a communist nation against whom the U.S. is still fighting the cold war has become an epi-center for the new 'war on terror'" (pp. 239-40), and also about how it has come to serve as both prototype and shorthand for other instances of

20. For this quote, Kaplan cites Matthew Hay Brown, *Cuban Base Has American Flavor*, MORNING CALL ONLINE, Jan. 2, 2004 (p. 264 n.30). Kaplan continues: "With unintended irony, a defense department publication elaborated on the meaning of "Mayberry," the town in television's *Andy Griffith Show* of the 1960's. 'Like Mayberry, Guantánamo Bay has virtually no crime'" (p. 246–47), citing Kathleen T. Rhem, *From Mayberry to Metropolis: Guantánamo Bay Changes*, AMERICAN FORCES PRESS SERVICE, Mar. 3, 2005.

21. Kaplan writes: "Until recently, the notion of American imperialism was considered a contradiction in terms, an accusation hurled only by left-wing critics. Indeed the denial of imperialism still fuels a vision of America as an exceptional nation, one interested in spreading universal values, not in conquest and domination. Yet, since September 11, 2001, neoconservative and liberal interventionists have openly embraced the vision of an ascendant American Empire policing and transforming the world around it through military and political might and economic and cultural power. Other commentators of different political perspectives have viewed the United States as an overstretched empire in chaotic decline . . . [However, t]he question of empire has rarely entered the important legal debates about . . . Guantánamo as a legal dilemma" (pp. 240–41).

unbridled incarcerative power (by way of what Michelle Brown, another of the volume's contributors, calls "The Prison Nation Abroad" (p. 381)).

Second, Kaplan powerfully reminds us that the naval base at Guantánamo has served a range of imperial functions over the years: "[F]rom a way-station for the global reach of military might outward, it became a site of detention camps for blocking Haitian and Cuban refugees from entering the United States." (p. 247). One portion of the camp was newly constructed in the 1980's to house HIV-infected Haitians during a period of race-inflected hysteria over mass contagion. These anxieties extend to the current prisoners who "continue to inhabit the racialized images . . . of shackled slaves, infected bodies, revolutionary subjects, and undesirable immigrants" (p. 248).

Overall, this chapter brings legal studies together with American Studies in a particularly effective way. Its sometimes-devastating cultural reading of "Guantánamo as a legal dilemma" (p. 241) represents interdisciplinarity at its best.

Another fascinating chapter of constitutional interest turns its sights back to the national interior and explores the complex interface between race and immigration politics here, this time in an historical context. Moon-Ho Jung's chapter, "Outlawing 'Coolies': Race, Nation and Empire in the Age of Emancipation" (pp. 85-109), examines the interplay between anti-slavery and racist logics in the debate over Chinese contract laborers who entered the United States en masse in the post-Civil War era. Jung shows, first, how the Chinese contract labor system exploded after emancipation in response to escalating labor demands and, in turn, how opposition to the "coolie" labor system served to justify opposition to Chinese immigration more broadly, and eventually made possible "the passage of the nation's first restrictions on immigration under the banner of 'freedom'" (p. 87). Anti-slavery arguments, in short, subserved anti-Chinese policy.

In the process, the chapter shows how demarcating "the legal boundary between slavery and freedom" (p. 86), between migrant labor importation and immigration, is difficult (a point we have yet again seen underlined by recent debates in the U.S. over proposed guest-worker programs). Jung asks, "[d]id the recruitment and employment of 'coolies' represent a relic of slavery or a harbinger of freedom?" (p. 88). That question was answered differently by different parties at different moments; the "coolie" labor regime was, at times, regarded (both by pro-slavery and abolitionist forces) as tantamount to, or even more exploitative

than, slavery; at others, as a means of effectuating slave emancipation and as an exemplar of "free" labor. But whatever the verdict, Jung shows how the Chinese coolies and African slaves or former slaves—"'the Chinaman and the Negro'" (p. 91)—were each employed to construct the other as racial inferiors and, simultaneously, to produce an image of the "immigrant" to America as a white European.

Meanwhile, the story of the coolie trade and the opposition it engendered is part of the story of nineteenth century United States imperial expansion in the Caribbean and Asia. After British emancipation, Chinese labor became essential as replacement labor on Caribbean plantations. In response, the antibellum U.S. government deployed anti-slavery and free trade rhetoric as justification for more aggressive regional interventions aimed at "deliverance of slaves and 'coolies' from backward despots" (p. 101). This history is recounted by Jung in chewy detail. Overall, the chapter's portrait of Chinese Exclusion as a site where slavery and emancipation, labor relations, racial stratification, immigration policy and national expansionism all intersect highlights the power and the the necessity of engaging in scholarly inquiry at the border.

There are several other chapters in the *Borderlands* volume which will be of interest to many constitutional scholars. These include Teemu Ruskola's essay on the 19th century regime of American extraterritorial jurisdiction in Canton (an instance of what Ruskola calls "nonterritorial imperialism" (p. 267-92, 283)), Lisa Yoneyama's essay on Japanese women's enfranchisement under American military occupation after World War II (pp. 293-318), Susan L. Carruther's treatment of Eastern Bloc "escapees" during the Cold War (pp. 319-50), Linda Kerber's account of the development of the institution of statelessness in the U.S. (pp. 135-57), and Michelle Brown's chapter on Abu Ghraib and the "Prison Nation Abroad." All of these present perceptive treatments of the borders, physical and symbolic, that divide the domestic from the foreign (pp. 381-405).[22]

22. Other chapters include an entertaining piece on Oil, Empire and the Sport Utility Vehicle, see David Campbell, *The Biopolitics of Securtiy: Oil, Empire and the Sports Utility Vehicle* (pp. 351–80), and the following chapters: Siobhan B. Somerville, *Notes Toward a Queer History of Naturalization* (pp. 67–83); Nayan Shah, *Between "Oriental Depravity" and "Natural Degenerates": Spatial Borderlands and the Making of Ordinary Americans* (pp. 111–33); Maria Josefina Saldana-Portillo, *In the Shadow of NAFTA: Y Tu Mama Tambien Revisits the National Allegory of Mexican Sovereignty* (pp. 159–85); Andrew Hebard, *Romantic Sovereignty: Popular Romances and the American Imperial State in the Phillippines* (pp. 213–38), and an introductory essay, Austin Sarat, *At the*

In sum, this volume of interdisciplinary essays on the legal construction of national borders has much to offer constitutional scholars. Yet it is worth considering the question of how, exactly, it can be useful. We clearly all benefit from reading across fields and reading interdisciplinarily, but what is this material's relevance to the field of constitutional studies specifically? Does constitutional law simply regard the border literature produced in other areas of law and in neighboring disciplines as pools which are edifying to dip into from time to time, but which are ultimately tangential to its standard research program? Or must national edges be brought into the center of the field itself?

Aleinikoff has argued that constitutional law scholarship needs to widen its gaze to address questions of the American nation-state's "borders, its members and its powers."[23] I entirely agree, as I have made clear. So far, these issues have remained largely off the main stage—as preconditional but unremarked frameworks rather than the central event. That is not to say the issues are unexplored: there is, in fact, a great deal of powerful work going on in constitutional studies on "legal spatiality,"[24] territoriality, assertions and denials of sovereignty, scope of jurisdiction, citizenship and immigration. Recent events associated with the "war on terror" have clearly accelerated the pace of production on these themes.[25] Still, in many respects, studies of the divide between America's foreign and domestic spheres continue to languish in "the backwaters of constitutional law."[26]

To make America's edges a central preoccupation of American constitutional law would be to self-consciously develop a

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Boundaries of Law: Executive Clemency, Sovereign Prerogative, and the Dilemma of American Legality (pp. 19–39).

23. ALEINIKOFF, *supra* note 5, at 11.

24. Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005)

25. *E.g.*, David Cole, ENEMY ALIENS (New Press, 2003); Neal Katyal, *Equality in the War on Terror*, 59 STAN. L. REV. 1365 (2007); Natsu Taylor Saito, FROM CHINESE EXCLUSION TO GUANTANAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE (2007).

26. ALEINIKOFF, *supra* note 5, at 183. Other scholars have urged that questions concerning the scope of the nation's membership and territory be treated as central to the field. *See especially* the symposium issue of Constitutional Commentary on *The Canons of Constitutional Law*, esp. Sanford Levinson, *Why The Canon Should Be Expanded To Include the Insular Cases and the Saga of American Expansionism*, 17 CONST. COMMENT. 241 (2000); Mark Tushnet, *The Canons of Constitutional Law: An Introduction*, 17 CONST. COMMENT. 187 (2000). *See also* Aleinikoff's contribution to the same symposium issue. T. Alexander Aleinikoff, *Sovereignty Studies in Constitutional Law: A Comment*, 17 CONST. COMMENT. 197 (2000). Several years earlier, Gerald Neuman urged constitutional scholars to attend to themes of national membership and the scope of national territory and jursidiction. *See* GERALD L. NEUMAN, STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS AND FUNDAMENTAL LAW (1996).

subfield of national boundary studies. Aleinikoff proposes "sovereignty studies" to name the field (or a similar one), but I don't find that framing compelling. Sovereignty, it seems to me, is one among many of the substantive themes this field must investigate, along with membership, territoriality, spatiality, citizenship, and jurisdiction, rather than an umbrella concept that contains them all. Indeed the idea of sovereignty seems to reference only part of what is at stake here: the term is conventionally linked with governance and power (and perhaps, by implication, its absence), but not with structural and experiential issues of national membership, solidarity, identity, and lack thereof.[27] Further, the term "sovereignty" seems to me to be loaded with too many assumptions about the nature of political community for the job.[28] Sovereignty's nearly inextricable association with the nation-state—the fact that we tend to treat the nation-state as the natural and inevitable locus of sovereignty—makes it hard to treat the national state as a central object of analysis in such a field. The idea of "sovereignty studies," in other words, seems to presuppose a substantial part of what we want to investigate.[29]

We are better off with a concept that names not a substantive quantity but a domain of inquiry. Arguably, the idea of "boundaries" does this. To speak of boundaries is not necessarily to speak of a physical domain; boundaries are often inanimate. On the other hand, the object of inquiry would not be conceptual boundaries, or the "the boundaries of legality" generally (p. 34) since, after all, much of legal studies could be described as the investigation of where and when some rules or standards give out and others begin. The focus, instead, would be the territorial

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27. For a thoughtful recent reflection on the concept of sovereignty, *See* James Sheehan, *Presidential Address: The Problem of Sovereignty in European History*, 111 AM. HIST. REV. 1, 2 (2006):

> Sovereignty is obviously a political concept, but unlike political concepts such as democracy or monarchy, it is not about the location of power (the sovereign, Hobbes wrote, can be "the one or the many"); unlike parliament or bureaucracy, it does not describe institutions that exercise power; and unlike order or justice, it does not define the purposes of power. The concept of sovereignty has to do with the relationship of political power to other forms of authority . . . Sovereignty is best understood as a set of claims made by those seeking or wielding power, claims about the superiority and autonomy of their authority.

28. For a useful commentary on the nationalist presumptions of the sovereignty concept, see R.B.J. Walker, *Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice*, in CONTENDING SOVEREIGNTIES: REDEFINING POLITICAL COMMUNITY 159–85 (R.B.J. Walker and Saul H. Mendlovitz, eds., Lynne Rienner Publishers, 1990).

29. Given Aleinikoff's own preoccupations with "sovereignty and membership," "sovereignty studies" does not quite seem to capture what he is after in any event.

and jurisdictional boundaries of the American nation, as mediated through constitutional law. Studying national boundaries means studying the ongoing construction and reconstruction of the context within which the Constitution is deemed, or claimed to be, operative. It means attending to the endlessly contested geographic and personal domain of all those rights and powers that are conventionally considered the real subject of constitutional law. It means making the frame part of the story.

To argue that the nation's boundaries ought to be made a central object of constitutional focus, I should add, is not necessarily to express a normative view about those boundaries. It is true that in many fields, border studies tend to be critical in orientation; and virtually all of the *Borderlands* chapters draw on, and articulate, critical approaches in their various disciplines. Yet my point here in urging more attention to the nation's edges is predominantly methodological in nature: the problem is not so much that national boundaries and their enforcement are bad as that they are ignored.

On the other hand, the methodological probably cannot ultimately be severed from the normative in this endeavor. After all, questions will more often be ignored when they relate to phenomena taken to be natural and unproblematic; and conversely, the very process of disregard tends to reinforce the perception of their naturalness and unproblematic quality. In this regard, simply placing these questions on the table can be viewed as a critical act, an act of "denaturalizing" aspects of the world heretofore taken-for-granted.

It is also true that questions about national boundaries inevitably implicate themes of exclusion and domination, about which some normative engagement is inevitable. And since exclusion and domination within the nation are themes that lie at the heart of the constitutional law field, making national boundaries a central concern of the field will require us to think about how well, and to what extent, the field's standard normative frameworks translate from the nation's center to its edges.

In sum, for those constitutional law scholars interested in making American edges more central to the field, the essays in the *Borderlands* volume provide an excellent accompaniment. Through imaginative readings of historical and contemporary legal materials, they help us to think about who is in and who is out, where is here and where is there—in short, about what is domestic and what is foreign in a national sense.