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Book Review

DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW. By Kal Raustiala. New York, N.Y.: Oxford University Press, 2009. 328 pages. \$29.95.

By John Parry*

Law depends on the existence of a sovereign government with power over a defined territorial space. Most of the time, this assumption functions as an unacknowledged baseline. As with many assumptions, however, a closer look reveals enormous complexity. The twentieth century, for example, witnessed the rise of international human rights law, a body of rules that claims to reach across territorial boundaries and into sovereign spaces. During the same period, U.S. courts repeatedly confronted questions about how U.S. law applies to conduct that takes place outside of the United States but that has effects in the United States or affects U.S. interests. More generally, assessing the importance of territory for sovereignty, legal regulation, and conflict-of-laws purposes was critically important throughout the last century. That importance has only increased with the new century and the strains created by the U.S. response to terrorism, especially as the Supreme Court vacillates between traditional and cosmopolitan views of sovereignty and territory in cases like *Munaf v. Geren*¹ and *Boumediene v. Bush*.² As territorial issues retain and even increase their importance, the need to understand their scope and interrelationships also becomes more and more compelling.

Kal Raustiala admirably fulfills this need with *Does the Constitution Follow the Flag?: The Evolution of Territoriality in American Law*.³ The

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1. 553 U.S. 674 (2008).

2. 553 U.S. 723 (2008).

3. KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?: THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW* (2009).

book is both a historical survey of the law relating to territoriality and an effort to provide organizing concepts for thinking about the forces that shape its meaning and significance over time.⁴ Importantly, Raustiala eschews the easy claim that territory and territorial borders are no longer important in an age of globalization. Territoriality, in his account, continues to be “the organizing principle of modern government.”⁵ At the same time, however, he also makes clear that it is not static. To the contrary, because territoriality functions “to manage, minimize, or sometimes capitalize on legal differences,”⁶ it is necessarily dynamic. The great strength of Raustiala’s study is the way in which he analyzes and explains this dynamism.

Drawing on the insights of writers such as Gerald Neuman, in *Strangers to the Constitution*⁷ and Alex Aleinikoff, in *Semblances of Sovereignty*,⁸ Raustiala explores the links between the emergence of the United States as a world power and changing notions of territoriality in U.S. law. From a broad perspective, this connection might seem obvious, but Raustiala hones in on the details. He provides careful readings of cases and legal developments, and meticulously places them into historical and political context. Among the topics that he addresses are the *Insular Cases*,⁹ antitrust law, overseas federal courts (such as consular courts and the United States District Court for China), status of forces agreements (SOFAs), and the legal and territorial status of the Guantanamo Bay Naval Base. Under Raustiala’s illuminating analysis, these conceivably disparate topics are revealed to be the doctrinal manifestations of the shifting principles and interests that territoriality reflects.

For example, Chapter Four begins by narrating the efforts of the executive branch and federal courts to determine the extent to which federal antitrust law applies to actions that take place overseas but have effects in the United States. Raustiala situates this discussion against the decline of traditional colony-based imperialism and the move to indirect control over dependent states, the rise of the progressive movement, and the beginnings of the modern regulatory state. He then broadens his focus to consider the rise of the “effects test” in U.S. and international law and the ways in which this approach began to apply outside of the context of antitrust law. Significantly, all of this analysis also provides traction for insights into the

4. *Id.* at 7–8.

5. *Id.* at 5.

6. *Id.* at 7.

7. *E.g., id.* at 242, 238 n.36 (citing GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* (1996)).

8. *E.g., id.* at 255 n.71, 268 n.58 (citing T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY: THE CONSTITUTION, THE STATE, AND AMERICAN CITIZENSHIP* (2002)).

9. The leading *Insular Cases* include *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); and *Downes v. Bidwell*, 182 U.S. 244 (1901).

changes in ideas about territoriality that took place during the early- and mid-twentieth century.

The next chapter turns to regulation of the military. Raustiala moves from war crimes, to SOFAs, to the rights of military spouses overseas, and then to the United States Court for Berlin, before finishing with the implications of these issues for U.S. efforts to combat international crime. The centerpiece of the chapter is an extended assessment of the transformative case on extraterritoriality and the Constitution—*Reid v. Covert*¹⁰—and its still-developing impact on later occurrences and topics. Other chapters exhibit similar combinations of broad coverage and detailed analysis.

Does the Constitution Follow the Flag? will take its place alongside Peter Spiro's *Beyond Citizenship: American Identity After Globalization*¹¹ and Antony Anghie's *Imperialism, Sovereignty and the Making of International Law*¹² as essential recent reading for anyone interested in contemporary approaches to and understandings of territory, citizenship, and sovereignty. While Spiro advances what could be called a cosmopolitan theory of citizenship and Anghie draws on post-colonial studies for his critique of the structure of modern international law, Raustiala gestures toward a theory of constitutional geography and a twenty-first century approach to the relationship between sovereignty and territory. To that end, the concluding chapter pulls together the various threads of Raustiala's analysis and underscores his call for "much greater attention to the past, present, and future of territoriality."¹³ With this synthesis accomplished, he suggests the existence of "a powerful disjuncture between the Westphalian doctrines of the past that were revived to bolster the Bush administration's policies in the war on terror and the common understanding of American constitutionalism that the twentieth century has forged."¹⁴ He also signals his sympathy for the argument that "geographic or citizenship distinctions simply have no real place in the interpretation of constitutional rights."¹⁵

If I have any criticism of the book, it is that Raustiala does not develop his own theory of territoriality and rights beyond this point. Such a theory would not just choose sides in a debate between traditional doctrines and contemporary understandings but would also examine that disjuncture more critically, explain how legal decision makers might remove geography and

10. 354 U.S. 1 (1957).

11. PETER J. SPIRO, *BEYOND CITIZENSHIP: AMERICAN IDENTITY AFTER GLOBALIZATION* (2008).

12. ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

13. RAUSTIALA, *supra* note 3, at 225.

14. *Id.* at 247.

15. *Id.* at 246.

citizenship from constitutional analysis, and assess what the consequences of such a development might be. In the end, however, it is almost certainly an indication of *Does the Constitution Follow the Flag?*'s success that it not only informs and enlightens but also whets the reader's appetite for more of Raustiala's thoughts on these issues.