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Balkan Ghosts

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What is it about the Balkans that is evocative? We all know, Siegal seems to believe. And we do: nationality or origin-based, persisting, bloody civil war: ethnic cleansing, outright massacres, partition, Sarajevo, etc. But why do we need the allusion?

We have our own history precisely on point. Reconstruction played out as civil war revisited, as massacres, separation, persistent terrorism, the whole thing — with a large triumph for hatred, a successor regime grounded in a culture of racial antipathy, popular and official terror, legal ratification. Why not recall our own horrors? Denial? We like to think that the Reconstruction afterward – Jim Crow etc. – has run its course, however much in fits and starts. A new regime – maybe institutionally first adjudicative but increasingly electoral, maybe even now culturally more tentative and uneven – has replaced open white supremacy – not necessarily an entire defeat for predecessor adherents, but a changed environment, with new moves, a new status quo, new possibilities indeed advertising and demonstrating the possibility of black ascendancy. Why hold on to past
horror? That is at bottom Justice Breyer’s question at the close of his Seattle opinion. (See Parents Involved in
Thomas answers — because reversion is always possible, nothing is definitively settled. (See id. at 772-81
(Thomas, J., concurring)). We should stay in touch with the past to ready ourselves to revisit its battles and
to keep the past at bay, to the extent possible. Thomas lays claim to a tragic constitutional law, sets up
constitutional law as a deep resource for meditation, akin to spiritual exercise.

But why invoke the Balkans then – as Professor Siegel and Justices Kennedy and O’Connor do? Perhaps
“balkanizing” is not necessarily a reference to an appalling end-state. Instead, we may think, it calls to mind a
deteriorating accumulation, attitudes asserted and steps taken too easily, ultimately in a wrong direction.

In this respect, it is interesting to consider a passage Justice Kennedy wrote that Siegel does not emphasize –
taken from his majority opinion in Rice v. Cayetano, 528 U.S. 495 (2000):

[T]he use of racial classifications is corruptive of the whole legal order .... The law itself may not
become the instrument for generating the prejudice and hostility all too often directed against
persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.
“Distinctions between citizens solely because of their ancestry are by their very nature odious to a
free people whose institutions are founded upon the doctrine of equality.” Hirabayashi v. United
States,.... (Rice, 517; see 320 U.S. 81 (1943))

Hirabayashi! What was Kennedy thinking?

Chief Justice Stone’s opinion is (put politely) controversial, we all know, in Stone’s own words, itself perhaps
“odious to a free people,” an effort at justifying a nationality-restricted curfew limiting West Coast citizens and
residents of Japanese origin in the wake of Pearl Harbor. One sequence in particular stands out:

There is support for the view that social, economic and political conditions have prevailed since the
close of the last century, when the Japanese began to come to this country in substantial numbers,
have intensified their solidarity and have in large measure prevented their assimilation as an
integral part of the white population. [320 U.S. at 96] ... Federal legislation has denied to the
Japanese citizenship by naturalization ... and the Immigration Act of 1924 excluded them from
admission into the United States. ... State legislation has denied to alien Japanese the privilege of
owning land. ... It has also sought to prohibit intermarriage of persons of Japanese descent with
Caucasians. ... Persons of Japanese descent have often been unable to secure professional or skilled
employment except in association with others of that descent, and sufficient employment
opportunities of this character have not been available. [320 U.S. at 97 n.4] ... The restrictions, both
practical and legal, affecting the privileges and opportunities afforded to persons of Japanese
extraction residing in the United States, have been sources of irritation and may well have tended to
increase their isolation, and in many instances their attachments to Japan and its institutions. [98]
... Congress and the Executive could reasonably have concluded that these conditions have
encouraged the continued attachment of members of this group to Japan and Japanese institutions.
[id.] ... Whatever views we may entertain regarding the loyalty to this country of the citizens of
Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of
Congress that there were disloyal members of that population, whose number and strength could
not be precisely and quickly ascertained. [99]
The possibility that citizens and residents of Japanese origin confronted by pervasive government support for restrictions grounded in prejudice might react negatively provides constitutional defense for further restrictions: “Because we treated you badly we reasonably fear you and therefore treat you even worse.” This is a vicious circle Robert Kaplan would appreciate – we too are (our history too is) Balkan. (See generally Robert D. Kaplan, Balkan Ghosts (1993)). It is also the sort of circle that Justice Kennedy’s own prescription in Rice (much like Justice Harlan’s in Plessy, we remember) means to break: “The law itself may not become the instrument for generating the prejudice and hostility all too often directed against persons whose particular ancestry is disclosed by their ethnic characteristics and cultural traditions.”

We can now readily appreciate, for example, the balkanizing risk posed by the Seattle plan at issue in Parents Involved. Students (and parents) were first invited to choose high schools and then – if racial demographics diverged from targets – particular students (and parents) were denied their choices precisely to correct the racial mix. (See Parents Involved, 551 U.S. at 711-12) It is hard to imagine this set-up as not introducing added racial tension in the families immediately affected. (Justice Thomas notes a similar risk associated with the Louisville plan. See id. at 759.) Justice Kennedy’s endorsement in Parents Involved of structural remedies that aim to become part of the background – that appear as simply given in the individual case – is altogether consistent with this perspective. None of these glimpses, I recognize, is necessarily dispositive. There may well be countering considerations. But we get a sense of risk, one side of what’s at stake.

* * *

Reva Siegel writes in a deliberately narrowed setting. For purposes of this article she takes seriously only a few Justices of the Supreme Court – Justices Kennedy, O’Connor, and Powell: so-called centrists seemingly playing large roles in the Court’s own internal politics in the Roberts, Rehnquist, and Burger eras. And she means also not to proceed too far beneath the surface of the opinions she reads. Her aim is to pull out new starting points and not deep structures or fundamental contradictions or invisible hands. This narrowing works like a lens in a way, focus intensifying force.

Not surprisingly, however, Professor Siegel has to take for granted some premises – most notably, that racial conflict is bad and that constitutional law ought not to proceed on any assumption otherwise. At first glance, this does not seem like a controversial proposition. I suppose similarly, for example, in my discussion of Hirabayashi. In closely assessing schemes like that at issue in Parents Involved or messes of the New Haven sort, however, a more worked-out account might be needed. But of course Balkan associations do much work – at least suggestively – in this regard as well (another sign of the success of Siegel’s article). Indeed, we may learn something from the most basic Balkan “fact”: Divisions along ethnic or racial or religious or national lines provoking antipathies — we know too, within our “American Balkans,” gender and sexual orientation, inter alia — if countenanced and persisting provoke horrific violence. The obvious question becomes: Why is legal use of violence-provoking terms therefore problematic?

- It cannot be because law does not involve use of force. The opposite, obviously, is true. It cannot be because law does not ordinarily provoke resistance. Legal terms often appear arbitrary (to some), or provoke disagreement (among some), and in these ways, in all sorts of settings, increase social discord. But there is a difference between the law’s own violence, or resistance — even violent resistance — to its terms, and violence which law foments or exacerbates by making use of already violence-inducing norms. Law in these circumstances works to reinforce or augment conditions we tend to associate with law’s absence — “war of all against all.” Law in these circumstances cannot be termed protective. Rather, it provokes hazard.

- It seems especially wrong for legal instruments to use terms that are in themselves obviously violence-provoking: as though the instruments embrace that which they should forestall. “Infernal” law-making,
we might think. But if it just turns out for some reason that certain terms, because of their independent
associations, are violence-provoking (something not predictable in advance), this effect is no different,
seemingly, from run of the mill resistance. But why can’t law mean to induce intra-social violence? To
some degree it does. Consider the doctrine of self-defense, the ramifications of bounties, or for that
matter self-help repossession.

• Is it sufficient to note that in these cases violence furthers the law’s own purposes? The lynch mob before
trial or before conclusion of appellate review, however, appears to put at risk all legally-relevant
considerations. We care about this – if we do – because we mean for legal terms to supplant
alternatives: we mean for law, as a complex of language and language-using institutions, to replace
alternative regimes. It is enough, perhaps, to recognize just this presupposition alone — to take law
seriously means to take seriously its priority. Terms within law that increase the likelihood of a-legal
actions undercut legal priority.

• This account of course drains off all or nearly all of the horror integral to the incidents that provoke the
inquiry. But it also offers instead the beginnings of a description of an interior motive, an almost-
positivist prompt or goad for judges, officials, and lawyers at large to oppose legal transplants of terms or
arrangements borrowing or reinforcing antipathetic distinctions already too common in the society at
large. It affords one jumping off place, as it were, for a peculiarly legal resistance, a truly countering
politics of law.

• The idea that grand horrors ought to lead to grand responses is tempting – it honors, after all, the form of
corrective justice. But it may matter more that the sense of horrors finds usual places — shows up, put to
work, within and therefore reinforcing within ordinary analysis. Isn’t this the opposite of denial? Not
occasional, marked as reserved for special occasions, otherwise forgotten: the fact of outrage becomes a
working part of social or legal work — a problem to be faced, to be remembered, to be acknowledged as
implicated, a matter of ordinary responsibility rather than heroic response, and thus everyone’s task.

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Reva Siegel’s article provokes thought – likely, in many cases, more sophisticated exercises than I have outlined
here. I like this article lots. I suspect it will become even more pertinent after Fisher v. University of Texas.

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