Borders that Bend

César Cuauhtémoc García Hernández

Follow this and additional works at: https://chicagounbound.uchicago.edu/uclf

Recommended Citation
Available at: https://chicagounbound.uchicago.edu/uclf/vol2023/iss1/5

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in University of Chicago Legal Forum by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
Borders that Bend

César Cuauhtémoc García Hernández†

ABSTRACT

Borders do not exist. They are made and remade. At every step, the law creates, moves, reforms, reproduces, and reinforces the border. Focusing on the boundary that México and the United States share, this essay critiques the U.S. Supreme Court’s privileging of the sovereign prerogative to control access to the nation’s territory. In their efforts to control movement across and near the border, legal doctrine permits Executive officials to deviate from ordinary legal constraints on the use of violence. This creates a modern version of the sovereign that Carl Schmitt described a century ago: extra-constitutional in origin and subject to law only on its own terms. Urging an end to the law of border exceptionalism, the essay argues that the Schmittian sovereignty that exists in the borderlands is neither justified by the facts on the ground nor required by the very legal principles that the Supreme Court points to.

I. INTRODUCTION

Just west of Conchita Road in Hidalgo, Texas, there is an old pumphouse that once brought fresh water to arid fields, turning dust into green blankets of citrus trees and vegetables. Named after the hero of México’s independence from Spain, Miguel Hidalgo y Costilla, the town exists only because there is a river to hug and an international boundary to traverse. Not far to the south, close enough to see with the naked eye, Avenida 20 de noviembre in Reynosa, Tamaulipas honors another important moment in Mexican history: the start of the country’s internal revolution against Porfirio Díaz, the dictator who gained fame in the fight against France only to rule with a heavy hand across the late nineteenth and early twentieth centuries.

Between Hidalgo and Reynosa stretches the Río Grande River, its muddy waters moving slowly along the river’s southeasterly route. Here the river doesn’t seem so big, despite what its name claims. From the bridge that spans the waterway between the small town of Hidalgo and

† Gregory H. Williams Chair in Civil Rights and Civil Liberties and Professor of Law, Ohio State University. Special thanks to Lauren Hamlett for excellent assistance.
the sprawling city of Reynosa, it appears to be like any ordinary river. Underneath the surface, though, its currents still run wild, a reminder that in México the Río Grande isn’t the Río Grande at all: it’s the Río Bravo, the wild river.¹

As wild rivers go, the Río Grande/Río Bravo has taken many forms and occupied multiple locations. In 1933, a storm blew through the region, taking lives and destroying crops.² An interpretive sign at the old pumphouse in Hidalgo crystallizes the power of its winds and the strength of the rain that it dumped into the river. The hurricane, the sign claims, moved the river south by about half a mile. Decades later, the United States Department of Homeland Security’s contractors would use that gap to erect a wall of steel and concrete. One river forming one international boundary with two identities and two locations—all in the last 100 years.

In the gap between a single international boundary joining the United States and México and its shifting form and location, the law of the border falls into a theoretical chasm. To believe political and legal justifications for policing the border, criminals of all types roam along the international boundary; from the bootleggers of a century ago to the fentanyl smugglers of today. At any moment, among them might be a terrorist. At every moment, there are migrants prone to illegality, willing to violate federal immigration law by crossing without the federal government’s permission, trampling on the federal government’s sovereign prerogative to keep them out if it so chooses.

These are the myths of border illegality that propel the law of border exceptionalism. To courts, this toxic mix of illegality is reason enough to depart from foundational principles of legality. At the border, the sovereign’s powers must be at its peak, courts declare, and so they regularly defer to the desires of the executive and legislative branches. Along the border, the Fourth Amendment’s constraint on the federal government must be at its weakest. For that reason, some seizures are permitted without suspicion and others on racial criteria that, in other parts of the United States, are treated as vestiges of a shameful past.³ Since the border is exceptional, so, too, must the law of the border be.

The law of border exceptionalism leads to predictable results. Freed from the restraints that apply elsewhere in the United States, at the border police forces stop grandmothers on their way from church and

---

¹ Joanne Tortorete Kropp, Constructing a River, Building a Border 1 (Jan.1, 2016) (Ph.D. dissertation, University of Texas at El Paso) (ScholarWorks@UTEP).
² Philip J. Klotzbach et al., The Record-Breaking 1933 Atlantic Hurricane Season, 61 MONTHLY WEATHER REV. E446, E454 (March 2021).
³ See Part II.B.
shoot teenagers in the light of day. Residents and travelers through the region are left with little legal recourse. They can complain, but they are unlikely to claim victory because the law of the border gives federal officials extraordinary leeway. Time and again, courts refuse to interfere with the securitization of the border even when it leads to death. If the Executive wants to deploy troops to the border and Congress is willing to fund it, the law of the border will permit deviations from legal norms present elsewhere in the nation-state. If Congress authorizes modern takes on ancient fortifications and the Executive is willing to police them, the law of the border will find daylight through which twenty-first century bullets can fly through.

There is a misalignment between the fact that the border between the United States and México regularly evolves and the exceptional quality of the law of the border. While legal doctrine permits violence premised on the notion that the border is nearby, the reality of the borderlands is that the border is not so easy to pin down. Sometimes it proves difficult to know where one nation-state begins and another ends. At other times, the border is so far that all but the strongest would likely perish before reaching the nation-state’s boundary. Premised on the belief that life along the border is exceptionally risky, the law of the border overlooks that in many situations, life in the borderlands is very similar to life in the nation’s interior. By embracing the myth of border illegality, securitization creates the very insecurity it claims to promote.

Rather than focus on the cross-border movement of people and goods, this essay takes as its starting point of analysis the mobility of borders themselves. Sometimes borders move in the most literal sense—from there to here—by agreement or acquiescence of two countries. At other times, borders move in form: they take on features that would make them unrecognizable to visitors of the past. Examining the border between the United States and México reveals that when borders move, the judiciary rarely interjects. It allows the border to take

4 Several years ago, Border Patrol agents in McAllen, Texas, approximately seven miles north of the river, pulled over my mother, a grandmother several times over, as she and a friend drove to church. By my mother’s account, the agent asked about their citizenship status and where they were headed, then allowed them to continue along their way. Teenagers like José Antonio Elena Rodríguez and Sergio Adrián Hernández Güereca, whose deaths at the hands of Border Patrol agents are discussed in Part II.B., were not so fortunate.

5 As a testament to the border’s constant evolution, the author of a recent essay about the border found it necessary to define the phrase “the border.” See Ernesto Hernández-López, Border Brutalism, 46 FORDHAM INT’L L.J. 213, 219 n.26 (2023).

6 See, e.g., Treaty of Peace, Friendship, Limits, and Settlement with the Republic of México, Mex.-U.S., Feb. 2, 1848, 9 Stat. 922 (repositioning the border between the United States and México); La Isla del Río Bravo, El FRONTERIZO, June 27, 1884, at 1 (describing a binational dispute regarding an island in the Río Grande River claimed by the United States and México).

7 See, e.g., Jennifer Koshatka Seman, Borderlands Curanderos 125 (2021) (describing the development of a 190-mile quarantine zone along what was referred to as “Mexican Texas”).
the shape that the Executive, working with Congress, chooses. The def-
ferential posture with which courts approach questions of border for-
mation and reformation leaves little room for oversight, and immense
space for tragedy: from the indignity of official harassment to the horror
of law enforcement killings.8

Leaving so much power in the hands of the Executive creates a
troubling version of sovereignty.9 A century ago, the political theorist
Carl Schmitt articulated a theory of sovereignty in which the sovereign
is an extra-constitutional decision-maker empowered to choose when
the law applies and when it does not.10 Under Schmitt’s version of sov-
ereignty, the sovereign can manipulate the slippery slope between these
poles while the people are simply objects of the sovereign’s decisions.
The version of sovereign control that predominates along the border be-
tween the United States and México is one in which what matters is
who has the power and is willing to exercise it. This is a dangerous no-
tion, as illustrated not only by the consequences along the U.S.-Mexican
borderline in recent decades, but also by the rise of Nazi authorities
that Schmitt supported. For courts, as for legal scholars, Schmittian
sovereignty concretized in the law of border exceptionalism ought to be
cause for concern because it turns the margins of the territory into the
margins of legality, permitting the suspension of the law in the name of
protecting the nation-state. That is, to exercise control, governance, and
legal authority, the United States treats the borderlands as a space of
extraordinary deviance justifying exceptional legal powers.11

Proceeding in three parts, this essay puts the law of border excep-
tionalism into its proper Schmittian theoretical context. Part I sketches
instances in which the international boundary between the United
States and México has moved as a way of highlighting the constant evo-
lution of border mobility. Part II then addresses the judiciary’s role in
regulating life in the constantly-evolving borderlands, paying special
attention to the plenary power doctrine and the Fourth Amendment.
Building on the factual and legal predicates set by the preceding parts,
Part III subsequently situates the exceptionalism of these legal doc-
trines along the border within Carl Schmitt’s trenchant theory of sov-
ereignty before proposing doctrinal alterations that would restore legit-
imacy to the law of the border.

8 See infra Part II.
9 I agree with the characterization that “[s]overeignty is a term used in many senses and is
much abused.” Restatement (Third) of the Foreign Relations Law of the United States
10 See generally Carl Schmitt, Political Theology: Four Chapters on the Concept of
11 See Restatement (Third) of the Foreign Relations Law of the United States § 206,
II. BORDER MOBILITY

To the philosopher Thomas Nail, “[b]orders are complex composites” wherein “each border is actually several borders.” In turn, each of those borders is the place where social division of some kind occurs.\(^{12}\) For most people who do not live near an international boundary, it is easy to imagine the border as a far-off place. For those who do live near an international boundary, it is just as easy to imagine the border as the place where one country stops, and another begins. For air travelers, the border is a pixilated line that appears on a seatback display. For land travelers, the border is the place where flags change colors, one set of law enforcement uniforms substituted for another. In the law, the border is imagined as identifiable and static. On this side, we live. On that side, they do.

Focusing on the geopolitical boundary between the United States and México, this Part illustrates the inherent mobility of borders. Rather than the clearly defined, easily identifiable points that can be plotted onto maps with the precision of regimented and standardized latitudinal and longitudinal measures, borders are, realistically, imprecise, fluid processes of bifurcation.\(^{13}\) The territorial division between the United States and México is no different.

A. Locating the Border

Less than two weeks before his time in the White House ended, President Donald Trump toured a section of border wall in South Texas. The steel pillars rising from a concrete foundation suggested certainty about the border’s location. But despite the president’s presence—and even his signature on a plaque attached to one of the steel bollards—neither the president nor the wall he visited were at the actual boundary between the United States and México.\(^{14}\) The border, it turns out, is difficult to pin down.

It has always been that way. In 1847, when Nicholas Trist left the United States for México his task was remarkably weighty but straightforward. On behalf of the United States, he was supposed to negotiate an end to the war between the two countries.\(^{15}\) As a high-ranking State Department official who spoke Spanish and was a member of the same party as President James Polk, Trist joined the invading forces as they

---

\(^{12}\) Thomas Nail, Theory of the Border 1-2 (2016).

\(^{13}\) Id. at 2.


made their way toward the Mexican capital. There, U.S. troops won a decisive victory, giving them control of Mexico City and pushing the Mexican president to flee the city, before resigning his post.

Trist carried with him a map: the seventh edition of Mapa de los Estados Unidos Mejicanos. Published by John Disturnell, the map was popular in the period. All the attention that México received in the lead up to war and then, of course, during the war, meant that there was an audience for basic information about the enormous country that, at that time, stretched from the northern edge of Guatemala to north of San Francisco. Disturnell’s map appears to have gone through about two dozen versions of the publication. It sold well enough that one copy of one of those versions wound up in Trist’s possession before he left the United States.

Trist turned to Disturnell’s map to carry out his diplomatic mandate, endowing it with legal significance. After military engagements made it clear that the United States could claim victory, it became the task of diplomats to settle on terms. One key issue was where to locate the new border between the two countries. In the east, the parties chose the Río Grande River, known in México as the Río Bravo, in part because that had been the boundary chosen by secessionist Texans a decade earlier. In the west, they chose a spot near the division between the Mexican states of Alta California and Baja California. The border started at the Pacific Ocean “one marine league due south of the southernmost point of the port of San Diego” and stretched all the way to the mouth of the Río Grande, the Treaty of Guadalupe Hidalgo provided.

From where the diplomats stood in the town of Guadalupe Hidalgo—today a Mexico City neighborhood—drawing the border was simple. Diplomats representing both countries could agree on the two end points, and both points existed on Disturnell’s map. Almost certainly unknown to the diplomats, there were already two problems with this plan. First, there was no standard measure of a marine league. That is, the unit that diplomats had inserted into the treaty and, thus, upon ratification by both countries, into the law, was of indeterminate length. It would take a lot of diplomatic maneuvering and on-the-ground measuring, but eventually delegations for the two countries

---

16 Id.
17 Id. at 36.
20 REBERT, supra note 18, at 63.
agreed on where to set the western terminus south of San Diego, just as the treaty demanded.

That proved to be the easy part. On the eastern end, the border that diplomats created with the stroke of a pen proved difficult to create on the ground. First there is the inherent difficulty of pinning a border to a river. As a river that flows through alluvial soil, the Rio Grande is prone to flooding—even now, but certainly in the middle of the nineteenth century before widespread damming and flood control infrastructure was built.21 At other times, the river is also prone to drying out. According to one member of the U.S. delegation tasked with actually locating the border on the ground, “I was informed, on good authority, that in the summer of 1851 a man drove a gang of mules along the bed of the river from the Presidio del Norte to El Paso.”22 Tracing the river’s deepest channel, as the treaty requires, is difficult when all that remains of the river is its muddy memory.

Starting with a difficult task, Disturnell’s map only added to the problems, not the solutions. Popular though it was, his map was wrong. The river was not where it should have been. On Disturnell’s map, the river was further east than his contemporaries would find in the dusty expanses around Paso del Norte, the Mexican town now called Ciudad Juárez in the state of Chihuahua. The town itself was further north on the map than it should have been.23

From Disturnell’s perspective, these are understandable errors. He did not hold himself out to be a cartographer. Instead, he was a professional publisher.24 In addition to maps, Disturnell printed directories, guidebooks, travelogues, and whatever else might sell. Every new product, just like every new version of a publication, came with the possibility of earning more revenue. There is no reason to suspect that Disturnell went through two dozen versions of the Mapa de los Estados Unidos Mexicanos for nefarious reasons. He was probably just trying to sell a better product. “To Officers of the Army and Navy,” Disturnell promised a “new and revised” map of México, on sale for $1.50 according to an advertisement he placed in the Evening Post.25

As the cartographic text attached to the Treaty of Guadalupe Hidalgo, Disturnell’s map obtained legal significance the moment that the Treaty became binding on the two countries. At that instant, the errors

21 Kropp, supra note 1, at 113.
23 Rebent, supra note 18, at 7; Kropp, supra note 1, at 87.
in his map revealed a lasting feature of the border that the diplomats constructed. No matter how much diplomats or legislators imagined otherwise, the geographic components of the new border were not simple to spot and fixed in space. Rivers move and borders are misplaced. Because the map was supposed to illustrate what the treaty’s text described, from the very beginning the law of the border was a contradiction. Seemingly self-evident truths like distances were not self-evident at all. Basic facts like locations were not facts at all.

B. Moving the Border

What began in contradiction has remained in contradiction. In the first part of the twenty-first century, the border continues to exist as a social division that is often at odds with commonly held beliefs. Though units of measurement are more standardized and mapping technologies more sophisticated, the border continues to prove imprecise and fluid. Even its most severe modern-day form, a wall built of steel and concrete, exemplifies the border’s indeterminateness.

Along the states of Arizona and Sonora, the international boundary mostly runs straight east-west. Roughly halfway along the east-west boundary that the two states share, the city of Nogales is no different. In the older part, International Street in Nogales, Arizona runs alongside Calle Internacional in Nogales, Sonora—a reminder that, at one time, this was a single commercial strip serving a single community. These days, it is better to describe the asphalt as two streets. Down the middle, rust-colored bollards rise from a concrete support wall like calcified fingers. Along the northern side, concertina wire promises bloody violence to anyone who dares scale the towns’ border wall.

From the surface, the towns appear divided by this steel-and-concrete border wall infrastructure. But from beneath the surface, the old codependence persists. Underground, the two Nogaleses share sewage and water delivery systems that straddle the border. These critical pieces of infrastructure belie the surface-level mirage that the international boundary marks one country’s end and another’s beginning. Instead, like the roots of the walnut trees that once grew in the region and from which both cities take their name, a network of pipes make life possible on both sides of the division. What on the surface appears to be a clearly defined, stark border simply disappears several feet below ground, giving way to life-sustaining infrastructure. Viewed cross-sectionally, the border appears only as deep as the concrete foundation into which the steel bollards are buried.

In other places, the border wall obscures the true legal location of the border. A few miles southwest of Columbus, New Mexico, still famous only because Pancho Villa once stormed into town giving U.S. troops a pretext to set off after him, the border wall travels south of streets named Oro and Plata (gold and silver) and north of a public elementary school named after Ford, though whether that is Gerald or Henry I can’t say. As in other parts of the borderlands, here, language and honorifics seep across the border. And so, too, does the wall. In 2000, the former Immigration and Naturalization Service built a 15-mile stretch of border wall ostensibly designed to keep cars and trucks from crossing at will. Running from Palomas, Chihuahua, across the border from Columbus, to Las Chepas, a tiny settlement then that hardly exists today, the wall was supposed to make the border more difficult to cross.

The problem was that the U.S. government and its construction contractors did not know where the border was. Instead of tracing the border, they built 1.5 miles of wall in Mexican territory. México was not pleased. This land may have had little of value and less to admire, but it was Mexican territory all the same. They demanded that the wall be torn down, as eventually it was. During the intervening years, however, the wall’s erroneous incursion in México meant that the border was effectively in a different location. Maps and diplomats may have agreed that the border was further north, but to the few people who ever laid eyes on Las Chepas or an onion farm on the New Mexico side, the border was where the wall was. Until it wasn’t. Flipping President Trump’s famous call on its head, the United States paid to build the wall, paid to tear it down, and paid to rebuild it—this time in the United States.²⁷

Meanwhile, in South Texas, border wall construction usually cedes territory in a different direction. By necessity, the wall is never built along the border because the border remains the river. Instead, border wall construction occurs inland of the border. Near the pumphouse in Hidalgo, Texas, where a hurricane shifted the river’s course almost a century ago, the wall now blocks access to the river’s edge. Half a mile or so of Texas south of Conchita Road is off-limits from the north, but accessible from the south.

About 45-minutes away, Eloísa Tamez traces her family’s possession of her property to a time before either the United States or México existed. In 1743, the Spanish crown issued a land grant for the region then known as Nuevo Santander, conveying title to a group of colonists

that included Tamez’s ancestors. Another part of her family, she claimed in a lawsuit against the Department of Homeland Security, has occupied that region even longer, as it is the homeland of the Lipan Apache.28 Either way, for Tamez, this plot of land is what she has called home her entire life. Well over a mile from the border, a wall now runs through it, splitting what remains of her ancestral property in two.

Even after losing her lawsuit and acknowledging the federal government’s legal authority to build a wall through her property, Tamez insists the federal government is “taking away our land.”29 In her view, the law and reality do not match up. To reach the southernmost portion of her property, Tamez uses a key that Customs and Border Protection (CBP) gave her, but part of her property, she insists, has still been lost. Like a passport, the key allows her to traverse the wall, but it does not erase the wall’s existence. For everyone who lacks a key, the wall has turned Tamez’s property into the equivalent of an international boundary to someone without a passport. The key, like the passport, is a privilege that the government extends only to a select few on terms set by the government.

III. BORDER EXCEPTIONALISM

From its earliest moments, the border between the United States and México has moved. Indeed, courtesy of Disturnell’s errors and the need to plot onto the ground what the businessman misplaced on the map and diplomats concretized into law, the border was born in movement. In the Tamez family plot’s wall, the division that is the border has moved inland. As Thomas Nail might say, here the border is several borders.

Like borders, people have always moved. Religions tell us of Cain leaving Eden, Muhammed leaving Mecca, and Moses leading Israelites from Egypt. Scholars working in multiple disciplines have traced Nilotic-language speakers from eastern to southern Africa,30 Mexicas as they reached Mesoamerica,31 and African Americans who left the American South for cities across the West and Midwest.32 Each instance

28 First Amended Complaint for Injunctive and Declaratory Relief at ¶ 82, Tamez v. Chertoff, No. 08-cv-0555, 2009 WL 10693618 (S.D. Tex. March 18, 2008).
appears in a different historical, political, economic, and social context, but, whether real or imagined, each is united by movement.

In contrast to those instances of human mobility and many others, the borders of political jurisdictions that turn mobility into migration are mere adolescents. The rigidly defined boundaries of nation-states are from centuries to mere decades old. Despite the longevity of human mobility and the innovation in governance that borders represent, today it is more common to imagine the movement of people as abnormal and dangerous while simultaneously envisioning the border as necessary and immovable. Law and legal culture invert reality, treating age-old human mobility as exceptional and youthful nation-state boundaries as unmovable.

The doctrinal consequences of this paradigm are remarkable. This Part turns to the doctrinal effects of treating the border as fixed and clear while presuming that cross-border movement is anomalous and threatening. Focusing on the plenary power doctrine and Fourth Amendment border jurisprudence, this Part attempts to respond to the paradigm-challenging frame that Sonia Shah urges scholars to turn to: “As the myth of a sedentary past evaporates, a previously obscured question emerges: not why people migrate but why their movements inspire terror.”

A. Sovereign Control

In the United States, for most of the first century after the Atlantic colonies successfully seceded from the United Kingdom, cross-border movement by people was regulated—to the extent it was regulated at all—by subfederal entities. States and towns often enacted laws limiting who could enter or take up residence within their boundaries. Beginning in 1875, though, Congress began legislating federal regulation of cross-border movement across the nation’s international boundaries. Soon, courts were tasked with determining whether the power to regulate cross-border movement—a key component of what we now describe as immigration law—was rightfully within the purview of the states and localities or more properly left to the national government.

In a series of decisions during the last quarter of the nineteenth century when anti-Chinese racism was popular and Chinese exclusion was developing as a matter of law, the Supreme Court located this power within the federal government, basing its conclusion on the need

---

for sovereign control. In *Chae Chan Ping v. United States*, the Court sided firmly with the federal government, explaining that a range of powers, including the power to “admit subjects of other nations to citizenship, are all sovereign powers.” Three years later, the Court reiterated this position with even greater clarity. In *Nishimura Ekiu v. United States*, the Court explained,

> It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

During the same period, involving many of the same cases, the Court also began developing the plenary power doctrine, the notion of a legal authority inherent in the national government to regulate cross-border movement of people and goods. In *Chae Chan Ping*, the Court’s first articulation of this legal concept, the Court allowed a statute to override a treaty in part on the basis that a migrant’s permission to enter the United States, even if it was a return trip, is “held at the will of the government, revocable at any time.” The manner in which Congress and the President jointly decide to exercise that will, the Court added, “is conclusive upon the judiciary.” Four years later, in *Fong Yue Ting v. United States*, the Court added that Congress can involve the courts in questions of entry or expulsion, but it is not required to do so. Rather, the Court held in *United States ex rel. Knauff v. Shaughnessy*, “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”

Summarized, the Court’s late nineteenth century decisions handed immigration law to the federal government on terms set by the President and Congress, administered by executive branch officials, and with immense deference from the courts. More than a century later, this remains the governing doctrinal framework.

---

36 130 U.S. 581 (1889).
37 *Id.* at 604.
38 142 U.S. 651 (1892).
39 *Id.* at 659.
41 *Chae Chan Ping*, 130 U.S. at 609.
42 *Id.* at 606.
43 149 U.S. 698 (1893).
44 *Id.* at 713–14.
B. Fourth Amendment

With the courts giving the Executive and Congress almost unreviewable authority to regulate cross-border movement, the question that follows necessarily concerns how the latter two branches exercise that power. In policing the border, executive branch agencies adopt an expansive view of their powers and Congress regularly appropriates substantial funds for these purposes.

The Fourth Amendment’s prohibition against unreasonable searches and seizures and its warrant requirement stand as the Constitution’s most significant constraints on the federal government’s power to impinge on people’s lives through the threat of surveillance, arrest, or imprisonment. Typically, the Fourth Amendment requires that police officers show individualized suspicion of wrongdoing before searching someone.

In a series of decisions expressing concern about some type of threat purportedly present at the border to a greater extent than elsewhere in the country, the Supreme Court relaxed those requirements at or near the border, “creating a zone nearly devoid of any Fourth Amendment protections.”46 Closest to the border, the Fourth Amendment’s individualized suspicion norm simply does not apply. In a Prohibition era decision, the Court in 1925 authorized warrantless, suspicionless searches of anyone attempting to cross a border into the United States. The Court explained that this deviation from the norm was necessary to promote “national self-protection.”47 A statute enacted five years later provides similarly expansive authority to customs inspectors anywhere in the United States, but courts have restrained that statute’s use to comply with Fourth Amendment restraints.48 Similarly, two regulations that date to 1972, long before the creation of today’s Department of Homeland Security, authorize suspicionless searches—one of people and another of vehicles—at the border.49

Suspicionless searches are likewise permitted at locations a great distance from the border if they are sites where people or goods first reach the United States (e.g., airports or mail sorting facilities), at least if the search does not involve immense intrusiveness.50 They are also...

48 19 U.S.C. § 1581(a); see United States v. Manbeck, 744 F.2d 360, 381–82 (4th Cir. 1984) (explaining, “§ 1581(a) must be interpreted in a manner consistent with limitations imposed by the Fourth Amendment.”).
49 19 C.F.R. § 162.5 (2022) (regarding vehicles); 19 C.F.R. § 162.6 (2022) (regarding persons).
50 United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (extending the Fourth Amendment’s border search exception to a passenger arriving at an international airport located in Los Angeles, a city that is not at or near the border); United States v. Ramsey, 431 U.S. 606,
permitted far from the border at fixed checkpoints staffed by federal immigration officers.\textsuperscript{51}

Even where suspicionless searches are not allowed, the logic of the border still permits a relaxed constitutional posture. An invasive body cavity inspection, accompanied by confinement for many hours at an international airport almost 200 miles from the border between the United States and México, was permitted because officers had individualized reasonable suspicion of wrongdoing—the relaxed Fourth Amendment standard that the Court first adopted in \textit{Terry v. Ohio} to justify a brief, investigatory stop.\textsuperscript{52} At a fixed immigration checkpoint approximately 66 miles from the border, an intrusive secondary inspection on the side of the highway is permitted on the basis of racial criteria that are banned in most U.S. law enforcement contexts. As the Court announced in \textit{United States v. Martinez-Fuerte},\textsuperscript{53} “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.”\textsuperscript{54} Meanwhile, in \textit{United States v. Brignoni-Ponce},\textsuperscript{55} the Court held that those same immigration officers can stop motorists in the course of roving patrols so long as they possess reasonable suspicion of wrongdoing by someone in the targeted vehicle.\textsuperscript{56} That reasonable suspicion analysis, the Court added, can include “the apparent Mexican ancestry of the occupants.”\textsuperscript{57} Expanding, the Court suggested that Mexicans look a certain way and immigration officers are trained to identify those features. “The Government also points out that trained officers can recognize the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut,” the majority explained.\textsuperscript{58}

To justify these deviations from the doctrinal norm, the Court’s rationale has shifted over the decades. In the 1970s, the Court regularly pointed to the extraordinary challenges presented by migrants who lack the federal government’s permission to be physically present in the United States. Unauthorized migrants “create significant economic and social problems,” and almost all come from México, the Court wrote in 1975.\textsuperscript{59} Stopping these individuals, especially those who enter the United States clandestinely, the Court added the following year, “poses


\textsuperscript{52} \textit{Montoya de Hernandez}, 473 U.S. at 541; \textit{Terry v. Ohio}, 392 U.S. 1, 21-22 (1968).

\textsuperscript{53} 428 U.S. 543 (1976).

\textsuperscript{54} \textit{Id.} at 563.

\textsuperscript{55} 422 U.S. 873 (1975).

\textsuperscript{56} \textit{Id.} at 882.

\textsuperscript{57} \textit{Id.} at 885–86.

\textsuperscript{58} \textit{Id.} at 885.

\textsuperscript{59} \textit{Id.} at 878–79.
formidable law enforcement problems." The border between the United States and México is approximately 2,000-miles long and “thinly populated” in many places, the Court explained. Once in the United States, migrants can count on friends or professional smugglers to move them around. As a result, “the flow of illegal aliens cannot be controlled effectively at the border.” At the same time, there is so much traffic in borderlands highways that it “would be impractical” to impose more demanding constraints on federal agents. They are doing what they can to patrol “thousands of miles of open border,” Justice Powell wrote in a concurring opinion in 1973.

With the onset of the war on drugs in the 1980s, the Court’s rationale evolved to include the federal government’s newfound interest in regulating illicit drug activity through the criminal legal system. The “sovereign’s interests at the border” remained, but the Court added concern about “the integrity of the border . . . heightened by the veritable national crisis in law enforcement caused by smuggling of illicit narcotics.” Early in the twenty-first century, the Court reiterated that concern. The Court added to its longstanding position that “the United States, as sovereign, has the inherent authority to protect, and a paramount interest in protecting, its territorial integrity” and underlined that the “interest in protecting the borders is illustrated in this case by the evidence that smugglers frequently attempt to penetrate our borders with contraband secreted in their automobiles’ fuel tank.”

The federal government’s border policing infrastructure has grown immensely since the 1970s when the Court began rapidly deviating from Fourth Amendment norms in the borderlands. Today, there are almost 20,000 Border Patrol agents throughout the United States, with most stationed along the border between the United States and México. The Border Patrol’s parent agency, Customs and Border Protection (CBP), received a budget of approximately $16 billion in fiscal year 2021. That is a significant increase from a decade earlier when

---

61 Id. at 552, 556.
62 Id. at 557.
CBP received approximately $3.5 billion and a decade before that when it received approximately $1.1 billion. At roughly the same time, the federal government’s border wall has grown from approximately 135 miles in 2007 to approximately 653 miles in 2014, a figure that remained essentially unchanged five years later.

Relaxed doctrinal constraints on immigration officials combined with remarkable growth in personnel and infrastructure has come to a deadly climax on multiple occasions in recent years. Twice, the Fourth Amendment’s limits—justified by the courts’ embrace of the executive branch’s claims of dire circumstances at the border, mixed with the growing on-the-ground power of Border Patrol policing—have left two teenagers dead. One, sixteen-year-old José Antonio Elena Rodríguez, a Mexican citizen and resident of Nogales, Sonora, was shot dead as he stood along Calle Internacional. From across the border wall, somewhere along International Street in Nogales, Arizona, Border Patrol agent Lonnie Swartz shot into Sonora—hitting Toñito, as the teen’s family calls him, and leaving him dead. A district court held that Toñito’s mother could bring a Fourth Amendment claim against Swartz. The Ninth Circuit initially agreed, but ultimately vacated that decision after the Supreme Court disagreed in another teen’s death.

That case involved fifteen-year-old Sergio Adrián Hernández Güereca, a resident of Ciudad Juárez, Chihuahua and a Mexican citizen. One day in June 2010, while Sergio and a group of other children played in the concrete culvert that now hugs the international boundary between Ciudad Juárez and El Paso, Texas, Border Patrol agent Jesús Mesa, Jr. shot and killed Sergio. Like Toñito’s family, Sergio’s family raised a Fourth Amendment claim against the Border Patrol agent. Akin to its 1975 decision in Brignoni-Ponce weighing training in the Fourth Amendment that Border Patrol agents receive, here again the Court credited government self-regulation. Describing the constitutional context in which it evaluated Sergio’s killing, the Supreme Court

---


72 Rodriguez v. Swartz, 899 F.3d 719, 748 (9th Cir. 2018), vacated, 140 S. Ct. 1258 (2020); Rodriguez v. Swartz, 800 Fed. Appx. 535 (9th Cir. April 7, 2020) (vacating district court decision).
assumed that Border Patrol agents were instructed on the Fourth Amendment, explaining, “[w]e presume that Border Patrol policy and training incorporate . . . the Executive’s understanding of the Fourth Amendment’s prohibition of unreasonable seizures.”

Had the legal doctrine or factual circumstances been different, perhaps the Fourth Amendment would have provided Sergio’s family with a means of redress. But the facts were what they were. In the majority’s view, the Fourth Amendment applies in the United States, where the Border Patrol agent was standing when he shot Sergio, but Sergio was a Mexican citizen standing in Mexican territory when he was killed. It is best for the judiciary to follow Congress’ lead and leave “extraterritorial claims brought by foreign nationals to executive officials and the diplomatic process,” the Court announced, referring to the fact that Sergio’s parents, like their son, are Mexican citizens. As such, the Court held that the family could not pursue a Fourth Amendment claim against the agent.

As in its earlier decisions expanding the reach of border policing, the Court in Hernandez v. Mesa pointed toward the dangers involved in the borderlands. Specifically, the Supreme Court lamented the “large volume of illegal cross-border traffic,” citing statistics about people and drugs: cocaine, methamphetamines, and marijuana. Border Patrol agents’ efforts to stop these people and goods from entering the United States “at the border has a clear and strong connection to national security,” the Court explained. This “is a daunting task,” the Court added.

C. Territoriality

Treating the border as impervious, the Court kept Sergio’s family from seeking recourse in the courts. By insulating the Border Patrol agent who killed Sergio and, by implication, the agent who killed Toñito, the Supreme Court extended the exceptional policing authority that it had already granted federal officials along the United States side of the border in the form of an unusual power outside the United States. If Border Patrol agents kill people who are not U.S. citizens and are not in the United States when they die, the Fourth Amendment’s prohibition against unreasonable seizures does not function as a meaningful limitation on their use of force. In effect, the border operates as a shield

---

73 Hernandez v. Mesa, 140 S. Ct. 735, 744 (2020).
74 Id. at 749.
75 Id. at 749–50.
76 Id. at 746 n.6.
77 Id. at 746.
78 Id.
for gun-wielding Border Patrol agents willing to shoot across the international boundary. In the words of a leading Mexican newspaper after Sergio’s death, “Patrulla fronteriza: licencia para matar” (Border Patrol: license to kill).\textsuperscript{79} Like any shield, the border is not impenetrable. Had Sergio been a U.S. citizen or been standing in the United States, the agent would have been at increased risk of legal liability, the Court suggested.

Complicating matters is the fact that sometimes it is difficult to identify the border. Near Palomas, Chihuahua, for example, government contractors thought they knew where the border was, but they did not.\textsuperscript{80} In Río Rico, residents, government officials, and anyone who passed by a police officer reasonably thought they were in Tamaulipas, México, but actually were more likely to have been in Hidalgo County, Texas.\textsuperscript{81} When the Border Patrol agent aimed his gun in Sergio’s direction, he did not know “on which side of the boundary line the bullet would land,” as Justice Breyer put it in an earlier decision involving Sergio’s killing.\textsuperscript{82}

It is tempting to imagine that U.S. law always ends at the border, but, doctrinally, that is not true. The Immigration and Nationality Act, for example, extends U.S. citizenship to some newborns if they are born outside of the United States.\textsuperscript{83}

In a contentious series of cases, the Supreme Court also recognized that the writ of habeas corpus reaches beyond the territorial United States. In \textit{Rasul v. Bush},\textsuperscript{84} one of the Supreme Court decisions that arose from the U.S. military’s use of Guantánamo, Cuba to imprison people after the attacks of September 11, 2001, the Court readily acknowledged that this sliver of southeastern Cuba is not part of the United States. Despite that, the Court emphasized the U.S. government’s “plenary and exclusive jurisdiction” over the military base on which the people seeking to access U.S. courts were confined.\textsuperscript{85} This theory was sufficient for the majority to extend habeas protection. Four years later, the Court returned to the Constitution’s extraterritorial reach in another decision arising out of Guantánamo. In \textit{Boumediene v.}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{80} See supra Part II.B.
\item \textsuperscript{81} Matter of Cantu, 17 I&N Dec. 190, 192 (BIA 1978).
\item \textsuperscript{82} Hernandez v. Mesa, 137 S. Ct. 2003, 2009 (2017) (Breyer, J., dissenting).
\item \textsuperscript{83} Immigration and Nationality Act § 301, 8 U.S.C. § 1401; Immigration and Nationality Act § 309, 8 U.S.C. § 1409.
\item \textsuperscript{84} 542 U.S. 466 (2004).
\item \textsuperscript{85} Id. at 475.
\end{itemize}
\end{footnotesize}
Bush,86 again the majority recognized that habeas extends to the people held there, though this time it adopted a “functional” assessment of U.S. law’s extraterritorial applicability.87

Tapping the World War II-era Johnson v. Eisentrager,88 Justice Scalia disagreed with the majority of his colleagues in both cases. In Eisentrager, the Supreme Court declined to allow German citizens detained at a military base in Germany to challenge their confinement through a habeas petition.89 Justice Robert Jackson explained that Eisentrager had no bearing on U.S. citizens. “With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens,” he wrote on behalf of the majority.90 Turning to post-September 11 detainees, Justice Scalia would not have extended habeas to the people held at Guantánamo.91 Even he, however, recognized that the nation’s territorial boundaries do not necessarily mark the limits of the nation’s laws. Relying on Eisentrager’s explicit inapplicability to U.S. citizens, Scalia posited in Rasul that there might be an “atextual exception” to the habeas statute, at least if the aggrieved individuals are U.S. citizens.92

By the time Boumediene reached the Court, Scalia seemed to think this was a settled question. Approvingly quoting an earlier decision concerning criminal prosecution of U.S. citizens abroad, Scalia embraced the position that “[w]hen the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.”93

Ironically, even U.S. citizens are not insulated from border exceptionalism.94 In 1997, Esequiel Hernández, Jr., a U.S. citizen from Redford, Texas, a spit of scrubland that hugs the Rio Grande River northwest of Big Bend National Park, tended his family’s goats after school one day as he often did. Alone in a field where wild dogs liked to lunch, he carried his grandfather’s old rifle to protect himself and his family’s

---

87 Id. at 764.
89 Id. at 785.
90 Id. at 769.
92 Id. at 497.
94 Chacón, supra note 46, at 153 (concluding that border exceptionalism “affect[s] citizens and noncitizens alike”).
livelihood. To a U.S. Marine hiding in the scrappy bushes that dot the arid landscape, Esequiel was a threat. Standing about 200 yards away, Esequiel fired in their direction. There is no reason to think he knew the Marines were there. Almost no one in town did. And there is also no reason to think Esequiel was trying to hit Marines. He had told a teacher that he often used that time with the goats to practice his shot.

But the Marines were in fact there and they were worried. “We’re taking fire,” one Marine radioed to the others. When Esequiel—only a week past his eighteenth birthday—raised his gun again, the Marine pulled the trigger on his M-16. One shot to the chest was enough. Esequiel was dead.95 A U.S. citizen was killed by a U.S. military agent deployed on an official mission: to help the Border Patrol keep out people and drugs. Fifteen years later, no one has been held liable.

IV. DANGEROUS BORDERS

The border’s constant evolution and the judiciary’s astounding complaisance in response illustrate that, in fact and in law, the border is much more complicated than the simple vision of unique dangers suggest. To the courts, the region’s factual extraordinariness justifies its legal exceptionalism. Due to its departure from norms that apply in the rest of the United States, the law of the border’s special nature makes it especially difficult to reconcile with theories of democratic governance. The law’s legitimacy suffers as a result. “In any social process, it is often what happens at the margins that is of greatest importance and the most difficult to incorporate into our analysis,” argue political scientists James Hollifield and Tom Wong.96 Though they were concerned with migration rather than the law of border exceptionalism, their basic point holds true. As a factual matter, the border is important because it marks the territorial limits of the nation-state. But as a legal matter, the border is important because it identifies the limits of the law. Not the limits of the law’s reach, but the limits of what the law will permit.

Interrogating the relationship between the sovereign and the individual at the border reveals a troubling dynamic. At the border, the sovereign’s power is at its peak and the individual’s ability to curtail the sovereign’s power is at its weakest. This is an asymmetrical relationship that finds theoretical grounding in Carl Schmitt’s century-old analysis of sovereignty. That same theory, and the political context in which it developed and in which its author thrived, should be enough to

prompt reevaluation of the border exceptionalism that persists today in the United States.

A. Sovereign Decisions

In the raw power that DHS exercises in the borderlands, courtesy of the doctrinal exceptionalism that the Court has extended the President and Congress, Carl Schmitt’s theory of sovereignty finds modern-day solace. In *Political Theology*, his compact 1922 meditation on sovereignty, Schmitt begins at his simplest. “Sovereign is he who decides on the exception,” Schmitt writes in the book’s opening sentence.97 Put differently, Schmitt defines the sovereign as whoever has power over others and is willing to exercise it. In wielding power, the sovereign creates sovereignty, the process of “determining definitively what constitutes public order and security, in determining when they are disturbed, and so on.”98

The sovereign, whose defining feature is its ability to turn sovereignty from an imaginary to a reality, is similarly tied to law. Emphasizing the sovereign’s decision-making power, Schmitt explains, “[w]hat matters for the reality of legal life is who decides.”99 Just as decisional authority is key to constituting the sovereign, Schmitt argues that the decision-making role is key to the law’s operation. But in casting the decision-making party as a building block of law, Schmitt insists that these are distinct. Neither the sovereign nor sovereignty are the same as the law. Rather, “[s]overeignty is the highest, legally independent, underived power,” while “the state is . . . identical with its constitution.”100 That is, to Schmitt, the state exists only to the extent and upon the terms allowed by the constitution. In contrast, the sovereign exists outside the constitution. “[H]e stands outside the normally valid legal system,” Schmitt writes.101 Moreover, if sovereignty is “underived,” then sovereignty’s source, the sovereign, is not just distinct from the constitution; the sovereign precedes the constitution.

As an entity independent from and antecedent to the law, the sovereign is not bound by the law. It can follow the law, even submit itself to legal requirements, prohibitions, or processes, but it does so as a matter of choice since the sovereign bears “the monopoly to decide.”102 Most of the time the sovereign will choose to allow normal legal processes to operate. “For a legal order to make sense, a normal situation must

97 *Id.* at 1.
98 *Id.* at 9.
99 *Id.* at 34.
100 *Id.* at 17, 19.
101 *Id.* at 7.
102 *Id.* at 13.
exist,” Schmitt writes.103 But it is the exception to this rule that “is more interesting” to Schmitt’s conceptualization of the sovereign.104 In those exceptional circumstances, the sovereign wields “unlimited authority,” meaning it can suspend “the entire existing order.”105

Suspending normal legal operations is, of course, a remarkable power. As a legal scholar, it is unsurprising that Schmitt envisioned the sovereign invoking the exception only in extraordinary circumstances. “The exception . . . can at best be characterized as a case of extreme peril, a danger to the existence of the state, or the like,” he writes.106 He reiterates this point later, explaining, “[t]he state suspends the law in the exception on the basis of its right of self-preservation.”107

Writing in early twentieth century Germany, Schmitt was heavily influenced by his era. An academic and intellectual, he was engaged in theoretical debates of the period as much as he was embedded in the political forces sweeping the continent.108 Unlike Hannah Arendt, Walter Benjamin, and many other intellectuals, he did not flee Germany upon Nazism’s rise. Perhaps his decision was motivated simply because, being Catholic, he was less likely to die, an end that Arendt escaped but Benjamin did not.109 That might be enough of an explanation except that Schmitt was not simply another unremarkable professional toiling away in Germany as Hitler’s power peaked, the continent convulsed, and the horror of horrors unfolded. He was, instead, an influential constitutional scholar before and after the Nazi rise to power.110

As a professor of law at the University of Berlin during Hitler’s time as chancellor, he could not avoid the political and intellectual changes underway. In February 1933, the Reichstag quickly burned to the ground, prompting German President Paul von Hindenburg to invoke Article 48 of the German Constitution, a law that Schmitt wrote in Political Theology “grants unlimited powers.”111 In the eighteen

103 Id. at 13.
104 Id. at 15.
105 Id. at 12.
106 Id. at 6.
107 Id. at 12.
108 See William E. Scheuerman, Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt, 17 HIST. POL. THOUGHT 571, 571 (1996) (claiming that after the Nazis consolidated power, his writings “offer unambiguous evidence of Schmitt’s fervent quest to ally himself with the National Socialist regime.”).
110 See Joseph Bendersky, The Expendable Kronjurist: Carl Schmitt and National Socialism, 1933–36, 14 J. OF CONT. HIS. 309, 312 (1979) (explaining that Nazi leaders brought Schmitt into their fold because they viewed him as a “prestigious” source of support).
111 SCHMITT, supra note 10, at 11.
months that followed, Hitler finished consolidating power. During that stretch, Schmitt joined the Nazi Party and later became president of the National Socialist Jurists Association, leading some later scholars to describe his Nazi affiliation as heartfelt. Always prolific, his output in support of Nazism was impressive: five books and over thirty-five articles from 1933 to 1936.

Schmitt’s theory of sovereignty, like his career, would always remain stained by the Nazism in which he was unquestionably an important intellectual even if neither the theory nor the author can be dismissed because of that ugly association. Indeed, eight decades later Italian philosopher Giorgio Agamben clarified that the state of exception that Schmitt wrote “makes relevant the subject of sovereignty, that is, the whole question of sovereignty,” is not a concept unique to Nazism or even to totalitarianism. Instead, Agamben locates its origin in a 1791 decree by the French Constituent Assembly distinguishing between an état de paix, an état de guerre, and an état de siège. Under an état de siège, civil authority regarding order and security passed to military authorities exclusively. In the modern era, Agamben writes, the state of exception “has become one of the essential practices of contemporary states, including so-called democratic ones.”

Today, the state of exception no longer takes the form of the French state of siege or Weimar Germany’s Article 48. Updated for the modern era, the state of exception appears in the late twentieth and early twenty-first centuries as a persistent drive toward securitization. “[T]he declaration of the state of exception has gradually been replaced by an unprecedented generalization of the paradigm of security as the normal technique of government,” Agamben writes. Under the banner of security, the law is pushed to its limit: where and when does it apply and where and when does it not? At the edge, the exception begins. Managing this “borderline concept,” as Schmitt put it, falls to the sovereign.

Encountering the boundary that the United States shares with México, the securitized, mundane state of exception that Agamben imagines comes to life. There, Agamben’s update to Schmitt’s theory is made real in routine interactions with front-line agents of the federal government. In the fall of 2024, I traveled from Mexico City, where I
was living at the time, to Denver, Colorado. It was an unremarkable flight until the moment I reached CBP’s immigration checkpoint inside the Denver airport. Like most other airports in the United States with international commercial flights, Denver’s international arrivals area is far from the border in fact, but at the border in law. The short distance from the airplane to the line of CBP officers represents a legal limbo: at once inside the United States yet asking for admission into the United States. Upon entry, everyone is required to appear before an immigration officer and request permission to proceed. For migrants, these can sometimes be delicate conversations about who they are, where they are coming from, what the government knows about them, and what plans they have. By contrast, U.S. citizens are entitled to enter the United States no matter who they are or what they have done in the past.

As a frequent traveler, I easily navigated the Global Entry station reserved for U.S. citizens with security preclearance. The CBP agent there was kind and efficient, but I had to renew my Global Entry permission, so the first agent referred me to a second one at the abutting desk. A few feet in front of me, within easy earshot, was a little girl who looked to be no more than six years old, her older brother, and their father. Three U.S. passports sat on the desk in front of the CBP officer. Breathing life into the sovereign, the CBP officer leaned over the desk to look down at her. “Have you ever been arrested,” the officer asked the little girl. The little girl did not move. Perhaps like I did, she thought she misheard. When no words came back at him, the agent repeated, “Have you ever been arrested?” This time the words came out a bit more spaced apart. Perhaps the agent thought that no words had been returned because the little girl had not understood. Perhaps the agent thought that if he spoke slower the little girl would understand, and words would be returned.

At first, no words came. The father, standing behind the little girl, stared at the agent. The little girl turned to the father. Her brother, a few years older, also turned to the father. The girl’s face was fear. The boy’s face was confusion. “Answer his question,” the father said to the little girl. The little girl turned back toward the desk, lifted her head up at the face sticking out above the glass partition and said as if in response to a defensible question, “No.” The officer returned three U.S. passports to the father, and the three continued along toward the baggage claim. They had navigated the legal limbo.

Walking out I thought of the Supreme Court’s words in Sergio’s case: “attempting to control the movement of people and goods across

---

the border . . . is a daunting task.” In that one exchange, the CBP officer illustrated that, at the border, the sovereign does not answer to the citizen. Instead, the citizen answers to the sovereign. It was not enough that these were U.S. citizens carrying U.S. passports. It did not matter that they had previously submitted to the additional scrutiny required by the government’s pre-clearance program. To carry out the sovereign’s “daunting task” of controlling cross-border movement, the CBP officer demanded access to the little girl’s past to sniff out any threat that did not appear on the computer in front of him. After all, as the Court explained in Sergio’s case, it is the CBP officer’s duty to identify “persons who may undermine the security of the United States.”

B. Schmittian Sovereignty

In the borderlands, Schmitt’s conceptualization of the sovereign reigns. Over its short history, the border between the United States and México has constantly evolved, occupying different locations and taking on different forms. The border is, as Sarah Fine writes of borders more generally, “the modern-day shapeshifter[].” Just as the border has itself moved at times, the plenary power doctrine and Fourth Amendment’s exceptionalism have moved the legal doctrine that governs life at the border away from that governing the rest of the nation-state.

Seeking to justify its demands for more power, the Executive repeatedly points to security dangers and existential threats to the nation-state emanating from the border. Almost as often, the courts agree, repeating many of those same fears: drugs and unauthorized migrants. Like lines and symbols on maps, these threats are the guideposts that mark the doctrinal course. But like Disturnell’s map, they are wrong. Neither of these phenomena are unique along the border. Illicit drug possession, transportation, and use are commonplace across the United States. In February 2020, eleven states plus Washington, D.C. had legalized marijuana for recreational purposes—while the Court in Hernandez v. Mesa explicitly referenced it as one of three substances whose efforts to keep out of the United States help explain why the work of Border Patrol agents promotes national security. By that time, legal

120 Hernandez v. Mesa, 140 S. Ct. 735, 746 (2020) (in part quoting 6 U.S.C. § 211(c)(5)).
recreational sale of marijuana had become a $90 million per month business in Colorado alone.123

Likewise, it is common, though remarkably myopic, to focus on the border as the site of unauthorized migration. That is certainly the place where one type of unauthorized migration occurs: clandestine entry into the United States. But clandestine entry is not the only type of unauthorized migration. Many people violate immigration law by arriving in the United States with the federal government’s permission, then failing to leave when required. Indeed, it appears that in recent years this may have become a more common method of violating immigration law than clandestine entry.124 Called overstaying, the Department of Homeland Security estimates that 104,621 people—mostly citizens of Western Europe, plus Australia, New Zealand, and Japan—overstayed in fiscal year 2020 alone.125 That same year, at least 57,592 Canadians overstayed, an estimate that DHS acknowledges is an undercount since most Canadians enter and leave the United States by land, where record-keeping is far worse than at airports.126 As such, it is common to find unauthorized migrants in communities around the country, including sizable communities in rural small towns and well-connected metropolises. Relying on these widespread and geographically dispersed legal violations to claim exceptional doctrinal leeway along the U.S.-Mexican border leaves courts “like travelers navigating an unknown terrain with the help of old maps, drawn at a different time and in response to different needs,” as Seyla Benhabib wrote of the nation-state.127

In the border’s shapeshifting, it is the sovereign who decides when law applies and when it is suspended. When diplomats finished their work in Guadalupe Hidalgo and politicians in México City and Washington approved it, the difficult task of stretching an imaginary line from somewhere south of San Diego to the mouth of the Rio Grande River fell on executive branch officials. Surveyors, scouts, military officers, enlisted personnel, geographers, and translators all teamed up

---


126 Id. at 30 tbl.6.

in the delegations that slowly made their way from end to end. They had instructions from México City and Washington, but ultimately it was up to them to decide when to measure the river’s flow and how to measure the coast’s distance. It was up to them to decide where U.S. law applies and where it does not.

A century and a half after that boundary was first laid across the land, executive branch officials remain equally powerful. Wherever they choose to put the border wall, the nation-state’s territory effectively comes to an end. Formally, the United States has not ceded the territory south of the wall to México, just as México did not cede a centimeter of dusty soil to the United States in the vicinity of Las Chepas. The United States retains “plenary and exclusive jurisdiction,” the Rasul Court’s touchstone for extending habeas protections, but that does not come with physical access by the public even where the public would otherwise be allowed. From the old pumphouse in Hidalgo, Texas, for example, a visitor can see into México across the tree canopy but cannot see the river that joins the two countries: the wall does not allow access to the river’s edge and the trees are too thick to see it from the distance.

In the law of the border, the separation of powers that undergirds U.S. constitutionalism has collapsed. The international boundary shields violence by the Executive. Factually, the Executive decides when and where to deploy armed agents, and those agents decide when to exercise their power to search, seize, and even kill. Doctrinally, the boundary’s presence somewhere in the vicinity means that the Fourth Amendment either does not apply or it applies in a form unknown in the rest of the territory over which the United States has plenary and exclusive jurisdiction. In these exercises of policing power, the CBP agents who represent the sovereign decide how and when to suspend the law.

As the border approaches, the law shifts, becoming even less of an impediment on the federal government’s ability to search, seize, or kill. Approaching the border from the nation’s interior, the sovereign begins to suspend features of the law. Slowly at first, the sovereign relaxes constitutional demands. At the international boundary itself, the sovereign’s power becomes “plenary”—complete and unreviewable. There, all searches are permissible, as are most seizures. Citizenship is no savior. On the territorial margins, the sovereign dictates the terms of life to the citizen.

One step further across the territorial margin and the sovereign becomes all powerful. Straddling the international boundary, the sovereign can stand inside the United States and kill outside the United

---

States. Here the sovereign reverts to its pre-modern form: the “omnipotent God” who Schmitt describes as the center of the pre-modern theory of the state.129 “The Lord killeth, and maketh alive: he bringeth down to the grave, and bringeth up,” says the Bible that the Catholic Schmitt almost certainly imagined as he wrote about God’s powers.130 At the nation’s territorial edge, the law of border exceptionalism gives the federal government the power to make citizens and end lives.

Clothing the sovereign in the power to kill, the law of border exceptionalism turns every deviation from legal norms short of death into a petty indignity. A CBP agent questioning a little girl about her arrest record or a U.S. Marine shooting at a teenaged goat rancher are reminders that citizenship is no shield. Mere presence in the borderlands is sufficient to suffer from the state violence that border exceptionalism permits. In the hierarchy of permissible violence that peaks at the international boundary between the United States and México, it is the law that is uniquely harsh and unyielding.

C. Doctrinal Crevices and Corrections

The current doctrinal state of affairs, in which the legal system embraces border exceptionalism despite the border region’s unremarkable qualities, is untenable and practically unsafe. The law of the border imagines the border as fixed, even as it forms and reforms. Courts imagine the border as an extraordinary threat to security, even as the ills they describe are commonplace throughout the country. The citizen is subjected to the sovereign’s whims, leaving ordinary people to suffer indignities, sometimes even death, regardless of citizenship status. This is a legal doctrine that permits violence in defense of a rigid border that has never existed, authorizing real harm in pursuit of a never-realized goal.

The legal doctrine of border exceptionalism is deeply rooted, but it is not ancient. There is nothing inevitable about the sovereign being tasked with controlling cross-border movements.131 Magna Carta, the foundational thirteenth century legal document, barred the King from impinging on merchants’ ability to “enter or leave England unharmed and without fear, and may stay or travel within it.”132 Centuries later, the Spanish jurist Francisco de Vitoria took a broader view, claiming “it was permissible from the beginning of the world... for any one to set

129 Schmitt, supra note 10, at 36.
130 1 Samuel 2:6 (King James).
131 See James A.R. Nafziger, The General Admission of Aliens Under International Law, 77 Am. J. INT’L L. 804, 807 (1983) (“The proposition that a state has the right to exclude all aliens is of recent origin.”).
132 Magna Carta (1215), cl. 41.
forth and travel wheresoever he would.” Applying this principle to an example that would have been immensely relevant to his sixteenth-century contemporaries, he wrote, “it would not be lawful for the French to prevent the Spanish from traveling or even from living in France, or vice versa, provided this in no way enured to their hurt and the visitors did no injury.” In the period before some of the British North American colonies seceded to form the United States, the prevailing view among English jurists was not that a migrant’s entry came only as a result of the sovereign’s grace; rather, migrants could enter as a matter of right. What’s more, “[a]s late as 1816, the word ‘deportation’ apparently ‘was not to be found in any English dictionary,’” the U.S. Supreme Court has observed. It was not until the late nineteenth century’s embrace of blatantly anti-Asian racism that the legal doctrine began to grant nation-states a sweeping power to exclude and deport recognizable to modern eyes. In *Chae Chan Ping*, *Nishimura Ekiu*, and *Fong Yue Ting*, the U.S. Supreme Court developed the plenary power doctrine in defense of policies that are now repugnant, and, as James Nafziger details, it did so based on misunderstanding of historical practice and legal doctrine.

Despite the proliferation of border control technologies that began in the late nineteenth century, in the modern era it remains common for movement across international boundaries to be regulated poorly, or not regulated at all. In 2007, Asa Hutchinson, then a top-ranking official in the Bush administration’s Department of Homeland Security, claimed, “[t]he best border security on the northern border is the grandmother who has lived in her house on the border for seventy years.” In many areas, Hutchinson’s comment continues to describe the lack of state control. As of fiscal year 2020, there were only 2,019 Border Patrol agents deployed across the entire 5,525-mile international boundary that the United States shares with Canada. Canadians do not need a

---

133 Francisca de Victoria, *De Indis et de Ivre Belli Rellctiones* 151 (Ernest Nys ed., 1917).

134 See Richard Pledger, *International Migration Law* 40–41 (1972) (“English common law reflected both the principle of sovereignty (whereby the King could exclude named individuals) and the principle of free movement (whereby aliens enjoyed *prima facie* the right to enter the kingdom).”).


136 See Nafziger, supra note 131, at 823.

137 Id. at 824–28.


139 Border Patrol Agent Nationwide Staffing by Fiscal Year, U.S. BORDER PATROL 3, https://www.cbp.gov/sites/default/files/assets/documents/2021-
visa to enter the United States, so they do not violate immigration law when they arrive without acquiring one. But violate immigration law they do when they overstay.

Even if the sovereign is to remain in control, it is possible to imagine that the sovereign who is in control is not a combination of the President and Congress. If the national government is one of enumerated powers, then courts should search for some concrete constitutional basis upon which to locate this power within the national government. Lacking that, the default would seem to be that, if this is indeed a power inherent in sovereignty, it ought to be the states or the people who hold it. Indeed, Justice Stephen Field took this position in his dissenting opinion in *Fong Yue Ting*, rejecting the notion that the federal government can “take any power by any supposed inherent sovereignty,” a phrase that resonates with Justice Fuller’s separate dissent decrying “a power implied . . . of a supposed inherent sovereignty.” Instead, “[s]overeignty or supreme power is in this country vested in the people, and only in the people,” Field claimed.

Burdening the states with border enforcement would almost certainly create a policy landscape of contrasts. Under the current political orientation of the United States, the four U.S. states that border México could be expected to adopt a checkerboard approach: California and New Mexico taking a more welcoming posture, while Arizona and Texas deploying police and National Guard troops. Each state would respond to internal political constituencies and financial realities. Indeed, several states have already begun enacting policies in light of these considerations.

Birthed in the blatantly racist era of Chinese exclusion, the plenary power doctrine makes for an odd doctrinal position within modern legality. A quarter of the way through the twenty-first century, the plenary power doctrine now reeks of an earlier era when sensibilities were...
different. Just as sensibilities change, law should, too. Instead of a doctrine that almost entirely precludes judicial oversight, it is possible to situate immigration law within constitutional law such that courts have an oversight role no more yet no less robust than they do in other areas. There is nothing inevitable about a doctrinal position that grants the legislature power to define constitutional obligations vis-à-vis one group of people, a task usually reserved to the courts. Indeed, the Supreme Court appeared to be heading in this doctrinal direction until reversing course during the Trump years.145

Replacing the law of border exceptionalism will not necessarily eliminate the violence of policing, but it would at least eliminate the hierarchy of legal protection that treats borderlands residents worse than people who find themselves in other parts of the United States. In that sense, rejecting the law of border exceptionalism may restore a semblance of legitimacy to a legal regime that currently lacks it.

V. CONCLUSION

Deviating from the jurisprudential norm is always dangerous, as it puts into doubt the principles that those norms are supposed to promote. If the Fourth Amendment is meant to limit the federal government’s power to intrude into private affairs, allowing it greater freedom to do so illustrates the courts’ wavering commitment to that principle. If federal authorities can only do so in one part of the country, the exception severs the populace into two: people who can claim the Fourth Amendment’s full reach and those who can’t. Residents of the nation-state’s territorial margin have been turned into marginal claimants on the state’s values.

The law of the border’s exceptionalism illustrates a long-running tension within the U.S. legal system. Its claim to equality, never more than an aspiration, is revealed to be a farce in the borderlands. Usually it ends in annoying, time-consuming meddling by federal agents who ask perfunctory questions: Schmitt’s “normal situation.” Sometimes it ends in the crimson-colored stain of death. To courts and legal scholars, this ought to be an unsettling spectrum. Solving it is not difficult. Dispense with the myth that the border is uniquely dangerous, then fold the border into the rest of constitutional law, disposing of the omnipotent sovereign before the sovereign disposes of those of us who travel the border.