
SYMPOSIA

BORDER NIGHTMARES

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INTRODUCTION

Mercedes, Texas, has seen better days. Located a few miles north of the Río Grande River, its 16,000 people live with less than most in the United States. Few have jobs, and those who do earn little. Only poverty is in abundance. Almost one-third of the town's residents live in poverty compared to one out of ten people nationwide.¹ Standing alongside Texas Avenue and U.S. Business 83 in the heart of town, it can feel like the town is asking for the compassion that its name alludes to. Mercedes's past is a complicated reflection of the messy politics of the border that gave it life.

Early in the twentieth century, industrialists and investors from the North turned their attention to the southeasternmost tip of the continental United States, hopeful that in this region of plentiful sunshine and high temperatures they could find year-round agricultural riches.² First, they needed water that would turn fields into farms and transportation networks that would tie farms to markets. Based in St. Louis, Missouri, the American Rio Grande Land and Irrigation Company began buying up acre upon acre.³ After the St. Louis, Brownsville and Mexico Railway reached a spot not far from today's Texas Avenue and Business 83, company executives and engineers parked railroad sidecars nearby and began overseeing the construction of a company town that would serve as the headquarters for the company's dreams of constant agricultural production.⁴

From here, they built a hotel, homes, and a power plant.⁵ When the natural course of the river began moving away from the company's land, they built a canal that diverted the river, which, by then had been the international boundary for half a century, marking one country's end and another's beginning.⁶ With the river relocated, the border did too. Or so it seemed—until decades later when the Attorney General announced that Homero Cantú was indeed a U.S. citizen

¹ Compare Mercedes city, Texas, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/mercedescitytexas> (last visited Aug. 25, 2025) (recording that rate of poverty in Mercedes, Texas, is 31.5%), with United States, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/US> (last visited Aug. 25, 2025) (recording that rate of poverty in the United States is 11.1%).

² See William Doherty & Wheelus, *A Stupendous Irrigation Enterprise*, 2 GULF COAST LINE MAG., no. 3, 1906, at 54-56 (tracing the founding of Mercedes, Texas, to the realization by Northern capitalists that the soil and climate of the Río Grande Valley could produce "lavish abundance").

³ See *id.* at 56 (recounting that St. Louis-based American Rio Grande Land and Irrigation Company began their irrigation project by buying 125,000 acres in the Río Grande Valley).

⁴ See *id.* at 56-57 (heralding founding of a new agricultural town on recently completed St. Louis, Brownsville and Mexico Railway).

⁵ *Id.* at 57.

⁶ See STATEMENT OF JOINT JOURNAL OF THE INTERNATIONAL BOUNDARY COMMISSION, reprinted in DEP'T OF STATE, PROCEEDINGS OF THE INTERNATIONAL BOUNDARY COMMISSION: UNITED STATES AND MEXICO—DIVERSION OF RIO GRANDE BY AMERICAN RIO GRANDE LAND & IRRIGATION COMPANY 10-11 (describing how newly cut canal had completely diverted Río Grande).

by virtue of having been born in the United States.⁷ A strip of land left south of the Río Grande River after the American Rio Grande Land and Irrigation Company dug its canal may have looked and felt Mexican, but it was actually in the United States.⁸

Part I explains that the border is in constant motion, born of frontiers that will not be still. Molded by illegality, the border's edge blurs. Tasked with regulating membership and mobility in a space where membership is illusive and mobility is constitutive, courts struggle to keep up. As Part II explains, judges have been left to wonder how far the law reaches and how much it burrows into the daily interactions of ordinary living in the borderlands. With conclusions built on fantasies of control, courts have handed to law enforcement officers the power to give life and take it. Courts claim that this law of border exceptionalism is necessary because of the extraordinary dangers that exist along the border. In fact, as Part III illustrates, the dangers are ordinary and no more tied to the border than anywhere else in the United States. Detached from its supposed empirical foundation, the law of border exceptionalism is now losing its territorial limitation. As the law of border exceptionalism spreads away from the geopolitical location that marks the international boundary that the United States shares with México, the juridical constraints available to limit its reach are loosening, casting an ominous shadow over the future of immigration law everywhere in the United States.

I. SHIFTING BORDERS

In August 1935, when Homero Cantú was born, the Río Grande River shifted slightly southeast near Mercedes.⁹ Just south of the waterway, Cantú's family lived in an area called Horcón.¹⁰ When his parents interacted with representatives of the local government, they dealt with Mexican bureaucrats and officials.¹¹ To celebrate life, death, and marriage, the Cantú family visited the local Mexican Catholic Church.¹² By the time he was old enough to go to school, Cantú attended the public school in nearby Río Rico, a small town that popped up in the Horcón Tract in 1929.¹³ "Citizens of Mexico pass as

⁷ See *In re Cantú*, 17 I. & N. Dec. 190, 209 (B.I.A. Dec. 18, 1978) (interim decision).

⁸ See *id.* at 207 ("Although the American company's action violated a convention entered into by the United States and Mexico in 1884, it did not have the effect of changing the international boundary.").

⁹ See *In re Cantú*, 17 I. & N. Dec. at 207 (finding Cantú was born between diversion of Río Grande and cutoff U.S. territory later ceded to México); see also ANSON MILLS, MY STORY 288-89 (2003) (depicting changes to flow of Río Grande caused by illegal digging of canal).

¹⁰ See *In re Cantú*, 17 I. & N. Dec. at 191 (finding Cantú lived in area known as the "Horcon Tract").

¹¹ See *id.* at 193 (finding town was served by Mexican political officials and followed Mexican laws but was technically on U.S. soil).

¹² See *id.* at 196-97.

¹³ See *id.* at 193.

freely . . . as they do between any other parts of Mexico,” a judge would later write about this area.¹⁴ In every way but one, life in and around Río Rico was unremarkably Mexican. That one difference mattered.

Despite what he thought, Cantú was not living in México and he was not a Mexican citizen. No one could deny that the Horcón Tract was located along the south bank of the Río Grande River and that life was just as ordinarily Mexican in Río Rico as in other small towns in Tamaulipas and Nuevo León, the two Mexican states nearby. Everything in Río Rico looked, felt, and sounded Mexican. Everyone thought of themselves as Mexican. Life, business, and love were conducted in Spanish. But along the border, reality can sometimes be a mirage.

Back in 1906, when the American Rio Grande Land and Irrigation Company dug a canal to move water to its crop fields, the Río Grande River moved along with it. Instead of looping back west, then stretching south before curving around to resume its easterly track toward the Gulf of México, now the river simply continued east.¹⁵ The Horcón Tract, filled with Río Rico’s residents, went from being north of the river to on its southern edge. This created substantial practical problems that needed to be addressed immediately. Riverfront property owners could no longer count on easy access to the river’s water.¹⁶ Without water, their crops and livestock could not survive in the hot, arid region. Accepting responsibility, in 1911 the American Rio Grande Land and Irrigation Company handed over some other riverfront property that it owned to people whose property no longer abutted the river.¹⁷ It also agreed to compensate the adversely impacted Mexican landowners, splitting \$5,000 among them.¹⁸

Returning the Río Grande River to where it had coursed before the canal was built evidently was not among the problems the court felt was in need of immediate remedy. The irrigation company did not dam its canal or fill it. Instead, it continued pumping water out of the river, helping turn the Río Grande Valley, as this region is known, into a “Magic Valley” suitable for year-round agribusiness.¹⁹

¹⁴ *Judge Rejects the Citizenship Claim of a “Lost American” of Rio Rico*, N.Y. TIMES, Dec. 2, 1976, at 29.

¹⁵ See MILLS, *supra* note 9, at 288-89.

¹⁶ See *id.* at 286-87 (explaining how new course of river deprived those along old riverbed of water).

¹⁷ See *id.*

¹⁸ See *id.* (explaining company agreed to restore access to the river); *United States v. Am. Rio Grande Land & Irrigation Co.*, No. 41 (S.D. Tex. Dec. 5, 1911), *reprinted in* DEP’T OF STATE, PROCEEDINGS OF THE INTERNATIONAL BOUNDARY COMMISSION: UNITED STATES & MEXICO—DIVERSION OF RIO GRANDE BY AMERICAN RIO GRANDE LAND & IRRIGATION COMPANY 56 (holding that landowners affected by illegally dug canal were entitled to \$5,000 in damages from American Rio Grande Land & Irrigation Company).

¹⁹ See Naveena Sadasivam, *The Making of the “Magic Valley,”* TEXAS OBSERVER (Aug. 21, 2018, 9:00 AM), <https://www.texasobserver.org/the-making-of-the-magic-valley/> [<https://perma.cc/J8KX-5ES5>] (discussing irrigation companies’ advertising campaigns describing area as “Magic Valley”).

By allowing its deviation of the waterway to continue, the company allowed the past to conceal the present. Everyone might have thought that Cantú was a Mexican citizen born on Mexican territory, but that was just the blurred effect of fickle memories. In a period when the Río Grande River functioned as a border but not a boundary, its waters provided a bounty to savor and channels to cross.²⁰ The river was not the fortified obstacle that it is today, so people forgot that it had once been south of where it now is. Decades later, Cantú entered the United States on a tourist visa with permission to stay for three days.²¹ After six years, he was still in the United States when the former Immigration and Naturalization Service tried to deport him.²²

The federal government and Cantú agreed on the facts: he was born in the Horcón Tract after it had been left south of the diverted river's channel.²³ For that reason, they all agreed that Cantú had been born in the United States. They disagreed about what that meant for his citizenship. Cantú said he ought to be treated like anyone born in Mercedes or anywhere else in surrounding Hidalgo County.²⁴

The federal government disagreed. To the government, Cantú had been born in the territorial United States, but he had not been born "subject to the jurisdiction" of the United States as the Fourteenth Amendment requires for birthright citizenship.²⁵ Focused on the daily realities of bureaucratic operations, the government was certainly correct. As the Board of Immigration Appeals, the Justice Department unit that adjudicates appeals of deportation cases, explained:

Officials in Hidalgo County, Texas, were not aware that the Horcon Tract was a part of the county. The county tax office taxed nothing south of the river, county law enforcement agencies had no jurisdiction in the area, and the county representative of the United States Department of Agriculture had no control over agricultural policies in the "Horcon Tract."²⁶

²⁰ See Paul Ivan Harris, *Los residentes de un pequeño pueblo fronterizo que descubrieron que no eran mexicanos sino ciudadanos de Estados Unidos*, BBC NEWS MUNDO (Feb. 25, 2023), <https://www.bbc.com/mundo/noticias-64629008> [<https://perma.cc/JL68-NG87>] (explaining that despite international border, people on both sides of river enjoyed swimming and fishing in the river together).

²¹ See *In re Cantú*, 17 I. & N. Dec. 190, 190-91 (B.I.A. Dec. 18, 1978) (interim decision) ("The respondent is a 42-year-old male who was admitted to the United States at Hidalgo, Texas, as a temporary visitor alien for 3 days. It is conceded that he has remained longer than authorized.").

²² See *id.*

²³ See *id.* (finding that Cantú was born on the United States side of the Río Grande).

²⁴ See *id.* at 193 (claiming entitlement to U.S. citizenship under Section 1 of the Fourteenth Amendment).

²⁵ See *id.* at 194 ("The Government concedes that the respondent was 'born in the United States within the meaning of the Fourteenth Amendment.' However, it challenges his assertion that he was also 'subject to the jurisdiction thereof'").

²⁶ *Id.* at 193.

To the Board, the reality on the ground was deceiving. What mattered most was which of the two countries formally retained sovereignty of the Horcón Tract. In a split decision, the Board concluded that the United States formally retained sovereignty.²⁷

The U.S. Attorney General agreed. Relying on the Supreme Court's decision in *United States v. Wong Kim Ark*,²⁸ the Attorney General concluded that Cantú obtained citizenship at the moment of birth under the Fourteenth Amendment.²⁹ The United States could formally cede territory to México, but it had not done so before Cantú was born; indeed, the United States did cede the Horcón Tract in a bilateral treaty that took effect in April 1972.³⁰ Absent that type of formal renunciation of sovereignty over territory, the jurisdiction that the Fourteenth Amendment requires continued unabated: "[I]t is the presence within and the personal relationship to the United States of a newborn child's parents that determines whether he was born 'subject to the jurisdiction thereof' and without more became a citizen."³¹ Without moving an inch or changing anything about his birth or childhood, the law had caught up with Cantú, suddenly transforming him from migrant to citizen.

II. SHIFTING LAWS

Five years younger than Cantú, Consuelo Pacheco grew up in the Horcón Tract at around the same moment.³² She spent some time in Río Rico as well as in Monterrey, the state capital of Nuevo León, located a couple of hours away from Río Rico.³³ At twenty-one years old, in 1961, she gave birth to Arturo Pacheco Bermea.³⁴ There is no question that Arturo was born in Díaz Ordaz, Tamaulipas, a Mexican border city not too far from Horcón but with a less intriguing history and a clearer location within one country.³⁵

Arturo's birth outside of the United States meant that he did not acquire citizenship through the Fourteenth Amendment. Instead, he claimed U.S. citizenship by virtue of his relationship to Consuelo, a U.S. citizen.³⁶ At the time, a U.S. citizen parent could convey their citizenship to a child if, at the moment

²⁷ See *id.* at 197 (holding that "there is a lack of evidence establishing by the requisite burden of proof that there was any such 'implied' renunciation" of jurisdiction).

²⁸ 169 U.S. 649 (1898).

²⁹ See *In re Cantú*, 17 I. & N. Dec. at 209 ("I have concluded that respondent acquired citizenship of the United States at birth.").

³⁰ See Treaty to Resolve Pending Boundary Differences and Maintain the Rio Grande and Colorado River as the International Boundary, Mex.-U.S., Nov. 23, 1970, 23 U.S.T. 371, 371, 380 (agreeing to cede the Horcón Tract, effective April 18, 1972).

³¹ *In re Cantú*, 17 I. & N. Dec. at 211.

³² See *Bermea v. Limon*, No. 1:15-cv-097, 2018 WL 4103011, at *1 (S.D. Tex. July 17, 2018).

³³ See *id.* at *3.

³⁴ See *id.* at *1.

³⁵ See *id.* at *2 n.3.

³⁶ See *id.*

of the child's birth, the parent had been physically present in the United States for ten years, at least five of which were after the parent reached the age of fourteen.³⁷ Relying on his mother's recollection, Arturo claimed that his mother had lived in the Horcón Tract for the necessary period and thus he satisfied the citizenship requirements.³⁸

A federal judge hearing his citizenship claim disagreed. Familiar with the Attorney General's decision in Cantú's case, Judge Andrew Hanen nonetheless cast a cloud of suspicion on the Horcón Tract's position within the United States. Even if Consuelo's memory was correct, Arturo "would still have to convince a court that a parent residing there for five years before 1972 would qualify as residing in the United States."³⁹

Policymakers and courts frequently focus on the movement of people across the border that the United States shares with México, but Homero Cantú's and Arturo Pacheco Bermea's cases illustrate that the border itself sometimes moves. When it does, its location can be hard to pin down, revealing the messy reality that, near the border, the law's reach is in flux. It does not apply equally to everyone. The law does not apply uniformly on one side of the border while failing to reach across to the other side.

A. *Border Exceptionalism*

Policymakers, courts, and political commentators frequently describe the border as a fixed binary location that is readily identifiable. On one side, people are outside the border, beyond the nation-state, while on the other side, they are inside the border, within the nation-state, and within reach of its laws.

Legal doctrine, meanwhile, treats the border as a variegated region in which ordinary legal concepts apply along a spectrum. The Fourth Amendment typically requires some amount of suspicion that a specific individual is engaged in criminal activity before they can be deprived of their liberty by a government official.⁴⁰ Even outside the criminal context, administrative searches require some amount of suspicion that the specific location to be intruded upon is the site of illegal activity.⁴¹ Mere generalized suspicion that some person or place is

³⁷ See Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163, 236 (1952) (providing citizenship to children of U.S. citizens born outside United States if parent spent ten years in United States with at least five of those years after parent turned fourteen).

³⁸ See *Bermea*, 2018 WL 4103011, at *2 (describing affidavit submitted by plaintiff's mother that recounted where she lived in years preceding plaintiff's birth).

³⁹ *Id.* at *3 n.6.

⁴⁰ See *Weeks v. United States*, 232 U.S. 383, 393 (1914) (explaining that Fourth Amendment requires warrant prior to search which must be accompanied by information "describing with reasonable particularity the thing for which the search was to be made").

⁴¹ See *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 535 (1967) (holding searches conducted to ensure compliance with administrative regulations must be supported by probable cause).

mixed up in illegality is insufficient to pass constitutional muster.⁴² To be sure, neither standard is a high bar, but both nonetheless impose some constraints on efforts by government officials to impinge on privacy or liberty.

A robust, entrenched body of law—the law of border exceptionalism—relaxes those common limits on the government’s power at or near the border.⁴³ Things are simply “different” at the imaginary geopolitical line that constitutes the international boundary between the United States and México.⁴⁴ At the border, courts have all but erased any limits that the Fourth Amendment imposes on government officials. A century ago, the Supreme Court explained, “[t]ravellers [sic] may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in.”⁴⁵ Nowhere else do courts allow government agents to so thoroughly impinge on people’s liberty as they go about the mundane activities of daily life. In parts of the borderlands, it is not unusual for work, home, school, and religion to straddle the international boundary, requiring residents to cross the boundary to engage in ordinary activities.⁴⁶

Courts justify their willingness to treat the border as being beyond the Fourth Amendment’s reach on the supposition that prospective border crossers are a specter of danger. Consequently, government officials must be freed of the Fourth Amendment’s constraints to allow “the sovereign to protect itself by stopping and examining persons and property crossing into this country.”⁴⁷ When wielded at the border, this surveillance power is “long-standing” and so obvious that it “require[s] no extended demonstration.”⁴⁸

Further afield, courts continue to apply a relaxed version of the Fourth Amendment. Border Patrol agents can stop anyone for no reason at fixed immigration checkpoints situated along major highways as many as 100 miles

⁴² See CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, *CRIMMIGRATION LAW* 224-29 (2d ed. 2021) (“It is a hallmark of the Fourth Amendment that government agents cannot intrude into a person’s private affairs without some indicia of suspicion that the individual is engaging in wrongdoing.”).

⁴³ See Jennifer M. Chacón, *Border Exceptionalism in the Era of Moving Borders*, 38 *FORDHAM URB. L.J.* 129, 139-40 (2010) (explaining how courts have “distinguished the border . . . from interior areas” resulting in reduced Fourth Amendment protections).

⁴⁴ See *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (“Consistently, therefore, with Congress’ power to protect the Nation by stopping and examining persons entering this country, the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior.”).

⁴⁵ *Carroll v. United States*, 267 U.S. 132, 154 (1925).

⁴⁶ Andrew Rice, *Life on the Line*, *N.Y. TIMES*, July 31, 2011, at 20, <https://www.nytimes.com/2011/07/31/magazine/life-on-the-line-between-el-paso-and-juarez.html> (reporting that between El Paso, Texas, and Ciudad Juárez, México, “[t]housands of commuters come across from Mexico every morning, waiting in a long line at the Paso del Norte bridge”).

⁴⁷ See *United States v. Ramsey*, 431 U.S. 606, 616 (1977).

⁴⁸ *Id.*

from an international boundary.⁴⁹ Citing an earlier decision involving housing code inspections, which the Court distinguished from other Fourth Amendment decisions regarding criminal investigations, the Supreme Court in *United States v. Martinez-Fuerte*⁵⁰ explained that the “government interests outweighed those of the private citizen” during stops at fixed highway checkpoints.⁵¹ As such, immigration agents can stop anyone who passes through such a checkpoint “in the absence of any individualized suspicion.”⁵² Turning traditional Fourth Amendment doctrine further on its head, the Court went on to embrace race-based policing practices. When choosing whom to subject to more exacting secondary inspection, which typically occurs off to the side of the primary inspection area, the Court added, “even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, we perceive no constitutional violation.”⁵³

In contrast to the Fourth Amendment’s absolute inapplicability at the border and at fixed immigration checkpoints many miles away from the border, the Court does impose minimal Fourth Amendment intervention when immigration agents stop people during roving patrols.⁵⁴ To pass constitutional muster, agents must have reasonable suspicion that passengers of the vehicle they target are engaged in illegal activity.⁵⁵ In assessing reasonable suspicion, the Court approved use of indicia suggesting “the characteristic appearance of persons who live in Mexico, relying on such factors as the mode of dress and haircut.”⁵⁶

B. *Disparate Treatment*

Just like courts are more reticent to halt governmental conduct near the border, they also treat U.S. citizens near the border differently than U.S. citizens elsewhere. Some, like Homero Cantú, struggle to have their citizenship recognized.⁵⁷ In more recent years, State Department officials frequently discounted claims to citizenship by people born outside of hospitals in border

⁴⁹ See 8 C.F.R. § 287.1(a)(2) (2025) (defining “reasonable distance” as “within 100 air miles from any external boundary of the United States”).

⁵⁰ 428 U.S. 543 (1976).

⁵¹ See *id.* at 561 (concluding searches at international borders, similar to regulatory searches, involve government interests that outweigh interest of individual private citizens (citing *Camara v. Mun. Ct. of S.F.*, 387 U.S. 523, 538-39 (1967) (holding government inspections to enforce housing codes do not need particularized suspicion when neighborhood appears noncompliant due to a strong government interest in safety))).

⁵² See *id.* at 562.

⁵³ *Id.* at 563 (footnote omitted).

⁵⁴ See *id.* at 555 (recognizing that roving patrols significantly impinge privacy interests protected by Fourth Amendment).

⁵⁵ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (“We are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion . . .”).

⁵⁶ *Id.* at 885.

⁵⁷ See *In re Cantú*, 17 I. & N. Dec. 190, 194 (B.I.A. Dec. 18, 1978) (interim decision).

communities.⁵⁸ Given high poverty rates and scarce medical resources in border communities, home births supervised by midwives were common until recently, leading government officials to doubt the veracity of citizenship claims grounded in the Fourteenth Amendment.⁵⁹

Time and again, geography cleaves U.S. citizens, leaving some struggling to have even their humanity recognized. Growing up near the border, Esequiel Hernández, Jr. surely understood the significance that the law gave to the Río Grande River that ran near his family's home in Redford, Texas. In a tiny town squeezed along the Texas side of the border, eighteen-year-old Esequiel frequently tended his family's sheep after school.⁶⁰ He hoped to become a game warden, but first he had to finish high school.⁶¹

He never got the chance to do either. As he herded the family sheep in May 1997, Esequiel had company. Corporal Clemente Banuelos of the U.S. Marine Corps was out there too.⁶² While Esequiel roamed the brush to protect his family's financial security, the Marine was out there ostensibly to protect national security.

As part of a joint task force to support the Border Patrol's anti-drug initiatives, Banuelos and the three other Marines in his unit saw Esequiel out near the river that afternoon.⁶³ "We have an armed individual," Banuelos radioed to troops at a remote operations center. "He's armed with a rifle, appears to be in uh . . . herding some goats or something," he added.⁶⁴ The military team had seen the goats before, but they had never seen a man with the goats.⁶⁵ The troops said Esequiel fired at them twice.⁶⁶ "We're taking fire," Banuelos radioed.⁶⁷ "Roger, fire back," the Marine staffing the unit's operations center responded.⁶⁸

⁵⁸ See Stipulation and Agreement of Settlement and Release at 4-5, *Castelano v. Clinton*, No. CA M-08057 (S.D. Tex. June 5, 2009).

⁵⁹ See *id.* at 44 ("The Department of State recognizes that midwife births were and are common in some border areas of United States, particularly along Texas-Mexico border.").

⁶⁰ Manny Fernandez, *A Boy, His Grandfather's Gun and the Marines at the Border*, N.Y. TIMES, Nov. 28, 2018, at A11.

⁶¹ See *id.* (describing Esequiel as "high school sophomore who dreamed of becoming a game warden").

⁶² Memorandum from Major Gen. John T. Coyne, U.S. Marine Corps, to Commanding Gen., I Marine Expeditionary Force ¶¶ 330-34 (Apr. 7, 1998) [hereinafter Coyne Report], <https://web.archive.org/web/20241008115038/https://www.dpft.org/hernandez/coyne.htm> (reporting that Corporal Clemente Banuelos and other Marines were wearing guille suits and hunched in grass when they spotted Esequiel).

⁶³ See *id.* (recounting how Marines "spotted a lone horseman on the Mexico side of the Río Grande river heading north").

⁶⁴ See *id.* ¶ 339.

⁶⁵ *Id.* ¶ 340 ("Although Team 7 had observed goats in that area on the previous two days of their observation period, this was the first time they saw a man accompany the goats.").

⁶⁶ See *id.* ¶ 342 ("The armed individual, Mr. Esequiel Hernandez, Jr., fired two shots from his 22. [sic] caliber rifle at the immediate location of Team 7 . . .").

⁶⁷ *Id.* ¶ 347.

⁶⁸ *Id.* ¶ 382.

All it took to kill Esequiel was one shot from Banuelos.⁶⁹ No one—not Banuelos, his superior officers, nor the politicians who sent the troops to the border—was ever held accountable for his death.⁷⁰

III. BORDER MYTHS

The legal doctrine of border exceptionalism relies heavily on the premise that there is something uniquely dangerous about border crossings. For this reason, governments have long possessed the unbridled authority to exclude migrants as they see fit. Neither premise is correct.

A. *Bending Reality*

To justify the law of border exceptionalism, including the disparate treatment of U.S. citizens who find themselves at or near the border, courts have adopted fanciful logic. Judicial decisions depict the geographic border as the site of unique practical susceptibility to which legal doctrine must respond by giving law enforcement agents extraordinary flexibility. According to this logic, along the border, unauthorized migration “from Mexico poses formidable law enforcement problems.”⁷¹ A year later in *United States v. Brignoni-Ponce*,⁷² the Court remarked that most of the people who were physically present in the United States in violation of immigration law hailed from México and that there were a lot of Mexicans near the border.⁷³

Midway through the 1980s, as the Reagan Administration busied itself building its war on drugs,⁷⁴ courts and policymakers added a new reason to dispense with traditional Fourth Amendment doctrine: illicit drugs. The “longstanding concern for the protection of the integrity of the border . . . is, if anything, heightened by the veritable national crisis caused by smuggling of illicit narcotics . . . and in particular by the increasing utilization of alimentary canal smuggling,” the Court announced in *United States v. Montoya de Hernandez*,⁷⁵ a case involving a person who was detained upon arrival at Los Angeles International Airport.⁷⁶

⁶⁹ See *id.* ¶ 450.

⁷⁰ See Fernandez, *supra* note 60 (reporting that “none of the four Marines on the surveillance team, including the one who fired the single fatal shot, Corporal Banuelos, were ever charged with any criminal wrongdoing”).

⁷¹ *United States v. Martinez-Fuerte*, 428 U.S. 543, 552 (1976).

⁷² 422 U.S. 873 (1975).

⁷³ See *id.*, 422 U.S. at 879, 886 (noting 85% of undocumented immigrants in United States were from México and that many people with “physical characteristics identified with Mexican ancestry” live in the United States, notably near the border).

⁷⁴ See KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 54-55 (1997).

⁷⁵ 477 U.S. 531, 538 (1985).

⁷⁶ *Id.*

By the time the decade closed, policymakers' interest in illicit drug activity had swept the Defense Department into action. The chairman of the Pentagon's Joint Chiefs of Staff created Joint Task Force-6 ("JTF-6") in 1989 specifically "for the purpose of assisting in the interdiction of the flow of illegal drugs into the United States."⁷⁷ Military units deployed to the border were frequently warned prior to their arrival: "The most significant [concern] is the threat your unit will face from an organized, sophisticated, and dangerous enemy (drug smugglers)."⁷⁸ To protect themselves against this danger, troops assigned to the task force sometimes shot at people inside the United States.⁷⁹ Clemente Banuelos, the Marine who killed Esequiel Hernández, Jr., was assigned to JTF-6.

The idea that the border is dangerous is not so much incorrect as incomplete. The border that the United States shares with México is far from idyllic. There are people and drugs moving through, the latter being consumed in the region despite federal and state prohibitions. I was born and raised in the borderlands of South Texas and northern Tamaulipas, so I have a lifetime of experience witnessing the legal violations that people commit there. When I practiced law in McAllen, the Texas city in which I was born, I spoke candidly with clients and prospective clients about their legal problems, not all of which resulted from ignorance or misunderstanding. While driving north toward San Antonio, I became inured to the routine questioning by Border Patrol agents at fixed highway checkpoints where signs tout the number of migrants apprehended and the number of pounds of illicit drugs seized.

My experience living and working in other parts of the United States has been filled with stories of immigration law violations and visible signals of illicit drug activity too. In Denver, where I currently live, drug sales are conducted in broad daylight under electrified green crosses—the telltale sign of marijuana dispensaries. Authorized by state law and regulated by state officials, entrepreneurs tout the many flavors and textures of their marijuana, still illegal under federal law, at the end of my block. When neighborhood children set up a lemonade stand last fall, charging \$1 per cup, a woman walked over with a \$20 bill, asked for a cup, and declined the change. "I work at the dispensary on the corner," she said with a smile as the children staffing the lemonade stand cheered their good fortune and I felt a tinge of shame for having waited for my change. There is money to be made in illegal drugs, and the children were pleased to benefit. In other parts of the United States, people go to greater efforts to hide their illegal drug sales, but people buy, sell, and use illicit drugs all the same.⁸⁰

⁷⁷ Coyne Report, *supra* note 62, ¶ 2.

⁷⁸ *Id.* ¶ 116.

⁷⁹ *See id.*, ¶¶ 20, 22, and 23 (reporting JTF-6 participants returned fire in several domestic shooting incidents between 1993 and 1997).

⁸⁰ *See New Study: Peer-Brokered Sales Central to Illegal Drug Trade*, DAILY (Dec. 5, 2024), <https://thedaily.case.edu/new-study-peer-brokered-sales-central-to-illegal-drug-trade/> [https://perma.cc/3EYX-KYE5] (noting drug transactions across United States increasingly occur through discreet, peer-mediated networks).

Likewise, it is not difficult to see evidence of immigration law violations in cities and towns throughout the United States, including communities that are far from the border. The Department of Homeland Security estimates that in 2022 there were approximately eleven million people living in the United States without the federal government's permission.⁸¹ Of those, almost 24% resided in California and another 19% resided in Texas. Only one other southwestern state, Arizona, is among those with the ten largest unauthorized migrant populations.⁸² Other states in the top ten, like Florida and New Jersey, are not anywhere near the U.S.-Mexican border.⁸³ Sparsely populated Wyoming, with slightly more than half a million residents,⁸⁴ is home to at least 5,000 unauthorized migrants.⁸⁵ Even considering that the two most populous states in the United States, California and Texas, are the states with the largest unauthorized migrant populations, only one metropolitan area situated on the U.S.-Mexican border, San Diego, numbers among the twenty metropolitan areas with the largest unauthorized migrant populations.⁸⁶ The rest are in the nation's interior.

Similarly, people who violate immigration law work in a variety of industries in every state. From manufacturing jobs in Missouri to education and health care in North Dakota, unauthorized migrants fill labor market demands in a variety of sectors. However, they are usually clustered within physically demanding, dangerous industries.⁸⁷ Nationwide, roughly 17% of the agriculture industry's workforce and 13% of the construction industry's workforce lacks the federal government's permission to live or work in the United States.⁸⁸

⁸¹ BRYAN BAKER & ROBERT WARREN, U.S. DEP'T OF HOMELAND SEC., ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2018-JANUARY 2022, at 15 tbl.A2-1 (Apr. 2024).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Quick Facts: Wyoming*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/WY> (reporting a state population of 587,618 as of July 1, 2024).

⁸⁵ *Unauthorized Immigrants and Characteristics for States, 2022*, PEW RSCH. CTR., https://www.pewresearch.org/wp-content/uploads/sites/20/2024/07/SR_24.07.22_unauthorized-immigrants_table-3.xlsx [<https://perma.cc/FW24-V5SS>] (last visited Aug. 25, 2025).

⁸⁶ See Jeffrey S. Passel & D'Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RSCH. CTR. (Mar. 11, 2019), <https://www.pewresearch.org/short-reads/2019/03/11/us-metro-areas-unauthorized-immigrants/> [<https://perma.cc/LC57-K5F6>] (reporting 61% of unauthorized immigrants resided in twenty major U.S. metropolitan areas in 2016, with San Diego being the only metro area on the U.S.-México border).

⁸⁷ *Unauthorized Immigrants in the Labor Force for States, 2022*, PEW RSCH. CTR., https://www.pewresearch.org/wp-content/uploads/sites/20/2024/07/SR_24.07.22_unauthorized-immigrants_table-4.xlsx [<https://perma.cc/A85C-VW86>] (last visited Aug. 25, 2025).

⁸⁸ *Size of U.S. Unauthorized Immigrant Workforce Stable After the Great Recession*, PEW RSCH. CTR. (Nov. 3, 2016), <https://www.pewresearch.org/race-and-ethnicity/2016/11/03/industries-of-unauthorized-immigrant-workers/> [<https://perma.cc/8KR4-ZD94>].

B. *Incomplete Histories*

Just as the empirical realities of illicit drug activity and immigration law violations are much more complicated than judicial explanations of border exceptionalism suggest, legal doctrine itself has been much more nuanced in its treatment of the federal government's power to regulate migrants than many courts imply. When the *Ramsey* Court referenced the "long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country," it was discussing a statute authorizing searches of vessels upon suspicion that they contain contraband goods.⁸⁹ As the Court correctly noted, this statute was enacted in 1789 by the same Congress that proposed the Fourth Amendment.⁹⁰ Similarly, the Court's foundational border search decision, *Carroll v. United States*,⁹¹ emphatically asserted, "Travelers may be so stopped in crossing an international boundary because of national self protection"⁹² In the next sentence, the Court referenced a string of statutes beginning with the same 1789 statute discussed in *Ramsey*.⁹³

Reliance on a single statute that was enacted just after the Constitution's ratification and that only indirectly touches on the search or seizure of a person hardly constitutes evidence of long-standing leeway granted to federal officials at the country's borders. Indeed, the 1789 statute mostly concerns the imposition of duties and says nothing about the interrogation of persons. Reflecting its true motive as a statute intended to raise revenue, its text addresses fees "on the exportation of dried or pickled fish" but does not mention any authority to inquire about the identity of a person on board a ship.⁹⁴

Despite the Court's facile claims of a longstanding tradition of border exceptionalism, the past is much more complicated. First, the laws of European nations at times limited the government's power to restrict migration. In England, Magna Carta, signed by King John in 1215, explicitly guaranteed merchants the legal right to "enter or leave England" as well as to "stay or travel within it . . . in accordance with ancient and lawful customs."⁹⁵ The version of Magna Carta on display at the National Archives in Washington, D.C., dating to 1297 during King Edward's reign, echoes this guarantee. "All merchants . . . are to have safe and secure conduct in leaving and coming to England and in staying and going through England . . . according to the ancient and right customs," the foundational legal charter reads.⁹⁶ Indeed, for several centuries after Magna

⁸⁹ *United States v. Ramsey*, 431 U.S. 606, 616 (1977) (citing Act of July 31, 1789, ch. 5, 1 Stat. 29) (upholding warrantless search of international mail by customs officials at border).

⁹⁰ *Id.*

⁹¹ 267 U.S. 132 (1925).

⁹² *Id.* 267 U.S. at 154.

⁹³ *Id.*

⁹⁴ Ch. 5, 1 Stat. at 46.

⁹⁵ MAGNA CARTA § 41 (1215 trans.).

⁹⁶ MAGNA CARTA § 30 (1297 trans.).

Carta, English law presumed that any foreigner could enter and travel through the king's realm.⁹⁷

Philosophical treatments of a nation-state's authority to regulate its borders that were contemporary to the enactment of the Fourth Amendment likewise offer a much more complicated assessment than the Supreme Court suggests. German philosopher Immanuel Kant's 1795 essay *Perpetual Peace* outlines a "right of visitation" accompanied by an obligation of hospitality. Before the world was divided into distinct realms, "no one individual had more right than another to live in any one particular spot," Kant writes.⁹⁸ As nation-states with fixed external boundaries propagated, that natural right evolved into a right to be welcomed on foreign territory. In Kant's view, this right is held by the visitor; it is not a right held by the sovereign who controls the territory that the visitor enters or seeks to enter. Discussing Kant's articulation of hospitality, French philosopher Jacques Derrida explained, "The foreigner is the one who halts, or can halt, to request to sojourn or to reside, or at any rate to visit . . ."⁹⁹

Moreover, Kant's right to hospitality, articulated in the same historical moment as the Fourth Amendment, is more than a mere procedural right to transit. It includes a substantive guarantee about the type of treatment expected while in foreign territory. According to Kant, the right to hospitality requires that the sovereign treat the visitor "without hostility."¹⁰⁰ Residents of the community that is visited are entitled to expel the visitor only after "the stranger" arrives.¹⁰¹ Importantly, this entitlement is itself qualified. The sovereign can expel the visitor only "if this can be done without causing his death," again casting doubt on the absolute power to expel that the Supreme Court posits existed universally in the late eighteenth century and for long before then.¹⁰²

Second, the Supreme Court's claim that the U.S. legal tradition offers longstanding support for the proposition that the federal government can regulate cross-border movement of people is undercut by historical practice. What regulation of cross-border movement of people did exist in the early years of the nation's history was mostly enacted by subfederal entities: states, counties, cities, and towns.¹⁰³ As Gerald Neuman put it in his foundational article *The Lost Century of American Immigration Law*, it is nothing more than a "pervasive myth" to think that no regulation of migration existed until after the

⁹⁷ See RICHARD PLENDER, *INTERNATIONAL MIGRATION LAW* 25-29 (rev. 2d ed. 1988) (examining historical context of English law regarding movement of foreigners).

⁹⁸ IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* 138 (M. Campbell Smith trans., 1903) (1795).

⁹⁹ JACQUES DERRIDA, *HOSPITALITY VOL. I*, at 53 (Pascale-Anne Brault & Peggy Kamuf eds., E.S. Burt trans., 3d ed. 2023).

¹⁰⁰ KANT, *supra* note 98, at 137.

¹⁰¹ *Id.*

¹⁰² See *id.*

¹⁰³ See Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1834 (1993) (explaining that cross-border movement in early United States was regulated primarily at state level).

Civil War.¹⁰⁴ On the contrary, Neuman details five broad types of migration regulation: crime, poverty, public health, race, and ideology.¹⁰⁵ With all but a handful of exceptions, all of this regulation was promulgated by state and local governments.¹⁰⁶

Indeed, Homero Cantú's experience reveals just how little the federal government concerned itself with the international boundary for much of the nation's history.¹⁰⁷ Ports-of-entry certainly existed in 1935 when Cantú was born, but it was routine to cross the international boundary without stopping at one. Mike England, who remembers the Río Rico of Cantú's childhood, recalls crossing freely for the most mundane of activities. "Being raised there on the river was paradise. I would fish and hunt daily with some kids from the other side of the river who would come to our house like they were part of my family," he said.¹⁰⁸ Federal officials worried so little about the border that they did not even demand that the American Rio Grande Land and Irrigation Company move the river back to where it stood before company employees shifted its course.¹⁰⁹

IV. BORDERS EVERYWHERE

The mismatch between the analytical justifications that courts provide for the doctrine of border exceptionalism on the one hand, and the complexities of empirical reality and historical practice on the other hand, suggests that there is more behind judicial treatments of the border than what meets the eye. Rather than a simple modern application of longstanding practice to remedy an acute danger, the doctrine of border exceptionalism responds severely to ordinary threats. And it does so in a way that, while not ahistorical, is not historically inevitable.

By pinning its doctrinal deviation along the border on the sovereign's right "to protect itself," as it did in *Ramsey*, or on the need for "national self protection," as it described in *Carroll*, the Supreme Court depicted the border as the geographic location in which an existential threat is realized.¹¹⁰ Protection presupposes danger. Since there is no empirically greater danger at this geographic location than at others within the United States, the border instead operates as the edge of legality. It is the geographic location at which the law

¹⁰⁴ *Id.* at 1833.

¹⁰⁵ *Id.* at 1841.

¹⁰⁶ *See id.*

¹⁰⁷ Paul Ivan Harris, *supra* note 20 (reporting that in early 20th century, residents of Río Rico, Texas, such as Cantú, regularly crossed U.S.-México border without federal oversight).

¹⁰⁸ *Id.* ("Crecer allí en el río fue un paraíso: salía a pescar y cazar a diario con algunos niños del otro lado del río, que venían a nuestra casa como si fueran de la familia.") (author's translation).

¹⁰⁹ *Id.*

¹¹⁰ *United States v. Ramsey*, 431 U.S. 606, 616 (1977); *Carroll v. United States*, 267 U.S. 132, 154 (1925).

tapers because of fears rooted in empirically indefensible claims. The fear is real even if the threat is not.

By narrowing the law's reach as an obstacle to the state's coercive power to surveil, detain, and even kill, courts reveal the normative underpinning of their empirically dubious and historically incomplete vision of the border. Unmoored from reality, juridical justifications for the law of border exceptionalism are rooted in fear—not of what is known, but of the unknown. Like nightmares, the border turns ordinary problems into extraordinary, imagined dangers. For that reason, the law of border exceptionalism responds to the border, and its inhabitants, as a protective force deployed by and for people who are not border dwellers.

What begins at the border does not end at the border. Increasingly, the law of border exceptionalism is expanding from the geopolitical boundary line. In Denver, Immigration and Customs Enforcement (“ICE”) shoots at, and misses, someone while agents try to arrest him.¹¹¹ In New York City, ICE shoots, and hits, someone who was in the United States with the federal government's permission.¹¹² In every community nationwide, ICE taps a border-focused legal authority to dispense with immigration judges and immigration courts to round up and forcibly remove people.¹¹³ “Borders. Everything begins with them, and all paths lead back to them. They are no longer merely a line of demarcation separating distinct sovereign entities. Increasingly, they are the name used to describe the organized violence that underpins both contemporary capitalism and our world order in general,” writes Achille Mbembe.¹¹⁴

The history of the Horcón Tract, like the development of the law of border exceptionalism, is a reminder that the border the United States and México share has never been a simple line on the ground. Whether moving under watch of the sun and moon or shifting doctrinally, the border is an evolving concept as much as, or perhaps more than, it is a real place.¹¹⁵ Whether the law of border exceptionalism continues to be constrained geographically is for time to tell, but the specious justifications that courts offer to contain it are vulnerable. If the fears courts point to lose sway, then the border might come to be anywhere and

¹¹¹ See Noelle Phillips, *Denver DA Clears ICE Agent in Shooting of Immigrant During Foot Chase*, DENV. POST (Oct. 5, 2017), <https://www.denverpost.com/2017/10/05/ice-officer-involved-shooting-chase-cleared/> [<https://perma.cc/EEF9-G5BF>].

¹¹² See Aaron Katersky & Christina Carrega, *Tourist Shot in the Face by ICE Agent During Family Friend's Arrest Files Lawsuit*, ABC NEWS (Feb. 19, 2020), <https://abcnews.go.com/US/tourist-shot-face-ice-agent-family-friends-arrest/story?id=69076417> [<https://perma.cc/T6JD-N43L>].

¹¹³ See Designating Aliens for Expedited Removal, 90 Fed. Reg. 8139, 8139-40 (Jan. 24, 2025) (noting that Department of Homeland Security authorized expedited removal without judicial hearings for certain noncitizens encountered nationwide).

¹¹⁴ ACHILLE MBEMBE, *NECROPOLITICS* 99 (Nancy Rose Hunt & Achille Mbembe eds., Steven Corcoran trans., 2019).

¹¹⁵ See THOMAS NAIL, *THEORY OF THE BORDER* 7 (2016) (describing borders as “historically contingent, politically charged, dynamic phenomena”).

everywhere, at which point the law of border exceptionalism will cease to be so exceptional.

CONCLUSION

Detached from its territorial origins, the juridical limitation that historically has constrained the law of border exceptionalism is loosening. “[T]here is no longer any ‘outside’ that might be opposed to an ‘inside,’” adds Mbembe.¹¹⁶ That is too stark a description to accurately apply to the United States in the present, but courts’ willingness to bend standard constitutional law norms in the past to fit a border that existed only as myth suggests that Mbembe’s ominous characterization could describe the future. Unless the doctrine of exceptionality gives way, inside might become outside, turning cities and towns everywhere into the exceptionally surveilled, extraordinarily policed border communities of the past and present.

¹¹⁶ MBEMBE, *supra* note 114, at 40.