

# Borderline Constitutionalism: Reconstructing and Deconstructing Judicial Justifications for Constitutional Distortion in the Border Region

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“[T]he obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained.”<sup>1</sup>

“Because the geography of the United States is not homogenous, the rights of citizens that live in its different parts cannot be viewed as a uniform, seamless web.”<sup>2</sup>

The United States border functions like a sort of constitutional black hole: the closer one gets to it, the more constitutional norms are bent and warped.<sup>3</sup> On the border itself, these norms are almost entirely destabilized. This Note examines several constitutional distortions in the border region—usually defined as a 100-mile strip along the U.S. border—and suggests that judicial justifications for these distortions are dangerous and inadequate. The logic supporting constitutional doctrines in the border region relies on unfounded assumptions about the threats posed by border crimes, and the constitutional damage cannot be, and has not been, contained.

It is perhaps unsurprising that the border distorts constitutional norms given its connection to sovereignty concerns that are seen as fundamental to the nation-state’s survival. Sovereignty is an elusive term, but it is traditionally conceived as concerning the state’s ability to exercise supreme legal

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<sup>1</sup> Plyler v. Doe, 457 U.S. 202, 213 (1982) (quoting *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938)).

<sup>2</sup> *United States v. Jackson*, 825 F.2d 853, 869 (5th Cir. 1987) (Clark, C.J., concurring).

<sup>3</sup> Professors Tribe and Gudridge have described legal black holes as “place[s] beyond the light of ordinary law” in which “the gravity of the situation (as it were) keeps us from seeing anything other than the crisis.” Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 *YALE L.J.* 1801, 1868–69 (2004).

authority within its borders.<sup>4</sup> Sovereignty involves both an external component, permitting the state to structure its relationship with other sovereigns, and an internal component that focuses upon the state's right to structure its own internal affairs.<sup>5</sup> Both forms of sovereignty may be affected when unauthorized persons and goods cross the border. External sovereignty is affected because territorial integrity is implicated; internal sovereignty is implicated to the extent that unwelcome goods and persons render the territory ungovernable, or undermine political cohesion, thereby stirring up unrest.

This Note does not question the assumption that states have the right to prescribe—and proscribe—who and what may cross its borders.<sup>6</sup> Consistent with this Westphalian assumption, the Supreme Court has granted sweeping powers to the executive to police the physical border for unwelcome goods or persons,<sup>7</sup> and to Congress to legislate conditions of entry for immigrants.<sup>8</sup> Thus, sovereignty entails both the right to physically defend against invaders and to exclude goods and persons that may pose a more gradual or creeping threat to the state.

<sup>4</sup> See T. ALEXANDER ALEINIKOFF, *SEMBLANCES OF SOVEREIGNTY* 4 (2002). *But cf.* Anne Peters, *Humanity as the A and Ω of Sovereignty*, 20 EUR. J. INT'L L. 513, 515 (2009) (describing sovereignty as a “legal status” granting rights but also obligations).

<sup>5</sup> See Peters, *supra* note 4, at 515–16 for a discussion of the difference between internal and external sovereignty.

<sup>6</sup> See Oliver Schmidtke, *Introduction: National Closure and Beyond*, in *OF STATES, RIGHTS, AND SOCIAL CLOSURE: GOVERNING MIGRATION AND CITIZENSHIP* 1, 2 (Oliver Schmidtke & Saime Ozcuremez eds., 2008) (“Controlling borders . . . [has] historically been among the pivotal prerogatives of the sovereign nation-state.”). Other “cosmopolitan” thinkers have questioned this premise. See generally SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987). Such critiques may have the moral high ground. However, as an account of how courts do, or even might soon, view sovereign powers, cosmopolitanism is not overly viable.

<sup>7</sup> See, e.g., *United States v. Ramsay*, 431 U.S. 606, 616 (1977) (holding that searches of international mail are justified in light of “the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country”). *Ramsay* found the roots of sovereign control over the border to date to the founding, noting that the first customs statute granted plenary search powers. See *id.* Border agents may conduct extended detentions, including holding a suspect for hours pending a bowel movement, based only upon reasonable suspicion. See *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 543–44 (1985). The Second Circuit recently upheld as routine in the border context under the Fourth Amendment four to six hour searches of United States citizens returning from an Islamic conference at which a few terror suspects were present. *Tabbaa v. Chertoff*, 509 F.3d 89, 92, 97–101 (2d Cir. 2007).

<sup>8</sup> Under the Court's “plenary powers” doctrine, Congress has virtually unlimited authority and discretion over immigration decisions. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). The plenary powers doctrine responds, in part, to the concern that a state is vulnerable to invasion via immigration. See Matthew J. Lindsay, *Immigration as Invasion: Sovereignty, Security, and the Origins of the Federal Immigration Power*, 45 HARV. C.R.—C.L. L. REV. 1, 31–40 (2010). As Professor Aleinikoff has described the plenary powers doctrine, it functions much like the political question doctrine: even if immigration decisions implicate constitutional norms, the Court will traditionally defer to the political branches. See ALEINIKOFF, *supra* note 4, at 159.

In recent times, these indirect threats have come most dramatically in the form of the smuggling of persons and narcotics.<sup>9</sup> This struggle against the flow of narcotics is consistently described as a “war,”<sup>10</sup> and has yielded violence consistent with a war both at home and abroad,<sup>11</sup> and state-sanctioned violence against drug consumers through mass incarceration.<sup>12</sup> While similar effects might stem from a “war” on purely domestic drug production, it is uncertain that such a “war” could have ever been initiated without the specter of foreign menace.<sup>13</sup> Meanwhile, the battle against undocumented individuals is increasingly perceived as a battle for survival against criminals, organized crime, or terrorists.<sup>14</sup>

This Note examines how judicial and political concerns about these perceived threats to sovereignty have resulted in constitutional doctrines that grant extraordinary powers to immigration agents not just *at* the border but also *in* the interior. Part I catalogs several distortions of the Fourth Amendment in the border zone. Specifically, it examines the judicial rationales supporting reduced suspicion “roving patrol” stops, suspicionless immigration checkpoints, and “extended border” searches. Part II connects these doctrinal distortions to sovereignty concerns, suggesting three possible accounts of the permissible scope of the sovereign’s powers to define the goods and persons that enter its territory. Parts III and IV argue that the “regional” sovereignty theory implicitly adopted by courts is dangerous and unsustainable. First, Part III attacks the assumptions about the threat posed by illegal border crossings that underlie this approach to border constitutionalism. Finally, Part IV argues that judicial creation of special constitutional doctrines in the border region is inherently unstable, undermining constitutional norms in the interior by creating logical demands that cannot be analytically contained within a narrow band of geographical or doctrinal space.

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<sup>9</sup> See generally PETER ANDREAS, *BORDER GAMES: POLICING THE U.S.–MEXICO DIVIDE* (2d ed. 2009).

<sup>10</sup> See *id.* at 43–44.

<sup>11</sup> See, e.g., Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.–C.L. L. REV. 435, 437–38, 446 & n.93 (2010).

<sup>12</sup> For one of many accounts of the harms perpetrated by mass incarceration, see Joseph E. Kennedy, *The Jena Six, Mass Incarceration, and the Remoralization of Civil Rights*, 44 HARV. C.R.–C.L. L. REV. 477, 482–87 (2009).

<sup>13</sup> See, e.g., Natsu Taylor Saito, *Interning the “Non-Alien” Other: The Illusory Protections of Citizenship*, 68 LAW & CONTEMP. PROBS. 173, 197 (2005) (“Under the Reagan administration, the drug war’s focus on ‘foreign’ enemies was intensified, with large scale operations targeting Mexico and Turkey and an increased focus on immigrants as drug traffickers.”).

<sup>14</sup> Professors Johnson and Trujillo have described how “immigration monism”—the view that all immigration issues are fundamentally national security issues—has historically predominated, and has resurged in the wake of the events of September 11, 2001. Kevin R. Johnson & Bernard Trujillo, *Immigration Reform, National Security After September 11, and the Future of North American Integration*, 91 MINN. L. REV. 1369, 1399–1400 (2007); see also Daniel Ibsen Morales, *In Democracy’s Shadow: Fences, Raids, and the Production of Migrant Illegality*, 5 STAN. J. C.R. & C.L. 23, 60–61 (2009) (describing how the increasing association of criminality with illegal immigration through legislation tends to modify the popular perception of illegal immigrants and lead to increased calls for enforcement).

## I. BORDER CONSTITUTIONALISM

The difficulty of policing the border has led courts to craft several specialized doctrines that relax constitutional requirements for agents near the border who conduct searches for unauthorized goods or persons. This Part examines three such doctrines and argues that their development has been driven by judicial concern that unauthorized entry poses a unique risk to sovereignty.

A. *Roving Patrols*

“Roving patrols” are a major weapon used by Border Patrol agents in an attempt to apprehend undocumented immigrants.<sup>15</sup> They involve Border Patrol agents driving around in sensitive areas of the border region and selectively stopping automobiles to question drivers and passengers about their immigration status.<sup>16</sup> Congress has authorized immigration agents to question any suspected alien and to board and search, both without a warrant, any automobile “within a reasonable distance” of the border.<sup>17</sup>

In its first encounter with roving patrols, the Supreme Court held suspicionless searches of stopped cars to be impermissible, but Justice Powell, who provided the fifth vote, suggested in his concurring opinion that the Court might allow such searches pursuant to “area warrants” demonstrating that a region, instead of a person, is suspect.<sup>18</sup> In *Almeida-Sanchez v. United States*, the Court held a suspicionless roving patrol stop more than twenty miles from the Mexico-California border to be a violation of the Fourth Amendment.<sup>19</sup> More specifically, it refused to permit these suspicionless searches based upon the administrative search doctrine—first articulated in *Camara v. Municipal Court*—which relaxes the level of suspicion required to obtain a warrant for purposes of non-criminal administrative searches and eliminates the warrant requirement in cases involving highly regulated enterprises.<sup>20</sup> First, unlike administrative searches, roving patrols do not involve warrants and therefore invite discretionary abuses.<sup>21</sup> Furthermore, unlike the permissible warrantless administrative searches of liquor and firearms deal-

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<sup>15</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-824, BORDER PATROL: CHECKPOINTS CONTRIBUTE TO BORDER PATROL'S MISSION, BUT MORE CONSISTENT DATA COLLECTION AND PERFORMANCE MEASUREMENT COULD IMPROVE EFFECTIVENESS 6–7 (2009), available at <http://www.gao.gov/new.items/d09824.pdf> (describing patrols as one of the three “tiers” of Border Patrol enforcement strategy).

<sup>16</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976) (comparing roving patrols with fixed checkpoints).

<sup>17</sup> 8 U.S.C. § 1357(a) (2006).

<sup>18</sup> *Almeida-Sanchez v. United States*, 413 U.S. 266, 268, 273 (1973) (stating the majority's holding); *id.* at 283–84 (Powell, J., concurring).

<sup>19</sup> *Id.* at 273.

<sup>20</sup> *Id.* at 270–71 (discussing *Camara v. Mun. Court of S.F.*, 387 U.S. 523 (1967) and its progeny).

<sup>21</sup> *Id.* at 270.

ers, roving patrols do not affect a population that has voluntarily exposed itself to increased governmental regulation.<sup>22</sup>

However, Justice Powell stated that the Government had made a “convincing showing” that roving patrols were the “only feasible means” of policing a porous border.<sup>23</sup> In light of “the Government’s extraordinary responsibilities and powers with respect to the border,”<sup>24</sup> he suggested that *Camara* might well authorize area warrants for roving patrols that aim to apprehend and deport undocumented aliens rather than to seek out general criminal activity.<sup>25</sup> Justice Powell thus advocated extending the administrative search doctrine, generally reserved for businesses and other regulated entities that are “[not] personal in nature,”<sup>26</sup> and would have applied the doctrine to searches of individual border zone motorists.

Two years later, the Court revisited roving patrols but shifted its analysis from administrative area warrants to an expansive reading of *Terry v. Ohio*. In *United States v. Brignoni-Ponce*,<sup>27</sup> the Court authorized roving patrols to stop cars for immigration questioning based only upon reasonable suspicion—a substantially lower standard than probable cause—that the car’s inhabitants might be undocumented.<sup>28</sup> Instead of taking up Justice Powell’s invitation in *Almeida-Sanchez* to seek area warrants, INS agents continued conducting warrantless stops but now limited their inquiries to a few questions about immigration status and to requests for documentation.<sup>29</sup> Nonetheless, balancing the “public interest” in “effective measures to prevent the illegal entry of aliens at the Mexican border” against the “modest” intrusion posed by a stop, the Court held roving patrols based on reasonable suspicion to be permissible.<sup>30</sup>

Justice Powell compared roving patrol stops to *Terry* stops, in which law enforcement officers may conduct limited pat-downs of a passersby if a “reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.”<sup>31</sup> By analogy, the Court suggested that roving patrols are “limited searches and seizures” that are “a valid method of protecting the public and preventing crime.”<sup>32</sup> Thus,

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<sup>22</sup> See *id.* at 271.

<sup>23</sup> See *id.* at 276–77 (Powell, J. concurring).

<sup>24</sup> *Id.* at 279.

<sup>25</sup> See *id.* at 278–79, 283–84. Justice Powell noted with approval that patrols are primarily designed to detect unlawful migrants with an eye towards deportation—a civil/administrative remedy—rather than criminal prosecution, an area in which Fourth Amendment protections must be more conscientiously preserved. See *id.* at 278.

<sup>26</sup> *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 537 (1967).

<sup>27</sup> 422 U.S. 873 (1975). Justice Powell authored the majority opinion in *Brignoni-Ponce*.

<sup>28</sup> *Id.* at 880–82, 884.

<sup>29</sup> See *id.* at 874.

<sup>30</sup> *Id.* at 878–81.

<sup>31</sup> *Terry v. Ohio*, 392 U.S. 1, 27 (1968). In *Terry*, the officers conducting the search suspected Terry and his friend of “casing” a store for a possible robbery, and suspected that the suspects were armed. *Id.* at 6.

<sup>32</sup> See *Brignoni-Ponce*, 422 U.S. at 881.

the Court compared the dangers posed by undocumented immigration to those posed by potential armed robbers. This analogy of immigrants to the (presumed) armed street toughs in *Terry* paints a picture of undocumented persons not as one-time offenders who commit a crime by crossing the border but rather as ongoing threats to the public.

Having established a reduced standard of suspicion in order to effect a roving patrol seizure for immigration questioning, the Court then explained the factors, many geographical in nature, that might justify such a stop. As summarized by the Fifth Circuit, these factors include:

- (1) proximity to the border;
- (2) known characteristics of the area in which the vehicle is encountered;
- (3) usual traffic patterns on the particular road;
- (4) the agent's previous experience in detecting illegal activity;
- (5) information about recent illegal trafficking in aliens or narcotics in the area;
- (6) particular aspects or characteristics of the vehicle;
- (7) behavior of the driver; and
- (8) the number, appearance, and behavior of the passengers.<sup>33</sup>

Understated, though present, in the last factor is the *Brignoni-Ponce* Court's striking assertion that appearing to be of Mexican ancestry, while insufficient to justify a roving patrol stop on its own, is a "relevant factor" that agents may consider.<sup>34</sup>

### B. Fixed Immigration Checkpoints

Shortly after *Brignoni-Ponce*, Border Patrol searches made their way back to the high court, this time in the garb of checkpoints in Texas and California operated roughly sixty-five road miles north of the U.S.-Mexico border.<sup>35</sup> Cars passing through the California checkpoint were slowed to a virtual stop, and an agent selected cars for "secondary" inspection in which occupants were questioned about their immigration status.<sup>36</sup> The Government conceded that selection for secondary inspection was not based upon any articulable suspicion.<sup>37</sup>

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<sup>33</sup> *United States v. Zapata-Ibarra*, 212 F.3d 877, 881 (5th Cir. 2000). In turn, the Supreme Court has recently emphasized that these factors cannot be examined *in seriatim*, but instead the factors provide a gestalt test. See *United States v. Arvizu*, 534 U.S. 266, 274–75 (2002). It (nearly) goes without saying that such a test will generally be easier to satisfy.

<sup>34</sup> *Brignoni-Ponce*, 422 U.S. at 887. It is instructive to compare the authorized use of race in *Brignoni-Ponce* to another controversial, high-profile case allowing the use of race in investigations. In *Brown v. City of Oneonta*, 195 F.3d 111 (2d Cir. 1999), the Second Circuit authorized local police to question young black men in response to specific reports that a crime had just been committed by a young black male. For a comparative discussion of *Oneonta* and *Brignoni-Ponce*, see Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675, 694 & n.94 (2000).

<sup>35</sup> *Martinez-Fuerte v. United States*, 428 U.S. 543, 545, 549–50 (1976).

<sup>36</sup> *Id.* at 546. At the Texas checkpoint all motorists were stopped for brief questioning, except for those recognized as local inhabitants. *Id.* at 550.

<sup>37</sup> *Id.* at 547.

Justice Powell's majority opinion in *Martinez-Fuerte v. United States* predictably leaned heavily upon *Brignoni-Ponce*, and its reasoning focused largely upon the perceived threats posed by undocumented immigration. The opinion opened with a discussion of the challenges of immigration policing; illegal entry was described as "relatively easy" and common, resulting in as many as "10 or 12 million" individuals unlawfully present in the United States.<sup>38</sup> The Court recognized that the checkpoints were seizures subject to the Fourth Amendment, and then analyzed them under *Brignoni-Ponce*'s balancing test by weighing the public interest in this mode of immigration policing against the private interests violated, concluding that "the need to make routine checkpoint stops is great, [but] the consequent intrusion on Fourth Amendment interests is quite limited."<sup>39</sup> Indeed, the Court found routine checkpoints less intrusive than roving patrols because they were more predictable and less discretionary.<sup>40</sup> Furthermore, the Court added that it would be permissible to choose motorists for secondary inspection based "largely on . . . apparent Mexican ancestry."<sup>41</sup> Justice Powell made short work of concerns that this might violate the constitutional rights of those chosen for further inspection. The "minimal" nature of the intrusion and the fact that a far greater number of Hispanics passed through the California checkpoint than were referred for secondary inspection ameliorated such worries.<sup>42</sup>

The focus on the harms presented by unlawful border crossings was recently reiterated in the Court's latest checkpoint case, *City of Indianapolis v. Edmond*.<sup>43</sup> In striking down Indianapolis' use of random highway drug checkpoints, the Court contrasted the "'formidable law enforcement problems' posed by the northbound *tide* of illegal entrants into the United States" in *Martinez-Fuerte* with "ordinary criminal wrongdoing."<sup>44</sup> *Martinez-Fuerte* thus reflected the Court's "longstanding concern for the protec-

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<sup>38</sup> See *id.* at 551–52. The INS' ten to twelve million estimate, upon which the Court relied, has been subject to subsequent criticism that suggests that the number was more like two to four million. Robert Alan Culp, Note, *The Immigration and Naturalization Service and Racially Motivated Questioning: Does Equal Protection Pick Up Where the Fourth Amendment Left Off?*, 86 COLUM. L. REV. 800, 816–17, 821 (1986) (discussing 1980 Census Bureau estimates).

<sup>39</sup> *Martinez-Fuerte*, 428 U.S. at 556–57.

<sup>40</sup> See *id.* at 559.

<sup>41</sup> *Id.* at 563.

<sup>42</sup> See *id.* at 563–64 & nn.16–17. Justice Brennan in dissent noted the stigmatizing results of such race-based selection, observing that it was "not difficult to foresee" that "deep resentment will be stirred by a sense of unfair discrimination" as a result of the Court's ruling. *Id.* at 573 (Brennan, J., dissenting). Indeed, such resentment has predictably resulted. For an expression of one attorney's frustration at the racial profiling he and his community have experienced for decades, see César Cuahtémoc García Hernández, *La Migra in the Mirror: Immigration Enforcement and Racial Profiling on the Texas Border*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 167 (2009).

<sup>43</sup> 531 U.S. 32 (2000).

<sup>44</sup> *Id.* at 38 (emphasis added) (quoting *Martinez-Fuerte*, 428 U.S. at 552).

tion of the integrity of the border.”<sup>45</sup> The *Edmond* Court also contrasted drug checkpoints with a Michigan sobriety checkpoint upheld by the Court in *Michigan Department of State Police v. Sitz* because Michigan’s checkpoint was “aimed at reducing the *immediate hazard* posed by . . . drunk drivers . . . .”<sup>46</sup> *Edmond* and *Sitz* help to contextualize immigration checkpoints in the Court’s larger checkpoint jurisprudence. Immigration checkpoints are permissible because—more like sobriety checkpoints—they address a specific hazard of sufficient immediacy to justify a constitutional exception. The threat to the sovereign does not end when immigrants enter unlawfully, but continues as the “northbound tide” flows into the interior further subverting the nation’s territorial integrity.

Lower court checkpoint cases further reflect *Martinez-Fuerte*’s emphasis on border-crossers as a unique threat. The Third Circuit recently upheld a suspicionless immigration checkpoint at the airport in the Virgin Islands, at which all passengers were required to answer questions about their immigration status before traveling to the continental United States.<sup>47</sup> Applying *Martinez-Fuerte*, the court found that the government interest in controlling the flow of unlawful immigrants into the mainland easily outweighed any intrusion given the “extremely low” expectation of privacy for travelers between the Virgin Islands and the continental U.S.<sup>48</sup> The court stated that “not all territory over which a sovereign exercises sovereignty has the same legal status, and borders between ‘incorporated’ and ‘unincorporated’ territory . . . of a sovereign have many of the characteristics of international borders.”<sup>49</sup>

### C. *Extended Border Searches*

Circuit courts along the border have created a doctrine of “extended border searches” that interior circuits have also adopted in airport-related cases. These cases move the border inland and relax the general probable cause standard for searches in specialized circumstances involving immigration or customs violations. Specifically, agents may conduct warrantless “reasonable suspicion” searches of persons or vehicles already inside the borders of the United States if that reasonable suspicion is coupled with a “reasonable certainty” that the individual has recently entered the United

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<sup>45</sup> *Id.* (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)) (internal quotation marks omitted).

<sup>46</sup> *Id.* at 39 (emphasis added) (distinguishing *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990)).

<sup>47</sup> *United States v. Pollard*, 326 F.3d 397, 402, 410–11 (3d Cir. 2003).

<sup>48</sup> *See id.* at 412–13. *Pollard* followed *Martinez-Fuerte* in assuming a minimal privacy interest on the part of travelers, *id.* at 413, likely because it understood air travelers near a border to expect less privacy than other travelers. However, the court may have meant that *all* air travelers have reduced expectations of privacy—thus justifying checkpoints at *any* airport.

<sup>49</sup> *Id.* at 414 (quoting *United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994)) (internal quotation marks omitted).

States and that she has not had a chance to obtain contraband since that entry.<sup>50</sup> Unlike roving patrol stops, which do not require a reasonable certainty of a recent border crossing, extended border searches allow agents not just to inquire about immigration status, but also to conduct a full search of the seized person or automobile—as if the stop were at the border.<sup>51</sup> These searches occur within a “wide range of spatial and temporal relationships with the border.”<sup>52</sup>

“Reasonable certainty” of entry requires more than “probable cause” but less than a “beyond a reasonable doubt” degree of certainty.<sup>53</sup> For example, in *United States v. Cardenas*, reasonable certainty was present where the defendant was found within a block of the border checkpoint after a search of another individual, entering separately, uncovered drug-related paraphernalia as well as a picture and the passport of the defendant.<sup>54</sup> These facts, combined with Border Patrol experience that drug traffickers often travel in pairs but split up at the border to avoid detection, supported an extended border search of the defendant.<sup>55</sup> Similarly, in *United States v. Guzman-Padilla*, agents had reasonable certainty of a border crossing when agents first observed the defendant’s sport utility vehicle, which did not appear modified for recreational use, in the dunes of a state park.<sup>56</sup> Agents could conclude that the truck had not come over the dunes from the direction of the United States, but must have driven through a valley that connected the park to the Mexican border.<sup>57</sup> Such physical proximity to the border is not always required, though, as evidenced by *United States v. Martinez*, where the Fifth Circuit upheld a search of a truck 150 miles inland and 142 hours after entry because it had been under surveillance since shortly after crossing the border.<sup>58</sup>

The extended border search doctrine treats the law enforcement needs of border agents differently from those of agents investigating any other type of crime. As the Ninth Circuit has stated, “[t]he flexibility inherent in the extended border search doctrine reflects a balancing of the individual’s right to freedom from arbitrary intrusions against the ‘myriad difficulties facing customs and immigration officials who are charged with the enforcement of smuggling and immigration laws.’”<sup>59</sup> In expanding the extended border search doctrine from automobile to pedestrian searches, the Fifth Circuit em-

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<sup>50</sup> See, e.g., *United States v. Guzman-Padilla*, 573 F.3d 865, 878–79 (9th Cir. 2009); *United States v. Cardenas*, 9 F.3d 1139, 1148 (5th Cir. 1993).

<sup>51</sup> See *Cardenas*, 9 F.3d at 1149.

<sup>52</sup> *Guzman-Padilla*, 573 F.3d at 878.

<sup>53</sup> *Cardenas*, 9 F.3d at 1148.

<sup>54</sup> *Id.* at 1151.

<sup>55</sup> *Id.* at 1151, 1153.

<sup>56</sup> *Guzman-Padilla*, 573 F.3d at 880.

<sup>57</sup> *Id.* at 880–81.

<sup>58</sup> 481 F.2d 214, 218–19 (5th Cir. 1973).

<sup>59</sup> *Guzman-Padilla*, 573 F.3d at 878 (quoting *United States v. Richards*, 638 F.2d 765, 771 (5th Cir. 1981)).

phasized that “[t]he major impetus behind the extended border search doctrine is the government interest in stopping drug traffic.”<sup>60</sup> Indeed, the doctrine is not available for general policing: as one court has pointed out, extended border searches may not be used to investigate a murder.<sup>61</sup> Thus, the extended border search doctrine treats smuggling and immigration offenses as special offenses even in the interior of the country, so long as those crimes are demonstrably tainted by recent border crossing. This permissive treatment of border crime investigations stems both from the difficulties of policing the border, as demonstrated by the Ninth Circuit’s remarks, and from the importance courts place on stopping borderland crimes, as evidenced by the Fifth Circuit’s declaration that stopping drug crimes requires crafting an “elastic” definition of the border.<sup>62</sup>

## II. THREE THEORIES OF THE SOVEREIGN’S BORDER-BASED POWER

So constitutional liberties work differently near the border. But why? Courts have long recognized special sovereign powers associated with the State’s control over its borders.<sup>63</sup> In principle, one could hold either of two different extreme views about the nature of sovereign border powers. The first, a “physicalist” theory of sovereignty, maintains that the sovereign’s power to control its borders is strictly incidental to its relationship with other states in the Westphalian order and is thus only a power to take extraordinary actions at the physical border itself. This presents the state with one unique opportunity to monitor the flows of goods and people as they cross the border, and treats the border as a limited anomaly to which people voluntarily expose themselves rather than a more expansive “anomalous zone”<sup>64</sup> where they also lead their lives. Thus, once a good or person has passed the border (or its functional equivalent), the full panoply of limitations on state power again apply because the state has “missed” its opportunity to investigate. The physicalist theory necessarily recognizes that some unsanctioned goods and persons will evade detection at the border, but is skeptical as to whether this penetration actually constitutes an existential threat to the state and its ability to govern.<sup>65</sup> The account is somewhat *laissez-faire*: it expects the

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<sup>60</sup> *Cardenas*, 9 F.3d at 1149 (internal quotation omitted).

<sup>61</sup> See *United States v. McGinnis*, 247 Fed. App’x 589, 594 (6th Cir. 2007).

<sup>62</sup> See *Martinez*, 481 F.2d at 218 (“In order to enforce the customs laws, particularly those dealing with the illegal importation of drugs, law enforcement officials must do more than arrest the street level operative; they must, if at all possible, apprehend the ringleaders as well. This objective would not be easily attainable if the authority of customs agents to search was strictly limited to the physical border.”).

<sup>63</sup> See *supra* notes 7–8 and accompanying text.

<sup>64</sup> See Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201 (1996) (defining anomalous zones as “geographical area[s] in which certain legal rules, otherwise regarded as embodying fundamental policies of the larger legal system, are locally suspended”).

<sup>65</sup> For a rare judicial pronouncement of a similar theory, see *United States v. Zapata-Ibarra*, 223 F.3d 281, 281 (5th Cir. 2000) (Wiener, J., dissenting) (“[I am c]onvinced that the fabric of our society suffers significantly more harm by sacrificing the right of all the people—

state to adapt to the threats posed by transborder violations, just as the state must adapt to violations of domestic law that cannot all be enforced.<sup>66</sup> If a state cannot control illicit flows, then it may either take stronger measures at the physical border—though if it does so it might expose itself to international opprobrium<sup>67</sup>—or adapt itself either by accepting a certain amount of illegality or by changing its immigration, customs, or drugs laws.<sup>68</sup>

The opposite “functionalist theory” embraces the notion that the threat of possibly having to change the sovereign’s law or policy in response to the penetration of goods or persons is itself an intolerable threat to sovereignty. Functionalism views the state as a closed system, and sees self-definition as central to sovereignty.<sup>69</sup> Sovereignty is threatened when the polity is forced to change its laws, values, or beliefs in response to the presence of uninvited goods or persons.<sup>70</sup> Transborder crimes, therefore, pose a unique threat to sovereignty (compared to other forms of illegality) because they undermine the state from outside. The functionalist maintains that the sovereign’s

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including those near the Mexican border—to the constitutional protections of the Fourth Amendment than it gains from the apprehension of a few more illegal immigrants or narcotic traffickers and their contraband . . .”).

<sup>66</sup> Cf. WILLEM VAN SCHENDEL & ITTY ABRAHAM, *Introduction: The Making of Illicitness*, in *ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS, AND THE OTHER SIDE OF GLOBALIZATION* 1, 23–25 (Willem van Schendel & Itty Abraham eds., 2005) (describing how violations of border rules are commonplace and result in evolving views of (il)licitness in the border zone).

<sup>67</sup> See Seyla Benhabib, *The Law of Peoples, Distributive Justice, and Migrations*, 72 *FORDHAM L. REV.* 1761, 1786 (2004) (“[S]tates who . . . close borders . . . are thought not to belong within a specific society of states or alliances.”).

<sup>68</sup> Justice Brennan may have held a view somewhat like this. Dissenting in *INS v. Delgado*, 466 U.S. 210 (1984), Justice Brennan stated that “it is worth remembering that the difficulties faced by the INS today are partly of our own making.” *Id.* at 240 (Brennan, J., dissenting). He went on to explain that undocumented immigration partly reflects a “failure to commit sufficient resources to the border patrol effort” and accused the Court of being “so mesmerized by the magnitude of the problem that it has too easily allowed Fourth Amendment freedoms to be sacrificed.” *Id.* at 239–40. This argument that our problems at the border are “partly of our own making” has revolutionary potential. It recognizes that states construct illegality through their laws but frequently do not actually will the means to full compliance, and it refuses to grant the political branches a free pass to first enact unrealistic laws and then issue a plea for constitutional flexibility in response to the failure of the initial, unrealistic scheme.

<sup>69</sup> See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* 39 n.48 (1999) (suggesting that immigration may be limited to “protect a people’s political culture and its constitutional principles”). See Benhabib, *supra* note 67, for a forceful rebuttal to Rawls from a cosmopolitan perspective.

<sup>70</sup> One (among many) intellectual underpinnings for pure functionalism might be located in Carl Schmitt’s political theory. For Schmitt, “a state affirms its identity through its decisions; it must keep itself free to decide” who is a friend or enemy and who is in or out of the polity. See Jeremy Webber, *National Sovereignty, Migration, and the Tenuous Hold of International Legality: The Resurfacing (and Resubmersion?) of Carl Schmitt*, in *OF STATES, RIGHTS, AND SOCIAL CLOSURE*, *supra* note 6, at 61, 72. Although Schmitt is often associated with fascism, several commentators have recently tried to resuscitate him as a populist democrat who elevates “the creative and founding will” of a state’s founders over Rawlsian liberal commitments to procedure. See Andreas Kalyvas, *Carl Schmitt and the Three Moments of Democracy*, 21 *CARDOZO L. REV.* 1525, 1534 (2000); see also Charles Barbour, *Exception and Event: Schmitt, Arendt, and Badiou*, in *CHARLES BARBOUR & GEORGE PAVLICH, AFTER SOVEREIGNTY: ON THE QUESTION OF POLITICAL BEGINNINGS* 84–87 (2010).

power to exclude goods *at* the border allows it by implication to act inside the border as necessary to combat the threats posed by unlawful border penetration. The sovereign's power extends not merely to the prescriptive power to specify lawful flows of goods and people, but also includes remedial powers to alleviate the harm that results from the inability-in-fact to stem such flows at the physical border.

It is difficult for a court to embrace either view in its purest form. The physicalist account seems to tie the hands of the political branches in confronting serious social problems, while the functionalist account cedes sweeping power to the political branches to ignore constitutional norms. Courts appear to have resolved this problem by implicitly endorsing a limited form of functionalism which I will refer to as the "regional theory." Regional theory accepts the functionalist's core assumption that border crimes pose an exceptional challenge to the state and therefore justify exceptional powers. However, regional theory seeks to limit the constitutional damage by containing it within a geographically delimited area.

This theory seems to capture much of what courts and the political branches do and say. By statute, roving patrols and checkpoints are permissible only within a "reasonable distance" of the physical border, and regulations have clarified that this creates a 100-mile band in which such searches are permitted.<sup>71</sup> Thus, by definition, most of the cases discussed above in Parts I.A–B approve only a "regional" distortion.

Although courts are not always explicit about the role that distance plays in their decisions, their reasoning suggests its centrality. In *Almeida-Sanchez*, Justice Powell emphasized that roving patrols were justified as "incidental to the protection of the border."<sup>72</sup> His initial solution—area warrants—envisioned an explicitly geographically bounded response to the concern that aliens are "transported [from the border zone] to their destinations by automobiles."<sup>73</sup> Similarly in *Brignoni-Ponce*, Justice Powell emphasized that roving patrols are "designed to *prevent* . . . inland movement" to cities where immigrants "find jobs and elude the immigration authorities."<sup>74</sup> Proximity to the border is one of the key factors that will support reasonable suspicion for a roving patrol stop, as is recent known illegal crossings in the area.<sup>75</sup> Thus, roving patrols represent a containment strategy.

The justification for checkpoints has a similar regional grounding. In *Martinez-Fuerte*, the Court emphasized that without checkpoints, highways

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<sup>71</sup> 8 U.S.C. § 1357(a)(3) (2006) authorizes warrantless searches of automobiles within a "reasonable distance" of the border. In turn, 8 C.F.R. § 287.1(a)(2) (2010) imposes the 100-mile standard. Courts have held that "the regulation does not foreclose searches beyond the [regulation's] limit." See *United States v. Venzor-Castillo*, 991 F.2d 634, 637 n.3 (10th Cir. 1993).

<sup>72</sup> 413 U.S. 266, 279 (1973) (Powell, J., concurring).

<sup>73</sup> *Id.* at 276.

<sup>74</sup> 422 U.S. 873, 879 (1975) (emphasis added).

<sup>75</sup> *Id.* at 884–85.

near the border would be a “quick and safe route into the interior,” and noted that checkpoints force smugglers onto “less heavily travelled” roads where they are “more vulnerable to detection by roving patrols.”<sup>76</sup> In other words, these strategies combine synergistically to create a regional dragnet.<sup>77</sup>

Distance from the border is also a critical factor in extended border searches because the subject of a search’s physical proximity to the border will frequently be a critical factor in establishing reasonable certainty of a recent border crossing.<sup>78</sup> For example, in *Guzman-Padilla*, “reasonable certainty” that the sport utility vehicle had crossed the border was established in part because it was found only 1.5 miles from the border.<sup>79</sup> And in *Cardenas*, “reasonable certainty” existed because the defendant, whose photograph and passport were in her co-conspirator’s possession, was found less than a block from the border.<sup>80</sup>

Yet the regional theory is functionally motivated. In particular, courts developing border region search doctrines are deeply concerned about the difficulties of border policing and the harms resulting from illegal immigration. The extension of special powers is “justifi[ed by] the Government’s extraordinary responsibilities and powers with respect to the border”<sup>81</sup> in light of the “impracticab[ility of] maintain[ing] a constant patrol along thousands of miles of border.”<sup>82</sup> In *Brignoni-Ponce* Justice Powell expounded on his view of the unique resulting social harms, noting that:

[T]hese [illegal] aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services. The aliens themselves are vulnerable to exploitation because they cannot complain of substandard working conditions without risking deportation.<sup>83</sup>

The unique nature of border-related “social problems” explains the *McGinnis* court’s statement that extended border searches could be used to catch

<sup>76</sup> *Martinez-Fuerte*, 428 U.S. at 557.

<sup>77</sup> Indeed, locating a checkpoint on one road may help authorities to establish reasonable suspicion to search cars driving on other roads. See, e.g., *United States v. Zapata-Ibarra*, 212 F.3d 877, 881–82 (5th Cir. 2000) (permitting a roving patrol stop in part because it occurred on a road “frequently used by smugglers who are attempting to circumvent [a] Border Patrol checkpoint”).

<sup>78</sup> But note that reasonable certainty can be established at considerable distances into the interior if the government has maintained regular surveillance since the time a vehicle crossed the border. See *United States v. Cardenas*, 9 F.3d 1139, 1150 n.5 (5th Cir. 1993) (indicating that surveillance can demonstrate that there has been no change in the condition of a vehicle between the time it crossed the border and the time of the search).

<sup>79</sup> *United States v. Guzman-Padilla*, 573 F.3d 865, 880–81 (9th Cir. 2009).

<sup>80</sup> 9 F.3d at 1151.

<sup>81</sup> See *Almeida-Sanchez v. United States*, 413 U.S. 266, 273, 279 (1973) (Powell, J., concurring).

<sup>82</sup> See *id.* at 276; see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (“[T]he flow of illegal aliens cannot be controlled effectively at the border.”).

<sup>83</sup> *United States v. Brignoni-Ponce*, 422 U.S. 873, 878–79 (1975).

smugglers, but not murderers.<sup>84</sup> The court was obviously not suggesting that murder is a lesser crime, but rather that it is not perceived as a threat to sovereignty and thus cannot be remedied through extraordinary policing or procedures.

Indeed, to the extent that the courts *have* restricted border-derived powers to the border region, they have only done so for the functionalist reason that the border region is the most likely place to find illicit goods and persons. The only bright-line *rule* limiting border powers is provided not by statute or judicial decision, but by regulation.<sup>85</sup> Checkpoints are justified not based on their distance from the border but because of their *role* in protecting against invasive forces. Judicial rhetoric focuses on the likelihood that a checkpoint will intercept a high volume of unlawful traffic, not on the precise distance from the border nor on the number of innocents seized.<sup>86</sup> Thus in *Pollard* the Third Circuit noted INS testimony that a “‘staggering’ number of illegal aliens . . . come to the Virgin Islands each day,”<sup>87</sup> and asserted that “[t]he need for the U.S. Government to monitor the movement of aliens over *and within* its borders is undoubtedly great.”<sup>88</sup>

The regional limits upon roving patrols also seem to derive only from the fact that courts do not view them as reasonably effective outside the border region, as shown by the Tenth Circuit’s explanation of these limits:

The further one gets from the border, the greater the likelihood the volume of legitimate travelers will increase. Thus, the more attenuated the international border becomes, the greater the significance distance assumes in the equation used to measure the power to stop only on reasonable suspicion . . . .<sup>89</sup>

Similarly, extended border stops can extend deeply into the interior, but only so long as an agent is convinced that a car came directly from the border. Indeed, the *Martinez* court celebrated the ability to conduct reduced suspicion searches in the interior because the “salutary legal principle” that “the

<sup>84</sup> See *United States v. McGinnis*, 247 Fed. App’x 589, 594 (6th Cir. 2007).

<sup>85</sup> See *supra* note 71.

<sup>86</sup> For example, the *Martinez-Fuerte* Court disagreed with the lower court’s holding that the location of one of the checkpoints at issue was impermissible because of the low frequency with which illegal aliens passed through. For the Court, it was enough that “[t]he *absolute* number of apprehensions at the checkpoint is high.” 428 U.S. at 562 n.15 (emphasis added). *But cf.* *United States v. Jackson*, 825 F.2d 853, 864–65 (5th Cir. 1987) (stating that in deciding whether to issue area warrants for checkpoints that rely upon searches as well as seizures, a judge should “carefully compare the volume of illegal alien traffic with the volume of lawful domestic traffic in the area in question”).

<sup>87</sup> *United States v. Pollard*, 326 F.3d 397, 404 (3d Cir. 2003).

<sup>88</sup> *Id.* at 400 (emphasis added).

<sup>89</sup> *United States v. Venzor-Castillo*, 991 F.2d 634, 639 (10th Cir. 1993); see also *id.* at 635 (noting that the fact that the road where the defendant was stopped, approximately 235 miles from the border, went through 13 different towns between the border and the point of the stop).

border is an elastic concept” helps law enforcement officials target ringleaders as well as street level operatives.<sup>90</sup>

Thus law enforcement officers’ ability to exercise border powers does decline as the border recedes, but the courts have not drawn a bright line around the border zone so much as accepted the probabilistic role that border zone searches play in apprehending immigrants and drug runners. Thus, the regional theory does not represent a principled stand to minimize constitutional damage so much as a calculation that in the border zone the means justify the ends, because border crimes are unique and because we catch enough border violators there to make it all worthwhile.

### III. UNDEFENDED ASSUMPTIONS: THE FUNDAMENTAL UNSOUNDNESS OF FUNCTIONALIST ASSUMPTIONS

I have argued that the regional theory depends on functionalist assumptions that border-crossing crimes justify constitutional distortions in the interior. In this Part, I take critical aim at these assumptions, suggesting that courts have become “mesmerized”<sup>91</sup> by the (concededly) serious law enforcement problems at the border and have too readily adopted doctrines built upon a misguided view that the dangers of illicit flows of persons and goods pose a *unique* threat as compared to other kinds of law-breaking.<sup>92</sup>

The constitutional distortions permitted to deal with trans-border criminality are unique, but underenforcement of the laws is not.<sup>93</sup> For example, it is understood that labor and employment laws,<sup>94</sup> environmental laws,<sup>95</sup> and

<sup>90</sup> United States v. Martinez, 481 F.2d 214, 218 (5th Cir. 1973).

<sup>91</sup> INS v. Delgado, 466 U.S. 210, 240 (1984) (Brennan, J., dissenting). See *supra* note 68 for a more thorough exposition of Justice Brennan’s *Delgado* dissent.

<sup>92</sup> Indeed, Professor van Schendel suggests that using the term “flows” to describe the entry of unlawful persons or goods is a discursive tool that inflates the danger they pose. See Willem van Schendel, *Spaces of Engagement: How Borderlands, Illicit Flows, and Territorial States Interlock*, in *ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS, AND THE OTHER SIDE OF GLOBALIZATION*, *supra* note 66, at 38, 39–41.

<sup>93</sup> See Edward K. Cheng, *Structural Laws and the Puzzle of Regulating Behavior*, 100 NW. U. L. REV. 655, 659–61 (2006) (discussing pervasive underenforcement of laws and the rule-of-law consequences). See generally Alexandra Natapoff, *Underenforcement*, 75 *FORDHAM L. REV.* 1715 (2006).

<sup>94</sup> See James A. Gross, *The Broken Promises of the National Labor Relations Act and the Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 *CHI.-KENT L. REV.* 351, 358–65 (1998) (explaining how all three branches of government have regularly and often self-consciously contributed to the underenforcement of laws protecting employees’ bargaining rights and safety). See also Ahmed A. White, *Mutiny, Shipboard Strikes, and the Supreme Court’s Subversion of New Deal Labor Law*, 25 *BERKELEY J. EMP. & LAB. L.* 275, 335, 338–43 (2004) (offering an historical analysis of the Supreme Court’s participation in the underenforcement of the labor law by undermining the National Labor Relations Board’s remedial power); Stephen F. Befort, *Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment*, 43 *B.C. L. REV.* 351, 401–02 (2002) (explaining how for lower-income employees it is impractical to bring lawsuits for wrongful termination); Paul Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1787–1803 (1983) (documenting the

(non-smuggling) narcotics laws<sup>96</sup> are serially underenforced—and likely could not be fully enforced. However, courts have not suggested that these areas of underenforcement so undermine the state as to justify systematic constitutional distortions in order to aid enforcement. Indeed, while the consumption of narcotics is certainly perceived as a massive *social* problem, in *Edmond* the Court expressly rejected treating drug possession in the same way as the Court was willing to treat the unlawful smuggling of the same drugs or of undocumented individuals.<sup>97</sup> Similarly, the Court has rejected attempts to develop special standing doctrines that would ensure full(er) enforcement of environmental laws.<sup>98</sup>

The differential willingness to distort constitutional norms in order to bring about enforcement can hardly be accounted for purely by the degree of social harm caused by law-breaking. Drug smuggling and drug consumption deal with many of the same social ills, and the smuggling of consenting persons arguably causes fewer social ills.<sup>99</sup> Labor law violations have the same effect of undermining workers' wages and jeopardizing their safety, as Justice Powell alluded to when cataloguing the harms caused by undocumented immigration.<sup>100</sup> And environmental violations have a *direct* effect on the health of millions of citizens.<sup>101</sup> Furthermore, the fact that under-enforcement of immigration laws represents at least a partially deliberate policy<sup>102</sup> suggests that the harm caused by violations is exaggerated.

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inadequacy of the National Labor Relations Act's remedial scheme to deter employers from engaging in labor violations).

<sup>95</sup> See, e.g., Robert B. Wiygul & Sharon Carr Harrington, *RCRA, Communities, and Environmental Justice*, 96 W. VA. L. REV. 405, 419–20 (1993–94) (discussing a high profile study that documented “an institutional pattern of neglect by the EPA in its enforcement of environmental law based on race and income”); David A. Barker, Note, *Environmental Crimes, Prosecutorial Discretion, and the Civil/Criminal Line*, 88 VA. L. REV. 1387, 1406–08 (2002) (documenting EPA's deliberate strategy of underenforcement of criminal environmental laws and focus on the most serious violators).

<sup>96</sup> Cf. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 575–76 (2001) (explaining that drug enforcement is disproportionately targeted against certain communities and that this discriminatory underenforcement is likely what allows legislatures to create broad criminal prohibitions).

<sup>97</sup> See *City of Indianapolis v. Edmond*, 531 U.S. 32, 43 (2000) (“[T]he Indianapolis [narcotics] checkpoints are far removed from the border context that was crucial in *Martinez-Fuerte*.”).

<sup>98</sup> See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565–66, 571–73 (1991); *Sierra Club v. Morton*, 405 U.S. 727, 738–39 (1972) (rejecting test that would grant special standing to environmental organizations); see also *id.* at 741–42 (Douglas, J., dissenting) (proposing losing suggestion that standing be granted to environmental objects).

<sup>99</sup> See *Culp*, *supra* note 38, at 821 (collecting sources showing disagreement as to whether undocumented aliens have adverse economic and cultural influence).

<sup>100</sup> See *supra* note 83 and accompanying text.

<sup>101</sup> See, e.g., Charles Duhigg, *Millions in U.S. Drink Dirty Water, Records Say*, N.Y. TIMES, Dec. 7, 2009, at A1 (noting that more than 20% of the nation's water treatment systems have violated the Safe Drinking Water Act, contributing to the nineteen-million water-borne illnesses Americans suffer each year).

<sup>102</sup> See, e.g., Natapoff, *supra* note 93, at 1735–36 (discussing underenforcement of immigration laws, especially in the context of the failure to enforce immigration laws against employers). Professor Johnson has explained how officials signaled that they would not seek to

Nor are the problems of border underenforcement new, which suggests that widespread violations do not actually wreak havoc upon the ability to govern. Indeed, the current perceived crisis is a time-honored problem: “[B]order law evasion is as old as border law enforcement.”<sup>103</sup> It is only because “in recent times . . . many states have acquired the technological and bureaucratic capacity” to consider fully policing their borders that their success in doing so has “[become] an important yardstick of a state’s sovereign power.”<sup>104</sup>

Instead, the political and judicial reactions to border crimes can be better explained by a socially constructed fear<sup>105</sup> of outsiders, and not by anything unique about the laws they might break while entering. Mae Ngai has documented the alarm inspired by the presence of undocumented persons as far back as 1925, shortly after restrictive immigration reform was passed: “The mere idea that persons without formal legal status resided in the nation engendered images of great danger” despite the fact that many undocumented aliens at the time had entered the country legally.<sup>106</sup> It was only later that these fears attached to Latinos “walking (or wading) across the border,” an act that “emerged as the quintessential act of illegal immigration.”<sup>107</sup> As Ngai argues, this construction of illegality, particularly the association of criminality with the border, was racially and sociologically driven<sup>108</sup>—not grounded in any concrete dangers to America’s ability to self-govern created by these border crossers. The Bracero program, in which large numbers of Mexicans were recruited to perform agricultural labor during the 1940s–60s, exposed the lack of danger posed by foreign workers. Border Patrol agents engaged in an enforcement campaign against “wetbacks,” who were transported to Mexico to “dry[ them] out” and then immediately permitted to re-enter as “legal” migrant workers.<sup>109</sup> This episode highlights the fact that any perceived threat to sovereignty lies in a fear of the “illegal immigrant,”

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enforce immigration laws against employers that hired undocumented workers after Hurricane Katrina. See Kevin R. Johnson, *Hurricane Katrina: Lessons about Immigrants in the Administrative State*, 45 HOUS. L. REV. 11, 58–59 (2008); see also Kitty Calavita, *Employer Sanctions Violations: Toward a Dialectical Model of White-Collar Crime*, 24 LAW & SOC’Y REV. 1041 (1990) (empirically documenting underenforcement of workplace immigration laws imposing employer sanctions and discussing how the law facilitates this underenforcement). Indeed, underenforcement appears to be part of a policy strategy by immigration officials that recognizes that most undocumented workers do not, in fact, pose serious problems for the sovereign. Thus, resources focus upon removing undocumented aliens who distinguish themselves by committing crimes. See Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 845–47 (2007).

<sup>103</sup> ANDREAS, *supra* note 9, at 3.

<sup>104</sup> van Schendel, *supra* note 92, at 59.

<sup>105</sup> I do not suggest that this social construction is a deliberate plan. A number of forces may be at work, and it is not likely that they are being orchestrated. This does not, however, mean that such fears are not socially constructed. See generally MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

<sup>106</sup> *Id.* at 61.

<sup>107</sup> *Id.* at 89.

<sup>108</sup> See *id.* at 64–90.

<sup>109</sup> See *id.* at 153–54; see also ANDREAS, *supra* note 9, at 34.

rather than in the empirical effects of the presence of alien workers on the sovereign's ability to govern.

An INS official speaking around the time of the Bracero program demonstrated this fear, arguing that “wetbacks” were dangerous because they were inherently criminal, as “it is easier for . . . [the undocumented person] to break other laws since he considers himself to be an outcast, even an outlaw.”<sup>110</sup> Unsurprisingly, courts which are charged with upholding laws are easily wooed by this argument. For example, in refusing to extend *any* Fourth Amendment protections to a previously-removed criminal alien, one district court in Kansas recently emphasized the perceived criminality of border-crossers:

“[I]llegal aliens are among persons typically considered dangerous or irresponsible because: they have already violated a law of this country and are likely to maintain no permanent address in this country, elude detection through an assumed identity, and—already living outside the law—resort to illegal activities to maintain a livelihood.”<sup>111</sup>

This statement was supported by citations to other courts—but not to any empirical evidence that the undocumented engage in higher rates of crime. This lack of citation is hardly surprising given that empirical evidence suggests the contrary.<sup>112</sup>

The functionalist assumption underlying regional theory is that border crimes pose a unique threat to the sovereign. But that “uniqueness” seems better explained as a matter of sociological construction rather than by any actual, empirically documented harm unique to border crimes. Thus, functionalist assumptions hardly justify the degree of constitutional distortion examined in Part I—immigration checkpoint searches without cause, roving patrol and extended-border searches based upon minimal cause, and the judicially sanctioned use of race. Before courts embrace functionalist assumptions, they should demand empirical evidence that the harms posed by

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<sup>110</sup> See NGAI, *supra* note 105, at 149 (reporting the statement of the INS official); see also Gerald L. Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and Structure of Equal Protection Doctrine*, 42 UCLA L. REV. 1425, 1441 (1995) (discussing how the term “illegal alien” constructs the undocumented as inherently illegal beings).

<sup>111</sup> *United States v. Gutierrez-Casada*, 553 F. Supp. 2d 1259, 1266–67 (D. Kan. 2008) (internal quotation marks omitted) (quoting *United States v. Juan Ochoa-Colchado*, 521 F.3d 1292 (10th Cir. 2008) (quoting *United States v. Orellana*, 405 F.3d 360 (5th Cir. 2005) (quoting *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984))). The chain of quotations in the Kansas court's decision indicates that this sentiment is not limited to a few renegade courts but appears to be quite widespread.

<sup>112</sup> See, e.g., Rubén G. Rumbaut, Roberto G. Gonzales, Golnaz Komaie & Charlie V. Morgan, *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFORMATION SOURCE (June 2006), available at <http://www.migrationinformation.org/USFocus/display.cfm?ID=403> (finding that U.S.-born men between the ages of eighteen and thirty-nine are four times more likely to be incarcerated than foreign-born men).

border crimes, as opposed to other forms of illegality, justify the distortions. Otherwise, functionalist assumptions should be rejected as a political philosopher's—or a politician's<sup>113</sup>—misplaced fixation.

#### IV. THE DIFFICULTY OF CONTAINMENT: WHY REGIONALISM DOES NOT WORK IN PRACTICE

In this part, I turn to a critique of the regional theory as applied, arguing that it works as a beachhead, whether intended or not, for a broader assault upon constitutional liberties. First, I argue that the regional theory's functionalist assumptions cannot be—and have not been—properly cabined within the border region. The same logic that drives the regional theory should entail similar results in other parts of the country, such as: neighborhoods with high percentages of foreign-born populations; workplaces in certain industries such as garment work, day labor, and migrant work; and inner city schools. Second, I argue that the regional theory's distortions cannot be—and have not been—confined merely to the Fourth Amendment. Instead they have also affected other fundamental constitutional norms such as equal protection, due process, and separation of powers.

##### A. *Regional theory cannot be logically bounded within the border region*

Because the regional theory relies upon fundamentally functionalist assumptions, it is difficult, if not impossible, to cabin its logic within a geographic boundary defined by a simple band around the border. Professor Gerald Neuman has described this metastasizing mechanism in his discussion of “anomalous zones” in which governments suspend their vice laws or civil liberties in response to social pressures.<sup>114</sup> Professor Neuman explains that anomalous zones represent an attempt at a “containment strategy,” but that such zones have “subversive force” that is “felt beyond the boundaries of the sphere that originally motivated it.”<sup>115</sup> Restricting constitutional dis-

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<sup>113</sup> Several commentators have suggested that politicians benefit by exaggerating the threats to sovereignty posed by immigrants and contraband and then being perceived as “managing” the situation through increased enforcement, even though the tactics selected are far from the most efficacious. Thus, “border policing has been less about deterring than about image crafting.” See ANDREAS, *supra* note 9, at 8–9; see also Morales, *supra* note 14, at 26 (describing how the border fence is a “classic white elephant” designed to provide an image of security to domestic audiences but flying in the face of government-authored reports and the reality that 40% of undocumented individuals are visa overstays); Paul Gootenberg, *Talking Like a State: Drugs, Borders, and the Language of Control*, in ILLICIT FLOWS AND CRIMINAL THINGS: STATES, BORDERS, AND THE OTHER SIDE OF GLOBALIZATION, *supra* note 66, at 101, 115–16 (“States must mystify illegal drugs in order to fight them.”).

<sup>114</sup> See Neuman, *supra* note 64, at 1201–06. Red light districts—in which vice laws are suspended—and Washington D.C.—where voting rights have been suspended—are both examples of anomalous zones. See *id.* at 1208–24. Professor Neuman articulates a number of explanations for why anomalous zones arise, ranging from a desire to grant local autonomy to policy experimentation to unenforceability. *Id.* at 1201–06.

<sup>115</sup> *Id.* at 1224, 1227.

tortions to the border region has the effect of only apprehending *recent* or *nearby* border crossings of contraband or persons. However, assuming the functionalist proposition (embraced by the regional theory) that the inability to stem the flow of drugs and persons is a threat to the sovereign that justifies drastic measures, it is difficult to see why the threat to sovereignty dissipates with time or movement into the interior. On the contrary, the threats posed by undocumented persons and narcotics that remain in the United States and penetrate to the interior are potentially more profound because the invasive act is longer lasting, is harder to detect through special policing, and has a greater impact on the national community and/or culture.<sup>116</sup>

The logic of the regional theory, which authorizes otherwise impermissible searches within the border region, applies typical Fourth Amendment utilitarian calculus, weighing the state's interest (in apprehension by the sovereign of illegal goods and persons) against the imposition on privacy.<sup>117</sup> But this same logic, by overvaluing the state's sovereignty interests,<sup>118</sup> should in principle permit similar distortions in other parts of the interior—at least when the government can come forward with evidence of an increased incidence of illegal goods or persons in a particular area. Thus, if an inner city neighborhood or industry is known to be populated by a relatively high number of undocumented immigrants, or alternatively if an area is known to be one in which a large amount of illegally imported narcotics are distributed, the logic of the regional theory should *a fortiori* extend to allow similar searches in such places.

A few years after authoring *Martinez-Fuerte*, Justice Powell demonstrated the seepage of the regional theory's logic in his concurring opinion in *Immigration and Naturalization Service v. Delgado*.<sup>119</sup> In that case the Court authorized the questioning of factory workers by immigration agents without individualized suspicion, finding that the employees had not been “seized” by INS questioners.<sup>120</sup> Finding the seizure question a “close one,” Justice Powell's concurrence went on to explain why a seizure would have been justified under the circumstances, relying upon the logic of his border region decisions, but without focusing upon the geographic location of this factory.<sup>121</sup> He noted that a main reason undocumented immigrants come to the

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<sup>116</sup> See, e.g., Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 574–78, 594–96 (2008) (explaining how migration flows to new destinations have created governance problems for communities not accustomed to large immigrant populations as compared with the relative ease with which high-migration areas incorporate immigrants).

<sup>117</sup> See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 879 (1975) (“Against [the] valid public interest we must weigh the interference with individual liberty that results . . .”).

<sup>118</sup> See *supra* Part III.

<sup>119</sup> 466 U.S. 210 (1984).

<sup>120</sup> *Id.* at 219–21.

<sup>121</sup> See *id.* at 221–24 (Powell, J., concurring) (discussing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)). While *Delgado* involved a factory in the Los Angeles area, and was therefore not very far from the border, this fact played no role in the analysis. Instead, Justice Powell placed reliance upon a government affidavit stating that workplace “surveys” (i.e.,

United States is to work, and thus suggested that the Government's interest was *greater* in administering suspicionless workplace raids than in policing the roads in the border region<sup>122</sup>—all of this despite the fact that it was not illegal for employers to hire undocumented workers at the time, and the fact that acceptance of employment did not constitute a separate criminal offense by an undocumented worker.<sup>123</sup> Furthermore, Justice Powell followed the Court's previous cases in undervaluing privacy interests,<sup>124</sup> assuming without much explanation that employees expect similarly little privacy in their workplaces as when driving their automobiles.<sup>125</sup> Justice Powell's concurrence followed the inevitable logic of the Court's earlier decisions: where undocumented immigrants can be expected to gather, the immigration service must be permitted to conduct suspicionless searches. Thus, when citizens spend time in places where immigrants are concentrated, those citizens may have to lower their own privacy expectations in light of the threat.<sup>126</sup>

In fact, the exception may have already devoured the rule. The existing border zone is expansive. A district court in Maine recently demonstrated this point when it upheld an immigration checkpoint more than seventy air miles from the Canadian border, and acknowledged that the entire state of Maine would be eligible for such a checkpoint under the authorizing regulation.<sup>127</sup> Indeed, nearly two-thirds of all Americans reside in the 100-mile band constituting the border zone, including every resident of Florida, Connecticut, Rhode Island, New Jersey, Delaware, Michigan, Hawaii, New Hampshire, and Massachusetts.<sup>128</sup> Furthermore, the border itself is conceptually more flexible than it initially appears. In a thought-provoking piece,

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sweeps of factories with suspicionless questioning of workers) accounted for a large proportion of apprehensions "away from the border." See *id.* at 222–23 (Powell, J., concurring).

<sup>122</sup> *Id.* at 222–23.

<sup>123</sup> See *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 892–93 (1984). It is now illegal to knowingly employ undocumented immigrants or to provide false documents to obtain employment. See *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 147–48 (2002).

<sup>124</sup> See *supra* notes 30, 39, and accompanying text.

<sup>125</sup> See *Delgado*, 466 U.S. at 224 (Powell, J., concurring).

<sup>126</sup> The expansiveness of functionalist logic is also evidenced by the fact that courts have appropriated border zone cases to justify suspicionless searches in other contexts that do not even involve border crimes. See, e.g., *Clark v. State of Florida*, 395 So.2d 525, 528 (Fla. 1981) ("A prison entrance is the functional equivalent of a border because it is an official boundary where traffic may conveniently be stopped and inspected. An inspection may reveal contraband, enabling officials to stop contraband at the border instead of having to detect illegal goods once dispersed inside . . .") (analyzing the Fourth Amendment issue under *Brignoni-Ponce*).

<sup>127</sup> See *United States v. Gabriel*, 405 F. Supp. 2d 50, 57 n.10, 62 (D. Me. 2005). *But cf.* *Jasinski v. Adams*, 781 F.2d 843, 849 (11th Cir. 1986) (holding that it was at least possible that the Border Patrol had abused its discretion by setting up a checkpoint on the road from the Florida Keys if, as plaintiffs alleged, the checkpoint was "merely a 'dragnet' to catch illegal aliens travelling in south Florida, regardless of their point of entry") (emphasis added). While I consider this case well decided as a matter of policy, it is unclear why, under *Martinez-Fuerte*, such a dragnet would be impermissible so long as the Border Patrol has good cause to believe that a disproportionate number of undocumented persons would be on the road.

<sup>128</sup> See American Civil Liberties Union, *Constitution Free Zone - Map*, available at <http://www.aclu.org/constitution-free-zone-map>.

Professor Ayelet Sachar suggests that the “entry fiction” effectively locates the border, for many legal purposes, wherever undocumented immigrants travel.<sup>129</sup> She also points out that the practice of treating airports as part of the border, and of allowing pre-inspection by U.S. agents posted outside of the United States, actually creates a polka-dot border scattered throughout the country and the world.<sup>130</sup> Professor Sachar’s observations serve to emphasize how difficult it is to cabin functionalism around the physical border when the physicality of the border itself can be called into question.

*B. The regional theory’s logic cannot be limited  
to the Fourth Amendment*

In addition to concerns about the regional theory’s geographic seepage, there are deep concerns about its constitutional seepage. As Professor Neuman notes, “a zone’s already anomalous character may be invoked explicitly to justify further anomalies.”<sup>131</sup> This is true of the constitutional distortions discussed herein: they cannot be, and have not been, limited to distortions of the Fourth Amendment.

First, the roving patrol and checkpoint cases do not actually limit themselves to distortions of the Fourth Amendment. *Martinez-Fuerte*’s and *Brignoni-Ponce*’s explicit authorizations for law enforcement officers to use race as a factor when deciding to conduct searches should have raised deep equal protection concerns at the time, and would almost certainly do so now that the modern Supreme Court has focused upon colorblindness and the importance of not using racial identifiers in government action.<sup>132</sup> Although

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<sup>129</sup> See Ayelet Sachar, *The Shifting Border of Immigration Regulation*, 30 MICH. J. INT’L L. 809, 815–16 (2009) (referring to fiction involved in the changed legal meaning of entry in immigration law without using the term “entry fiction”). The “entry fiction” treats an immigrant who was not formally admitted to the United States as if she just arrived for purposes of immigration law, even if the alien has resided in the United States for years. See *id.* at 815. Professor Sachar also observes that the United States is pushing its borders *outward* in an attempt to broaden the security perimeter through greater international cooperation, especially with Canada, using programs such as biometric pre-inspection at points of departure, joint inspections, and “look-out” lists. See *id.* at 820–24.

<sup>130</sup> See *id.* at 819–21. Indeed, the polka dots may be mobile. An airfield without normal international traffic can be transformed into the functional equivalent of the border if a plane makes that strip its point of first landing. See *United States v. Niver*, 689 F.2d 520, 527–29 (5th Cir. 1982) (plane carrying drugs that made unexpected landing at San Angelo, Texas airfield could be inspected without cause based on functional equivalence doctrine). We have already seen that extended border search doctrine explicitly applies around airport entries in addition to entries at the physical border. See *United States v. McGinnis*, 247 Fed. App’x 589, 595 (6th Cir. 2007) (unpublished); accord *United States v. Yang*, 286 F.3d 940, 947 (7th Cir. 2002).

<sup>131</sup> Neuman, *supra* note 64, at 1228.

<sup>132</sup> See, e.g., *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 795 (2006) (Kennedy, J., concurring in part and concurring in judgment) (“Reduction of an individual to an assigned racial identity for differential treatment is among the most pernicious actions our government can undertake. The allocation of governmental burdens and benefits, contentious under any circumstances, is even more divisive when allocations are made on the

in practice courts may currently disfavor “reasonable cause” arguments founded largely upon race,<sup>133</sup> there is very little question that the mere existence of the doctrine leads to substantial racial profiling.<sup>134</sup> Indeed, the evolution of reasonable cause doctrine in the roving patrol context ensures that racial profiling will likely occur, regardless of whether it receives formal judicial sanction.<sup>135</sup>

Second, Congress and the Executive Branch have reacted to Article III’s permissiveness in the border region by passing troubling legislation and regulations authorizing the use of “expedited removal” in the region. Expedited removal is a procedure for removing aliens through reduced process after limited review by only a line agent, with very little chance for appeal, instead of through immigration court processes subject to review by Article

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basis of individual racial classifications.”); see also *Johnson v. California*, 543 U.S. 499, 509 (2005).

<sup>133</sup> See Kristin Connor, *Updating Brignoni-Ponce: A Critical Analysis of Race-Based Immigration Enforcement*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 567, 593–98 (2008) for a description of how circuit courts, with the Ninth in the lead, have limited *Brignoni-Ponce*’s license to racially profile. Interestingly, Connor argues that despite the perniciousness of racial profiling, it is better to keep the current doctrine because Border Patrol agents will inevitably rely on race. As Connor sees it, by preserving the doctrine intact, Congress and the courts will at least encourage honest conversation and thereby “serve the public interest more than deceptive neutrality ever could.” *Id.* at 619–20.

<sup>134</sup> See *id.* at 582–83 (describing the experiences of Latinos in Arizona and South Texas). See Johnson, *supra* note 34, at 696–702 for stories supporting the widespread use of racial profiling by Border Patrol agents. See also García Hernández, *supra* note 42, at 180–89.

<sup>135</sup> In a powerful and carefully documented passage, one Fifth Circuit judge demonstrated how easily border search doctrine can function as a pretext for unadulterated racial profiling. Dissenting in *United States v. Zapata-Ibarra*, Judge Wiener asked, “[h]ow is this practice distinguishable from the former practice of Southern peace officers who randomly stopped black pedestrians to inquire, ‘Hey, boy, what are you doin’ in this neighborhood?’” 223 F.3d 281, 285 (5th Cir. 2000). Surveying the Fifth Circuit’s reasonable suspicion jurisprudence, Judge Wiener summarized the results as follows:

[W]e . . . accept as justifiable suspicion virtually anything and everything thus articulated: The vehicle was suspiciously dirty and muddy, *or* the vehicle was suspiciously squeaky-clean; the driver was suspiciously dirty, shabbily dressed and unkept, *or* the driver was too clean; the vehicle was suspiciously traveling fast, *or* was traveling suspiciously slow (*or* even was traveling suspiciously at precisely the legal speed limit); the [old car, new car, big car, station wagon, camper, oilfield service truck, SUV, van] is the kind of vehicle typically used for smuggling aliens or drugs; the driver would not make eye contact with the agent, *or* the driver made eye contact too readily; the driver appeared nervous (*or* the driver even appeared too cool, calm, and collected); the time of day [early morning, mid-morning, late afternoon, early evening, late evening, middle of the night] is when “they” tend to smuggle contraband or aliens; the vehicle was riding suspiciously low (overloaded), *or* suspiciously high (equipped with heavy duty shocks and springs); the passengers were slumped suspiciously in their seats, presumably to avoid detection, *or* the passengers were sitting suspiciously ramrod-erect; the vehicle suspiciously slowed when being overtaken by the patrol car traveling at a high rate of speed with its high-beam lights on, *or* the vehicle suspiciously maintained its same speed and direction despite being overtaken by a patrol car traveling at a high speed with its high-beam lights on; and on and on *ad nauseam*.

*Id.* at 282–83 (internal citations omitted) (internal brackets in original).

III courts.<sup>136</sup> Introduced in 1996, expedited removal drastically limits the amount of process an alien receives, and as authorized by statute, it applies to arriving aliens who most recently entered the United States less than two years prior to apprehension.<sup>137</sup> Although Department of Homeland Security (“DHS”) regulations initially authorized the use of expedited removal for detentions at the border, subsequent regulations expanded DHS’s powers. The agency now authorizes itself to use its authority, albeit only against aliens who arrived within the last fourteen days, within the same 100-mile band around the border that is subject to reduced-suspicion roving patrol stops and the installation of warrantless checkpoints.<sup>138</sup>

The constitutionality of expedited removals of aliens physically present in the interior is highly questionable,<sup>139</sup> although the process is likely permissible on the physical and functional border, where courts traditionally grant the greatest deference to immigration enforcement.<sup>140</sup> However, it is nearly impossible to bring a constitutional challenge because Congress insulated the statute from review after a sixty-day window from the date of its implementation or the implementation of any written regulation or change to the statute.<sup>141</sup> Furthermore, courts have narrowed even this limited review by refusing to grant organizational standing to lawyers or immigrant rights activists, despite recognizing that plaintiffs subject to summary removal will find it virtually impossible to bring a challenge from abroad in the miniscule window for review.<sup>142</sup> Thus, we surprisingly lack an answer to the question of the constitutionality of this sharply reduced procedural process for aliens.

It is difficult to imagine that the 100-mile zone for expedited removal was not in part chosen because of courts’ previous permissive attitude to-

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<sup>136</sup> See Cox & Posner, *supra* note 102, at 820–21 for a comparison of the procedures available in expedited removal and in standard removal proceedings.

<sup>137</sup> 8 U.S.C. § 1225(b)(1)(A) (2006).

<sup>138</sup> See Nat’l Immigration Law Ctr., *DHS announces latest in series of expedited removal expansions: Entire U.S. border now covered*, 20 IMMIGRANTS’ RIGHTS UPDATE (Mar. 23, 2006), available at <http://www.nilc.org/immlawpolicy/removpsds/removpsds151.htm>.

<sup>139</sup> At the very least, aliens present in the United States are generally entitled to minimal due process protections. See *Yamataya v. Fisher*, 189 U.S. 86, 100–01 (1903). Professor Neuman, among others, has noted the “extremely limited” process provided by expedited removal, and has suggested that it may be unconstitutional in the interior as a denial of due process and as a violation of the Suspension Clause. See Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 572–77 (2010).

<sup>140</sup> See, e.g., *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892).

<sup>141</sup> 8 U.S.C. § 1252(e)(3)(B) (2006). Surprisingly, the challenge to the constitutionality of expedited removal failed to challenge the constitutionality of this provision limiting constitutional review. In the ensuing litigation, the D.C. Circuit suggested that this may have been a smart litigation move in light of the “longstanding principle that determining the conditions governing the admission of aliens is so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.” See *Am. Immigration Lawyers Assoc. v. Reno*, 199 F.3d 1352, 1355 n.5 (D.C. Cir. 2000) (internal quotation omitted).

<sup>142</sup> See, e.g., *Am. Immigration Lawyers Assoc. v. Reno*, 18 F. Supp. 2d 38, 48–50 (D.D.C. 1998), *aff’d* 199 F.3d 1352 (D.C. Cir. 2000).

wards the Fourth Amendment in the same area. While this does not provide foolproof evidence that the regional theory would lead courts to uphold expedited removal in the border region, it does suggest that the political branches have also been affected by regional theory and are eager to push its limits. In turn, the procedural decisions regarding expedited removal suggest that courts are reluctant to intervene into an area—even in the interior—where the plenary power and the border powers meet in such a heady brew.

Third, concerns about the border have led Congress to delegate “breathhtaking”<sup>143</sup> powers to the Secretary of Homeland Security to waive any law she deems “necessary to ensure expeditious construction” of a fence on the border.<sup>144</sup> This power has affected the spiritual, economic, and medical welfare of millions of persons who never even touch the border. Shortly after REAL ID expanded the Secretary’s powers in this regard, Secretary Chertoff began to exercise his authority by waiving, *inter alia*, the Religious Freedom Restoration Act, the Administrative Procedure Act, the Migratory Bird Treaty Act, and countless environmental statutes<sup>145</sup> as well as state and local land use laws.<sup>146</sup>

These waivers have been challenged in federal court as a violation of separation of powers, both as a violation of bicameralism and presentment under *Clinton v. City of New York*<sup>147</sup> and as a violation of the delegation doctrine for lack of an intelligible principle.<sup>148</sup> Courts have consistently rejected these claims. While this Note cannot explore in full the merits of these claims, it is worth examining briefly the reasoning in these cases. In rejecting the *Clinton* challenge, the *Defenders of Wildlife* court analogized REAL ID’s sweeping waiver provision to a number of other federal statutes that authorize the Executive Branch to waive compliance with certain specific laws in the interest of national security.<sup>149</sup> The court’s analogy to situations in which officials are authorized to waive *specific* laws (as opposed to any and all state, local, or federal law) seems imprecise, suggesting that the borderlands context may have led the court to bend the requirements of separation of powers. Similarly, the court “buttressed” its rejection of the dele-

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<sup>143</sup> The “breathhtaking” remark comes from Senator Leahy. See 151 CONG. REC. 9029 (May 10, 2005).

<sup>144</sup> 8 U.S.C. § 1103(c)(1) (2006). The REAL ID Act amended and expanded § 1103. The earlier version stemmed from the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRAIRA”). See *Defenders of Wildlife v. Chertoff*, 527 F. Supp. 2d 119, 122 n.2 (D.D.C. 2007).

<sup>145</sup> See CHAD C. HADDAL ET AL., CONG. RESEARCH SERV., BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER, 43–53 (2009) for a list of many laws already waived by the Secretary.

<sup>146</sup> See, e.g., Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 as Amended, 73 Fed. Reg. 19077–78 (Apr. 8, 2008).

<sup>147</sup> See, e.g., *Defenders of Wildlife*, 527 F. Supp. 2d at 123 (discussing *Clinton v. City of New York*, 524 U.S. 417 (1998)).

<sup>148</sup> *Id.* at 126; see also *County of El Paso v. Chertoff*, No. EP-08-CA-196-FM, 2008 WL 4372693, at \*2 (W.D. Tex. Aug. 29, 2008).

<sup>149</sup> See *Defenders of Wildlife*, 527 F. Supp. 2d at 125 n.5.

gation doctrine challenge with the observation that immigration is an area in which the executive has special powers<sup>150</sup>—ignoring the fact that here those special powers are being expanded to grant sweeping power to waive *non-immigration* laws of general interest to interior residents.

Finally, and perhaps most fundamentally, it is difficult to restrict the regional theory strictly to the Fourth Amendment because other constitutional doctrines are also subject to context or balancing tests. It is easy to imagine a court that actually agreed to hear a challenge to expedited removal as applied within the border region holding that the process, while inadequate elsewhere, is justified in the border region under *Yamataya v. Fisher*<sup>151</sup> and *Matthews v. Eldridge*<sup>152</sup> because the amount of process required must be weighed against the threats to sovereignty. Similarly, a court might find that the use of race in roving patrols is an equal protection violation, but hold that such violations are narrowly tailored responses to the compelling sovereign interests in the border region.<sup>153</sup> Such a holding, of course, would not technically mean that the Constitution does not apply in the border region; rather it would mean that because the very content of the Bill of Rights is flexible, the rights apply differently in the border. Or as one court troublingly stated, “[b]ecause the geography of the United States is not homogenous, the rights of citizens that live in its different parts cannot be viewed as a uniform, seamless web.”<sup>154</sup> If this is the flag that regional theory flies, then the Constitution has failed millions of citizens living in the border region.

## V. CONCLUSION

I have argued that the problems of transborder crime have motivated courts to adopt dangerous doctrines that cannot simply be contained within the border region, nor simply to Fourth Amendment violations. Courts have relied upon functionalist assumptions, but have attempted to cabin their holdings to limit the impact of these constitutional distortions to a certain geographical region. However, these limitations are logically unstable. The reasoning in the border region cases proves too much and demands too much: following their logic would require distorting many constitutional norms in many settings. While regional theory provides cover for courts, it risks devolving into pure functionalism.

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<sup>150</sup> See *id.* at 129.

<sup>151</sup> 189 U.S. 86 (1903).

<sup>152</sup> 424 U.S. 319 (1976).

<sup>153</sup> For example, see Culp, *supra* note 38, at 813–15, for an argument that reasonable suspicion border-area searches that use race as a factor satisfy the compelling interest and narrow tailoring tests. Culp goes on to argue that there is no compelling interest or narrow tailoring for *suspicionless* race-based stops. *Id.* at 819–22. *But cf. supra* note 135 (quoting the dissent in *Zapata-Ibarra*, 223 F.3d 281, 285 (5th Cir. 2000) at length on the ways in which pretexts are used to turn suspicionless race-based stops into “reasonable suspicion” stops in retrospect).

<sup>154</sup> *United States v. Jackson*, 825 F.2d 853, 869 (5th Cir. 1987) (Clark, C.J., concurring).

A better doctrine, which merits further exploration, would embrace physicalist theory and require the state to act at the actual border if it wishes to assert its sovereign prerogatives. Beyond the physical border constitutional norms should apply with the same force as they would anywhere else. Such an approach will not prevent all illicit traffic—but neither do our current practices. The state has several options in response to illicit traffic. It may accept it as a necessary result of the historical porosity of borders. It may step up enforcement *at* the physical border in any constitutionally permissible manner it chooses.<sup>155</sup> Or it may recognize that the illicit flows it seeks to control often stem in part from its own economic and social policies and reconsider those policies. If the realities of an interconnected world are such that our policies are not practically sustainable, this is an argument for changing the policies—not for compromising the liberties of both citizens and aliens alike in the interior.

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<sup>155</sup> I am aware that such a doctrine would result in additional pressure to build and maintain a border fence. Such a fence may be an *unwise* solution and an offensive symbolic gesture. See generally WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* (2010); see also *supra* note 113. However, I consider the *constitutional* damage wrought by such a fence to be tolerable, assuming the fence were built while still respecting other laws. See *supra* Part IV.B.

