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FOREWORD TO ON THE BORDER: A LEGAL SURVEY OF THE SOUTHWEST

THE HON. M. MARGARET MCKEOWN*

“What began as a line on a map became a space of evolving and multiple meanings and forms.”¹

—Rachel St. John

When we think of the United States-Mexico border, visions spring to mind of a sunbaked landscape, wide open spaces punctuated by towns and major cities, and our countries’ shared history. The border extends nearly 2,000 miles, spans ten states in the United States and Mexico, and is the most-crossed land border in the world.² But the southwestern border is much more than that. It has shaped the growth, population, and culture of these countries for nearly two centuries.

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1. RACHEL ST. JOHN, *LINE IN THE SAND: A HISTORY OF THE WESTERN U.S.-MEXICO BORDER* 3 (2011).

2. Kai Bartolomeo, *Immigration and the Constitutionality of Local Self Help: Escondido’s Undocumented Immigrant Rental Ban*, 17 S. CAL. REV. L. & SOC. JUST. 855, 859 (2008).

Not surprisingly, the border's prominence is reflected in popular culture. Indeed, the spirit of the border has inspired many books, such as *Into the Beautiful North*,³ *Death Comes for the Archbishop*,⁴ *Borderlands/La Frontera: The New Mestiza*,⁵ and *The Border Trilogy*.⁶ It has inspired artists—from Frida Kahlo, Georgia O'Keeffe, and Fritz Scholder to the recent graffiti artists who are painting both sides of the border wall.⁷ And it has been captured in movies such as *No Country for Old Men*,⁸ *Sin Nombre*,⁹ *Traffic*,¹⁰ and *El Norte*.¹¹

For our purposes, the story starts with the Treaty of Guadalupe Hidalgo, ratified in 1848 under President James K. Polk to end the Mexican-American War.¹² That treaty established the modern border and significantly increased the geographic footprint of the still-new United States—but it was only the beginning of the impact that the region would have on this country's cultural and political ethos.¹³

3. LUIS ALBERTO URREA, *INTO THE BEAUTIFUL NORTH* (2009).

4. WILLA CATHER, *DEATH COMES FOR THE ARCHBISHOP* (1927).

5. GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* (1987).

6. CORMAC MCCARTHY, *THE BORDER TRILOGY* (1999).

7. See Jean Guerrero, *Artists Aim to Make Border Fence 'Beautiful,'* KPBS (Dec. 30, 2016), <http://www.kpbs.org/news/2016/dec/30/artists-aim-make-border-fence-beautiful/>.

8. *NO COUNTRY FOR OLD MEN* (Paramount Vantage et al. 2007).

9. *SIN NOMBRE* (Scion Films et al. 2009).

10. *TRAFFIC* (Bedford Falls Co. et al. 2001).

11. *EL NORTE* (Am. Playhouse et al. 1983).

12. Treaty of Peace, Friendship, Limits, and Settlement, Mex.-U.S., Feb. 2, 1848, 9 Stat. 22. The treaty not only set the modern border, but it expanded the size of the United States by more than 500,000 square miles to include territory covering California, Nevada, and Utah, as well as parts of Arizona, New Mexico, Colorado, and Wyoming. J.J. Bowden, *Spanish & Mexican Land Grants in the Southwest*, 8 *LAND & WATER L. REV.* 467, 468 (1973).

13. This impact is reflected in current demographics. The 2015 American Community Survey reports that more than 17% of the U.S. population is Latino and nearly 11% of the population is of Mexican origin. UNITED STATES CENSUS BUREAU, ACS DEMOGRAPHIC AND HOUSING ESTIMATES (2015), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_15_5YR_DP05&src=pt (last visited Mar. 27, 2017). Studies indicate these populations continue to grow at a rate of 2.1% per year. Jens Manuel Krogstad & Mark Hugo Lopez, *Hispanic Population Reaches Record 55 Million, but Growth Has*

Ever since, the border has been a flashpoint of legal controversy. Cross-border issues involving sovereignty, immigration, criminal law, trade, the environment, and more have been with us for years. This volume touches on some of these legal developments, from American Indian law to immigration to foreign and consular relations.

Underscoring the role of the border, one of the most publicized cases before the Supreme Court this term is *Hernandez v. Mesa*.¹⁴ A United States Border Patrol Agent, standing in the United States, shot and killed an unarmed fifteen-year-old Mexican boy who was playing on the Mexican side of a cement culvert that marks the border near El Paso, Texas.¹⁵ With a decision expected by late June 2017, the Supreme Court will address the reach of constitutional protections beyond our borders.

The scope of the government's power in the border region is also implicated in the more routine cases involving searches and seizures under the Fourth Amendment.¹⁶ This observation probably comes as no surprise given that in 2016 more than 185 million people crossed into the United States from Mexico on foot or by train, bus, or personal vehicle.¹⁷ Notably, international borders have spawned the border search exception to the Fourth Amendment's probable cause and warrant requirements.¹⁸ At the border, or its functional equivalent, the balance between individual privacy and security tips to the government.¹⁹ Nonetheless, rapid advances in technology and

Cooled, PEW RES. CTR. (June 25, 2015), <http://www.pewresearch.org/fact-tank/2015/06/25/u-s-hispanic-population-growth-surge-cools/>.

14. *Hernandez v. Mesa*, 137 S. Ct. 291 (2016) (granting certiorari).

15. *Hernandez v. Mesa*, 757 F.3d 249, 255 (5th Cir. 2014) *adopted in part*, 785 F.3d 111 (5th Cir. 2015) (en banc) *cert. granted*, 137 S. Ct. 291 (Oct. 11, 2016).

16. *E.g.*, *United States v. Flores-Montano*, 541 U.S. 149 (2004); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Ramsey*, 431 U.S. 606 (1977); *United States v. Guzman-Padilla*, 573 F.3d 865 (9th Cir. 2009); *United States v. Seljan*, 547 F.3d 993 (9th Cir. 2008); *United States v. Arnold*, 533 F.3d 1003 (9th Cir. 2008); *United States v. Jackson*, 825 F.2d 853 (5th Cir. 1987) (en banc).

17. *Border Crossing/Entry Data: Query Detailed Statistics*, BUREAU OF TRANSP. STATISTICS, https://transborder.bts.gov/programs/international/transborder/TBDR_BC/TBDR_BCQ.html (select "Southern Border Ports," "2016 (Jan-Dec)," "Annual Summary," "Aggregate All Southern Border Ports," and "All Measures Detail"; then click "Submit").

18. *Montoya de Hernandez*, 473 U.S. 531; *Ramsey*, 431 U.S. 606.

19. *Montoya de Hernandez*, 473 U.S. at 539–40.

changing expectations of privacy challenge these principles. For example, in *United States v. Cotterman*, the Ninth Circuit held that a forensic examination of a laptop must be supported by reasonable suspicion—and cannot be conducted under the guise of a cursory border search.²⁰ This case illustrates that in today’s increasingly electronic world, where our digital devices carry “the most intimate details of our lives,” the notion of “anything goes” no longer holds at the border.²¹ As our relationship with technology evolves, courts will continue to grapple with the intersection of technological advancements, constitutional rights, and the border.

International borders also serve as a demarcation of sovereignty. As a consequence, under the Foreign Sovereign Immunities Act of 1976 (“FSIA”)²² foreign states are presumed to have immunity from suit in United States courts, subject to limited exceptions.²³ For example, the airline *Compania Mexicana de Aviacion* (“Mexicana”) was determined to be an agency of the Mexican government and therefore a foreign state under FSIA.²⁴ As a result, the court lacked subject matter jurisdiction to review a lawsuit brought by the decedents of passengers killed in Mexico in a Mexicana plane crash.²⁵ Similarly, in other cases Mexico’s attempts to bring claims against the United States have been barred on Eleventh Amendment sovereign immunity grounds.²⁶ These principles of sovereign immunity highlight the tension between allowing parties to seek relief in cross-border disputes and the importance of international comity.

20. *United States v. Cotterman*, 709 F.3d 952, 961–68 (9th Cir. 2013) (en banc).

21. *Id.* at 960, 964.

22. 28 U.S.C. §§ 1602 *et seq.*

23. *See Tubular Inspectors, Inc. v. Petroleos Mexicanos*, 977 F.2d 180 (5th Cir. 1992); *Sec. Pac. Nat’l Bank v. Derderian*, 872 F.2d 281 (9th Cir. 1989); *Compania Mexicana De Aviacion, S.A. v. U.S. Dist. Court for the C.D. Cal.*, 859 F.2d 1354 (9th Cir. 1988) (per curiam); *Zernicek v. Brown & Root, Inc.*, 826 F.2d 415 (5th Cir. 1987); *Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985). *But see Gerritsen v. De La Madrid Hurtado*, 819 F.2d 1511 (9th Cir. 1987); *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir. 1987).

24. *Compania Mexicana de Aviacion, S.A.*, 859 F.2d at 1356.

25. *Id.* at 1357.

26. *See United Mexican States v. Woods*, 126 F.3d 1220 (9th Cir. 1997); *Consulate Gen. of Mexico v. Phillips*, 17 F. Supp. 2d 1318 (S.D. Fla. 1998).

It goes without saying that a discussion of law at the border would be incomplete without touching on immigration, which implicates foreign affairs, federal law, and state sovereignty. The United States' immigration laws are famously complicated: "With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.'"²⁷ Interpreting this regulatory framework poses challenges to petitioners, and adjudicating thousands of petitions annually requires significant judicial resources. The Executive Office for Immigration Review reports that in fiscal year 2015, more than 280,000 new or reopened actions were filed in immigration courts; of those, more than 43% were in California, Arizona, and Texas alone.²⁸ In 2016, nearly 14,000 immigration-related criminal actions were commenced in the district courts located in the Fifth and Ninth Circuits.²⁹ Some border states have endeavored to enforce their own immigration laws. In *Arizona v. United States*, however, the Supreme Court held that Arizona's state immigration regime was preempted by federal law.³⁰ Interestingly, even in the aftermath of the Court's opinion, a number of states have passed immigration-related legislation.³¹ Most recently, our borders have been

27. *Castro-O'Ryan v. INS*, 847 F.2d 1307, 1312 (9th Cir. 1987) (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985)); *see also* *Baltazar-Alcazar v. INS*, 386 F.3d 940, 948 (9th Cir. 2004) (emphasizing the complexity of immigration laws); *Escobar Ruiz v. INS*, 813 F.2d 283, 292 (9th Cir. 1987) (referring to "the intricate laws of the INA, which resemble 'King Minos's labyrinth in ancient Crete'") (quoting *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977)); Mirriam Seddiq, *Immigration Law: A Primer*, 28 GPSOLO 46, 46 (2011) ("To say that immigration law is vast and complex is an understatement.").

28. U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGRATION REVIEW, FY 2015 STATISTICS YEARBOOK A2–A3 (Apr. 2016), <https://www.justice.gov/eoir/page/file/fysb15/download>.

29. U.S. COURTS, JUDICIAL BUS. 2016 TABLES, U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE AND DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2016, http://www.uscourts.gov/sites/default/files/data_tables/jb_d3_0930.2016.pdf.

30. 132 S. Ct. 2492 (2012).

31. In the first half of 2016, "[l]awmakers in 41 states enacted 70 laws and 159 resolutions related to immigration, for a total of 229." *State Laws Related to Immigration and Immigrants*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 1, 2016), <http://www.ncsl.org/research/immigration/state-laws-related-to-immigration-and-immigrants.aspx>. This represented a 40% decrease from 2015, when state lawmakers enacted 216 laws and 274 resolutions. *Id.*

much in the news as courts have dealt with recent immigration restrictions imposed by various Executive Orders.³²

The movement of people across the United States-Mexico border is mirrored by the robust trans-border movement of goods and services. It is well known that Mexico is the United States' third largest trading partner; in 2015, trade between the two countries totaled more than \$583 billion.³³ Since 1994, this relationship has been governed by, among other agreements, the North American Free Trade Agreement ("NAFTA"), which created a free-trade zone across Mexico, the United States, and Canada.³⁴ The Mexican trucking dispute is illustrative of the trade, environmental, and safety tensions underlying the relationship. Although NAFTA intended to open up cross-border trucking, the intersection between environmental regulations and efforts to ease up on the long-standing American moratorium on Mexican commercial trucks landed in the Supreme Court.³⁵ The Supreme Court held that the Department of Transportation was not required to conduct a comprehensive review of the environmental impact of opening the border to Mexican trucks.³⁶

In addition to NAFTA, other treaties have generated controversy and informed our understanding of international law. Prominent among these is the Vienna Convention, which provides, among other rights, that those persons detained by a foreign state be informed of the right to contact their consulate.³⁷ In 2004, the International Court of Justice ("ICJ") determined the United States had violated that right with respect to certain Mexican citizens.³⁸ However, the Supreme Court held in

32. *See, e.g.*, *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Hawai'i v. Trump*, No. 17-00050 DKW-KSC, 2017 WL 1011673 (D. Haw. Mar. 15, 2017); *Washington v. Trump*, No. C17-0141JLR, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017).

33. *Mexico*, OFFICE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/countries-regions/americas/mexico> (last visited Mar. 20, 2017).

34. North American Free Trade Agreement, Can.-Mex.-U.S., preamble, Dec. 17, 1992, 32 I.L.M. 289 (1993).

35. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

36. *Id.* at 773.

37. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

38. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)* Judgment, 2004 I.C.J. 128 (Mar. 31). In that opinion, the ICJ also found that the United States had violated the Convention in the case of fifty other Mexican nationals.

Medellin v. Texas that the ICJ's judgment under the Vienna Convention was not directly enforceable in domestic state courts.³⁹ Although the treaty is a binding international commitment, the treaty is not "self-executing" and thus not enforceable absent implementing legislation.⁴⁰ In contrast, the child abduction provisions of the Hague Convention provide jurisdiction and a procedure to return children wrongfully removed from one country to another.⁴¹ The treaty is implicated in a number of Fifth and Ninth Circuit cases that arise out of child custody disputes as parents move back and forth across the border.⁴²

Southwest border relations are further complicated by the scarcity of water in the region. The United States and Mexico share rights in the Colorado River and Rio Grande (called Rio Bravo del Norte in Mexico), an arrangement made necessary by the aridity of the region and the fact that these rivers comprise about two-thirds of the border.⁴³ Today, the two countries' rights in the rivers are governed predominantly by a treaty signed in 1944, which requires Mexico to deliver water to the United States each year.⁴⁴ But recently, frequent droughts have rendered Mexico unable to provide water, leaving

Id. at 71. After the ICJ's *Avena* decision, the United States withdrew its consent to specific jurisdiction of the ICJ with respect to claims arising out of the Vienna Convention. *Medellin v. Texas*, 552 U.S. 491, 500 (2008).

39. 552 U.S. at 513. The Supreme Court also determined that President George W. Bush's directive to the states to comply with the ICJ judgment was similarly not binding on the state courts. *Id.* at 530–32.

40. *Id.* at 504–16, 524–32.

41. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

42. *E.g.*, *Madrigal v. Tellez*, 848 F.3d 669 (5th Cir. 2017); *Rodriguez v. Yanez*, 817 F.3d 466 (5th Cir. 2016); *Sanchez v. R.G.L.*, 761 F.3d 495 (5th Cir. 2014); *Berezowsky v. Ojeda*, 765 F.3d 456 (5th Cir. 2014); *Valenzuela v. Michel*, 736 F.3d 1173 (9th Cir. 2013); *In re B. Del C.S.B.*, 559 F.3d 999 (9th Cir. 2009).

43. Allie Alexis Umoff, *An Analysis of the 1944 U.S.-Mexico Water Treaty: Its Past, Present, and Future*, 32 ENVIRONS ENVTL. L. & POL'Y 69, 71 (2008).

44. Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Mex.-U.S., Feb. 3, 1944, 59 Stat. 1219. The treaty requires that Mexico deliver one-third of the flow reaching the Rio Grande from various rivers in the region, but that amount cannot be less than 350,000 acre-feet annually averaged over a five-year period. *Id.* at 1226.

Texans—and especially Texas farmers—high and dry.⁴⁵ As water becomes an increasingly scarce resource, the United States and Mexico will likely continue to face these conflicts in the future.

This introduction highlights in only the briefest fashion a few of the legal consequences and controversies of the border. Other areas of the law—such as the international application of intellectual property principles,⁴⁶ tax law,⁴⁷ and torts,⁴⁸ among others—have been the source of litigation throughout the years and have affected rights of citizens on both sides of the border. One thing is certain—the border will continue to generate novel legal disputes reflecting the people, culture, terrain, languages, and industry of the southwest border region.

45. Joshua Partlow, *Amid Drought, Texas Is Fuming Because Mexico Isn't Sending the Water It Owes*, WASH. POST. (Sept. 8, 2014), https://www.washingtonpost.com/world/texas-is-fuming-because-mexico-isnt-sending-the-water-it-owes/2014/09/07/fb82914c-463d-409e-853c-be44e386cc45_story.html (“Mexico owes the United States 380,000 acre-feet of water, more than all the water consumed in a year by the 1.5 million residents of the Lower Rio Grande Valley in Texas.”). In fact, in 2004 some Texans and a Texas water company from the Rio Grande Valley brought a claim under NAFTA’s Chapter 11, arguing that Mexico had failed to release water from the Rio Grande as required by the Treaty and seeking economic damages from the purported improper withholding. The case was mediated under NAFTA’s conflict resolution framework and ultimately dismissed for lack of jurisdiction. *Bayview Irrigation Dist. et al. v. United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, ¶ 124 (June 19, 2007).

46. *See Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952); *Reebok Int’l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552 (9th Cir. 1992) (international trademark infringement).

47. *See Cook v. Tait*, 265 U.S. 47 (1924); *Barquero v. United States*, 18 F.3d 1311 (5th Cir. 1994); *MacGuire v. Comm’r*, 450 F.2d 1239 (5th Cir. 1971); *Stanford v. Comm’r*, 297 F.2d 298 (9th Cir. 1961); *Rowan v. Comm’r*, 120 F.2d 515 (5th Cir. 1941).

48. *See Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025 (9th Cir. 2011); *In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009).