

National Borders and the Constitution: A Brief (and Rough) Landscape of Issues
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Here are four questions that organize much of our constitutional thought about borders, with emphasis on the second two:

1) *What is the geographic scope of the constitutional community as defined by the nation's borders? Where is inside/who is inside, and where is outside/who is outside?*

- Starting point: Constitutional norm of territoriality. Persons inside national space recognized as constitutional subjects. But line between “inside” and “outside” subject to much manipulation.
- Disavowal of territory: Puerto Rico, Guantanamo.
- Disavowal of persons who are physically in territory: Mezei, Mariel Cubans (excludable/inadmissible aliens)
- Conversely, constitutional recognition of US citizens located outside territory. However, disavowal of extraterritorially-located aliens: Johnson v. Eistentrager

2) *Who gets in, who stays out, and who must go? Who may access and remain within the constitutional community—in both territorial and political sense?*

- Birthright citizenship and expatriation constitutionally dictated/constrained (14th Am.; Afroyim/Vance v. Terrazas)
- All other decisions (naturalization, denaturalization, jus sanguinis citizenship, admission, assignment of alien status, exclusion, deportation) deemed political and subject to little, if any, judicial oversight. (Chae Chan Ping forward).

3) *What rights and protections attach to persons who are territorially inside? What difference does possession or nonpossession of citizenship status/ LPR status make in these rights and protections?*

--Answer depends on the regulatory setting.

-- Starting premise: “Border” not only enforced at nation’s geographical edges but in national interior as well. Deportation, immigration enforcement at airports, immigration apprehension and detention in interior, employer sanctions are all forms of “border” enforcement.

--When border law enforced in the interior (via immigration status and enforcement and removal decisions), plenary power doctrine governs. Aliens subject to largely unconstrained authority of political branches; few recognized individual rights.

(“Immigration exceptionalism.”) However, some constitutionalization of deportation procedures over time. (Yamataya).

–In domains other than immigration/ border regulation, aliens entitled to basic constitutional protections as territorially- present persons: (Yick Wo, Plyler). Application varies depending on category of noncitizen and which government entity acting. Sometimes when federal government discriminates against noncitizens in non-immigration arena, Ct has been permissive; apparently driven by following syllogistic reasoning: If it’s federal government acting, and object of such action is noncitizen immigrant, then federal government must be exercising immigration power, and to that extent, some version plenary power rule applies (e.g., Cts apply rational basis review to federal alienage classifications (Mathews v. Diaz)).

However, and overall, noncitizens enjoy far more protection in “nonimmigration” than “immigration” (border) domains. (Criminal due process, property, contract, marriage, school, employment rights) (constitutional, common law, statutory rights)

--Given applicability of these two different regulatory regimes to territorially present aliens, two kinds of disputes commonly arise:

1) Categorization: Disputes often arise about how to characterize the nature of regulation at issue in any given case. Which government actions constitute border regulation and which do not? Categorization matters because different constitutional rules apply in each case (extreme latitude for government in border context vs. more protective norms in other arenas). Federal government seeks to broadly construe the domain of “border enforcement” in order to avail itself of plenary power subsidy; immigrant advocates seek narrow reading.

2) Jurisdiction: Disputes often arise about legitimate reach and scope of border enforcement: How far into life of aliens may government’s border authority extend? Are there zones necessarily off-limits from such incursion? Issue arises especially in re: undocumented aliens. Some regard undocumented as engaged in “continuing violation” of border law, and consequently, as continually subject to its enforcement. Others emphasize immigrants’ need for insulation from border in some arenas of public/private life.

4) *Who may enforce the border within the national territory? What are the relative roles of federal and state/local governments in this arena?*

A) Notice throughout that answers to these questions depend on concurrent understandings about categorization and jurisdiction (see #3, above), i.e., they consistently implicate disputes re: which government activities in fact constitute immigration/border regulation,

and what legitimate scope and reach of such regulation is.

B) Organizing question: Is regulation of immigration an exclusively federal power? What is it that states may and may not do in relation to immigration and immigrants?

--Until recently, federal exclusivity was baseline assumption. State action in this arena rejected by courts on preemption grounds. (Chy Lung).

--Landscape has been complicated by fact that many state policies relating to immigrants that have been deemed preempted by courts are policies that are arguably "immigrant" rather than "immigration" regulation. (E.g., discrimination in access to in-state tuition (Toll v. Moreno); gun licenses (Takahashi); welfare (Graham).) Some of these provisions also struck down on equal protection grounds.

--Preemption rulings in this area have often been structured by following syllogistic reasoning: If government actor is a state, and the objects of state action are immigrants/noncitizens, then state is necessarily engaged in regulation of immigration/border, which it is constitutionally precluded from doing.

--S. Ct rejected such logic in one 1976 case, *De Canas v. Bica*, and upheld state employer sanctions law. "[S]tanding alone, the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." (Note that *De Canas* decided prior to 1986 enactment of federal employer sanctions enacted; today Congress might be deemed to have occupied field).

C) In last decade, landscape is changing. Among other things:

-- Congress has authorized and encouraged states to directly undertake immigration/border enforcement; organized through federal/state "cooperation programs" which involve training. (IIRIRA, 1996)

--Congress has authorized states to discriminate against immigrants in public benefits programs (PRWORA, 1996). Many have done so. NY law struck down on by NY Ct on state and federal equal protection grounds. (*Aliessa v. Novello*)

--Growing criminalization of immigration law brings rising numbers of aliens into state criminal custody

--Justice Department maintains that state and local authorities possess

“inherent authority” to make arrests for civil immigration violations (Office of Legal Council, 2002). Pending legislation (CLEAR ACT) would make same point (state and local inherent authority).

—States and localities have become much more active in addressing issues of immigration and immigrant status.

–Restrictive: (e.g., Hazelton, PA, State of Arizona): sanctions imposed on landlords for doing business with undocumented; requiring verification/ reporting of immigration information to federal government. Mixed results in lower courts, but more often policies declared preempted.

–Protective: Non-reporting and don’t ask-don’t tell policies; issuance of local I.D. cards to all without immigration verification (“sanctuary cities”)

–In response to some early protective local measures, Congress outlawed state and local policies that specifically bar reporting of immigration status information to the federal government (IIRIRA, 1996) In response, many localities have adopted “don’t-ask, don’t tell policies.

D) Legal questions: Of the many that are implicated, here are a few:

- 1) May federal government delegate immigration authority to the states?
If so, what precisely is the scope of “immigration authority” that it may delegate?
- 2) May Congress authorize states to violate/evade EPC as to noncitizens?
- 3) May states act without specific authorization to regulate in this area, or are they precluded from such exercise under principles of federal exclusivity/preemption? Would employing an analogy to the Dormant Commerce Clause make better sense?
- 4) If states may regulate in this area, how are state policies and federal policies to be accommodated?
- 5) To what extent may states decline to cooperate with federal immigration law?

