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Expulsion and Escape Among Partial
Constitutional Orders

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Constitutionalism and Mobility: Expulsion and Escape Among Partial Constitutional Orders

Jacco Bomhoff *

Abstract: Mobility, in its many different forms – its restriction and its excesses, for individuals and for corporations – lies at the heart of many pressing challenges for contemporary constitutionalism. The legal treatment of mobility, however, is fragmented across many different specialized fields – from immigration law, to tax law, to international arbitration – to which constitutionalist concerns are rarely central. This paper aims to address this lacuna by sketching the contours of an ‘outward-facing constitutionalism’ which could provide the conceptual and normative means to scrutinize the constitutional implications of the regulation of ‘access’ and ‘exit’ for both individuals and corporate actors. In its first part, it contrasts the recognition of the legally constructed character of borders and jurisdictional boundaries in critical scholarship, with the ubiquity of unquestioning determinations of ‘inside’ and ‘outside’ in judicial practice. The second part of the paper, then, approaches the question of the character and effects of constitutional boundaries by way of a case study on mobility. Taken together, these two parts reveal the intertwined relationship between these two themes – showing how constitutionally relevant boundaries are often constituted through their effect on mobility, and how mobility can itself only be grasped in terms of legal boundary-crossings.

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I. INTRODUCTION

If we are to imagine what a more encompassing contemporary constitutionalism could look like and what it might demand, then it could be tempting to start with some idea of ‘the border’. Nation state borders, such thinking might go, mark the line from which constitutional commitments can be either projected inwards or outwards. And it is this latter, ‘outward-facing’, dimension, that has most often been ignored in the past, and that is now most urgently in need of appraisal and re-invigoration. Such an approach is especially tempting because the urgency it invokes is real. It is precisely in zones in some way ‘beyond’ the border, or ‘outside’ the state’s jurisdiction – the spheres of ‘extraterritoriality’ and ‘foreign relations’, of ‘aliens’ and immigration, or of ‘transnational contexts’ – that constitutional commitments have often been most feebly felt and most haphazardly enforced. ‘[E]ven in the sphere of foreign affairs’, Justice Kennedy of the US Supreme Court wrote in his concurrence in the 2017 Travel Ban case, ‘[i]t is an urgent necessity that officials adhere to ... constitutional guarantees ... so that freedom extends outwards, and lasts’.¹ This rousing admonition, however, did nothing to stop the US government from implementing a measure with regard to foreigners abroad that was far removed from anything the US Constitution would have permitted with regard to citizens at home. Surely, then, *this* is where a more robust form of ‘outward-facing’ constitutionalism could have most purchase, and so, surely again, this is where reflection on the meaning of a ‘double-facing constitution’ should start.

Well, I want to suggest in this paper, yes, and no. The first main argument offered here is that this temptation – to start from state borders, and to move swiftly outwards, into discussions of jurisdiction, foreign affairs law, immigration, or extraterritoriality – should be resisted, at least in part, for two main reasons. The first of these has to do with the constructed character of any border or other constitutionally relevant boundary. Whether any individual, any governmental action, or any rights claim comes ‘within’ or remains ‘outside’ the reach of any particular constitutional order, is always itself a legally mediated question. The first task for a reinvigorated ‘outward-facing’ constitutionalism will have to be to scrutinize precisely these processes of demarcation, and thus the very constitution of the boundaries of the polity. ‘Extraterritoriality’, for example, can be shorthand for an outcome in constitutional law; for a determination that someone or something lies outside constitutional coverage. It cannot, without more, serve as an input for such a conclusion.² This argument has been made before, notably in the fields of immigration law and conflict of laws, some of which this paper surveys, or in discussions of Internet governance. It is, however, only beginning to be made a central element of more general reflections on what might be called ‘constitutional exteriority’.³

¹ *Trump v. Hawaii* 585 U.S. ____ (2018) at 2 (emphasis added).

² See, e.g., Joanne Scott, ‘Extraterritoriality and Territorial Extension in EU Law’ 62 *American Journal of Comparative Law* (2014) 87; Hannah L. Buxbaum, ‘Territory, Territoriality, and the Resolution of Jurisdictional Conflict’ 57 *American Journal of Comparative Law* (2009) 631. See further Sections II and III.

³ The terms of ‘legal’ and ‘constitutional exteriority’ have recently also been invoked by Raza Saeed, with special attention to colonial and tribal contexts. See Raza Saeed, *Contested Legalities, (De)Coloniality and the State: Understanding the Socio-Legal Tapestry of Pakistan*, Unpublished PhD Thesis, University of Warwick, School of Law (2014).

Borders, in other words, cannot be taken as given. They also cannot, by themselves, be taken *as special*. The second reason why reflection on outward-facing constitutionalism should not focus solely on borders is that many of the social and economic dynamics, governmental techniques, and individual experiences commonly associated with state borders, have important equivalents and parallels deep inside the territories of modern nation states. This is true in a number of different ways. The policing of state borders, first of all, is sometimes redesigned so as to effectively take place within states' territories.⁴ But beyond border policing in even this broader sense, local regulations, such as restrictive zoning ordinances, can also produce exclusionary effects that are functionally similar to immigration restrictions. And there is one still more general and more fundamental point. As Kunal Parker has written, with regard to US constitutional history: 'Designation as foreign is not a function of coming from the territorial outside. It is a political strategy that has been used inside *and* outside the country and to multiple ends'.⁵ If this is true, and if the aim is to grow the reach of constitutionalism, specifically by way of the further development of its 'outward-facing' dimension, then it seems that this dimension itself may have to be made to reach further *inwards* – back into the polity, as it were – than an exclusive focus on borders and on the outer limits of jurisdiction would allow. In short: the first main argument of this paper, to be developed in Sections II, III and IV below, is that preoccupation with the question of whether people or events come within, or fall outside of, constitutionally salient boundaries, cannot offer a solid foundation on which to elaborate a more consciously 'outward-facing' form of constitutionalism.

This paper's second main argument, set out in Section V, is that we should replace this concern with what lies 'inside' or 'outside' of constructed boundaries, with a more immediate focus on instances of *mobility*. Mobility – alongside, crucially, its denial – figures at the heart of many highly visible contemporary conflicts that require more intense engagement from within constitutionalist thought. From travel bans to 'frictionless trade', one recurrent contemporary theme is the stark contrast between virtually unrestrained possibilities of 'escape' for wealthy individuals and corporate actors – what we might broadly call the 'hypermobility' of capital – on the one hand, and individuals stuck in 'peripheries', or even at risk of 'expulsion' – from cities and countries, neighbourhoods and livelihoods – on the other.⁶ In all such cases, it is mobility, both within and across bounded territories, as well as enforced immobility, that in fact contribute to the production and reproduction of socially, politically, and economically – and thus constitutionally – salient space itself.⁷ 'Mobility', as a recent

⁴ See Ayelet Shachar, 'The Shifting Border of Immigration Regulation' 30 *Michigan Journal of International Law* (2009) 809; Kate Huddleston, Border Checkpoints and Substantive Due Process: Abortion Rights in the Border Zone, 125 *Yale Law Journal* (2016) 1744.

⁵ Kunal M. Parker, *Making Foreigners: Immigration and Citizenship Law in America, 1600-2000* (Cambridge: Cambridge University Press, 2015), p. ix.

⁶ Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Cambridge, Mass.: Belknap Press, 2014).

⁷ See on this idea more generally, Philip E. Steinberg, 'Sovereignty, Territory, and the Mapping of Mobility: A View from the Outside' 99(3) *Annals of the Association of American Geographers* (2009) 467.

newspaper report on the French yellow-vests protests put it, ‘is the story of globalization and its inequities. Mobility means more than trains, planes and automobiles, after all. It also includes social and economic mobility — being too poor to afford a car, being rich enough to transfer money out of the country’.⁸

But if social scientists and journalists have begun to explore these themes of expulsion and escape, and of physical and constructed, literal and metaphorical, mobility together, constitutional theory has not kept up.⁹ The idea of ‘exit’, for example, figures prominently as a guarantor of freedom in traditions of liberal, republican, and libertarian thought.¹⁰ But it is not clear that classical, liberal constitutionalism has the resources to readily address, say, runaway transnational corporate autonomy. One important reason for this, I would argue, is that we lack an appropriate conceptual and normative vocabulary in which to conduct this kind of reflection. We do not have a constitutional discourse that is able to encompass not just the individuals of immigration law, but also the corporations of tax law or commercial arbitration; not just mobility across borders, but also within countries; and not just denials of entry, or enforced immobility, but also opportunities for exit, all together, within one frame. We also mostly lack a robust historical awareness. We miss a historical perspective that could remind us of how, in the United States for example, domestic migration was made free only fairly recently, and of how out-of-state corporations were still regularly ‘ousted’ from doing business in target jurisdictions, as recently as a century ago.¹¹

Notable partial exceptions to this fragmented landscape do of course exist. Kunal Parker, who was cited earlier, has investigated parallels and symmetries among a wide range of different ‘ways of rendering foreign’ across four centuries of American history. And Timothy Zick has brought together a variety of territorial restrictions or denials of individual liberties under the heading of ‘constitutional displacement’. Neither of these projects includes corporations, however. Robert Wai has usefully coined the terms of ‘lift-off’ and ‘juridical touchdown’ to describe transnational corporate activity, but then his study does not look at individuals, or at mobility within jurisdictions.¹² Mostly, then, mobility is not seen as one broad, unifying concern in constitutional thought. And where it is, its theorization and regulation are often displaced upwards, toward federal or international levels.¹³ But that vantage point one-up, as it were, tends to come with its

⁸ Michael Kimmelman, ‘France’s Yellow Vests Reveal a Crisis of Mobility in All Its Forms’ *The New York Times*, A4, 21 December 2018 (citing the work of French geographer Christophe Guilluy).

⁹ For an early social-theoretical and ethnographical analysis of different forms of movement and immobility (legal and illegal, physical and constructed) across the fields of international migration, inter-country adoption, and global finance, see Susan Bibler Coutin, Bill Maurer, Barbara Yngvesson, ‘In the Mirror: The Legitimation Work of Globalization’ 27(4) *Law & Social Inquiry* (2002) 801.

¹⁰ See notably Robert S. Taylor, *Exit Left: Markets and Mobility in Republican Thought* (Oxford: Oxford University Press, 2017); Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003), on Locke’s ‘freedom of exit’; Michael Otsuka, *Libertarianism without Inequality* (New York: Oxford University Press, 2003), on the importance of ‘costless exit’.

¹¹ See further Section V.

¹² Parker, *Making Foreigners*; Timothy Zick, ‘Constitutional Displacement’ 86 *Washington University Law Review* (2009) 515; Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’ 40 *Columbia Journal of Transnational Law* (2001-2002) 209.

¹³ See, e.g., the literature on European Union Citizenship, or the recent Symposium on ‘Framing Global Migration Law’ 111 *American Journal of International Law Unbound* (2018).

own imperatives of ‘liberalization’, and its rejection of most local impediments to mobility as suspect ‘balkanization’ or ‘parochialism’. But just as exclamations of ‘extraterritoriality’ cannot settle issues of constitutional reach, neither can simple denunciations of ‘parochialism’. Nor, I would argue, the mere invocation of an unanchored, cosmopolitan notion of ‘freedom’ or ‘autonomy’.

What is missing, therefore, turns out to be something fairly specific. We lack a constitutionalist vocabulary that can institute more encompassing aspirations while remaining conscious of its own inevitably incomplete, partial character.¹⁴ A constitutionalism that is simultaneously local – relative to other possible scales of legal or constitutional ordering – and outward-facing; one that does not take the illusory certainty of determinations of ‘inside’ or ‘outside’ for granted, but that speaks rather to governmental control over mobility across any constitutionally salient boundary; and that does so with regard to both individuals and corporate actors. Such a constitutionalism would indeed be ‘double-facing’ in that it would demand and sustain ongoing deliberation over whether the commitments that make up the polity’s core are being lived-up to at its margins, wherever these may be found. It is to the elaboration of the outward-facing dimension of such a form of constitutional thought that this paper seeks to make a contribution.

The paper proceeds as follows. Sections II, III, and IV develop the first argument set out above. Section II first introduces the theme of constitutional exteriority and then turns to the centrality of the domestic/foreign distinction in liberal thought. Sections III and IV then seek to undermine this distinction. Section III first develops a critique the artificiality of determining ‘presence’ and ‘foreignness’ in law, while also revealing the continued importance of precisely these techniques in current jurisprudence. Section IV.A questions the naturalness of our principal received constitutional boundary: the border of the territorial state, while Section IV.B interrogates the emergence and effects of new constitutionally salient boundaries. Section V then moves to the second argument set out above, suggesting a focus on ‘mobility’ as an – incomplete – answer to the critique of the inside/outside distinction developed earlier. This latter Section, finally, offers up a provisional grid of ways in which constitutionalism and mobility can intersect, looking at ‘access’ and ‘exit’, of both individuals and corporate actors.

¹⁴ See further Section II.

II. DISCOVERING CONSTITUTIONAL EXTERIORITY

Constitutional law and theory, it seems, *should* be able to say something of value about the ‘outside’ of constitutional orders. No such order, after all, finds itself alone in this world. ‘When individuals bind together to form a political community ... they also create a collective agent that holds an inevitable relationality with *other* collective agents’.¹⁵ Even just as a conceptual matter, then, constitutionalism would seem to have to address these relations. But there is also a strong case that, as the type of normativity that both institutes and limits the autonomy of political communities, constitutionalism *ought* to be concerned also with the project of generating responsibilities in these autonomies themselves, towards other communities as well as towards individual outsiders.¹⁶ And to make matters more complicated still, some of these outsiders – resident aliens, notably – stake their claims on constitutional orders well within these orders’ own territories. For, as Robert Meister reminds us, ‘self-governing citizens have never exhausted the cast of characters who populate liberal states’.¹⁷

The classic questions in relation to constitutional exteriority are those concerned with the constitutional order’s territorial reach, with admission to and exclusion from the polity, and with the status and rights of aliens once admitted. Typically not addressed in written constitutional documents, these questions were also, in the past, largely ignored in constitutional legal scholarship. In a path breaking 1985 article, Louis Henkin could still refer to these three topics as ‘several small related subjects which have been largely neglected’ in US constitutional scholarship.¹⁸ That characterization, though, certainly no longer holds true. In the decades since Henkin wrote, legal scholars have engaged with precisely these questions ever more intensively, prompted in particular by post cold-war trade liberalization, by restrictive turns in the immigration policies of many Western countries beginning in the mid 1990s, and by the ‘war on terror’ since the early 2000s.¹⁹ And so, while it is certainly true that ‘the domain of ... constitutionalism has *always* been contested’, in the US as well as elsewhere,²⁰ it does seem clear that interest in how constitutionalism might speak to what happens beyond the boundaries of legal and constitutional orders has intensified more recently.²¹

¹⁵ Douglas A. Kysar, ‘Global Environmental Constitutionalism: Getting There from Here’ 1 *Transnational Environmental Law* (2012) 83, 90-91.

¹⁶ Gunther Teubner, *Constitutional Fragments* (Oxford: Oxford University Press, 2012), 3.

¹⁷ Robert Meister, ‘Sojourners and Survivors: Two Logics of Constitutional Protection’ 3 *University of Chicago Roundtable* (1996) 121, 121.

¹⁸ Louis Henkin, ‘The Constitution as Compact and as Conscience: Individual Rights abroad and at Our Gates’ 27 *William and Mary Law Review* (1985) 11, 11. As a general note: most of the examples in this chapter will be taken from US constitutional law. The arguments developed, however, do seek a broader application.

¹⁹ See, e.g., Saskia Sassen, *Losing Control: Sovereignty in the Age of Globalization* (New York: Columbia University Press, 1996); Gerald Neuman, *Strangers to the Constitution* (Princeton, NJ: Princeton University Press, 1996). For overviews, see e.g. Kal Raustiala, ‘The Geography of Justice’ 73 *Fordham Law Review* (2005) 2501; Daniel Kanstroom, ‘Alien Litigation as Polity-Participation: The Positive Power of a Voteless Class of Litigants’ 21 *William & Mary Bill of Rights Journal* (2012) 399.

²⁰ Neuman, *Strangers to the Constitution*, 3 (emphasis added).

²¹ See in particular the contributions to the Symposium on ‘The External Dimensions of Constitutions’, convened by Eyal Benvenisti and Mila Versteeg (2018 *Virginia Journal of International Law* Symposium); Daniel S. Margolies, Umut Özsü, Maïa Pal, Ntina Tzouvala (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (London: Routledge, 2019); Ran Hirschl and Ayelet Shachar ‘Spatial Statism’ *International Journal of Constitutional Law* (2019,

Animating this growing interest appears to be increased recognition of the idea that a constitutionalism that does not address the exteriors of constitutional orders is, in an important sense, radically incomplete. A constitutionalism that does not offer normative resources to scrutinize, say, projections of military power abroad, or denials of membership at home, is increasingly seen as *partial* – in a way analogous to how earlier generations of scholars came to see a constitutionalism that did not address (domestic) abuses of private power as partial.²² The discourse of ‘constitutional black holes’ and ‘constitution-free zones’ are good examples of this development. The ‘black hole’ metaphor is by no means new to constitutional jurisprudence. American scholars had for some decades been using this expression, as well as that of ‘constitution-free zones’, from time to time, to refer to sites of perceived gaps in constitutional coverage that were entirely domestic – such as labour relations or criminal trials – and often in some sense ‘private’ – such as family relations and schools.²³ With the advent of the ‘war on terror’ and the turn to ‘black sites’ and the prison at Guantanamo, the ‘black hole’ and ‘free zone’ metaphors were seamlessly, and with increased power, transferred to ‘extra-territorial’ sites of public-law lawlessness.²⁴

Addressing these newly apparent gaps in constitutional coverage is proving difficult, though. One important reason for this is that liberal constitutional orders are partial also in a second sense. Constitutionalist discourse, even when often profoundly aspirational in terms of its substance, is commonly biased towards the *status quo* in terms of its formal reach – notably towards current distributions of membership, and towards existing zones of responsibility.²⁵ Both forms of partiality are reflected and embodied in the inside/outside – domestic/foreign – distinction in public law. This dichotomy is central to the modern liberal way of ordering the world.²⁶ Giving voice to the contrasting commitments towards insiders and outsiders that lie at the heart of liberal thought, Michael Walzer has famously argued that ‘[n]eighborhoods can be open only if countries are at least potentially closed’.²⁷ For Walzer, as Linda Bosniak has commented, ‘[b]oundedness governs at the community’s edges, while inclusiveness prevails within’.²⁸ The

forthcoming); Chimène I. Keitner, Rights Beyond Borders, 36 *Yale Journal of International Law* (2011) 55; Galia Rivlin, ‘Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question’ 30 *Boston University International Law Journal* (2012) 135.

²² I borrow this vocabulary from Cass R. Sunstein, *The Partial Constitution* (Cambridge, Mass.: Harvard University Press, 1993), which deals extensively with the public/private distinction. From the perspective of international relations, and in descriptive terms: while any ordering effect stemming from domestic state constitutions could only ever be partial, any global ordering itself is also only partially realized. See notably Robert A. Keohane, *Power and Governance in a Partially Globalized World* (London: Routledge, 2002).

²³ For a well known example from employment law, see James Gray Pope, ‘Labor and the Constitution: From Abolition to Deindustrialization’ 65 *Texas Law Review* (1987) 1071, 1074-1076.

²⁴ See, e.g., Michel Rosenfeld, ‘Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror’ 27 *Cardozo Law Review* (2006) 2079.

²⁵ Neil Walker calls this ‘demarcation constitutionalism’. See Neil Walker, ‘Sovereignty and beyond: The Double Edge of External Constitutionalism’ 57 *Virginia Journal of International Law* (2018) 799.

²⁶ See, e.g. Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1986); Linda Bosniak, ‘Being Here: Ethical Territoriality and the Rights of Immigrants’ 8(2) *Theoretical Inquiries in Law* 389 (2007); Meister ‘Sojourners and Survivors,’ 121.

²⁷ Walzer, *Spheres of Justice* 38.

²⁸ Bosniak, ‘Being Here,’ 395. See also Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), 118-120.

inside/outside distinction, then, almost exclusively in its guise of the domestic/foreign demarcation, is foundational to liberal thought, and with it to liberal constitutionalism. The question, though, is whether it can hold.

In his well-known history of the ‘stages of decline’ of the public/private distinction, Duncan Kennedy sums up the telltale signs indicating that a particular legal dichotomy is ‘no longer a success’. ‘Either people can’t tell how to divide situations up between the two categories’, he writes, ‘or it no longer seems to make a difference on which side a situation falls’.²⁹ What, then, we might ask, would an assessment, of the contemporary state of the inside/outside distinction in constitutional legal thought and practice look like, applying Kennedy’s criteria? How do constitutional legal orders attempt ‘to divide situations up’ between the two categories of ‘inside’ and ‘outside’? Do such allocations still matter to the constitutional imagination, and what level of commitment do they garner when implemented in constitutional legal practice?

More concretely, Kennedy’s analysis raises three broad types of question when transposed to the context of the domestic/foreign distinction: with regard to legal method, normative principle, and societal implications. First, as to method, Kennedy prompts us to ask whether, and if so how, faith is maintained in the techniques of ‘jurisdictional division’ that sustain polities’ contrasting commitments to insiders and foreigners.³⁰ Second, in terms of principle, the question is how a double-facing stance can avoid becoming *two-faced*, in the sense of normatively inconsistent and complacent? And third, empirically, we have to ask whether nation state borders, and other outer limits to state jurisdiction, are still the boundaries that matter, or whether their exclusionary effects are as likely to be dispersed or replicated elsewhere, possibly deep inside or even far outside the polity.

There are good reasons to be skeptical on these points. As Linda Bosniak explains in a passage worth quoting at length, the ‘splitting strategy’ of ‘jurisdictional division’ between inside and outside,

is based on empirical premises about the possibility of maintaining separation between the community’s inside and its edges that simply do not hold. ... Exclusion functions also inside the territory ... — the “border” — conceived as regulatory sphere — follows the immigrant into the national geographic space and shapes her experience there. ... The point, in short, is that the normative divide between the community’s inside and its edges that the territorialists presume possible — that, indeed, is foundational to them — is *chimerical*.³¹

²⁹ Duncan Kennedy, ‘The Stages of Decline of the Public/Private Distinction’ 130 *University of Pennsylvania Law Review* (1982) 1349, 1349. The public/private distinction, Kennedy argued, together with other binary oppositions such as those between state & society, and property & sovereignty - and, he allowed, ‘maybe some more I’m not thinking of’ - constituted ‘the liberal way of thinking about the social world’; a way of thinking that, in his diagnosis at least, was in long-term decline.

³⁰ *Cf.* Bosniak, ‘Being Here,’ 397.

³¹ *Ibid.* Emphasis added.

This sense of boundaries that are ‘chimerical’, but that still appear able to sustain a constitutional jurisprudence that is itself arguably ‘schizophrenic’,³² poses a difficult dilemma for the elaboration of any form of ‘outward-facing’ constitutionalism. This is the problem of how to redirect attention in constitutional thought towards engagement with the ‘outside’ of constitutional orders, without at the same time subscribing to the substance and location of any particular inside/outside demarcation in current constitutional law. The challenge, in other words, of taking constitutional exteriority seriously, without at the same time accepting such exteriority at face value. This is the challenge that is taken up in the following Sections.

III. BEING ‘HERE’ AND ‘THERE’

This Section addresses Kennedy’s first sign of decline for pivotal distinctions in law: the sense that it is no longer possible to know ‘how to divide situations up between the two categories’. Its aim is to demonstrate a striking tension between longstanding acknowledgment of the artificiality and circularity of determinations of ‘here’ or ‘there’ in legal theory, on the one hand, and continued uncritical reliance on precisely such determinations in practice.

The critique of the artificiality of judicial efforts to allocate cases to different localities and their legal orders goes back at least to the American Legal Realists, and in particular to the work of Walter Wheeler Cook. In his *Logical and Legal Bases of the Conflict of Laws*, Cook, with evident relish, called out judges for their qualifications of litigants as “‘constructively’” absent’ - or constructively present - within different relevant jurisdictions.³³ For example, when discussing court decisions on cross-border shootings, Cook pointed out that courts sometimes regarded shooters as – constructively – ‘accompanying the [canon] ball, and as being represented by it, up to the point where it strikes’, while at other times taking a diametrically opposing approach. Cook wrote he was ‘tempted to add’ that, apparently at least in some cases, shooters were deemed also to have “‘constructively returned’” to their home state, ‘as soon as [they] had accomplished the purpose for which [they] constructively accompanied the bullet’.³⁴ In a similar vein, a few years later, another noted legal Realist, Felix Cohen, used the question ‘Where is a corporation?’ – which he compared in usefulness to the scholastic question of ‘How many angels can stand on the point of a needle?’ – as his opening example of what he famously came to call ‘transcendental nonsense’ in the law.³⁵ These critiques then, are early gestures at the more general idea that what is deemed to be ‘inside’ or ‘outside’ of any particular legal order – the ‘fact’, we could say, misleadingly, of ‘being here’ – is always a matter of construction.

³² Parker, *Making Foreigners*, 204.

³³ Walter W. Cook, ‘The Logical and Legal Bases of the Conflict of Laws’ 33 *Yale Law Journal* (1924) 457, 463.

³⁴ *Ibid.*

³⁵ Felix S. Cohen, ‘Transcendental Nonsense and the Functional Approach’ 35 *Columbia Law Review* (1935) 809, 810-811.

This idea has been developed much more fully in legal scholarship of the past two decades or so, some of it animated by advances in critical geography. Most of this development has taken place in immigration law studies, with Linda Bosniak, Ayelet Shachar, and Leti Volpp among the main authors. Volpp's work, for example, addresses the question of how space is 'legally imagined' in immigration law.³⁶ "Being here", she insists, 'can mean many different things', and the legal doctrines determining whether a person is '*inside* particular territorial borders [or] standing *outside* at the gates', are 'complicated and paradoxical'.³⁷ Echoing Walter Wheeler Cook's writings, Volpp catalogues cases within US immigration law where, as she puts it, 'noncitizens who surely are in some sense "here" are met by government arguments that they in fact, are not here'.³⁸ As a mirror image of this scenario, we could think of claims arising out of the conduct of military agents abroad as similarly situated in a twilight zone of quasi-presence and -absence. When such foreign conduct is subjected to foreign law only, rather than also to the constitutional-legal constraints of the agents' home country, is this not akin to claiming that the agents involved were never truly "there", in the place where they exercised force under colour of official authority – at least not "there" as public officials, representing their home polity, and acting within limits set by its constitutional order?²

In all these instances, it turns out, on reflection, that people – their lives, injuries, and grievances – are really only 'foreign' to a constitutional order when that order *makes* them so. This, it seems, has been clear, at least on some level, for decades. We know enough not to fall into 'the facile trap of fetishizing space, of allowing our sense of what we owe to neighbors and do not owe to strangers to turn on something as crude as "pure" physical presence or absence, which ... is always politically and legally mediated'.³⁹

And yet, this is precisely what happens regularly in judicial practice. The judicial determinations of 'inside' and 'outside', or 'here' and 'there', in the context of cross-border shootings, jurisdiction over foreign corporations, and divorce proceedings, that Cook and Cohen were concerned with, have their contemporary analogues in debates on the jurisdictional reach of constitutional rights protection. In these more recent constitutional cases, circularity and artificiality are still on full display. An analysis of US Constitutional rights jurisprudence shows how labels like 'outside' and 'inside' – or 'extraterritorial' and 'domestic' – cannot be applied in any neutral or mechanistic way, principally because the localization of any rights infringement that such a distinction requires itself already depends on a background notion of what it is the relevant right is meant to protect in the first place.⁴⁰ We can take the Fourth and Fifth Amendments to the US Constitution as examples. Only once it is already decided that a violation of the prohibition on unreasonable searches in the Fourth Amendment is 'fully accomplished' at the time of the actual search itself – regardless of whether any evidence found will be

³⁶ Leti Volpp, 'Imaginations of Space in Immigration Law' 9(3) *Law, Culture & the Humanities* (2012) 456, 456.

³⁷ *Ibid.*, 456-457. Emphasis in original.

³⁸ *Ibid.*, 460 ('a noncitizen can be spatially here, but not doctrinally here'. See at 463, discussing the case of individuals 'paroled' into the United States).

³⁹ Parker, *Making Foreigners*, 16.

⁴⁰ This point is analogous to Cook's own famous critique of the circularity involved in the so-called 'vested rights' doctrine in choice of law.

invoked in a subsequent trial –, only then does a case involving a police search abroad become a ‘foreign’ case, outside the scope of constitutional protection.⁴¹ Conversely, it is only once it has already been decided that the Fifth Amendment’s privilege against self-incrimination is a ‘fundamental trial right’ which “applies” ‘in American courtrooms’, that a case involving testimony compelled abroad by foreign officials becomes, seemingly naturally, a ‘domestic’ case, squarely within the realm of local constitutional protection.⁴² But then again, on that reading, a case involving US officials, compelling a US citizen, to testify against him or herself, in domestic proceedings, would become a ‘foreign’ case, if that testimony was only likely to be used in criminal proceedings abroad, brought by a foreign sovereign.⁴³ This, then, despite the fact that the Fifth Amendment refers to ‘any person’ and ‘any criminal case’ in setting out the privilege, and despite the fact that all relevant governmental conduct in such a case would occur within the territorial boundaries of the US.⁴⁴ If, on the other hand, US courts were to read the privilege against self-incrimination as ‘a rule of conduct generally to be followed by our Nation’s officialdom’ – as Justice Ginsburg did in her dissent in the case this discussion is based on – then any foreignness would dissipate, and the case would revert to being an ordinary, ‘domestic’ constitutional rights case.⁴⁵

The artificiality of such wholesale designations of ‘inside’ our ‘outside’, in cases such as these, was on especially stark display in recent decisions involving, as did Cook’s discussions a century earlier, cross-border shootings. In *Mesa v. Hernandez*, a US border patrol officer on the US side of the border shot and killed an unarmed Mexican teenage boy playing on the Mexican side.⁴⁶ Previous case law strongly suggested that, had the case involved a similar shooting entirely within the territory of the US, a private right of action against the agent would have been available to his relatives. And yet, the majority found that the ‘transnational context’ and ‘extraterritorial aspect’ of this case cautioned against ‘extending’ such a remedy ‘for injuries to foreign citizens on foreign soil’.⁴⁷ In fastening its gaze exclusively on the point of injury – a foreign citizen, on foreign soil – the majority was able to invent a ‘transnational context’ for this case, with all that such a mode of framing brings along: a presumption against extraterritorial extension of US

⁴¹ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁴² *United States v. Allen*, No. 16-898 (2d Cir. 2017).

⁴³ *United States v. Balsys*, 524 U.S. 666 (1998).

⁴⁴ Note that the outcome would have been the same had Balsys been a US citizen. By way of context, as one critic of the decision pointed out at the time: ‘until *Balsys*, no case had ever held that a US citizen or lawful resident alien would not be protected from otherwise unconstitutional governmental conduct within the fifty states’. See Daniel J. Steinbock, ‘The Fifth Amendment at Home and Abroad: A Comment on *United States v. Balsys*’, 31 *University of Toledo Law Review* (2000) 209, 216.

⁴⁵ Justice Ginsburg, dissenting opinion in *Balsys*. These difficulties involved in allocating ‘cases’ and ‘claims’ to a domestic or a foreign sphere may also arise outside the rights context. Helmut Aust’s paper in this collection furnishes a nice example. The US Supreme Court was asked to review an executive decision with regard to a statute regarding the registration of “Jerusalem, Israel” as place of birth in U.S. official documents. Was this, as Chief Justice Roberts wrote, simply a case of a US citizen, in the US, seeking vindication of a statutory right – ‘a familiar judicial exercise’ –, or was this rather a case arising ‘in the field of foreign affairs’, as Justice Breyer held in dissent? See the discussion of *Zivotofsky* in Helmut Aust, ‘The Democratic Challenge to Foreign Relations Law in Comparative Perspective’.

⁴⁶ *Hernandez v. Mesa*, 885 F.3d 811 (3rd Cir. 2018).

⁴⁷ *Ibid.*, at 817. See also at 823 (citing Judge Kavanaugh’s discussion of the ‘presumption against extraterritoriality’ in *Meshal v. Higgenbotham*, 804 F.3d 417 (D.C. Cir. 2015), at 425-426, 430).

law, fear of diplomatic incidents, *etc.* A case which, as the dissenters noted, ‘simply involves a federal official engaged in his law enforcement duties acting on United States soil who shot and killed an unarmed fifteen-year-old boy standing a few feet away’, is made foreign.⁴⁸ There is real pathos in the dissenters’ invocation of *Marbury v. Madison*’s appeal to ‘the very essence of civil liberty’ as ‘the right of every individual to claim the protection of the laws, whenever he receives an injury’.⁴⁹

It is in cases like *Mesa*, that an outward-looking constitutionalism could have real bite, connecting commitments at a community’s core to claims voiced at its outer edges. An outward-facing constitutionalism would recognize that there can be no prior stage of constitution-free determinations of ‘jurisdiction’ or ‘reach’. It would demand a more disaggregated assessment of the different connections to the polity in any given case, and a more searching reflection on how such connections ought to, or ought not to, count. Such a perspective could be put into operation, for example, by way of a presumption in favour of constitutional coverage – even if such a presumption would be rebuttable, just as current presumptions *against* extraterritoriality are. Such an approach would have the benefit of demanding explicit engagement with the important underlying question of whether the constitutional community’s ‘vision of harmonious self-ordering could be made to be more inclusive’ – even if it is accepted that the answer to that question will not always be a fully cosmopolitan ‘yes’.⁵⁰ In any case, whatever approach is chosen in any given polity, what matters is recognition of the pretense involved in claiming that merely ‘localizing’ individuals and their claims can somehow, as a matter of legal logic, settle their status. That, any robust form of outward-facing constitutionalism cannot allow.

⁴⁸ *Ibid.*, at 825 (Dissenting opinion of Judge Prado).

⁴⁹ *Ibid.*, at 832.

⁵⁰ Kysar, ‘Global Environmental Constitutionalism,’ 90.

IV. BOUNDARIES THAT MATTER

‘Success’ for a legal distinction, in Kennedy’s scheme cited earlier, has two dimensions: it should not only be ‘possible to make the distinction’, that distinction must also ‘make a difference’.⁵¹ How does the inside/outside dichotomy in constitutional law fare on this second criterion? This Section addresses this question by looking at how a double-facing constitutionalism can ensure scrutiny of those boundaries between insides and outsides that matter most today. This involves interrogating both *which* boundaries matter, and *how* they matter. The analysis, accordingly, proceeds in two steps. First, Subsection IV.A interrogates the contingent and constructed character of what is by far the most prominent inside/outside boundary in modern constitutional law: the territorial border of the nation state. Subsection IV.B then looks in more detail at changes in the character of state borders, and at the emergence of new constitutionally salient boundaries and cleavages – many of them crisscrossing the inner domains of states – and their effects. Section V will then go to analyze these effects in terms of their impact on the mobility of individuals and corporations.

A. THE CONSTITUTION OF ‘DOMESTIC’ AND ‘FOREIGN’

A double-facing constitutionalism should scrutinize the constructed and contingent character of the vantage points from which determinations of inside and outside are made. This means, principally, interrogating the construction of the nation state border as *the* paradigmatically meaningful boundary for liberal polities. As geographers have noted, this involves questioning two powerful assumptions. First, the so-called ‘territorial trap’, ‘wherein the inside of the territorial state is assumed to be a timeless fundamental sociopolitical entity’. And second, a view of ‘the outside’ as merely some ‘residual space remaining after declaring the inside’. For, as Philip Steinberg observes, ‘[i]f that is the prevailing image of the outside it is an image that is itself constructed in tandem with the construction of a particular image of the inside’.⁵²

Opening up these images for scrutiny – of the constituted inside, the empty outside, and their radical separateness – can follow different tracks. Gerald Frug, for example, has developed a pioneering critique of the way liberal political thought has long devaluated the idea of ‘real local power’, by casting forms of regulation at infra-state levels as ‘local selfishness and protectionism’.⁵³ In a way taken up only some years later by geographers, Frug’s work called attention to the question of the ‘missing scale’ – those levels of government and those jurisdictions that do not exist, or exist only in enfeebled form, and whose absence has an impact on those levels that current legal or ideological frameworks do empower.⁵⁴ Other work challenges the radical separation of inside and outside in contemporary constitutional thought, by recovering lost

⁵¹ Kennedy, ‘The Stages of Decline of the Public/Private Distinction,’ 1349.

⁵² Steinberg, ‘Sovereignty, Territory, and the Mapping of Mobility,’ 472, 477.

⁵³ Gerald E. Frug, ‘The City As a Legal Concept’ 93 *Harvard Law Review* (1980) 1057, 1066-1067.

⁵⁴ Dennis R. Judd, ‘The Case of the Missing Scales: A Commentary on Cox’ 17 *Political Geography* (1998) 29, 30, cited in Allan Erbsen, ‘Constitutional Spaces’ 95 *Minnesota Law Review* (2011) 1168, 1177.

connections. Such scholarship might point out, for example, that the model of federalism adopted for what was to become the interior of the United States was developed on the basis of contemporary understandings of relations between states in the law of nations.⁵⁵ At the same time, and in the opposite direction as it were, as David Golove and Daniel Hulsebosch have recently argued, ‘the revolutionary generation conceptualized, drafted, and institutionalized their new constitutions not only for domestic constituencies but also for foreign audiences’. In this way, many of the Founders ‘conceived of the Federal Constitution in particular as a promise to foreign nations’.⁵⁶ Domestic and foreign, then, were intertwined during the founding era in ways that look rather different from the strict modern liberal inside/outside distinction.

But the vision of an undifferentiated, homogenous interior, on which the contemporary character of the state’s outer border depends, finds perhaps its strongest support in a constitutional ideal of unrestricted *domestic* mobility – even if such an ideal is only patchily realized in practice. This is so especially when such a vision is contrasted with the stringent regulation of migration across the nation state border. Interrogating the role of the citizen/foreigner distinction in immigration regulation, in other words, can also adopt the track of revisiting the foundations and history of internal migration, and with it the elaboration of a unified, national conception of citizenship. Developing this point requires a brief excursus.

If we take the US as a case study, it is clear that *local* barriers to free movement were indeed both prevalent and significant, until really rather recently. Many of the most widely used local regimes for “keeping people in their place” – some with histories going back to Elizabethan England – were only abolished in the period between the 1930s and the mid-1970s. Significantly, these earlier regimes, such as vagrancy statutes or Welfare Codes prohibiting the migration of indigent persons, typically did not distinguish between domestic and foreign migrants. With millions of mostly poor Americans on the move during the middle decades of the twentieth century, the US Supreme Court came to take tentative steps towards the recognition of a constitutional right to ‘free movement’, and provision for the indigent slowly became a Federal concern.⁵⁷ As Elisa Minoff has noted, it was only over the course of this period, and in large part as a result of precisely these developments that *national* citizenship became, for the first time, the primary mode of identification for many Americans.⁵⁸ Strikingly, though, as Minoff also writes, ‘the interest in internal migration during these years and its profound

⁵⁵ Edwin D. Dickson, ‘The Law of Nations as Part of the National Law of the United States’ 101 *University of Pennsylvania Law Review* (1952) 26. See also Meister ‘Sojourners and Survivors,’ 124.

⁵⁶ See Daniel Hulsebosch, ‘Being Seen Like a State: How Americans (And Britons) Built the Constitutional Infrastructure of a Developing Nation’ 59 *William and Mary Law Review* 1239 (2018); David M. Golove & Daniel J. Hulsebosch, ‘A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition’ 85 *New York University Law Review* (2010) 932.

⁵⁷ See Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935–1972* (Cambridge: Cambridge University Press, 2016); Parker, *Making Foreigners*, Elisa Alvarez Minoff, ‘Free to Move? The Law and Politics of Internal Migration in Twentieth-Century America’ (unpublished Doctoral dissertation, Harvard University, 2013). For a contemporary source, see e.g., Leonard B. Boudin, ‘The Constitutional Right to Travel’ 56 *Columbia Law Review* (1956) 47.

⁵⁸ Minoff, ‘Free to Move?’ iv.

consequences for the formation of the American state and the evolution of thinking about rights and citizenship has been all but forgotten'.⁵⁹

But if free domestic migration is a comparatively recent invention, so too is the construction of a powerful, centralized regime to control immigration from outside the country.⁶⁰ And just in the way that the foundations of free internal migration are today largely forgotten, there is also today, in the words of one leading immigration law scholar, 'surprisingly little opposition to or discussion of the basics of the U.S. immigration system'.⁶¹ This notably includes the most basic immigration law principle of all: the categorical demarcation of 'aliens' from insiders.⁶² These twin trajectories of construction, neglect, and forgetting have produced the unique character of the domestic/foreign distinction in constitutional law. When the history of the vulnerability of 'insiders' is forgotten, and the present vulnerability of 'outsiders' is left unquestioned, what emerges is an understanding of the country's current external borders as constituting a natural boundary – one that has no specific history and does not require any special justification. It is this boundary that sets apart today's immigrant as 'the ultimate outsider' – 'a lonely legal subject ... uniquely marked with a set of distinct legal and territorial disabilities that he or she once shared with many insiders'.⁶³

B. FROM THE BORDER, TO THE EDGE

One key challenge for a double-facing constitutionalism, then, is to encourage reflection on how the processes of constitution and exclusion, of government and neglect, have come to be associated almost exclusively with the outer boundaries of the nation state – with its borders and with the furthest reaches of its jurisdiction more generally (Section IV.A, above). Another task, as was seen earlier, is to interrogate the juridical techniques by which these processes are put in operation (Section III, above). What remains to be discussed is one further challenge: to demand vigilance in the face of the emergence of new boundaries, and with regard to changes in the character of familiar ones. Today's immigrants may well be 'ultimate outsiders' in many ways. But if governmental strategies and individual experiences of exclusion are being replicated within our polities, then a genuinely double-facing constitutionalism must stand ready.

There are indeed signs of changes afoot in the character and location of the boundaries that matter. As the anthropologists Jean and John Comaroff note, 'the lines that count nowadays seem less and less coterminous with geopolitical boundaries'.⁶⁴ This

⁵⁹ *Ibid.*, 7.

⁶⁰ Parker, *Making Foreigners*, 204ff.

⁶¹ T. Alexander Aleinikoff, 'Towards a Global System of Human Mobility: Three Thoughts' 111 *American Journal of International Law Unbound* (2017) 24, 24.

⁶² See, e.g., Bosniak, 'Being Here,' 399 (on the common rejection as 'utopian' of open-border arguments). For important recent reflections on the philosophical foundations of migration regulation, see the contributions to Sarah Fine and Lea Ypi (eds.), *Migration in Political Theory The Ethics of Movement and Membership* (Oxford: Oxford University Press, 2016); and in particular, on the role of the basic insider/outsider distinction, the contribution by Sarah Fine on 'Immigration and Discrimination' in the same volume.

⁶³ Parker, *Making Foreigners*, 11.

⁶⁴ Jean Comaroff and John L. Comaroff, *Theory From The South: Or, How Euro-America is Evolving Toward Africa* (London: Routledge, 2012), 28, 104.

is true in at least two ways. First, national borders themselves increasingly exhibit the paradoxical character of being ‘simultaneously open *and* closed’: ‘permeable to business from the outside ... yet closed to aliens’, embodying in this way ‘the contradiction between globalized *laissez-faire* and national priorities, protections, and proprieties’.⁶⁵ As another collective of anthropologists has detailed, these contradictory jurisdictional regimes actively facilitate some types of ‘border crossings’ – such as notably those of international finance, but also those involved in inter-country adoptions, for example – while others are made difficult, rendered suspect, or are criminalized.⁶⁶ At the same time, though, ‘internal frontiers *within* countries tend increasingly to reinforce racial and ethnic cleavages, seeking to secure the “homeland” by dividing citizens from outsiders wherever they might be’.⁶⁷ Racial profiling, mass incarceration, and a wide range of other forms of spatial and economic exclusion, combine to create a ‘*de facto* border’ that ‘crisscrosses the country’.⁶⁸ Taken together, these changes amount to the rise of a new ‘archetype’: of the state as ‘citadel’, and of borders as ‘elusive lines to be drawn and redrawn within the polity and beyond’.⁶⁹

These emerging parallels, between outer boundaries and inner cleavages, border patrols and prisons, aliens and marginalized citizens, have recently been given a distinctive sociological frame by Saskia Sassen. Like Comaroff and Comaroff, Sassen goes back to the 1980s to locate the roots of what she calls the emergence of ‘new logics of expulsion’.⁷⁰ This term indicates societal dynamics – made up of much more than just governmental action – by which people are expelled from societies or economies. These dynamics operate not just, or not even principally, at national borders, but are rather the manifestation of ‘global trends inside countries’.⁷¹ Logics of expulsion take hold at ‘*the systemic edge*’ of whatever system is in play – ‘economic, social, biospheric’, and can as easily lie inside a country as at its outer borders.⁷² As Sassen emphasizes: the systemic edge ‘is foundationally different from the geographic border in the interstate system’.⁷³

In addition, then, to identifying the emergence of domestic boundaries that are equivalent, in functions and impact, to state borders, these accounts by social scientists make two further important contributions. They point to the importance of including corporations, and private law instruments more generally, in any discussion of borders and jurisdiction; and they suggest that alongside ‘exclusion’, some forms of ‘escape’ will also have to be counted among the constitutionally salient effects of legal boundaries. These two points are closely related. Many corporations, Sassen writes, ‘have sought to free themselves from constraints, including those of local public interests’. They have made use in particular of ‘global freedoms of movement’ and of ‘private contractual

⁶⁵ *Ibid.*, 27.

⁶⁶ Bibler Coutin, Maurer & Yngvesson, ‘In the Mirror,’ 801.

⁶⁷ Comaroff and Comaroff, *Theory From the South*, 104.

⁶⁸ *Ibid.*, 104, 106.

⁶⁹ *Ibid.*, 107.

⁷⁰ Sassen, *Expulsions*, 1.

⁷¹ *Ibid.*, 7.

⁷² *Ibid.*, 211. Note: Such ‘edges’ need not, strictly speaking be spatial in character, but the discussion here will be limited to those that operate at least to some extent in spatial terms.

⁷³ *Ibid.*

arrangements that can bypass state regulations *lawfully*, so to speak'.⁷⁴ This is, of course, the same observation Felix Cohen made back in 1935, when he remarked on 'the practice of modern corporations in choosing their sovereigns'.⁷⁵ If corporations and their assets are free to move, however, it should not be forgotten that it is state law that gives capital its mobility.⁷⁶

But even if it is state practices that 'render people and property mobile' – just as it is state practices that make people foreign, as seen earlier – the resultant threat of escape changes the character of the boundaries around our polities. As Comaroff and Comaroff write, many states today 'act as if they were constantly subject *both* to invasion from outside *and* to the seeping away of what, like offshore commerce, jobs, and human capital, ought properly to remain within'.⁷⁷ Sassen brings these themes together under an overarching heading of extreme inequality in a passage worth quoting in full:

Inequality, if it keeps growing, can at some point be more accurately described as a type of expulsion. For those at the bottom, or in the poor middle, this means expulsion from a life space; among those at the top, this appears to have meant exiting from the responsibilities of membership in society via self-removal (...).⁷⁸

These, I would argue, are precisely the tendencies contemporary constitutionalism must concern itself with to remain relevant. This is where the newest and most urgent gaps in constitutional coverage are to be found. And so this is where thinking about a double-faceted constitutionalism could be most productive. As our foremost public vocabulary for expressing collective aspirations and responsibilities, constitutionalism has to be able to speak to themes such as expulsion and escape; to 'hypermobility' for capital, and 'stagnant' mobility for individuals;⁷⁹ and to the ever-growing chasm between our 'global cities', our 'peripheries', and our deserts. When returning foreign fighters have their citizenship revoked; when homeless individuals are expelled from city parks; or when registered sex-offenders are excluded from so many neighbourhoods that no place remains for them to live, it does make at least intuitive sense to cast all these governmental practices and individuals' experiences of them as 'banishment'.⁸⁰ If that intuition points to a plausible case that these and other phenomena of expulsion and of escape are indeed connected – that there could indeed be meaningful connections between how a diesel-tax affects the 'mobility' of poorer citizens, and a wealth-tax the 'mobility' of the rich – then there is a challenge for constitutional theory to answer. This is not to say that constitutionalism ought to necessarily conceive of, say, prisoners and aliens in equal terms, or treat 'social' and 'physical' mobility as raising the exact same

⁷⁴ *Ibid.*, 213, 23.

⁷⁵ Cohen, 'Transcendental Nonsense and the Functional Approach', 810.

⁷⁶ Bibler Coutin, Maurer & Yngvesson, 'In the Mirror', 809.

⁷⁷ Comaroff and Comaroff, *Theory from the South*, 98 (emphasis added).

⁷⁸ Sassen, *Expulsions*, 15.

⁷⁹ *Ibid.*, 25 (on 'hypermobility').

⁸⁰ Katherine Beckett and Steven Kelly Herbert, *Banished: The New Social Control in Urban America* (Oxford University Press, 2010); Audrey Macklin and Rainer Bauböck, 'The Return of Banishment: Do the New Denationalisation Policies Weaken Citizenship?', Robert Schuman Centre for Advanced Studies, EUI Discussion Paper 2015/14; *Galvan v. Press*, 347 U.S. 522, 530 (1954) (on deportation as akin to 'banishment or exile').

difficulties in each case. But – and this is the main point: an appropriately outward-focused constitutionalism will at least make it harder to lazily assume any categorical difference.

V. CONSTITUTIONAL MOBILITY: VARIETIES OF EXPULSION AND ESCAPE

Over the course of the twentieth century, liberal constitutionalism has had to come to terms – however haltingly and incompletely – with private spheres previously thought of as akin to a foreign country. Today’s ‘new constitutional question’ requires renewed engagement with another range of zones that are again ‘foreign’ to constitutional orders, this time in a more literal sense.⁸¹ A ‘double-facing’ constitutionalism can do this. But, as the previous Sections have sought to demonstrate, efforts to rethink constitutionalism’s reach go wrong if they start from the nation-state border and simply seek to project constitutionalist ideals and responsibilities outwards. A ‘double-facing’ constitutionalism *does* need to do that, but its aspirations should run much deeper.

A more encompassing, ‘double-facing’, constitutionalism cannot start from the state border, but must scrutinize how boundaries, of any kind, are legally and politically constructed in the first place. It cannot take ‘extraterritoriality’ or ‘transnational contexts’ as given, but has to interrogate how individuals and their claims come to be relegated to constitutional exteriors to begin with. It has to ask how people and places are ‘made foreign’, and whether in doing so, the constitutional order is being true, at its peripheries, to the commitments that make up its core. If constitutional orders are necessarily and often justifiably partial, then a ‘double-facing’ constitutionalism must take this partiality as its starting point. If experiences of expulsion and banishment turn out to show so many similarities across different societal scales – from local zoning measures to national laws revoking citizenship – then a ‘double-facing’ constitutionalism has to at least encourage reflection on whether these phenomena should not also be placed in the same constitutionalist frame.⁸² If transnationally organized spheres of private – corporate – activity are expanding ever more deeply into the interiors of nation states, severely restricting the ability of local polities to assert themselves, then a ‘double-facing’ constitutionalism could aim to check these ‘expansionist tendencies’ and the ‘centrifugal dynamics of subsystems in global society’.⁸³

This, of course, remains all rather abstract. But I do want to suggest that a first challenge for thinking about the outside of constitutional orders has to be to confront the sheer range of forms of constitutional exteriority – of forms of ‘foreignness’ either actively pursued or tolerated by governments or private actors, and variously experienced

⁸¹ Cf. Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012), 1.

⁸² On this topic, see notably Peter J. Spiro, ‘Expatriating Terrorists’ 82 *Fordham Law Review* 2180 (2014); and Leti Volpp, ‘Citizenship Undone’ 75 *Fordham Law Review* 2580 (2007).

⁸³ Teubner, *Constitutional Fragments*, 4.

by a diverse cast of constitutionally marginalized individuals.⁸⁴ Cataloguing ways of ‘rendering foreign’, therefore, has to be useful in itself. And so, the very breadth of the examples given before is partly the point. It may well be that, on further reflection, there are good reasons for treating nation-state borders as special, at least in some circumstances and for some purposes. To some degree, ‘banishing’ registered sex offenders from parks, and ‘banishing’ returning ISIS fighters from their states of origin, really can be very different things. Immigration control with regard to aliens and the regulation of ‘extra-territorial’ government action will always be areas of special concern to any form of outward-facing constitutionalism. But the cases and literature surveyed above offer sufficient indications to suggest that if the aim is to make our constitutional thinking more inclusive, much work remains to be done both abroad *and* at home, both at the level of transnational activity *and* in local settings.

But if a first task for this paper was to expand the potential range for what should become a more encompassing constitutionalism, then what remains to be carried out is the opposite move of finding some narrower starting point to make this project more concrete. This is what this final Section will try to do, by suggesting an approach that focuses, not on finding the – illusory – answer to the question of whether natural or legal persons ‘are’ within or outside the reach of any particular constitutional domain, but rather engages directly with these persons’ *mobility* across constituted boundaries. The relevant parameters for such an approach, as developed over the preceding Sections, are as follows. The aim is to develop a vocabulary and conceptual tools for an outward-facing constitutionalism (1) that can operate not just at state borders but at any relevant boundary or ‘edge’ where individuals risk expulsion or collectives risk undermining through escape; (2) that looks the edges of constitutional domains that are partial, both in the sense that they are incomplete and in the sense that they – to an extent justifiably – attach value to membership and other forms of counting as insider; (3) that is able to interrogate in particular how these domains have come to be constituted, and with what sorts of exclusionary or centrifugal effects; (4) and that is able to take in not just individuals but also corporate actors and the mobility of capital. Finally, in order to avoid again hypostatizing these boundaries simply via a different route, the focus of this approach should be, not on the ‘fact’ of moving from A to B, but on the combination of governmental measures – aimed at forcing, allowing, or restricting mobility – and on individual experiences of mobility – in the form of expulsion, as escape, or through the denial of freedom to move.⁸⁵ This combined focus on governmental strategy (to keep out, to keep in place, to allow to leave) and individual experience (being kept at bay, being kept in place, being allowed to leave) should allow us to distinguish ‘the mechanisms’ through which the various forms of a status of ‘in’ or ‘out’ are shaped, from that status itself.⁸⁶

⁸⁴ These individual experiences deserve much fuller consideration, in particular by way of ethnographic fieldwork, than is possible here.

⁸⁵ As Bibler, Coutin, Maurer & Yngvesson, ‘In the Mirror,’ demonstrate, in addition to facilitating or hindering movement, state laws can make movement appear as non-movement.

⁸⁶ Saskia Sassen, ‘The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics’ 2 *Globalizations* (2005) 79, 81, cited in: Kanstroom, ‘Alien Litigation as Polity-Participation’ at 407.

Engaging with governmental measures and individual experiences centered on mobility could bring a number of benefits. It could help create an initial sense of what types of cases may have to be thought of together, as part of the same frame of reference, in the development of an outward-facing constitutionalism. It could also help introduce a much-needed historical awareness. One thing that is especially striking about some of the governmental strategies to be discussed in the provisional typology below, is how certain types of measures to control mobility were, at one time, absolutely dominant, often to the point of normality, but then disappeared astonishingly quickly. This becomes very clear if we look at how some of the relevant vocabulary has disappeared from practice; think of terms such as ‘locomotion’, ‘ingress’ and ‘egress’, ‘ouster’, and ‘banishment’. Such a historical overview, however, can also reveal how some of these measures, thought to have been banned for good, were sometimes swiftly reintroduced, using different legal techniques, but with very similar impact on individual experiences.⁸⁷ Finally, elaborating a grid of measures and experiences of mobility forces us to face up squarely to the manifold and stark ways in which the law treats natural persons and corporations differently. This was not always the case. An outward-facing constitutionalism concerned with the mobility of all sorts of actors and in all sorts of forms can help address this gulf, by allowing us to imagine and recover an ‘immigration law for corporations’ or ‘frictionless movement for people’.

Here, then, is what a provisional grid of instances of constitutional mobility could look like.

A. NATURAL PERSONS – ACCESS

The paradigm cases of governmental measures limiting access for natural persons, of course, are immigration and citizenship laws. *Within* contemporary liberal polities, on the other hand, it is much more difficult to think of legal limits on individual movement. Such limits do exist, but it is also certainly true that they were much more prevalent in the past. Prime examples from historical and current practice include local zoning regulations and private limitations on housing – so called ‘restrictive covenants’ –, and a wide range of local government ordinances that could broadly be called ‘anti-vagrancy’ measures.⁸⁸

If we think of these together, as all concerned with inward individual mobility, the following points emerge. First, as discussed in earlier Section IV.A, the radical distinction between internal migrants and foreign immigrants is a historically contingent phenomenon, and a creation in particular of the era since the Great Depression. Second, these nominally very different types of restraints show a revealing symmetry in their relationship to constitutional sources. Critics have commented on a profound ‘*incoherence*

⁸⁷ See, e.g., Beckett and Herbert, *Banished* (detailing the hybrid public-private law character of local regulations in Seattle); Harry Simon, ‘Towns without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities’ 66 *Tulsa Law Review* (1991-1992) 631, 634 (US Supreme Court decisions ‘changed the form, but not the substance, of official efforts to control the homeless’).

⁸⁸ On the prominence – until very recently – of this latter category, see Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* (Oxford: Oxford University Press, 2016).

in the relationship of immigration law to the Constitution'.⁸⁹ In the absence of any foundations for a federal power to control immigration, this power has been found to simply 'inhere' in the scheme of the US Constitution – an approach that has resulted in extensive authority and minimal judicial oversight. At the same time though, even within the domestic sphere, the US Supreme Court has never been able to agree on a clear and coherent foundation for a domestic 'right of free movement'. Instead, such a 'right of locomotion' was found to be 'a right so elementary [that it] was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created'.⁹⁰ And in this area, as discussed above, many previously prevalent measures have since been held to fall foul of constitutional constraints. One closely related striking further parallel is that when courts have intervened, in either area, they have often done so on more procedural 'rule of law' grounds, such as the excessive 'vagueness' of the relevant legislation, rather than on any substantive justification specific to human mobility and its limitation by governments.⁹¹

In both areas, then – of the 'plenary power' over immigration, and the 'inherent' right of locomotion – the best argument courts have been able to muster is a kind of purported obviousness: of course countries must be able to control their borders; of course, domestically, individual mobility should be free.⁹² The divergence between the two regimes of domestic and cross-border movement really came about only once such purportedly obvious arguments – such as the designation of paupers' as a 'moral pestilence', and the conception of barriers to their entry as part of a 'sacred right of self-defence' – were held to no longer apply in the domestic context.⁹³ The upshot of these symmetries and divergences, however, remains troubling. Not only is governmental power over immigration radically under-determined by constitutional standards, but also internal mobility of citizens, residents and others, is itself not as securely protected constitutionally as it should be. And so, local governmental strategies to keep people out that once seemed definitively beyond the constitutional pale, are able to resurface again, in different formal guises, but with the same harsh effects.⁹⁴ In conclusion, and to reiterate once more: the argument of this Subsection is not that domestic migration and immigration are entirely equivalent, from a constitutionalist standpoint, and that citizens and foreigners ought to be treated the same way in all cases. Whether and when that is so will have to depend on the constitutional commitments each polity is willing to make. The argument is, however, that the current, unthinking, radical bifurcation between

⁸⁹ Jennifer Gordon, 'Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution' 93 *Indiana Law Journal* (2018) 653, 656 (emphasis added).

⁹⁰ *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969), quoting *United States v. Guest*, 383 U.S. 745, 758 (1966). See further Simon, 'Towns without Pity'.

⁹¹ See, e.g., Gordon, 'Immigration as Commerce', 655 (on the role of 'vagueness' in immigration jurisprudence); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) ('vagueness' and vagrancy laws). For extensive discussion of this line of attack on vagrancy regulations, see Goluboff, *Vagrant Nation*.

⁹² See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (on the constitutional right to travel as 'a virtually unconditional personal right, guaranteed by the Constitution to us all').

⁹³ *Edwards v. California*, 314 U.S. 160 (1941) (overruling *New York v. Miln*, 36 U.S. 102 (1837)). Parallel tensions in European Law – in part related to EU Citizenship – have to remain outside the scope of this chapter.

⁹⁴ See, e.g., Paul Ades, 'The Unconstitutionality of 'Antihomeless' Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel' 77 *California Law Review* (1989) 595.

domestic migrants and immigrants ‘from abroad’ makes it that much more difficult to organize systematic reflection on whether those commitments are being lived up to, in both types of cases.

B. NATURAL PERSONS – EXIT

A long tradition in republican thought has seen the right of ‘exit’ – previously constrained by sovereign prerogative – as central to meaningful conceptions of freedom. Today, in liberal democracies, there is little in public law that directly limits the possibilities for individuals to leave. Constraints do exist, but they commonly take less direct forms, for example through the domestic criminalization of foreign conduct, the refusal to recognize statuses obtained abroad, or the denial of public benefits to citizens residing out-of-state.⁹⁵ One striking example from recent history concerns efforts by countries to extraterritorially regulate access to abortion abroad. In one well-known episode, the Irish courts granted an injunction designed to prevent a pregnant Irish teenager from traveling to the United Kingdom for an abortion. Around that same time, in the early 1990s, West-German customs officials engaged in ‘compulsory gynecological examinations’ at the German-Dutch border, in order to seek out and be able to prosecute German women whom had obtained abortions in The Netherlands.⁹⁶

A few decades earlier, we find striking examples of how law can also aid individuals’ attempts at escape, in the context of the American civil rights movement. For lawyers representing civil rights activists in southern US states of the late 1950s and early 1960s, a key challenge was ‘freeing their clients from the shackles of the state system’.⁹⁷ The US Supreme Court responded to state court hostility with a series of seminal jurisdictional rulings that ‘reshaped the boundaries between federal and state courts’.⁹⁸ These allowed litigants to seek relief in lower federal courts and thus, effectively, to escape the southern states’ jurisdictional reach. If we are willing to consider these cases as relevant instances of constitutional mobility – under the heading of ‘exit’ or ‘escape’ - as I want to suggest we should, then three facets of these jurisdictional innovations of the Warren Court-era are especially interesting. First, these cases illustrate really how broad the range of legal instruments with potential effects on meaningful mobility can be. ‘Jurisdiction’ is a mostly helpful general heading, but the relevant techniques ranged widely, and included doctrines of ‘removal’, ‘abstention’, ‘exhaustion’, and *habeas corpus*, to name just a few.⁹⁹ Second, it is important to note that most of the relevant cases in fact concerned denials of access to segregated public facilities. And of course, ‘escape’ from the reach of southern administrations was achieved only through ‘entry’ into a different constitutional

⁹⁵ See, e.g., Zick, ‘Constitutional Displacement’, 536; Lea Brilmayer, ‘Interstate Preemption: The Right to Travel, The Right to Life, and the Right to Die’ 91 *Michigan Law Review* (1993) 873.

⁹⁶ See, e.g., Seth Kreimer, ‘But Whoever Treasures Freedom...: The Right to Travel and Extraterritorial Abortions’ 91 *Michigan Law Review* (1993) 907; Gerald Neuman, ‘Conflict of Constitutions—No Thanks: A Response to Professors Brilmayer and Kreimer’ 91 *Michigan Law Review* (1993) 939, 942.

⁹⁷ Robert J. Glennon, ‘The Jurisdictional Legacy of the Civil Rights Movement’ 61 *Tennessee Law Review* (1994) 869.

⁹⁸ *Ibid.*, 870.

⁹⁹ *Ibid.*

order – that of the federal constitution. This means that these cases are also illustrative of how closely intertwined strategies and experiences of expulsion and escape may be in practice.¹⁰⁰ The third point is this: when it comes to civil rights claims brought by individuals, many of these jurisdictional innovations were rolled back from the mid-1970s onwards.¹⁰¹ This means that, for individuals in the US, the Warren Court era in many ways marks the high point of their freedom to ‘opt out’ of local public regulation. A similar rollback, however, never took place for corporate actors. Instead, the freedom for legal persons to escape, opt out, achieve ‘lift-off’ from the constraints of local public law has never stopped expanding.¹⁰²

C. CORPORATIONS - EXIT

Picking up on this last point: it is indeed today extremely easy for corporate actors to escape the reach of local public regulation. This is true, for example, with regard to the laws determining their internal organization (by way of the transfer of their corporate ‘seat’); with regard to corporate liability (through the use of local subsidiaries); or in the field of taxation (by way of transfer-pricing techniques, for example). What is especially striking, though, is how the contrasting idea of limiting ‘exit’ possibilities for corporations has become almost unthinkable. Efforts to do so are typically short-lived, and swiftly denounced as ‘parochial’ and unworkable. This was the fate, in particular, of efforts by local governments in the US in the 1980s to stem the tide of corporations moving out-of-state and off-shore. During that time, many state governments passed so-called ‘plant closing statutes’ which would allow local authorities to condemn – that is: expropriate by way of eminent domain – businesses on the verge of relocation.¹⁰³ Critics quickly labeled these statutes as ‘the embodiment of economic parochialism’.¹⁰⁴ They were difficult to apply effectively in practice and were soon thought to be in violation of the federal constitutional imperative of unrestrained inter-state commerce.¹⁰⁵

Of great practical relevance to the scope of corporate ‘lift-off’ today, is the concept of party autonomy in private international law. Party autonomy is what allows individuals and corporations to opt-out of local legal systems, by choosing a foreign court or a foreign applicable law, or by electing to have their disputes settled in arbitration. Party autonomy has become the predominant feature of both jurisdiction law and choice of

¹⁰⁰ It is important to reemphasize that what matters is not the ‘fact’ of mobility from an unambiguous ‘here’ to an equally unambiguous ‘there’, but, in this case, the individual experience of being able to leave one legally constituted realm for another (the ‘private’ lunch counter, for example, for the ‘public’ sphere of constitutional rights; oppression allowed or mandated under state law, for constitutional relief under federal law).

¹⁰¹ See, e.g., Glennon, ‘The Jurisdictional Legacy of the Civil Rights Movement’ 871.

¹⁰² Jacco Bomhoff, ‘Back to The Bremen (1972): Forum Selection and Worldmaking’ in Watt, Bíziková et al (eds.) *Global Private International Law: Adjudication without Frontiers* (Elgar, 2019) 16.

¹⁰³ Edward P. Lazarus, ‘The Commerce Clause Limitation on the Power to Condemn a Relocating Business’ 96 *Yale Law Journal* (1987) 1343; Michael H. Abbey, ‘State Plant Closing Legislation: A Modern Justification for the Use of the Dormant Commerce Clause As a Bulwark of National Free Trade’ 75 *Virginia Law Review* (1989) 845.

¹⁰⁴ Abbey, ‘State Plant Closing Legislation,’ 879.

¹⁰⁵ Lazarus, ‘The Commerce Clause Limitation on the Power to Condemn a Relocating Business’; Abbey, ‘State Plant Closing Legislation.’

law in the post World War II era.¹⁰⁶ While it is true that party autonomy can benefit both individuals and corporations, it is corporate actors in particular that have been able to use this ‘escape device’ to evade local regulations on a massive scale. The phenomenon of ‘hyper-mobility’, mentioned earlier, is largely a creation of this form of autonomy from local law. And yet, as Ralf Michaels has noted, ‘[g]iven the radical character of party autonomy, it is surprising how little theoretical discussion there is on its theoretical foundations’.¹⁰⁷ As any other foundational discussion on the balance between individual freedom and public authority, such reflection, it is submitted, will require some grounding in constitutional theory and experience. The same corporate autonomy, for example, that allows multinational corporations today to operate around the world while remaining out of the reach of most local laws, was invoked by the NAACP – technically a New York corporation – as a shield to protect its members and activities in southern states, during the Civil Rights era discussed above.¹⁰⁸ The idea of constitutional orders as both partial and outward-facing, with a stake in, and some legitimate say over, the determination of their own reach, may offer a useful way forward.

D. CORPORATIONS – ACCESS

State-imposed obstacles to access for foreign corporations are as rare today as efforts to limit immigration of individuals are commonplace. Many countries rather go out of their way to attract foreign business. Examples of such barriers can be found, however. In Europe, for example, a series of decisions by the Court of Justice of the European Union over the past two decades has enforced limits on the ability of EU Member States to impose local company law standards on foreign corporations as a condition for their local recognition.¹⁰⁹ For more direct and more dramatic examples of state regulations seeking to impose conditions on the ‘privilege’ of doing business for out-of-state corporations, we do have to go back quite a while, however: to the United States of the late 19th- and early 20th century. At the time, many US states, in particular in the Mid-West, had extensive lists of conditions that they imposed only on out-of-state corporations, for the privilege of ‘doing business’ within the forum. As a typical decision of an Alabama court of the era put it, conditions such as the obligation for foreign corporations to appoint an in-state resident as an agent for service of court documents, were ‘just as much a police regulation for the protection of the property and interests of its citizens as a law forbidding vagrancy among its inhabitants’.¹¹⁰ Many of these limits

¹⁰⁶ See, e.g., Horatia Muir Watt, ‘Party Autonomy’ in *International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 3 *European Review of Contract Law* 250 (2010); Peter Nygh, *Autonomy in International Contracts* (Oxford: Oxford University Press, 1999).

¹⁰⁷ Ralf Michaels, ‘Party Autonomy in Private International Law – A New Paradigm Without a Solid Foundation?’ 15 *Japanese Yearbook of Private International Law* (2013) 282, 283. See, more recently, also Alex Mills, *Party Autonomy in Private International Law* (Cambridge: Cambridge University Press, 2018).

¹⁰⁸ *NAACP v. Patterson*, 357 U.S. 449 (1958).

¹⁰⁹ See, principally, the now classic decisions in Case C-212/97 (*Centros*); Case C-208/00 (*Überseering*); and Case C-167/01 (*Inspire Art*).

¹¹⁰ *American Union Telegraph Company v. Western Union Telegraph Company*, 67 Ala. 26 (1880), cited in Gerard C. Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge, Mass: Harvard University press, 1918), at 125.

were gradually struck down by the US Supreme Court, under a newly developed doctrine of ‘unconstitutional conditions’.¹¹¹ In fact, virtually all of the early cases on what Robert Lee Hale came to call ‘the conditioning power of the state’ were such out-of-state corporations cases; a fact that reveals the intimate connection between the character of constitutional limits on governmental power more generally and the theme of (corporate) mobility more specifically. These state efforts to ‘oust’ corporations have been largely forgotten. But they may well be worth revisiting. For one, as Naomi Lamoreaux and William Novak note in their recent *‘Corporations and American Democracy’*, they belie the image of the Gilded Age as a uniformly *‘laissez-faire’* era.¹¹² Still more importantly, these instances of local assertiveness could serve as inspiration for an outward-facing constitutionalism that is able to mediate between a boundless liberalization, on the one hand, and an absolutely bounded parochialism, on the other.

VI. CONCLUSION

The history of the interplay of constitutionalism and mobility seems littered with practices that are today either virtually forgotten, or so widespread to seem almost completely natural. ‘Corporate ouster’ and ‘vagrancy laws’ are examples of the former; ‘party autonomy’ and immigration restrictions, of the latter. Our constitutional jurisprudence seems caught in stark binaries, such as between a power over immigration that is supposedly ‘plenary’, and a domestic right of free movement that is purportedly ‘obvious’. Absent from these two strands of purported obviousness is a more nuanced legal and constitutional vocabulary in which to discuss old and new questions of what was long known as the right of ‘ingress and egress’. The lack of such a constitutional language is an important part of why it is so difficult to talk about reasserting local public autonomy vis-à-vis transnational private autonomy without facing immediate objections of ‘local selfishness and protectionism’;¹¹³ or, conversely, to discuss limits to local sovereignty from a position other than that of a ‘citizen of nowhere’.

This chapter has suggested that if liberal constitutional thought is to address these challenges, it will have to be through a more robust development of its outward-facing dimension. This means investing in a form of constitutionalism that demands and scrutinizes commitment to greater inclusivity, while remaining conscious of the partial character of whatever local domain it institutes. Much about such a brand of constitutionalism remains to be elaborated. But the argument offered in this paper does at least suggest some pitfalls to be avoided. An outward-facing constitutionalism should not be preoccupied with what ‘is’, or is not, inside any particular jurisdiction or polity. It should not limit itself to the level of national borders. And it should not be concerned only with the rights of individuals. Instead, I have suggested, an outward-facing

¹¹¹ See in particular Robert L. Hale, ‘Unconstitutional Conditions and Constitutional Rights’ 35 *Columbia Law Review* 321 (1935).

¹¹² Naomi R. Lamoreaux and William J. Novak (eds.), *Corporations and American Democracy* (Cambridge, Mass.: Harvard University Press, 2017), 17-19.

¹¹³ Frug, ‘The City As a Legal Concept’, 1067.

constitutionalism should look at the widest possible range of forms of mobility and enforced immobility. It should scrutinize the constitution and effects of any kind of legally meaningful boundary to such mobility. And it should encompass both natural persons and corporate actors.

Questions of individual and corporate mobility – relating to experiences of being forced out, allowed in, permitted to exit, or of simply being ‘stuck’ – are found time and again at the heart of pressing contemporary issues. And constitutional thought simply has not kept up. Instead, the legal treatment of mobility has been fragmented across a wide range of specialized fields of regulation and scholarship, in which constitutionalist concerns rarely play any central role. An outward-facing constitutionalism may work to bring these strands together, and, in so doing, offer a home for reflection on the profound contemporary challenge of how to ‘broaden the benefits of openness while enhancing democratic accountability’.¹¹⁴

¹¹⁴ Mark Carney, ‘The Global Outlook’, Speech of 12 February 2019, available at <https://www.bankofengland.co.uk/-/media/boe/files/speech/2019/the-global-outlook-speech-by-mark-carney>.