1

Introduction

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This collection explores some of the many ways in which constitutional orders engage with the outside world – the world of other states, of foreign norms and of individuals who are in some sense 'strangers to the constitution'.[1] These various forms of foreignness we refer to as 'constitutional and legal exteriority'. The conceptual and normative understanding of constitutional orders as actively concerned with, and in part formed by, their exteriors, we call the 'double-facing constitution'.

Thinking about the double-facing constitution means thinking about constitutional orders in terms of both boundaries and boundary-crossings. It implies an understanding of the act of constitution 'as not an exclusionary but a liminal act'.[2] As one of us previously described this idea, the double-facing constitution envisages constitutional orders 'as having both an inner and an outer membrane. They face outwards as well as inwards and these two faces are related'.[3] These relations, this volume suggests, extend in two directions. On the one hand, 'the act of constituting the internal space of the state also necessarily affects the space outside of it as that space is constituted in relation to other constituted jurisdictions'.[4] On the other hand, 'how a constitutional order engages with the world outside it feeds back into how it constructs itself internally'.[5] At its broadest, as Karen Knop observes in this volume, the double-facing constitution calls attention to the many ways in which 'the existence of, dependence on and regard for the Other figure in the Constitution'.[6]

[1] Cf. Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (Princeton, NJ: Princeton University Press, 1996).
[2] David Dyzenhaus, 'The Janus-Faced Constitution', Chapter 2 of this volume.
[3] Thomas Poole, 'The Constitution and Foreign Affairs' (2016) 69(1) *Current Legal Problems* 143, 148.
[4] Dyzenhaus, 'The Janus-Faced Constitution', Chapter 2 of this volume.
[5] Thomas Poole, 'The Idea of the Federative', Chapter 3 of this volume.
[6] Karen Knop, 'The Spectre of Comity', Chapter 7 of this volume.

The relationship between domestic law and the outside world is not, of course, a new topic. The status of international law in domestic legal systems is a classic concern for legal theory and in public international law scholarship, while the role of domestic law in cross-border situations is the central preoccupation of private international law, or the conflict of laws. The categories of 'domestic' and 'international' have been in flux since at least the time of the League of Nations, and have since been joined by the 'transnational' and, more recently, the 'global'. The roles of territory and membership in law, and the role of law in the constitution of territory and membership, have been important topics in legal scholarship for many years, and in particular from the early 1990s onwards. The early 2000s saw a sustained debate in the United States over the legitimacy of judicial invocations of foreign norms – a dispute which drew attention to what one leading scholar labelled the 'multiple ports of entry' of constitutional orders – while legal scholars in Europe during the same period began to discuss related issues under the heading of 'constitutional pluralism'.[7] Judges and jurists have converged over the past decade in particular on the broad heading of 'foreign relations law' to engage with questions surrounding 'the legality of foreign affairs decisions by the executive' or 'the protection of the individual affected by the foreign exercise of public power'.[8]

The main strands of what we call 'double-facing constitutional law' are therefore familiar, even if they remain understudied. They concern principally, at a minimum, 'the relationship between national law and public international law; the relationship between states that gives rise to private international law; and the reach of the public law norms of a national order beyond the territorial limits of the state in the field of "foreign relations law"'.[9] The chapters in this collection draw on these various strands, while also suggesting new emphases and drawing new connections. In this Introduction, we explore some of the common themes and novel approaches to be found across this volume, before presenting the individual contributions in order.

[7] Judith Resnik, 'Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Points of Entry' (2006) 115 *Yale Law Journal* 1564; Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65(3) *Modern Law Review* 317.

[8] Campbell McLachlan, *Foreign Relations Law* (Cambridge: Cambridge University Press, 2014). See also, most recently, Eyal Benvenisti and Mila Versteeg, 'The External Dimensions of Constitutions' (2018) 57(3) *Virginia Journal of International Law* 515; and Daniel S. Margolies, Umut Özsu, Maïa Pal, and Ntina Tzouvala (eds.), *The Extraterritoriality of Law: History, Theory, Politics* (Abingdon: Routledge, 2019).

[9] Dyzenhaus, 'The Janus-Faced Constitution', Chapter 2 of this volume.

Double-facing constitutionalism, firstly, suggests an understanding of the constitution as 'a membrane through which norms may and sometimes must travel'.[10] This 'permeable' conception of constitutional boundaries sustains attempts to move beyond a preoccupation with the classic questions listed above, in that it draws attention squarely, first, to the modalities and direction of this 'travel' and, second, to the character of the thresholds to be crossed. As to the former theme, the idea of the double-facing constitution calls for special consideration of the fact that 'it is not only the international that is piercing through the outer layers of the state, but it is also the inside of the state which is pushing its way outwards'.[11] The act of constitution, as David Dyzenhaus writes in this collection, 'is therefore Janus-faced – it looks both inwards and outwards'. This outward-facing dynamic is particularly central, for example, to Geneviève Cartier's exploration in this volume of the role of cities in foreign affairs. The latter theme – the character of the relevant thresholds – also plays a pivotal role in a number of chapters. Here too, the Janus-image is important, this time in his guise as the god of doorways and passages. In this vein, Karen Knop, for instance, examines 'a curious and little noticed threshold' between the domestic and the international in the form of 'the Supreme Court of Canada's recent characterization of "comity" as a principle of constitutional interpretation'. Audrey Macklin and Jacco Bomhoff, in their contributions, discuss the constructed character and changing nature of borders and other constitutionally salient jurisdictional and spatial boundaries. In this area, any binary oppositions suggested by the image of Janus or the 'double-facing' metaphor must themselves be kept under close review. 'Liminality', as Macklin wryly observes, 'is not so liminal anymore. Bordering is happening everywhere', whether 'a hundred miles inside the territorial United States' or 'at any visa office anywhere in the world'.[12] Notions of 'inside' and 'outside', as Bomhoff also notes, cannot be taken for granted but will instead have to be made themselves objects of constitutionalist concern.

The idea of the double-facing constitution aims to go beyond more familiar notions of extraterritoriality and foreign relations in a second way: by including within its scope a broad range of questions about how

[10] Dyzenhaus, 'The Janus-Faced Constitution', Chapter 2 of this volume.
[11] Helmut Philipp Aust, 'Shining Cities on the Hill? The Global City, Climate Change, and International Law' (2015) 26(1) *European Journal of International Law* 255, 260, cited in Geneviève Cartier, 'Double-Facing Administrative Law: State Prerogatives, Cities and Foreign Affairs', Chapter 11 of this volume.
[12] Audrey Macklin, 'The Inside-Out Constitution', Chapter 9 of this volume.

'the state's public law [governs] its interactions with non-citizens' – what Evan Fox-Decent calls in this volume 'the state's cosmopolitan law'. A large segment of these interactions is covered by the fields of immigration and citizenship law. One striking observation provoked by the contributions to this volume, however, is the extent to which the fields of immigration law and foreign relations law (and private international law, for that matter) have developed in isolation.[13] But questions of citizenship and alienage, of entry and exclusion, clearly have to be central to any conception of the double-facing constitution. Asha Kaushal's chapter addresses this issue of '*who* the constitution is facing' head on. 'When the constitution faces inward', she asks, 'who does it hold in its gaze? When the constitution turns outward, to whom is its face directed? The answers to these questions are found in the interstices of immigration law and constitutional law'.[14] After all, as Kaushal notes, 'both the membership and identity of the constitution's external and internal audiences are partly constituted by immigration law'. These 'interstices of immigration law and constitutional law' are fraught with dangers to constitutional rights protection, as both Kaushal's and Macklin's chapters make clear.

In many of the contributions to this volume, the 'double-facing' constitution figures as common shorthand for attention to a two-way traffic of constitutional normativity – from 'the local' as it faces outwards and from the constitution's exteriors as they seep into the polity. 'Double-facing' draws attention to the constructed character of boundaries and the close connections between what is deemed to be 'internal' and 'external' to the constitution – in contrast to a narrower, unquestioning focus on 'extraterritoriality' and 'foreign' affairs. It emphasises that there is 'no obvious or natural separation between one constitutional domain and the other',[15] that exclusionary dynamics may well operate deep inside the territories of nation states, but also that many familiar legal boundaries may well be 'more porous than is usually assumed'.[16] And it motivates the search for linkages between different fields that often lead

[13] See, for a similar integrated approach, the Symposium Issue on 'The External Dimensions of Constitutions' curated by Eyal Benvenisti and Mila Versteeg, in (2018) 57(3) *Virginia Journal of International Law*.

[14] Asha Kaushal, 'The Constitution in the Shadow of the Immigration State', Chapter 10 of this volume.

[15] Poole, 'The Idea of the Federative', Chapter 3 of this volume.

[16] Cartier, 'Double-Facing Administrative Law: State Prerogatives, Cities and Foreign Affairs', Chapter 11 of this volume.

separate lives – foreign relations law and immigration law; constitutional law and legal theory; public law and private law.

In the most general terms, as Karen Knop explains, 'exploration of the double-facing constitution might call for a certain amount of lateral thinking and methodological experimentation if it is to include a variety of thresholds – back doors, emergency exits, false doors, hidden passageways'.[17] Such experimentation is evident throughout the chapters that follow, particularly when it comes to questions of terminology and conceptual vocabulary. Bringing together immigration law and foreign relations law, for example, requires linking the language of 'the border' to that of 'jurisdiction', by foregrounding both the juridical character of the former and the materiality of the latter. To discuss Carl Schmitt alongside the jurisprudence of private international law invites reflection on how comity might relate to enmity and on the striking diversity of ways in which law distinguishes between insiders and outsiders. The invisibility of the local – cities – on the international plane is placed alongside the invisibility of the foreign – immigrants – in the sphere of domestic constitutional law. The question of who decides on the individuals 'we' are willing to let in is juxtaposed with the question of who determines the countries with which 'we' will cooperate – as well as, for both cases, the further question of how these decisions reflect back on any original 'us'. In a number of contributions, lost vocabulary or imported terms from seemingly very different contexts are invoked in efforts to capture the distinct conceptual nature and normative character of double-facing constitutionalism. In this spirit, Evan Fox-Decent turns to the idea of 'fiduciary' duties (to convey the legitimacy threshold for state action vis-à-vis citizens and outsiders alike), and Thomas Poole revisits the notion of 'the federative' (which Locke, drawing on Cicero, used to describe the state's foreign relations power).

In many of the contributions collected here, grappling with the double-facing qualities of constitutional normativity provokes reflection on foundational problems in jurisprudence and constitutional theory, some of which appear especially urgent today. Alexander Somek uses the work of Jean-Jacques Rousseau to rethink the connections between patriotism and cosmopolitanism, and Theodore Christov revisits Thomas Hobbes's conception of the state. David Dyzenhaus returns to the classic question of what constitutes a legal system in the work of H. L. A. Hart and Hans Kelsen. Helmut Aust, finally, connects theoretical salience to real-world

[17] Knop, 'The Spectre of Comity', Chapter 7 of this volume.

urgency in a particularly direct way, by framing his chapter as a response to the question of whether, and if so how, international cooperation can be made compatible with sovereignty and democracy.

That last, overarching, question points to some of the most pressing and difficult problems in contemporary scholarship and politics. The second decade of the twenty-first century has come to resemble an extended backlash against previously ascendant liberalising and cosmopolitan trends. Current scholarship, across a range of disciplines, is preoccupied both with the origins and character of contemporary 'globalism', *and* with the character and resurgent or continued appeal of localism, nationalism and nativism.[18] One assumption common to the chapters in this volume is that, as well as being the concern of historians, political scientists and lawyers more generally, these questions are also of specifically *constitutionalist* concern. Modern constitutionalism has to contemplate both dreams of 'taking back control' and reveries of a 'frictionless' world. Whatever its specific content, it must navigate between excesses of narrow parochialism and unmoored cosmopolitanism, finding a place for borders and jurisdictional boundaries as well as for permeability and transcendence. For the elaboration of such visions of constitutional ordering, we offer as a starting point the idea of 'double-facing' constitutionalism.

The contributors to this volume address the double-facing constitution from a range of different angles and in different registers. Chapters are divided into the following parts: (I) 'Theoretical Foundations', (II) 'Border Crossings: Comity and Mobility', and (III) 'The Foreign in Foreign Relations Law'.

I Theoretical Foundations

The volume opens with David Dyzenhaus's attempt, in Chapter 2, 'The Janus-Faced Constitution', to develop the theoretical basis for a 'permeable' conception of the constitution. This conception is developed by way of what

[18] See, e.g., Stephen Tierney (ed.), *Nationalism and Globalisation* (Oxford: Hart Publishing, 2015); Or Rosenboim, *The Emergence of Globalism: Visions of World Order in Britain and The United States, 1939–1950* (Princeton, NJ: Princeton University Press, 2017); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018); Jean Comaroff and John L. Comaroff, *Theory from the South: Or, How Euro-America Is Evolving toward Africa* (Abingdon: Routledge, 2016); Glenda Sluga and Patricia Clavin, *Internationalisms: A Twentieth-Century History* (Cambridge: Cambridge University Press, 2017).

Dyzenhaus calls 'a rather deep dive into an arcane debate between the two great legal positivists of the last century, Hans Kelsen and H. L. A. Hart'. The purpose of that detailed analysis is to contrast the respective 'functional equivalents they propose to Hobbes's claim that a social contract explains the unity of political and legal order'. These alternatives are Hart's rule of recognition and Kelsen's basic norm. Favouring Kelsen's dynamic, monist conception of the relation between international and domestic law, and his commitment to the 'gaplessness' of legal order, Dyzenhaus ultimately turns to exploring the promise of this conception for an understanding of, both, the outward projection of public law norms of a domestic legal order beyond its borders and the reception, within that order, of norms originating elsewhere.

In Chapter 3, 'The Idea of the Federative', Thomas Poole makes a case for an account of the double-facing constitution which puts the idea of the federative at its heart. Locke used that term to designate the foreign relations power of the commonwealth. The argument builds on Locke's intuition, sourced from Cicero, that this power is concerned centrally with the capacity to effect compacts (alliances) with other political associations. One advantage of the perspective that ensues is that this compact-making power is demonstrably a juridical idea. It is an idea, moreover, that is open to the possibility of reciprocity and, by extension, the development of truly juridical structures of mutual recognition. In contrast to rival theories which have war or enmity as the focus of foreign relations, the federative theory relies on the generative properties of compact making and serves as such to de-centre war from this central position within the external constitution. The federative offers the prospect of escaping the paradox of the sovereign state, based on law and peace internally, but geared to prerogative and war externally, and unites the object of the internal and external aspects of the constitution – peace – and the means of achieving that object – law.

As the multitude of sovereign states emerged from a former world of empires, a common assumption has come to dominate the theory of statehood: that the spheres of the domestic and the foreign are fundamentally distinct from each other. The sovereign state has matured as Janus-faced, with one face looking inward, as a sovereign over its subjects, while the other face looks outward, as a sovereign among other sovereigns. Hobbes – and the 'Hobbesian tradition' he seems to have generated – is generally considered the originator of the dichotomy between home and abroad, the inside and the outside. Theodore Christov's Chapter 4, 'Hobbes's Janus-Faced Sovereign', traces

Hobbes's own thought on the nature of the sovereign state within the international sphere and disassociates him from such a common assumption. It argues instead that the domestic constitution of the Hobbesian sovereign is the precondition for the emergence of an international legal framework based in the consent of voluntary states and informed by their practice of the law of nations. The possibility for international legal compliance can be ensured only when states configure their domestic constitutions not as independently sovereign but as interdependently sovereign.

Evan Fox-Decent's Chapter 5, 'Jurisprudential Reflections on Cosmopolitan Law', is a defence of the basic claim that 'the state's public law governing its interactions with non-citizens – the state's cosmopolitan law – must have a certain outward orientation and representative character if it is to be law, properly so-called'. Drawing on earlier work with his frequent co-author Evan Criddle, Fox-Decent invokes the conceptual vocabulary of the 'fiduciary criterion of legitimacy' to denote the stipulation that state action ought always to be intelligible as 'action made on behalf of or in the name of the individual subject to it' if it is to be legitimate, regardless of whether this individual is a citizen or an outsider in some sense. Fox-Decent uses a discussion of Joseph Raz's notion of authority, and of the 'riveting and intractable' problem of 'the non-jurisdictional/jurisdictional distinction to distinguish de facto from legitimate authority', and on this basis constructs his case for the 'fiduciary criterion'. When it comes to the outer boundaries of the constitutional order, this criterion functions as a 'cosmopolitan threshold – not a barrier – that welcomes the entry of peaceful outsiders into sovereign states while empowering states to limit migration when conditions warrant'.

In Chapter 6, 'From Republican Self-Love to Cosmopolitan *Amour-Propre:* Europe's New Constitutional Experience', Alexander Somek uses Rousseau's famous notion of '*amour-propre*' – 'that form of self-infatuation which is mediated by shining in the eyes of others' – as a key towards mediating between patriotism and cosmopolitanism. Somek's defence of what he calls 'cosmopolitan *amour-propre*' against the prominent contemporary alternative of 'constitutional patriotism' leads him to a discussion of the Janus-faced dimensions of international peer review mechanisms for human rights compliance and, similar to Fox-Decent's argument for a 'fiduciary criterion' of legitimacy, to an emphasis on the importance of those outsiders 'legitimately excluded from the constituency'.

II Border Crossings: Comity and Mobility

In Chapter 7, 'The Spectre of Comity', Karen Knop takes up the question '[h]ow do we study doorways and the constitution?' and offers an answer in a deliberately 'explanatory and experimental vein'. Her contribution focuses on the curious introduction, by the Supreme Court of Canada, of 'comity' as a principle of interpretation for the Canadian Charter of Rights and Freedoms. Curious, because, as Knop writes, while the 'constitutionalization of comity is familiar', notably in the area of private international law, 'the "comitization" of the Constitution is not'. Knop analyses four leading decisions by the Supreme Court of Canada, each of which figured 'something(s) called "comity"' as 'a way in which the existence of, dependence on and regard for the Other figure in the Constitution'. Using these four cases, Knop is able to elaborate a history of 'cosmopolitanism introduced into the Constitution by comity', which both reaches further back and is richer – in including also private legal relations – than familiar accounts of the post–Second World War emergence of international human rights regimes in public international law.

Like Karen Knop – and like Audrey Macklin, in her chapter presented below – Jacco Bomhoff, in Chapter 8, 'Constitutionalism and Mobility: Expulsion and Escape among Partial Constitutional Orders', is also principally concerned with the character of constitutionally salient boundaries. In its first part, this chapter explores the contrast between, on the one hand, recognition of the legally mediated character of borders and jurisdictional boundaries in critical scholarship and, on the other hand, unquestioning determinations of 'inside' and 'outside' in judicial practice. The second part of this chapter, then, approaches the question of the character and effects of constitutional boundaries by way of a case study on mobility. Mobility, in its many different forms – its restriction and its excesses, for individuals and for corporations – lies at the heart of many pressing contemporary challenges. The legal treatment of mobility, however, is fragmented across many different specialised fields – from immigration law, to tax law, to international arbitration – in which constitutionalist concerns are rarely central. The chapter aims to address this lacuna by sketching the contours of an 'outward-facing constitutionalism' which could provide the conceptual and normative means to scrutinise the constitutional implications of the regulation of 'access' and 'exit' for both individuals and corporate actors.

In Chapter 9, 'The Inside-Out Constitution', Audrey Macklin engages with Canadian case law on the 'deportability' of non-citizen residents, as

a case study on how the protection offered by constitutional rights guarantees is undermined in the field of immigration law. This project, she emphasises, 'is not a "whodunit" – everyone knows the culprit is sovereignty, conventionally understood'. The question to be explored rather is how this conception of sovereignty and its exclusionary effects are 'operationalized in a modern constitution, and at what cost'. Macklin explores this operationalisation of sovereignty in the case law on the state's right to exclude. The guiding image for Macklin's investigation is not so much the two-faced image of Janus but, following the sociologist Didier Bigo, the metaphor of the 'Mobius strip' – 'a rectangular ribbon that has been twisted and then joined'. Whether any claim for constitutional protection raises what Macklin calls an 'inside problem' for a constitutional order is a matter of perspective. Importantly, this alternative metaphor does not deny the existence of insides and outsides: 'it does not contemplate a borderless world, but rather one where borders are relational and perspectival . . . dynamic and contingent, but no less real'.

Asha Kaushal's Chapter 10, 'The Constitution in the Shadow of the Immigration State', also takes as its subjects the relationships between immigration law and constitutional law and between external and internal sovereignty. Kaushal focuses in particular on the importance of immigration to the constitution of 'the people'. As she writes: 'Immigration is both an external objective of the constitutional order and a modifier of that order.' Her chapter approaches these connections between outward projection and inward constitution by way of a conceptual and historical exploration of the relationship between citizenship and constituent power. These concepts, it turns out, surprisingly, are not often discussed in the same frame. Kaushal details what she calls the 'division of labour between immigration law and constitutional law' and the foundational role of the internal/external distinction in that division, through a rich historical overview ranging from Emer de Vattel's public international law to modern Canadian judicial decisions on the Charter's demands in the context of immigration law.

III The Foreign in Foreign Relations Law

In Chapter 11, 'Double-Facing Administrative Law: State Prerogatives, Cities and Foreign Affairs', Geneviève Cartier introduces cities 'as both subjects and agents on the international stage'. Traditionally seen as creatures of domestic law alone, cities are increasingly actively engaged