
Spatial statism

Ran Hirschl* and Ayelet Shachar**

In this Foreword, we wish to insert a degree of innovation into debates about global law and the supposed demise of state-based public law. We do so by asking how considerations of space, place and density impact the conceptualization and utilization of state power in a world of growing complexity and interdependence. In an array of key policy areas, we examine in considerable detail how state-centered public law defines, and where required redefines, space and territory in order to tame potential threats—local or global, vertical and horizontal—to the state’s territorial sovereignty. Our exploration highlights the tremendous versatility and creativity of states in deploying and stretching, through the classic tools of public law, their spatial and juridical tentacles in a new and complex global environment. Taken in conjunction, these illustrations suggest that the disregard for and dismissal of the state as a potent actor in the public law arena is premature. State sovereignty may be metamorphosing, but it is evidently not vanishing.

Recent years have seen a wide-range backlash against patterns of political and legal global convergence. It is ironic that in the mid-1990s, merely a quarter century ago, the “end of history” was said to have been upon us. Fascinated by the third wave of democratization in Southern Europe, Asia, and Latin America, as well as by the subsequent collapse of the Berlin Wall, intellectuals of all persuasions were quick to declare the ultimate triumph of a new world order, the hallmarks of which are globalization, transnationalism, market economy, and procedural and substantive democracy. A dominant discourse on globalization emerged that envisioned a world in

* Professor of Political Science and Law at the University of Toronto and holder of the Alexander von Humboldt Professorship in Comparative Constitutionalism at the University of Göttingen. Email: ran.hirschl@utoronto.ca.

** Director of the Max Planck Institute for the Study of Religious and Ethnic Diversity and Professor of Law at the University of Toronto. Email: shachar@mmg.mpg.de.

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which jurisdictional borders collapse, and in which goods, services, people, and information “flow across seamless national borders.”¹ Aphorisms such as “the end of the nation state,” “waning sovereignty,” or “a borderless world” were the thought du jour. Whereas national sovereignty—and the notion of authority embodied in territorial states—was one of the constituent ideas of the post-medieval world and “sets the modern era apart from previous eras,”² in the post-Westphalian literature of the last quarter century, the core prognosis is that the relevance of borders is declining, sovereignty is diminishing, and states as territorially bounded “containers” of authority are dissipating.³

This notion quickly caught fire in public law discourse and, given added impetus by the widespread convergence of constitutionalism and judicial review, the emerging pan-European constitutional order, and the increasing significance of supranational tribunals and international human rights regimes. Legal scholars begun turning their attention to transnational law—a category encompassing “all law which regulates actions or events that transcend national frontiers.”⁴ “Global law,” a term that has become ubiquitous, is variably understood as describing post-national processes and the rise of “new actors, other than states, on the international scene,”⁵ or construed as an overarching umbrella of legal norms and commitments that protect universal community interests by allowing individuals, groups, and non-governmental organizations to bring claims before international jurisdictions.⁶ New fields of legal inquiry, such as global administrative law, have emerged.⁷ In comparative constitutionalism, too, a groundswell of scholarship has focused on global convergence upon constitutional supremacy, perhaps even the emergence of a global constitutional order, most visible in the context of rights and proportionality.⁸ According to these burgeoning branches of thought, an emerging global legal order is ascendant and acquiring an

¹ Janet Ceglowski, *Has Globalization Created a Borderless World?* BUS. REV. (FED. RES. BANK PHILA.) 17 (Mar./Apr. 1998).

² ROBERT JACKSON, *SOVEREIGNTY: THE EVOLUTION OF AN IDEA* ix, 1 (2007).

³ On states as “power containers,” see ANTHONY GIDDENS, *THE NATION-STATE AND VIOLENCE: VOL. TWO, A CONTEMPORARY CRITIQUE OF HISTORICAL MATERIALISM* 13 (1985). An influential articulation of this argument, from a sociological perspective, is found in SASKIA SASSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION* (1996).

⁴ PHILIP JESSUP, *TRANSNATIONAL LAW* 2 (1956).

⁵ Giuliana Ziccardi Capaldo, *What Is Global Law?*, OUP BLOG (Aug. 10, 2015), available at <https://blog.oup.com/2015/08/what-is-global-law-jurisprudence/>.

⁶ *Id.* Global law is notoriously difficult to define. See Richard Collins, *The “Slipperiness” of Global Law*, 37 OXFORD J. LEGAL STUD. 714 (2017). For influential interpretations, see, e.g., NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* (2015); EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014). Of the various critical voices, see, e.g., *GLOBAL LAW WITHOUT A STATE* (Gunther Teubner ed., 1997).

⁷ For foundational contributions to this growing field of research, see Sabino Cassese, *Administrative Law Without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT’L L. & POL. 663 (2005); Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

⁸ See, e.g., James Tully et al., *Introducing Global Integral Constitutionalism*, 5 GLOB. CONST. 1 (2016); Colin J. Beck et al., *Constitutions in World Society: A New Measure of Human Rights* (Feb. 2, 2017), available at <https://ssrn.com/abstract=2906946>; Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law*, 20 IND. J. GLOB. LEGAL STUD. 605 (2013); Kai Möller, *THE GLOBAL*

Esperanto-like status, while state law is en route to losing its distinct voice and relevance. In short, despite some important early cautionary notes, some of which have been published in this journal, it has become trite to claim that in the current age of globalization, states are losing control over their regulatory spaces and membership boundaries.⁹

These assumptions are now contested. From the surge of populist discontent to the backlash against supranational courts and challenges to the multilateral architecture of the post-war international order, the demise of the state prophesied by earlier literature appears to have been, like the rumors about Mark Twain's death, greatly exaggerated. These days, pressed by current localist, nativist, and nationalist backlash on one side and by the still influential globalist narrative on the other, the state is transforming its exercise of power in relation to space, place, and territory. Expanding the horizons of current debates, our discussion calls attention to the *spatial* grip and reach of public law in adapting and reinventing the scope, scale, intensity, and sphere of influence exercised by states in an interdependent, yet fiercely turbulent, world. Canonic legal texts in comparative constitutionalism seldom acknowledge that “nearly every aspect of law is located, takes place, is in motion, or has a spatial frame of reference.”¹⁰ This Foreword begins to address this dearth.

In a world in which the globalization narrative is associated with unrestrained flows of capital, ideas, and technologies, we track and identify a counter-narrative—*spatial statism*—of reconfigured regulation of the mobility of people, the immobility of cities, emplacement of natural wealth and resources, the withering expression of religious diversity in the public sphere, and the unheralded return of us-them distinctions based on “true” belonging and place-based attachments to a particular patria, revealing through these illustrative examples the importance of a framework of analysis that pays heed to the spatial dimensions of public law—the kernel of this Foreword.

Lively debates in the literature between theories of fragmentation and harmonization have in recent years been supplemented by creative attempts to break free from such dichotomies. Studies have emphasized instead the values and realities of

MODEL OF CONSTITUTIONAL RIGHTS (2012); David Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163 (2011); David Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). For an illuminating take on the cosmopolitan tilt of “global constitutionalism” and the challenges it faces, see Vlad Perju, *Cosmopolitanism in Constitutional Law*, 35 CARDOZO L. REV. 711 (2013). Another relevant strand of critique questions the universality of global constitutionalism from a “Global South” standpoint. See, e.g., Vidya Kumar, *Symposium: Towards a Constitutionalism of the Wretched—Global Constitutionalism, International Law and the Global South*, BLOG-IACL-AIDC.ORG (Aug. 10, 2017), available at <https://blog-iacl-aidc.org/new-blog-2/2018/5/26/symposium-towards-a-constitutionalism-of-the-wretched-global-constitutionalism-international-law-and-the-global-south-drr7p>.

⁹ In an article published in this journal almost a decade ago, Eric Ip suggested that the rise of transnational law will not necessarily undermine the importance of sovereign state law. He went on to speculate that transnational law may even be invoked by national elites who can “blame” transnational law when unpopular policies benefit them, or change national law so that it complies with transnational law when it suits their interests. See Eric Ip, *Globalization and the Future of the Law of the Sovereign State*, 8 INT’L. J. CONST. L. 635 (2010).

¹⁰ Irus Braverman, Nicholas Blomley, David Delaney, & Alexander (Sandy) Kedar, *Introduction: Expanding the Spaces of Law*, in EXPANDING THE SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY (Irus Braverman et al. eds., 2014).

constitutional pluralism; competing legal orders; regime complexity; “reflexivity” in the context of institutional density; and the study of “interface conflicts” in the absence of a global legislature or global court, among other approaches.¹¹ The literature has also devoted ample attention to discussions about the character of law as “hard” or “soft,” “solid” or “fluid.”¹² Some scholars have further argued that we are entering a new era “where agency (individual choice) takes precedence over structures (the laws and rules of territorial states).”¹³ Since individuals and non-state actors have acquired a more robust role in international and transnational dispute resolution and may bring suit before regional and international courts and tribunals, some scholars have concluded that “[i]nternational law is increasingly shifting its focus from the state to the individual.”¹⁴

While pushing the envelope in imaginative directions, many of these accounts nevertheless sustain “law’s ‘anti-geographic’” tendencies.¹⁵ Critical geographers have leveled the charge that “law’s servants and scholars” have blinded themselves to the manifold ways in which “law does not transcend place, but is dependent on it.”¹⁶ Without the “materialities of place . . . law is merely a cluster of abstract, generic concepts . . . law comes alive applied to space, and the action and things embodied within places.”¹⁷

¹¹ For a concise overview, see Michael Zürn, Benjamin Faude, & Christian Kreuder-Sonnen, *Overlapping Spheres of Authority and Interface Conflicts in the Global Order*, WZB Discussion Paper (SP IV 2018–103), July 2018. Institutional density is characterized by a multiplicity of legal actors and sites of regulation by different public and private bodies operating at different levels or layers of dispute resolution or rule-making.

¹² The list of sources describing these new directions of scholarship is too vast to cite. Representative contributions include: Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421 (2000); Andrew T. Guzman, *The Design of International Agreements*, 16 EUR. J. INT’L L. 579 (2005); Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010); Nico Krisch, *Liquid Authority in Global Governance*, 9 INT’L THEORY 237 (2017).

¹³ James F. Hollifield, *Sovereignty and Migration*, in *IMMIGRATION AND ASYLUM FROM 1900 TO THE PRESENT* 575 (Matthew J. Gibney & Randall Hansen eds., 2005).

¹⁴ See Capaldo, *supra* note 5.

¹⁵ Luke Bennett & Antonia Layard, *Legal Geography: Becoming Spatial Detectives*, 9 GEOGRAPHY COMPASS 406, 413–418 (2015), observe a lack of “space-talk” in legal judgments. Notable exceptions to the dismissal of spatiality in public law scholarship include: Oran Doyle, *The Silent Constitution of Territory*, 16 INT’L J. CONST. L. 887 (2018); Neil Walker, *The Place of Territory in Citizenship*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* (Ayelet Shachar et al. eds., 2017); Lorenzo Cassini, *International Regulation of Historic Buildings and Nationalism: The Role of UNESCO*, 24 NATIONS & NATIONALISM 131 (2018); Sabino Cassese, *Reconsidering the State in the Broader Legal Spaces*, in *THE ADMINISTRATIVE STATE: VOLUME 1* (Armin von Bogdandy, Peter M. Huber, & Sabino Cassese eds., 2017). In international law, Kal Raustiala, *The Geography of Justice*, 73 FORDHAM L. REV. 2501 (2005). In sociolegal studies and critical legal geography, see, e.g., Yishai Blank & Issi Rosen-Zvi, *The Spatial Turn in Legal Theory*, 10 HAGAR: STUD. IN CULTURE, POLITY, AND IDENTITIES 39 (2010); David Delaney, *NOMOSPHERIC INVESTIGATIONS: THE SPATIAL, THE LEGAL AND THE PRAGMATICS OF WORLD-MAKING* (2010); *THE EXPANDING SPACES OF LAW: A TIMELY LEGAL GEOGRAPHY* 1–2 (Irus Braverman et al. eds., 2014) (describing the intellectual project of legal geography as foregrounding the legal aspects of space and the spatial aspect of law).

¹⁶ Robyn Bartel et al., *Legal Geography: An Australian Perspective*, 51 GEOGRAPHICAL RES. 339, 349 (2013), cited in Bennett & Layard, *supra* note 15, at 407. See also PETER J. TAYLER, *POLITICAL GEOGRAPHY: WORLD-ECONOMY, NATION-STATE AND LOCALITY* (1993).

¹⁷ Bennett & Layard, *supra* note 15, at 414.

While these arguments are fascinating to explore, our focus here is more concrete and grounded. We seek to show how public law, through its spatial ordering, partakes in sustaining the centrality of a state-oriented locus and focus of sovereign control, even in the face of competing forces—both within and beyond the state.

In this Foreword, we wish to insert a degree of innovation into what have become all-too-familiar debates between communitarians and cosmopolitans; liberal internationalists and “neo-nationalists”; advocates of domestic sovereignty and proponents of supranational, transnational, and global law regimes. We do so by adding the dimension of legal spatiality—asking how considerations of space, place, and density impact the conceptualization and utilization of state power in a world of growing complexity and interdependence. Offering an invitation to reexamine familiar legal phenomena in new and startling ways, this Foreword highlights the understudied significance of spatial regulation in defining the reach of sovereign authority. Our discussion exposes the state’s strategic reliance on notions of jurisdiction, territoriality, division of authority, and competencies to regain or maintain control vis-à-vis potential competitors from within and outside. We show how public law is selectively adjusted and drawn upon by policymakers and lawmakers at different levels of government to maintain a statist grip over a given country’s territory and its boundaries, real or imagined.¹⁸ The account we offer elucidates quite clearly that state law is not dissolving, but transforming. To preserve their grip in a new environment and under constantly changing geopolitical circumstances, states—in particular those with relatively well-developed “state capacity,” as defined by political scientists—are engaging in ever-closer cooperation with trusted partners, be it their national counterparts, corporate service providers, or supranational and international organizations.¹⁹ This, in turn, points to the continued relevance, albeit in a new configuration, of Weberian theories of the state and their sophisticated systems of wielding authority, as well as classic works in political sociology and state theory, from Michel Foucault’s *Discipline and Punish* to Charles Tilly’s *Cities and the Rise of States in Europe* and to James Scott’s *Seeing Like a State*—all of which establish the ability to consolidate and enforce laws over a defined territory as one of the constitutive factors for the rise of the modern state.²⁰

¹⁸ In certain cases, it is impossible to fully comprehend state motives and actions without taking into account a longer time horizon, explaining a special relationship toward certain territories a state has maintained in the past or those over which it may wish to extend its sovereignty in the future.

¹⁹ Political science literature has identified a given country’s ability to enforce laws within its borders as a litmus test for what has been termed “state capacity.” See Luciana Cingolani, *The State of State Capacity: A Review of Concepts, Evidence and Measures*, UNU-MERIT Working Paper Series on Institutions and Economic Growth 1 (2013); Felicity Matthews, *Governance and State Capacity*, in *OXFORD HANDBOOK OF GOVERNANCE* 281 (David Levi-Faur ed., 2012); Francis Fukuyama, *What Is Governance?*, 26 *GOVERNANCE: AN INT’L. J. POL’Y. ADMIN., & INSTITUTIONS* 347 (2013). For an influential account of governance through a complex web of “government networks,” see ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

²⁰ See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (1977); CHARLES TILLY, *CITIES AND THE RISE OF STATES IN EUROPE, A.D. 1000 TO 1800* (Charles Tilly & Wim P. Blockmans eds., 1994); PIERRE BOURDIEU, *Rethinking the State: Genesis and Structure of the Bureaucratic Field*, 12 *SOC. THEORY* 1 (1994); JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998); JAMES C. SCOTT, *THE ART OF NOT BEING GOVERNED: AN ANARCHIST HISTORY OF UPLAND SOUTHEAST ASIA* (2009).

Recent constitutional theory scholarship also emphasizes the continued relevance of the state as a core building block, indeed a *sine qua non* concept, in public law.²¹ In its international law guise, this body of corrective work suggests, to quote Barbo Fassbender, that the state has never abandoned its claim “to be the center of the legal universe.”²² In another strand of literature, scholars have pointed to the continued relevance, perhaps even resurgence, in both the academic and jurisprudential discourse of what has been termed “constitutional identity,”²³ and to a noticeable nationalist and localist backlash against global constitutionalism and its supposedly universal world view.²⁴

The discussion is structured as follows. We begin by focusing on two detailed case studies that illustrate potential threats to state spatial hegemony: (i) the growing anxiety over immigration, borders, and “uncontrolled” entry; and (ii) the rise of large, densely populated, politically significant, and economically potent cities. In each of these examples, we examine in considerable detail how state-centered public law defines, and where required redefines, space and territory in order to tame potential threats—local or global, vertical and horizontal—to the state’s territorial sovereignty. Next, (iii) we examine several other key areas of spatial legal governance dominated by an adaptive statist outlook, ranging from (a) permanent sovereignty over natural wealth and resources to (b) state control of spatiality in the context of regulating religious sites and attire in the public sphere, and finally to (c) statist neo-secessionism driven by nationalist-populist trends.²⁵ Taken in conjunction, these illustrations suggest that the disregard for and dismissal of the state as a potent actor in the public law arena is premature. Statist law never disappeared. Facing existential threats to its long-standing dominance, it has been modified and reinvented to remain a key player in the struggle for spatial control.²⁶

²¹ Martin Loughlin, *The State: Conditio Sine Qua Non*, 16 INT’L. J. CONST. L. 1156 (2018). For an overview of patterns of change and continuity, see, e.g., Neil Walker, Cormac Mac Amhlaigh, & Claudio Michelon, *Law, Polity and the Legacy of Statehood: An Introduction*, 16 INT’L. J. CONST. L. 1148 (2018). Loughlin argues that in linking territory, authority, and people in an intelligible scheme, the state is “the foundational concept that enables lawyers coherently to engage with the issue of political authority.”

²² Barbo Fassbender, *The State’s Unabandoned Claim to Be the Center of the Legal Universe*, 16(4) INT’L. J. CONST. L. 1207 (2018).

²³ See, e.g., Zsolt Körtvélyesi & Balázs Majtényi, *Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary*, 18 GERMAN L.J. 1721 (2017); Kriszta Kovács, *The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts*, 18 GERMAN L.J. 1703 (2017); Monika Polzin, *Constitutional Identity as a Constructed Reality and a Restless Soul*, 18 GERMAN L.J. 1596 (2017); Elke Cloots, *National Identity, Constitutional Identity and Sovereignty in the EU*, 45 NETHERLANDS J. LEGAL PHIL. 82 (2016).

²⁴ Of this fast-growing body of scholarship, see, e.g., CONSTITUTIONAL DEMOCRACY IN CRISIS (Mark Graber, Sanford Levinson, & Mark Tushnet eds., 2018); Ran Hirschl, *Opting Out of “Global Constitutionalism,”* 12 LAW & ETHICS OF HUM. RTS. 1 (2018). See also Doreen Lustig & J. H. H. Weiler, *Judicial Review in the Contemporary World—Retrospective and Prospective*, 16(2) INT’L. J. CONST. L. 315 (2018) (concluding section).

²⁵ Space constraints forestall additional discussions of “classical” territory-related statist public law, notably, zoning and land policy, takings, public works and infrastructure investment, social welfare, and control over intergenerational wealth transfer through inheritance and property taxation.

²⁶ Statist law today often incorporates into its framework regulatory provisions originating from supranational and international sources. Furthermore, states may act alone or in concert with other states, cooperate through regional agreements and institutions, or promote their interests via multilateral channels. As long as the spatial aspect of the regulation is shaped by authorities of the state it falls within the scope of our analysis.

True, a range of economic activities—investment, trade, capital mobility, knowledge transfer, tax evasion—know no borders; international organizations are proliferating; and transnational standard-setting is rising. Global markets have largely weakened the state's fiscal autonomy, but fallen short of dismantling a core element of the Westphalian order: the state's legal grip over its territory. Core aspects of public law remain largely statist, especially those intensely focused on territoriality, a vital dimension of modern conceptions of sovereignty.²⁷ When it comes to key issues such as a country's control of natural wealth and resource allocation, citizenship and immigration, governance of religious and ethnic diversity, territorial integrity, populist politics, and democratic backsliding—let alone the intensely government-controlled military, policing intelligence, and surveillance domains—state sovereignty may be metamorphosing, but it is evidently not vanishing.

As part of a broader call for problem-driven constitutional studies, we highlight a phenomenon that is hidden in plain sight: the importance of law's interaction with the spatial context in which it operates and the gravitational power of territoriality in a world system that, despite many dramatic changes, has not switched to a new source of authority and legitimacy. This refocusing on the ground on which law stands—both literally and figuratively—is intended to open up a new space for debate and reflection. We conclude by suggesting that any sober look at the post-Westphalian era, a quarter century after its supposed triumph, suggests that while its novel, “post” facet is readily observable and has been discussed *ad nauseam*, its Westphalian roots and character are very much alive, even if their current-day manifestations are constantly transforming. In an array of key policy areas, states and governments have adjusted themselves effectively to the new global era to maintain their sovereign stature and pursue their own domestic agendas, either independently or in collaboration with other states and international actors. In fact, with respect to some of the most pressing challenges of early twenty-first-century governance—international migration, environmental protection, urban agglomeration, or natural resource allocation (all of which require close international collaboration to be effectively addressed)—renewed state power, and methodological nationalism more generally, protract, impede, or altogether prevent convergence on global solutions.

²⁷ Our usage of the term “territoriality” refers to it primarily as a “spatial strategy to affect, influence, or control resources and people, by controlling area.” See ROBERT DAVID SACK, *HUMAN TERRITORIALITY: ITS THEORY AND HISTORY* 21 (1986). Definitions of sovereignty may vary, but legally there are three enduring constituent features: people, territory, and political authority exercised over that territory and its people. In international law, article 1 of the Montevideo Convention on the Rights and Duties of the State (1933), echoes the traditional Westphalian view, stating that: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relation with other States.”

1. After the Berlin Wall: Shifting, not disappearing, borders

To begin this journey, we need to wind back the clock. In 1989, the fall of the Berlin Wall led many to predict that barbed wire and sealed entry gates would become relics of a bygone era. Thirty years later, we find a very different reality. When the Berlin Wall came down, there were fifteen border fences around the world. Today, nearly seventy border fences have either been completed or are under construction.²⁸ Some of these new barriers, especially those built in Europe, were erected in response to the 2015 refugee crisis.²⁹ Yet many of the post-Berlin border fences were raised before this recent influx of migrants. Globally, perhaps the most recognizable—and politicized—border wall stretches along parts of the US-Mexico border. Other notable examples include Spain’s watchtowers and razor wire fences around Melilla and Ceuta, its enclaves in North Africa; the barrier between Bulgaria (an EU member state) and Turkey; the metal curtain that India has built around its poorer neighbor, Bangladesh; and the new steel fence that Norway is constructing on its arctic border with Russia. To the surprise of many, Europe, with its promise of open borders, has more extensive fencing than the world’s most (in) famous border wall. Since the fall of the Berlin Wall, European countries have built, or are in the process of building, approximately 1200 km (or 750 miles) of fencing to keep uninvited people out. By way of comparison, as of the end of 2015, the US-Mexico border wall stretches a little over 650 miles, covering roughly one-third of the 2000-mile-long US-Mexico border. Similar patterns emerge when comparing the number of border guards and police officers involved in border management in EU member states and through Frontex, which dwarfs those in the United States.³⁰

Contrary to the predictions of globalists, humanists, post-nationalists, and others who forecasted the imminent demise of borders and citizenship regimes, the legal distinction between member and stranger is, if anything, back with renewed vengeance, especially since 9/11.³¹ Today, more than ever, questions of migration, membership, identity, and belonging have become pressing issues, and are likely to remain

²⁸ Ron E. Hassner & Jason Wittenberg, *Barriers to Entry: Who Builds Fortified Boundaries and Why?* 50 INT’L SEC. 157 (2015); FENCES AND WALLS: STATE OF INSECURITY? (Elisabeth Vallet ed., 2016).

²⁹ Some have challenged the use of the term “refugee crisis.” See, e.g., Leo Lucassen, *Peeling an Onion: The “Refugee Crisis” from a Historical Perspective*, 41 ETHNIC & RACIAL STUD. 388, 403 (2018).

³⁰ On the United States-European member states comparison, see Roy Koslowski, *Addressing Side-Effects of Increasing Border Security Cooperation: A Global Perspective*, in BEYOND THE MIGRATION AND ASYLUM CRISIS: OPTIONS AND LESSONS FOR EUROPE 108 (Ferruccio Pastore ed., 2017). Frontex, Europe’s border and coastguard agency, was established in 2005. Its budget and personnel have increased exponentially in recent years: from €6 million in 2005 to €98 million in 2014 to €320 million in 2018. See European Commission, *Fact Sheet—European Agenda on Migration: Securing Europe’s External Borders* (Dec. 15, 2015). Frontex has had around 300 operational staff members in 2014, a number that rose to over 1300 in 2018. According to recent proposals by the European Commission, Frontex will hire an additional 8400 border guards, bringing the total number to 10,000 by 2020. See European Commission, *Fact Sheet—State of the Union 2018: A Strengthened and Fully Equipped European Border and Coast Guard* (Sept. 12, 2018).

³¹ See, e.g., Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES IN L. 498 (2007); Ayelet Shachar et al., *Introduction: Citizenship—Quo Vadis?*, in THE OXFORD HANDBOOK OF CITIZENSHIP 3 (Ayelet Shachar et al. eds., 2017).

at the forefront of public debate for the foreseeable future. Rather than relics of a bygone era, menacing border walls and steel fences have become renovated fortified manifestations of (real or imagined) sovereign control.³² As important as these visible walled borders are for separating the haves from the have-nots, both symbolically and practically, a new and striking trend has emerged: the surge of state-controlled *invisible* borders—borders that rely on sophisticated legal techniques to detach migration control functions from a fixed territorial location, creating a new framework that we call the *shifting border*.

As migration pressures mount globally, governments in rich countries search for new ways to expand their remit, both conceptually and operationally, both inward and outward. In a world where borders are transforming, but not dissolving, the question of legal spatiality—*where* a person is barred from onward mobility and *by whom*—holds dramatic consequences for the rights and protections of the persons on the move, and correlative duties and responsibilities of the countries they seek to reach and the transit locations through which they pass.³³ Drawing on comparative legislation, regulation, and the guidelines and directives of administrative agencies, we investigate how and why these changes are being fostered by states, acting alone or in concert, and what strategic goals motivate them.

The fixed borderlines depicted on a world atlas often do not coincide with those comprehended and created by words of law, which facilitate and authorize the operation of the shifting border. The border itself has become a moving barrier, an unmoored legal construct.³⁴ Unlike the traditional, reinforced physical barrier, the shifting border is not fixed in time and place; it is comprised of legal portals rather than physical gates situated at a specific frontier location.

When it comes to migration control, the *location* of the border is shifting: at times penetrating deeply into the interior of a territory, while in other circumstances extending well beyond its perimeter. In other contexts, fixed territorial borders are being “erased” or refortified. This is part of a shifting-border strategy that strives, as official government policy documents plainly reveal, to “‘push the border out’ as far away from the actual [territorial] border as possible.” The idea, enthusiastically endorsed by governments in relatively rich and stable regions of the world, is to screen people “at the source” or origin of their journey (rather than at their destination country) and then again at every possible “checkpoint along the travel continuum—visa screening, airport check-in, points of embarkation, transit points, international airports and seaports.”³⁵ The traditional static border is thus reimaged as the *last*

³² For a critical exploration of border walls, see WENDY BROWN, *WALLED STATES, WANING SOVEREIGNTY* (2010).

³³ The concept of legal spatiality is applied here to the specific context of immigration issues, but it is highly relevant for other legal terrains as well. For a comprehensive discussion, see Raustiala, *supra* note 15.

³⁴ This is so even as politicians frequently revert to images of a fixed legal spatiality when it comes to the rhetoric surrounding the exercise of sovereign authority, as in Donald Trump’s election promise to build an “impenetrable, physical, tall, powerful, beautiful . . . border wall.”

³⁵ Preamble to the Canada-US Statement of Mutual Understanding (SMU) signed between Canada and the United States in the aftermath of 9/11.

point of encounter rather than the first.³⁶ Just as the shifting border ever more flexibly extends the long arm of the state to regulate mobility half a world away, it also stretches into the interior, creating “constitution lite” zones or “waiting zones” (*zones d’attente*) deep inside liberal democracies. Within these zones ordinary constitutional rights are limited or partially suspended, especially for those who do not have proper documentation or legal status.³⁷

Consider the following examples, which capture only a sliver of the rapidly evolving shifting-border phenomenon.³⁸ While each of the countries we explore has developed its own variant of the shifting-border strategy, deserving a more extensive treatment than we can offer here, their policies offer excellent illustrations of the reliance on *legal* (not *extralegal*) measures to detach the border from a fixed territorial marker.

Much has been said about the fortification of the US-Mexico border. As part of a major reform to US immigration policy, a procedure called expedited removal was introduced into law.³⁹ It permits front-line officers and border agents to expeditiously return undocumented migrants at the border, as well as to review the legal status of individuals detected up to 100 miles away from any US land or coastal border, in effect “moving” the border from its fixed location at the edge of the country’s territory into the interior.⁴⁰ This legal maneuver not only relocates the border, but also creates what has been referred to as a “constitution-lite” zone *within* the United States. Law enforcement agents can set up checkpoints on highways, at ferry terminals, or on trains, requiring any random person to provide proof of his or her legal status in the United States without probable cause. Such governmental surveillance of movement and mobility—traditionally restricted to the actual location of the border crossing—is now seeping into the interior.⁴¹

The most recent official US census data reveal that no less than two-thirds of the US population lives in this 100-mile constitution-lite zone.⁴² That is, more than 200 million people live in the malleable or moveable border zone. The whole state of New

³⁶ Our reference here is to the current legal situation which holds, in the words of the European Court of Human Rights, that “[s]tates enjoy an undeniable sovereign right to control aliens’ entry into and residence in their territory.” *Saadi v. UK* (GC), 2008-I Eur. Ct. H.R. 31, 60 (internal references omitted). Contemporary political theorists have, however, questioned the justice and legitimacy of this current legal situation. Of this fast burgeoning literature, see, e.g., Sarah Fine, *The Ethics of Immigration: Self-Determination and the Right to Exclude*, 8 PHIL. COMPASS 254 (2013).

³⁷ Tugba Basaran, *Legal Borders in Europe: The Waiting Zone*, in *A THREAT AGAINST EUROPE: SECURITY, MIGRATION AND INTEGRATION* 63 (Peter Burgess & Serge Gutwirth eds., 2001).

³⁸ A more extensive discussion is offered in Ayelet Shachar, *Bordering Migration/Migrating Borders*, 37 BERKELEY J. INT’L. L. 95 (2019).

³⁹ This procedure was ushered in as part of the 1996 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). See 8 U.S.C. §§ 1225(b)(1)(A)(iii)(I), 1225(b)(1)(A)(iii)(I)(II).

⁴⁰ As one scholar succinctly put it, this removal procedure “sharply redefined—downward—what process is due an individual who arrives at [the] border and is deemed not to have proper documents to enter.” See Stephen M. Knight, *Defining Due Process Down: Expedited Removal in the United States*, 19 REFUGEE 41, 41 (2001).

⁴¹ These current temporal and spatial specifications appear in the *Federal Register*. See *Designating Aliens for Expedited Removal*, 69 FED. REG. 48877 (Aug. 11, 2004).

⁴² The data are reported in the ACLU, *Customs and Border Protection’s (CBP’s) 100-Mile Rule*, available at https://www.aclu.org/sites/default/files/assets/14_9_15_cbp_100-mile_rule_final.pdf.

York, for example, lies completely within 100 miles of the land and coastal borders of the United States, as does Florida, another migrant-magnet state. And the governmental agency responsible for implementing the shifting border, the Department of Homeland Security, has gone on record declaring that its border-enforcement measures may well expand “*nationwide*.”⁴³

Until recently, the prospect of nationwide implementation seemed to belong squarely in the realm of the futuristic and the implausible. In today’s political clampdown on immigration, the current administration’s commitment to “using all these statutory authorities to the greatest extent possible” potentially translates into precisely such a massive spatial and temporal expansion of expedited removal. Supplemented by multiple executive orders and accompanying memos, expedited removal threatens to reach “*any immigrant anywhere* in the United States who can’t prove that they’ve been in the country for two or more years.” A simple bulletin in the *Federal Register* is all that is required to make this sweeping augmentation of the border a legal reality. Under the shifting-border paradigm, the “interior” could be recast as the “exterior” for the purposes of immigration control with the stroke of a pen.⁴⁴

The notion that legal circumstances affecting non-members change dramatically after they “passed through our gates” is well-established, as canonical case law from *Shaugnessy to Zadvydas* attests.⁴⁵ However, the shifting border distinguishes between *physical entry* into the country (which does not count for immigration purposes) and *lawful admission* through a recognized port of entry (which makes one’s presence in the territory permissible, and therefore visible, in the eyes of the regulatory state).⁴⁶ Accordingly, entry into the territory—the material act of crossing the geographical border and physically being present within the jurisdiction of the United States—does *not* equate with legally “being here.”⁴⁷ This change in the meaning is formalized into law: “an alien present in the United States without being admitted,” to recite the somewhat cryptic language of the Immigration and Nationality Act, is treated as though they never really crossed the border into the country despite being present in the territory.⁴⁸ This legal fiction bears serious consequences for

⁴³ US Department of Homeland Security, *Fact Sheet: Secure Border Initiative* (Nov. 2, 2005) (emphasis added).

⁴⁴ To date, no such notice has been issued. If such an expansion were to occur, major litigation challenging its constitutionality will likely follow. The distinction between the internal and the external is central to the Westphalian notion of sovereignty.

⁴⁵ *Shaugnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). See also *Kaplan v. Tod*, 267 U.S. 228, 230 (1925).

⁴⁶ The distinction between entry and admission dates back to the enactment of IIRIRA. For a concise overview of the legal impacts of this change, see, e.g., Daniel Cicchini & Joseph Hassel, *The Continuing Struggle to Define “Admission” and “Admitted” in the Immigration and Nationality Act*, 6 IMMIGR. L. ADVISOR 1 (2012). A recent study found that the term “admission,” or variations thereof, appear over 100 times in the Immigration and Nationality Act and accompanying regulations. See AMERICAN IMMIGRATION COUNCIL, PRACTICE ADVISORY: INSPECTION, ENTRY AND ADMISSION? (2015).

⁴⁷ The term “being here” is drawn from Linda Bosniak’s critical investigation into the ethical significance of territorial presence of unauthorized migrants. See Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants*, 8 THEORETICAL INQUIRIES IN L. 389 (2007).

⁴⁸ 8 U.S.C. § 1182(a)(6)(A)(i). These individuals will have certain constitutional protections while in the country, including procedural and/or substantive due process.

those aliens present in the United States without being admitted. For instance, their unlawful entry triggers the preclusion of future status regularization or the application of waivers during the removal process, thereby causing them to forfeit their prospects for lawful admission to the United States. Moreover, the very act of having crossed without inspection and permission (the otherwise unrecognized presence of the non-citizen in the territory) becomes the “main substantive charge used to remove them.”⁴⁹

In creating the legal distinction between “entry” and “admission,” US immigration law effectively treats individuals present in the country without authorization as though they had been stopped *at the border*, depriving them of the traditional protections enjoyed by non-citizens who have been able to reach the interior. Such a legal maneuver can only occur by “redrawing the traditional exclusion-deportation line” under a shifting conception of the border.⁵⁰ The exclusion-deportation line has become blurred and detached from a fixed spatial marker. The key factor for the legal analysis is no longer whether the person has penetrated the territory’s physical frontiers. Rather, for immigration regulation purposes, the question is whether the person has crossed at any time or place through the *law’s* gates of admission, which, as the authorizing legislation openly proclaims, are not territorially fixed, but rather designated by the executive branch of government.⁵¹

Just as the shifting border bleeds into the interior, it extends the long arm of the state outward, ever more flexibly, to regulate mobility at a distance. Travelers who wish to embark on a US-bound flight now regularly encounter the US border, or its authorized guardians—American officials located on foreign soil—in places as diverse as Freeport and Nassau in the Bahamas, Dublin, and Shannon in Ireland, or Abu Dhabi in the United Arab Emirates. Thanks to a legal carve-out known as the pre-clearance system, these procedures regularly take place in foreign transit hubs that are sometimes located tens, hundreds, or even thousands of miles away from the “homeland” territory. Currently, more than 600 American customs and border control specialists are deployed in airports around the world, processing over 18 million US-bound passengers per year before they embark on their air travel journeys to the United States. An ambitious expansion program for such pre-clearance and pre-inspection procedures launched in 2015 with the goal of pre-clearing, on foreign soil, at least a third of all US-bound air travelers by 2040. Such expansion is touted as promoting America’s interests by facilitating international trade and travel, while at the same time countering global security threats by allowing the “United States and our international partners to jointly identify and address threats at the earliest possible point,” as the official publication of America’s border protection agency simply and elegantly explains.⁵² Strikingly, such pre-inspection decisions bear the full weight

⁴⁹ There are also three-year and ten-year bars to readmission. *See* Immigration and Nationality Act §§ 212(a)(9)(B)(i)(I)–212(a)(9)(B)(i)(II).

⁵⁰ IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 428 (Thomas Alexander Aleinikoff et al. eds., 5th ed. 2003).

⁵¹ 8 U.S.C. § 1182(a)(6)(A)(i).

⁵² U.S. Customs and Border Protection, CBP Releases Fiscal Year 2015 Trade and Travel Numbers (Mar. 4, 2016).

of US law as though their determinations were made “at the border,” even though the territory of the USA is far from sight. The border has instead been replanted as a legal construct on non-US soil.

America’s shifting border is part of a larger transformation that is complemented by the legislative and regulatory actions undertaken by other leading destination countries. The Canadian government, for example, proclaims itself to be a “world leader in developing interdiction strategies against illegal migration.”⁵³ Apart from Canada’s massive shared land border with the United States, it is otherwise surrounded by large bodies of water and ice. Given its geopolitical location, Canada relies heavily on overseas interdiction. Over the years, it has perfected the technique of interception and interdiction abroad, effectively relocating much of its migration regulation activities to overseas gateways located primarily in Europe and Asia. There, migration integrity officers, or liaison officers, conduct border control activities as a matter of course, although they are nowhere near the formal edge or frontier of Canadian territory. As a key component of the shifting-border strategy, these government officials are strategically located in “key foreign embarkation, transit and immigration points around the world.”⁵⁴ This part of Canada’s border strategy strives to “‘push the border out’ as far away from the actual [territorial] border as possible.”⁵⁵ In the words of the Canadian Border Service Agency, “moving the focus of control of movement of people away from [the territorial] border to overseas, where potential violators of citizenship and immigration laws are interdicted prior to their arrival” has become a core feature of the country’s multiple-border-strategy, as Canada has branded its extensive variant of the shifting-border strategy.⁵⁶

Canada, along with many other wealthy nations, also relies heavily on private-sector third-party actors—in particular airline carriers—as “enforcers” of its immigration regulation and border control provisions. As many seasoned travelers will know, it is usually airline personnel who take pains to verify that the required documents and visas are in place prior to permitting embarkation on international flights.⁵⁷ They do so, at least in part, because their companies face steep financial penalties by the receiving countries if they transport improperly documented persons into their territories. Canadian law permits the government to seek reimbursement from airline carriers for “costs of detention, return, and, in some cases, medical care” associated with irregular migrants that arrived aboard their flights.⁵⁸ Similarly, the Schengen Implementation Agreement obliges all members of the European Union to implement

⁵³ Janet Dench, *Controlling the Borders: C-31 and Interdiction*, 19 REFUGE 34, 37 (2001).

⁵⁴ Canada Border Services Agency, *Fact Sheet 2009* (2009).

⁵⁵ *Id.*

⁵⁶ SMU, *supra* note 35.

⁵⁷ Canada as well as other countries have also signed memoranda of understanding with airline carriers that permit immigration officials abroad to refuse permission to individual passengers to board flights in return for indemnity from the administrative fines these airline carriers would have been obliged to pay if found carrying inadmissible passengers.

⁵⁸ Andrew Brouwer & Judith Kumin, *Interception and Asylum: When Migration Control and Human Rights Collide*, 21 REFUGE 6, 10 (2003).

carrier sanctions.⁵⁹ Allowing airline personnel to perform such passport control activities in effect contributes to the growing role of private-sector intermediaries in conducting what is arguably a central plank of sovereign authority: deciding whom to admit and whom to keep at bay.

Since the early 2000s, EU member states have followed suit, creating an expanded transnational network of immigration liaison officers operating under a EU directive framework that binds them all. As a result, today's interdiction programs have proliferated into massive information-gathering operations among trusted partners in offshore locations through a "network of contacts with host-country officials, officials from other governments in the designated region, airline personnel and law-enforcement agents." Their main goal is to identify and interdict improperly documented travelers at the earliest point at which their identity can be verified and as remotely as possible from the actual border, before these irregular migrants stand a chance of reaching their respective territorial boundaries. These overseas agents operate under the recommended guidelines developed by the International Air Transport Association (IATA). The existence of this *non-state* organization representing the global airline industry reveals not only the shifting *location* of the border, but also the increased collaboration between private and public actors in regulating de-territorialized "edges" of well-off polities seeking to prevent admission of unwanted persons. The expanding involvement of for-profit intermediaries in the task of regulating migration blurs the line between state and market, adding yet another non-traditional brick to the "moving" border and offering new techniques of controlling access to territory and membership.⁶⁰

Australia, even more explicitly than Canada or the United States, has officially relocated its border through words of law, creating—as its government readily admits—a distinction between the country's "migration zone" and "Australia" as we know it on the map. This "excision" policy was created through the Migration Amendment Act of 2001, which was expanded in 2005 and then again in 2013.⁶¹ The legislation authorizes Australia's immigration officials to remove asylum seekers who have managed to reach its now excised territory as though they had never reached Australia, despite having physically landed on its shores.⁶² Put differently, those who reach the excision zone cannot make a valid asylum claim in Australia because they never entered it in a legally cognizable way. Thus, the territory they reached is no longer "Australia" for immigration law purposes. This legal fiction further limits the procedural and substantive rights that asylum seekers and other irregular migrants are entitled to under domestic and international law. It also eliminates the possibility

⁵⁹ This mandate was further enhanced in 2001, by a European Council Directive that aims to harmonize these financial sanctions as a powerful regulatory tool, used here by member states in concert, to diminish the prospects of arrival to their shores of unauthorized migrants.

⁶⁰ See e.g., *THE MIGRATION INDUSTRY AND THE COMMERCIALIZATION OF INTERNATIONAL MIGRATION* (Thomas Gammeltoft-Hansen & Ninna Nyberg Sørensen eds., 2013).

⁶¹ Migration Amendment (Excision from Migration Zone) Act 2001 (Cth.) (Austl.).

⁶² PARLIAMENT OF AUSTRALIA, DEPT' OF PARLIAMENTARY SERVS., *EXCISING AUSTRALIA: ARE WE REALLY SHRINKING? RESEARCH NOTE NO. 5, 2005-2006* (2005).

of judicial review, thus not only redrawing the territorial border, but also attenuating legality in the process. In 2013, the excision zone was expanded through legislation to include the entire Australian mainland. In effect, this means that the border applies *everywhere* and *nowhere* at the same time.

The legal consequences of arrival to Australia's "erased" territory are both far-reaching and irreversible. Those falling under the spell of excision are refused the possibility of securing status in Australia, even *after* their claims are adjudicated. Excision provides a hocus-pocus way to keep out those who were never wanted or invited. By erecting an unlimitable line of defense against unauthorized maritime arrivals, excision creates a legal barrier that makes illusionary the possibility of passing through the proverbial entry gates, even for those who have managed to reach the country's (actual) territory. This logic is reminiscent of the rights-restricting inward "bleeding" of the US border into the interior and the resultant restriction of rights, but with a unique Australian twist of erasing certain segments of its own territory off the map for migration regulation purposes.⁶³

More limited versions of excision occur in several high-traffic airports located in European capitals, which have declared certain parts of these airports, physically located in their national territories, as extraterritorial "international zones" or "transit zones" where a fiction of non-entry prevails, permitting expedited removal procedures to take place. These transit zones were treated as legal gray zones, operating in a limbo space, "in which officials '[we]re not obliged to provide asylum seekers or foreign individuals with some or all of the protections available to those officially on state territory.'" This practice was eventually challenged in the European Court of Human Rights, which concluded that "[d]espite its name, the international zone does not have extraterritorial status," thus bringing border-control actions taking place in these locations back into the fold of legality.⁶⁴

The creation of legal gray zones is not entirely new. The US navy base in Guantanamo Bay, now known primarily as the detention place of foreign nationals suspected of terrorism links, was formerly used as a repository for asylum seekers (particularly from Haiti) whose shattered boats were intercepted on the high seas by US navy ships in order to prevent those onboard from claiming refuge at "our gates." Again, we witness the dexterity of legal definitions and categories to interdict unwanted entrants before they can reach the actual border—unless, as in Australia's extreme variant of the shifting border, that territory itself is "excised."

In 2013, along with the spatial expansion of the excision zone, Australia has adopted another measure of shifting border: all "asylum seekers who unlawfully arrive *anywhere* in Australia" must be transferred to third countries for offshoring processing.⁶⁵ The Australian government calls this policy regional processing, which in practice has meant that those who reach the excision zone are transferred to offshore

⁶³ This unprecedented act was prefaced by a governmental clarification that the excised zones were not altogether removed from Australian sovereign territory.

⁶⁴ *Amuur v. France*, 1996-III Eur. Ct. H.R. 826, 851.

⁶⁵ For the authorizing legislation, see Migration Amendment (Unauthorised Maritime Arrivals and other Measures) Act 2013 (Cth.) (Austl.).

locations. The offshore locations are remote islands in the Pacific, such as Nauru, a tiny microstate island nation that is 4500 kilometers away from Australia, or Manus Island in Papua New Guinea. There, asylum seekers may languish for years while the immigration authorities process and assess the asylum claims. Australia is the only country in the world that uses *other* countries to process asylum claims. Close to 80 percent of those transferred to such offshore processing centers have proven they have credible claims. Yet, even those recognized as refugees are forbidden for life from settlement in Australia due to their “original sin” of arriving on excised territory. The erased territory thus becomes a legal black hole, a gravitational field so intense that no unauthorized migrant can ever escape it. This ironclad policy—a one-way ticket away from Australia—has recently attracted the interest of European policymakers desperately seeking answers to their respective challenges of responding to uninvited migration flows. The policy has also fueled discussions of building migrant “reception” centers in North Africa and deeper into the heart of the continent.

Australia has invented one of the most striking manifestations of the shifting border by legally redefining the area of Australian territory upon which asylum claims can be made, and by removing and “emplacing” any intercepted irregular migrants to offshore processing centers in remote locations in poorer and less stable third countries. These policies have been subject to extensive domestic and international critique, highlighting their tremendous toll on human rights and the questionable compatibility of such legal measures with Australia’s own domestic and international law commitments. Without a global review mechanism or a supranational tribunal devoted to migration and asylum claims, Australia’s High Court has on several occasions been called on to review various aspects of Australia’s excision policy and offshore processing framework. In several landmark decisions, the High Court favored the claims of those who arrived in excised territories. These decisions include the cases known as *Plaintiff M61/2010* and *Plaintiff M69/2010*, in which the High Court unanimously found that two Sri Lankan asylum seekers detained on Australia’s Christmas Island had been denied procedural fairness. The Court’s decision led the government to amend certain aspects of the processing of claims beyond mainland Australia.⁶⁶ In *Plaintiff M70/2011 v. Minister for Immigration and Citizenship*, the High Court struck down the government’s so-called Malaysian solution, which proposed that Australia swap 800 asylum seekers held in detention after they arrived by boat to the excision zone, with 4000 processed refugees waiting for resettlement from Malaysia. The Court found that Malaysia is not a signatory to the Refugee Convention, nor does it recognize the status of refugees under its domestic law, and blocked the plan.⁶⁷ However,

⁶⁶ *Plaintiff M61/2010E v. Commonwealth* [2010] H.C.A. 41 (Austl.).

⁶⁷ *Plaintiff M70/2011 v. Minister of Immigration and Citizenship* [2011] H.C.A. 32 (Austl.). Most recently, the High Court raised questions about the legality of maritime interception and turn-back operations, but in a tight 4–3 decision it eventually upheld the government’s policies. See *CPCF v. Minister of Immigration and Border Protection* [2015] H.C.A. 1 (Austl.). Human rights lawyers have argued that despite this High Court decision, which focused on domestic law, Australia is still in breach of its *non-refoulement* international obligations. In a previous decision, *Plaintiff S156/2013 v. Minister for Immigration and Border Protection*, [2014] H.C.A. 22 (Austl.), the High Court unanimously rejected a challenge to the constitutional validity of §§ 198 AB and 198 AD of the Migration Act 1958, as amended by the Migration

the very same justice system that protects all refugees, but those arriving without authorization by boat ultimately upheld some of the more controversial aspects of the country's excision and offshoring tactics.

Another twist to the shifting-border trend is the implementation of new technologies that create virtual contactless border control, potentially deployable anywhere within a country's territory. Countries as distinct as China, Australia, the United States, and the United Arab Emirates (UAE) are leading the way. Dubai International Airport, for example, has introduced a pilot test of new "biometric borders"—known as smart tunnels—in its Terminal 3, and plans to implement the new technology in the remaining terminals by 2020.⁶⁸ The smart tunnel identifies passengers through a combination of scans of the user's iris and 3D face-scanning which occurs as you walk through, meaning that no human interaction is needed.⁶⁹ The information is then matched with the passenger's digital profile. Government officials foresee a future whereby arriving and departing passengers will not require "any travel documents such as passport, ID cards or boarding cards."⁷⁰ Instead, the body will become our ticket of admission (or conversely, denial of entry) as biometric borders expand their reach. Once in the UAE, however, every citizen and lawful resident, including those on a work visa, must also carry a national ID card (known as the Emirates ID) at all times. The Emirates ID serves as a "personal database of every resident," which can be checked and verified by government officials as well as private actors when opening a bank account, accessing medical care, renting a house, or crossing a border.⁷¹ Meanwhile, in the same spirit of technocratic innovation, in China, railway police have begun to test facial-recognition sunglasses for scanning domestic travelers on trains with suspected criminal backgrounds, ranging from traffic infringements to the use of fake identity documents and human trafficking.⁷² The glasses would match the scans against a linked database to identify faces with exceptionally fast (albeit not always particularly accurate) results. Human rights groups have raised concerns that such measures are disproportionately applied to regulate the movement of religious and ethnic minorities. In these examples,

Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth.) (Austl.), which gives the immigration minister the power to designate regional (offshore) processing countries. These amendments were introduced into law in response to a previous ruling of the High Court, *Plaintiff M70*, a decision in which the Court struck down the government's "Malaysian solution."

⁶⁸ See Gillian Duncan, *Face-Scanning Tunnel Expected to Replace Immigration Officers Is Trialled in Dubai*, THE NATIONAL, Oct. 11, 2018, available at <https://www.thenational.ae/uae/transport/face-scanning-tunnel-expected-to-replace-immigration-officers-is-trialled-in-dubai-1.779336>.

⁶⁹ For further information, see <https://airwaysmag.com/airports/dubai-international-tests-new-passport-control/>.

⁷⁰ See Dean Wilkins, *Enter the UAE with Just Your Face: DXB in World First Trial of Face Recognition Technology at the Border*, TIME OUT DUBAI, Oct. 11, 2018, available at <https://www.timeoutdubai.com/dubai-airport/386146-enter-the-uae-with-just-your-face>.

⁷¹ See [government.ae](https://www.government.ae/en/information-and-services/visa-and-emirates-id/emirates-id), Emirates ID, available at <https://www.government.ae/en/information-and-services/visa-and-emirates-id/emirates-id>. See also Edarabaia, All You Need to Know About the Emirates ID (2019 Guide), available at <https://www.edarabia.com/all-you-need-know-emirates-id/>.

⁷² Tara Francis Chan, *Chinese Police Are Using Facial-Recognition Glasses to Scan Travelers*, BUS. INSIDER, Feb. 2, 2018.

measures of migration and population control become intertwined with new, powerful technologies of surveillance.

Additionally, sought-after destination countries are simultaneously developing and implementing futuristic data-mining technologies, and predictive as well as bilateral and multilateral agreements with countries of origin and transit that treat the latter as migration “buffer zones” for wealthier nations (often in exchange for capacity building and material assistance in the form of development aid). The new conception of the shifting border has coincided with the rise of big data and propagated the creation of enormous databases that store biometric information and electronic records of travelers’ identities. Sharing these records prior to travel has replaced traditional interactions between the individual and state officials at the actual territorial border because, as the UK Home Office revealingly puts it, the encounter “can be too late—they [unauthorized entrants] have achieved their goal of reaching our shores.”⁷³ To achieve this ambitious Orwellian vision, the location, operation, and logic of the border have to be redefined to allow government officials or their delegates (increasingly operating transnationally and in collaboration with third parties and private-sector actors) to screen and intercept travelers at continuous and multiple eBorders, iBorders, or automated gates en route to their desired destinations and, before long, within their territories as well.

Pre-travel electronic clearance is now required as a matter of course, even for those in possession of internationally coveted passports, including travelers from EU member states. Such electronic travel authority must be applied for and approved by the government of the destination country before the travelers embark on their journey, and is linked electronically to their passports. Without such authorization, it is impossible to board a plane or enter into the United States, Canada, or Australia. Following suit, European countries are expected to implement the European Travel Information and Authorization System in 2021. This additional layer of pre-clearance and information-gathering creates a powerful yet invisible electronic border that is operational in every place (adjusting itself to the location and risk profile of the traveler). It is intentionally severed from and sequentially precedes the act of territorial admission, thereby allowing a government to “see like a state” outside and beyond its own territory.⁷⁴

As these examples illustrate, borders are not vanishing, but rather are being reanimated and reinvented by governmental authorities. The shifting border is at once multidirectional and slippery, but not in the transnational, open, and tolerant variant that demise-of-the-state or post-Westphalian theories had foreseen. Instead, a darker, more restrictive orientation has emerged. Far from the dream of a borderless world that emerged after the Berlin Wall came down, today, we see not only more border walls, but also the rapid proliferation of “movable” legal barriers that may appear anywhere, but are applied selectively and unevenly, with fluctuating degree, intensity, and frequency of regulation. Prosperous countries are turning to increasingly

⁷³ U.K. Home Office, *Securing the UK Border: Our Vision and Strategy for the Future*, point 1.4., Mar. 2007.

⁷⁴ See SCOTT, *SEEING LIKE A STATE*, *supra* note 20.

sophisticated measures of interdiction, pre-clearance, and biometric tracking in their quest to prevent uninvited migrants, including asylum seekers, from accessing their bounded legal spaces of rights protection and relative safety and stability.

The shifting border is a key pillar in these countries' wholesale agenda to strategically and selectively sort and regulate mobility. As a result, it is increasingly difficult for unwanted and uninvited migrants to set foot in the greener pastures of the more affluent and stable polities they desperately seek to enter. Conversely, wealthy migrants wishing to deposit their mobile capital in these very same countries find fewer and fewer restrictions to fast-tracked admission.⁷⁵ This bifurcation has become more visible with the surge of citizenship by investment programs, which represent another interesting dimension of states' ability to manipulate time and space whenever they seek to facilitate, rather than prohibit, admission for those migrants they perceive as high value in a competitive global environment. A growing number of countries now offer tailor-made, exclusive, and expedited pathways for the world's super-rich to acquire citizenship "quickly and simply" in exchange for a hefty investment.⁷⁶ In certain cases, millionaire migrants need not even set foot in the new home country. These programs—creatures of states' control over their membership boundaries—turn large money transfers into the core, if not sole, criterion for admission into the body politic. Such red-carpet treatment is offered by states at the same time as they rely on increasingly complex bordering mechanisms to redefine the reach of their migration control power, both internally and externally, when it comes to other categories of non-citizens seeking entry and protection.⁷⁷

The proliferation of "golden visa" and "golden passport" programs is germane for another reason. For this echelon of well-to-do migrants, governments are treating the transfer of funds as a substitute for the establishment of long-term physical presence on the territory, again revealing the flexible and instrumental treatment of space and place. For those with deep pockets, the establishment of a "genuine link"—typically requiring several years of continuous residence, whereby physical presence on the territory is treated as a proxy for "putting down roots in the country"—is simply waived at the discretion of the state. By contrast, for those in search of international protection and safe haven, reaching the actual, physical, territorial border remains the make-or-break pre-condition for launching an asylum claim, and with it, accessing the relatively high level of rights protection offered by affluent, stable rule-of-law societies. This fixation on territorial arrival as the connecting factor activating the state's asylum-protection apparatus helps explain the tremendous investment by

⁷⁵ See, e.g., Ayelet Shachar & Ran Hirschl, *On Citizenship, States and Markets*, 22 J. POL. PHIL. 231 (2014).

⁷⁶ For further discussion, see Ayelet Shachar, *Citizenship for Sale? in THE OXFORD HANDBOOK OF CITIZENSHIP* 789 (Ayelet Shachar et al. eds., 2017).

⁷⁷ In the United States, this tension is perhaps best manifested in the contrasting legal treatment of the "Parachuters," the super-rich entering on the heft of their wallet, and the "Dreamers"—namely, children who were brought into the country at a young age, have been educated in the United States, and raised "American" but, despite widespread support for their cause, have no legal pathway to establish a secure legal status in the only country they know as home. This contrast is elaborated in Ayelet Shachar, *The Marketization of Citizenship in an Age of Restrictionism*, 32 ETHICS & INT'L AFF. 3 (2018).

states in devising new shifting-border regimes. If a person seeking asylum is blocked *prior* to arrival, the rights guaranteed under national, regional, and international protection regimes do not arise.

The agility of the shifting border supplies the legal arsenal for states to skirt their obligations without formally withdrawing them, as it operates to prevent aspiring newcomers from reaching the actual, territorial border. It allows governments—of prosperous societies, in particular—to continue to present themselves as global beacons of democracy and human rights, while engaging in ever more frantic efforts to avert certain arrivals in the first place. This divergent treatment of time, place, and space—crucial and compulsory for activating a state’s protection regime vis-à-vis the asylum seeker, yet totally relinquishable by governments in relation to those admitted on the heft of their wallet—reveals the perplexing features of the new landscape of shifting borders. Countries simultaneously engage in opening and closing their borders, but do so selectively. The duality of “preventive” shifting-border policies and facilitative fast-track admission for desired migrants reflects the ingenuity of governmental actors operating under conditions of formally constraining rule of law norms in a globalizing world. Instead of disappearing, states have engendered a whole new legal cartography of control over borders and membership boundaries, indicating quite decisively who is welcomed to, or barred from, their respective “islands” of stability and prosperity. Far from a static and immovable barrier, the border has become a mobile, agile, sophisticated, and ever-transforming legal construct—a *shifting border*, which can be planted and replanted in myriad locations, with dramatic implications for the rights and protections offered to those who fall within its remit of influence.

2. Urban agglomeration, state domination

The twenty-first century has been hailed the “century of the city.”⁷⁸ Major demographic, economic, and political trends point to the increasing centrality of cities and extensive urbanization more generally. Whereas a century ago only one in ten people lived in an urban area, today, for the first time in recorded human history, the majority of the world’s population lives in cities. This marks a major and unprecedented transformation in the ways in which human societies organize, both in spatial and in geopolitical terms. The majority of the growth is in the Global South, but the Global North has also seen its fair share of change in terms of both absolute numbers and speed of change. In 1800, a meager 3 percent of the world’s population lived in cities. In 1950, less than 30 percent of the world population lived in cities. In 1990, that number went up to 43 percent. By 2018, this proportion had grown to 56 percent. Given that during this time, the world’s population has increased from 2.6 billion in 1950 to 5.3 billion in 1990 and to 7.6 billion in 2018, the city growth becomes even more significant—from 750 million in 1950 to 2.2 billion people in 1990 and to 4.3 billion in 2018. In

⁷⁸ The Rockefeller Foundation, Report: Century of the City (Dec. 18, 2006), available at <https://www.rockefellerfoundation.org/report/century-of-the-city/>.

other words, from 1950 to 1990 alone, the number of city dwellers worldwide tripled itself. What is more, within a quarter of a century from the 1990s to the present day, a mere generation, the number of city dwellers has further grown by 95 percent, or nearly doubled itself. By 2050, an additional 2.5 billion people are expected to live in urban settings; approximately 70 percent of the world population (projected at 10 billion) will reside in cities (85 percent within OECD countries), thereby reflecting unprecedented human agglomeration in urban areas, with ever-widening density gaps between cities and hinterlands, as well as among neighborhoods in the megacity.⁷⁹

An immediate by-product of the extensive urbanization of the last century is the emergence of megacities and megacity regions. In 1900, there were merely twelve cities in the world with one million residents or more.⁸⁰ Today, the number has passed 500 (more than a forty times increase in little over a century). As cities with one million residents are now so common, the term “megacities” typically refers to cities with 5 to 10 million people or more, or to urban centers with 10 million people or more. These figures are striking. Between 1990 and 2015 alone, the number of cities worldwide with at least 5 million inhabitants has nearly tripled from eighteen to fifty-three. That number is expected to further double to 104 cities by 2030. In 1950, only New York had a population of more than 10 million.⁸¹ By contrast, in 2017, nineteen megacities had a population greater than 10 million. When metro area population is taken into account, as of 2017, forty-seven urban centers had populations of at least 10 million.⁸² The numbers are stunning: as of 2017, Tokyo’s population stands at 38 million; Shanghai at 34 million; Jakarta at 32 million, Delhi at 28 million, Seoul at 26 million, Beijing at 25 million, Manila and Mumbai at 24 million each, while the populations of metro Sao Paulo, Mexico City, Karachi, and Lagos stand at 22 million each. New York—the paradigmatic example of a Western megacity—is ranked ninth in the world in terms of its metro area population of approximately 24 million. Gigantic cities such as Cairo, Los Angeles, or Dhaka (each with a metro-area population of 19 million) do not crack the top fifteen most populated cities list. Megacities such as Bangkok, Rio de Janeiro, or Bangalore, each with a metro-area population between 13 and 15 million, are not listed among the twenty most populated cities. Another approach to defining megacities takes the concentration of people in a given city relative to the overall population of the entire country. Using this criterion, the list of megacities grows. Santiago de Chile or the Taipei-Keelung metropolitan area do not meet the 10 million standard, but are home to well over one-third of their respective polities’ overall population.

⁷⁹ For recent data, see Population Division of the UN Department of Economic and Social Affairs (UN DESA), United Nations 2018 Revision of World Urbanization Prospects (2018), available at <https://population.un.org/wup/>.

⁸⁰ In the late eighteenth century, Beijing was the first city in history to have reached population of one million. London reached that milestone circa 1825.

⁸¹ See Richard Stren, *Cities and Politics in the Developing World: Why Decentralization Matters*, in THE OXFORD HANDBOOK OF URBAN POLITICS 567 (Peter John, Karen Mossberger, & Susan E. Clarke eds., 2012).

⁸² See City Mayors Statistics, Largest Cities in the World and Their Mayors (July 2017), available at <http://www.citymayors.com/statistics/largest-cities-mayors-1.html>.

The extensive urban agglomeration and population growth in megacities are expected to continue in the coming decades. Demographic models suggest that by 2030, merely a decade from now, Delhi's population will reach 36 million (30 percent more than its current population), Karachi's population will reach 30 million (30 percent increase), while Dhaka's population will stand at 28 million (32 percent increase). Some projections suggest that megacities of 50 million or even 100 million inhabitants (dubbed "metapolis") are likely to emerge within the next century, all while levels of density and geographic concentration will continue to rise as the percentage of land area occupied by human settlement remains well below 10 percent.⁸³ New research further predicts that by 2100, approximately one-quarter of the world's population will reside in the world's 101 largest cities, with an overall megacity population between 1.6 and 2.3 billion. Should current urbanization patterns in Africa continue, studies suggest, the population of Lagos and Kinshasa could each reach 85 million by 2100, while the population of Dar es Salaam will reach 75 million. Meanwhile, the population of several megacities in the Indian sub-continent (Mumbai, Delhi, Kolkata, Karachi, and Dhaka) will have reached 50 to 70 million each by the turn of the twenty-first century.⁸⁴ No wonder recent UN reports declare that the management of urbanization, especially in low-income and lower-middle-income countries, is one of the greatest challenges of our times.⁸⁵

This remarkable shift touches on some of the core elements of political public life: how we conceive and govern the relationship between our urban space, in which more than half of the world's population now resides and processes of political organization and representation—the building blocks of political sovereignty and of constitutional law. Surprisingly, our legal institutions and constitutional imagination have not even begun to catch up with this new reality. While living in the century of the city we are still captives of outmoded constitutional structures, doctrines, perceptions, and expectations sown during the age of revolution and germinated during the creation of the modern nation state. While legal scholars have, by and large, overlooked the new reality of extensive urbanization, the city has attracted much attention throughout the human sciences. Contemporary political theory has generated renewed discussion on the urban space as a site of dense social interaction, as an alternative to state- or ethnicity-based political community, and on the city as a potential source for its dwellers' rights and entitlements to renewed urban life (e.g. Henri Lefebvre's "right to the city").⁸⁶ Some normative theorists have gone as far as suggesting that cities may have their own defining ethos or values, or that cultivating the "spirit of cities" may be an effective answer to global convergence and homogenization.⁸⁷ Political sociologists, from S. N. Eisenstadt and Peter Hall to Charles Tilly and Saskia Sassen, have examined

⁸³ See, e.g., Robert H. Samet, *Complexity, the Science of Cities, and Long-Range Futures*, 47 *FUTURES* 49 (2013).

⁸⁴ See Daniel Hoorweg & Kevin Pope, *Population Predictions for the World's Largest Cities in the 21st Century*, 29 *ENV'T & URBANIZATION* 195 (2017).

⁸⁵ See UN DESA, *supra* note 79.

⁸⁶ See, e.g., MARGARET KOHN, *THE DEATH AND LIFE OF THE URBAN COMMONWEALTH* (2016).

⁸⁷ See, e.g., DANIEL A. BELL & AVNER DE-SHALIT, *THE SPIRIT OF CITIES: WHAT THE IDENTITY OF A CITY MATTERS IN A GLOBAL AGE* (2011).

the political and economic roots of the evolution, decline, and re-emergence of the city and, later, of the global city. Prominent economists (e.g. Paul Krugman) and scholars of urban planning (e.g. Richard Florida) have paid considerable attention to the city as an engine for economic growth, a magnet for the creative classes, and a potential catalyst of regional cooperation.

In recent years, scholars and public intellectuals have gone on to suggest that, due to their relatively manageable scale and proximity to the people, cities are often better problem-solvers than the rigid and detached state apparatus. Cities should seize the current zeitgeist of “new localism” and take control over solving social and economic problems within their ambit.⁸⁸ Benjamin Barber’s *If Mayors Ruled the World* offers what is arguably the boldest effort within mainstream discourse (i.e. aside from the Marxist-anarchist line of thought à la Murray Bookchin of undermining state authority via city power), to advocate for giving more power to cities.⁸⁹ Barber’s argument is pragmatic: cities can deliver where big government cannot. He suggests that cities’ tendency to find practical solutions to big policy challenges, as well as their unique combination of local engagements and cosmopolitan inclinations, makes cities better suited than states to deal with major contemporary governance problems. Cities, in Barber’s conceptualization, offer “a miracle of civic ‘glocality’ promising pragmatism instead of politics, innovation rather than ideology, and solutions in place of sovereignty.”⁹⁰ In short, the last decades have seen a burst of interest in and novel thinking about urbanization and cities through the human sciences.

By stark contrast, very little of this intellectual flurry has penetrated constitutional law. Here, the city remains a non-entity and a non-subject. The existing conversation, whether academic or jurisprudential, about all matters subnational—regions, states, provinces, and so on—is confined within centuries-old ideas about federalism and subsidiarity. The gap is even more glaring when it comes to comparative constitutionalism. In unitary polities, urban law and administrative law govern the nitty-gritty legal terrain. Despite the tremendous renaissance of comparative constitutional law, not a single comparative study traces the origins of constitutional innovation and stalemate with respect to city/state relations. In fact, the metropolis is virtually non-existent in comparative constitutional law, constitutional design, or constitutional thought. With the exception of a few American legal academics whose work focuses on American cities’ legal status,⁹¹ there are no book-length comparative accounts of the challenges to constitutional governance posed by extensive urbanization, the rise of the metropolis, or consequent tensions along a center/periphery demographic and geopolitical axis. In comparative constitutional thought, the city continues to be non-existent, quietly accepted as being fully subsumed within existing federalism and separation of powers doctrinal schemes. *The Oxford Handbook of Comparative Constitutional*

⁸⁸ BRUCE KATZ & JEREMY NOWAK, *THE NEW LOCALISM: HOW CITIES CAN THRIVE IN THE AGE OF POPULISM* (2018).

⁸⁹ BENJAMIN BARBER, *IF MAYORS RULED THE WORLD: DYSFUNCTIONAL NATIONS, RISING CITIES* (2013).

⁹⁰ *Id.* at 5.

⁹¹ Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730–1870* (1983); RICHARD SCHRAGGER, *CITY POWER* (2016).

Law, for example, is a major state-of-the-field collection that includes over fifty chapters spread over 1000 pages.⁹² Not a single chapter addresses the urban challenge in passing, let alone in significant detail. A similar silence resounds in virtually all other definitive handbooks, companions, and textbooks on comparative constitutional law.

Of particular relevance here are historical accounts of the rise of the modern state and the corresponding demise of city and subnational autonomy. It is well known that the process of state formation in Europe involved the subjugation of the medieval city. Medieval and early-modern city state and autonomous communities' powers were gradually yet effectively subordinated to the growing authority of the early-modern state, with its quest for control over its territory and people.⁹³ In some cases, the subjugation of city powers by the state-led "building a leviathan" project was swift, either as a result of clear power imbalances or because pooling military or economic resources of several smaller units to create a more potent large one served the interests of weakened city states. In other instances, emerging states had to resort to active disciplining and open confrontation with recalcitrant, self-asserting cities adamant on maintaining their sovereignty and authority over their territory, people, capital, and knowledge. Given the considerable variance in how city states were incorporated into the modern state, it is clear that a range of historical and regional contingencies influenced this evolution alongside broader geographical, cultural, and economic factors. Sooner or later, however, the vast majority of hitherto autonomous cities (at least in Europe) were "nationalized" and incorporated into the early-modern state, giving way to the state-centered conception of sovereignty and spatiality.

Whereas in 1500, the city state in all its varieties was the dominant form of political unit in Europe, by 1800 it had given way to the early-modern state and its overseas colonies.

Subsequent political paths converged, with a few exceptions, upon a single form of a medium-sized, centralized state, with the later addition of federalism as a joint-governance pact between subnational administration and a national government. It was during that phase of the evolution of city state relations that substantial urban communities lost much of their previous autonomy and status. As states sought to establish their monopoly over the legitimate exercise of physical force and authority, enhance their influence upon economic and social life, and, most importantly, control "who gets what, when and how" within their respective territories, they also laid increasing claim to primacy as a focus of popular loyalties and collective identity.⁹⁴ As cities lost the considerable autonomy they once enjoyed, state-centered bureaucracies and governance structures were established; cities were increasingly perceived as

⁹² THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Michel Rosenfeld & András Sajó eds., 2012).

⁹³ See, e.g., PATRICK LE GALÈS, EUROPEAN CITIES: SOCIAL CONFLICTS AND GOVERNANCE (2002); HENDRIK SPRUYT, THE SOVEREIGN STATE AND ITS COMPETITORS (1996).

⁹⁴ See CHARLES TILLY, COERCION, CAPITAL AND EUROPEAN STATES, AD 990–1992 (1993); PETER J. TAYLOR, WORLD CITY NETWORK: A GLOBAL URBAN ANALYSIS (2004). Holding the monopoly over the legitimate use of physical force by a government in a well-defined territory is, according to Max Weber, one of the defining features of the state. See generally, WEBER'S RATIONALISM AND MODERN SOCIETY: NEW TRANSLATIONS ON POLITICS, BUREAUCRACY, AND SOCIAL STRATIFICATION 129–198 (Tony Waters & Dagmar Waters trans. & eds., 2015).

mere cogs (important as they might be) in national economies, and as components of nation states.⁹⁵ As Gerald Frug has shown in his seminal article written in 1980, during that grand transformation, the legal conceptualization of the city was consistently narrowed to a powerless “creature of the state” authorized to solve purely local problems. In that process, Frug argues, “it is not simply that cities have become totally subject to state control—although that itself demonstrates their powerlessness—but also that cities have lost the elements of association and economic strength that had formally enabled them to play an important part in the development of Western society.”⁹⁶ As the statist project of national constitutions, whether centrist or federalist, achieved prominence, the effect on the constitutional imagination with respect to political geography and spatial autonomy was immediate and complete, leading to a dearth of creative thinking concerning the governance of cities.

American constitutional jurisprudence on city power represents a very small fraction of federalism case law in that country. *Hunter v. City of Pittsburgh*, a major US Supreme Court ruling rendered in 1907, continues to stand out as the landmark, field-defining ruling decision in this area.⁹⁷ Its take-home message is clear: “municipal corporations are subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.”⁹⁸ More than a century later, little has changed. States continue to exercise significant power over their political subdivisions.⁹⁹ Yet, as devastating as *Hunter’s* message has been for city power, several observers point out that progressive municipal agendas in San Francisco (with respect to LGBT marriage equality), Portland (with respect to corporate tax surcharge), or New York (with respect to universal pre-kindergarten) have led the way in planting the seeds of social change.¹⁰⁰

From a formal constitutional standpoint, two main principles govern city power in the USA. Forty states follow some version of the so-called Dillon’s Rule. Formulated by jurist John Dillon in 1868, it requires that all exercise of city power be traced back to a specific legislative grant of authority. The presumption is that cities do not have legislative authority unless it is explicitly granted to them through a concrete, identifiable piece of legislation. In other words, municipal corporations owe their origin to, and derive their powers and rights wholly from, the state legislature. Ten states are considered “home rule” (so-called Cooley Doctrine) jurisdictions. Here, cities enjoy a broader initial grant of authority and are able to act without specific authorization.

⁹⁵ See TAYLOR, *supra* note 94, at 15.

⁹⁶ See Frug, *supra* note 91, at 1119–1120.

⁹⁷ For an overview of the *Hunter* ruling, its evolution and legacy, see Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL. REV. 390 (2012).

⁹⁸ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–179 (1907).

⁹⁹ For an overview, see Richard Schragger, *The Political Economy of City Power*, 44 FORDHAM URB. L.J. 91 (2017).

¹⁰⁰ See, e.g., Heather Gerken & Joshua Revesz, *Progressive Federalism: A User’s Guide*, 44 DEMOCRACY (2017), available at <https://democracyjournal.org/magazine/44/progressive-federalism-a-users-guide/>.

In these states, an article of amendment in the state constitution grants cities and municipalities the capacity to pass laws to govern themselves as they see fit as long as they comply with state and US constitutions. The Cooley Doctrine upon which home-rule jurisdiction is based reflects the notion of an inherent right to local self-determination. In practice, however, even in states that follow the home-rule principle, legislatures can (and often do) override municipal laws with ordinary legislation.

In some home-rule states—New York being a prime example—an intricate system of joint governance has evolved, whereby in certain policy areas the state may legislate only upon approval of affected localities, whereas in other policy areas, counties may pass laws only upon the approval of the state. In several major cities that account for a significant portion of their respective state’s population—notably Chicago (Illinois) and New York City (New York)—state legislatures allow for what has been termed “integrated governance” of the school system, whereby the mayors control public schools in the city and directly appoint the head of the school system. In 2002, New York State legislature granted the sitting New York City mayor, Michael Bloomberg, control over the New York City Department of Education. This deferential policy, which was one of Mayor Bloomberg’s major accomplishments in transforming New York, has remained in effect.

Even as relatively powerful a city as New York may be, it too often finds itself bound by limiting, preemptive state legislation that prevents the city from implementing policy changes in key areas.¹⁰¹ Limiting rulings by apex state courts have restricted the ability of other American major cities such as Los Angeles, San Francisco, or Chicago to legislate in key policy areas such as education, taxation, or crime prevention. According to the National League of Cities’ 2018 report, *City Rights in an Era of Preemption: A State by State Analysis*, “state legislatures have stricken down laws passed by city leaders in four crucial areas of local governance: economics, social policy, health and safety.”¹⁰² Leading experts on American cities’ constitutional status note that there are various ways in which states could frustrate cities’ efforts to address the welfare of urban residents by implementing redistricting and rezoning to dilute local power to the suburbs.

Instances of preemption have expanded considerably in the last decade, with states preempting or overriding city ordinances concerning issues as diverse as local living wage regulations, gun control, municipal civil rights law, tobacco regulations, transgender anti-discrimination rights, posting nutritional information in restaurants, and sanctuary city policies.¹⁰³ As a recent study astutely observes, “it is unclear how a

¹⁰¹ See, e.g., *Mayor of N.Y. v. Council of N.Y.*, 2013 N.Y. Slip Op. 31802(U), 1–2.

¹⁰² <https://www.nlc.org/resource/city-rights-in-an-era-of-preemption-a-state-by-state-analysis> (Apr. 2, 2018).

¹⁰³ Martha F. Davis, *Design Challenges for Human Rights Cities*, 49 COLUM. HUM. RTS. L. REV. 28, 29–30 (2017). See also Erin A. Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?* 106 GEO. L.J. 1469 (2018); Kenneth A. Stahl, *Preemption, Federalism and Local Democracy*, 44 FORDHAM URBAN L.J. 133 (2017); Erin A. Scharff, *Powerful Cities? Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292 (2016); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018). Schragger further notes that “these legal challenges to municipal regulation have been accompanied by an increasingly shrill anti-city politics, emanating from state and federal officials. . . . Anti-urbanism is a long-standing and enduring feature of American federalism. . . .”

system overtly dedicated to the principles of devolution can be so hostile to the exercise of municipal power.”¹⁰⁴

As disempowered as American cities may be, Canadian cities easily win the title of most constitutionally weak cities in North America. As a primer on Canadian politics describes it, “Canadian cities have been, without a doubt, the outcasts of Canadian federalism.”¹⁰⁵ Lacking any direct constitutional powers, cities and municipalities in Canada exist only as bodies of delegated provincial authority, entirely dependent on provincial legislation for their power and sources of revenue. The *British North America Act, 1867* (renamed *Constitution Act, 1867*) established the relevant constitutional (and by extension, political) landscape for current federal and provincial relationships with municipalities. In that mid-nineteenth-century document, cities are virtually non-existent, with no residual authority of their own. Section 91 of the *Constitution Act, 1867* lists the main legislative areas reserved to the federal government, while section 92 addresses the legislative areas reserved for the provincial governments. There are two key provisions in section 92: section 92(8), which gives the provinces exclusive control over municipalities, and section 92(16), which gives the provinces authority over all matters of a local or private nature. In addition, provinces have jurisdiction over “hospitals, asylums, charities, and eleemosynary institutions” (§ 92(7)) as well as “shop, saloon, tavern and actioneer licenses” (§ 92(9)). In short, the constitutional powers assigned today to major cities such as Montreal, Toronto, and Vancouver are delineated by a 150-year-old document, and are controlled exclusively by provincial authority, alongside “charities,” “shops,” and “saloons and taverns.” Consider the statist subjugation of Toronto, Canada’s largest metro area and home to approximately 20 percent of Canada’s population and over 50 percent of Ontario’s population. It is the fourth largest urban center in North America (after Mexico City, Los Angeles, and New York) and is consistently ranked among the world’s top financial centers. Metropolitan Toronto’s population has passed 7 million with a growth rate of approximately 18 percent over the last decade—nearly double that of Canada or Ontario. The City of Toronto itself, home to 3 million people, has far more people than five of Canada’s provinces. And yet, the city is without the constitutional or self-government prerogatives awarded to the provinces. It is estimated that every second immigrant to Canada settles in the Greater Toronto Area; consequently, nearly half of the city’s population is foreign-born. On a practical level, given its size and unique demographic composition, the city carries much of the day-to-day brunt of sustaining viable multiculturalism in the public sphere, as well as addressing the consequences of growing economic inequality and social strife. Nonetheless, the city is systemically dependent on national or sub-national planning, funding, and political economy considerations as its independent taxation and legislative authority is very limited.

To add to the constitutional datedness and systemic city underrepresentation, the federal and provincial governments lack strong incentive to reshuffle the pertinent

¹⁰⁴ Schragger, *supra* note 103, at 1163.

¹⁰⁵ Luc Turgeon, *Cities Within the Canadian Intergovernmental System*, in *CONTEMPORARY CANADIAN FEDERALISM* 358, 367 (Alain Gagnon ed., 2009).

constitutional cards. Not only would such a reshuffle result in a major loss of their respective revenue and planning control, but—perhaps most importantly—it would not result in any immediate political gain for either of the major parties. Federal and provincial objection to city empowerment abound. In fact, few countries in the world have witnessed such resistance by senior levels of government to loosen restraint and regulation on cities as has been the case in Canada.¹⁰⁶

In Europe, too, cities lack autonomous constitutional standing. As is well known, contemporary pan-European constitutional discourse is preoccupied with subsidiarity talk and attempts to appease democracy deficit tensions through jurisprudential and legislative deference to national world views, cultural inclinations, and policy preferences. Yet, while European countries are increasingly vocal in demanding enhanced nullification and opting-out options vis-à-vis pan-European policies to which they object, they are avidly reluctant to even consider, let alone grant, anything close to such options for major urban centers within their territorial boundaries. Despite major overhauls in urban governance (e.g. the establishment of the Greater London Authority or the Greater Paris plan), virtually none of Europe's major cities, whether in unitary or federal states, enjoys extended constitutional status that emancipates it from the ultimate grip of central or regional governments.

Consider Germany, the most populated country in the EU. Unlike most countries of its population size (85 million) or economic significance, Germany does not feature a real megacity. Due to a confluence of historical contingencies, from the multiple political entities of the pre-Bismarck era to the destruction of World War II and the split of the country, and of Berlin from 1945 to 1990, it has evolved as a relatively decentralized country. Several German cities, notably Berlin (one of Europe's cultural capitals), Frankfurt (one of Europe's and the world's financial centers), and Dusseldorf (at the heart of the Rhine-Ruhr region, one of Europe's heavy industry centers), have evolved into major cities on a continental scale. Indeed, Berlin (by virtue of being capital of Germany), Hamburg, and Bremen (both were independent city state members of the historic Hanseatic League at the time of German unification in 1871)¹⁰⁷ enjoy constitutional status as city states equal to that of a canton/province/state.¹⁰⁸ Yet, this designation is predominantly of administrative significance, and does not reflect any enhanced revenue-generation modes or novel constitutional thinking about the role of the megacity or the urban agenda more generally.

The weak constitutional status of German cities has come to the fore amid the arrival of a very large number of refugees to Germany in 2015 and 2016. A federal quota system distributed the incoming refugees across the country according to tax

¹⁰⁶ See Alison Smith & Zachary Spicer, *The Local Autonomy of Canada's Largest Cities*, 54 URBAN AFF. REV. 931 (2018).

¹⁰⁷ The inclusion of Bremerhaven—essentially an enclave in the state of Lower Saxony—in the German Basic Law's designation of Bremen as city state was done upon request of the US navy to allow it access to a main seaport after World War II.

¹⁰⁸ The main privilege the three German city states have enjoyed vis-à-vis other cities is their systemically better positioning with respect to equalization transfers between the Federal Government and the Länder (*Länderfinanzausgleich*).

revenues and population size. Consequently, Germany's large cities received the bulk of incoming migrants, regardless of their existing challenges with respect to density, affordable housing, oversubscribed transit, healthcare, education facilities, and so on. As recent reports suggest, that framework imposed uneven burdens on city states and large cities.¹⁰⁹ While large German cities, notably Berlin and Hamburg, have shown considerable ability to innovate in order to effectively absorb a large number of newcomers, there remains a huge institutional and constitutional gap between what German cities are expected to do with respect to refugee housing or integration and their lack of meaningful constitutional standing or even a seat at the policymaking table.¹¹⁰

Likewise, there are no provisions in the specific German state constitutions that grant any special treatment to large cities.¹¹¹ Munich is only named once in the Bavarian state constitution¹¹²; neither Cologne nor Dusseldorf is even mentioned in the state constitution of North Rhine-Westphalia; and the Hessian state constitution is silent with respect to Frankfurt, a city that was described in Saskia Sassen's seminal work as a "global city" alongside New York, London, and Tokyo.¹¹³ Within the Rhine-Ruhr metropolitan region, Germany's largest urban agglomeration, there are 11 million people living in an area considerably smaller than the size of Cyprus, yet with a population ten times larger than that of Cyprus. The region is included in its entirety within the state of North Rhine-Westphalia and maintains certain administrative coordination bodies; however, it lacks any autonomous constitutional standing or personality.

Arguably, the boldest attempt in Europe at the devolution of power to megacities was the creation of the Greater London Authority (GLA) in 2000. In the 1990s, the central government renewed interest in developing the city. Mega-projects such as the Channel Tunnel Rail Link, the Jubilee Line expansion, the London Eye, and the Millennium Dome and Bridge were centrally funded. The entire GLA initiative was part of the Labour government's plan to modernize local government and make it more accessible and responsive to people's concerns. In addition, the government attempted to foster policy cohesion across the London metro area—something that urban planners thought was missing since the disbanding of the Greater London Council in 1986.¹¹⁴ Still, constitutional empowerment of London has never been part of the plan. Calls for greater city autonomy, especially following the Brexit referendum, have been quickly

¹⁰⁹ Bruce Katz, Luise Noring, & Nantke Garrelts, *Cities and Refugees—The German Experience*, Discussion paper, Brookings Institution Forum, New York, Sept. 18, 2016.

¹¹⁰ See Bruce Katz & Jessica Brandt, *The Refugee Crisis Is a City Crisis: World Leaders Are Negotiating a Global Compact on Refugees. Urban Leaders Need a Seat at That Table*, CITY LAB, Oct. 27, 2017.

¹¹¹ The Basic Law formally recognizes municipal autonomy (art. 28 GG), although due to a great deal of mandatory tasks and limited resources, this autonomy is undermined in practice.

¹¹² VERFASSUNG BAYERN art. 68 states that the Bavarian Constitutional Court shall be formed at the Higher Regional Court in Munich.

¹¹³ SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2001).

¹¹⁴ See Carolyn Harrison, Richard Munton & Kevin Collins, *Experimental Discursive Spaces: Policy Processes, Public Participation and the Greater London Authority*, 41 URBAN STUD. 903, 905 (2004); Karen West et al., *The Greater London Authority: Problems of Strategy Integration*, 31 POL'Y & POL. 479, 480 (2003).

silenced by the central government. Moreover, observers agree that the GLA Act left many opportunities for the central government to intervene and assert its authority over core urban planning and city governance matters.¹¹⁵

The statist hand that restrains the megacity may also empower it at will. Much has been written on leading Asian countries' political and constitutional support of megacities, reflecting astute, long-term central government planning aimed at fostering megacity power as the engine of regional or national economic growth. The Japanese state's support of Tokyo or South Korea's backing of Seoul are prime examples of megacity central state empowerment. Shanghai's rapid metamorphosis from a gray factory city into its current status as a regional and global megacity has also been analyzed extensively.¹¹⁶ Observers agree that transforming Shanghai into a world-class city was not possible without it becoming a Chinese "state project" since the 1990s. China's long-term, state-enabling approach toward megacity governance has been implemented through the mechanism of centrally administrated municipalities (CAM): Shanghai, Beijing, Tianjin, and Chongqing. Article 30 of China's 1982 constitution establishes the notion of CAMs ("[t]he country is divided into provinces, autonomous regions and municipalities directly under the Central Government"); assigns to CAMs a constitutional status equivalent to that of provinces; and stipulates that these province-level megacities are held directly accountable for and controlled by the central government.

Consequently, China's unique spatial governance structure comprises four CAMs, twenty-two provinces (official Chinese reports include Taiwan in that category for a total of twenty-three), and five autonomous regions, all in what is formally a unitary state, but practically has evolved as an intricate quasi-federal system. Article 89(4) of the Constitution further warrants that one of the tasks of the People's Republic of China State Council is "to exercise unified leadership over the work of local organs of State administration at various levels throughout the country, and to formulate the detailed division of functions and powers between the Central Government and the organs of State administration of provinces, autonomous regions and municipalities directly under the Central Government." In addition, from the mid-1980s onward, fifteen large cities were assigned a "sub-provincial cities" status. These include rapidly growing megacities such as Guangzhou, the capital of Guangdong Province (metro population 25 million), Shenzhen (metro population 23 million; also within the Guangdong Province), Hong Kong, and Chengdu, capital of Sichuan Province (metro population 18 million).

In a complementary move, China's *hokou* (household registration) system—introduced in the 1950s to monitor the population, control internal migration, and prevent the emergence of slums in urban centers—was reformed several times. Most notably, a major overhaul in 2014 allowed over 100 million internal migrant workers to register in the cities where they live, thereby enabling them and

¹¹⁵ See, e.g., Greg Clark & Tim Moonen, *WORLD CITIES AND NATION STATES* 41 (2017).

¹¹⁶ See, e.g., SHANGHAI RISING: STATE POWER AND LOCAL TRANSFORMATION IN A GLOBAL MEGACITY (Xiangming Chen ed., 2009).

their families to access essential social services, including education and health-care benefits.¹¹⁷ For the most part, the *hokou* system remains tiered depending on the size of the migrant workers' destination city: the larger the destination city is, the stricter the criteria for residence registration and entitlement to social services. However, experts agree that while further reforms to the *hokou* system are required, the gradual ease of legal restrictions on internal migration since the 1980s has contributed to the success of China's centrally planned approach to urbanization.¹¹⁸

The list of examples of state subjugation of the city, or self-interested central government empowerment of urban centers, is extensive. We could have gone on to discuss state-initiated capital city relocation (e.g. Rio de Janeiro to Brasilia, Lagos to Abuja, or the Egyptian government's plan to relocate the country's capital away from Cairo); the statist outlook behind the Greater Paris (Le Grand Paris) plan; how political survival interests of central governments have led to the constitutional empowerment of Buenos Aires and Mexico City, or the bifurcation of Dhaka, the densest city in the world. Ostensible attempts (e.g. through the 74th Amendment to India's constitution) to empower Indian cities, among them some of the world's most massive megacities, have done little more than allow state governors to call the shots on city power. What is more, according to articles 81 and 82 of the Indian Constitution (as amended by the 87th Amendment, 2003), apportionment of Lok Sabha seats within and among states is based on the 2001 census and is frozen until 2026, the year demographic projections suggest the country's population will have reached a stabilized number. Consequently, the massive urbanization trend in India over the last two decades is not reflected in either intra- or interstate seat allocation.¹¹⁹ In short, all things considered, cities—whether as economically powerful as Chicago or Frankfurt or as impoverished and dilapidated as Dhaka or Kinshasa—remain tightly under the state's constitutional grip.

Whereas the shifting border demonstrates that states, acting alone or in concert, may creatively “unshackle” themselves from the constraints of fixed territoriality—dramatically rewriting traditional conceptions of sovereignty as they variably redefine the spatial scope and reach of migration control functions, when it comes to cities, no such ingenuity is manifested. States are acting instead as strict, rigid constitutional landlords in a universe of spatial statism; cities are unduly constrained as they are “place-locked” and therefore cannot “vote with their feet,” and, under prevalent

¹¹⁷ See Bettina Gransow, *International Migration in China – Opportunity of Trap?*, BPB FOCUS MIGRATION—POLICY BRIEF No. 19, Dec. 2012.

¹¹⁸ Kam Wing Chan, *Achieving Comprehensive Hoku Reform in China*, PAULSON POLICY MEMORANDUM, Dec. 2014; KAM WING CHAN, *URBANIZATION WITH CHINESE CHARACTERISTICS: THE HUKOU SYSTEM AND MIGRATION* (2018); Liliu Zhao, Shouying Liu, & Wei Zhang, *New Trends in Internal Migration in China: Profiles of the New-Generation Migrants*, 26 CHINA & WORLD ECON. 18 (2018).

¹¹⁹ While metro Mumbai's population, for example, constitutes approximately a quarter of the State of Maharashtra's overall population, due to India's electoral system, the Greater Mumbai region has merely six of the State of Maharashtra's forty-eight members of Parliament in a national parliament of 543 elected members of Parliament.

national constitutional models, have only limited leeway to redraw and renegotiate their powers and competences vis-à-vis the federal or unitary states in which they are spatially located.

Cities, unlike capital, are fixed in place. The anchoring spatial factor plays a key role in delineating, indeed frequently constraining, cities' bargaining power. Shrewd litigants who are not anchored to a single location may engage in "forum shopping"—essentially choosing a jurisdiction or a legal forum that is likely to benefit them the most. Legitimate companies and tax evaders alike commonly register their businesses in overseas jurisdictions that offer favorable taxation and banking rules. Mass production of goods tends to gravitate to jurisdictions with lower wages, reduced safety standards, or poorly protected worker rights. Potential "capital flight"—essentially, if you do not accept our demands, we will transfer our operations elsewhere where costs are lower—is a lethal strategy commonly deployed by corporations in their constant attempts to extract better conditions from governments (e.g. tax cuts, investment in infrastructure, or favorable trade platforms). Cities, by contrast, are not going anywhere; they are tied to a specific spatial location. Naturally, none of these strategic maneuvering options are available to them.

As cities lack any exit option, and can only exercise limited "voice" channels (to borrow Albert Hirschman's famous terminology), cities that seek to have their agendas pursued in ways other than the usual "privatize public assets, attract private sector investment, and develop public-private partnerships" pro-business mantra must align themselves with broader political interests at the national or subnational levels, or create transnational alliances to implement at the city level global standards (e.g. gender and sexual equality, environmental protection) that their own nations may resist enforcing, as well as think creatively about how to use regulatory niches in policy areas that permit limited city autonomy.

The stark gap between city centrality and the virtual constitutional silence on urban power pushes ambitious cities and city leaders to advance notions such as international city networks, human rights cities, and environmentally friendly cities or to adopt right to the city charters.¹²⁰ For the most part, such initiatives have a socially progressive undercurrent to them, addressing policy areas such as air quality and energy-efficient construction, "smart cities" (cities that implement new technologies), affordable housing, enhanced community representation, or accommodating policies toward refugees and asylum seekers. However, with few exceptions, such initiatives live beside the formal constitutional or international law frameworks that govern national jurisdictions, but are not included in them. Such initiatives, meaningful as they may be at the practical or symbolic level, remain rather toothless inasmuch as constitutional institutions, litigation, or jurisprudence is involved.

The near-absolute constitutional silence on cities amid unprecedented levels of urbanization worldwide points to a methodological nationalism embedded in modern constitutionalism. National constitutions have an inherently centralizing, statist

¹²⁰ See, e.g., *GLOBAL URBAN JUSTICE: THE RISE OF HUMAN RIGHTS CITIES* (Barbara Oomen, Martha F. Davis, & Michele Grigolo eds., 2016).

outlook to them. They reflect a “seeing like a state” vision of the territory they govern and, more often than not, a dated conceptualization of that territory’s geographical organization and demographic composition. Just as modern states—conquerors of the city—would not entertain the possibility of seriously re-emancipating cities unless they are set to benefit from it, so do their constitutional orders with their subordination of the local and general disregard for urban autonomy.

Even as influential cities emerge, the state and the accompanying statist constitutional vision are reluctant to give away governance power. City leaders must align their interests with broader state interests and/or with big business and private-sector resources. As cities cannot forum-shop and cannot “relocate” to other states or countries, they must turn to other ways to try to improve their lot—for example, by competing for mobile resources, such as talent, wealth, or the headquarters of major industries or corporations. In the recent Amazon search for a location for its second headquarters, a bidding war emerged among 238 cities in the United States, Mexico, and Canada, a tally later reduced to twenty finalists, each of which offered significant tax incentives and other benefits to lure the company. While politicians understandably saw this as a valuable opportunity for their cities to create or strengthen their branding as high-tech hubs, critics have sounded a more cautious note, raising concerns about the use of public money in serving the interests of one of the world’s richest and most valuable corporations. In New York City, which landed one of the promised new headquarters (a decision later rescinded by Amazon), the approval process was finalized only after the city gave up its local veto on the planning process, agreeing that control over the process will be held by the state.¹²¹

Whereas transnational organs or economic corporations hold considerable leeway vis-à-vis the statist constitutional order, cities do not. Lacking any meaningful “exit” or “forum-shopping” capacity, aspiring cities are caught in a bind: as major service providers, they are hampered by the inability to directly levy taxes. This dearth increases the incentive to lure private sector actors as cities try to fulfill their complex mandates and ambitions. Increasingly, innovative city leaders have also turned to international city networking, mainly in areas such as environmental protection, sustainability, and human rights, drawing on attractive yet still highly abstract notions such as the “right to the city.” The net potential of such collaborations to bring about real constitutional (i.e. not merely symbolic, reputational, or educative) change in megacity status is, alas, limited. Granted, such transnational city networks may affect local regulations, and may also be seen as an initial step toward the realization of a parliament-of-cities notion, often associated with Barber’s *If Mayors Ruled the World*. However, these networks lack the most basic prerogative of parliaments, namely, the ability to make the law of the land. Ultimately, states, as purveyors of national

¹²¹ In response to mounting public criticism of the financial promises made to Amazon, estimated at \$3 billion in tax breaks, subsidies, and infrastructure incentives, Amazon announced in early 2019 that it would cancel the planned Long Island City location. New York State Governor Andrew Cuomo as well as series of other officials published an open letter in the *New York Times* addressed to Amazon and Jeff Bezos, announcing their continued commitment to hosting one of the two new headquarters and pleading for the company to reinstate the plan.

collective identity and belonging narratives, as well as the territorial sovereigns of the ground upon which these cities arise, continue to reign supreme.

3. States and spatial governance: On natural resources, religious places, and “us first” challenges to constitutional democracy

We now turn to explore briefly three additional illustrations of spatial statism in action, in defiance of common “globalist” talk: control over natural resources under the doctrine of permanent sovereignty; managing difference and diversity; and the surge of patria-centered populist movements hostile to multilateralism and global constitutionalism. Taken together, these examples further exemplify the dual motion of spatial statism: adamant state dominance in policy areas involving core spatial sovereignty alongside adaptive ingenuity aimed at maintaining that dominance in an ever-changing global legal environment.

3.1. “Permanent sovereignty”

State control over natural wealth and resources is often taken to be one of the core elements of a state’s territorial rights, alongside the right to control borders, the right to determine membership, and the right to exercise jurisdiction over its territory and the people residing in it.¹²² In public law, it has been formalized through the legal doctrine known as “permanent sovereignty.” The doctrine grants nation states both jurisdiction-type rights and rights of ownership over the resources to be found in their territories. It was first formulated in the 1950s as part of the struggle for decolonization. For centuries, colonizing powers robbed their colonies of natural resources. With the extensive post-World War II decolonization process in Africa, Asia, and the Middle East, the new doctrine was meant to serve as a legal shield against infringement of new states’ economic sovereignty by their former colonial rulers.¹²³ In 1962, the UN General Assembly adopted a Declaration on Permanent Sovereignty over Natural Resources, thereby solidifying “permanent sovereignty” in the international legal lexicon.¹²⁴ Other international covenants echo a similar orientation. The International Covenant on Civil and Political Rights (ICCPR), for instance, states that “[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources.”¹²⁵

¹²² Chris Armstrong, *Natural Resource Ownership*, in INTERNATIONAL ENCYCLOPEDIA OF ETHICS 7 (Hugh LaFollette ed., forthcoming 2019), available at <https://ssrn.com/abstract=3045687>.

¹²³ Nicolaas Schrijver, *Self-Determination of Peoples and Sovereignty over Natural Wealth and Resources*, in REALIZING THE RIGHT TO DEVELOPMENT 95 (2013).

¹²⁴ Permanent Sovereignty over Natural Resources, G.A. Res. 1803 (XVII), U.N. G.A.O.R., 17th Sess., 1194th plen. mtg., U.N. Doc. A/RES/1803(XVII) (Dec. 14, 1962). For commentary, see Amado Tolentino, *Sovereignty over Natural Resources. Change of Concept or Change of Perception?* 44 ENVTL. POL’Y L. 300, 301 (2014).

¹²⁵ International Covenant on Civil and Political Rights, art. 1 (Dec. 16, 1966), 999 U.N.T.S. 171. See also art. 47: “Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.” See also ELENA BLANCO & JONA RAZZAQUE, GLOBALISATION AND NATURAL RESOURCES LAW 135 (2011).

Perceived in that way, permanent sovereignty has a major effect in constituting the status quo of the Westphalian world order, forming the default position that states possess territorial rights, even though their borders may have originally been drawn by imperial or colonial powers.

The distributive effects of the permanent sovereignty doctrine are dramatic. Approximately two-thirds of the world's oil reserves are located in seven Middle Eastern countries (Saudi Arabia, Iraq, Iran, UAE, Kuwait, Libya, and Qatar). Approximately one-fifth of the world's fresh water is in Russia. Brazil (12 percent) and Canada (9 percent) also enjoy major freshwater reservoirs. Whereas in Canada there are more than 80,000 cubic meters of fresh water per person, there are merely 100 cubic meters of fresh water in the Sudan. Brazil is home to 70 percent of the Amazon basin, the world's largest tropical forest and biodiverse wilderness. How the country decides to handle that invaluable natural resource is primarily within its own discretion—now in the hands of President Jair Bolsonaro and his government.¹²⁶

While permanent sovereignty has received scant jurisprudential attention in recent years, the question of what justifies the assumption that states ought to hold such expansive and exclusive rights over domestic natural wealth and resources, is a topic that has only recently captivated the attention of philosophers and political theorists. As Margaret Moore observes, the common view of this entitlement is statist. On this account, the modern state can function properly *only if* it has control over territory, and this is what justifies the three dimensions of “territorial right”: (i) rights to jurisdictional authority, (ii) a right to control, extract, and tax resources within the territory, and (iii) a right to control entry and exit of goods and people.¹²⁷ Many international relations' theories simply assume this as definitional of state sovereignty over a geographical domain. On the other hand, and partially in response to this statist view, the cosmopolitan position suggests that state control over natural resources is a form of “undeserved advantage to the state and its citizen.”¹²⁸ Cosmopolitan theories of global justice point out that having resources is a matter of brute luck and that the crucial yet arbitrary distributive consequences of this unfairness should be addressed. A significant strand in the global justice literature appeals to this fairness intuition and extends luck egalitarianism—which suggests that natural resources are properly “owned” or controlled by everyone—from the domestic sphere (where it requires that people are compensated for undeserved brute luck), to the global sphere (where the

¹²⁶ Some restrictions apply. For example, while international law recognizes a “state’s ‘sovereign right to exploit [its] own [natural] resources pursuant to [its] own environmental and developmental policies,’ it limits state sovereignty over the way natural resources are managed. Hence states do not have an absolute and unfettered right to explore and exploit their natural resources, in that they have an obligation to respect the rights of other states and not cause cross-boundary harm.” These restrictions themselves still privilege states as the main units of analysis. For a critical account, see Ricardo Pereira & Orla Gough, *Permanent Sovereignty over Natural Resources in the 21st Century: Natural Resource Governance and the Right to Self-Determination of Indigenous Peoples Under International Law*, 14 MELBOURNE J. INT'L L. 451, 457–458 (2013) (internal citations omitted).

¹²⁷ Margaret Moore, *Natural Resources, Territorial Right, and Global Distributive Justice*, 40 POL. THEORY 84, 85 (2012).

¹²⁸ *Id.*

initial allocation of access to membership in a well-off or a poor and unstable country relies on the birthright lottery—where or to whom we are born—circumstances that none of us choose or control).¹²⁹

Distributive justice involves redistribution with a view to mitigating the effects of these undeserved advantages. Charles Beitz writes that “the fact that someone happens to be located advantageously with respect to natural resources does not provide a reason why he or she should be entitled to exclude others from the benefits that might be derived from them.”¹³⁰ Because the distribution of the world’s resources across countries is mere happenstance, several authors have argued that a global resource tax is required to ensure that all countries can achieve effective institutions and fulfill the rights of their members. Thomas Pogge, for example, highlights the arbitrary distribution of natural resources in making the claim in favor of establishing a “global resource dividend.”¹³¹ For Pogge, resource extraction by the advantaged is unjust if it occurs in the face of severe poverty elsewhere, since the world’s resources are co-owned by all. Mathias Risse revives and updates the old Grotian idea that humanity collectively owns the earth—a view that was prominent among seventeenth-century political philosophers, and at the time, was infused with religious imagery. As Grotius put it, “Almighty God at the creation, and again after the Deluge, gave to Mankind in general a Dominion over Things in this inferior World.”¹³² Relieving the account from its theological references, Risse argues that if the earth was originally given to mankind collectively, then certain obligations remain binding on states (as they are conceived to emerge from natural, not positive, law) in cases of emergencies, for instance, where individuals cannot satisfy their basic needs or safety without access to certain spaces and resources. Such an argument, if accepted, would have important implications, not only for the redistribution of resources, but also in the realm of immigration.¹³³ Other prominent political theorists (e.g. David Miller) have criticized both the statist argument and the cosmopolitan stance.¹³⁴ Chris Armstrong goes as far as suggesting that despite the considerable significance of the permanent sovereignty doctrine in world politics, it has not been thoroughly and explicitly justified within international law.¹³⁵ Others raise a pragmatic concern: in reality, state leaders, in particular in the

¹²⁹ AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009); MARGARET MOORE, *A POLITICAL THEORY OF TERRITORY* 179 (2015).

¹³⁰ See Moore, *supra* note 127, at 90; CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979).

¹³¹ THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* ch. 8 (2d ed. 2008); see also M. Reitberger, *Targeting Rents: Global Taxes on Natural Resources*, 34 *EUR. J. POL. THEORY* 1 (2017).

¹³² HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* II.2.II.1 (1625).

¹³³ MATHIAS RISSE, *ON GLOBAL JUSTICE* (2012). Risse’s interpretation of collective ownership is that everyone has an equal opportunity to use the planet, including its natural resources, to meet their basic needs. In international law, Eyal Benvenisti has staked an ambitious claim to expanding the scope of sovereignty to include obligations by states to promote global goods and reduce global bads. See, e.g., Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 *AM. J. INT’L L.* 295 (2013).

¹³⁴ David Miller, *Territorial Rights: Concept and Justification*, 60 *POL. STUD.* 252 (2012).

¹³⁵ Chris Armstrong, *Against “Permanent Sovereignty” over Natural Resources* 14 *POL., PHIL. & ECON.* 129, 130 (2014).

developing world, have appropriated natural resources and claimed them not as their countries' but as their own.¹³⁶

Large-scale land acquisitions (sometimes referred to as land grabs), whereby foreign governments and multinational corporations buy up vast tracts of land in other countries, further exacerbate such concerns. For example, data collected by the Land Matrix, an independent land-monitoring initiative, show that close to "nine percent of Africa's total area of arable land has changed hands since 2000."¹³⁷ Other estimates suggest that, on average, 10 million hectares of land are being purchased annually, an estimate which is considered conservative given that many such transactions are carried with deliberate secrecy.¹³⁸ These land grabs are concentrated in countries with weak governance, which, despite having control over natural resources including agricultural land, have been unable to provide basic food security to their populations, especially vulnerable segments thereof such as children, who succumb to hunger and malnutrition in alarming numbers.¹³⁹ As a recent study concludes, these transactions have seen the governments in the Global South "solicit" multinational agribusiness, primarily from the Global North, leading to the "transferring [of] agricultural capacity from desperately poor countries to wealthier ones."¹⁴⁰

From yet another angle, scholars have made the argument that "permanent sovereignty over natural resources to indigenous peoples serves as a necessary platform for indigenous peoples' control over the means and goals of their own progress."¹⁴¹ The logic behind this line of reasoning is that indigenous peoples will benefit from greater distributional gains if they are better able to control the direction of their own development within the state apparatus. Along the same line, the UN Special Rapporteur on Indigenous Issues stated in 2004: "the principle of permanent sovereignty over natural resources is necessary to level the economic and political playing field and to provide protection against unfair and oppressive economic arrangements. The natural resources originally belonged to the indigenous peoples concerned and were not . . . freely and fairly given up."¹⁴² Counter-arguments posit that "in light of the fact that state control—and permanent sovereignty more broadly—is a licence to disregard (indigenous) claims . . . taking the value of self-determination seriously speaks in favour of constraints on state authority, rather than a world in which states monopolize jurisdictional or meta-jurisdictional authority."¹⁴³

¹³⁶ *Id.*

¹³⁷ The Land Matrix Global Observatory, available at <https://landmatrix.org/global/>.

¹³⁸ Richard Schiffman, *Hunger, Food Security, and the African Land Grab*, 27 *ETHICS & INT'L AFF.* (2013).

¹³⁹ See *Land Grabbing*, GLOBAL AGRICULTURE, available at <https://www.globalagriculture.org/report-topics/land-grabbing.html>.

¹⁴⁰ See Schiffman, *supra* note 138.

¹⁴¹ Lillian A. Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 *VAND. J. TRANSNAT'L L.* 785, 808–809 (2012).

¹⁴² *Id.* at 808.

¹⁴³ CHRIS ARMSTRONG, *JUSTICE AND NATURAL RESOURCES: AN EGALITARIAN APPROACH* 145 (2017). For a similar conclusion, reached from a different angle, see Ingrid Barnsley & Roland Bleiker, *Self-Determination: From Decolonization to Deterritorialization*, 20 *GLOBAL CHANGE, PEACE & SEC.* 121 (2008).

In short, various arguments have been put forward for and against the doctrine of permanent sovereignty. Taken as a whole, they question the justifications behind the ironclad legal norm of assigning to states the exclusive control over the natural wealth and resources found within their territory. However, highbrow debate aside, the fact remains: in a world of ever-increasing inequality, a statist outlook continues to dominate one of the most consequential global distributive justice matrixes currently on offer.

3.2. Statist control of religion in the public sphere

Religion is transcendental, but for human worshippers, place and location matter tremendously when it comes to holy sites, prayer houses, devotional practice, and ritual. For the Christian pilgrim, participating in a procession in the Via Dolorosa in Jerusalem's old city—from the Antonia Fortress to the Church of Holy Sepulchre—following the path believed to have been walked by Jesus, carrying his cross on the way to his crucifix, is an unparalleled spiritual experience. Even if a city planner were to replicate precisely the same route, with the same stations of the cross, relocating a duplicate Via Dolorosa to another city or another country, the effect would never be the same. It is the experience of walking in Christ's "real" footsteps that makes all the difference. It is the experience of praying in the places where the popular tradition recounts Jesus's encounters with others, including the place where pilgrims believe that Veronica, a Jerusalemite woman, offered Jesus a veil to wipe his forehead. When the cloth was returned to her, the image of Jesus's face miraculously appeared on it.¹⁴⁴ The sense of history that lingers in the air, combined with this genuine experience of place, allows the believer to revisit and recount Jesus's way of suffering.

Significant religious sites and holy places are by no means unique to Christianity. In Judaism, the *kodesh ha-kodashim* ("holiest of the holy") refers to a sacred place in the inner sanctuary within the Tabernacle and Temple in Jerusalem, represented today by the Temple Mount, a compound standing on what is believed to have been the site where Solomon's Temple and the Second Temple once stood. This very same location is also one of Islam's holiest sites, where the Al-Aqsa mosque now stands on top of *Haram esh-Sharif*, as the Temple Mount is known to Muslims. Mecca, in Saudi Arabia, the location of the Kaaba (or Ka'bah "the cube"), is the most sacred place of worship in Islam and is considered the *Bayt Allāh* ("house of God"). When performing the Islamic prayer, Muslims are expected to face the direction of the Kaaba, wherever they might be in the world. For members of the Bahá'í Faith, the direction of obligatory prayer is the Qiblih, fixed at the Shrine of Bahá'ullāh, near Acre, another holy site located in Israel. Varanasi—the city on the banks of the Ganges, with its revered temples, *ghats* and holy shrines—is considered by many to be the holiest of the sacred cities in Hinduism, and is the most sacred and spiritually significant site in which to perform the Hindu puja ceremony. The Golden Temple, located in Amritsar, India, is the holiest Gurdwara (Sikh place of worship) and the most important pilgrimage site

¹⁴⁴ This legendary encounter is commemorated in station 6 of the Via Dolorosa, where the Greek Roman Catholic Church of the "Holy Face" now stands.

for Sikhism. Qufu in China is known as the hometown of Confucius and remains the traditional center of Confucianism, home of the holy Temple of Confucius and other revered cultural and religious Confucian sites (known collectively as San Kong). The city is also home to a tiny Christian minority (accounting for approximately 2.5 percent of the population). In 2016, the Confucian majority proposed to ban Christian churches in the city, claiming that their presence “taints” Qufu as the holy city of Confucianism.

Historically, conquerors often marked their victory by taking over the holy houses of worship of the vanquished and “converting” them into holy sites of the defater’s religion. The Hagia Sophia, an architectural marvel in Istanbul, offers a telling tale. The structure was originally inaugurated as a basilica almost a millennia and half ago, in 536 A.D., under the reign of Byzantine Emperor Justinian I. It served as the seat of the Orthodox Patriarch of Constantinople until the sack of Constantinople, the capital of the Byzantine Empire, in 1204 by the Fourth Crusade. Then, under the Latin occupation of the Constantinople (1204–1261), the Hagia Sophia became a Roman Catholic Cathedral. With the city’s recapture by the Byzantines, it reverted back to the Orthodox Church. However, its identity and function as a Christian house of worship came to an abrupt end in 1453 with the fall of Constantinople by attacking Ottoman forces. The Muslim forces that captured Constantinople, led by Sultan Mehmet II, quickly converted the Hagia Sophia into a mosque. And so the sacred church of Byzantine became an imperial mosque under the rulers of the Ottoman Empire. Another twist in this saga came in 1935, when Mustafa Kemal Atatürk, the founding father of Modern Turkey, “secularized” the Hagia Sophia. The use of the complex as a religious place of worship, for either Muslims or Christians, was banned by modern Turkey’s state law.

With the rise of Recep Tayyip Erdoğan’s political influence and the Justice and Development Party that he founded, calls for “re-Islamizing” the Hagia Sophia have grown louder. In 2016, for the first time in eighty-five years, the Turkish government permitted the muezzin’s call for prayer to take place inside the Hagia Sophia, now a UNESCO world cultural heritage site, echoing its former function as a religious pillar. In 2017, the Directorate of Religious Affairs (Diyanet), a governmental body, organized a special religious program, which included the recitation of the Quran during the holy month of Ramadan in the complex. This performative “reclaiming” of the site’s Islamic character was broadcast on national television. In the latest and boldest move toward “re-religionizing” the former mosque, in 2018, Turkey’s present-day president, Erdoğan, recited in the Hagia Sophia the first verses of the Quran (the *Sūrat al-Fātiḥah* or the “opener”), which has a special role in Islamic prayer, in explicit defiance of the secularist statehood creed that was the political legacy of Atatürk and Kemalism.

Turkey’s populist authoritarianism brand of re-Islamization has received significant attention and critical rebuke from students of comparative constitutionalism. Yet it is merely one example of a much broader phenomenon. Processes of religionization of the public sphere, often accompanied by constitutional amendments to reflect these tides of change, have also manifested in recent years in countries as diverse as Israel, India, Malaysia, and Sri Lanka. In Poland, the Preamble to the Constitution includes

a reference to Poland's "culture rooted in the Christian heritage."¹⁴⁵ Some leaders, such as Hungary's Viktor Orbán, boast of their country's (majority) religious identity as a "Christian democracy, rooted in European traditions" to assert a neo-secessionist stance against the "liberal" EU. This rhetoric is part of an orchestrated campaign to deploy a notion of constitutional identity to strengthen a nationalist populist position, to promote a "clash of civilizations" narrative, to describe migrants as jeopardizing the nation's cultural integrity, and to justify, *inter alia*, the government's refusal to participate in the EU's refugee relocation program.¹⁴⁶ While denying access to refugees and imposing strict naturalization requirements on non-citizen residents, Hungary has amended its Nationality Act to allow simplified, facilitated *extraterritorial* naturalization to a non-resident of Hungarian descent whose ancestors resided in territories that were once part of Greater Hungary, again demonstrating how spatial statism may prove ambitious and adaptable in its reach, in this example "spilling" beyond the modern-day territory of a country to advance a revisionist agenda of defining the nation and its once-greater, historical spatial reach.¹⁴⁷ Across Europe, the labeling of Syrian and other asylum seekers as "Muslim invaders" threatening to "flood" Europe has fueled anti-immigrant, anti-Muslim sentiments that have swayed the far right at the ballot boxes. In these examples, an inflated contrast with the feared "other" helps construct a unified "us" as the "true" people and defenders of its land, thereby eroding some of the core tenets of liberal democracy along the way.¹⁴⁸

Other countries have addressed the majority-under-threat narrative in a different fashion, using public law instruments to restrict or altogether ban "offensive" visible manifestations of minority religious identity, attire, and spatial presence in the public sphere. Perhaps the most familiar example of this pattern at work is the legislation introduced by France in 2010 that prohibited the "concealment of the face in the public space."¹⁴⁹ The face-covering ban does not apply in places of worship open to the public, as required by the French Constitutional Council.¹⁵⁰ Failure to comply with the prohibition is punishable by a fine (maximum €150) and/or by a citizenship course. The French law came into effect in 2011 and applies throughout the Republic. Belgium, too, passed the *Loi visant à interdire le port de tout vêtement cachant totalement ou de manière principale le visage* ("Act to prohibit the wearing of any clothing that

¹⁴⁵ CONST., preamble (Pol.).

¹⁴⁶ See, e.g., Constitutional Court of Hungary, Decision 22/2016 (XII. 5.), https://hunconcourt.hu/uploads/sites/3/2017/11/en_22_2016-1.pdf. For detailed analysis, see Zsolt Körtvélyesi & Balázs Majtényi, *Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary*, 18 GERMAN L. REV. 1721 (2017).

¹⁴⁷ The Hungarian Nationality Act was amended in 2010, and the facilitated naturalization provision went into effect in 2011. For further analysis, see Judith Tóth, *The Curious Case of Hungary: Why the Naturalisation Rate Does Not Always Show How Inclusive a Country Is*, Global Governance Programme, GlobalCit, Jan. 3, 2018.

¹⁴⁸ For further discussion, see JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016); Ran Hirschl & Ayelet Shachar, "Religious Talk" in *Narratives of Membership*, in CONSTITUTIONAL DEMOCRACY 515, *supra* note 24.

¹⁴⁹ Loi 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public [Law 2010-1192 of Oct. 11, 2010 on the Prohibition of the Concealment of the Face in the Public Space], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [OFFICIAL GAZETTE OF FRANCE], Oct. 12, 2010, p. 18344.

¹⁵⁰ Conseil constitutionnel (CC) [Constitutional Court] decision No. 2010-613 DC, Oct. 7, 2010.

totally or predominately conceals the face”). This law prohibits the concealment of the face, in whole or in part, in such a way that renders the individual unidentifiable. It applies throughout the country and in all public places, with exceptions for those who conceal their face according to occupational rules and police orders or for festive occasions.

In 2017, the German Bundesrat introduced, among other traffic laws, a ban on full or partial face coverings while driving. Failure to comply with the law is punishable by a monetary fine.¹⁵¹ In the same year, the “Anti-Face Covering Act” came into effect across Austria.¹⁵² As in other European countries, failure to comply with the law is punishable by a fine, but in Austria, the police also have authority to demand that the face-covering garment be removed on the spot. After contemplating such a ban in 2016, the Netherlands’ ban came into effect in 2018, the same year Denmark and Norway adopted their own variants of the face-covering ban. This timeline reveals a pattern of restrictive policy emulation and cross-national “borrowing” whereby, for example, “developments in France concerning both the headscarf and face-veiling influenced what was happening in Belgium . . . and what happened in Belgium influenced . . . the Netherlands.” The list goes on.¹⁵³

We have already witnessed a similar pattern of restrictive policy inter-jurisdictional emulation (with local variation) in our discussion of the shifting border. Here, statist rationales for face-covering bans were upheld by the European Court of Human Rights (ECtHR) in its much-anticipated *S.A.S. v. France* (2014) ruling, and later reaffirmed in *Belcacemi and Oussar v. Belgium* and *Dakir v. Belgium* (2017).¹⁵⁴ The Court relied on the governmental rationale and justification of public order and neutrality of the public sphere in which people from different walks of life and religions meet and interact, presumably under the principle of *vivre ensemble* (living together).

Interestingly, the United Nations Human Rights Committee (UNHRC) recently found that the 2010 French face-covering ban, which inspired other countries to follow suit, disproportionately harmed the right of women to manifest their religious beliefs, adding that “rather than protecting fully veiled women, [the ban] could have the opposite effect of confining them to their homes, impeding their access to public services

¹⁵¹ See Jefferson Chase, *German Bundesrat Approves “Burqa Ban” for Drivers, Beefs up Road-Race Sanctions*, DEUTSCHE WELLE, Sept. 22, 2017, available at <https://www.dw.com/en/german-bundesrat-approves-burqa-ban-for-drivers-beefs-up-road-race-sanctions/a-40642060>.

¹⁵² Open Society Justice Initiative, *Restrictions on Muslim Women’s Dress in the 28 EU Member States: Current Law, Recent Legal Developments and the State of Play 3* (April 2018).

¹⁵³ Ralph Grillo & Prakash Shah, *The Anti-Burqa Movement in Western Europe*, in *THE BURQA AFFAIR ACROSS EUROPE* 197, 202 (Alessandro Ferrari & Sabrina Pastorelli eds., 2013). For an account that places such policies in the context of immigration and membership politics in Europe, see Sara Wallace Goodman, *Fortifying Citizenship: Policy Strategies for Civic Integration in Europe*, 64 *WORLD POL.* 659 (2012). An illuminating analysis of the constitutional and normative dimensions of immigration and citizenship policies that are designed to defend the majority culture is offered by LIAV ORGAD, *THE CULTURAL DEFENSE OF NATIONS* (2015).

¹⁵⁴ *S.A.S. v. France* (GC), 2014-III Eur. Ct. H.R. 341; *Belcacemi and Oussar v. Belgium*, App. No. 37798/13, 2017-II Eur. Ct. H.R.; *Dakir v. Belgium*, App. No. 4619/12, 2017-II Eur. Ct. H.R. See also Case C-157/15, *Achbita v. G4S*, ECLI: EU:C:2017:203 (Mar. 14, 2017).

and marginalizing them.”¹⁵⁵ The Committee’s findings followed complaints by two French women convicted in 2012 under the law. The reasoning emphasizes that “[in] particular, the Committee was not persuaded by France’s claim that a ban on face covering was necessary and proportionate from a security standpoint or for attaining the goal of ‘living together’ in society.”¹⁵⁶ The UNHRC rulings are not binding, and France has yet to respond to the Committee’s call to review its face-covering-ban legislation.

The regulation of religious attire, especially the visible manifestation of difference in the public sphere by members of minority religious communities, is just one way for governments to try to control the “landscape” of their respective countries. Holy structures, with their visible manifestation of power and faith, are another topic of contestation as the centuries-old saga of the Hagia Sophia clearly attests. But these debates are not confined to the past. In a referendum held in 2009, a majority of Swiss voters approved a constitutional amendment prohibiting the construction of new minarets in Switzerland. The amendment sought to keep the spatial visibility and public presence of (minority) religion under check. The amendment was challenged before the ECtHR by applicants in the *Quardiri v. Switzerland* and the *Ligue des musulmans de Suisse and others v. Switzerland* litigation. Both cases were declared inadmissible on procedural grounds. In Israel, such spatial dimensions of conflicts over collective identity have come to the fore in recent years. Contrasting the Turkish government’s attempt to desecularize the country, inter alia, by amplifying the muezzin’s calls for prayer throughout the country, there are debates in Israel about how to balance the country’s constitutional commitment to both Judaism and democracy. A growing campaign by a nationalist-oriented government to curtail the formally equal rights of the country’s Arab citizens has led to a proposed “muezzin bill” that would muffle calls for prayers in Muslim neighborhoods in cities with a mixed Jewish-Arab population. Another paradigmatic example of spatial disputes arising around the governance of holy sites by state authorities is found in Israel’s “Women of the Wall” (*Ne’shot Ha’Kotel*) ongoing legal battle.¹⁵⁷ For the last fifteen years, an organization representing Reform, Conservative, and other non-Orthodox Jewish organizations has fought to secure the rights of women to pray at the Western Wall (also known as the Wailing Wall and the “Kotel”). The Kotel is a surviving support wall to the Temple Mount complex and is thus considered by many devout religious believers to be a remnant of the destroyed Second Temple. Under Israeli rule, the Kotel and its surrounding area is designated by law as a government-protected holy site and official prayer ground. While a sacred site in Judaism, people of all faiths visit the Western Wall and often place notes in its crevices—an old tradition borne out of the belief that there is a divine presence within the wall. The Women of the Wall have

¹⁵⁵ UNHRC, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2747/2016*, Dec. 7, 2018, CCPR/C/123/D/2747/2016, para. 8.15; see also UNHRC, *Views Adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2807/2016*, Oct. 17, 2018, CCPR/C/123/D/2807/2016, para. 7.15.

¹⁵⁶ *Id.*

¹⁵⁷ See generally YUVAL JOBANI & NAHSHON PEREZ, *WOMEN OF THE WALL: NAVIGATING RELIGION IN SACRED SITES* (2017).

led the struggle for women's rights to worship at the Western Wall in group prayer, with *tallitot* (prayer shawls) and Torah scrolls, in contravention of the ultra-Orthodox view of women as permitted to only pray in silence in this public, holy space. Over the years, the Women of the Wall introduced collective women-led prayers at the Kotel on Rosh Hode'sh and other important religious dates in the Jewish calendar. They faced mounting opposition by the Rabbi of the Kotel, a government employee affiliated with the Chief Rabbinate and the Authority of the Western Wall and Holy Sites.

In a series of rulings, the Supreme Court of Israel, sitting as the High Court of Justice, sided with the Women of the Wall group on various gender equality, religious freedom, freedom of expression, and administrative law grounds. The Court ordered the government to accommodate the Women of the Wall and respect the prayer rights of non-Orthodox Jews. After an arduous process, a compromise was reached in early 2017. However, later that year, the government succumbed to pressure from ultra-Orthodox parties, upon which the governing coalition depends, and suspended the plan. While their rights have again been vindicated, this time by the District Court in Jerusalem, the Administrator of the Western Wall and Holy Place, a government-appointed rabbi, is still preventing the Women of the Wall from accessing Torah scrolls at the Western Wall, leading the group to proclaim, in frustration, that the Western Wall "has become the greatest symbol of the exclusion of women in the public sphere in Israel."¹⁵⁸ And so the Kotel, a significant site imbued with cultural, religious, and national meaning for Jews around the world, remains under the sectarian rule of one faction of Judaism. The state remains complicit in shaping and upholding the status quo.

In India, another, comparable legal battle has unfolded. The Indian Young Lawyers' Association petitioned the Supreme Court of India to lift a ban that prohibited women from entering the Sabarimala Hindu temple, a holy place of worship located in the state of Kerala, which annually draws a worldwide pilgrimage of millions of devotees. The ban, prohibiting the entry of women of menstruating age (interpreted to include women from the ages of 10 to 50), was authorized in 1991 by the Kerala High Court. In 2006, six female petitioners challenged the ban, arguing that it violated their constitutional rights, in particular article 25 (freedom of religion), and was contrary to provisions of the Hindu Places of Worship (Authorization of Entry) Act, 1965. In 2018, the Supreme Court of India ruled in their favor.¹⁵⁹ It held that women of all ages may enter the Hindu temple and its shrine, stating that "[w]e have no hesitation to say that such an exclusionary practice violates the right of women to visit and enter a temple and freely practise Hindu religion and to exhibit her devotion towards Lord Ayyappa [the Temple's deity, also known as *Dharma Sastha*]. The denial of this right to women significantly denudes them of their right to worship."¹⁶⁰

¹⁵⁸ Women of the Wall, Legal Struggle, <https://www.womenofthewall.org.il/legal-struggle/>.

¹⁵⁹ Writ Petition (Civil) No. 373 of 2006, Young Lawyers Association & Ors. v. State of Kerala & Ors. (Supreme Court of India, decision released on Sept. 28, 2018).

¹⁶⁰ *Id.* at 64, ¶ 101.

The Court's decision was met with opposition by conservative Hindu groups, which staged mass protests and hartals, involving strikes and business shutdowns, which brought the state of Kerala to a standstill. Some of these protests were organized by officials from the governing Hindu nationalist Bharatiya Janata Party (BJP). The Indian National Congress, too, has launched a protest demanding a review of the Supreme Court's ruling. The Temple itself has refused to abide by the ruling. As occurred with the legal struggle for women's coequal worship at the Kotel in Jerusalem, attempts by women worshipers to enter the Sabarimala shrine clandestinely were met by massive protests and heavy police forces.

Each of these cases illuminates how spatial statism construes the deep-seated comparative constitutional puzzles that emerge at the intersection of law and religion. Spatial statism seeks to define the boundaries of both how religion should be practiced and how it should *not* be practiced; where it should be performed and where it should *not* be performed. It also reveals divergent trends. Under the "living together" narrative, face-covering Muslim women residing in France and several other European jurisdictions may be fined or face jail time for expressing their religious identity in public spaces, such as schools, courthouses, and shopping malls, while they are permitted to express their "difference" in the confined spaces of religious houses of worship. However, when it comes to democratic yet deeply divided societies, we find a mirror-image scenario: women are permitted to wear religious attire and visibly manifest their group identity in the public sphere but may be blocked from gaining equal access to the holy sites of their respective traditions, be they mosques, synagogues, churches, or temples. In the early twenty-first century, then, where, how, and by whom religious expression of devotion and diversity can be manifested in the public sphere is still determined to a large extent by state authority, national meta-narratives, and different countries' historical, colonial, and constitutional legacies.

3.3. Neo-secessionism and the "us first" populist backlash

No longer a "default design choice," liberal constitutionalism is under siege in many parts of the world.¹⁶¹ Liberal constitutional principles and the legitimacy of judicial review and courts more generally have come under attack by nationalist populist movements claiming to represent the "true" people versus what they depict as rootless, cosmopolitan elites.¹⁶² These movements are varied in their local manifestations, but nonetheless share a core hostility to global constitutionalism, universal rights, and international organizations.¹⁶³ In some cases, a commitment to multilateralism and supranational institutions is perceived as a betrayal of national autonomy, national identity, and justice itself. Contrary to what many globalists and post-nationalists

¹⁶¹ See Tom Ginsburg, Aziz Z. Huq, & Mila Versteeg, *Symposium: The Coming Demise of Liberal Constitutionalism?* 85 U. CHI. L. REV. 239, 239 (2018).

¹⁶² Of the fast-growing literature on the rise of populism, see, e.g., MÜLLER, *supra* note 148; CONSTITUTIONAL DEMOCRACY, *supra* note 24.

¹⁶³ In countries as varied as Turkey, the United States, Hungary, Poland, Brazil, Thailand, and the Philippines, the judiciary has become a major target of populist leaders bent on adopting reforms to clamp down on judicial independence.

may have predicted or wished, separatist and anti-globalization impulses, rather than disappearing into the currents of history, have instead gained renewed momentum worldwide.¹⁶⁴

When it comes to *sub-national* separatism, however, countries are adamant in protecting their territorial integrity. In some settings—Canada is a prime example—statist constitutional law alongside centrally guided accommodation is drawn upon to tame separatist impulses.¹⁶⁵ In Russia (Chechnya), Turkey (Kurdistan), or India (Jammu and Kashmir), statist rejection of sub-national secessionism is blatant and forceful. The Catalonia secessionist bid is perhaps the most obvious example of statist temperance of sub-national separatism in recent years. After government officials in Madrid turned to the Spanish Constitutional Court to successfully prevent a plebiscite on separation in Catalonia from taking place (the Court ruled in 2014 that such a referendum is unconstitutional, as only the federal government may launch a referendum on such matters), in an explicit act of defiance, the government of Catalonia proceeded with a non-binding referendum. A year later, the separatist “Together for Yes” (JxSi) coalition won the Catalan regional elections, garnering approximately 40 percent of the popular vote, and a well-orchestrated secessionist campaign took off. A political showdown ensued between pro-independence forces in Catalonia and the Spanish government, backed by the EU and its anti-secessionist line. The Spanish Constitutional Court reiterated that a Catalan secession referendum—let alone a declaration of independence—would be unconstitutional.¹⁶⁶ Eventually, the Spanish government invoked article 155 of the Spanish Constitution to impose direct rule in Catalonia. Spatial statistm has shown its hard edge.

In recent years, a new trend—*neo-secessionism*—has arisen as an explicitly counter-convergence mode of response to various globalization trends, constitutional and otherwise. The rhetoric invoked by its proponents directly targets elements of new constitutionalism and thrives on disenchanting or supposedly left-behind voters’ intuitive resentment toward externally imposed rigid sets of rules and the consequential limitations they impose on national and local policy choices. The 2016 Brexit referendum—an unprecedented, popular rejection of supranational political and constitutional convergence (recall the “take back control” mantra)—is a prime example. Populist-nationalist opposition groups in other EU member states, from France to the Nordic countries, and from Austria to Greece, have also voiced grave concerns about the presumed threat to national sovereignty posed by the pan-European constitutional project. Across Europe, the financial crisis of 2008, in particular, boosted public support for separatist parties that questioned the logic and future of the “ever closer union” project.¹⁶⁷ In France, the National Front (FN), led by Marine Le Pen, received 13.2 percent of the popular vote in the 2017 elections for the French National

¹⁶⁴ PIPPA NORRIS AND RONALD INGLEHART, *CULTURAL BACKLASH: TRUMP, BREXIT, AND AUTHORITARIAN POPULISM* (2019).

¹⁶⁵ See Reference re Secession of Quebec, [1998] 2 S.C.R. 217.

¹⁶⁶ Tribunal Constitucional, Judgment 114/2017 of Oct. 17, 2017, available at https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2017_074/2017-4334STC.pdf.

¹⁶⁷ See Francesco Nicoli, *Hard-Line Euroscepticism and the Eurocrisis: Evidence from a Panel Study of 108 Elections Across Europe*, 55 J. COMMON MKT. STUD. 312 (2017).

Assembly, while Le Pen herself attracted 21.3 percent of the vote in the first round of 2017 presidential elections, and nearly 34 percent in the second round run-off. In Finland, the Finns Party (formerly known as True Finns)—a populist-nationalist party advancing a clear anti-EU, “Finland first” agenda—has emerged as the second largest political party in that country. In neighboring Sweden, a traditional bastion of social democracy, the Sweden Democrats—a far right party evolving in late-1980s from the *Bevara Sverige Svenskt* (“Keep Sweden Swedish”) movement—has become a significant political force.

In recent electoral campaigns, parties representing local variants of this “us first” right-wing agenda received unprecedented popular support: In Greece, the Golden Dawn party has turned from a fringe, neo-Nazi pariah party that received less than 5000 votes in 1996 into the third largest party in that country, while the *Syriza* party has advanced from being a small radical left-wing party to the main opposition and, as of 2015, the governing party. While these parties advance very different agendas, they share a core “Greece first” line. In Hungary, Fidesz (Hungarian Civic Union) and its KDNP satellite party received 48.5 percent of the votes in the 2018 general elections (translated into an overwhelming majority of 134 seats in the 199-seat parliament); Poland’s Law and Justice (PiS): 37.6 percent (2015); and the Austrian Freedom Party (FPÖ): 26 percent (2017). Meanwhile, the anti-immigration Danish People’s Party (DFP) received 21.1 percent of the popular vote in the 2015 general elections—a significant increase compared to the 12.3 percent support it received in 2011. The Sweden Democrats party received 17.6 percent of the popular vote in the 2018 election, translated into a record-high of sixty-two seats in the Swedish parliament. Italy’s ultra-nationalist (and formerly northern secessionist) Lega Nord received 17.4 percent of the votes in the 2018 general election (compared to a mere 4.1 percent in 2013). The far-right Party for Freedom (PVV) in the Netherlands garnered 13.1 percent of the popular vote in the 2017 general elections (compared to 10 percent in 2013), translated into 20 seats in the 150-seat parliament. In Germany, the controversial Alternative for Germany (AfD) party attracted an unprecedented 12.6 percent of the popular vote in the federal elections held in October 2017 (translated into ninety-four seats in the Bundestag—the first time the AfD had won any seats in the Bundestag). Using a similar “us first” strategy, the AfD repeated its electoral success in 2018 in two sub-national elections in the key states of Bavaria and Hessen.

While many scholars have emphasized the democratic backsliding associated with the rise of populist, charismatic authoritarian leaders, and offer sophisticated legal and normative critiques of such trends, little attention has been paid to the *spatial* aspect of these “us vs. them” constructions of national identity. From the Brexit referendum to America’s “red states/blue states” distinction and to voting patterns in the French elections, the geographical concentration of populist, neo-secessionist voices is clear.¹⁶⁸ Some studies identify exposure to immigration and global competition as

¹⁶⁸ See, e.g., Ryne Rohla et al., *Spatial Scale and the Geographical Polarization of the American Electorate*, 65 *POL. GEOGRAPHY* 117 (2018); Jurgen Essletzbicher et al., *The Victims of Neoliberal Globalization and the Rise of the Populist Vote: A Comparative Analysis of Three Recent Electoral Decisions*, 11 *CAMBRIDGE J. REGIONS, ECON., & Soc’y* 10 (2018); Matthew Goodwin & Oliver Heath, *The 2016 Referendum, Brexit and the Left Behind: An Aggregate-Level Analysis of the Result*, 87 *POL. Q.* 323 (2016).

catalyst for such locality- or region-specific preferences.¹⁶⁹ The image of the local and the ordinary hard-working loyal-to-patria people as the authentic bearers of the “self” in self-determination plays a major role in populist repertoires resisting a presumptively unfair and oppressive multilateral global order. As Trump succinctly put it when announcing that the USA would withdraw from the Paris climate accord: “I was elected to represent the citizens of Pittsburgh, not Paris.”¹⁷⁰ And also, on another occasion: “There is no global anthem, no global currency, no certificate of global citizenship. From now on, it’s going to be ‘America First.’”¹⁷¹ A similar message is echoed in nationalist-populist voices worldwide, from Frauke Petry, former leader of the German extreme right AfD party (“The election of Donald Trump is a victory of ordinary people over the political establishment. It’s a victory over the politically-correct, globalist elites who show little interest in the well-being of the people”),¹⁷² to Matteo Salvini, leader of the Italian right party Lega Nord (North League) (“Matteo Renzi [former prime minister, of the center-left Democratic Party] can give his own kids wine made without grapes, Tunisian oil, Moroccan oranges, Canadian wheat and Polish milk. We prefer products from our own land.”).¹⁷³

In line with such an “us first” outlook is a growing hostility to international norms and organizations. The USA has withdrawn from a number of important international agreements and organizations, including the Trans-Pacific Partnership (TPP), UNESCO, and the Paris Agreement (the Paris climate accord). It has also forced renegotiation of the North American Free Trade Agreement (NAFTA), which will be replaced by the new USMCA Agreement. Meanwhile, since the 2015 refugee crisis, a direct confrontation has been brewing between Hungary, Poland, the Czech Republic, and Slovakia—the four members of the Visegrád Group—and the EU regarding centralized migrants’ relocation policies. In line with the increased discretion that governments seek to achieve with shifting-border policies, the USA opted out of the Global Migration Compact, despite its being non-binding. Austria, Australia, Hungary, and the Czech Republic, among other countries, followed suit.

A similar backlash that sees the global as an enemy to the local may also emanate from the other end of the political spectrum, taking the form of active resistance against

¹⁶⁹ See, e.g., Italo Colantone & Piero Stanig, *Global Competition and Brexit*, 112 AM. POL. SCI. REV. 201 (2018).

¹⁷⁰ Donald Trump when announcing that the USA would be withdrawing from the Paris Climate Agreement, reported in Lauren Gambino, *Pittsburgh Fires Back at Trump: We Stand with Paris, Not You*, GUARDIAN, June 1, 2017.

¹⁷¹ Cited in Greg Ip, *We Are Not the World*, WALL ST. J., Jan. 7, 2017.

¹⁷² Speech in Pirna, Germany, Nov. 11, 2016, cited in Jeremy Ashkenas & Gregor Aisch, *European Populism in the Age of Donald Trump*, N.Y. TIMES, Dec. 5, 2016.

¹⁷³ Cited in James Politi, *Fierly Salvini Forces Anti-Immigrant Tone on Italy Poll Debate*, FIN. TIMES, Mar. 2, 2018. While much of the U.S.-first rhetoric and pathos emerges from nationalist impulses opposing migrants and minorities, it is important to note that recent years have also witnessed another strand of anti-globalization resistance, one which is galvanized by opposition to neo-liberal policies, socio-economic elites, unaccountable supranational bodies, corporate brass and multinationals, the global one percent (accounting, according to most recent data, for more than 47 percent of household wealth globally), and the concentration of power and influence in too-big-to-fail financial institutions that benefited from national bailouts while individuals who have lost their homes and mortgages were left without remedy. Both strands are highly suspicious of global elites as corrupt and self-serving.

what is seen as an enmity by international tribunals toward countries that purport to resent the so-called Washington Consensus.¹⁷⁴ A prime example is Venezuela's withdrawal (2013) from the Inter American Court of Human Rights following what Hugo Chavez viewed as biased due process rights rulings by that body against his country. A similar tenor underlies various African nations' (e.g. Burundi and South Africa) criticism and threats of withdrawal from the International Criminal Court for alleged disproportional targeting of African leaders by that tribunal. In 2008, Zimbabwe withdrew from the Southern African Development Community (SADC) Tribunal following its ruling (based mainly on due process rights and on anti-discrimination grounds) against Zimbabwe's policy of expropriating white farmers' land—a challenge to that country's sovereignty over its territory.¹⁷⁵ In an attempt to pursue independent foreign policy, the Philippines' President Rodrigo Duterte has declared on multiple occasions his disregard for international human rights norms, supposedly because of their irrelevance to the country's situation. In 2018, Duterte went on to declare that the Philippines would withdraw from the International Criminal Court treaty (the withdrawal materialized in 2019), and called upon other countries to take similar action.¹⁷⁶

Even EU member state constitutional courts occasionally proclaim national constitutional sovereignty vis-à-vis the emerging pan-European constitutional order. In its 1993 *Maastricht* decision, the German Federal Constitutional Court held that “the Federal Constitutional Court will examine whether legal acts of the European institutions and organs are within or exceed the sovereign powers transferred to them.”¹⁷⁷ In December 2016, to pick one recent example, the Supreme Court of Denmark decided in the *Ajos Case* that judge-made principles of EU law concerning non-discrimination on the grounds of age developed after the *Danish Accession Act* (2008) were not binding.¹⁷⁸ The Court went on to decide that it would exceed its own mandate within the Danish constitutional framework if it gave priority to EU law over Danish law in such situations.¹⁷⁹ A few months earlier, the Russian Constitutional Court reached a similar decision with respect to the ECtHR's 2013 ruling on prisoners' voting rights in *Anchugov and Gladkov v. Russia*: an ECtHR ruling may not be

¹⁷⁴ See generally Mikael Rask Madsen, Pola Cebulak, & Micha Wiebusch, *Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts*, 14 INT'L J. L. CONTEXT 192 (2018).

¹⁷⁵ Mike Campbell (Pvt) Ltd & Others v. Republic of Zimbabwe [2008] S.A.D.C.T. 2 (Nov. 28, 2008). Zimbabwe's withdrawal ultimately triggered the tribunal's dismantling in 2012. See Laurie Nathan, *The Disbanding of the SADC Tribunal: A Cautionary Tale*, 35 HUM. RTS. Q. 870 (2013).

¹⁷⁶ See *Philippine's Rodrigo Duterte Urges Nations to Abandon International Criminal Court*, DEUTSCHE WELLE, Mar. 18, 2018, available at <http://www.dw.com/en/philippines-rodrigo-duterte-urges-nations-to-abandon-international-criminal-court/a-43028013>.

¹⁷⁷ BVerfGE 89, 155, at 188 (Oct. 12, 1993). For analysis, see, e.g., Steve J. Boom, *The European Union After the Maastricht Decision: Will Germany Be the “Virginia of Europe?”* 43 AM. J. COMP. L. 177 (1995).

¹⁷⁸ Mikael Madsen, Henrik Palmer Olsen, & Urška Šadl, *Competing Supremacies and Clashing Institutional Rationalities: The Danish Supreme Court's Decision in the Ajos Case and the National Limits of Judicial Cooperation*, 23 EUR. L.J. 140 (2017).

¹⁷⁹ Dansk Industri (DI) acting on behalf of Ajos A/S v. Estate of A, SCDK Case No. 15/2014 (Dec. 6, 2016), available at <http://www.supremecourt.dk/supremecourt/nyheder/pressemeddelelser/Documents/Judgment%2015-2014.pdf>.

implemented in Russia if it contradicts the Russian Constitution.¹⁸⁰ One of the crying rallies of the Brexiters was the demand that Britain withdraw from the European Convention on Human Rights (ECHR) and the jurisdiction of the ECtHR, a demand that was flatly rejected by the European Union in the course of the Brexit negotiations. Nevertheless, the current version of the EU Withdrawal Bill removes the EU Charter of Fundamental Rights from UK law, creating, in the eyes of critics, “a human rights hole because the Charter provides some rights and judicial remedies that have no clear equivalents in UK law.”¹⁸¹

To maintain their legitimacy amid such opting-out exercises and mounting political pressures, supranational tribunals have developed subsidiarity and “margin of appreciation” doctrines aimed at accommodating domestic traditions and policy preferences while maintaining a one-rule-fits-all jurisprudential umbrella. This stance is reflected in the jurisprudence of the ECtHR as it treads between fostering a robust pan-European human rights regime and averting backlashes against its rulings, which often stem from perceptions that such rulings encroach too heavily on established local traditions. For example, in leading rulings concerning freedom of and from religion, the ECtHR deferred to national preferences in allowing the crucifix in Italy’s classrooms (*Lautsi v. Italy*) and in allowing the French ban on religious face covering (*S.A.S. v. France*).¹⁸²

A key concept that guides such rulings is the “margin of appreciation.”¹⁸³ The Council of Europe defines margin of appreciation as the space for maneuvering that the Strasbourg organs are willing to grant national authorities in fulfilling their obligations under the ECHR.¹⁸⁴ From a jurisprudential standpoint, the margin of appreciation allows states to have a measure of diversity in their interpretation of human rights treaty obligations, based on local traditions, heritage, and context. Essentially a concept of qualified and reasoned deference, margin of appreciation is at the core of some of the most important rulings of the ECtHR, and has become increasingly central to the viability and future of the entire ECHR system. This trend was given the formal stamp of approval in 2013 when the Committee of Ministers of the Council of Europe adopted Protocol 15 to the ECHR, which seeks to encourage the incorporation of subsidiarity and margin of appreciation within the ECHR and ECtHR system; both principles share a closer-to-the-affected-community spatial orientation. It has been further strengthened by the intergovernmental 2015 Brussels

¹⁸⁰ Nos. 11157/04 and 15162/05, Eur. Ct. H.R. (July 4, 2013).

¹⁸¹ Equality and Human Rights Commission, EU Withdrawal Bill Will Not Protect Human Rights: Open Letter, Jan. 14, 2018, available at <https://www.equalityhumanrights.com/en/our-work/news/eu-withdrawal-bill-will-not-protect-uk-rights-open-letter>. See also Johnathan Cooper, *The Fate of the Charter of Fundamental Rights in UK Law After Brexit Is Sealed*, OXFORD HUM. RTS. HUB (June 20, 2018), available at <http://ohrh.law.ox.ac.uk/the-fate-of-the-charter-of-fundamental-rights-in-english-law-after-brexit-is-sealed/>.

¹⁸² *Lautsi v. Italy* (GC), 2011-III Eur. Ct. H.R. 61; *S.A.S. v. France* (GC), *supra* note 154.

¹⁸³ Alastair Mowbray, *Subsidiarity and the European Convention on Human Rights*, 15 HUM. RTS. L. REV. 313 (2015); Samantha Besson, *Subsidiarity in International Human Rights Law—What Is Subsidiary About Human Rights?* 61 AM. J. JURIS. 69 (2016); Robert Spano, *Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity*, 14 HUM. RTS. L. REV. 487 (2014).

¹⁸⁴ ANDREW LEGG, *THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW* (2012).

Declaration, which “reiterates the subsidiary nature of the supervisory mechanism established by the Convention, and in particular the primary role played by national authorities, namely governments, courts, and parliaments, and their margin of appreciation in guaranteeing and protecting human rights at national level, while involving National Human Rights Institutions and civil society where appropriate.”¹⁸⁵ Whether the greater sensitivity to the local and the national will suffice to tame the current anti-EU backlash remains to be seen.

4. Conclusion

With the proliferating bundle of economic, cultural, and legal trends referred to as globalization, uncertainty emerged about the continued gravitas of the modern state’s spatial reach and capacity, leading to forecasts of “neutralizing the importance of place, indeed of rendering it irrelevant.”¹⁸⁶ Latter, more balanced accounts have pointed to the emergence of “glocalization” as an amalgam of the universal and the particular, yielding hybrid legal constellations of national realities, traditions or practices, and international ideals, norms, and standards. According to any view, there is little doubt that in some key respects, national sovereignty is diminishing. However, as we hope to have shown, in a host of territory-related realms, state control may have transformed, but has definitely not disappeared. Facing existential threats to its historic dominance of the public law domain, statist law has ingeniously transformed and adapted itself in novel, interesting ways to a new and complex legal order.

Although finance may often be transnational, control over space and place remains central to the state’s classic activities: shaping borders, controlling cities, managing diversity, and extracting resources. In these and other policy arenas where spatial control is focal, public law has been selectively adjusted and drawn upon to maintain a statist grip over territory. In that respect, to paraphrase a Middle Eastern proverb, in each of these areas the global law dogs may bark, but the multifaceted statist legal caravan, transformed and reinvented as it may be, marches on.

This in turn suggests that there are pressing reasons to look more carefully at the ground on which public law stands, operates, and, in part, constitutes. Whereas the social sciences and humanities have witnessed the advent of a “spatial turn,” law has remained remarkably impervious to this trend.¹⁸⁷ Public law scholars have long held the critical edge when it comes to developing sophisticated doctrinal and theoretical arguments. They engage in dialogue with judges and other policymakers; interrogate and evaluate the diffusion of core concepts in the field, such as proportionality or the margin of appreciation; and identify value clashes and analyze concomitant risks, especially in the context of competing protected interests. Public law

¹⁸⁵ See Besson, *supra* note 183, at 71. As of 2018, forty-three of forty-seven member countries in the Council of Europe have ratified the protocol, thereby strengthening principles of subsidiarity within the Council of Europe.

¹⁸⁶ James Holston & Arjun Appadurai, *Cities and Citizenship*, 8 *PUB. CULTURE* 187, 188 (1996).

¹⁸⁷ For important exceptions, see above-mentioned references, *supra* notes 7, 10, and 15.

scholarship has also taken heed to changing scales of authority and jurisdiction as well as problems of coordination.¹⁸⁸ Recent years have also seen significant attention paid to questions of scale, sources of authority, hybridity, and institutional design.¹⁸⁹ These are welcome developments that enrich the conversation and permit cross-fertilization with neighboring disciplines, including political science, international relations, public policy, geography, economics, and sociology—a trajectory that one of the authors of this Foreword has long advocated. Yet, with a few notable exceptions, public law remains surprisingly “spatially blind.”¹⁹⁰ This is puzzling given that the modern Westphalian legal order has elevated territoriality into a core organizing principle of sovereignty, replacing and suppressing other possible sources of authority and jurisdiction—personal, sacred, feudal, and so on. Despite operating as a core building block of public law, it is odd that the spatial dimension of statism has been so swiftly dismissed as outmoded by students of contemporary public law. Its neglect, to quote John Ruggie, “is akin to never looking at the ground that one is walking.”¹⁹¹

The examples explored in this Foreword have illustrated the tremendous versatility and creativity of states in deploying and stretching, through the classic tools of public law, their spatial and juridical tentacles in a new and complex global environment. We have seen the malleability of once-fixed territorial markers when it comes to shifting borders of migration control; the relentless grip of state-centered constitutional frameworks on increasingly powerful yet placed-locked cities and urban agglomerates; the prevalence of the doctrine of permanent sovereignty which, while initially designed to rectify past injustice, may in today’s globalizing world generate and accentuate new patterns of inequality; the fascinating yet underexplored legal spatiality of diversity which we touched upon in our exploration of holy sites and the regulation of religious attire in the public sphere; as well as our open invitation to scholars of comparative constitutionalism to take into account the spatial aspects of “us vs. them” constructions of national identity in the context of a now-thriving intellectual terrain of addressing the challenges to constitutional democracy raised by the recent populist backlash.¹⁹²

¹⁸⁸ See, e.g., *COMPARATIVE CONSTITUTIONAL DESIGN* (Tom Ginsburg ed., 2012); Aziz Huq, *Does the Logic of Collective Action Explain Federalism Doctrine?* 66 *STANFORD L. REV.* 1203 (2013); B. Guy Peters, *The Challenge of Policy Coordination*, 1 *POL’Y DESIGN & PRAC.* 1 (2018). Some of the political science classics on this point are: DOUGLASS NORTH & ROBERT THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England*, 49 *J. ECON. HISTORY* 803 (1989); Barry R. Weingast, *Constitutions as Governance Structures: The Political Foundations of Secure Markets*, 149 *J. INSTITUTIONAL & THEORETICAL ECON.* 286 (1993); Mancur Olson, *Dictatorship, Democracy, and Development*, 87 *AM. POL. SCI. REV.* 567 (1993).

¹⁸⁹ See Lustig & Weiler, *supra* note 24.

¹⁹⁰ We draw this term from Günter Frankenberg.

¹⁹¹ John G. Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 *INT’L ORG.* 139, 174 (1993).

¹⁹² The list of recent titles on this topic is too long to cite. Illustrative examples include, among others, the following impressive collective endeavors: *CONSTITUTIONAL DEMOCRACY*, *supra* note 24; Ginsburg et al., *supra* note 161.

The empirical quest of our inquiry is complemented by a normative one. Elements of spatial statism, alongside the constitutional structures that we inherited from early modern processes of nation-building, are inhibiting our legal imagination when it comes to offering innovative solutions to changed realities on the ground. Many crucial challenges facing humanity in the twenty-first century are not merely transnational in nature, but require close international collaboration to effectively address and overcome, at times in contravention of spatial statism. By their nature, matters such as rising economic inequality among nations, access to and distribution of essential natural resources, large-scale migration and massive urbanization, global health pandemics, natural disasters, or critical environmental hazards (e.g. climate change and melting polar ice caps, rising sea levels and existential threat to lowland and island nations, vanishing forest ecosystems, and detrimental ocean pollution) know no borders and defy the spatial statist paradigm. What is more, capital and big business, often with the support, tacit or explicit, of national governments have been able to successfully hide behind established principles of legal territoriality and national spatial sovereignty to advance their various interests. These include threats of capital flight aimed at extracting favorable conditions; lowering production costs and circumventing labor and safety protections; multi-billion-dollar tax avoidance through offshore registration; or shielding multinationals from potentially costly recourse by victims of human rights violations.¹⁹³ These and related practices, perfectly legal yet morally debatable, draw strategically on spatial statism and the obstacles it poses for formulating effective universal solutions. Renewed scholarly attention to the ever-evolving constellations of spatial statism is therefore an essential intellectual mission not merely from an empirical standpoint, but from an ethical and normative one too.

¹⁹³ See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Here, the US Supreme Court drew on a presumption against extraterritoriality to rule that the Alien Tort Claims Act does not apply extraterritorially, consequently allowing big business to hide behind traditional notions of statist spatial sovereignty to shield itself from potentially costly recourse by victims of human rights violations. The ruling was supported by other statist positions. In an amicus brief submitted to the Court, the government of Germany, for example, argued: “[A]n unreasonable extraterritorial application of the ATS could potentially interfere with The Federal Republic of Germany’s sovereignty, thus hugely affecting The Federal Republic of Germany’s governmental interests in a way that is unacceptable.” Supplemental Brief of the Federal Republic of Germany as Amicus Curiae in Support of Respondents (2012), at 10. For discussion of the ruling’s spatial elements, see, e.g., Philip Liste, *Transnational Human Rights Litigation and Territorialised Knowledge: Kiobel and the “Politics of Space,”* 5 *TRANSNAT’L LEGAL THEORY* 1 (2014); Philip Liste, *Geographical Knowledge at Work: Human Rights Litigation and Transnational Territoriality*, 22 *EUR. J. INT’L REL.* 217 (2016).