

YOU, THE PEOPLE:
CUBA’S INTERNATIONAL CONSTITUTION

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I. INTRODUCTION: FROM INTERNATIONAL LAW TO INTERNATIONAL CONSTITUTION	830	R
II. CONSTITUTIONAL ENSHRINEMENT OF INTERNATIONAL RELATIONS	837	R
A. <i>International Amity</i>	838	R
B. <i>Independentismo</i>	840	R
C. <i>Anti-imperialism</i>	844	R
D. <i>Latinoamericanismo</i>	845	R
E. <i>International Socialism</i>	847	R
F. <i>Pragmatism and Principles</i>	848	R
III. CONSTITUTIONALIZING INTERNATIONALISM	849	R
A. <i>Universal Human Rights</i>	850	R
B. <i>The Climate Change Clause</i>	852	R
C. <i>Foreign Investment</i>	856	R
IV. CONSTITUTIONALIZING TRANSNATIONALISM	858	R
A. <i>Dual Citizenship</i>	858	R
B. <i>The Rights of Foreigners</i>	861	R
V. FUNCTIONS AND POSTURES	864	R
A. <i>Functions: Definition, Expression, and Regulation</i>	864	R
B. <i>Postures: Convergence, Resistance, and Engagement</i>	867	R
VI. CONCLUSION	872	R

In today’s global era, constitutions do more than merely establish a nation’s governing structure. They also play a prominent role in the

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international realm. Integrating scholarship in international law and comparative constitutional law, this article explores an extended concept of an international constitution, one which incorporates international law issues and speaks to international audiences. International constitutions define the territory, the polity, and the citizens; express aspirations that governments hope to achieve when they participate in the international sphere; and regulate the transnational activities of governments and individuals. By doing so, international constitutions operate as a mechanism that enables governments to converge, resist, or engage with international norms, influence, and experience.

Under that conceptual framework, this article offers a case-study of Cuba's 2019 constitution and argues that it can be conceptualized as an international constitution. Findings are empirically supported by a field visit to Havana shortly after the constitution's ratification. In response to Cuba's increasingly globalized international relations, internationalism, and transnationalism, the constitution incorporates and deals with various issues of foreign relations law, international human rights law, international environmental law, and international economic law. It adapts principles governing Cuba's international relations with the global community generally and with the United States, Latin America and Caribbean countries, and socialist countries particularly. It incorporates the universal concept of human rights for the first time and concomitantly adopts many new rights that reflect two major international human rights treaties that have been signed by the government. It is also the latest constitution in the world to include a climate change clause. Audaciously, it incorporates capitalist elements, namely foreign investment and private property, while defining socialism as irrevocable. Finally, it provides for dual citizenship and extends the right of asylum. In addressing these issues, the constitution speaks to diverse outside interests: Cuban communities overseas, international organizations, and foreign firms, governments, and peoples. By discussing how the constitution operates as a mechanism for the Cuban government to converge with norms of international law, resist foreign influence, and engage with the transnational experience, this article contributes to theoretical debates on the relation of international law to constitutional law and to the general body of empirical knowledge on Cuba's international constructs and its constitution.

I. INTRODUCTION: FROM INTERNATIONAL LAW TO INTERNATIONAL CONSTITUTION

On February 18th, 2019, amidst ongoing turmoil in Venezuela, President Donald Trump addressed the Venezuelan American community of Miami and proclaimed that “socialism is dying.”¹ In response, Cuba's President Miguel Díaz-Canel said “[w]e Cubans are voting for our new constitution, we're

1. *Remarks by President Trump to the Venezuelan American Community*, THE WHITE HOUSE (Feb. 18, 2019, 4:47 PM), <https://www.whitehouse.gov/>

voting for Latin America and the Caribbean . . . We're also voting for Venezuela, we're defending Venezuela because in Venezuela the continent's dignity is in play."² He was referring to Cuba's referendum vote, held on February 24th, that approved a new constitution.³ The new constitution does not merely speak to the Cuban people, however. It also sent clear messages of resistance to an international audience: socialism is not dying, and Cuba stands with Venezuela.

Cuba's 2019 constitution-making process also incorporated an external point of view. During the consultation process that lasted from August to November of 2018,⁴ participants of the constitutional debates included not only domestic Cubans, but also, according to Cuba's Ministry of Foreign Affairs, some 1.4 million people of the Cuban diaspora across more than 100 countries.⁵ Diplomats in Panamá, Spain, Angola, Ecuador, El Salvador, Uruguay, and other countries held meetings where hundreds of proposals and comments were presented.⁶ This external participation in the constitution-making process arose because many substantial constitutional issues are essentially international in nature, such as principles of international relations, universal human rights, the threat of climate change, foreign investment, dual citizenship, and the rights of foreigners. These issues are all addressed in the

briefings-statements/remarks-president-trump-venezuelan-american-community/.

2. *Cuba Votes in Referendum on New Constitution that President Miguel Díaz-Canel Says Is Also a 'Vote for Venezuela'*, SOUTH CHINA MORNING POST (Feb. 25, 2019, 5:22 AM), <https://www.scmp.com/news/world/americas/article/2187517/cuba-votes-referendum-new-constitution-president-miguel-diaz>.

3. *Id.*

4. For background information on this process, see Larry Catá Backer & Flora Sapio, *Popular Consultation and Referendum in the Making of Contemporary Cuban Socialist Democracy Practice and Constitutional Theory*, 27 U. MIAMI INT'L & COMP. L. REV. 37 (2020) (studying the Marxist-Leninist model of endogenous democracy in Cuba and China); Larry Catá Backer, Flora Sapio, & James Korman, *Popular Participation in the Constitution of the Illiberal State—An Empirical Study of Popular Engagement and Constitutional Reform in Cuba and the Contours of Cuban Socialist Democracy 2.0*, 34 EMORY INT'L L. REV. 183 (2020) (examining the emerging means of popular expression in Cuba's constitutional reform process).

5. *Cubans Abroad Continue Discussing Draft Constitution*, RADIO RELOJ (Sept. 18, 2018), <http://www.radioreloj.cu/en/international-news/cubans-abroad-continue-discussing-draft-constitution/>.

6. *Id.*

final text of the Constitution, proclaimed in April 2019.⁷ To deal with these issues, the constitution speaks not only to “we, the people of Cuba”⁸ but also to you, the people—referring to those residing outside the country.

From the integrated perspectives of international law and comparative constitutional law, this article explores the international nature of the Cuba’s 2019 Constitution. According to the conventional view, a constitution is the expression of the sovereignty and aspirations of the citizens.⁹ But recent scholarship indicates that constitutions “are also written to satisfy and influence diverse audiences, ranging from domestic constituencies whose support is needed to ensure regime stability, to foreign investors who seek assurance that their investments are safe from expropriation, to other countries whose approbation is crucial to securing diplomatic recognition and national security.”¹⁰ From Solon, Lycurgus, and Zaleucus’s engagement in the creation of the Constitution of ancient Athens¹¹ to Columbia Professor Frank Goodnow’s advice to the Chinese Government in 1912,¹² the external aspects of constitutions are historically established. Expanding on these precedents,

7. Raúl Castro Ruz, *The Constitution We Proclaim Today Guarantees the Continuity of the Revolution and the Irrevocability of Our Socialism*, GRANMA (Apr. 11, 2019, 4:04 PM), <http://en.granma.cu/cuba/2019-04-11/raul-the-constitution-we-proclaim-today-guarantees-the-continuity-of-the-revolution-and-the-irrevocability-of-our-socialism>.

8. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], pmbl.

9. Tom Ginsburg, Nick Foti, & Daniel Rockmore, *We the Peoples: The Global Origins of Constitutional Preambles*, 46 GEO. WASH. INT’L. L. REV. 305, 306 (2014) (“[C]onstitutions, particularly preambles, reflect local needs, idioms, and aspirations.”). For the conventional view of constitutions and political law as the expression of local identity, see MONTESQUIEU, *THE SPIRIT OF THE LAWS* 8 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748) (“[T]he political and civil laws of each nation . . . should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.”); G.W.F. HEGEL, *OUTLINES OF THE PHILOSOPHY OF RIGHT* 263 (Stephen Houlgate ed., T.M. Knox trans., Oxford Univ. Press 2008) (1820) (“[E]very people has the constitution appropriate to it and suitable for it.”).

10. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1172 (2011).

11. Adriaan Lanni & Adrian Vermeule, *Constitutional Design in the Ancient World*, 64 STAN. L. REV. 907, 917–18 (2011).

12. Tom Ginsburg, *Constitutional Advice and Transnational Legal Order*, in *CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER* 26, 30 (Gregory Shaffer, Tom Ginsburg, & Terence C. Halliday eds., 2019).

globalization in the twenty-first century has intensified and complicated the international dimensions of constitutions. In their article, Benvenisti and Versteeg highlight that “in a globalized world, the external face of constitutions is changing, reflecting the technological, political, economic, social, and cultural changes that continuously reshape a variety of boundaries and determine their nature and level of permeability.”¹³ Cheryl Saunders also argues that the globalized world in which constitutions presently operate indicates that constitutions have an external and an internal face. A constitution must “distinguish the state, its people and its territory from others . . . [and] it structures the way in which the state participates in the international realm by empowering state institutions, by limiting the authority of state institutions and by defining the relations between them.”¹⁴ Consequently, there is a growing interdisciplinary scholarship—the intersection between international law and comparative constitutional law—on the external dimensions of national constitutions.¹⁵

13. Eyal Benvenisti & Mila Versteeg, *The External Dimensions of Constitutions*, 57 VA. J. INT'L L. 515, 518 (2018).

14. Cheryl Saunders, Laureate Professor Emeritus, Melbourne Law Sch., Keynote Speech at the Chinese University of Hong Kong Constitutional Transformation Symposium: Global Constitutionalism: Asia-Pacific Perspectives (Mar. 28, 2019).

15. For recent development on this topic, see CHAIHARK HAHM & SUNG HO KIM, *MAKING WE THE PEOPLE: DEMOCRATIC CONSTITUTIONAL FOUNDING IN POSTWAR JAPAN AND SOUTH KOREA* 20 (2015) (arguing that “external sovereignty, a matter of international law, and internal sovereignty, an issue in domestic politics, have come to form an interlocking whole in the dogma of popular sovereignty”); VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 5 (2009) (arguing that national constitutions may perform both internal and external functions); Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 COLUM L. REV. 225 (2010) (examining “the role of ‘embedded’ international law in U.S. constitutional interpretation, in the context of extraterritorial application of the Constitution”); Tom Ginsburg, *Chaining the Dog of War: Comparative Data*, 15 CHI. J. INT'L L. 138 (2014) (studying how constitutions treat the questions of war differently and how they evolved in this respect); Tom Ginsburg, *Constitutions and Foreign Relations Law: The Dynamics of Substitutes and Complements*, 111 AM. J. INT'L L. UNBOUND 326 (2017) (“show[ing] how the shifting boundaries of constitutions serve to allocate lawmaking authority, emphasizing the substitution between international and domestic norms”); Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219 (2017) (conducting a systematic assessment of constitutional asylum provisions from different states). There is also growing schol-

Through integrating the scholarship of international law and comparative constitutional law, this article aims to explore an extended notion of an international constitution. Columbia Law School Professor Sarah H. Cleveland refers to the U.S. Constitution as an “international constitution” to highlight how international law is used in domestic constitutional interpretation.¹⁶ Conceptualized broadly, an international constitution discusses broader issues related to its nature, factors, functions, and postures. By nature, an international constitution refers to a constitution that incorporates or addresses issues of international law and consequently speaks to international audiences. In this sense, international law is incorporated into domestic constitutions not through judicial adjudication, but through the constitution-making process itself. International constitutions speak to diverse international audiences, such as diaspora, foreigners, foreign firms, foreign governments, and international organizations. International constitutions are enacted to respond to international and transnational processes animated by globalization. Further, such constitutions are broken into several parts, including definition, expression, and regulation. They serve a wide range of purposes: defining and differentiating the territory, the polity, and the citizens from others; expressing international aspirations of governments; and regulating the transnational activities of governments and individuals. An international constitution responds to interna-

arship on the internationalization of the constitutional process and substances. See generally Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1165 (Michel Rosenfeld & András Sajó eds., 2012) (arguing that the internationalization of constitutional law is mainly caused by “the expansion of a global market, the triumph of rights-based discourse, and . . . the emergence of transnational networks by governments, non-governmental organizations, and technocrats or professionals”); CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER, *supra* note 12 (exploring constitution-making from the transnational and comparative perspective through a collection of essays); Cheryl Saunders, *International Involvement in Constitution Making* 1 (Univ. of Melbourne Legal Studies Research Paper Series No. 839), <https://ssrn.com/abstract=3414698> (examining the tension between international involvement in constitution making and constitutions as quintessentially national frameworks).

16. Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 7 (2006).

tional influence with different postures, such as convergence, engagement and resistance.

This article situates the Cuban experience within the conceptual framework of an international constitution. Although Cuba is a small country in terms of physical size, it has enjoyed a prominent international role since the Revolution led by Fidel Castro in 1956. This Revolution “was a watershed in United States–Latin American relations, posing the most serious challenge to U.S. regional hegemony in the previous 100 years.”¹⁷ In addition, Cuba was a battleground for the three-decade Cold War struggle between the United States and the Soviet Union.¹⁸ Today, given Cuba’s prominent role internationally, its diplomatic relationship with the United States is an important and controversial issue in American foreign policy. For example, in 2014, former U.S. President Barack Obama introduced policies to normalize relations with Cuba,¹⁹ which were reversed by President Donald Trump in 2017.²⁰

Cuba’s international significance is necessarily reflected in its constitution, the fundamental document of the polity that serves as a foundation for the legal system, political order, and Cuban society. In fact, many new features of Cuba’s 2019 Constitution deal with international issues. Catherine Krull identifies three ways in particular in which Cuba changed to reflect international dimensions: international relations, internationalism, and transnationalism.²¹ This article investigates and explores the recent changes discussed in Krull’s writing.

This study adopts an empirical qualitative method. It is supported by a research trip to Havana in 2019, shortly after the new constitution was proclaimed. The fieldwork provided

17. MORRIS MORLEY & CHRIS MCGILLION, UNFINISHED BUSINESS: AMERICA AND CUBA AFTER THE COLD WAR, 1989–2001 1 (2002).

18. Catherine Krull, *Introduction: Cuba in a Global Context*, in CUBA IN A GLOBAL CONTEXT: INTERNATIONAL RELATIONS, INTERNATIONALISM, AND TRANSNATIONALISM 1 (Catherine Krull ed., 2014).

19. Stephanie Condon, *Obama to Start Normalizing U.S. Relations with Cuba*, CBS (Dec. 17, 2014, 1:00 PM), <https://www.cbsnews.com/news/obama-to-start-normalizing-u-s-relations-with-cuba/>.

20. Press Briefing, The White House, Background Briefing on the President’s Cuba Policy (June 15, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/15/background-briefing-presidents-cuba-policy>; *Trump Reverses Certain Steps Toward Normalizing Relations with Cuba*, 111 AM. J. INT’L L. 1027, 1027 (2017).

21. Krull, *supra* note 18, at 1.

instrumental insights into the international presences in Cuba: hotel joint ventures, increasing foreign tourism, dual currency usage (the Convertible Peso, widely used by foreign visitors, and the Cuban Peso), music from greater Latin America, and buses manufactured in China. The international characterization of Cuba's constitution is, therefore, supported by first-hand experience of the increasingly internationalized atmosphere of Havana. The field research also enabled the author to interview local citizens and jurists and attend individual lectures with two legal scholars. This engagement provides useful contextual background to the international nature of Cuba's new constitution.

This article argues that Cuba's 2019 Constitution can be conceptualized as an international constitution. In response to Cuba's changing relations with other nations, internationalism, and transnationalism animated by globalization, the constitution incorporates and addresses various issues of foreign relations law,²² international human rights law,²³ international environmental law,²⁴ and international economic law.²⁵ It enacts principles governing Cuba's international relations with the global community generally and with Latin America and Caribbean countries and socialist countries in particular.²⁶ It incorporates the universal concept of human rights for the first time and concomitantly adopts many new rights that reflect Cuba's acceptance of the two major international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. It is also the most recent constitution in the world to include a climate change clause.²⁷ Audaciously, the constitution contains provisions that discuss capitalist concepts, such as foreign investment and private property, while concomitantly declaring socialism irrevocable. Finally, it provides for dual citizenship²⁸ and extends asylum

22. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], arts. 22, 28, 91, 95.

23. *Id.* art. 41

24. *Id.* art. 16, § f; *id.* arts. 75, 90.

25. *Id.* art. 16, § f.

26. *Id.* art. 16, §§ d, n, ñ.

27. *Id.* art. 16 § f.

28. *Id.* art 36.

rights.²⁹ In dealing with these issues, the constitution speaks to diverse interests: Cuban communities overseas, foreign peoples, firms, and governments, and international organizations. In order to more clearly address international concerns, the constitution defines and differentiates the Cuban people, government, and territory from other parties, expresses the regime's aspirations, and regulates international activities. Through these functions, the constitution operates as a mechanism for the Cuban government to converge with norms of international law, resist foreign influence, and engage with the transnational experience.

This study contributes to theoretical debates on the relation of international law to constitutional law, as well as to general empirical knowledge about Cuba's international constructs and its Constitution. As to the theoretical contribution, it expands the notion of an international constitution beyond judicial application of international law. In addition, it extends the debates on constitutional incorporation of international law beyond the familiar discourse on incorporation of international human rights law.

Parts II, III, and IV of this article explore and explain the nature and factors of several international aspects of the Cuban Constitution. Part V engages in a theoretical discussion of the functions and postures of international constitutions, with reference to Cuban experience.

II. CONSTITUTIONAL ENSHRINEMENT OF INTERNATIONAL RELATIONS

By global standards, the U.S. Constitution is exceptional in many aspects,³⁰ but one of its distinctive features is its limited discussion of foreign affairs. Louis Henkin points out that as far as foreign affairs are concerned, the U.S. Constitution "seems a strange, laconic document,"³¹ and makes the surprising observation that "[f]oreign affairs' is not a term found in

29. *Id.* art. 17.

30. David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927, 928 (2015).

31. LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 13 (2012).

the Constitution.”³² However, unlike America’s constitutional exceptionalism, “many constitutions contain explicit statements of foreign policy.”³³ While Cuba’s Constitution is not different in this regard, it is perhaps unique in that it devotes a single chapter to articulate sixteen verbose statements on foreign affairs.³⁴ These statements both reflect and facilitate the Cuban government’s pragmatic new policy on international relations. Major features of these constitutional principles include: (1) international amity, (2) protection of sovereignty, (3) anti-imperialism, (4) maintaining special relations with Latin American and Caribbean countries, and (5) maintaining special relations with socialist countries.

A. *International Amity*

International amity is a foundational constitutional principle of international relations in Cuba. This principle is made up of three parts. First, although Cuba insists on socialism,³⁵ it seeks to promote an amicable relationship with all countries in the world, notwithstanding different political, social and economic systems. Article 16, section ñ of the Constitution provides that the Cuban government “maintains and fosters friendly relations with countries that, despite having a different political, social and economic system, respect our sovereignty, observe the norms of coexistence between States, and adopt a reciprocal attitude with our country.”³⁶ Second, Cuba is committed to adhering to the principles and norms of international law. Article 16, section c stipulates that the Cuban government:

[s]ustains the will to observe, without restrictions, the principles and norms that constitute international law, in particular the equality of laws, territorial integrity, the independence of states, the nonuse of threats of force in international relations, international cooperation for mutual and equal benefit and interest, the peaceful resolution of controversies on

32. Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFF. 284, 284 (1987).

33. Benvenisti & Versteeg, *supra* note 13, at 524.

34. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION] art. 16.

35. *Id.* art. 4

36. *Id.* art. 16, § ñ.

the basis of equality, respect and the other principles proclaimed in the United Nations Charter.³⁷

Third, the government is committed to supporting international values (e.g. peace, self-determination, and independence of sovereignty),³⁸ and repudiating international evils (e.g. international crimes).³⁹

These aspects of international amity are the legacy of the previous Constitution of 1976,⁴⁰ but they have also been given new manifestations, such as the repeated references to international law. Notably, the new substantive elements were added to the final aspect of international amity. The regime is committed to fighting against new forms of international threats such as nuclear weapons, cyber warfare, terrorism, and radio spectrum misuse. Sections k, l, m of Article 16 are newly introduced in the Constitution, providing that the Cuban government:

k) Promotes complete and general disarmament and rejects the existence, proliferation or use of nuclear weapons, weapons of mass destruction or those with similar effects, as well as the development and use of new weapons and new weapons, including autonomous weapons and new forms of waging war, such as cyberwarfare, that transgress International Law;

l) Repudiates and condemns terrorism in any of its manifestations, in particular, State terrorism;

m) Ratifies our commitment to the construction of a society of information and knowledge centered on the people and oriented towards sustainable development, in which all may create, consult, utilize, and share information and knowledge in order to improve their quality of life; and defends the cooperation of all states and the democratization of cyberspace, and condemns its use and the use of the radio spectrum for purposes contrary to those purposes

37. *Id.* art. 16, § c.

38. *Id.* art. 16, § b.

39. *Id.* art. 16, §§ j–l.

40. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 12 (1976, as amended in 2002).

stated above, including the subversion and destabilization of sovereign nations.⁴¹

The constitutional principle of international amity derives from the impact globalization has had on Cuba's international relations. Under the new leadership of Raúl Castro, who formally succeeded his brother Fidel Castro in 2008, Cuba's policy for international relations features the triple paradigm that was captured by William M. LeoGrande:

first, to diversify Cuba's international economic relations so that the disruption of ties with any one country will not throw the economy into chaos; second, to build diplomatic support both regionally and globally through active participation in a wide range of international organizations; and third, to pursue normal relations with the United States, reducing the threat Washington poses to Cuba's security and opening the doors to expanded trade and investment.⁴²

Thus, in response to globalization, Cuba has pursued a pragmatic approach to international relations. While it is still a communist-socialist country, the collapse of the Soviet bloc taught Cuba not to tie itself to one ally. As such, Cuba has now expanded its international relations globally. Globalization has also led to the emergence of new forms of international threats, which also informs the constitutional principle of international amity.

B. Independentismo

The principle of sovereignty is a cardinal principle of both modern international law and constitutional law.⁴³ Constitutions define and protect the supreme authority that states

41. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art.16, §§ k-m.

42. William M. LeoGrande, *The Danger of Dependence: Cuba's Foreign Policy After Chavez*, *WORLD POL. REV.* (Apr. 2, 2013), <https://www.worldpoliticsreview.com/articles/12840/the-danger-of-dependence-cubas-foreign-policy-after-chavez>.

43. Samantha Besson, *Sovereignty*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Rüdiger Wolfrum ed., 2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472>.

exercise within their physical borders to “protect those inside these borders from the, often dangerous, outside.”⁴⁴

In the same manner, the Cuban Constitution defines the sovereignty of the nation. Article 11 provides:

The State exercises its sovereignty and jurisdiction:

- a) Over the entire national territory, comprised of the Island of Cuba, the Isla de La Juventud, the other adjacent islands and cays, the interior waters, and the extended maritime territories established by the law, the aerospace that extends over these territories, and the radio spectrum;
- b) Over the environment and the natural resources of the country;
- c) Over the natural resources, both living and nonliving, of the waters, seabed, the waters above it, and the subsoil of the sea within the Republic's exclusive economic zones according to the territorial extensions set by the law and in accordance with International Law; and
- d) Over the continental shelf as far as the law prescribes and in accordance with International Law.

Likewise, the State exercises jurisdiction in the contiguous zone that corresponds to International Law.⁴⁵

These provisions, of course, address the domestic audience: those within the defined territory that are subject to the control of the Cuban state. But this provision also territorially differentiates the Cuban state from others. The provision sends a message to non-Cubans that only the Cuban state can exercise its sovereignty within this constitutionally defined physical boundary. Finally, the inclusion of this provision demonstrates to the international community that the Cuban definition of sovereignty is consistent with international law. The

44. Benvenisti & Versteeg, *supra* note 13, at 520.

45. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 11.

repeated reference to international law in defining sovereignty and territory is a new feature of the current Constitution in comparison to the previous one.⁴⁶ Such conformance with international legal standards was designed to build international legitimacy and reflect Cuba's increasing political and economic interconnectedness with the world.

In addition to merely defining sovereignty, the Cuban Constitution protects sovereignty while enabling the state to engage in international interactions. To protect sovereignty, section a of Article 16 provides that the Cuban government "reaffirms that economic, diplomatic, and political relations with any other State may never be negotiated under the force of aggression, threat or coercion."⁴⁷ In addition, Article 12 confirms that the Cuban government "repudiates and considers illegal and void the treaties, concessions, or pacts agreed to under conditions of inequality or that alienate or diminish its sovereignty and territorial integrity."⁴⁸

Another mechanism of protection is the constitutional reservation of international treaties. A reservation in international law is defined by the 1969 Vienna Convention on the Law of Treaties (VCLT) as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State."⁴⁹ One form of reservation is constitutional. The 1957 U.S. Supreme Court decision in *Reid v. Covert* established that the constitution overrides any treaty obligations.⁵⁰ Rather than relying on judicial interpretation, Cuba established its constitutional reservations directly when it redrafted its constitution. Article 8 of the constitution provides that "international treaties that are in force for the Republic of Cuba constitute or form part of national legislative regulations, as applicable. The Constitution

46. The 1976 Constitution defines sovereignty and jurisdiction in Article 11 without explicit reference to international law. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 11 (1976, as amended in 2002).

47. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 16, § a.

48. *Id.* art. 12.

49. Vienna Convention on the Law of Treaties, art. 2, ¶ 1(d), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

50. *Reid v. Covert*, 354 U.S. 1, 16–17 (1957).

of the Republic of Cuba takes priority over international treaties.”⁵¹

There are two aspects in the provision. First, it allows international treaties signed by the Cuban government to take effect domestically. This change is a response to Cuba's global approach to international relations and adoption of international treaties that facilitate social and economic cooperation and global integration. At the same time, the supremacy of the Constitution over international treaties is reserved. This constitutional reservation aims to protect both national sovereignty and the political regime. In the first instance, one function of constitutional reservation is to ensure that international treaties prevent non-Cuban actors from exercising sovereignty within Cuban territory. Secondly, constitutional reservation aims to protect the socialist regime in Cuba. The constitution defines socialism as irrevocable,⁵² so to raise the Constitution as superior over international treaties is to ensure that Cubans may integrate in the global community and establish connections with the capitalist world without abandoning or compromising the socialist nature of their economic and political system.

Every constitution must address sovereignty, but the Cuban constitution in particular addresses the issue from both historical and contemporary perspectives. Historically, the goal to achieve independent sovereignty can be traced back to the 1868–98 Cuban War of Independence against the Spanish Empire, culminating in the emergence of *independentismo* as the core of Cuban political ideology.⁵³ Subsequently, American intervention in Cuba (originating with Spain's defeat in the Spanish–American War in 1898; U.S. military intervention in the creation of the Provisional Government of Cuba in 1906; and the Sugar Intervention from 1917–22)⁵⁴ reinforced

51. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 8.

52. *Id.* art. 4 (“The socialist system that this Constitution supports is irrevocable.”).

53. Ernesto Domínguez López & Helen Yaffe, *The Deep, Historical Roots of Cuban Anti-Imperialism*, 38 *THIRD WORLD Q.* 2517, 2519 (2017).

54. On history of U.S. intervention in Cuba, see Richard A. Falk, *American Intervention in Cuba and the Rule of Law*, 22 *OHIO ST. L.J.* 546 (1961) (describing the history of U.S. intervention in Cuba and its relation to law); Rafael A. Lecuona, *International Law, Cuba, and the United States of America*, 14 *INT'L J. ON WORLD PEACE* 37 (1997) (discussing the relationship between the

Cuba's aspiration for independent sovereignty. These events serve as a foundation for the concepts of sovereignty that appear in the constitution.

C. *Anti-imperialism*

A related key principle of international relations entrenched in the Cuban constitution is anti-imperialism. Indeed, the document takes an antagonistic tone against imperialism. Article 16 directs the government to adopt the anti-imperialist principle in international relations.⁵⁵ This principle is further detailed in section e of that Article, which establishes that the regime “promotes the unity of all Third-World countries and condemn imperialism, fascism, colonialism, neocolonialism, and other forms of subjugation in any of its manifestations.”⁵⁶ Anti-imperialism is also manifested in section o of the Article, which affirms that the Cuban government “promotes multilateralism and multipolarity in international relations, as alternatives to the domination and political, financial and military hegemony or any other manifestation that threatens peace, independence and the sovereignty of peoples.”⁵⁷

Cuban anti-imperialism draws on the Leninist conception of imperialism as the “structural domination of peripheral countries and regions by core powers through different means,” and correspondingly, “anti-imperialism encompasses projects, actions and policies oriented to revert domination and to build a ‘balanced’ relationship between countries and regions based on the promotion of sovereignty.”⁵⁸

In addition to Leninist conception of imperialism, the principle of anti-imperialism is influenced by tensions between the United States and Cuba, although the constitution does not explicitly refer to the United States in its articulation of this principle. Cuba's political leadership often refers to the

United States and Cuba through the lens of international law); Thomas G. Paterson, *U.S. Intervention in Cuba, 1898: Interpreting the Spanish-American-Cuban-Filipino War*, 29 OAH MAG. HIST., Spring 1998, at 5 (analyzing the “Spanish-American-Cuban-Filipino War” in the international, regional, national, and individual contexts).

55. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 16.

56. *Id.* art. 16, § e.

57. *Id.* art. 16, § o.

58. López & Yaffe, *supra* note 53, at 2518.

American imperialists,⁵⁹ and Cuban anti-imperialism may be a negative response to ongoing American efforts to promote democracy in the country. In recent decades, the United States has codified laws (the Cuban Democracy Act and the Cuban Liberty and Democratic Solidarity Act signed by Presidents George H.W. Bush and Bill Clinton, respectively) to effectuate regime change on the island.⁶⁰ The U.S. Congress provided \$20 million on Cuban democracy programs in 2017 and the same amount in 2018.⁶¹ Efforts to promote democracy in Cuba imply that the country's existing socialist regime is illegitimate,⁶² which explains Cuban resistance through the constitutional enshrinement of the existing socialist regime and the principle of anti-imperialism. Commentators observe that:

(Anti)imperialism remains a central issue since the restoration of diplomatic relations with the US in 2015. The Cuban government has declared that 'normalisation' between the [sic] Cuba and the US is impossible without the cessation of the US blockade, the end of the US occupation of Guantanamo Bay and termination of regime change programmes including attempts to foment an internal opposition. The issue of imperialism remains key today, in the post-Fidel, President Trump era.⁶³

This explains why Cuba's anti-imperialism is more than a foreign policy; it is a constitutional principle of international relations.

D. Latinoamericanismo

While Cuba aspires to be a friend of all countries, it particularly seeks to maintain special relations with Latin American and Caribbean countries. One commentator observes that "the Revolution has always posited the doctrine of *latinoameri-*

59. E.g., Jorge Ruiz Miyares, *President Díaz-Canel Says Cubans Respond to Trump with Peace and Supporting Their New Constitution*, RADIO HAVANA CUBA (Feb. 20, 2019), <http://www.radiohc.cu/en/noticias/nacionales/184004-president-diaz-canel-says-cubans-respond-to-trump-with-peace-and-supporting-their-new-constitution>.

60. Alessandro Badella, *American Hýbris: US Democracy Promotion in Cuba after the Cold War—Part 1*, 6 INT'L J. CUBAN STUD. 157, 162 (2014).

61. López & Yaffe, *supra* note 53, at 2529.

62. *Id.*

63. *Id.* at 2518.

canismo, adopted in the Cuban Constitution of 1976.”⁶⁴ This constitutional principle of international relations is continued in the 2019 constitution. Article 16, section d of the Constitution provides that the Cuban government “reaffirms its will to integrate and collaborate with the countries of Latin America and the Caribbean.”⁶⁵ The preamble of the Constitution also states that the Cuban people are supported by the “fraternal friendship, the help, cooperation, and solidarity of the peoples of the world, especially those of Latin America and the Caribbean.”⁶⁶

Cuba’s connection with its Latin American neighbors has been strengthened in the twenty-first century, and its international status had been fortified by its leadership in various Third World groups. The country “interjected a new dimension into this aspect of its twenty-first-century hemispheric policies by moving, in conjunction with and as a result of its increasingly close ties with Hugo Chávez’s government in [Caracas], to create a new organization designed to counteract Washington’s dominance of Latin American/Caribbean affairs.”⁶⁷ In this regard, Cuba and Venezuela signed the *Alianza Bolivariana para los Pueblos de Nuestra América* (ALBA) on December 14, 2004, in Havana. The aims of the alliance include: the promotion of trade and investment between member governments, the cooperation between member states to provide free health care and free education, the integration of ALBA members’ energy sectors, and the development of basic industries so that ALBA member states can become economically independent.⁶⁸ In addition to ALBA, Cuba consolidated its ties with the region in November 2008 when it became the an official member of the Rio Group, which in 2011 became the Community of Latin American and Caribbean States (CELAC). CELAC includes every country in the Western Hemisphere except the United States and Canada, and it presents a

64. Luis Suárez Salazar, *Cuba’s Foreign Policy and the Promise of ALBA*, NACLA (Sept. 25, 2007), <https://nacla.org/article/cuba%27s-foreign-policy-and-promise-alba>.

65. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 16, § d.

66. *Id.* pmbl.

67. H. Michael Erisman, *Raúlista Foreign Policy: A Macroperspective*, in *A CONTEMPORARY CUBA READER: THE REVOLUTION UNDER RAÚL CASTRO* 272, 280 (Philip Brenner et al. eds., 2d ed. 2015).

68. *Id.*

formidable challenge to the U.S.-dominated Organization of American States (OAS).⁶⁹ The continued constitutional entrenchment of *latinoamericanismo* reflects these developments and provides the foundational base for Cuba's regional integration.

E. *International Socialism*

Apart from *latinoamericanismo*, the goal of promoting international connectivity among socialist states is one of the foremost constitutional principles of Cuban international relations. The preamble of the Constitution stipulates that Cuban society relies on "proletarian internationalism" and is guided by "the social emancipation ideas of Marx, Engels, and Lenin."⁷⁰ Consistent with this statement, Section n of Article 16 provides that Cuba "[b]ases its relationships with countries that edify socialism on fraternal friendship, cooperation and mutual assistance."⁷¹

In this regard, Cuba, as a socialist country, has maintained special relations with other socialist countries.⁷² Cuba has a particularly strong relationship with China; in fact, "China is Cuba's second-largest trading partner, and the two countries have pursued state-led cooperation in sectors as diverse as biomedicine, tourism, industrial manufacturing, nickel and oil mining, and oil refining."⁷³ Sino-Cuban ties are driven by his-

69. *Id.*

70. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], pmbl.

71. *Id.* art. 16, § n.

72. Cuba maintains special relations with North Korea, Vietnam, and Laos. See Associated Press, *North Korea, Cuba Agree to Deepen Ties amid US Sanctions*, SOUTH CHINA MORNING POST (Nov. 5, 2018, 11:06 AM), <https://www.scmp.com/news/asia/east-asia/article/2171660/north-korea-cuba-agree-deepen-ties-amid-us-sanctions> (reporting a meeting between Kim Jong-un and Cuban President Miguel Díaz-Canel); *Cuba and Vietnam Tout Solid Relations During Havana Meetings*, AGENCIA EFE (May 20, 2019), <https://www.efe.com/efe/english/world/cuba-and-vietnam-tout-solid-relations-during-havana-meetings/50000262-3980858> (reporting a meeting between the First Secretary of the Communist Party of Cuba and the Deputy Prime Minister of Vietnam); *Laos, Cuba Agree to Cement Traditional Ties*, XINHUA (Nov. 12, 2018), http://www.xinhuanet.com/english/2018-11/12/c_137599496.htm (reporting a meeting between Lao President Bounnhang Vorachit and Cuban President Miguel Díaz-Canel).

73. Adrian H. Hearn, *China and the Future of Cuba*, in A CONTEMPORARY CUBA READER: THE REVOLUTION UNDER RAÚL CASTRO 284, 284 (Philip Brenner et al. eds., 2d ed. 2015).

torical, ideological, institutional, and political factors. More than 150,000 Chinese indentured laborers arrived in Havana's port of Regla in 1847, and these people and their descendants fought in Cuba's two wars of independence (1868–78 and 1895–98) and in the social movement that resulted in the Cuban Revolution of 1959.⁷⁴ Ideologically, both countries have adopted Marxism-Leninism as the official ideology of the ruling communist party. Similar to Cuba, China's constitution declares in the preamble that the Chinese people are “[u]nder the leadership of the Communist Party of China and the guidance of Marxism-Leninism.”⁷⁵ In addition, institutional similarities, such as the domination of a communist party in a centralized constitutional order that rejects western-style separation of powers,⁷⁶ naturally draw the two countries close together. Finally, Sino-Cuban relations are also a matter of political strategy. Havana focuses on relations with China to circumvent the American embargo and potentially establish a political alliance with a rising global power.⁷⁷ Beijing, for its part, has sought to expand its influence in Latin America, and recognizes that Cuba can serve as the bridge for this expansion.⁷⁸ Understandably, the establishment of relations with socialist countries, especially China, is entrenched as a constitutional principle of international relations.

F. *Pragmatism and Principles*

Cuba's policy of international relations is pragmatic, but its principles are persistent. Following the Cold War, Cuba's policy of international relations has been realistic and adaptive and has focused on two key strategies: reconstructing trade to promote economic security and undertaking various aid and cooperation initiatives (e.g. ALBA) to consolidate its international stature and influence.⁷⁹ Yet Cuba is principled in its international relations. The principles of international amity, in-

74. *Id.* at 287.

75. XIANFA pmbl. (1982, as amended in 2018) (China).

76. See Larry Catá Backer, *Party, People, Government and State: On Constitutional Values and the Legitimacy of the Chinese State-Party Rule of Law System*, 30 B.U. INT'L L.J. 331, 333-34 (2012) (noting that the Chinese Constitution promotes Marxist principles and grants all power to the people of China).

77. Krull, *supra* note 18, at 7.

78. *Id.* at 8.

79. Erisman, *supra* note 67, at 274.

dependent sovereignty, anti-imperialism, *latinoamericanismo*, and proletarian internationalism were introduced in the previous 1976 constitution and were inherited by the 2019 constitution.⁸⁰ Due to globalization and new, emerging international threats, however, new elements were added to international amity in the current Constitution, namely commitments to fight against terrorism, nuclear arms, and cyber warfare. The fact that principles of international relations have been constitutionalized indicates that the Cuban government considers these principles as foundational to its long-term engagement with the world.

III. CONSTITUTIONALIZING INTERNATIONALISM

The second global dimension of Cuba's constitution concerns the country's internationalism and the government's efforts to promote increased economic and political cooperation with other nations.⁸¹ Krull points out that "while Cuba has strong political and economic relations with a number of powers in the developed and developing world, in many instances these relationships have been enhanced and strengthened by conscious intergovernmental efforts to increase cooperation."⁸² Tourism is the manifestation of Cuban internationalism. The tourism industry is essential to Cuba's economy and its international position as it has "provided billions of dollars and euros for the government's foreign currency reserves."⁸³ Globalization is a catalyst for the creation of joint ventures between the Cuban government and tourist firms from the capitalist world.⁸⁴ In addition, a unique aspect of Cuban internationalism is its medical outreach, as the country funds massive medical aid programs around the world.⁸⁵ Finally, in response to a global food crisis, the Cuban government "encourage cooperative ventures abroad, within ALBA and through domestic bodies, such as the National Association of Small Farmers

80. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 12 (1976, as amended in 2002).

81. Krull, *supra* note 18, at 9.

82. *Id.*

83. *Id.* at 10.

84. *Id.*

85. Mauro Castelló González et al., *International Medical Collaboration: Lessons from Cuba*, 3 CHILDREN 20 (2016) ("Cuba currently has over 50,000 health professionals working in 67 different countries.").

(*Asociación Nacional de Agricultores Pequeños*), which linked Cuban farmers with those in the Caribbean, Central America, and Mexico.”⁸⁶

Cuban internationalism is manifested in the 2019 constitution. The Cuban government seeks to promote its enhanced connections with other nations and its consolidated integration into the international community through constitutionalizing universal human rights, climate change mitigation efforts, and foreign investment.

A. *Universal Human Rights*

In a seminal article, Zachary Elkins, Tom Ginsburg, and Beth Simmons argue that “international instruments have a powerful coordinating effect on the contents of national constitutions.”⁸⁷ Drawing on a comprehensive dataset of 680 constitutional texts promulgated between 1789 and 2006, they found that “ratification is important, and that binding international law leads to new rights in subsequently adopted national constitutions.”⁸⁸ The Cuban experience is consistent with this empirical finding.

Cuba’s 2019 constitution recognizes the concept of human rights for the first time. Importantly, two provisions were debuted in the document. First, Article 40 states that “[h]uman dignity is the supreme value that underpins the recognition and exercise of the rights and duties enshrined in the Constitution, treaties, and laws.”⁸⁹ Second, Article 41 provides that the “Cuban State recognizes and guarantees to a person the non-renounceable, indivisible, and interdependent enjoyment and exercise of human rights, in correspondence with the principles of progressivity and nondiscrimination. Their respect and guarantee are obligatory for all.”⁹⁰ In addition, the

86. Krull, *supra* note 18, at 12.

87. Tom Ginsburg, Zachary Elkins, & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61, 64–65 (2013).

88. *Id.* at 65. Versteeg also finds that international human rights treaties sometimes operate as norms as they “alter constitutional commitments upon ratification, attesting to their importance as law.” Mila Versteeg, *Law Versus Norms: The Impact of International Human Rights Treaties on National Bills of Rights*, 171 J. INSTITUTIONAL & THEORETICAL ECON. 87, 89 (2015).

89. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 40.

90. *Id.* art. 41.

number of rights has increased significantly. Compared to the previous 1976 Constitution, which contained roughly 20 rights, the chapter on individual rights in the new constitution includes around 30 rights—not including rights provisions that appear in other chapters of the document. Notable new rights are: the right to life,⁹¹ the right to free development of personality,⁹² the right to family privacy,⁹³ prohibition of torture,⁹⁴ the right to freedom of movement,⁹⁵ the right to freedom of thought,⁹⁶ the right of participation,⁹⁷ the right to marry regardless of gender,⁹⁸ the right of court access (habeas corpus),⁹⁹ and the assumption of innocence.¹⁰⁰ The right to same-sex marriage was particularly fought for by Mariela Castro Espín, a Cuban lawmaker and Raul Castro's daughter, and was controversially debated during the constitution-making process.¹⁰¹

The constitutional adoption of human rights does not merely seek to protect the rights of domestic Cuban people. Rather, it is a further illustration of the international and external dimension of Cuba's new constitution. First, ratification of international human rights law provides an impetus for the constitutional incorporation of human rights. Days after Raúl Castro assumed the presidency in 2008, the Cuban government signed two major international human rights treaties—the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights—that former president Fidel Castro had long op-

91. *Id.* art. 46.

92. *Id.* art. 47.

93. *Id.* art. 48.

94. *Id.* art. 51.

95. *Id.* art. 52.

96. *Id.* art. 54.

97. *Id.* art. 80.

98. *Id.* art. 82.

99. *Id.* art. 96

100. *Id.* art. 95, § c.

101. Calvin Freiburger, *Cuba's New Constitution May Open Door to Gay 'Marriage': Castro's Daughter*, LIFE SITE (June 25, 2018, 12:48 PM), <https://www.lifesitenews.com/news/raul-castros-daughter-new-cuban-constitution-may-open-door-to-gay-marriage>.

posed.¹⁰² The constitutional incorporation of human rights was based on treaties ratified by the new leadership. Second, the Constitution indicates that rights are not only protected under domestic laws, but are also protected under international treaties signed by Cuba. Third, the Constitution reflects international discourse on the nature of human rights: in particular, that they are non-renounceable, indivisible, and universal.¹⁰³

The constitutional incorporation of human rights is a response to international criticism of human rights abuses reported in Cuba. For example, Human Right Watch has reported that

[t]he Cuban government continues to repress and punish dissent and public criticism. The number of short-term arbitrary arrests of human rights defenders, independent journalists, and others was significantly less in 2018 than in 2017, but still remained high, with more than 2,000 reports of arbitrary detentions between January and August. The government continues to use other repressive tactics, including beatings, public shaming, travel restrictions, and termination of employment against critics.¹⁰⁴

Such criticisms delegitimize the international status of Cuba. The new constitutional provisions help restore Cuba's international legitimacy, as the constitutional rights provisions signal to the international community that Cuba is committed to respecting human rights according to international law.

B. *The Climate Change Clause*

Environmental protection is now a top concern of the global community. International law has, for its part, responded to the threat of climate change, through such pacts as the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the Paris Agree-

102. James C. McKinley Jr., *Cuba Signs 2 Human Rights Treaties*, N.Y. TIMES (Feb. 29, 2008), <https://www.nytimes.com/2008/02/29/world/americas/29iht-cuba.4.10589148.html>.

103. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 41.

104. *World Report 2019: Cuba*, HUMAN RIGHTS WATCH (2019), <https://www.hrw.org/world-report/2019/country-chapters/cuba>.

ment.¹⁰⁵ Countries around the world have responded to the dire state of affairs by incorporating environmental issues into national constitutions,¹⁰⁶ a phenomenon that scholars have dubbed “environmental constitutionalism.”¹⁰⁷ Tunisia, Ecuador, and the Dominican Republic were among the first countries to include a climate change clause in their constitutions,¹⁰⁸ and Cuba is now the latest country to constitutionalize climate change. Article 16, section f of the 2019 Constitution provides that Cuba “promotes the protection and conservation of the environment as well as responding to climate change, which threatens the survival of the human species, through the recognition of common, yet differential, responsibilities.”¹⁰⁹

That constitutionalization of environmental protection aims to address the effects of climate change that Cuba has already suffered, including, for example, devastating hurricanes:

[B]etween 1998 and 2008, Cuba was affected by a total of 16 hurricanes that caused losses worth more than 20 billion dollars. For instance, Hurricane Gustav left a trail of destruction in its wake when it hit the Caribbean in late August 2008, turning the provinces of Pinar del Río and Matanzas and the Isle of Youth Municipality into a pitiful sight. Eighty per cent of the Isle of Youth's 25,000 houses were partially or totally destroyed, as were almost 102,000 (45 per cent) in Pinar del Río. Fidel Castro compared the devastation to that caused by ‘a nuclear attack’. Then, in

105. Ademola Oluborode Jegede, *Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 84, 85 (Erin Daly & James R. May eds., 2018).

106. *Id.* at 87.

107. JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM 1 (2014) (“Environmental constitutionalism is a relatively recent phenomenon . . . [that] embodies the recognition that the environment is a proper subject for protection in constitutional texts and for vindication by constitutional courts worldwide.”); Lael K. Weis, *Environmental Constitutionalism: Aspiration or Transformation?*, 16 INT'L J. CONST. L. 836, 836 (2018) (“Today over three-quarters of the world's national constitutions contain environmental provisions of some kind, a pattern reflected at the sub-national level in many federations.” (footnotes omitted)).

108. Jegede, *supra* note 105, at 94.

109. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 16, § f.

September 2008, Hurricane Ike destroyed, among other things, 323,000 houses and 700,000 tons of foodstuffs, not to mention most of the power grid and the drinking water reserve. On the other hand, a drier-than-usual rainy season stretching from November 2008 to June 2010 crippled Cuban agriculture and therefore the country's ability to export goods like tobacco, rum and sugar.¹¹⁰

In response, the Cuban government has already introduced policies to deal with "destructive hurricanes, extreme droughts and sea level rise."¹¹¹ The inclusion of the climate change clause in the constitution presents a more authoritative response to environmental crises. This inclusion, however, triggered mixed responses.¹¹² Carl Bruch, an attorney at the Environmental Law Institute in Washington DC, opined that "[t]he fact that you're [Cuba] seeing climate change in the highest law of the land reflects the growing urgency in addressing it."¹¹³ But Rolando García, a Cuban expat and an atmospheric chemist at the National Center for Atmospheric Research in Boulder, Colorado, doubts the meaningfulness of the constitutional provision on climate change, claiming that "[t]he aspirational goal enshrined in the new Cuban constitution does not change anything."¹¹⁴

From an academic point of view, one scholar argues that the constitutional climate change clause generally can have three positive effects: first, to entrench climate change at the constitutional level and "take climate change beyond the wave of partisan politics and commit the governed and government to combatting the threat of climate change;"¹¹⁵ second, to provide an authoritative legal foundation for civil society by "holding government and non-state actors accountable in public sessions of parliamentary proceedings" and to provide "human rights complaints mechanisms at the regional and interna-

110. Salim Lamrani, *Reforming the Cuban Economic Model: Causes and Prospects*, 4 INT'L J. CUBAN STUD. 17, 19 (2012) (footnotes omitted).

111. Emiliano Rodríguez Mega, *Cuba Acknowledges Climate Change Threats in Its Constitution*, NATURE (Mar. 08, 2019), <https://www.nature.com/articles/d41586-019-00760-3>.

112. *Id.*

113. *Id.*

114. *Id.*

115. Jegede, *supra* note 105, at 97.

tional levels”;¹¹⁶ and third, to “create opportunities for better access to justice” as rights of communities may be affected by measures to tackle the effects of climate change.¹¹⁷ The clause of climate change in Cuba’s constitution can also have such positive effects.

Apart from the above general effects, the constitutional climate change clause can have three positive external effects on international legitimacy, international environmental law implementation, and international cooperation in dealing environmental issues. First, the fact that Cuba includes climate change in its Constitution signals to the global community that the country shares universal concerns, and this signaling can enhance Cuba’s legitimacy in the international arena.¹¹⁸ Second, the incorporation of a climate clause in the Constitution enables international environmental law to have domestic effect. This clause thus compels the Cuban government to implement its international commitments regarding environmental issues and related human rights issues.¹¹⁹ Finally, the constitutionalization of environmental protection provides the legal foundational for Cuba to cooperate with other countries and organizations in order to respond to the effects of climate change.¹²⁰ This may particularly mitigate United States-Cuba tension as hurricanes affect both countries.¹²¹ These three ef-

116. *Id.* at 98.

117. *Id.* at 98.

118. Iñigo González-Ricoy, *Climate Change and Human Rights: Environmental Rights by Constitutional Means*, GLOBAL POL’Y (Nov. 26, 2015), <https://www.globalpolicyjournal.com/blog/26/11/2015/climate-change-and-human-rights-environmental-rights-constitutional-means> (“By granting environmental rights the highest legal status, on a par with other fundamental rights and freedoms, it signals the perils of climate change and the importance of policies addressing them, thus helping to shape citizens’ values and beliefs on environmental matters. Moreover, since protecting such rights is likely to entail present costs, such signaling is credible.”).

119. *Id.* (suggesting that constitutionalization can be a solution to legislators putting off enacting environmental reforms).

120. See, for example, Cuba’s cooperation with Canada to handle the effects of climate change, *Cuba-Canada Cooperation to Handle Climate Change Praised*, FOOD & AGRIC. ORG. U.N. (Jan 25, 2018), <http://www.fao.org/in-action/agronoticias/detail/en/c/1099059/>.

121. Krull, *supra* note 18, at 5. For example, Hurricane Irma damaged both Florida and Cuba in 2017. Jon Lee Anderson, *Cuba and the Hurricanes of the Caribbean*, NEW YORKER (Sept. 19, 2017), <https://www.newyorker.com/news/daily-comment/cuba-and-the-hurricanes-of-the-caribbean>.

facts suggest that the constitutional clause of climate change does not merely speak to the Cuban people, but the world at large and proves Cuba's 2019 constitution is an international document.

C. *Foreign Investment*

Nations can use their constitutions to attract foreign investment. This can be achieved both directly and indirectly. In the latter instance, political institutions are designed to attract foreign investment. David Law argues that due to globalization, countries have engaged in a constitutional "race to the top" to attract scarce capital and skilled labors by offering constitutional protection of civil liberties.¹²² The logic is that investors are more willing to put their money in stable and transparent environments founded on legal systems that respect human rights and guarantee civil liberties.¹²³ Constitutionalization of political rights thus has an indirect effect on foreign investment. Some constitutions, however, deal with foreign investment more directly by protecting private property, promoting foreign investments, and protecting national resources from foreign economic predators.¹²⁴ The Cuban experience is an example of such a direct mechanism.

The provision on foreign investment is one of the most important changes in Cuba's 2019 constitution. Article 28 provides that Cuba "promotes and provides guarantees to foreign investment as an important element for the economic development of the country, which is based upon the protection and the rational use of the natural and human resources as well as respect for national sovereignty and independence."¹²⁵ In addition, the Constitution guarantees the property rights of both local people and foreigners.¹²⁶ The constitutional commitment to foreign investment and private property is an unusual one because Cuba has maintained a commitment to so-

122. David S Law, *Globalization and the Future of Constitutional Rights*, 102 *Nw. U. L. REV.* 1277, 1282 (2008).

123. *Id.* at 1317–21.

124. See Bui Ngoc Son, *Economic Constitutions in the Developing World*, 12 *L. & DEV. REV.* 669, 681–82 (2019) (discussing the formulations of economic usage, protection, and management of economic resources in different national constitutions).

125. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 28.

126. *Id.* art. 22, § d.

cialism, including the socialist model of a central state-controlled economy. However, a commitment to foreign investment and private property implies that the national economy would open up to the capitalist world and possibly adopt capital-market norms and principles. Globalization and the domestic imperative to solve economic difficulty have compelled Cuba to adopt competing commitments: socialist reservation and capitalist engagement.

In fact, the Cuban economy under the new leadership of Raúl Castro has significantly opened up to Europe, North America, and Latin America.¹²⁷ The legal framework for Cuban foreign investment is the 2014 Foreign Investment Law.¹²⁸ The enactment of this law indicates that the new leadership “has recognized the need for foreign investment, which includes not only opening the door to those investors, but also protecting their investments in the country.”¹²⁹ According to a statement in 2014 by Cuba’s Minister of Foreign Trade and Foreign Investment, Rodrigo Malmierca, “Cuba needs to attract between \$2 billion and \$2.5 billion in foreign investment annually in order for the economy to grow at the 7 percent per annum rate that planners have set as a target for the next few years.”¹³⁰ Cuba has found itself confronted with economic difficulty, and foreign investment is now seen as a solution to help boost the economy.

One may argue that the new constitutional commitment to foreign investment merely institutionalizes the preestablished legal framework and practices of foreign investment in

127. See Richard E. Feinberg, *What Will Be Raúl Castro’s Legacy?*, BROOKINGS INSTITUTION (Dec. 4, 2017), <https://www.brookings.edu/blog/order-from-chaos/2017/12/04/what-will-be-raul-castros-legacy/> (listing Cuba’s trade partners and foreign investors in Europe, Latin America, and North America).

128. Ley No. 118, Ley de la Inversión Extranjera [Law No. 188, Foreign Investment Law], Mar. 29, 2014.

129. Kevin J. Fandl, *Trading with the Enemy: Opening the Door to U.S. Investment in Cuba*, 49 GEO. J. INT’L L. 563, 580 (2018). Before this law, Cuba had a joint venture law to facilitate foreign investment. Jean G. Zorn & Harold A. Mayerson, *Cuba’s Joint Venture Law: New Rules for Foreign Investment*, 21 COLUM. J. TRANSNAT’L L. 273, 273 (1983).

130. Jorge Pérez-López & Yu Xiao, *Foreign Investment and Economic Growth in Cuba: Lessons from China*, in PATHS FOR CUBA: REFORMING COMMUNISM IN COMPARATIVE PERSPECTIVE 85, 87 (Scott Morgenstern, Jorge Pérez-López, & Jerome Branche eds., 2019).

Cuba. This commitment, however, is more than a constitutional reflection of the current milieu. The constitutional commitment to the promotion of foreign investment seeks to send an authoritative message to the world that the regime is committed to opening up the economy to the outside world. In addition, this constitutional commitment demonstrates to the world that the promotion of foreign investment is a goal the regime will pursue in the years to come, perhaps signaling a significant revision of laws governing investment or even the enactment of a new one.

IV. CONSTITUTIONALIZING TRANSNATIONALISM

The third aspect of Cuba's global construct is transnationalism. "[T]ransnationalism has emerged not only because of the increased interconnection amongst peoples rather than governments, but also because of the declining significance of borders caused by the advent of economic globalization and the weakening of social boundaries between states."¹³¹ The transnational construct of Cuba's global position has been reinforced by the development of the Havana cigar industry outside the island, co-production of films with foreigners, immigration, emigration, and people-to-people interactions.¹³² The new Constitution institutionalizes Cuba's transnational construct in its new provisions on dual citizenship and the rights of foreigners.

A. *Dual Citizenship*

Peter J. Spiro writes that "[f]or most of modern history, dual citizenship was considered an anomaly, at best, and an abomination, at worst. It has since become a commonplace of globalization."¹³³ This is because globalization has induced the worldwide movement of people and increased the need for the acceptance of dual nationals. The consequence has been "[t]he global shift toward dual citizenship."¹³⁴ For example,

131. Krull, *supra* note 18, at 13.

132. *Id.* at 13–15.

133. Peter J. Spiro, *Dual Citizenship as Human Right*, 8 INT'L J. CONST. L. 111, 111 (2010).

134. Yossi Harpaz & Pablo Mateos, *Strategic Citizenship: Negotiating Membership in the Age of Dual Nationality*, 45 J. ETHNIC & MIGRATION STUD. 843, 846 (2019).

by 2010 almost four-fifths of countries in Europe and the Americas had begun accepting dual nationality.¹³⁵ Indeed, the Cuban experience follows this global trend.

Article 36 of the 2019 constitution stipulates that “[t]he acquisition of other citizenship does not imply the loss of Cuban citizenship.”¹³⁶ This new constitutional move to accept dual citizenship is a response to the massive Cuban refugee flow to the United States,¹³⁷ as well as to recent Cuban immigration to countries in Latin America and Europe.¹³⁸ Some 2 million U.S. residents are natives of Cuba or claim Cuban ancestry, and some 300,000 Cubans have relocated to other countries abroad.¹³⁹ The constitutional arrangement of dual citizenship enables the members of the Cuban diaspora to maintain a connection to their heritage.

The constitutional protection of dual citizenship is accompanied by the new constitutional right to movement provided in Article 52: “People have the right to enter, remain in, travel through, and exit from the national territory.”¹⁴⁰ This constitutional guarantee of the freedom of movement outside the country is significant given the existing regulations restricting travel. Human Right Watch reports that travel regulations in

135. *Id.*

136. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 36.

137. *See generally* GUILLERMO J. GRENIER, LISANDRO PÉREZ, & NANCY FONER, *THE LEGACY OF EXILE: CUBANS IN THE UNITED STATES 20–23* (2002) (detailing the wave of migration from Cuba to the United States over the past several decades).

138. Jorge Duany, *Cuban Migration: A Postrevolution Exodus Ebbs and Flows*, MIGRATION POL’Y INST. (July 6, 2017), <https://www.migrationpolicy.org/article/cuban-migration-postrevolution-exodus-ebbs-and-flows>.

139. *Id.* The U.S. Embassy in Cuba stated on its website that “The Government of Cuba treats U.S. citizens born in Cuba as Cuban citizens and may subject them to a range of restrictions and obligations. The Cuban government requires U.S.-Cuban dual citizens who departed Cuba on or after January 1, 1971 to enter and depart Cuba using a Cuban passport. Using a Cuban passport for this purpose does not jeopardize one’s U.S. citizenship; however, such persons must use their U.S. passports to enter and depart the United States. Cuban-Americans who departed Cuba before January 1, 1971 may travel to Cuba on their U.S. passport but must apply for an HE-11 visa from the Cuban Embassy. Cuban authorities do not always notify the U.S. Embassy of the arrest of dual nationals and may deny U.S. consular officers access to them.” *Dual Nationality*, U.S. EMBASSY CUBA, <https://cu.usembassy.gov/u-s-citizen-services/dual-nationality/>.

140. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 52.

Cuba “gave the government broad discretionary powers to restrict the right to travel on the grounds of ‘defense and national security’ or ‘other reasons of public interest.’”¹⁴¹ These regulatory restrictions of international travel in Cuba may be relaxed due to the new constitutional right to movement.

Scholars have recently developed the concept of “strategic citizenship,” which describes citizens who seek to acquire a second passport to access new opportunities such as asset building, family protection, and tax avoidance.¹⁴² Strategic citizenship can also be conceptualized in a top-down manner: governments may allow dual citizenship as a matter of transnational strategy to protect their interests.¹⁴³ Cuba’s constitutional acceptance of dual citizenship can be understood from this instrumentalist, top-down perspective. The change is a constitutional strategy to tie the Cuban diaspora to their home country. The constitutional provision on dual citizenship is not merely an entitlement, it also encourages the Cuban diaspora to retain their home state membership.

Maintaining Cuban nationality while acquiring a second nationality provides three instrumental benefits: First, tying Cubans to their home country through dual citizenship would mitigate the de-legitimatization of Cuba in the international realm. When Cubans leave their home country to acquire a second nationality, it potentially creates the negative image of Cuba as a country worth abandoning,¹⁴⁴ presenting a challenge to the country’s international legitimacy. Encouraging the Cuban diaspora to retain their Cuban citizenship can reduce such negative international impressions. Second, the constitutional recognition of dual citizenship protects national identity because Cubans residing in a second country are still Cuban. They may acquire another nationality, but they still share a history and culture with the greater worldwide Cuban community. Third, the constitutional acceptance of dual citi-

141. *World Report 2019: Cuba*, *supra* note 104.

142. Harpaz & Mateos, *supra* note 134, at 849.

143. See Spiro, *supra* note 133, at 117 (discussing observations that “frame dual citizenship in terms of state interest”).

144. See, e.g., John Caulfield, *Cuba Faces the Next Migration Crisis*, HILL (June 17, 2019, 3:00 PM), <https://thehill.com/opinion/international/448921-cuba-faces-the-next-migration-crisis> (writing that many Cubans believe leaving the island is the only way to improve their lives and that Cubans have long used emigration to express their discontent).

zenship may reduce criticism to Cuba's current regime. The history of Cuba makes this benefit particularly relevant. Cubans who left the country after 1959 to settle in Miami were ideologically and politically antagonistic to the new revolutionary government.¹⁴⁵ Further, more recently, Cuban dissidents have sought to leave the country.¹⁴⁶ Encouraging Cubans to maintain their citizenship is a strategy to reduce criticism of the government from abroad.¹⁴⁷

A final benefit of the acceptance of dual citizenship is that it leads to increased foreign investment.¹⁴⁸ The creation of a dual citizenship encourages elites who have left the country to invest back in their home country.¹⁴⁹ This strategy is, of course, connected to the constitutional commitment to promote foreign investment mentioned above.

B. *The Rights of Foreigners*

Article 91 of Cuba's 2019 Constitution provides for the rights and duties of foreigners, stating that:

Foreigners residing in the Republic are equal to Cubans:

- a) In the protection of their person and property;
- b) In the obligation to observe the Constitution and the law;

145. Krull, *supra* note 18, at 15.

146. Nick Miroff, *Cuba's Dissidents Go Abroad*, PUB. RADIO INT'L (Feb. 18, 2013), <https://www.pri.org/stories/2013-02-18/cubas-dissidents-go-abroad>.

147. *See id.* (quoting Ted Henken, professor at Baruch College, as saying "the government is attempting to convert its harshest and most eloquent critics into its best ambassadors for the reality of the changes taking place on the island, especially as related to its migration reforms.").

148. Mounir Siaplay, *Do Countries that Recognize Dual Citizenship Have Healthier Economies? Evidence from the Economic Community of West African States*, 3 MIGRATION & DEV. 254, 254 (2014) (finding that countries that recognize dual citizenship have greater foreign direct investment and gross capital formation).

149. David Leblang, *Harnessing the Diaspora: Dual Citizenship, Migrant Return Remittances*, 50 COMP. POL. STUD. 75, 75 (2017) (arguing that dual citizenship helps home countries to "leverage the financial and human resources of their diasporas, encouraging both remittances and return migration.").

c) In the obligation to contribute to the public expenditures in the form and quantity established by the law;

d) In their submission to the jurisdiction and rulings of the courts of justice as well as the authorities of the Republic, and

e) In enjoyment of the rights and compliance with the duties set forth within this Constitution under the conditions and within the limits established by the law.

The law establishes the cases and the form in which foreigners may be expelled from the national territory as well as the authorities empowered to decide in these cases.¹⁵⁰

This provision is not new and in fact can be found in the previous Constitution.¹⁵¹ However, due to the augmentation of constitutionally protected rights of Cuban nationals, foreigners also may enjoy the same expanded rights. In particular, foreigners now have the right to private ownership, which is a necessary constitutional protection for foreign investment.¹⁵²

In particular, one important constitutional right of foreigners is the right of asylum. Article 17 of the 2019 Constitution provides that

The Republic of Cuba may grant asylum, in accordance with the law, to those who are persecuted because of their ideals or struggles for national liberation, progressive activities, socialism and peace, democratic rights and their claims, as well as to those who fight against imperialism, fascism, colonialism, neocolonialism and any other form of domination, discrimination or racism.¹⁵³

150. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 91.

151. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 34 (1976, as amended in 2002).

152. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 22, § d.

153. *Id.* art. 17.

While this right was also protected in the previous Constitution, its scope is broader in the current version. The 2019 Constitution extends the right of asylum to a broader group of foreigners who struggle for democratic rights and their claims, while the previous Constitution specified protection for advocates of “the rights and demands of the workers, peasants, and students.”¹⁵⁴ The expanded scope of the right to asylum is a response to the increasing emergence of transnationalism in Cuba, which may lead to an increase of refugees in need of asylum regardless of class.

Cuba is not exceptional in constitutionalizing the right of asylum. Kowalczyk and Versteeg found that around thirty-five percent of all countries included the right to asylum in their constitutions.¹⁵⁵ They argue that the constitutional adoption of the right to asylum is the function of political economy, stating that:

[T]he right to asylum does not merely confer entitlements upon refugees but also brings important potential benefits to the right-granting states. Notably, a constitutional asylum provision can serve as a foreign policy tool that allows a state to cast judgment on the practices of other sovereigns. Granting asylum to the citizens of another country can serve as an indictment of that country's government for its inability or unwillingness to prevent persecution. States may also use the provision to explicitly broadcast their ideology by extending protections to those who share their ideological commitments, thereby making asylum an instrument in the legal and political battles between states. Thus, a constitutional asylum provision can be an attractive and useful tool of foreign policy, independent of its humanitarian purposes.¹⁵⁶

That argument certainly resonates in the context of Cuba. The constitutional asylum provision is an instrument for the Cuban government to express its resistance to imperialism, fascism, colonialism, neocolonialism, hegemonic domination, discrimination, and racism. In addition, the provision is a tool

154. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 13 (1976, as amended in 2002).

155. Kowalczyk & Versteeg, *supra* note 15, at 1224.

156. *Id.* at 1225–26 (footnotes omitted).

for the government to advertise its socialist ideology and strengthen its connection with countries that share the same political and economic system. This provision, therefore, expresses ideological antagonism between socialism and capitalism.

The constitutional asylum provision is consistent with the constitutional principles of Cuba's international relations, particularly, anti-imperialism, and proletarian internationalism. This constitutional provision does not merely speak to any future refugees who may seek asylum, however. It also speaks to foreign governments, including both the governments that Cuba condemns as imperialist and the governments that Cuba values as ideological allies.

V. FUNCTIONS AND POSTURES

The previous sections of this piece have explored the textual features and explained the contextual factors of the international dimensions of Cuba's constitution. This following section situates the Cuban experience within a more general, theoretical context regarding the functions and postures of international constitutions.

A. *Functions: Definition, Expression, and Regulation*

An international constitution has multiple functions. Such a constitution's international audience are multifaceted: foreign citizens, foreign firms, foreign governments, and international organizations. In addition, its external audiences may hold competing interests. Therefore, a state may use its constitution to speak differently to various outside influences. Apart from the pluralist nature of an international audience, constitutional statements may be written in diverse forms and can be expressed in the preamble, principles, or body of provisions. Finally, because international issues vary, constitutions must respond to such issues in different ways.

In order to communicate with outside as well as inside audiences, constitutions employ definitive, expressive, or regulatory legal functions.¹⁵⁷ However, these functions may have

157. Sujit Choudhry differentiates the regulative and constitutive conceptions of constitutions. Sujit Choudhry, *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies*, in CONSTI-

different manifestations depending on which audience is being addressed. To begin with, the definitive function refers to how constitutions define the legal nature of an entity (a state, an enterprise, or a person) and how they differentiate that entity from others. Article 11 of the 2019 Cuban Constitution, which defines the territory of the country, provides an example of this differentiation.¹⁵⁸ In addition to its territorial nature, a constitution may also define the nature of the polity.¹⁵⁹ To the domestic audience, this communicates the nature of their political system, but it also differentiates the polity from others. When the Cuban Constitution defines the polity as socialist, this communicates to the outside world that the country is different from a capitalist, liberal state. Finally, in addition to the territory and the polity, a constitution may define the legal nature of citizens in order to differentiate citizens of a particular country from those of other countries. For example, Article 34 of the Cuban Constitution defines who may be considered Cuban citizens.¹⁶⁰

The second legal function of constitutions is expressive.¹⁶¹ A constitution may express political, social, and economic aspirations and commitments that a regime will pursue in the future. In regard to the external dimensions, a constitution may express the aspirations and principles of a government as it participates in the international realm. Constitu-

TUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 5 (Sujit Choudhry ed. 2008). For the expressive function of law, see generally RICHARD H. McADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2017) (discussing “how law expressively influences behavior”).

158. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 11.

159. The nature of the polity can be democratic, socialist, or liberal. For some examples of constitutional definition of the polity, see Constitution of the Republic of Fiji, art. 1 (2013) (“The Republic of Fiji is a sovereign democratic State.”); Rodthathommonounhnh Nei Preahreacheaneachakr Kampouchea [Constitution of the Kingdom of Cambodia], art. 1 (1993, as amended in 2008) (“Cambodia is a Kingdom in which the King shall rule according to the Constitution and the principles of liberal multi-party democracy.”), translated in Comparative Constitutions Project, Univ. of Tex. at Austin, *Cambodia’s Constitution of 1993 with Amendments Through 2008*, CONSTITUTEPROJECT, https://www.constituteproject.org/constitution/Cambodia_2008.pdf?lang=EN.

160. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 34.

161. See generally Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1269–85 (1999) (explaining the expressive function of constitutions).

tions also express a government's particular views and attitudes towards international issues. Most, though not all constitutional principles of international relations in Cuba's new Constitution perform such expressive functions. These principles express the government's aspirations, hopes, and commitments to defending Cuba's sovereignty, promoting relations with neighbors and other socialist countries, and resisting hegemonic domination.¹⁶² They also express the regime's concerns for global problems facing the international community, such as climate change,¹⁶³ terrorism, and nuclear arms.¹⁶⁴ These constitutional international aspirations and commitments are not normally enforced by local or international courts, as they do not authoritatively require actions from governments and individuals. But, they may inform the government's foreign policy and activities. For example, *latinoamericanismo* informs Cuba's engagement with ALBA and CELAC. They may also inform the activities of citizens. A climate change clause, for instance, may incentivize local citizens to engage in transnational environmental movements.

The third function of constitutions is regulatory. In contrast with expressive principles, regulatory constitutional rules directly enable the actions or non-actions of institutions and individuals.¹⁶⁵ As to the external aspect, a constitution may empower or limit the international actions of a government. For example, the Cuban Constitution empowers the government to grant the right of asylum.¹⁶⁶ Such constitutions may also limit a government, however. For example, the constitution prohibits the government from signing treaties, concessions, or pacts that undermine national sovereignty and territory integrity.¹⁶⁷ A constitution may also empower domestic citizens when they engage with the international community. The provisions on dual citizenship and foreign investments in the Cuban Constitution are an example of such empowerment.¹⁶⁸ A constitution may also empower foreigners, as evidenced by the Cuban Constitution's provision allowing for-

162. *Supra* Part II, Sections C, D, E.

163. *Supra* Part III, Section B.

164. *Supra* Part II, Section A;

165. Choudhry, *supra* note 157, at 5.

166. *Supra* Part IV, Section B.

167. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 12.

168. *Supra* Part IV, Section A; Part III, Section C.

eigners to seek asylum in Cuba and invest in the country.¹⁶⁹ Finally, a constitution may restrict the activities of foreigners. For example, while the Cuban constitution seeks to promote foreign investment, it implicitly prohibits the misuse of human and natural resources.¹⁷⁰

Human rights provisions may serve both expressive and regulatory functions. The general commitments to universal human rights, such as the state recognizing and guaranteeing universal human rights,¹⁷¹ may be expressivist in nature. This is the constitutional expression that the state endorses a universal value, but that value does not instruct the state's action. However, while general provisions may be expressive, provisions regarding particular rights may serve regulatory functions. The constitutional right to movement, for example, allows citizens to travel overseas while also limiting the government's discretionary power to restrict international travelling.¹⁷²

B. *Postures: Convergence, Resistance, and Engagement*

Constitution-drafters may hold different attitudes toward various international audiences, and this variance can be captured through posture. Vicki Jackson introduces a useful triple conceptualization of posture—convergence, resistance, and engagement—to explain the different attitudes held by courts towards the influence of international law in domestic adjudications.¹⁷³ Like judges, constitution-drafters hold similar postures when facing external influences.

According to the Convergence Model, constitutions operate as instruments to implement international law.¹⁷⁴ In this way, constitution drafters favor consistency between constitu-

169. *Supra* Part IV, Section B.

170. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 28 (stating that foreign investment is based on the rational use and protection of natural and human resources).

171. *Id.* art. 41.

172. *Id.* art. 52.

173. Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 112-115 (2005) [hereinafter Jackson, *Constitutional Comparisons*]; Vicki C. Jackson, *Transnational Challenges to Constitutional Law: Convergence, Resistance, Engagement*, 35 FED. L. REV. 161, 164-177 (2007) [hereinafter Jackson, *Transnational Challenges*].

174. Jackson, *Constitutional Comparisons*, *supra* note 173, at 112.

tions and international standards.¹⁷⁵ The typical example is the convergence of a bill of rights with international human rights treaties.¹⁷⁶ This convergence is motivated by both normative forces and instrumental considerations. Normatively, the cosmopolitan values of human rights and human dignity may motivate the posture of convergence.¹⁷⁷ But, such convergence with universal human rights standards may be driven by instrumental signaling. Put more simply, international standards may be inserted within a constitution in order to gain international legitimacy and send an authoritative message to other nations that the regime is a part of the civilized and humane world that respects human rights.¹⁷⁸ Indeed, international human rights can be used as such a signal because the language of those provisions is normally vague, and hence it is difficult to gauge the extent to which a commitment to human rights has been realized. Due to constitutional ambiguity, formal constitutional incorporation of universal human rights does not necessarily compel a government to realize human rights in practice.

The possible gap between formal commitment and the realization of human rights raises academic debates on whether human rights treaties and their constitutional incorporation matter. Oona A. Hathaway argues that “ratification of human rights treaties appears to have little favorable impact on individual countries’ practices.”¹⁷⁹ In contrast, Elkins, Ginsburg, and Simmons find that ratification of human rights treaties results in not only constitutional incorporation of human rights, but also an increased observation of human rights practices because, once constitutionalized, rights “become a tool for do-

175. *Id.* at 112–113 (noting that many post-World War II constitutions “explicitly incorporate international law as a controlling legal norm.”)

176. See Jackson, *Transnational Challenges*, *supra* note 173, at 164–65 (giving examples of states that incorporate human rights clauses in their constitutions as part of the convergence process). See also Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT’L L. 985, 987 (2009) (discussing the “convergence among national constitutional systems in their structures and in their protections of fundamental human rights.”).

177. Jackson, *Transnational Challenges*, *supra* note 173, at 166–67.

178. *Id.* at 167; Ginsburg, Elkins, & Simmons, *supra* note 87, at 81 (“Signaling refers to the idea that constitutional laws, as the highest legal instrument in a state, send a message about the priority of particular policies.”).

179. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941 (2002).

mestic legal as well as political mobilization.”¹⁸⁰ Situated somewhere in the middle, Chilton and Versteeg argue that not all constitutional rights are equally effective, and particularly finding that organizational rights (e.g. the right to form political parties, the right to unionize, the freedom of association, the freedom of religion, the freedom of expression, and the freedom of movement) are most effective.¹⁸¹ This is mainly because these rights are less ambiguous and can be claimed by citizens in a more straightforward manner than personal, social, economic rights.

This article contends that constitutional rights do play the signaling function, but that this function is varied. First, developing countries that base their political legitimacy and social and economic development on international recognition and universal standards would have more incentive to use human rights as a signal.¹⁸² Second, regime type matters. In the international realm, new democracies, which may lack internal confidence, may constitutionalize human rights as a pre-commitment to “lock in” democracy domestically.¹⁸³ In this regard, rights operate as an internal pre-commitment rather than an external signal. In contrast, authoritarian regimes, which have no commitment to transition into a democracy, may constitutionalize human rights as external signals. This is mainly because authoritarian regimes are often criticized by international actors for their domestic human rights situation.¹⁸⁴ To counter against such criticisms and to legitimize the existing regime in the eyes of international audiences, authoritarian states may constitutionalize international human rights to send

180. Ginsburg, Elkins, & Simmons, *supra* note 87, at 69.

181. Adam S. Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 575, 575–76 (2016).

182. Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 95 (2002) (noting that “new regimes have the strongest need to signal their future intentions” because they “have no track record and therefore a much stronger need to establish their credibility.”)

183. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 712 (2006).

184. Jamie J. Gruffydd-Jones, *Citizens and Condemnation: Strategic Uses of International Human Rights Pressure in Authoritarian States*, 52 COMP. POL. STUD. 579, 579 (2019) (“Governments with strict control over the information that their citizens hear from foreign sources are regular targets of human rights pressure”).

an authoritative message to the outsiders that they respect human rights at a fundamental level.

The incorporation of universal human rights into the Cuban Constitution illustrates the Convergence Model well. Because the support of the international community, foreign investment, and political and economic integration are important for the country's social and economic development, Cuba has an incentive to signal to the outside world that the country respects human rights as a normative universal value shared among the civilized world. This signaling is instrumental to the regime's desire of gaining the support and acceptance of the international community. In addition, the Constitution signals a human rights commitment to silence international criticisms of the human rights situation within the country.

When rights are used as a signaling tool, one may question their meaning in Cuban constitutional politics. However, once rights are constitutionalized, they then take on new life. The Cuban government may use rights as a signal, but Cuban citizens and international actors may employ rights as a discursive and mobilizing tool. International actors (e.g. the U.S. Council on Human Rights, Human Rights Watch, foreign governments, and dissidents abroad) as well as local citizens may invoke the constitutional language of human rights to evaluate the local reality of human rights practices and mobilize for the protection of constitutional rights. Such international and domestic discourse and mobilization may pressure the regime to incrementally implement constitutional commitments to human rights.

Many of the debates on constitutional convergence focus on human rights,¹⁸⁵ but constitutional convergence is also manifested in other areas related to international law. For example, the Cuban Constitution repeatedly refers to international law in its definition of territory and sovereignty,¹⁸⁶ and it repeatedly states that the Cuban government conforms to the norms and principles of international law, including the ones proclaimed in the Charter of the United Nations. Finally, the

185. Ran Hirschl, *Opting Out of "Global Constitutionalism"*, 12 L. & ETHICS HUM. RTS. 1, 1 (2018) ("Much has been written about the global convergence on constitutional supremacy, perhaps even the emergence of a global constitutional order, most visible in the context of rights.").

186. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 11.

climate change clause in the Cuban Constitution is another embodiment of the Convergence Model, as it is consistent with the UNFCCC, the Kyoto Protocol, and the Paris Agreement. Through this consistency, the clause sends an authoritative message to the outside world that the regime shares global climate concerns.

The second posture is Resistance. In contrast to the Convergence Model, the Resistance Model indicates a negative, adverse attitude towards external models, influences, or events.¹⁸⁷ This posture is motivated by the consideration of independent sovereignty, the fear of hegemonic domination, and other threats.¹⁸⁸ This posture is explicitly embodied in the Cuban's constitutional resistance to imperialism, colonialism, nuclear arms, cyber warfare, and terrorism, among others.¹⁸⁹ The Resistance Model is also implicit in *latinoamericanismo* and international socialism. The special connection with other Latin American and Caribbean countries is in some ways an explicit resistance to the transnational networks led by developed countries. For example, ALBA is both a "system of free trade" and "a nexus point for legal and political resistance to economic globalization and legal internationalism sponsored by developed states."¹⁹⁰ International socialism is also an explicit resistance to the capitalist world; when the constitution defines socialism as irrevocable and confirms Cuba's special connections with socialist countries, it implies a negative attitude to capitalism and liberal democracy.¹⁹¹

The third posture, Engagement, lies somewhere in the middle. It neither rejects nor converges with the external standards. "The engagement model values the insights of foreign

187. Jackson, *Transnational Challenges*, *supra* note 173, at 169 (arguing that "constitutional texts lay an explicit foundation for resistance to the transnational."). See also Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 297 (2003) (arguing that cross-constitutional influence can be negative).

188. See Jackson, *Constitutional Comparisons*, *supra* note 173 at 113 (noting that constitutions may resist the economic pressures of globalization and protect internal federal systems).

189. *Supra* Section II, Parts A, B, C.

190. Larry Catá Backer & Augusto Molina, *Cuba and the Construction of Alternative Global Trade Systems: ALBA and Free Trade in the Americas*, 31 U. PA. J. INT'L L. 679, 685 (2010).

191. *Supra* Section II, Part E.

and international law, but without necessarily placing a thumb on the scale in any one direction."¹⁹² According to the Engagement Model, constitution drafters may consider external standards, but they are not controlled by them.¹⁹³ In the Cuban experience, this is manifested in the constitutional treatment of international treaties. The treaties become domestic law once ratified by Cuba, but the national constitution retains primacy over these treaties.¹⁹⁴

Private property and foreign investment are the other areas of engagement in Cuba's Constitution. Constitution drafters seemed circumspect in embracing these institutions, as they are traditionally capitalist and may potentially undermine the regime's commitment to socialism. Therefore, the Cuban Constitution's drafters considered and partially adopted some capital institutions (private property and foreign investment),¹⁹⁵ but did not go so far as to embrace a market economy.¹⁹⁶ Constitution drafters, therefore, preserved the social model of a state economy, but adopted private property and foreign investment as complementary and important elements of the national economy.¹⁹⁷

VI. CONCLUSION

Constitutions do not merely express national identity and regulate the domestic relationship between a government and its citizens. In today's globalized world, constitutions also play a prominent role in the international realm. They differentiate the state and its citizens from others. They express aspirations that governments hope to achieve in their international engagements. They empower and limit the actions of governments, citizens, and foreigners both domestically and internationally. In incorporating aspects of foreign relations law, international human rights law, international environmental

192. Jackson, *Transnational Challenges*, *supra* note 173, at 171.

193. *Id.*

194. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], art. 8.

195. *Id.* arts. 22, 28.

196. Note that there is no a single model of capitalism. *See generally* PETER A. HALL & DAVID SOSKICE, *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (2001) (applying the new economics of organization and relational theories of the firm to the study of the varieties of capitalism).

197. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA [CONSTITUTION], arts. 22, 28.

law, and international economic law, Cuba's new 2019 Constitution manifests these external aspects. In light of these aspects, Cuba's 2019 Constitution is more than a national charter of national governance: It is also an international document.

This case-study of Cuba contributes to the movement drawing academic attention to the international dimensions of national constitutions. The investigation of the external dimensions of the Cuban Constitution in this study is based on external factors that generate a constitutional response. These factors include changing international relations, consolidated internationalism, and enhanced transnationalism. Other possible classifications of the external dimensions of constitutions can be based on objects. These objects may include territory, polity, the state as an entire entity, government institutions, domestic citizens, and foreigners. Typology can be also based in reference to areas of international law. The prevailing discourse focuses on the incorporation of international human rights law into national constitutions, but as this case study indicates, constitutions also deal with several other areas of international law, such as foreign relations law, international environmental law, and international investment law.

Another implication of this case study is that constitutions do not have the same external face. A multifaceted approach to a constitution's externality may be necessary. In this regard, it is important to consider the determinants of the variations of a constitution's externality. These may include external and internal determinants. The external determinants are international status, international relations, and the surrounding geography. Constitutions of global powers may be more exceptional and include fewer external aspects. Small states may be forced to include external components in their constitutions as they "are more vulnerable to the forces of globalization and thus more susceptible to, and dependent upon, the international community, and their vulnerability incentivizes them to curry favor with the international community by adopting its norms."¹⁹⁸ Considering international relations, a constitution may include external provisions that facilitate the establishment of ties with economic and military allies. To take account of the surrounding geography, constitutions may have provi-

198. David Law, *Constitutional Archetypes*, 95 TEX. L. REV. 153, 209 (2016)

sions that promote good relations with countries of physical affinity.

The variations of the external dimensions of constitutions may also be determined by internal factors. These internal determinants may be historical, ideological, institutional, or socioeconomic. A colonial history may underlie a constitutional principle of foreign affairs, particularly if there is a stronger concern for national independence. Domestic political ideology may influence a country's foreign relations, and a constitution may play a role in facilitating the connection of a country with its ideological allies. Domestic institutional arrangements may also affect the external aspects of constitutions. The power to declare war is an example. Ginsburg finds that constitutions of semi-presidential democracies tend to specify the war powers of the executive and the legislature due to the hybrid nature of such governments, while the constitutions of parliamentary democracies "generally refrain from saying anything at all about the war power."¹⁹⁹ Finally, social and economic conditions may also determine variations between constitutions. Constitutions of developing countries may include provisions that explicitly address foreign investments, while these may not be included in constitutions from more developed countries.

199. Ginsburg, *Chaining the Dog of War: Comparative Data*, *supra* note 15, at 152–53.