

# The External Dimensions of Constitutions

EYAL BENVENISTI\* & MILA VERSTEEG\*\*

*Constitutions are traditionally seen as inherently domestic documents, written by the people, for the people, and reflecting the nation's highest values. Yet, constitutions also have important external dimensions. Constitutions define the territory of the nation. They articulate the requirements for citizenship. They define war-powers, treaty-making powers, and structure foreign affairs. They commonly demand that governments protect nationals that reside abroad. In some cases, they extend protections to foreigners in need, especially when they are seeking admission to the country. In a globalized world, this 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. Hence, questions arise as to whether national constitutions take account of their impact on strangers, whether they should, and if so, how they accommodate their concerns. Our aim is to draw attention to the external dimensions of constitutions, to the role constitutions play in the global sphere and, ultimately, to the question of the responsibility that constitution drafters and interpreters have to the outside world. While constitutions are traditionally understood as domestic documents, their significant and multifarious external dimensions raise moral and legal questions about the concern and respect that are due to outsiders.*

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\* Whewell Professor of International Law, University of Cambridge Faculty of Law; Director, the Lauterpacht Centre for International Law; Professor, Tel Aviv University Faculty of Law.

\*\* Professor of Law, Director of Human Rights Program, University of Virginia School of Law. We thank Morten Broberg for helpful comments, conversations, and suggestions. Eyal's research for this Article was supported by the European Research Council Advanced Grant (grant agreement no. 323323).

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## I. INTRODUCTION

Constitutions are traditionally seen as inherently domestic documents. They are written “by the people, for the people,”<sup>1</sup> and in many cases, stipulate how they can be replaced or revised by the people.<sup>2</sup> Substantively, they are often believed to reflect the people’s highest values.<sup>3</sup> In many cases, they lay out the requirements for citizenship and thereby, somewhat circularly, define the people. Citizenship, or “the right to have rights,”<sup>4</sup> is given further meaning through the bill of rights, which defines the obligations that the government owes its people. Indeed, in articulating rights provisions, constitutions commonly distinguish between rights that belong to all those in the territory and those that belong to citizens only.<sup>5</sup> Constitutions may further authorize such distinctions in subconstitutional texts, such as laws, regulations, judgments, and executive orders.

But while constitutions are primarily inward looking, they also have important external dimensions.<sup>6</sup> One of constitutions’ central tasks is to define the internal from the external, the citizen from the outsider. Such “demarcation constitutionalism,”<sup>7</sup> as Neil Walker describes, is the most visible, and arguably most important, external dimension of constitutions.<sup>8</sup> Indeed, the very existence of the constitution is an assertion of borders.

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1 D.J. Galligan, *The Sovereignty Deficit in Modern Constitutions*, 33 OXFORD J. LEGAL STUD. 703, 707 (2013) (finding, empirically, that constitutions are near universally proclaimed in the name of “We the People”). See also 1958 Const., Art 2 (Fr.) (“The principle of the Republic shall be: government of the people, by the people and for the people.”); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident . . . That . . . governments . . . deriv[e] their just powers from the consent of the governed.”).

2 Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. & SOC. SCI. 201, 209 (2009) (documenting, empirically, that over 40 percent of all constitutions today require approval by popular referendum).

3 BEAU BRESLIN, FROM WORDS TO WORLDS: EXPLORING CONSTITUTIONAL FUNCTIONALITY 5 (2009) (noting that the primary function of constitutions is to “imagine and then help to realize a shared collective existence”); GARY JACOBSON, CONSTITUTIONAL IDENTITY 3 (2010) (arguing that one of the core functions of constitutional law is to articulate the nation’s distinct identity).

4 Heinz Klug, *Constitution in the World: The External Dimensions of South Africa’s Post-Apartheid Constitution*, 57 VA. J. INT’L L. 657, 661 (2018).

5 George Rutherglen, *The Rights of Aliens Under the United States Constitution: At the Border and Beyond*, 57 VA. J. INT’L L. 707, 712 (2018) (describing how some provisions in the U.S. Constitution deal with citizens, while others concern “persons” and concluding that “because citizens have greater rights than aliens, under the U.S. Constitution, as under most constitutions around the world, the extent of aliens’ rights depends primarily upon how closely the aliens resemble citizens, particularly citizens within the United States”).

6 VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 5 (2009) (“National constitutions, and their interpretation by courts, thus may be said to perform both internal and external functions, at once clarifying the legal foundations for a state to function as a national state in the world community, providing for its internal allocation of powers and governance, expressing a particularly national identity, checking that governance remains within the limits of the constitution as law, and promoting the legitimacy of governance under the constitution.”).

7 Neil Walker, *The Double Significance of External Constitutionalism*, 57 VA. J. INT’L L. 799 (2018).

8 See also JACKSON, *supra* note 6, at 258-62.

Constitutions are often promulgated as a declaration of sovereignty and independence. As Nathan Brown observes, when a country becomes independent, or when a regime change takes place, the new government will write a constitution, just as it “designs a new flag, a national anthem, and postal stamps.”<sup>9</sup> Constitutions further define the territory of the nation and stipulate who is entitled to rights and protections by the government that controls that territory.<sup>10</sup> Constitutions also interact with the outside world to protect national interests. They define war-powers,<sup>11</sup> treaty-making powers,<sup>12</sup> and structure foreign affairs.<sup>13</sup> Moreover, they often demand that governments protect citizens that reside abroad,<sup>14</sup> and, in some cases, extend protections to those in need and who are seeking admission.<sup>15</sup> Moreover, as David Golove argues, even purely internal arrangements, such as the separation of powers, can, and have long been, motivated by external concerns, such as enhancing the nation’s credibility to engage in international affairs.<sup>16</sup> Seemingly internal values and aspirations might, moreover, be written as advertisement to the outside world, turning constitutions into “billboards” for an international audience.<sup>17</sup>

Yet, 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. Today, there is one boundary regime to regulate the in and outflow of different types of people (refugees, migrants, trafficked persons), several others to regulate

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9 NATHAN J. BROWN, CONSTITUTIONS IN A NONCONSTITUTIONAL WORLD: ARAB BASIC LAWS AND THE PROSPECTS FOR ACCOUNTABLE GOVERNMENT 10 (2001); H.W. Okoth-Ogendo, *Constitutions Without Constitutionalism: Reflections on an African Political Paradox*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 65-82 (Stanley N. Katz et al. eds., 1993) (noting that constitutions are inextricably linked to sovereignty; JACKSON, *supra* note 6, at 6-8).

10 *See infra* Parts II.A & II.B.

11 Tom Ginsburg, *Chaining the Dog of War: Comparative Data*, 15 CHI. J. INT’L L. 138, 149–50 (2013) (describing in how many countries the executive can declare war and in how many countries the legislature is involved).

12 Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008); Pierre-Hugues Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT’L L. 514 (2015).

13 *See, e.g.*, Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFFAIRS 284 (1987).

14 *See supra* Part II.C.

15 *See supra* Part II.D.

16 David Golove, *The American Founding and Global Justice: Hamiltonian and Jeffersonian Approaches*, 57 VA. J. INT’L L. 621 (2018). *See also* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 101 (2010).

17 Tom Ginsburg & Alberto Simpser, *Introduction: Constitutions in Authoritarian Regimes*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 1, 6 (Tom Ginsburg & Alberto Simpser eds., 2014) (“Constitutions are advertisements; they seek to provide information to potential and actual users of their provisions.”).

the flow of pollutants, various types of natural resources and foreign trade and investment, as well as regimes that seek to regulate the boundless virtual space. Some of these boundaries are constitutional in nature, while others are defined in subconstitutional texts such as judicial decisions or legislation. Regardless, as physical borders no longer define the political space,<sup>18</sup> the need for the law to define the political space, with ever-greater sophistication, is growing. As Charles Meier observes: “the growing vulnerability of the borders means that they are likely to be defended all the more rigorously.”<sup>19</sup> The vulnerability is increasingly also moral, as conflicting demands for space, sometimes by desperately disadvantaged individuals and communities, raise difficult moral questions regarding the differential life chances allocated among humanity by different constitutions.<sup>20</sup> Thus, in a globalized world, we might expect the external dimensions of constitutions to be growing in both importance and complexity.

These processes themselves are interdependent. More than in the past, the drafters and interpreters of these legal boundaries interact with their peers across borders as their task often depends on what others are doing. In this ongoing process of setting and negotiating borders, constitutions or subconstitutional texts may be increasingly other-regarding, even formally expressing a duty or a responsibility to take outsiders’ interests into account.<sup>21</sup>

The purpose of this article is to identify and map the external dimensions of constitutions, the ways by which they regulate the various borders between humans, spaces, and activities, and perhaps also to understand their motivations and considerations in regulating these borders. As we embark on this quest, we encounter the external dimension that has preoccupied public attention in recent years, namely the regulation of asylum seekers. In light of a mounting refugee crisis in Europe and elsewhere, the constitutional obligations that states owe toward refugees are particularly relevant. Indeed, it is this question—the obligation that states owe to those seeking admission—that has motivated this article. But as we dig deeper, we encounter several additional dimensions with which constitutions are increasingly preoccupied. While this Article is unable to encompass them all, we hope that it will outline the framework for the debate about the proper scope of the various external dimensions of constitutions.

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18 See CHARLES S. MAIER, *ONCE WITHIN BORDERS: TERRITORIES OF POWER, WEALTH, AND BELONGING SINCE 1500* (2016).

19 *Id.* at 279.

20 See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* (2009).

21 See *infra* Part II.E. See also Eyal Benvenisti, *Sovereigns as Trustees of Humanity*, 107 AM. J. INT’L L. 295 (2013) (on the duty to take foreigners’ interests into account).

## II. A TYPOLOGY OF EXTERNAL DIMENSIONS OF CONSTITUTIONS

In developing a typology of the external dimensions of constitutions, we are guided by the question of why constitutions busily demarcate physical and human borders. As it turns out, the various answers to this question provide us with a useful way to characterize different external dimensions of constitution.

### *A. Defining the Boundaries of Nation*

Perhaps the primary way that constitutions interact with the outside world is by defining the physical and legal boundaries of the state. Constitutions can be seen as the legal borders of the state, which protect those inside these borders from the, often dangerous, outside.

In some cases, constitutions literally deal with physical borders, by declaring them inviolable, or imposing constraints on their modification. The Constitution of Finland, for example, states that, “[t]he territory of Finland is indivisible,”<sup>22</sup> and that, “[t]he national borders cannot be altered without the consent of the Parliament.”<sup>23</sup> Similarly, the Constitution of Cambodia notes that, “[t]he territorial integrity of the Kingdom of Cambodia shall never be violated within its borders as defined in the 1/100,000 scale map made between the years 1933-1953, and internationally recognized between the years 1963-1969.”<sup>24</sup> In the same vein, some countries seek to protect and guard their territory by explicitly banning secession. To illustrate, the Constitution of Ukraine states that, “[i]ssues of altering the territory of Ukraine are resolved exclusively by an All-Ukrainian referendum,”<sup>25</sup> and further declares Crimea “an inseparable constituent part of Ukraine...,”<sup>26</sup> thus prohibiting secession by Crimea.<sup>27</sup> Conversely, other constitutions explicitly allow secession. The constitution of Ethiopia states that, “[e]very Nation, Nationality and People in Ethiopia has an unconditional right to self-determination, including the right to

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<sup>22</sup> Suomen Perustuslaki (Constitution of Finland), June 11, 1999, 1 luku, 4§ (Fin.).

<sup>23</sup> *Id.*

<sup>24</sup> រដ្ឋធម្មនុញ្ញនៃព្រះរាជាណាចក្រកម្ពុជា (Constitution Of The Kingdom Of Cambodia), art. 2 (1993, as amended in 2008) (Cambodia). As another example, the Constitution of Georgia notes that, “[t]he territorial integrity of Georgia and the inviolability of state borders is acknowledged by the Constitution and laws of Georgia” and that, “[t]he state borders may be changed only by a bilateral agreement with a neighbouring state.” საქართველოს კონსტიტუცია (Constitution of Georgia), art. 2.1, 2.2 (1995/2011) (Geor.).

<sup>25</sup> Конституція України 28 червня 1996 року (Constitution of Ukraine), art. 73 (1996) (Ukr.).

<sup>26</sup> *Id.*, art. 134.

<sup>27</sup> *Id.*

secession” and stipulates procedures for invoking this right.<sup>28</sup> Famously, the Supreme Court of Canada has outlined the conditions for lawful secession of Provinces from Canada under Canadian constitutional law.<sup>29</sup>

Constitutions do not only define physical borders; they also define human borders. They define the collective border of the people,<sup>30</sup> and most importantly, they define citizenship,<sup>31</sup> and the rights to which citizens are entitled. They may further limit the conditions under which citizenship can be lost,<sup>32</sup> and they may stipulate a pathway to citizenship for outsiders. In many settings, the link between constitutional rights and citizenship raises difficult questions about what level of protection is afforded to non-citizens. Adam Shinar discusses these difficulties in the context of Israel,<sup>33</sup> while Rosalind Dixon and Bridget McManus examine the rights afforded to detained non-citizens.<sup>34</sup>

In addition to defining citizenship, constitutions may also articulate a more comprehensive national identity. For example, Article 66 of the Turkish Constitution declares that, “[e]veryone bound to the Turkish State through the bond of citizenship is a Turk.”<sup>35</sup> Ozan Varol discusses the

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28 የኢትዮጵያ ፌዴራላዊ ዲሞክራሲያዊ ሪፐብሊክ አገ መንግስት (Constitution of the Federal Democratic Republic of Ethiopia), art. 39.1, 39.4 (Eth.) (1994). *See also* Verfassung des Fürstentums Liechtenstein (Constitution of the Principality of Liechtenstein), art. 4.2 (1921/2003) (Liech.) (“Individual communes have the right to secede from the State. A decision to initiate the secession procedure shall be taken by a majority of the citizens residing there who are entitled to vote. Secession shall be regulated by a law or, as the case may be, a treaty. In the latter event, a second ballot shall be held in the commune after the negotiations have been completed.”).

29 Reference re Secession of Quebec [1998] 2 S.C.R. 217 (Can.).

30 Sometimes they define the people as the sovereign, as, for example, does the French Constitution of 1958, which stipulates that “National sovereignty shall vest in the people.” *See* 1958 Const. (Constitution), art. 3 (Fr.) and the decision of the French Conseil Constitutionnel [CC] [Constitutional Court] decision No. 91-290DC, May 9, 1991 (Fr.) (finding that a proposed law that would recognize the Corsican people would be incompatible with that Article).

31 *See, e.g.*, Constitución de la Republica de Cuba (Constitution of the Republic of Cuba), art. 28 (1976) (Cuba) (“Cuban citizenship is acquired by birth or through naturalization.”) and art. 32 (“Cubans may not be deprived of their citizenship except for legally established causes. Nor may they be deprived of the right to change it..The law establishes the procedure to be followed for formalizing the loss of citizenship, and the authorities empowered to decide on it.”).

32 *See, e.g.*, Ustav Republike Hrvatske (Constitution of the Republic of Croatia), art. 9 (1991) (Croat.) (“A citizen of the Republic of Croatia may not be forcibly exiled from the Republic of Croatia or deprived of citizenship, nor extradited to another state, except in case of execution of a decision on extradition or surrender made in compliance with international treaty or the *acquis communautaire* of the European Union.”).

33 Adam Shinar, *Israel’s External Constitution: Friends, Enemies and the Constitutional/Administrative Law Distinction*, 57 VA. J. INT’L L. 735 (2018) (discussing the “personal approach” to constitutional rights protection and describing how the Israeli Supreme Court found that the Basic Law applies to settlers when an area is subject to Israeli control under belligerent occupation.).

34 Rosalind Dixon & Bridget McManus, *Detaining Non-Citizens: Political Competition & Weak v. Strong Judicial Review*, 57 VA. J. INT’L L. 591 (2018).

35 Türkiye Cumhuriyeti 1982 Anayasası (Turkish Constitution of 1982), art. 66 (Turk.).

difficulties of this provision, especially in relation to the Kurds who view this as an imposition of ethnic identity that they do not share.<sup>36</sup>

Constitutions further define who can enter and exit the territory. To those who are citizens, constitutions usually provide a right to enter and exit their own country without constraints. For example, the Constitution of Gambia states that “[e]very person lawfully within The Gambia shall have [the] right to move freely throughout The Gambia, to choose his or her own place of residence within The Gambia, and to leave The Gambia.”<sup>37</sup> Indeed, no less than 71% of all constitutions contain a right of citizens to return in some form.<sup>38</sup> Finally, constitutions in some cases regulate trade boundaries indirectly by recognizing individuals’ freedom of occupation, which entails the right to engage in foreign trade,<sup>39</sup> although the details are usually left to subconstitutional documents.

With globalization—and with most recent anti-globalization policies—it has become apparent that constitutions also play a role in guarding the interest of nationals in defining entry and exit options into international and supranational legal orders. Many constitutional courts have positioned themselves as gatekeepers between the international and domestic legal order. For example, the German Constitutional Court, in its well-known Maastricht ruling, set limits on the transfer of power from German representative bodies to the European Union.<sup>40</sup> Similarly, a growing number of constitutions require constitutional courts to review the constitutionality of international agreements prior to their entry into force.<sup>41</sup> Most notably, the United Kingdom High Court recently found that the Parliament must authorize Brexit talks because the 1972 European Communities Act granted U.K. citizens the right to work in European Economic Community countries, and this right can be taken only by Parliament.<sup>42</sup>

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36 Ozan O. Varol, *Alien Citizens: Kurds and Citizenship in the Turkish Constitution*, 57 VA. J. INT’L L. 769 (2018).

37 Constitution of the Republic of the Gambia, art. 25 (1996/2004) (Gam.). It further states that, “[e]very citizen of The Gambia shall have the right to return to The Gambia.”

38 Benedikt Goderis & Mila Versteeg, *The Diffusion of Constitutional Rights*, 39 INT’L REV. L. & ECON. 1, Tbl.1 (2014).

39 HCJ 4676/94 Meatreal Ltd v. Knesset [1994] IsrSC 50 (5) 15 (Israel’s Supreme Court finds that the freedom to import is part of the freedom of occupation that is constitutionally protected).

40 Bundesverfassungsgericht (Federal Constitutional Court) [hereinafter BVerfG], Judgment of Oct. 12, 1993 (Maastricht), 89 BVerfG 155.

41 Pierre Verdier & Mila Versteeg, *Domestic Law and the Credibility of Treaty Commitments* (unpublished manuscript, on file with authors) (finding that 40% of all countries they coded demand judicial review of treaties prior to ratification).

42 *R v. Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (U.K.).

*B. Protecting the National Interest*

The protection of domestic interests requires constitutions to do more than merely erect inert borders. After all, the state has to act proactively to promote its interests. As a consequence, constitutions regulate who has the constitutional authority to protect the territorial space,<sup>43</sup> that is, to declare and wage war, and to enter into relationships with foreign countries. This burgeoning field of inquiry has acquired a distinct title—foreign relations law.<sup>44</sup> Tom Ginsburg shows that 71% of all historical and current constitutions explicitly stated who has the power to declare war.<sup>45</sup> And arguably, failure to constitutionally define this power is also an important constitutional design choice. A growing number of constitutions further specify how the nation makes treaties, and how these treaties interact with the domestic legal order.<sup>46</sup> They do the same for customary international law.<sup>47</sup>

Some constitutions also reach out with a metaphorical olive branch. In regulating the recourse to war they often seek to curb aggression and communicate the promise of measured response to foreign governments.<sup>48</sup> In addition, a growing number of constitutions include a right to peace. The constitution of the Democratic Republic of the Congo, for example, notes that, “[a]ll Congolese have the right to peace and to security, both on the national as well as on the international level.”<sup>49</sup> More recently, Japan has famously debated how to interpret Article 9 of its 1946 constitution, which stipulates that, “the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.”<sup>50</sup> In some cases, constitutions recognize a

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43 1958 Const. (Constitution), art. 5 (Fr.) (“The President of the Republic shall . . . be the guarantor of national independence, territorial integrity . . .”).

44 See CURTIS A. BRADLEY & JACK GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* (3d ed. 2008).

45 Ginsburg, *supra* note 11, at 148.

46 See Antonio Cassese, *Modern Constitutions and International Law*, 192 *RECUEIL DES COURS* 331 (1985). See also Hathaway, *supra* note 12; Verdier & Versteeg, *supra* note 12.

47 *Id.*

48 Golove, *supra* note 16, discusses this aspect in his study of the origins of the U.S. Constitutional arrangements in this context. See also Tom Ginsburg, *Chaining the Dogs of War* (2015) (manuscript, on file with author) (finding that when parliaments are constitutionally required to authorize war, nations are less likely to go to war).

49 Constitution de la République Démocratique du Congo, 2005/2011, art. 52.

50 日本国憲法 (Constitution of Japan), art. 9 (1946) (Japan) (“(1) Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. (2) In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.”) See also Craig Martin, *Change It To Save It: Why and How to Amend Article 9*, 18 *RITSUMEIKAN J. PEACE STUD.* 1 (2017), available at

right to peace for foreign peoples that may implicitly condition peace on those peoples' exercise of self-determination. Notably, the French Constitution of 1791 stated that, "[t]he French nation renounces the undertaking of any war with a view of making conquests, and it will never use its forces against the liberty of any people."<sup>51</sup> According to our count, thirty-eight constitutions currently in force recognize the principle of self-determination as a general right potentially applicable to all peoples.<sup>52</sup>

Perhaps less well known is that many constitutions contain explicit statements of foreign policy. For example, the 1974 Constitution of Nicaragua declares that, "to rebuild the Central American nation is a permanent aspiration of the people of Nicaragua,"<sup>53</sup> while the 1973 Constitution of Bahrain notes that it is "realizing the responsibilities of our state as a member of the Arab family and international community."<sup>54</sup> Early Francophone African constitutions even mentioned that the nations' borders could be redrawn or eliminated to achieve greater African unity. To illustrate, the 1977 Constitution of Burkina Faso (Upper Volta at the time) noted that its "people reaffirm their attachment to the realization of close cooperation among all African states for the purpose of forming a united and prosperous Africa," and that, to that end, it "may conclude with any African state agreements of association or of cooperation involving partial or total abandonment of sovereignty for the purpose of realizing African unity."<sup>55</sup> Other constitutions identify with the world as a whole. For example, since 1975, the Constitution of Angola states that, "[t]he People's Republic of Angola supports, and is in solidarity with, people's struggles for national liberation, and will establish relations of friendship and co-operation with all democratic and progressive forces in the world."<sup>56</sup> Similar provisions can be found in numerous other constitutions.

In protecting domestic interests, constitutions can also reach out to foreigners, most notably foreign investors seeking commitments to the protection of their investments. The conventional wisdom in the neo-

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[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2883588](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2883588); Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus ad Bellum*, 30 U. PENN. J INT'L L. 267 (2008).

51 La Constitution, 1791, title 6 (Fr.).

52 This number results from searching for "self-determination" in the Constitute database <https://www.constituteproject.org/search?lang=en&q=self-determination>.

53 Constitución Política de la República de Nicaragua, 1974, art. 5.

54 البحرين مملكة دستور [The Constitution of the Kingdom of Bahrain], 1973, Preamble (Bahr.).

55 Constitution de la République Haute-Volta (Constitution of the Republic of Upper Volta), art. X (1977) (Upper Volta changed its name to Burkina Faso in 1984). See also Constitution de la République de Guinée (Constitution of the Republic of Guinea), art. 89 (1982) (Guinea) ("Guinea may conclude with one or many African states agreements of association or of community involving partial or total abandonment of sovereignty with a view to realizing the united states of Africa").

56 Constituição Da República De Angola, 1976, art. 15.

liberal consensus that has prevailed since the 1990s is that foreign investment is beneficial for a country's economy. Indeed, since the 1990s, constitutions have witnessed a wave of neo-liberal constitutional reforms intended to attract foreign investors.<sup>57</sup> David Law has even suggested that states use their bill of rights to compete for foreign investors and high-skilled workers by offering attractive bundles of constitutional rights.<sup>58</sup> These kinds of protections for foreign investors unambiguously serve important national interests.

Yet, constitutions also erect borders against foreigners to protect domestic interests. Although usually the protection of domestic markets from foreign activities, such as antitrust, is delegated to sub-national texts, in recent years, we have also seen constitutional amendments introduced to protect national resources from foreign economic predation. In what may be motivated by growing wariness of economic forces of globalization, Slovakia and Slovenia recently amended their constitutions to protect water sources against privatization by making access to drinking water a fundamental right.<sup>59</sup> Likewise, the 2009 Bolivian Constitution states: “[a]ccess to water and sewer systems are human rights, neither are the object of concession or privatization, and are subject to a regimen of licensing and registration, in accordance with the law.”<sup>60</sup> Other countries have adopted strong social rights protections that stand in the way of internationally imposed austerity measures.<sup>61</sup> And pre-dating the neo-liberal reforms of the 1990s are older provisions that express similar sentiments. For example, a number of Latin American constitutions contained provisions that limited the amount of property that foreigners could hold.<sup>62</sup> Some constitutions, moreover, limit the land that foreigners can hold near the border, such as the Guatemala Constitution, which states that, “[o]nly Guatemalans of origin, or the communities whose members possess the same qualities, may own and possess real property located in a strip of fifteen kilometers wide along the borders, measured from the dividing line.”<sup>63</sup>

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57 Stephen Gill, *New Constitutionalism, Democratization and the Global Political Economy*, 10 PACIFICA REV. 23 (1998) (describing constitutional reforms in the 1990s intended to “lock-in neo-liberal reforms”); David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 L. & SOC. INQ. 757, 764-67 (2000) (observing that when Mexico acceded to the North Atlantic Free Trade Agreement (NAFTA), it promulgated up to 30 constitutional amendments to its 1917 constitution, to conform to the investment rules of NAFTA).

58 See generally David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008).

59 *Slovenia Adds Water to Constitution as Fundamental Right for All*, THE GUARDIAN (Nov. 17, 2016), <https://www.theguardian.com/environment/2016/nov/18/slovenia-adds-water-to-constitution-as-fundamental-right-for-all>.

60 Constitución de 2009 del Estado Plurinacional de Bolivia, 2009, art. 20.3.

61 See Kim Lane Scheppele, *Constitutional Courts in the Field of Power Politics: A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1924-25 (2004).

62 Mila Versteeg, *The Politics of Takings Clauses*, 109 NW. U. L. REV. 695, 721-23 (2015).

63 Constitución Política de la República de Guatemala, 1985/1993, art. 123.

*C. Protection of Nationals*

A third external dimension of constitutions is centered around those whom the constitution first and foremost seeks to protect: nationals. Constitutions offer protection to their nationals from outsiders by regulating activities in foreign territories that affect their citizens at home and, in some cases, also when they reside abroad.

The notion that a state has some responsibility toward citizens that reside abroad is well-accepted. Many countries extend their criminal laws to criminalize acts committed abroad against their nationals due to their specific national affiliation (such as acts of terrorism).<sup>64</sup> In some cases, the responsibility for citizens abroad is constitutionalized. For example, the Ukrainian Constitution states: “Ukraine guarantees care and protection to its citizens who are beyond its borders.”<sup>65</sup> While this type of obligation to promote the interest of citizens living abroad is fairly common, the question whether and to what extent the bill of rights extends in full to those citizens is more complex. Constitutions themselves rarely directly address this issue, and where courts are confronted with this question, they usually find that the bill of rights applies fully to citizens abroad only when the government has effective control over the foreign territory. Yet, even when the bill of rights does not apply in full, constitutions frequently extend certain protections to nationals residing abroad.

Citizens residing abroad not only enjoy protections but can also be held accountable. Indeed, many countries have vouched to hold their citizens responsible for committed crimes, even when they reside abroad. The Argentinian Constitution, for example, notes: “[a]ll ordinary criminal trials...shall take place in the same Province where the crime was committed; but when the crime is committed outside the borders of the Nation, in violation of international norms, Congress shall determine by a special law the place where the trial is to be held.”<sup>66</sup> Most countries have similar provisions in their ordinary criminal laws.

Some countries also extend their extraterritorial responsibility toward those whom they define as members of their ethnic or cultural group, regardless of whether they are actually citizens. One well-known example

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64 CEDRIC RYNGAERT, *THE PRINCIPLES OF EXTRATERRITORIAL CRIMINAL JURISDICTION* 94–95 (2008).

65 Конституція України 28 червня 1996 року (Constitution of Ukraine), art. 25 (1996/2014) (Ukr.); ushtetuta E Republikës Se Shqipërisë (Constitution of the Republic of Albania), art. 8 (1998/2012) (Alb.) (“The Republic of Albania protects the rights of its citizens with a temporary or permanent residence outside its borders.”).

66 Constitución Argentina, 1853/ 1994, art. 118.

that has caused friction with neighboring countries<sup>67</sup> is the Hungarian Constitution, which notes: “Hungary shall bear responsibility for the fate of Hungarians living beyond its borders, and shall facilitate the survival and development of their communities; it shall support their efforts to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and with Hungary.”<sup>68</sup> Similarly, the Ecuadorian Constitution recognizes that some of its indigenous communities are separated by artificial borders and protects the right of indigenous communities “[t]o uphold and develop contacts, ties and cooperation with other peoples, especially those that are divided by international borders.”<sup>69</sup> The Greek Constitution commits “[t]he State [to] take care for emigrant Greeks and for the maintenance of their ties with the Fatherland. The State shall also attend to the education, the social and professional advancement of Greeks working outside the State.”<sup>70</sup> In all these cases, the constitutions extend protections to people based on ethnic ties, regardless of whether these people actually enjoy citizenship.

#### *D. Providing Shelter to Outsiders Seeking Admission*

The fourth external dimension of constitutions concerns the provision of shelter to non-citizens that are outside of the territory, but that are seeking admission. There are two broad groups to which such shelter is provided: (1) those that are part of the ethnic or cultural group that comprises the majority of the country; and (2) those in need that qualify for asylum.

Several constitutions promise refuge, including citizenship, to members of their ethnic or cultural group. The Israeli Basic Law gives all Jews the right to return to Israel.<sup>71</sup> A similar aspiration is stated in the unofficial Palestinian Constitution.<sup>72</sup> Somewhat comparable is the

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<sup>67</sup> See EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), OPINION ON THE NEW CONSTITUTION OF HUNGARY, CDL-AD(2011)016 (2011), available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)016-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e).

<sup>68</sup> Magyarország Alaptörvénye [The Fundamental Law of Hungary], 2011, art. D.

<sup>69</sup> Constitución de la Republica del Ecuador 2008, art. 57.

<sup>70</sup> Το Σύνταγμα της Ελλάδας [Constitution of Greece], 1975/2008, art. 108.

<sup>71</sup> Law of Return, 5710-1950, 4 LSI 114 (1950) (Isr.). On this issue in a comparative context, see ALEXANDER YAKOBSON & AMNON RUBINSTEIN, ISRAEL AND THE FAMILY OF NATIONS: THE JEWISH NATION-STATE AND HUMAN RIGHTS (2009).

<sup>72</sup> 2003 المعد الأساسي للقانون [Amended Basic Law], 2003, Preamble (Palestine) (“The birth of the Palestinian National Authority in the national homeland of Palestine, the land of their forefathers, comes within the context of continuous and vigorous struggle, during which the Palestinian people witnessed thousands of their precious children sacrificed as martyrs, injured persons and prisoners of war, all in order to achieve their people’s clear national rights, the foremost

provision in the German Basic Law that notes, “[f]ormer German citizens who between 30 January 1933 and 8 May 1945 were deprived of their citizenship on political, racial or religious grounds, and their descendants, shall on application have their citizenship restored.”<sup>73</sup> The Greek Constitution provides that “Greeks deprived in any manner whatsoever of their citizenship prior to the coming into force of this Constitution shall re-acquire it” in a procedure specified by law.<sup>74</sup>

Perhaps more striking are the protections that are offered to those in need who seek admission into the country. Lucas Kowalczyk and Mila Versteeg draw attention to the fact that no less than 35% of all countries protect the right to asylum in their constitutions.<sup>75</sup> The right to asylum is a remarkable right in that it is a gateway to all other constitutional rights that are usually available only to citizens or those that have lawfully gained admission. Moreover, this right is not merely granted to those with ethnic or religious ties to a country, but to a much broader group of foreigners.<sup>76</sup> In some cases, the right requires an ideological affinity with the state, and is extended to all those who share the state’s ideology.<sup>77</sup> More common, however, is a version of the right that applies to all those in need. Fairly typical, today, is the Democratic Republic of the Congo’s constitutional provision that states that the right to asylum aims to provide sanctuary to “foreign nationals pursued or prosecuted in particular for their opinion, their beliefs, their racial, tribal, ethnic, linguistic affiliation or their action in favor of democracy and the defense of human and peoples’ rights.”<sup>78</sup>

It is noteworthy, especially in light of the mounting refugee crisis, that constitutional asylum provisions often go beyond states’ commitments under international law by (1) broadening international law’s narrow definition of refugee and (2) expanding the scope of protection by granting a right to permanent legal status in the country through asylum.<sup>79</sup> These provisions are thus a remarkable example of constitutions concerning

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of which are the right of return, the right to self-determination and the right to establish an independent Palestinian state...”).

<sup>73</sup> Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], 1949/2012, art. 116.2. Art 116.2 further states that, “[t]hey shall be deemed never to have been deprived of their citizenship if they have established their domicile in Germany after 8 May 1945 and have not expressed a contrary intention.”

<sup>74</sup> Το Σύνταγμα της Ελλάδας [Constitution of Greece], 1975/2008, art. 111.5.

<sup>75</sup> Lucas Kowalczyk & Mila Versteeg, *The Political Economy of the Constitutional Right to Asylum*, 102 CORNELL L. REV. 1219 (2018).

<sup>76</sup> *Id.*

<sup>77</sup> See, e.g., Конституция (Основной закон) Российской Советской Федеративной Социалистической Республики [Constitution (Fundamental Law) of the Russian Soviet Federative Socialist Republics], 1978, art. 38 (“[t]he USSR grants the right of asylum to foreigners, persecuted for defending the interests of the working people and the cause of peace, for participating in revolutionary or national liberation movements, or for progressive socio-political, scientific, or other creative activities.”).

<sup>78</sup> Constitution de la République Démocratique du Congo, 2005/2011, art. 33.

<sup>79</sup> Kowalczyk & Versteeg, *supra* note 75.

themselves with the needs of outsiders. They are an important supplement to the Refugee Convention, which, as Melissa Carlson, Laura Jakli, and Katerina Linos show, the protections of which are not always invoked by refugees as a result of misinformation.<sup>80</sup>

At first glance, it is not obvious that these provisions further a nation's own self-interest. Unlike the foreign relation provisions or the protection of nationals abroad, these provisions appear to serve a broad humanitarian purpose and first and foremost concern themselves with those in need. It raises the possibility that the external dimensions of constitutions do not merely serve national interests and the nation's people, but also seek to enhance global welfare. If so, these provisions might be the product of a true Ackermanian "constitutional moment" in which people transcend their ordinary shortsighted self-interest and deliberate and take into account the greater good.<sup>81</sup> Yet, as Kowalczyck and Versteeg show, constitutional asylum provisions can also promote national interest. As they point out, the right to asylum is a useful tool to promote a state's foreign policy.<sup>82</sup> Additionally, the right turns out to be particularly popular among states that have net refugee outflows and can use the right to improve their image in countries with high age-dependency ratios that need more workers.<sup>83</sup>

We also see self-interest at play in the application of the right. David Landau finds that the Colombian Constitutional Court liberally interpreted the constitution's asylum provisions in the context of internally displaced persons, but not in the context of refugees seeking admission into Colombia.<sup>84</sup> The reason, he suggests, is that protection of internally displaced persons is politically popular, while protecting refugees is not.<sup>85</sup>

Finally, Adam Chilton and Eric Posner suggest that countries for which migrants have to make country-specific investments, such as learning a foreign language, offer higher levels of legal protections for migrants that would secure their place in the host country.<sup>86</sup> They find that such countries conclude more Bilateral Labor Agreements and are more likely to include the right to asylum in their constitutions.

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80 Melissa Carlson, Laura Jakli & Katerina Linos, *Refugees Misdirected: How Information, Misinformation and Rumors Shape Refugees' Access to Fundamental Rights*, 57 VA. J. INT'L L. 539 (2018). Of course, there is an important question whether refugees have information on domestic legal frameworks.

81 BRUCE ACKERMAN, *WE THE PEOPLE, VOLUME 1: FOUNDATIONS* (1991).

82 Kowalczyck & Versteeg, *supra* note 75.

83 *Id.*

84 David Landau, *IDPs vs. Refugees: Insiders and Outsiders in Colombian Constitutional Law*, 57 VA. J. INT'L L. 679 (2018).

85 *Id.*

86 Adam S. Chilton & Eric A. Posner, *Country-Specific Investments and the Rights of Non-Citizens*, 57 VA. J. INT'L L. 575 (2018).

*E. Promoting the Welfare of Foreigners Residing Abroad*

The final external dimensions of constitutions concern the acknowledgement of responsibility (or the provision of charitable assistance) by states toward foreigners residing abroad, even those that have no religious, ethnic, or cultural ties to the country and who are not seeking admission. There are two separate grounds for assuming such responsibility. One relates to acts to which the state is directly responsible, most notably to acts of the state's own forces that operate or have operated abroad. The other is more generally concerned with an interest in providing charitable assistance or in promoting global welfare and even global justice.

One aspect of United States exceptionalism is the fact that, "the protection of noncitizens under the [U.S.] Constitution was historically thought to stop at the border,"<sup>87</sup> even with respect to the acts of state officials that operate abroad.<sup>88</sup> This basic rule still stands even though the Supreme Court extended some constitutional protection to the unique situation in Guantanamo,<sup>89</sup> and a report to the U.S. President acknowledged some minimal privacy protection to the surveillance of foreign individuals abroad.<sup>90</sup> George Rutherglen delves into the details of this aspect of the U.S. legal system.<sup>91</sup>

The U.S. is exceptional however. As Chimene Kreitner<sup>92</sup> and Galia Rivlin show,<sup>93</sup> the constitutional texts of other countries acknowledge the applicability of constitutional limits to their agents operating abroad, or have been interpreted to have extra-territorial application.<sup>94</sup> The extension of protection to foreigners abroad could also be a result of internalizing

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87 Andrew Kent, *Citizenship and Protection*, 82 *FORD. L. REV.* 2115, 2128 (2014). *See also* Sarah H. Cleveland, *Embedded International Law and the Constitution Abroad*, 110 *COLUM. L. REV.* 225 (2010); *see generally* KAL RAUSTIALA, *DOES THE CONSTITUTION FOLLOW THE FLAG?* (2009); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION* (1996).

88 *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not protect foreigners from search and seizure abroad). *See* most recently *Hernandez v. Mesa*, 582 U.S. \_\_\_\_ (2017) at the U.S. Supreme Court (deciding whether the U.S. Constitution protected the right to life of a Mexican teenager killed by a Border Patrol agent firing across the border).

89 *Boumediene v. Bush*, 553 U.S. 723, 761–62 (2008) (holding that non-citizens detained at Guantanamo Bay have the constitutional privilege of habeas corpus).

90 THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES, *LIBERTY AND SECURITY IN A CHANGING WORLD* (December 12, 2013), *available at* [https://www.justsecurity.org/wp-content/uploads/2013/12/2013-12-12\\_rg\\_final\\_report.pdf](https://www.justsecurity.org/wp-content/uploads/2013/12/2013-12-12_rg_final_report.pdf). (National Security Agency's surveillance practices should limit U.S. surveillance of foreigners in respect of their right to privacy).

91 George Rutherglen, *The Rights of Aliens Under the United States Constitution: At the Borders and Beyond*, 57 *VA. J. INT'L L.* 707 (2018).

92 Chimène I. Keitner, *Rights Beyond Borders*, 36 *YALE J. INT'L L.* 55 (2011).

93 Galia Rivlin, *Constitutions Beyond Borders: The Overlooked Practical Aspects of the Extraterritorial Question*, 30 *B. U. INT'L L.J.* 135 (2012).

94 *See* Shinar, *supra* note 33 (discussing extra-territorial application of the Israeli basic laws).

international legal obligations into domestic law, as in the case of the U.K., whose Human Rights Act binds it to extend that the Act's remit to its acts and omissions in foreign territories subject to its "jurisdiction," understood to encompass circumstances where a territory is under its effective control.<sup>95</sup>

A broader category of constitutional protection—not tied to state actions abroad—begins with one of the oldest prohibitions in national constitutions, the prohibition of slavery. According to our data, no less than 63% of all constitutions today contain such a prohibition. Today, a number of constitutions also explicitly include human trafficking in that prohibition. In many cases, these prohibitions extend to all forms of trafficking and slavery, regardless of whether a nation's nationals are involved or whether there is a territorial connection.<sup>96</sup> For example, the Egyptian Constitution notes that "[s]lavery and all forms of oppression and forced exploitation against humans are forbidden, as is sex trafficking and other forms of human trafficking, all of which are punishable by law."<sup>97</sup> The constitutions of Fiji, Kyrgyzstan, Mexico, Serbia, and Somalia contain similar provisions. Similar prohibitions are found in subconstitutional law, such as the U.S. Trafficking Victims Protection Act,<sup>98</sup> and the California Transparency in Supply Chains Act.<sup>99</sup>

There are other examples of concerns with global welfare taking constitutional form. The Lisbon Treaty, which forms the constitutional basis of the European Union (EU), contains a detailed set of rules on humanitarian assistance by the EU.<sup>100</sup> To our knowledge, no other constitutions explicitly constitutionalize an obligation to provide foreign aid, although some developing countries have constitutional provisions on how to allocate the foreign aid that they receive. What is more, one study finds that foreign aid donors' insistence on human rights and rule of law has shaped the content of the bill of rights of receiving countries.<sup>101</sup>

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<sup>95</sup> Most recently, see *Hassan v. United Kingdom*, App. No. 29750/09, Eur. Ct. H. R., (2014) (the ECHR applies to the UK forces in control of territory in Basra).

<sup>96</sup> George Rutherglen, *The Constitution and Slavery Overseas*, 39 SEATTLE U. L. REV. 695, 695–97 (2016) (suggesting that the Thirteenth Amendment, along with the Commerce Clause, the Define and Punish Clause, and the Treaty Power, give Congress "ample scope to enact any law realistically designed to prevent or remedy slavery overseas").

<sup>97</sup> 2014 العربية مصر جمهورية دستور [Constitution of the Arab Republic of Egypt 2014], 2014, art. 89.

<sup>98</sup> Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, div. A, 114 Stat. 1464 (codified as amended in scattered sections of 18 U.S.C. & 22 U.S.C.).

<sup>99</sup> CAL. CIV. CODE § 1714.43 (West 2012).

<sup>100</sup> Treaty on the Functioning of the European Union, 2008 O.J. (C115/1) Title 3. See Morten Broberg, *EU Humanitarian Aid after the Lisbon Treaty*, 22 J. CONTINGENCIES & CRISIS MGMT. 166 (2014); Morten Broberg, *From Colonial Power to Human Rights Promoter: on the Legal Regulation of the European Union's Relations with the Developing Countries*, 26 CAMBRIDGE REV. INT'L AFFAIRS 675 (2013).

<sup>101</sup> Goderis & Versteeg, *supra* note 38.

Usually, however, commitments to deliver aid and humanitarian assistance do not take constitutional form.

To a limited extent, constitutions and constitutional law also concern themselves with states' commitments to prosecute international crimes committed outside of their territory. Today, 124 states are a member to the Rome Statute, which allows for the prosecution of four international crimes—genocide, crimes against humanity, war crimes, and the crime of aggression—when committed on member states' territory or by its nationals.<sup>102</sup> A growing number of countries passed universal jurisdiction laws that allow them to prosecute foreigners who committed international crimes abroad. Such provisions have produced headline-grabbing cases, such as the House of Lords ordering the arrest of Pinochet in London in 1998,<sup>103</sup> or the conviction of four Rwandan génocidaires by a Belgian court in 2001.<sup>104</sup> In some cases, these universal jurisdiction provisions have been interpreted by constitutional courts. For example, the South African Constitutional Court has interpreted the country's implementation of the Rome Statute in light of the Constitution's reference to "our country's responsibilities as a member of the family of nations to investigate crimes against humanity..."<sup>105</sup> Based on this provision, the Constitutional Court concluded that the South African police had a constitutional duty to investigate torture committed in Zimbabwe by Zimbabweans.<sup>106</sup> In Australia, the High Court was confronted with the question of whether the country's 1945 War Crimes Act exceeded the power of Parliament as defined in the Constitution, and ruled that this was not the case.<sup>107</sup> What is more, in a growing number of countries, the constitution specifically refers to genocide or crimes against humanity.<sup>108</sup>

Furthermore, mainly in subconstitutional texts, there is a growing set of issues on which states concern themselves with the welfare of foreigners residing abroad.<sup>109</sup> Most wealthy countries provide humanitarian assistance and aid to developing countries. They usually have policies to

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<sup>102</sup> Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF.183/9 of 17 July 1998, entered into force 1 July 2002, art. 126. See Klug, *supra* note 4.

<sup>103</sup> See *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte*, 3 W.L.R. 1456 (H.L. 1998).

<sup>104</sup> See Luc Reydam, *Belgium's First Application of Universal Jurisdiction: The Butare Four Case*, 1 J. INT'L CRIM. JUST. 428 (2003).

<sup>105</sup> Constitution of the Republic of South Africa 1996, 1996/2012, Preamble.

<sup>106</sup> *National Commissioner of the South African Police Services v. Human Rights Litigation Centre and Another* 2015 (1) SA 315 (CC) (S. Afr.).

<sup>107</sup> See *Polyukovich v. The Commonwealth* (1991) 172 CLR 501 (Austl.).

<sup>108</sup> At the same time, constitutional recognition of those international crimes does not mean that courts will have jurisdiction over foreigners that commit those crimes abroad. Universal jurisdiction provisions are not usually written into the constitution itself but tend to be left to subconstitutional laws.

<sup>109</sup> See generally Eyal Benvenisti, *Legislating for Humanity: May States Compel Foreigners to Promote Global Welfare?*, 13 (GlobalTrust Working Paper No. 02/2013, 2013).

protect rule of law, democracy, and human rights, globally. In the United States, federal law prohibits the offering of foreign aid to nations that engage in “gross violations of internationally recognized human rights.”<sup>110</sup> Many other countries have done the same. They further commonly tie foreign aid to human rights,<sup>111</sup> or make it conditional upon certain policy and institutional reform.<sup>112</sup> In many cases, countries further have a separate set of rules that seek to prevent human trafficking and protect victims.<sup>113</sup> Finally, some national regulators are empowered by their constitutional arrangements to take into account the stability of foreign markets or global welfare when determining domestic policies. The U.S. Federal Reserve, for example, regards the stability of global markets as a factor in determining interest rates.<sup>114</sup> In setting emission standards, the U.S. Environmental Protection Agency has undertaken cost-benefit analyses that counted the benefits of the restrictions for the entire world, not just the U.S. This policy decision was based on a 2010 report issued by a U.S. Government Interagency Working Group on Social Cost of Carbon, which concluded that, “a global measure of the benefits from reducing U.S. emissions is preferable.”<sup>115</sup>

Regardless of whether they are constitutional or subconstitutional in nature, the various arrangements that concern themselves with foreigners residing abroad appear to be truly concerned with global welfare. Yet, it is important to note that the protection of the welfare of foreigners can ultimately serve a country’s own self-interest. While the promotion of liberal democracy and human rights first and foremost benefits the people of the countries where this is promoted, it arguably has global spillover effects, in the form of increased global security and trade.<sup>116</sup> The link between liberal democracy and global security has its basis in Immanuel

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110 Foreign Assistance Act, 22 U.S.C. § 2151n(a) (2000).

111 See, e.g., Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. ECON. GROWTH 33 (2000) (finding that aid flows do depend on respect for human rights).

112 WADE JACOBY, *IMITATION AND POLITICS* 29 (2000).

113 See, e.g., William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified in scattered sections of 8 U.S.C., 18 U.S.C. & 22 U.S.C.); California Transparency in Supply Chains Act, CAL. CIV. CODE § 1714.43 (West 2012).

114 See Stanley Fischer, Vice Chairman, Bd. Gov’rs Fed. Reserve, Lecture on the Federal Reserve and the Global Economy given at the Per Jacobsson Foundation Lecture, 2014 Annual Meetings of the International Monetary Fund and the World Bank Group (Oct. 11, 2014) (stating that, “[i]n a progressively integrating world economy and financial system, a central bank cannot ignore developments beyond its country’s borders, and the Fed is no exception.”). See also Marka Peterson, *The Federal Reserve Since the Global Financial Crisis: Do Foreign Interests Matter to the World’s Economic Hegemon?* (GlobalTrust Working Paper Series, March 2016), available at <http://globaltrust.tau.ac.il/wp-content/uploads/2016/06/16-03-Marka-Peterson.pdf>; Peter Conti-Brown & David Zaring, *Foreign Affairs and the Federal Reserve* (on file with authors).

115 INTERAGENCY WORKING GROUP ON SOCIAL COST OF CARBON UNDER EXECUTIVE ORDER 12866—U.S. GOV., SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS, Technical Support Document (Feb. 2010).

116 JOANNE GOWA, *BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE* 3 (1999).

Kant's famous 'democratic peace thesis,' which holds that democracies do not fight each other.<sup>117</sup> Today, there is a wealth of international relations scholarship that finds empirical support for this thesis.<sup>118</sup> Its policy implication is that global security can be enhanced by increasing the number of democratic states. Scholars have made a similar observation for human rights, suggesting that states that protect rights are less likely to go to war.<sup>119</sup> The link between liberal democracy and trade has its basis in a related body of international relations literature, which finds that democracies enjoy stronger trade relationships, and simply trade more.<sup>120</sup> It has been noted that these insights constituted a central premise of the Clinton administration's foreign policy, which stressed that, "[a]ll of America's strategic interests—from promoting prosperity at home to checking global threats abroad before they threaten our territory—are served by enlarging the community of democratic and free market nations."<sup>121</sup> Thus, constitutions concerning themselves with foreigners residing abroad are perhaps best viewed as a form of enlightened self-interest.<sup>122</sup>

### III. THE EXTERNAL DIMENSIONS OF THE SECOND ORDER RULES OF CONSTITUTIONS

There is also an external dimension to the ongoing constitutionally-mandated process of drawing and redrawing the constitutional boundaries, that is, the secondary rules of constitutions. This reflects the fact that in an increasingly globalized world, different countries' constitutions and constitutional law are also increasingly interconnected, and there is a need to coordinate and negotiate outcomes across jurisdictions.

Constitution-makers themselves have long sought inspiration from other constitution-makers abroad. In the nineteenth century, Latin American constitutions borrowed heavily from the U.S. Constitution, producing a generation of constitutions that, according to some, "not only

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117 IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY 134 (Mary Campbell Smith trans., G. Allen & Unwin Ltd. 1903).

118 See, e.g., Zeev Maoz & Bruce Russett, *Normative and Structural Causes of Democratic Peace, 1946-1986*, 87 AM. POL. SCI. REV. 624 (1993).

119 See David Sobek et al., *The Human Rights Peace: How the Respect for Human Rights at Home Leads to Peace Abroad*, 68 J. POL. 519 (2006).

120 See, e.g., John R. Oneal & Bruce M. Russett, *The Classic Liberals Were Right: Democracy, Interdependence and Conflict, 1950-1985*, 41 INT'L STUD. Q. 267, 270-71 (1997); Edward D. Mansfield et al., *Free to Trade: Democracies, Autocracies, and International Trade*, 94 AM. POL. SCI. REV. 305, 318 (2000).

121 See DAN REITER & ALAN C. STAM, *DEMOCRACIES AT WAR 2* (2002) (citing THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT 1, 22 (1995)).

122 This is also the conclusion of Marka Peterson after surveying the Federal policies concerning the setting of interest rates for the US dollar. See Peterson, *supra* note 114.

shared the same provisions, but also the same typographical errors.”<sup>123</sup> While the popularity of the U.S. Constitution as a global model has since declined,<sup>124</sup> the practice of constitutional borrowing has not.<sup>125</sup> Today, constitution-makers commonly consider foreign constitutions as a model for imitation. One study analyzed 108 rights provisions in 186 countries and found that an important predictor of whether a country will adopt a particular right is whether certain other countries previously adopted the same.<sup>126</sup> Another empirical study found that, as a result of borrowing, constitutions are fairly standardized documents that vary along a limited number of underlying dimensions.<sup>127</sup> These studies suggest that constitutions are, at least partly, transnational documents, shaped by a range of foreign influences. The five external dimensions of constitutions are likely also shaped in interaction with foreign constitutions and constitution-makers.

International law also penetrates constitutions directly. As noted, most constitutions explicitly specify how international legal commitments can be made and how they penetrate the domestic legal order.<sup>128</sup> Perhaps more strikingly, a growing number of countries incorporate international human rights law directly into the constitution.<sup>129</sup> This is a particularly prominent trend in Latin America, but also in other countries. Relatedly, bills of rights of modern constitutions often explicitly seek to protect human rights rather than civil rights.<sup>130</sup> In practical terms, this means that the default assumption is that the bill of rights extends to all those on the country’s territory rather than to citizens.<sup>131</sup> It also implies a universalist conception of what rights people enjoy, inspired by international human rights law rather than more local conceptions of rights. These kinds of trends are likely to produce further similarities in how constitutions interact with the outside world.

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123 Zachary Elkins, *Constitutional Networks*, in NETWORKED POLITICS: AGENCY, POWER, AND GOVERNANCE 43, 43 (Miles Kahler ed., 2009).

124 David S. Law & Mila Versteeg, *The Declining Influence of the U.S. Constitution*, 87 N.Y.U. L. REV. 762 (2012).

125 See, e.g., THE MIGRATION OF CONSTITUTIONAL IDEAS 20 (Sujit Choudhry ed., 2006).

126 Goderis & Versteeg, *supra* note 38.

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

128 See *supra* notes 45–40.

129 Mila Versteeg, *Law Versus Norms: The Impact of Human-Rights Treaties on National Bills of Rights*, 171 J. INSTITUTIONAL & THEORETICAL ECON. 87, 108 (2015) (reporting that, “as of 2006, 10 percent of all constitutions incorporated one or more human-rights treaties by reference (compared to none in 1946, 1.2 percent in 1986, and 7 percent in 1996)”).

130 Klug, *supra* note 4, (describing the 1996 South African Constitution as concerned with a “new conception of the role the constitution in concordance with the post World War II rise of human rights,” which “[i]nstead of merely protecting the citizens of South Africa enshrines the right of all people”).

131 *Id.*

Not only are constitutions themselves at least in part shaped by international and foreign influences, but the same is true for judicial decisions interpreting constitutions. It has been well-documented that constitutional courts frequently cite other courts in interpreting their constitution. Anne-Marie Slaughter famously described a “global community of courts,” comprised of judges that meet each other at international conferences and who are engaged in “active and ongoing dialogue,” which has generated an “increasingly global constitutional jurisprudence.”<sup>132</sup> Most visibly, judges cite foreign decisions in interpreting their own constitution. Indeed, numerous scholars have concluded that global judicial dialogue has produced a “globalization of the practice of modern constitutionalism,”<sup>133</sup> a “transnational era” of constitutional law,<sup>134</sup> a “generic constitutional law,”<sup>135</sup> and a “common law of human rights.”<sup>136</sup> While these observations have sparked substantial normative debate,<sup>137</sup> there is no doubt that constitutional interpretation is a transnational affair and a growing topic of scholarly analysis.<sup>138</sup> Transnational judicial dialogue also covers issues relating to the external dimensions of constitutions. Eyal Benvenisti has observed that national courts are increasingly using international law to coordinate the policies in the different jurisdictions, thereby empowering domestic democratic processes against the forces of globalization.<sup>139</sup> In doing so, they cite each other, as well as international law, to form a united judicial front which can overcome collective action problems in the area of counter-terrorism, environmental protection, and migration.<sup>140</sup> Benvenisti’s study suggests that, when it comes to defining the external dimensions of constitutions, judicial dialogue is particularly common as well as normatively desirable.

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132 ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 65-66 (2004).

133 See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 819-27 (1999) (insert explanatory parenthetical).

134 JACKSON, *supra* note 6.

135 See David S. Law, *Generic Constitutional Law*, 89 *MINN. L. REV.* 652, 727-42 (2005).

136 See Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 *OXFORD J. LEGAL STUD.* 499, 516-27 (2000).

137 Jeremy Waldron, *Foreign Law and the Modern *Ius Gentium**, 119 *HARV. L. REV.* 29 (2005); Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 *TEX. INT’L L.J.* 353, 359-65 (2004) (reflecting that the refined moral views of other nations and the “world community” should not guide interpretation of the U.S. Constitution); Richard A. Posner, *Foreword: A Political Court*, 119 *HARV. L. REV.* 31, 84-90 (2005) (warning against “judicial cosmopolitanism” on the part of American judges); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 *STAN. L. REV.* 131, 142-43 (2006) (arguing that the Condorcet Jury Theorem offers a theoretical framework for determining when it is sensible for courts to consider the practices of other countries).

138 See Ran Hirschl, *In Search of an Identity: Voluntary Foreign Citations in Discordant Constitutional Settings*, 62 *AM. J. COMP. L.* 547 (2014).

139 Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 *AM. J. INT’L L.* 241 (2008).

140 *Id.* at 242.

#### IV. CONCLUSION

As our Article has shown, while constitutional law is mainly about regulating the relationship between the state and its citizens, constitutional law, by necessity, also regulates the interface between the state and the world outside. Constitutions commonly determine boundary questions such as citizenship, immigration, or constitutional limitations to state action whose cause or effect takes place beyond the state's borders. Constitutions (directly or indirectly through domestic laws and doctrines) also define the state's relationships with foreign legal systems (specifically the status of public international law and the state's extra-territorial jurisdiction to prescribe, enforce and adjudicate). Naturally, the regulation of these and other boundary questions impacts foreigners.

Hence, questions arise as to whether national constitutions take account of their impact on strangers, whether they should do so, and if so, how they should accommodate their concerns. Our aim in this article is to draw attention to the external dimensions of constitutions, to the role constitutions play in the global sphere, and ultimately to the question of the responsibility of constitution drafters and interpreters to the outside world. While constitutions are traditionally understood as written by the people and for the people, their significant and multifarious external dimensions raise moral and perhaps also legal questions about the respect that is due to outsiders and their human entitlement to equal concern and respect. We hope that this volume serves as the opening for such a debate among constitutional lawyers.

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