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REVIVING THE 1940 CUBAN CONSTITUTION: ARGUMENTS FOR SOCIAL AND ECONOMIC RIGHTS IN A POST-CASTRO GOVERNMENT

Jonathan Wachs*

INTRODUCTION

In recent years, many people have considered what form the Cuban legal structure might take if Fidel Castro were no longer in power.¹ Observers monitoring Cuba throughout the United States have speculated about the future of Cuban law in various fields including property reform, constitutional law, investment, and claims restitution.² As part of

* J.D. Candidate, 1995, Washington College of Law, The American University; B.A., 1991, University of Pennsylvania. The author dedicates this Comment to the members of his family, Herbert, Susan, Michelle, and Beth Wachs, who use a team approach to address the opportunities and challenges of life.

1. See Gillian Gunn, *Balancing Economic Efficiency, Social Concerns and Political Control*, 5 CUBA BRIEFING PAPER SERIES 1 (The Cuba Project, Center for Latin American Studies, Georgetown Univ. 1994) (describing a novel proposal for post-Castro claims restitution); Ernest H. Preeg, *Cuba and the Caribbean*, GLOBAL BUS. WHITE PAPERS (The Conference Board), Jan. 1994, at 12 (envisioning a legal regime for private property rights in post-Castro Cuba); Richard Boudreaux, *Can Castro Weather Storm?*, L.A. TIMES, Apr. 6, 1992, at A1 [hereinafter Boudreaux, *Can Castro Weather Storm*] (discussing technical problems Cuba may encounter in a transition from socialism to capitalism); FREE-MARKET CUBA BUS. J., Winter 1992, at 2 (on file with the law firm of Shaw, Pittman, Potts & Trowbridge) (dedicating the publication to the discussion of "legal, legislative and commercial issues of importance to those interested in doing business in a free-market Cuba").

2. See BUSINESS INTERNATIONAL CORPORATION, *DEVELOPING BUSINESS STRATEGIES FOR CUBA* 73 (1992) (outlining recommendations for post-Castro legal reforms in privatization, banking, and foreign investment); ALBERT P. BLAUSTEIN, *CONSTITUTION OF THE REPUBLIC OF CUBA: A PROPOSED DRAFT* (Cuba Paper Series, Cuban American National Foundation 1993) [hereinafter BLAUSTEIN, *CONSTITUTION*] (articulating provisions to be included in a post-Castro Cuban constitution); Stanley J. Glod, *Eastern European Models for Cuban Foreign Restitution Claims*, FREE MARKET CUBA BUS. J., Winter 1993, at 5 (on file with the law firm of Shaw, Pittman, Potts & Trowbridge) (providing examples of ways in which Cuba could structure a post-Castro foreign claims restitution system).

the continuing effort to examine possible scenarios for the future of Cuban constitutional law, this Comment examines how legislators in a post-Castro government might use the 1940 Cuban Constitution to reconcile the nation's historically strong constitutional commitment to social and economic rights with the modern reality of a severely declining economic condition.

As indicated by several market-oriented legal reforms which Castro initiated in the 1990s to reverse the nation's economic freefall,³ Cuba appears poised for significant political and legal change.⁴ Despite the fact that Castro's health, charisma, and determination appear to be stable,⁵ Cuban economic resources no longer can support many of the socialist policies and institutions he created.⁶ Because the Cuban legal system under Castro has failed to respond to political and economic shocks caused by the dissolution of the former Soviet Union and the tightening of the United States embargo,⁷ the need to develop a drasti-

3. See Douglas Farah, *Cuban Economy Recovering—But Capitalism Still Taboo*, WASH. POST, Feb. 6, 1994, at A1 (noting that during 1993 Castro set in motion several new laws which will bring more United States dollars, private sector initiatives, and joint ventures into the Cuban economy).

4. Roberto Fabricio, *Castro Seeks Help for Survival at Latin Summit: Signals Recently Have Been Coming Out of Cuba That Indicate Political Changes May Be Imminent*, ORLANDO SENTINEL, July 13, 1993, at A3 (recognizing several factors that indicate the Cuban socialist system is deteriorating rapidly).

5. See Michael Stott, *Castro Gives Ringing Defense of Socialism*, The Reuter Library Report, Aug. 11, 1993, available in LEXIS, News Library, Curnws File (noting that Castro declared he will never resign from office); David Adams, *The Cuban Revolution on Its Final Spin: Castro's Tattered Experiment is Reflected in Grim Street*, SAN FRAN. CHRON., Apr. 15, 1993, at A8 (noting that Castro is in good physical condition and follows a strict diet and exercise program).

6. See Adams, *supra* note 5, at A8 (suggesting that food and fuel shortages will force Cuba to significantly alter its socialist system in the near future); Kathleen Barrett, *The Collapse of the Soviet Union and the Eastern Bloc: Effects on Cuban Health Care*, 2 CUBA BRIEFING PAPER SERIES 1 (The Cuba Project, Center for Latin American Studies, Georgetown Univ. 1993) (observing that the termination of Soviet aid and the tightening of the U.S. embargo have caused the Cuban health-care system to deteriorate seriously and rapidly); Carmelo Mesa-Lago, *The Social Safety Net in the Two Cuban Transitions* [hereinafter Mesa-Lago, *Social Safety Net*], in The Cuban Research Institute, TRANSITION IN CUBA: NEW CHALLENGES FOR U.S. POLICY 601, 601 (Lisandro Pérez, ed., 1993) (noting that in 1992 the cost to the Cuban Government of providing a social safety net rose from 17% to 26% of the national Gross Social Product, and that these expenditures are now "unbearable").

7. See Adams, *supra* note 5, at A8 (stating that the demise of the former Soviet bloc has caused Cuba to lose 85% of its foreign markets and 50% of its hard currency earnings); Cuban Democracy Act of 1992 § 1706(a), 22 U.S.C. § 6005 (Supp.

cally revised or entirely new Cuban legal structure appears imminent.⁸

When Cubans do attempt to redesign their legal system, the framers of the new constitution can look to Cuba's extensive constitutional heritage for guidance.⁹ In particular, post-Castro constitution framers may examine the 1940 Constitution, which embodies Cuba's time-honored political and social philosophy in reflecting a strong desire to promote national autonomy and social commitment.¹⁰ Unlike the Cuban constitutions prepared under Spanish or American guidance, the 1940 Constitution explicitly guaranteed rights to employment, minimum acceptable standards for working conditions, property ownership, education, and social security.¹¹ Because the relevant provisions of this document are

1992) (extending the 30-year-old United States embargo against Cuba to all foreign subsidiaries of United States corporations); Robert Torricelli, *Cuba Embargo Has Had Desired Effect*, N. Y. TIMES, Jan. 5, 1994, at A14 (stating that, as a result of the Cuban Democracy Act, United States trade to Cuba through foreign subsidiaries declined from \$718 million in 1991 to \$1.6 million in 1993); Gunn, *supra* note 1, at 1 (noting that at the end of 1993, 69% of Cuban state enterprises operated at a loss, with little prospect for future profitability).

8. See Robert Mason Lee, *Spies Quarterly: A Glimpse at How Our Spy Agency Sees the Post-Cold War World Unfolding*, OTTAWA CITIZEN, Oct. 4, 1992, at A2 (quoting Charles Svoboda, an official at the Canadian Security Intelligence Service, who claims that pressure for dramatic change in Cuba during the 1990s could become insurmountable).

9. See William T. D'Zurilla, *Cuba's 1976 Socialist Constitution and the Fidelista Interpretation of Cuban Constitutional History*, 55 TUL. L. REV. 1223, 1227-41 (1981) (outlining seven Cuban constitutions written in the 19th and 20th centuries).

10. See 2 INT'L BUREAU OF THE AM. REPUBS., AMERICAN CONSTITUTIONS 109 (José Ignacio Rodríguez trans. 1907) (hist. notes) [hereinafter Rodríguez, notes] (declaring in a commentary to the 1901 Cuban Constitution that in terms of its ethnic composition, governmental institutions, and social traditions, Cuba is more dedicated to social commitment than any other nation in the Western Hemisphere); Mesa-Lago, *Social Safety Net*, *supra* note 6, at 601 (noting that throughout the Cold War era, Cuba maintained a stronger social safety net than any other socialist or Latin American country).

11. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, July 1, 1940, Gaceta Oficial No. 646, July 8, 1940 [hereinafter 1940 CONST.] arts. 48, 49, 60, 65-68, 79, 90, 91, translated in AMOS J. PEASLEE, 1 CONSTITUTIONS OF NATIONS 610 (2d ed. 1956). Under Title V, vocational and primary school education are free. *Id.* art. 48. This Title also stipulates that the State must provide schools to foster adult literacy among rural citizens. *Id.* art. 49. Title VI, section 1 (Labor) guarantees Cuban citizens the right to employment (art. 60), social security (art. 65), an eight hour maximum work day and a forty hour maximum work week (art. 66), one month paid vacation annually (art. 67), three months paid maternity leave (art. 68), and employer provided housing for certain workers (art. 79). *Id.* Title VI, section 2 (Property) provides that

notably expansive and detailed, however, many Cuban-studies scholars view the 1940 Constitution as incompatible with Cuba's anticipated political and economic conditions.¹²

When placed in a comparative context, the economic and social rights granted by the 1940 Constitution appear to be more extensive than corresponding provisions contained in the constitutions of formerly socialist Eastern European countries.¹³ Some of these constitutions rely on one

large landholdings are proscribed and foreign investments in Cuban real property shall be "restrictively limited" (art. 90), and that ownership of family farms shall be permanently protected (art. 91). *Id.*

12. See Matias Travieso-Diaz, Overview of Legal Changes in Cuba's Market Transition 6 (Shaw, Pittman, Potts & Trowbridge Workshop, Strategies for the First Year of Cuba's Transition) (Jan. 27, 1994) (on file with the law firm of Shaw, Pittman, Potts & Trowbridge) (suggesting that the inclusion of various property and labor rights contained in the 1940 Constitution would, if included in a post-Castro constitution, hinder Cuba's efforts to develop a prosperous, free-market economy). Professor Blaustein's proposed post-Castro constitution also fails to support several of the guarantees provided in the 1940 Constitution. See BLAUSTEIN, CONSTITUTION, *supra* note 2, arts. 18-29 (articulating social and economic rights which require fewer and less extensive government obligations). Under the Blaustein proposal, the right to education is preserved. *Id.* art. 21. Social and economic security is "advanced" through privatized government agencies instead of guaranteed by state organs. *Id.* art. 18. Economic rights include the right of the state to privatize companies (art. 25), freedom of contract and the right of free trade (arts. 26-27), and the right of employers to select their own employees. *Id.* art. 28. Minimal working conditions, maximum work hours, and vacation periods are to be prescribed by statute. *Id.* art. 28.

13. BULG. CONST. (adopted Jul. 12, 1991), *translated in* 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds. 1992) [hereinafter CONSTITUTIONS]; 1940 CUBAN CONST., *supra* note 11; CZECH CONST. (adopted Dec. 16, 1992), *translated in* 5 CONSTITUTIONS (1993), *supra*; Czechoslovak Constitutional Law of January, 1991 Enacting the Bill of Basic Human Rights and Freedoms, *translated in* National Telecommunications Information Service, CENTRAL & EASTERN EUROPE LEGAL TEXTS, *available in* LEXIS, World Library, EELEG File; ESTONIAN CONST. (adopted June 28, 1992), *translated in* 6 CONSTITUTIONS (1994), *supra*; HUNG. CONST. (adopted Dec. 31, 1990), *translated in* National Telecommunications Information Service, CENTRAL & EASTERN EUROPE LEGAL TEXTS, *available in* LEXIS, World Library, EELEG File; The Constitutional Act of 17th October 1992 (Poland) (effective Dec. 8, 1992), *translated in* 15 CONSTITUTIONS (1993), *supra*; Charter on Rights and Liberties (Pol. 1992), *translated in* National Telecommunications Information Service, CENTRAL & EASTERN EUROPE LEGAL TEXTS, *available in* LEXIS, World Library, EELEG File; ROM. CONST. (adopted Nov. 21, 1991) *translated in* 15 CONSTITUTIONS (1992), *supra*; SLOVAK. CONST. (adopted Sept. 3, 1992), *translated in* 17 CONSTITUTIONS (1993), *supra*; YUGO. CONST. (adopted Apr. 27, 1992), *translated in* CONSTITUTIONS (Supp. 1 1994), *supra*. Of the nine recently drafted East European constitutions cited above, two grant a right to employment, five

of several methods to avoid creating concrete social or economic rights. Even though these constitutions address more topics in greater depth than the United States Constitution, they still contain either: 1) vague, noncommittal language on the social and economic aspirations of the nation;¹⁴ 2) non-self-executing provisions stipulating that social and economic commitments are to be prescribed by subsequent national legislation that can be modified over time;¹⁵ or 3) a clause allowing the

grant a right to minimal working conditions, eight grant a right to own property, eight grant a right to education, and six grant a right to social security. Unlike the 1940 Cuban Constitution, however, eight of these new constitutions grant a right to health care, and five grant a right to a clean environment. The distribution of these social and economic provisions are:

	Emp.	Work Cond.	Prop.	Educ.	Soc. Sec.	Health
Bulgaria	N	N	Y	Y	Y	Y
Cuba	Y	Y	Y	Y	Y	N
Czech Rep.	Y*	N	Y	N	Y	N
Czechoslovakia	N	N	Y	Y	N	Y
Estonia	N	N	Y	Y	Y	Y
Hungary	N	Y	N	Y	N	Y
Poland	N	Y*	Y*	Y*	Y*	Y*
Romania	N	Y	Y	Y	N	Y
Slovakia	Y	Y	Y	Y	Y	Y
Yugoslavia	N	Y*	Y	Y	N	Y

* "programmatic rights" (rights granted only to the extent allowed by subsequent national legislation) *Id.*

14. See HUNG. CONST. (1990) art. 16, *supra* note 13 (stipulating that "The Republic of Hungary shall pay particular attention to the security of existence, education and training of young people and protects the interests of youth"). While these provisions promote socially desirable goals, they often do not create commitments a judiciary could enforce against its government. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 468 (1991) (discussing vague language contained in social and economic provisions of the Hungarian Constitution and the Slovak draft constitution).

15. See Charter on Rights and Liberties (Pol. 1992) art. 31, *supra* note 13 (mandating that the state must protect safe and hygienic working conditions by adopting

national executive and/or the legislature to suspend social, economic, political, or civil rights in a declared national emergency.¹⁶ These provisions support the perception that legislators must either dilute their social and economic guarantees with one of the methods described above or burden their economy with unrealistic welfare promises that would politically and economically strangle their government and discourage sorely needed infusions of foreign capital.¹⁷

This Comment suggests that a post-Castro constitution could retain meaningful social and economic commitments, albeit in a manner less concrete and comprehensive than the 1940 Constitution, without resorting to any of the aforementioned practices.¹⁸ It draws from previous Cuban constitutions, newly written constitutions from other countries, and international charters on social and economic guarantees. This Comment also serves as a plea to post-Castro constitution drafters to create a

national legislation determining the maximum working hours, days off, and minimum number of paid leave of absences). The provision of social and economic rights to be defined and limited by statute is not an uncommon practice. See Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527-28 (1992) (noting that the constitutions of Scandinavia and Western Europe include this form of constitutional guarantee).

16. BULG. CONST. (1991) art. 57(3), *supra* note 13; Charter on Rights and Liberties (Pol. 1992), *supra* note 13, art. 49; ROM. CONST. (1991) art. 49, *supra* note 13. The suspension of rights during a case of emergency is not solely an East European phenomenon. See Claudio Grossman, *States of Emergency: Latin America and the United States*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 176 (Louis Henkin & Albert J. Rosenthal eds., 1990) (addressing this form of individual rights deprivation as it exists in Latin America).

17. See Robert C. Juelke, Note, *The Economic Causes and Consequences of Constitutional Reform in Eastern Europe*, 34 WM. & MARY L. REV. 1367, 1396-1400 (1993) (suggesting that social and economic guarantees in the new constitutions of Bulgaria, Albania, and Romania will deter foreign capitalists from investing in these countries); Cass R. Sunstein, *Against Positive Rights*, E. EUR. CONST. REV., Winter 1993, at 35 [hereinafter Sunstein, *Against Positive Rights*] (arguing against social and economic constitutional guarantees); Cass R. Sunstein, *Something Old, Something New*, E. EUR. CONST. REV., Spring 1992, at 18 [hereinafter Sunstein, *Something Old*] (explaining the differences between the Western and the Eastern European views on social and economic rights).

18. See Herman Schwartz, *Economic and Social Rights*, 8 AM. U. J. INT'L L. & POL'Y 551, 553 (1993) [hereinafter Schwartz, *Economic and Social Rights*] (suggesting that modern constitutional drafts can and should contain social and economic guarantees). Professor Schwartz further examined social and economic rights in the context of constitutions in formerly Communist states. Herman Schwartz, *In Defense of Aiming High*, E. EUR. CONST. REV., Fall 1992, at 25 [hereinafter Schwartz, *Aiming High*].

document that is both acceptable to the international community and responsive to the particular challenges facing Cuba.

Part I of this Comment traces the development of social and economic guarantees throughout Cuban constitutional history. Part II reveals several political reasons why future Cuban constitution drafters may want to preserve social and economic rights. Part III employs economic theory to suggest that Cuba could provide social and economic guarantees in a manner that is not only socially desirable but also economically feasible. Part IV addresses the 1940 provisions individually and recommends a package of guarantees which maximizes social welfare and minimizes economic and political costs. In the aggregate, this Comment proposes that Cuba has the capacity to pursue social commitment and political-economic viability simultaneously.

I. THE HISTORICAL ARGUMENT

A. COLONIALISM UNDER THE SPANISH CONSTITUTION OF 1812

Cuba's first experience with constitutional law occurred in 1810 when Cuban delegates travelled to Cadiz, Spain, to participate in the drafting of the first Spanish constitution, referred to as the Cadiz Constitution or the Constitution of 1812.¹⁹ The document's 384 articles contain several liberal provisions, including a statement that "the nation is obliged by wise and just laws to conserve and protect the civil liberty, property and the legitimate rights of all individuals [protected] herein."²⁰ Cubans and Spaniards alike quickly realized the feeble nature of these guarantees when King Ferdinand VII repealed the Spanish constitution in 1814, restored it by military order in 1820, and then permanently abolished it in 1823.²¹

During the early to mid-1800s, wealthy Cuban creoles (people of Spanish descent born on the island) and the Spanish Government developed a mutually beneficial partnership that denied to the majority of the Cuban population all social and economic rights.²² The creole

19. See Leonel De la Cuesta, *Cuba*, in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 2 (Albert P. Blaustein & Gisbert H. Flanz, eds., 1976) [hereinafter De la Cuesta, timeline] (providing a timeline of essential dates in Cuban constitutional history).

20. LA CONSTITUCIÓN DE 1812 art. 4, reprinted in Manuel Tuñón de Lara, *La España del siglo XIX*, in SPANISH HISTORY: SELECTED TEXTS FROM THE FALL OF GRANADA IN 1492 TO MODERN TIMES 135 (Salvador Ortiz-Carboneres, ed. 1989) (author's translation).

21. De la Cuesta, timeline, *supra* note 19, at 2.

22. See JUAN M. DEL AGUILA, CUBA: DILEMMAS OF A REVOLUTION 13 (2d ed.

latifundistas (owners of large land holdings) amassed considerable wealth by running sugar and tobacco industries with the labor of small wage earners and slaves.²³ In exchange for allowing creoles to derive a disproportionate share of social and economic benefits, the Spanish Government received exclusive imports of Cuban products that it resold at higher prices, and a promise that the *latifundistas* would not attempt to establish national independence.²⁴ Because the Spanish Government excluded most classes from this arrangement, many Cubans began to resent and distrust both the Cuban elite and the Spanish Crown.²⁵

As the national production of sugar and tobacco expanded during the first half of the 19th century, a rigid social and economic structure evolved to accommodate the cultivation of these crops.²⁶ During this period, Spain concentrated an overwhelming majority of the economic privileges it granted to Cuba among the creole population, and distributed the few remaining privileges among lower classes in accordance with a well-recognized social hierarchy.²⁷ As the sugar and tobacco industries grew in the mid-1800s, the creoles became wealthier and obtained more land, the need for slave labor increased, and the lower classes in the Cuban socioeconomic order expanded accordingly.²⁸

1988) (suggesting that creole elites gave political deference to the Spanish crown in exchange for economic and social privileges); JAIME SUCHLICKI, FROM COLUMBUS TO CASTRO 42 (1990) (noting that Cuban elites worked closely with Spanish authorities to protect their economic interests).

23. See DEL AGUILA, *supra* note 22, at 12 (noting that creole planters drove out less efficient competitors by using intensive slave labor and modern equipment).

24. DEL AGUILA, *supra* note 22, at 13.

25. See *id.* (noting that significant social and economic discrimination led to tensions between creoles and other Cubans).

26. See MAX AZICRI, CUBA: POLITICS, ECONOMICS AND SOCIETY 5 (1988) (noting that the Cuban socioeconomic structure favored, in descending order, Spanish settlers, the clergy and the military, creoles, mulattoes, free blacks, and slaves).

27. See LOUIS A. PÉREZ, JR., CUBA: BETWEEN REFORM AND REVOLUTION 93 (1988) [hereinafter PÉREZ, BETWEEN REFORM] (noting that the creole population owned the majority of the means of production and exercised substantial control over the island); SUCHLICKI, *supra* note 22, at 42-43 (noting that the opportunities to derive income during this time were distributed among *latifundistas*, small landholders, landless peasants, and slaves, in that order).

28. See SUCHLICKI, *supra* note 22, at 43 (noting that the black population on the island, including slaves and freed citizens, grew considerably between 1791 and 1872); PÉREZ, BETWEEN REFORM, *supra* note 27, at 85 (noting that an estimated 750,000 slaves were brought to Cuba between 1763 and 1862). Another examination of racial composition on the island shows that the slave population grew faster than the freed black population during the early nineteenth century:

B. THE CUBAN DECLARATION OF INDEPENDENCE (1868)
AND THE CONSTITUTION OF GUÁIMARO (1869)

The first organized demand for Cuban economic and social rights occurred in 1862 with the creation of the Reformist Party.²⁹ Instead of striving for independence, the Reformist Party called for constitutional reforms that would bring greater political and economic freedom to Cuba without destroying the colonial relationship.³⁰ The Party agenda included institutionalization of economic independence already recognized in Cuba, abolishment of slavery, and termination of Cuban representation in the Spanish Cortez.³¹ Because the Spanish Government was preoccupied with and debilitated by domestic revolutionary pressures,³² the Cuban people began to question Spain's ability to honor its promises for reform.³³ Consequently, the Reformist Party could not deliver significant political changes for Cuba.³⁴

As many Cubans became increasingly disenchanted with the Spanish

	1817	1827	1846	1862
Whites	239,830	311,051	425,767	793,484
Freed	114,058	106,494	149,226	232,433
Slaves	199,145	286,946	323,759	370,533
Total	153,033	704,491	898,752	1,396,470

PÉREZ, BETWEEN REFORM, *supra* note 27, at 86.

29. DEL AGUILA, *supra* note 22, at 14.

30. See PÉREZ, BETWEEN REFORM, *supra* note 27, at 113 (suggesting that Cuban elites were not willing to sacrifice economic stability in order to gain political independence).

31. DEL AGUILA, *supra* note 22, at 14. The Reformist Party also sought to gain economic rights previously unrecognized by the Spanish crown. See PÉREZ, BETWEEN REFORM, *supra* note 27, at 112 (noting that the Reformists advocated freedom from illegal confiscation of property and changes in tax and tariff laws).

32. See SUCHLICKI, *supra* note 22, at 65-66 (noting that during these years the Spanish Government defended itself against a revolutionary movement which later became the Glorious Revolution of 1868).

33. See *id.* at 68 (noting that Carlos Manuel de Céspedes, the leader of the Cuban independence movement, gained supporters by drawing attention to Spain's weakened ability to exert control over its colonies).

34. See DEL AGUILA, *supra* note 22, at 14 (indicating that the Reformist Party agenda failed due to the fragile political climate in Spain).

constitutional system, the movement for establishing Cuban autonomy from Spain gained momentum quickly.³⁵ On October 10, 1868, Carlos Manuel de Céspedes, a lawyer and land owner not identified with the *latifundista* cause, announced Cuba's Declaration of Independence from Spain.³⁶ The Declaration of Independence, also known as the Grito de Yara, recognized the natural rights of all people and called for the gradual cessation of slavery.³⁷ This proclamation also initiated a ten-year war which philosophically divided the Cuban people between reform and revolution.³⁸

In April 1869, de Céspedes convened delegates in the eastern town of Guáimaro to draft a constitution that would implement the goals of the Grito de Yara.³⁹ The document they produced, the Constitution of Guáimaro ("Guáimaro"), recognized many of the freedoms associated with the First Amendment of the United States Constitution⁴⁰ and proclaimed an end to slavery by stating that "all inhabitants of the Republic are entirely free."⁴¹ The philosophical tone of the document signalled a progressive shift towards the protection of individual liberty and a transformation in the focus of the Cuban constitutional movement away from the interests of the wealthy creole class towards those of the larger, landless population.⁴²

35. See *id.* (providing explanations for the renewed momentum for the Cuban independence movement).

36. De la Cuesta, timeline, *supra* note 19, at 4; DEL AGUILA, *supra* note 22, at 14.

37. See DECLARACIÓN DE INDEPENDENCIA, Oct. 10, 1868, reprinted in JUAN CLEMENTE ZAMORA, DERECHO CONSTITUCIONAL DE CUBA: COLECCIÓN DE DOCUMENTOS SELECTOS PARA EL ESTUDIO DE LA HISTORIA POLÍTICA DE CUBA 210, 212 (1925) (calling for universal suffrage and the gradual emancipation of slaves).

38. See SUCHLICKI, *supra* note 22, at 72 (suggesting that the philosophical division among Cuban rebels directly led to their defeat in the war).

39. See Emetrio S. Santovenia, *La Asamblea Constituyente de Guáimaro*, in LAS CONSTITUCIONES CUBANAS DE GUÁIMARO (1896), JIMAGUAYÚ (1895) Y LA YAYA (1897) 11 (1926) (discussing the events of the Guáimaro Constitutional Convention).

40. See CONSTITUCIÓN DE GUÁIMARO, Apr. 10, 1869 [hereinafter GUÁIMARO CONST.] art. 28, reprinted in ZAMORA, *supra* note 37, at 216 (mandating that the legislature cannot infringe upon the "freedom of worship, press, peaceful assembly, teaching and petition, or any other inalienable right of the people") (author's translation).

41. GUÁIMARO CONST. art. 24, reprinted in ZAMORA, *supra* note 37, at 216.

42. See D'Zurilla, *supra* note 9, at 1227-28 (noting that many Cuban scholars believe the Guáimaro Constitution incorporated theories from Montesquieu's separation of power doctrine and the natural law concept of inalienable rights).

C. THE PACT OF ZANJÓN AND THE
CONSTITUTION OF BARAGUÁ (1878)

On February 10, 1878, the Cuban rebels and the Spanish Government signed a peace agreement, entitled the Pact of Zanjón, under which Spain granted a partial end to slavery and a general amnesty for Cuban freedom fighters while Cuban rebels discontinued their struggle for independence.⁴³ After the two nations signed the Pact, the preexisting philosophical division continued to separate those Cubans supporting reform under Spanish colonial rule from other Cubans supporting national independence.⁴⁴ While some rebel leaders accepted the peace plan,⁴⁵ others, notably General Antonio Maceo, rejected the Pact and vowed to continue Cuba's struggle for political autonomy.⁴⁶ During this time, Maceo promulgated a constitution called the Constitution of Baraguá ("Baraguá").⁴⁷ The Cuban population never felt the full effect of this constitution, however, because several months later Maceo withdrew from fighting and went into exile.⁴⁸ Although the Cuban Government never fully implemented it,⁴⁹ the Baraguá Constitution had a lasting impact on the philosophical focus of Cuban constitutional thought.⁵⁰ The Baraguá Constitution mandated that "unless Spain offered independence to Cuba, the government must refuse to make peace without the consent of the Cuban people."⁵¹ With this provision, Baraguá built upon the

43. Pacto del Zanjón, Feb. 10, 1878, Cuba-Spain, *reprinted in* ZAMORA, *supra* note 37, at 226; De la Cuesta, timeline, *supra* note 19, at 4-5.

44. DEL AGUILA, *supra* note 22, at 15.

45. See DEL AGUILA, *supra* note 22, at 15 (noting General Máximo Gómez accepted the Pact because his soldiers lost their military strength and political unity). During the years immediately following the Zanjón Pact, a political group called the Autonomists was organized to promote an agenda similar to that of the earlier Reformist Party. *Id.*

46. See PHILIP S. FONER, ANTONIO MACEO: THE "BRONZE TITAN" OF CUBA'S STRUGGLE FOR INDEPENDENCE 75-77 (1977) (noting that Maceo pledged to continue fighting until Cuba gained its independence and abolished slavery).

47. De la Cuesta, timeline, *supra* note 19, at 5.

48. FONER, *supra* note 46, at 86. Maceo refrained from fighting and left Cuba on May 10, 1878. *Id.*

49. See LOUIS A. PÉREZ, JR., CUBA BETWEEN EMPIRES: 1878-1902, at 5 (1983) (noting that the "Baraguá Protest" as it is called lasted only ten weeks).

50. See D'Zurilla, *supra* note 9, at 1230 (noting that socialist scholars in Cuba attach great value to the philosophical legacy of the Baraguá charter).

51. CONSTITUCIÓN DE BARAGUÁ, Mar. 15, 1878 arts. 3-4, *translated in* D'Zurilla, *supra* note 9, at 1229.

foundations of Guáimaro in recognizing the Cuban people as the ultimate source of Cuban political power. This provision further suggested that, despite its long history of colonial domination, Cuba's constitution must serve as more than a contract between a government and its controlling hegemonic power. It must also serve as a contract between a government and its citizens.

Just as Baraguá changed the ideas associated with Cuban constitutional thought, it also changed the faces associated with the movement. As both a well respected General and a black man deeply concerned with the emancipation of Cuban slaves, Maceo was a uniquely competent spokesman for social and economic advancement in Cuba.⁵² As Fidel Castro later noted, the Baraguá Constitution signaled the transformation in the leadership of the independence movement from the rich creoles to the campesinos and liberated slaves.⁵³ From this point forth, previously silent sectors of the population became actively involved in the development of constitutional guarantees to the disenfranchised population.⁵⁴

D. THE CONSTITUTIONS OF JIMAGUAYÚ (1895) AND LA YAYA (1897)

On February 24, 1895, the Cuban Revolutionary Party, under the political leadership of José Martí and the military leadership of Antonio Maceo and Máximo Gómez, revived the struggle for Cuban independence by formally renewing the war against Spain.⁵⁵ On September 13 of that year, the rebels adopted a provisional constitution, the Constitution of Jimaguayú ("Jimaguayú"), in order to establish an operational wartime government.⁵⁶ The rebels stipulated that this document would be the supreme law of Cuba for two years or until the end of the war,

52. See FONER, *supra* note 46, at 35 (noting Maceo's personal stake in the revolutionary effort).

53. D'Zurilla, *supra* note 9, at 1230.

54. See *id.* (noting that since Baraguá, the poorest sectors of the Cuban population led the national movement for independence).

55. See De la Cuesta, timeline, *supra* note 19, at 5 (recognizing the February 24, 1895 declaration of war, also known as the Grito de Baire). In March 1895, Martí, Maceo, and Gómez further articulated the goals of the Cuban independence movement in a proclamation entitled the Manifiesto de Montecristi. MANIFIESTO DE MONTECRISTI, Mar. 25, 1895, reprinted in ZAMORA, *supra* note 37, at 244.

56. CONSTITUCIÓN DE JIMAGUAYÚ, Sept. 16, 1895 [hereinafter JIMAGUAYÚ CONST.], reprinted in ZAMORA, *supra* note 37, at 254; Joaquín Llaverías, *La Asamblea Constituyente de Jimaguayú*, in LAS CONSTITUCIONES CUBANAS DE GUÁIMARO (1896), JIMAGUAYÚ (1895) Y LA YAYA (1897), at 19 (1926).

whichever came first.⁵⁷ As it was an essentially political document, Jimaguayú contained no mention of social or economic guarantees.

On October 29, 1897 the rebels replaced the Constitution of Jimaguayú with the Constitution of La Yaya ("La Yaya"), which was a technically refined document containing a bill of rights.⁵⁸ Although virtually all the provisions in the relevant section of La Yaya addressed political and civil rights, one article did provide free education for all Cuban citizens.⁵⁹ This was the first social guarantee contained in a Cuban constitution. Nevertheless, La Yaya, like its Jimaguayú predecessor, was primarily a political document.⁶⁰

The War for Cuban Independence served to destroy not only the political relationship between Spain and Cuba but also the socioeconomic relationship between the creole elite and the popular classes.⁶¹ As they executed Gómez' orders to cease all economic activity,⁶² Cuban rebels vigorously adopted the fight for social and economic equality. A noted Cuban scholar, Louis A. Pérez, Jr., summarized this conflict as a war "waged against the beneficiaries of colonialism by the victims of colonialism."⁶³

E. THE 1901 CONSTITUTION AND THE PLATT AMENDMENT

The War for Cuban Independence, which developed into the Spanish-American War after the United States intervened, ended in 1898 when Spain surrendered to the United States.⁶⁴ The Spanish and American

57. JIMAGUAYÚ CONST. art. 24, reprinted in ZAMORA, *supra* note 37, at 257.

58. CONSTITUCIÓN DE LA YAYA, Oct. 29, 1897 [hereinafter LA YAYA CONST.], reprinted in ZAMORA, *supra* note 37, at 260. The drafters of La Yaya wanted this constitution to promote social equality as envisioned by Martí, Maceo, and Gómez in the Manifiesto de Montecristi. See Antonio L. Valverde, *La Asamblea Constituyente de La Yaya*, in LAS CONSTITUCIONES CUBANAS DE GUÁIMARO (1869), JIMAGUAYÚ (1895) Y LA YAYA (1897), at 25, 26 (1926) (discussing the events of the La Yaya Constitutional Convention).

59. LA YAYA CONST. Title II, art. 8, reprinted in ZAMORA, *supra* note 37, at 261.

60. See LA YAYA CONST. Title II, reprinted in ZAMORA, *supra* note 37, at 261 (providing 13 political and civil rights but only one social right).

61. See PÉREZ, BETWEEN REFORM, *supra* note 27, at 162 (suggesting that the War removed the creole planter class from its position of socioeconomic domination).

62. See *id.* (recalling Gómez' July 1895 decree which stipulated that the government would destroy estates found in violation of the moratorium on economic activity and would execute people helping to operate sugar factories).

63. *Id.*

64. See Treaty of Paris, *infra* note 66 (recognizing that Spain relinquished all

Governments did not invite representatives from the Cuban Government to attend negotiations for the cessation of hostilities.⁶⁵ Because the United States legally accepted several of the colonial obligations Spain had assumed prior to the war,⁶⁶ many Cubans felt that their attainment of formal independence was a Pyrrhic victory at best and a replacement of imperialistic conquerors at worst.⁶⁷

A constitutional assembly representing the government of a newly independent Cuba completed a constitutional draft on February 21, 1901.⁶⁸ This document is similar to most constitutions written in the nineteenth century because its text is long and detailed.⁶⁹ Articles III and IV contain several liberal provisions designed to protect the economic rights of domestic and foreign entities.⁷⁰ Article III also creates an explicit right to free primary and vocational education.⁷¹ Additionally, this constitution resembles the United States Constitution in that

legal claims to Cuba).

65. See PÉREZ, *BETWEEN REFORM*, *supra* note 27, at 179 (stating the United States' justifications for limiting political power on the island).

66. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, art. I, 30 Stat. 1754, *reprinted in* Rodríguez, *supra* note 10, at 111 (declaring that "Spain relinquishes all claim of sovereignty over and title to Cuba . . . [a]nd . . . the United States will . . . assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property"). The statute and treaty reinforced Cuba's legal status as a United States protectorate. See CONSTITUCIÓN DE CUBA, Military Order No. 181, May 20, 1902 [hereinafter 1901 CONST.] appendix art. III, *reprinted in* Rodríguez, 2 INT'L BUREAU OF THE AM. REPUBS., AMERICAN CONSTITUTIONS 112 (José Ignacio Rodríguez trans. 1907) [hereinafter Rodríguez, CONST.] at 149, 153 (stating the United States may intervene in Cuba to protect the national order); Treaty of Permanent Reciprocity, May 22, 1903, U.S.-Cuba, 21 Stat. 897-98 (ratifying the Platt Amendment as an official treaty).

67. See AZICRI, *supra* note 26, at 17 (citing Juan Gualberto Gómez, a colleague and friend of Martí, who claimed that Washington's influence over Cuban affairs, as formalized by the Platt Amendment and contained in the 1901 Cuban Constitution, caused Cubans to view their national independence and sovereignty as an illusory goal).

68. De la Cuesta, timeline, *supra* note 19, at 7.

69. See 1901 CONST., *reprinted in* Rodríguez, CONST., *supra* note 66 (containing 14 titles, 115 articles, 4 transitional provisions and the Platt Amendment).

70. *Id.* at 114, 119. These provisions stipulate that foreigners residing in Cuba shall enjoy the same legal protection as Cuban citizens (art. 10(1)); the government shall not deprive an individual of his or her property without proper cause and indemnification (art. 32); and the government shall not impose the penalty of confiscation of property under any circumstances (art. 33). *Id.*

71. See *id.* at 118 (guaranteeing that the state will provide free primary and vocational education).

both documents contain similar provisions regarding basic divisions of power and political rights.⁷²

Because the drafting process of the 1901 Constitution occurred during the American occupation of the island, the United States military governor effectuated the new constitution.⁷³ In order to retain American influence on the island, the United States Congress proposed the Platt Amendment to that document, named for Senator Orville H. Platt, which stipulated among other things that the United States could intervene into the domestic affairs of Cuba in order to maintain Cuban independence, individual rights, or the obligations created under the Treaty of Paris.⁷⁴ On March 2, 1901, United States President William McKinley signed into law an Army Appropriation Act which included the Platt Amendment.⁷⁵ On June 12 of the same year, the Cuban Constitutional Assembly, after failed attempts to persuade the United States to revise the Amendment, approved the Platt Amendment as an appendix to the Cuban Constitution.⁷⁶

Article 40 of the 1901 Constitution set a dangerous precedent for Cuban constitutional law by permitting suspension of individual rights in the event of a declared national emergency.⁷⁷ For example, under authority of this provision and Article III of the Platt Amendment, the United States and Cuban Governments suspended constitutional rights in

72. See *id.* arts. 11-90, at 115-137 (establishing a bicameral legislature (art. 44), a President (art. 64), and an independent judiciary (art. 81), while guaranteeing the freedom of speech (art. 25), religion (art. 26), and assembly (art. 28)).

73. D'Zurilla, *supra* note 9, n. 8, at 1224.

74. 1901 CONST. appendix art. III, reprinted in Rodriguez, CONST., *supra* note 66, at 153; D'Zurilla, *supra* note 9, n.4, at 1233; Platt Amendment, CUBA READER: THE MAKING OF A REVOLUTIONARY SOCIETY 30 (Philip Brenner et al. eds., 1989) [hereinafter CUBA READER]; AZICRI, *supra* note 26, at 16-17.

75. De la Cuesta, timeline, *supra* note 19, at 7.

76. *Id.*

77. 1901 CONST. art. 40, reprinted in Rodriguez, CONST., *supra* note 66, at 120.

This article declares:

The guarantees established in articles 15 [no unlawful detentions], 16 [arrestees to be placed before a magistrate within 24 hours of arrest], 17 [arrests to be terminated or turned into formal imprisonments within 72 hours of judicial appearance], 19 [no ex post facto prosecutions], 22 [secrecy of correspondence], 23 [inviolability of domicile], 24 [freedom of domicile] and 27 [right to petition authorities], section first of this title, shall not be suspended either in the whole Republic, or in any part thereof, except temporarily and when the safety of the state may require it, in cases of invasion of the territory or of serious disturbances that may threaten public peace.

Id.

1906-1909, 1912, and 1917 to protect political stability on the island.⁷⁸ Because the Cuban Government invoked these "emergency provisions" frequently, Cuban citizens seriously questioned the significance of their constitutional rights.⁷⁹

As Cuban Governments enforced the 1901 Constitution with increasing inconsistency in the decades following its creation, people from both Cuba and the United States began to doubt the existence of any legitimate constitutional rule.⁸⁰ Even though their standard of living began to improve considerably, the political instability that shortened the life expectancy of any socioeconomic advances created a sense of dissatisfaction with the overall status of individual rights on the island.⁸¹ During these years of considerable turbulence, political and academic leaders actively began to explore ways to formalize a national, social, and economic commitment.⁸² The persistent efforts of these individuals created popular support for the creation of a new constitution that would reflect the progressive values of its citizens.⁸³

78. PÉREZ, *BETWEEN REFORM*, *supra* note 27, at 226; De la Cuesta, timeline, *supra* note 19, at 8-9. These interventions fueled the perception that, under the Platt Amendment, Cuban leaders could not provide a stable political or legal regime. See LOUIS A. PÉREZ, JR., *INTERVENTION, REVOLUTION, AND POLITICS IN CUBA: 1913-1921*, at xiii (1978) (noting that the United States interventions hindered as much as it enhanced stability on the island).

79. See DEL AGUILA, *supra* note 22, at 18 (suggesting that United States interventions seriously threatened Cuba's ability to exert political control over its inhabitants).

80. *Id.* at 19.

81. See *id.* at 18 (suggesting that, due to unsuccessful efforts to achieve political independence, Cuban citizens did not trust the United States Government "[d]espite major improvements in health, education, sanitation, public administration, economics, and finance achieved under U.S. tutelage").

82. See PÉREZ, *BETWEEN REFORM*, *supra* note 27, at 236-37 (noting that student and intellectual leaders led the reform movement by calling for a "re-examination of national values" that would incorporate social advances in agriculture, education, and industry). The working class, which became larger, vocal and more organized during these years, also made strong demands for social and economic equality. See *id.* at 242 (noting that around 1920 the labor unions conducted frequent work stoppages, boycotts, and strikes throughout Cuba in order to secure higher wages, maximum work hours, and improved working conditions).

83. See DEL AGUILA, *supra* note 22, at 27 (explaining that during the 1930s, Cubans created several political organizations to legitimize and institutionalize social and economic reforms).

F. THE 1940 CONSTITUTION

After a series of United States interventions, Cubans renewed their hope for political stability and social commitment in 1924 when they elected Gerardo Machado to the Cuban presidency on his promise of economic and social reform.⁸⁴ Machado's promises for substantial reform proved to be irrelevant and illusory, however, when in 1928 he forced through the subservient Cuban Congress a constitutional amendment which called for six-year Presidential terms.⁸⁵ After taking this action, Machado secured victory in an uncontested and allegedly unconstitutional reelection, began a brutal dictatorship, and quashed Cuba's prospect for instituting a stable political or legal regime.⁸⁶

Under threat of intervention from the United States and desertion by the Cuban army, Machado resigned one year before his term expired and fled Cuba in August 1933.⁸⁷ At the suggestion of the United States ambassador, Cuban officials approved Carlos M. de Céspedes, Jr., whose father was the author of the Grito de Yara and sponsor of the Guáimaro Constitution, to succeed Machado and restore the 1901 Constitution.⁸⁸ Because his rise to power resulted from his neutrality and family name, and not from his level of political experience, de Céspedes could not organize an effective government coalition.⁸⁹

The following month, a group of Cuban Army officers led by Fulgencio Batista staged a coup that overthrew de Céspedes.⁹⁰ Batista's

84. See LOUIS A. PÉREZ, JR., *CUBA UNDER THE PLATT AMENDMENT: 1902-1934* 258 (1986) [hereinafter PÉREZ, *CUBA UNDER PLATT*] (noting that Machado's Platform of Regeneration was based on a pledge to end political corruption and a commitment to create new social services and public facilities).

85. DEL AGUILA, *supra* note 22, at 20; De la Cuesta, timeline, *supra* note 19, at 9.

86. See generally PÉREZ, *CUBA UNDER PLATT*, *supra* note 84, at 278-90 (suggesting that Machado used fraudulent practices to win the 1928 election and that after his victory, Machado ruled Cuba as a totalitarian leader).

87. De la Cuesta, timeline, *supra* note 19, at 9.

88. See PÉREZ, *CUBA UNDER PLATT*, *supra* note 84, at 317 (stating that the United States Ambassador effectively had unlimited discretion to select a new Cuban president).

89. See LUIS E. AGUILAR, *CUBA 1933: PROLOGUE TO REVOLUTION* 153 (1972) (stating that Céspedes lacked the leadership skills needed to overcome Cuba's difficult situation); PÉREZ, *CUBA UNDER PLATT*, *supra* note 84, at 317 (stating that Céspedes did not receive an endorsement from either the Cuban political elite or the general population).

90. See De la Cuesta, timeline, *supra* note 19, at 9 (indicating that the coup oc-

movement originally constituted a mere outcry against reductions in the national defense budget and in no way represented an organized plea for social or economic change.⁹¹ Once installed, however, the 1933 Revolution gained support from other anti-Machado and anti-United States forces that wanted to revive Cuban nationalism by strengthening political-economic sovereignty and social commitment.⁹²

The revolutionary government soon adopted an agenda designed to promote full political independence and comprehensive social and economic rights.⁹³ Within the initial days of its administration, the revolutionary government officially abrogated the Platt Amendment.⁹⁴ The new government, largely through decrees issued by Interior Minister Antonio Guiteras, also initiated reforms establishing eight-hour work days (Decree No. 1693), cutting utility rates by forty percent, requiring a minimum of fifty percent Cuban labor in local industries (Decree No. 2583), granting peasants permanent ownership rights to their land, and placing limits on foreign investor land holdings.⁹⁵ These decrees were established, in the words of President Ramón Grau San Martín, to create a "Cuba for the Cubans."⁹⁶

Between 1933 and 1939, Batista effectively ruled the country by overpowering a series of politically handicapped Presidents whom he replaced whenever they refused to agree with his recommendations.⁹⁷ In 1939, Batista attempted to improve relations with the international community by permitting Cubans to elect delegates for a new constitutional

curred on September 4, 1933); DEL AGUILA, *supra* note 22, at 22 (noting that Batista led the coup).

91. See DEL AGUILA, *supra* note 22, at 22 (explaining that Batista organized his forces to protest the reductions in the size and budget of the Cuban military that Céspedes promulgated upon Machado's departure).

92. See *id.* at 22-23 (noting that the 1933 Revolution incorporated the efforts of many students, nationalists, and communists who opposed the Machado regime).

93. See AGUILAR, *supra* note 89, at 171 (stating that Ramón Grau San Martín, the first president of the post-revolutionary republic, dedicated his life to nationalism, socialism, and anti-imperialism, which he believed to be the three main themes of the revolutionary agenda).

94. De la Cuesta, timeline, *supra* note 19, at 9; AGUILAR, *supra* note 89, at 174.

95. AGUILAR, *supra* note 89, at 174; DEL AGUILA, *supra* note 22, at 22; PÉREZ, CUBA UNDER PLATT, *supra* note 84, at 322.

96. AGUILAR, *supra* note 89, at 175; PÉREZ, CUBA UNDER PLATT, *supra* note 84, at 322.

97. See De la Cuesta, timeline, *supra* note 19, at 10 (indicating that Batista forced President Grau from office in 1934 and President Miguel Mariamo Gómez from office in 1936).

assembly that would consolidate and formalize the gains which the revolutionary government achieved.⁹⁸ Cubans challenged Batista to implement a new constitution, and he met this challenge on July 5, 1940, when he promulgated a new constitution after winning the Cuban Presidency.⁹⁹

Social and economic guarantees occupy a dominant position in both the text and the tenor of the 1940 Constitution.¹⁰⁰ Of the 286 Articles in the document, fifty-four deal exclusively with social and economic rights.¹⁰¹ In several provisions, the document raises to constitutional status rights that other countries provide only by statute.¹⁰² In other provisions, the document recognizes rights with a level of specificity that most countries do not include even in their normal statutes.¹⁰³ The Communist representatives to this Assembly believed that these guarantees constituted inalienable rights which the government should not deny to any person under any circumstance.¹⁰⁴ Other delegates believed that, due to the perceived weakness and/or disloyalty of previous Cuban lead-

98. See DEL AGUILA, *supra* note 22, at 28.

99. IRWIN F. GELLMAN, ROOSEVELT AND BATISTA: GOOD NEIGHBOR DIPLOMACY IN CUBA 1933-1945, at 183 (1973); DEL AGUILA, *supra* note 22, at 29; PÉREZ, BETWEEN REFORM, *supra* note 27, at 282.

100. See JORGE DE LA FUENTE, ANÁLISIS CONSTITUCIONAL DESDE JIMAGUAYÚ HASTA EL 40 149-50 (1989) (summarizing the provisions of the 1940 Constitution).

101. 1940 CONST. arts. 24, 43-96, *translated in* PEASLEE, *supra* note 11, at 614-27.

102. 1940 CONST. arts. 48-51, 60-79, *translated in* PEASLEE, *supra* note 11, at 614-27. Title V creates extensive and fully subsidized primary, vocational and adult education systems. *Id.* arts. 48-52. Title VI provides Cubans with the right to employment and minimal work benefits. *Id.* arts. 60-79.

103. *Id.* at 618-626. Article 43 states that alimony and child care payments "shall enjoy preference over every other obligation and against that preference no plea can be made of exemption of property, salary, pension or economic income of any kind." *Id.* Article 52 mandates that "[t]he budget of the ministry of education shall not be less than the ordinary budget of any other ministry, except in case of an emergency declared by law" and that the "monthly salary of a primary teacher must not in any case be less than one-millionth of the total budget of the Nation." *Id.* Article 91 further states that "[t]he head of a family who inhabits, cultivates, and directly exploits a rural property owned by him, provided the value of it is not more than two thousand dollars, can irrevocably declare it to be family property, to the extent that this is indispensable for his residence and subsistence, and it shall be exempt from taxes and shall be unattachable and inalienable except for liabilities prior to this Constitution." *Id.*

104. See DE LA FUENTE, *supra* note 100, at 166 (stating that Communist delegates encouraged the Assembly to create a constitution without any social or economic divisions) (author's translation).

ers, a new constitution should compel the national executive to undertake certain activities and to refrain from engaging in other activities.¹⁰⁵ Yet despite these differences, delegates to the Assembly worked towards the common goal of protecting social and economic rights.¹⁰⁶

Many Cubans, both then and now, view the creation of the 1940 Constitution as one of the most distinguished moments in Cuban history.¹⁰⁷ It was the first Cuban national charter created by a diverse representation of the population without any influence from a foreign nation.¹⁰⁸ Because this document required the government to spend vast amounts of scarce financial resources, however, Cuban leaders found it extremely difficult to honor constitutional guarantees and to promote a prosperous nation simultaneously.¹⁰⁹ Consequently, many leaders ignored these rights and Batista formally suspended the entire 1940 Constitution between 1952 and 1954.¹¹⁰ Administration of the relevant constitutional provisions was therefore inconsistent at best, and many Cuban citizens considered their social and economic rights during the Batista years to be legitimate but unenforceable.¹¹¹

105. See GELLMAN, *supra* note 99, at 181 (stating that the fear of presidential discretion and authority resulted in the creation of autonomous legislative and judicial branches and the limitation of Presidential terms to four years with reelection only after an eight year hiatus).

106. See DEL AGUILA, *supra* note 22, at 29.

107. See PÉREZ, BETWEEN REFORM, *supra* note 27, at 282 (stating that this document created a sense of political and legal legitimacy that permeated Cuban society for many years); De la Cuesta, timeline, *supra* note 19, at 11 (same).

108. See DE LA FUENTE, *supra* note 100, at 152-54 (recognizing that the 76 delegates to the Constitutional Assembly included 17 members of the Liberal Party, 17 members of the Auténtico Party, 15 members of the Democratic-Republican Party, 9 members of the Nationalist Union Party, 6 members of the Communist Party, and several delegates from smaller parties, but no foreigners); PÉREZ, BETWEEN REFORM, *supra* note 27, at 281 (noting that representatives of all political affiliations attended the Constitutional Assembly).

109. See DEL AGUILA, *supra* note 22, at 29 (stating that social and economic guarantees under the 1940 Constitution became "illusory goals" because the government neglected to enforce its laws consistently and because Cuba's dependent economy restricted the capacity to subsidize extensive social services).

110. De la Cuesta, timeline, *supra* note 19, at 12.

111. See DEL AGUILA, *supra* note 22, at 31-32 (noting that the ineffectiveness and disloyalty of public officials led to widespread skepticism towards governmental authority).

G. CASTRO'S 1976 SOCIALIST CONSTITUTION

During the early 1950's Fidel Castro, a young lawyer, ardent nationalist, and former student agitator, was extremely vocal in expressing his hostility towards the Batista government.¹¹² Castro's rise to popularity in the 1950's occurred largely because he presented his movement to the Cuban people as the legitimate heir of the 1933 Revolution and the 1940 Constitution.¹¹³ In a famous speech given to defend himself at trial for his assault on Batista's military barracks, Castro made an impassioned plea for fulfilling Cuba's social and economic goals.¹¹⁴ After his rebel movement solidified several years later, Castro formally declared that his movement "foresees the establishment of an order in which all the inalienable rights of a human being—political, social, economic, and cultural—will be fully met and guaranteed."¹¹⁵

When Castro overthrew Batista in 1959, he quickly proclaimed a Fundamental Law that effectively replaced the existing constitution.¹¹⁶ This document consolidated political power from the three branches of the former Cuban Government into a central authority and removed

112. See THOMAS E. SKIDMORE AND PETER H. SMITH, *MODERN LATIN AMERICA* 257 (2d ed. 1989) (tracing Castro's history of dissent against the Batista government).

113. D'Zurilla, *supra* note 9, at 1239.

114. See Fidel Castro, *History Will Absolve Me*, reprinted in *CUBA READER*, *supra* note 74, at 32. In this speech, Castro used several statistics to indicate that the Batista government was not fulfilling the guarantees of the 1940 Constitution and the nation needed a new government to perform the task:

In terms of struggle, . . . we're talking about the *six hundred thousand* Cubans without work, . . . the *five hundred thousand* farm laborers who live in miserable shacks, . . . the *four hundred thousand* industrial workers and laborers whose retirement funds have been embezzled, the *one hundred thousand* small farmers who live and die working land that is not theirs . . . The problem of land, the problem of industrialization, the problem of housing, the problem of unemployment, the problem of education and the problem of people's health: these are the six problems we would take immediate steps to solve.

Id.

115. *Program Manifesto of the 26th of July Movement (November 1956)*, translated in *CUBA READER*, *supra* note 74, at 36.

116. De la Cuesta, timeline, *supra* note 19, at 12. While the Fundamental law resulted in substantial changes in the distribution of political power and rights, Castro claimed that the statute was a mere amendment to the 1940 Constitution. D'Zurilla, *supra* note 9, at 1239.

many civil and political rights previously guaranteed to all Cubans.¹¹⁷ The social and economic guarantees mandated by the 1940 Constitution, however, remained essentially unchanged by the Fundamental Law.¹¹⁸

Between 1959 and 1976, Castro amended the Fundamental Law several times to strengthen state control and reduce individual political rights.¹¹⁹ Because Cuba appeared to lack a permanent and tangible constitutional regime, Castro appointed a commission in October 1974 to prepare a socialist constitution that would embody the goals of his revolution.¹²⁰ In February 1975, the First Congress of the Cuban Communist Party approved the commission draft by an overwhelming majority and Castro promulgated the new constitution in the beginning of the following year.¹²¹

The social and economic provisions of the 1976 Constitution, and indeed the entire document itself, are couched in the rhetoric of Marxist-Leninist philosophy.¹²² The 1976 Constitution exceeds the social provisions of the 1940 Constitution by providing all Cuban citizens with the right to free physical education and medical and dental care.¹²³ The charter further guarantees a national interest in housing and environmen-

117. D'Zurilla, *supra* note 9, at 1239.

118. LEY FUNDAMENTAL DE LA REPÚBLICA DE CUBA, GACETA OFICIAL, arts. 20-96, Feb. 7, 1959, *reprinted in* FUNDAMENTAL LAW OF CUBA 1959 6-26 (Pan American Union translation).

119. *See* De la Cuesta, timeline, *supra* note 19, at 13 (noting that in the years following the promulgation of the Fundamental Law, the Cuban Government modified this document nineteen times in order to deprive all rights to citizens who opposed the Castro regime).

120. D'Zurilla, *supra* note 9, at 1242-43.

121. *Id.*

122. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, Gaceta Oficial, Feb. 24, 1976 [hereinafter 1976 CONST.], *translated in* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Leonel De La Cuesta, trans.) (Albert P. Blaustein & Gisbert H. Flanz, eds., 1976) [hereinafter De la Cuesta, CONST.]. The Preamble states that the citizens of Cuba are the "heirs and continuators of the creative work and traditions of those . . . who spread socialist ideas and founded the first Marxist and Marxist-Leninist movements." *Id.* Chapter One states that "The Republic of Cuba is a socialist state of workers and peasants and all other manual and intellectual workers," *id.* art. 1, and endorses the modified Marxist principle of "from each according to his ability to each according to his work." *Id.* art. 19.

123. *Id.* at 13-14. Chapter Six provides for all Cubans free medical care, hospital care, rural medical service networks, specialized treatment centers, regular medical examinations, free dental care, and vaccinations. *Id.* art. 49. This chapter further provides that all Cuban citizens have the right to physical education, sports and recreation. *Id.* art. 51.

tal cleanliness.¹²⁴ At the same time, however, the 1976 charter limits economic rights contained in the 1940 Constitution by granting to the state ownership of almost all real property and by prohibiting labor unions that are not organized by the state.¹²⁵ Although social and economic rights granted under this constitution are explicit, the document is in no way based upon these provisions, as is evidenced by the fact that only twenty-two of 141 articles grant rights of this nature to the Cuban people.¹²⁶

H. THE 1992 CONSTITUTION

During the 1970s and early 1980s, Castro appeared able to fulfill many guarantees contained in the 1976 charter.¹²⁷ This was due in

124. *Id.* at 4-8. Chapter One stipulates that the state will work "to achieve that no family be left without a comfortable place to live." *Id.* art. 8(c). This Chapter further states that the states and individual citizens must share responsibility "to watch over the cleanliness of the waters and of the air, and to protect the flora and the fauna." *Id.* art. 27.

125. *Id.* at 6-14. Chapter One states that "all the people" own the entire means of production. *Id.* art. 14. This chapter also states that "[t]he law regulates the right of citizens to inherit legal title to a place of residence and to other personal goods and chattels" (art. 24), and that "expropriation of property for reasons of public benefit or social interest and with due compensation is authorized" (art. 25). *Id.* Chapter Six holds that work "is a right and duty and a source of pride for every citizen." *Id.* art. 44. Because work is transformed from a right into a duty, Cuban citizens under this charter lose the ability to strike or to engage in collective bargaining. D'Zurilla, *supra* note 9, at 1251-52. Furthermore, because the state is virtually the only employer on the island and because only official unions are permitted, worker unions do not serve the same purpose that Western unions do. 1976 CONST. art. 53, *translated in* De la Cuesta, CONST., *supra* note 122, at 14; *see also* Organization of American States, Inter-American Commission on Human Rights, *Human Rights in Cuba*, in CUBA READER, *supra* note 74, at 233 (noting that labor unions in Cuba, which once served worker's interests, now serve as instruments of government control).

126. 1976 CONST. arts. 8, 19-27, 38-39, 42-51, *translated in* De la Cuesta, CONST., *supra* note 122, at 3-14. Article 8 addresses duties of the state, Articles 19-27 address property ownership, Articles 38-39 address education and culture, Articles 42-43 address equality of rights, and Articles 44-51 address fundamental rights, duties and guarantees. *Id.*

127. *See generally*, Robert N. Ubell, *Twenty-Five Years of Cuban Health Care*, reprinted in CUBA READER, *supra* note 74, at 435 (noting that Castro has successfully honored his obligation to provide free and full medical care for all Cubans). Cuba under the first years of the Castro government also made tremendous advances in education. Marvin Leiner, *Cuba's Schools: 25 Years Later*, reprinted in CUBA READER, *supra* note 74, at 447-48. Castro further made notable advancements in employment. *See* Carmelo Mesa-Lago, *The Socioeconomic Performance of Cuba*, in CUBAN

large part to a huge annual foreign assistance package from the former Soviet Union.¹²⁸ In 1989, when the communist bloc disintegrated and the Soviets cancelled Castro's subsidy, however, Cuba's ability to provide for the welfare of its citizens declined dramatically.¹²⁹ Without favorable trade agreements with socialist nations,¹³⁰ and with the imminent tightening of a trade embargo by Western countries,¹³¹ Cuba's social and economic condition plunged into what Castro euphemistically called a "special period."¹³²

In order to maintain control over the island, Castro chose to make only those reforms which he believed were absolutely necessary to preserve the existing order.¹³³ As part of this effort, Castro guided

COMMUNISM 13, 28 (Irving L. Horowitz, ed., 1984) [hereinafter Mesa-Lago, *Socioeconomic Performance*] (stating that Cuba had reached virtually full employment in 1970).

128. See Ron Howell, *System Failing Where It Hurts; Cuban Health Care Suffers*, NEWSDAY, May 16, 1993, at 38 [hereinafter Howell, *System Failing*] (noting that Cuba's annual subsidy from the former Soviet Union, which amounted to approximately four billion dollars, enabled the government to finance extensive social service programs).

129. See Ron Howell, *Socialism Plowing On In Cuba*, NEWSDAY, Sept. 20, 1992, at 17 [hereinafter Howell, *Socialism Plowing On*] (noting that the elimination of trade agreements with the former Soviet Union and its former East European allies caused widespread shortages of food, raw materials and spare parts that have crippled the nation); C. Elizabeth Espin, *Fourth Communist Party Congress Issues Invitation to Foreign Capitalist Investors*, FREE-MARKET CUBA BUS. J. (Winter 1992), at 1 (same) (on file with the law firm of Shaw, Pittman, Potts & Trowbridge); *Making the Best of Cuba's Bad Job*, ECONOMIST, Jan. 26, 1991, at 37 [hereinafter *Making the Best*] (same); Preeg, *supra* note 1, at 5 (same).

130. Howell, *Socialism Plowing On*, *supra* note 129, at 17.

131. See Cuban Democracy Act of 1992, § 1706, 22 U.S.C. (section) 6005 (Supp. 1992) (prohibiting vessels that dock in Cuba from entering United States territory within 180 days of departure from Cuba and prohibiting subsidiaries of United States firms from doing business in Cuba).

132. See Phil Davison, *Cubans Get on Their Bikes to Beat Fuel Shortage*, INDEPENDENT, Sept. 15, 1993, at 15 (noting that Castro used the term "special period" to refer to economic crisis); Ricardo Chavira and David Marcus, *Cuba: Communist Dream on the Brink of Disaster*, CALGARY HERALD, Sept. 29, 1993, at A5 (stating that Castro's so-called "special period" involved several measures that quickly and dramatically reduced Cuban living standards).

133. See Ricardo Chavira, *To Risk It All: Cuba's Need For Economic Reform Poses Dilemma For Castro*, DALLAS MORNING NEWS, Sept. 20, 1993, at 1A (stating that Castro's recent mixed-market reforms are limited to those measures absolutely necessary to ensure the survival of the Castro government); Jorge I. Domínguez, *The Secrets of Castro's Staying Power*, FOREIGN AFFAIRS, Spring 1993, at 97, 99 (noting

through the legislature a new constitution which further consolidated his executive powers and revised all references to friendly relations with the former Soviet empire.¹³⁴ Although the social and economic provisions of the 1992 Constitution are almost identical to those of the 1976 Constitution, numerous reports both within and outside Cuba indicate that Castro simply cannot honor all his constitutional commitments under Cuba's current state of virtual autarky.¹³⁵

The 1992 Constitution grants some minor economic rights in the form of limited property ownership.¹³⁶ On the other hand, this document re-

that Castro has made "minimal" political reforms); Gunn, *supra* note 1, at 2 (noting that in September 1993, the Cuban government, as a matter of economic necessity, promulgated Decree-Law 141 which provides limited free-enterprise initiatives, but only to Cubans who do not hold university degrees); ANDRES OPPENHEIMER, *CASTRO'S FINAL HOUR: THE SECRET STORY BEHIND THE COMING DOWNFALL OF COMMUNIST CUBA* 366 (1992) (citing Jiri Valenta, a renowned Cuban studies expert, who stated that Castro failed to implement substantial political or economic reforms).

134. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, Sept. 22, 1992 [hereinafter 1992 CONST.], translated in Foreign Broadcasters Information Service, TEXT OF NEW CUBAN CONSTITUTION (1992) [hereinafter FBIS]. The language from the preamble of the 1976 Constitution, recognizing Cuba's friendship with the Soviet Union, was replaced with a new preambulatory clause stating that Cuba is supported "by proletarian internationalism, and by the fraternal friendship, aid, cooperation, and solidarity of the peoples of the world, especially those of Latin America and the Caribbean." *Id.* at 1.

135. See UNITED STATES CENTRAL INTELLIGENCE AGENCY, CUBA: HANDBOOK OF TRADE STATISTICS 9 (1992) (stating that the Cuban economy shrank drastically during the early 1990s). Cuba's composition of trade from 1986 to 1991 (in millions of dollars) was:

	1986	1987	1988	1989	1990	1991
exports	6,439	5,402	5,518	5,392	4,910	3,585
imports	9,191	7,584	7,580	8,124	6,745	3,690
deficit	2,752	2,182	2,062	2,732	1,835	105

Id.; see also Howell, *System Failing*, *supra* note 128, at 38 (noting that, due to the loss of favorable trade agreements and the embargo of necessary supplies, Cubans have witnessed a sharp reduction in health care services and a sharp increase in the incidence of malnutrition and disease); Johanna McGeary and Cathy Booth, *Cuba Alone*, TIME, Dec. 6, 1993, at 42, 45 (stating that a reduction in imports from \$8 billion to \$1.7 billion since the fall of the Soviet empire has forced Cuba to revise its socialist program).

136. 1992 CONST. art. 24, translated in FBIS, *supra* note 134, at 4. This provision recognizes the "right to inheritance of the individually owned dwelling, and of other personally owned assets." *Id.* art. 24(1). Article 24 further states that small

stricts several economic rights by making more explicit the state's right to own all property and each Cuban's duty to work and serve the state.¹³⁷ Regardless of these changes to the 1976 charter, the most noteworthy provision of the new constitution is Article 67 which allows the executive to suspend any or all constitutional provisions indefinitely and replace them with any regulations he or she deems appropriate.¹³⁸ Given the tenuous state of national affairs in the 1990s, Article 67 effectively has placed Cuban constitutional law at the mercy of Fidel Castro.¹³⁹

II. THE POLITICAL ARGUMENT

A. DOMESTIC POLITICAL CONCERNS

Perhaps the most compelling reason to include social and economic rights in a new constitution is that most Cubans would want them in-

farms are inheritable in certain cases. *Id.* art. 24(2).

137. *Id.* at 3-6. Chapter 1 declares that "The State directly administers the assets comprising the socialist property of all the people, or may create and organize enterprises and entities responsible for their administration." *Id.* art. 17. Chapter 7 holds that "[t]here is recognition for unpaid volunteer work, done for the benefit of the whole society, in industrial, agricultural, technical, artistic, and service activities, as a shaper of our people's communist conscience." *Id.* art. 45(3).

138. *Id.* at 7. Art. 67 states:

In the event, or in view of imminent natural disasters or calamities, or other circumstances which, by their nature, proportion, or importance, affect the internal order or security of the country, or the stability of the State, the President of the Council of State may declare a state of emergency in the entire national territory, or in a part of it; and, while it is in effect, may order the mobilization of the population. The law regulates the manner in which the state of emergency is declared, its effects, and its termination. It also determines the fundamental rights and obligations recognized by the Constitution, the exercise of which must be regulated differently while the state of emergency is in effect.

Id.

139. See *Cuba's New Constitution: Better or Worse?*, THE CUBA REPORT, Sept. 1992, at 1 (recognizing the new political and military powers granted to Castro by the 1992 Constitution). Despite this broad delegation of authority, one scholar believes that Article 67 may actually benefit the Cuban government in its anticipated transition to a market economy. See Jorge I. Domínguez, *The Transition to Somewhere: Cuba In the 1990s*, in The Cuban Research Institute, TRANSITION IN CUBA: NEW CHALLENGES FOR U.S. POLICY 5, 25 (Lisandro Pérez, ed., 1993) (noting that a new, strong and centralized authority would be better equipped than a new legislature to wean the Cuban people away from their dependence on social services).

cluded.¹⁴⁰ Recent reports indicate that older Cubans and loyal Fidelistas want to retain these national commitments in order to further the comprehensive social and economic agenda that has evolved since the 1933 Revolution.¹⁴¹ According to these accounts, Cubans are concerned that a failure by a new government to recognize existing social and economic rights would reverse thirty-five years of progress in education and health care.¹⁴²

These reports further indicate that younger Cubans, born after the 1959 Revolution, favor social and economic rights because they want to retain the panoply of benefits that the government always has provided for them.¹⁴³ Many Cubans in this generation believe that Cuba should pursue market-oriented prosperity but not at the expense of social privileges to which they are accustomed.¹⁴⁴ Although they use different rea-

140. See McGeary & Booth, *supra* note 135, at 48 (stating that millions of Cubans who had few if any social and economic rights before the revolution are "fiercely proud" of their health care, education and social security benefits and are committed to retaining these guarantees).

141. See *id.* at 45 (noting that most Cubans want their government to preserve current social and economic rights because they believe these guarantees are too valuable to sacrifice); Stan Pankratz, *Vast Majority of Cubans Will Refuse to Let Socialist System Fall*, STAR TRIB., Sept. 18, 1993, at A23 (stating that the vast majority of Cubans approve of the nation's current social welfare system). The Cuban Government continues to demonstrate its belief in continued social and economic commitment by attempting to honor its constitutional obligations even during the current economic crisis. *Id.* at A23; see also Julio Carranza Valdés, *Reform and the Future of Cuban Socialism*, in THE CUBAN REVOLUTION INTO THE 1990S: CUBAN PERSPECTIVES 11, 14 (Centro de Estudios Sobre América ed. & Clare Weber trans., 1992) (noting that between 1986 and 1992, expenditures on social security increased 36% and spending on education and health increased 45%).

142. See Chavira, *supra* note 133, at 1A (citing Wayne Smith, former head of the U.S. mission in Havana, who stated that Cubans are "cautious" of reforms to the socialist system because they fear losing their free health care and education benefits); *Making the Best*, *supra* note 129, at 37 (suggesting many people in Cuba today are willing to sacrifice political reforms in order to retain health and education services).

143. See Janette Habel, *Social Crisis, Bureaucratization and Rectification*, in CUBA: THE REVOLUTION IN PERIL 57, 68 (Jon Barnes trans., 1991) (noting that younger Cubans continue to demand the social services they have always enjoyed as a matter of birthright); McGeary & Booth, *supra* note 135, at 48 (stating that a 35 year old Cuban described his generation as being inextricably attached to the social achievements of Castro's revolution).

144. *Id.*, at 48. Many young Cubans who call for societal reform envision a new, mixed economy with both private enterprise and social and economic protections. See Oppenheimer, *supra* note 133, at 269 (citing Canek Sanchez Guevara, Che Guevara's oldest grandchild and a well known Castro critic, who desires to live in a market-

sons to support their beliefs, most Cubans consider some package of social and economic rights essential for the construction of any new Cuban society.¹⁴⁵

Because Cubans past and present have expressed a strong desire for social and economic protection, future Cuban elites could use the new national charter to recognize the people's intent.¹⁴⁶ Several experts have recognized that, because it is a political document reflecting the will of its people, the drafters must tailor the constitution to respond to the individual demands of the nation.¹⁴⁷ If post-Castro constitution drafters support this notion, then they would create a document which incorporates the Cuban view on social and economic commitments.¹⁴⁸

Beyond granting Cubans what they want in their constitution, the inclusion of social and economic guarantees in a new constitution could have additional positive effects on the health and stability of Cuban society by reducing the rates of crime, drug abuse and social tension on the island.¹⁴⁹ This statement is based on the simple premise that in societies where jobs, education, and medical care are relatively easy to procure, criminal behavior will result more from greed than from need.¹⁵⁰ International crime statistics support this assertion by demonstrating that societies providing greater social and economic guarantees generally have experienced lower rates of drug abuse and crime.¹⁵¹

oriented, socially responsive society like Sweden, Switzerland or Belgium).

145. See Boudreaux, *Can Castro Weather Storm*, *supra* note 1, at A1 (stating that future Cuban leaders would not overcome political costs which would arise if they denied their constituents of significant social benefits).

146. See Schwartz, *Aiming High*, *supra* note 18, at 28 (noting that the decision of which items to include in a constitution should be based on the political concerns of the individual country instead of the theoretical concerns of constitutional experts).

147. See 138 CONG. REC. E3084 (daily ed. Oct. 9, 1992) (statement of Prof. Albert Blaustein) (stating that countries should tailor each constitution to reflect the individual needs, aspirations, and culture of the society it serves).

148. See Lloyd Cutler & Herman Schwartz, *Constitutional Reform in Czechoslovakia: E Duobus Unum?*, 58 U. CHI. L. REV. 511, 512 (1991) (stating that societies write constitutions to express their collective views on the past and to embody their aspirations for the future); see also Schwartz, *Economic and Social Rights*, *supra* note 18, at 551 (same).

149. See Mary Carter-Williams, *Jobs Can Curb Crime*, WASH. TIMES, Mar. 28, 1993, at B5 (referring to several longitudinal studies of crime which indicate that unemployment, poverty and social discrimination lead to increased homicide rates).

150. See William F. Buckley, Jr., *Poverty Not the Cause of Black Crime?*, HOUS. CHRON., Jan. 11, 1993, at A12 (stating that people who become homeless and hungry also become more likely to steal).

151. See *Crime: Bewitched, Bothered and Bewildered*, ECONOMIST, Aug. 28, 1993,

An examination of the experiences of Eastern European nations and the former Soviet Union demonstrates the increase in crime, drug abuse, and social friction when a state retreats from social and economic commitments.¹⁵² During the 1990s, these states experienced markedly increased crime and drug problems in their transition from socialist to capitalist systems.¹⁵³ This dilemma is exacerbated by the fact that the new governments do not possess adequate financial or political resources to deter the spread of drugs and crime.¹⁵⁴ Furthermore, in the case of the former Soviet republics, the lack of social and economic commitment from the new governments has threatened the political stability of several nations.¹⁵⁵

at 56 (citing a recent international crime survey which reports that in France, Belgium, Finland, Norway and Switzerland, 15% to 20% of the population are victims of crime whereas in Australia, New Zealand, Holland, Poland, Canada and the United States, 25% to 30% of the population are victims of crime). The United States, whose constitution affords relatively little social and economic protection, maintains one of the highest murder rates in the world. See Bernd Debusmann, *U.S. Holds Lonely Lead in International Murder Statistics*, REUTER LIBRARY REPORT, Aug. 27, 1990, available in LEXIS, News Library, Curnws File (noting that the overall United States murder rate is 2.6 to eight times higher than the murder rate in other Western countries and, in some categories, the United States homicide rate is 70 times higher than it is in other Western countries); Tom Carter, *Life Under Castro: Iron Fist Hasn't Crushed Cubans' Spirit*, WASH. TIMES, Oct. 28, 1992, at A1 (noting that, despite the rising rate of petty crimes in Cuba, the rate of violent crime is much higher in the United States than in Cuba).

152. See Aleksander Checko, *Crime and Punishment for Eastern Europe's Cops: Reforms Foster Crime While Police Take the Heat*, WORLD PAPER, Oct. 1991, at 12 (providing statistics to demonstrate that the incidence of both property and violent crimes in Czechoslovakia, Hungary, Romania and Bulgaria increased dramatically during the early 1990s); Ray Moseley, *Berlin Wall is Down, But German Crime Up*, CHI. TRIB., July 7, 1991, at 1 (noting that German police officials recorded an increase in violent crime by skinheads and Neo-Nazis in the years following the fall of the East German Government); Bill Gertz, *Crime Syndicates Form East-West International Link*, WASH. TIMES, Nov. 22, 1993, at A5 (noting that the crime rate in the former Soviet bloc rose almost 1,000% during the last half of 1993). Observers already have noted a correlation between the decrease in social services and the increase in social tensions within Cuba. Mesa-Lago, *Social Safety Net*, *supra* note 6, at 602. This trend is likely to become more noticeable as the economic crisis on the island intensifies. *Id.* at 602.

153. Checko, *supra* note 152, at 12; Gertz, *supra* note 152, at A5.

154. See Checko, *supra* note 152, at 12 (stating that East European police are understaffed and ill-equipped to handle the increased level and more sophisticated forms of crime); Moseley, *supra* note 152, at 1 (noting the same phenomenon for police officers in East Germany).

155. See Checko, *supra* note 152, at 12 (stating that violent, well organized gangs

Similar to the increase in crime rates and drug abuse caused by the failure to create social and economic guarantees, the failure to deliver social and economic guarantees can lead to the same result.¹⁵⁶ In the case of Cuba, the government's recent inability to implement fully its social welfare programs¹⁵⁷ coincides with a significant increase in crime and drug usage.¹⁵⁸ If current trends continue, further deprivation of social or economic rights will likely lead to more and more serious crime and drug problems.¹⁵⁹

Critics of expansive constitutional guarantees might suggest that Cuba can and should address its social ills without raising any social or economic rights to the level of constitutional promises.¹⁶⁰ Advocates of social and economic rights could counter this proposition, however, by noting that Cuba, as a small state with less developed political institutions, does not possess the amount of time and resources needed to cultivate these rights as a legally significant element of society.¹⁶¹ Proponents of the latter view, which include a majority of post-socialist government constitution drafters,¹⁶² fear that if essential social and eco-

recently established in the former Soviet republics have exported illegal drugs and arms, embezzled millions of rubles from the state treasury, and murdered several victims).

156. See Richard A. Epstein, *Drafting A Constitution: A Friendly Warning to South Africa*, 8 AM. U. J. INT'L. L. & POL'Y, 567, 570 (1992/1993) (linking the demise of the former Soviet Union with Moscow's failure to deliver social and economic promises contained in the Soviet constitution).

157. See McGeary & Booth, *supra* note 135, at 44 (suggesting that the Cuban government in 1993 continues to offer adequate education and health care but fails to provide an adequate food supply).

158. See Richard Boudreaux, *Crime Soaring In Cuba As Fidel Castro's Socialist Economy Is Caught In Free Fall*, L.A. TIMES, Nov. 9, 1991, at 22 [hereinafter Boudreaux, *Crime Soaring*] (noting that the rate of murders and violent crimes in Cuba increased 42% between 1989 and 1991 and the rate of theft increased 63% in 1990).

159. See *id.* (suggesting that if Cuba's social safety net were to disintegrate, the nation would witness greatly increased rates of violent crime and drug trafficking as experienced by Jamaica and Columbia).

160. See Sunstein, *Against Positive Rights*, *supra* note 17, at 36 (stating that constitution drafters who attempt to incorporate all their societal aspirations into a national charter run the risk of creating an ineffective document with no legal or practical value).

161. See Schwartz, *Economic and Social Rights*, *supra* note 18, at 561 (suggesting that countries without well established political and judicial institutions can benefit greatly by creating longer, more detailed constitutions that determine the authority and purpose of each branch of government).

162. See *supra* note 13 (recognizing that all of the nine listed post-socialist consti-

conomic guarantees are not created in the new constitution, the legislature may fail to create them, the executive may fail to enforce them, and the judiciary may be powerless to uphold them.¹⁶³ If the latter view is indeed accurate, then branches within the new Cuban Government can act immediately and completely to fulfill their social and economic mandate only if the constitution clearly establishes the structure and the function of the entire government.¹⁶⁴

B. INTERNATIONAL POLITICAL CONCERNS

Another political reason why Cuba should include social and economic rights in its post-Castro constitution is that several treaties of the United Nations and the Organization of American States recognize these guarantees as fundamental components of society.¹⁶⁵ Some treaty provisions promote social and economic commitments in the abstract¹⁶⁶ whereas other treaties outline specific promises for each state to make.¹⁶⁷ In either case, the language of most of these treaties suggest that economic and social guarantees are a fundamental component of the undeniable individual rights of all people.¹⁶⁸

tutions stipulate some form of social and economic rights).

163. See Schwartz, *Economic and Social Rights*, *supra* note 18, at 561 (noting that governmental institutions in new democracies may not have sufficient power in the years immediately following their creation to effectuate short and/or vague constitutional guarantees).

164. *Id.*

165. See Declaration, *infra* note 166, art 22 at 355 (declaring that individuals possess inalienable social and economic rights); Covenant, *infra* note 167, arts. 6-13 at 378-80 (same); Convention, *infra* note 179, art. 26 at 459 (same); Protocol Preamble, *infra* note 183, at 161 (same).

166. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 22, at 71, U.N. Doc. A/810 (1948) [hereinafter Declaration], *reprinted in* INTERNATIONAL LAW SELECTED DOCUMENTS, 352, 355 (Barry E. Carter & Phillip R. Trimble, eds., 1991) [hereinafter Carter & Trimble] (declaring that "[e]veryone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation in accordance with the organization and resources of each state, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality").

167. See International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), *entry into force* Mar. 23, 1976 [hereinafter Covenant], *reprinted in* Carter & Trimble, *supra* note 166, at 376, 381 (mandating in article 14 that nations which cannot provide free, universal and compulsory education at the primary level within two years of signing the Covenant must submit a detailed plan outlining their plans to do so).

168. See Covenant Preamble, *reprinted in* Carter & Trimble, *supra* note 166, at

The Universal Declaration of Human Rights, adopted by the United Nations in 1948,¹⁶⁹ is the most significant product of that organization's effort to define and protect indispensable natural rights.¹⁷⁰ This treaty mandates that member states explicitly recognize, and undertake affirmative measures to protect, universal rights to social security and education.¹⁷¹ The Declaration also holds that all member states agree to recognize rights to property ownership, work, and leisure.¹⁷² Because Cuba voted in favor of the Declaration,¹⁷³ it currently maintains a legal commitment to fulfill the obligations contained therein.¹⁷⁴

The International Covenant on Economic, Social and Cultural Rights, adopted by the United Nations in 1966,¹⁷⁵ is the universally accepted treaty on social and economic rights.¹⁷⁶ The Covenant declares that parties to the treaty must recognize universal rights to work, education, social security, physical and mental health, and favorable working con-

376 (stating that social and economic rights "derive from the inherent dignity of the human person"); Protocol Preamble, *infra* note 183, at 162 (stating that social, economic and cultural rights combined with civil and political rights create "an indivisible whole based on the recognition of the dignity of the human person, for which reason both [sets of rights] require permanent protection and promotion if they are to be fully realized").

169. Declaration, *reprinted in* Carter & Trimble, *supra* note 166, at 352. The governments of 48 states voted in favor of the Declaration, no governments voted against it, and eight states abstained from voting. *Id.*

170. BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 869 (1991).

171. Declaration, *reprinted in* Carter & Trimble, *supra* note 166, arts. 22, 26 at 355-56. The Declaration guarantees a universal right to social security. *Id.* art. 22. This document also mandates that member states must provide its citizens with education that is universal and, at the elementary stages, free and compulsory. *Id.* art. 26.

172. *Id.* arts. 17, 23-24, at 354-55. Article 17(1) provides that "[e]veryone has the right to own property alone as well as in association with others," and art. 17(2) provides that "[n]o one shall be arbitrarily deprived of his property." Article 23 provides that "[e]veryone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment." *Id.* art. 23(1). Article 24 provides that "[e]veryone has the right to rest and leisure, including reasonable limitations of working hours and periodic holidays with pay" *Id.* art. 24.

173. Universal Declaration on Human Rights, BASIC DOCUMENTS IN INTERNATIONAL LAW AND WORLD ORDER 916 (Burns H. Weston et al. eds., 1990).

174. *See* Declaration, *reprinted in* Carter & Trimble, *supra* note 166, art. 28 at 356 (declaring that each state must provide a social order "in which the rights and freedoms set forth in this Declaration can be fully realized").

175. Covenant, *supra* note 167.

176. *See id.* (indicating that the 92 parties to the covenant represent virtually every political and geographical affiliation in the world).

ditions.¹⁷⁷ The Covenant also outlines reporting procedures which all parties to the agreement must follow in their effort to implement the aforementioned goals.¹⁷⁸

The American Convention on Human Rights, signed in 1970 by twenty members of the Organization of American States,¹⁷⁹ mandates that parties to the treaty must adopt individual measures in their own legislatures that are designed to fulfill the social and economic standards implied in the OAS Charter.¹⁸⁰ Legal practitioners could attempt to interpret or uphold this provision because the Charter establishes several identifiable social and economic standards.¹⁸¹ Because the Charter treats these standards as long range aspirations instead of current expectations, however, the Convention places no tangible legal commitments on ratifying states.¹⁸²

The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, signed in 1988 by thirteen of the original Convention members,¹⁸³ provides the

177. Covenant, *supra* note 167, arts. 6-13.

178. See Covenant, *supra* note 167, art. 14, 16-17 (mandating in Article 14 that nations who cannot provide free, universal and compulsory education at the primary level within two years of signing the Covenant must submit a detailed plan outlining its plans to do so, and in Articles 16-17 that parties to the Covenant must periodically submit reports to the UN Secretary-General detailing the successes and failures they encounter in their efforts to implement the Covenant).

179. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (entered into force on July 18, 1978) [hereinafter Convention], reprinted in Carter & Trimble, *supra* note 166, at 451. The 20 parties to the treaty are: Argentina, Barbados, Bolivia, Columbia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay and Venezuela. *Id.*

180. Convention art. 26, reprinted in Carter & Trimble, *supra* note 166, at 459.

181. See Charter of the Organization of American States (as amended), Apr. 30, 1948, art. 31, 2 U.S.T. 2394; amended effective 1970, 21 U.S.T. 607 (calling upon states to work towards, among other things, "rapid eradication of illiteracy and expansion of educational opportunities for all" and "adequate housing for all sectors of the population"). The Charter also declares that states should work towards recognition and implementation of rights to employment, labor unions and social security. *Id.* art. 43.

182. See Convention art. 26, reprinted in Carter & Trimble, *supra* note 166, at 459 (failing to specify the number, nature or timeframe concerning measures nations should undertake).

183. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 161, 162 [hereinafter Protocol]. The states that signed the Protocol are Argentina, Bolivia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nica-

details on social and economic commitments that are missing from the original treaty.¹⁸⁴ This Protocol mandates that parties to the treaty must recognize universal rights to work, satisfactory working conditions, work unions and strikes, health care, social security, a clean environment, food and education.¹⁸⁵ Although the Additional Protocol provides a clear agenda for social and economic commitment throughout the region, this treaty will not enter into force until eleven of the signatory states deposit instruments of ratification or accession with the OAS.¹⁸⁶

Because an overwhelming majority of nations support the shared set of values and norms contained in the International Covenant on Economic, Social and Cultural Rights, Cuba could demonstrate its political and philosophical alliance with these countries by incorporating the suggestions of the Covenant into its own constitution.¹⁸⁷ If it were to do so, Cuba could enhance the legal strength of social and economic rights both within the country and throughout the world.¹⁸⁸ Furthermore, if Cuba created a legal structure that conforms with the Covenant or with the Additional Protocol, states within the region might more easily or more quickly invite Cuba to join local economic organizations such as the Caribbean Economic Community ("CARICOM") or regional

ragua, Panama, Peru and Uruguay. *Id.*

184. See Protocol art. 6, *supra* note 183, at 162 (creating the right to work); *id.* art. 7 (creating the right to satisfactory work conditions); *id.* art. 8, (creating trade union rights and the right to strike); *id.* art. 9 (creating the right to social security); *id.* art. 10 (creating the right to health); *id.* art. 11 (creating the right to a healthy environment); *id.* art. 12 (creating the right to food); *id.* art. 13 (creating the right to education).

185. *Id.* arts. 6-13. Several of these guarantees provide greater detail than that which is included in corresponding provisions of the Covenant. See *id.* art. 9 (guaranteeing that social security benefits shall include injury compensation and paid maternity leave programs for all employed citizens); *id.* art. 10 (guaranteeing that the right to health care include universal access to immunization against the principal infectious diseases and health prevention public education programs).

186. *Id.* art. 21(3). None of the original signatory states ratified the Protocol in the year they signed the treaty. *Id.* Nevertheless, regardless of whether or not the Protocol enters into force, this treaty is valuable as a source of international customary law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. f (1987) (stating that unratified treaties are used increasingly as sources of international customary law).

187. See Phillip R. Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 835 (1990) (stating that by incorporating recognized international norms into domestic legislation, states can validate the legitimacy of the relevant international standards and the strength of international law).

188. *Id.*

political organizations such as the Organization of American States ("OAS").¹⁸⁹

III. THE ECONOMIC ARGUMENT

The goal for any classical-liberal economic actor is to maximize profit.¹⁹⁰ The most direct way to achieve this task, according to noted economists and business executives, is to produce optimally efficient products, which are defined as those items that create the maximum output using the minimum amount of resources.¹⁹¹ Assuming this theory is valid, economic actors, both at the macroeconomic and microeconomic level, exercise sound economic judgement when they attempt to produce high quality, low cost products and services.¹⁹²

When examined under a cost-benefit analysis, several social and economic rights promote the development of high quality and low cost products.¹⁹³ For example, several notable studies demonstrate that ade-

189. See Boris Yopo, *Latin American Perspectives on the Cuban Transition*, 3 CUBA BRIEFING PAPER SERIES 4-5 (The Cuba Project, Center for Latin American Studies, Georgetown Univ. 1993) (noting that Cuba's failure to adopt a political and legal agenda consistent with that of its neighbors has prevented the island from becoming a full partner in the movement towards Latin American economic and political cooperation).

190. See EDWIN MANSFIELD, *ECONOMICS* 119 (5th ed. 1986) (stating that economists assume maximization of profits as the primary motivation for all businesses).

191. See *id.* at 507 (explaining the "optimal input decision" principle, as a principle which shows that economic actors pursue profit by purchasing only those additional inputs to production that generate more revenue than costs).

192. See Michael N. Cantwell, *Global Competition: U.S. Industry's Hidden Advantages*, *INDUSTRY WK.*, Oct. 7, 1991, at 45 (stating that 80% of the respondents in a survey of 250 owners and chief executive officers of large United States manufacturing companies agreed that high quality leads to high profits).

193. See generally JOE SHERMAN, *IN THE RINGS OF SATURN* (1994) (demonstrating that Saturn Corporation, which provides its employees with comprehensive medical, education and vacation benefits, produces high quality and low cost automobiles). During their initial years of production, Saturn employees cut costs and increased production. See *id.* at 318-19 (noting that in 1992, Saturn reduced its manufacturing costs by \$1,600 per car and increased production to 1,050 cars per day, up from 800 cars per day in 1991). The Saturn labor agreement creates a policy of hiring workers for life and providing them with a substantial benefits package and a profit-sharing incentive program. See Saturn Memorandum of Agreement [Saturn MOA] art. 16 (establishing mandatory training for all Saturn employees) (on file with the Saturn Corporation); *id.* art. 21 (providing permanent job security to the vast majority of Saturn employees); *id.* art. 25 (providing 2-5 weeks annual vacation, depending on an employee's length of service with Saturn and/or General Motors); *id.* art. 31 (provid-

quate health care services can reduce the costs incurred in repairing or replacing a society's human capital.¹⁹⁴ Stated differently, money spent on preventative health care programs could substantially increase productivity by reducing health care costs and worker absenteeism.¹⁹⁵ International statistics also show that a limited national right to health care can be an economically beneficial proposition.¹⁹⁶

Additional reports indicate that minimal work conditions and vacation periods could help to ensure that employees are not worked so often or so hard that they lose productivity, develop serious health problems or, in the worst scenario, die.¹⁹⁷ These reports indicate that death by over-

ing comprehensive health care benefits). Commentators praised the Saturn labor agreement because it encouraged the company to invest in its employees and employees to invest in their company. *See also* Robert Reich, *Labor Secretary Robert Reich Address to the Organization for a New Equality*, REUTER TRANSCRIPT REPORT, Apr. 23, 1993, available in LEXIS, News Library, Curnws File (suggesting that Saturn used on the job training, management-labor cooperation and profit sharing to create a partnership between labor and management which has made Saturn the "most successful car" of General Motors).

194. *See* THEODORE W. SCHULTZ, *INVESTING IN PEOPLE: THE ECONOMICS OF POPULATION QUALITY* 38-39 (1981) (suggesting that extensive public health programs implemented in India during the 1950s caused an extraordinary decline in the mortality rate and a 36% increase in agricultural production); Anetta Miller and Elizabeth Bradburn, *Shape Up-Or Else*, NEWSWEEK, July 1, 1991, at 42 (noting that preventable illnesses account for 15% to 25% of all employee health care costs).

195. *See* Carol Krucoff, *Energizing the Sedentary Workplace*, WASH. POST, Apr. 16, 1991, at Z16 (noting that Mesa Ltd. Part., a United States company which provides extensive preventative care programs for its employees, saves \$1.6 million annually on reduced health care expenses); Business Wire Inc., *Study Shows Mesa's Innovative Employee Fitness Program Controls Health Care Costs, Improves Productivity*, BUS. WIRE Apr. 23, 1990 (noting that Mesa's per employee health care costs dropped to 60% less than the national average and that its worker absentee average dropped to less than half the national average); Barbara Marsh, *Wellness Programs Hedge Against Future Health Care Costs*, JACKSONVILLE BUS. J., June 1, 1990, at 13 (citing a Florida health care executive who claimed that each dollar spent on preventative health care could save employers an estimated \$3.60 in lower health care costs, reduced absenteeism and increased productivity).

196. *See* Christine Woolsey, *Study Sees Big Savings From National Health Care*, BUS. INSURANCE, Nov. 4, 1991, at 2 (suggesting that United States employers would save trillions of dollars if their government established a comprehensive health care system similar to that of Canada or Germany).

197. *See* Kevin Rafferty, *Killer Karoshi: Japanese Begin to Admit That Workaholicism is Deadly*, OTTAWA CITIZEN, Sept. 6, 1992, at E6 (noting that the Japanese Labor Ministry has implemented new labor regulations, created special health care centers, and developed governmental guidelines to prevent this occurrence).

work, or "karoshi," as referred to in Japan, claims up to 10,000 victims per year in that country, where excessive work hours and no vacations are the norm.¹⁹⁸ Also, although the Japanese legislature has tried to establish new labor standards in recent years, Japanese employers and courts have largely ignored these standards.¹⁹⁹ Regardless of the fact that different societies maintain distinct work philosophies,²⁰⁰ post-Castro constitution drafters might consider the Japanese experience in deciding whether or not to recognize a right to healthy working conditions.

The right to education may further benefit a nation's productive power by ensuring that a society's workforce possesses the volume and breadth of intellectual skills needed to maintain different occupations and industries.²⁰¹ Several reports indicate that the most competitive economic actors are those who constantly train and retrain people to ensure that neither products nor workers become obsolete.²⁰² As information and technology involved in virtually all economic sectors expand at an astronomical rate,²⁰³ investment in education appears to be a commit-

198. See *id.* (demonstrating that Japanese people work more hours and take fewer vacations than people in any other industrial country).

199. See *id.* (noting that despite a Japanese regulation prohibiting employers from forcing employees to work more than eight hours a day or 40 hours a week, a judge recently permitted a large company to fire an employee because he refused to work overtime).

200. See Reid Collins, *Comparison of U.S., Japanese and German Work Ethics*, (CNN Television broadcast, Mar. 30, 1992), available in LEXIS, News Library, Cumws File (noting that people in Japan maintain a significantly stronger cultural attachment to long working hours and minimal vacations than people in the United States or Germany).

201. See SCHULTZ, *supra* note 194, at 33 (demonstrating a positive quantitative correlation between investment in education and growth in national income); *Poor Basic Skills Cost Britain 8.4 Billion A Year, Report Says*, PRESS ASSOCIATION NEWSFILE, Sept. 30, 1993, available in LEXIS, News Library, Cumws File [hereinafter *Poor Basic Skills*] (citing a study which indicates that each year British industry could save up to 8.4 billion pounds and the government could save up to 1 billion pounds if they improved the nation's education skills).

202. See *Poor Basic Skills*, *supra* note 201, (citing a study of British industries which indicates that a deficiency in essential education skills has caused labor productivity in that country to rank 20 out of 22 Organization for Economic Cooperation and Development countries); *Manufacturing: Less Is More*, ECONOMIST, May 25, 1991, at 75 available in LEXIS, News Library, Cumws File (citing a study of large manufacturing firms in Germany which indicates that the most productive firms "spent six times more per employee on education and training than their less successful rivals").

203. See MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 628 (1990) (suggesting that in order to become or stay prosperous, nations must ensure

ment that Cuba cannot afford to overlook.²⁰⁴

A highly skilled workforce also is needed to expand Cuba's base of production from today's dominant sugar economy²⁰⁵ to a diversified and industrialized system.²⁰⁶ Cuba could employ educational resources to change its economic focus from volume oriented production (i.e. agriculture and textiles) to skill oriented production (i.e. telecommunications and electronics) as several societies with roughly similar size and natural resources already have done.²⁰⁷ This change would be extremely difficult, however, without a large workforce trained in education intensive disciplines such as science, medicine, technology, and informa-

that its citizens meet the "high and rising" world standards for education and training); Cantwell, *supra* note 192, at 45 (stating that the United States' leadership in high technology industries is based on a huge national investment in education and research).

204. PORTER, *supra* note 203, at 628.

205. See David Clark Scott, *From Paltry Sugar Crop, Cubans May Reap Political Change*, CHRIS. SCI. MON., June 22, 1993, at 1 (noting that the sugar industry is the number one source of income for Cuba and that the 40% decline in sugar production during 1993 has had devastating effects on the economy); Gunn, *supra* note 1, at 3 (noting that between 1991 and 1993, state subsidies to the sugar and agricultural industries accounted for 54% of the Cuban budget deficit); Mesa-Lago, *Socio-economic Performance*, *supra* note 127, at 18 (noting that despite high expectations, the sugar industry continues to dominate the Cuban economy and efforts to diversify the nonsugar sector have failed); Preeg, *supra* note 1, at 11 (noting that in 1989 the sugar industry constituted 67% of all foreign exchange receipts in Cuba).

206. See PORTER, *supra* note 203, at 628 (suggesting that education and training can best promote industrial development); Preeg, *supra* note 1, at 13 (noting that Cuba's low-wage, highly educated work force could attract significant private investment). Cuba's historical failure to cultivate high skill jobs and to diversify its economy has fueled the nation's economic dependence on larger countries. See RONALDO MUNCK, *THE NEW INTERNATIONAL LABOUR STUDIES* 48-49 (1988) (noting that in the mid-1920s foreign owned sugar mills, which accounted for three-quarters of all Cuba's sugar production, caused Cubans to abandon most economic activities that were not linked to the sugar and coffee sectors).

207. See Preeg, *supra* note 1, at 7 (noting that during the 1980s the Caribbean economies experienced a dramatic shift in foreign exchange earnings away from agricultural commodities toward tourism, manufacturing, and service industries); Thalif Deen, *Put People in the Picture, Says UNDP*, INTER PRESS SERVICE, May 13, 1993, available in LEXIS, News Library, Cumws File (stating that the World Bank and the United Nations Development Program cited the increase in South Korea's and Thailand's overall economic growth and labor productivity by 11% a year between 1963 and 1979 in South Korea and by 63% between 1980 and 1985 in Thailand resulted from the newly industrialized countries' policy of channeling investments into education and training).

tion systems.²⁰⁸

Whereas the social and economic rights noted above often promote high quality and low cost products, too many or the wrong kind of social and economic guarantees easily could reduce national productivity.²⁰⁹ For example, universal guarantees of employment might force governments to employ workers far in excess of those which private industries would hire in their capacity as rational economic actors.²¹⁰ If a society hires a surplus of workers who are not needed to produce the desired output, the additional employment will unnecessarily raise labor costs, threaten revenue and reduce the overall profitability of items manufactured in that society.²¹¹

A constitutional right to specific labor guarantees (i.e. forty hour work week, eight hour work day, and affirmative action hiring programs) also could hinder national productivity by formalizing regulations which promote a current business goal but restrict economic vitality in the long term.²¹² If a nation's constitution universally and drastically limits the ability of employers and employees to tailor labor contracts to the needs of individual industries, then employers will be locked into a potentially unprofitable working climate, and capitalists, both domestic and foreign,

208. See Reich, *supra* note 193 (stating that technology will replace individuals who do not have basic education and training in the fields of computers, mathematics and communications); PORTER, *supra* note 203, at 627-30 (stating several reasons why governments must establish and maintain high educational standards).

209. See Schwartz, *Economic and Social Rights*, *supra* note 18, at 561 (suggesting that overly detailed labor guarantees interfere with the efficiency of market-oriented economies and that in many societies provisions of this nature have been amended frequently or abolished over time).

210. See Mesa-Lago, *Socioeconomic Performance*, *supra* note 127, at 28 (stating that during the 1960s, Cuba maintained full employment "by transforming open employment into underemployment at the expense of a sharp decrease in labor productivity" and that during the 1970s, "the priorities were reversed and labor productivity rose from bottom to top priority while full employment deteriorated"); Scott Baldauf, *US Productivity Slides*, CHRIST. SCI. MON., Aug. 11, 1993, at 20 (noting that the price of labor accounts for approximately two-thirds of the cost of a product).

211. See Chavira, *supra* note 133, at 1A (suggesting that Cuba's vertical economic organization, with the state managing all economic activity, has resulted in grossly inefficient economic production).

212. See Sunstein, *Against Positive Rights*, *supra* note 17, at 36 (suggesting that constitutions should not force governments to interfere with free markets); Schwartz, *Aiming High*, *supra* note 18, at 26 (stating that constitutional provisions that contain specific economic limitations are highly susceptible to change); Samuel Brittan, *Clues to Rising Unemployment*, FIN. TIMES, July 22, 1993, at 18 (noting that labor regulations can lead to increased unemployment).

will be less likely to invest in that country.²¹³ For this reason, future Cuban elites might decide that, although minimal labor protections can contribute to a healthy workforce, a constitution is the improper place for a detailed labor code.²¹⁴

Post-Castro constitution drafters might threaten further the economic stability of Cuba by creating promises based predominantly on social aspirations (i.e. universal guarantees to housing and food) which the government could not afford to honor without extreme difficulty.²¹⁵ If a new Cuban government were to honor such constitutional commitments, the financial base of the new government, which already would be limited due to the recent economic crisis, would drastically shrink.²¹⁶ If Cuba's new government failed to honor these guarantees, then the domestic political community and the international economic community would lose faith in the legal system, which in turn would substantially disturb the national investment climate.²¹⁷

IV. RECOMMENDATIONS: REVISITING THE 1940 CONSTITUTION

After balancing the aforementioned historical, political and economic

213. See Brandon Mitchener, *A Gloomy Birthday For German Unity*, INT'L HERALD TRIB., Oct. 2, 1992, available in LEXIS, News Library, Curnws File (noting that the new German labor policy of wage parity for East and West German workers has caused severe unemployment in East Germany and has led potential investors to favor nations which do not apply similar labor restrictions).

214. See Sunstein, *Against Positive Rights*, *supra* note 17, at 37 (noting that because they lack the bureaucratic machinery contained in the political branches of government, courts are ill-equipped to enforce specific administrative standards articulated in a national charter).

215. See Ricardo Chavira and David Marcus, *Cuba: Communist Dream on the Brink of Disaster*, CALGARY HERALD, Sept. 29, 1993, at A5, available in LEXIS, News Library, Curnws File (suggesting that Cuba currently does not even have adequate resources to fulfill its commitments to education and health care); Mesa-Lago, *Social Safety Net*, *supra* note 6, at 645 (noting that, despite Castro's promise to build 100,000 dwelling units each year, the Cuban Government built only 18,315 units between 1986 and 1989).

216. *Id.*

217. See Richard Ehrlich, *Japan: Ignoring Protests to Expand Business Reach in Asia*, INTER PRESS SERVICE, July 23, 1993, available in LEXIS, News Library, Curnws File (recognizing that Japanese companies have resisted making major investments in Cambodia due to that country's sensitive political stability); Judy Dempsey, *Clashes Erupt As Albanian Refugees Shun Repatriation*, FIN. TIMES, Aug. 12, 1991, at 2 (noting that, despite favorable economic reforms, Albania has not attracted foreign investors due to its fragile political stability).

considerations, post-Castro constitution drafters should retain from the 1940 Constitution those guarantees which are both politically and economically desirable. An appropriate example in this category of guarantees is the right to education,²¹⁸ contained in Articles 48 and 49, because it is likely to generate more money than it costs.²¹⁹ Furthermore, the language contained in these provisions, which guarantees universal and free primary and secondary education, is no more extensive than that provided in international treaties and charters of several industrializing and progressive nations.²²⁰

Although the 1940 Constitution did not include the right to receive medical care, post-Castro constitution drafters should consider creating such a right because it has become part of Cuba's historical and political legacy.²²¹ Although economic statistics indicate that the cost effectiveness of health care applies more to preventative care than to comprehensive care,²²² future Cuban decision-makers should recognize that most Cubans would sacrifice some economic stability in order to retain what they feel is one of the greatest achievements of the social revolution.²²³ Because a guarantee of complete health care is likely to be ex-

218. 1940 CONST. arts. 48-49, translated in PEASLEE, *supra* note 11, at 610.

219. See *supra* note 202 and accompanying text (noting that most state subsidized education and training programs are economically beneficial propositions).

220. See HUNG. CONST. (1990) art. 70(F), translated in National Telecommunications Information Service, *supra* note 13 (declaring that "[t]he Republic of Hungary shall ensure the right of the citizens to education" and that "[t]he Republic of Hungary shall realize this right by extending public education and making it generally available, by means of free and compulsory primary school, by secondary and higher education, accessible on the basis of ability to all, and by financial support to those being educated"); Polish Charter on Rights and Liberties (1992) art. 29(2), translated in National Telecommunications Information Service, *supra* note 13 (declaring that "[m]andatory elementary education is free in public schools"); BULG. CONST. (1991) art. 53, translated in CONSTITUTIONS, *supra* note 13 (declaring that "[t]he right to education is universal" and that "[p]rimary and secondary education in state and township schools is free").

221. See *supra* notes 140, 141, 143 and accompanying text (acknowledging the popular demand in Cuba for universal health care guarantees); Chavira, *supra* note 133, at 1A (same); *Making the Best*, *supra* note 129 at 37 (same).

222. See Frank Swoboda, *AFL-CIO Backs Tax For Health Care*, WASH. POST, Feb. 17, 1993, at F3 (noting that a comprehensive national health reform plan is likely to cost the government billions of dollars in additional spending); *Condition Critical: Canadian Health System Has Many Ills*, SAN DIEGO UNION-TRIB., Mar. 10, 1993, at B-8 (suggesting that Canada's allocation of huge financial resources to universal and comprehensive health care services has become unprofitable and unaffordable).

223. See *supra* note 140 and accompanying text (noting widespread dedication to

pensive, however, Cuba should realize that it probably will lack the resources to honor similarly strong constitutional commitments to fulfill other social goals.²²⁴

For those guarantees contained in the 1940 Constitution which are socially desirable but are also too detailed to be economically beneficial, post-Castro drafters should revise the provisions to reflect Cuba's national aspirations without binding the government to any specific action.²²⁵ For example, constitution drafters should transform the universal guarantee of eight hour work days, forty-four hour work weeks, one month annual paid vacation and twelve weeks maternity leave (Art. 66-68)²²⁶ into a general commitment calling for the use of "best efforts" or "reasonable measures" to promote healthy working conditions.²²⁷ Similarly general guarantees should be created by revising the right to social security included in Article 65²²⁸ and the right to shelter included in

the protection of education, health care and social security).

224. See *supra* note 215 and accompanying text (noting that Cuba already is struggling to honor its most basic social commitments).

225. See Schwartz, *Economic and Social Rights*, *supra* note 18, at 562-63 (recognizing the value of vague constitutional provisions for guarantees like the right to work because the unrestrictive language permits governments to maintain their strongest possible commitment to national goals regardless of the economic climate prevailing at any particular time).

226. 1940 CONST. arts. 66-68, *translated in* PEASLEE, *supra* note 11, at 623. Article 66 creates a maximum work day of eight hours which "can be reduced to six hours daily for those over fourteen and less than eighteen years of age." *Id.* art. 66(1). This Article further declares that "[t]he maximum working week shall be forty four hours, equivalent to forty- eight in wages, excepting these industries which, because of their nature, must produce uninterruptedly during a certain part of the year." *Id.* art. 66(2). Article 67 declares that "[t]he right to a paid vacation of one month for each eleven months of work in each calendar year is established for all manual and intellectual workers." *Id.* art. 67(1) Article 68 declares that "[d]uring the six weeks immediately preceding childbirth, and the six that follow it, [a female employee] shall enjoy compulsory rest, with compensation equal to what she was paid for working, retaining her position and all the rights attached to it and covered by her labor contract" and that "[i]n the nursing period she shall be allowed two special rest periods a day, of one-half hour each, to nurse her child." *Id.* art. 68(3).

227. See Charter on Rights and Liberties (Pol. 1992) art. 31, *supra* note 13 (promoting "safe and hygienic working conditions" by declaring that national legislation will regulate minimum working conditions and annual paid vacation periods); BULG. CONST. (1991) art. 48(5), *supra* note 13 (guaranteeing the right to safe working conditions, minimum wages, and compensation for work as provided by law); YUGO. CONST. (1992) art. 56, *supra* note 13 (guaranteeing work hours, rest and vacation, as defined by law).

228. 1940 CONST. art. 65, *translated in* PEASLEE, *supra* note 11, at 622-23. This

Article 79.²²⁹ These modifications would allow Cuba to honor the spirit of its constitutional heritage and at the same promote economic stability by avoiding the restrictive language associated with excessively detailed rights.²³⁰

Post-Castro drafters should not include in the new charter a universal right to employment, as mandated by Article 60,²³¹ or to irrevocable property ownership, as mandated by Article 91,²³² because Cubans no longer consider these guarantees to be sacrosanct.²³³ In fact, many people on the island are skeptical of these promises because they have witnessed in recent years the right to employment become the right to underemployment and the right of all people to own property become a right reserved to the state.²³⁴ Future Cuban legislators should also de-

provision declares that "[s]ocial security is established as an irrenounceable and non-prescribable right of workers", *id.* art. 65(1), and that "[s]ocial security funds or reserves cannot be subjected to transfer, nor can they be disposed of for purposes other than those for which they were created." *Id.* art. 65(4).

229. *Id.* art. 79. This provision declares that "[t]he Nation shall promote the building of cheap dwellings for workers", and that "[t]he law shall determine the enterprises which, because they employ workers away from populated places, shall be required to furnish to the workers suitable dwellings, schools, infirmaries, and other services and attentions favorable to the physical and moral welfare of the worker and his family." *Id.*

230. See *supra* note 225 and accompanying text (suggesting that loosely defined rights for certain constitutional guarantees may work to a nation's benefit).

231. 1940 CONST. art. 60, translated in PEASLEE, *supra* note 11, at 622. This provision declares that "[l]abor is an inalienable right of the individual" and that "[t]he Nation shall employ the resources within its reach to furnish employment to every one who lacks it and shall assure to every manual or intellectual worker the economic conditions necessary to a fitting existence." *Id.*

232. See *supra* note 103 (reciting Article 91 of the Cuban Constitution).

233. See Farah, *supra* note 3, at A1, A27 (noting that during the early 1990s, the Castro government introduced market initiatives that permitted managers of state owned farms and enterprises to fire inefficient workers and lay off surplus labor); Gunn, *supra* note 1, at 4 (noting that the 1992 Constitution establishes a commitment to state ownership of property that is considerably less serious than the commitments created by the previous three Cuban constitutions).

234. See *supra* note 209 and accompanying text (stating that the guarantee of full employment gives rise to unintended and undesirable results). During the era of the 1976 and 1992 constitutions, Cuban governments increasingly restricted the right to private property in reality as well as in effect. Compare 1940 CONST. art. 87, translated in PEASLEE, *supra* note 11, at 626 (declaring that "[t]he Cuban Nation recognizes the existence and legitimacy of private property in its broadest concept as a social function and without other limitations than those which, for reasons of public necessity or social interest, are established by law") with 1976 CONST. art. 14, translated in

cline to include universal promises of employment and property ownership also in the new Cuban constitution because these provisions seriously restrict the nation's ability to eliminate unprofitable economic resources and to pursue economic development.²³⁵

CONCLUSION

Cuba in the 1990s maintains a fragile legal system. Because Cuba suffers from political and economic isolation, the government is unable to honor the extensive social and economic commitments of its 1992 Constitution. Furthermore, because Castro retains the ability to suspend, redefine or abandon Cuban constitutional rights at any time, one cannot assume that either he or the legislature will enforce or recognize any of these allegedly guaranteed rights. If the Cuban Government wants to earn the confidence of its citizens, potential investors, and foreign governments, it must create a constitution providing rights that all future Cuban administrations can and will enforce.

The 1940 Constitution provides an excellent reference tool from which post-Castro constitution drafters might work. This document contains a broad array of governmental obligations that the Cuban Government has honored or attempted to honor for more than half a century.²³⁶ Instead of starting anew, post-Castro constitution drafters should reexamine this document to learn how the language of each provision affected the political, economic and social landscape of Cuba.

In 1940, and throughout the history of the island, the Cuban people have expressed a strong desire for their government to provide social and economic commitments.²³⁷ The national ambition, to create a Cuba that satisfies the most essential human needs of its citizens, remains strong today.²³⁸ For this reason, the creation of a new constitution

De la Cuesta, CONST., *supra* note 122, at 6 (declaring that all the people own all the property) and 1992 CONST. art. 19, *translated in* FBIS, *supra* note 134, at 3 (same).

235. See *supra* note 209 and accompanying text (implying that full employment and economic productivity are antithetical goals). The 1940 constitution explicitly discourages economic development with the use of foreign capital. See 1940 CONST. art. 90, *translated in* PEASLEE, *supra* note 11, at 626 (declaring that "[t]he acquisition and possession of land by foreign persons and companies shall be restrictively limited by law, which shall provide measures tending to restore land to Cubans").

236. *Supra* notes 218-30 and accompanying text.

237. See *supra* note 10 and accompanying text (suggesting that Cuba maintains a strong historical, ethnic and cultural attachment to social commitment).

238. See *supra* note 143 and accompanying text (noting the popular support for Cuban social services); Gunn, *supra* note 1, at 10 (concluding that Cubans would

without social and economic guarantees would be contrary to the political will of the Cuban people.

In responding to the political will of the people, however, post-Castro constitution drafters must exercise great care in distinguishing legitimate national expectations from generic national aspirations.²³⁹ Future Cuban elites bear the responsibility of creating a set of social and economic commitments that the people will embrace and the government can provide without undue hardship. Because Cuba's leaders structured Cuban society during the last several decades so as to uphold these guarantees, constitution drafters may struggle in delineating a realistic set of undeniable rights. They must, nevertheless, undertake this effort. The provisions they select may determine whether and to what extent the post-Castro government succeeds.

sacrifice greater economic prosperity in order to preserve a strong social safety net).

239. See *supra* note 160 and accompanying text (suggesting that a state will jeopardize the legitimacy of its constitution if it creates excessive, unenforceable or ill-defined rights).