

Article

**Globalization and the Future of
Constitutional Rights**

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I. INTRODUCTION

There is one word today with the power to unleash mass protest in the streets of Seattle, Genoa, and Hong Kong.¹ That word is globalization. Definitions of the term vary, but it typically refers to both a process of change and a resulting set of conditions²: it is a process by which “technological, economic,

1. See, e.g., MANFRED B. STEGER, *GLOBALIZATION: A VERY SHORT INTRODUCTION* 122–28 (2003) (describing violent anti-globalization protests in Seattle, London, Prague, Davos, Quebec City, Gothenberg, and Genoa); JOSEPH E. STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 3 (2002) (observing ruefully that “[v]irtually every meeting of the International Monetary Fund, the World Bank, and the World Trade Organization is now the scene of conflict and turmoil”); Richard Falk, *Interpreting the Interaction of Global Markets and Human Rights*, in *GLOBALIZATION AND HUMAN RIGHTS* 61, 71–73 (Alison Brysk ed., 2002) (discussing the repercussions of the “battle for Seattle”); Richard Bondreaux & Marjorie Miller, *Genoa on Minds of Protesters*, *L.A. TIMES*, July 18, 2001, at A1 (describing the “populist movement” of growing size and sophistication behind both the 2001 riots in Genoa and the 1999 riots in Seattle).

2. See, e.g., ROBERT O. KEOHANE, *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* 15 (2002) (proposing for purposes of clarity a distinction between “globalism,” “which describes a state of the world,” and “globalization,” which “describes a *trend* of increasing transnational flows

and political innovations . . . have drastically reduced the barriers to economic, political, and cultural exchange,”³ resulting in not only “increasing transnational flows and increasingly thick networks of interdependence,”⁴ but also an expansion of the “scale on which power is organized and exercised.”⁵ For some, globalization promises peace and prosperity on an unprecedented scale; for others, it portends injustice, inequality, and the demise of community and self-government.⁶ Across the political spectrum, it evokes a sense that largely uncoordinated action by faceless actors is changing political, social, and eco-

and increasingly thick networks of interdependence”); STEGER, *supra* note 1, at 7 (lamenting that the term “globalization” has been used in indiscriminate ways “to describe a process, a condition, a system, a force, and an age,” and urging a distinction between the process of “globalization” and the condition of “globality”); David L. Richards et al., *Money with a Mean Streak? Foreign Economic Penetration and Government Respect for Human Rights in Developing Countries*, 45 INT’L STUDIES Q. 219, 220 (2001) (identifying “globalization” as an abstract “umbrella concept” that “must be defined in every context” lest it lack “operational meaning or significance”).

3. Daniel W. Drezner, *Globalization and Policy Convergence*, 3 INT’L STUD. REV. 53, 53 (2001); *see also, e.g.*, STIGLITZ, *supra* note 1, at 9 (defining globalization as “the closer integration of the countries and peoples of the world which has been brought about by the enormous reduction of costs of transportation and communication, and the breaking down of artificial barriers to the flows of goods, services, capital, knowledge, and (to a lesser extent) people across borders”).

4. KEOHANE, *supra* note 2, at 15 (emphasis omitted).

5. David Held & Anthony McGrew, *The Great Globalization Debate: An Introduction*, in THE GLOBAL TRANSFORMATIONS READER 1, 8 (David Held & Anthony McGrew eds., 2003).

6. *See, e.g., id.* at 28-30 (contrasting “neoliberal” and “social democratic” assessments of globalization); Richards et al., *supra* note 2, at 221–25 (contrasting the hopeful predictions of the “liberal neoclassical approach” to globalization with the glum predictions of “dependency theory”). *Compare, e.g.*, THOMAS L. FRIEDMAN, THE WORLD IS FLAT 419–29 (2004) [hereinafter FRIEDMAN, THE WORLD IS FLAT] (arguing that globalization generates economic ties that prevent military conflict), *and* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 248–61 (2000) [hereinafter FRIEDMAN, THE LEXUS AND THE OLIVE TREE] (same), *and* STIGLITZ, *supra* note 1, at 18, 20–21 (arguing that globalization is inherently “neither good nor bad” but “has the *power* to do enormous good,” as demonstrated by the recent successes of East Asia), *with, e.g.*, STEPHEN GILL, POWER AND RESISTANCE IN THE NEW WORLD ORDER 123–28, 131–35, 139–41 (2003) (characterizing “economic globalization” as a form of “oligopolistic neo-liberalism” that privileges corporate capital, constrains democracy, widens social and economic inequalities), *and* DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR? 2–3 (1997) (arguing that globalization “is exposing a deep fault line between groups who have the skills and mobility to flourish in global markets” and those who do not, and chastising the “standard approach” of economists for failing to consider the resulting “social tensions”).

conomic life in ways that we have yet to realize and that we cannot prevent. In short, it is a word coined to describe a future that we have created yet cannot fully control.

There can be little doubt that changes of this magnitude in the global order will influence the development of constitutional law.⁷ The question is how. Yet the subject of globalization has barely penetrated the consciousness of constitutional scholars in this country.⁸ The notable exception in this regard has been a torrential outpouring of literature on the propriety of judicial citation to foreign law,⁹ prompted by the Supreme

7. See, e.g., MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 143 (2003) (deeming it “quite likely” that “constitutional law will be transformed by globalization”); Frank L. Michelman, *W(h)ither the Constitution?*, 21 CARDOZO L. REV. 1063, 1063 (2000) (observing that globalization is “fraught with possible effects on constitutionalism and constitutional rights”); *id.* at 1064–65 (arguing that globalization has the potential to render our own Constitution a “largely empty shell” by “removing from the sway of effective national governance huge swathes of activity,” and thus rendering meaningless “that (very large) part of the country’s constitutional law whose raison d’être is to set up a fair, efficient, and broadly acceptable lawmaking system”);

8. Observes Peter Spiro:

[G]lobalization appears barely to have registered on the consciousness of constitutional law scholars. The legal academy appears to be suspended in a sort of splendid isolation, either oblivious to recent developments (unlikely, given the widespread attention afforded them in the mainstream media), persuaded that globalization is irrelevant to the study of constitutional law, or ill-equipped to process the implications of the change.

Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 650–51 (2002).

9. E.g., Roger P. Alford, *Citation to Foreign Precedent in Domestic Jurisprudence: Four Mistakes in the Debate On Outsourcing Authority*, 69 ALB. L. REV. 653, 658–60 (2006) [hereinafter Alford, *Outsourcing Authority*] (reviewing recent highlights of the literature); Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 639–714 (2005) (assessing the appropriateness of “constitutional comparativism” against various theories of constitutional interpretation); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 125–27 (2005) (arguing that the propriety of citing foreign authority necessarily depends upon the context and manner in which the authority is used); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 727–742 (2005) (contending that the Supreme Court’s use of foreign authority is no more troubling from a democratic perspective than the use of treatises, dictionaries, microeconomic theories, “studies of how children play with dolls,” “law office history,” or any number of other sources to which judges have on occasion resorted); Austen Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 ILL. L. REV. 637, 642–80 (surveying the recent debate, and arguing at length against the “sovereignist” position that judicial use of foreign law undermines American sovereignty); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV.

Court's use of foreign authority in a recent string of controversial cases.¹⁰ Judicial use of foreign law is not, however, an isolated phenomenon rooted in the demands of constitutional adjudication or the character of legal reasoning. It is, rather, an unsurprising byproduct of globalization: it has been encouraged by advances in transportation and communication, and by the deepening of political, economic, cultural, and legal ties, that have made it easier for all varieties of people—including judges—to interact with their foreign counterparts, and for all varieties of ideas—including jurisprudential ones—to travel across borders.¹¹ Viewed in proper perspective, the citation practices of a handful of judges are but a tiny fraction of much greater developments that lie well beyond judicial control yet threaten to have a tremendous impact on the worldwide evolu-

131, 136–46 (2006) (arguing that the Condorcet Jury Theorem supports the judicial use of law from other jurisdictions); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31, 84–90 (2005) (warning against “judicial cosmopolitanism” on the part of American judges).

10. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (citing foreign law in the course of holding that execution of the mentally retarded violates the Eighth Amendment); *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (citing foreign law in the course of holding that the criminalization of same-sex sodomy violates privacy interests protected by the Due Process Clause); *Roper v. Simmons* 543 U.S. 551, 578 (2005) (citing foreign law in the course of holding that execution of juveniles violates the Eighth Amendment).

11. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 70 (2004) (describing a “growing dialogue” among high court judges around the world, conducted through “mutual citation and increasingly direct interactions”); Lawrence M. Friedman, *Erewhon: The Coming Global Legal Order*, 37 STAN. J. INT'L L. 347, 353–64 (2001) (describing the content of an emerging “global legal order,” and relating its emergence to technological change and the globalization of trade and culture); The Hon. Claire L'Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 16–27 (1998) (describing how increased “dialogue” among judges and courts is promoting the “globalization” of human rights law); Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 436–37 (2003) (tying the “increasing flow across borders of so many things” to the emergence of a “common culture” among judicial bodies around the world); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192–204 (2003) (describing a “global community of courts” that engages in “constitutional cross-fertilization”); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L. L. 1103, 1116–22 (2000) [hereinafter Slaughter, *Judicial Globalization*] (discussing how increased face-to-face contact among constitutional judges from different countries is promoting “legal cross-fertilization” in the areas of human rights and constitutional law); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 99–100, 103 (1994) (describing increased “judicial dialogue” and “cross-fertilization,” particularly within Europe).

tion of constitutional law.

It is this larger context that has gone unexplored by constitutional scholars, to the point that the inattention of the scholarly community has itself become a source of concern.¹² As Peter Spiro suggests, much of this failure may have to do with a certain narrowness of outlook and training on the part of the typical public law scholar.¹³ Notwithstanding the recent surge of interest in the legitimacy of judicial citation to foreign law, it is still not the habit of legal scholars to look outside the nation's borders for sources of influence on constitutional law.¹⁴

12. See, e.g., Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125, 154–55 (2005) (criticizing extant legal scholarship for its failure to explain “why, when, and how” the “large-scale migration of constitutional ideas” “has been occurring or is likely to occur,” and urging investigation of the “interlinks . . . between the triumph of democracy, the emergence of an economic and cultural ‘global village,’ and the transnational migration of constitutional ideas”); Robert Post, *The Challenge of Globalization to American Public Law Scholarship*, THEORETICAL INQUIRIES IN L. 1, 2–15 (2001) (suggesting that “the basic intellectual orientation of current American public law scholarship” renders it ill-suited to grappling with the normative dilemmas posed by globalization); David Schneiderman, *Comparative Constitutional Law in an Age of Economic Globalization*, in DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW 237, 238–41 (Vicki C. Jackson & Mark Tushnet eds., 2002) (denouncing the field of “comparative constitutional law” for its “silence” and “complicity” in the face of “economic globalization”); Spiro, *supra* note 8, at 650–51 (criticizing constitutional scholarship for its failure to contemplate the implications of globalization); Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1654 (1994) (questioning “why we constitutional scholars spend our time working over one admittedly interesting Supreme Court opinion rather than devoting time to thinking about what it would mean to have a constitutional democracy in a global economy”); see also Frederick Schauer, *The Politics and Incentives of Legal Transplantation*, in GOVERNANCE IN A GLOBALIZING WORLD 253, 254 (Joseph S. Nye, Jr. & John D. Donahue eds., 2000) (offering hypotheses as to the causes and patterns of “legal transplantation and legal globalization,” and calling for further investigation and “systematic and rigorous testing”).

Constitutional scholarship aside, however, the legal academy appears to be gradually paying greater attention to questions of a global character. See H. Patrick Glenn, *A Transnational Concept of Law*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 839, 843 fig.37.1 (Peter Cane & Mark Tushnet eds., 2003) (graphing the increase in the number of law review articles that contain “global” or “globalization” in their titles).

13. See Spiro, *supra* note 8, at 650–51 (speculating that constitutional scholars have ignored globalization either because they are “persuaded that globalization is irrelevant to the study of constitutional law,” or because they are “ill-equipped to process” its implications).

14. See, e.g., Mayo Moran, *Inimical to Constitutional Values: Complex Migrations of Constitutional Rights*, in THE MIGRATION OF CONSTITUTIONAL IDEAS 233, 233 (Sujit Choudhry ed., 2007) (describing constitutional law as the

Indeed, the Court's recent uses of foreign law came as a shock precisely because constitutional lawyers are not accustomed to thinking of foreign law as relevant. Nor is the study of globalization likely to appear especially inviting to the average constitutional scholar. To peer beyond the pages of the nation's law reviews is to discover quickly that the academic literature on globalization is vast and reaches every corner of the social sciences, each with its own peculiarities of method and jargon to discourage the casual visitor.

Whatever their reasons for doing so, it is a mistake for constitutional scholars to ignore globalization. The goal of this Article is to place globalization on the agenda of constitutional scholarship—where it belongs. It seeks to do so by proposing a provocative hypothesis about the impact of global investment and migration patterns on the worldwide development of certain constitutional rights. Specifically, this Article discusses the potential for a constitutional “race to the top” driven by competition among countries for capital and skilled migrants: as capital and skilled labor become increasingly mobile, countries will face a growing incentive to compete for both by offering bundles of human and economic rights that are attractive to investors and elite workers. Such people are likely to favor jurisdictions that respect “first generation” individual rights—namely, civil liberties and property rights of the type found in the U.S. Constitution.¹⁵

“last stronghold of domestic law”).

15. The question of whether competition for capital and skilled labor might also encourage countries to offer generous bundles of “second generation” socioeconomic rights or “third generation” group rights, of the kind sometimes expressed in more recent constitutional documents, must be left for another day. See, e.g., WILLIAM H. MEYER, HUMAN RIGHTS AND INTERNATIONAL POLITICAL ECONOMY IN THIRD WORLD NATIONS: MULTINATIONAL CORPORATIONS, FOREIGN AID, AND REPRESSION 132 (1998) (defining “first generation rights” as “civil-political,” not “socioeconomic” in nature); Jeffrey Goldsworthy, *Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 14, at 115, 120 (contrasting judicial enforcement of “‘first generation’ or ‘negative’ rights” with that of “socio-economic rights”). It is not clear, in particular, whether the logic of the “race to the top” argument applies with much force, if at all, to second-generation rights. Investors and skilled workers are, by definition, more likely to possess the resources to provide for themselves the kinds of basic necessities such as food, housing, and education that are often identified as second-generation human rights. Countries may be reluctant to offer generous bundles of such rights not simply because it is expensive to do so, but also because such a policy may prove more attractive to indigents and low-skilled workers than to the wealthy and well educated. The global survey data dis-

Part II sets the conceptual stage by making the case for the relevance of globalization to constitutional law. It contends that a profound transformation of the economic and political environment, of the type wrought by globalization, is bound to render certain constitutional practices more attractive or rewarding than others. In particular, changing patterns of investment and migration are likely to influence human rights and property rights practices, and vice versa.

Part III sets forth five alternative hypotheses as to the likely impact of globalization on domestic law and policy. These include not only the hypothesis of a “race to the top” driven by international competition, but also the competing hypotheses of a “race to the bottom,” policy cooperation among states, policy specialization among countries determined to carve out unique competitive niches for themselves, and finally a lack of any systematic effect upon domestic law at all. Part IV introduces various empirical measures that indicate rising worldwide levels of globalization and protection for property rights and civil liberties. The direction and correlation of these trends suggest that some form of a “race to the top” hypothesis is in fact empirically plausible.

Part V sets forth the logic of the argument that competition for investment capital encourages countries to offer attractive bundles of both property rights and human rights. In doing so, however, it also suggests that competition in the area of property rights may be self-limiting because investors are unlikely to reward a rigid, *Lochner*-style¹⁶ understanding of such rights that leaves governments no leeway to tax, spend, or regulate in ways that promote stability and productivity. On the basis of recent empirical research, Part V also rejects the sometimes popular view that foreign investment has a negative impact on the observance of human rights.

Part VI considers the potential impact of competition for human capital on worldwide levels of human rights. Part VI.B

cussed below in Part VI.D. tends to confirm that first-generation rights offer governments a cheaper and more effective way of attracting human talent than second-generation rights: educated workers around the world appear to place greater value upon individual freedom, for example, than substantive equality. See *infra* Part VI.D. (discussing the findings of the World Values Survey regarding the attitudes of educated elites toward individual rights and freedoms).

16. *Lochner v. New York*, 198 U.S. 45 (1905) (striking down a state law limiting bakery working hours as an unconstitutional limitation upon freedom of contract).

describes how restrictions on labor mobility—including those imposed by immigration law—increasingly discriminate in favor of skilled workers, for whom governments now compete. Part VI.C introduces the concept of a “world market” in human rights, in which countries bid for skilled workers by offering both pecuniary and nonpecuniary inducements that include greater or lesser degrees of personal freedom, while skilled workers demonstrate a willingness to pay for such freedom by forgoing other types of compensation. Conversely, countries that do not boast the rights bundles available elsewhere must in effect pay skilled workers what might be called a “freedom premium” in order to compete successfully in the global market for human capital.

Parts VI.D and VI.E address theoretical objections to the idea of a “race to the top” in the area of human rights. Drawing upon global survey data on the preferences of educated workers, Part VI.D considers, and rejects, the hypothesis that countries will compete for skilled migrants not by offering more generous bundles of rights, but rather by offering divergent or specialized bundles of rights that vary in their overall generosity. Divergence is not a sensible strategy for countries to pursue, the data suggests, because educated workers share homogenous preferences that are most likely to be satisfied by a generous bundle of first-generation rights. Part VI.E evaluates the possibility that repressive regimes might adopt a two-tiered strategy of extending certain rights only to elite workers while withholding them from the remainder of the population. It identifies several reasons why such a strategy is unlikely to prove wholly successful at attracting human capital.

Finally, this Article concludes by emphasizing the case for immigration policy that enables skilled workers to migrate, and by identifying avenues for further research, including the ultimate empirical validity of the “race to the top” hypothesis and the complex causal relationship between globalization, democratization, and rights.

II. THE RELEVANCE OF GLOBALIZATION TO CONSTITUTIONAL LAW

Over the last sixty years, the world has witnessed a wave of constitutionalism.¹⁷ In Central and Eastern Europe alone,

17. See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 214 (2004) (observing that

more than twenty-five national constitutions have been adopted or revamped since the end of Cold War; a trend of similar magnitude has occurred in Africa.¹⁸ In Asia, newly established and long-dormant courts alike have begun to flex the power of judicial review.¹⁹ These developments have been mirrored by regional initiatives that have swept up the old

“the world seems to have been seized by a craze for constitutionalism and judicial review”); Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997) (declaring that “[t]he Enlightenment hope in written constitutions is sweeping the world,” and speculating that constitutionalism may be “on the brink of a world-wide hegemony”); Philip Alston, *A Framework for the Comparative Analysis of Bills of Rights*, in PROMOTING HUMAN RIGHTS THROUGH BILLS OF RIGHTS: COMPARATIVE PERSPECTIVES 1, 1 (Philip Alston ed., 1999) (“[W]ithin the course of the last decade alone, bills of rights have assumed particular and renewed importance in an extraordinary number of countries in all parts of the world...not only their number but also their importance (in formal terms, at least) have increased significantly.”); Goldsworthy, *supra* note 15, at 116 (describing the “common model” of liberal democratic constitutionalism” that “has been adopted in most countries that have achieved independence since the Second World War”) (citing DAVID BEATTY, *THE ULTIMATE RULE OF LAW* ch.1 (2004)); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 21 tbl.1, 69 (David Trubek & Alvaro Santos eds., 2006) (identifying constitutions, treaties, and charters as the defining legal instruments of the current era, and speculating as to the causes of the global spread of judicial review); Michel Rosenfeld & András Sajó, *Spreading Liberal Constitutionalism: an Inquiry into the Fate of Free Speech Rights in New Democracies*, in THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra*, at 142, 142 (commenting on the “proliferation of transitions from authoritarianism and colonial rule to constitutional democracy in virtually every corner of the world” over the second half of the twentieth century).

18. See, e.g., Alston, *supra* note 17, at 1 (describing the “prolonged fit of ‘constitutional fever’” occurring in former Soviet satellite states as well as in Africa); Charles Manga Fombad, *A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 African Constitutions*, 2007 PUB. L. 233, 233–34 (observing that “[c]onstitutional reforms have dominated all political discourse in Africa since the current transition from authoritarian to democratic rule started in the early 1990s,” and discussing the ensuing wave of constitutional drafting efforts to establish courts with sufficient independence to protect human rights); see also Christof Heyns, *The African Charter on Human and Peoples’ Rights*, in THE ESSENTIALS OF HUMAN RIGHTS 3, 3–6 (Rhona K.M. Smith & Christien van den Anker eds., 2005) (discussing the African Union’s adoption and implementation of regional human rights instruments and adjudicatory bodies).

19. See TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 106–246 (2003) (tracing the development of judicial review in Taiwan, Korea, and Mongolia); Tom Ginsburg, *Constitutional Courts in New Democracies: Understanding Variation in East Asia*, 2 GLOBAL JURIST ADVANCES 1, 1–24 (2002) (discussing, and attempting to explain, the “emergence of powerful constitutional courts” in Thailand, South Korea, Mongolia, and Taiwan).

wealthy states of Europe²⁰ and the small developing states of the Caribbean alike.²¹ The spread of constitutionalism at the national and regional levels has occurred in symbiosis with the post-war proliferation of international human rights instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and a growing array of United Nations protocols and conventions.²² It is almost without exception, moreover, that the constitutions fashioned during this period have expressed a “core set” of civil and political rights that include:

the right to life, freedom from torture, freedom from arbitrary arrest and detention, the right to be presumed innocent, the right to privacy, freedom of movement, the right to property, freedom of thought, conscience, and religion, freedom of expression, freedom of assembly and association, and the right to participate in government.²³

20. See, e.g., CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Dec. 7, 2000, art. 52, O.J. (C 364) 1 (2000); European Commission, *Summary of the Agreement on the Constitutional Treaty*, June 28, 2004, at 2, at http://europa.eu.int/futurum/documents/other/oth250604_2_en.pdf (explaining how the proposed E.U. “Constitution for Europe” would incorporate the currently nonbinding Charter of Fundamental Rights); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 218–19, 230–43, 245–46 (2000) (offering a detailed account of the evolution and impact of the European Convention on Human Rights, which is an instrument of the Council of Europe and remains distinct from both the Charter of Fundamental Rights and the proposed Constitution for Europe).

21. See Alston, *supra* note 17, at 2 (describing the initiative on the part of twelve states that led in 1997 to adoption of the Charter of Civil Society for the Caribbean Community); Adelle Blackett, *Toward Social Regionalism in the Americas*, 23 COMP. LAB. L. & POL’Y J. 901, 937–38 (2002) (discussing the Charter of Civil Society for the Caribbean Community and its pledges of protection for a variety of civil rights).

22. See, e.g., SLAUGHTER, NEW WORLD ORDER, *supra* note 11, at 79–80 (observing that “pockets of global jurisprudence” generated by a combination of national constitutions and international human rights treaties are emerging in the area of “basic human rights”); Vicki C. Jackson & Mark Tushnet, *Introduction to DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* xiv–xv (Vicki C. Jackson & Mark Tushnet eds., 2002) (describing an “upward-and-downward flow” between domestic and international human rights law, in which the development of domestic human rights jurisprudence fuels the development of international human rights jurisprudence, and vice versa). For a representative list of current international human rights instruments, see United Nations Office of the High Commissioner for Human Rights, International Human Rights Instruments, <http://www.unhcr.ch/html/intlinst.htm> (last visited Aug. 8, 2006).

23. Alston, *supra* note 17, at 2; see also, e.g., CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 5–6 (1998) (describing the occurrence of substantively parallel “rights revolutions” in the United States and other countries); Goldsworthy,

In practice, of course, constitutions do not always deliver what they promise. Written protections for the rights of the individual, in particular, have too often amounted to a cynical exercise in form over substance that deflects attention from actual practice.²⁴ Yet the extent of this constitutional mimicry—the extent to which even wrongdoers feel compelled to employ the same legal forms and recite the same verbal incantations—remains a conspicuous fact. Why have national and supranational governments alike flocked to adopt constitutions that recite the same core set of rights? Is this trend itself a form of globalization?

To speak of globalization is to speak of rapid and extensive transnational flows in money, goods, services, people, ideas, culture, and technology. The membrane of the nation-state is becoming increasingly permeable: not only are governments lowering the barriers to transnational exchange, but their capacity to enforce those barriers is continually under-

supra note 17, at 116–18 (setting forth the defining elements of the “common model” of “liberal democratic constitutionalism” that has become ascendant in the last half-century); Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 61, 62 (Vicki C. Jackson & Mark Tushnet eds., 2002) (discussing the “common core of basic rights and liberties, both substantive and procedural,” shared by newer and older constitutions alike); Law, *supra* note 9, at 687–726 (identifying and explaining the emergence of “generic” analytical and doctrinal approaches that appear in constitutional jurisprudence around the world).

24. As Tom Ginsburg puts it, constitutionalism now “commands such normative power as an aspiration that it is invoked by regimes that make no pretense of submitting to constitutional control.” GINSBURG, *supra* note 19, at 9; see, e.g., JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 170–71 (2005) (arguing that participation in human rights conventions has served to “exonerate” and “elevate” the stature of states that chronically abuse human rights); Alston, *supra* note 17, at 3 (observing that many constitutional rights have been, from the moment of their adoption, nothing more than “tokenistic concessions to normative decency which bore no relationship to the realities of the society and which were accompanied neither by the political will to take them seriously, nor accompanied by the institutional means which might have made them viable”); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most*, 44 *J. PEACE RESEARCH* 407, 415–21 (2007) (concluding that the treaty commitments to human rights so often made by repressive governments lack any clear effect in either the short run or long run); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935, 1940 (2002) (finding that human rights abuses often worsen after ratification of human rights treaties, and raising the possibility that “human rights treaties may sometimes lead to poorer human rights practices”).

mined by advances in transportation, communication, miniaturization, and digitization technology. Thanks to these advances, persons who once interacted with each other rarely or with difficulty for reasons of time and space can now influence each other quickly and with ease.

The spread of constitutional ideas has no doubt been facilitated by these developments. Commentators have remarked specifically upon the growth of legal “cross-fertilization” in the areas of human rights and constitutional law.²⁵ That constitutional law is riding the wave of globalization should come as little surprise. By their very nature, law and policy lend themselves to rapid and extensive distribution: not only are they intangible, but they are also conveyed in standardized formats (cases, statutes, constitutions) over extensive and well established avenues of transmission, both print and electronic.²⁶ Increasingly, scholars have remarked upon the contagion-like ability of economic policy and constitutional law to spread from country to country. Professors Simmons and Elkins write, for example, of “some kind of policy contagion involved in the liberalization of foreign economic policy.”²⁷ Professors March and Olsen observe that “democratic norms are contagious” and “spread through international contact to coun-

25. *E.g.*, Slaughter, *Judicial Globalization*, *supra* note 11, at 1116–19; *see supra* note 11 (citing other scholarship on the subject of legal “cross-fertilization,” “judicial dialogue” and “judicial globalization”).

26. *See* Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 985 (1981) (finding “little evidence of regionalism in the diffusion of tort doctrines,” and attributing the lack of regionalism to the fact that “[t]he legal system developed rather early a method for communicating court decisions that is both formally structured and geographically unlimited”); Peter Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870–1970*, 19 L. & SOC. REV. 449, 471 (1985) (reporting that the “inter-court communication network” within the United States has become “much more homogenous over time,” such that by the early twentieth century, “[a]ll courts were more likely to cite all others; all courts produced more cases; and differences among the courts in the rates at which they transmitted precedent declined”).

27. Beth A. Simmons & Zachary Elkins, *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION 275, 282–83 (Miles Kahler & David A. Lake eds., 2003); *see also* Dennis P. Quinn & A. Maria Toyoda, *Ideology and Voter Preferences as Determinants of Financial Globalization*, 51 AM. J. POL. SCI. 344, 344, 353–59 (2007) (concluding on the basis of empirical analysis that “the spread of ideas”—specifically, “capitalist” and “anti-capitalist ideology”—contributes significantly to the adoption and rejection of capital account liberalization policies).

tries with less secure democratic traditions.”²⁸ Professors Goodman and Jinks suggest the existence of a “contagion’ effect” at work in the international spread of women’s rights.²⁹

Yet the consequences of globalization for constitutional law are not limited to the rapid and extensive propagation of ideas. Globalization also influences the *success* of constitutional law. A constitution consists of a set of rules and practices that both enable and constrain public and private activity.³⁰ Like the operating system of a computer,³¹ it provides the foundation of legal and political activity and shapes a nation’s ability to achieve its goals. A successful constitution is nothing less than a major feat of social engineering with ramifications for all aspects of a country’s performance.³² A substantial body of research demonstrates, in particular, that the quality and characteristics of a country’s legal infrastructure—not least of all its constitutional law—affect its prospects for economic prosperity.³³ Constitutional law and constitutional rights are an inte-

28. James G. March & Johan Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT’L ORG. 943, 962 (1998).

29. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 650 (2004).

30. Cf. STEPHEN HOLMES, PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 162, 164 (1995) (characterizing constitutional rules as “constitutive rules” that do not merely constrain certain practices, but also “make a practice possible for the first time”).

31. See FRIEDMAN, THE WORLD IS FLAT, *supra* note 6, at 54 (likening a country’s legal infrastructure to the operating system of a computer).

32. Cf. E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS 293 (1954) (observing that societies are forced to develop sophisticated forms of law in order to address problems generated by increasing social heterogeneity and complexity).

33. See, e.g., DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 112 (1990) (arguing that economic development and industrialization depend heavily upon the existence of a legal system that provides adequate protection for property rights and private business activity); TORSTEN PERSSON & GUIDO TABELLINI, THE ECONOMIC EFFECTS OF CONSTITUTIONS 3 (2003) (discussing the correlation between constitutional rules, policy decisions and economic outcomes); Thorsten Beck et al., *Law, Endowments, and Finance*, 70 J. FIN. ECON. 137, 160–61, tbl.4 (2003) [hereinafter Beck et al., *Law, Endowments, and Finance*] (finding that countries with a British common law foundation offer greater protection for property rights and, consequently, have higher levels of capital market development than countries with legal systems based on French civil law, even controlling for per capita income levels, religious and ethnic composition, and other variables); Thorsten Beck et al., *Why Does Legal Origin Matter?*, 31 J. COMP. ECON. 653, 655 (2003) [hereinafter Beck et al., *Legal Origin*] (suggesting that common law countries enjoy more advanced financial development because common law systems adapt better to changing conditions); Daniel

gral part of the legal infrastructure that determines whether and to what extent will thrive as barriers to transnational interaction fall.

Globalization rewrites the rules of transborder interaction in ways that render certain constitutional practices advantageous and others disadvantageous. It transforms the terms of international economic competition in much the same way that thick networking transforms a computing environment. Some actors benefit from greater interconnectedness; others are placed at a relative handicap. By way of analogy, some computer operating systems thrive in a tightly networked environment; others exhibit weaknesses and defects that would not otherwise have emerged. Similarly, legal rules and practices that worked well in a world of relatively impermeable borders and immobile factors of production may prove a handicap in a world of relatively porous borders and relentless mobility. Globalization generates new opportunities for prosperity at the same time that it exposes new vulnerabilities. Constitutional law makes possible certain responses to these challenges while excluding others altogether. On the one hand, for example, a liberal democracy with a favorable reputation for the protection of personal freedom can exploit that reputation to attract human and intellectual capital from elsewhere; on the other hand, it is not a constitutional option for such a country to combat the departure of its own skilled workers by barring emigration.

What sorts of constitutional practices is globalization likely to reward? Is globalization bound to have a deleterious effect on the constitutional rules and practices of the liberal state, or might it prove more benign? Part III of this Article lays the groundwork for discussion of these questions by offering a number of competing hypotheses as to the impact of

Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 181–86 & 184 tbl.5, 192 (2003) (finding that national performance on various measures of “legality” has a significant impact on GNP per capita); Steven Gliberman & Daniel Shapiro, *Global Foreign Direct Investment Flows: The Role of Governance Infrastructure*, 30 WORLD DEV. 1899, 1915 (2002) [hereinafter Gliberman & Shapiro, *Global Investment*] (finding that the probability and amount of foreign direct investment in a country is significantly influenced by the quality of its “governance infrastructure,” including its legal system); Steven Gliberman & Daniel Shapiro, *Governance Infrastructure and U.S. Foreign Direct Investment*, 34 J. INT’L BUS. STUD. 19, 20, 29–37 (2003) [hereinafter Gliberman & Shapiro, *Governance Infrastructure*] (arriving at similar results with respect to investment emanating from the U.S. in particular).

globalization on domestic law in general. Part IV then evaluates empirically the plausibility of these hypotheses with respect to the development of constitutional law in particular.

III. THE IMPACT OF GLOBALIZATION ON DOMESTIC LAW: FIVE COMPETING HYPOTHESES

In order to understand the impact of globalization on constitutional law in particular, it is helpful to understand the impact of globalization on the development of domestic law more generally. How will globalization reshape domestic law? Will its effects be systematic across countries? What patterns, if any, are likely to be generated by the pressures of globalization?

There are five competing possibilities to be considered. The first is legal convergence driven by destructive competition, in the form of states engaging in a “race to the bottom.” The second possibility is the opposite of the first—namely, legal convergence driven by constructive competition, in the form of a “race to the top.” A third possibility is legal convergence that is partly or wholly the result of cooperation as opposed to competition. A fourth possibility is legal divergence, or specialization, which might occur if states were to respond to the globalization of the market by carving out niches and catering to different audiences. Finally, there is what social scientists would call the null hypothesis³⁴—namely, that globalization may have no systematic and meaningful impact on the policies that states adopt.

Perhaps the most popular hypothesis is that globalization drives countries to adopt similar domestic policies in the form of a “race to the bottom,” wherein jurisdictions compete to attract mobile capital by slashing taxes, regulatory standards, and social spending.³⁵ Commentators have repeatedly identi-

34. The null hypothesis is ordinarily the proposition that there exists no causal or empirical relationship between two or more variables of interest. It is the default position against which scientific hypotheses should explicitly be tested. See ALAN AGRESTI & BARBARA FINLAY, *STATISTICAL METHODS FOR THE SOCIAL SCIENCES* 156–57 (3d corrected ed. 1999) (defining and contrasting the “null hypothesis” and “alternative hypothesis”).

35. See, e.g., RODRIK, *supra* note 6, at 3 (describing how the idea of a “race to the bottom,” along with a handful of other concepts, “has come to dominate the debate” over globalization); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1597 (2000) (describing OECD concerns that countries will in effect bid for business by engaging in competitive tax-cutting); Drezner, *supra* note 3, at

fied the threat of capital flight as a powerful constraint upon the scope of democratic policymaking that forces states to adopt laissez-faire economic policy tailored to the desires and priorities of international investors.³⁶ The notion that the threat of capital flight constrains government taxation efforts is a venerable one that can be traced back to such writers as Adam Smith,³⁷ Montesquieu,³⁸ David Hume,³⁹ and Benjamin Constant.⁴⁰ It was centuries ago that Smith argued in *The Wealth of Nations*:

The proprietor of stock is properly a citizen of the world, and is not necessarily attached to any particular country. He would be apt to abandon the country in which he was . . . assessed to a burdensome

56–60 (tracing the different intellectual strands of the “race to the bottom” hypothesis); Daniel C. Esty & Damien Geradin, *Regulatory Co-Operation*, 3 J. INT’L ECON. L. 235, 237 (2000) (noting the academic dominance of “regulatory competition theory,” which emphasizes the potential for a “race to the bottom” among competing jurisdictions); Richards et al., *supra* note 2, at 223 (describing the school of thought known as “dependency theory,” which holds that the threat of exit by investors encourages a “race to the bottom” in the areas of “tax, labor safety and wage standards, and social welfare programs”).

36. See, e.g., GILL, *supra* note 6, at 123–26, 132, 139–40 (characterizing economic globalization as “oligopolistic neo-liberalism” that serves the interests of corporate capital and “undermin[es] the traditional tax base and the capacity to provide public goods”); PAUL HIRST & GRAHAME THOMPSON, *GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE* 163–90 (2d ed. 1999) (arguing that “high capital mobility and international exposure to trade” impose a degree of added constraint upon modern welfare states); RODRIK, *supra* note 6, at 6 (observing that the threat of capital flight has made it “exceedingly difficult” for governments to raise the taxes necessary to fund social insurance programs).

37. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 373 (Robert Maynard Hutchins ed., Encyclopedia Britannica 1952) (1776) (discussing the difficulties that governments encounter in attempting to tax mobile capital, or “stock”).

38. See Geoffrey Garrett, *Global Markets and National Politics: Collision Course or Virtuous Circle?*, 52 INT’L ORG. 787, 793 (1998) (acknowledging the early intellectual contributions of Montesquieu, Hume, and others).

39. See *id.*

40. Wrote Constant:

Land cannot be conveniently expatriated. By a skillful deployment of soldiers and threats of confiscation political officials can put irresistible pressure on landowners. On the other hand, moveable stocks, la richesse mobile, can be smuggled out of the country. Modern commerce and the circulation of goods thus erected “an invisible and invincible obstacle to that unlimited action of the social power.” [L]iquid assets build a wall against governmental coercion. The transactions of merchants “cannot be penetrated by authority.

BENJAMIN CONSTANT, *DE LA LIBERTE CHEZ LES MODERNES* (1980) (1819), quoted in Charles Fried, *Constitutionalism, Privatization, and Globalization*, 21 CARDOZO L. REV. 1091, 1091 (2000).

tax, and would remove his stock to some other country where he could either carry on his business or enjoy his fortune more at his ease.⁴¹

Notwithstanding either the intellectual pedigree or brute logic of this view, there is no scholarly consensus that globalization is in fact causing a race to the bottom.⁴² With respect to tax policy, for example, some have pointed to evidence that greater capital mobility leads to lower capital taxation: in a number of industrialized countries, the relaxation of exchange rate controls since the early 1980s has been accompanied by falling tax rates on capital, even as taxes on labor have continued to rise.⁴³ Even full capital mobility, however, does not necessarily entail downward convergence in tax rates, as evidenced by the significant variation in income and sales taxes across states within the United States.⁴⁴ Likewise, in the regulatory arena, there is a dearth of firm empirical evidence that the lowering of barriers to the movement of goods and capital forces jurisdictions to race to the bottom.⁴⁵ To be sure, international trade relationships have sometimes forced countries to conform to regulatory standards that are more lenient than those countries might otherwise choose. For example, the World Trade Organization has prevented the United States from barring the import of tuna fish caught by dolphin-unfriendly means⁴⁶ and frustrated European Union policy

41. SMITH, *supra* note 37, at 373.

42. See, e.g., LAYNA MOSLEY, GLOBAL CAPITAL AND NATIONAL GOVERNMENTS 70–101 (2003) (analyzing data on the economic performance and policy choices of nineteen wealthy democracies over a fifteen-year period, and concluding that developed nations can in fact “compete in the global economy while retaining many of the hallmarks of post-World War II social democracy”).

43. See RODRIK, *supra* note 6, at 2 (discussing patterns in the United States, United Kingdom, France, and Germany); Avi-Yonah, *supra* note 35, at 1577 (reporting upon OECD findings).

44. See Garrett, *supra* note 39, at 822 (observing that “complete integration of the U.S. market has not resulted in convergence of tax rates around a minimal mean”).

45. See, e.g., Esty & Geradin, *supra* note 35, at 245 (acknowledging “the powerful logic of the theory . . . that there will be industrial migration to low-standard jurisdictions,” yet simultaneously noting the “the dearth of empirical evidence” in favor of such theories); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race to the Bottom” Rationale for Federal Environmental Regulation*, 67 NYU L. REV. 1210, 1227–29, 1233–44 (1992) (observing that many states have adopted environmental standards more stringent than the corresponding federal standards, and disputing the existence of a “race to the bottom” in the area of environmental regulation).

46. See FRIEDMAN, THE LEXUS AND THE OLIVE TREE, *supra* note 5, at 209

against the use of animal leg-hold traps.⁴⁷ At the same time, however, the experience of American federalism belies the general proposition that market integration entails regulatory convergence on the lowest common denominator. Even within the fully integrated American market, states often adopt regulatory standards higher than those imposed by the federal government or neighboring states.⁴⁸

Indeed, it has been argued that globalization can instead cause policy convergence in the form of a race to the *top*, most notably in the context of regulatory standards.⁴⁹ Prosperity can breed a taste for certain types of regulation: the relatively affluent consumers of California and Germany, for example, appear to be less tolerant of air pollution, and more willing to pay a premium for clean air, than those elsewhere.⁵⁰ When a large, wealthy market insists upon higher regulatory standards, producers face pressure to adopt those standards in order to pre-

(discussing the WTO ruling against the American tuna-fishing restriction); DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* 112 (1995) (describing the legal basis of the decision against the United States).

47. See Drezner, *supra* note 3, at 74 (noting the “considerable ire” that this episode drew “from antiglobalization activists who claim that the WTO will force a reduction of environmental standards”); see also *supra* note 20 and accompanying text (describing how the European Union itself has been responsible in some cases for forcing lower regulatory standards upon its own member states in the name of market integration).

48. See, e.g., ROBERTA ROMANO, *THE ADVANTAGE OF COMPETITIVE FEDERALISM FOR SECURITIES REGULATION* 137–39 (2002) (describing the varying stringency with which states have approached securities regulation); VOGEL, *supra* note 46, at 254–55 (listing various areas in which states have adopted stricter regulatory standards than those required by the federal government, and noting a similar tendency on the part of subnational governments in Canada and Australia to exceed federally imposed regulatory requirements).

49. See VOGEL, *supra* note 46, at 6 (coining the term “California effect” to describe “the critical role of powerful and wealthy ‘green’ political jurisdictions in promoting a regulatory ‘race to the top’ among their trading partners”); cf. ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 14–24 (1993) (discussing whether the “market” for state corporation codes, in which firm managers choose among competing bodies of corporate law in deciding where to incorporate, results in a “race to the top” or a “race to the bottom” from the perspective of shareholders); ROMANO, *supra* note 48, at 63–111 (concluding that states do in fact compete for corporate charters, and that such competition—far from resulting in a “race to the bottom”—improves shareholder welfare).

50. See VOGEL, *supra* note 46, at 6, 258 (noting the “relative size and wealth” enjoyed by California and Germany within the U.S. and E.U. respectively, and observing that “greater wealth leads to a preference for strong regulatory standards”).

serve valuable market access.⁵¹ Moreover, once a country's producers comply with the higher standards, it is in the interest of those producers to encourage their own country to adopt the same standards as a barrier to entry for would-be competitors.⁵² Market demand and protectionist politics thus combine to produce what David Vogel has called a "California effect" of rising regulatory standards.⁵³

Yet another possibility is policy convergence that results not from competition, but from a shifting combination of both competition and cooperation that Professors Esty and Geradin have dubbed "regulatory co-opetition."⁵⁴ Antitrust, for example, has been characterized as an area of regulation "rife with informal cooperation."⁵⁵ On this account, policy convergence emerges from a process of "give and take" within governments, between governments, and between public and private actors.⁵⁶ The result of this polycentric process, suggest Esty and Geradin, is likely to be substantively superior policy.⁵⁷ Ex ante, however, it is unclear whether "co-opetition" will tend to produce convergence on the most stringent policies, the lowest common denominator, or some kind of median policy. Although governments often cooperate for the express purpose of avoiding a race to the bottom,⁵⁸ even highly coordinated efforts at

51. *See id.* at 6 (discussing how the adoption of stricter product standards by "rich nations with large domestic markets such as the United States and Germany" forces other countries "to meet those standards in order to maintain their export markets").

52. *See id.* at 5–6.

53. *Id.* (contrasting the "Delaware effect," or race to the bottom, with the "California effect," or race to the top).

54. Esty & Geradin, *supra* note 35, at 235–38, 248–55 (defining "regulatory co-opetition," and setting forth its various forms); Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211, 217–18 (2006) (citing regulatory "co-opetition" in such areas as environmental protection and securities regulation as an example of "network cooperation" among governments).

55. Slaughter & Zaring, *supra* note 54, at 217; *see* Esty & Geradin, *supra* note 35, at 249 (noting the cooperative relationship between the Department of Justice and the European Commission on antitrust matters).

56. Esty & Geradin, *supra* note 35, at 252; *see id.* at 248–55 (distinguishing among "inter-governmental," "intra-governmental," and "extra-governmental" "co-opetition").

57. *See id.* at 255 (concluding that "regulatory co-opetition represents a better model for achieving optimal governance," in part because "[c]ompetition between groups for governmental attention" enables decision-makers "to choose among a large set of policy options and hear well-honed arguments").

58. *See id.* at 235–36.

policy harmonization can force governments to accept lower standards than they might choose for themselves, as the European Union has from time to time demonstrated.⁵⁹

Alternatively, the lowering of barriers to transnational movement may lead not to policy convergence at all, but instead to policy divergence, or *specialization*.⁶⁰ In any market, producers can be expected to differentiate their products and to exploit any comparative advantages they may possess. A firm that is more efficient at producing sprockets than widgets will choose to produce sprockets, and it will seek to avoid direct competition with other sprocket-makers by offering a different type of sprocket for which it can command a premium. Likewise, countries may choose to adopt divergent or specialized policies that exploit their strengths: a country that excels at management of financial capital, for example, may be perfectly content to cede its competitive position in precision manufacturing, and to pursue policies that attract financial capital at the expense of manufacturing capability.⁶¹ The notion that

59. See, e.g., Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon)*, 1979 E.C.R. 649, ¶¶ 8-14 (striking down as an impediment to trade a German requirement that beverages marketed as “liqueurs” contain no less than 25% alcohol); Case 178/84, *Comm’n v. Germany*, 1987 E.C.R. 1227, ¶¶ 31-35, 41-53 (invalidating as an impediment to trade provisions of the German Biersteuergesetz that prohibited the marketing of beer containing any ingredients other than barley, hops, yeast, and water); PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW 613-77* (3d ed. 2003) (discussing *Cassis de Dijon* and *Commission v. Germany*, and noting widespread concern that the European Court of Justice’s approach to market “harmonization” in such cases would result in a lowering of safety and quality standards throughout Europe); VOGEL, *supra* note 46, at 25-43 (discussing *Cassis de Dijon* and, more generally, the controversy surrounding E.U. efforts to “create a single market for food and beverages” by “undermin[ing] national culinary standards”).

60. See MOSLEY, *supra* note 42, at 9-11 (describing various strands of scholarly argument that economic globalization will promote institutional and policy divergence); *id.* at 11-14 (reporting that “[r]ecent empirical work . . . reveals a mixed pattern” of both policy convergence and divergence, particularly among “advanced capitalist democracies,” but also noting a dearth of evidence as to the trend among developing nations).

61. See, e.g., Peter Gourevitch, *Corporate Governance: Global Markets, National Politics*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION, *supra* note 27, at 305, 308 (suggesting that the policies that give rise to “organized market economies,” such as those of Germany and Japan, favor the success of precision manufacturing and other industries that rely upon relatively stable technologies, whereas the policies underlying the “liberal market economy” of the United States favor innovation-intensive and service industries); Daniel Gross, *A Nation of Buffetts*, SLATE, May 10, 2006, <http://www.slate.com/id/2141595/> (contrasting China’s la-

competitive pressures may drive governments to adopt divergent policies owes much to a seminal article written fifty years ago by Charles Tiebout, who argued that, in a world of perfect labor mobility, jurisdictions would compete for taxpayers by offering specialized bundles of public services at different prices that would attract people according to their particular tastes.⁶²

The last possibility to consider is that globalization will have no systematic impact across countries on domestic policy at all. Its effects may vary too broadly to permit any kind of meaningful generalization across countries, or they may simply be negligible. In this vein, many scholars have argued that the novelty, magnitude, and impact of globalization have been overstated.⁶³ As these skeptics are quick to point out, international flows of capital, goods, and people all experienced a significant downturn in the aftermath of World War I.⁶⁴ Transna-

bor cost and manufacturing advantages with American superiority at capital management).

62. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 421 (1956). The result of this competition, Tiebout concluded, would be perfectly efficient, in the sense that it would satisfy the actual preferences of the population to the greatest possible extent. See *id.*

63. See, e.g., STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 223 (1999) (disputing the notion that “globalization has systematically undermined state control or led to the homogenization of policies and structures”); RODRIK, *supra* note 6, at 7–8 (arguing that the economic impact of globalization was perhaps greater in the late nineteenth century than it is today); Drezner, *supra* note 3, at 53, 55 (questioning the “implicit assumption of most policy analysts and some academics” that “globalization leads to a convergence of traditionally national policies” in such areas as regulation and capital taxation, and arguing on the basis of the available empirical evidence that “the transnational economic and ideational forces commonly cited” in support of this assumption “are not as powerful as previously suggested”); Janice E. Thomson & Stephen D. Krasner, *Global Transactions and the Consolidation of Sovereignty*, in GLOBAL CHANGES AND THEORETICAL CHALLENGES: APPROACHES TO WORLD POLITICS FOR THE 1990S, at 195, 216 (Ernst-Otto Czempiel & James N. Rosenau eds., 1989) (expressing skepticism as to the “macro” impact of the “micro processes” that make up globalization); Timothy J. Hatton & Jeffrey G. Williamson, *What Fundamentals Drive World Migration?*, 2 (Nat’l Bureau of Econ. Research, Working Paper No. 9159, 2002) (opining that “the international mobility of goods and capital is probably no greater than it was a century ago”).

64. See, e.g., Miles Kahler & David A. Lake, *Globalization and Governance*, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION, *supra* note 27, at 1, 4 (noting that pre-World War I levels of global integration have “been surpassed only recently, if at all”); Robert O. Keohane & Joseph S. Nye, Jr., *Governance in a Globalizing World*, in KEOHANE, *supra* note 2, at 193, 197 (describing how globalization boomed in the mid-nineteenth century 1850 but reversed itself in the years between 1914 and 1945); Alan M. Taylor & Jeffrey G. Williamson, *Convergence in the Age of*

tional movement in capital and goods, measured as a proportion of domestic economic activity, is no greater now than a century ago.⁶⁵ Indeed, international exports constituted a higher proportion of world gross national product (GNP) in the 1880s than in the 1960s.⁶⁶ Foreign investment, measured as a proportion of the GNP of Western industrialized countries, was nine times higher in 1913 than in 1970.⁶⁷ At the dawn of the twentieth century, seven percent of American GNP was invested overseas; at the outset of the twenty-first century, that percentage remains roughly unchanged.⁶⁸ Meanwhile, the volume of transnational movement in people, measured as a proportion of world population, is in fact significantly lower now than a century ago, as countries have erected significant legal barriers to immigration.⁶⁹ The overall proportion of migrants—with estimates varying from 2.3% to 5% of world population⁷⁰—

Mass Migration, 1 EUR. REV. ECON. HIST. 27, 27–28 (2006) (observing that migration occurred in the nineteenth century “on a scale not witnessed before or since”).

65. See, e.g., Kahler & Lake, *supra* note 64, at 4 (noting “similarities between the present and the decades before 1914” with respect to levels of economic globalization); Keohane & Nye, *supra* note 64, at 194, 201 (observing that, “[b]y some measures, capital markets were more integrated at the beginning of the century” than they are at present).

66. See Thomson & Krasner, *supra* note 63, at 199 tbl.11-1.

67. See *id.* at 201 tbl.11-3.

68. See Ethan B. Kapstein, *We Are Us: The Myth of the Multinational*, NAT’L INT., Winter 1991, at 57.

69. See, e.g., ROBERT J. FLANAGAN, GLOBALIZATION AND LABOR CONDITIONS 91–95, 99–101 (2006) (tracing the origins and rise of the “political backlash” against mass migration that began in the late nineteenth century, and observing that the overall volume of international migration, unlike international capital and trade flows, has not returned to the levels experienced over a century ago); HIRST & THOMPSON, *supra* note 36, at 29–30 (discussing the tightening of legal restrictions on labor migration, and observing that “in many ways the situation between 1815 and 1914 was much more open than it is today”); RODRIK, *supra* note 6, at 8 (noting that immigration restrictions were relatively rare in the nineteenth century, and that the mobility of labor was correspondingly higher as a result); Kahler & Lake, *supra* note 64, at 5 (describing the advent of immigration restrictions “in the United States and elsewhere during the 1880s” as “the first evidence of backlash against globalization”); Keohane & Nye, *supra* note 64, at 194 (contrasting labor mobility now with labor mobility in the second half of the nineteenth century, which was characterized by the mass emigration of sixty million people from Europe); Taylor & Williamson, *supra* note 64, at 28 (observing that the “age of uncontrolled mass migration” came to a halt with the imposition of immigration quotas in the United States in the 1920s).

70. See, e.g., Hatton & Williamson, *supra* note 63, at 2 (offering a 2.3% estimate); James N. Rosenau, *The Drama of Human Rights in a Turbulent, Globalized World*, in GLOBALIZATION AND HUMAN RIGHTS 148, 156 (Alison

is not thought to have changed substantially over the last forty years,⁷¹ and the migration that does occur frequently involves movement to adjacent or nearby countries.⁷²

It is prudent to approach sweeping claims about globalization with a degree of skepticism—all the more so because the topic has captured popular attention, fueled by sometimes hyperbolic commentary.⁷³ Nevertheless, it would also be a mistake to conclude that globalization is an imaginary or waning phenomenon.⁷⁴ The downward trend in international economic integration precipitated by World War I reversed itself in the years following World War II as industrialized countries began to remove exchange controls, lower trade barriers, and relax restrictions on immigration.⁷⁵ By the 1980s, economic integration in the industrialized world had again reached, or surpassed, pre-World War I levels.⁷⁶ Over the last half of the twentieth century, international trade grew at twice the rate of world output⁷⁷ and increased in magnitude by a factor of sixty.⁷⁸ Over the same period, foreign investment grew at three times the rate of world output.⁷⁹ International capital flows now ex-

Brysk ed., 2002) (offering a 5% estimate); ECONOMIST (A SURVEY OF MIGRATION), *Irresistible Attraction*, Nov. 2, 2002, at 5 (placing the overall figure at “under 3%”); *Open Up*, ECONOMIST (A SPECIAL REPORT ON MIGRATION), Jan. 5, 2008, at 4 (estimating that migrants make up 3% of the world’s population); Abdurrahman Aydemir & George J. Borjas, *A Comparative Analysis of the Labor Market Impact of International Migration: Canada, Mexico, and the United States*, 1 (Nat’l Bureau of Econ. Research, Working Paper No. 12327, June 2006) (citing a United Nations estimate of 3%).

71. See Hatton & Williamson, *supra* note 63, at 2. *But see, e.g.*, Aydemir & Borjas, *supra* note 70, at 1 (writing of a “resurgence of large-scale international migration throughout much of the world in recent decades”).

72. See Hirst & Thompson, *supra* note 36, at 29 (describing most migration as being of the “country next door” variety).

73. *Cf.* FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, *supra* note 6, at 169 (employing the term “globalution” to convey the sense that globalization amounts to a form of global revolution).

74. See, e.g., GILL, *supra* note 6, at 123–24 (emphasizing the “unparalleled” “scale and extension” of globalization processes since 1945); *Globalization’s Last Hurrah?*, FOREIGN POL’Y, Jan. 2002, at 38, 42–44 (offering various measures to refute the notion that globalization has slowed in the aftermath of the terrorist attacks of September 11, 2001).

75. See Kahler & Lake, *supra* note 64, at 6.

76. See *id.*

77. See Keohane & Nye, *supra* note 64, at 194.

78. See VOGEL, *supra* note 46, at 11.

79. See Keohane & Nye, *supra* note 64, at 194.

ceed one trillion dollars per day.⁸⁰ And although overall migration as a proportion of world population has been relatively flat in recent decades, that aggregate figure conceals accelerating changes in the composition of the migrant population, in the form of a widening rift between the prospects of skilled workers and those of unskilled workers.⁸¹

It is not merely the speed and volume of transnational activity that have changed profoundly, but also the nature of such activity. International trade in natural resources has been eclipsed by movements of intangible assets, intellectual capital, and manufactured goods that owe their existence to tightly integrated multinational supply and production chains.⁸² The advent of globally integrated production, triggered by the lowering of trade and investment barriers, is said to mark the evolution of the “multinational corporation” (MNC) into the “globally integrated enterprise” (GIE) structured on different principles; whereas the MNC organized production on a national basis in order to ensure access to particular markets defined by the boundaries of nation-states, the GIE organizes production on a global basis in order to achieve cost efficiencies and tap the best available human capital.⁸³ Modern currency markets are also a relatively recent development, having emerged from the wreckage of the gold standard and the Bretton Woods system of fixed exchange rates.⁸⁴ Yet the amount of

80. See Avi-Yonah, *supra* note 35, at 1586.

81. See *infra* Part VI.B.

82. See, e.g., PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 706 (2002) (discussing how changes in the nature of world output are driving a decline in global demand for raw materials); Kahler & Lake, *supra* note 64, at 5 (observing that multinational investment has shifted away from the natural resource sectors, toward manufacturing and the dispersion of “production chains” across jurisdictions); ECONOMIST (SOMETHING NEW UNDER THE SUN: A SPECIAL REPORT ON INNOVATION), Oct. 13, 2007, at 3, 4 (reporting the rising importance of the “knowledge economy” and the diminishing importance of manufacturing, which is now “barely a fifth of economic activity in rich countries”).

83. Samuel J. Palmisano, *The Globally Integrated Enterprise*, 85 FOREIGN AFF., May/June 2006, at 127, 128–30 (discussing the evolution of the modern corporation); see also, e.g., KENICHI OHMAE, *THE END OF THE NATION STATE: THE RISE OF REGIONAL ECONOMIES* 4, 115 (1995) (observing that a company no longer needs to develop “an entire business system in each of the countries where it has a presence,” and describing the challenge facing corporate management in a “genuinely borderless world” as one of “creat[ing] and over-see[ing] a global network of disaggregated skills, competencies, and capabilities”).

84. See BOBBITT, *supra* note 82, at 221 (describing how the basis of cur-

money now traded each day in these markets—some four trillion dollars—exceeds the annual gross domestic product of the United States.⁸⁵ The scope of the currency markets is indicative of a broader transformation in the very nature of global finance: the vast bulk of transnational financial activity is no longer related to actual trade but now consists instead of capital endlessly manipulating itself.⁸⁶ Capital and equity markets are global in scope, to powerful effect. Among the major economies, interest rates are converging⁸⁷; so too are rates of return on similar assets.⁸⁸

In sum, it is sufficiently clear that evolving global patterns of commerce, communication, and migration are in fact having a significant influence on law and policy at the nation-state level. What remains to be seen is whether the legal and constitutional impact of these developments will be systematic and predictable, or will instead vary so much from jurisdiction to jurisdiction that no meaningful generalizations can be drawn. Drawing upon evidence of recent empirical trends, the next Part of this Article offers reason to think that the impact of globalization on the future of constitutional rights is taking an identifiable—and perhaps even encouraging—direction.

rency exchange has evolved from the gold standard to what the author dubs the “information standard”); HIRST & THOMPSON, *supra* note 36, at 32–35 (discussing the development of the modern currency system).

85. See BOBBITT, *supra* note 82, at 221 (citing this statistic).

86. See, e.g., GILL, *supra* note 6, at 124 (estimating that “perhaps no more than 10% of all financial transactions are related to real economic activity” such as “trade flows or capital movements”); DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE 221 (1999) (describing “a fundamental shift towards an autonomous global financial market in which financial activity is largely divorced from the requirements of trade, that is, the exchange of goods and services”); *The Alchemists of Finance*, ECONOMIST (A SPECIAL REPORT ON INTERNATIONAL BANKING), May 19, 2007, at 3, 3–6 (describing the emergence of a global banking system that is characterized by the securitization of investment risk and a growing market in increasingly complex derivatives—namely, financial instruments that are derived from other financial instruments).

87. See *id.* at 218 (citing empirical evidence that “points to the existence of a world (real) interest rate among the major economies, with small and stable risk premiums for different countries”).

88. See *id.* at 219–20 (noting that “[n]ational rates of return on similar assets do not appear to differ markedly,” and citing “empirical evidence that profit rates are similar the world over”).

IV. EMPIRICAL TRENDS IN GLOBALIZATION AND THE PROTECTION OF CONSTITUTIONAL RIGHTS

Which of the above hypotheses is most plausible with respect to the impact of globalization on the protection of constitutional rights? Does globalization encourage convergence or divergence across countries? If the answer happens to be convergence, will the overall pattern be one of increasing or decreasing rights protection? One way to evaluate these hypotheses is to consider actual empirical trends in globalization and the protection of constitutional rights. The focus here is upon “first generation” individual liberties and property rights, as opposed to “second generation” socioeconomic rights or “third generation” group rights,⁸⁹ for which empirical data is scarce.⁹⁰

Any effort to measure “globalization,” “property rights,” or “civil liberties” on a worldwide basis would constitute a formidable research project in its own right. For the limited purpose of offering a bird’s-eye overview, this Article relies upon a trio of existing measures developed by other scholars—namely, an overall measure of globalization formulated by a team of Swiss researchers,⁹¹ the property rights index devised by Professors Knack and Keefer,⁹² and the civil liberties scores published annually by Freedom House.⁹³ The latter two metrics share in common a practical, rather than formal, approach to the measurement of rights protection: both aim to capture the extent to which a country actually observes certain rights in practice, rather than the extent to which a country’s written laws

89. See *supra* note 15 and accompanying text (contrasting “first generation” “negative” rights with “second generation” socioeconomic rights and “third generation” group rights).

90. There exist plentiful sources of data on the extent to which people receive adequate levels of housing, education, health care, and other goods that fulfill basic human needs and are thus often called human rights. What is lacking, however, is reliable information on the extent to which the legal designation of such goods as rights causes governments to provide them. The extent to which citizens of a given country enjoy basic human necessities may have more to do with economic constraints than with legal rules. As a result, measures of how well a country does at feeding or educating its population may reflect not its commitment to second-generation rights, but rather its overall wealth.

91. See *infra* Part IV.A (discussing the merits and drawbacks of the KOF Index of Globalization).

92. See *infra* Part IV.B (describing the Knack and Keefer ICRG index).

93. See *infra* Part IV.C (explaining the Freedom House civil liberties scores).

purport to guarantee such rights.⁹⁴ In the area of constitutional rights, formal doctrine and actual practice can diverge considerably from one another: some governments fail to honor rights that are explicitly entrenched in a formal constitution,⁹⁵ while others honor rights that enjoy no formal constitutional status at all.⁹⁶ This Article's underlying concern with the impact of globalization on the actual protection of civil liberties and property rights demands a measurement approach that is focused upon government practice rather than legal promises.

A. GLOBALIZATION

Globalization—like the protection of civil liberties or property rights—is a multifaceted phenomenon that can be measured in innumerable ways. Although no single measure of any of these phenomena is likely to satisfy everyone, there do exist sources of data capable of providing a cross-country perspective over time. Researchers have employed a variety of proxies,

94. A more formal approach to the measurement of constitutional rights is currently being implemented by Professors Elkins and Ginsburg, in the form of a database that captures the formal characteristics of written constitutional documents from around the world. See Comparative Constitutions Project, <https://netfiles.uiuc.edu/zelkins/constitutions/data.htm> (last visited Dec. 17, 2007) (setting forth the scope of the data collection project and its expected completion date).

95. See *supra* note 24 and accompanying text (observing that formal constitutional guarantees of a standard litany of rights sometimes amount to little more than window-dressing on the part of tyrannical regimes). Compare, e.g., XIAN FA [Constitution] art. 35 (1982) (P.R.C.) (“Citizens of the People’s Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration.”), and *id.* art. 13, § 3 (amend. 2004) (“The State ... shall make compensation for ... private property expropriated or requisitioned.”), with, e.g., *infra* notes 234-235 and accompanying text (describing pervasive government censorship in China), and *infra* notes 237-238 and accompanying text (noting that Chinese authorities have frequently appropriated homes and farms for redevelopment without paying compensation).

96. For example, there is no written document known as the British constitution, yet it would be a mistake to argue as a practical matter that the British lack a constitutional right of habeas corpus. See Law, *supra* note 9, at 674 (noting the widespread understanding that the United Kingdom possesses an “unwritten” constitution that encompasses, inter alia, the Habeas Corpus Acts of 1640 and 1679). Likewise, the European Union’s legal obligation to respect “fundamental rights” is grounded not in any document formally known as a constitution, but rather in a treaty. See TREATY ON EUROPEAN UNION art. 6(2) (obligating the European Union and its institutions to “respect fundamental rights, as guaranteed by the European Convention [on] Human Rights . . . and as they result from the constitutional traditions common to the Member States, as general principles of [E.U.] law”).

ranging from measurements of trade as a proportion of gross domestic product⁹⁷ and foreign investment as a share of total investment⁹⁸ to the number of McDonald's franchises per capita in a country,⁹⁹ to name just a few. Comprehensive empirical efforts to capture all facets of globalization over a period of decades are rare, but the KOF Index of Globalization compiled by researchers at the Swiss Federal Institute of Technology in Zurich constitutes precisely such an effort.¹⁰⁰ The 2007 edition of the index covers 122 countries over the period from 1970 to 2004. It assigns scores to countries for three types of globalization—economic, social, and political—and combines them into a single composite index, with slightly greater weight attached to social globalization than to political globalization.

Like any ambitious empirical measurement project of global scope, the KOF Index of Globalization falls short of the ideal in various ways. For example, the “political” dimension of the overall index would appear especially useful for present purposes because it is supposed to capture the “diffusion of government policies.”¹⁰¹ In practice, however, the KOF measure of “political globalization” does not directly measure the phenomenon of policy diffusion. Instead, it is simply a composite of the number of embassies in a country, the number of international organizations to which a country belongs, and the number of U.N. Security Council missions in which a country participates.¹⁰² There is no guarantee that these figures corre-

97. See, e.g., HIRST & THOMPSON, *supra* note 36, at 27–28 & 27 tbl.2.3 (using trade-to-GDP ratios to compare economic “openness and integration” across different periods).

98. See, e.g., RODRIK, *supra* note 6, at 7 fig.1.1 (employing “merchandise exports as a share of GDP” as one measure of globalization).

99. See, e.g., FRIEDMAN, WORLD IS FLAT, *supra* note 6, at 420 (using the spread of McDonald's as a proxy for cultural globalization); 2007 KOF Index of Globalization: Definitions and Sources, at 2 (2007), http://globalization.kof.ethz.ch/static/pdf/definitions_2007.pdf (last visited Mar. 15, 2007) (employing the number of McDonald's restaurants per capita as part of an overall measure of a country's “social globalization”).

100. KOF Index of Globalization, <http://globalization.kof.ethz.ch/> (last visited Mar. 1, 2007) (offering a composite measure of “globalization” consisting of “economic,” “social,” and “political” components).

101. Eidgenössische Technische Hochschule Zürich [Swiss Federal Institute of Technology Zurich], *Press Release*, KOF Index of Globalization, (Jan. 19, 2007), at 1, http://globalization.kof.ethz.ch/static/pdf/press_release_2007_en.pdf (last visited Feb. 27, 2007).

102. See 2007 KOF Index of Globalization: Definitions and Sources, *supra* note 99, at 1–2.

late closely with the extent to which a jurisdiction imports and exports policy.¹⁰³

A more general problem with composite indices—including the KOF Index of Globalization—is that there exists no obviously correct way to construct them. Even if the individual components of an index happen to measure relevant and tangible phenomena in an uncontroversial way, it is less clear what meaning to attach to a composite index that combines these individually meaningful measures into a single number. If, for example, the task were one of devising a “household fruit index,” there would arise questions of whether one can legitimately add together apples and oranges, or how apples ought to be weighted relative to oranges.¹⁰⁴ Nevertheless, to the extent that a phenomenon as broad and amorphous as “globalization” can be defined and measured in concrete terms, the KOF Index offers a transparent and convenient measure that is likely to reflect broad trends over time in the transnational movement of capital, people, and ideas.

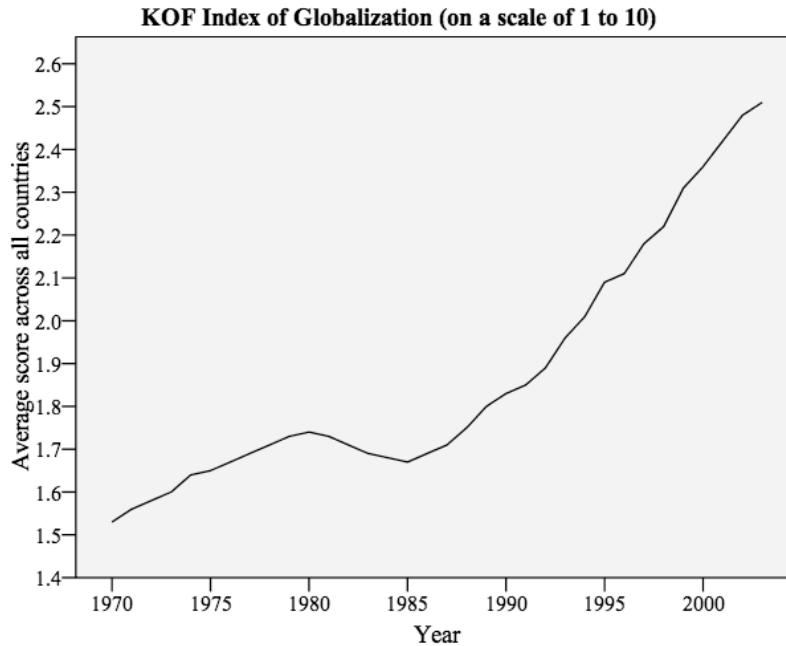
The overall picture of globalization that emerges from this data is unsurprising. Although globalization appears to have leveled off in the world’s wealthiest countries in recent years—

103 Similarly, one might also quibble with the manner in which “social globalization” is measured. International telephone usage, the size of the newspaper industry as a proportion of gross domestic product, and the amount of international mail per capita are among the components of this measure. See 2007 KOF Index of Globalization: Indices and Variables, at 1 (2007), http://globalization.kof.ethz.ch/static/pdf/variables_2007.pdf (last visited Feb. 27, 2007). Yet the very technologies that drive globalization are also rendering print newspapers, conventional telephones, and traditional letter mail obsolete. The substantive impact of such reliance upon arguably outdated proxies may be to understate the true extent of “social globalization.”

104 Those in the law school world may be most familiar with the problems inherent in composite indices from the controversy that persistently surrounds *U.S. News & World Report’s* annual ranking of law schools on the basis of a single numerical score that purports to combine a wide range of admittedly relevant criteria, but in seemingly arbitrary ways. See, e.g., STEPHEN P. KLEIN & LAURA HAMILTON, ASS’N OF AM. L. SCHS., *THE VALIDITY OF THE U.S. NEWS AND WORLD REPORT LAW SCHOOL RANKINGS 1* (1998), <http://www.aals.org/reports/validity.html> (deeming the combination of different factors into an overall rank “[p]erhaps the most controversial aspect of the US News evaluations,” and noting that “US News has not provided any justification for the weights it assigns”); Jeffrey E. Stake, *Law School Ranking Game: Indiana Law*, <http://monoborg.law.indiana.edu/LawRank/index.html> (last visited Mar. 15, 2007) (enabling users to create their own unique set of law school rankings on the basis of statistics reported by the American Bar Association, and to observe firsthand how arbitrary reweighting of different factors can produce radically different rankings).

and the “social” component, in particular, now lags behind the “economic” and “political” components¹⁰⁵—the overall trend across all countries remains one of increasing globalization. Figure 1 below illustrates how the average level of globalization across all countries has risen over the last several decades.

Figure 1. Overall level of globalization, 1970–2003



B. PROPERTY RIGHTS

An empirical measure of property rights protection that has proven popular among social scientists is the “property rights index” developed by Professors Knack and Keefer.¹⁰⁶

¹⁰⁵ See *Press Release*, *supra* note 101, at 2 fig.3; see also, e.g., *Globalization’s Last Hurrah?*, *supra* note 74, at 39 (comparing the amount of development within global nations in the areas of economic integration, personal contact, technology, and political engagement).

¹⁰⁶ Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 *ECON. & POL.* 207, 210–12, 225–26 (1995) (describing the components of what the authors call the “ICRG Index,” and utilizing the index for purposes of

The index for a given country consists of a score from 0 to 50 based upon its performance in each of five equally weighted categories: the risk of contract repudiation by the government, the risk of outright government expropriation or nationalization, corruption, rule of law, and bureaucratic competence.¹⁰⁷ The underlying data is drawn from the International Country Risk Guide, which is published by a private risk-rating agency akin to Moody's that sells its research on country conditions to potential investors.¹⁰⁸ The index is currently available for approximately 135 countries from 1984 through 1997.¹⁰⁹

Figure 2 illustrates the upward trend in the average level of property rights protection over this period, as measured by this index. The tail end of the data hints, however, at the pos-

empirical analysis); *see also, e.g.*, Christopher Clague et al., *Property and Contract Rights in Autocracies and Democracies*, 1 J. ECON. GROWTH 243, 254-55 (1996) (same); Robert Hall & Charles Jones, *Why Do Some Countries Produce So Much More Output Per Worker Than Others?*, 114 Q. J. ECON. 83, 83-116 (1999) (following Knack and Keefer's method of averaging the relevant five risk factors identified by the International Risk Factor Guide to estimate the effect of social infrastructure on output per worker variances); Quan Li & Adam Resnick, *Reversal of Fortune: Democratic Institutions and Foreign Direct Investment Inflows to Developing Countries*, 57 INT'L ORG. 175, 190 (2003) (utilizing Knack and Keefer's property rights index to test the positive effect of democratic institutions).

107. *See* Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POLITICS 207, 210-12, 225-26 (1995) (setting forth the components of what the authors call the "ICRG Index"); Li & Resnick, *supra* note 106, at 190 (describing how the property rights protection index is calculated from the raw ICRG risk-rating data); *IRIS-3 File of International Country Risk Guide (ICRG) Data*, Data, Government and Geographic Information Services, at 1-3, http://ssdc.ucsd.edu/ssdc/pdf/IRIS_doc.pdf (last visited Mar. 1, 2007) (providing variable descriptions and value scales for indicators).

108. *See* MOSLEY, *supra* note 42, at 136-45 (discussing the role and accuracy of risk-rating assessments such as the International Country Risk Guide); Li & Resnick, *supra* note 106, at 190 & n.64 (explaining the purpose and business of risk-rating agencies such as the Political Risk Service Group, the institutional author of the International Country Risk Guide). Many academic institutions hold licenses to use some version of the data; it can also be purchased directly from the Political Risk Service Group at <http://www.prsgroup.com>.

109. For a description of the latest version of the data, *see IRIS-3: File of International Country Risk Guide (ICRG) Data*, Data, Government & Geographic Information Services <http://ssdc.ucsd.edu/ssdc/iri00001.html> (last visited Mar. 1, 2007). The index is available for a subset of these countries for two additional years, 1982 and 1983. However, a graph that includes these two years would leave the misleading impression of a considerable spike in the average level of property rights protection between 1983 and 1984, when in fact this apparent increase would merely reflect the inclusion of additional countries as of 1984.

sibility of a plateau or decline. Whether the generally upward trend has continued over the last decade cannot be determined on the basis of the Knack and Keefer data.¹¹⁰

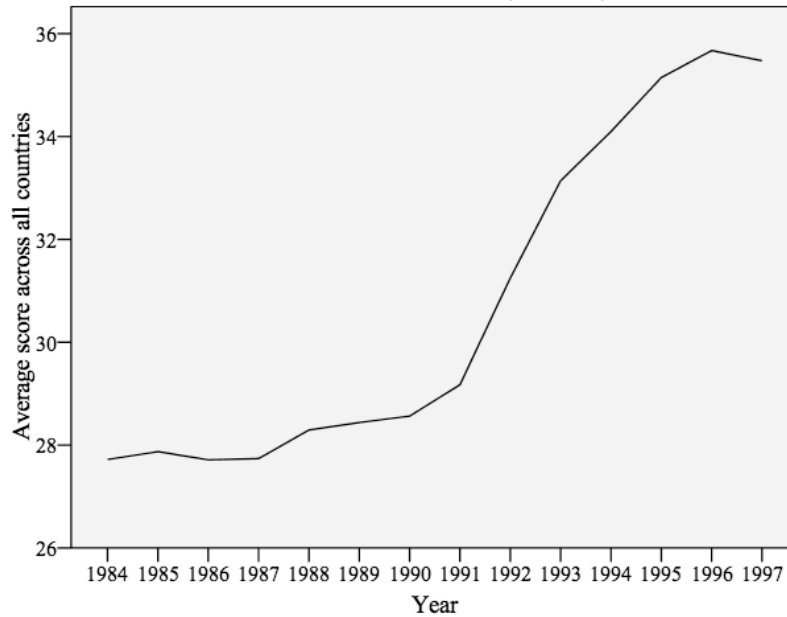
110. It is problematic, moreover, to attempt to fill in this gap by turning to other sources of data, such as the property rights scores that the Heritage Foundation and *Wall Street Journal* have jointly published since 1995 as part of their overall Index of Economic Freedom. See TIM KANE ET AL., 2007 INDEX OF ECONOMIC FREEDOM 49–50 (2007), available at <http://www.heritage.org/research/features/index/downloads.cfm>; Heritage Foundation & Wall St. J., Index of Economic Freedom 2007, <http://www.heritage.org/index> (last visited Mar. 1, 2007) (consisting of data in Microsoft Excel format for 161 countries on 10 different dimensions of economic freedom, including “property rights”).

There are several reasons why the Heritage Foundation scores are neither fungible with, nor preferable to, the Knack and Keefer index for purposes of empirical research. First, because each index defines and measures the notion of “property rights” differently, neither measures exactly the same combination of phenomena as the other. When contacted by the author, the Heritage Foundation warned that its methodology for measuring “property rights” is “quite different” from the one employed by Professors Knack and Keefer, and that the two datasets therefore may not be “compatible.” E-mail from Anthony Kim, Policy Analyst, Heritage Foundation, to David Law, Associate Professor of Law, University of San Diego School of Law (Mar. 9, 2007, 07:16:41 PST) (on file with the author). Consequently, the two sources of data cannot be used as chronological extensions of one another.

Second, the methodology used to construct the Heritage Foundation scores is generally less transparent and harder to replicate than that underlying the Knack and Keefer index. Whereas Knack and Keefer specify the five components of their index, as well as the weight given to each component, *see supra* note 107 and accompanying text, the Heritage Foundation scores appear to reflect a more holistic assessment of the extent to which property rights are respected in a given country. See KANE ET AL., *supra*, at 49–50. Moreover, to the extent that the exact criteria underlying the Heritage Foundation scores can be discerned, those criteria appear to be somewhat narrower in scope: for example, unlike the Knack and Keefer index, the Heritage Foundation scores do not appear to encompass the idea of “bureaucratic competence.” Compare *id.* (discussing the content of the Heritage Foundation “property rights” scores), with *supra* note 107 and accompanying text (describing the components of the Knack and Keefer index). Finally, whereas Professors Knack and Keefer rely upon a single source of raw data for all five components of their overall index—namely, the International Country Risk Guide’s assessment of country conditions, *see supra* note 108 and accompanying text—the Heritage Foundation scores draw upon a variety of sources—ranging from the Economist Intelligence Unit to State Department reports—and it is unclear which sources are used for what purposes, or to what extent some sources are favored over others. See KANE ET AL., *supra*, at 50 (listing the relevant sources of data “in order of priority,” without further explanation).

Third, it is not clear what meaning can be attached to changes in the Heritage Foundation scores over time, due in part to the obscurity of their underlying methodology. The worldwide average score has declined steadily over time, from a high of 56.5 out of 100 in 1994 to a low of 45.6 in 2006. How-

Figure 2. Overall observance of property rights, 1984–1997
Knack & Keefer ICRG Index (out of 50)



C. CIVIL LIBERTIES

Consistent with the pattern observed for globalization—and in contrast with the mixed pattern exhibited by property rights—overall levels of protection for civil liberties appear to have risen in recent decades. A measure of civil liberties often used by empirical researchers can be found in the scores developed by Raymond Gastil for Freedom House.¹¹¹ These scores

ever, the extent to which this pattern in the scores reflects a real-world decline in the observance of property rights is highly unclear. According to the Heritage Foundation, this apparent downward trend may actually reflect greater refinement and sophistication over time in the calculation of the scores themselves. See E-mail from Anthony Kim, *supra* (indicating that “more thorough assessment” of property rights in recent years “may have contributed to the downward trend of the property rights scores” noted by the author).

111. The scores were originally published on an annual basis in book form. See, e.g., RAYMOND D. GASTIL, *FREEDOM IN THE WORLD: POLITICAL RIGHTS AND CIVIL LIBERTIES, 1985–1986* (1986). The latest version of the data spans the period from 1973 to 2006 and is available for download in Microsoft Excel format at <http://www.freedomhouse.org>. The Freedom House scores have been put to frequent and varied use in the social science literature. See, e.g.,

rate countries on their real-world performance in each of two categories, “political rights” and “civil liberties.” The “civil liberties” scores focus upon “freedoms of expression, assembly, religion, and organization, equality under the law, protection from political terror and [freedom] from unjustified imprisonment, exile, or torture.”¹¹² Although “civil liberties” can be measured in a variety of ways, the Freedom House scores correlate heavily with other popular empirical measures of human rights protection and tend to yield comparable findings when subjected to statistical analysis.¹¹³ Figure 3 shows the increas-

FLANAGAN, *supra* note 69, at 205–07, 217 (using the Freedom House civil liberties scores to explore the global relationship between labor conditions, labor rights, and foreign investment); PERSSON & TABELLINI, *supra* note 33, at 74–77 (using a combination of the Freedom House political rights and civil liberties scores to measure the extent to which countries are democratic); Christopher J. Anderson et al., *Political Repression and Public Perceptions of Human Rights*, 55 POL. RESEARCH Q. 439, 444 n.3 (2002) (noting the heavy correlation between the Freedom House civil liberties scores and the Political Terror Scale, another measure that is also popular among political scientists); Matthew A. Baum & David A. Lake, *The Political Economy of Growth: Democracy and Human Capital*, 47 AM. J. POL. SCI. 333, 339 (2003) (noting that a popular empirical measure of “democracy” found in the Polity dataset is “highly correlated” with the combined Freedom House scores for “political rights” and “civil liberties,” and that use of either measure yields “largely comparable” results); Philipp Harms & Heinrich W. Ursprung, *Do Civil and Political Repression Really Boost Foreign Direct Investments?*, 40 ECON. INQUIRY 651, 653 (2002) (using the Freedom House scores to calculate “average political repression” across a range of countries); Samuel P. Huntington, *Will More Countries Become Democratic?*, 99 POL. SCI. Q. 193, 197 n.6 (1984); Henry S. Rowen, *The Growth of Freedoms in China*, A/PARC Working Paper, April 2001, at 7-8, 27, available at http://iis-db.stanford.edu/pubs/12015/Rowen_revised_2001.pdf (explaining the Freedom House scores, and using them to measure the growth of freedom in China).

112 Anderson et al., *supra* note 111, at 444 n.3; *see also, e.g.*, PERSSON & TABELLINI, *supra* note 33, at 75 (distinguishing the content of the “political rights” and “civil liberties” scores).

113 *See, e.g.*, PERSSON & TABELLINI, *supra* note 33, at 74–75 (identifying reasons for confidence in the Freedom House scores); Anderson et al., *supra* note 111, at 444 n.3 (noting the heavy correlation between the Freedom House civil liberties scores and the Political Terror Scale, another measure that is also popular among political scientists); Baum & Lake, *supra* note 111, at 339 (reporting that a popular empirical measure of “democracy” found in the Polity dataset is “highly correlated” with the combined Freedom House scores for “political rights” and “civil liberties,” and that use of either measure yields “largely comparable” results); Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. POL. (forthcoming 2007) (arriving at the same results using either the Political Terror Scale or the Freedom House civil liberties scores); Richards et al., *supra* note 2, at 226–27 & 226 n.4 (reporting that the use of the Freedom House scores in lieu of an alternative measure constructed from the U.S. State Department’s annual *Country Re-*

ing trend in the average worldwide level of civil liberties protection from 1972 through 2005.¹¹⁴

Figure 3. Overall protection of civil liberties, 1972–2005
Freedom House civil liberties scores (rescaled from 1 to 7)



D. THE CORRELATION BETWEEN GLOBALIZATION AND CONSTITUTIONAL RIGHTS: CAUSATION OR COINCIDENCE?

The data described above suggests a positive correlation between the rise of globalization and global levels of protection for civil liberties and property rights. At the very least, the relationship does not appear to be a negative one. What are we to make of this information? Is the relationship purely coinci-

ports on Human Rights Practices yielded “no significant substantive difference” for purposes of the authors’ empirical findings). *But see, e.g.*, Blanton & Blanton, *supra*, at n.23 (reporting that the Polity IV measure of democracy and the Freedom House scores correlate in opposite directions with levels of foreign direct investment).

114 In their original form, the Freedom House scores assign the lowest possible score of 1 to the countries with the strongest performance in the area of civil liberties, and the highest possible score of 7 to those with the worst performance. To facilitate comparison with the other indices discussed here, the scale has been reversed so that 7, the nominally highest score, now denotes the best performance, while 1, the nominally lowest score, now denotes the worst performance.

dental?

It is a truism of scientific inquiry that correlation does not equal causation. The fact that the stock market has tended to rise and fall with the length of hemlines on women's skirts, for example, does not prove that one phenomenon influences the other, or even that both are symptoms of some third phenomenon.¹¹⁵ Similarly, the fact that the rise of globalization happens to parallel an upward global trend in the protection of civil liberties does not necessarily mean that there exists a causal relationship between the two developments. Nevertheless, it should be obvious that globalization and the observance of basic rights have more to do with one another than do investor confidence and the latest fashion whims. Human rights and property rights do not merely influence globalization: they are *necessary preconditions* of globalization. There can be no expansion of capital markets if governments are in the habit of confiscating capital. A country cannot export its cultural products globally if its citizens are not free to create such products in the first place. People cannot emigrate or communicate across borders if they are forbidden to travel or express themselves.

If it is clearly the case that certain constitutional rights promote globalization, it seems only natural to ask whether the opposite holds true as well: does globalization promote the observance of certain constitutional rights? As a general matter, it would be surprising if a social, political, and economic phenomenon as far-reaching as globalization lacked any ramifications for domestic constitutional law. The competing hypotheses identified in Part III are all plausible ways of thinking about the potential impact of globalization on constitutional rights. Although the factual account offered here is a highly general one, it nevertheless helps to render some of these hypotheses more plausible than others. For example, the patterns described above do not, by themselves, prove that globalization has a benign effect on the worldwide protection of

115. See Amy Tsao, *Don't Go Long on Short Skirts*, BUS. WK. ONLINE, Sept. 7, 2004, http://www.businessweek.com/bwdaily/dnflash/sep2004/nf2004097_1337_db042.htm (attributing the theory of markets and hemlines to George Taylor, an economist at Wharton Business School in the 1920s); *Leading Eccentric Indicators*, FORBES, June 28, 2001, http://www.forbes.com/2001/06/28/exotics_print.html (last visited Mar. 1, 2007) (describing the "oddball" theory that "[a]s hemlines fall, so does the stock market," and observing that the correlation is, sadly, an imperfect one).

human rights or property rights. Yet the existence of a positive correlation between globalization and both types of rights certainly suggests that the idea is a reasonable one. By contrast, these same trends lend no support to the opposing hypothesis that globalization is instead encouraging a “race to the bottom” with respect to the observance of constitutional rights.

The remainder of this Article develops a hypothesis about the impact of globalization on constitutional rights that is consistent with the general patterns depicted in Parts IV.A through IV.C. The hypothesis is a simple one: competition for capital and skilled labor encourages countries to pursue policies that are highly protective of basic human and economic rights. This “race to the top” argument is subject, however, to the potentially important caveat that, beyond a certain point, the enshrinement of property and contract rights may in fact prove detrimental to a country’s efforts to attract capital.

V. CONSTITUTIONAL COMPETITION FOR INVESTMENT CAPITAL

If there is any kind of competition that globalization is likely to entail, it is international competition for capital. In its most liquid form, capital now takes the form of digital information that can be stored and transmitted in unlimited quantities at instantaneous speeds.¹¹⁶ Moreover, as governments from Bangkok to Mexico City have discovered, the amount of capital that can be reallocated in this manner is more than sufficient to wreak havoc on a nation’s economy in a matter of days.¹¹⁷ States have ample incentive to wield constitutional law as an instrument of policy for making credible commitments that will, directly or indirectly, attract and retain capital.¹¹⁸ In fact, there is reason in theory to expect that com-

116 See, e.g., Garrett, *supra* note 39, at 792 (describing how “mind-boggling amounts of money” move “around the globe more or less instantaneously in ceaseless efforts to arbitrage profits”).

117 See FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, *supra* note 6, at 127–28 (discussing the rapid escalation of the economic difficulties confronted by Mexico and Thailand in their dealings with international investors). On the subject of how the threat of capital flight bends even the mightiest into submission, former Clinton political strategist James Carville is said to have commented: “I used to think that if there was reincarnation, I wanted to come back as the president or the pope. But now I want to be the bond market: you can intimidate everyone.” Garrett, *supra* note 39, at 792.

118 See, e.g., Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 83–94, 98 (2002) (arguing that constitutional commitments to human rights and

petition for capital will encourage a degree of policy convergence in the areas of both property rights and civil liberties.

A. THE POSITIVE EFFECT OF COMPETITION FOR CAPITAL ON PROPERTY RIGHTS

Let us first consider the potential impact of competition for capital on property rights. For the international investor—as opposed to the classical liberal or political libertarian¹¹⁹—property rights are of instrumental value. The typical hedge fund manager is more concerned with the expected rate of return on an investment—that is, the rate at which his capital will beget still more capital—than with any deontological justification of property rights. The greater the risk that a given investment entails, the higher the potential return that the investment must offer in order to attract capital. For example, the willingness of investors to back the exploration of a Venezuelan oil field is adversely affected by the risk that the Venezuelan government will eventually nationalize the oil field.¹²⁰ A credible regime of property rights encourages investment by reassuring investors that the government will not expropriate their assets, or that appropriate compensation will be paid in the event of expropriation.¹²¹

judicial independence encourage investment by sending a credible signal to investors that a country can be trusted not to expropriate investments); Gordon Silverstein, *Sequencing the DNA of Comparative Constitutionalism: A Thought Experiment*, 65 MD. L. REV. 49, 53–54 (2006) (observing that the extreme mobility of capital that characterizes the “much faster-paced era of globalization” means that a country’s ability to commit itself credibly to respect for contract and property rights “may be even more important” now than in times past).

119. See, e.g., WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 103 (2d ed. 2002) (contrasting liberal and libertarian conceptions of property rights); JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 46 (C.B. Macpherson ed., 1980) (setting forth a classical liberal justification of property rights); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 177 (1974) (articulating and defending a libertarian conception of property rights).

120. See *Oil and Hauteur*, *ECONOMIST*, May 6, 2006 at 14 (discussing the Venezuelan nationalization of oil assets in which Brazil had invested extensively).

121. See Daron Acemoglu & Simon Johnson, *Unbundling Institutions*, 113 J. POL. ECON. 949, 953 (2005) (reporting, on the basis of empirical analysis, that countries with greater protection against expropriation by “politicians and elites” have “substantially higher income per capita,” “higher long-run growth rates,” “greater investment rates,” and “more developed stock markets”); see also, e.g., FLANAGAN, *supra* note 69, at 133 (explaining that “[r]isks of expropriation, repudiation of contracts, and corruption all tend to discourage foreign investment by reducing its expected return”); LIEBERTHAL,

It is in a country's best interests to adopt a credible scheme of property rights, not only because the existence of such a scheme encourages investment, but also because it happens to encourage *long-term* investment in particular. As a general matter, property rights promote the efficient allocation of capital by reducing uncertainty and stabilizing expectations.¹²² If investors are uncertain whether their capital will be safe from confiscation a year from now, they will favor investments that yield short-term gain or can easily be liquidated on a moment's notice. As Janice Thomson and Stephen Krasner explain:

Without secure property rights market activities would be constrained because of uncertainty about the possessor's right to sell the commodity and the threat to achieve transfers through force and coercion rather than voluntary exchange. Individuals would place a high discount rate on the future. Capital allocation would be aimed at maximizing short-term gain—getting out before the rules of the game were changed. International trade would concentrate on luxury goods that offered the possibility of very high payoffs if a transaction were successfully completed.¹²³

There is strong evidence that states are indeed modifying their constitutional practices and committing themselves to a common regime of property rights in order to attract capital. From South Africa to New Zealand, elected policymakers have

GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 303 (2d ed. 2004) (noting that the need to enable "foreign trade and investment to occur at reasonable risk" was the "major impetus" behind the development of a "serious legal regime" in post-Maoist China); Randall Peerenboom, *An Empirical Overview of Rights Performance in Asia, France, and the USA: The Dominance of Wealth in the Interplay of Economics, Culture, Law, and Governance*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA 1, 21 (Randall Peerenboom et al. eds., 2006) (observing that Asian countries that have experienced high economic growth in recent years have "generally scored highly with respect to the legal protection of economic interests").

¹²² See, e.g., NORTH, *supra* note 33, at 52; Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, in THE ORIGINS OF LIBERTY: POLITICAL AND ECONOMIC LIBERALIZATION IN THE MODERN WORLD 16, 16 (Paul W. Drake & Mathew D. McCubbins eds., 1998) (explaining why credible sovereign commitment to property rights is a necessary condition of investment and economic growth); Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 571 (1993) (discussing the relationship between economic growth and respect for property and contract rights).

¹²³ Thomson & Krasner, *supra* note 63, at 214 (citing Eirik Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LIT. 1137, 1139 (1972)).

grasped the basic insights that constitutional law can be a potent instrument of national policy, and that the protection of property rights is a form of national policy that encourages foreign lending and investment.¹²⁴ In many cases, the commitment to property rights in exchange for access to foreign capital is formal and explicit. Developing countries have adopted property rights protections in order to qualify for development capital from major international lenders such as the World Bank and International Monetary Fund, which routinely condition financial assistance upon the pursuit of free-market policies.¹²⁵

Likewise, countries have pursued foreign capital by signing trade and investment treaties that contain property rights protections for investors.¹²⁶ The bilateral investment treaties promoted by wealthy nations typically contain provisions that guarantee compensation and confer standing upon investors to bring complaints in the event of nationalization or expropriation.¹²⁷ As David Schneiderman observes, such provisions pro-

124. See, e.g., Hirschl, *supra* note 12, at 84–88 (arguing that New Zealand’s adoption of a bill of rights should be understood as part of a transition to a “neoliberal economic order” that was induced by a need to facilitate large-scale foreign borrowing); *id.* at 88 (citing Sir Geoffrey Palmer, former prime minister of New Zealand, on the need for New Zealand’s constitutional system to pay “better attention to the taking of property” in order to preserve a favorable “investment climate”); *id.* at 94 (arguing that the African National Congress reversed its earlier opposition to judicial review and embraced the constitutional protection of property rights in order “to prevent capital flight and to attract foreign investment”); *id.* at 96 (“Without a constitutional guarantee of property rights, . . . the new regime in South Africa would have been unable to reassure domestic and international economic elites that regardless of significant changes their predictability interest would remain secure.”); ECONOMIST, *Caught Between Right and Left, Town and Country*, Mar. 10, 2007, at 23–25 (discussing recent constitutional and legislative moves by the Chinese government toward explicit recognition of property rights).

125. See, e.g., STEGER, *supra* note 1, at 52–53 (discussing the origins, content, and effect of the set of neoliberal economic policies known as the “Washington consensus” and promoted by the International Monetary Fund and World Bank); STIGLITZ, *supra* note 1, at 73–74 (criticizing the International Monetary Fund and its “Washington Consensus” policies for placing undue faith in the power of property rights alone to unleash economic development).

126. See Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960-2000*, 60 INT’L ORG. 811, 811–12, 836–38 (2006) (finding empirically that the spread of bilateral investment treaties “and the liberal property rights regime they embody” has been “driven by international competition among potential host countries—typically developing countries—for foreign direct investment”).

127. See David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 L. & SOC. INQUIRY 757, 768–71 (2000) (offering, by way of example,

vide “constitution-like certainty” for investors by imposing onerous delays upon treaty withdrawal and providing extended grandfather-clause protection for investments made during the lifetime of the treaty.¹²⁸

Treaties of this ilk have effected constitutional change in developed and developing countries alike. For example, provisions in the North American Free Trade Agreement (NAFTA) designed for the protection of investments forced Mexico to limit the effective reach of the “Calvo Clause” found in article 27 of its constitution, which subjects foreign investors to domestic law and bars them from invoking the protection of their home countries against actions of the Mexican government.¹²⁹ Perhaps more surprisingly, NAFTA has imposed a property rights regime of sorts upon Canada as well. By design, the Canadian Charter of Rights and Freedoms lacks any explicit guarantee of property rights.¹³⁰ Yet American investors have invoked NAFTA’s expropriation provisions to attack Canadian policies ranging from the prohibition of toxic materials to the repudiation of contracts that would have privatized the country’s busiest airport.¹³¹

the protections against expropriation found in Canada’s bilateral investment treaties with Thailand and South Africa); *see also, e.g.*, Susan D. Franck, *Foreign Direct Investment, Investment Treaty Arbitration and the Rule of Law*, 19 PAC. MCGEORGE GLOBAL BUS. & DEVS. L.J. (forthcoming 2007), available at <http://ssrn.com/abstract=882443> (describing how a typical investment treaty amounts in substance to “an economic bill of rights” for investors); Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 39 VA. J. INT’L L. 639, 65–58 (1998) (explaining the contents of a typical investment treaty).

128. Schneiderman, *supra* note 127, at 771.

129. *Id.* at 765–66 (discussing how the disciplinary provisions of NAFTA include “stringent” takings protections, “enforceable before international trade tribunals, that appear to run counter to the Calvo clause”).

130. *See* PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, § 32.4, at 717–18 (student ed. 2005) (noting that the property rights protections found in Canada’s earlier Bill of Rights were among the very few provisions “not substantially replicated” in the subsequent Charter of Rights and Freedoms); Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1, 16–27 (2004) (observing that the deliberate omission of property rights from the text of the Charter of Rights and Freedoms was part of a “deliberate strategy” to prevent the emergence of *Lochner*-style substantive due process jurisprudence in Canada).

131. *See* Schneiderman, *supra* note 127, at 771–72 (describing the impact of NAFTA’s expropriation provisions on Canadian policy in a variety of areas, ranging from cigarette packaging to toxic waste disposal); David Schneiderman, *Constitution or Model Treaty? Struggling Over the Interpretive Authority of NAFTA, in The Migration of Constitutional Ideas, supra note 14, at 294, 296, 302-03* (giving examples of the impact of “NAFTA’s takings

B. PRACTICAL LIMITS ON A “RACE TO THE TOP” IN PROPERTY RIGHTS

There are intrinsic limits, however, on the extent to which capital markets are likely to reward ever-increasing levels of property rights. Beyond a certain point, the constitutional protection of property rights may prove counterproductive even from the perspective of investors. Competition for mobile capital need not, in particular, entail a worldwide revival of the *Lochner* era,¹³² in which constitutional law would once again be employed to shield capital from the reach of government regulation. Regulation is not inherently anathema to the interests of capital. Investors seek, above all, to maximize their risk-adjusted returns. Government activity that fosters predictability and stability reduces the risk associated with investment in a particular country and thus encourages capital formation;¹³³ likewise, government activity that improves productivity increases the returns to private investment and thus attracts capital.¹³⁴ As Geoffrey Garrett observes, “governments provide economically important collective goods—ranging from the accumulation of human and physical capital, to social stability under conditions of high market uncertainty, to popular support for the market economy itself—that are undersupplied by markets and valued by actors who are interested in productivity.”¹³⁵

rule” on Canadian policymaking, and expressing the view that NAFTA alters Canadian constitutional law by illegitimate means); see also Hirschl, *supra* note 12, at 77 (arguing that business elites who failed to secure inclusion of property rights in the Canadian constitution later accomplished their goals by successfully supporting the inclusion of various economic freedoms and investment rules in NAFTA).

132 *Lochner v. New York*, 198 U.S. 45 (1905); see Choudhry, *supra* note 129, at 3–4 (observing that *Lochner* has come to epitomize a variety of jurisprudential evils in other countries as well as in the United States).

133 See, e.g., FRIEDMAN, THE LEXUS AND THE OLIVE TREE, *supra* note 6, at 171 (observing that the international investment community “values stability, predictability, transparency and the ability to transfer and protect its private property from arbitrary or criminal confiscation”); *supra* notes 121–123 and accompanying text (discussing how government protection of property rights encourages investment by stabilizing expectations and reducing risk).

134 Cf. Debora Spar, *Foreign Investment and Human Rights*, 42 CHALLENGE 55, 64–65 (1999) (suggesting that labor quality may be a more important determinant of investment decisions than labor cost).

135 Garrett, *supra* note 39, at 823; see also, e.g., Nathan M. Jensen, *Democratic Governance and Multinational Corporations: Political Regimes and Inflows of Foreign Direct Investment*, 57 INT’L ORG. 587, 599 (2003) (describing “new growth theory,” which stresses the positive macroeconomic ef-

Regulation, taxation, public spending, and even income redistribution are all means by which governments can and do reduce uncertainty and increase productivity. It is widely accepted, for example, that the regulation of capital markets can contribute significantly to their success; American securities regulation and corporate law reduce uncertainty and enhance confidence in the nation's capital markets by imposing uniform disclosure requirements and protecting the rights of minority shareholders.¹³⁶ Regulatory and social policies that increase the cost of labor can also improve labor productivity—a fact that may help to explain how OECD countries impose the highest labor standards yet attract ninety percent of all foreign direct investment.¹³⁷ Even redistributive policies that increase the tax burden on capitalists and investors can actually encourage investment. Income inequality increases social and political instability; such instability, in turn, significantly reduces investment.¹³⁸ By keeping economic inequality from reaching

fects of government provision of public goods that would otherwise be under-supplied by the market).

136 See, e.g., THOMAS LEE HAZEN, *SECURITIES REGULATION: CASES AND MATERIALS* 9 (7th ed. 2006) (observing that the efforts of federal securities regulators have “been credited with making an important contribution to the generally favorable reputation which American corporate securities and American securities markets enjoy, not only among American investors, but also in foreign countries”); FRIEDMAN, *THE WORLD IS FLAT*, *supra* note 6, at 245–46 (quoting Dick Foster, director of McKinsey Consulting, on how the success of U.S. capital markets is attributable to a legal regime that “protects minority interests under conditions of risk”); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 *J. FIN.* 1131, 1139–46, 1149 (1997) (finding, on the basis of empirical analysis of data from forty-nine countries, that strong legal protections for investors have a large positive effect on both the depth and breadth of a country's debt and equity markets); *Marketplaces on the Move*, *ECONOMIST* (MAGNETS FOR MONEY: A SPECIAL REPORT ON FINANCIAL CENTRES), Sept. 15, 2007, at 14, 15 (highlighting the role of high-quality regulation in the success of top financial centers such as New York and London).

137 See Drezner, *supra* note 3, at 67 (noting that the relationship between foreign direct investment and labor standards is “highly positive,” and that countries belonging to the Organization for Economic Cooperation and Development (OECD) “have the highest labor standards” yet have attracted more than ninety percent of foreign direct investment in recent years); *infra* notes 161–162 and accompanying text (discussing the extent to which investors place greater emphasis upon labor quality than labor cost).

138 See RODRIK, *supra* note 6, at 53 (“[A]s globalization proceeds, the social consensus required to maintain domestic markets to open to international trade is endangered.”); Alberto Alesina & Roberto Perotti, *Income Distribution, Political Instability, and Investment*, 40 *EUR. ECON. REV.* 1203, 1226 (1996) (analyzing data from 71 countries over a 25-year period, and concluding

destabilizing proportions, moderately redistributionist government policies can foster a social and political environment that attracts investment. To be sure, the threat of capital flight penalizes fiscal irresponsibility and pointless regulation, but it does not threaten the modern regulatory state or the modern welfare state with outright extinction either.¹³⁹ States do not necessarily stand to gain by committing themselves constitutionally to refrain from regulation, taxation, or redistribution. The fact that radically laissez-faire economic policies can actually deter international investment is likely to place a ceiling upon any “race to the top” that may occur with respect to the protection of property rights.

C. THE POSITIVE EFFECT OF COMPETITION FOR CAPITAL ON HUMAN RIGHTS

If competition for capital appears likely to have—within limits—a positive effect on overall levels of property rights, what effect is it likely to have on the protection of human rights? The traditional view of the relationship between foreign investment and human rights is decidedly bleak. Cost-conscious capitalists should favor repressive states capable of crushing efforts by labor to secure better wages or working conditions.¹⁴⁰ Democracy, meanwhile, is portrayed as a regretta-

that income inequality increases social and political instability which, in turn, significantly reduces investment); Garrett, *supra* note 39, at 789, 798 (endorsing the view expressed by other economists that “reducing inequality stimulates growth by increasing social stability”).

139. See HIRST & THOMPSON, *supra* note 36, at 163–90 (posing the question of whether the welfare state can survive globalization, and answering it in the affirmative); Garrett, *supra* note 39, at 804 (concluding that financial markets penalize increased government spending that is not offset by increased tax revenues, but are indifferent to the actual amount of government spending); Layna Mosley, *Room to Move: International Financial Markets and National Welfare States*, 54 INT’L. ORG. 737, 737–73 (2000) (concluding that globally integrated capital markets respond to broad macroeconomic indices such as inflation and deficit as a proportion of GDP, but are otherwise indifferent to welfarist policy choices).

140. See, e.g., WILLIAM GREIDER, *ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM* 37 (1997) (arguing that globalization encourages governments to gravitate toward the “productive efficiency” of authoritarianism and leads corporations to set aside all “[c]oncern for human rights” in their zeal to exploit new markets “where the governments routinely control and abuse their citizens”); MEYER, *supra* note 89, at 91–93 (1998) (describing the school of thought that the economic activity of multinational corporations in Third World countries creates a need for “[i]nstruments of control” that “entail repression and denials of civil and political rights”); Blanton & Blanton, *supra* note 113 (explaining why the “traditional” view of the relationship

bly “inefficient institutional structure” that is penalized accordingly by international investors.¹⁴¹ But recent empirical studies have turned this view on its head. Various economists and political scientists have found a significant and positive relationship between the extent to which a country honors civil liberties—for example, freedom of expression, rights of political participation, and freedom from political persecution—and the amount of foreign investment that the country receives: on the whole, countries that uphold human rights tend to receive more foreign investment than countries that do not.¹⁴²

between human rights and foreign investment has become increasingly questionable); Falk, *supra* note 1, at 64–65 (noting the “somewhat uncritically perpetuated” but widespread belief among “both government policymakers and their critics” that rigid control of labor and denial of human rights serves “the best interests of international capital”); Farber, *supra* note 118, at 85 (noting “the widespread notion that foreign investors would ideally prefer to deal with authoritarian regimes,” but observing that there is in fact “solid support” among economists for precisely the opposite view); Jensen, *supra* note 135, at 593 (questioning the “[c]onventional wisdom . . . that multinationals prefer to invest in authoritarian regimes” “[b]ecause of the lack of popular pressure from below, and the repression of labor unions to drive down wages”); Spar, *supra* note 134, at 57–59 (tracing the origins of the view that international investment supports and perpetuates oppressive regimes).

141. Jensen, *supra* note 135, at 587 (observing that “[d]emocracy is often seen as an inefficient institutional structure in the global economy”).

142. See, e.g., MEYER, *supra* note 89, at 103–08, 136 (finding that “[f]oreign investment is positively associated with both civil liberties and political freedoms,” and that “improvement in human rights” accompanies “increased economic development”); Wesley T. Milner, *Economic Globalization and Rights: An Empirical Analysis*, in GLOBALIZATION AND HUMAN RIGHTS 77, 88 (Alison Brysk ed., 2002) (finding that a country’s openness to foreign trade and investment has a positive and significant effect on the extent to which it respects human rights); Blanton & Blanton, *supra* note 113 (concluding that “respect for human rights” increases foreign direct investment); Gliberman & Shapiro, *Global Investment*, *supra* note 33, at 5 (finding a positive relationship between foreign direct investment and a country’s respect for “voice, political freedom, and civil liberties”); Gliberman & Shapiro, *Governance Infrastructure*, *supra* note 33, at 21 (finding a positive relationship between American investment, in particular, and a country’s respect for “voice, political freedom, and civil liberties,” but not between American investment and the extent to which a country upholds the “rule of law” and “property rights”); Harms & Ursprung, *supra* note 111, at 653 (reporting a significant and negative relationship between “indices of political and civil repression” and “foreign direct investment per capita”); Jensen, *supra* note 135, at 596 (finding a positive relationship between a country’s level of democratization and net inflows of foreign investment); Richards et al., *supra* note 2, at 234 (performing a statistical analysis of data from forty-three developing nations over a fifteen-year period, and finding “systematic evidence” of a positive relationship between “foreign economic penetration” and “increased government respect for physical integrity rights and political rights and civil liberties”); Spar, *supra* note 134, at 55–57, 67–69 (concluding that “foreign investment . . . tends

to improve the conditions of human rights in developing countries,” in part because of the scrutiny given by consumers and activists to the behavior of multinational corporations operating abroad); Matthias Busse & Carsten Hefeker, *Political Risk, Institutions and Foreign Direct Investment* 5 (Hamburg Institute of International Economics, Discussion Paper No. 315, 2005), available at <http://ssrn.com/abstract=704283> (finding a positive relationship between foreign direct investment, on the one hand, and “responsiveness of the government to its citizens” and “fundamental civil liberties and political rights,” on the other); cf. FLANAGAN, *supra* note 69, at 217 (reporting a “[m]arginally significant,” but nevertheless positive, relationship between levels of foreign direct investment and civil liberties).

These studies vary along a number of dimensions that include the manner in which they measure respect for human rights, the breadth with which they define foreign investment, the scope of the data that they analyze, and the control variables that they employ. The fact that they vary in methodology should, however, only increase our confidence in their common conclusion: the greater the variety of approaches that they exhibit, the less likely it becomes that they have all reached the same, incorrect result by committing the same errors.

For example, Professors Globerman and Shapiro employ an index of “voice, political freedom, and civil liberties” devised by researchers at the World Bank that includes measures of freedom of expression and assembly, transparency and fairness in the legal system, the freedom and fairness of elections, minority rights, the extent of military involvement in politics, and the ability of business to criticize government practice. Daniel Kaufmann et al., *Governance Matters* 54 app.2 (Pol’y Research Working Papers, Paper No. 2196, 1999), available at <http://ssrn.com/abstract=188568>. Their conclusions are based upon a cross-sectional analysis of data from 144 countries over the period from 1994 through 1997. See Globerman & Shapiro, *Governance Infrastructure*, *supra* note 33, at 22; Globerman & Shapiro, *Global Investment*, *supra* note 33, at 1900. They control for such variables as the relative openness of the target country’s economy, its labor costs, its tax burden, its exchange rate stability, and various capitated measures of physical infrastructure. None of their control variables proved to have a statistically significant on foreign investment. See *id.* at 1905.

By comparison, the measure that Professors Blanton and Blanton use to gauge governmental respect for human rights—a coding of countries on the “Political Terror Scale” based upon annual reports prepared by Amnesty International and the State Department—emphasizes the extent of political persecution by the state, defined as detention, torture, and murder on the basis of one’s political views. Blanton & Blanton, *supra* note 113. Their data spans the period from 1980 to 1997, across a similarly broad cross-section of countries. See *id.* The authors conclude that respect for human rights, measured thusly, has both direct and indirect effects upon foreign direct investment: respect for human rights improves the quality of human capital, which in turn attracts foreign investment, but it also promotes foreign investment independent of its effect on human capital. Their study controls for the effects of such variables as the openness and size of the target country’s economy, the extent to which the target country imposes capital flow restrictions, the extent to which it is endowed with natural resources, its involvement in internal or international armed conflict, the extent to which it enjoys democratic institutions, and its overall degree of economic development. See *id.*

There are, to be sure, studies that paint a more mixed picture of the relationship between foreign investment and human rights¹⁴³: post-1950 U.S. involvement in Latin America, in par-

The approach taken by Professors Richards, Gelleny, and Sacko differs yet again: their study focuses exclusively upon developing countries and employs both a different measure of human rights observance and a broad concept of foreign investment. The authors draw their data from a random sample of forty-three developing countries at various points in time from 1981 to 1995. See Richards et al., *supra*, at 225 & n.1 (listing the countries in question, and describing their sampling methodology). Their study evaluates the empirical relationship between government respect for human rights, on the one hand, and what they call “foreign economic penetration,” on the other. *Id.* at 220, 227–29. “Foreign economic penetration” is broadly defined to include not only the traditional concept of “foreign direct investment” (FDI) (defined by the World Bank as acquisition of “at least 10 percent of the voting stock of a foreign enterprise,” *id.* at 228), but also “portfolio investment” (stock acquisition that falls short of the ten percent mark), “long-term debt” (debt with a maturity of more than one year that is owed to nonresidents) and “official development assistance,” which includes “funds and assistance from multilateral lending agencies such as the IMF and World Bank.” *Id.* at 228–29.

Within the broader category of human rights, the authors distinguish between “government respect for political rights and civil liberties” and “government respect for physical integrity rights.” *Id.* at 226. Their measure of “government respect for political rights and civil liberties” consists of an eleven-point scale that is the aggregate of a country’s score over five dimensions—namely, “openness and freedom of political participation, government control of media and freedom from censorship, freedom to unionize, freedom to travel internally and externally, and freedom of religion.” *Id.* at 226–27. The scores for each of these dimensions were calculated from information found in the State Department’s annual *Country Reports on Human Rights Practices*. See *id.* at 227. Although they do not employ the Freedom House scores used in Part IV.C of this Article, the authors make a point of verifying that their substantive findings would have been the same had they relied upon the Freedom House scores. See *id.* at 226 n.4.

Professor Richards and company find that foreign direct investment is associated with increased respect for political rights and civil liberties, while portfolio investment is positively correlated with respect for physical integrity rights. See *id.* at 231 tbl.3, 232, 233 fig.1, 234 & fig.2, 236. They also find, however, that increases in long-term debt are associated with decreased respect for political rights and civil liberties. See *id.* at 232, 235–36. They hypothesize that the existence of a significant foreign debt burden drives governments to cultivate a submissive “low-wage labor force in export-oriented sectors” capable of generating foreign currency for debt repayment purposes, and that governments may attempt to guarantee such a work force by suppressing organized labor. *Id.* at 236. Like all of the other studies cited above, this study controls for the effect of a number of variables that have been found in the past to have an impact upon a country’s human rights practices. In this case, the authors controlled for a country’s level of democracy, economic development, domestic conflict, enmeshment in “interstate hostility,” and population size. See *id.* at 229–30.

143 See, e.g., Li & Resnick, *supra* note 106, at 202–03 (finding that the extent to which democratic states respect property rights encourages foreign

ticular, stands out as a recurring culprit.¹⁴⁴ Yet American Cold War imperialism in the western hemisphere may well be the exception that proves the rule. The overall picture remains one of a positive relationship between foreign investment and the observance of basic human rights. When it comes to human rights, it is encouraging to think that global competition for capital is not driving an international race to the bottom but may instead be fueling a race to the *top*. Indeed, the relationship between capital and human rights appears so friendly that it has prompted critics to question the efforts of international financial institutions such as the International Monetary Fund and World Bank to promote human rights and the rule of law: it has been alleged that such efforts are motivated not by any ultimate interest in freedom or good governance, but rather by an instrumental desire to foster social and political condi-

direct investment, but that other characteristics of democratic states have the opposite effect); John R. Oneal, *The Affinity of Foreign Investors for Authoritarian Regimes*, 47 POL. RES. Q. 565, 582 (1994) (finding that economically developing autocracies attract more investment, on the whole, than economically developing democracies, but also reporting that both developed countries as a whole, and Asia as a region, exhibit the opposite pattern); Adam L. Resnick, *Investors, Turbulence, and Transition: Democratic Transition and Foreign Direct Investment in Nineteen Developing Countries*, 27 INT'L INTERACTIONS 381, 384 (2001) (discussing both positive and negative "connections between democracy and FDI"); John P. Tuman & Craig F. Emmert, *The Political Economy of U.S. Foreign Direct Investment in Latin America: A Reappraisal*, 39 LATIN AM. RES. REV. 9, 21 (2004) (concluding, "[a]fter controlling for the effects of the other economic and political variables," that Latin American and Caribbean countries with "worse rights records—including Argentina, Brazil, Chile, and Mexico—received more U.S. FDI during the study period than other countries" within those regions); David Jessup, *Dollars and Democracy: The Post-Cold War Decline in Developing Democracies' Share of Trade and Investment Markets*, NEW ECONOMY INFORMATION SERVICE, Nov. 10, 1999, at 14–17, <http://www.newecon.org/DollarsandDemocracy.pdf> (reporting evidence that developing democracies are drawing a stagnant or diminishing share of world investment); cf. Peerenboom, *supra* note 122, at 4, 22 (asserting that empirical research on the relationship between foreign direct investment and human rights performance has been "inconclusive," but citing only one unpublished paper on the subject of worker rights in support of this assessment).

144 See Oneal, *supra* note 143, at 582 (noting that, for several decades, authoritarian regimes in Latin America "received significantly greater amounts of U.S. investment than democracies in the region," and that historically, U.S. investments have been more profitable in Latin America than elsewhere); Tuman & Emmert, *supra* note 143, at 11 (finding that, among Latin American countries, a "poor human rights record" has historically had "a positive and statistically significant effect" on inflows of foreign direct investment).

tions that please investors.¹⁴⁵

D. EXPLANATIONS FOR THE COMPATIBILITY OF FOREIGN INVESTMENT AND HUMAN RIGHTS

There are a number of possible explanations—none of them mutually exclusive—as to why the observance of human rights might be associated with higher inflows of foreign capital. First, investors value stability. The fact that a state does not repress its citizens both reflects and contributes to the political and social stability that investors covet.¹⁴⁶ Repression and instability have the potential to form a vicious cycle: a regime resorts to repression because its survival is threatened, but repression in turn undermines support for the regime. The degree to which a regime violates human rights may therefore mirror the extent to which the regime has difficulty maintaining internal order and its own hold on power.¹⁴⁷ Conversely, a lack of repression is indicative of a society that is stable and at peace with itself.

Second, investors reward not only stability, but also transparency. In particular, they seek reliable information about the environment in which they are placing their capital at risk, and about the policy decisions that will affect the value of their investments.¹⁴⁸ Repressive regimes that control the flow of information about domestic conditions and government policy cannot satisfy the informational demands of investors because “the information they offer is seen as biased and selec-

145 See, e.g., B.S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1, 10 (2004) (asserting that the “central motivation” behind the World Bank’s efforts to promote the observance of human rights and the rule of law “is of course to create conditions that facilitate the operation of transnational capital”).

146 See, e.g., Jensen, *supra* note 135, at 599–601, 612 (finding that democracy and respect for human rights are positively correlated with foreign investment, and concluding that a lack of repression attracts investment because it enhances political stability).

147 Cf. Richards et al., *supra* note 2, at 224 (describing the view held by many scholars that governments may resort to repression in an effort to “provide and maintain the kind of stable political climate necessary to keep and attract foreign investment”).

148 See, e.g., ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* 226 (3d ed. 2001) (explaining that investors seek to reduce the risk associated with investment in foreign countries by obtaining reliable and credible information about the environment in which they are investing); MOSLEY, *supra* note 42, at 116, 130–31 (describing both the importance of information to investors in emerging markets and the difficulty of obtaining such information).

tive.”¹⁴⁹ Transparency, observe Robert Keohane and Joseph Nye, is thus “becoming a key asset for countries seeking investments.”¹⁵⁰ A state that upholds human rights is likely to enjoy a variety of institutions—such as independent courts, a free press, meaningful opposition parties, and a thriving assortment of interest groups—that are capable not only of imbuing the state with transparency, but also of providing extensive and credible information in their own right.

Third, the kind of political and legal infrastructure that pleases foreign investors is also conducive to the observance of human rights. Thriving market economies are inherently attractive to investors. Yet the same institutions and practices that make possible a thriving market economy—such as the rule of law, the free movement of goods and people, and a stable political system—are also essential to the flourishing of basic civil liberties.¹⁵¹ Effective institutional mechanisms for the enforcement of property rights and the adjudication of commercial disputes, for example, are likely to offer some capacity for the enforcement of civil rights and the adjudication of suits against the government.¹⁵² The protection of human rights can piggyback upon the existence of institutions that protect property rights, and vice versa. Economic liberalism and political liberalism are symbiotic partly because they share common institutional foundations. Even if the existence of a market economy does not by itself guarantee the existence of a liberal polity, the two forms of liberalism are likely to be correlated in practice.

Fourth, the extent to which capital flows to regimes that respect human rights may partly reflect the self-conscious efforts of those with wealth to wield their economic power in

149. KEOHANE & NYE, *supra* note 148, at 226 (observing that “it is risky for foreigners to invest funds in a country where the key decisions are made in an opaque fashion”); *see also* MOSLEY, *supra* note 42, at 130–31 (quoting investor criticism that, in emerging markets, “[t]here is no culture of information and transparency . . . and governments don’t want to tell you anything,” and observing that “low information quality” can increase the “risk premium” that a country must offer in order to attract investment).

150. KEOHANE & NYE, *supra* note 148, at 226.

151. *See, e.g.*, Richards et al., *supra* note 2, at 235 (observing that foreign investment demands a “stable macroeconomic and political environment,” and that the “institutional foundations” of a market economy include “the rule of law” and “the free mobility of production factors”).

152. *Cf.* Farber, *supra* note 118, at 87 (arguing that the ability of courts to protect human rights is evidence of their ability to protect property rights as well).

ways that promote the observance of their political values. The World Bank, for example, pressures borrower nations to take steps toward democratization,¹⁵³ conditions loans to African countries on the cessation of female circumcision,¹⁵⁴ and offers funding for projects that support the legal and judicial protection of basic human rights.¹⁵⁵ Federal law prohibits the United States from giving foreign aid to nations that consistently engage in “gross violations of internationally recognized human rights.”¹⁵⁶ The European Union, meanwhile, will not conclude a comprehensive treaty agreement that lacks a human rights clause.¹⁵⁷ Agreements of this type, which tie trade benefits to human rights practices, have proven more effective than ordinary human rights treaties at influencing actual government practice.¹⁵⁸ Private individuals, too, have ways of pooling their economic power to promote the observance of human rights. European companies face shareholder pressure to curtail investment in American states that practice the death penalty—including Texas, where Europe constitutes the largest source of foreign investment.¹⁵⁹ Multinational corporations that

153 See Falk, *supra* note 1, at 66 (observing that “IMF and World Bank support . . . is now conditioned by demands associated with democratization and heightened social sensitivity”).

154 See WADE JACOBY, *IMITATION AND POLITICS: REDESIGNING MODERN GERMANY* 29 n.17 (2000) (discussing the World Bank’s practice of “conditionality” in lending).

155 See Stefano Battini, *The Globalization of Public Law*, 18 EUR. REV. PUB. L. 1, 3 (2006) (describing the World Bank’s efforts to advance a “universal model of public law” along the lines contemplated by the French revolutionaries of 1789). It is unclear, however, whether the efforts and practices of institutions such as the World Bank and the International Monetary Fund actually have a positive impact on the observance of human rights. See Richards et al., *supra* note 2, at 229, 231 tbl.3 (finding no statistically significant relationship between the amount of assistance that a developing country receives from lenders such as the International Monetary Fund and the World Bank, and the extent to which it respects human rights).

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

157 See Päivi Leino, *European Universalism? The EU and Human Rights Conditionality*, 24 Y.B. EUR. L. 329, 332–33 (2005) (discussing the “essential element” clause of E.U. general framework agreements).

158 See Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 609–20 (2005) (mustering both qualitative and quantitative evidence that preferential trade agreements that contain “hard” human rights standards are more effective at modifying the behavior of repressive states than human rights agreements).

159 See T.R. REID, *THE UNITED STATES OF EUROPE* 120 (2004) (noting that Europe’s \$900 billion of direct investment in the United States makes it the largest source of foreign investment in forty-four states, including Texas and

are perceived to be financing human rights violations risk costly disapproval from activists and consumers alike.¹⁶⁰

A final explanation—and one that demands particular attention—involves the strongly synergistic relationship between investment and human capital: respect for human rights attracts investment by improving the quality of a country's workforce. From the perspective of investors, highly skilled labor is a coveted resource: the more productive the labor in a given country, the higher the returns to investment in that country, all other things being equal. Countries that offer the most skilled and productive workers will, for this reason, be attractive to investors as well. A growing body of research confirms that labor productivity is increasingly of greater importance to multinational investors than labor cost.¹⁶¹ This em-

California); Steven A. Drizin & Stephen K. Harper, *Old Enough to Kill, Old Enough to Die*, S.F. CHRON., Apr. 16, 2000, at Z1, 4–5 (describing a warning letter from the chairman of the European Parliament's Delegation for Relations to then-Governor George W. Bush of Texas).

160. See Spar, *supra* note 134, at 70–74 (discussing the “spotlight phenomenon,” or the manner in which information technology has rendered multinational corporations increasingly vulnerable to criticism and organized action by human rights activists).

161. See, e.g., FLANAGAN, *supra* note 69, at 132, 137, 144, 181 (explaining that “low wages tend to be offset by low output per worker,” and reporting empirical evidence that multinational corporations are, on the whole, not attracted to low-wage workforces on account of their low productivity); HELD ET AL., *supra* note 86, at 279 (reporting that average wages in developing countries are over seventy percent lower in developing countries than in advanced industrial states, but labor productivity is sixty percent lower as well); Blanton & Blanton, *supra* note 113 (citing “considerable evidence” that “foreign investors in non-extractive industries” place greater value upon access to a “well-trained skilled labor pool” than upon low wages); Falk, *supra* note 1, at 64 (arguing that the “actual investment decisions” of multinational firms “are based on the quality of labor, rather than the price”); Harms & Ursprung, *supra* note 111, at 661 (noting that, as technology becomes increasingly sophisticated, “an educated labor force has become more valuable as a factor of production than unskilled workers”); Kalman Kalotay, *New Members in the European Union and Foreign Direct Investment*, 48 THUNDERBIRD INT'L BUS. REV. 485, 485 (2006) (concluding that new members of the European Union derive their competitive advantage from labor productivity, not lower taxes or subsidies); Li & Resnick, *supra* note 142, at 195 tbl.1, 198 (finding that increases in the cost of labor are not correlated with any significant decrease in foreign direct investment, if one controls for the effect of other variables such as the observance of property rights, market size, and exchange-rate volatility); Susmita Dasgupta et al., *Japanese Multinationals in Asia: Capabilities and Motivations* 12–13 (Pol'y Research Working Papers, Paper No. 1634, 1996), available at <http://ssrn.com/abstract=620493> (finding that labor quality has a greater impact upon the actual investment decisions of Japanese multinational firms than labor cost).

phasis upon quality over cost is a predictable result of the ongoing shift in the global economy away from the extraction of natural resources, which has relied primarily upon unskilled labor, toward the production and delivery of technologically demanding, skill-intensive goods and services.¹⁶²

Respect for human rights improves the quality of human capital in two important ways. First, a favorable human rights environment promotes the development of a country's *existing* human capital. It is not difficult to see, for example, how a country that discourages the female half of its population from obtaining higher education or prevents them from driving automobiles fails to maximize the productivity of its human capital.¹⁶³ Productivity and innovation are more likely to flour-

162 See, e.g., KEOHANE, *supra* note 2, at 205–06 (discussing how changes in the world economy are causing global demand to shift away from unskilled labor toward skilled labor); Spar, *supra* note 134, at 64–65 (suggesting that labor quality has a greater impact on investment decisions than labor cost); *Smaller Shares, Bigger Slices*, *ECONOMIST*, Apr. 7, 2007, at 76, 76 (discussing recent findings by the International Monetary Fund that, even though the offshoring of jobs decreases wages of highly skilled workers, the overall share of world income enjoyed by skilled workers has increased because of the extent to which employment has shifted “from unskilled to skilled sectors” of the global economy); cf. FLANAGAN, *supra* note 69, at 126–27, 129–30 (reporting that global companies tend to be concentrated in high-wage industries, to “employ relatively skilled workers,” and to pay higher wages than purely local companies).

To be sure, some have argued that the relationship between human rights and multinational investment is a negative one, not a positive one: oppressive regimes, it is said, attract investment because they can contain labor costs by crushing worker efforts to organize. This school of thought is open, however, to powerful theoretical and empirical objections. First, as a theoretical matter, this view of the relationship between human rights and multinational investment emphasizes labor *cost* to the exclusion of labor *quality* and thus appears to rest upon an increasingly outmoded view of multinational economic activity. Even assuming that repressive regimes excel at delivering the kind of docile, low-cost workforce well suited to the needs of the United Fruit Company or the garment industry, such regimes may by the same token struggle to produce the kinds of skilled workers sought by IBM or high-value manufacturing industries.

Second, as an empirical matter, recent studies suggest that the opposite is true: to the extent that labor practices and foreign investment are correlated at all, countries with superior labor practices appear to attract a greater share of foreign investment. See *id.* at 124, 134–37, 207–12 & 211 tbl.A4.1 (finding a statistically significant and negative relationship between a country's job fatality rates and its share of foreign direct investment, and citing additional studies that show a negative relationship between child labor and forced labor, on the one hand, and foreign investment, on the other).

163 See, e.g., JEFFREY D. SACHS, *THE END OF POVERTY: ECONOMIC POSSIBILITIES FOR OUR TIME* 60, 72 (paperback ed. 2006) (observing that dis-

ish in an environment of freedom than in a country where criticism of government policy or prevailing social orthodoxy invites persecution and imprisonment.¹⁶⁴

Second, respect for human rights makes a country attractive to human capital from *elsewhere*. One way in which countries can compete for the elite workers who are crucial to a nation's growth and prosperity is by offering competitive bundles of individual rights and civil liberties. The next Part of this Article argues at length that countries will be rewarded by the global labor market for engaging in constitutional competition and participating in a "race to the top" in the area of human rights.

VI. CONSTITUTIONAL COMPETITION FOR HUMAN CAPITAL

A. THE POSITIVE RELATIONSHIP BETWEEN HUMAN RIGHTS AND HUMAN CAPITAL

Human capital theory holds that the key to economic growth lies not in a given locale's capacity for low-cost production, but rather in its endowment of highly educated and pro-

crimination against women undermines the ability of "half the population" to contribute to "overall development" and is thus a root cause of poverty); Blanton & Blanton, *supra* note 113 (noting that the prevalence of secondary education for women is commonly used as a yardstick of the overall level of human capital in a country); *All Puffed Up and Stalling on Reform*, ECONOMIST, Mar. 3, 2007, at 53 (reporting that women in Saudi Arabia "are still deprived of simple rights, such as the right to drive or to travel without a male guardian's permission"); *Glacier in the Desert*, ECONOMIST (A LONG WALK), Jan. 7, 2006, at 7 (observing that the Saudi prohibition against female drivers is "not merely humiliating," but also "crippling, even for wealthy women who can afford drivers").

164 See, e.g., FRIEDMAN, THE LEXUS AND THE OLIVE TREE, *supra* note 6, at 207 (arguing that productivity and innovation flourish in an environment of freedom); KEOHANE & NYE, *supra* note 148, at 226 (observing that it is difficult for authoritarian governments "to encourage the individual creativity that the information economy will demand" while still maintaining controls over the flow of information); SACHS, *supra* note 163, at 33 (arguing that "traditions of free speech and debate were powerful contributors to the uptake of new ideas" that helped to propel Britain to early industrialization, while the absence of such traditions contributed to the laggardly performance of China, notwithstanding its initial technological lead); Blanton & Blanton, *supra* note 113 (concluding that "respect for human rights facilitates a more efficient, productive, skilled, and engaged society" and drives improvement in human capital); Falk, *supra* note 1, at 67 (observing that "[t]he bureaucratic rigidities of a command economy and an authoritarian state [deprive] society of the creativity needed for success under postindustrial conditions.").

ductive workers.¹⁶⁵ Innovative firms and industries concentrate themselves in thriving cities like New York and San Francisco, notwithstanding the high costs entailed, in order to reap the productivity benefits and other advantages that accrue from high endowments of densely packed human capital.¹⁶⁶ Likewise, argues Richard Florida, a country's capacity for "international economic leadership," in every area "from manufacturing excellence to scientific and technological advancement," turns upon its "ability to mobilize, attract, and retain human creative capital."¹⁶⁷ This view is no mere academic fantasy divorced from the actual profit-seeking behavior of investors and corporate managers: it is the president and chief executive officer of IBM who insists that the "single most important challenge" facing today's "globally integrated enterprises," and "the consideration driving most business decisions today," is the need to secure "a supply of high-value skills."¹⁶⁸

Respect for human rights, in turn, can help states to develop and attract a talented workforce in the same manner that respect for property rights helps states to attract and accumulate capital. Empirical evidence suggests that knowledge workers are drawn to locales that are "inclusive and diverse,"¹⁶⁹ if not "bohemian,"¹⁷⁰ because they thrive both person-

165. See, e.g., RICHARD FLORIDA, CITIES AND THE CREATIVE CLASS 32-33 (2004) (discussing human capital theory); Edward L. Glaeser, *Are Cities Dying?*, J. ECON. PERSP., Spring 1998, at 139, 148-49 (observing that "[c]ities with higher levels of human capital have had faster growth in income and in population since 1950, and particularly since 1970") (citation omitted).

166. See FLORIDA, *supra* note 165, at 33 (explaining why cities with "greater numbers of talented people" tend to enjoy self-perpetuating growth); see also, e.g., Glaeser, *supra* note 165, at 146 (observing that the opportunity to share a "common labor pool is the most important determinant of which industries locate together").

167. RICHARD FLORIDA, THE FLIGHT OF THE CREATIVE CLASS 3 (2005).

168. Palmisano, *supra* note 83, at 13-34; see *supra* note 83 and accompanying text (describing the evolution of the modern corporation into a "global network" designed to tap human capital).

169. See FLORIDA, *supra* note 165, at 33 (arguing that members of the "creative class"—namely, the highly skilled portion of the population that engages in innovative work—flock to locales with a reputation for tolerance and open-mindedness); FLORIDA, *supra* note 167, at 38-39 (same); see also, e.g., Greg Barns, "A Draw for the Creative Class," S. CHINA MORNING POST (Hong Kong), Sept. 13, 2005, at 15 (citing the views of economists that Tasmania's dramatic about-face on gay rights issues—from the criminalization of gay sex, to the formal recognition of same-sex relationships—has enhanced its appeal to creative professionals and boosted its economy).

170. See *id.* at 113-28 (offering empirical evidence of the relationship between a city's tolerance for "bohemian" lifestyles and its capacity to attract

ally and professionally in an environment of openness and tolerance.¹⁷¹ Private enterprise has already grasped the link between tolerance and human capital: profit-hungry giants such as Disney,¹⁷² Wal-Mart,¹⁷³ and Procter & Gamble¹⁷⁴ have pursued gay-friendly employment policies even in the face of organized consumer opposition because such policies help them to attract talented workers.¹⁷⁵

The same qualities of diversity and freedom that make cities and corporations attractive to skilled labor make countries attractive as well. States can, in effect, bid for human capital by offering attractive bundles of political, social, and economic rights.¹⁷⁶ Favorable constitutional policies—such as the right to practice one’s religion or to speak one’s mind without fear of punishment, or the freedom to enjoy the latest popular film or novel—constitute a noneconomic incentive for workers to stay

human capital and high-technology industries).

171. See *id.* at 32–33 (discussing human capital theory).

172. See, e.g., Mireya Navarro, *Disney’s Health Policy for Gay Employees Angers Religious Right in Florida*, N.Y. TIMES, Nov. 29, 1995, at A20 (describing the boycott effort led by the American Family Association and conservative Christian groups in retaliation against Disney’s decision to extend health insurance benefits to live-in partners of gay employees); *Baptists End Disney Boycott*, N.Y. TIMES, June 23, 2005, at A17 (noting the end of an eight-year boycott by the Southern Baptist Convention against Disney for offering employee benefits to same-sex partners).

173. See FLORIDA, *supra* note 167, at 60 (discussing the inclusion of sexual orientation in Wal-Mart’s nondiscrimination policies).

174. See *id.* (discussing Procter & Gamble’s support for the repeal of an anti-gay rights provision of Cincinnati’s city charter that served to discourage workers and companies from locating there); David D. Kirkpatrick, *Conservatives Urge Boycott of Procter & Gamble*, N.Y. TIMES, Sept. 17, 2004, at A4 (describing boycott efforts by conservative Christian groups against Procter & Gamble in response to its position on the Cincinnati charter provision).

175. See, e.g., Joann Muller, *Foes to Mickey: You Dirty Rat*, BOSTON GLOBE, Sept. 1, 1996, at E1 (quoting an entertainment industry analyst’s observations that “[t]here are a lot of talented people in Hollywood who happen to be gay,” and that Disney “faces a lot of competition” for such talent if it fails to extend employee benefits to same-sex partners).

176. See Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1483, 1487–91, 1503–05, 1534–35, 1541–42 (1997) (discussing how the framers of Argentina’s mid-nineteenth century constitution deliberately and successfully used constitutional guarantees of personal freedom, explicitly modeled after those in the U.S. Constitution, to attract immigrants and generate spectacular economic growth); cf. IRENE BLOEMRAAD, *BECOMING A CITIZEN: INCORPORATING IMMIGRANTS AND REFUGEES IN THE UNITED STATES AND CANADA* 139 (2006) (arguing that migrants judge governments in part on the degree to which they demonstrate openness to “outsiders like themselves”).

or move. To the extent that workers with valuable skills are mobile and desire similar rights and freedoms, competition for such workers has the potential to generate a “race to the top” with respect to the rights and freedoms that they value.

B. THE PROBLEM OF LABOR MOBILITY: A TALE OF TWO TIERS

Whether competition for skilled labor will encourage states to commit themselves to certain rights, and what those rights will be, turns upon a number of questions. Is labor sufficiently mobile to respond to constitutional incentives? If so, what workers are most likely to be mobile, and what rights are they likely to demand?

Labor is, on the whole, not nearly as mobile as capital.¹⁷⁷ Though estimates of overall migration vary, it has been reported that the number of people who live outside their country of birth has doubled in less than forty years and now reaches upwards of 150 million people, or 2.5% of world population.¹⁷⁸ Measured in proportional terms, however, international labor flows have actually experienced a significant decline since World War I, in large part because states have imposed significant legal restrictions on immigration.¹⁷⁹ As a result, labor mobility was more comparable to capital mobility in the eighteenth century than it was in the twentieth century.¹⁸⁰ Paul Hirst and Grahame Thompson offer this glum assessment of the situation facing most would-be immigrants today:

[A]part from a ‘club class’ of internationally mobile, highly skilled professionals, and the desperate poor migrants and refugees who

177. See, e.g., Esty & Geradin, *supra* note 35, at 242–43 (observing that the “Tieboutian vision of ‘people voting with their feet’ bears little resemblance to the real world” because “[c]ultural barriers and tradition affect mobility”); HIRST & THOMPSON, *supra* note 36, at 27–31 (contrasting labor and capital mobility); *Be My Guest*, ECONOMIST, Oct. 8, 2005, at 86, 86 (characterizing labor as “globalisation’s missing link,” and observing that heavy impediments to the “flow of workers across borders” have left “the global market for labour far more distorted than those for capital and commodities”).

178. See Susan F. Martin, *Heavy Traffic: International Migration in an Age of Globalization*, BROOKINGS REV., Sept. 22, 2001, at 41, 41 (reporting an estimated 150 million migrants comprising 2.5% of world population as of 2001); see also Frédéric Docquier & Hillel Rapoport, *Skilled Migration: The Perspective of Developing Countries* 7 (World Bank Pol’y Research, Working Paper No. 3382, 2004), available at <http://ssrn.com/abstract=625259> (reporting that 1.66% of the world’s working-age population live outside their countries of birth); *supra* note 70 and accompanying text (reporting estimates ranging from 2.3% to 5%).

179. See *supra* note 69 and accompanying text.

180. See *id.*

will suffer almost any hardship to leave intolerable conditions, the bulk of the world's populations now cannot easily move. Workers in advanced countries have no 'frontier' societies like Australia or Argentina to migrate to . . . Increasingly the poor . . . are unwelcome in advanced countries except as guest workers or illegal migrants working for poverty wages. . . . In this respect, despite the rhetoric of globalization, the bulk of the world's population live in closed worlds, trapped by the lottery of their birth.¹⁸¹

The erection of barriers to the movement of people, and the lowering of barriers to the movement of money, goods, and ideas, have combined to divide the world's population into two tiers: an elite upper tier consisting of "owners of capital, highly skilled workers, and many professionals" who can move with relative freedom according to their own tastes, and an enormous lower tier consisting of "[u]nskilled and semiskilled workers and most middle managers" who cannot move in response to any incentives, economic or otherwise.¹⁸² Countries that offer an abundance of wealth, opportunity, and freedom have defined these tiers by distinguishing sharply between capitalists and workers, then still further among workers on the basis of the skills and knowledge that they possess. Workers in the lower tier are trapped within—or, more commonly, excluded by—national borders. The prevailing political climate in the world's wealthy liberal democracies is not at all conducive to an opening of the floodgates to large numbers of foreign workers.¹⁸³

181. HIRST & THOMPSON, *supra* note 36, at 267.

182. RODRIK, *supra* note 6, at 4; *see also* HELD ET AL., *supra* note 86, at 324 (noting "considerable polarization among immigrants" between "highly skilled professionals," on the one hand, and "poorly paid" immigrants in "insecure" jobs, on the other); *id.* at 309 tbl.6.2 (describing a "hierarchy of ease of movement" that affords more options to "high-skill migrants" than "low-skill migrants," refugees, or asylum seekers); Allan M. Findlay, *Brain Strain and Other Social Challenges Arising from the UK's Policy on Attracting Global Talent*, in COMPETING FOR GLOBAL TALENT 65, 68 (Christiane Kuptsch & Pang Eng Fong eds., 2006) (describing how most "West European democracies" seek both to exclude "clandestine migrants and unwanted entrants," and "to recruit highly skilled workers"); Christiane Kuptsch, *Students and Talent Flow—The Case of Europe: From Castle to Harbour?*, in COMPETING FOR GLOBAL TALENT, *supra*, at 33, 59 (describing European efforts to reconcile the policy goals of excluding unskilled migrants and attracting skilled migrants).

183. *See, e.g.*, FLANAGAN, *supra* note 69, at 109–12 (offering a sophisticated and nuanced explanation of both the economic basis of public opposition to increased migration and the failure of international organizations to seek the lowering of immigration restrictions); PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 9–11 (1998) (citing survey data that indicates most Americans are "quite favora-

Those in the upper tier, by contrast, enjoy freedom of movement because they possess skills and knowledge that are in rising demand. Intellectual capital is responsible for an increasing share of economic growth in the industrialized world.¹⁸⁴ The human bearers of this capital generate wealth far out of proportion to their numbers.¹⁸⁵ At the same time, demographic changes place mounting pressure upon the world's developed economies merely to maintain the stock of human capital that they already possess,¹⁸⁶ while even populous giants such as China and India—notwithstanding their vast pools of low-wage, unskilled labor—are rapidly exhausting their supplies of skilled labor.¹⁸⁷ Chinese businesses, for ex-

bly disposed in principle to legal immigration . . . but want less of it”); Michael A. Fletcher, *Bush Immigration Plan Meets GOP Opposition*, WASH. POST, Jan. 2, 2005, at A6 (describing opposition from within the President's own party to White House proposals to liberalize immigration policy); *American Idiocracy*, ECONOMIST, Mar. 24, 2007, at 40 (noting the “bilious tone” of a national debate that has “focused overwhelmingly on the threat of illegal immigration”) *Lowest Common Denominator*, ECONOMIST, Nov. 29, 2003 at 71 (citing Germany's alliance with Britain and France to block European Union proposals that would extend the rights of temporary workers); *Hughes Fault*, ECONOMIST, Apr. 3, 2004, at 60 (describing how the United Kingdom has “cracked down on asylum-seekers”); *Pick and Mix*, ECONOMIST, Mar. 9, 2006, at 52–53 (describing efforts by the British government to tailor immigration policy to the admission of skilled workers amidst mounting public concerns over immigration as a whole); *Talking of Immigrants*, ECONOMIST, June 1, 2006, at 50 (explaining the underlying policy origins of European opposition to legal as well as illegal immigration); *The Longest Journey*, ECONOMIST (A SURVEY OF IMMIGRATION), Oct. 31, 2002, at 3–4 (reporting upon a global political clampdown on immigration); *supra* text accompanying note 181 (citing Hirst & Thompson, *supra* note 36, at 29, 267, on the dim prospects facing the bulk of the world's would-be migrants).

184 See *The Battle for Brainpower*, ECONOMIST (THE BATTLE FOR BRAINPOWER), Oct. 7, 2006, at 4 (reporting that “intangible assets” now comprise seventy percent of the value of companies in the S&P 500, as compared to only twenty percent in 1980, and that the number of high-skill jobs in the United States requiring “complex interactions” and a “high level of judgment” has grown three times faster than overall employment); *The Brains Business*, ECONOMIST, Sept. 10, 2005, at 3 (discussing “the contribution of knowledge-based industries to total value added” across Europe).

185 See RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS 76* (2002) (noting the superior wealth and earning power of members of elite workers, or the “creative class”).

186 See *The Battle for Brainpower*, *supra* note 184, at 4 (describing impending declines in the working-age population of Europe, Japan, China, and the United States).

187 See, e.g., Peter Coy & Jack Ewing, *Where Are All The Workers?*, BUS. WK., Apr. 9, 2007, at 28, 28, 31 (observing that only a small fraction—perhaps no more than two percent—of the 400,000 engineers that India produces each year “have the skills and language abilities to work in an advanced multina-

ample, now cite a shortage of qualified staff as their most serious concern, ahead of such grave problems as bureaucratic red tape and corruption.¹⁸⁸ Such shortages are only aggravated by the fact that countries poach talent from one another. The extent of this poaching can be dramatic: some smaller nations have lost more than eighty percent of their most educated citizens to “brain drain.”¹⁸⁹

tional corporation,” and reporting more generally that the “seemingly inexhaustible pools of cheap labor from China, India, and elsewhere are drying up as demand outstrips the supply of people with the needed skills”); *Capturing Talent*, *ECONOMIST*, Aug. 18, 2007, at 59, 59–60 (citing a worsening “Asian talent shortage” in a dizzying array of professions, including information technology, law, accounting, medicine, business, and even commercial aviation); *Opening the Doors*, *ECONOMIST* (THE BATTLE FOR BRAINPOWER), Oct. 7, 2006, at 13 (describing Chinese and Indian efforts to repatriate skilled émigrés in order to meet domestic needs); *The Problem with Made in China*, *ECONOMIST*, Jan. 13, 2007, at 68, 69 (reporting that an inadequate supply of “qualified workers” in China is causing “rampant poaching and extremely fast wage inflation”); *The World is Our Oyster*, *ECONOMIST* (THE BATTLE FOR BRAINPOWER), Oct. 7, 2006, at 9, 12 (describing double-digit wage inflation and employee turnover rates in the information technology sectors of the Indian and Chinese economies); see also, e.g., Jack Ewing, *Desperately Seeking Bulgarian Programmers*, *BUS. WK.*, Apr. 9, 2007, at 31, 31 (describing how a shortage of information technology workers in Eastern Europe has emerged, as multinational corporations exhaust “what was supposed to be a deep pool of math and science graduates”); *Open Up*, *supra* note 70, at 4 (observing that “[m]ost, perhaps all, poor and middle-income countries face chronic shortages of skilled workers”).

188 See *Capturing Talent*, *supra* note 187, at 60 fig.1 (summarizing the results of a January 2007 survey of Chinese business concerns).

189 E.g., FLANAGAN, *supra* note 69, at 105–06 (noting that Suriname, which has lost 89.9% of its skilled workers, is only one of twenty developing countries that have lost more than half of their skilled workers to emigration); FLORIDA, *supra* note 167, at 83 (reporting that seventy-five percent of college-educated Jamaicans reside in the United States); HELD ET AL., *supra* note 86, at 304 (discussing how international recruitment by multinational corporations and targeted efforts by immigration authorities have resulted in “significant ‘brain drain’ from the developing world to the West”); Findlay, *supra* note 182, at 70 (reporting that one-third of developing countries lose more than fifteen percent of their tertiary educated population to emigration); Docquier & Rapoport, *supra* note 178, at 9 (reporting that emigration of skilled workers exceeds eighty percent in countries such as Guyana, Jamaica, and Suriname); *id.* at 5 (noting that nearly forty percent of Filipino emigrants are college-educated, and that Mexico was, as of 1990, “the world’s third largest exporter of college-educated migrants”); Prachi Mishra, *Emigration and Brain Drain: Evidence from the Caribbean* 13 (Int’l Monetary Fund, Working Paper No. 06/25, 2006) 13 (2006) (noting that many Caribbean countries have lost more than seventy percent of their educated citizens to “brain drain”); Graeme Hugo, *Australian Experience in Skilled Migration*, in *COMPETING FOR GLOBAL TALENT*, *supra* note 182, at 143 tbl.19 (reporting that over one-fifth of New Zealanders, and nearly the same proportion of Mexicans, have

One country's loss is, of course, another country's windfall. A country that can attract elite workers from around the world stands to profit handsomely. The United States alone is home to over two and a half million highly educated immigrants from developing countries—without even accounting for foreign students.¹⁹⁰ Nowhere have the benefits of this high-end migration been more evident than in the service and technology sectors.¹⁹¹ Nearly one-quarter of the nation's scientists and engineers, and more than half of all its doctorate holders in engineering, computer science, and the life sciences, are foreign imports.¹⁹² Silicon Valley, the high-tech envy of the world, owes much of its success to immigration: entrepreneurs of Chinese and Indian origins have founded over thirty percent of its technology firms over the last quarter-century.¹⁹³ Restrictions on immigration by skilled workers have prompted dismay from business leaders who are quick to grasp the adverse consequences for American competitiveness.¹⁹⁴ Other industrialized countries, meanwhile,

left for other countries).

In absolute numbers, the movement from larger countries has also been considerable: in the space of thirteen years beginning in the early 1970s, four Asian countries—India, China, South Korea, and the Philippines—lost a total of 145,000 scientifically trained workers to the United States. See HELD ET AL., *supra* note 86, at 314. To put this figure in perspective, McKinsey Consulting estimates that, in 2003, China possessed only 160,000 “young engineers who were capable of working for multinational companies.” *Nightmare Scenarios*, ECONOMIST (THE BATTLE FOR BRAINPOWER), Oct. 7, 2006, at 16. India alone has exported 1.5 million knowledge workers to the U.S. and U.K. See Rupa Chanda & Niranjana Sreenivasan, *India's Experience with Skilled Migration*, in COMPETING FOR GLOBAL TALENT, *supra* note 182, at 215, 219 tbl.3.

190. See Docquier & Rapoport, *supra* note 178, at 5 (citing 1990 census estimates of the number of “highly educated immigrants from developing countries” over the age of twenty-five residing in the United States).

191. See HELD ET AL., *supra* note 86, at 325 (explaining that migrant labor in the U.S. “is likely to account for some part of its competitive edge in service and high-tech industries”).

192. See FLORIDA, *supra* note 167, at 11, 99–100 & 100 fig.4.1 (discussing America's “[d]ependen[ce] upon foreign talent in our economy”); *Racing for Knowledge: International Comparisons*, WILSON Q., Autumn 2006, at 42 (noting that “about [seventy-five] percent of new Ph.D. holders from overseas plan to stay in the United States”).

193. See *Brains and Borders*, ECONOMIST, May 6, 2005, at 15; see also FLORIDA, *supra* note 167, at 7 (reporting that “immigrant entrepreneurs accounted for 30 percent of all Silicon Valley start-ups during the 1990s”); *id.* at 109–09 (reporting that Chinese and Indian engineers alone run nearly thirty percent of Silicon Valley's technology companies).

194. See Pang Eng Fong, *Foreign Talent and Development in Singapore*, in COMPETING FOR GLOBAL TALENT, *supra* note 182, at 155, 159 (reporting that, of multinational corporations surveyed by PricewaterhouseCoopers, forty-six

have sought to capitalize on such missteps and to tailor their immigration policies to the admission of those with needed talents.¹⁹⁵ Targeted recruitment by multinational corporations and national governments alike have generated increasing flows of elite migration: the average worldwide emigration rate for high-skill workers is over six times greater than for low-skill workers, and the gap is only increasing.¹⁹⁶

What can be said of the people for whom the world's wealthiest nations now compete? They go by many names.

percent cited U.S. immigration policy as a source of difficulty); *American Idiocracy*, *supra* note 183, at 40 (describing how American high-tech companies “relentlessly complain about not being able to get visas for some of the world’s best brains”); *Brains and Borders*, *supra* note 193, at 15 (quoting a letter from Microsoft founder Bill Gates to Congress). Only ten to fifteen percent of immigrants to the United States are admitted for economic or employment reasons, as compared to half or more of immigrants to Australia and Canada. *See* Martin, *supra* note 178, at 87; *see also id.* at 89 (observing that the U.S. “does not have a coherent strategy for attracting global talent,” and that the shortcomings of U.S. immigration policy enable “other countries with focused strategies” to become increasingly competitive).

195. *See, e.g.*, Hugo, *supra* note 189, at 107, 111–27 (recounting the evolution of Australian immigration policy); Kuptsch, *supra* note 182, at 43–58 (discussing measures being taken by the United Kingdom, France, Germany, and the European Union to attract talented students then retain them as permanent residents); Docquier & Rapoport, *supra* note 178, at 7 (describing how the proportion of skilled workers among the overall migrant population has risen most markedly in Canada and Australia, “the two countries which were the first to introduce selective immigration policies officially”); *American Idiocracy*, *supra* note 183, at 40 (observing that “many other countries—including Australia, Canada, Britain, Germany, and even France—are bending over backwards to attract talented people”); *Brains and Borders*, *supra* note 193, at 15 (discussing selective immigration policies in Australia, Canada, Switzerland, and the European Union); *ECONOMIST*, *Not the Ace in the Pack*, Oct. 27, 2007, at 60, 60 (describing a European Union proposal to issue “blue card” work permits to skilled workers in an effort “to make Europe a bit more competitive,” in the words of one E.U. commissioner); *Opening the Doors*, *supra* note 187, at 12–14 (describing the heightened efforts of the British, German, French, Canadian, Singaporean, Australian, and New Zealand governments to recruit foreign talent).

196. The average emigration rate for “high-skill workers” is 5.5%, as compared to 1.6% for “medium-skill workers” and 0.9% for “low-skill workers.” Docquier & Rapoport, *supra* note 178, at 7. The emigration rate for high-skill workers, meanwhile, is growing over twelve times faster than the emigration rate for low-skill workers. *See id.* (reporting that the emigration rate for highly skilled workers increased by 0.75% between 1990 and 2000, as compared to a 0.06% increase in the emigration rate for low-skill workers over the same period); *see also* FLANAGAN, *supra* note 69, at 104–05 & tbl.5.4 (noting that highly skilled workers comprise less than ten percent of the global workforce yet make up over thirty-seven percent of the immigrant stock of OECD countries).

Professors Hirst and Thompson dub this elite group the “club class.”¹⁹⁷ Philip Bobbitt calls them the “learned castes.”¹⁹⁸ Richard Florida writes of international competition for the highly mobile members of the “creative class.”¹⁹⁹ In their most extreme manifestation, they are what Pico Iyer calls “global souls”: such people possess not only the requisite talents, but also the requisite mindset, for continuous relocation across the globe.²⁰⁰ Technology has not merely facilitated the physical uprooting of these elite workers to an identity-annihilating degree; it has created entirely new forms of mobility for them. Modern communication technology allows intellectual capital to flow as freely as financial capital.²⁰¹ The result is that a person in one place can now perform services in another: an English-speaking electrical engineer can now live in Bangalore but work in Bangor.²⁰² What is commonly known as outsourcing might equally be called the astral projection of labor. Not only can technology sever the soul from its roots in any earthly community; it can also sever mind from body.

Globalization is not, however, rendering it irrelevant where

197. HIRST & THOMPSON, *supra* note 36, at 31, 267.

198. BOBBITT, *supra* note 82, at 697.

199. FLORIDA, *supra* note 167, at 7 (categorizing “some 40 million people, or more than 30 percent of our total workforce,” as members of the “creative class,” which embraces not only the arts, but also “science and engineering,” “architecture and design,” and “the creative professions of law, business and finance, health care, and related fields”).

200. PICO IYER, *THE GLOBAL SOUL: JET LAG, SHOPPING MALLS, AND THE SEARCH FOR HOME* 18–19, 23–24 (2000) (describing the “global soul” with heart-felt ambivalence as a creature that is both privileged yet impoverished in respect of a sense of community and belonging).

201. *See* BOBBITT, *supra* note 82, at 699 (“Regulation by law . . . is . . . becoming more costly because the technology of computers has conferred greater value on intellectual capital, which flees from regulation wherever possible.”).

202. *See, e.g.*, FRIEDMAN, *THE WORLD IS FLAT*, *supra* note 6, at 28 (“I see a whole lot of American industry has come into Bangalore and I don’t really need to go there. I can work for a multinational sitting right here.” (quoting a managerial employee in Bangalore)); *The Great Indian Hope Trick*, *ECONOMIST*, Feb. 25, 2006 at 29, 30–31 (describing the mass “outsourcing” of services to India, and quoting a Silicon Valley venture capitalist on the phenomenon of “reverse brain-drain” caused by Indian and Chinese engineers choosing to return home); Docquier & Rapoport, *supra* note 178, at 21 (citing recent evidence of a “brain exchange” or “brain circulation” between India’s software industry and employers in other countries); *supra* note 83 and accompanying text (discussing how the modern corporation, or “Globally Integrated Enterprise,” is organized as a network that makes use of information technology to exploit human capital wherever it may be physically located).

elite workers choose to live. On the contrary, it is enabling them to choose where to live, and their ability to choose will push governments to compete for their presence. “The paradox of globalization,” observes Michael Porter, “is that location still matters”: “the more that capital and talent become mobile, the more decisive become geographic advantages.”²⁰³ Countries that fail to offer a desirable living environment will find it difficult to retain mobile talent. And to the extent that technology enables a knowledge worker to live in one place while selling her labor in another, the effect of geographic advantages will only be amplified: such a worker will no longer be compelled to live where her services are actually needed but will instead enjoy the freedom to choose a living environment with the amenities that she desires.

Meanwhile, jurisdictions that can attract flows of skilled labor stand to benefit handsomely. All other things being equal, it is easier for a state to tax someone within its borders than to tax someone who is not.²⁰⁴ Thus, a government that wishes not only to attract intellectual capital, but also to generate tax revenues, will seek to encourage skilled workers to reside within its territory. A state can encourage workers to do so, in turn, by exploiting advantages that are tied to physical location, such as the bundle of legal rights and protections that a state offers. A company that demands reliable judicial dispute resolution and legal protection of its assets must do business in a country that upholds the rule of law and property rights; likewise, a worker who demands the full panoply of rights and protections enjoyed by members of a free and democratic society must actually choose to live in a free country. Unlike money or goods or people, an attractive legal and political environment cannot be shipped by airplane or transmitted over a modem: either a country offers such a thing, or it does not.

203 Pete Engardio, *Slicker Cities*, BUS. WK., Aug. 21, 2006, at 109 (quoting Michael Porter).

204 See Avi-Yonah, *supra* note 35, at 1576–77 (discussing the difficulties associated with government taxation of foreign source capital and income); Michael S. Kirsch, *Taxing Citizens in a Global Economy*, 82 NYU L. REV. 443, 495–501 (2007) (describing problems of compliance and enforcement in taxing foreign citizens).

C. ELITE WORKERS AND THE WORLD MARKET FOR HUMAN RIGHTS

To the extent that skilled workers demand a premium for sacrificing their personal freedoms, some countries will enjoy a competitive advantage over others in the market for skilled labor. For example, many skilled American and European workers would no doubt be unwilling to live in China unless they were compensated in some way for the loss of various nonpecuniary benefits that include a substantial measure of personal freedom, from unrestricted use of the Internet to religious services that are free from state control.²⁰⁵ Just as investors demand compensation for uncertainty in the form of a risk premium, it is logical to think that workers might demand compensation for loss of personal freedom in the form of a *freedom premium*.²⁰⁶

To what extent, then, are human rights likely to prove an effective form of enticement for the world's elite workers? The "vast majority" of international migration, it has been observed, occurs in response to economic incentives.²⁰⁷ Yet members of the "club class" are, by definition, not part of the "vast majority," and their reasons for choosing one country over another are less likely to be wholly economic than those of an impoverished laborer. Freedom might be considered what economists call a superior good: our taste for it increases with our income. Someone who is starving cares first and foremost about food. Only someone who is not starving has the luxury of worrying about freedom of speech.²⁰⁸ As income rises, con-

205 For specific discussion of state censorship and control of religion in China, see notes 234–236 and accompanying text below. For more general discussion of why an educated professional raised in the West might find the Chinese legal environment unappealing, see notes 232–240 and accompanying text below.

206 Cf. Li & Resnick *supra* note 143, at 203 (arguing that countries that cannot offer strong property rights protection—perhaps because they are undemocratic—may seek to compensate for this weakness in the eyes of international investors by offering other types of incentives, such as tax holidays and resource monopolies); Quan Li, *Democracy, Autocracy, and Tax Incentives to Foreign Direct Investors: A Cross-National Analysis*, 68 J. POL. 62, 71–72 (finding empirically that autocratic regimes do, in fact, offer higher levels of incentives and subsidies to foreign investors than do democratic regimes).

207 Hatton & Williamson, *supra* note 63, at 13 (examining the disparity between the amount of immigration from wealthy areas of foreign countries and the amount of immigration from poor areas of those same countries).

208 See ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 251–53 (2000) (observing that "[t]he rich will presumably pay more for liberty than will the

siderations of sheer survival subside, and noneconomic considerations—including the legal rights and freedoms that a particular country has to offer—find room to play a more prominent role in a worker’s decision to relocate. Global elites capable of commanding healthy wages in any number of countries should be relatively more responsive to incentives of this variety, and relatively less responsive to minor sums of money, than impoverished migrants. A manual laborer who earns \$2,000 a year might leave a country that offers freedom of religion for a country that instead offers an extra \$1,000 a year, but an engineer who already earns \$60,000 a year is less likely to make the same decision: the high-earning professional demands, in effect, a higher freedom premium.

To describe the choice in economic terms, human rights such as religious freedom can be conceptualized as consumption goods. To give up income in exchange for human rights is the economic equivalent of spending money to consume more human rights. That is, workers can in effect buy freedom by forgoing additional income in exchange for a more extensive or more stringently observed set of rights. Wealth induces people to consume more of certain goods, and less of others. Food consumption, for example, may increase in absolute terms yet decline as a proportion of overall spending: necessities such as food and shelter typically absorb a lower proportion of a rich person’s income than of a poor person’s income. Civil rights and liberties, by contrast, may be akin to “luxury goods” that, though valuable to everyone, comprise a greater *proportion* of the bundle of goods preferred by the wealthy.²⁰⁹ That is, the engineer would be willing to spend a greater proportion of her income on freedom of expression, while the laborer would choose to spend a greater proportion on food. Countries, meanwhile, can be conceptualized as producers that offer different bundles of human rights in response to demand: the

poor,” in part because they have more left to spend after satisfying more “urgent needs”).

209. The increased consumption of a good in response to an increase in wealth is known by economists as a wealth effect or income effect. See JOHN BLACK, A DICTIONARY OF ECONOMICS 223–24 (2d ed. 2002) (defining “income effect”); CHRISTOPHER PASS ET AL., COLLINS DICTIONARY OF ECONOMICS 547 (3d ed. 2000) (defining “wealth effect”). The demand for what economists call inferior goods actually decreases with income, whereas the demand for normal or superior goods increases. See *id.* at 234 (defining an “inferior good”). Consumption of superior goods, such as luxury goods, increases with income not only in absolute terms, but also as a proportion of overall consumption.

more that elite workers are willing to pay for human rights, the more generous the bundles that countries will produce.

Within this conceptual framework, there are two basic reasons why elite workers would exhibit greater demand for human rights than the immobile masses. First, they will spend more on human rights simply because they have the ability to do so. Because they are far above the subsistence level, they have wealth to spare for nonmaterial goods such as civil rights. Moreover, unlike the immobile masses, they are free to spend on the country and accompanying rights bundle of their choosing. Workers who cannot move to another country are in an even worse situation than consumers who cannot switch producers. Not only does the state possess a monopoly on the production of human rights; they must accept exactly as much as the state chooses to provide—no more and no less. Whereas consumers can vary the amount that they purchase from an ordinary monopolist, immobile workers possess no market mechanism for inducing the state to provide the amount of freedom that they desire. Unlike their elite and mobile brethren, they cannot threaten to leave, and the state need not bribe them to stay with more freedom. As a result, the state-qua-monopolist's production of this particular good will be even lower than what a run-of-the-mill, overcharging, underproducing monopolist would produce.²¹⁰

Second, elite workers may demand a higher level of human rights because they possess a more intense preference for such rights. It is plausible to think that highly educated workers might place a greater premium upon certain freedoms than would uneducated workers of equal wealth. Presumably, members of the “learned castes” do not find censorship and repression congenial to any taste for intellectual freedom that they may have acquired in the course of becoming learned. Nor is a thought-controlled environment likely to enhance their capacity to perform the creative mental work for which they are so highly valued. Thus, Singapore—a capitalist but authoritarian state with no obvious attachment to democracy or hu-

210. A producer in a competitive market sells at the equilibrium price determined by the intersection of supply and demand. A monopolist, by contrast, chooses the price at which marginal cost equals marginal revenue and, as a result, produces less than would be the case in a competitive market. See PASS ET AL., *supra* note **Error! Bookmark not defined.**, at 354–57 & 357 fig.129 (explaining how monopolies result in both lower output and higher prices); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 273–76 & 276 fig.9.3, 278–79 (6th ed. 2003) (same).

man rights as a matter of principle—has drawn a pragmatic connection between its tendency toward censorship, its ability to attract skilled labor from abroad, and its capacity for innovation; its government openly acknowledges that knowledge workers are both hindered and repelled by an atmosphere of censorship.²¹¹ Likewise, its leadership now concedes that laws against homosexuality are a competitive handicap in the market for skilled labor.²¹² China, meanwhile, has been forced to tread lightly upon the freedoms enjoyed by the inhabitants of Hong Kong, partly for fear of triggering an exodus of skilled labor.²¹³

211. See, e.g., FRIEDMAN, *THE LEXUS AND THE OLIVE TREE*, *supra* note 6, at 228–29 (quoting a public address by Singaporean Prime Minister Goh Chok Tong on the country’s need to foster a “creative” mindset, and noting the government’s subsequent loosening of Internet censorship); KEOHANE & NYE, *supra* note 148, at 226 (“[A]s societies like Singapore reach levels of development where their knowledge workers want free access to the Net, they run the risk of losing their scarcest resource for competing in the information economy.”); *Rich Pickings*, *ECONOMIST* (A PLACE IN THE SUN), Feb. 24, 2007, at 11 (noting that Singapore has loosened restrictions on “racy films” as part of its efforts to become more attractive to foreign financial workers such as “hedge-fund managers” who tend to be “young and lively”).

212. See Seth Mydans & Wayne Arnold, *Creator of Modern Singapore Is Ever Alert to Perils*, *N.Y. TIMES*, Sept. 2, 2007, at A8 (quoting Singaporean leader Lee Kuan Yew on the country’s need to gradually liberalize its laws against homosexuality in order to “survive” in the “modern world”); Geert de Clecq & Sara Webb, *Singapore Considers Legalizing Homosexuality: Lee*, *REUTERS*, Apr. 24, 2007, <http://www.reuters.com/article/idUSSP5349120070424> (“If we want creative people, then we have to put up with their idiosyncrasies[.]”) (quoting Lee Kuan Yew on the reasons for which he sees “no option but to legalize homosexual sex”).

213. See James McCall Smith, *One Sovereign, Two Legal Systems: China and the Problem of Commitment in Hong Kong*, in *PROBLEMATIC SOVEREIGNTY* 105, 105–29 (Stephen D. Krasner ed., 2001) (describing how the various commitments to Hong Kong’s autonomy contained in the 1984 Sino-British Joint Declaration and the 1990 Basic Law were primarily intended to reassure the business community and local residents); *Rebellion*, *ECONOMIST*, July 12, 2003, at 10 (describing how popular protest forced Hong Kong’s government to retreat from enactment of anti-subversion legislation long sought by the Chinese government). The high rate at which Hong Kong’s skilled workers emigrate illustrates why the threat of labor flight should indeed give Beijing cause for concern. See Docquier & Rapoport, *supra* note 178, at 9 tbl.1 (reporting a 28.7% emigration rate for Hong Kong’s skilled workers—the fourteenth highest rate in the world). For evidence that the Chinese government cares about the appearance of freedom in Hong Kong, see, for example, Donald Tsang, *Hong Kong’s Clear Skies*, *ECONOMIST*, Aug. 26, 1999, at 60, in which the official appointed by China to run Hong Kong identifies “a trusted and deeply-rooted legal system, the freest press in Asia and a transparent government accountable to a lively and probing legislature” as Hong Kong’s greatest competitive advantages, and insists for the benefit of

In sum, human rights attract human capital. As a consequence, even authoritarian regimes driven by purely economic goals have reason to take a more generous approach toward personal freedom. There are, however, two theoretical objections to this argument that ought to be addressed. The first objection concerns the possibility that countries will deliberately specialize in different bundles of rights.²¹⁴ If elite workers do not value the same bundle of rights but instead have heterogeneous preferences—if, for example, some demand an environment that tolerates homosexuality, while others demand an environment that suppresses it—then countries will possess an incentive not to converge, but to specialize by offering divergent bundles of rights. The second objection concerns the possibility that countries may offer a more generous bundle of rights to mobile skilled workers than to ordinary citizens by adopting a discriminatory double standard that could, in practice, resemble a form of constitutional apartheid. Part VI.D of this Article contends with the first objection. Part VI.E addresses the second.

D. ELITE WORKER PREFERENCES AND THE MARKET DEMAND FOR HUMAN RIGHTS

The idea that competition for human capital will encourage states to engage in a human rights “race to the top” is, at first glance, inconsistent with Charles Tiebout’s well-known argument that labor mobility ought to produce policy divergence.²¹⁵ According to Tiebout, people who can move freely from one jurisdiction to another will choose different places to live according to the types of public services that they prefer, and the result will be policy specialization or divergence because local governments will compete for taxpayers of different tastes by offering different bundles of public services.²¹⁶ Within an urban region, for example, families with children might seek out jurisdictions that offer high-quality schools, whereas single

a global readership that Hong Kong’s “defining ideology” is the “rule of law.” For evidence that China’s commitment to freedom in Hong Kong may be at best grudging and at worst utterly insincere, see, for example, *Radio Silence*, *ECONOMIST*, May 29, 2004, at 41, which describes a mysterious “rash of resignations” among media commentators critical of mainland Chinese government policy toward Hong Kong.

214. See *supra* notes 61–62 and accompanying text (discussing the hypothesis of policy specialization).

215. See *supra* note 62 and accompanying text.

216. See *id.*

professionals might favor jurisdictions that instead emphasize public transit. Tiebout's public choice model might plausibly be extended to civil rights: a jurisdiction that bans abortion or gay marriage, for instance, might conceivably attract certain workers at the same time that it repels or excludes others. The potential result could take the form of different states for different folks: socially conservative states would become more so in both population and policy orientation, while socially liberal states would move in the opposite direction.

The reason why Tiebout reaches the opposite conclusion as to the impact of labor mobility on government policy is straightforward. This Article shares with Tiebout the conceptual framework of a market for policy, in which governments produce policy bundles and people choose where to live based (at least in part) upon which government offers the bundle that they prefer. Within this framework, however, the question of whether labor mobility produces policy convergence (as in the form of a human rights "race to the top") or policy divergence (as in the form of increasing differentiation between "red states" and "blue states") will depend upon the extent to which consumers share similar tastes in policy. Tiebout's model assumes that governments compete to attract people with heterogeneous preferences,²¹⁷ whereas the argument offered here assumes that governments are competing to maximize their share of a global pool of elite workers characterized by a certain homogeneity of preference. In theory, more rights—or, at least, more of certain rights—may not appeal to all elite workers. If so, countries might adopt a strategy of offering a bundle of rights tailored to a subset of workers, or of catering to people who disfavor societies characterized by certain freedoms.

Those who possess considerable human capital are a select subset of the global workforce, however, and there are reasons to think that they will favor an expansive bundle of human rights. The term "club class" implies a certain similarity of taste, and the suggestion may not be entirely misleading. By definition, members of this class are well-educated, better compensated than the average worker, and sufficiently cosmopolitan in outlook to relocate from one country to another. Simply by dint of being migrants, they will be keen to avoid discrimination on the basis of alienage and to enjoy the right of continued abode wherever they may happen to move. But

217. See Tiebout, *supra* note 62, at 418.

there are more subtle ways in which their shared characteristics may shape their approach to personal freedom.

Educated migrants are prone, in particular, to have experienced discrimination in their countries of origin. Empirical evidence indicates that those who emigrate from ethnically divided countries tend disproportionately to have been educated members of the minority group.²¹⁸ It should come as no surprise that educated immigrants often hail from a background of discrimination: as economists have observed, minority members can be expected to invest more in their own education if they believe that education will help them not only to overcome the effects of discrimination at home, but also to escape their home country altogether.²¹⁹ Upon their arrival in a new country, migrants are by definition outsiders dependent upon the tolerance of others and, perhaps to a heightened degree, the protection of the government. Because they come from foreign lands, their personal views and practices—religious, sexual, ideological, or otherwise—may not fall squarely within the cultural mainstream of local society. These common traits and experiences would presumably incline members of the “club class” to prefer a tolerant and open-minded environment backed by strong legal guarantees of freedom of conduct and freedom from discrimination.²²⁰

An analysis of recent global survey data from Professor Inglehart’s World Values Survey supports the conclusion that

218 See Frédéric Docquier & Hillel Rapoport, *Ethnic Discrimination and the Migration of Skilled Labor 2* (Center for Research on Econ. Dev. & Pol’y Reform, Working Paper No. 122, 2001) (citing a recent study of migration to Australia from Malaysia, Sri Lanka, and Fiji, as well as other studies suggesting that minority members are both more mobile and better educated than majority members).

219 See *id.* (explaining how “standard human capital theory” predicts that minority members will invest in education if it is a means of avoiding discrimination); Reuven Brenner & Nicholas M. Kiefer, *The Economics of the Diaspora: Discrimination and Occupational Structure*, 29 *ECON. DEV. & CULTURAL CHANGE* 517, 532–34 (1981) (theorizing that members of groups that have experienced discrimination and forced migration tend to invest more heavily in education, and drawing empirical support for their theory from the experience of both Jews and Palestinians); cf. FLANAGAN, *supra* note 69, at 107 (observing that “migration policies [that] offer well-educated workers a choice of employment abroad as well as at home raise[] the incentive to acquire more education”).

220 See FLORIDA, *supra* note 165, at 33 (arguing that members of the “creative class”—namely, the highly skilled portion of the population that engages in innovative work—flock to locales with a reputation for tolerance and open-mindedness); FLORIDA, *supra* note 167, at 38–39 (same).

elite workers are indeed characterized by a taste for individual freedom, if not a socially liberal bent.²²¹ For purposes of this Article, responses to survey questions relating to individual freedom were crosstabulated against the educational level of the respondents. The results suggest that those with higher levels of education are both more tolerant of diversity and more willing to sacrifice other social and political values in exchange for greater individual liberty. On the whole, the most educated are not more likely to describe themselves in ideological terms as left of center.²²² Notwithstanding their reluctance to identify themselves as liberal, however, those who are highly educated express more liberal views across a gamut of social issues with constitutional dimensions. They are significantly more likely, for example, to say that abortion and homosexuality are “justifiable”;²²³ significantly less likely to oppose having neighbors who are homosexual²²⁴ or belong to other racial groups;²²⁵ and significantly less supportive of mandatory “prayer, meditation, or contemplation” in schools.²²⁶ At a higher level of abstraction, the most educated are also significantly more likely than the

221. The World Values Survey collects survey data from a wide range of countries on a variety of political, social, and economic issues. It is conducted by an international consortium of social scientists and research institutions. The most recent wave of data spans seventy-one countries and was collected between 1999 and 2004. This data can be downloaded free of charge from <http://www.worldvaluessurvey.org>. The statistical analyses described here were performed by the author using the Macintosh version of SPSS 11.0.

222. Respondents were asked to assess their own ideological position from left to right on a scale of one to ten. On this ten-point scale, the modal response for the most and least educated respondents alike was five.

223. Fifty-four percent of the least educated respondents took the strong view that abortion is “never justifiable”; only 35.6% of the most educated respondents took the same position. An even larger majority of the least educated respondents, 64.5%, expressed the position that homosexuality is “never justifiable,” as compared to 50.1% of the most educated. The differences by level of education are statistically significant at $p=.001$.

224. A slight majority (50.1%) of the least educated objected to having homosexual neighbors. By comparison, 47.7% of those with an intermediate level of education, and only 40.5% of the most educated, expressed the same prejudice. These differences are statistically significant at $p=.001$.

225. The proportion of respondents who objected to having neighbors of a different race declined with education, ranging from 21% of the least educated to 13.5% of the most educated. These differences are statistically significant at $p=.001$.

226. Highly educated respondents were evenly divided on this issue, with 40% falling on each side of the question and 20% remaining undecided; by comparison, 55% of the least educated expressed support for mandatory school prayer. The difference between these proportions is statistically significant at $p=.001$.

least educated to believe that the “most important responsibility of government” is to “respect freedom of the individual” rather than to “maintain order in society.”²²⁷ Similarly, they are significantly more likely to take the position that “personal freedom” is more important than “equality.”²²⁸ While the world’s educated elites are hardly monolithic in their views on such questions, it would appear that they are, on the whole, apt to favor countries that guarantee a generous assortment of personal liberties. Social conservatism and authoritarianism may attract some people and repel others; those who are repelled, however, will tend to include those with the most human capital to offer.

None of this is to suggest that a country that denies human rights or pursues socially illiberal policies cannot enjoy economic growth and prosperity. China, for example, appears determined to prove the contrary. The argument does suggest, however, that countries with a miserly approach to personal freedom must pay an economic cost for such behavior: either they must settle for a diminished share of the global pool of elite workers, or they must offer such workers a premium to offset the noneconomic incentives offered by free countries. A lack of freedom and openness has hindered China’s economic development in the past,²²⁹ and it may continue to do so in the future. This competitive disadvantage may not be enough to halt the dragon’s long march to prosperity.²³⁰ At the margin, however, it is likely to cost China some amount of skilled labor, all other things being equal. The economic consequences of failure in the global competition for human talent, meanwhile,

227. On this question, 46.9% of the most educated respondents favored freedom over order, as opposed to 43.3% of those with an intermediate level of education and only 33.8% of the least educated respondents. The difference in responses by level of education is statistically significant at $p = .001$.

228. Fifty-seven percent of the most educated chose “personal freedom” over “equality,” as compared to 52.4% of those with an intermediate level of education and only 48.4% of the least educated. The difference in responses by level of education is statistically significant at $p = .001$.

229. See SACHS, *supra* note 163, at 33 (arguing that societal openness, individual freedom, and property rights help to explain why Britain, not China, was the first nation to industrialize, notwithstanding the formidable technological advantages that China had possessed for centuries).

230. See TED C. FISHMAN, CHINA, INC.: HOW THE RISE OF THE NEXT SUPERPOWER CHALLENGES AMERICA AND THE WORLD 17 (2006) (stressing the “catalytic role” played by skilled foreign workers in China’s economy, but concluding that investors will not flee even if “China’s leadership ultimately cannot reconcile itself to the free flow of information that capitalism favors”).

are likely only to increase over time, given that China is already experiencing skilled labor shortages across a wide range of industries.²³¹

Consider, for example, the choice faced by a hypothetical Canadian-born, American-educated lawyer who speaks Mandarin fluently. Let us assume that she faces employment opportunities in New York, Vancouver, and Shanghai, and that she has comparable personal and family ties to all three cities. From Shanghai's perspective, she is a valuable human asset—a member of “the crowd of young internationalists” who possess a “style and creative energy” that have contributed immeasurably to that city's roaring resurgence.²³² Let us assume further—and plausibly—that pecuniary considerations generally favor Shanghai: adjusted for cost of living, her wages would be higher in New York than in Vancouver, but higher still in Shanghai than in New York.²³³

Yet economic considerations are not all that matter to knowledge workers. There would also be profoundly unattractive aspects of life in China for our fictitious lawyer, many of which have to do with that country's cavalier approach to individual rights and freedoms. Presumably, she would prefer not to live in a country where—as in China—her personal communications are censored and she cannot access popular sources of information online or, indeed, any website whose name happens to contain the word “blog.”²³⁴ She is unlikely to appreci-

231. See *supra* notes 187-188 and accompanying text (discussing the emergence of a shortage of skilled labor in China in fields ranging from medicine to commercial aviation).

232. *Id.* at 28.

233. Not everything in China is less expensive—automobiles and name-brand luxury goods are among the exceptions—and the cost of living in Shanghai, in particular, is rising rapidly. See *Less For Your Money*, Economist.com Cities Guide: Shanghai Briefing, July 2006 (e-mail newsletter on file with the author) (citing a June 2006 report that Shanghai is now the world's twentieth most expensive city in which to live). Nevertheless, the purchasing power of one American dollar is, on the whole, nearly five times higher in China than in the United States itself. See FISHMAN, *supra* note 230, at 10 (“In China, one dollar buys about what \$4.70 does in Indianapolis.”).

234. See, e.g., FISHMAN, *supra* note 230, at 284 (describing the Chinese government's ongoing efforts to censor not only the traditional press, but also the Internet and telephone text messages); Randall Peerenboom, *Human Rights in China*, in HUMAN RIGHTS IN ASIA: A COMPARATIVE LEGAL STUDY OF TWELVE ASIAN JURISDICTIONS, FRANCE AND THE USA, *supra* note 121, at 413, 427–28 (discussing the extent to which China blocks popular online news sources—including the BBC and CNN websites—and imposes content restrictions upon electronic chatrooms). Chinese censors have, for example,

ate the fact that the government bans works of fiction²³⁵ and suppresses her church.²³⁶ If she is contemplating the purchase of a home, it can hardly inspire confidence of ownership to know that the government has made a habit of confiscating homes from the poor without compensation or even adequate notice,²³⁷ or that the very notion of property rights remains a

blocked the entire blogspot.com domain, as well as Wikipedia. See Howard W. French, *Chinese Discuss Plan to Tighten Restrictions on Cyberspace*, N.Y. TIMES, July 4, 2006, at A3 (describing efforts by the Chinese government to “[p]olice and control the Internet and other communications technologies, including instant messaging and cellphones”). Although China has since lifted its total ban on Wikipedia, its censorship of the Internet remains pervasive. See Noam Cohen, *China Lifts Wikipedia Ban, but Some Topics Remain Blocked*, N.Y. TIMES, Nov. 16, 2006, at C2 (reporting that “[s]ubjects that are still off-limits on Wikipedia include high-level politics, the suppression of the pro-democracy movement in Tiananmen Square in 1989, the Falun Gong movement and historical events like the Communist revolution”); see also, e.g., Tom Zeller Jr., *A Rise in Bloggers Behind Bars*, N.Y. TIMES BLOG, Dec. 7, 2006, <http://thelede.blogs.nytimes.com/tag/china> (reporting that one in three imprisoned journalists is based in the Internet medium, and that China has now been the “world’s leading jailer of journalists” for eight consecutive years).

235. See, e.g., Kao Chen, *Rebel Yell of China Gals*, STRAITS TIMES (Singapore), Dec. 11, 2000, § 15, at 14 (describing the Chinese government’s banning of risqué and highly popular novels by Wei Hui, Mian Mian, and Gao Xingjian); Alex Pasternack, *On the Road Again*, TIME (Asian ed.), June 26, 2006, at 52 (discussing the fate of a collection of short stories set in Tibet authored by former government propagandist Ma Jian, who was forced into hiding following their publication).

236. See, e.g., Peerenboom, *supra* note 234, at 413, 421–24 (describing how “freedom of religion” in China “is confined to five state-recognized religions . . . and registered places of worship” that must comply with a variety of membership and content controls); Keith Bradsher, *Cardinal Faults China for Installing Bishop Without Approval*, N.Y. TIMES, Dec. 1, 2006, at A9 (reporting allegations made by the Roman Catholic bishop of Hong Kong that the Chinese government coerced Catholic clergy into installing a bishop of the government’s choice, over explicit Vatican protest); Erik Eckholm, *China Repeats Terms for Ties Pope Seeks*, N.Y. TIMES, Oct. 26, 2001, at A10 (describing continuing tension between China and the Vatican over the Chinese government’s insistence upon appointing members of the ecclesiastical leadership); Bruce Einhorn & Ben Elgin, *Helping Big Brother Go High Tech*, BUS. WK., Sept. 18, 2006, at 47, 50 (quoting a former Chinese security officer on the Chinese government’s use of American technology to engage in ongoing surveillance of Catholic and Protestant churches); Bruce Pomfret, *China Holds 40 Foreign Falun Gong Protesters*, WASH. POST, Feb. 15, 2002, at A26 (reporting that the Chinese government’s suppression of the Falun Gong religious movement now extends to the detention of foreigners).

237. See FISHMAN, *supra* note 230, at 106–09 (describing protests by impoverished rural and urban residents against government confiscation of their homes for redevelopment); *Caught Between Right and Left, Town and Country*, *supra* note 124, at 24 (describing how “large-scale appropriation of

recent and controversial innovation.²³⁸ Nor can it be comforting for someone who performs the work of an attorney to know that the wrong line of inquiry or expression invites arrest without probable cause on trumped-up charges of espionage or subversion²³⁹—after which one might be tortured into confessing then sentenced to death²⁴⁰—or that an ordinary businessman can be detained for months in a secret location without access to counsel over a mundane commercial dispute.²⁴¹ Our hypothetical lawyer might be especially disturbed to learn that the government engages in widespread intimidation and detention of criminal defense attorneys.²⁴² All of these considerations would no doubt give pause to a potential migrant whose livelihood involves intellectual work and

farmland” for “little or no compensation” contribute to ongoing social unrest in China).

238 See *Caught Between Right and Left, Town and Country*, *supra* note 124, at 23–25 (noting that China’s constitution was amended only three years ago to provide that private property is “not to be encroached upon,” and discussing strong political opposition to proposed legislation that would implement property rights).

239 See, e.g., *Peking Is Pressed on Reporter*, N.Y. TIMES, July 19, 1986, at 3 (reporting on the U.S. State Department’s “serious concern” over Chinese detention of the Beijing bureau chief of the *New York Times*, a British passport holder); Elisabeth Rosenthal, *For China-Born U.S. Citizens, Visiting Homeland Has Risks*, N.Y. TIMES, May 1, 2001, at A1 (noting the vagueness of what constitutes a “state secret,” the alleged pilfering of which has been used to justify detention of American citizens); *China’s Echo Chamber*, N.Y. TIMES, Sept. 13, 2006, at A22 (criticizing China’s imposition of a three-year prison sentence on *New York Times* reporter Zhao Yan on a “bogus fraud charge,” and an even lengthier five-year sentence for Singaporean reporter Ching Cheong “on trumped-up espionage charges”).

240 See, e.g., Joseph Kahn, *Deep Flaws, and Little Justice, in China’s Court System*, N.Y. TIMES, Sept. 21, 2005, at A1 (documenting the ordeal of a Chinese man who confessed to rape and murder after three days of continuous interrogation and torture, and was subsequently sentenced to death, before being exonerated by the voluntary confession of another man).

241 See Chris Buckley, *Efforts Continue to Win Release of American in China*, N.Y. TIMES, May 17, 2005, at C6 (discussing the detention of American electronics entrepreneur David Ji on allegations of nonpayment of a local supplier, without free access to a lawyer and in a location denied by Chinese authorities); Chris Buckley, *For Entrepreneur, Business Trip Ends in a Chinese Jail*, N.Y. TIMES, Jan. 18, 2005, at C6 (describing the underlying business dispute and the use of house arrest to pressure Mr. Ji into capitulating).

242 See U.S. Department of State, *Country Reports on Human Rights Practices—2006: China (includes Tibet, Hong Kong, and Macau)*, Mar. 6, 2007, <http://www.state.gov/g/drl/rls/hrrpt/2006/78771.htm> (citing a report by the All-China Lawyers Association that the Chinese government has detained over 500 criminal defense attorneys since 1997, and describing the growing reluctance of Chinese lawyers to handle criminal cases).

hood involves intellectual work and vigorous advocacy on behalf of private interests that may come into conflict with those of the state and its officials. It is difficult to believe that the Chinese government's civil rights practices would not exercise a chilling effect on her personal and professional conduct alike.

There are many reasons for migrants to choose—or abandon—a particular country. States vary in their attractiveness to migrants along a number of salient dimensions—such as language, economic opportunity, culture, climate, and prevailing social attitudes toward new arrivals—that can dominate considerations of personal and political freedom. Taken together, the risks and restrictions of life under an authoritarian regime may lead skilled and educated workers to balk at the idea of moving to a country like China—absent, at least, some kind of wage premium or other offsetting compensation. At the margin, a government's failure to observe constitutional rights and liberties ought to discourage the migration of skilled workers who possess the option of choosing an equivalent, or perhaps even slightly inferior, material standard of living elsewhere. A world in which repressive regimes act to address this disadvantage by moderating their behavior is increasingly plausible; indeed, it may already be approaching reality.²⁴³

E. CONSTITUTIONAL APARTHEID: A DOUBLE STANDARD FOR ELITE WORKERS?

There is another interesting theoretical objection to the argument that the need to compete for human capital will encourage authoritarian regimes to change their ways. Confronted with the potential loss of talent to other countries, an oppressive government might attempt to reap the benefits of a more generous approach to human rights without actually extending those rights to the general population. It might attempt to do so by offering preferential treatment to skilled workers who are capable of going elsewhere. Such a two-tiered system might in practice mean that the government would respect the rights and freedoms of skilled workers with foreign passports, while oppressing local workers and preventing edu-

243 See FLORIDA, *supra* note 167, at 180 (arguing that “some of the most repressive of political and cultural climates are giving way” to the realization that it is no longer possible to compete for the best global talent “just by providing economic opportunity and high-paying jobs” because elite workers “have come to expect a certain working environment and lifestyle” characterized by openness, tolerance, and freedom).

cated citizens from emigrating.

To revisit the earlier metaphor of a market in human rights,²⁴⁴ a two-tiered system of this kind might be likened to a form of price discrimination by a monopolist who charges different prices according to what each consumer will bear.²⁴⁵ With respect to the provision of rights, a dictator is a kind of monopolist, and citizens who cannot leave are captive consumers of a sort. Instead of charging them higher prices, however, the dictator offers them less freedom, and he does so because they cannot seek a better deal elsewhere. Conversely, the clever and discriminating dictator offers a more attractive bundle of freedoms to skilled workers who are in demand elsewhere and must therefore be offered additional inducements to stay.

The practice of according different levels of rights to different categories of people within the same country is not unprecedented. An obvious example is, of course, the little-mourned constitutional system of racial segregation in South Africa that gave apartheid its name.²⁴⁶ Another example of slightly older vintage, but an appropriate one in the context of the present discussion, involves the use of extraterritorial courts in China. In the mid-nineteenth century, the Western powers secured Chinese acquiescence not only in preferential legal treatment for their citizens, but also in administration of this special treatment via a parallel system of foreign-operated courts located on Chinese soil.²⁴⁷ Indeed, although the days of formal extraterritoriality are long over, an informal double standard persists to this day insofar as the detention of foreign

244. See *supra* Part VI.D.

245. See BLACK, *supra* note **Error! Bookmark not defined.**, at 364 (defining “price discrimination”); POSNER, *supra* note 210, at 283–84 (same).

246. See, e.g., S. AFR. CONST. 1961 §§ 34, 36 (limiting eligibility to serve in South Africa’s Senate or House of Assembly to “white person[s]”); John Dugard, *Toward Racial Justice in South Africa*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 349, 350–66 (Louis Henkin & Albert J. Rosenthal eds., 1990) (describing the evolution of South African constitutional law from the seventeenth century through the 1980s).

247. See EILEEN P. SCULLY, BARGAINING FROM AFAR: AMERICAN CITIZENSHIP IN TREATY PORT CHINA, 1844–1942, at 4–8 (2001) (describing the establishment and operation of the United States District Court for China, and observing that it was “only one among many” foreign courts on Chinese soil); Teemu Ruskola, *Canton Is Not Boston: The Invention of American Imperial Sovereignty*, 57 AM. Q. 859, 860–81 (2005) (recounting the history of American and European “extraterritorial jurisdiction” in China).

citizens remains a matter of unusual delicacy for the Chinese government.²⁴⁸

There are a variety of reasons why a double standard is likely to prove much less attractive to potential migrants than a single standard that benefits all of a country's inhabitants. First, many rights and freedoms lack meaning unless they are widely shared. Human activity is, to a large extent, social activity that cannot be pursued in isolation. There is little point to a personal guarantee of freedom of expression if others are punished for talking or listening to you; likewise, freedom of religion loses much of its value if one is required to worship in isolation from all others. Second, and relatedly, elite workers may be drawn as much to the social and cultural *environment* that flourishes under conditions of freedom, as to the freedom itself.²⁴⁹ One need be neither artistic nor gay, for instance, in order to appreciate life in a society with a thriving artistic or gay community.

Third, a selective commitment by a government to observe the rights and freedoms of elite workers, regardless of how it treats ordinary citizens, is likely to lack credibility in the eyes of those it is intended to seduce. How can a regime that tramples its own citizens credibly promise to respect the rights of foreigners on its soil? In predicting whether a particular government is likely to respect her freedom, a rational would-be migrant would presumably take into account the extent to which the government respects the freedom of others, and the existence of constraints that prevent the government from turning against her. On both counts, an authoritarian regime fares poorly. Even under the best of circumstances, it is inherently difficult for a sovereign to convince others that it will abide by its commitments: whereas private parties can render their commitments credible by invoking the prospect of government enforcement, there is no third party that can enforce the gov-

248 See, e.g., *Peking Is Pressed on Reporter*, *supra* note 239, at 3 (reporting on the U.S. State Department's "serious concern" over Chinese detention of the Beijing bureau chief of the *New York Times*, a British passport holder); Rosenthal, *supra* note 239, at 1 (describing a "worrisome change" in the Chinese government's willingness to detain American citizens of Chinese birth for the supposed theft of "state secrets").

249 See FLORIDA, *supra* note 165, at 33 (arguing that members of the "creative class"—namely, the educated workers most responsible for innovation and growth—are drawn to tolerant, open-minded environments); Florida, *supra* note 167, at 38–39 (same).

ernment's own commitments.²⁵⁰ A sovereign commitment to respect certain rights can be rendered credible by the existence of constraining institutional arrangements that equip competing political actors with the means and incentives to combat overreaching by one another: federalism, separation of powers, and a system of checks and balances are all familiar examples of such arrangements.²⁵¹ By definition, however, an authoritarian regime lacks such restraints on its own power. The credibility of any institutional arrangements that a dictator might devise in order to implement a two-tiered system of rights protection would, in all likelihood, be backed by little more than the dictator's interest in developing and maintaining a reputation for the favorable treatment of skilled workers. And history is replete with rulers who fail to keep their word, even when their reputation is at stake.²⁵²

VII. CONCLUSION

Globalization has aroused many fears. Among these is the fear that globalization inevitably entails the abuse of workers and citizens for the benefit of rapacious multinational corporations. Yet the empirical evidence to date simply does not substantiate this blanket fear. Global capital movements have, on the whole, taken a highly benign stance with respect to the observance of human rights. In fact, foreign investment has demonstrated a bias in favor of jurisdictions that honor human rights.²⁵³ At the same time, global competition for human capital rewards jurisdictions that pursue liberal rights policies of the type that are attractive to skilled workers. Moreover, this incentive to observe human rights is likely only to grow over time, as human capital becomes an increasingly coveted resource for which companies and countries alike must

250. See David S. Law, *The Paradox of Omnipotence: Courts, Constitutions, and Commitments*, 40 GA. L. REV. 407, 409–15, 453–55 (2005) (discussing the conceptual and practical obstacles to third-party enforcement of sovereign commitments, and the resulting challenge that sovereigns face in making commitments that are credible).

251. See *id.* at 416–18 (explaining why “[t]he ability of a sovereign to make commitments that are binding, or merely credible, will depend upon how a given constitution happens to configure sovereign power”).

252. See *id.* at 409–12 (discussing repeated debt repudiation by the English and French monarchs); *id.* at 422–25 (discussing widespread debt repudiation by state governments in the aftermath of both the Revolutionary War and Civil War).

253. See *supra* Part V.C.

compete with unprecedented vigor.²⁵⁴ Human rights, like property rights, are not only a moral imperative; they are also a potent instrument of global competition for scarce resources. Thus, the same authoritarian regimes that feel compelled today to improve their property rights practices in order to attract foreign investment²⁵⁵ may feel compelled tomorrow to improve their human rights practices in order to attract skilled labor.

What cannot be so easily dispelled is the much larger fear that we are increasingly hostage to forces that lie beyond the control of the governments that we elect. It has become all too obvious that today's territorially bounded nation-states, if they insist upon acting alone, will find it ever more difficult to provide for the safety and welfare of their inhabitants in the face of international terrorist cells, or global warming, or crisis in the currency markets. In some contexts, however, the forces of globalization may be benign, in the same way that market forces are often capable of rewarding good behavior. The many economic and political developments subsumed under the name of globalization are not necessarily antithetical to all forms of human freedom.

This Article has sought to provoke constitutional scholars into thinking about the consequences of globalization. It has done so by arguing that global investment and migration patterns may have a positive impact on the worldwide observance of certain basic rights. It has contended specifically that the notion of a global "race to the top" in the areas of civil liberties and property rights, fueled by international competition for investment and human capital, is both theoretically and empirically plausible. This claim is a limited one that raises a host of further questions, at least two of which should be acknowledged here.

The first question is a daunting one: to what extent is the relationship between globalization and constitutional rights entangled with another phenomenon—that of democratization? The spread of democracy throughout the modern world, though

²⁵⁴ See *supra* notes 184–187 and accompanying text (discussing the increasing value and scarcity of skilled labor); notes 83 & 168 and accompanying text (describing the evolution of the modern global corporation into a form of network designed to tap human capital).

²⁵⁵ See *supra* note 121 and accompanying text (discussing how countries have successfully sought to attract investment by improving their property rights practices).

it has occurred in fits and spurts, is by now well documented.²⁵⁶ Rising levels of globalization, democracy, and protection for basic rights are unlikely to be purely coincidental. Does globalization promote both democratization and the observance of certain rights? Does it directly promote the protection of these rights, or is its impact upon rights merely an indirect consequence of its impact upon democratization? Can a trend toward democratization and a trend toward increasing protection of human rights even be distinguished from one another?

Democracy and rights are so closely connected in both theory and practice that it is difficult to explain either phenomenon in isolation from the other. As a theoretical matter, it can be argued that the very concept of democracy is synonymous with respect for a certain bundle of personal and political rights: on this view, any measure of democratization would necessarily be a measure of respect for rights as well, and vice versa.²⁵⁷ As a practical matter, democracy and respect for indi-

²⁵⁶ See, e.g., FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* 49–50 (1992) (cataloguing the growth of liberal democracy in recent decades); GINSBURG, *supra* note 19, at 6–8 & 7 tbl.1.1 (charting the spread of judicial review among the world’s many recent, or “third wave,” democracies); SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 13–26, 14 tbl.1.1, 26 tbl.1.1 (1991) (documenting three historical “waves of democratization,” and suggesting that global democratization has overall exhibited a “two-step-forward, one-step-backward” pattern); ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990*, at 36–51 (2000) (analyzing regime transitions from 1950 through 1990, and discussing Huntington’s theory of “waves” of democratization); Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs*, 12 *PHIL. & PUB. AFF.* 209–12 tbl.1 (1983) (tracing the membership of the “Pacific Union” of liberal states since the eighteenth century).

The origins and causes of democracy are the subject of a vast scholarly literature. See, e.g., DARON ACEMOGLU & JAMES A. ROBINSON, *ECONOMIC ORIGINS OF DICTATORSHIP AND DEMOCRACY* 80 (2006) (reviewing the literature on the origins of state institutions); HUNTINGTON, *supra*; MANCUR OLSON, *POWER AND PROSPERITY: OUTGROWING COMMUNIST AND CAPITALIST DICTATORSHIPS* 30–33 (2000) (identifying three necessary conditions for the emergence of democracy).

²⁵⁷ For such reasons, the measures of democracy used by empirical researchers tend to incorporate some measure of rights protection. See, e.g., Li & Resnick, *supra* note 106, at 189 (employing the Polity IV composite measure of “democracy” to predict levels of “property rights protection”); Richards et al., *supra* note 2, at 229 (using the Freedom House index of “political rights” to measure a country’s level of democracy); Monty G. Marshall & Keith Jaggers, *Polity IV Project: Dataset Users’ Manual*, Oct. 25, 2005, at 13, at <http://www.cidcm.umd.edu/polity> (defining “democracy” as consisting in part

vidual rights should be strongly correlated because democratic states tend to have the kinds of institutions necessary for the observance and enforcement of such rights.²⁵⁸ Consistent with expectations, scholars have indeed found such a relationship.²⁵⁹ It is therefore difficult to say whether democratization explains increasing protection for rights, or vice versa. Similarly, it is unclear whether, or to what extent, the relationship between globalization and rights is merely an indirect byproduct of the relationship between globalization and democratization.

The second and equally daunting question is the empirical one of whether a “race to the top” will in fact materialize. Will globalization actually increase the worldwide observance of certain individual rights? Even if global competition gives countries an incentive to offer investors and skilled migrants an attractive bundle of rights, there is no guarantee that countries will actually act upon this incentive. Some regimes have demonstrated resistance to the adoption of human rights and will no doubt continue to resist, even in the face of economic incentives to reform their ways. It must therefore be asked what countries are most (or least) likely to participate in such a race, and why. For what reasons might a government fail to pursue rights policies that confer a competitive advantage in the global

of “the guarantee of civil liberties to all citizens in their daily lives and in acts of political participation,” and thus incorporating a measure of “constraints on the chief executive” as a weighted component of a composite measure of “democracy”).

258 See OLSON, *supra* note 256, at 40–43; Law, *supra* note 250, at 409–13, 449–64 (explaining how a purely monarchical government lacks any institutional means of committing itself to respect the rights of creditors, and discussing how independent courts can help to make such commitments credible); Li & Resnick, *supra* note 106, at 186 (contending that democratic institutions are generally more effective at guaranteeing property rights than autocratic institutions); Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 572 (1993) (observing that “the same court system, independent judiciary, and respect for law and individual rights that are needed for a lasting democracy are also required for security of property and contract rights”).

259 See OLSON, *supra* note 256, at 42–43; Christopher Clague et al., *Property and Contract Rights in Autocracies and Democracies*, 1 J. ECON. GROWTH 243, 256 (1996) (acknowledging “[t]he close historical connection between the emergence of democratic political institutions and the development of property and contract rights”); *id.* at 257–58 (finding on the basis of statistical analysis that “democracies as a group outperform autocracies in protecting property and contractual rights,” “even controlling for the higher per capita incomes prevailing in most democracies”); Li & Resnick, *supra* note 106, at 186 (citing a wide range of scholars for the proposition that “more democratic governments offer better protection of property rights”).

economy?

The question of why a government might refuse to offer a basic bundle of rights, even if such refusal is both politically and economically costly, is in effect a question of why governments do not always act in the best interests of their people. Neither question can ultimately be resolved here. By way of a possible answer, however, such failures of government can happen for the same reason that agents do not always act in the best interests of their principals—namely, because their interests and incentives diverge at crucial points. An autocratic regime such as the Chinese government, for example, is unlikely to embrace human rights policies that foster prosperity but also loosen the regime's grip on power: even if greater freedom for individuals would mean greater prosperity for the nation as a whole, a ruling cabal that risks losing power entirely as a result of such reform may find itself unable to extract a share of that prosperity and therefore has no incentive to allow the reform in the first place.²⁶⁰

By contrast, dictators should be more sympathetic to the idea of property rights insofar as they stand to capture a share of the resulting economic benefits. It is unsurprising that even an autocratic regime of the type found in China or Saudi Arabia might wish to respect property and contract rights,²⁶¹ for the reason that the interests of a durable dictatorial regime are potentially aligned, on this particular issue, with those of the citizenry. A wholly self-interested but rational dictator, so long as he has a sufficiently long time horizon, will maximize the rents that he can extract not by engaging in rampant expropriation, but rather by respecting contract and property rights that facilitate productive activity and economic growth.²⁶²

260. See THRÁINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 61, 324 (1990) (observing that rulers may fail to adopt property rights regimes that maximize economic growth insofar as such regimes entail the decentralization of power and a resulting potential for loss of control).

261. See *Caught Between Right and Left, Town and Country*, *supra* note 124, at 23–25 (discussing China's halting but real progress toward observance of property rights).

262. See Clague et al., *supra* note 106, at 244, 260–64 (finding that autocrats who hold office for a longer duration are significantly more likely to respect to property and contract rights than autocrats who serve only briefly, and explaining this finding on the ground that autocrats who expect to remain in office for a long time have selfish reasons to pursue policies that maximize tax revenue over the long run); Olson, *supra* note 258, at 571 (explaining why a ruler will “reap the maximum harvest in taxes . . . only if his subjects have total confidence that their ‘rights’ to private property and to impartial contract

Even so, however, it has been found that autocracies are, on the whole, less protective of property rights than are democracies.²⁶³ This failure to match the rights bundle offered by the world's democracies comes, quite literally, at a price: autocracies must compete for international investment by offering incentives that are costlier than those offered by democracies.²⁶⁴

What can be said with confidence is that effective guarantees of tolerance and freedom confer a competitive advantage in the global labor market that can help states to attract and retain valuable human capital. Would-be migrants may ordinarily be reluctant, for example, to abandon a home country in which they are members of the linguistic and religious majority in exchange for a host country in which they constitute a minority. But constitutional policy can close the gap between the comforts of home and those of a foreign land by establishing an environment in which migrants remain free to use their own languages and practice their own religions with government protection, if not actual support.²⁶⁵ It is also much cheaper to attract skilled workers by offering an environment of freedom and tolerance than to do so by offering additional financial incentives. Unlike higher wages, the legal rights and privileges of life in a liberal state are a public good that can be extended to additional persons at little or no extra cost to either the state or private employers.²⁶⁶

enforcement will be permanently respected”).

263 See Clague et al., *supra* note 106, at 258–59, 271 (concluding that “democracies as a group outperform autocracies as a group in protecting property and contractual rights,” but also finding significant evidence that “new democracies” face difficulties “that can render property rights less secure than in a country ruled by a secure autocrat”); Olson, *supra* note 258, at 571 (“History provides not even a single example of a long and uninterrupted sequence of absolute rulers who continuously respected the property and contract-enforcement rights of their subjects.”).

264 See Quan Li, *Democracy, Autocracy, and Tax Incentives to Foreign Direct Investors: A Cross-National Analysis*, 68 J. POL. 62, 71–72 (2006) (finding empirically that autocracies offer costlier tax incentives to attract foreign investment than do democracies, and offering the explanation that a democratic country “can offer a lower level of incentives without impairing its attractiveness to foreign investors” because it is “[m]ore likely to provide better rule of law”).

265 See FLORIDA, *supra* note 167, at 263 (arguing that Canada’s official “mosaic” model of multiculturalism, under which the government extends social and economic support to ethnic communities, attracts and motivates creatively skilled immigrants).

266 See BLACK, *supra* note **Error! Bookmark not defined.**, at 379 (defining “public goods”).

None of these competitive advantages can be realized, however, if countries do not reform their immigration policies to facilitate the entry of skilled workers. No country can compete effectively for human capital in the global labor market until it first *chooses* to compete. For an authoritarian state, the decision to compete requires the abandonment of oppressive practices that are abhorrent to skilled workers, not to mention ordinary citizens. For a nation that is already a liberal democracy, however, the decision to compete requires the liberalization of immigration policy toward skilled workers. The most forward-thinking members of the industrialized world—including Canada, New Zealand, Singapore, and Switzerland—have already chosen to compete in this way and have done so with great success.²⁶⁷ Even Japan, which remains culturally and politically resistant to immigration, has incrementally adjusted its policies toward skilled labor in the face of demographic changes that threaten to decimate its workforce.²⁶⁸ American policy, by comparison, lacks focus and fails to exploit this country's many advantages in the global competition for human talent.²⁶⁹ For example, the United States boasts a disproportionate share of the world's greatest universities, yet it is increasingly an ordeal for foreign graduates of those universities to remain here permanently.²⁷⁰

267. See *supra* note 195 and accompanying text.

268. See Chieko Kamibayashi, *Current Migration of IT Engineers to Japan: Beyond Immigration Control and Cultural Barriers*, in KUPTSCH & FONG, *supra* note 182, at 171, 184–85 (describing the historically restrictive goals of Japanese immigration policy, and reporting that “public opinion on foreign workers in Japan is changing in favor of their acceptance,” but also noting that Japan remains “far behind” in attracting engineering talent from other countries); Konosuke Kuwabara, *Immigration Law: No Skills, No Entry*, NIHON KEIZAI SHIMBUN (JAPAN ECON. J.), Sept. 30, 1989, at 1 (describing revisions to Japan's Immigration Control Act “geared toward opening the doors to skilled, not unskilled, workers”); Noritmitsu Onishi, *Japan's Population Fell This Year, Sooner Than Expected*, N.Y. TIMES, Dec. 24, 2005, at A8 (noting that there is “no movement in Japan to open the door to widespread immigration,” notwithstanding the simultaneous aging and contraction of the Japanese population); James Sterngold, *Japan Is Divided on Foreign Workers*, N.Y. TIMES, Oct. 29, 1989, § 4, at 3 (contrasting Japanese legislative proposals to admit more professionals with the country's “persistent prejudices” and “insularity”).

269. See *supra* notes 194–195 and accompanying text.

270. A leading Silicon Valley venture capitalist succinctly captures the perversity of American policy toward elite foreign students: “When you graduate from Stanford University with an advanced degree in the sciences or engineering, we then make you go home[.] We should be stapling a green card to your diploma.” FLORIDA, *supra* note 167, at 252 (quoting John Doerr);

Progressives have found much to dislike about globalization and the operation of global markets.²⁷¹ But constitutional competition for human talent, at least, ought to be considered a good thing. It encourages countries to treat people well, and it encourages people around the world to educate themselves. In short, it rewards good behavior. A race to the top in the human rights arena is, moreover, a race that poor countries can run well—just as rich countries can run it badly. India is no wealthier than China or Saudi Arabia, to be sure, yet it can boast a record of liberal constitutionalism, complete with a high court so aggressive in its defense of constitutional rights that it puts the headiest days of the Warren Court to shame.²⁷² A country need not be rich in order to treat its minorities fairly, for example, or to uphold religious freedom. Nor, for that matter, must it be poor in order to condone the use of torture.

Global competition for human capital also offers people around the world an opportunity for freedom and a better life, if they are willing and able to acquire valuable skills. It is no coincidence that members of minorities that experience active persecution tend also to strive for higher levels of education.²⁷³ For those who suffer from discrimination, the benefits of education include not only the possibility of a better life in their home countries, but also the possibility of an even better life somewhere else. For better or for worse, it is a political reality that a truly open-door immigration policy—one that embraces the educated and the uneducated alike—is unlikely to be adopted, either here or elsewhere.²⁷⁴ Immigration reform that

see id. at 251–52 (characterizing America’s attitude toward foreign graduates as one of “want[ing] to send our top foreign talent packing”); Philip L. Martin, *Competing for Global Talent: The US Experience*, in *COMPETING FOR GLOBAL TALENT*, *supra* note 182, at 87, 87 (describing how the United States treats foreign graduates of its universities as “probationary” immigrants in a “Darwinian process” that “holds out the hope of an immigrant visa and freedom in the US labor market as the eventual prize”); *American Idiocracy*, *supra* note 183, at 40 (reporting that “[p]otential graduate students and high-tech workers” alike suffer through “nightmare stories of waiting for months for the right bits of paperwork”); *Brains and Borders*, *supra* note 193, at 15 (noting the domestic political pressures that have combined to cut off “this vital flow of talent”).

271. *See supra* note 6 and accompanying text.

272. *See Law, supra* note 9, at 684 n.125 (describing the Supreme Court of India’s repeated invalidation of constitutional amendments that, in its view, threatened the protection of “fundamental rights”); *see also id.* at 679–80 & 680 n.106 (discussing judicial activism in India more generally).

273. *See supra* notes 218–219 and accompanying text.

274. *See supra* note 183 and accompanying text.

opens the door to skilled workers, though inherently limited in scope, is nevertheless a politically feasible way of improving the life prospects of millions of people. From a brutally selfish perspective, wealthy and free countries help themselves by adopting immigration policies that embrace skilled workers, and that is more than enough reason to adopt them. But it is another great virtue of such policies that they confer possibility and hope upon people in need of both.