

ABSTRACT

GLOBALIZATION AND THE FUTURE OF CONSTITUTIONAL RIGHTS

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Globalization – the drastic reduction of barriers to transborder movement and exchange – is a phenomenon of obvious practical significance that has received little attention from American constitutional scholars. To the extent that it has received such attention at all, that attention has been largely confined to a handful of conspicuous changes in judicial behavior, such as the growth of transnational judicial dialogue and the citation of foreign law in recent Supreme Court decisions. Yet the potential impact of globalization is not limited to its effect on the travel and citation habits of judges. On a larger scale, globalization entails intensifying international competition for investment capital and human talent that may have much greater implications for the worldwide development of constitutional law.

This article ties globalization to constitutional scholarship by proposing a provocative hypothesis about the impact of global investment and migration patterns on the extent to which countries uphold basic rights. One way in which countries can and do compete for financial capital and human talent is by offering bundles of rights and freedoms that are attractive to investors and elite workers. This article argues that such competition has the potential to result in a “race to the top” in the areas of civil liberties and property rights. It draws upon scholarship and data from a range of disciplines –most heavily political science and economics – to show that this “race to the top” hypothesis is both logically and empirically plausible.

Part II of the article sets the conceptual stage by articulating the relevance of globalization to constitutional law. Part III sets forth five competing hypotheses as to the likely impact of globalization on domestic law and policy. Part IV draws upon various sources of data to offer a brief snapshot of worldwide levels of globalization and protection for property rights and civil liberties, for the purpose of illustrating that some form of a “race to the top” hypothesis is 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. Part VI considers the potentially positive impact of competition for skilled labor on worldwide levels of human rights. It introduces the concept of a world market in human rights, in which states bid for elite workers by offering both pecuniary and nonpecuniary inducements that include more or less generous bundles of rights and freedoms. Countries that do not boast an attractive bundle of this kind must compensate by offering what this article calls a “freedom premium,” which amounts to a pure competitive disadvantage. The article concludes by identifying avenues for further research, and by offering a modest critique of excessively restrictive immigration policies that prevent the United States from fully exploiting its competitive advantages in the global market for human talent.