

ESSAY

The Inevitable Globalization of Constitutional Law

MARK TUSHNET*

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INTRODUCTION

Lorraine Weinrib writes of a postwar paradigm of domestic constitutional law, adopted by nations around the world.¹ That paradigm combines institutional and doctrinal features. Institutionally, the postwar paradigm outlined by Weinrib insists on the importance of constitutional review of legislation by an independent court; that is, it rejects parliamentary supremacy in its strongest forms. I would add a reasona-

* William Nelson Cromwell Professor of Law, Harvard Law School. Prepared for presentation at a workshop on separation of powers at “The Changing Role of Highest Courts in an Internationalizing World,” sponsored by the Hague Institute on International Law, October 23–24, 2008. A different version of this Essay will appear in *THE CHANGING ROLE OF HIGHEST COURTS IN AN INTERNATIONALISING WORLD* (Sam Muller ed., forthcoming 2010). I thank participants in the workshop, and especially Eyal Benvenisti, Rainer Nickel, and Otto Pfersman for their comments and critical suggestions, and Gabriella Blum for her comments. I received additional helpful comments at workshops at the University of Pennsylvania Law School and the New York Law School and at the Public Law Workshop at Harvard Law School.

1. Lorraine E. Weinrib, *The Post-War Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84 (Sujit Choudhry ed., 2006).

bly high degree of centralization of regulatory authority in national governments,² even in nominally federal systems.³ Doctrinally, the postwar paradigm implements national commitments to the protection of basic human rights through proportionality tests licensed by explicit (or sometimes implicit) limitations clauses. In addition, the paradigm includes a separate commitment to “rule of law” principles regarding procedural regularity, legal transparency, and modulated legal change so as to avoid defeating reasonable expectations of legal stability.

Set against the idea of a postwar paradigm of constitutional law is the idea of domestic constitutional exceptionalism. Australia and the United States appear to be the nations with the strongest commitment to exceptionalism. Australia lacks a judicially enforceable set of human rights, for example, and U.S. judges appear to resist references to non-U.S. constitutional law in constitutional adjudication for reasons rooted in exceptionalist ideas. The sources of these commitments to exceptionalism differ somewhat. Australian exceptionalism seems rooted in a deep national commitment to legislative supremacy as the best expression of democratic self-governance.⁴ The United States’ exceptionalism seems to arise from a related concern that there is an ineradicable tension between the postwar paradigm’s commitment to reasonably intrusive judicial supervision of legislation and even somewhat modest versions of legislative supremacy.⁵

2. Notably, as a matter of stated international law, the fact that a nation may be unable to comply with international obligations it has undertaken because of its internal federal structure does not in general relieve the nation of its duty to comply and its vulnerability to sanctions for noncompliance. *See* Vienna Convention on the Law of Treaties art. 27, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

3. The combination of regulatory authority flowing upwards from nations to supranational bodies such as the European Union (EU) and the devolution of regulatory authority to subnational units complicates this suggestion. Speaking broadly, I would assert that the postwar paradigm with respect to regulatory authority is that no governing entity can depart much from some standard set at a reasonably high level. So, for example, both subnational units exercising devolved power and national units have some, in my view, modest “margin of appreciation” with respect to their regulatory choices, but it is the modesty of the margin rather than its existence that is the important feature of the postwar paradigm. I believe that there is also a trend toward concentration of power in the executive branch in separation of powers systems, but that the reasons for this trend are not closely related to the causes of the globalization of domestic constitutional law I discuss here.

4. For an argument that Australian exceptionalism is weakening (or perhaps only that it should weaken), see Michael Kirby, *Transnational Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT’L L. 171 (2008).

5. For reasons sketched below, see *infra* text accompanying note 63, I do not think that American constitutional exceptionalism rests on an accurate judgment that the values constitutionalized in the United States differ significantly, either individually or as a package, from those

To speak of the globalization of domestic constitutional law is to suggest that these and other traditions of exceptionalism are likely to weaken over time.⁶ The suggestion differs from the claim that nations will gradually but inevitably abandon authoritarianism for rule of law constitutionalism. It is weaker than the latter claim because the globalization processes I identify are limited to nations that compete internationally for investment and human capital, with classes of lawyers able to assert some autonomous pressure on a nation's government.⁷ My claim is stronger, however, because I use the term "globalization" to suggest convergence among national constitutional systems in their structures and in their protections of fundamental human rights.⁸

I refer to convergence and occasionally harmonization, but not to uniformity. The processes I describe may induce nations to converge on statements of constitutional principles on high or intermediate levels of abstraction or on quite specific details; even convergence on the most abstract level can be important and consequential. But so too are differences in detail, which means that globalization does not entail uniformity. Further, although I argue that there are processes that push in the direction of convergence, I make no claims about the magnitude of those processes' effects, or, putting it another way, about the extent to which those effects will be offset by counterpressures in particular nations. As a result, I make no claims either about the rate at which the globalization of domestic constitutional law will occur.

My point of reference is the United States, whose constitutional system I know best, and my argument is that the globalization of constitutional law is impelled by both "top-down" and "bottom-up" forces with reasonably deep roots in the political and economic system in which every nation within the scope of my argument is today located.⁹ This Essay examines "top-down" processes impelling the globalization of

constitutionalized in other modern social welfare states.

6. I am concerned here with *domestic* constitutional law and do not address the separate question of, and controversy over, whether there is something fairly called a constitution of the international order or a global constitution.

7. For example, nations whose income depends on resource extraction may not experience many of the pressures attributable to the preferences of highly skilled workers, few of whom will be permanent residents in such nations. The limited effects of the processes I describe here on authoritarian regimes and resource-extraction nations suggests that the phenomenon I am describing is one of only partial globalization of constitutional law.

8. In what follows, I sometimes speak of a convergence among domestic constitutional systems, but I refer to a single phenomenon of globalization/convergence.

9. As noted in the text, I am agnostic as to the general content of the rules on which domestic constitutional systems will converge, whether on abstractions, mid-range concepts, or details.

constitutional law in Part I and “bottom-up” processes in Part II. Part III turns to some sources of resistance to that globalization, describing—and to some extent explaining why I discount—these countervailing forces. My argument might be described as one in which nations compete with respect to constitutional law, and Part IV therefore asks whether the race is to the top, the bottom, or somewhere else. The Conclusion discusses some implications of the argument for domestic separation of powers law. In sum, because the globalization of domestic constitutional law is inevitable, notions of separation of powers—or of legislative supremacy qualified by the existence of judicial review—will need to accommodate themselves to that globalization. Although my primary argument concerns the processes impelling globalization, I sketch some thoughts in the Conclusion about how that accommodation might occur.

I. TOP-DOWN PROCESSES

Most scholarship on the globalization of domestic constitutional law focuses on top-down processes. The most widely known is likely Anne-Marie Slaughter’s work on the development of cross-national networks of constitutional court judges, akin to the cross-national networks she finds throughout the contemporary international system.¹⁰ Judges of the world’s constitutional courts now meet regularly in academic and other conferences, and some serve with others on various transnational bodies. Slaughter suggests that personal interactions probably encourage judges to consider and occasionally to adopt solutions to problems they come to see as common across constitutional systems.¹¹

Personal contact can show a judge of a constitutional court in one nation that judges occupying similar positions elsewhere often confront the same kinds of problems, that those judges seem to be sensible people and reasonably astute lawyers, and that the first judge could probably do worse than take their solutions seriously as she attempts to solve problems. For some, judges in other nations will become members of

10. The most developed exposition is ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65–103 (2004). Slaughter includes among the reasons for the development of a globalized constitutional law the choices individual judges make when they refer to decisions by courts from other nations. This is of course descriptively accurate, but in contrast to her identification of personal contacts, it does not suggest a mechanism leading judges to make such choices.

11. *See id.* at 96–99. For a substantially more skeptical view of the effects of transnational networks, focusing on nongovernmental organizations, see ANNE-LISE RILES, THE NETWORK INSIDE OUT (2000).

the reference group of people whose judgments about their own work matter. And, apart from these networking connections, as the world's elites become more cosmopolitan—as trends in education and transnational career paths suggest they will—they will be increasingly inclined to view decisions taken elsewhere as worth considering with respect to domestic constitutional problems.

As Weinrib's account suggests, convergence can occur narrowly, for example with respect to the general approach constitutional court judges take to government efforts to regulate speech critical of government policy that executive officials believe poses some threat of social disorder.¹² Or, it can occur more broadly, as with the formulation of proportionality tests in numerous doctrinal domains.¹³ In this phase of the analysis, however, what propels convergence is personal contact among sensible lawyers seeking to perform what they come to understand to be similar jobs.

Transnational nongovernmental organizations (NGOs) that focus on constitutional matters—typically subsets of constitutional law dealing with fundamental human rights—provide another institutional location pushing toward the globalization of constitutional law.¹⁴ These NGOs intervene in domestic constitutional disputes in several (or many) nations and put forward a universalist understanding of human rights. Interventions sometimes take the form of “constitutional advice giving,” in which these NGOs offer constitutional structures and rights as models worth adopting.¹⁵ This may mean no more than informing domestic courts of the approaches taken to the problem at hand in other nations. More often, the actual aim is to influence the domestic courts to adopt the NGOs' preferred solutions by providing reasons for those solutions. To the extent that transnational NGOs tend to present a unified perspective in favor of human rights as currently understood, their regular appearance in domestic courts will provide a consistent force in one direction, at least until (as might happen) some countervailing pressure is consistently asserted by some other institutions.¹⁶

12. See Weinrib, *supra* note 1, at 87.

13. See *id.* at 93–98.

14. These NGOs might be transnational in structure, such as Amnesty International, or might be permanent “alliances” among domestically organized groups.

15. For my views on this practice, see Mark Tushnet, *Some Skepticism About Normative Constitutional Advice*, 49 WM. & MARY L. REV. 1473 (2008).

16. These countervailing pressures might come from opposing NGOs, if they develop (e.g., antiterrorism NGOs). Particularly if such opposing NGOs are domestically oriented, they might emphasize the peculiar national concerns implicated in the problem presented and stress that transnational NGOs cannot fully appreciate those concerns. And, of course, domestic legislatures

Top-down pressure also comes from transnational treaty bodies whose decisions have domestic constitutional implications, sometimes through the force of law and at other times through more diffuse mechanisms such as effects on reputation. Here the exemplary institution is the European Court of Human Rights (ECHR). National courts subject to review by these treaty bodies will almost inevitably mirror their jurisprudence, that being the safest way to avoid reversal, embarrassment, and perhaps financial sanctions against the domestic government.¹⁷ The mechanism of convergence is straightforward in this context. Perhaps the only point worth making is that this form of globalization can occur with respect to institutional structure as well as human rights. For example, the ECHR's decisions on the relation between fundamental fairness and judicial structure¹⁸ appear to have played some role in the creation of the new supreme court in the United Kingdom.¹⁹

A final source of top-down pressure is more traditional. Consider a nation that receives a large number of workers from elsewhere. Those workers' nations of origin have an interest in seeing that their nationals are treated decently.²⁰ Therefore, they will place pressure on the receiving nation to provide at least a minimum level of fundamental rights.²¹

and executive authorities will always be present, perhaps supplemented by support from allies on the international scene. My tentative view is that transnational NGOs have a systematic advantage along one dimension because they can present and sustain a single view over a reasonably long period, whereas national governments face conflicts from within the nation that make it more difficult for them to do the same. But, of course, national governments will almost certainly have greater resources than transnational NGOs, giving them an advantage along another dimension.

17. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 24, 2003, 108 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 129 (138) (F.R.G.), available at http://www.bverfg.de/entscheidungen/rs20030624_2bvr068503en.html (asserting that the domestic "standard of review corresponds . . . to the case-law of the European Court of Human Rights").

18. See, e.g., *McGonnell v. United Kingdom*, 2000-II Eur. Ct. H.R. 107; *Procola v. Luxembourg*, 326 Eur. Ct. H.R. (ser. A) (1995).

19. For a report of the Council of Europe recommending that the United Kingdom consider the creation of a supreme court to avoid the combination of functions in the House of Lords, see Eur. Parl. Ass., *Office of the Lord Chancellor in the constitutional system of the United Kingdom*, 2003 Sess., Doc. No. 9798 (2003), available at <http://assembly.coe.int/Documents/WorkingDocs/Doc03/edoc9798.htm>.

20. See, e.g., Note, *Labor Market Needs and Social Policy: Guestworkers in West Germany and the Arab Gulf States*, 8 COMP. LAB. L.J. 357, 397 (1987) (referring to "external pressure from guestworkers and their home countries to maintain attractive, or at least tolerable, working conditions").

21. Of course such diplomatic pressures might be dampened by other foreign policy concerns, but once again my concern is with the direction in which pressure is exerted and not with its magnitude.

II. BOTTOM-UP PROCESSES

David Law connects globalization and constitutional rights by means of market processes.²² He argues that economic globalization includes competition among nations for investment and human capital. Under this view, nations compete by offering investors and those with high levels of human capital—the well-educated and highly trained—attractive packages of benefits. An important component of those packages, Law argues, is constitutional protection.²³

The argument as to investors is straightforward.²⁴ When considering where to place their capital, investors will consider the likely returns on their investments. As Law puts it, investors “seek . . . to maximize their risk-adjusted returns.”²⁵ Consider an investor choosing between two nations. One nation offers a relatively high rate of return, but does not guarantee that the investor will actually be able to realize the returns due to a constitutional provision authorizing the government to expropriate investments and returns at will. The second nation offers a slightly lower rate of return.

Depending on the size of the gap and the likelihood of expropriation in the first nation, however, the second nation may be able to attract the investment by coupling the lower rate of return with an assurance that the returns will actually be realized. It can do that by providing constitutional protections for investment and having them enforced by an independent court (that is, a court not under the control of the executive government). To meet that competition, the first nation will adopt similar constitutional protections. So, through a race to the top, globalization induces one nation after another to adopt constitutional protections for property rights enforced by independent courts.²⁶

22. David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008). In what follows, I sketch the outlines of Law’s argument, which in its details contains a number of important qualifications that go largely to the pace of globalization of constitutional law.

23. *Id.* at 1307–11 (describing the relation between competition for investment capital and constitutional protection of property rights); *id.* at 1321–23 (describing the relation between competition for human capital and constitutional protection of human rights).

24. A note on the harmonization of private law seems appropriate here. The pressures for private law harmonization are, I believe, substantially greater than those for the globalization of constitutional law. Differences among substantive legal rules applicable to private transactions are costly in direct and obvious ways. This gives lawyers and their clients a reasonably strong interest in reducing such differences, which can be accomplished through harmonization. The costs of differences in constitutional law are, in contrast, less obvious and, perhaps more important, more difficult to reduce by ordinary political means.

25. Law, *supra* note 22, at 1311.

26. Law emphasizes that constitutional rules that maximize risk-adjusted returns will almost

But more than property rights are involved. Investors value political stability generally, and there is reason to think that governments can reassure investors worried about stability by providing some threshold level of civil rights and liberties to residents. That level, to be sure, may not be terribly high. Further, some authoritarian rulers may have time horizons that are short enough—basically, to the point where they expect to leave the country with wealth they have accumulated—that make them indifferent to concerns about stability in the longer term. Even so, stability concerns are likely to have some effect, however modest, in giving ruling elites incentives to provide some modest rights guarantees.

The human capital argument is different because it depends on assumptions, almost certainly correct, about the preferences of well-educated people, that is, those with relatively high levels of human capital.²⁷ Law assumes that such people prefer reasonably high levels of individual freedom, including freedom of expression, freedom of religion, and freedom to live a relatively undisturbed private life.²⁸ It is important to emphasize that this assumption extends further: Such people prefer these liberties for themselves, but they also prefer that others in the society with whom they identify enjoy the same liberties.²⁹ In a globalized economy, people with high levels of human capital are just about as mobile as investment capital, and they will locate themselves in nations that provide them with what they want by way of freedom. If that is correct, nations will compete to offer such people constitutional protections

inevitably authorize significant amounts of government economic regulation in the service of economic and political stability. *Id.* at 1311–12.

27. As Law puts it, “*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’ . . .*” *Id.* at 1323 (emphasis added).

28. *See id.* at 1335–36 (citing evidence to support the proposition that “elite workers are . . . characterized by a taste for individual freedom”). This taste, I note, might sometimes be satisfied by constitutional protection afforded to common values realized differentially, at least within some range of reasonableness. To the extent that Weber’s classic thesis about the connection between certain religious beliefs and personal investments in acquiring human capital is correct, there might be an intrinsic connection between having a high level of human capital and (some) religious beliefs supporting religious freedom. *See* MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Stephen Kalberg trans., Roxbury 3d ed. 2002) (1920).

29. The idea here is similar to that dealt with in the literature on the proposition that “richer is safer,” that richer people prefer higher levels of safety than poor people do because their preferences change as they become richer and not simply because they can afford to purchase more safety with their greater incomes. For a critical review of the claim that “richer is safer,” see Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement*, 87 *CORNELL L. REV.* 648, 666–70 (2002).

of personal freedom, for the same reasons that they will compete to offer property rights protections.

Law's arguments rest on the proposition that financial and human capital is mobile. There is, however, another source of bottom-up pressure to globalize constitutional law, involving not actual physical mobility of investments and people but rather "mobility" in the provision of services, specifically legal services. Globalization means that lawyers in one country will routinely interact with other nations' legal systems. So, for example, family lawyers in the United States will inevitably deal with the Hague Convention on the Civil Aspects of International Child Abduction,³⁰ and in doing so will need to come to some understanding of the extent to which another nation's procedures provide fundamental guarantees of procedural justice.³¹ Lawyers working on transnational contracts will have to understand where relevant regulatory authority resides in another nation's constitutional system—in the nation or in some subnational unit, for example, and/or in which administrative body. To do so the lawyer will need to understand the nation's constitutional system.

These examples, involving both constitutional rights and constitutional structure, show that domestic lawyers will need to learn about other nations' constitutional systems. Doing so is costly. The cost of learning will be lower if the other nation's constitutional system is the same as, or nearly the same as, the domestic lawyer's.³² To overstate the point: Having learned domestic constitutional law, the domestic lawyer will *already* know at least something about the other nation's.³³

This suggests that domestic lawyers with transnational business—which is to say, a great many—will prefer some degree of convergence

30. Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1983 U.N.T.S. 98.

31. I use the example of family lawyers and the Hague Convention, because in the United States such lawyers tend to be sole practitioners or practitioners in small law firms. The example thus demonstrates how deeply globalization penetrates into the legal profession.

32. My argument here is related to the argument prevalent in the literature on harmonization of private law that harmonization or convergence makes coordination (and contracting) easier. My argument differs from that argument because the domestic constitutional rules on which national systems converge do not provide a solution to a coordination problem available to both parties at low cost but instead reduce the cost of determining whether some arrangement is constitutionally permissible or prohibited in one or the other constitutional system.

33. Changes in legal education could supplement convergence. As students, lawyers would learn the constitutional law of other nations, thereby reducing the costs of practicing law transnationally. Legal education occurs before the lawyer knows which nations' constitutional law she should know, which suggests that *some* degree of convergence will still be useful to practicing lawyers.

of constitutional systems. Domestic lawyers will face lower costs in transacting with lawyers in nations with familiar constitutional systems than in transacting with lawyers in nations with dramatically different constitutional systems. The difficulty, though, is that this demand will arise at both ends of transactions, and it will be less costly for each set of lawyers if the *other* nation's law moves in the direction of their own law, rather than vice versa. This is a classic coordination game, with two equilibria acceptable to the players but with neither having any obvious advantages. To some extent it can be solved, or at least its impact lessened, because of ordinary learning processes. With any luck, after dealing with each other, each nation's lawyers will come to think that one or the other nation offers better solutions to specific constitutional problems and will urge their law makers to adopt those solutions. The same network processes that lead constitutional court judges to learn from each other can lead lawyers to do the same. Judges have the power to change the law, of course, whereas lawyers can only place pressure on their nation's law makers to change the law.

Perhaps more important, markets may intervene here as well. Consider lawyers in two nations competing to obtain business in a third nation. Due to the difference in transaction costs, their transacting partners will prefer to deal with lawyers from the nation whose laws (including constitutional law) are similar to their own. That disparity will induce the lawyers who lose business to seek changes in their own nation's law. Competing for business in a globalized economy, domestic lawyers will "demand" (in the economic sense) that their own constitutional system converge with systems elsewhere.³⁴ That demand exists does not necessarily mean that supply will be forthcoming. Law "producers" must first see the increased demand and conclude that somehow they themselves will benefit from convergence.³⁵ Here bottom-up pressure must be satisfied through top-down processes.

To this point I have emphasized structures and pressures, but to complete the argument, it seems to me necessary to give ideology some direct role, such as rule of law considerations for the judges in transnational networks and substantive commitments to human rights for the highly skilled. By way of introducing further qualifications, I point out that there is nothing inevitable about the direction in which these ideo-

34. I suspect that some mechanism like this might explain what appear to be mere preferences for convergence in Slaughter's account. *See supra* notes 10–11 and accompanying text.

35. The profit motive induces producers of goods and services to respond to increased demand, but there is no closely analogous motive for law makers.

logical considerations will push. Therefore, nothing is truly inevitable about the globalization of domestic constitutional law, despite some seemingly strong structural pressures in that direction.

III. QUALIFICATIONS: COUNTERPRESSURES ON THE SUPPLY SIDE

The law- and lawyer-driven accounts of bottom-up globalization identify tendencies, but certainly identifying them tells us little about the pace of globalization of domestic constitutional law. In addition, each is subject to possibly important qualifications.

Perhaps the most important qualification is that the bottom-up accounts treat market pressures toward globalization as exogenous to the domestic and international legal systems, yet markets are themselves constructed by legal rules. Were there a different set of legal rules in place—for example, rules that treated contracts between a prosperous party and a significantly less prosperous one as voidable because they are coercive—there would be different pressures on national law makers to develop *other* rules, and not necessarily the constitutional protections Law argues are produced by the race to the top.³⁶ As an analytic matter, this seems clearly correct, but also somehow misdirected in the world as it exists today. Law implicitly makes reasonable assumptions about the actual content of domestic legal regimes, and at the very least his arguments have a resonance that the realist critical argument lacks.³⁷ Put another way: Law assumes, I believe correctly, that some version of the so-called Washington Consensus is likely to remain important in structuring domestic legal rules in nations interested in attracting investment and high skilled human capital.³⁸

36. This combines a standard legal realist critique of contract doctrine with equally standard public choice analysis.

37. A more limited point about the endogeneity of law bears on the lawyer-related bottom-up argument. Domestic lawyers have an interest in monopolizing access to domestic law through the usual exclusionary practices. Yet, it seems to me, exclusion of nondomestic lawyers from domestic legal practice is not related to (or only quite indirectly related to) the bottom-up pressures domestic lawyers may place on their law makers to bring domestic constitutional law into rough alignment with constitutional law elsewhere. And, in any event (and for whatever reason), the domestic lawyers' monopoly over legal practice seems to have weakened substantially in the era of globalization. One example is that each EU member must allow lawyers licensed in other member states to practice locally. *See* Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, 1995 E.C.R. I-4165; Case 2/74, *Reyners v. Belgian State*, 1974 E.C.R. 631. Even in the United States, many jurisdictions allow non-U.S. lawyers to practice relatively freely.

38. *See* Law, *supra* note 22, at 1310 n.125 (referring to the "Washington Consensus").

Earlier, I suggested some additional qualifications. These qualifications have a common structure. Political elites are willing to forgo the economic benefits of inflows of investment or high level human capital,³⁹ so as to ensure that their political power is not diminished by constitutionalizing civil rights and liberties. For example, authoritarian regimes are likely to resist rather strongly pressures to “level up” the protections they give civil rights and liberties, though not property rights. And nations whose wealth rests on resource extraction may have little need to attract large enough numbers of people with high levels of human capital, avoiding the pressure such people place on the nation’s government. Put another way, elite preferences can counter pressures toward the globalization of domestic constitutional law.⁴⁰

Consider next the argument that competition for investment capital will induce nations to provide reasonably high levels of protection for investment by means of constitutional doctrines limiting expropriation and regulatory interventions that substantially reduce that capital’s value. Tamir Moustafa’s account of judicial independence in Egypt is quite suggestive here and seems likely to have general implications.⁴¹ According to Moustafa, Egypt’s authoritarian government came to understand that its socialist and nationalist commitments obstructed inflows of capital, because investors worried that their investments were always at risk of expropriation.⁴² The government responded to those concerns by creating an independent constitutional court authorized to enforce constitutional guarantees, including an anti-expropriation guarantee.⁴³ The court then exercised its independence to weaken slightly the government’s authoritarian control over elections, thereby leading the government to reconsider its commitment to judicial independ-

39. Inflows of high level human capital may be unnecessary in both cases—in resource-extraction nations because resource extraction can take place without much high level human capital and in large authoritarian nations because such capital can be developed internally rather than imported.

40. These elite preferences can take other forms. They may prefer to preserve domestic sovereignty rather than elite power. Or elites may believe that the costs of guaranteeing human rights are too great given the nation’s resources, especially if the package of human rights includes some degree of protection for social and economic rights. For a discussion of resistance by local lawyers to the lawyer-driven “bottom-up” pressure, see *infra* text accompanying note 54.

41. TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* (2007).

42. *Id.* at 67–70 (describing the government’s concerns about investor uncertainty regarding expropriation).

43. *Id.* at 77–79 (describing the creation of Egypt’s Supreme Constitutional Court in 1979).

ence.⁴⁴ Yet, doing so across the board would once again raise foreign investors' concerns about expropriation.

On the level of institutional design, the solution for an authoritarian government seems obvious: Create an independent court with jurisdiction restricted to the matters of concern to foreign investors and rigorously honor that court's decisions even when they are at odds with the government's immediate policy preferences.⁴⁵ The effect would be the creation of a bifurcated system of constitutional protections, in which rights of domestic subjects received relatively low levels of protection. Law suggests that such a solution might be unstable, perhaps because the existence of parallel regimes of protection would be an ever present reminder of the authoritarian government's ability to set the level of protection at whatever point it found politically advantageous at the moment. Such a reminder would undercut the anti-expropriation commitment the government would seek to make.⁴⁶ If Law is correct, the globalization of constitutional law might occur even in somewhat authoritarian nations.

A similar problem and related response might arise in connection with the argument for globalization of constitutional law based on human capital. Even if nations need to attract and retain residents with specialized training so as to compete effectively in global markets, they could provide bifurcated protections—high levels for people with good human capital, low levels for those with only basic human capital assets.⁴⁷ Again, this solution might be unstable because of the message of vulnerability it sends to those with good human capital. Probably more important, people with high levels of education and training tend to

44. *Id.* at 162–64 (describing Egypt's Supreme Constitutional Court's decisions regarding local elections).

45. I suspect that this solution may sometimes be unavailable because of path dependence. Were Egypt to shut down its existing constitutional court and create a new court with narrower jurisdiction, the message to foreign investors might be merely that the government retains complete control over outcomes. Creating a court with restricted jurisdiction from the outset would not send such a message nearly as overtly.

46. I take this suggestion from a portion of Law's article dealing with competition for human capital, not investment, but it seems to be applicable in both contexts. *See* Law, *supra* note 22, at 1342 ("A sovereign commitment to respect certain rights can be rendered credible by the existence of constraining institutional arrangements 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.").

47. This is especially true because unskilled workers are likely to be less mobile than skilled ones.

support human rights as such, that is, for everyone and not just for themselves.⁴⁸ A bifurcated system of rights protection would then be insufficient to attract and retain such people.⁴⁹

Government resistance to globalization of domestic constitutional law is a thread common to these processes. Local values, of a sort captured in some conceptualizations of domestic legal exceptionalism, tend to counter the pressures toward globalization. For example, while there might be widespread agreement on eliminating the possibility of outright expropriation of foreign investments, there may well be a wide range of variation in the extent to which regulatory impositions will be regarded as the equivalent of expropriation. Some regulatory impositions might be regarded as regulatory takings in one nation but not in another, simply because the nations differ with respect to the value they place on the goal sought through the regulation. Another way of putting this point is that the globalization of constitutional law, particularly in response to top-down pressures, has an elitist and antidemocratic character that might lead local democrats to oppose that globalization as some have opposed other manifestations of globalization.

Resistance of this sort might be accommodated by adjusting transnational norms, through doctrines in the “margin of appreciation” family, without eliminating entirely the pressures toward convergence.⁵⁰ More important, though, may be the difficulty national governments will have in sustaining resistance. On many issues that might be expected to arise in the globalization of domestic constitutional law, national governments may find themselves internally divided. Many may need to satisfy some domestic constituencies that favor the convergence on a specific issue even if they are indifferent to convergence in other issue areas. National governments will face constant pressure toward globalization of domestic constitutional law and will probably be able to resist that pressure only intermittently.

One might think that there might be a somewhat different conflict between protection of property rights and a set of human rights widely

48. *See supra* note 29.

49. I should note that if a nation can manage to segregate highly skilled workers in their own enclaves (a segregation that might be geographical or cognitive), the bifurcated system of constitutional protection for the rights of such workers and no protections for other workers might be reasonably stable—although I wonder how effective such segregation can be over the long run. Where lower skilled workers, such as construction workers and family attendants, come predominantly from outside the nation, pressure from those workers’ nations of origin might lead to the provision of higher levels of rights protection than the receiving nation would provide on its own.

50. This is particularly so if the theory of the margin of appreciation contemplates its gradual reduction over time, as the official theory of the European human rights regime has it.

recognized in contemporary constitutions—so-called second-generation social and economic rights. The reason for the conflict is basically cost: Ensuring second-generation rights requires state expenditures financed out of taxes, but the prospect of paying high taxes might adversely affect a decision to invest in one nation rather than another. As with the other qualifications I have mentioned, here too there is an offsetting influence, albeit one falling within the “top-down” category. International financial institutions such as the World Bank and the International Monetary Fund have increasingly come to the view that investments in human capital—particularly the provision of education and medical care—ultimately repay themselves out of the increased productivity to which they contribute.⁵¹ These top-down pressures to protect some second-generation rights might offset the bottom-up pressures against doing so.⁵² Therefore, I suspect that the globalization of domestic constitutional law will lead to convergence not towards classical liberalism, but to some sort of social democratic liberalism.⁵³

The lawyer-driven account of bottom-up globalization faces its own challenges and can offer its own responses. One challenge, again, comes from local elites, local lawyers who offer themselves as specialists in domestic constitutional law to outside lawyers trying to arrange deals. My sense is that such lawyers play an important role in contemporary transnational transactions. Lawyers on the other side of the transaction also hire local specialists to assure them that the transaction is consistent with the other nation’s law, including local constitutional law. Harmonization and convergence take both sets of local constitutional lawyers’ distinctive knowledge away from them, and they can be expected to argue against convergence.

These domestic constitutional specialists are not the only interest group involved, though, and may not be the strongest one. First, nonna-

51. See, e.g., Press Release, World Bank, Progress Toward Nutrition, Health, Education, and other Development Goals off Track (Apr. 8, 2008), available at <http://go.worldbank.org/B3FJSTJLA0> (quoting World Bank President Robert Zoellick as saying that “reducing malnutrition has a ‘multiplier’ effect, contributing to success in other [Millennium Development Goals] including maternal health, infant mortality, and education”).

52. For a further account of “top-down” pressures, see Law, *supra* note 22, at 1318–19 (describing World Bank, U.S., and EU programs that encourage aid recipients to protect human rights).

53. An additional reason for this suspicion is the path-dependent one that many workers with high levels of human capital will come from nations with some degree of social democratic commitments and will therefore prefer to see such commitments honored wherever they are located. Yet, the interest-based advocacy of more pure forms of neoliberalism will weigh against these preferences.

tional lawyers must be confident that the local lawyers they are hiring are truly competent in the fields in which they specialize. Achieving that confidence may be difficult, but some degree of convergence may help. Perhaps more important, constitutional lawyers are only a subset of all domestic lawyers involved in transnational transactions. Local transactional lawyers can reduce the cost of transacting by eliminating their partners' need to hire another specialist.⁵⁴ It seems to me likely that there actually will be more, and more influential, local transactional lawyers than local constitutional specialists.

A second challenge is suggested by an important recent article urging some caution in identifying areas of convergence in constitutional law. Using "judicial balancing" and proportionality doctrine as a case study, Jacco Bomhoff argues that we should be careful about inferring convergence at a deeper level from superficial similarities in doctrinal form.⁵⁵ Bomhoff points to the many suggestions that balancing in the United States and proportionality in the postwar paradigm model are quite similar. But, he points out, Europeans "often omit extended treatment of institutional considerations" in their discussion of proportionality, while U.S. commentators and courts often make such considerations important in their treatment of balancing.⁵⁶ And Europeans discuss proportionality by invoking Weberian concerns about formal rationality, a concept entirely absent from U.S. discussions.⁵⁷

To some extent Bomhoff's argument is a straightforward application of cautions familiar to scholars of comparative law. Words take on different meanings in different contexts, and the relevant contexts include the social, economic, and political organization of the world within which the words are used. So, for example, "judicial references to balancing are at heart arguments offered to legitimize the exercise of political power in particular settings."⁵⁸ But, "the legitimizing force of these arguments is inherently dependent on local meanings and understandings."⁵⁹ More generally, balancing formulations combine the uni-

54. And, by doing so, these local transactional lawyers may be able to reap a larger portion of the transactions' benefits for themselves.

55. See Jacco Bomhoff, *Balancing, the Global and the Local: Judicial Balancing as a Problematic Topic in Comparative (Constitutional) Law*, 31 HASTINGS INT'L & COMP. L. REV. 555 (2008).

56. *Id.* at 558.

57. *Id.*

58. *Id.* at 559.

59. *Id.* For a more optimistic view of convergence with respect to proportionality doctrine, see Moshe Cohen-Eliya & Iddo Porat, *The Hidden Foreign Law Debate in Heller: The Proportionality Approach in American Constitutional Law*, 46 SAN DIEGO L. REV. (forthcoming May

versal—the interests to be balanced—with the local, the context within which balancing occurs. Those who notice the similarities in doctrinal formulations may overlook the differences in application because they are insufficiently aware of the local contexts. And, as I indicated at the outset, apparently small differences in detail can have large consequences, both doctrinally and practically.

Another challenge might be the language of margins of appreciation. That terminology resonates with notions of deference, but it was developed by transnational treaty bodies attempting to explain why they sometimes tolerate diversity with respect to the content and enforcement of treaty rights across national jurisdictions.⁶⁰ The rationale for allowing a margin of appreciation is two-fold: (1) deference to local decision makers' judgments of when local conditions vary widely enough to make variations in the definition and protection of treaty rights sensible on policy grounds and (2) respect for residual national sovereignty.

Consider then the question of whether or the degree to which a domestic constitutional court should defer to decisions made by the national executive or legislature respecting constitutional rights. A constitutional court might observe that, with respect to the constitutional right at issue (e.g., freedom of expression with respect to reputation), some transnational treaty body allows a substantial margin of appreciation. The reason for allowing such a margin of appreciation will combine the two reasons for having such a margin in the first place—local variation and national sovereignty. It might be a mistake, though, to give the national law maker a similar margin of appreciation. To some extent, the national law maker's expertise might be analogous to domestic law makers' greater knowledge of local conditions, and respect for the democratic warrant for legislative or executive decision making might similarly be analogous to the sovereignty concerns to some extent. The "to some extent" qualifications, however, mean that the deference the constitutional court should give in the purely domestic context might differ from the margin of appreciation a transnational treaty body gives in its own institutional context.

Bomhoff's arguments identify risks and certainly caution against strong claims about the extent to which the globalization of constitutional law has already occurred. Some of the pressures for the globalization of constitutional law might also work to reduce the imperfect un-

2009), available at <http://ssrn.com/abstract=1317833>.

60. See, e.g., *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) at 22–23 (1976) (describing the basis and limits of the margin of appreciation).

derstanding that Bomhoff suggests might occur. Lawyers who discover that seeming agreement on legal meaning masks misunderstanding will do what they can to get meanings to converge further. And each transnational NGO will be ready to offer consistent understandings across nations. The result, I suspect, will be more rapid convergence with respect to high level abstractions than with respect to mid-level ones and more rapid convergence with respect to mid-level ones than with respect to many—though perhaps not all—detailed constitutional rules.⁶¹

I should emphasize that the pressures for globalization that I have identified merely push in that direction. We have no way to identify the rate at which national constitutional systems will respond to those pressures. A reasonable guess would be that convergence with respect to fundamental rights will occur more quickly than convergence with respect to constitutional structures, largely because constitutional structures more strongly condition the way politics is conducted on the national level and so produce stronger counterpressures, through those who are involved in domestic politics.

One final source of pressure against the globalization of domestic constitutional law deserves mention. “Constitutional” constraints can be enforced externally, by supranational treaty bodies for example, without becoming internalized into domestic constitutional law. Indeed, we might see the globalization of domestic constitutional law as a substitute for the creation of a more general system of external enforcement—a worldwide federation of nations, for example. But, to the extent that external enforcement is available and acceptable, domestic constitutionalization is unnecessary.⁶²

IV. RACES TO THE TOP AND BOTTOM, AND ELSEWHERE

The bottom-up pressures I have described create a “race” among nations on issues of constitutional law. But is it a race to the top, to the bottom, or to somewhere else?

Answering that question is difficult in part because it may be badly posed. What is the “top” with respect to constitutional protections? The

61. For the moment, I put to one side the question of whether nominal commitment to high level abstractions will be accompanied by genuine enforcement of those abstractly described rights. For a brief observation on this point, see *infra* text accompanying note 66.

62. The British experience with the ECHR suggests that external enforcement may not always be acceptable. One impetus for the adoption of the Human Rights Act 1998 in the United Kingdom was a sense among British political elites that it was embarrassing for the nation to be losing so many cases in the ECHR.

United States gives greater constitutional protection to hate speech than do most other liberal democracies, but at some cost to equality and human dignity. Would convergence on rules allowing restrictions on hate speech demonstrate a race in the direction of the bottom? Similarly, with respect to constitutional protections of property rights, how much accommodation of local values is consistent with a race in the direction of the top?

A few observations about the race's direction seem reasonably well-supported. First, there is no reason to think that the "top" with respect to any specific constitutional guarantee is the most robust protection offered anywhere in the world. Constitutional guarantees come with costs, some to other constitutional values; and the nation with the most robust protection of a particular guarantee may be giving insufficient weight to those other values.

A second point is of particular relevance to U.S. readers. There is no general reason to think that U.S. constitutional law is at the "top" with respect to every specific constitutional guarantee. It may be there as to some guarantees but not as to others. As a result, the possibility that U.S. constitutional law will change as a result of the top-down and bottom-up pressures does not mean that in general U.S. constitutional law will get worse in some normative sense. My own sense is that these pressures will induce some changes in constitutional law. Some of those changes will seem to be reductions in the level of protection, for example perhaps with respect to the protection given commercial speech. Others will seem enhancements in the level of protection, for example perhaps with respect to an open acknowledgement that U.S. constitutional law, as properly understood, guarantees some social and economic rights.⁶³ In both cases, though, the developments might as readily be characterized as movement toward the top as toward the bottom.

Third, radical critics of the Washington Consensus tend to believe that the consensus leads to a race to the bottom with respect to workers' rights and environmental protection.⁶⁴ That belief seems to me overstated even when we consider only competition for investment capital, due to the effects of actually reaching the bottom on social and political stability. Adding the pressures from competition for high level human

63. For discussions of the proposition that such rights are indeed already guaranteed by U.S. constitutional law properly understood, see CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004); Ernest A. Young, *The Constitution Outside the Constitution*, 117 *YALE L.J.* 408 (2007).

64. For a summary of criticisms of the Washington Consensus, see Robert L. Kuttner, *Development, Globalization, and Law*, 26 *MICH. J. INT'L L.* 19, 28–29 (2004).

capital further weakens the claim that the race will end at the bottom. Elite preferences for human rights exert pressure to increase human rights guarantees for everyone, subject to the possibility that geographical and cognitive separation of those with high level human capital from those with less such capital will allow nations to deny human rights to those with lower levels of human capital—though of course without any assurances about how much they will be increased.

Perhaps, though, the metaphor of “top” and “bottom” leads us to think in the wrong terms because it suggests that convergence will move everyone to a single point, whether at the top or the bottom. Instead, there might be multiple resting points. So, for example, we might see the emergence of *separate* “top-down” networks of high court judges.⁶⁵ Cultural values common to some but not all nations interested in attracting investment and high level human capital may lead to *various* stable arrangements.

This may be a real possibility, but it may not undermine the argument that globalization of constitutional law is inevitable quite as much as it might seem. Perhaps human rights come in relatively large packages, with some but relatively small variations within the packages. I alluded to one version of this suggestion in discussing the possibility that constitutional law would converge on rights stated at an intermediate level of abstraction. It seems clear, for example, that a range of doctrines are compatible with fundamental principles of free expression, but that some doctrines are not.⁶⁶ If this suggestion is right, we might observe races to different points, but not to points widely separated on some relevant measure of human rights overall.

CONCLUSION

Most of the pressures I have described can be accommodated by any or all of a nation’s law making institutions, and with respect to those pressures separation of powers concerns are largely irrelevant.⁶⁷ The most prominent top-down pressures may be different in this respect, and

65. One can imagine, for example, a network of high court judges from Moslem-majority nations operating with only occasional contacts with other judicial networks, or networks organized on a regional basis and, again, with relatively few contacts with other networks.

66. A good candidate for one core principle is that governments may not criminally punish people merely because they criticize government policy without making a reasonably strong showing that the criticism is likely to lead to serious social instability.

67. Put another way, to the extent that domestic constitutional law limits the paths through which constitutional change can be accomplished, those pressures can exert themselves along the required pathways.

indeed my sense is that most separation of powers concerns have indeed been expressed about judges influenced by transnational networks transforming domestic constitutional law “on their own,” so to speak, and about the implications for sovereignty of domestic constitutional responses to pressures from and decisions by transnational treaty bodies. At the formal level at least, I think that these concerns are misplaced.⁶⁸

Rather, the concerns arise from an inchoate sense that convergence among national constitutions toward a common position is somehow problematic—that it undermines national sovereignty in some difficult-to-specify way. But, precisely because there is no good way to spell out precisely and in good legal form why the convergence is troublesome, application of ordinary domestic rules of constitutional interpretation will almost always—and perhaps will always—lead to the conclusion that the way in which globalization takes root in a nation’s constitution is consistent with the nation’s constitution.

In many ways, the globalization of domestic constitutional law poses a problem for the separation of powers that resembles the problem posed by the rise of the administrative state and its modern successors. In the United States and the United Kingdom, the administrative state fit badly into the standard tripartite theory of separation of powers. James M. Landis finessed the problem by asserting that there was nothing magic about the number three⁶⁹—and that turned out to be the solution in the United States and Great Britain.⁷⁰ Although occasionally questions about where administrative agencies, quangos,⁷¹ “Next Steps” or-

68. Judges on domestic constitutional courts have the authority to make (and remake) domestic constitutional law, and the separation of powers concerns one might have about their doing so by appropriating nondomestic law are no different from the separation of powers concerns associated with their power to make law generally. For a discussion, see Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 *LOY. L.A. L. REV.* 239 (2003). Decisions by transnational treaty bodies are either made applicable in domestic law by domestic processes, including whatever requirements domestic separation of powers rules impose or induce domestic law makers to make their own decisions, again in accordance with those rules.

69. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 47 (1938).

70. Theorists of the administrative state attempted to rest its legitimacy on a new account of the separation of powers. They emphasized that all we really wanted from the separation of powers was a system in which different institutions, with varying bases of legitimacy themselves, were in a position to check and balance each other and that modern society had such institutions, both within the government and outside it in civil society. For the classic modern presentation and critique of such theories, see Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *HARV. L. REV.* 1667 (1975).

71. “Quangos” differ from NGOs because they have policy making responsibilities and provide services traditionally provided by government, but have governing boards that include both government officials and nongovernment members. See 12 *OXFORD ENGLISH DICTIONARY* 976 (2d ed. 1998); Carsten Greve et al., *Quangos—What’s in a Name? Defining Quangos from a*

ganizations,⁷² and the like fit into separation of powers theories crop up to bedevil constitutional theorists,⁷³ Landis's solution seems to have stuck: However conceptualized, the modern administrative state must fit into our account of separation of powers because it is here to stay.

So too, I suspect, with the globalization of domestic constitutional law. Perhaps we will talk of the convergence process as one involving a "fifth branch" of government, such as Slaughter's networks. But once we are comfortable with the globalization of domestic constitutional law, the question of how we fit it into our separation of powers theories will become uninteresting. I end by saying that this is entirely understandable if, as I have sketched, the globalization of domestic constitutional law is inevitable.

Comparative Perspective, 12 GOVERNANCE 129, 135–37 (1999).

72. "Next Steps" organizations are independent government agencies in the United Kingdom that are run like private entities to improve the provision of services to the public. See Patricia Greer, *The Next Steps Initiative: The Transformation of Britain's Civil Service*, 63 POL. Q. 222 (1992); Kate Jenkins, *Politicians and Civil Servants: Unfinished Business—The Next Steps Report, Fulton and the Future*, 79 POL. Q. 418 (2008) (describing the origins of "Next Steps" organizations).

73. For a discussion of the imperfect fit between the British theory of ministerial responsibility and modern forms of administration, see PAUL CRAIG, ADMINISTRATIVE LAW 104–06, 109–11 (6th ed. 2008).