Globalization can instead cause policy convergence in the form of a race to the *top*, most notably in the context of **regulatory standards**. 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.

When a large, wealthy market insists upon higher regulatory standards, producers face pressure to adopt those standards in order to preserve valuable market access. More-over, 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. Market demand and protectionist politics thus combine to produce what David Vogel has called a "California effect" of rising regulatory standards.

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."

Antitrust, for example, has been characterized as an area of regulation "rife with informal cooperation."

On this account, policy convergence emerges from a process of "give - and-take" within governments, between governments, and between public and private actors.

The result of this **polycentric process**, suggest Esty and Geradin, is likely to be substantively superior policy.

Ex ante, however, it is unclear whether "competition" 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, even highly coordinated efforts at 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.

Alternatively, the lowering of barriers to transnational movement may lead not to policy convergence at all, but instead to policy divergence, or *specialization.*

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.

The notion that 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 offer ing specialized bundles of public services at different prices that would at-tract people according to their particular tastes.

The last possibility to consider is that globalization will have no systematic impact at all on domestic policy across countries. Its effects may vary too broadly to permit any kind of meaningful generalization across countries: there may be country-specific reasons for globalization to encourage higher regulatory standards in some places, for example, while inducing lower standards in others.

Alternatively, the policy impact of globalization may prove negligible if governments deem it undesirable or unnecessary to modify existing policies in the face of globalization.

In this vein, many scholars have argued that the practical importance of globalization has been overstated.

As these skeptics have frequently pointed out, international flows of capital, goods, and people all experi-enced a significant downturn in the aftermath of World War I.

Transnational movement in capital and goods, measured as a proportion of domestic economic activity, is no greater now than it was a century ago. Indeed, international exports constituted a higher proportion of world gross national product (GNP) in the 1880s than in the 1960s.

Foreign investment, measured as a proportion of the GNP of Western industrialized countries, was nine times higher in 1913 than in 1970. 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.

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. The overall proportion of migrants—with estimates vary-ing from 2.3% to 5% of world population[70]—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.

It is prudent to approach sweeping claims about globalization with a degree of skepticism—all the more so because the topic has captured popu lar 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 in-tegration precipitated by World War I reversed itself in the years following World War II as industrialized countries began to remove exchange con-trols, lower trade barriers, and relax restrictions on immigration.

By the 1980s, economic integration in the industrialized world had again reached, or surpassed, pre-World War I levels.

Over the last half of the twentieth century, international trade grew at twice the rate of world output and in-creased in magnitude by a factor of sixty.

Over the same period, foreign investment grew at three times the rate of world output.

International capital flows now exceed one trillion dollars per day. And although over-all 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 be-tween the prospects of skilled workers and those of unskilled workers.

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 as-sets, intellectual capital, and manufactured goods that owe their existence to tightly integrated multinational supply and production chains.

The advent of globally integrated production, triggered by the lowering of trade and in-vestment 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.

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. Yet the amount of money now traded each day in these markets—some four trillion dollars—exceeds the annual gross domestic product of the United States.

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. Capital and equity markets are global in scope, to powerful effect. Among the major economies, interest rates are converging; so too are rates of return on similar assets.

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.

EMPIRICAL TRENDS IN GLOBALIZATION AND THE PROTECTION OFCONSTITUTIONAL 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 in-creasing 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,for which empirical data is scarce.

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,

measure of globalization formulated by a team of Swiss researchers, the property rights index devised by Professors Knack and Keefer, and the civil liberties scores published annually by Freedom House.

The latter two metrics share a practical, rather than for-mal, 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 purport to guarantee such rights.

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, while others honor rights that enjoy no formal constitutional status at all.

This Article's underlying concern with the impact of globalization on the actual protection of civil liberties and property rights demands a measure-ment 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, ranging from measurements of trade as a proportion of gross domestic product and foreign investment as a share of total investment[98] 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.

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 politi-cal—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 espe-cially useful for present purposes because it is supposed to capture the "dif-fusion of government policies."

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 embas-sies in a country, the number of international organizations to which a coun-try belongs, and the number of U.N. Security Council missions in which a country participates.

There is no guarantee that these figures correlate closely with the extent to which a jurisdiction imports and exports policy.

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.