
CONTENTS

Acknowledgments and Permissions xiii

A Note to Readers on Citations and Abbreviations xvii

INTRODUCTION: CONSTITUTIONAL COSMOLOGY—CONVERGENCE, RESISTANCE, AND ENGAGEMENT 1

Transnationalism and Constitutional Review 1

The Distinctiveness of Constitutions as Law 3

The Functions of Judicial Review 3

An Expanding Universe of Law 5

Historic Relationships of Constitutions to a Global Audience 6

Three Postures toward the Transnational 8

Transnational Sources, Foreign and International 10

Engagement and Constitutional Law in the United States 11

Engagement in a Pluralist Global Context: Transnational
Constitutionalism? 14

CHAPTER 1: RESISTING THE TRANSNATIONAL 17

A. Sources of Resistance 18

Constitutions as Self-Constituting and Self-Expressive 18

Interpretive Theory: Originalism, Contractarianism, and Popular
Sovereignty 20

Interpretive Theory: Representation-Reinforcement and
“Majoritarianism” 22

Law as Autochthonous Identity 24

Judging under Constraints: Sources and Discretion, Expertise, Opportunity
Costs, and Comparison 26

Political Resistance: Nation-Building, Western Dominance, and Cultural
Exceptionalism 27

Political Resistance and Principled Substantive Disagreement 28

The Political Economy of Transnationalism and Constitutional
Interpretation 29

Cultural Elites, Self-Interested Judges, and the Politics of Citation 30

- B. Jurisprudential Assumptions 30
 - Positivism 30
 - Organic Conceptions of Law 31
 - Will, Organicity, and Exceptionalism 32
- C. Manifestations of Resistance: Silence, Indifference, and Active Resistance 32
 - Articulated Resistance Inside the United States 33
 - Silent Resistance or Indifference 34
 - Articulated Resistance Outside the United States 34
 - Ambivalent Resistance 35
 - Resistance in Specific Settings—Foreign Investment, Control of Natural Resources, and Supranational Regimes 35
- D. Resistance, Differentiation, and the Expressive Function of Constitutions 38

CHAPTER 2: CONVERGENCE WITH THE TRANSNATIONAL 39

- A. Influences toward Postures of Convergence 40
 - Of Archetypes, Incentives, and Supranational Courts and Organizations 40
 - Convergence or Fragmentation? 41
 - Convergence in Law or As Interpretive Posture 42
- B. Convergence Postures and Their Normative or Jurisprudential Foundations 43
 - Universal Moral Rights 45
 - Epistemic Arguments 47
 - Interpretive Discretion and Legitimacy 48
 - Arguments from Judges' Roles 49
 - Support for the International Legal System 49
 - Checks against Horrific Conduct or Backsliding from Democracy 51
 - Positive Textualist Arguments 52
- C. Doctrinal Implications and Manifestations 54
 - Different Presumptions? 54
 - Extraterritorial Effects 55
 - Margins of Appreciation 57
 - Proportionality, Balancing, and Means-End Analysis 60
 - Scope of Its Use 60
 - Proportionality Inherent in Constitutional Review? 61

Divergent Predictions 63
 Dualism/Monism and Convergence 64

D. Interpretive Approaches and Convergence Postures 65

Multiple Interpretive Roots 65
 The Necessary Incompleteness of Convergence as Interpretive
 Approach 66

CHAPTER 3: ENGAGEMENT WITH THE TRANSNATIONAL 71

A. Engagement: Deliberative and Relational Modes 73

Deliberative Engagement: Australia, the United States, Canada,
 and Japan 73

Expressive and Affiliative Functions of Engagement 77

Relational Engagement: South Africa and Elsewhere 78

B. Normative or Jurisprudential Foundations 81

Positive law 81

Pragmatism or Consequentialism 81

Law as Inquiry 82

Autopoiesis 84

Process and Justification 84

Constitutional Law as Mediating the Domestic and the Global 85

C. Doctrinal or Interpretive Manifestations 86

Texts That Call For or Invite Comparison—Limitations Clauses and
 Other Examples 86

Multi-Valenced Interpretation 88

The Judicial Role, Constitutionalism, and Interpretive Approaches 90

Legal Hierarchies and Multi-Vocal Constitutionalism in Europe 91

D. Positive Influences 95

Globalization, Transnational Disputes, and Plural Legal Orders 95

Past Colonialism and the Commonwealth Nations 96

Increases in Comparative Legal Knowledge 97

Institutional and Strategic Concerns, Mandatory Consideration
 as Soft Monitoring 97

Independent Judging Gone Global: Judicial Networks and the
 Ideology of Judging 98

The Idea of Independent Judging in International and
 Constitutional Law 98

Judging as an Activity with Supranational Elements 99
 Autonomy and judicial control of interpretive sources 99
 Human rights law's protection of judicial independence 100
 Independence of judges from each other 100
Judicial Networks 100
Courts Constructing Influence? 101

**CHAPTER 4: CONSTITUTIONAL ADJUDICATION IN THE
U.S. SUPREME COURT: WHY ENGAGE THE TRANSNATIONAL? 103**

A. Deliberative Engagement: An Internal Perspective 103

Reflective Comparisons and Expressive Aspects of Interpretation
in U.S. Constitutional History 104

Freedom and Equality 105

Due Process and Criminal Procedure 106

Executive Power 106

Citizenship and Immigration 107

Cruel and Unusual Punishment 108

Overlapping Normative Commitments and Constitutional Justice Seen
from Outside 108

Implementing the Constitution: Functionality and Doctrine 110

Change, New Problems, Health and Safety Regulation 111

Criminal Procedure 111

Separation of Powers 112

Federalism 112

The Law of Nations in the Constitution 113

Inevitability of Comparison, Multiple Perspectives, and Ethical Judging:
Reflective Comparison and Impartiality 114

**B. Relational Engagement: Constitutional Symbiosis in a Globalizing
Legal World 117**

Strategic or Institutional Goals, Weak State–Strong State Differences? 118

Moral Obligations and Claims of Outsiders 119

A Transnational Court? 119

An Influential Court? 120

Relational Constitutionalism and Minimal Cosmopolitanism? 121

Judges and National Legitimacy in a Transnational Environment 122

Judges as Diplomats? 123

Diffuse Instrumentalism, Diffuse Legitimacy 124

Jurisprudential Change and Constitutional Interdependence 124

Permeable Boundaries 124

Pluralism, Courts, and Constitutional Self-Defense	125
Constitutional Coexistence and Interdependence	128

CHAPTER 5: ENGAGEMENT, U.S. INTERPRETIVE THEORY, AND MULTIFUNCTIONAL CONSTITUTIONS 133

A. Engagement and Leading Interpretive Approaches	133
Text- or “Moment”-Focused Positivism, Originalism, and Intentionalism	134
Purposivism	135
Multi-Valenced (“Common Law”) Practice-Based Approaches	136
B. Rejecting Resistance: Legitimate Interpretation in the United States	139
Fear of Being Bound	140
Originalism and Formalism	140
Democracy, Self-Rule, and Sovereignty	142
Interpretive License	145
Separation of Powers, Federalism, and the Treaty Power	145
National Ethos and the Perils of Pragmatic Comparative Inquiry	147
Rule of Law, “Persuasive Authority,” and Judicial Discretion	147
Expertise and Bounded Rationality	150
Comparability Challenges	151
Constitutional Situation Sense, Contextualized Judgment, and Socialization	151
C. Questioning Convergence: Constitutions as Embodiments of National Distinctiveness and Plural Functions	154
Compromise and Constraint in Constitutional Design	155
Local Authorship and Universal Reason	155
Textual, Institutional, and Practice-Based Distinctions	156
Treaties, Presumptions, and Sub-Constitutional Implementation	157
International Law and Interpretive Space	158
Elusiveness of Goal	158

CHAPTER 6: ENGAGING THE TRANSNATIONAL: A CONTEXTUAL FRAMEWORK 161

A. Three Contextual Considerations	162
The Nature of the Issue and of Domestic Sources of Interpretation	162
Fifth Amendment Grand Jury Clause	162
Establishment Clause	163
Eighth Amendment	163

X CONTENTS

- Security and Liberty 164
 - International Law as Embedded Element in Constitutional Terms 165
 - Transnational Sources and “Open” Questions 165
 - The Nature of the Transnational Source and its Proposed Use 166
 - Authority and Institutional Setting: Courts and Legislatures 167
 - Authority and Source of Law: International and Foreign Law 168
 - International law as binding or potentially binding 169
 - International law and questions of comparison 170
 - International law as “part of our law” 171
 - The limited scope of international law 171
 - General, aspirational, or conflicted norms; clarity and enforceability 172
 - Gravitational pull and seriousness among rule of law constitutional democracies 173
 - Seriousness and cosmoskepticism: *Breard*, *Sanchez-Llamas*, and *Medellín* 175
 - Comparability: Normative and Functional Concerns 178
 - B. Fair Usage, Fair Process, and Recent Controversies 183
 - Fair and Accurate Usage: Death Penalty and Gay Rights Cases 184
 - Hate Speech and the Importance of National Context 186
 - Fair-Mindedness and the Multi-Directionality of Transnational Law: The Exclusionary Rule 187
 - Procedures for Gathering and Considering Transnational Legal Sources 189
 - C. Institutional Constraints and Prudential Silences: Limits on Engagement? 192
 - Lower Courts as well as Supreme Court? 192
 - Prudential Noncitation, “Silent Dialogues,” and Internal and External Legitimacy 193
- CHAPTER 7: ENGAGEMENT, EQUALITY, AND OLDER CONSTITUTIONS 197**
- A. Equality and Interpretation over Time: Federal Power to Redress Gender Inequality 199
 - Reading the U.S. Constitution Holistically 199
 - The *Morrison* Case: Federal Power and Gender Equality 201
 - The Commerce Clause of the Original Constitution 202
 - The Fourteenth Amendment 205
 - Doctrinal Specificities and the *Hibbs* Case 206
 - B. Citizenship and Gender: *Nguyen* 206

- C. Abortion, Reproductive Freedom, and Equality 210
- The Absence of Worldwide Consensus 212
 - Health, Autonomy, Multiple Perspectives and *Gonzales v. Carhart* 215
 - Social Rights, Social Reasons, Equality, and Abortion 217
 - Liberty and Equality at Stake 220
 - The Absence of a “Positive” State and the “Optionality” of Government Interests 220
- D. Optional But “Compelling” State Interests in U.S. Constitutional Law: Affirmative Action in the United States and India 222
- Constitutional Solidarity, Societal Discrimination, and Individualized Consideration 223
 - Temporary Measures? 224
 - Super-Classifications and Specially Subordinated Groups 225
- CHAPTER 8: CONSTITUTIONAL PARTICULARITIES, FEDERALISM, AND THE TRANSNATIONAL 227**
- A. Federalism and the Limits of Interpretive Engagement 227
- Historically Contingent Compromises 228
 - Interdependent Federal Balances 229
 - No Transnational Archetype 230
- B. Federal Systems’ Varying Postures toward the Transnational 232
- Theoretical Tendencies? 232
 - Federalism Tropes and the Transnational in the United States and Canada 234
 - Constitutional Commonalities 235
 - Distinctive Constitutional Histories and Federal Bargains 237
 - Founding Divisions and Historic Momentum 238
 - Age of Rights-Incorporating Texts 239
 - Geopolitics 240
 - Legal Culture: Rights and Negotiation, Written and Unwritten Constitutional Constraints 240
 - Legal Culture and Legal Education 242
- C. Federal Systems, Constitutional Adjudication, and Transnational Sources of Law 243
- Secession 244
 - Commerce, Criminal Law, and National Power 245

Rights and Federalism 248

Death Penalty and the Allocation of Criminal Jurisdiction 248

Group Rights, Group Remedies, and Federal Compromises 250

D. Toward Moderating Certainties about Federalism 252

**CHAPTER 9: CONSTITUTIONS AS MEDIATING INSTITUTIONS, TRANSNATIONAL
CONSTITUTIONAL VALUES, AND ENGAGEMENT IN TWENTY-FIRST CENTURY
CONSTITUTIONAL INTERPRETATION 255**

A. The Interdependence of Constitutional and International Law 257

Recognition of States 258

International Law and Domestic Constitutional Compliance 259

Overlapping Subjects 261

International Incentives for Domestic Constitutional Change 261

Interlock and Overlap 262

B. Boundaries and Transitions at the Intersection of International and
Constitutional Law: Transnational Constitutional Values? 262

Boundaries, Membership, and Secession 263

Transitional and Transnational Constitutional Processes 265

Federalism and the National/International Border 267

Risks of Transnational Constitutionalism: Law or Values? 270

C. The Future: The Gravitational Force of the Transnational and the
Range of Constitutional Responses 273

Interdependence and Interpretation: Mediating the National and
the Global 273

Constitutional Interdependence, Transnational Legal Process,
Acculturation, and Changing Threats 275

Constitutional Diversity and the Mediating Role 277

Increased Interactions, Litigation, and Technology 278

Future Choices and the Enduring Significance of National
Constitutions 279

NOTES 287

Table of Cases 477

Index 495