

INTRODUCTION

Constitutional Cosmology—Convergence, Resistance, and Engagement

A committee of the House of Representatives of the U.S. Congress holds hearings on a bill providing that U.S. courts “may not rely upon” laws, rules, or judicial decisions of foreign countries or international organizations in deciding constitutional cases.¹ The Lord Chief Justice of England and Wales issues a “practice direction” regulating the citation to foreign law in briefs before the courts.² The Constitution of South Africa requires judges to consider international law in interpreting that constitution’s Bill of Rights, and specifically authorizes the consideration of foreign law.³ Argentina’s constitution incorporates several named human rights instruments as of constitutional stature.⁴ Colombia’s Constitutional Court interprets its constitution to preclude certain bilateral investment treaties; in partial response, the constitution is amended.⁵ France amends its constitution to permit judicial review of laws after they are enacted, moving away from its longstanding constitutional opposition to judges having such power.⁶

These and other events are manifestations of the new universe in which domestic constitutions operate—an increasingly transnational legal environment of international treaties, customary international law, multilateral and bilateral agreements, and supranational infrastructures of trade law and human rights law. This new universe also includes pressures and influences from transnational business firms, human rights groups, and social movements (in the global North and South) that seek to reconstruct and use law at local, national, and global levels. It includes, as well, increased comparative judicial awareness reflected in cross-national references in constitutional court decisions around the world, and some degree of transnational convergence towards judicial enforcement of constitutions. How do these multiple transnational phenomena affect our understanding of the role of constitutions and of courts in deciding constitutional cases? How do constitutions and constitutional courts affect these transnational legal phenomena? Is there an emerging phenomenon of “transnational constitutionalism” and, if so, how should it be conceptualized? How should the U.S. Supreme Court respond? This book will explore these questions.

Transnationalism and Constitutional Review Recent U.S. debate over the role of transnational law (that is, both foreign and international law) in constitutional interpretation reflects both the gravitational pull of transnational legal sources and resistance to their influence.⁷ It has been clear since the early 1990s that something transnational is reflected in the spread of constitutional review and in the discourse of constitutional courts around the world. Transnational regional