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ABSTRACT

For many decades, Supreme Court justices and legal scholars have argued over the validity of different tools in constitutional interpretation, including social science data, public opinion and, most recently, laws and standards of decency from abroad. Although several of those currently on the bench maintain that foreign laws have no place in American constitutional adjudication, the larger universe in which their institution operates has become increasingly transnational since the end of the Cold War. The term judicial transnationalism has been coined to describe this phenomenon, characterized by unprecedented levels of interaction and exchange between foreign courts and legal activists. This project examines these changes, evaluating the extent to which they have resulted in higher levels or new forms of foreign and transnational participation and interest in Supreme Court cases. In doing so, it tests three observations made about the effect of judicial globalization on the Court. First, it has been suggested that because of the increasingly complex and global nature of legal structures, the Court is more likely to hear cases that involve some form of foreign or international law. Second, scholars have noted that the Court is increasingly subject to foreign and international legal arguments put forth by a range of participants in and observers of its judicial process. Third, contemporary justices appear to be increasingly engaged in an ongoing conversation about judicial globalization, having become more vocal in discussing its implications in Court opinions as well as public forums. Although these observations have been widely made by scholars of the Court, they lack empirical support. By analyzing the litigant and amicus briefs filed in all cases from the 1989-1990, 1999-2000, and 2009-2010 dockets, this project attempts to provide this support and determine if there been an increase in the

presence of foreign law arguments made in briefs filed to the Supreme Court, what kinds of actors are introducing transnational arguments to the Court, and if contemporary justices are devoting more attention to transnationalism in their opinions, public statements, and professional activities.

A MORE GLOBAL COURT?

JUDICIAL TRANSNATIONALISM AND THE U.S. SUPREME COURT

By

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DISSERTATION

Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Political Science in the Graduate School of Syracuse University

August 2011

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ACKNOWLEDGEMENTS

The story of how this dissertation began as a project on the constitutional courts of Eastern Europe and ended up as a study of judicial transnationalism and the U.S. Supreme Court is a long one that I will not tell here. However, it is important that I identify the numerous individuals that helped that story unfold, providing me with the skills and knowledge necessary to develop and complete this dissertation. Although any mistakes or deficiencies are entirely my own, I want to recognize and thank those responsible for its strengths.

My advisor, Dr. Keith J. Bybee, has my deepest gratitude for his unwavering patience, encouragement, and guidance throughout this process. He was not only instrumental in the evolution of my dissertation from its earliest stages through its completion, but has been a mentor in the true sense of the word, playing the perfectly balanced role of cheerleader, therapist, role model, and academic mastermind. I will continue to look up to him and be thankful for his mentorship throughout my academic career.

Second, I owe my interest in American politics and the U.S. Supreme Court to Dr. Thomas M. Keck. His incredibly well-taught and engaging courses on the subjects were the single most important influence on my early academic development, and the continuous encouragement and positive feedback that he gave me from my very first attempts at academic research gave me the confidence to keep at it. Many thanks as well to the other members of my committee who, in addition to serving in that capacity, have been influential in other ways. Dr. Grant Reeher not only provided helpful comments on my proposal, but was a reliable source of professional advice and guidance during his

time as graduate director. I would not have been able to pursue such an ambitious empirical project were it not for Dr. Sarah Pralle, who gave me the opportunity to learn valuable skills as her research assistant. In addition to instilling a love for American political thought and early constitutional development that continues to inform my work, Dr. Ralph Ketcham was extremely supportive of this project in its earliest stages and has offered sincere encouragement since. And finally, I thank Professor Lisa Dolak for agreeing to serve as the oral examination chair of the committee and provide her expertise as a distinguished member of the faculty of Syracuse University College of Law.

I am indebted to the Department of Political Science of Syracuse University for the extensive research support it provided over the past seven years, including summer research fellowships in 2005, 2006, and 2009 and a dissertation completion assistantship in the fall of 2010. I also received grants from the Institute for the Study of the Judiciary, Politics, and the Media (IJPM) and the Maxwell School's Roscoe-Martin Fund for Research, while the Maxwell Dean's office provided me with summer research fellowships in 2007 and 2008. My time at Syracuse afforded me with numerous opportunities to present my research and receive feedback from my professors and colleagues. Presentations at research workshops organized by IJPM and the Sawyer Law and Politics Program (SLAPP) were of particular importance in the development of my project. Furthermore, I owe the successful completion of this project to numerous other colleagues and mentors at Syracuse University. Candy Brooks has provided invaluable support over the years, and I join everyone else that I know who has been able to accomplish a task with her cheerful and expert help in thanking her. Although I am sure

that there are others that deserve my thanks, I want to mention Anirban Acharya, Dr. Kristi Andersen, Dr. Jim Bennett, Dr. Matt Guardino, Dr. Glyn Morgan, Richard Price, Dr. Mark Rupert, and Dr. Brian Taylor for their comments and encouragement along the way.

I am also grateful to Dr. Austin Sarat, William Nelson Cromwell Professor of Jurisprudence and Political Science at Amherst College and editor of *Law, Politics, and Society*, for providing me with the opportunity to have an earlier version of the first chapter of this dissertation peer reviewed and published in that journal. In addition to receiving helpful comments from my fellow panelists at several conferences, including the Law and Society Association 2009 Graduate Student Workshop and the Northeastern Political Science Association 2009 annual meeting, Dr. Lawrence Baum of Ohio State University, Dr. Paul M. Collins, Jr. of the University of North Texas, Dr. Lee Epstein of Northwestern University, Dr. Ken I. Kersch, and Dr. Kim Lane Scheppele were kind enough to correspond with me directly about the project and all offered extremely helpful feedback, advice, and resources.

I would also like to acknowledge my colleagues in the Department of Political Science and Public Administration at the University of North Dakota, particularly Carissa Green, Dr. Dana Harsell, Dr. Mark Jendrysik, and Dr. Paul Sum. Although I was only with them for a few months, their professional support and friendship were crucial as I attempted to finish the dissertation while balancing teaching and the 300 mile separation from my family. I am also grateful for on-site resources and access provided to me by the law libraries of the University of North Dakota, the University of Minnesota, and Syracuse University.

Several people deserve special recognition for their constant friendship and companionship throughout the long life of this dissertation. If one can be measured by the company that they keep, it should be no surprise that I was able to complete such a task considering the remarkable set of women that I am lucky enough to call my best friends: Dr. Hannah Allerdice, Dr. Jessica Boscarino, Dr. Heather Pincock, (future) Dr. Deepa Prakash, and Dr. Haley Swedlund. Not only does each have her own set of incredible strengths and accomplishments that have inspired and motivated me along the way, but together they have provided me with the best possible support network imaginable. I want to give individual thanks to Hannah for her role as kindred spirit, to Jessica for exemplifying the dual role of mother/academic, to Heather for being a constant sounding board and source of comfort, and to Haley for her optimism and admirable perseverance. And thank you to Deepa, a friend who has helped me, since that very first day of orientation back in 2004 when we met, weather the various challenges, insecurities, milestones, and absurdities of life as a graduate student, wife, and mother. She has, and will continue to be, one of the most important people in my life.

In addition, my extended family, in both New York and India, were a wonderful source of moral support throughout my graduate career: my parents-in-law, Ganapathy and Sushila Narasimhan, sister-in-law, Radhika Narasimhan, aunt, Beth Frind, and cousins, Jenny Tyburksi and Tina Center (and the Tyburksi and Center families), merit special thanks.

As for my immediate family, the completion of this dissertation is as much their accomplishment as it is mine. My husband, Kamesh, gave me the love, acceptance, and patience that I required along the way, while our daughter, Mina, has been the single best

reason to work hard, meet my goals, and bring them to fruition since her birth in 2008. My mother, Janice Fitzpatrick, not only helped me finish by moving halfway across the country to serve full-time as grandmother, mother-in-law, and surrogate household manager, but she also helped me begin this task, like all others I have accomplished, by being a constant source of unconditional support. Her sacrifices allowed me to finish this dissertation without making too many of my own.

And finally, I want to recognize my father, Gary Fitzpatrick, and extend my deepest gratitude for his guidance in this project, and all others I have undertaken since I first followed in his footsteps as a writer in the sixth grade. He has supplied critical support every step of the way, providing much-needed help with big tasks, as well as small – from reading my work, inspiring new ideas, and helping me articulate my contributions, to working with me to tackle those time-consuming details that most people have to sort through on their own. Through this process, I have been inspired by his intellect, work ethic, and the fact that his numerous talents and accomplishments span so many disciplines and mediums. The greatest ambition of this dissertation is that it is one he is proud of, and I therefore dedicate it to him.

INTRODUCTION

"Transnationalism is clearly in the air… a core theme [of which] is the penetration of national cultures and political systems by global and local driving forces" (Guarnizo and Smith 1998).

In 2010, the Arizona legislature passed SB 1070, the Support Our Law Enforcement and Safe Neighborhoods Act, granting local and state agencies unprecedented authority to combat illegal immigration in their jurisdictions. For police, this authority included the right to require proof of legal residence from individuals based on a reasonable suspicion of their immigration status, and detain those without documentation until their status was either verified or deportation proceedings were initiated. This provision and the law more generally, garnered immediate and intense national scrutiny. While many supported Arizona's right to address the problem of illegal immigration in the absence of an effective federal policy, critics argued that it encouraged racial profiling and subverted the national government's constitutional authority over the issue. Taking the latter position, the U.S. government filed suit against the state of Arizona in July 2010, asking the federal judiciary to invalidate the law as a violation of the Supremacy Clause.

On the surface, the lawsuit represents a classic domestic conflict: it involves the issue of federalism and competing claims of constitutional authority by different levels of the United States government. However, a closer examination of the lawsuit and the controversy surrounding it also reveals an element of transnationalism, highlighting the increasingly global nature of traditionally home-grown political and social issues. This stems from the fact that when *U.S. v. Arizona* was filed in the U.S. District Court for the District of Arizona by the Justice Department, amicus curiae briefs were filed in support of its position by Mexico and 10 other Latin American countries, each voicing opposition

to SB 1070 on the grounds that it discriminated against their citizens and created conflicting immigration requirements that would burden their own authorities. These two arguments are evident in Mexico's brief (available at http://media.phoenixnewtimes.com/4967906.0.pdf):

> Mexico seeks to ensure that its bilateral diplomatic relations with the United States of America are transparent, consistent and reliable… SB 1070 substantially impacts Mexico, its officials and citizens, by inappropriately burdening the uniform and predictable sovereign-to-sovereign relations, opening the door to divergent requirements among the different states, and with respect to the national government. Mexico seeks to assure that its citizens, present in the United States, are accorded the human and civil rights granted under the U.S. Constitution; having therefore a substantial and compelling interest in protecting its citizens and ensuring that their ethnicity is not used as basis for state-sanctioned acts of discrimination….

Although these countries' briefs represented only a minor part of the case, attempting to introduce the international implications of the law to the court, their participation attracted a fair amount of controversy in its own right. Soon after the case was filed, Governor Brewer of Arizona attempted to block participation by these foreign governments, arguing against their involvement in the case in an October 14, 2010 statement (available at http://www.janbrewer.com/article/response-to-mexico-amicus-brief):

> Today I filed my response to the amicus brief that Mexico, with ten other foreign countries, filed in support of the U.S. Justice Department's lawsuit challenging S.B. 1070. Mexico's brief is nothing more than a political statement expressing its desire for lax enforcement of U.S. immigration laws. Arizonans, in a bipartisan fashion, have agreed with me that Mexico should not be meddling in an internal legal dispute between the United States and one of its states.

Although Governor Brewer was not able to persuade the U.S. District Court to exclude these briefs from the case, members of the state legislature showed support for her

position on foreign interference in the state's affairs by introducing a resolution banning the consideration of foreign and international legal sources by Arizona courts. In doing so, Arizona became one of six states currently considering such a resolution: it joined Oklahoma, who had passed a similar bill earlier in 2010, and was quickly followed by Texas, Kansas, Iowa, and Missouri (Gavel to Gavel).

These efforts were lauded by national Republican leaders, including 2012 presidential hopeful Newt Gingrich, who announced that he would like to see a similar resolution introduced in Congress that would extend to the federal judiciary and the Supreme Court. However, concern over transnational involvement in domestic issues had already been present at the national level for several years before state politicians mobilized on the issue. Following the citation of foreign and international law in two controversial Supreme Court cases of the early 2000s, *Lawrence v. Texas* (2003) and *Roper v. Simmons* (2005), members of Congress attempted to pass resolutions prohibiting the consideration of foreign or international law by the Supreme Court. In both cases, a narrow majority invoked non-domestic sources in the opinion of the Court to strike down practices that has significant conservative support: in *Lawrence*, Texas' anti-sodomy law was invalidated, while the execution of minors was declared unconstitutional in *Roper*. Perceived as a violation of national sovereignty by opponents to these decisions, both on the bench and among its observers, the presence of transnationalism in these Supreme Court cases was quickly condemned and, as in the Arizona case, would result in political backlash. The U.S. House of Representatives passed a Reaffirmation of American Independence Resolution in both 2004 (H.R. 568) and 2007 (H.R. 372), which reminded Supreme Court justices that "their role is interpreting U.S. law, not importing foreign

law," while the unsuccessful Constitutional Restoration Act of 2005 (H.R. 1070) threatened to impeach any who did so.

These measures highlight increasing pressure on American courts at every level to address the increasingly transnational nature of law and determine its appropriate place in the national legal system. As noted in the opening quote, "transnationalism is clearly in the air," as economic, social, and political transactions have become more likely to unfold across, rather than within, national borders (Guarnizo and Smith 1998: 1). This dissertation attempts to explore the effects of such changes on the U.S. Supreme Court, examining the concept of transnationalism in this particular judicial context. While judicial transnationalism has been discussed in the international and comparative context primarily as an empirical concept, characterized by the global interconnectedness of law, its consideration in the U.S. context has been largely normative. As the controversies just described demonstrate, the influence of judicial transnationalism on the Supreme Court has become a contentious issue, reflecting a larger ideological division over the appropriate sources of political and constitutional change. Existing literature on the Court largely mirrors this emphasis, focused primarily on debating whether or not foreign and international law should be referred to in its decisions, a practice called constitutional comparativism.

In chapter one, I review the debate on comparativism and suggest that by focusing on responsiveness to foreign law at the level of individual decision making, Supreme Court scholars have failed to capture the potential influence of transnational law, norms, and actors on the judicial process and its institutional identity. The goal of my work is to redirect attention to the Court's response to transnationalism through structural and

institutional level analysis. This approach builds on numerous scholarly contributions, explored in the remaining sections of this chapter, which suggest that judicial decision making is not driven merely by ideology, but also shaped by the legal and institutional context in which the Supreme Court operates.

By analyzing the litigant and amicus curiae briefs filed in each case before the Supreme Court in three terms, 1989-1990, 1999-2000, and 2009-2010, I hope to determine the extent to which transnationalism has become a common feature of its jurisprudential responsibilities. In chapter two, I look at the transnational legal sources included in these briefs to identify changes in the substance of the legal arguments being introduced to the Court, and measure the appearance of these sources in each term to determine whether there has been an increase in the presence of transnational legal arguments in Supreme Court litigation over the past two decades.

In chapter three, I identify the sources of those transnational arguments to determine what parties are most likely to use them to make their case. While it is possible that the Court is being lobbied by an increasingly international range of actors and institutions, it might also be the case that domestic actors are more likely to introduce transnational legal arguments. This chapter examines an issue rarely, if ever, addressed by scholars: in addition to the Court being lobbied by an increasingly international range of actors and institutions, it might also be the case that domestic actors are also more likely to introduce transnational legal arguments.

In chapter four, I consider the meaning of the findings in these two chapters for the job of the Supreme Court and its members, identifying several other potential indicators of responsiveness to transnationalism that merit consideration. First, I look at

the opinions of the Supreme Court cases analyzed in the other chapters first, identifying not only foreign citations but any formal discussion of judicial transnationalism. Second, I examine Court records and coverage of the contemporary justices' professional activities for indicators of their level of attention to and engagement with transnational legal sources and actors, including international travel, commitments and other opportunities for interaction with their foreign counterparts. An increase in judicial attention to transnationalism over the past two decades may prove that its effect on American constitutional law has not yet been fully explored. An approach that takes into account changes in the institutional identity and professional responsibilities of the Court, I argue, captures more than just the effect of external sources of pressure on the Court jurisprudence and behavior, but also has the ability to illustrate changes in the way that justices consider and approach their role within an increasingly transnational setting.

CHAPTER ONE

Structural and Institutional Perspectives on Judicial Transnationalism and The U.S. Supreme Court

1.1 Introduction

In the late 1980s, scholars began to use the term 'globalization' to describe the rapid integration of national economic systems at the global level. The term would also come to be applied to the increasingly international nature of numerous political and social transactions, which had previously been considered primarily within their domestic contexts. The idea of judicial globalization, introduced by Anne-Marie Slaughter in the late 1990s and more recently referred to as judicial transnationalism, recognized the effect of these changes on the world's courts and judges and suggested that countries' national legal systems were integrating globally in much the same way that their economies were. According to Slaughter and other scholars, judicial transnationalism has been characterized by new opportunities for both formal and informal cooperation among national legal actors (Ackerman 1997), increasing levels of cross-citation between national courts (Slaughter 2004), and the rise of transnational legal activism and international involvement in traditionally domestic legal issues (Keck and Sikkink 1998).

By the mid-1990s, the Supreme Court and its decisions had started to gain visibility abroad through the United States' active involvement in constitution drafting and judicial reform (Scheppele 2003). Although this involvement was originally a minor part of American foreign aid and concentrated primarily on the new democracies of Europe and the former Soviet Union, it became a major priority of U.S. democracy

assistance in the late 1990s as attention turned to the importance of securing the rule of law in other transitional countries (Carothers 2005). As a result, the prominence of the American judicial system grew and members of foreign and international courts became more familiar with and likely to consider its decisions (Slaughter 1998). Through these efforts, the U.S. system had a profound impact on the constitutional structure of emerging democracies and new legal networks as the active exportation and influence of the Bill of Rights abroad helped universalize human rights norms and led to international convergence on the importance of their protection (Kelemen and Sibbitt 2004).

Despite the active role of Supreme Court justices in transnational legal networks and the influence of its decisions abroad, however, the question of whether its foreign connections and new level of global prominence have had any demonstrable effects on the Court itself remains largely unanswered. That is because consideration of judicial transnationalism within the U.S. context has primarily focused on its normative implications, resulting in debate over the legitimacy and value of transnational law and norms within the American constitutional system. In this chapter, I will explore this normative discussion and describe how its emphasis on foreign law and individual-level decision making largely replicates broader debate on the appropriate sources of constitutional interpretation, overlooking additional sources of transnational influence as well as its potential effect on other stages of the judicial process.

1.2 Normative Perspectives on Judicial Transnationalism and the Supreme Court: To Cite or Not To Cite?

In a 2008 article in the *New York Times* on judicial transnationalism, Noah Feldman suggested that "the defining constitutional problem for the present generation will be the nature of the relationship of the United States to what is somewhat optimistically called the international order" (2008). Two contrasting visions of this relationship have been articulated in recent years, both of which propose dramatically different interpretations of the Supreme Court's responsibility and position vis-à-vis the world's courts. The first interpretation, often referred to as judicial exceptionalism, requires that American courts consult the decisions of their foreign counterparts only when they are legally binding, such as in the case of treaties that the U.S. government has signed. Although exceptionalists acknowledge that globalization has changed the nature of law, they view the importation of non-binding law as a threat to American sovereignty. On a 2007 visit to Syracuse University, Chief Justice John Roberts was asked for his opinion on judicial transnationalism by the author and argued that although the Court is indeed more active globally, its interaction with international actors only serves to accentuate, not accommodate, the differences between it and its counterparts.

By stressing the uniqueness of the American legal system and the need to preserve it in the face of globalization, judicial exceptionalism has appealed to and been adopted by American conservatives in recent years. However, critics of exceptionalism, who generally represent the opposite end of the ideological spectrum, equate it with isolationism. This perspective, often referred to as judicial cosmopolitanism, proposes a liberal vision of the judicial marketplace in which the U.S. is an enthusiastic participant

in the two-way exchange that characterizes transnationalism. For some cosmopolitans, transnationalism has expanded the meaning and consequences of law, rendering traditional structures of democratic accountability irrelevant (Slaughter 2004; Slaughter 2005). As a result, national courts – including the Supreme Court – can legitimately draw from transnational legal sources. Other proponents of cosmopolitanism, including many who focus on the U.S. legal system, agree that its courts should participate in global judicial exchange but acknowledge exceptionalist concerns by suggesting that it be limited to states with similar democratic traditions and structures (Posner and Sunstein 2006). More recently, judicial cosmopolitanism has been used to refer to "a constitutional obligation to protect the interests of noncitizens," which holds that the post-9/11 war on terror has forged new connections between international law and the U.S. Constitution such as those raised in recent enemy combatant cases like *Boumediene v. Bush* (2008) (Posner 2008: 2). Such cases signal that the justices must contend with new issues in the post-9/11 era and recognize that their decisions will have important consequences on the international legal order. The Supreme Court should therefore "play a key role in coordinating U.S. domestic constitutional values with rules of foreign and international law, not simply to promote American aims, but to advance the broader development of a well-functioning international judicial system" (Koh 2004: 53). For cosmopolitans, international events and politics can transform the demands placed on the Court and its agenda; judicial transnationalism should therefore be acknowledged and realistically considered as part of the universe of judicial decision-making.

In contrast to Justice Roberts and his fellow exceptionalists, the cosmopolitan view of the Supreme Court is that its consideration of transnational law will not only

serve to "accommodate differences, but acknowledge and reinforce common values (Slaughter 1998: 189). In other words, "we [can] not fully understand our own Constitution and its guarantees until we have thought about other ways of organizing similar material" (Nussbaum 2002: 430). This view is held by several members of the Court who are not only considered to be proponents of judicial cosmopolitanism, but have used it to change the direction of American constitutional law by citing foreign laws in their official opinions, a practice referred to as comparativism. Constitutional comparativism has come under scrutiny in recent years following its application in several high profile cases, particularly *Lawrence v. Texas* (2003), in which the Court invalidated a Texas statute criminalizing sodomy, and *Roper v. Simmons* (2005), striking down death penalty sentences for minors. The citation of foreign sources in these controversial and narrowly-decided cases helped expand the debate on evolving standards of decency to introduce the notion that the Court's decisions should not only be informed by the activities of state legislatures and national consensus, but by international norms and values as well.

In *Roper*, Justice Kennedy, who is considered to be one of the most fervent cosmopolitans on the Court, argued that comparativism "does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom" (2005). While several other contemporary justices have affirmed this view and cited foreign law in their opinions,

including Justice Breyer, Justice Ginsburg, and former Justice Stevens,[1] others have used Court opinions to directly denounce it. Justice Scalia's dissent in *Roper*, which was joined by former Chief Justice Rehnquist and Justice Thomas, contains a harsh critique of comparativism. In it, he argues that the "'acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*–which is surely what it parades as today" (emphasis in original, *Roper v. Simmons* 2005).

In addition to battling over comparativism in Court opinions, the justices have also taken the debate public. Notable examples include a discussion between Justice Scalia and Justice Breyer hosted by American University Washington College of Law in January 2005 on the relevance of foreign law for American constitutional adjudication (*Federal News Service* 2005a). Overall, a majority of the current justices have commented on the subject in interviews and talks.[2] As a result, the justices' opinions on foreign citations are well-known and have been fully documented. Scholars have also played an important role in this debate and an abundance of articles discussing comparativism have appeared in law journals in recent years, most of which focus on its compatibility with different legal theories and the question of its legitimacy as a judicial source. While many of its proponents have echoed Kennedy's suggestion in *Roper* (2005) that the Court can benefit from acknowledging the legal traditions of other nations, they have also been cautious and sought to carefully outline the terms under which foreign law should be allowed to influence American constitutional interpretation

[1] Examples of constitutional comparativism include Justice Stevens writing for the Court in *Atkins v. Virginia* (2002), Justice Ginsburg and Justice Breyer's concurring opinion in *Grutter v. Bollinger* (2003), and Justice Kennedy writing for the Court in *Lawrence v. Texas* (2003), *Roper v. Simmons* (2005), and *Graham v. Florida* (2010).

[2] Many of the current justices, along with former Chief Justice Rehnquist and former Associate Justice O'Connor, have mentioned comparativism in interviews with the media, keynote addresses at legal conferences, and other public venues. For a full list of these, see Parrish 2007.

(including Koh 2003, 2004; Tushnet 2003, 2004). Opponents, on the other hand, have argued that caution is not enough and that non-domestic sources of law should be refused any degree of authority in our constitutional system, echoing the exceptionalist objections raised by Justice Scalia in *Roper* (including Alford 2004, 2005; Anderson 2005; Posner 2005).

Like the justices, legal scholars have also taken the issue to public forums. For example, in 2004 Vicki Jackson, a professor of law at Georgetown University, debated fellow academic and judge Richard Posner on foreign citations in *Legal Affairs* (Jackson 2004; Posner 2004).[3] Media observers of the Court have joined the discussion, perhaps as a result of this coverage; articles on comparativism have been featured in prominent publications including *The Atlantic Monthly* (Bazelon 2005), *The New Yorker* (Toobin 2004), and more recently *The New York Times* (Liptak 2008; Feldman 2008). As reflected by the intense focus on and division over foreign citations, existing discussion of judicial transnationalism has usually been framed in the same terms as long-standing disputes on what should inform judicial decision making. Mark Tushnet finds that the debate over comparativism consists mostly of “re-plays of arguments about statutory and constitutional interpretation” (2003: 23), while Austen Parrish, who calls it a “storm in a teacup,” feels that exceptionalism unconvincingly rests on the tenets of “particular modes of constitutional interpretation – textualism and originalism – that, despite recent attempts to resuscitate, the legal mainstream long ago rejected, at least in their extreme forms” (2007: 641). Evidence of any external influences on the Court, international or other, is

[3] Another indication that comparativism has divided legal academia is the fact that the American Constitution Society and the Federalist Society, organizations that attract legal professionals from opposite ends of the ideological spectrum – the left and right, respectively – have actively defended the correlating positions on the influence of foreign law in American constitutional adjudication.

certainly a matter of great concern for those who believe that justices should refer solely to the plain-meaning of the Constitution. From this perspective, justices who advocate comparativism do so because they have a more liberal view of the law than those who oppose it or because they have the expectation that importing foreign law will help support their policy goals (Posner 2005).

Indeed, anecdotal evidence suggests that "on every subject for which the Court has so far cited foreign views, notably gay rights and the death penalty, the Justices in the majority have inclined in the liberal direction" and that "in looking at what other democracies are doing, it would mean looking to the left, not to the right" (Toobin 2004). As Justice Scalia contends in his dissent in *Roper v. Simmons* (2005), "to invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry." While many of its advocates are the more liberal members of the Court, however, prominent cosmopolitans also include more moderate ones like former Justice O'Connor and Justice Kennedy. This suggests that ideology may not be the only factor that determines a willingness to cite foreign legal sources. For example, those who have cited foreign law in their opinions have provided different explanations for it. Reflecting a functionalist approach to constitutional interpretation, Justice Breyer has stated that he refers to foreign law when, in Mark Tushnet's words, "it can inform the Court's assessment of the practical workings of alternative institutional arrangements" (2003: 3). And Justice Kennedy has often pushed his normative view on comparativism in interviews, stating simply that he and his colleagues "have to be aware of what's going on in the world" (Toobin 2004). Even upon considering these different explanations, however, the predominant scholarly focus is on the decision to cite foreign

law; the Court's degree of responsiveness to it is indicated by the range of personal preferences and legal principles among the justices on the bench at the time.

Whether or not foreign citations are truly just window dressing for those justices with goals that are compatible with precedents established abroad, they have become yet another source of alleged bias that constantly and inevitably surrounds judicial decision making. Although comparativism has been criticized as an ideological and illegitimate means of altering the outcome of constitutional interpretation, there is little empirical evidence to suggest that it has truly had a significant effect on Court jurisprudence. For all of the scholarly attention that foreign citations have received, there have been few studies that have actually involved empirical data and analysis. And those studies have failed to find any clear evidence that comparativism has either become more ubiquitous or succeeded in shifting the direction of American constitutional law in recent years. While many agree that comparativism is a historic practice that has always been a tool of Supreme Court decision making (including Kersch 2004, Morag-Levine 2006, and O'Brien 2010), some have noted an "escalation" in the rate of foreign citations in recent years (Calabresi and Zimdahl 2005). Others argue that while the frequency of foreign citations may not have changed, the type of sources being cited has – the contemporary Court has become more likely to reference non-binding law and legal norms and practices (Bork 2003; Kersch 2004). In one of the most recent empirical studies of foreign citations, an analysis of the rulings from the 2003-2004 term uncovers no evidence of pervasive transnational influences on judicial decision making, and concluding that "justices are quite selective in the actual deployment of foreign law in their opinions" (Banner, Miller, and Provine (2010: 39).

This study, however, like the others, only looks at a limited selection of cases to reach this conclusion, highlighting the need for a more ambitious research design that not only considers a larger sample of cases across time, but also addresses other potential sources and effects of transnationalism. This is supported by the fact that many scholars have anecdotally noted the relevance of these other transnational sources and their broader effects, including Banner, Miller, and Provine (2010), observing what can be summarized as three hypotheses about judicial transnationalism in the U.S. context. First, the Court is more likely to hear cases that involve some form of foreign or international law because of the increasingly complex and global nature of legal structures. Second, the Court is increasingly subject to foreign and international legal arguments put forth by a range of participants in and observers of its judicial process. Third, contemporary justices are to be increasingly engaged in an ongoing conversation about judicial transnationalism, having become more vocal in discussing its implications in Court opinions as well as public forums.

If true, these observations would offer evidence that a fundamental shift has occurred in the way that justices consider their role and approach constitutional interpretation. Although these hypotheses highlight the need for a meaningful study of judicial transnationalism that looks beyond foreign citations, none have been empirically tested. This dissertation attempts to do so by utilizing models of Supreme Court decision making that look beyond ideology and outcome. While some scholars maintain that justices are driven primarily by their values and personal views on matters before the Court in support of the attitudinal emphasis seen in the debate on comparativism (Segal and Spaeth 1993), many others have rejected this perspective as overly simplistic. These

attitudinal models of judicial decision making restrict discussion of foreign influences on the Supreme Court to a debate over what should inform its members' decision making rather than exploring the potential effects of transnationalism on a larger scale. Attention is therefore limited to the individual level and the outcome of the judicial process, replicating existing debate on what influences these factors. Foreign law, however, is not the only source of transnational influence, and a focus on individual level decision making and the decision to cite or not to cite ignores other channels of input through which those influences might reach the Court. Even if none of the justices choose to acknowledge them in future opinions, the presence of non-domestic actors and institutions among those who seek to lobby the Court merits attention as an important (and possibly new or different) characteristic of the American judicial process. For example, the rise of transnational legal activism has mobilized interest and involvement in American constitutional issues, particularly those related to such human rights issues as sexual privacy and the death penalty, as evidenced by amicus briefs filed by foreign governments, politicians, and transnational NGOs in recent cases like *Lawrence* (2003) and *Roper* (2005). It is unlikely that the decisions in those cases were determined by the presence of these briefs, but discussions of comparativism have focused too much on the appropriateness of references to foreign law, overlooking the significance of the presence of foreign actors in these cases.

If the level of foreign interest and involvement in Supreme Court decisions has indeed risen over the past two decades, it would suggest that the post-Cold War globalization has resulted in a new set of actors that, as with any who lobby the Court, justices now interact with and must ultimately choose to either respond to or ignore. The

potential relevance of such transnational participation itself, regardless of the outcome of litigation, is supported by models of judicial decision making that involve attention to the legal process. The predominant focus on foreign citations and the outcome of judicial decision making overlooks two important ways in which the Court may be subject to transnational influences through participation and input in the litigation stage. First, justices are not only influenced by the environment in which they operate, but they are also constrained by the law and the range of legitimate judicial outcomes available to them. Second, participants in Supreme Court litigation, including the petitioner and respondent, as well as amicus parties, serve an important role by framing the legal questions before the Court and introducing new arguments. In the next section, I explore scholarship on the Court that takes these facts into account and demonstrates the need to look for judicial transnationalism in both the substance of the legal arguments introduced in Supreme litigation, as well as the sources of those arguments in the form of litigants and amicus parties.

1.3 Process and Procedure: The Importance of Arguments and Actors in Supreme Court Litigation

The very nature of judicial transnationalism, which is characterized by higher levels of Court prominence abroad, transnational exchange and interaction, and involvement by foreign actors in domestic cases, underscores the importance of the judicial process and the procedural setting in which Supreme Court decision making occurs. One of the major deficiencies of purely attitudinal accounts of the Court is that they overlook the importance of law and the constraints that are placed on it as a legal institution. Even if it

is unrealistic to consider judges as purely legal actors, without political preferences and ambitions, it is important to recognize that they must frame their decision making in legal terms in order to preserve the legitimacy of judicial power. Otherwise, behavior that violates the expectation of neutrality as an element of the rule of law undermines our trust in the courts, which Alexander Hamilton promised in Federalist #78 would protect us as "bulwarks of a limited Constitution against legislative encroachments" (Hamilton 2002). Keith J. Bybee (2010) suggests that one of the Supreme Court's defining features also represents one of the most important checks on its power: because the legal process is expected to be fair, judicial decision making must also be fair, or at least appear to be, in order to maintain its prestige. In other words, "the avoidance of actual judicial improprieties is necessary to secure judicial legitimacy but it is not sufficient; judges must also visibly appear to play the role of neutral arbiter in order to reduce the probability of actual bias and to maintain popular support" (Bybee 2010: 23).

If judicial legitimacy rests on legal appearances, as Bybee argues, litigation provides its participants with an opportunity to present the Supreme Court with a range of new outfits to choose from. Actors involved in the judicial process play an essential role by signaling the range of acceptable jurisprudential sources and outcomes that are available to them: the way in which a legal question is framed when introduced in court limits judges to a particular set of options in deciding it. In his 1991 book, *Deciding to Decide*, H.W. Perry confirmed the importance of this role through an extended series of interviews with sitting justices and Supreme Court clerks, which revealed that participants in litigation are able to help set the Court's agenda through their presentation of the facts and legal arguments involved in a case. Although Perry focused specifically

on factors that influence a justice's decision to grant cert, his findings are relevant for other stages of the judicial process as well; not only do the briefs filed to the Court help inform its members of the range of possible legal outcomes, but those with repeat experience filing those briefs are more likely to be effective in crafting persuasive arguments. Because of the "the openness" of the U.S. legal system, this important form of participation is available, at least in theory, to all that "seek to establish their claims through litigation" (Tushnet 2003: 22). Scholars have long acknowledged the ability of domestic interest groups and social movements, dating back to the NAACP's involvement in 1940s and 1950s civil rights cases, to bring about meaningful political change through litigation.[4] However, only a few, including Mark Tushnet (2003), have acknowledged that transnational legal interest and involvement in American constitutional issues has been facilitated by the same opportunities for influence. Although exceptionalists do not include foreign sources in their conception of the rule of law in the United States, the possibility that the judicial process involves an increasing number of transnational legal issues and non-domestic participants highlights the potential transformation of the Court's sources of agenda setting and legitimacy.

A second important source of external pressure on the Supreme Court comes in the form of amicus curiae participation, which provides individuals and organized interests with an opportunity for formal involvement in the legal process by filing a brief in support of one of the parties to a case.[5] These briefs have been shown to play a significant role in judicial decision making because, like those filed by the litigants in a case, they often introduce new legal arguments to the Court that it would not have

[4] For studies on the efficacy of litigation and legal tactics in enacting social change, see Mark V. Tushnet (2005) and Michael McCann (1994).
[5] From here forward, I will refer to authors of amicus curiae briefs as "amicus filers" or "amici."

otherwise considered on its own. As Paul M. Collins points out, most justices are policy generalists and look to the material that is made available to them in order to identify the full range of options on any particular legal question (2008). The amicus briefs filed in a case, which often represent a diverse range of interests and expertise, offer the justices assistance in reaching "correct legal decision" and "exploring alternative legal perspectives" (Collins 2008: 90-91). Although Collins does not suggest that these briefs always play a definitive role or have a predictable effect, he finds evidence that they have the ability to "persuade the justices to endorse the conclusions advocated in the briefs" (2008: 114). Furthermore, amicus participation can undermine the effect of ideology and political preferences on judicial decision making by introducing additional legal considerations and ambiguity. "By raising new issues in the Court, and persuading the justices to adopt positions that are attitudinally incongruent," Collins argues, "amicus briefs confound the certainty surrounding the justices' perspectives as to the correct application of the law" (137). The more legal arguments that are introduced by amicus parties in a case, he finds, the more likely there is to be dissensus on the Court in the form of separate opinions (Collins 2008: 164). This is an interesting finding, in that it demonstrates the ability of a wide range of actors to participate in litigation – not only the parties in the case, but also the authors of amicus curiae briefs – and shape the legal constraints on the Court and introduce the justices to new ideas and arguments.

As mentioned earlier in this chapter, transnational amicus participation has been present in several of the notable cases that contained references to foreign law in the opinion of the Court. If the materials presented by litigants and amicus parties are indeed as significant as Collins' work suggests, then a meaningful increase in the inclusion of

transnational legal arguments in these materials could make them a more likely source of influence on the Court, at least in the long-run. According to scholarly accounts of judicial transnationalism that consider its effects from a more global perspective, however, it is not clear who we might expect these litigants and amici to be. One of the most obvious sources of transnational legal arguments is, not surprisingly, transnational advocacy networks, which is a concept coined by Margaret E. Keck and Kathryn Sikkink defined as "those relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services" (1998: 2). According to Hans Peter Schmitz (2010), transnational advocacy networks are comprised primarily of NGOs. However, their membership can include other actors. In 2003, Richard Price noted that "transnational civil society" had been instrumental in the globalization of law, defining that term as a group of actors engaged in "voluntary collective action across state borders in pursuit of what they deem the wider public interest" (2003: 580). Although these efforts involve cooperation among a diverse range of actors, including private organizations, corporations, and government entities in addition to NGOs, it is unclear if both the concepts of transnational legal networks and transnational civil society are transnational in the sense that their members are themselves defined by cross-national interests and constituencies, or if it is the cooperation between those members that is transnational, in the sense that those members represent a combination of different national and international interests.

While chapters two and three explore the extent to which the Supreme Court has been exposed to transnationalism, through the input of both legal arguments and participants in the legal process, it is still important to evaluate the effect of that input

beyond the decision of individual justices to cite foreign law or not. In the next and final section of this chapter, I identify several other potential indicators of responsiveness to transnationalism that merit consideration. An approach that takes into account changes in the institutional identity and professional responsibilities of the Court, I argue, captures more than just the effect of external sources of pressure on Court jurisprudence and behavior; it also has the ability to illustrate changes in the way that justices consider and approach their role within an increasingly transnational setting.

1.4 Institutional Identity and Judicial Legitimacy: The Globalization of Court Responsibilities and its Relevant Audiences

As this chapter has argued, the aggregate of individual justices' positions on constitutional comparativism is not the only potential indicator of the degree to which the Court might be impacted by global legal trends. The contributions reviewed above demonstrate why changes in the judicial process of the Supreme Court and its participants, which have the potential to shape its behavior and decisions, are also important. If further research was to find that judicial transnationalism has altered that process significantly, it would lend support to a relatively simple yet unexplored idea: Supreme Court justices serving today have a different job than they would have had in the past simply because of the new set of priorities and pressures present in the world and, perhaps, some might even make different decisions because of it. In addition to looking for evidence of external influences on the justices and their decisions, we should also consider their effect on the Supreme Court as an institution and how changes in its

operations and the demands placed on it, as well as its visibility and status, have the potential to alter the way that its members define and do their job.

As noted previously, one reason that Supreme Court justices might be responsive to participants in and observers of the judicial process is their desire to maintain the institution's legitimacy. This comes not only in the form of acceptance or approval of case outcomes, but also when the justices meet expectations held by other actors about how they should conduct themselves in office. These expectations can constrain judicial behavior and motivate justices to behave differently than they might have otherwise. Although the justices may not agree upon how they do their job or the decisions before them, they are all equally vested in the success of and esteem accorded to the institution and may be driven to consider that objective in their individual work. This underlines the importance of examining how justices perceive the role of the Court when looking at their decisions. Howard Gillman suggests that such constraints create "an identifiable purpose or a shared normative goal that, at a particular historical moment in a particular context, becomes routinized within an identifiable corporate form" (1999: 79). He refers to this as an institutional mission, in that it represents a set of objectives and ideas about the operations of a particular organization that are shared by its members. From another perspective, however, it is possible to argue that it is actually the law and the Supreme Court's status as a legal institution that places a unique set of constraints on its members, rather than a common set of duties that includes, among other things, legal responsibilities.

In 1960, Robert McCloskey observed that "though the judges do enter [the] realm of policy-making, they enter with their robes on, and they can never (or at any rate

seldom) take them off; they are both empowered and restricted by their 'courtly' attributes" (2004: 12). These courtly attributes are not just descriptive, but are determinant: the Supreme Court is not another political actor that happens to be influenced by its legal nature, but is a legal institution that must frame any political motivation, either real or suggested, within the framework of law. As noted, the importance of appearances in the judicial process places a unique constraint on judges that cannot be found in any other institutional setting. Regardless of what actually motivates a particular Supreme Court decision, whether it be ideology or a jurisprudential commitment, it is likely to be framed in legal terms because that is what is expected and required of it (Bybee 2010). And those terms are outlined, at least in part, by the parties that bring their conflict to the court. Changes in the identity of those parties, including an increase in the introduction of transnational legal arguments or higher levels of participation by transnational legal actors, therefore not only have the potential to affect the way that those serving on the Court perceive their job, but can create new constraints on its legitimacy as a neutral arbiter of law.

The notion that Supreme Court justices are likely to make their decisions based not only on personal preferences, but in order to maintain legitimacy as well is explored by Lawrence Baum (2006), who considers the influence of justices' salient audiences on their decision-making. He suggests that justices' memberships in personal and professional networks and their desire for acceptance or approval by them may influence their approach to constitutional adjudication, thus providing a psychological account of why legitimacy may be an important motivation for justices. His account also considers the impact of legitimacy at both the individual and institutional level; at any given time,

there is a particular set of audiences – including different segments of the legal profession, policy makers, the media, and the public – tuned in to the activities of the Court. The presence of new audiences in the greater environment in which the Court operates therefore has the potential to affect it because the justices' "interest in what their audiences think of them has fundamental effects on their behavior as decision makers." (Baum 2006: 4). On one level, Baum's argument reiterates the influence of ideology on the behavior of individual justices; clearly, conservative ones will be much more likely to respond to the Federalist Society as a relevant audience than liberal ones. However, Baum's contribution also implies that even though the members of the Court will not respond to or be influenced by the same audiences in the same ways, they must all contend with the available set of options. The idea that justices confront and selectively respond to different audiences provides an alternative way of approaching the question of international influence on the Court, including the decision to cite foreign law. Rather than a purely autonomous choice, that decision may be viewed as based on a justice's responsiveness to a particular audience with a stance on or stake in the issue. Furthermore, this responsiveness indicates that the Supreme Court is still influenced by law and its role as constitutional adjudicator, and is not purely a political animal.

Support for the idea that the Court may respond to new audiences in the era of judicial transnationalism can be found at the intersection of literature examining the influence of American law abroad through post-Cold War legal diplomacy (Carothers 2005) and the impact of global legal norms and networks on domestic law and institutions (Risse and Sikkink 1999; Slaughter 2004). While there is a considerable amount of literature that looks at the role of economic and political incentives in

promoting legal convergence on the American model (Kelemen and Sibbitt 2004), scholars have only recently begun to address the importance of legal professional networks in the convergence and globalization of law (Keck and Sikkink 1998; Slaughter 2004) and few have explored the potential impact of these networks on American national courts and judicial decision-making. If we accept that judicial systems and constitutions across the globe have been influenced by the exportation of American legal reform advice and the Bill of Rights (Kelemen and Sibbitt 2004), it seems logical to look for evidence of international and transnational influences on domestic law and judicial actors within the American system in the form of new relevant audiences for the justices. When considered together with the work examined in the previous section, these contributions suggest that members of the Court might be expected to take several factors into account when adjudicating: their understanding of the law, personal preferences, the policy priorities of the governing regime, their personal conception of the office, and their relevant audiences.

Jeffrey Toobin, a journalist and observer of the Court, has anecdotally noted the kind of link between contemporary globalization and judicial behavior that merits further scholarly attention. In his book *The Nine*, he suggests that the decision of particular justices to cite foreign law, such as Justice Kennedy, is directly connected to changes in their worldview resulting from travel abroad (Toobin 2007). He describes Kennedy's experience teaching law over the summers in Salzburg, Austria, through a program of McGeorge Law School, as resulting in "the connection that would transform his judicial career" (Toobin 2007: 183). Furthermore, he links this transformation to the fact that this connection was made after the end of the Cold War, during a period in which American

legal expertise was sought from and exported to emerging democracies around the world and programs like the Central European and Eurasian Law Initiative (CEELI) of the American Bar Association were involved in American democracy promotion efforts abroad. He observes that "most of the justices participated in some of these exchanges, but Kennedy and O'Connor were by far the most active" and notes O'Connor's role in having "helped create" CEELI (184). This is especially relevant because they are both considered moderate and have cast the deciding vote in numerous important cases; former Justice O'Connor did so during her time on the Rehnquist Court, and Justice Kennedy on both the Rehnquist and Roberts Court. Thomas M. Keck emphasizes the important role of both justices on the Rehnquist Court, arguing that "the limits of judicial activism – in both liberal and conservative directions – [have been] determined by O'Connor's and Kennedy's constitutional vision" (2004: 292). Lee Epstein and Tonja Jacobs also examine the impact of what they call "super medians," which they define as "justices so powerful that they are able to exercise significant control over the outcome and content of Court decisions," and identify Kennedy as a noteworthy example (2008: 41). Even if an analysis of judicial transnationalism does nothing but confirm a link between O'Connor and Kennedy's exposure to and participation in the globalized legal community and their jurisprudence, their noted ability to change the direction of American constitutional law in recent years renders that finding significant.

Toobin's suggestion that the justices' experience abroad during the 1990s shaped their judicial career merits further attention not only for this reason, but also because it is in line with Slaughter's (2005) account of the impact that increased global judicial dialogue has had on judges in other domestic contexts. Furthermore, there is ample

evidence that Washington was both a facilitator of, as well as active participant in, this dialogue. From 1995 to 1997, the Federal Judicial Center published a biannual newsletter entitled the *International Judicial Observer* that was included with issues of its *State-Federal Judicial Observer*. This newsletter provided a record of travel abroad by federal judges and the Supreme Court justices, visits by foreign judges, international legal conferences, and developments in American judicial reform efforts abroad. Such evidence supports the idea that interaction between American justices and their foreign counterparts may have dramatically increased from the 1990s on due, at least in part, to the more active role the U.S. has played in promoting democracy since the end of the Cold War, including its efforts to promote judicial reform abroad. Slaughter (1997) considers such efforts a crucial part of what she calls "judicial foreign policy," which emerged following the Cold War and has resulted in an increasingly transnational community of judges and legal professionals, of which the U.S. is a primary and active member (186). Carothers (2005) cites further evidence of U.S. membership in this globalized legal community: there has been unprecedented growth in the levels of exchange and communication between members of the legal profession here and abroad and in the world-wide availability of information about legal decisions and courts.[6]

As Chimene Keitner (2007) argues, the decision to cite foreign law "depends critically on one's view of what the relevant community is for determining the meaning of concepts such as decency, cruelty, and due process..." (4). A justice's values and preferred approach to constitutional adjudication is undeniably an important factor in determining what sources, domestic or international, are most likely to influence his or

[6] This has been facilitated by programs providing legal advice, institutional reform assistance, legal education and professional development such as those of the American Bar Association.

her decisions; an international community or audience may be relevant for Justice Kennedy and irrelevant for Justice Scalia. Slaughter (2005) acknowledges that in general, contemporary U.S. Supreme Court justices are much more receptive to the idea of exporting advice or ideas than importing them from foreign courts and have thus managed to resist the trend of judicial transnationalism. But although some will choose not to respond to new sources of international influence on the Court, all of the justices must still confront their presence and frame their jurisprudence accordingly. Even though these exchanges tend to be one-way, Slaughter (2005) argues, they have nevertheless had an impact on the Court because they transform the broader universe of the institution and the way that American justices view their office. Similarly, Kenneth Anderson (2005) suggests that the more recent appearances of comparativism have laid "the groundwork for a globalizing Court" because the presence of justices that are sympathetic to the practice has the potential to transform the institution over time (1). If we accept that justices are part of what he calls a "new global elite," we must consider what "the Court's new globalized sense of itself might mean for the democratic political community of the United States" (Anderson 2005: 12).

Although Slaughter is an enthusiastic supporter of comparativism and Anderson ultimately rejects it in his work, both scholars hint at the influence of a feedback effect and thus provide important insight into the Supreme Court's place within the global judicial framework: justices have been and are likely to continue to be shaped by the post-Cold War political and social environment in which they operate – characterized by new legal norms and transnational dialogue. Slaughter (2005) suggests that although scholars have generally found that "American judges defiantly define themselves outside

the mainstream of global judicial conversation," they have shown increasing awareness of foreign and international law in the past decade as well as a growing willingness to consider or cite it (277). An important aspect of this shift is psychological: "judicial globalization changes not only what our judges know and need to know, as a practical matter, but also how they think about who they are and what they do" (Slaughter 2005: 280). She cites the involvement of the American legal profession in promoting global judicial education and widespread support among judges for it as one indicator of this psychological shift; in encouraging courts across the world to think globally, their own views of law are transformed. However, neither Slaughter nor Anderson looks for evidence of such a transformation or identifies possible mechanisms through which a feedback effect might occur, although they would likely agree that the Supreme Court's response to the process of judicial transnationalism is likely to be more complex than simply deciding to cite foreign law or not.

If found, an increase in transnational involvement in Supreme Court litigation might not only signal the creation of new relevant audiences, but also create new sources of political pressure and legitimacy. As Thomas M. Keck notes in a piece on recent Supreme Court cases on affirmative action, "the rise of such litigation has been both a consequence as well as a cause of the Court's decisions" in that particular legal area (2006: 415). In other words, legal activism and litigation sometimes creates new politics, an idea that seems applicable to recent debate over judicial transnationalism. Not only might such involvement cause some justices to look to international law and norms, but their decisions to do so might encourage more attention by transnational actors in the future that will have to be confronted by members of the Court. There is already some

evidence to suggest that resistance to judicial transnationalism by members of the Supreme Court has undermined its legitimacy abroad. It is not surprising that many of the foreign judges that have looked to U.S. constitutional law to inform their decisions in the 1990s and 2000s are vocal cosmopolitans. Aharon Barak, one of these judges and the former president of the Supreme Court of Israel, articulated international concern with exceptionalism on the Supreme Court in a 2002 *Harvard Law Review* article by criticizing its failure "to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems" (Barak 2002: 114). This failure, he argues, has resulted in the Court "losing the central role it once had among courts in modern democracies" (Barak 2002: 114).

On the one hand, the prominent role that the U.S. played in post-Cold War judicial reform abroad has created new opportunities to consider cosmopolitanism and bring foreign citations to the forefront of debate over constitutional interpretation. But the statement by Barak suggests that resistance to these opportunities and the continued advocacy of isolationism in this debate has had its own consequences, having reshaped the actual process of judicial transnationalism in recent years by turning foreign courts away from the U.S. model. In one of several recent *New York Times* articles discussing the globalization of law, Adam Liptak (2008) explores these consequences, speculating that the adamant defense of isolationism by conservative members of the Supreme Court has reduced its international prominence and diminished its influence on its foreign counterparts. Since the height of the Supreme Court's position abroad in the 1990s and early 2000s, he notes, citations of its decisions by foreign courts have plummeted. Liptak

suggests that this is a consequence of the post-9/11 isolationism of conservative political and Supreme Court elites, a belief articulated by several members of the Court in public statements. In 2007, former Justice O'Connor argued that foreign law "may not only enrich our own country's decisions" but its consideration by the U.S. Supreme Court "will create that all important good impression" (as cited in Liptak 2008). And earlier this year, Justice Ruth Bader Ginsburg warned that "you will not be listened to if you don't listen to others" (as cited in Liptak 2009). These statements suggest that the debate on foreign citations has attracted scrutiny of American constitutional interpretation abroad and resulted in a feedback effect of its own, creating a new set of challenges for those considering the place of cosmopolitanism and exceptionalism on the Court.

From a larger perspective, the debate on comparativism has more closely resembled a "contested process of judicial globalization than an enduring and exceptional isolationism" – judicial exceptionalism is "not exceptional so much as temporal" and will become a lesser attractive option as time goes on and the potential benefits of reciprocating the respect previously given to our Constitution abroad become more evident (Slaughter 2005: 277). Because "the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own," observes Feldman, further globalization of the legal world will place a growing burden on exceptionalism (2008). Thus, not only are changes in its broader social and political environment important to explore, including the rise in international judicial cooperation and foreign concern with domestic issues that has characterized the post-Cold War era, but we must also consider that the justices' response to these changes has the potential to reshape its global reputation and the opportunities for exchange that come with it.

According to its observers, judicial transnationalism will continue to shape the world of law around the Supreme Court and we can expect demands for further conversation about its role in that process. Here, it is useful to refer back to Baum (2006) to inform analysis of a possible feedback effect on Supreme Court politics from transnationalism; he emphasizes the link between changes in the universe in which the Court is operating, which is increasingly global, and their potential to create new audiences it may engage with or respond to. By focusing on the relationship of Supreme Court justices to different relevant audiences, Baum's work places a similar emphasis on legitimacy as Bybee (2010); an audience can convey certain expectations about judicial outcomes and behavior that can motivate those who consider them important. When considered at the institutional level, this approach suggests that changes in the Court's role or level of prominence abroad may also influence its members' sense of mission or office, thereby creating new sources of legitimacy that even opponents to comparativism are eventually encouraged to respond to. One place that we might look for existing evidence of this is in what justices opposed to the citation of foreign law have to say on the subject in both Supreme Court opinions and public commentary. Perhaps by repeatedly engaging in debate over comparativism and articulating the reasons why foreign law cannot be considered in American constitutional adjudication, its opponents are in fact acknowledging the importance of and attempting to establish a convincing position vis-à-vis the international actors that increasingly populate its audience.

CHAPTER TWO

The Globalization of Law?

The Inclusion of Transnational Legal Arguments in Supreme Court Litigation

2.1 Introduction

Although Supreme Court justices and legal scholars have argued over the validity of different tools in constitutional interpretation, including social science data, public opinion and, most recently, laws and standards of decency from abroad, the larger universe in which their institution operates has become increasingly transnational since the end of the Cold War. As noted in the previous chapter, the term judicial transnationalism has been coined to describe this phenomenon, characterized by unprecedented levels of interaction and exchange at a global level. The increasingly transnational nature of political, economic, and social life, some argue, has succeeded in altering the substance of the legal questions brought before domestic courts, as litigation increasingly involves global transactions and multiple jurisdictions. This is especially true of personal interactions, as more and more citizens cross national borders to live, do business, attend school, or build families. In its 2009-2010 term, the U.S Supreme Court heard a custody case, *Abbott v. Abbott* (2010), which involved the latter.

Abbott reflected the increasingly transnational nature of social life in several ways. First, the child in question was born in the U.S. to an American mother and British father. Second, the family had resided in Chile for several years before separating, and it was the Chilean government that granted a joint custody agreement that included a *ne exeat* order, requiring either parent to obtain consent from the other prior to removing the

child from the country. Then, after Mrs. Abbott violated this agreement by taking her son to Texas, Mr. Abbot took his complaint out of Chile and filed suit in a U.S. federal district court. And finally, rather than seek redress under Chilean or American law, his counsel asked the U.S. court to affirm that the Chilean *ne exeat* order translated into a custodial right under the Hague Convention on the Civil Aspects of International Child Abduction and order the return of his son. The case reached the Supreme Court through appeal, which ruled in favor of Mr. Abbott in a 6-3 decision that divided the justices across traditional partisan lines: Justice Kennedy's majority opinion was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Alito, and Sotomayor, while Justice Thomas and Justice Breyer were party to Justice Stevens' dissent. Unlike the conflict over foreign citations found in the *Lawrence v. Texas* (2003) and *Roper v. Simmons* (2005) decisions, the justices were not divided on the validity of non-domestic law; rather, the opposing sides articulated two different interpretations of the Hague Convention and its appropriate application in transnational custody disputes.

As the *Abbott v. Abbott* case demonstrates, judicial transnationalism is not necessarily an ideological doctrine that members of the Court must either embrace or reject. It describes a new way of life, in which law and the bodies that interpret it must adapt to the increasingly global nature of everyday political, economic, and social transactions. Dahlia Lithwick (2010), a prominent legal correspondent for *Slate*, was at the oral arguments for the *Abbott* case and made the following observation:

> The most interesting thing about this morning's argument in *Abbott v. Abbott* is that it breaks down all the normal divisions on the court: left versus right, women versus men, pragmatists, internationalists, textualists, idealists … all of it flies out the big ornamental doors as the court grapples with this new problem of international child abduction at the grittiest, most practical level….

If international child abduction is a new problem for the contemporary Supreme Court, has it had to grapple with others of a transnational nature? And do these new problems represent a significant change in the substance of the legal questions before the Court? This chapter addresses these questions, measuring the inclusion of transnational arguments in briefs filed in U.S. Supreme Court litigation in the 1989-1990, 1999-2000, 2009-2010 terms to determine if the cases brought before it over the past two decades have become more complex and likely to touch on issues of a global nature. Prior to presenting my findings, I first discuss the relevance of my measures and follow with a detailed description of the methodology employed in my data collection and analysis. Merits and amicus curiae briefs serve an important role in litigation by introducing new legal arguments to the Court, I argue, and the evidence presented here suggests that it has become more common to include foreign or international law in both kinds of briefs when framing those arguments.

2.2 The Relevance of New Legal Arguments by Participants in U.S. Supreme Court Litigation

The *Abbott v. Abbott* case highlights two important characteristics of judicial transnationalism that the debate on foreign citations has not captured. First, cases involving foreign or international law or legal issues of a comparative nature are not always controversial, at least not in the ideologically polarized way that the debate on foreign citations is often framed. Second, the Supreme Court appears to be well-aware that the legal questions it confronts are often highly complex and can involve multiple legal frameworks and jurisdiction. Discussion of a non-domestic legal source does not

automatically result in the level of tumult surrounding decisions like *Roper* and *Lawrence*, as the comprehensive legislative bans on the citation of foreign law suggest. Instead, the Court has had to confront a wide range of transnational issues in recent years, in both divisive and routine cases, and determine on a case-by-case basis how they should be addressed within the domestic legal structure. Indeed, the larger profession seems to acknowledge the inevitable, and often mundane, globalization of law. As noted in the previous chapter, there seems to be a consensus among legal scholars that law, like politics and the economy, has become more complex in recent years.

This is reflected in significant structural changes that the legal profession underwent in the 1990s in order to accommodate this complexity. Although the American Society of International Law (ASIL) was founded in 1906, it began organizing annual workshops in 2000 intended to facilitate dialogue between American legal actors and their foreign counterparts. This series, like similar initiatives by the CEELI initiative of the American Bar Association and the Federal Judicial Center discussed in the previous chapter, was intended to meet the demands of an increasingly globalized profession. This is reflected in the program for a 2008 ASIL conference on the Globalization of the Legal Profession held at Harvard Law School, which noted this transformation:

> Legal practice historically has been a largely parochial endeavor; one need look no further than the complex debate within the United States about multi-jurisdictional practice between states (let alone questions of foreign lawyers practicing within the US) to see that the inherent complexities of the emerging global bar extend far beyond fitness and character to practice law. In an age of rapid globalization, this is no longer merely the academic issue it might have been even a decade ago. The largest law firms now span the globe, with thousands of lawyers carrying the banner of a single firm, yet residing in geographically diverse offices and practicing law in numerous states. Large corporations face similar challenges in creating a common legal identity among in-house attorneys

> practicing in a multitude of jurisdictions that typically report upward to a single general counsel resident in one nation.

The increasingly transnational scope of American legal practice is also evidenced by the expansion of U.S. law firms overseas, which will be detailed later in this chapter. However, there is also evidence of this change in U.S. law schools, as many restructured their curriculum in the 1990s to include more international law courses. While most schools have added to their offerings in this area, some, including Harvard Law School, have revised their core curriculum to include global courses as a degree requirement. During her time as Dean of Harvard Law, Justice Elena Kagan successfully lobbied for a complete overhaul of the curriculum, which included adding a comparative law course as one of three new requirements for first year law students. In a press release (Kagan 2008), this addition was explained:

> From the beginning of law school, students should learn to locate what they are learning about public and private law in the United States within the context of a larger universe -- global networks of economic regulation and private ordering, public systems created through multilateral relations among states, and different and widely varying legal cultures and systems…. Accordingly, the Law School will develop three foundation courses, each of which represents a door into the global sphere that students will use as context for U.S. law.

Justice Kagan would later be questioned about this decision in her confirmation hearings by Senator Charles Grassley, who suggested that the decision indicated her inclination toward citing foreign law once on the bench (*Federal News Service* 2010). Despite the controversy, other prominent law schools have made similar changes. In 2006, for example, Georgetown Law began to require its first year students to "begin their second semester with a one week intensive course called 'Week One: Law in a Global Context'" (AALS Report 2006). In 2004, Justice Sandra Day O'Connor was invited to dedicate the

school's new Hotung International Law Center, which includes the following statement as part of its mission (available at http://www.law.georgetown.edu/otp/):

> The importance of law in today's world never has been greater. The movement of people, of goods, of armies across borders has led law across borders, as human beings strive for the order, the control on arbitrariness and the fulfilling of expectations that law can bring.

This is not surprising, as the website of virtually every law school now comments on the increasingly global nature of law, portraying it as an inevitable trend that has transformed the responsibilities of the profession. At the University of Michigan, another law school that has a required international law course, its law library offers the following advice in its research manual for new students (available at http://www.law.umich.edu/library/students/research/Documents/foreign.pdf):

> As the globalization of our world increases, it is rapidly becoming the exception – rather than the rule – that an attorney in domestic practice in the United States can spend her/his entire career dealing exclusively with American law. Transnational issues may be expected to arise today in virtually any legal context. Thus, familiarity with basic foreign legal research techniques is essential for success in modern American law practice.

If the globalization of law is generally an accepted fact of the profession, as this statement implies, why is it that the citation of foreign law has attracted such fierce controversy in recent years? In the previous chapter, I argued that it is because scholars have overlooked the structural effects of judicial transnationalism, framing Supreme Court responsiveness to global trends as an individual, ideological choice, or yet another interpretational tool that has the potential to facilitate judicial activism. Instead, the changes documented above suggest that transnationalism has had a similar effect on the U.S. legal system as scholars have observed in other national contexts: it has resulted in

an influx of new sources of law and more complex legal issues, necessitating the development of new strategies and proficiencies by participants in the judicial process. In this chapter, I develop measures aimed at capturing the type of substantive changes that might necessitate such professional adaptation and provide empirical evidence that the globalization of law has indeed brought a more international set of questions and cases to the Supreme Court over the past two decades.

While changes in the substance of law, legal transactions, and the judicial process might appear to be of obvious interest to political scientists who study the Supreme Court, their primary focus in recent decades has been on judicial decision making as an ideological enterprise, in which different theories and sources of interpretation are perceived to mask the pursuit of personal policy preferences by judges. This approach dates back to the rise of legal realism in the early 1900s, which encouraged scholars to turn towards an instrumental perspective on courts and stress individual decision making as part of a broader disciplinary trend (Maveety 2003). As a result, much of the controversy over the Supreme Court and its jurisprudence, including the debate on foreign citations, is framed as a form of ideological and/or political conflict. This approach had its critics, however, even early on. In 1969, C. Herman Pritchett was one of the first to identify a fundamental problem with political science scholarship on the U.S. Supreme Court, arguing that the behavioral approach failed to capture its dual nature as both a political and legal institution. Noting that "any accurate analysis of judicial behavior must have as a major purpose a full clarification of the unique limiting conditions under which judicial policy making proceeds," Pritchett implied that political science would benefit from retaining a legal understanding of the judicial process and the

constraints placed on it by the law (1969: 42). H.W. Perry's 1991 book, *Deciding to Decide*, was one of the first attempts at reintroducing legal considerations to political studies of the Court by focusing the effect of institutional and procedural factors like jurisdiction, the status of litigants, and the substance of legal questions on the justices' decision to grant cert.

Perry's work reflects a structural approach by demonstrating that both the substance of law and participants in Supreme Court litigation play an important role in judicial process, and his work established several important findings relevant to this project. Highlighting the ability of litigants to help set the Court's agenda, he demonstrated that cert petitions help the institution identify new problems that must be addressed. This suggests that changes in the nature of those problems, like the transnational elements of contemporary family law that were first introduced to the Supreme Court in the *Abbott v. Abbott* case, can have a direct effect on the scope of litigation in traditionally domestic venues. In essence, courts, and the legal profession more generally, must adapt to the demands of the judicial marketplace. One of the fundamental tenets of judicial transnationalism is that this marketplace has become global, and it is indeed possible to find evidence – unrelated to the limited practice of foreign citations by members of the Supreme Court – that the American legal system has responded to this change. As noted above, many U.S. law schools began to incorporate international training into their curriculum in the 1990s. And around the same time, prominent U.S. legal organizations expanded their focus, enacting such projects as the American Bar Association's Central European and Eurasian Law Initiative, described in

the previous chapter, or the Federal Judicial Center's conference series on "International Law and Litigation for U.S. Judges."

These projects suggest that the legal profession has been influenced by transnationalism more broadly, and several studies have identified two important trends that support this fact. First, U.S. law firms have become more likely to expect their employees to be well-versed in international law and the growing range of legal issues that involve a transnational element (Silver 2009). Second, the law firms themselves have responded to the increasingly global nature of law by expanding overseas and the number of U.S. law firms that have offices abroad grew exponentially during the 1990s (Kelemen and Sibbitt 2004; Silver 2009). These findings will be addressed further in chapters three and four, when the focus of this project turns to the actors involved in introducing transnational legal arguments to the Court and those actors' role as an important source of legitimacy for its members. However, they are relevant at this stage because they provide further evidence of the globalization of law in the United States, and suggest that the increasingly international focus of the American legal profession may reflect broader changes in the type of problems that it is equipped to resolve.

Changes in the substance of the legal arguments introduced in litigation also provide the justices with new sources of information to take into consideration. In addition to the direct parties to a case, this includes the authors of amicus curiae briefs, and their importance in judicial agenda-setting and decision making has been well-documented. In his large-scale analysis of amicus participation in contemporary Supreme Court cases, Paul M. Collins finds that this particular form of brief not only plays a critical role by introducing new arguments to the Court, but can also be effective

in "persuading the justices to adopt positions that are attitudinally incongruent…" (2008: 137). As a result, "amicus briefs confound the certainty surrounding the justices' perspectives as to the correct application of the law in a case" and are therefore "the single strongest predictor of increased variance in judicial decision making" (Collins 2008: 137). According to Collins, 90% of cases heard by the Supreme Court from 1990 and 2001 had amicus participation (2008: 46).

There are few rules limiting amicus participation; those interested in filing a brief must get permission from both parties or obtain leave to file from Court, which is almost always granted (42). The Court's "open door policy toward amicus participation provides reasonably strong evidence that the justices look favorably on the information contained…" (Collins 2008: 71). Amicus participation plays a crucial role, Collins argues, because justices are policy generalists and the information provided by amicus briefs are likely to be an important part of decision-making (89). Indeed, of the thousands of briefs that Collins analyzed during this period, 70% contained new information not available to justices otherwise and were therefore able to "supply the justices with alternative legal authorities" (72). From the perspective of attitudinal models of judicial decision making, the information that briefs provide to justices is relevant only to the extent that it supports their preexisting ideological preferences in a case. However, Collins refutes this notion, finding that amicus briefs serve to "persuade the justices to endorse the conclusions advocated in the briefs rather than only respond to those consistent with their personal ideology" (114). As a result, he concludes that a "legal persuasion model" best captures the role that briefs play, in that they help justices explore "alternative legal perspectives" (91). The substance of the legal arguments that

are introduced to the Court through formal participation in the judicial process merits attention, Collins' work suggests, because of the ability of those arguments to determine the range of choices available to the justices in any given case.

The informational role that briefs play is especially important when considering whether they have become more likely to draw on transnational sources, as those sources often represent an area of law in which the Supreme Court is not likely to have expertise. In a 2003 address to the American Society of International Law, Justice Stephen Breyer highlighted this fact, calling on those in the audience with transnational experience to share it with the Court. Noting that he and his colleagues "face an increasing number of legal questions that directly implicate foreign or international law," Breyer told the audience that it was difficult for them to "easily find relevant comparative material on our own" and suggested that "lawyers must do the basic work, finding, analyzing, and referring us to that material" (Breyer 2003). In the *Abbott* case, the litigants and amicus parties did exactly as Justice Breyer instructed in his address. Not only did they help set the Supreme Court's agenda by introducing a new transnational legal problem, but they also played an informational role by providing it with relevant transnational sources and arguments that helped its members understand one of the many complex areas of law that they must deliberate on.

In this chapter, I address the globalization of law from the perspective of these potential structural influences by measuring the inclusion of transnational arguments in merits and amicus curiae briefs filed in cases before the Supreme Court in the 1989-1990, 1999-2000, 2009-2010 terms. In the next section of this chapter, I will describe the methodology used to select, code, and analyze these briefs in order to determine if the

actors involved in Supreme Court litigation over the past two decades have become more likely to reference non-domestic sources when framing their legal arguments.

2.3 Methodology

The Universe of Cases

My data is comprised of all cases decided on the merits by the Supreme Court in the 1989-1990, 1999-2000, and 2009-2010 terms. I chose these three terms for two reasons. First, I was able to employ a time series analysis to measure change across two decades, from the 1989-1990 term to the 2009-2010 term, with the 1999-2000 term as the mid-point. This allowed me to capture the effects of judicial transnationalism, which scholars have characterized as a progressive trend that the world's courts have had to adapt to in the post-Cold War era of globalization. Because the objective of this chapter was to determine if this was true of the U.S. Supreme Court, I needed to look for evidence of a marked increase during the relevant period of time, and a time series analysis was the best tool to do so. Second, it was necessary to limit the scope of this study because of the large amount of unique data that needed to be collected. On average, each of the terms that I analyzed contained 90 cases, with an average of 11 briefs per case. As I will detail in the following paragraphs, this material had to be retrieved from multiple locations and each document had to be analyzed in detail. Ultimately, more than 3000 documents were coded over a period of six months and, because there was no existing data to draw on, all of the relevant information was obtained firsthand. After my hypothesis was confirmed by the evidence of significant change across the three sampled terms, I decided to mine my existing data for additional variables, which are analyzed in chapters three and four,

rather than expand my study to other terms. With the three terms already representing a unique dataset, the first to establish empirical measures of transnationalism in the U.S. context, this strategy allowed me to focus on providing a richer account of the changes that I uncovered.

Supreme Court Terms Examined

Since it normally takes cases years to work their way through the lower courts of the state and federal judicial systems before they reach the Supreme Court, the 1989-1990 term was selected to represent cases that would capture conditions prior to major events of 1989 and 1990 that had a dramatic impact on globalization in the political, economic, and social spheres: the dissolution of the Soviet Union and the protests of Tiananmen Square. That term therefore serves as a baseline against which any increase in references to transnational law or materials can be measured. The 2009-2010 term was the most recent completed term when the analysis for this dissertation was conducted. A full twenty years after the dramatic events of 1989-1990, it should fully reflect any change in the referencing of foreign materials or the involvement of non-American actors in Supreme Court cases. The 1999-2000 term was selected as the third term analyzed because it was midpoint between the other two. With a time series analysis, having an interim term between the earliest and latest would be valuable in showing whether there was an upward trend over time. Without such an interim measure, any measured change in non-domestic involvement between 1989-1990 and 2009-2010 could simply be an aberration rather than a trend.

Cases Examined

Surprisingly, one of the most difficult stages of my data collection was establishing the universe of cases that I would analyze by determining the exact number of decisions on merits issued by the Supreme Court in each of the three terms. According to Adam Liptak (2009), different legal databases count the total number of decisions in different ways, and many scholars of the Court have difficulty establishing an exact number. [1] I decided to source my universe of cases from the *United States Reports* that are published by the Supreme Court's Publication Office and contain a full record of all of its rulings, orders, case tables, and other formal proceedings. After identifying the relevant volumes of the *Reports* for each of my three terms, I went through the chronological list of rulings and noted the name of each decision on the merits along with its citation and docket number that was issued. This allowed me to create a complete list of cases for each term based on a single, official source to ensure maximum consistency and reliability. It may be that there are easier ways to compile such a list, but this was the method used for this study. For example, a later search of the Internet yielded a complete list of cases by volume of the *United States Reports* posted on Wikipedia (available at http://en.wikipedia.org/wiki/Lists_of_United_States_Supreme_Court_cases_by_volume), but its reliability cannot be confirmed.

[1] In his study on the declining docket of the contemporary Supreme Court, for example, David Stras (2009) of the University of Minnesota found multiple counts of the number of decisions issued in the period between 1986 and 1993. As a result, he had to choose a single source to refer to and report that as the source of his universe of cases for each term; he used the *Harvard Law Review's* count (2009).

Briefs Examined

In order to evaluate the contents of the briefs that were collected, I coded each individual brief filed in every case in the 1989-1990, 1999-2000, and 2009-2010 terms, noting the ones that contained at least one citation of a transnational source in the "Table of Authorities," which is used to list every source referred to in its arguments. Although a table of authorities can be found in every brief filed to the Supreme Court, including all of the briefs analyzed in this study, it is not referred to by this specific name in the Court's official rules. Rather, the following description is listed as a formal requirement:

> The constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case, set out verbatim with appropriate citation. If the provisions involved are lengthy, their citation alone suffices at this point, and their pertinent text, if not already set out in the petition for a writ of certiorari, jurisdictional statement, or an appendix to either document, shall be set out in an appendix to the brief.

I chose the table of authorities as my primary source of information about the legal arguments presented to the Supreme Court in each brief because it summarizes the resources that are used by participants in litigation to make their case. Rather than review the actual content of each brief analyzed, which would have required a prohibitive amount of time and been subject to error, the table of authorities allowed me to quickly review the sources cited in each brief and identify any that were relevant to this study. This was simplified by the fact that each source is listed by name and grouped by category; as indicated above, the table of authorities begins with the prescribed categories of cases, constitutional provisions, treaties, statutes, ordinances, and regulations. In almost all briefs, the table of authorities ended with a section titled either "Other" or "Miscellaneous." Initially, I was looking for transnational citations only in those two

sections, as the intent of the Court seems to be that the prescribed categories were meant only for domestic citations, The physical process of reviewing the table of authorities, however, required me to at least briefly browse all the other sections, so my review did occasionally find transnational references in sections that should have been strictly domestic. In briefs for the 1989-1990 term, almost every single transnational reference was found in the "Other" or "Miscellaneous" sections. In the later two terms examined, transnational references were found under "Cases" and "Treaties" as well. In some briefs, the "Cases," "Treaties," and "Other" categories were separated, where appropriate, into domestic and foreign subcategories.

Although the terminology differed in the two online databases, the briefs that were examined fell into two categories: merits briefs and amicus briefs. Merit briefs included those filed by the litigants, identified as petitioner or respondent. In some cases, a brief by a third party was listed in the same section as merits briefs, especially in the 1989-1990 term. In the initial coding of data, such ancillary merit briefs were counted as amicus curiae briefs. Amicus curiae briefs were listed separately from merit briefs in the online databases. In the 1989-1990 term, however, a significant number of briefs were listed as "motions." Such motions had all the characteristics of the other briefs and for the purpose of this study were treated as amicus briefs, among which they were generally listed.

In all, 269 cases containing 3,059 briefs were examined for this study. The breakdown by term is shown below.

Table 2.1: Cases and Briefs Coded from the 1989-1990, 1999-2000, and 2009-2010 Terms

Term	Total Number of Cases Coded	Total Number of Briefs Coded
1989-1990 Term	117	1281
1999-2000 Term	78	784
2009-2010 Term	74	994

In this descriptive data, two interesting trends are evident. First, the number of cases decided by the Supreme Court dropped significantly after the 1989-1990 term. The two later terms had similar, much lower numbers, reflecting a broader trend that some scholars have called the Supreme Court's "incredible shrinking docket" (Liptak 2009). This trend was first observed in the early 1990s, when "the number of decisions dropped to 107 from 145 in the space of five terms" (Greenhouse 1996), and has been linked to a variety of factors, including a larger number of justices participating in the cert pool, a decline in the number of petitions filed by the Solicitor General on behalf of the U.S. Government (Chandler and Harris 2009), and changes in the preferences of new appointees to the bench (Stras 2009).

Second, while the number of cases heard by the Court has declined in the period covered by my three terms, my data indicates that the number of briefs per case has grown. In fact, when the average number of briefs per case was calculated, shown in the table below, the 1989-1990 and 1999-2000 terms had similar averages of 10.9 and 10.1 briefs per case, while the most recent term's average was 13.4.

Table 2.2: Average Number of Briefs Per Case in the 1989-1990, 1999-2000, and 2009-2010 Terms

Term	Average Number of Briefs Per Case
1989-1990 Term	10.9
1999-2000 Term	10.1
2009-2010 Term	13.4

This increase might be explained by growth in the number of amicus briefs filed to the Supreme Court, which have become an increasingly popular strategy of interest groups and other legal activists in the U.S. (Kearney and Merrill 2000; Lynch 2004; Collins 2008; Garcia 2008). According to Kelly J. Lynch, amicus briefs now represent "a judicial lobbying tool that organizations and individuals aspiring to influence the Court's decision-making process increasingly employ" (2004: 33). Indeed, there is evidence that amicus participation has grown exponentially in recent decades. In a 2000 study, Joseph Kearney and Thomas Merrill found an 800% increase in the number of amicus briefs filed during two ten year periods, 1946-1955 and 1986-1995. When tabulated by brief type, shown in the table below, the data from the three terms that I analyzed provide clear evidence of this growth in amicus participation, with amicus briefs climbing from 48.3% of the total number of case briefs in the 1989-1990 term to 73.5% in the 2009-2010.

Table 2.3: Number and Percentage of Brief Types Filed in the 1989-1990, 1999-2000, and 2009-2010 Terms

Term	Merits Briefs	Amicus Briefs	Total
1989-1990 Term	662	619	1281
	51.7%	48.3%	100%
1999-2000 Term	293	491	784
	37.4%	62.6%	100%
2009-2010 Term	263	731	994
	26.5%	73.5%	100%

Amicus participation has clearly grown over the three terms that I examined, generating the majority of briefs that compose contemporary case proceedings. Because the Supreme Court has not sought to establish any formal barriers to amicus participation, the now ubiquitous presence of amicus briefs in Supreme Court cases has led several scholars to conclude that the justices welcome the practice (Kearney and Merrill 2000; Collins 2008). In 1983, Karen O'Connor and Lee Epstein predicted that the Court would be forced to limit the number of amicus briefs if they continued to grow, especially because the Rule 37(1) of the *Rules of the Supreme Court* indicate that they should be used with discretion:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

Although there have been some such limitations practiced at lower levels of the judiciary,[2] to date the justices have not shown any inclination to follow suit.[3]

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[2] Judge Richard Posner of the Seventh Circuit of Appeals has criticized the increasing rate of amicus participation in federal cases, arguing that the briefs are often repetitive and clog the judicial system. He has moved to deny amicus

The Supreme Court's shrinking docket suggests that the cases that it does agree to hear have more weight in the recent terms. This underscores the importance of looking for changes in the substance of those cases to determine if the legal questions before the Court have become more likely to involve transnational elements. At the same time, the higher number of briefs per case in the most recent term suggest that participation in litigation has grown to include a larger, and perhaps more diverse, set of actors that represent potential sources of new legal arguments and strategies that might be reflective of the globalization of the profession.

Locating a Complete Set of Case Briefs for Each Supreme Court Term Analyzed

While planning the collection of my data, I discovered that there is no single source for merits and amicus briefs; the older the term, the more difficult it is to find a complete set of materials. Although the Supreme Court's guide on "Where to Find Briefs of the Supreme Court of the U.S." (available at http://www.supremecourt.gov/oral_arguments/briefsource.aspx) states that the Lexis-Nexis online database contains briefs from the 1979 term, which would have covered all three of the terms that I examined, I quickly discovered that it has a limited selection that varies across cases. Various significant cases include a link to the full text of the brief, but the majority list only the title of the brief without any additional information on its contents. Westlaw, another prominent legal database mentioned in the guide, was similar to Lexis-Nexis in that it only included the full text of briefs for selected cases after 1979;

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participation in two cases to date, and is said to strictly enforce the requirement that briefs only contain unique and relevant arguments (Garcia 2008).

[3] It is clear, however, that if this study were to find evidence of increased amicus participation by transnational groups, a hypothesis that will be tested in chapter three, it might add to the concern of those already skeptical of the legitimacy of foreign input into the domestic judicial process.

it was impossible to determine what cases had briefs without going into each individually. I was not able to find any other online sources of the material that I required for the 1989-1990 term; as a result, my only option for obtaining a full set of briefs for that term was to visit either the Supreme Court itself or one of its ten official depositories of briefs, located at the Library of Congress, the Connecticut State Library, and the law libraries of the University of Chicago, Cornell University, Indiana University, the University of Louisville, Minnesota, Texas, Washington, and Yale University. Because I was living in Minneapolis at the time, I was able to visit the University of Minnesota's collection in the fall of 2010. During this time, I coded the entire set of briefs for the 1989-1900 term directly from microfiche, as the cost of downloading or printing the material would have been prohibitive. A few microfiche were of such poor quality that some briefs were illegible, and a few missing microfiche meant that in a few cases the complete set was not available for examination. Given the total number of briefs analyzed, however, my estimate is that more than 99% of all references in the briefs were analyzed.

For the more recent terms, the other online database suggested in the Supreme Court's guide was the Findlaw website, but it only included the 1999-2000 to 2007-2008 terms. I was therefore able to obtain the briefs for a second term, 1999-2000, from Findlaw (available at http://supreme.lp.findlaw.com/supreme_court/briefs/index.1999.html), but needed a third source for my third and final term, 2009-2010. This was found by searching the internet for the 2009-2010 docket, which yielded an online listing of all briefs from the Supreme Court's most recent term provided by the American Bar Association (available at

http://www.americanbar.org/publications/preview_home/publiced_preview_briefs_2009_2010.html). Although I downloaded the briefs for the 2009-2010 term through this link in October 2010, the ABA recently reorganized its materials and briefs are now available through its *Preview of United States Supreme Court Cases* site. This site links directly to PDFs of the briefs for all cases from the 2003-2004 term through those decided in the previous month of the current docket (available at http://www.americanbar.org/publications/preview_home.html).

Between the ABA and Findlaw sites, it is possible to obtain the full text of merits and amicus briefs online going back a decade to the 1999-2000 term. Prior to that, however, it appears that there is no comprehensive source of briefs apart from the microfiche collections housed at the Supreme Court and at its ten depositories. There is an online database that is accessible through direct access to the University of Minnesota Law School, *United States Supreme Court Records and Briefs*, but that contains only selected briefs for the period of 1832-1978. And although it is possible to order briefs from a document retrieval service, you must specify the name of and pay for each, individual document, usually at a prohibitive cost of $25.00 per brief. Scholars can certainly obtain briefs for a large number of cases from Lexis-Nexis or Findlaw, but my research has shown that it is impossible to obtain briefs for a universe of cases unless it has been defined based on the limited availability of these sources. The period from 1978 through 1998 is therefore not covered by an electronic resource; the only way to access a complete set of merits and amicus briefs from this period is to obtain microfiche and analyze them one by one. This presents a significant barrier to research on briefs and their influence as an important tool of participants in the judicial process, and the few

studies that analyze a large universe of cases sets across multiple terms (including Collins 2008) have relied on author-created databases. Until this study, however, none of these databases have coded briefs based on the origins of their cited sources or authors, nor have they looked at the inclusion of domestic vs. non-domestic legal arguments in the briefs' contents.

Categorizing Transnational Sources in Case Briefs

In my first pass at coding the briefs, I was looking for any reference to foreign material or foreign actors. Given that it was uncertain what would be found, I began my analysis by broadly defining a transnational source as any foreign or international document; in addition to legal documents, this included foreign or international works of literature and political philosophy, religious documents, political figures, and British law predating U.S. independence. This was done with the understanding that a second pass through the recorded data would then yield a more precise assessment of which foreign and international citations were relevant to this study. In fact, the use of such a broad interpretation led to some insights that, while not necessarily germane to this study, suggest other areas that may be worthy of research. Because my goal was to examine the inclusion and application of transnational legal arguments in Supreme Court litigation over the past decades, it was necessary to go into my coding with as broad a definition of what might constitute such arguments in order to capture change and larger trends in their form and origin. This inductive approach allowed me to deepen my understanding of the concept as I learned more about its meaning, ultimately creating an informed definition of a relevant transnational source that was closely tied to the objectives of my research.

This is sometimes referred to as the clarification of concepts by social scientists, or the process of refining a nominal definition of a term into a more precise one that reflects a focused observational strategy (Babbie 2010).

Separating Non-Relevant Transnational Sources

The first round of coding yielded a surprisingly disparate array of transnational references in merits and amicus curiae briefs, running the gamut from Shakespeare plays to international treaties and conventions to official correspondence from foreign governments to the United States. Because a large number of these sources were not legal and therefore not directly related to my objectives, I was able to identify three categories of transnational sources that were mostly irrelevant to this study: Literature, English law, and Religious texts. The "Literature" category was applied to all non-legal references of a transnational nature. One of the most frequently cited sources in all three terms fell into this category, the work of Alexis de Tocqueville. "English Law" was the category assigned to all references to historic English laws and documents, such as the Magna Carta, and non-American expositions on English law. The single most cited source in the three Supreme Court terms analyzed, which was Blackstone's *Commentaries*, fell into this category. Analyses and histories of English law of American authorship or publication were not treated as transnational sources. "Religious" sources originally included references to all Christian and Judean sources, but, as explained below, I later had to create a separate category for Vatican documents.

Defining Relevant Transnational Legal Sources

While the number of cases with any form of transnational citation, broadly defined, showed a remarkable increase over the terms examined, this data provided no insight into the substantive nature of transnational references. For that, it was necessary to narrow the category a second time by subdividing them into more specific categories of transnational sources that would be broad enough to yield a manageable number, but would be narrow enough to capture important information about their content and make my analysis meaningful. These were limited to foreign or international laws, treaties, conventions, and other relevant legal authorities. It is this element of my analysis that is at the heart of this chapter.

Although it was simple to identify the three broad categories of non-relevant transnational citations, the categorization of pertinent legal sources presented some challenges. My first objective in doing so was to create relevant categories of citations. Three of these categories were relatively straightforward, and encompassed the vast majority of transnational references. The first was "Foreign Law." This category included any reference to laws of a single nation or the opinion of a foreign government on a specific issue. The second was "International Law," which referred to any document, convention, treaty, or standards that multiple nations or the citizens of multiple nations adhere to. The most prominent of such citations referred to United Nations agreements and conventions, such as the Hague International Child Abduction Convention, the Law of the Sea, etc. [4] The third relevant category, "NGOs," was created

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[4] It should be noted here, however, that at least one instance of a non-governmental/quasi-governmental convention was referenced in the briefs that were examined: the standards of the International Auditing and Assurance Standards Board. Initially, there was some question as to whether international treaties and conventions should be counted as non-domestic in nature. If the United States were a signatory to the agreement, then in one sense such treaties and conventions are American law. But after examining the way in which such international agreements were cited and by

to refer not to the actors themselves, but to documents issued by non-governmental organizations that are then cited in merits or amicus briefs. If an organization's work was international in character and its membership was multi-national, then the citations to the documents issued by such organizations were included in this category. Human Rights Watch and Amnesty International were the two organizations whose documents make up nearly all of the citations listed in this category.

Not surprisingly, as I went through this second pass of categorizing transnational citations I encountered some material that seemed to be relevant but did not necessarily fit into my three broad categories, thus requiring the addition of two more classes of transnational legal sources. The first of the questionable categories concerned what I call "antecedent law." The American legal system grew out of English law, which makes the citation of English law a natural part of our judicial system. But modern American law was superimposed in place of other legal systems that had been in force in many parts of North America and the Pacific Ocean which later became part of the United States. Native American law, customs, and practices is the antecedent which first comes to mind, although none were found in the cases analyzed for this study. Much of the United States, however, belonged to nations with documented legal systems immediately before annexation or acquisition. Spanish law applied at one time in Florida, Louisiana, and the American Southwest; French law in Louisiana; Mexican law in the Southwest, and Russian law in Alaska and parts of the Pacific Coast as far south as California. But some parts of the United States were independent nations prior to joining the Union, such as

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whom, it seemed that their inclusion as a relevant transnational legal source was justified because of the potential of different interpretations of the meaning and application by American, international, and foreign actors. Also, within the context of this study, it was not possible to determine if the United States was a signatory to all such agreements, nor the number of other countries that were signatories.

Texas (although Mexican legal specialists and historians might dispute this assertion). In the case of *Rice v. Cayetano*, in the 1999-2000 term, the Court is reminded that prior to annexation, Hawaii was unquestionably an independent nation and had its own, fully-developed, fully documented system of law. In this case, multiple briefs relate the significance of antecedent Hawaiian law to contemporary legal issues. While I made the decision that English law was not truly a transnational source because of the way it is inherently incorporated into American law, I decided that it was appropriate to create the category of Antecedent Law to reference the types of citations found in *Rice* to ensure the proper inclusion of antecedent law in other cases in future research on this topic.[5]

The next category that presented a challenge pertains to a specific type of religious material. As noted above, religious references, such as to the Bible or Jewish writings, were deemed irrelevant to this study. In a number of briefs, however, references were included to documents issued by the Vatican and pronouncements made by various popes. The first inclination was to categorize these with other religious documents. The Vatican, however, enjoys formal diplomatic recognition by the United States and many other countries. In that light, the question remains whether justices of the Supreme Court would consider such references in their religious context only or as legal documents of a recognized nation. For this dissertation, formal Vatican documents have been considered transnational sources and assigned to a fifth relevant category, "Vatican." On the other hand, the works of individual Catholic theologians have been considered as part of the non-relevant "Religious" category and not counted as transnational sources. At this point I also had to reinstate my category of literature, but

[5] *Hawaii Housing Authority v. Midkiff* (1984), for example, is another case in which practices instituted under the laws of an independent nation had to be judged in terms of the Fifth Amendment.

more precisely defined to include official reports by foreign or international entities regarding the application of or the analysis of the effectiveness of law germane to some particular topic. Here I also included truly relevant legal studies by foreign academics or officials analyzing very narrowly defined foreign or international laws.

There were, of course, many briefs which included citations from more than a single category. For this dissertation, the category that appeared to be the most significant was the one assigned to the brief for my initial analysis. To provide perspective, the entire list of relevant and non-relevant categories is shown below, along with the number of corresponding briefs.

Table 2.4 Total Number of Briefs Assigned to Each Category of Transnational Sources for the 1989-1990, 1999-2000, and 2009-2010 Supreme Court Terms

Non-Relevant Categories	**1989-1990 Term**	**1999-2000 Term**	**2009-2010 Term**
Literature	14	15	32
English Law	33	28	63
Religious	1	0	4
Relevant Categories	**1989-1990 Term**	**1999-2000 Term**	**2009-2010 Term**
Foreign Law	3	1	26
International Law	5	16	32
NGOs	0	0	25
Antecedent Law	0	3	0
Vatican	6	3	0

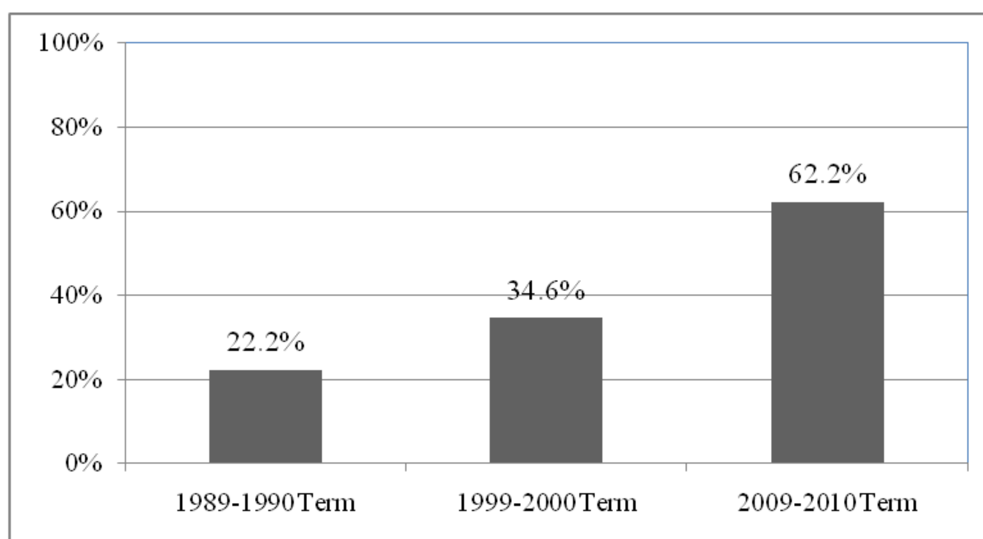
2.4 Data and Analysis

The Inclusion of Transnational Sources, Broadly Defined, in U.S. Supreme Court Cases

My analysis in this chapter first measured the percentage of cases in each of the three terms examined that included at least one brief including at least one reference to a transnational source in its table of authorities. This included sources from all seven

relevant and non-relevant categories (Literature, English Law, Religious, Foreign Law, International Treaties and Agreements, NGOs, and Vatican), so this stage of analysis focused on the inclusion of transnational sources, broadly defined, in Supreme Court litigation. As illustrated in the following figure, my analysis of this data yielded evidence of a significant increase in the percentage of cases containing general transnational arguments in their briefs over the past two decades.

Figure 2.1. Percentage of Cases with Briefs Citing Any Transnational Source, Broadly Defined



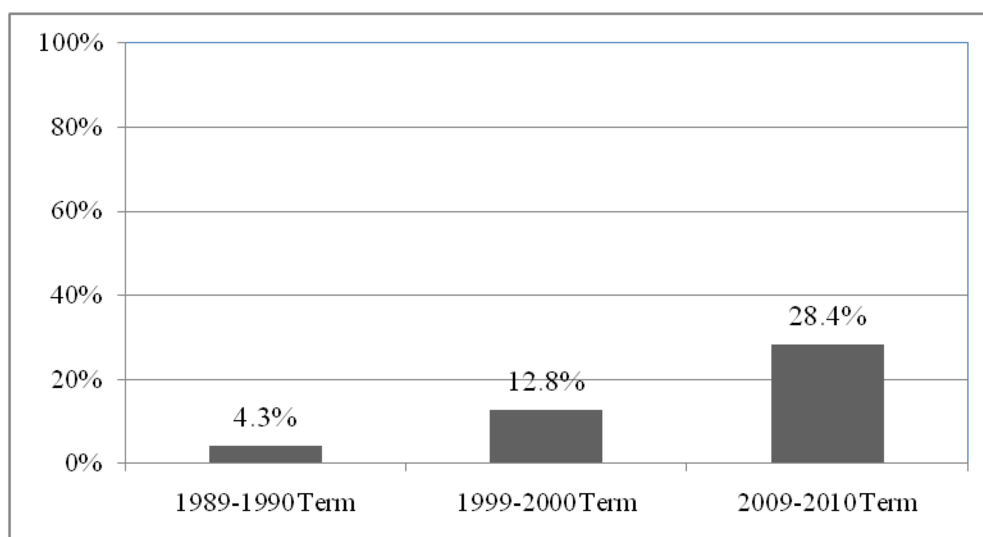
From the 1989-1990 term to the most recent 2009-2010 term, the percentage of cases that contained at least one attempt to introduce a transnational source to the Court in a merits or amicus briefs increased from 22.2% to 62.2%. As a result, a significant majority of the briefs filed in cases during the Supreme Court's past term contained at least one non-domestic reference. Because this chapter is focused on the ability of briefs to provide the Court with arguments that are germane to a case, however, it is necessary to look only at

the relevant categories of these sources to determine if there has been a concerted effort to include more transnational authorities of a strictly legal nature in recent years. Evidence of such a change might suggest that the Court is being asked to address problems that involve a new or increasingly complex transnational element.

The Inclusion of Transnational Sources, Narrowly Defined, in U.S. Supreme Court Cases

Attempting to capture this transnational element, the second part of my analysis shifted to a narrow definition of transnational sources. This was focused on identifying briefs containing at least one transnational reference that fell under one of my five relevant categories: Foreign Law, International Treaties and Agreements, NGOs, Antecedent Law, and Vatican. My data here, illustrated below, indicates that there has been a significant rise in the percentage of cases before the Supreme Court including references to transnational legal sources over the past three decades.

Figure 2.2: Percentage of Cases with Briefs Citing Transnational Legal Sources



Although the majority of cases from its most recent term do not contain any mention of non-domestic legal authorities, the presence of those that do has grown exponentially during the contemporary era of judicial transnational. In its most recent term, over a quarter of the cases heard by the Supreme Court contained some mention of transnational legal issues in their merits and amicus briefs. This indicates not only that the cases that the contemporary Court hears have become more likely to involve some supranational element, but also that participants in the judicial process are asking it to consider the transnational implications of their claims more frequently. Out of the 269 cases analyzed for this project, 37 of those included relevant transnational legal sources: 6 in the 1989-1990 term, 10 in the 1999-2000 term, and 21 in the 2009-2010 term. In order to provide more insight into the substance of these 37 relevant cases, I will discuss them in more detail in chapter three when I examine the sources and nature of the transnational legal arguments raised in their briefs.

The Inclusion of Transnational Sources in Briefs Filed to the Supreme Court

In many ways, the number of briefs containing transnational references is more significant than the number of cases because it provides a more accurate picture of the use of transnational sources by participants in the judicial process to frame the arguments that they present to the Supreme Court. To determine this, I calculated the percentage of briefs containing at least one citation of a transnational legal source from the total number of briefs coded for each term. My findings, for both my broad category of any transnational source and the narrower one for strictly legal sources, are below.

Figure 2.3: Percentage of Briefs Citing Any Transnational Source, Broadly Defined

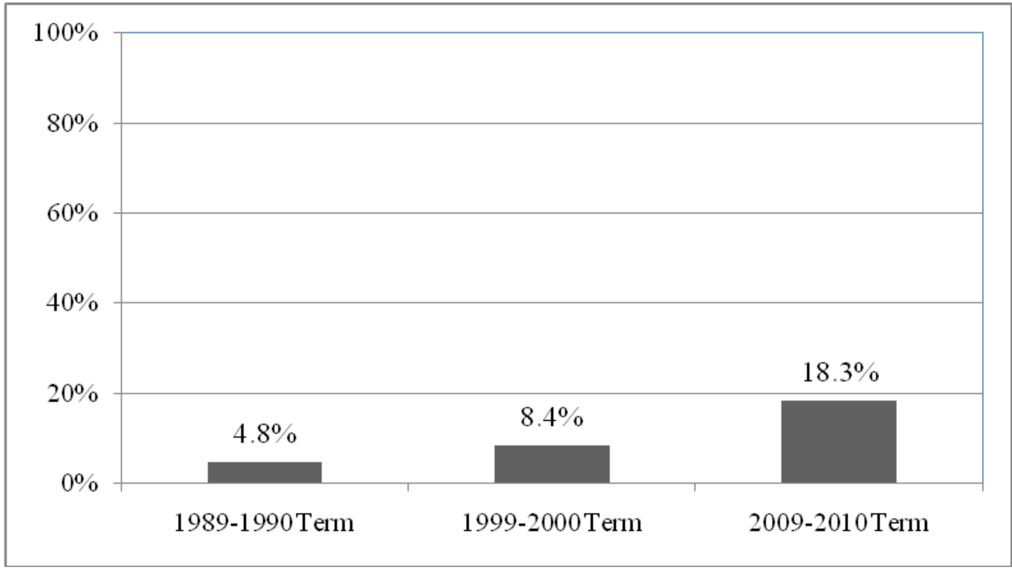
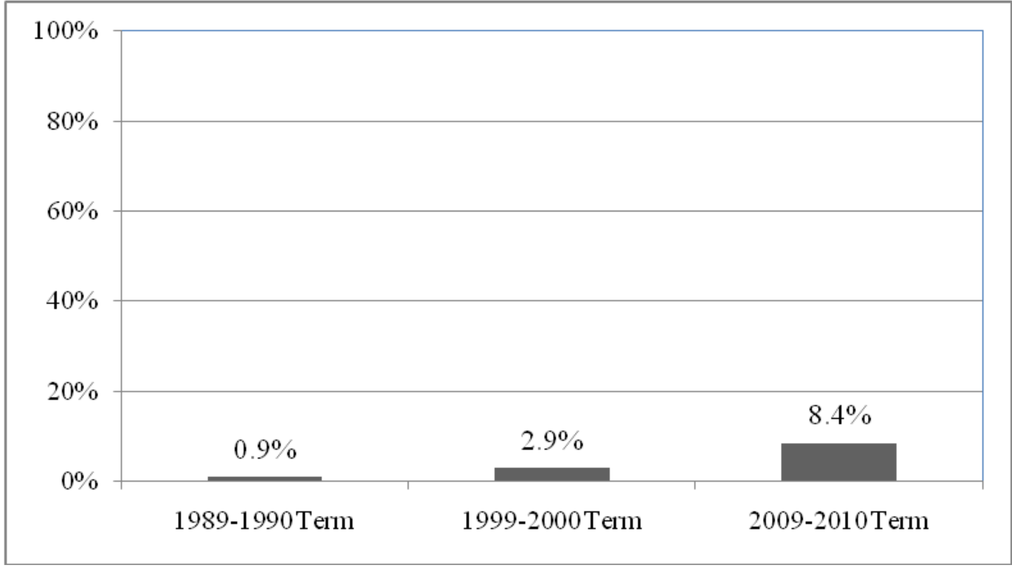


Figure 2.4: Percentage of Briefs Citing Transnational Legal Sources



I have also provided a table with the percentage of different categories of briefs by term to provide a general overview of the variation of transnational sources in each term.

Table 2.5 Percentage of Briefs Filed in Each Term by General Category

General Categories by Relevance	1989-1990 Term	1999-2000 Term	2009-2010 Term
Briefs with Only Domestic Sources	94.4%	88.6%	74.6%
Briefs with Any Broadly Defined Transnational Source	4.8%	8.4%	18.3%
Briefs with Any Narrowly Defined Transnational Legal Source	0.9%	2.9%	8.4%

Although briefs including references to non-domestic sources still make up a small percentage of the material filed to the Supreme Court each term, this data indicates that their presence has grown significantly over the past three decades, with the percentage of briefs containing transnational legal sources climbing from 0.9% in the 1989-1990 term to 8.4% of the total briefs filed in 2009-2010. This provides additional evidence that these transnational sources are being used more frequently to frame the arguments presented by participants in Supreme Court litigation. And again, even if the briefs that include transnational legal arguments still constitute a small fraction of the hundreds or thousands typically filed in each term, the fact that their presence has grown substantially represents an important phenomenon that merits attention by legal scholars.

The Centrality of Non-Domestic Sources in Transnational Briefs

The final stage of my analysis in this chapter looks more closely at the briefs that I identified as including transnational legal sources. I categorized these as "relevant briefs" because they contained the non-domestic legal arguments that were the primary focus of this study. Although I have already illustrated the increase in the presence of these relevant briefs across terms as a percentage of the total number of briefs filed in each term, it is useful at this point to also note the total number of relevant briefs in each term, which follows. This provides a breakdown of the 117 relevant briefs that I will

analyze in detail in this section; detailed information on each of these relevant briefs, including the case in which they were filed, title, and a list of authors, is included in Appendix B. This data set of relevant briefs was also used to determine the parties responsible for introducing transnational legal arguments in Supreme Court litigation, and data on the authors of these briefs will be analyzed in chapter three.

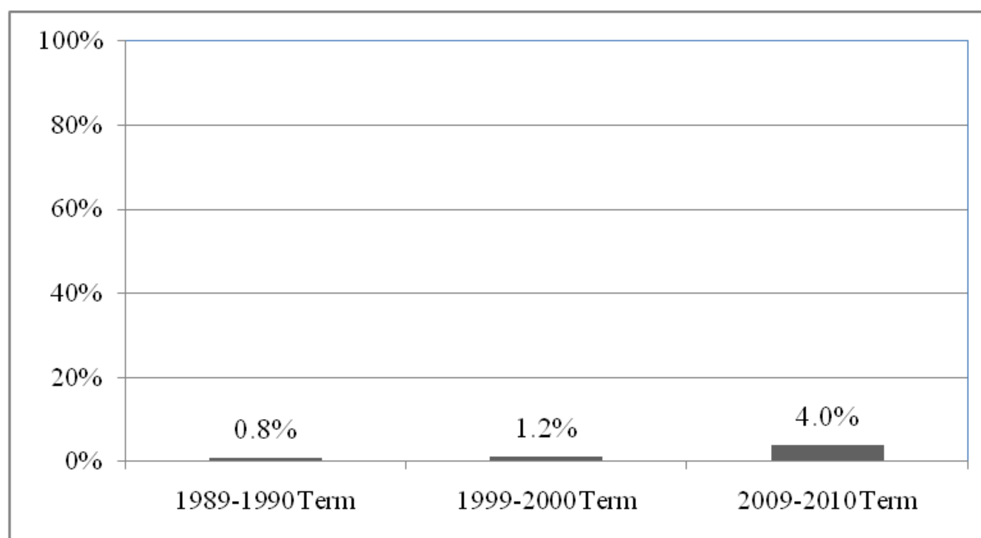
Table 2.6 Total Number of Relevant Briefs by Term

Term	Relevant Briefs
1989-1990 Term	11
1999-2000 Term	23
2009-2010 Term	83
Total	117

In looking at each of these relevant briefs, I wanted to determine how central the transnational legal sources were to the arguments being made by the brief authors. In order to calculate this, I measured the total number of sources listed in the table of authorities of each brief, identified the number of those that were counted as transnational legal sources, and calculated the percentage of transnational legal citations as a percentage of total citations in each brief. When I first did these calculations, I looked only at non-case citations because I assumed that only precedent cases from the U.S. legal system would be included in this category. Because of the large number of precedent cases typically cited in a brief's table of authorities, I did not want to include this category of citations and dilute the prominence of transnational citations among other similar non-case citations. When looking through case citations in my relevant briefs, however, I did find that some listed foreign court cases under the "cases" heading in the table of authorities. As a result, my first analysis of this section focuses specifically on

this unexpected finding, measuring transnational case citations as a percentage of total case citations for each term, indicated below.

Figure 2.5 Percentage of Transnational Case Citations in All Relevant Briefs by Term

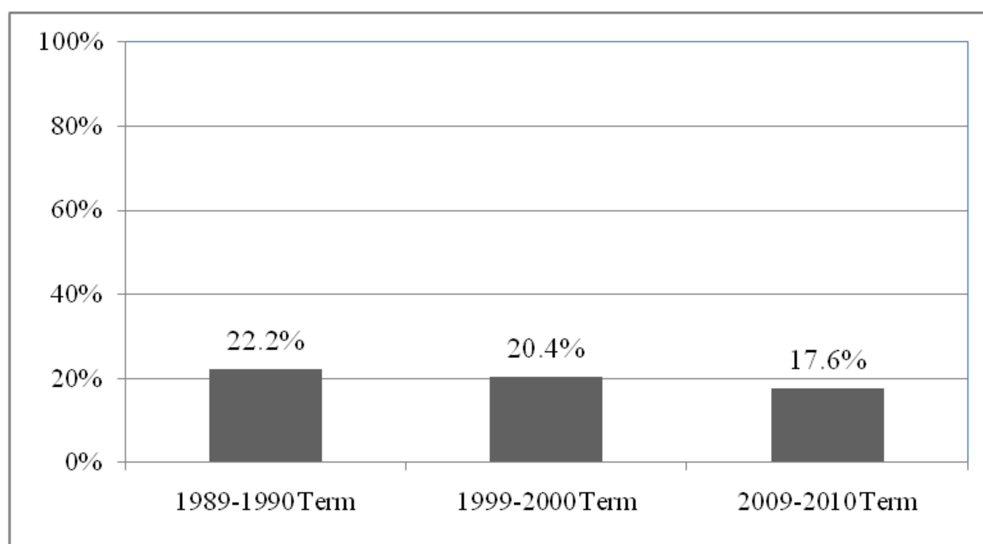


Although the percentage of non-domestic cases cited in the relevant briefs was very low in each term, the 500% increase from the first term analyzed to the third two decades later is noteworthy in that it shows that participants in Supreme Court litigation have become more likely to cite the decisions of foreign courts in support of their arguments. Non-domestic rulings still do not constitute a significant part of the cases cited in transnational briefs, but their inclusion has become more common.

After noting the unanticipated rise in transnational case citations, I continued with my analysis of the centrality of transnational legal arguments in my set of relevant briefs by focusing on non-case citations. Non-case citations are listed in a brief's table of authorities under any of the usual categories, including treaties, statutes, and miscellaneous, with the exception of precedent cases. My data illustrating the percentage

of non-case citations that were transnational in nature across the three terms that were examined is below.

Figure 2.6 Percentage of Non-Case Transnational Citations in All Relevant Briefs by Term



This analysis yielded an interesting finding, in that the centrality of the transnational citations in my set of relevant briefs appeared to decline over the three terms that I examined. In the 1989-1990 term, 22.2% of the non-case citations listed across the 11 relevant briefs that I examined were not domestic. That percentage dropped slightly to 20.4% in the 1999-2000 term, and again to 17.6% in 2009-2010. However, I realized that one explanation for this decline might be that over time, the number of total citations in the relevant briefs had grown. This might indicate that although the percentage of transnational citations had declined slightly, participants in litigation were more likely to cite transnational sources in more substantial briefs, or at least those using a greater number of sources to make their argument. I was able to test this hypothesis by

calculating the average number of citations per relevant brief from my descriptive statistics on the briefs, shown below.

Table. 2.7 Data on the Average Number of Citations Per Relevant Transnational Brief by Term

Measurement	1989-1990 Term	1999-2000 Term	2009-2010 Term
Total of Relevant Briefs	11	23	72
Total Number of Citations in All Relevant Briefs	153	422	1779
Average Number of Citations Per Relevant Brief	13.9	18.3	24.7

I did not have a base average for the number of citations in non-relevant briefs from my study, meaning those that were coded but not found to include any relevant transnational source, because there were over 2,900 of those non-relevant briefs across all three terms and it would have been too time-consuming to do the same counts on that many documents. However, the comparison of the averages for the relevant briefs across the three terms is useful in that it does support my hypothesis. If we accept that the average number of total citations per brief is an indicator of how much content there is in an average brief from that set of data, this would indicate that the amount of content in briefs containing transnational legal sources has grown significantly over the twenty year period of my study, rising from 13.9 citations per brief in the 1989-1990 term to 24.7 citations per brief in the 2009-2010 term. When considered alongside evidence of the significant increase in the percentage of Supreme Court merit and amicus briefs that contain transnational sources, the larger amount of content in these transnational briefs are a sign that the legal questions involved have become more complex and require participants in litigation to draw on a broader set of tools to address them. This conclusion can be

verified further by looking back at the original level of analysis, the cases themselves, to determine if those that included briefs with transnational legal sources also had a higher number of briefs per case than purely domestic cases, and if the average number of briefs per relevant transnational case grew across the three terms. This data is shown in the following table.

Table 2.8 Average Number of Briefs Per Case by Case Type

Term	Average Number of Briefs Per Domestic Case	Average Number of Briefs Per Relevant Transnational Case
1989-1990 Term	10.3	24.8
1999-2000 Term	9.1	16.7
2009-2010 Term	9.5	23.5

Although the average number of briefs per transnational case varied across the three terms, these averages were consistently higher than the average number of briefs for domestic cases. Just as transnational briefs are more likely to include a higher number of legal sources, this additional data suggests that cases involving a transnational element can be expected to attract a higher number of briefs than purely domestic cases. Not only do transnational cases generate a greater amount of legal content for the Supreme Court, but they also appear to attract a higher level of participation by amicus parties, a hypothesis that is explored in the next chapter.

2.5 Conclusion

The data presented in this chapter demonstrates that the judicial process and Supreme Court litigation is increasingly subject to transnational influences in ways, and through channels, not captured by existing debate on judicial transnationalism. My different

analyses have provided evidence of the globalization of U.S. Supreme Court litigation, characterized by a considerable rise in the percentage of case briefs that include transnational legal arguments over the past two decades. By determining that the legal arguments introduced in Supreme Court litigation through merits and amicus briefs have become increasingly likely to draw on non-domestic sources, this chapter provides a new set of considerations for those interested in the effects of judicial transnationalism in the context of the U.S. legal system. In considering the extent to which American courts, including its highest tribunal, are likely to respond to non-domestic law, it seems useful to consider the institutional channels through which it can be formally included in the judicial process. The findings in this chapter also have two important implications. First, it provides empirical support for the widespread observation that the law interpreted by the contemporary Supreme Court has become more complex and likely to involve transnational issues. Second, it indicates that those involved in the judicial process, at least at this highest level, have become more likely to employ transnational sources to frame their legal arguments. In the next chapter, I will examine the sources of these transnational arguments to determine if their presence can be explained by a growth in the level of transnational participation in Supreme Court litigation, or if they indicate a shift by domestic legal actors toward a more globalized perspective on law.

CHAPTER THREE

Foreign Friends of the Court?

Sources of Transnational Legal Arguments in Supreme Court Litigation

3.1 Introduction

In 2010, the United States Supreme Court announced its decision in *United States v. Stevens*, a case on animal cruelty that had attracted significant public attention. In it, the Court had been asked to overturn Robert J. Stevens' conviction under federal criminal statute 18 U.S.C. § 48, which had been enacted with the intention of prohibiting "the knowing creation, sale, or possession of depictions of animal cruelty with the intent to place them in interstate or foreign commerce for commercial gain." Although 18 U.S.C. § 48 had been targeted to combat the production and dissemination of "crush videos," which typically depicted the torture of small animals with the purpose of appealing to a particular a sexual fetish, its broad language had allowed prosecutors to charge Stevens under the law for distributing dog fight videos, which he argued had been produced for an educational purpose. He therefore challenged the law on the grounds that it was overly broad and had unreasonably restricted his First Amendment right to free speech, and the case reached the Supreme Court on appeal. By the time oral arguments were heard in October 2009, the case had attracted widespread media attention, particularly among animal rights activists who wanted to see the act upheld (Humane Society of the U.S. Press Release, 4 September 2009). However, Stevens' position also garnered support, with groups like the National Rifle Association recognizing that the law could be applied to a broad range of otherwise legitimate material depicting harm to animals, including footage of hunting (National Rifle Association Press Release, 7 October 2009).

One aspect of the activist involvement in that case was overlooked, however: its international component. In one of the amicus briefs filed in support of the federal government, the Animal Legal Defense Fund invoked a number of foreign animal cruelty prevention measures that had been enacted worldwide in order to show that there was international precedent for the similar one in question. Citing over 30 foreign or international statutes, ordinances, acts, and reports in support of that argument, the organization framed the question before the Supreme Court from a transnational perspective, as reflected in the following passage from its brief:

> [T]here is an emerging international consensus in prohibiting cruelty to animals. The following represent selective examples of countries that expressly prohibit cruelty towards animals by either statute or constitutional provision: Australia (New South Wales), Bangladesh, Barbados, Brazil, Bulgaria, Canada, China (Hong Kong), Czech Republic, France, Germany, India, Israel, Italy, Jamaica, Kenya, Malaysia, Malta, New Zealand, Pakistan, Philippines, Poland, Saint Lucia, Singapore, Sri Lanka, Sweden, Switzerland, Taiwan, Turkey, Uganda, the United Kingdom, Vanuatu, Zambia, and Zimbabwe. Additionally, the European Convention for the Protection of Pet Animals—signed by 19 countries—decrees that humans have "a moral obligation to respect all living creatures and prevent cruel treatment."

Because the final ruling did not include references to the foreign sources cited in the Animal Legal Defense Fund's brief, their presence went unnoticed. This is despite the fact that they represent part of the growing number of transnational legal arguments which, as the analysis in the previous chapter indicated, have become increasingly common in Supreme Court litigation over the past two decades. What is truly significant about this particular brief, however, is that those transnational arguments were actually introduced by domestic, not foreign, actors. This suggests that in the U.S. context, the globalization of law is not only represented by a more complex and transnational set of

issues that its courts must address, but has also been accompanied by the use of transnational litigation strategies by domestic actors.

The goal of this chapter is to explore that possibility, examining the source of the transnational arguments identified in my prior analysis of the 1989-1990, 1999-2000, and 2009-2010 terms in order to reveal another structural element of judicial transnationalism in the context of the U.S. Supreme Court. If American participants in Supreme Court litigation have become more likely to adopt global arguments to make their case, it represents an important change in both the judicial process and the strategies of the larger profession that has the potential to reframe the debate on judicial transnationalism in the U.S. context. More generally, however, even non-domestic involvement in the globalization of American law has important implications, as it might raise new questions about the appropriate role of such involvement in domestic litigation. By examining the origins of the transnational legal arguments found in my three terms and the role that they play in case briefs, I will be able to provide greater insight into both the substance of the transnational cases identified in my analysis as well as the circumstances in which transnationalism is most commonly used as a strategy in litigation.

3.2 Sources of Transnational Participation in National Litigation and the Use of Transnationalism as a Litigation Strategy

Because conventional accounts of transnationalism in the context of the U.S. Supreme Court focus primarily on the citation of foreign materials as an outcome of judicial decision making, the origins of those materials are rarely considered despite the fact that they are often cited directly from case briefs, as in the controversial *Lawrence* and *Roper*

decisions. As noted in the previous chapter, these case briefs and their authors play an important role by introducing new legal arguments to the Court, but scholars interested in non-domestic influences on American law have not considered participants in the judicial process as a potential source of those influences. Even if one were to focus on the choices that justices make regarding the role of foreign law as the most significant measure of transnationalism on the Supreme Court, it seems obvious that a better understanding of the legal arguments available to them in their work would facilitate a better understanding of those choices.

As a result, one of the tasks involved in determining the source of the transnational legal arguments found in my set of cases was to find a meaningful way to capture both the origin of the parties responsible for introducing them as well as the type of participation that characterized their transnational litigation strategies. My expectation at the outset of this project was largely informed by the depiction of transnational legal activism as an international phenomenon, in that I hypothesized that any increase in the number of transnational legal arguments over the twenty year period that I examined would correlate with increased levels of participation in litigation by non-domestic actors. As noted in chapter one, the very definition of judicial transnationalism by international scholars suggests that legal mobilization and participation has become more global in form and scope, with more actors from outside a country developing an interest and stake in its internal matters. This expectation is actually shared by many critics of comparativism, although most do not directly address the role of external actors in encouraging foreign citations. Ken I. Kersch (2004) is one scholar that does, arguing that the contemporary practice of citing transnational legal sources reflects, at least in part, the

efforts of a global cosmopolitan elite to influence American constitutional interpretation. Responding to the contemporary rise of transnational civil society, Kersch notes that transnational activists have been successful at recruiting traditionally domestic advocacy groups like the American Civil Liberties Union to join their movement and frame national legal reform goals as part of a larger "global governance" agenda aimed at "moral universalism" (2004: 19). As a result, Supreme Court responsiveness to non-domestic influences is not merely an issue of judicial decision making, but represents the blurring of the "transparent lines of responsibility and authority" that are vital to maintaining the rule of law in our constitutional system. From a similar angle, the introduction of transnational legal practices and norms in national courts can be perceived as "top down," or "born of transnational advocacy, and then internalized by responsible lawyers, scholars, and human rights activists to refashion domestic society" (Bromund 2009: 2). It therefore seems useful to explore the role played by transnational actors in Supreme Court litigation, since evidence of their growing involvement in the judicial process can be interpreted as proof that judges are not alone in their efforts to push a cosmopolitan agenda, but are in fact influenced by global elites. If formal transnational participation in the judicial process, as either parties to cases or authors of amicus briefs, is responsible for providing sympathetic members of the Court with the resources to import their global agenda, this adds an important element to the debate on foreign citations that has not been adequately addressed by scholars.

However, despite the fact that multiple accounts of judicial globalization in the U.S., both sympathetic and critical, have advanced the hypothesis that it has been facilitated by transnational legal activism, there are two problems with this assumption.

First, the critical perspective just reviewed implies that all transnational elements of a case are directly related to a cosmopolitan agenda, which is weakened by the wide range of non-domestic legal arguments, often more mundane than divisive, identified in the previous chapter. In the fourth chapter, I will look more closely at the substance of the relevant transnational cases in my dataset and examine judicial attention given to the non-domestic elements of those cases in the Court opinions to determine under what circumstances their presence resulted in the type of controversy seen in the prominent comparativism cases. Evidence of non-controversial discussion of foreign and international law provides clear evidence that the globalization of law has presented the Supreme Court with new professional challenges, much as it had transformed the American practice of law.

Second, as already mentioned, it is not entirely clear that the transnational legal activists active in any given national arena, including the United States, are indeed primarily foreign. It is possible that national actors have sought to redefine the scope of their interests by looking abroad, as suggested by the *Stevens* case. In particular, there has been significant evidence of this dynamic in the area of human rights activism. In a 1989 treatise on human rights activism in the U.S. context, *The U.S. Constitution and Human Rights*, Richard B. Lillich was one of the early identifiers of transnational legal activism, which he defined as involving the strategy of "indirect incorporation" of international human rights norms in domestic constitutional jurisprudence. Suggesting that this strategy has been developed as an informal way to pursue the convergence of U.S. human rights practices with international ones, since a formal means is structurally unavailable, Lillich implies that human rights actors and judges have pursued informal

ways to achieve convergence because the formal relationship between international customary law and U.S. law is ambiguous. One of their strategies has therefore been to join and mobilize transnational networks and human rights coalitions, which would be an example of one way in which traditionally domestic legal participation has been globalized. The possibility of such cooperation merits examination in that it provides a more comprehensive account of the effects of globalization on the American judicial process, revealing the sources and channels of transnational influence on Supreme Court jurisprudence. Regardless of whether the presence of a new set of global actors interested and involved in the American legal process is considered a positive or negative development (for that is entirely a normative calculation), this finding would provide a new focal point for those interested in transnational influences on the Court.

If these transnational arguments have also, or even more frequently, been introduced by domestic actors, it would also suggest that they have become an increasingly common element of litigation regardless of the identity of participants in the process. Although the rise of transnational legal proficiency and awareness among the American legal profession might also represent the presence of a domestic cosmopolitan elite to some, this concern would in itself contribute a new set of issues to the debate on transnationalism in the U.S. context as previously suggested, by shifting the focus away from its influence on individual decision making to its sources in litigation and their role in the judicial process. There is already evidence that the American law profession has become more involved in transnational litigation, as briefly discussed in the previous chapter. Not only do many U.S. law firms now have a presence abroad (Kelemen and Sibbitt 2004; Silver 2009), but those who practice law at home are more likely to have

training in international law as a result of the globalization of the American law school curriculum (Born and Rutledge 2007; Picker 2007; Silver 2009). Indeed, cooperation between both domestic and non-domestic actors is considered to be a key characteristic of transnational litigation as defined by Harold Honju Koh, one of the first scholars to define and study the concept. Koh is more specific about the nature of cooperation involved in this practice, arguing that transnational litigation requires a "transnational party structure" with equal participation by both "states and nonstate entities" (1991: 2371). However, he does acknowledge that the circumstances under which transnational legal arguments are more likely to be introduced in litigation vary, as "different classes of transnational litigants emphasize different goals" (1991: 2371). It therefore seems valuable to identify those circumstances in the context of the Supreme Court, since others have confirmed the growing presence of transnational litigation in the United States, arguing that it has become a "ubiquitous" and "significant part" of the American legal system (Baumgartner 2007: 1).

One reason that has been given for this growing presence is not only that domestic legal actors have become more likely to adopt transnationalism as a strategy in Supreme Court litigation, but that the Court is being presented with more transnational cases as the result of the application of those strategies on a global level. According to Samuel P. Baumgartner, this is the result of the globalization of litigant expectations:

> Litigants, especially repeat players in the global market place, expect their lawyers to do the best they can in securing a favorable outcome. Today, this means not only excellent advice and representation within a particular jurisdiction, but also sufficient knowledge about the advantages and disadvantages of litigating in foreign countries (2007: 799).

Indeed, there is a small body of legal scholarship focused on the topic of transnational litigation that has observed the presence of a global cache of lawyers who engage in what is known as venue shopping. Venue shopping is defined as the practice of litigating cases in different jurisdictions in order to maximize their client's potential gains (Burke Robertson 2010). And the American venue has been described as "magnetic," attracting foreign parties "through generous discovery, higher damages, and contingent fee representation" (Burke Robertson 2010: 1085).

By examining changes in the source of transnational legal arguments over the 1989-1990, 1999-2000, and 2009-2010, it should be possible to determine if this particular form of participation has become more common in Supreme Court litigation. If so, it may represent yet another structural element of judicial transnationalism not previously captured by discussion of its effect on the Court, which has the potential to reveal both the forms and goals of participation that results in the introduction of non-domestic legal issues in the U.S. judicial process.

3.3 Methodology

Identifying Relevant Cases and Briefs

In this chapter, the second part of my empirical study, I examine the actors involved in the relevant cases and briefs identified in the previous chapter. In review, the relevant cases were those found to include at least one brief containing a reference to a transnational legal source in its table of authorities. I found a total of 37 relevant cases across the three terms that I examined; 6 in the 1989-1990 term, 10 in the 1999-2000 term, and 21 in the 2009-2010 term. These cases, which are described in detail in the

next chapter, spanned a broad range of legal questions involving economic, political, and social concerns, but each involved at least one participant who chose to frame those concerns from an international perspective by drawing on transnational legal sources. Such participants introduced those sources in either a merits brief, as a party to the case, or in amicus curiae brief as an author.[1] My analysis of cases therefore draws on data from these relevant briefs, which were also identified in the previous chapter and included those containing at least one transnational legal source in their table of authorities; these relevant cases and briefs are numbered by term in the following table. By analyzing the identity of the authors of these relevant briefs, my goal was not only to determine the source of the change in the substance of legal arguments found in the previous chapter, but also determine patterns in the authorship of briefs for greater insight into role of transnationalism as a strategy in litigation.

Table 3.1 Number of Relevant Cases and Briefs Analyzed for Authorship in the 1989-1990, 1999-2000, and 2009-2010 Terms

Data Type	1989-1990 Term	1999-2000 Term	2009-2010 Term
Relevant Cases	6	10	21
Relevant Briefs	11	23	83

Coding the Relevant Briefs

During my first pass at coding, the same in which I identified the presence of transnational legal arguments in case briefs as described in the previous chapter, I also noted which briefs had at least one contributor of non-domestic origin, meaning that they were not a strictly American entity. As already noted, these contributors were either a

[1] From here forward, I will refer to authors of amicus curiae briefs as “amicus filers” or “amici.”

party to the case, as either the petitioner or respondent filer of a merits brief, or an amici. The expectation was that the briefs flagged in that first pass would then be subjected to further analysis of authorship according to a more sophisticated classification scheme.

Coding the participants was done by analyzing three aspects of the briefs. The most important was the title of the brief, which includes at least the lead author if not all authors. Merits briefs, both by the petitioner or respondent, were generally quite easy to analyze. Transnational actors were usually identified quite clearly in the front matter of the brief. For amicus curiae briefs, however, the identification of transnational authors was not so simple. In many amicus briefs, the title page would list one or two primary authors and then refer to others as “et al.” In such briefs, participants were listed in one or two of three possible places. In some, a full list of authors was given on the inside cover of the brief or in a list at the end. Others contained a section titled “Interest of the Amici.” Where present, this section usually stated the nature of the amici and explained why they had an interest in the case before the court. It was necessary to examine all of these sources to make my first pass determination that there was some degree of non-domestic authorship or participation involved. In this first pass, a single author that might possibly be non-domestic was sufficient for flagging the brief for additional analysis.

Challenges in Creating a More Complex Categorization of Actors by Origin

Of the briefs that had been flagged for additional analysis because of the uncertain identity of one or more of its authors, many contained references to individuals, organizations, or other entities that I did not recognize and was therefore not able to

categorize immediately. Most commonly, I searched the Internet for references when the brief itself could not provide conclusive proof. Once I began to research these ambiguous examples, I discovered that there are significant challenges to creating a reliable categorization of participants in litigation by their origin or national identity. Not surprisingly, I found that my set of transnational cases involved a diverse set of actors, many of whom were not clearly domestic, nor strictly non-domestic. In essence, this diversity was in itself evidence of transnationalism; scholars have recognized the growing number of individuals, organizations, institutions, and corporations whose identity transcends national borders as a key characteristic of contemporary transnationalism (Slaughter 1998).

With individuals, for example, some were of foreign origin but were scholars at American universities, and it was impossible to determine if they were American citizens or still citizens of their land of birth. Organizations presented similar problems. Over the course of coding, I came across three organizations that were participants in all three terms and filed amicus briefs, often together, in cases involving the sentencing of criminals: the International Municipal Lawyers Association, the International Association of City Managers, and the International Association of Chiefs of Police. Upon further examination, all three were clearly American-based organizations, but each claimed on their website to have strong international membership. However, their organizational descriptions did not include demographic statistics on membership, and the general gist of the web-site was American oriented. Another organization that was present in several of the cases that I analyzed was the D.C.-based Rutherford Institute, which also described itself as having an international membership and orientation.

Again, the institution's website did not provide any information that made it possible to judge the extent to which its work was internationally oriented. Together, these four organizations were the most frequent contributors to transnational briefs, but it remains unclear if they were truly transnational in scope and identity, especially because they often appeared together along with other clearly American think tanks and organizations. Although not appearing as often, unions presented a similar challenge. The Teamsters International, for instance, is almost entirely American in its membership, with the exception seeming to be Canadian workers who mostly seem to be employed by Canadian subsidiaries of American-owned firms.

When it came to companies, it was also impossible to determine the exact origins of many seemingly international firms because of the lack of transparency regarding their ownership. Even in the "Interest of Amici" section of briefs, there was most often too little information about the companies to determine where they are based. In some cases, amici seem to be American-based subsidiaries, but it was difficult to ascertain whether they are wholly or only partly owned by a foreign parent, and if partly owned whether the foreign entity has a controlling or minority interest. An illustration of this problem is found in *Morrison v. National Bank of Australia*, the 2009-2010 case in which several briefs included citations of foreign law. In that case, the dispute was whether compensation could be sought in American courts for losses suffered by mostly Australian stockholders in an Australian company. The National Bank of Australia's stock price had plummeted when it was revealed that a wholly-owned American subsidiary, HomeSide Lending, based in Florida, had falsely stated its finances. The first question, in regard to coding, was whether the National Bank of Australia should be

coded separately from its HomeSide Lending subsidiary as a foreign firm. And should HomeSide be counted as an American firm? This issue was complicated by the fact that when the fraud occurred, HomeSide had been owned by the Australian bank, but by the time the suit was filed in American courts it had been purchased in a fire sale by Washington Mutual, an American firm.

However, not even the term transnational could accurately capture the identity of some of these complex cases, which could only be described in more descriptive terms. As a result, I determined that it would be difficult to make any meaningful assessment of changes in the source of transnational legal arguments across my three terms based on a categorization of actors by origin. Rather, I realized that I could establish a richer description of the sources of those arguments by looking at the level of each relevant brief to determine the nature of the participation involved. Because I had already decided that my analysis of transnational participation across the three terms would focus on only the 117 relevant briefs found to contain transnational legal arguments, I was able to take the time necessary to go back and code each one according to their authorship: those with exclusively domestic authorship would be considered "Domestic," those with exclusively non-domestic authorship would be considered "Foreign," and those with some combination of both domestic and non-domestic authors, including those that were truly transnational in nature, would be considered "International." I felt this would provide a more accurate picture of the role played in the introduction of transnational briefs in Supreme Court litigation. A breakdown of my set of relevant briefs by authorship is listed below.

Table 3.2 Breakdown of Relevant Briefs by Authorship Category in the 1989-1990, 1999-2000, and 2009-2010 Terms

Categories of Relevant Briefs by Authorship	1989-1990 Term	1999-2000 Term	2009-2010 Term
Exclusively Domestic Authorship (American)	11	17	60
Exclusively Non-Domestic Authorship (Foreign)	0	2	13
Both Domestic and Non-Domestic Authorship (International)	0	4	10

3.4 Data and Analysis

Looking at the subset of relevant cases and briefs that have indicated growth in the number of transnational legal arguments introduced in Supreme Court litigation over the past two decades, my analysis in this chapter was originally intended to determine if the source of those arguments were primarily domestic or non-domestic actors. As a result, my first method of coding these cases and briefs was to categorize them dichotomously as either involving exclusively domestic participation or including some form of non-domestic participation, and my findings are illustrated in the following figures.

Figure 3.1 Percentage of Relevant Cases with Exclusively Domestic Participation by Term

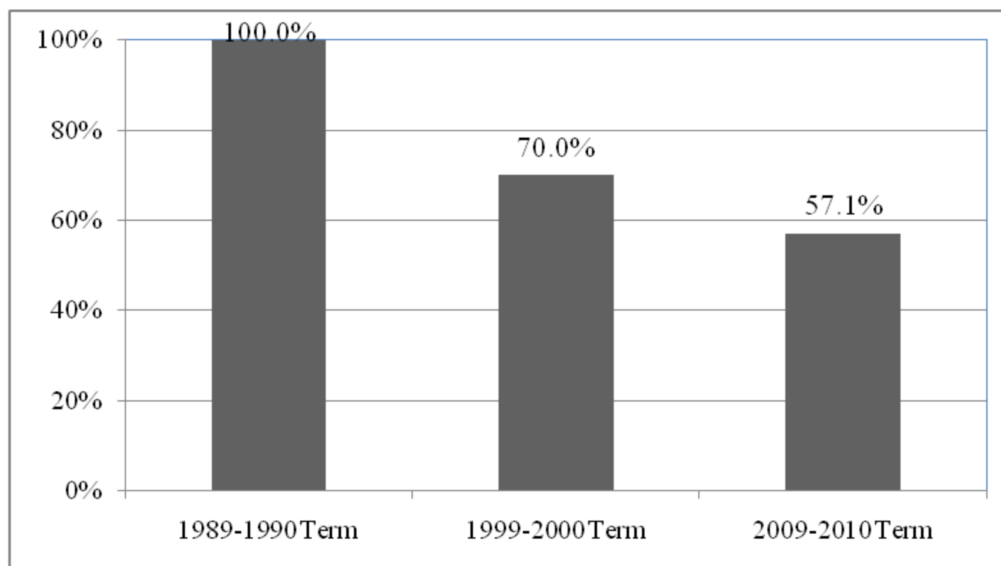
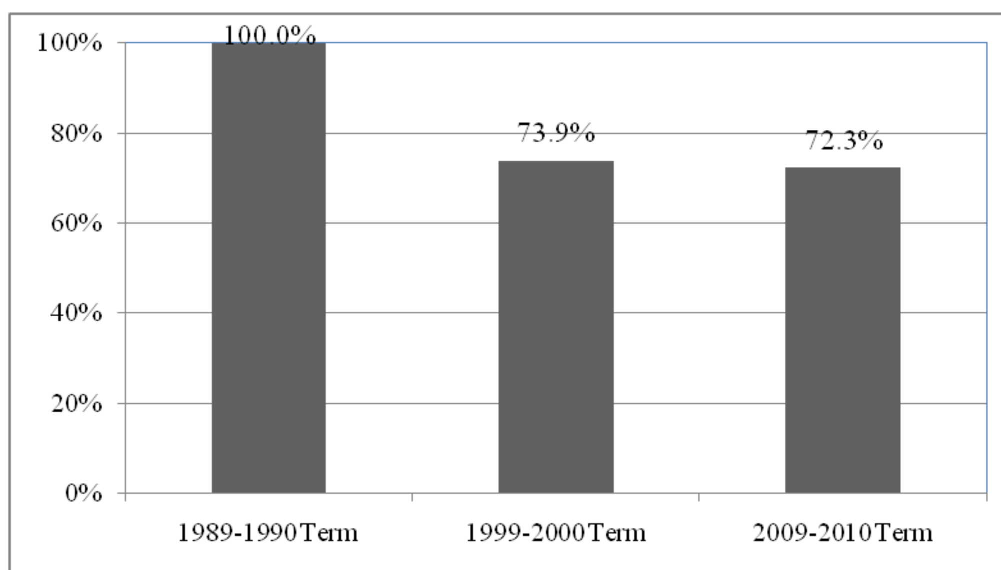


Figure 3.2 Percentage of Relevant Briefs with Exclusively Domestic Participation by Term



The most significant finding in my analysis of this categorization was that there was an overwhelming trend of exclusively domestic participation across all terms. In the 1989-1990, all of the actors involved in the relevant cases – including the authors of each relevant brief – were American. The percentage of cases with exclusively domestic participation did go down gradually across the two later terms, but they still represented a majority in the 2009-2010 term at 57.1%. And the percentage of relevant briefs authored solely by American actors remained very high at 73.9% in 1999-2000 and 72.3% in 2009-2010.

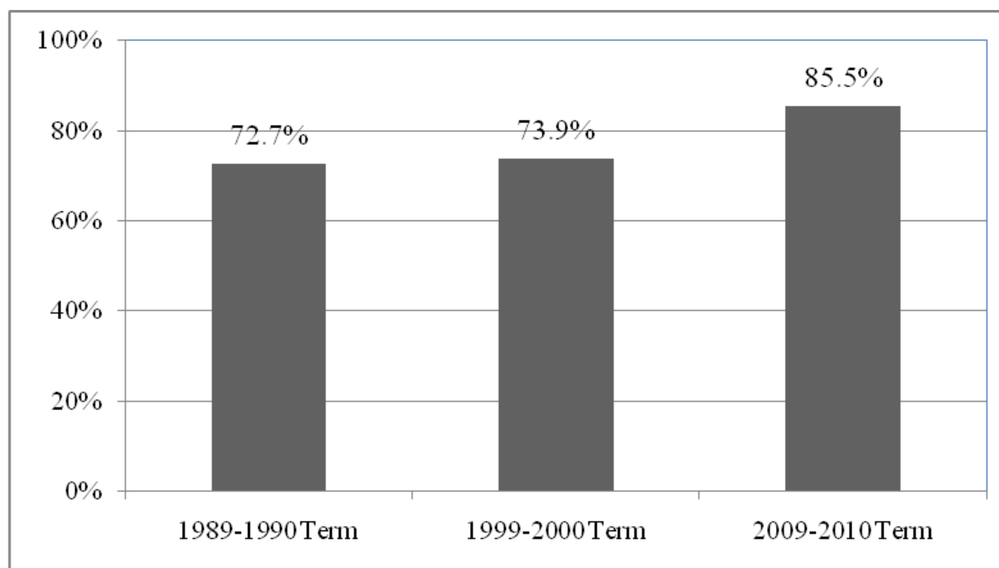
Although the dichotomous categorization employed here provided useful information about domestic participation, it did not offer any insight into the complexities of non-domestic participation. It failed to capture, for example, the fact that many of the actors first categorized as non-domestic were not strictly foreign or international, were often engaged in transnational activities, or had a complicated set of ties to both American and overseas constituencies. It therefore seemed more useful to look more closely at these transnational briefs and consider their source at a higher level of analysis than the identity of individual actors.

The Use of Transnational Briefs by Litigants vs. Amici

First, I first wanted to determine if the source of these briefs had more frequently been litigants or amici. As exhibited in the previous chapter, contemporary accounts of growing amicus participation were confirmed by the significant increase in the percentage of case briefs filed by amici across the three terms that I examined. I

expected this trend to follow when calculating the percentage of relevant briefs authored by amici per term, as illustrated below.

Figure 3.3 Percentage of Transnational Briefs Filed by Amici



With this data, my work not only provides additional evidence of growing amicus participation in Supreme Court litigation, but it also indicates that amici, not litigants, are by far the most common source of transnational legal arguments. The implications of this finding will be discussed in more detail as part of the descriptive analysis that follows.

Transnational Briefs by Authorship

To capture the source of these relevant briefs in terms of participation in litigation as opposed to the identity of individual actors, I coded them based on the categories of authorship described previously: those with exclusively domestic participation were categorized as “Domestic,” those with exclusively non-domestic participation were

categorized “Foreign,” and those with both domestic and non-domestic authors were categorized as “International.” The percentages in each category are tabulated by term below.

Table 3.3 Percentage of Relevant Briefs by Authorship Category in the 1989-1990, 1999-2000, and 2009-2010 Terms

Categories of Relevant Briefs by Authorship	1989-1990 Term	1999-2000 Term	2009-2010 Term
American Authorship	100.0%	73.9%	72.3%
Foreign Authorship	0.0%	8.7%	15.7%
International Authorship	0.0%	17.4%	12.0%

Although some of the same trends from the earlier figures are present, with exclusively domestic participation in the 1989-1990 term and similarly high percentages across both of the two later terms, this analysis revealed that the other two forms of participation found in transnational briefs varied greatly. First, although there was a consistent majority of exclusively domestic authored briefs across all three terms, non-domestic briefs were equally likely to be filed by domestic and non-domestic actors working together as they were by foreign actors working alone. This indicates that only a small percentage of the transnational briefs examined involved strictly non-domestic participation, providing additional evidence of the central role still held by domestic actors in Supreme Court litigation, either employing transnationalism independently or in collaboration with external actors. This not only highlights the more complex nature of those actors, which was already identified in my coding, but also suggests that participation in contemporary transnational cases is, aptly, just as likely to be transnational in nature as it is foreign. In order to shed more light into this finding, as

well as explore the high number of strictly American transnational briefs and transnational amicus briefs, I will now turn to my descriptive analysis of participation in the relevant briefs by term.

1989-1990 Term: Detailed Findings on Participation

As shown in the earlier table, participation in all of the six relevant cases and 11 relevant briefs of the 1989-1990 term was exclusively American. In the case with the highest number of transnational citations from that term, *Cruzan v. Harmon*,[2] for example, they were introduced in six amicus briefs, all authored by American organizations. This case involved a woman, Nancy Cruzan, who had been critically injured in a car accident and as a result, had been in a persistent vegetative state for four years when her family asked the hospital to remove life support. Without clear and convincing evidence that the patient would have supported this action, the Missouri Department of Health refused to grant the request and the family challenge's to that decision reached the Supreme Court on appeal.

The organizations that authored the six relevant briefs identified in the case included the Society for the Right to Die, the United States Catholic Conference, the American Academy of Medical Ethics, Frances Ambrose, the Center for Catholic Policy, and Nurses for Life of Missouri. In their amicus curiae briefs, these organizations primarily framed their position by citing Vatican law, although one included foreign laws pertaining to end-of-life policies.

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[2] This case is more commonly known as *Cruzan v. Director, Missouri Department of Health*, but is referred to by the name used for the purposes of coding, which is that listed in the *Supreme Court Reporter*. From this point forward, all case names cited are in the form found in the Supreme Court Reporter, and details on each can be found in the Appendix B.

The findings in this term are interesting, in that they show that domestic organizations were already engaged in the practice of framing their legal arguments from an international perspective at the beginning of the period of interest. However, this only occurred in a miniscule percentage of the cases heard in that term, suggesting that it was an extremely limited practice at the time. And with the *Cruzan* case, at least, this strategy primarily involved the citation of Vatican documents by American Catholic organizations. However, as the case pertained to human rights, the citation of transnational sources in *Cruzan* also supports scholarly observations that transnational networks had already mobilized over such issues, including end-of-life decisions and the death penalty, from the 1970s. It therefore merits separate consideration as the earliest one of my relevant cases in which transnationalism was used to advocate a universal human rights arguments; a discussion of this subset of transnational human rights cases will be discussed later in this chapter.

In the five other relevant briefs from the 1989-1990 term, which were found in the term's four other relevant cases, American actors were also exclusively responsible for introducing transnational sources and, as already noted, they were more likely to do so as litigants rather than amici. One such example is *U.S. v. Verdugo-Urquidez*, a case in which the U. S. searched the home of a Mexican citizen who had been arrested and brought to the United States for trial. In *Verdugo-Urquidez*, both the petitioner, the Solicitor General of the United States, and the respondent cited the Mexican Constitution, while the Solicitor General also cited specific Mexican laws. The authors of the two amici briefs, however, did not cite any transnational sources. In *Sisson v. Ruby*, an American's yacht anchored in a Lake Michigan marina burned as a result of faulty

maintenance, resulting not only in the near total loss of the boat but damage to other yachts and the harbor. Mr. Sisson attempted to limit his liability from suits by the marina and other yacht owners by arguing that the International Maritime Law was applicable and thus limited his liability to the value of the boat after its salvage ($800). The Supreme Court upheld lower courts that he was not protected by the International Maritime Law but subject to state and federal statutes. In this case, it was again only a litigant who invoked international law; none of the six amici briefs raised transnational law. This will change over the next two terms examined, as the relevant cases not only become more likely to involve international participation but are characterized by a higher number of amici responsible for the introduction of transnational legal arguments.

1999-2000 Term: Detailed Findings

A decade later, the majority of transnational cases still involved exclusively domestic participants. In the 10 relevant cases identified in this term, only three, or 30%, had some form of non-domestic participation, while of the 23 briefs citing a relevant transnational source drawn from those cases, only six, or 26.1%, included foreign or international authorship.

One of the relevant cases with exclusively American participation was *Rice v. Cayetano*. In this case, it is not surprising that domestic parties were responsible for introducing non-domestic arguments, because these arguments fell under the category of Antecedent Law. When issues arise that have their origins in times when a state was an independent nation, it is to be expected that laws from that period of independence might be invoked. However, two other American-authored briefs from the relevant cases of this

term are worth examining to further elaborate on a point raised in the discussion of the *Cruzan* case from the 1989-1990 term.

In *Troxel v. Granville* and *Mitchell v. Helms*, Catholic organizations filed amicus briefs in cases containing numerous citations to Vatican documents and Papal declarations. In *Troxel*, the issue before the court concerned the right of third parties to file suits demanding child visitation rights. In an amicus brief filed in that case, the Society of Catholic Social Scientists state that "it is… a fundamental principle both of Catholic social teaching and of constitutional law that 'the child is not the mere creature of the state'" (2). In another section, amidst several citations to Vatican documents, this organization also suggests that a "parent's natural moral duties, obligations, and responsibilities carry with them moral rights which the state is obligated to respect and protect" (6). Throughout this brief, the amici argue that natural or moral law must be respected by the government, and they cite Vatican sources not just as supportive of that opinion but also as a documented set of "law" that is critical in defining those natural and moral laws. In *Mitchell*, the case involved the constitutionality of using federal funds to support education programs in private schools, namely Catholic schools in the state of Louisiana. The Catholic League for Religious and Civil Rights looked to similar religious sources in that case, referencing nine Vatican documents out of a total of fourteen combined citations in an amicus brief arguing that the use of federal funds in private, Catholic schools for general educational purposes does not constitute federal promotion of a particular religion. In this brief, Vatican documents are cited not so much to define broad religious principles as to illuminate the role of various religious authorities in the operation of church schools. The argument, in some respects, uses the

Vatican documents to show that religious leaders of the church have nominal responsibility for the management of the church schools, but that they do not impose strict religious control over secular aspects of the curriculum for which federal funding indirectly provided some support. In both of these cases, therefore, domestic actors clearly see a transnational source – in this case, one with an ambiguous political/religious status before the United States government – as being one that they have justification for citing.

Another interesting finding from this term, already previewed, is that very few of the relevant briefs identified were exclusively authored by foreign actors. Of the six with some form of transnational participation, only three had exclusively foreign authors; those with exclusively foreign authorship therefore only accounted for 8.7% of the relevant briefs. These foreign briefs were filed in the case with the most transnational citations in the term, *U.S. v. Locke,* which was very clearly transnational in nature. This case questioned whether a state, Washington, could enact laws more restrictive than federal statutes regarding the types of oil tankers that could anchor in state ports. For this case, nine briefs were filed that included transnational legal arguments; five of those transnational briefs were authored by domestic actors, two had a mix of domestic and non-domestic authors, and two had only non-domestic authors. Among the domestic filers of briefs with transnational references in this case were four parties against the state of Washington, two of which were fishing or maritime trade organizations and the other two of which were briefs filed by the United States as petitioner. Only one brief was in support, that of the state of Alaska. All three of these government briefs cited various

treaties and conventions regarding life and safety at sea as well as one dealing with pollution by maritime vessels.

In two amicus briefs from the *Locke* case, domestic and foreign trade associations joined together to argue against the more restrictive laws of the state of Washington. In another, fourteen European nations also joined together to oppose the state's right to enforce stricter standards, while a fourth with that same argument was filed by Canada independently. In all of these cases, it appears that organizations and governments that joined together were representing their clients, or national companies, to ensure that international trade would not be hampered by having to deal with myriad local laws that would have been difficult to discover, let alone abide by. In that context, it seems natural for them to have cited various international conventions and treaties, arguing that those represented adequate protection and thus nullified any need for more stringent standards applied by an individual state.

2009-2010 Term: Detailed Findings

In the most recent term examined, 2009-2010, the rate of non-domestic participation went up slightly across the relevant cases, but still did not represent a majority; of the 21 identified in this term, nine, or 42.9%, had at least one non-domestic actor participate by authoring a brief. In the analysis of relevant briefs from this term, only 23 of the 83 briefs containing transnational sources, or 27.7%, included non-domestic participation. An overwhelming 72.3% of the relevant briefs in this term were therefore authored exclusively by American actors, indicating that the most common sources of transnational legal arguments are still domestic. And while 23 of the 83 relevant briefs

had some form of transnational participation, representing 27.7%, those with exclusively foreign authorship accounted for only 12.0%. At this point, I find it useful to structure my remaining analysis of the relevant cases and briefs encountered in the survey of 2009-2010 by focusing on two prevailing trends pertaining to both the sources of transnational litigation and the circumstances in which transnationalism was used by different actors that I was able to identify as significant in the Supreme Court's most recent completed term.

3.5 Prevailing Trends in the Use of Transnationalism in Contemporary Supreme Court Litigation

Domesticity of Transnationalism

My prior review of relevant literature on judicial globalization and transnational legal activism suggests that scholars working on this topic have failed to note the possibility that the internationalization of national legal systems might be driven primarily by domestic legal actors, either working alone or in collaboration with foreign counterparts. And in many, if not most, discussions of transnationalism in the U.S. context, such as those cited in the first chapter of this project, the lack of detailed information about the exact nature of the source of non-domestic influences on the Supreme Court has led to the impression that they signify an ideological struggle to bring America into line with international legal standards. There simply is little evidence in the terms studied to support that contention.

To a great extent, scholars of the American legal system and the Supreme Court need to reassess their arguments about judicial transnationalism to explain why domestic

actors are more frequently using transnational sources and partnering with non-domestic actors. It could be that an ideological element is still involved, but if so, it is unclear under what circumstances the different forms of transnational participation found in my analysis would be deemed either acceptable or illegitimate by exceptionalists or cosmopolitans. Along the same lines, domestic actors are not invoking transnationalism in support of broad, ideological goals in the vast majority of cases. The cases in which transnational arguments and actors have been found are largely mundane cases, many of them with economic or commercial themes.

One of the more interesting illustrations of the domestic utilizations of transnational arguments comes from the *Graham v. Florida* case (consolidated with *Sullivan v. Florida*) from the 2009-2010 term. In "Brief of Sixteen Members of the United States House of Representatives as Amici Curiae in Support of Respondent," Republican members of the House of Representatives cite fifteen documents in the categories of foreign law, international law, literature, and NGOs to frame arguments regarding the imposition of life without parole on juvenile offenders. This brief was filed specifically to rebut the arguments presented in "Brief for Amnesty International, et al., as Amici Curiae in Support of Petitioners," which claims that America is in violation of the United Nations Convention on the Rights of the Child (CRC) when it applies a life with parole sentence to a juvenile, a treaty that was signed by the United States.

The Sixteen Members basically set forth an argument that the United States is not bound by that treaty, with the ultimate rationale being that the CRC was never submitted to the Senate for ratification, and therefore this country "is not a party and, by definition, is not bound by its provisions even in an international tribunal much less in the domestic

courts of the United States." That argument is straightforward, and little if any citation of foreign law would be necessary to back it up. But the Sixteen Members are not content to leave it at such a basic level, instead opting to turn the brief into a complex analysis of how international law and custom dictate the applicability of treaties to the signatory parties. The brief states that "even if the United States becomes a party to the CRC by ratification, it is not clear that any obligation contained in that treaty would be self-executing." In essence, the Sixteen Members claim, after an extensive analysis, that international law itself supports the contention that the CRC is not applicable in the cases being considered, an argument that would seemingly be unnecessary if the lack of ratification alone would make the CRC inapplicable.

At the same time, the Amnesty International et al brief to which the sixteen members of Congress object, involves one of the clearest examples of the kind of domestic participation that most closely fits the notion of judicial transnationalism – collaboration between American entities and foreign counterparts. This brief was authored by three American-based NGOs, two foreign-based NGOs, the Columbia Law School Human Rights Clinic, and nine foreign law associations. These participants set the stage for the introduction of transnational legal arguments by presenting a basic principle for the application of international law in our courts:

> International law and opinion have informed the law of the United States from the Declaration of Independence forward. The Founders were greatly influenced by international legal and social thought; and throughout the history of this country, courts have referred to international standards in considering the permissibility of practices under the Constitution.

Considerable legal scholarship has been brought to bear in making this claim, with several bars or law societies of England and four other countries, whose legal systems,

like ours, are outgrowths of English law, serving as co-authors. In addition, the legal societies of the cities of Amsterdam and Montreal contribute their expertise. In respect to transnational participation, an interesting aspect of this brief is the collaboration of actors on several levels: Americans joining with non-Americans; foreign law societies joining with advocacy-oriented NGOs; and American counsels collaborating with English counsels in the actual preparation of the documents.

Transnationalism and Venue Shopping

As can be expected, many cases that enter the court system hinge on a narrow argument about the application of a specific clause of law, but the parties involved use that specific element of law as a surrogate for a larger goal. This statement is actually borne out by examining three of the relevant cases from the 2009-2010 term. And participants in these three cases make quite specific arguments to the Supreme Court that suggest scholars have overlooked one of the underlying causes of transnational actors becoming involved in cases before the court: venue shopping.

First, it is necessary to return to *Abbott v. Abbott*. In addition to the two principle parties already described in chapter two, the separated parents enmeshed in a custody battle, there are three other players involved: the Chilean court system, the Hague Convention, and the American court system. To understand what this case says about transnationalism, it is necessary to see the relationship of the two principal parties to the other three. Mrs. Abbot was unhappy with the judgment of the Chilean courts, so she removed her child to the United States fully aware that her husband would contest the

action. But in essence, she was betting that she would receive a better result from the courts that might be sympathetic to her nationality.

Mr. Abbott, on the other hand, knew that with his son out of the country, there was little that the Chilean government could do to assist him, but he was also aware that as a foreigner relying on the legal judgment of American courts, he might be at a disadvantage in the American court system. So he indirectly involved a third party by building his case around international law rather than American law. He was successful in this regard in part because his framing of the case precipitated the participation of the Permanent Bureau of the Hague Convention. Although this case generated a substantial number of amicus curiae briefs, the only one that was filed solely by a transnational actor was that of the Permanent Bureau. Although the Permanent Bureau cited none of the 18 foreign court cases that Mr. Abbott, the petitioner, did, its brief does present a hefty list of 17 documents of a foreign nature. This brief is notable in a special way; of all the cases studied, this is only one of two authored by an international entity with some legal responsibility for the oversight of international or foreign law applicable to the case. In that respect, Mr. Abbott was successful in drawing that fourth party into the case as a prominent authority.

The Supreme Court was also faced with the task of resolving America's relationship to the legal system of Chile as well as to international law that the nation had accepted through a treaty. In the end, the Court sided with Mr. Abbott, agreeing that the international law as expressed in the Convention on Abduction of Children was applicable law. In essence, both Mr. Abbott and Mrs. Abbott engaged in venue

shopping. While this interpretation might seem strained on the surface, it makes sense when two other cases from the 2009-2010 term are studied.

Morrison v. the National Bank of Australia also featured amicus participation by a significant foreign entity with a vested interest in the case, in this instance that entity being the Australian government itself. And like the brief of the Permanent Bureau noted above, the Australian government documented through 23 citations the foreign laws, international laws, and foreign reports or literature that supported resolving the case in favor the defendants, a company based in Australia. While the petitioners argued for access to the American judicial system to seek redress for their losses, they were also "shopping' for a sympathetic arbiter of justice. The Australian Government, in its brief, was clearly reminding the court that the petitioners had gotten their day in the Australian courts and lost. Never specifically stated, but an undercurrent through many of the briefs in this case, was the fact that a single American investor was among the petitioners, and was there not because he represented a large class of American shareholders but probably to give more credence to the request for the hearing before lower courts. In its brief, the Australian government noted:

> [We are] opposed to overly broad assertions of extraterritorial jurisdiction over aliens arising out of foreign disputes, because such litigation can interfere with national sovereignty and result in legal uncertainty and costs for actors in global trading and investment.

As was pointed out in the first brief of the National Bank of Australia, the stock of the company had never been sold in the United States. While fraudulent financial results of an American subsidiary had been integral in the stock depreciation, those financial results

had been reported in Australia under Australian procedures and law. The Australia government therefore viewed this venue shopping as a serious threat:

> An expansive exercise of jurisdiction by one nation can undermine the policy choices made by other sovereign nations with regard to the proper vindication of rights and redress of wrongs.

In its decision, the Court ruled that suits such as this one need to be resolved in the country in which the stock was sold, thus lessening the likelihood that future petitioners to American courts the opportunity could venue shop.

While *Abbott* indirectly argued this point, *Morrison* forcefully made the claim that in certain cases, American courts need to acknowledge that international and foreign law must take precedence. The briefs of the Permanent Bureau and the Government of Australia underlined this by citing transnational cases and documents to show that support for a Supreme Court decision in the direction of their interests had already been well established in the transnational arena. And indeed, the Court did decide in favor of both the Permanent Bureau and the Australian Government's interests in both cases. In other words, these cases – particularly *Morrison v. the National Bank of Australia* – suggest that examining the circumstances under which transnational sources are introduced to the Court is important to gain a comprehensive picture of the globalization of its docket.

Although 2009-2010 represents only one of the Supreme Court's recent terms, the large number of cases in which it was asked to address the issue of the appropriate venue for transnational legal claims during that period is suggestive. An additional case that illustrates this quite clearly was *Kawasaki v. Regal-Beloit*. This case hinged on whether litigation over compensation for the loss of a shipment when a train derailed should take

place in Japan, as was specified in agreements signed by several of the parties. The petitioners had failed to convince lower American courts to resolve the issue under their jurisdiction. While the nature of this case is too complex to be completely understood by someone not versed or active in international shipping procedures and insurance, the issue of venue shopping comes across quite clearly. This is seen in the introduction of the brief filed by the Union Pacific Railroad:

> Respondents argue that enforcing the contracts to which they agreed [requiring litigation in Japan] would be unfair, but those policy arguments are unpersuasive, inconsistent with settled law, and more than a bit rich considering that three of the four respondents are foreign corporations with substantial operations in China [which is closer to them than the United States].

As in *Morrison v the National Bank of Australia*, the presence of a single American firm among the parties that suffered a loss is being used to enhance the chance to seek redress in American courts where these petitioners believe the law is friendlier to their interests. The actual arguments of the case center on whether a certain amendment to American law regarding shipping was correctly applied in the lower cases, but at the heart of the matter is venue shopping: an attempt by a foreign actor to find the most sympathetic audience among multiple national jurisdictions.

It is somewhat ironic that these cases are among the handful in which there are truly substantial numbers of transnational citations and actors. But at the same time, the large presence of this particular type of participation in transnational cases is significant in that it is entirely void of the ideological controversy found in the debate over foreign citations; rather, it presents the Court with a unified institutional task of delineating its purview in light of the increasing number of litigants willing to shop their claim across national borders. In many respects, it is evident that the cases involving substantial

transnational citations and actors simply reflect the fact that our social and economic lives have grown increasingly global. One of the implications is that non-Americans will have greater reason for and more partners to help in gaining access to U.S. courts. But the opposite is also true; transnational litigation may also represent an increasingly popular strategy of the American legal profession. This possibility not only points back to the continued globalization of that profession, but also suggests that such trends ultimately have the power to undermine U.S. exceptionalism by changing the strategies and stakes involved in litigation.

3.6 Conclusion

The data presented in the previous chapter indicates that the Supreme Court is increasingly likely to encounter the use of transnational legal arguments as a litigation strategy in its work, even as domestic actors have remained the most common source of that strategy. And while non-domestic actors have clearly become more likely to participate in contemporary Court litigation, my evidence indicates that they most often do so in collaboration with American actors. Globalization has impacted society in many ways, as exemplified by the variety of cases with transnational issues heard by the Court in the most recent term. Whether on personal, social, organizational, commercial, or legal levels, American legal actors are interacting with foreign and international counterparts in increasingly complex and intense ways.

In one respect, this transnational involvement gives parties in suits more opportunities to venue shop in legal cases. Where Americans are involved in some transnational activity, even in minor role, there is an opportunity to test the U.S. legal

system to see if the interests of one side will be heard more sympathetically here than abroad. This represents a structural effect of transnationalism, I argue, in that it presents the justices with a set of concerns that are very different than those raised in the debate on foreign citations; although they may not ultimately agree on the appropriate level of non-domestic involvement in its cases, it is potentially an issue that will be addressed at the institutional, not individual, level by attempts to more carefully define Court jurisdiction. In the fourth and final chapter, I will discuss my interpretation of venue shopping as one of several structural elements of judicial globalization further, as well as provide evidence of an institutional response to the practice in an analysis of Court opinions from the 2009-2010 cases examined here.

CHAPTER 4

A New Kind of Justice?

4.1 Judicial Attention to Transnationalism by Contemporary Supreme Court Justices

Introduction

In the previous two chapters, I provided evidence of two important structural effects of judicial transnationalism on the litigation of cases before the U.S. Supreme Court. First, the widely held view that law has been globalized by the increasingly transnational nature of social, political, and economic transactions appears to be true in the case of the Supreme Court, as the legal questions it is asked to interpret over the past two decades have become more likely to involve a transnational element or be framed from a transnational perspective by those introducing supporting arguments in the course of litigation. Second, domestic legal actors, either as independent participants in the judicial process or in collaboration with foreign or international counterparts, are clearly the most frequent sources of those transnational arguments in litigation. Although there has been an increase in non-domestic participation in litigation since 1989, my evidence suggests that the presence of transnationalism in Supreme Court cases is neither an exclusively external phenomenon, nor is it exclusively linked to controversial issues in which cosmopolitan elites attempt to import foreign norms.

With those findings established, the goal of this chapter is to go further in exploring the meaning of those changes for the contemporary Supreme Court, and

provide additional evidence that transnationalism is an issue that has become routinized within its everyday operations.

As I have argued throughout this project, it seems naïve to portray the justices' main concern with judicial transnationalism as an ideological one, reserved to the narrow set of instances when foreign law has attracted controversy, given that both the set of legal questions that they must interpret as well as the forms of participation through which they have been introduced have become more global. It is my belief that these structural changes in the judicial process represent a new set of professional concerns and potential responsibilities, which anyone serving as justice would need to be attuned to. In order to explore this idea, I look for evidence of responsiveness to the changes identified by my analysis in their professional duties.

This first includes considering existing evidence that those currently serving on the bench have a more global set of responsibilities as demonstrated in records of their formal duties, travel, and other professional engagements. Although I will provide some additional data on the professional engagements of the current justices, it does not necessarily add anything new to the discussion on judicial transnationalism in the U.S. context that has not already been confirmed by scholars, the press, and the justices themselves: the contemporary Supreme Court is an active member of the global legal community. However, as I will explain, I view the implications of that fact differently than some, especially when considered in light of the second measure of judicial engagement with transnationalism explored in this chapter: judicial attention to the elements of transnationalism that are more structural than ideological, such as venue shopping. My analysis of judicial attention, which consists of a review of the Supreme

Court opinions of the relevant 2009-2010 cases described in the previous chapter, provides the main contribution of this concluding chapter. By providing evidence that its members are aware of the complex set of legal changes and issues produced by globalization, I hope to add greater meaning to my study by indicating that the justices' engagement with judicial transnationalism occurs not only at an individual level, in terms of a justice's decision to cite foreign law or not, but at an institutional level as well, as changes in the substance of law and forms of participation in the judicial process transform the context in which justices perform their duties.

4.2 The Globalization of the Job of Justice

Like other Supreme Court nominees in recent years, one aspect of Sonia Sotomayor's jurisprudence that came under scrutiny during her Senate confirmation hearings in July 2009 was her position on references to foreign and international law in Court decisions. Along with questions on what should inform constitutional interpretation and controversial topics like abortion, the probing of a nominee's view on foreign citations has become a mainstay of confirmation hearings and yet another source of predictable partisan conflict over appointments to the bench. On three separate occasions during her four days before the Senate, Sotomayor was questioned on the topic. Noting at one point that "there has been a fairly robust, roaring debate over this question" and that "there are basically two sides, one led by Justice Ginsburg, and one led by Justice Scalia and Thomas," Republican Senator Sessions asked her which one she identified with (*Federal News Service* 2009). Although she avoided clearly positioning herself on the citation of foreign law, Sessions' question reflected the politicized nature of comparativism and the

fact that it has become a major source of division on the Court. As already noted in chapter one, all justices appointed to the bench since 2000, both as Republican and Democratic nominees, have been questioned on the topic and have either avoided stating a clear position, like Justice Sotomayor, or expressed their disapproval, as in the case of Chief Justice Roberts and Justice Alito.

At the same time, however, most of the current Supreme Court justices have also shown signs of engagement with the global legal communities that scholars like Anne-Marie Slaughter speak of, spending time overseas teaching law and attending international legal conferences in recent summers. In July of 2007, for example, the Associated Press reported that five of the nine justices had plans to teach and attend conferences overseas that summer: Chief Justice Roberts and Associate Justices Alito, Ginsburg, Kennedy, and Scalia (*Associated Press* 2007). And the most recent press report available, from June 2010, stated that, after a contentious and difficult term, the justices were "fanning out across the globe during the summer for restorative and possibly lucrative teaching assignments, meetings, and conferences" (Mauro 2010). The noted travel last summer included teaching gigs for Justice Breyer in England, Justice Alito in France, and Justice Kennedy's longstanding engagement in Austria. Although past travelers have not only included those who believe its members should consult foreign legal sources, like Justice Ginsburg, but also those who vehemently oppose it, like Justice Scalia, their willingness to travel and interact with the global legal community has not been seen as out of the ordinary (*Associated Press* 2007). Perhaps this is because, as members of the most prominent national judiciary in the world, such interaction is considered a natural part of a Supreme Court justice's job.

In this last chapter, I wanted to explore this notion by looking beyond the anecdotal media accounts and provide as complete an account as possible of the contemporary justices' foreign travel and event schedule. Surprisingly, I was unable to find a single source of this information reported in any scholarly work or public domain. Although several of the scholars reviewed in this project specifically address this trend in their work (including Baum 2006 and Toobin 2007), they do not report any specific facts regarding individual justices' records or more general trends across members and years. After contacting the Public Information Office of the Supreme Court, I discovered that the only public source of this information is in the financial disclosure reports filed by each current justice for each fiscal year. Because these reports list any compensated public appearances or engagements, I was told that they should indicate if a justice had traveled abroad or attended a relevant international event in their formal capacity.

When I collected this information in the spring of 2009, these reports were only available through the Financial Disclosure Office of Administrative Office of the United States Courts, who keep them on file for every justice that served on the Supreme Court in the past five years dating back to 2003. Prior to that, I was told that no official records exist. In order to obtain a full set, I had to file a formal request with the exact documents requested, wait for approval and an invoice for the expected total cost, and then send remittance.[1] After initiating this process, it took approximately five months to receive the documents. At that time, the statements that I was able to obtain were those of Chief Justice John G. Roberts from 2005-2008, Associate Justice John Paul Stevens from 2003-

[1] My request was to obtain copies of all of the available financial disclosure reports for Chief Justice John G. Roberts, Associate Justices John Paul Stevens, Antonin Scalia, Anthony Kennedy, Clarence Thomas, Ruth Bader Ginsburg, Stephen G. Breyer, Samuel A. Alito, Jr., and Retired Associate Justices Sandra Day O'Connor and David H. Souter of the Supreme Court.

2008, Justice Antonin Scalia from 2003-2008, Justice Anthony Kennedy from 2003-2008, Justice Clarence Thomas from 2003-2008, Justice Ruth Bader Ginsburg from 2003-2008, Justice Stephen G. Breyer from 2003-2008, Justice Samuel A. Alito, Jr. from 2006-2008, and Retired Associate Justice Sandra Day O'Connor from 2003-2005 and Former Justice David H. Souter from 2003-2008. It is now possible, however, to access these reports through Oyez, an online legal database (available by following the links to the biographies of each justice at http://www.oyez.org/courts/robt6, and dating back to 2002). I was therefore able to expand my database to cover 2002 through 2009 (with the exception of Justice Kennedy, who did not have a report posted on Oyez for 2009) and include Justice Sotomayor. For 2009, Justice Kagan only had a financial disclosure report as a nominee and I did not include that.

Despite the fact that the information collected only dates back to 2003, it is useful because it provides the first complete set of data of its kind, reporting on the official international activities of the entire membership of the Supreme Court over multiple years. I compiled this data by identifying each instance in which a justice reported foreign travel abroad or participation in an international event; this was very straightforward, as their annual reports included a full list of compensated speaking engagements, the location of the event, and its purpose. The one exception was Justice Souter, who did not list any events or engagement of any kind in his five reports, which led me to believe that he does not accept any compensation for them so that he does not have to report them. I should note here that for the other justices, compensation typically was limited to travel expenses.

Again, this data was intended to serve an illustrative purpose, by providing more details on the Court's formal connections with the transnational legal community and identifying general trends over the five year period that is covered. Although there is no evidence of a significant increase in either the number of events or the percentage of justices participating in them during that time, it is clear that a majority of the justices have indeed engaged in some form of international activity during this entire recent period, as shown in the numbers listed in the table below.

Table 4.1 Number of Foreign Travel and Events Reported in the Fiscal Disclosure Statements of Contemporary Supreme Court Justices, 2002-2009

Name	**2002**	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**	**Total**
Justice Alito	X	X	X	X	0	0	0	3	3
Justice Breyer	2	3	2	5	3	6	9	N/A	30
Justice Ginsburg	2	2	3	1	1	3	2	3	17
Justice Kennedy	2	2	4	4	4	3	3	1	23
Chief Justice Roberts	X	X	X	1	1	1	1	2	6
Justice Scalia	4	4	5	4	3	9	3	7	39
Justice Sotomayor	X	X	X	X	X	X	X	0	0
Justice Thomas	0	1	0	0	0	0	1	0	2
Former Justice O'Connor	5	4	4	1	X	X	X	X	14
Former Justice Souter	0	0	0	0	0	0	0	X	0
Former Justice Stevens	0	0	0	0	0	0	0	0	0
Combined Number of Events	**15**	**16**	**18**	**16**	**12**	**22**	**19**	**16**	**134**
Number of Justices Involved	**5**	**6**	**5**	**6**	**5**	**5**	**6**	**5**	**5.3 (AVG)**

Of the eleven justices that I received data for, only former Justices Stevens and Souter and the most recent appointee, Justice Sotomayor, did not report any foreign travel or events. However, I have already noted that Justice Souter did not publish any

information on his activities, so it is still possible that he did travel abroad. Justice Stevens, however, included a limited number of domestic activities in his report, so that indicates that foreign events were simply not a part of his itinerary during this period.

To summarize the data collected, the eight current justices and three former justices recorded a total of 134 foreign travel or events during the 2002-2009 period combined. Although these activities brought them to six continents, the vast majority took place in the United Kingdom and Europe, as shown in the following table.

Table 4.2 Breakdown of Foreign Travel and Events Reported in the Fiscal Disclosure Statements of Contemporary Supreme Court Justices by Region, 2002-2009

Region	**Percentage**
Africa	0.7%
Australia/New Zealand	2.2%
Canada	5.2%
Continental Europe	58.2%
East or South Asia	9.7%
Middle East	4.5%
South America	1.5%
United Kingdom	17.9%

After recording the described purpose of each travel or event as indicated in the financial disclosure reports, I was able to establish three categories that captured the range of activities: speaking engagements or attendance at professional meetings and conferences ("Professional"), teaching or lectures ("Teaching"), and official visits to national courts ("State"). I also added a fourth category of "Not Specified" to indicate those that had no description. The breakdown of the 134 total events recorded for the 2002-2009 period by activity type are shown in the following table.

Table 4.3 Breakdown of Foreign Travel and Events Reported in the Fiscal Disclosure Statements of Contemporary Supreme Court Justices by Activity Type, 2002-2009

Activity Type	**Percentage**
Professional	49.3%
Teaching	23.9%
State	2.2%
Not Specified	24.6%

Of the eight current justices and three former justices that I collected data on, Justice Scalia is the most internationally active justice of this period, which might be considered surprising by some due to his reputation as the most ardent and vocal critic of comparativism. At the same time, he displays an intense interest in foreign law, especially English, and, as a strict constructionist, his criticism of comparativism has generally been limited to non-binding inclusions of international sources. On the other hand, the Court's second most frequent international traveler is Justice Breyer, who is one of its strongest advocates of judicial cosmopolitanism. This is an interesting finding, given that some scholars have suggested that a justice's engagement in the international judicial community has influenced his or her position on foreign citations, my data suggests otherwise. As previously noted, in Jeffrey Toobin's (2007) biographical account of the Supreme Court, *The Nine*, he explores Justice Kennedy's travels abroad and argues that they have been instrumental in shaping his cosmopolitan belief in the validity of international law and practices. My data, however, clearly indicates that the majority of justices, representing both ends of the ideological spectrum, are actively involved in the global legal community. I therefore stop here at my individual review at

these two justices, as my point is already proven by the data.[2] This implies that justices with similar experiences to Justice Kennedy, like Justice Scalia, have been influenced by them in different ways, and this is further supported by statements made on the subject of comparativism that were presented in chapter one. There, I noted that the exceptionalists on the Court, like Chief Justice Roberts and Justice Scalia, have described their relationship to their foreign counterparts, as well as the responsibilities involved in that relationship, in very different terms than the frequent and self-identified cosmopolitans like Justices Breyer and Kennedy.

However, the idea that engagement with transnationalism can be best understood as a set of similar experiences with different independent outcomes is in itself limited, because it overlooks the ability of those similar experiences to produce changes that are not evident in an individual decision to cite foreign law or not. Scholars have already addressed responsiveness to transnationalism from this perspective, which I have already reviewed and critiqued at length, suggesting that global dialogue and awareness are only important in terms of their ability to promote a substantive change in a justice's decision making. From this perspective, the fact that almost all members of the Court are exposed to the same transnational elements is considered insignificant to the extent that those elements have a different effect on different individuals; evidence of that variation in individual justices' responsiveness to transnationalism has only been considered in terms of the decision to cite non-binding international practices and norms in a limited set of controversial cases.

And yet, my findings in the previous two chapters have shown that these controversial cases represent only a small part of the transnational issues that the

[2] I do provide a full report of my data for each justice and each fiscal year in Appendix C, however.

contemporary Supreme Court must address. In the case of Justice Scalia, travel abroad and interaction with the global legal profession is clearly not intended to help him import foreign norms and practices. It serves a different purpose, which perhaps might be to become more informed of the increasingly complex and technical set of legal issues involving some element of transnationalism. During one of his 2009 trips, Justice Scalia addressed this fact in a lecture on "Globalization and the Law" before the American Society in Berlin, Germany. Noting that "the term globalization is invoked to describe nearly everything taking place in the world today… from the proliferation of the Internet to the fall of Communism, from NAFTA to the war in Iraq," Scalia argued that the perception of these changes varies depending on what context they are considered in. Going on to share his openness to considering foreign or international law in cases when it was formally involved in a U.S. treaty or other binding relationship, his comments highlighted the tendency to consider such a broad and complicated process from too limited a perspective.

I therefore turn to an analysis of the complex set of transnational issues identified in the 2009-2010 term to provide examples of judicial attention to transnationalism that has not yet been adequately identified or addressed by existing scholarship. I argue that these examples demonstrate that the current justices are also aware of and concerned with the structural effects of transnationalism, in that they have devoted a significant amount of time in their opinions to discussing how the increasingly transnational nature of the legal questions that they interpret and the use of transnational litigation strategies by participants in the judicial process should be addressed.

4.3 Judicial Attention to Transnationalism in Supreme Court Opinions

Although the travel schedules, professional activities, and teaching engagements of the contemporary Supreme Court justices provide evidence that they are, at least in a formal capacity, engaged in the global legal networks and judicial dialogue that characterize judicial transnationalism, it is also possible to look to their one form of formal expression, the opinions of the Court, for additional evidence of its effects. Judicial attention, meaning discussion and not merely citation, provides a measure of the extent to which members of the Court have responded to the larger changes in the substance of legal arguments and participants in the judicial process in their engagement with the complex transnational issues identified in the previous two chapters. Along the same lines, it demonstrates that the justices are aware of a growing level of legal transnationalism and have put thought into how to address the structural and substantive issues raised by it.

Going back to earlier arguments that the Court is constricted by its nature as a judicial body and by the nature of the cases that are presented for its consideration, a way to gain insight into its responsiveness to transnational issues is by looking at how particular cases have been handled and what its members have said in their opinions – not just about the questions involved, but also about the legal context in which decisions must be rendered. It can be argued that this approach is anecdotal in nature and cannot be used for a systematic interpretation. But at the same time, the work of the Court is essentially anecdotal: they tackle one case at a time, resolving the issues presented therein. Their job involves interpreting the law, including that involving transnational issues, at the basic level of individual cases. Three cases that have significant

transnational issues at their core are worth examining to illustrate how the issue of globalization with which the justices are dealing is integral to the cases themselves.

Bilski v. Kappos

This case addresses an issue that has become rather contentious in recent decades, the patentability of business processes. While the implementation of patent authority began in 1790, Congress first modified it only three years later, marking the start of a nearly continuous process of changes in patent law and procedures. Attitudes toward the basic concept of patents have fluctuated over time, with the primary focus of opposition being the extent to which patents can stifle innovation through the creation of a monopoly. The Supreme Court has contributed to the understanding and practices related to patents in many significant cases, with *Bilski v. Kappos* (2010) representing the most recent decision rendered. The Court, in its Opinion, summarized the issue as follows:

> Petitioners seek to patent both the concept of hedging risk and the application of that concept to energy markets… however, these are not patentable processes but attempts to patent abstract ideas. Petitioners' remaining claims, broad examples of how hedging can be used in commodities and energy markets, attempt to patent the use of the abstract hedging idea, then instruct the use of well-known random analysis techniques to help establish some of the inputs into the equation.

In some respects, the issue in *Bilski* is similar to a principle that is well established in copyright law – that an idea cannot be copyrighted, only the expression of the idea – as explained by the Copyright Office of the United States on its web page (available at http://www.copyright.gov/help/faq/faq-protect.html):

> Copyright does not protect ideas, concepts, systems, or methods of doing something. You may express your ideas in writing or drawings and claim copyright in your description, but be aware that copyright will not protect the idea itself as revealed in your written or artistic work.

Given that software is usually protected by copyright, *Bilski* may be a result of the petitioner trying to circumvent copyright law by seeking a patent instead. But patent law is also very specific about where patents are not permitted, according to the Supreme Court in *Diamond v. Chakrabaty* (1980): laws of nature, physical phenomena, and abstract ideas. The idea behind both the patent and copyright limitations is that general knowledge, principles, or practices should not be taken out of the public domain. Encouraging creativity and new products is appealing, but care must be taken to ensure that the proposed patent is truly new and useful. In codifying this concept, the patent law lays out four categories of inventions or discoveries that are eligible for patents, as noted in the Court's Opinion in *Bilski*: "process[es]," "machin[es]," "manufactur[es]," and "composition[s] of matter." In practice, patent applications are subject to a "machine or transformation" test, and the petitioners in Bilski argue that such a test is overbroad and discriminates against processes such as they have developed to help clients hedge their risks in markets.

The transnational aspect of this cases stems from the fact that the two businesses targeted by the petitioner's product or process are the financial services and software industries. The implications of the case were significant enough to attract several transnational actors. One broad arena of concern is reflected by the non-domestic authorship of several of the briefs, with those of Knowledge Ecology International (KEI) and the International Association for the Protection of Intellectual Property (IAPPI) being of most interest here. Both organizations are based abroad and share an interest in ensuring that intellectual property is effectively protected, but each brings a different

perspective. KEI begins its brief by stating that it believes "the Court will gain only a limited perspective from those parties, instead of the long-term view of the consequences of this case necessary to fashion an appropriate remedy." IAPPI describes its role in the worldwide intellectual property arena and notes that its reports are regularly considered by many international organizations concerned with intellectual property. It clearly relates the international composition of its membership to the rationale for involving itself in this case "on behalf of both resident and non-resident AIPPI members who seek patent protection in the United States for inventors they represent…."

Of particular note in the IAPPI quote is the fact that it represents "resident", or American, members. This, therefore is an example of the transnational aspects of modern lives; Americans being represented in their own country by an international organization which they support. In many cases, the same Americans may belong to national organizations with a similar purpose, but this does seem to reflect the view of many people in this country that their interests are as much international as international. But another facet of the IAPPI quote is worth noting, where the brief states it is interested because non-residents, or foreigners, also rely on this country's patent system.

An example of a non-resident company that relies on the American patent system is Teles-AG, a German firm that filed an amicus brief in the *Bilski* case. It summarized the importance of American patent law to it and similar briefs by stating that it "relies on the strength of patent rights awarded in the United States, Europe, and elsewhere to protect its investments in research and development." In fact, that statement lays out the concept that modern companies operate in a transnational economic system. Possibly the most germane statement from the Teles-AG brief is the following statement:

> …when commercializing a new product or service, Teles concentrates its resources in countries having robust patent systems. Teles therefore has a vested interest in supporting patent systems that properly reward innovation.

The Teles-AG brief states more clearly than almost any brief filed in the relevant cases studied for this dissertation a basic fact of modern transnational culture and economics; it is a transnational world, but local variations on such issues as patents and copyright are of the utmost concern when it comes to deciding where in the world a company or individual might choose to play.

A fourth international perspective on the case is provided in a brief filed by the Foundation for a Free Information Infrastructure (FFII), IP Justice, and four global software professionals and business leaders. This brief is international in nature, with a foreign foundation, FFII, joining with a Silicon Valley foundation, IP Justice. Also joining in authorship are three professionals from Germany and one from Sweden. These authors remind the Court of the following:

> Plainly, with the potential reward of an unfettered monopoly, there exists great pecuniary incentive for special interests to attempt to place their thumb on the scale of justice in order to obtain that which has historically been prohibited. This court has long provided the guiding hand protecting society from the ills that would result from expanding the exclusionary power of patents beyond the boundaries set forth by the founding fathers and subsequent legislators.

Specifically, the authors encourage the justices to reaffirm the “machine-or-transformation test used in patent law, and they argue that doing so will put America in congruence with the “technicity” test that is a part of European patent law.

It is interesting that there is not agreement among the transnational actors. One brief argues for the petitioner in favor of a more liberal view of what is patentable, two

are in support of the respondent, or the Patent Office, and one comes from a position of favoring neither party but seeking to ensure the upholding of a certain principle.

The citation of foreign or international law is a minor element in these four briefs. Out of 63 citations among the four briefs, only eight are transnational in nature. Not a single one of those eight citations, which mostly refer to European patent law or treatises, are cited by the Supreme Court. Nor are any of these briefs specifically cited.

Bilski v. Kappos illustrates an instance in which transnational actors contribute suggestions to the Court on an issue that has implications for non-Americans. In cases like this, unlike those pertaining to controversial human rights issues that draw more public notice, references to foreign law and practices are made by transnational actors, but in a non-controversial way. In particular, the references to European patent practices merely showed that there are additional ways to look at whether something is patentable other than the "machine-or-transformation" test. The Supreme Court based its decision upon the reading of American law, but the decision of the Court did come down on the side of an expanded view of patent law, at least in the sense that the "machine-or-transformation" test is only one of the ways in which such patent cases must be viewed.

Kawasaki v. Regal-Beloit

As noted in chapter three, one aspect of several of the 2009-2010 transnational cases was the apparent presence of venue shopping by involved litigants. In those cases, the Supreme Court clearly recognized that the introduction of transnational legal arguments and claims in litigation may not always involve the testing of important legal questions.

This is most clearly demonstrated in a statement by Justice Kennedy, writing for the Court in *Kawasaki v. Regal-Beloit* (2010, emphasis added):

> [T]he bills state that any action relating to the carriage must be brought in "Tokyo District Court in Japan." *The forum selection provision in the last clause gives rise to the dispute here.*

In America, venue shopping has often garnered attention because of the way in which litigants choose between state or federal courts, between one federal district and another, or between one state and another. Even within a state, venue shopping can be practiced. There are several rationales behind this practice, one being simply the convenience of engaging in litigation close to home as opposed to having to contest the case in a distant venue with higher attendant cost and the distractions that can come with being away from home. Another rationale for venue shopping is to find a legal system that seems to favor one's case. States have different laws, various federal districts interpret law differently until the Supreme Court finds it necessary to resolve inconsistencies among the various districts, and often federal and state laws applicable to a case are significantly different and thus could result in radically different outcomes. And, most importantly in the context of this study, nations have different legal approaches to common issues. *Kawasaki v. Regal Beloit* is an illustration of venue-shopping on an international scale, and such was acknowledged by Justice Kennedy in his opinion for the Court.

There is another, and in some ways more important, way to look at *Kawasaki*; it reflects the way in which international law, foreign law, and American law are often joined in a transnational system. The venue shopping taking place in *Kawasaki* is made possible because many nations came together to standardize procedures employed in the shipping of goods at sea. In this instance, the respondents, who lost this case, had been

seeking a way to extricate themselves from the standardized litigation practices established by that international law. For the Court, this was not a controversial case, and the manner in which it was handled illustrates how cases involving foreign litigants as well as foreign or international law are routinely addressed by the Supreme Court. It is this last element that is the primary focus of the following commentary. In addition, the case presents an instance of how a brief of foreign origin can inform the Court about international implications of a case without invoking controversial foreign law.

Kawasaki is actually two cases heard as one. Two plaintiffs are unrelated but intertwined because of a contract for shipping material overseas that involves both of them, Kawasaki Kisen Kaisha, Ltd., a Japanese firm, and the Union Pacific Railroad. In this case, Kawasaki contracted with the respondents to ship material from China to the United States, and it subcontracted the rail portion of the shipment in the United States to Union Pacific. On the other side of the case, the respondents are two American firms, Regal-Beloit and Victory Fireworks, plus a Chinese insurance company, Property and Casualty Company, Ltd., and Sun Alliance Assurance, a subsidiary of RSA Insurance Group of the United Kingdom.

Material ordered by Regal-Beloit and Victory Fireworks was delivered by ship to the United States, where it was taken over by Union Pacific for final delivery. A rail accident destroyed the material, and the purchasers and insurers of the goods sued in American courts to gain restitution. They argued that the Carmack amendment of 1916 to the 1887 Interstate Commerce Act (ICA) was the ruling authority. The respondents reply was that the dispute should be settled according to the Carriage of Goods Overseas Act (COGSA) of 1936, which meant such litigation should take place in Japan.

COGSA is the American implementation of the Convention on Bills of Lading, which was developed and agreed to by many nations in order to standardize the paperwork and consequences of international shipment of goods by ocean-going vessels. What the Supreme Court faced in *Kawasaki* was two different interpretations of COGSA by lower courts. The district court of Central California held that COGSA should govern the litigation of this case, while the Appeal Court ruled that the Carmack amendment was the overriding authority.

A ruling that placed the litigation under COGSA meant that the respondents, the owners of the goods and their insurance companies, would have to sue in Japan under the Japanese law through which the Convention on Bills of Lading was implemented, as was stipulated in the original contract between the purchasers of the goods and the deliverers. The original contract for delivering the goods used what is known in COGSA and the Convention on Bills of Lading as a "through bill of lading" that covered both the ocean going and rail portions of the shipment. All parties in this case agreed to the original contract that specified the Japanese court system for litigation.

The respondents, however, had filed their suit in order to get the litigation heard in the United States. In their initial brief, the respondents specifically note the importance of the venue selection:

> [The petitioner] seeks to have a nationally uniform statutory rule in the United States replaced by a court-sanctioned, unregulated contractual regime, in which cargo claimants would never be protected in the formation of contracts of carriage and would be forced to litigate domestic disputes in far-distant countries.

As was pointed out previously, it was this comment which the petitioners, in their reply brief, found "a bit rich," given that two of the plaintiffs had operations in Asia.

As the case is presented to the Court, the issues have nothing to do with who is responsible for compensation, the amount of compensation due, or who was at fault in the damage of the goods. The sole argument is which legal system should be used for determining those other issues. Most likely, there were two overriding concerns of the parties on each side of this issue. First, through both amendments and judicial decisions over time, COGSA had deviated from some of the terms of the original Convention on Bills of Lading, so the petitioners may have felt that the Japanese implementation of the law was more favorable to them. The second issue is that the Carmack argument would bring the litigation under the umbrella of law that was designed strictly with American transportation in mind, there being no reference to foreign law or treaties or to the realities of practices in international shipping. And under this domestic approach, the nature of determining compensation for loss in shipping was significantly different from that under COGSA.

In reading the briefs of the plaintiffs and respondents, it comes across only that the two sides have different hopes for the outcome of the case, there is little sense of what the long term implications might be of the decision. However, in an illustration of a point raised earlier, how briefs can present the Court with an important perspective that might otherwise be missed, the Group of International Indemnity Clubs laid out what the effects might be if Carmack would be held as the applicable law:

> …if more than one law were to govern various parts of each carriage, resolution of claims for loss or damage would be needlessly and wastefully complicated. Before the merits of a claim could be addressed, the applicable law (Carmack or COGSA) would have to be determined. The applicable law could not be ascertained until the location of the loss or damage and the location of its cause was determined.

> The location of the loss or damage or the location of its cause may be difficult or impossible to prove. Ocean containers used for multimodal transportation are generally not opened during their carriage; as a result, damage or loss is often not discovered until the container reaches its final destination and is opened by its receiver. If different legal regimes required shippers to open and inspect containers as they were transferred from one mode or party to another, the transportation would be slowed and cargo might be damaged or pilfered. The ocean container has greatly reduced damage and loss during transportation. This advantage should not be lost by a need to open containers in transit.

Of all the briefs filed, this one lays out in the clearest and most succinct terms what would be lost if the domestically-oriented result, favoring consideration under Carmack, would held applicable instead of for the internationally-oriented COGSA law. In the majority opinion, Justice Kennedy spells out the process by which the Court address this dilemma, walking very carefully through the process of showing that the Carmack amendment did not address nor was ever intended to address international shipments under a through bill of lading. And in the end, the Court could not simply state its conclusion in such succinct terms as in the just quoted brief. Instead, it was obligated to address the less clear arguments presented by the plaintiffs and respondents:

> Because the Carmack amendment does not apply to a shipment originating overseas under a single through bill of lading, the parties' agreement to litigate these cases in Tokyo is binding.

Kawasaki provides an excellent example of how the Court can reconcile an issue of international importance through a careful reading of American law in spite of the fact that each of the competing parties were comprised of domestic and non-domestic actors and the outcome could send Americans abroad to litigate a claim. For those concerned with transnationalism, this case is illustrative of the fact that a significant portion of American law is simply this country's codified version of international law. In many

cases, large portions of acts passed by Congress are taken almost verbatim from international covenants, conventions, and treaties. But such laws can often be construed as in conflict with laws that are more organic in origin.

For the Court, the task is to interpret such American codifications in ways that balance the country's internal needs with its obligations to international law. The greater the deviation from the international basis of some of our laws, the more likely there will be negative implications for our international commerce. The same, however, is true for courts in other nations, as well. And the more that national tribunals allow deviations in the application of mutually agreed upon international laws, practices, and customs, the greater the opportunities and reasons are for litigants to venue shop.

Abbott v. Abbott

In the last case that I will analyze in detail from the 2009-2010 term, the international custody case previously discussed in chapters two and three, the Supreme Court was faced with conflicting interpretations of the applicability of an international treaty, the Hague Convention on the Civil Aspects of International Child Abduction. While the custodial parent in *Abbott* argued that she was not entitled to return her child to Chile because the father's visitation rights did not extend to custody under the Convention, the father argued that they did, arguing that his right to veto removal from the country, or *ne exeat* right, was interpreted as such by several of the signatory countries. Justice Kennedy and the majority of the Court sided with the father, arguing the following:

> This Court should be most reluctant to adopt an interpretation that gives an abducting parent an advantage by coming here to avoid a return remedy that is granted, for instance, in the United Kingdom, Israel, Germany, and South Africa.

Justice Stevens, however, was joined by Justices Thomas and Breyer, in a dissent that took the opposite stance. He wrote that the return remedies established by such signatory countries as the U.K. and Germany represented a legitimate alternative interpretation, rather than an incorrect one. By overturning the narrower interpretation affirmed by lower U.S. courts earlier in the appeals process to side with one particular set of countries that took the broader approach, the Supreme Court would undermine its authority. This concern is evident in the concluding remarks of Stevens'dissent:

> In sum, the decisions relied upon by the Court and Mr. Abbott from our sister signatories do not convince me that we should refrain from a straightforward textual analysis in this case in order to make way for a uniform international interpretation of the Convention. There is no present uniformity sufficiently substantial to justify departing from our independent judgment on the Convention's text and purpose and the drafter's intent.

As summarized by the American Society of International Law in its analysis of *Abbott*, Stevens' dissent highlights the fact that conflicting assumptions about the proper role of the Court in its interpretation of international treatments were ultimately at the core of the justices' disagreement in this case (available at http://www.asil.org/insights100804.cfm):

> One way of viewing the difference between the Abbott majority and the dissent is to consider the relative merits of international cooperation and of national sovereignty. The majority observed that the Convention was intended to suppress forum-shopping by a disgruntled parent. Giving a broad meaning to the concept of custody means increasing the number of instances in which the Convention would give an effective remedy to a parent whose rights in the country of origin, however categorized, had been violated. Correspondingly, giving a narrow reading to the "custody" concept in the Convention would mean that national courts would have a freer rein to decide for themselves what arrangements meet the best interest of a child, without having to defer to any earlier rulings of a foreign court. Kennedy's majority opinion emphasized the value of international cooperation; Stevens' dissent would have buttressed national sovereignty. An additional consideration, however, is that a narrow reading of "custody" also might encourage other states to shift to this position. If other states made it harder for victims of abduction to obtain effective relief, U.S. parents would find it harder to retrieve children abducted elsewhere.

While the members of the contemporary Court do not always agree on its treatment of the transnational legal issues that come before it, they are obviously comfortable with addressing them through discussion and disagreement that looks very different than that depicted in the debate on foreign citations.

CONCLUSION

This study has contributed several important and unique insights on transnationalism in Supreme Court litigation, drawing on analysis and textual sources within the briefs filed in individual cases. The essence of my research is that there are a variety of nuanced ways to conceptualize the issue of transnationalism before the Supreme Court. Members of the Court are engaged in the process of transnationalism and appear to share a common understanding of its effects and implications in almost every sense except for those few instances in which there is an ideological divide over non-binding use of law.

I also found that, with the exception of a few individual supporters, the justices largely ignore transnational human rights arguments when they are presented by litigants or amici. Because this kind of activism has been successful in a few landmark cases, it is neither surprising that legal actors continue to engage in it nor that judicial discussion of such arguments remains contentious. Again, however, it represents only one of many elements of transnationalism present in the context of the Supreme Court.

While most discussion and analysis of the topic has relied primarily on interpreting transnationalism in terms of competing philosophical approaches to the law, my research has revealed that such scholarship has some inherent weaknesses. It would be strengthened if those involved would more clearly define what constitutes a transnational actor, provide statistics on and/or examples of the types of cases that merit consideration as transnational, define what constitutes a legitimate transnational citation, and address how the collaborative nature of filing amicus curiae briefs accounts for the opportunity of transnational participation in litigation.

Another inference from my research is seemingly ignored in contemporary academic studies: a significant percentage of American law is the codification of international law, practices, and customs. As noted specifically in the discussion of the specific cases in the previous chapter, international conventions and treaties that America signs do not become American law. Instead, after ratification, law has to be passed that implements the concepts of those treaties. According to the Wikipedia entry, "List of United States Treaties," this country has signed approximately 170 international treaties; that is a significant amount of international law codified in our own statutes. And since those treaties date to the very origin of our country, it is obvious that the Supreme Court has a long history of interpreting United States law while understanding its relevant foreign origin. Transnationalism is not new to the Supreme Court.

While suggesting that scholarship on transnationalism needs to look beyond the controversial human rights cases and the publicity they attract, it is not my intention to suggest that they do not deserve the attention they get. In fact, an appropriate discussion with which to close this dissertation is drawn from one of the most significant human rights cases before the Court in recent years, *Graham v. Florida*. Given the extent of international participation in the authoring of briefs as well as the contribution of many briefs of strictly American origin containing transnational references, it would have been difficult for the Court not to comment on the presence of the transnational arguments. Indeed, the last two sentences of Justice Kennedy's argument are a succinct statement of an important view of the role of transnationalism before the Court:

> The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world's nations that a

> particular sentencing practice is inconsistent with basic principles of decency demonstrates that the Court's rationale has respected reasoning to support it.

The structure of his argument is interesting: international and foreign law is not the foundation of the Court's decision, but reflects the validity of our own law. In this context, the referencing of foreign law or international customs and practices serves not to define our own legal system, but to remind the world that we are cognizant of other legal approaches, and that our system is generally not out line with the world. Such references, however, also are a reminder to our own citizens that our law is in line with world opinion. That is important because, as the data gathered in this dissertation indicates, our own citizens advance the argument that transnational congruence of law is important more often than do transnational actors. Failure to acknowledge our own citizens' concerns with the transnational nature of law could ultimately undermine the Court's legitimacy.

APPENDIX A-1
Unique Documents from Briefs with Foreign and International Citations
1989-1990 Supreme Court Term

Cases Citing	Briefs Citing	Document
1	3	Declaration on Euthanasia of the Sacred Congregation for the Doctrine of the Faith
1	2	Dessaur & Rutenfrans, Mag de Kokter doen
1	2	Driesse, Van der Kok, Van Nunen-Forger & Van Swinderern, Euthanasie en het recht in Nederland
1	2	J. Segers, Ouderen Over Euthanasie
1	2	Mexican Constitution
1	2	Schepers, EuthanasiaL Our own Future
1	1	Admiral, Justifiable Euthaniasia
1	1	Code Penal of France
1	1	Dutch Penal Codes
1	1	English Statute of Treason
1	1	Feber, De Wederwaardigheden van Artikel 293 van het wetboek van strafrecht vanaf 1981 tot Heden.
1	1	Gonbggrijo, euthanassie bij een op de acht aids-patienten
1	1	John-Paul II, Pope
1	1	John-Paul II, Pope, Address to the Eleventh European Congress of Perinatal Medicine, 1988
1	1	Mexican General Health Law
1	1	Penal Code of German Federal Republic
1	1	Pius XII
1	1	Pope Paul VI Address to World Food Conference, 1974
1	1	R. Fenigsen, Euthanasie: Een Wldaad?
1	1	Safety at Life at Sea Convention
1	1	Treaty between Canada and the United States of America relating to the cooperative development of the water resources of the Columbia River Basin
1	1	Treaty with Belgium On Mutual Legal Assistance in Criminal Matters
1	1	Treaty with Canada on Mutual Legal Assistance in Criminal Matters
1	1	Treaty with Thailand on Mutual Legal Assistance in Criminal Matters
1	1	Treaty with The Bahamas on Mutual Legal Assistance in Criminal Matters

1	1	Treaty with The United Kingdom on Mutual Legal Assistance in Criminal Matters

APPENDIX A.2
Unique Documents from Briefs with Foreign and International Citations
1999-2000 Supreme Court Term

Briefs Citing	Cases Citing	Document
6	1	International Convention on Standards for Training, Certification, and Watchkeeping for Seafarers
5	1	International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973
2	1	Letter from the Embassy of Canada to the U.S. Dep't of State (May 7, 1997)
2	1	Note Verbale from the Royal Danish Embassy to the U.S. Dep't of State (June 14, 1996)
2	1	Uruguay Round of 1994
1	2	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entered into force Nov. 20 1994
1	1	1983 Code of Canon Law
1	1	1997 Tanker Safety and Pollution Prevention, ILM
1	1	American Convention on Human Rights, entered into force on July 18, 1978, Series No. 36, at 1, Organization of American States, Official Record, OEA/Ser. V/VII.23 Document Revision 2, 1144
1	1	Amnesty International, "Myanmar: 10 Anniversary of Military Repression (August 7, 1998)
1	1	Article 4 of the International Convention for the Protection of Intellectual Property, 25 Stat. 1372, TS No. 379 (Paris Convention) as revised, 21 U.S.T. 1629, 1631, TIAS No. 6923, 828 UNTS 107 (Stockholm text)
1	1	Beijing Declaration and the Platform for Action, General Assembly, Report of the Fourth World Conference on Women, UN Doc. A/CONF.177/20 (17 OCT. 1995)
1	1	Catechism of the Catholic Church (1994)
1	1	Charles Chitat Ng, UN GAOR, Hum. Rts. Comm., 49th Sess., UN Doc CCPR/C/49/D/469 (1991)
1	1	Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/REV.2 (29 March 1996)
1	1	Convention Concerning Minimum Standards for Ships, ILM 1288 (1976)
1	1	Convention on the Elimination of All Forms of Discrimination Against Women, entered into force, Sept. 3, 1981, 1249 UNTS 20378
1	1	Convention on the Elimination of All Forms of Race Discrimination, entered into force, Jan 4, 1969 and ratified by U.S. on Oct. 221, 1994, 660 UNTS 195 (1966)
1	1	Declaration on the Elimination of Vilence Against Women, GAOR Res. 104, 48th Sess. UN Doc. A/Res/48/104
1	1	European Commission, Report on United States Barriers to Trade and Investment (1999)
1	1	European Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force Sept. 3, 1953, 213 UNTS 222
1	1	Gen. Comment 20[44], Para. 6, UN Doc CCPR/C/21/Add. 3 (1992)

1	1	Hawaiian Almanac 1893
1	1	Hawaiian Constituion 1841
1	1	Human Rights Committee, Comments on U.S.A., UN GAOR, Hum. Rts. Comm., 53rd Sess., 1413 mtg. UN Doc. CCPR/C/79/Add. 50 (1995)
1	1	Human Rights Watch/Asia Burma--Entrenchment or Reform? Human Rights Developments and the Need for Continued Pressure (July 1995)
1	1	IMO Guidelines on the Grant of Consultative Status, Basic Documents Volume I, IMO London 1986
1	1	IMO Resolution A.481 (XII) 1981
1	1	IMO Resolution A.787(19)
1	1	Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, opened for signature 9 June 1994, 3 IHRR 232
1	1	International Code for the Safe Operation of Ships and for Pollution Prevention
1	1	International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 UNTS 3
1	1	International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, Dec. 18, 1971, 110 UNTS 57
1	1	International Convention on Tonnage Measurement, TIAS No. 6331
1	1	International Covenant on Civil and Political Rights, ratified by US June 8 1992
1	1	International Maritime Organization, IMO: What it is, What it Does, How it Works (1998)
1	1	John Paul II, Encyclical Letter Evangelium Veritas Splender, (1993)
1	1	John Paul II, Encyclical Letter Evangelium Vitae, (1995)
1	1	Laws of Hawaii 107 (1847)
1	1	Laws of Hawaii 109 (1847)
1	1	Laws of Hawaii 202 (1847)
1	1	Laws of Hawaii 81 (1847)
1	1	Organization for International Investment, "State and Municipals Sanctions Report"
1	1	Pope John Paul II, The Hundreth Year (1991)
1	1	Pope John XXIII, Peace on Earth (1963)
1	1	Pope Leo XIII, The Condition of Labor (1891)
1	1	Pope Pius XI, Reconstructing the Social Order (1931)
1	1	Protocol of 1978 Relating to the International Convention for Safety of Life at Sea, 1974
1	1	Report of the Special Rapporteur on Systematic Rape, Sexual Slavery, and Slavery-like Practices During Armed Conflicts, 50th sess. UN GAOR, Human Rts. Comm., UN Doc. E/CN.4/1996/53 (1996)

1	1	Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, 52nd Sess., UN GAOR, Hum. Rts. Comm., UN Doc E/CN.4/1996/53 (1996)
1	1	Report on the Situation of Human Rights in Haiti, Inter-Am. C.H.R., OEA/Ser.L/V/11.88, Doc. 10 rev. (1995)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.102 (1998) (Japan)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.107 (1999) (Costa Rica)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.109 (1999) (Mexico)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.89 (1998) (Zimbabwe)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.94 (1998) (Italy)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.95 (1998) (Algeria)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.98 (1998) (Iceland)
1	1	Summary of the Record of the Human Rights Committee, UN Doc. CCPR/C/79/Add.99 (1998) (Belgium)
1	1	Testimony of David Stimson, President, International Trademark Assn., Feb. 12, 1998
1	1	The Catholic School on the Threshold of the Third Millennium: Statement by the Congregation of Catholic Education
1	1	Treaty [by Kingdom of Hawaii] with Russia, 1867
1	1	UN Doc. A/Conf. 62/122
1	1	United Nations Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982
1	1	Uruguay Round of 1994
1	1	Vat. II, Christus Cominus (Decree Concerning the Pastoral Office of Bishops) (1965)
1	1	Vat. II, Dei Verbum (Dogmatic Constitution on Divine Revelation) (1965)
1	1	Vat. II, Dignitatis Humanae (Declaration on Religious Freedom) (1965)
1	1	Vat. II, Gravissimum Educationsis (Declaration on Christian Education) (1965)
1	1	Vat. II, Lumen Gentium (Dogmatic Constitution of the Church) (1965)
1	1	Vatican Council II, Decree on the Apostolate of Lay People (1965)
1	1	Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, UN Doc A/Conf.39/27 at 289 (1969), 1155 UNTS 331
1	1	Vienna Declaration and Programe of Action, General Assembly, World Conference on Human Rights, UN Doc A/Conf.157/23 (12 July 1993)
1	1	Will of Bernice Pauahi Bishop, 1888

APPENDIX A-3
Unique Documents Cited in Briefs with Foreign or International Citation
2009-2010 Supreme Court Term

Briefs	Cases	Document
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1	1	Replies of the Governments to the Questionaire, Actes et Documents de la Quatorzieme Session, Tome III
1	1	Report of the Commisiion pour la Lieration de la Croissance Francaise (Jan. 2008)
1	1	Report of the Coulon Commissioon to the French Minister of Justice Jan 2008
1	1	Report of the Task Force on Extra-Territorial Jurisdiction of the International Bar Association
1	1	Report of Working Group III (Transport Law) on the Work of Its Nineteenth Session (New York, 16-27 April 2007), U.N. doc. no. A/CN.9/621 (May 17, 2007)
1	1	Report on the Fifth Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction and the Practical Implementation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (30 October – 9 November 2006)
1	1	Report on the Second Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (18-21 January 1993)
1	1	Report on the Third Meeting of the Special Commission to review the operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (17-21 March 1997)
1	1	Reserve Bank of Australia, Additional Credit Card Statistics
1	1	S. Clark and C. Harris, The Push to Reform Class Action Procedure in Australia. Melb. Ul>. Rev 775
1	1	S. Guinchard, "Une class action a la francaise?"
1	1	Sascha Lotze, US-amerikanisches Kapitalmarksrecht und Internet, 2002
1	1	Savolainen, Matti, The Hague Convention on Child Abduction of 1980 and Its Implementation in Finland, 66 NORDIC J. INT’L L. 101 (1997)..
1	1	Secretary-General, Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993)
1	1	Secretary-General, Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, U.N. Doc. S/25704 (May 3, 1993)
1	1	Special Commission meetings on the practical operation of the Convention

1	1	Speech of Baron Alexandre Lamfalussy
1	1	Statute of Monopolies, 21 Jac. 1, c. 3, § 6 (1623)
1	1	Statute of the Hague Conference on Private International Law (15 July 1955), Article 1, T.I.A.S. No. 5710, 2997 U.N.T.S. 123
1	1	Summary of Findings on a Questionaire Studied by International Social Service, Actes et Documents de la Quatorzieme Session, Tome III
1	1	The Commonwealth@60, Who We Are,
1	1	The European Patent Convention, Article 52(2)(c)
1	1	The Patents Act, 1970 (India) (as amended),
1	1	Tijo, Hans: Enforcing Corporate Disclosure, 2009 Singapor Journal of Legal Studies
1	1	Toshiko Takenaka (Ed.), Patent Law and Theory, A Handbook of Contemporary Research, Cheltenham, UK
1	1	Trade-Related Aspects of Intellectual Property Rights (TRIPS), Annex 1C to Marrakesh Declaration of 15 April 1994 establishing World Trade Organization
1	1	Treaty of Amity, Commerce, and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, Arts. 7-8, 8 Stat. 121-122
1	1	Treaty of Friendship, Limits, and Navigation, U.S.-Spain, Oct. 27, 1795, Art. 21, 8 Stat. 150
1	1	Treaty with Canada on Mutual Legal Assistance in Criminal Matters, 1985
1	1	U.K. Protection of Trading Interests Act, 6 (1980)
1	1	U.N. Doc. No. A/CN.9/WG.III/ WP.28 (Jan. 31, 2003)
1	1	U.N. Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, U.N. Doc. CCPR/C/USA/CO/3 (Sept. 15, 2006)
1	1	U.N., Int'l Covenant on Civil & Political Rights, G.A. Res. 2200A, Art. 24(1), U.N. GAOR, 16th Sess., Supp. No. 16, U.N. Doc. A/6316 (1966)
1	1	Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM), Appendix B to the Convention Concerning International Carriage by Rail (COTIF), May 9, 1980, 1397 U.N.T.S. 2, 112, as amended by Protocol for the Modification of the Convention Concerning International Carriage by Rail (COTIF) of 9 May 1980, June 3, 1999 (CIM-COTIF)
1	1	United Nations Conference on Trade and Dev., Implementation of Multimodal Transport Rules – Comparative Table (Oct. 9, 2001)
1	1	United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517 (June 10, 1958)
1	1	United Nations Convention on Rights of the Child, U.N. Doc. A/44/736, 28 I.L.M. 1456 (Nov. 20, 1989)
1	1	United Nations Declaration of Human Rights, ART. 21
1	1	Universal Declaration of Human Rights
1	1	Veronique Magnier, Information Boursiere et Prejudice de Invetisseurs, 2008
1	1	Vienna Convention on the Law of Treaties Art. 31(3)a)
1	1	World Intell. Prop. Org., Report of the Seventh Session of the Standing Committee on the Law of Patents (2002)

APPENDIX B.1
Relevant Cases, Coded as Including at Least One Transnational Legal Argument
1989-1990 Supreme Court Term

DOCKET/ ORIGIN	1989-1990 CASE/BRIEF NAME	CASES ALL	CASES FOR	DOCS TOTAL	DOCS FOR	AL	FL	IL	LIT	NGO	VAT
89-333	**California v Federal Energy Regulatory Commission**										
AMER	Pacific Northwest Utilities	13		3	1			1			
88-15803	**Cruzon v. Harmon**										
AMER	American Academy of Medical Ethics	7	2	24	8				8		
AMER	Center for Catholic Policy, et al	0		8	1						1
AMER	Frances Ambrose	0		19	2						2
AMER	Nurses for Life of Missouri	0		2	6		6				
AMER	The Society for the Right to Die	28		16	2						2
AMER	United States Catholic Conference	48		10	2						2
88-2041	**Sission v Ruby**										
AMER	Petioner's Brief	47		6	1			1			
89-1503	**United States v Eichman**										
AMER	American Civil Liberties Union, et al	24		4	3		3				
88-805	**US v Verdugo-Urquidez**										
AMER	Petioner's Brief	44		22	6		1	5			
AMER	Petitioner's Reply	28		5	2		2				

APPENDIX B.2
Relevant Cases, Coded as Including at Least One Transnational Legal Argument
1999-2000 Supreme Court Term

DOCKET	1999-2000	CASES		DOCS		CITATIONS PER CATEGORY					
ORIGIN	CASE/BRIEF NAME	All	FOR	TOTAL	FOR	AL	FL	IL	LIT	NGO	VAT
99-6723	**Bryan v Moore**										
AMER	Minnesota Advocates for Human Rights	9		9	3			3			
99-29	**Brzonakala v Morrison**										
INT	International Law Scholars et al.	29	6	20	23			23			
98-1648	**Mitchell v Helms**										
AMER	Catholic League for Religious and Civil Rights	24		5	9						9
99-474	**Nastios v. Foreign Trade**										
AMER	Gerald R. Ford et al.	12		15	1			1			
AMER	Members of Congress	25		13	1			1			
INT	Nonprofit Organizations	14		23	4			1		3	
AMER	Petitioners - Reply	15		11	1			1			
98-818	**Rice v Cayetano**										
AMER	Kamehameha Schools Bishop Estate	16		16	1	1					
AMER	Pacific Legal Foundation	15		15	1	1					
AMER	Petitioner	55		21	1	1					
AMER	State Council of Hawaiian Homestead Association et al.	22		44	5	5					
99-138	**Troxel v Granville**										
AMER	Society of Catholic Social Scientists	13		36	6						6
98-1701	**US v Locke**										
AMER	American Waterways Operators	**17**		1	1			1			
FOR	European Governments	12		13	2			2			
FOR	Government of Canada	5		10	2			2			
FOR	International Chamber of Shipping et al.	8		9	7			7			
AMER	Maritime Law Association of the United States	21		26	8			8			
AMER	Petitioner United States - Petition	**11**		7	2		2				
AMER	Petitioner United States	**26**		7	2		2				
INT	Puget Sound Steamship Operators Association et al.	15		4	2			2			

APPENDIX B.3
Relevant Cases, Coded as Including at Least One Transnational Legal Argument
2009-2010 Supreme Court Term

DOCKET	2009-2010	CASES		DOCS		CITATIONS PER CATEGORY					
ORIGIN	**CASE/BRIEF NAME**	**All**	**FOR**	**TOTAL**	**FOR**	**AL**	**FL**	**IL**	**LIT**	**NGO**	**VAT**
08-645	**Abott v Abbot**										
FOR	Brief for Petitioner Timothy Mark Cameron Abbott	16	18	31	7			2	7		
AMER	Brief for Respondent Jaquelyn Vaye Abbott	46	1	19	8		1	3	6		
FOR	Brief for Reunite International Child Abduction Center in Support of Neither Party	7	26	28	3						
FOR	Brief for the Permanent Bureau of the Hague Conference on Private International Laws in Support of Petitioner	19		7	15			12	5		
FOR	Reply Brief for Petitioner Timothy Mark Cameron Abbott	14	1	8	4			1	5		
08-661	**American Needle v NFL**										
AMER	Brief for the Merchant Trade Association in Support of Petitioner and Reversal	34		12	3		4	1			
08-964	**Bilski v Kappos**										
AMER	Brief for Adams Pharmaceuticals, Inc., and Tethys Bioscience, Inc., in Support of Respondent	12		29	2			3			
AMER	Brief for Borland Software Corporation in Support of Petitioner	20		7	1			1			
AMER	Brief for Eleven Law Professors and AARP in Support of Respondent	60	2	20	4		4	2			
FOR	Brief for Knowledge Ecology International in Support of Respondent	11		32	2			1	1		
AMER	Brief for Legal OnRamp in Support of Neither Party	19		4	1			1			
FOR	Brief for Teles AG in Support of Neither Party	11		10	1			1			
INT	Brief for the Association Internationale Pour La Protection de la Propriete Intellectuelle and the International Association for the Protection of Intellectual Property U.S. in Support of Reversal	26		2	2			3			
AMER	Brief for the Computer & Communications Industry Association in Support of Respondent	16		33	2			1	1		
FOR	Brief for the Foundation For A Free Information Infrastructure, IP Justice, and Four Global Software Professionals and Business Leaders in Support of Respondent	8		11	3			4			
AMER	Brief for the Free Software Foundation in Support of Respondent	10		38	2					2	
AMER	Brief for the Software and Information Industry Association in Support of Respondent	25		12	2				2		

AMER	Brief for the William Mitchell College of Law Intellectual Property Institute in Support of Respondent	98		19	6		4	4			
09-60	**Carachuri v Holder**										
AMER	Brief for Asian American Justice Center, American Immigration Lawyers Association, Asian American Institute. Asian Pacific American Legal Center, Banished Veterans, Catholic Legal Immigration Network, et al in Support of Petitioner	41		12	2					2	
AMER	Brief for National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, The Immigrant Defense Project, The Immigrant Legal Resource Center, and The National Immigration Project of The National Lawyers Guild in Support of Petitioner	31		26	2					2	
AMER	Brief for Organization Representing Asylum Seekers in Support of Petitioner	18		12	6		1	4	3		
08-1371	**Christian Legal v Martinez**										
AMER	Brief for Advocates International in Support of Petitioner	2	5	3	3			4			
09-559	**Doe #1 v Reed**										
AMER	Brief for Petitioner John Doe #1, John Doe #2, and Protect Marriage Washington	50		30	1			1			
AMER	Brief for the American Civil Rights Union in Support of Petitioners	18		13	1			1			
AMER	Brief for the Electronic Privacy Information Center (EPIC) and Legal Scholars and Techical Experts in Support of Petitioner	20		36	2				1	1	
AMER	Brief for Council of Institutional Investors; The American Federation of Labor and Congress of Industrial Organizations; the California Public Employees Retirement System; The California State Teachers' Retirement System; CFA Institute; the Consumer Federation of America; the Los Angeles County Employees Retirement Association; the Nathan Cummings Foundation; Thomas P. Dinapoli, Comptroller of the State of New York, as Trustee of the New York State Common Retirement Fund and as Administrative Head of the New York State and Local Retirement Systems; the Public Employees Retirement Association of Colorado; the Sacramento County Employees' Retirement System; and the Teachers Insurance and Annuity Association-College Retirement Equities Fund in Support of Respondents	11		49	1					1	
AMER	Brief for the Coalition for Fair	16		6	3			4			

	Lumber Imports in Support of Petitioner											

08-7412 Graham v Florida

INT	Brief for Amnesty International, et al., in Support of Petitioner	23	6	19	31		8	23		2	
AMER	Brief for Educators in Support of Petitioner	10		40	1				1		
AMER	Brief for Petitioner Terrance Jamar Graham	29		36	3			3		1	
AMER	Brief for Respondent the State of Florida	31		40	2			1		1	
AMER	Brief for the American Association of Jewish Lawyers and Jurists, the American Catholic Correctional Chaplains Association, the American Correctional Chaplains Association, the American Friends Service Committee, Buddhist Peace Fellowship, Church Women United, the Council of Churches of the City of New York, Engaged Zen Foundation, the General Synod of the United Church of Christ, Islamic Shura Council of Southern California, Karamah: Muslim Women Lawyers for Human Rights, Mormons for Equality and Social Justice, the National Council of the Churches of Christ in the United States of America, the National Council of Jewish Women, New Jersey Regional Coalition, Office of Restorative Justice, Archdiocese of Los Angeles, Prison Fellowship Ministries, Progressive Jewish Alliance, Queens Federation of Churches, Rev. Dwight Lundgren, Sister JoAnne Talarico, Trinity United Methodist Church, and United Methodist Church, General Board of Church and Society in Support of Petitioner	12		31	5		2	5			
AMER	Brief for the Center on the Administration of Criminal Law in Support of Petitioner	39		42	1					1	
AMER	Brief for the Disability Rights Legal Center in Support of Petitioner	8		41	2					2	
AMER	Brief for the Juvenile Law Center, the National Juvenile Defender Center, and the Children and Family Justice Center in Support of Petitioner (reprint)	29		35	1						
AMER	Brief for the Sentencing Project in Support of Petitioner	14		12	2					2	
AMER	Brief for the State of Louisiana in Support of Respondent	10		17	2				1	1	
AMER	Reply Brief for Petitioner Terrance Jamar Graham	30		7	2			1		1	

08-1529 Hui v. Castaneda

AMER	Brief Of Amicus Curiae National Immigrant Justice Center in Support Of Respondent	3		27	1					1	

08-1553 Kawasaki v Regal-Beloit

INT	Brief for Respondent Regal-Beloit Corporation, Victory Fireworks, Inc., PICC Property & Casualty Co. LTD., and Royal & Sun Alliance Insurance Co., LTD.,	57			6			6	2		
INT	Brief for the International Group of Protection and Indemnity (P&I) Clubs, et al., in Support of Petitioners	22			5			5			
AMER	Reply Brief for Petitioner Union Pacific Railroad Co.	36			2			2			

08-911 Kucana v Holder

INT	Brief for American Civil Liberties Union in Support of Petitioner	65		0	1						
INT	Brief for Respondent Supporting Petitioner Agron Kucana	52		5	1			1			

08-1521 McDonald v Chicago

AMER	Brief For Respondents City Of Chicagoand Village Of Oak Park	103		50	4		3	1			

09-475 Monsanto v Geertson

AMER	Brief for the Union of Concerned Scientists, Center for Responsible Genetics, Dr. Steven R. Radosevich, Dr. Paul E. Arriola, Dr. John Fagan, Dr. E. Ann Clark, Dr. Don M. Huber, and Caroline Cox in Support of Geertson Respondents	1		76	2					3	

08-1191 Morrison v National Australia

AMER	Brief for Law Professors in Support of Respondents	20		16	2				3		
FOR	Brief for NYSE Euronext in Support of Respondents	25		25	5			6	1		
AMER	Brief for Professors and Students of the Yale Law School Capital Markets and Financial Investments Clinic in Support of Respondents	21	4	19	2						
FOR	Brief for Republic of France in Support of Respondent	26		20	11		6		7		
INT	Brief for Respondent National Australia Bank Limited, Homeside Lending, Inc., Frank Cicutto, Hugh R. Harris, Kevin Race, W. Blake Wilson	59		23	3		4	1			
FOR	Brief for the European Aeronautic Defence & Space Co. N.V. , Alstom SA, Lagardère Groupe SCA, Thales SA, Technip SA, and Vivendi SA in Support of Respondents	30	4	18	13		6	6	3		
FOR	Brief for the Government of the Commonwealth of Australia in Support of the Defendants-Appellees	28		23	21		19	2	2		
FOR	Brief for the United Kingdom of Great Britain and Northern Ireland in Support of Respondents	27		13	3		4				
INT	Supplemental Brief for Respondent National Australia Bank Limited, Homeside Lending, Inc., Frank Cicutto, Hugh R. Harris	21		0	1		1				

08-651	**Padilla v Kentucky**										
AMER	Brief for Asian American Justice Center, Mexican American Legal Defense and Educational Fund, and Other Immigrants' Rights Organizations in Support of Petitioner	20		27	2					2	
08-6261	**Robertson v US**										
AMER	Brief for National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, The Immigrant Defense Project, The Immigrant Legal Resource Center, and The National Immigration Project of The National Lawyers Guild in Support of Petitioner	31		26	2						
AMER	Brief for Organization Representing Asylum Seekers in Support of Petitioner	18		11	7		1	6	2		
AMER	Brief for the Domestic Violence Legal Empowerment and Appeals Project and Other Domestic Violence Organizations, Scholars, and Professionals in Support of Respondent	31		24	1					1	
08-472	**Salazar v Buono**										
AMER	Brief Of Amicus Curiae Jewish Social Policy Action Network supporting Respondent	21		4	1						1
08-1555	**Samantar v Yousuf**										
AMER	Amicus Curiae Brief Of The American Jewish Congress In Support Of Petitioner	29	16	15	4			4			
FOR	Brief for Respondent	88		20	5		1	4			
AMER	Brief For Retired Militaryprofessionals As Amici Curiae Insupport Of Respondent	7		8	9			7		2	
INT	Brief Of Amici Curiae Academic Experts In Somali History And Current Affairs In Support Of Respondents	0		34	4		1	2		1	
INT	Brief Of Amici Curiae Dolly Filártiga, Sister Dianna Ortiz, And Other Torture Survivors And Their Family Members, Human Rights Organizations, Religious Organizations, And Torture Survivors Support Organizations In Support Of The Respondents	48	4	14	2			2			
AMER	Brief Of Amici Curiae Martin Weiss, Gerald Rosenstein, Progressive Jewish Alliance,Association Of Humanistic Rabbis, Jews Against Genocide, Stop Genocide Now, Save Darfur Coalition, Darfur And Beyond, Defend Darfur Dallas, Texans Against Genocide, San Francisco Bay Area Darfur Coalition, And Massachusetts Coalition To Save Darfur In Support	14	7	22	12			12			

	Of Respondents												
AMER	Brief Of Former United States Diplomats	14	2	2	3			2		1			
AMER	Brief Of Professors Of International Litigation And Foreign Relations Law As Amici Curiæ In Support Of Respondent	28		6	2			2					
AMER	Brief Of Professors Of Public International Law And Comparative Law As Amici Curiae, In Support Of Respondents	47	1	11	2			2					
FOR	Brief of the Petitioner	52	9	16	5			5					
FOR	Reply Brief of the Petitioner	57	10	9	2				2				
08-1198	**Stolt-Neilsen v Animal Feeds**												
AMER	Brief for DRI- The Voice of the Defense Bar in Support of Petitioner	27		15	1			1					
AMER	Brief for Respondent Animalfeeds International Corp. (reprint)	84		4	1			1					
08-7621	**Sullivan v Florida**												
INT	Brief for Amnesty International, et al., in Support of Petitioner	23		19	31		8	23		2			
AMER	Brief for Educators in Support of Petitioner	10		40	1				1				
AMER	Brief for Sixteen Members of the United States House of Representatives in Support of Respondent	3	3	7	13		1	9	4	1			
AMER	Brief for the Center on the Administration of Criminal Law in Support of Petitioner	39		42	1					1			
AMER	Brief for the Disability Rights Legal Center in Support of Petitioner	8		41	2					2			
AMER	Brief for the Juvenile Law Center, the National Juvenile Defender Center, and the Children and Family Justice Center in Support of Petitioner (reprint)	29		35	1								
AMER	Brief for the Sentencing Project in Support of Petitioner	14		13	1					1			
AMER	Brief for the State of Louisiana in Support of Respondent	10		17	2				1	1			
08-769	**US v Stevens**												
AMER	Brief for The Animal Legal Defense Fund in Support of Petitioner	22		29	32		34						
INT	Brief for the Safari Club International and the Congressional Sportsmen Foundation in Support of Respondent	9		5	2		2						

APPENDIX C
Foreign Travel and Events, Reported in the Annual Financial Disclosure Reports of Contemporary Supreme Court Justices, 2002-2009

JUSTICE ALITO

	Foreign Event	Described Purpose
2009	St. Mary's University (Innsbruck, Austria)	Teaching
2008	None	
2007	None	
2006	None	
2005	None	
2004	None	
2003	None	

JUSTICE BREYER

	Foreign Event	Described Purpose
2009	N/A	
2008	Paris Reseau ID Meeting, College-De-France (Paris, France)	Participate in Meeting
	ABA World Justice Project (Vienna, Austria)	Participate in Meeting
	Les Cercle De Economists (Aix-En-Provence, France)	Participate in Meeting
	ABA ILEX (Tokyo, Japan)	Participate in Meeting
	Ritsumeikan University (Kyoto and Osaka, Japan)	Speaker at Various Events
	IAI Forum (Burgundy, France)	Participate and Serve on Panel
	Ecole Nationale de la Magistrature (Bordeaux, France)	Speaker at Event
	Forum for EU-US Economic Affairs (Paris, France)	Participate in Meeting
	Oxford Law (Oxford, England)	Judge at Oxford Moot Court
2007	French-American Foundation (Paris, France)	Speaker at Event
	German Marshall Fund Brussels Forum (Brussels, Belgium)	Participate in Forum
	University of Urbino (Urbino, Italy)	Conferral to Honorary Degree
	Constitutional Court of Italy (Rome, Italy)	Speaker at Event
	Annual Gathering of Economics Sections of British Association and British Institute (York and London, England)	Lecturer at Event
	National Judical Academy of India, Supreme Court of India (Bhopal and New Delhi, India)	Speaker at Event
2006	Erasmus University, the Hague (Rotterdam, Netherland)	Not specified
	College De France (Paris, France)	Not specified
	Oxford University Press (Oxford, England)	Not specified
2005	Ecole Nationale de la Magistrature (Bordeaux, France)	Not specified

	Les Cercle De Economists (Aix-En-Provence, France)	Not specified
	Seminaire Bellagio Project on Terrorism, Globalism, and the Rule of Law (Bellagio, Italy)	Not specified
	Winter Conversazioni on Culture and Society (Melbourne, Australia)	Not specified
	Saban Forum (Jerusalem, Israel)	Not specified
2004	European-American Judicial Summit, Oxford Conference (Oxford, England)	Not specified
	Anglo American Exchange, British Department of Constitutional Affairs (London, England)	Not specified
2003	50th Anniversary of the European Court of Justice in Luxembourg (Luxembourg, Paris, Florence)	Not specified
	International Advisory Council, World Bank (London, England)	Not specified
	Oxford Program, University of Oklahoma (London, England)	Not specified
2002	Mentor Group (Brussels, Belgium)	Not specified
	Paris Bar Association (Paris, France)	Not specified

JUSTICE GINSBURG

	Foreign Event	**Described Purpose**
2009	Center for the Americas (Paris, France)	Speech
	Supreme Court of Argentina (Buenos Aires, Argentina)	Conference
	Loyola University School of Law (Rome, Italy)	Teaching
2008	Wake Forest School of Law Summer Program (Venice, Italy)	Lecturer
	ABA World Justice Forum (Vienna, Austria)	Participant and Speaker
2007	Hofstra School of Law Summer Program (Sorrento, Italy)	Lecturer
	The Law Society, Philosophical Society (Galway and Dublin, Ireland)	Speaker
	U.S.-European Legal Exchange, U.S. State Department (Brussels, Belgium)	Participant
2006	Exchanges with Constitutional Court of South Africa (Capetown, South Africa)	Guest Lecturer
2005	Emmanuel College (Cambridge, England)	Lecturer
2004	Hofstra School of Law Summer Program (Nice, France)	Lecturer
	European-American Judicial Summit (Luebeck, England)	Not specified
	Swedish Law Conference, Institute for Vidareutbildning (Stockholm, Sweden)	Not specified
2003	European Court of Justice Conference (Luxembourg, Germany)	Not specified
	La Pietra Conference (Florence, Italy)	Not specified
2002	Tulane Law School (Siena, Italy)	Lecturer
	Institute for Jewish Policy Research (London, UK)	Lecturer

JUSTICE KENNEDY

	Foreign Event	Described Purpose
2009	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
2008	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	Peking University School of Transnational Law (China)	Speaker
	The Law Society of Hong Kong (Hong Kong, China)	Speaker
2007	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	Travel to Paris and Athens, teaching in Athens (Paris, Athens)	Meetings with bench and bar
	Austrian-American Judicial Exchange (Vienna, Austria)	Participant
2006	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	Sultan Azlan Shah Law Lecture (Kuala Lumpur, Malaysia)	Meetings with bench and bar
	Travel to Dubai (Dubai, U.A.E.)	Meetings with bench and bar
	Travel to London (London, England)	Visited courts
2005	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	ABA - Asia Law Initiative (Bangkok, Thailand)	Participant
	Hong Kong University (Hong Kong, China)	Lecturer
	ABA Central European and Eurasian Law Initiative Advisory Board Meeting (Prague, Czech Republic)	Not specified
2004	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	Amsterdam Forum (Krakow, Poland)	Speaker
	Constitutional Court and Administrative Court of Poland, Warsaw University, and Jagellonian University (Krakow, Poland)	Speaker
	Canadian Exchange, Supreme Court of Canada (Ottawa, Canada)	Meetings
2003	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	Conference of the Constitutional Future of Europe (Florence, Italy)	Not specified
2002	Pacific McGeorge School of Law (Salzburg, Austria)	Adjunct instructor
	Mentor Group (Copenhagen, Denmark)	Not specified

CHIEF JUSTICE ROBERTS

	Foreign Event	Described Purpose
2009	New England School of Law (Galway, Ireland)	Teaching

	University of Cambridge (Cambridge, England)	Speaker
2008	St. Mary's University School of Law's Institute on World Legal Problems (Innsbruck, Austria)	Instructor
2007	Penn State, Dickinson School of Law (Vienna, Austria)	Instructor
2006	America College of Trial Lawyers (London, England)	Speaker
2005	Georgetown University Law School, London Summer Program (London, England)	Instructor

FORMER JUSTICE SOUTER

	Foreign Event	**Described Purpose**
2008	None indicated	
2007	None indicated	
2006	None indicated	
2005	None indicated	
2004	None indicated	
2003	None indicated	
2002	None indicated	

JUSTICE SCALIA

	Foreign Event	**Described Purpose**
2009	American Academy in Berlin (Berlin, Germany)	Speech
	Government of Poland (Warsaw, Poland)	Speech
	Harvard Alumni Association of Brazil (Brasilia, Brazil)	Lectures
	Lund University (Lund, Sweden)	Lectures
	Mentor Group (Berlin, Germany)	Speech
	Penn State Law School (Strasbourg, France)	Teaching
	University of Copenhagen (Copenhagen, Denmark)	Lecture
2008	New England School of Law (Galway, Ireland)	Teaching
	South Eastern Circuit (London, England)	Lecture
	University of Iceland (Reykjavik, Iceland)	Teaching
2007	Carleton University (Ottawa, Canada)	Conference
	McGill Institute (Montreal, Canada)	Conference
	Mentor Group (Lisbon, Portugal)	Conference
	Pepperdine University (London, England)	Teaching
	St. Mary's University (Innsbruck, Austria)	Teaching
	University College, Dublin Law Society (Dublin, Ireland)	Lecture
	University of Edinburgh (Edinburgh, Scotland)	Lecture
	Valparaiso University (Cambridge, England)	Teaching
	World Forum on the Future of Sport Shooting Activities (Germany)	Speech
2006	Europa Institut Zuerich (Zurich, Switzerland)	Seminar
	Fulbright United States, Israel Educational Forum	Speech

	(Jerusalem, Israel)	
	Hofstra University (Sorrento, Italy)	Teaching
2005	Mentor Group (Rome, Italy)	Conference
	National Italian American Foundation (Rome, Italy)	Speech
	Trinity College (Melbourne, Australia)	Conference
	University of Kansas School of Law (Istanbul, Turkey)	Teaching
2004	Constitutional Studies Center (Edmonton, Canada)	Not specified
	Doshisha University (Kyoto, Japan)	Not specified
	Leiden University (Leiden, Netherlands)	Not specified
	Lex Mundi, Asia Pacific Regional Conference (Auckland, New Zealand)	Not specified
	Tulane Law School Summer Program (Rhodes, Greece)	Not specified
2003	Hofstra University (Nice, France)	Teaching
	Japanese Society for Legal Studies (Kyoto, Japan)	Not specified
	The Mentor Group (Rome, Italy)	Not specified
	University of Western Ontario (London, Ontario)	Not specified
2002	The Asia Foundation (China and Taiwan)	Not specified
	Republic of Croatia (Zagreb, Croatia)	Not specified
	International Conference on Federalism (Zurich, Switzerland)	Not specified
	St. Mary's University (Innsbruck, Austria)	Teaching

JUSTICE STEVENS

	Foreign Event	**Described Purpose**
2008	None	
2007	None	
2006	None	
2005	None	
2004	None	
2003	None	
2002	None	

JUSTICE THOMAS

	Foreign Event	**Described Purpose**
2009	None	
2008	New York University School of Law (Florence, Italy)	Conference
2007	None	
2006	None	
2005	None	
2004	None	
2003	New York University School of Law (Florence, Italy)	Teaching
2002	None	

FORMER JUSTICE O'CONNOR

	Foreign Event	**Described Purpose**
2005	ABA Central European and Eurasian Law Initiative (Istanbul, Turkey)	Board meeting
2004	Iraqi Judicial Conference (The Hague, Netherlands)	Speech
	St. Mary's University School of Law (Innsbruck, Austria)	Lecture
	Southern Methodist University Law School (London, England)	Meetings
	U.S. Canadian Judicial Exchange (Ottawa, Canada)	Speech
2003	Court of Justice for the European Communities (The Hague, Netherlands)	Meetings
	New York University Global Law Conference (Florence, Italy)	Speeches, panel discussions
	ABA Central European and Eurasian Law Initiative (Serbia-Montenegro)	Board meeting
	Middle East Judicial Forum (Manama, Bahrain)	Panel discussions
2002	Fordham University (Dublin, Ireland)	Teaching
	ABA Central European and Eurasian Law Initiative (Moscow, Russia)	Board meeting
	Canadian Bar Association (London, Ontario)	Speech
	Singapore Academy of Law (Singapore)	Speech
	China-U.S. Judicial Exchange (China)	Speech

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