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Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine,

Ryan C. Black

Ryan J. Owens

Daniel E. Walters
Texas A&M University School of Law, dkw5367@psu.edu

Jennifer L. Brookhart

ARTICLES

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RYAN C. BLACK,* RYAN J. OWENS,** DANIEL E. WALTERS*** & JENNIFER L. BROOKHART****

Over the last ten years, judges, scholars, and policy makers have argued—quite vehemently at times—about whether U.S. courts should use transnational sources of law to interpret domestic legal doctrine. All eyes in this debate focus on the U.S. Supreme Court and its alleged use and misuse of transnational law. And almost all the debates are normative. Some scholars and judges argue the Court is correct to use transnational law. Others believe to do so is constitutional apostasy.

Still, the controversy seems to have generated more heat than light. Among the clamor can be found little empirical work on the conditions under which Supreme Court Justices actually use transnational law. Is it in fact the case that only liberal Justices employ transnational law—or do conservatives as well? In addition, there is little work on which countries Justices cite when they do use transnational law. Do they cherry pick whichever country works best in a given case, or is there a constraint via legitimacy on which countries to examine and cite?

The authors provide one of the most systematic empirical explorations of the Court's use of transnational law to date. Their results challenge conventional wisdom and upend the existing debates over transnational law. The data show that Justices are more likely to reference transnational law when they exercise judicial review and when they overturn precedent, which likely explains much of the controversy around the practice. Importantly, the data show, further, that all Justices cite transnational law. Liberals cite transnational law when they render liberal decisions, and conservatives cite transnational law when they render

* Ph.D.; Associate Professor of Political Science, Michigan State University.

** J.D., Ph.D.; Lyons Family Faculty Scholar, Associate Professor of Political Science, and Honorary Fellow, Institute for Legal Studies, University of Wisconsin-Madison.

*** J.D.; Regulation Fellow, University of Pennsylvania Law School; Graduate Student, Department of Political Science, University of Wisconsin-Madison.

**** Graduate Student, Department of Political Science, University of Wisconsin-Madison. Previous versions of this research were presented at the annual meetings of the American Political Science Association (2010), the Southwestern Political Science Association (2008), and the Southern Political Science Association (2008). We thank Martin Brody, Tom Hansford, and Jon Pevehouse for their helpful comments. We also gratefully acknowledge the research assistance of Amanda Bryan.

conservative decisions. Liberals and conservatives alike employ such law because both are ideologically conscious and strategic judicial actors who seek to support their decisions with as much persuasive material as possible.

Finally, the results suggest that Justices cite countries with regard to their political and legal characteristics. They cite what the public would consider to be among the most legitimate countries across the globe. In other words, on the whole, Justices seem to borrow from countries most like the United States. Whether these results are good or bad is unclear; what is clear, however, is that the normative debate over using transnational law must take a turn and address the authors' findings. Scholars can then pay more attention to best practices and the policy implications of cases that cite transnational law.

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INTRODUCTION

It is well-known that the United States Supreme Court occasionally—and controversially—references transnational sources of law when deciding cases concerning domestic doctrine.[1] Anyone who has followed the Court in recent years knows that debate over the practice has, at times, been ferocious.[2] Scholars and policy makers have divided into two groups: those that claim courts should reference transnational law because it can serve as an objective interpretive tool, and those who claim courts never should use such law because it is irrelevant and its use is opportunistic. Others lay blame for these differences on the role of ideology, believing that the ideological divide is clear and consistent.

Do these debates miss the mark? Are legal scholars arguing over immaterial claims? If our data have anything to say on the matter, the answer is yes. Our results promise to upend the normative debates.

Most of the controversy in recent years stems from a series of high profile, extremely political Supreme Court cases, most of which featured deep divides

1. *Transnational law* includes but is not limited to foreign court opinions. As the term is commonly used, it includes informal customs and practices, as well as nongovernmental sources of law. For a definition, see *infra* note 64 and accompanying text. For the sources of transnational law that we included in our sample, see *infra* section IV.A.

2. *See, e.g.*, ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES (2003); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance*, 11 WIDENER L. REV. 59 (2004); Vicki C. Jackson, *Progressive Constitutionalism and Transnational Legal Discourse*, *in* THE CONSTITUTION IN 2020, at 285 (Jack M. Balkin & Reva B. Siegel eds., 2009); Donald J. Kochan, *Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law*, 29 FORDHAM INT'L L.J. 507 (2006); Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT'L L. REV. 745 (2006); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005).

between the Court's liberals and the Court's conservatives. For example, in striking down a Texas statute banning homosexual sodomy in *Lawrence v. Texas*, Justice Anthony Kennedy cited a host of transnational legal sources, including a committee report to the British Parliament, British legislation passed in 1967, decisions by the European Court of Human Rights, and the general actions of "[o]ther nations."[3] Justice Scalia disagreed with the use of these sources.[4] The decision, of course, then triggered an even more heated battle in the legal and political communities over whether Justices should use transnational law to interpret domestic law. The issue emerged again in 2005 in *Roper v. Simmons*, with Justice Scalia again chastising the majority for citing transnational law to support its position on a death penalty issue, arguing that "[t]o invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."[5] In cases involving the death penalty for mentally retarded prisoners and life without parole for juveniles, the Court likewise entered the fray, and the Court's more consistent conservatives again balked at the liberals' penchant for cosmopolitanist jurisprudence.[6] In various cases, speeches, and publications, Justices Kennedy, O'Connor, Breyer, and Ginsburg later advocated that Justices at least look to transnational law.[7] Justices Scalia and Thomas, on the other hand, rejected the practice as constitutionally unsound.[8]

Despite the vehemence generated by these high profile cases, there have been other cases in which the Court used transnational law without a peep from purported opponents. One such recent case was *Kiobel v. Royal Dutch Petroleum Co.*[9] The petitioners in *Kiobel* were Nigerian civilians who resided in the United States. They claimed that the Royal Dutch Petroleum Corporation, among others, helped the Nigerian government beat, kill, and rape them, and to destroy their property—all done in retaliation because some Nigerian civilians

3. 539 U.S. 558, 572–73, 576 (2003).

4. *See id.* at 598 (Scalia, J., dissenting).

5. 543 U.S. 551, 627 (2005) (Scalia, J., dissenting).

6. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 82 (2010) (holding that it is cruel and unusual punishment to impose life sentences without parole on juvenile defendants who have not committed homicide); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding that it is cruel and unusual punishment to use the death penalty on individuals who are mentally retarded).

7. *See, e.g.*, Ruth Bader Ginsburg, *"A Decent Respect to the Opinions of [Human]kind": The Value of a Comparative Perspective in Constitutional Adjudication*, 64 CAMBRIDGE L.J. 575 (2005) [hereinafter Ginsburg, *Decent Respect*]; Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1 (2003); Sandra Day O'Connor, *Keynote Address*, 96 AM. SOC'Y INT'L L. PROC. 348 (2002); Stephen Breyer, Assoc. Justice, U.S. Supreme Court, The Supreme Court and the New International Law, Keynote Address at the American Society of International Law Annual Meeting (Apr. 4, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-04-03.html.

8. *See* Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring); *Atkins*, 536 U.S. at 347–48 (Scalia, J., dissenting). *But see* Antonin Scalia, *Outsourcing American Law: Foreign Law in Constitutional Interpretation* 1 (Am. Enter. Inst., Working Paper No. 152, 2009) (admitting that foreign law could be appropriately used to interpret treaties and sometimes to interpret statutes).

9. 133 S. Ct. 1659 (2013).

had protested the environmental ramifications of the corporations' actions.[10] The petitioners brought suit in the Southern District of New York under an act passed in 1789—the Alien Tort Statute (ATS), which states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[11] Facing the Court, then, was whether and to what extent the ATS granted federal courts jurisdiction to hear cases about international law violations committed abroad.

Rather than focus solely on statutory text, original intent, domestic precedents, or canons of statutory construction, the conservative Chief Justice went further and looked—surprisingly, for those who are accustomed to trenchant critiques both from Chief Justice Roberts and other conservative Justices on the Court—at transnational law and how its decision might impact international comity[12] and the balance of enforcement power for international law norms.[13] The entire Court effectively endorsed a role for international law in resolving the jurisdictional question. To be sure, Chief Justice Roberts's majority opinion went about it in subtle, almost sly, fashion. He framed the problem in terms of the Court's desire to not interfere with diplomatic relationships without explicit authorization from Congress.[14] For Chief Justice Roberts, the presumption against extraterritorial application of U.S. statutes "guards against our courts triggering . . . serious foreign policy consequences."[15] Justice Breyer, echoing similar concerns, made a much more explicit reference in his concurring opinion to "principles and practices of foreign relations law."[16] He cited the Restatement (Third) of Foreign Relations Law as "helpful" in discerning the international norms of extraterritorial jurisdiction, finding ample support for a broad standard of extraterritorial application for the ATS.[17] The Court rendered

10. *See id.* at 1662–63.

11. 28 U.S.C. § 1350 (2012).

12. *See Kiobel*, 133 S. Ct. at 1668–69.

13. *See id.* ("[F]ar from avoiding diplomatic strife, providing such a cause of action could have generated it."); *cf.* Eugene Kontorovich, Kiobel *Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1674 (2014) ("While *Kiobel* was a surprise from a domestic law context, it fits perfectly into broader patterns in international law.").

14. Indeed, Chief Justice Roberts indirectly cited comity-based objections by other nations when he cited a D.C. Circuit dissent by Judge Brett Kavanaugh, which itself cited instances of foreign nations objecting to extraterritorial application of the ATS. *See Kiobel*, 133 S. Ct. at 1669 (citing Doe v. Exxon Mobil Corp., 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (listing objections to the extraterritorial application of the ATS by Canada, Germany, Indonesia, Papua New Guinea, South Africa, and the United Kingdom)).

15. *Id.*

16. *Id.* at 1671 (Breyer, J., concurring); *id.* at 1673–77 (reviewing a number of international law sources and concluding that "the jurisdictional approach that [he] would use is analogous to, and consistent with, the approaches of a number of other nations," and that "[i]t is consistent with the approaches set forth in the Restatement").

17. *Id.* at 1673. The majority opinion articulated a test under which U.S. courts will have extraterritorial jurisdiction where the activities abroad "touch and concern" U.S. territory "with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669 (majority opinion). Justice

a 9–0 decision on the merits, and none of the opinions raised any objections to Chief Justice Roberts's or Justice Breyer's consideration of transnational legal principles.

Given the backlash to the Court's use of transnational law in *Lawrence*, *Roper*, and *Atkins*, it is perhaps surprising that the entire Court so nonchalantly incorporated legal principles lifted from the Restatement (Third) of Foreign Relations Law and other sources of transnational law. That surprise is squelched by a richer appreciation of the context of the decision—one that acknowledges that a citation to transnational law is hardly the key variable in predicting controversy. Indeed, it is certainly the case that the courts routinely cited these kinds of sources in previous cases dealing with extraterritorial jurisdiction of the ATS,[18] and, more broadly, in cases that might simply be thought of as transnational law cases masquerading as domestic cases. More importantly, the unanimity of the case differentiates it from some of the more controversial constitutional cases from the mid-2000s. Placed in this broader context, it is easy to see that the citation of transnational law might be a relative constant; what is variable is the reliance that Justices put on it and the degree to which we hear complaints about it. By focusing an inordinate amount of attention on the complaints in highly ideology-driven cases, we risk missing the extent to which the practice is deeply entrenched in current Court practice and effectively endorsed by all of the Justices. In other words, perhaps the Court's use of transnational law in *Kiobel* should *not* have been surprising. Indeed, perhaps the distinction between *Lawrence*, *Roper*, and *Atkins* on the one hand, and *Kiobel* on the other, exists on another dimension wholly unrelated to the actual fact of transnational law citation. Could it be that all Justices use transnational law? Could it be that the Court's use of transnational law is ideologically opportunistic but contextually constrained at the same time? And, if so, what does this mean for the normative debates among legal academics?

In this Article, we examine the conditions under which Justices cite transnational law as well as the countries and entities to which they cite—and our results upend conventional political and legal beliefs. The results show that Justices are more likely to reference transnational law when they exercise judicial review and when they overturn precedent. What is more, the data show

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Breyer's concurring opinion articulates a closely related multifactor jurisdictional test, where courts will possess jurisdiction when

> (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.

Id. at 1671 (Breyer, J., concurring).

18. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 882–84 (2d Cir. 1980) (looking to the United Nations Declaration on the Protection of All Persons from Being Subjected to Torture, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and "international consensus").

that *all* Justices cite transnational law. That is, liberals cite transnational law when they render liberal decisions, and conservatives cite transnational law when they render conservative decisions. In short, the Court's pattern of citing transnational law refuses to support the now common and largely rhetorical debates about ideology. Instead, Justices use transnational law opportunistically. At the same time, the results suggest that Justices cite countries with regard to their political and legal characteristics. They cite what the public would consider to be among the most "legitimate" countries across the globe. Put plainly, the assumption that citing foreign law is a principled disagreement between judicial ideologies is a red herring: liberals and conservatives alike employ foreign law because both are ideologically conscious, strategic judicial actors who seek to support their decisions with as much persuasive material as possible, and they have developed what one might call capacity or skill in doing so.

This Article unfolds in five Parts. In Part I, we explain the debates over the Court's citation of transnational law, focusing on the various legal, theoretical, and normative arguments that support or oppose the practice. In Part II, we examine the empirical literature on the Court's use of transnational law. As Part II shows, scholars require a more comprehensive theory of the Court's use of transnational law—specifically, one that asks questions about how and why the Court cites foreign law and one that is tailored to resolve some of the disputes about the practice. We offer this theory in Part III. We then provide one of the most comprehensive empirical analyses of the factors determining citations to transnational law to date. Not only do we examine the conditions under which Justices cite transnational law, we also examine the domestic political and legal aspects of the countries to which they cite. In Part IV, we review our dataset, providing background on some of the more specialized measures we employ and our strategy for identifying the relevant citations that serve as the unit of analysis. In Part V, we present our results. As we stated above, we find that a realistic picture of the Supreme Court's practice of citing transnational law upsets the focus of existing debates. The citation of transnational law appears to be just another instrumental technique of interpretation and persuasion, like canons of statutory construction or deference regimes, which generally fail to supersede Justices' policy-driven behavior.[19] Citation of transnational law is neither the bogeyman nor the savior that it is frequently made out to be.

19. *Cf.* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 32–33 (2005) (empirically studying the use of canons in a subset of statutory interpretation cases and finding that ideology accounts for some of the selective use of canons); Connor N. Raso & William N. Eskridge, Jr., Chevron *as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1727 (2010) (finding some evidence that Justices apply administrative law "deference regimes" sporadically but in line with their ideological preferences).

I. THE THEORETICAL, LEGAL, AND NORMATIVE DEBATES OVER USING TRANSNATIONAL LAW

The debate over citing transnational law has been called "mad and largely fruitless."[20] Nevertheless, we believe that criticism of the Court's citation of transnational law can be divided into two separate debates.[21] The first debate centers on whether courts *must* follow transnational law. On the one hand, some scholars claim that transnational law is part of a natural, global law that binds all sovereign nations regardless of their specific legal traditions.[22] On the other hand, those with a more positivistic conception of law argue that these legal sources are not relevant to the U.S. context.[23] In other words, the question is whether transnational sources are in some way a part of U.S. law, and therefore must be brought to bear on questions of U.S. constitutional and statutory interpretation. The second, more pragmatic debate centers on whether courts often *ought* to follow transnational law because of some purported interpretive benefits it may offer.[24] On one side of this debate is Justice Breyer, who argues that using transnational law simply "involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful."[25] On the other side is Justice Scalia, who argues that interpretation ought to be focused solely on U.S. legal materials because of the practical difficulties created by consulting transna-

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20. *See* Kim Lane Scheppele, "Looking over the Crowd and Picking Your Friends": The Social World of Legal Cases 1 (Feb. 2012) (unpublished manuscript), *available at* http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1144&context=schmooze_papers.

21. There have been other attempts to pare down the debate into "essential division[s]." *See, e.g.*, Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1341 (2007). Daniel Farber argues that the division is between "internationalists and constitutional nationalists." *Id.* We agree that this classification captures a good deal of the important differences in the theoretical defenses offered by judges and academics, but we also see additional dimensions, which this Part addresses.

22. *See* JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 20 (2012) (noting that there seem to be "'laws common to all mankind'" that function as an "overarching system"); *see also* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639, 669–70 (2005) (noting that certain recent decisions citing transnational or comparative law implicitly employ a natural law theory that emphasizes fundamental rights).

23. *See* Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 292–94 (2005). Of course, this distinction is fairly blunt. As Jeremy Waldron has pointed out:

> Historians of jurisprudence have spent gallons of ink on the question of whether [the Law of Nations] was conceived as natural law or positive law. The fact is that at various times and for various purposes it has been both, as well as the product of a sort of reflective equilibrium between the two.

Waldron, *supra* note 2, at 136 (footnote omitted).

24. *See* WALDRON, *supra* note 22, at 8 (noting that "when Supreme Court justices like Kennedy and Stephen Breyer argue in other forums that citing foreign law is sometimes a good idea . . . they have defended the practice in mostly pragmatic terms").

25. Norman Dorsen, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 524 (2005).

tional sources. In what follows, we recreate these debates and later discuss what, if anything, an empirical study can do to resolve them.

A. TRANSNATIONAL LAW AS BINDING, NATURAL LAW

Some more monist scholars and policy makers seem to believe in a set of transnational, universalist, and globalist legal norms, often couched in terms of natural law theory, to which sovereign nations are bound to follow in case of conflict between domestic law and transnational law.[26] "[T]ransnationalist jurisprudence," as the name suggests, "assumes America's political and economic interdependence with other nations operating within the international legal system," and does not "distinguish sharply between the relevance of foreign and international law, recognizing that one prominent feature of a globalizing world is the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international."[27] For Dean Harold Koh, courts are bound to follow international practice "not simply to promote American aims, but to advance the broader development of a well-functioning international judicial system."[28] Indeed, there is a rich historical lineage for this notion of transnational jurisprudence. The Supreme Court long ago seemed to want to enmesh international law and domestic law.[29] For example, in *Hilton v. Guyot*, the Court claimed that

> [i]nternational law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the "law of nations," but also questions arising under what is usually called "private international law," or the "conflict of laws," and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination.[30]

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26. *See* WALDRON, *supra* note 22, at 20; Alford, *supra* note 22, at 659–73; Delahunty & Yoo, *supra* note 23, at 292–94. Justice Breyer, for instance, refers to a "global legal enterprise," which American courts are, to some extent, bound to follow as a matter of natural rights and moral duties. *See* Breyer, *supra* note 7. For a discussion of monism (and its foil, dualism), see Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 636–43 (2007).

27. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 53 (2004).

28. *Id.* at 53–54.

29. *See id.* at 44 ("Not surprisingly, the early Supreme Court saw the judicial branch as a central channel for making international law part of U.S. law. The original design and early practice of our courts envisioned that they would not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind."); *see also* WALDRON, *supra* note 22.

30. 159 U.S. 113, 163 (1895).

Similar statements can be seen in *The Paquete Habana*.[31] There is in fact precedent for the transnationalist vision, but most of the most complete statements are to be found in academic circles in the discussion of comparative constitutionalism and transnational law.[32] The important point is that, given that international law surrounds many important legal disputes, many of which are grounded in domestic law, transnational law will almost always be relevant in important constitutional decisions in the United States if one takes this view.

There are, however, equally strong theoretical reasons to reject the transnational jurisprudence approach, reasons which ultimately stem from a legal positivism-influenced dualism and a concern that foreign law will undo domestic law if it is automatically relevant in domestic disputes and is given a relatively equal footing without explicit incorporation through law-making processes.[33] The so-called nationalist jurisprudence that can occasionally be traced to Justice Scalia and Justice Thomas is "characterized by commitments to territoriality, extreme deference to national executive power and political institutions, and resistance to comity or international law as meaningful constraints on national prerogatives."[34] The fear here is that the U.S. Constitution, which is—under a positivistic or dualistic conception of sovereignty and legal authority—the only document from which judges can draw legal authority, would be subverted if judges considered any transnational sources. Academics, too, have articulated this kind of worry. Delahunty and Yoo, for instance, argue that, to the extent that Justices and academics advocate for a "convergence" between domestic law and foreign law, this convergence could give "decisional effect to foreign materials"—an outcome that could denigrate and demote domestic law.[35] They likewise argue that giving decisional effect to transnational materials is indefensible under current theories of judicial review. If judges only obtain the power to strike legislation in service of a popular sovereign and a written constitution, they argue, judges' use of materials exogenous to domestic law makes judicial review theoretically indefensible except on the nondemocratic grounds that citing foreign sources will simply help the judge reach an abstractly "ideal" decision. This positivistic theory—well-established in the larger literature on legal theory and, for all practical purposes,

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31. *See* 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

32. *See* Waldron, *supra* note 2, at 135 (noting that *ius gentium*, or the Law of Nations, speaks to domestic law problems and serves as "a guiding ideal for a uniform body of transnational law").

33. For the classic treatment, see H. L. A. HART, THE CONCEPT OF LAW (1961). For recent treatments of the distinction between positivism and natural law, see Brian Bix, *On the Dividing Line Between Natural Law Theory and Legal Positivism*, 75 NOTRE DAME L. REV. 1613 (2000), and Brian Leiter, *Why Legal Positivism (Again)?* (Univ. of Chi. Law Sch. Pub. Law & Legal Theory Working Paper No. 442, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2323013.

34. Koh, *supra* note 27, at 52.

35. Delahunty & Yoo, *supra* note 23, at 295–96 (emphasis omitted); *see also* Ilya Shapiro, *The Use and Misuse of Foreign Law in U.S. Courts*, CATO AT LIBERTY (May 19, 2010, 8:51 AM), http://www.cato.org/blog/use-misuse-foreign-law-us-courts.

the governing legal ideology in American legal culture[36]—strongly challenges the transnational jurisprudence approach.

According to Delahunty and Yoo, "we enjoy our current Constitution precisely because the Americans of the late Eighteenth Century rejected their relationship with Europe" and sought to erect "an 'effective barrier against the Europeanization of American politics'"; therefore, "relying on the decisions of postwar Europeans who were neither part of the American polity that drafted and ratified the U.S. Constitution and Bill of Rights, nor descended from ancestors who shared a common political system with the Framers" cannot be defended as part of the American legal tradition.[37] So the argument goes: "[C]iting foreign law, using it to support a given reading of domestic law[,] undermines democratic self-governance. The interpretation of the U.S. Constitution should depend on that document's text, structure, and history, what it means in the context of the American polity."[38]

It is not surprising, then, that defenders of transnational law have reacted by defending it on positivistic grounds. That is, many argue that, for one reason or another, the American legal tradition always anticipated and expected the incorporation of transnational materials. For example, Daniel Farber argues that citation of transnational law has been a mainstay in the American legal tradition from the beginning, and that such citations even appeared in well-known opinions written by Chief Justice John Marshall.[39] Along these lines, he states:

> Citation of foreign law did not merely reflect the paucity of relevant domestic precedent. Rather, it reflected a deeply held understanding of law, in which background legal principles did not derive from any particular jurisdiction. Such background principles percolated through specific legal systems, filling gaps and providing context for positive enactments such as statutes and written constitutions.[40]

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36. *See* Leiter, *supra* note 33; *see also* Waldron, *supra* note 2, at 142 (noting that "Justice Holmes's view in *Erie* is said to have lent to legal positivism the authority of the Supreme Court," but also noting that "positivism's . . . credentials are suspect today" and have been widely questioned by such legal theorists as Ronald Dworkin).

37. Delahunty & Yoo, *supra* note 23, at 310 (quoting PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776–1814, at 176 (1993)).

38. Shapiro, *supra* note 35.

39. *See* Farber, *supra* note 21, at 1336; *see also* Koh, *supra* note 27, at 44 ("The original design and early practice of our courts envisioned that they would not merely accept, but would actively pursue, an understanding and incorporation of international law standards out of a decent respect for the opinions of mankind."); David M. O'Brien, *More Smoke Than Fire: The Rehnquist Court's Use of Comparative Judicial Opinions and Law in the Construction of Constitutional Rights*, 22 J.L. & POL. 83, 89 (2006) ("The Supreme Court has, in fact, long drawn on sources of comparative and international law, ranging from observations on comparative legal systems and practices to works by foreign commentators, constitutional and statutory provisions, international treaties and declarations, and other high courts' judicial decisions." (footnotes omitted)).

40. Farber, *supra* note 21, at 1336.

On this account, foreign law operates much as canons of statutory construction do: as tools for interpreting the inevitable ambiguities left in even the most coherent positivist legal code.[41] Citation to foreign law thus could be defended as an appeal to background principles that are implicitly incorporated into the American legal system and potentially even decisive in the absence of better evidence from within the legal system. This positivist defense of transnational law is also apparent in Dean Harold Koh's argument that certain passages in the U.S. Constitution seem to "implicitly refer[] to a community standard."[42] One need look no further than the clear constitutional supremacy of treaties over statutes or the early enactment of the Alien Tort Statute to see that the Framers no doubt intended that judges be familiar with more than purely domestic law.

In sum, the argument over whether judges must use transnational law has divided relatively cleanly. On the one side are the natural law or monistic types who believe the practice is necessary as part of a global, transnational legal system that transcends national sovereignty and represents something of a natural law of nations. On the other side are positivists or dualists who argue about whether the practice is faithful to the American legal tradition and the U.S. Constitution. Often, debates in the Supreme Court's cases seem to take on one or another of these theoretical stances. Nevertheless, these are not the only arguments about transnational law. Indeed, the argument that courts must apply transnational law is more of an academic argument than anything else, and no Justice on the Supreme Court seems particularly serious about pursuing that ideal consistently. Instead, most of the focus in terms of transnational law comes in the form of a debate about whether courts *should* look to it as just another interpretive tool. It is to this debate that we now turn.

B. TRANSNATIONAL LAW AS AN INTERPRETATIVE TOOL

A more practical argument for the use of transnational law has been articulated by some Supreme Court Justices, led chiefly by Justice Breyer. For example, Breyer argues: "If I have a difficult case and a human being called a judge, though of a different country, has had to consider a similar problem, why should I not read what that judge has said? It will not bind me, but I may learn something."[43]

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41. *Cf.* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 847–48 (4th ed. 2007); Brudney & Ditslear, *supra* note 19, at 32–33.

42. Koh, *supra* note 27, at 46 (emphasis omitted).

43. Dorsen, *supra* note 25, at 523; *see also* Printz v. United States, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) ("Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . . ." (citation omitted)); *id.* at 921 n.11 (majority opinion).

For Breyer, transnational law is not dispositive. Instead, it is simply another tool he uses to interpret what he believes to be an unclear legal question.[44] Breyer claims to use such sources as part of a more general process of interpretation that requires judges to consult as many diverse sources of information as they can find[45]—a "more is better" approach to legal interpretation. And he is not alone. Justice Ginsburg has made similar remarks.[46] Somewhat recently, Justice Kennedy also articulated a variant of this defense. Writing in *Graham v. Florida*, he stated:

> 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.[47]

Of course, there is also strong opposition to the Court's use of transnational law—even as "merely" an interpretive tool. For opponents, transnational law does not really help the judge or the Court, but in fact undermines the rule of law.[48] It does so for two reasons. First, as has often been suggested about judges who use legislative history, it could be the case that when picking transnational legal sources, judges simply look out over a crowd and pick out their friends.[49]

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44. *See* Dorsen, *supra* note 25, at 523 ("I realize full well that the decisions of foreign courts do not bind American courts. Of course they do not."). Jeremy Waldron makes a similar point, arguing:

> Of course it is ultimately our decision: "[I]t is a Constitution for the United States of America that we are expounding." But that does not preclude turning to the legal consensus of civilized nations for assistance any more than the American origin of an epidemic precludes Americans' turning to foreign scientists for guidance.

Waldron, *supra* note 2, at 144 (footnote omitted).

45. *See* Dahlia Lithwick, *Justice Grover Versus Justice Oscar*, SLATE (Dec. 6, 2006, 4:31 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/12/Justice_grover_versus_Justice_oscar.html ("Breyer has six interpretive tools—text, history, tradition, precedent, the purpose of a statute, and the consequences. In his view, it's a mistake to ignore the last two.").

46. *See* Ginsburg, *Decent Respect*, *supra* note 7, at 576 ("If US experience and decisions can be instructive to systems that have more recently instituted or invigorated judicial review for constitutionality, so we can learn from others now engaged in measuring ordinary laws and executive actions against charters securing basic rights.").

47. 560 U.S. 48, 82 (2010). Despite some speculation that Justice Sotomayor rejected the citation of foreign law in her confirmation hearings, she joined Justice Kennedy's opinion in *Graham*, leading scholars to speculate that her views are very much in concurrence with Breyer, Ginsburg, and Kennedy on these issues, her testimony notwithstanding. *See* Jonathan H. Adler, *Justice Sotomayor, Graham, and International Law*, VOLOKH CONSPIRACY (May 22, 2010, 10:28 AM), http://www.volokh.com/2010/05/22/Justice-sotomayor-graham-and-international-law.

48. *See* WALDRON, *supra* note 22, at 23 (noting that Justice Scalia has argued that the Court is "unprincipled and opportunistic" in its citation of foreign law).

49. *See* Dorsen, *supra* note 25, at 530 ("The criticism can be encapsulated in Judge Harold Leventhal's remark: Using legislative history is like looking out over the crowd at a cocktail party to try to identify your friends."); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing

In other words, a judge, faced with a dizzying array of legal systems from around the world—some of the common law ilk and some with a civil law lineage, some more autocratic and some more democratic—can "find anything [she] want[s]. If [she does]n't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever."[50] This easy availability of reinforcing evidence raises concerns that even the most thoroughly pragmatic and open-minded judge, committed simply to trying to learn from consideration of foreign sources, might be susceptible to "confirmation bias."[51] A less charitable label for this is cherry picking. In fact, even supporters of transnational law admit that in comparative constitutional law, "the reliance on only one side of the argument, bolstered by citations to only a few of the many cases on point, is common."[52] Selective citation is, of course, a reality in any case, as there are always more potentially relevant precedents and authorities that *could* be cited and which may detract from the ultimate conclusion. There are diminishing returns to exhaustive documentation of every such source, especially when the goal is at least in part to write opinions that will be accepted as legitimate and binding.[53] But as Chief Justice Roberts suggested in remarks from his confirmation hearing, the problem seems particularly acute in the context of citation of foreign law, where the diversity of potential legal sources far exceeds the diversity of potential sources stemming from domestic legal sources.

The second argument against using transnational law as an interpretive tool is that it is difficult to carry out correctly and, as a result, is usually done poorly. Justice Scalia, making just this point, has argued:

> One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is. So that you can say, for example, "Russia

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legislative history is still, as my late colleague Harold Leventhal once observed, akin to 'looking over a crowd and picking out your friends.'").

50. Peggy McGuinness, *Judge Roberts Hearing: Use of Foreign Law in Constitutional Cases*, OPINIO JURIS (Sep. 13, 2005, 5:14 PM), http://lawofnations.blogspot.com/2005/09/judge-roberts-hearing-use-of-foreign.html; *see also* Dorsen, *supra* note 25, at 521 ("When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it.").

51. *Cf.* Gretchen B. Chapman & Eric J. Johnson, *Incorporating the Irrelevant: Anchors in Judgments of Belief and Value*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 120, 133–34 (Thomas Gilovich, Dale Griffin, & Daniel Kahneman eds., 2002) (noting the existence of "a number of phenomena often labeled collectively as *confirmation bias*" that lead people "to seek information that if consistent with the current hypothesis would yield positive feedback" and to "examine evidence expected to confirm the hypothesis rather than evidence that could disconfirm the hypothesis"); *see also* JONATHAN BARON, THINKING AND DECIDING 159–62 (3d ed. 2000) (noting research on "confirmation bias" but urging a different label, "congruence bias," to more accurately describe the findings of the research).

52. Scheppele, *supra* note 20, at 1.

53. Indeed, Curry and Miller conducted an experiment and determined that referencing foreign legal judgments can erode public support for the Court. *See* Brett Curry & Banks Miller, *Looking for Law in All the Wrong Places? Foreign Law and Support for the U.S. Supreme Court*, 36 POL. & POL'Y 1094, 1107–08 (2008).

> follows *Miranda*," but you don't know that Russia doesn't have an exclusionary rule.
>
> And you can say every other country of the world thinks that holding somebody for twelve years under sentence of death is cruel and unusual, but you don't know that these other countries don't have habeas corpus systems which allow repeated applications to state and federal court, so that the reason it takes twelve years here is because the convicted murderer himself continues to file appeals that are continuously rejected.[54]

Judges who wish to learn something from transnational materials have to make sure they make apples-to-apples comparisons. Doing so can be resource intensive and introduce the risk of misapplication.[55] Given that judges tend to be resource constrained and rely heavily on persuasive amicus briefs for information about the law,[56] there are legitimate reasons to believe that judges will find false similarities when they (often) have incomplete information.

Still, even among opponents, there are some instances in which using transnational law is appropriate—but these instances are limited to referencing English common law. Justice Scalia has given effect to this argument. For Scalia, and those who agree with him, transnational law is "irrelevant" unless it directly sheds light on the original understanding of the American constitutional framework.[57] Justice Scalia's originalist approach allows Justices to consult certain kinds of foreign law sources. Because the English common law, as well as the commentaries of William Blackstone, was the direct inspiration for many terms of art in the Constitution, Justice Scalia claims that "the reality is [that he] use[s] foreign law more than anybody on the Court. But it's all old English law."[58] Again, Justice Scalia's more positivistic outlook on the American constitutional framework shines through, as any text that does not meet these criteria is immaterial, and anything that is immaterial should not be cited.[59]

These two concerns about the arbitrariness or difficulty of citing transnational law are ultimately susceptible to empirical testing, but no existing studies

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54. Dorsen, *supra* note 25, at 528–29.

55. *See* David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 302 (2006) ("[T]he limited ways that federal courts use foreign authority raises real questions about the ad hoc and inexpert nature of that use.").

56. *See* PAUL M. COLLINS, JR., FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING 106 (2008).

57. Dorsen, *supra* note 25, at 525 ("[M]y theory of what to do when interpreting the American Constitution is to try to understand what it meant, what it was understood by the society to mean when it was adopted. And I don't think it has changed since then. That approach used to be orthodoxy until about sixty years ago. Every judge would have told you that's what we do. If you have that philosophy, obviously foreign law is irrelevant with one exception: old English law—because phrases like 'due process,' and the 'right of confrontation' were taken from English law, and were understood to mean what they meant there.").

58. *Id.*

59. *See* Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 676 n.273 (citing Justice Scalia's statement: "I mean, go ahead and indulge your curiosity! Just don't put it in your opinions!").

directly address the Court's performance, even if agreement can be had on an acceptable theoretical baseline against which to judge performance. Although we remain agnostic about an appropriate theory, we do provide a detailed analysis of the Court's citation patterns, and we hope it is the first of many attempts to understand and address some of the pragmatic claims on behalf of and against citation of transnational law.[60]

Before we proceed to examine the empirical research on the Court's use of transnational law, we should point out that the argument over using transnational law has taken on an ideological dimension. Perhaps not surprisingly, given the dividing lines among normative camps (and the positions of the Justices in the salient cases discussed in the introduction), the debate over using transnational law has been framed in terms of liberals versus conservatives.[61] After all, two of the three Justices who most publicly support the use of transnational law are Breyer and Ginsburg,[62] and they reside in the Court's liberal bloc. That Justice Kennedy and Justice O'Connor have been noted to support the practice should caution against jumping to any hasty conclusions, however.[63] Thus, the question is ultimately one that needs to be answered by empirical analysis.

In short, scholars have divided into camps: those who believe judges must look to transnational law and those who believe they may not, and those who believe judges should look to transnational law as just another interpretive tool and those who believe its use is opportunistic. These are important normative questions, to be sure, but the scholarship on transnational law largely lacks empirical support. That is, few scholars have systematically examined which Justices reference transnational law and under what circumstances. Nor have they examined the domestic political conditions of the countries they cite and whether those conditions influence citation practices. In what follows, we review the empirical studies and discuss how they relate back to the normative debates above.

II. PREVIOUS EMPIRICAL RESEARCH ON TRANSNATIONAL LAW CITATION

Perhaps the debates about transnational law are in fact, "mad and largely fruitless." But if they are, perhaps that is because of a lack of understanding of how and when the Supreme Court cites transnational law.[64] In other words,

60. *See infra* Part V.

61. *See* Farber, *supra* note 21, at 1340 ("Roughly speaking, conservatives generally have attacked the Court's use of foreign citations while liberals have defended it.").

62. *See, e.g.*, Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 21 CARDOZO L. REV. 253 (1999); Breyer, *supra* note 7; Ginsburg, *Decent Respect*, *supra* note 7.

63. *See* O'Brien, *supra* note 39, at 85, 87; *see also infra* Table 4 and accompanying text.

64. The term *transnational law* has grown in popularity in recent years vis-à-vis more traditional terms that describe much of the same content (e.g., international law) because it is broader than

there have been few empirical studies of the Justices' behavior that might shine some light on assumptions made in the normative debate, possibly because some see the question as primarily or exclusively normative.[65] Accordingly, in what follows, we discuss the extant empirical literature and lay out and test several theories about the use of foreign materials in Supreme Court cases.

We start by observing that several components of the normative debates seem susceptible to resolution by empirical evidence. Some of the points of disagreement concern how ubiquitous the citation of transnational materials is—if it is widespread and done by liberal and conservative Justices alike, then the inference that such practices are for all intents and purposes part of the American legal tradition is strengthened. We might, therefore, want to know how often transnational materials are cited and who cites them. Likewise, some of the most important disagreements concern the consistency of citing foreign materials. Are Justices cherry picking when they cite transnational law, or are there other factors at work? We might therefore want to know more about which Justices cite foreign materials and under what circumstances, as well as *what* they tend to cite. To the extent that there is a great deal of consistency and reasoned selection in such citations, that might alter how scholars take some of the criticisms of the practice. In short, the normative debates in this area of jurisprudence are somewhat susceptible to resolution, or at least to recalibration, in light of empirical evidence. We hope to advance the discussion around these normative debates in our empirical analysis in Part V.

By point of contrast, prior studies of the Supreme Court's practice of citing transnational materials have focused mostly on different questions that, while important, have not been able to help resolve or refocus the normative debates. These extant studies look at, for instance, the rate or frequency of citation over the Court's history, as well as changes in the citation practices of briefing parties and amici. These studies vary in their methodology and often come to different conclusions. For example, Calabresi and Zimdahl search the historical record for "some of the most striking" examples where the Court borrowed from other countries.[66] Using what they admit is a nonrandom sample of cases, they find

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international law and encompasses law that was not necessarily generated through formal state institutions. *See* Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 U.C. IRVINE L. REV. 97, 103–06 (2011) (defining it as "law that transcends or crosses borders but may not be formally enacted by states").

65. *See* Vicki C. Jackson, Comment, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005) ("Past practice, however, is only a partial answer to debates over whether transnational law should be considered in resolving questions of U.S. constitutional law, debates linked to a broader set of disagreements about constitutional interpretation.").

66. Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 754 (2005).

that, while employing transnational law is not new, "the Court has cited foreign law with much more frequency in far more important constitutional cases" in recent Terms.[67]

Still, other, more rigorous studies have cast doubt on Calabresi and Zimdahl's findings. David O'Brien, for example, looks at citation counts to assess how often individual Justices on the Rehnquist Court (1986–2005) employed foreign law. He finds that the dominant pattern is a paucity of citations, even among the Justices who are outspoken in their support of citation to transnational materials.[68] For instance, Justice Breyer employed foreign law, foreign practices, or foreign judicial decisions in only five cases, three of which were dissents from denial of review in death penalty cases.[69] This compares with four such citations for the Court's most outspoken critic of the practice (Justice Scalia), and with only one such citation by Breyer's compatriot, Justice Ginsburg.[70] On the whole, then, O'Brien finds that the practice of citing foreign materials is quite limited and seems to lack clear ideological dividing lines.[71]

One of the most exhaustive empirical studies to date on transnational law comes from David Zaring, who examined how often U.S. federal courts (district courts, circuit courts of appeals, and the Supreme Court) between 1945 and 2005 cited the decisions of a select group of foreign high courts.[72] Zaring's data suggest that federal courts nowadays (from 1995 to the present) cite foreign law more than they did in the past (though not to a significant degree), but that when they do cite foreign courts, they do so not in cases involving domestic doctrine, but when the case involves a question about the content of transnational law itself, such as whether a claim is cognizable under the Law of Nations,[73] or where the courts coordinate "parallel proceedings before a foreign tribunal."[74] Like O'Brien, Zaring finds that the use of transnational materials to support the interpretation of domestic law is a relatively uncommon practice.[75] Zaring's coding allowed him to disaggregate citations into several categories, one of which was the use of foreign precedent to support the interpretation of domestic law. Within that category, only thirty cases involved the interpretation of the Constitution; thirty-four involved interpretation of a statute, such as the ATS or

67. *Id.* at 755; *see also* Jerry Goldman & Timothy R. Johnson, Exploring the Use of Foreign Law and Foreign Sources in the U.S. Supreme Court's Decision Making Process (Sept. 2005) (unpublished manuscript), *available at* htttp://citation.allacademic.com/meta/p4144_index.html.

68. *See* O'Brien, *supra* note 39, at 108–09.

69. *See id.* at 109.

70. *See id.*

71. *See id.* at 108 ("The Court's references to foreign legal sources were not historically unprecedented and remained infrequent and limited.").

72. *See* Zaring, *supra* note 55, at 301, 304. The foreign high courts in Zaring's study were from Mexico, Canada, Germany, France, Italy, Japan, Belgium, Holland, Spain, Switzerland, Israel, India, South Africa, and Australia, as well as the European Court of Human Rights and the European Court of Justice. *Id.* at 304–05.

73. *See id.* at 300–01; *see e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

74. Zaring, *supra* note 55, at 301.

75. *See id.*

admiralty statutes; and sixteen involved interpretation of state law.[76] Given that these cases represent only a fraction of all the cases where the courts cited transnational law—they could do so, for instance, to interpret international or foreign law[77]—one is left with the unavoidable conclusion that the much-maligned use of foreign materials for constitutional interpretation purposes in the highly salient "troika" of *Roper v. Simmons*, *Lawrence v. Texas*, and *Atkins v. Virginia* is rare and unrepresentative.[78]

As illuminating as these studies are, they leave important questions unanswered. First, these studies are unable to answer the broader questions of *when* Justices cite foreign law. The O'Brien study suggests an answer: almost never. But considering it is commonplace for a critic of citation to foreign law to argue that it is employed more often by liberal Justices, providing a cover for them to enforce their values on the general populace, it is worth statistically analyzing the individual behavior of Justices to find out whether ideology and other factors do in fact make it more likely that they will cite transnational law.

Second, consider the Zaring study. Because it is limited to citation counts for only a select group of foreign courts, it potentially misses a good deal of the action, and perhaps in the places where we might be most concerned about courts' citation to foreign law. Some of the most important criticisms offered by the likes of Justice Scalia and Chief Justice Roberts focus precisely on the assertion that it is problematic for judges to look at less prominent and prestigious courts from nations that differ greatly from the United States on important dimensions.[79] By selecting particular courts on the basis of characteristics that would make U.S. courts likely to cite them ex ante, Zaring cannot answer questions about *whose* law judges tend to cite, and, consequently, whether there is any truth to the criticism that judges can and do use the diversity of legal systems around the world to cherry pick citations that support their preformed conclusions.

In short, the extant literature focuses on assessing how frequently judges cite foreign law, finding that the Court has long considered foreign law in a wide variety of contexts—but with little frequency. This is an important contribution, and suggests that citing transnational law might not be groundbreakingly new. But this research also cannot answer questions related to the nuanced critiques offered by academics and the Justices themselves—critiques that rest on assumptions about *how* and *when* the Justices invoke transnational law. Accordingly, in what follows, we offer a theory designed to fill some of these gaps in the literature and provide testable hypotheses about the determinants of judicial use of transnational law.

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76. *See id.* at 315–19.

77. *See id.* at 306.

78. *Id.* at 306, 330–31.

79. *See supra* note 50 and accompanying text; *see also* Dorsen, *supra* note 25, at 521 ("When it agrees with what the justices would like the case to say, we use the foreign law, and when it doesn't agree we don't use it.").

III. A THEORY OF THE SUPREME COURT'S USE OF TRANSNATIONAL LAW

Our theoretical starting point, based on decades of scholarship, is that Justices are strategic judicial decisionmakers who seek to pursue their policy goals but are constrained from so doing by a host of internal and external norms and actors.[80] More specifically, the Supreme Court lacks the power to enforce its decisions. Instead, it must rely on citizens' and policymakers' beliefs in its legitimacy, something it earns by writing principled, logical, and well-supported opinions. As Justice Frankfurter once observed, the Court's authority "ultimately rests on sustained public confidence in its moral sanction."[81] In order to effectuate their policy goals, Justices must ensure that the opinions that justify those positions have legal and logical support. One way Justices can support their decisions is to reference transnational practices and transnational law.

Because they must legitimate their positions, we believe Justices will turn to as many sources of support as they can, including transnational sources of law. Supposing there is little (or no) domestic legal precedent on which to rely to support a Justice's preferred policy position, what can Justices do? One option is to accept that current domestic law fails to support the position and refuse to move forward with the Justice's desired legal change. Yet, if we know anything about judicial behavior, Justices will not be so dissuaded. Another option, then, is for the Justice to move forward with his or her desired legal change and offer up as much extralegal or nondomestic support for the position as possible. Transnational legal sources can fit the bill here.[82]

To be sure, although there are no studies that analyze whether Justices cite foreign law to protect or enhance opinions, there are a number of studies that examine how Justices use other institutional tools to do so. Zink, Spriggs, and Scott find that Justices can use unanimity and the favorable treatment of precedent to signal their impartiality and build legitimacy.[83] Cassillas, Enns, and Wohlfarth highlight how the Court modifies its behavior as a function of the perceived threats to its legitimacy stemming from ignoring public opinion.[84] Owens, Wedeking, and Wohlfarth find that the Court will alter the language of

80. *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

81. Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

82. *See* Waldron, *supra* note 2, at 138 ("Reference to official judgments, whether local or foreign, helps rescue judges from a feeling of intellectual nakedness. Just asserting that it is objectively wrong to executive individuals for crimes committed when they were children might be viewed as an expression of subjective sentiment rather than an insight into moral fact.").

83. *See* James R. Zink, James F. Spriggs II & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909, 909 (2009).

84. *See* Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 74 (2011).

its opinions to protect its policies from a hostile Congress.[85] And Horowitz finds that the Court is more likely to cite more authoritative case law when its decisions might be met with hostility from political actors and the public.[86]

Building on the logic of these studies, we believe Justices will cite transnational sources of law to prop up the logic of their opinions. Justices might utilize transnational law in these instances as "'logical reinforcement'. . . . in which the Court looks to foreign law and practice to demonstrate that its decisions are logical and supported by reason," so much so that other countries have made the same legal choices as those advocated in the case.[87] This type of citation method gives Justices more fighting ground with other Justices, Congress, and the public. That is, even if the use of transnational legal sources might stir up controversy, ultimately it is controversy that is unlikely to harm the Court, its Justices, or the decision itself. Indeed, citing transnational law, even when sparking domestic controversy, can begin a discussion of where the United States stands in relation to peers and turn the debate away from the Court's opinion to broader ground. As we discuss in section III.A below, we expect Justices to find transnational law attractive as a supportive tool when they overturn precedent, engage in judicial review, and render ideologically motivated decisions. Moreover, as we discuss in section III.B below, we also expect them to draw from countries the public will likely find most appropriate, such as countries with a perceived democratic government, common language, or a history of good trade relations.

A. THE CONDITIONS UNDER WHICH JUSTICES CITE TRANSNATIONAL LAW

1. Overruling Precedent

Justices may be more likely to reference transnational law when they break with precedent and when they engage in judicial review. One of the key elements of legal stability—and the Court's legitimacy—is stare decisis. The norm of stare decisis holds that judges and Justices should treat similar cases similarly. When the facts of one case are similar to the facts of a previously decided case, courts should apply the holdings decided in those previous cases.[88] Scheb and Lyons show that the public believes the Court should adhere to stare decisis.[89] Johnson, Spriggs, and Wahlbeck call stare decisis "the defin-

85. *See* Ryan J. Owens, Justin Wedeking & Patrick C. Wohlfarth, *How the Supreme Court Alters Opinion Language to Evade Congressional Review*, 1 J.L. & COURTS 35, 35 (2013).

86. *See* Jeremy D. Horowitz, Legitimacy, Ideology, and the Use of Precedent on the U.S. Supreme Court 2–3 (Nov. 2011) (unpublished manuscript) (on file with author).

87. Calabresi & Zimdahl, *supra* note 66, at 899. Of course, the Supreme Court sometimes does depart from its strict adherence to the norm of stare decisis. For a useful discussion of the importance and limits of stare decisis, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992).

88. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 571 (1987).

89. *See* John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 186 (2001).

ing feature of American courts . . . [a feature that] represents the most critical piece of American judicial infrastructure."[90] Lindquist and Klein also argue that "[o]ne of the Court's most important claims to legitimacy is the proposition that its decisions are not determined solely by the justices' personal policy preferences but are influenced as well by their understandings of what 'the law' requires in a given case."[91]

The Court's legitimacy can suffer when Justices ignore or break from precedent.[92] Therefore, Justices must amass considerable support for their positions when they do so. Justices seeking to overturn precedent may need to interject as many supporting considerations into their opinions as possible. They may even reach out and cite transnational sources of law to support their decision. By mustering law from elsewhere, Justices might protect their opinions and make them look more reasonable. They might even frame the debate so as to make their opponents appear on the wrong side of international consensus. This is precisely what Justice Kennedy tried to do in *Lawrence* and what Justice Stevens tried to do in *Roper*.

2. Engaging in Judicial Review

For similar reasons, we believe the Court will be more likely to cite transnational law when it exercises judicial review. Justices may be concerned with congressional responses to their decisions because Congress can initiate and support constitutional amendments to overturn judicial decisions, alter the Court's composition, reduce the Court's budget, regulate Court procedure, hold judicial salaries constant, strip the Court of jurisdiction, impeach and remove Justices, and pass legislation that overrides Supreme Court decisions.[93] Presidents can refuse to enforce the Court's decisions and order Cabinet Secretaries and other high-ranking officials to ignore them.[94] They can unilaterally create their own executive policies and shift the policy status quo,[95] mobilize interest groups to attack and undermine the Court's decisions,[96] "use their agenda-

90. Timothy R. Johnson, James F. Spriggs, II & Paul J. Wahlbeck, *The Origin and Development of Stare Decisis at the U.S. Supreme Court*, *in* NEW DIRECTIONS IN JUDICIAL POLITICS 167, 167 (Kevin T. McGuire ed., 2012).

91. Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 L. & SOC'Y REV. 135, 135 (2006).

92. *See* Zink et al., *supra* note 83.

93. *See, e.g.*, William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); Anna Harvey & Barry Friedman, *Pulling Punches: Congressional Constraints on the Supreme Court's Constitutional Rulings, 1987–2000*, 31 LEGIS. STUD. Q. 533 (2006); Ryan J. Owens, *The Separation of Powers and Supreme Court Agenda Setting*, 54 AM. J. POL. SCI. 412 (2010).

94. *See* Clifford J. Carrubba & Christopher Zorn, *Executive Discretion, Judicial Decision Making, and Separation of Powers in the United States*, 72 J. POL. 812, 812 (2010).

95. *See* Ryan C. Black et al., *Adding Recess Appointments to the President's "Tool Chest" of Unilateral Powers*, 60 POL. RES. Q. 645, 649 (2007).

96. *See generally* Mark A. Peterson, *The Presidency and Organized Interests: White House Patterns of Interest Group Liaison*, 86 AM. POL. SCI. REV. 612 (1992).

setting power to focus public scrutiny on judicial decisions,"[97] and "sign or veto override legislation."[98] Justices might pay close attention to the preferences of these political actors, rendering their decisions within the boundaries of acceptable behavior. And these concerns would appear to be most relevant when the Court strikes down legislation as unconstitutional. By showing how transnational law, and perhaps a growing worldwide consensus, supports the Court's decision to strike down a law, Justices might be able to withstand scrutiny of their opinion.[99]

Accordingly, we hypothesize that when a majority opinion overrules precedent or exercises judicial review, it will be more likely to reference transnational law than when it does not overrule precedent or exercise judicial review.

3. Ideological Decisionmaking

As stated above, conventional wisdom holds that liberal Justices are more likely to employ transnational law than conservative Justices.[100] Just looking at the breakdown among advocates and opponents of employing transnational law, one might suspect that liberals would be more likely to cite foreign law than conservatives. Robert Bork, for instance, has argued that the universalist impulse behind the former viewpoint is associated with judicial liberalism, as liberals have a "tendency to search for the universal and to denigrate the particular."[101] Consequently, any empirical analysis of transnational law must account for ideological tendencies among Justices.

Yet, there is considerable evidence to challenge the conventional wisdom that ideology divides supporters and opponents of transnational law. Consider Justice O'Connor. In 1995, she wrote a law review article which claimed that as the United States "moves toward a more international regime of dispute resolution, [its] federalist ideal of healthy dialogue and mutual trust may possibly be adapted to describe the proper relationship between domestic courts and transnational tribunals."[102] In *Grutter v. Bollinger*[103] and elsewhere, she relied on or supported transnational laws and practices.[104] Moreover, despite their vocal pro-

97. Owens, *supra* note 93, at 414.

98. *Id.*

99. Of course, many citizens will for many reasons not be particularly persuaded by the Court's invocation of transnational legal authority. Some, no doubt, will have their own opinions about the propriety of such citation, and others might simply be skeptical if the only authority offered for a ruling is transnational in nature and seems in tension with supposedly "core" American values. We simply suggest that, for many more readers, more citations and more support, whatever their nature, might be more persuasive and could defuse controversy.

100. *See* BORK, *supra* note 2; Farber, *supra* note 21.

101. BORK, *supra* note 2, at 22.

102. Sandra Day O'Connor, *Federalism of Free Nations*, 28 N.Y.U. J. INT'L L. & POL. 35, 41 (1995). Surprisingly, though, in 1997, she signed on to the majority opinion in *Printz v. United States*, which castigated Justice Breyer's use of transnational law in his dissent. 521 U.S. 898, 921 n.11 (1997).

103. 539 U.S. 306 (2003).

104. *See, e.g.*, O'Connor, *supra* note 7, at 350 ("[T]here is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.").

tests against using transnational law to interpret domestic doctrine, Chief Justice Rehnquist and Justices Scalia and Thomas employed transnational law to support their positions. For example, in *Washington v. Glucksberg*,[105] Chief Justice Rehnquist's majority opinion, which held that the Constitution observes no right to assisted suicide, cited laws in Canada, Britain, New Zealand, Australia, and Colombia.[106] In his separate opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Rehnquist referred to abortion decisions from Canadian and German courts.[107] Justices Thomas and Scalia joined each of these opinions.[108] These inconsistencies challenge the conventional view that liberals alone use transnational law. It is plausible, perhaps, that there are principled distinctions that these conservatives may draw to support their citations—for instance, Justice Scalia insists on a clear difference between citations to the common law of England and citation to other transnational legal authorities on the theory that the common law of England was likely on the minds of the Framers of the Constitution.[109] But *Planned Parenthood* suggests that Scalia—just like his colleagues—may not be as consistent as conventional wisdom suggests. Instead, we propose that *all* Justices may employ transnational law when it suits their dispositional and ideological goals.

That all Justices might use transnational law accords with our theory that Justices use what they can to support potentially suspect decisions. Key elites and the public are less likely to support a Court decision that is highly polarizing and ideological. For example, Bailey and Maltzman found that a decision justified solely on policy grounds would alienate citizens, whereas a decision justified on constitutional (as opposed to policy) grounds could enhance support for that decision—even among citizens with lower levels of general trust in the Court and greater predisposition to reject the decision.[110] Our belief is that Justices, worrying about how an ultra-ideological decision will look, will search for as many supporting grounds as possible, including transnational law. So, we expect that Justices who render a decision consistent with their ideological motivations, worried about how that might appear, will be more likely to cite transnational law to buttress their position. That is, we hypothesize that Justices will be more likely to employ transnational law when they render ideologically motivated decisions. Liberals will reference transnational law when they render liberal decisions, and conservatives will reference

105. 521 U.S. 702 (1997).

106. *See* Diane Marie Amann, *"Raise the Flag and Let It Talk": On the Use of External Norms in Constitutional Decision Making*, 2 INT'L J. CONST. L. 597, 604 n.34 (2004).

107. 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

108. *See* Amann, *supra* note 106. Indeed, conservatives had good reason to search for international law in the abortion context during some of the heated battles in the 1990s, because most of the available transnational law suggested that the United States was the outlier in protecting rights to abortions. *See* Dorsen, *supra* note 25, at 521.

109. *See* Dorsen, *supra* note 25, at 525.

110. *See* MICHAEL A. BAILEY & FORREST MALTZMAN, THE CONSTRAINED COURT: LAW, POLITICS, AND THE DECISIONS JUSTICES MAKE 4 (2011).

transnational law when they render conservative decisions.

4. Statistical Controls

To be sure that any findings that support our hypothesis are not confounded by rival explanations, we must include some control measures in our model. We first control for the effect of information. When more groups file briefs, the Court is probably more likely to be exposed to, and thus cite, transnational law. Accordingly, we measure the number of amicus briefs in each case. We also control for whether the Court construes a treaty. Zaring finds that the Court is more likely to reference and discuss foreign law when interpreting a provision in a treaty.[111] Next, we control for whether the Court is constrained by Congress and the President when it renders its decision. Justices might cite foreign law—to bring in more supporting materials—when they are more liberal or conservative than Congress and susceptible to political attack. Similarly, Black and Epstein suggest that the Court may be more likely to reference transnational law as Congress becomes more liberal.[112] As Congress becomes "more cosmopolitan," they argue, "transjudicial communication should increase."[113] Conversely, as politicians become more "isolationist," the Court may be less likely to cite transnational law.[114] Given this suggestion, we control for the general ideological mood of Congress. Finally, we control for Court Term to determine whether the modern Court cites transnational law more than its predecessors. Accounting for Court Term also allows us to capture the impact of technology, with Justices having an easier time finding transnational law with modern computing and the Internet.

B. GEOPOLITICAL CONTEXT AND THE COURT'S USE OF TRANSNATIONAL LAW

If Justices use transnational law strategically, not only would they cite it for support when they make controversial decisions, but they would also cite law from countries most likely to be deemed legitimate by the public—countries that have legal ideals similar to the United States. As Diane Amann intimates, these will be countries with "norms that are grounded in the same respect for freedom from undue state interference that animates U.S. constitutional culture."[115] So, for example, "Zimbabwe—a country widely criticized as a human rights violator—might not be the first to which a [U.S.] court would turn."[116] To determine what countries are the likeliest candidates for citation, we turned to literature on the attributes of states and the conditions under which they trade and make alliances with one another. This scholarship led us to believe that the

111. *See* Zaring, *supra* note 55.

112. *See* Ryan C. Black & Lee Epstein, *(Re-)Setting the Scholarly Agenda on Transjudicial Communication*, 32 L. & SOC. INQUIRY 791, 801 (2007).

113. *Id.* at 803.

114. *Id.*

115. Amann, *supra* note 106, at 606.

116. *Id.* at 606.

Supreme Court will be most likely to look to countries that have experiences similar to the United States, countries with whom the United States has military alliances, and wealthy countries.

1. Countries with Shared Experiences

Literature on international trade finds that similar regime types trade with each other more than they trade with dissimilar regimes. Similar countries are more likely to understand how the institutions in one another's states operate, and thus will find the transaction costs of trade diminished.[117] They will also believe the other state's institutions to be more legitimate.[118] This trade dynamic is even more pronounced among democracies. Because democratic countries are more likely to protect economic actors and individual rights than nondemocratic countries are, they find it more profitable to trade with each other. Indeed, trading with democratic regimes is less risky because citizens of such governments are more likely to reject illegitimate nationalizations of business that might jeopardize trade relations with the United States.

The same logic might lead the Supreme Court to reference law from countries that are democratic. Because democratic countries tend to reflect the desires of their citizens better than authoritarian regimes, they are perceived to be more legitimate. The Supreme Court, of course, feeds on legitimacy.[119] Thus, looking toward more legitimate regimes is logical because if Justices seek to bolster their opinions with additional logic and support, looking to the most respected foreign countries simply makes the most sense.[120] Thus, we expect that the Supreme Court will be increasingly likely to employ transnational law from countries that are more democratic.

Justices also should be more likely to cite countries whose legal and cultural histories are similar to the United States. Countries with similar legal systems are much more likely to understand and agree with one another's laws and history. For example, common law systems are likely to understand the importance of precedent and the importance of incremental judicial change.[121] In-

117. *See* William J. Dixon & Bruce E. Moon, *Political Similarity and American Foreign Trade Patterns*, 46 POL. RES. Q. 5, 6 (1993); *see also* Donald P. Green et al., *Dirty Pool*, 55 INT'L ORG. 441, 442 (2001).

118. *See* Harry Bliss & Bruce Russett, *Democracy and Trade: Ties of Interest and Community*, *in* DEMOCRATIC PEACE FOR EUROPE: MYTH OR REALITY? 75, 76 (Gustaaf Geeraerts & Patrick Stouthuysen eds., 1999); Harry Bliss & Bruce Russett, *Democratic Trading Partners: The Liberal Connection, 1962–1989*, 60 J. POL. 1126, 1126 (1998); James D. Morrow et al., *The Political Determinants of International Trade: The Major Powers, 1907–90*, 92 AM. POL. SCI. REV. 649, 649 (1998).

119. *See* Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1215 (1986); James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 343 (1998).

120. Future work on this topic might also consider examining constitutional similarities among countries by turning to the Comparative Constitutions Project. *See* COMPARATIVE CONSTITUTIONS PROJECT, http://comparativeconstitutionsproject.org/download-data (last visited May 29, 2014).

121. *See* Emilia Justyna Powell & Stephanie J. Rickard, *International Trade and Domestic Legal Systems: Examining the Impact of Islamic Law*, 36 INT'L INTERACTIONS 335, 339 (2010).

deed, there is considerable evidence that common law countries tend to trade with one another much more than with states with a civil law system, as common law systems tend to have more effective enforcement of contracts than other types of states.[122] Given these natural complements, we expect that the Supreme Court will be much more likely to reference countries with common law traditions. And simply because Supreme Court Justices and the (majority of the) American public speak English as the primary language, we expect them to be more likely to reference transnational sources of law from English-speaking countries.

2. Alliances

Scholarship suggests that states with similar regime types are more likely to form military and trade alliances because of their shared interests.[123] Such states "identify through shared norms and political culture," have similar backgrounds, and often find themselves facing similar external hostile forces.[124] This is particularly true of democracies.[125] Democracies tend to have strong attachments to the rule of law,[126] making them eager to cooperate. Additionally, because the public must largely approve of international agreements in democracies, the underlying agreements generate legitimacy and provide a credible commitment to the deal.[127] What is more, the domestic political costs suffered by democratic leaders for noncooperation or reneging are great. That is, states have strong reasons to believe that democracies will make good on their international commitments because their leaders will suffer at the hands of their electorates if they abandon their promises. "If a [democratically elected] leader decides to renege on an international agreement, the leader will suffer potentially heavy domestic political costs because such an action will likely be out of step with domestic political opinion . . . ."[128] Thus, we expect that the Supreme Court will be more likely to cite transnational law from countries with whom the United States has defense alliances and those with whom the United States trades.

122. *See* Simeon Djankov et al., *Courts*, 118 Q. J. ECON. 453, 453 (2003).

123. *See* Ajin Choi, *The Power of Democratic Cooperation*, 28 INT'L SECURITY 142, 144 (2003); Brian Lai & Dan Reiter, *Democracy, Political Similarity, and International Alliances, 1816–1992*, 44 J. CONFLICT RESOLUTION 203, 203 (2000); Brett Ashley Leeds et al., *Alliance Treaty Obligations and Provisions, 1815–1944*, 28 INT'L INTERACTIONS 237 (2002).

124. *See* Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 387 (1994).

125. *See* Brett Ashley Leeds, *Domestic Political Institutions, Credible Commitments, and International Cooperation*, 43 AM. J. POL. SCI. 979, 997 (1999).

126. *See generally* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J. P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1966).

127. *See* Lai & Reiter, *supra* note 123.

128. *Id.* at 206.

3. Wealth and Location

The "gravity model" in many trade studies suggests that distance and economic production influence the decision to trade.[129] States that are geographically closer are more likely to trade with one another. And states with larger economies are more likely to trade with each other. Similar to the logic of alliances, countries that have consistent contact and shared economic interests are more likely to be familiar with and understand each other's institutions, particularly political and military.[130] We expect, then, that the Supreme Court will be more likely to reference transnational laws from countries that are geographically close to the United States and countries with larger economies.

4. Major Power Status

Finally, we examine whether the Court is more likely to cite a country defined as a major power. The appearance of cherry picking a country from which to cite is likely to be minimized when the country is a major power. With major-power status comes recognition and notoriety. Additionally, major powers tend to be more stable and durable,[131] giving them an aura of legitimacy. What is more, there is evidence that major powers (like the United States) are more likely to form alliances and defense pacts with one another.[132] And major powers tend to engage in extensive trade, especially when they are allies.[133] As such, we expect that the Court will be more likely to cite the law of major powers than the law of nonmajor powers.

IV. DATA

A. DESCRIPTIVE STATISTICS AND THE DEPENDENT VARIABLES

To determine whether Justices strategically cite transnational law, we analyzed every formally decided full-opinion case, unsigned orally argued case, and judgment of the Court handed down during the Court's 1953–2008 Terms. Unlike existing studies, we searched for references to every country, along with major international tribunals during our time period. We began by searching every Supreme Court majority opinion for references to well over 200 countries and international tribunals.[134] We searched each opinion to determine whether

129. *See* JAN TINBERGEN, SHAPING THE WORLD ECONOMY: SUGGESTIONS FOR AN INTERNATIONAL ECONOMIC POLICY 263 (1962).

130. *See* Edward D. Mansfield & Rachel Bronson, *Alliances, Preferential Trading Arrangements, and International Trade*, 91 AM. POL. SCI. REV. 94, 94 (1997).

131. *See* James D. Morrow, *Alliances and Asymmetry: An Alternative to the Capability Aggregation Model of Alliances*, 35 AM. J. POL. SCI. 904, 913 (1991).

132. *See* Leeds et al., *supra* note 123, at 247.

133. *See* Mansfield & Bronson, *supra* note 130.

134. To determine the names of countries to search, we examined the State Department's list of recognized countries around the world. *See A–Z List of Country and Other Area Pages*, U.S.

the reference to the country was to:

- a foreign court decision;
- the procedures or practices of a foreign court;
- foreign law enforcement procedures;
- the provisions of a foreign constitution;
- formal government acts of a foreign country (such as laws, statutes, regulations, codes, decrees, or directives);
- informal government acts of a foreign country (such as debates, speeches, or proposals);
- international reports (for example, by the United Nations) or documents that mention the country searched for;
- the cultural, economic, political, or historical practices within a foreign country;
- international treaties; and
- common law.

For each citation, we read the substance of the language and coded it for whether the citation was positive/approving, negative/disapproving, mixed, or neutral. We supplemented these data on citation type with other data from the Supreme Court Database[135] and other content coding, which will be explained more *infra*.

Before we proceed to discuss how we coded our data for the multivariate study, we wish to present some descriptive data.[136] Overall, we find 1699 citations in our sample across all the Court's published opinions (including concurrences, special concurrences, dissents, and dissents in part). With 6212 cases in our dataset, these citations are distributed across only 6.39% of the total cases (N=397 cases). *Positive* citations to these sources appear in only a fraction of these cases, or 4.73% of all the cases in the dataset (N=294 cases). The practice is, in other words, fairly rare.

DEP'T OF STATE, http://www.state.gov/misc/list/index.htm (last visited May 29, 2014). While some countries' names have changed, and new countries have sprung up, we examined their previous names as well.

135. *See The Supreme Court Database*, WASH. UNIV. IN ST. LOUIS, http://scdb.wustl.edu (last visited Dec. 6, 2013).

136. We note that the descriptive data presented in Tables 1–4 include citations to these sources to interpret treaties. However, only nineteen of the 6,212 cases analyzed involved the interpretation of a treaty, and those nineteen cases only cited any of these sources a total of twenty-nine times.

We can also take an initial look at how the Court used these various authorities. As Table 1 indicates, foreign court decisions (15.19%), the procedures and practices of a foreign court (17.36%), formal government actions of a foreign state (18.07%), the cultural practices within a foreign state (12.83%), and foreign common law (15.24%) were the most used transnational sources; in contrast, foreign constitutions (4.06%) and informal government actions (6.18%) were relatively infrequently used.

Table 1: Treatment of Citation

Type	Positive	Neutral	Negative	Mixed	Total
Court Decision	165	33	54	6	258
Court Procedures	151	44	86	14	295
Law Enforcement Procedures	20	0	53	2	75
Constitutional Provisions	40	3	18	8	69
Formal Government Acts	177	45	58	27	307
Informal Government Acts	72	26	7	0	105
International Reports	7	2	11	0	20
Cultural, Economic, Historical Practices	61	64	78	15	218
International Treaty	17	35	41	0	93
Common Law	170	7	62	20	259
Total	880	259	468	92	1699

Moreover, by coding each citation for how it was used, we begin to see that certain types of sources are more associated with particular uses. For instance, Justices negatively cited cultural, economic, political, or historical practices within a foreign country (that is, to distinguish or disparage the practice) more than they did positively or neutrally. Most of the other categories of sources are more tilted toward positive or neutral citations.

Another way to slice the data is to examine where the citations appear. Table 2 shows that some sources are associated with majority opinions and others are associated with dissents. For instance, we find that foreign constitutional provisions, international reports, and cultural, economic, political, or historical practices break the general mold, exhibiting a higher proportion of citations in dissent than other categories.

And, as Table 3 indicates, positive citations of foreign authority are more likely in majority opinions than they are in dissent, but so too are negative citations. We find that 56.25% of all the positive citations appear in majority opinions and that 51.28% of negative citations appear in majority opinions. Because a small number of citations appear in concurrences, dissents do not account for the rest, but they do account for significant proportions of both

Table 2: Opinion in Which Citation Located

Type	Majority	Regular Concur	Special Concur	Dissent in Part	Dissent	Total
Court Decision	152	9	16	6	75	258
Court Procedures	181	13	18	9	74	295
Law Enforcement Procedures	47	5	3	1	19	75
Constitutional Provisions	21	8	4	2	34	69
Formal Government Acts	178	16	5	6	102	307
Informal Government Acts	57	7	4	11	26	105
International Reports	2	2	3	0	13	20
Cultural, Economic, Historical Practices	85	19	32	11	71	218
International Treaty	76	0	11	0	6	93
Common Law	148	15	13	9	74	259
Total	947	94	109	55	494	1699

positive and negative citations: 27.61% and 35.3%, respectively.

Moreover, as suggested by prior studies,[137] it appears from the data in Table 4 that individual Justices engage in the practice at strikingly different rates than commonly assumed.[138] If any ideological pattern emerges, it is that there is no pattern. In short, the data suggest a more complicated pattern of citation than popular accounts suggest.

Table 3: Opinion in Which Citation Located, by Treatment

Treatment	Majority	Regular Concur	Special Concur	Dissent in Part	Dissent	Total
Positive	495	53	52	37	243	880
Neutral	165	10	22	10	52	259
Negative	240	26	29	8	165	468
Mixed	47	5	6	0	34	92
Total	947	94	109	55	494	1699

Although it is difficult to read too much into these descriptive data, they do at least challenge common beliefs. The conventional story that liberal Justices cite transnational law in support of majority opinions that depart from domestic

137. *See supra* notes 72–74 and accompanying text.

138. The Justices chosen for inclusion were selected to highlight the patterns of citation across Justices with very different views on the propriety of citing transnational law.

Table 4: Identity of Select Authors[139]

Justice	Positive	Neutral	Negative	Mixed	Total
Breyer	31	2	8	2	43
Ginsburg	3	3	5	1	12
Kennedy	12	0	3	1	16
O'Connor	24	2	3	0	29
Rehnquist	9	0	5	0	14
Scalia	35	1	20	2	58
Stevens	40	7	30	2	79

law—and that conservative Justices object to that practice in dissent—is not substantiated.

Our goals, again, were to go beyond mere descriptive analysis to determine the conditions under which Justices cite transnational law, as well as the countries whose laws they cite. Accordingly, we estimated two distinct models. The dependent variable in our first model examines whether the majority opinion cited a foreign source of law in support of the argument being made in the opinion (1 if yes; 0 otherwise).[140] The dependent variable in the second model examines whether the Court positively cited the law of a particular country. That is, our unit of analysis is the country–year dyad. If the Court positively cited the country's laws, we coded the dependent variable as 1; 0 otherwise.

B. MODEL 1 EXPLANATORY VARIABLES

We coded our independent variables in the first model, which examines the conditions under which Justices cite transnational law, as follows: *Exercise of Judicial Review* equals 1 if the Court majority struck down an Act of Congress, or struck down a state statute; 0 otherwise. *Case Alters Precedent* takes on a value of 1 when the Court majority expressly overruled an existing Supreme Court precedent; 0 otherwise. *Liberal Case Outcome* measures whether the Court's decision in the case was liberal or conservative.[141] To determine *Majority Coalition Ideology*, we followed political science conventions and examined the ideal point of the median member of the majority coalition.[142] In essence,

139. For illustrative purposes, we only present the most frequent users of transnational law in this table.

140. Our results are statistically and substantively similar if we instead examine any reference to foreign law in the majority opinion.

141. To determine whether the Court exercised judicial review, formally altered precedent, and rendered a liberal or conservative decision, we relied on the Supreme Court Database. *See Supreme Court Database*, *supra* note 135.

142. *See* Cliff Carrubba et al., *Who Controls the Content of Supreme Court Opinions?*, 56 AM. J. POL. SCI. 400, 400 (2012).

this convention assumes that the most central member of the majority coalition is the best approximation of the overall ideological valence of that coalition. We measure this ideology variable using the oft-used Martin–Quinn scores. The Martin–Quinn scores essentially track the voting behavior of Justices relative to one another and generate estimates for how liberal or conservative each Justice is.[143] Justices with smaller values are more liberal while Justices with larger values are more conservative. Justice William Douglas was the most liberal Justice on the Court; Justice Clarence Thomas is the most conservative.

We coded our controls as follows: *Amicus Briefs* counts the total number of amicus curiae briefs filed at the merits stage of the case. We obtained data for 1953–2001 from Collins.[144] Using *LexisNexis*, we collected amicus data from 2002–2009. *Court Term* is simply the Term in which the Court rendered its decision. *Case Involved Treaty Interpretation* is a dummy variable coded 1 if the Supreme Court Database determines that the case interpreted a treaty. *Constrained Court* is a binary variable that takes on a value of 1 if the Court median, as determined by the Judicial Common Space Scores,[145] was more conservative or liberal than both the House and Senate medians during the Terms in question; 0 otherwise. *Legislative Liberalism* is simply the average of the House and Senate median Judicial Common Space scores for the term in question. Negative values represent increasing liberalism in these scores. Finally, we used James Stimson's first-dimension Policy Mood Scores to develop a measure of *Public Liberalism*. We include this measure to control for the possibility that any effects can be traced to the Justices' propensity to respond to swings in the national ideological climate.[146]

C. MODEL 2 EXPLANATORY VARIABLES

We coded the following independent variables for a model examining the countries to which Justices make citations. To examine our hypotheses about the role of shared experiences, we first coded each country's *Polity Score*. We relied on the Polity IV Project scores to determine the authority characteristics of

143. *See* Andrew D. Martin & Kevin M. Quinn, *Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999*, 10 POL. ANALYSIS 134, 145–46 (2002); *see also Martin–Quinn Scores*, UNIV. OF CAL. BERKELEY, http://mqscores.berkeley.edu/measures.php (last visited May 29, 2014).

144. *See* COLLINS, JR., *supra* note 56, at 187–96.

145. *See generally* Lee Epstein et al., *The Judicial Common Space*, 23 J.L. ECON. & ORG. 303 (2007). These data provide comparable ideal point estimates (i.e., estimates of preferences) of all federal courts and judges, Congress, and the President. *See id.*

146. The first-dimension Policy Mood Scores chart the public's support for government on a liberal–conservative continuum. *See generally* JAMES A. STIMSON, PUBLIC OPINION IN AMERICA: MOODS, CYCLES, AND SWINGS (2d ed. 1999). Up-to-date Policy Mood Scores can be accessed via the *Policy Agendas Project* website. *See Datasets & Codebooks*, POLICY AGENDAS PROJECT, http://www.policyagendas.org/page/datasets-codebooks#policy_moods (last visited Jan. 16, 2014).

countries around the world and over time.[147] The Polity measures, used extensively in international relations scholarship, examine how autocratic or democratic a state is.[148] Negative scores reflect a country that is more autocratic, while positive scores reflect a country that is increasingly democratic.[149] We next examined the *Government Longevity* of each country's regime. Government longevity simply measures the number of years in which the country has received that same Polity score.

Next, we measured whether the country's legal system was based on the *Common Law*, as well as whether *English* was the country's official language (or one of its official languages). If the country was based on the common law, the variable received a value of 1; 0 otherwise. Further, if the country spoke English as an official language, *English* received a value of 1; 0 otherwise.

To determine whether the United States had a defensive military alliance with the country, we turned to the Correlates of War (COW) database.[150] If COW noted that the United States had a defensive alliance with the country, we coded *Alliance with U.S.* as 1; 0 otherwise. Following the gravity model, we measured the *Geographic Distance from U.S.* as the number of miles between Washington, D.C. and each country's capital. We also measured each country's *Real GDP*. Finally, we included a dummy variable *Preferential Trade Agreement*, with a value of 1 if the United States maintains a preferential trade agreement with that nation; 0 otherwise.

We controlled for the yearly amount of exports from each country to the United States (*Exports from Country*), as well as the United States' exports to each country (*Exports to Country*). We also coded whether (1) or not (0) COW asserts the country is a *Major Power*. Finally, we controlled for the *Year* of the decision to eliminate any time-based effects from the model.

V. EMPIRICAL ANALYSES

To recap, we estimate two models: one seeks to identify the conditions under which majority opinions cite transnational law, our hypothesis being that Justices are more likely to cite transnational law when they are overruling precedent or striking statutes, and especially when doing so supports their ideological predispositions; the second seeks to identify the countries the Court cites, our hypothesis being that Justices are more likely to cite to countries that share key

147. *See* Monty G. Marshall & Ted Robert Gurr, *Polity IV Project: Political Regime Characteristics and Transitions, 1800–2012*, CTR. FOR SYSTEMIC PEACE, http://www.systemicpeace.org/polity/polity4.htm (last visited Dec. 6, 2013).

148. *See id.*

149. *See id.*

150. *See Datasets*, CORRELATES OF WAR, http://www.correlatesofwar.org/datasets.htm (last visited Dec. 6, 2013).

characteristics with the United States. In both cases, we estimate the models using logistic regression, with random effects in Model 2.[151] These specifications allow us to assess the probability that the Court moved from a negative value (that is, no citation to foreign material) to a positive value (that is, citation to foreign material) based on the effect of the independent variables included in the models.

A. MODEL 1: MAJORITY OPINION CITATION TO TRANSNATIONAL LAW

Table 5 shows the results from our first model, which addresses the conditions under which a Supreme Court majority opinion positively employs transnational law. We find strong support for our hypotheses. Justices are more likely to reference transnational sources of law when they strike down federal and state legislation, when they overrule precedent, and when they decide cases in an ideological fashion. That is, conservatives and liberals both use transnational law.[152] The significant coefficient for *Public Liberalism* suggests that the use of transnational law is, in fact, partially attributable to the Justices' read on the ideological preferences of the public (namely, the Justices are more likely to cite transnational law when the public becomes increasingly liberal).[153] Importantly, the model strongly supports our main hypotheses even after taking account of this effect.

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151. Random effects models are one method for achieving unbiased regression estimates from panel data when there is unobserved heterogeneity in individual subjects. Another method is fixed effect models. As long as key assumptions hold true—namely, that the unobserved characteristics are unrelated to the other explanatory variables and are, in effect, random—random effects models yield unbiased estimates. *See* ORLEY ASHENFELTER ET AL., STATISTICS AND ECONOMETRICS: METHODS AND APPLICATIONS 264–73 (2003).

152. One item to consider is the role of English common law. That is, some Justices may consult the common law to determine how it informs an original understanding of the Constitution. *See supra* notes 57–58 and accompanying text. To account for this dynamic, we refit our models excluding references to English common law. Our results are quite similar to the results we present. In our first model (which looks at the conditions under which cases cited transnational law), the *Constrained Court* variable becomes positive and statistically significant (meaning the Court cites transnational law more often when it is more conservative or liberal than Congress). The *Public Liberalism* coefficient becomes slightly less significant ($p < 0.07$). Most importantly, the slope of the *Liberal Outcome x Majority Ideology* variable is less pronounced and the range for which the difference is significant decreases somewhat (i.e., the range runs from -2.27 to 0.42). The results of our revised second model, *see infra* Table 6, are nearly identical to the results we present here.

153. There is a long-running interest in the literature in the extent to which the Supreme Court tends to follow public preferences, but little agreement on whether or why it does. *See generally* BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009); Casillas et al., *supra* note 84; Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Lee Epstein & Andrew D. Martin, *Does Public Opinion Influence the Supreme Court? Possibly Yes (But We're Not Sure Why)*, 13 U. PA. J. CONST. L. 263 (2010).

Table 5: Logistic Regression Model Parameter Estimates of the Conditions Under Which a Supreme Court Majority Positively Refers to Transnational Material

Variable	Coefficient (Standard Error)
Exercise of Judicial Review	0.520* (0.195)
Case Alters Precedent	1.147* (0.258)
Number of Amicus Briefs	0.034* (0.010)
Court Term	0.009 (0.005)
Case Involved Treaty Interpretation	2.688* (0.502)
Liberal Case Outcome	0.412* (0.183)
Majority Coalition Ideology	0.410* (0.162)
Liberal Outcome x Majority Ideology	−0.581* (0.194)
Constrained Court	0.212 (0.154)
Legislative Liberalism	0.994 (0.703)
Public Liberalism	0.041* (0.019)
Constant	−22.991 (11.456)
Observations	6212
Log Likelihood	−1135.039

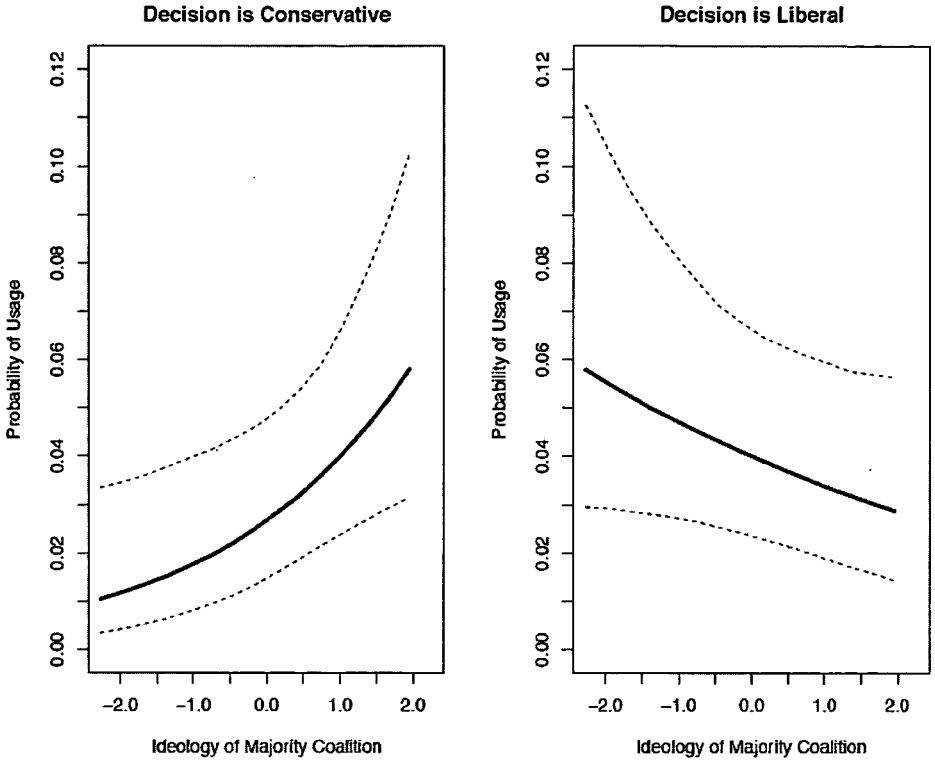
* denotes $p < 0.05$ (two-tailed test).[154]

To illustrate these results, we calculate predicted probabilities. Consider, first, the conditional relationship between outcome and ideology.[155] We hypothesized that a majority opinion would be more likely to include transnational law when reaching a decision that was ideologically consistent with the composition of the majority coalition. Figure 1 provides strong support for this assertion. We show majority ideology on the x-axis (with increasingly negative values indicating more liberal majorities and increasingly positive values indicating more conservative majorities) and the likelihood of citing transnational law on the y-axis. The different line types within the plot itself show separately when the direction of the decision is conservative or liberal.

154. P-values represent the probability, under repeated sampling, of observing a parameter estimate that is at least as extreme as the one we obtained when the true value of the parameter is actually zero. When that probability is very low (here, less than 5%), then we say that we have sufficient evidence to reject the null hypothesis that the parameter is equal to zero (i.e., no effect exists). Two-tailed p-values allow for the possibility that the true value of the parameter estimate could be either positive or negative, and, as a result, are more demanding than their one-tailed counterpart.

155. Note that even though the coefficient on *Majority Coalition Ideology* is positive and statistically significant, one must interpret that coefficient differently than the noninteracted coefficients because it is part of the interactive term as well. That is, the positive coefficient on *Majority Coalition Ideology* essentially shows the effect of ideology when *Liberal Outcome* is held at zero. In other words, it shows the effect of increasing conservatism when there is an increasingly conservative outcome in a case.

Figure 1: Probability Court References Foreign Law as a Function of Ideology[156]



Starting with a conservative decision outcome, we estimate roughly a 0.01 probability of observing a positive reference to transnational law when the majority coalition itself is very liberal. When the coalition is very conservative, however, that likelihood jumps to around 0.06. Consider, next, a majority opinion that reaches a liberal outcome. As the plot reveals, we observe exactly the opposite trend: liberal coalitions are more than twice as likely to cite approvingly transnational materials in their liberal opinions than are their conservative counterparts. Simply put, when rendering ideologically motivated decisions, Justices pepper their opinions with transnational law as a backstop.

The data also show that liberal *and* conservative Justices call upon transnational law. Our data reveal no significant differences between conservatives and liberals in their tendency to cite transnational law. When comparing a liberal majority/liberal outcome versus a conservative majority/conservative outcome, we find no significant difference between the two probabilities of a positive

156. Solid lines represent predicted probability of referencing transnational law. Dashed lines are the 95% confidence intervals surrounding those predictions. Recall that smaller values of Justice ideology (on the x-axes) represent increasingly liberal outcomes and large values represent increasingly conservative outcomes.

citation ($p = 0.72$, two-tailed test). Similarly, we also find no significant difference in the probability of transnational law citation between a liberal majority/conservative outcome and a conservative majority/liberal outcome ($p = 0.11$, two-tailed test). In short, the conventional understanding that only liberal Justices employ foreign law is mistaken.

Moving beyond the ideological use of transnational law, Figure 2 shows that Justices are moved, to a small degree, by public opinion. Justices also are significantly more likely to employ transnational law when they exercise judicial review and overrule precedent. When the majority opinion merely upholds a statute, the Court's probability of employing transnational materials is roughly 0.04. When, however, the Court majority strikes down a statute, that probability increases by 50% to approximately 0.06.[157] Next, consider the act of overruling one of its own precedents. When the Court upholds an existing precedent, it has only a 0.04 probability of employing transnational law. Yet, when it makes the important decision to overrule its previous precedent, the Court's likelihood of referencing transnational law jumps to 0.11—nearly triple the baseline value. Thus, when the Court makes its most dramatic decisions, it pulls from transnational sources of law. No wonder the practice of citing transnational law generates controversy in many cases; Justices cite it in their most controversial decisions. Yet they also tend to cite it when the public gives them license to be controversial, as our data show that a more liberal public—as measured by *Policy Mood* scores—leads to an increase from a baseline probability of about 0.04 to a probability of 0.05.

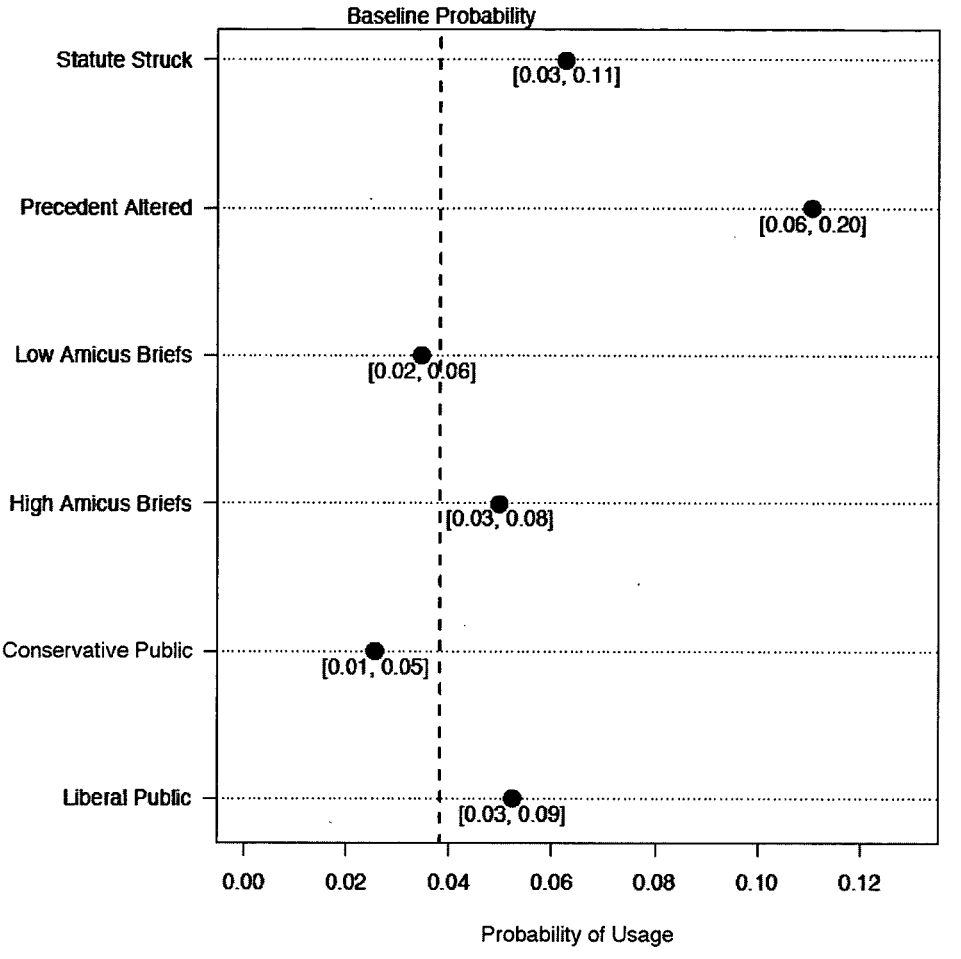
Our controls largely perform as expected. Cases with a large number of amicus briefs are just over 40% more likely to cite transnational law than those with a small number of briefs. Unsurprisingly, the treaty effect is also substantial, with treaty cases nearly ten times as likely to employ transnational law than nontreaty cases.

B. MODEL 2: THE COUNTRIES CITED

As we expected, the Court uses transnational law to support its most controversial decisions—those that are ideologically motivated, exercise judicial review, and undo precedent. What about the second half of our theory? Do Justices strategically cite legitimate countries? The answer is yes. Figure 3 illustrates the countries the Supreme Court cited. Countries in gray are those the Supreme Court cited favorably. The white squares over the country's capital are proportionate to the number of positive references. The five countries most frequently cited positively were the United Kingdom, Canada, Australia, France, and Switzerland. All of these countries share important characteristics with the

157. This result holds if we include separate dummy variables for whether a federal law or state law is being struck down. Both are more likely than the baseline—no law being struck down—to observe the usage of foreign law. A Wald test comparing the two coefficients fails to reveal any significant difference between the two separate variables.

Figure 2: Probability Court References Foreign Law, Controls[158]



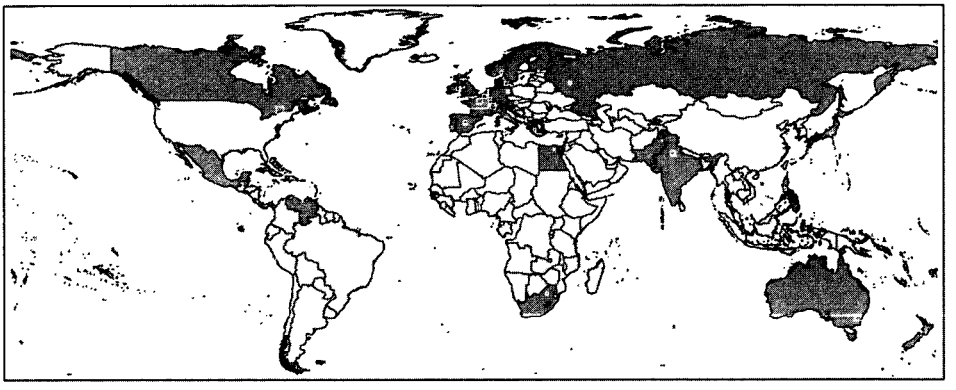
United States, and all would seem to be legitimate in the eyes of the American public and legal elites.

Looking more specifically at our hypotheses, Table 6 shows that Justices do in fact cite those countries most likely to be deemed legitimate by the American public and by elites.[159] Consider, first, our shared experience hypothesis. We argued that Justices would be most likely to cite transnational law from countries that are democratic, are durable, speak English, and use the common law. The data support three of these four expectations: namely, the first three listed above.

158. The solid dots reflect predicted probability of referencing transnational law, with the numbers in brackets reflecting the 95% confidence intervals surrounding those predictions.

159. Note that although we have foreign law data through most of 2009, our model only includes observations up through 2000 due to data availability on several key country-level measures.

Figure 3: Countries Cited Positively by the Supreme Court, 1953–2000



As the left panel of Figure 4 shows, fully democratic countries are more than twenty-five times more likely to be positively referenced by the Court than

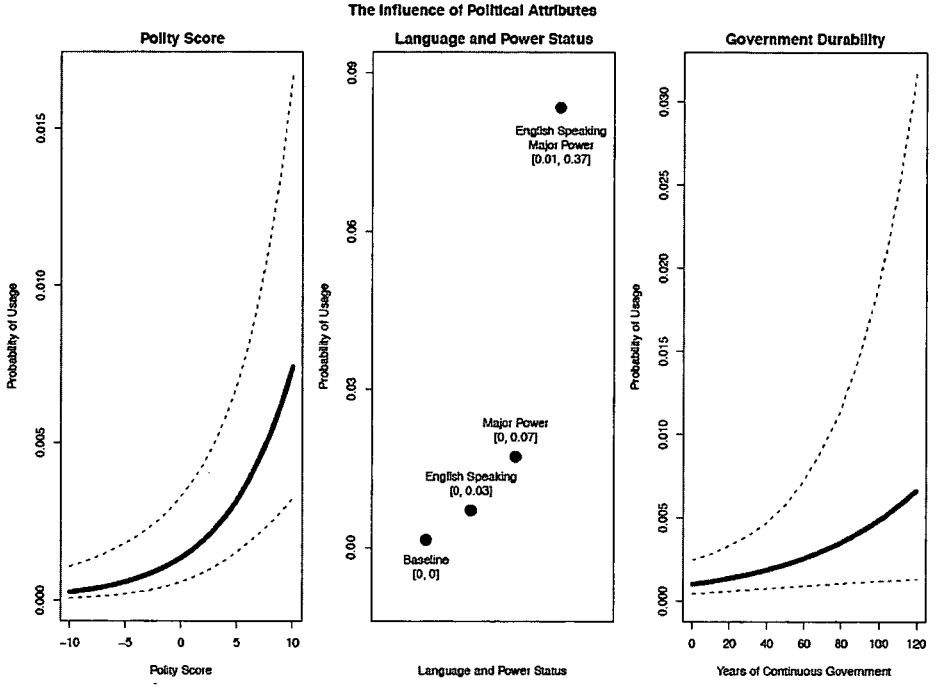
Table 6: Random Effects Logistic Regression Model Parameter Estimates of Conditions Under Which a Supreme Court Majority Opinion Positively Refers to Legal Material from a Given Country in a Given Year

Variable	Coefficient (Standard Error)
Polity Score	0.171* (0.041)
Government Longevity	0.016* (0.007)
English is Official Language	1.642* (0.791)
Common Law Country	−0.728 (0.771)
Alliance with U.S.	0.542 (0.393)
Country is a Major Power	2.560* (0.592)
Distance from U.S.	0.023 (0.104)
Country Wealth	0.121* (0.028)
Imports from Country	−0.040* (0.015)
U.S. Exports to Country	0.045* (0.022)
Preferential Trade Agreement with U.S.	−0.019 (1.043)
Year	−0.014 (0.010)
Constant	19.986 (20.540)
ρ	0.152* (0.067)
Observations	5237
Log Likelihood	−373.752

* denotes $p < 0.05$ (two-tailed test). ρ (i.e., the Greek letter "rho") reports the estimate of the total amount of variance contributed by the panel-level (i.e., country) variance component. Because it is significantly greater than 0, we can conclude that the model including random effects is superior to a model that pools all countries together.

those that are fully autocratic.[160] Turning to the middle panel, if we examine a country's English language and major power status, we observe that the Court has only a 0.001 likelihood of citing a non-English speaking country that is not a major power. On the other hand, when the country is an English-speaking major power, the Court cites that country with a 0.085 probability. A non-English speaking major power and an English-speaking nonmajor power are cited with probabilities of 0.017 and 0.007, respectively. Finally, the durability of the country matters (right panel). Countries with political stability of 120 years (roughly the ninety-ninth percentile in our data) are just over six times more likely to be cited than those where dramatic changes have been observed (that is, durability is zero—the sample minimum in our data). Taken together,

Figure 4: Probability Court References Country as a Function of Country Characteristics[161]



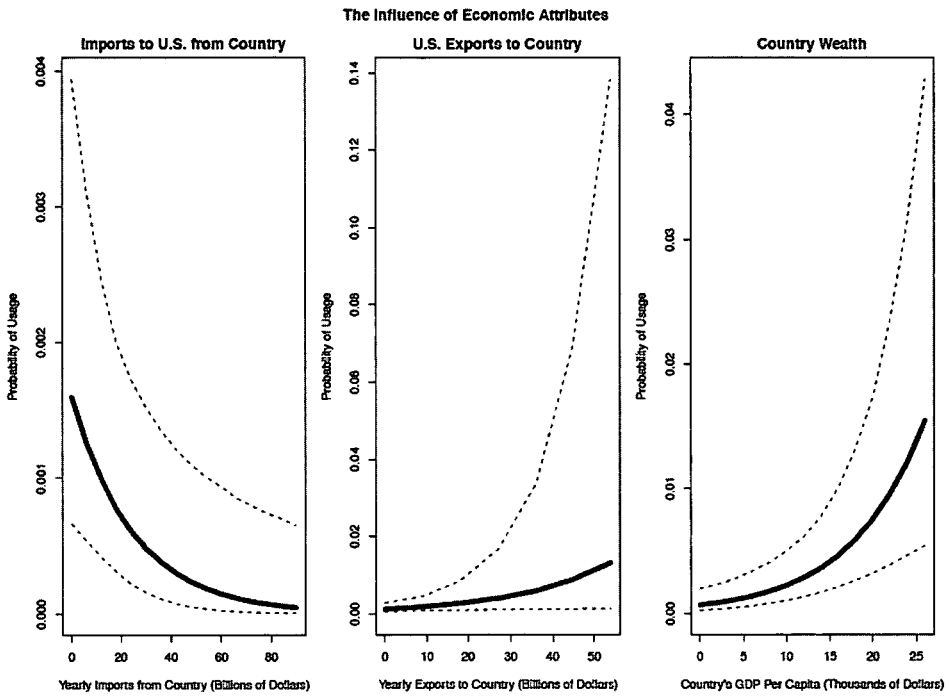
160. As the scale on the y-axis reveals, with a maximum plotted value of 0.015 (i.e., 1.5%), the raw probabilities are far from overwhelming. This, of course, is due to the high prevalence of zeroes in our data—roughly 97%.

161. The solid dots reflect predicted probability of referencing a country, with the numbers in brackets reflecting the 95% confidence intervals surrounding those predictions. Further, the solid lines represent predicted probabilities of referencing a country. Dashed lines are the 95% confidence intervals surrounding those predictions.

the results suggest the Court is most likely to cite foreign countries that are highly legitimate and have certain characteristics similar to the United States.

Finally, in Figure 5 we consider the role of economic variables such as trade flows and wealth. Interestingly, we find a negative relationship between the amount of physical imports that come into the United States from a country and the amount of law the Court imports from that country. The Court is more than thirty times more likely to import law from a country from which the United States has no physical imports compared with those from which the United States has substantial imports.[162]

Figure 5: Probability Court References Country as a Function of Economic Interests[163]



Turning to the middle panel, which portrays U.S. exports to a country, we uncover a positive relationship, with the Court being roughly eleven times more likely to import law from a country to which the United States exports a

162. The maximum plotted value—about 90 billion dollars—corresponds to imports from Japan in the early 1980s. With 300 billion dollars, the sample maximum is Canada in 2000. One post hoc explanation is that this finding is perhaps driven partly by China, whose laws are unlikely to be cited positively in U.S. courts for other reasons.

163. The solid lines represent predicted probabilities of referencing a country. Dashed lines are the 95% confidence intervals surrounding those predictions.

substantial amount of physical goods.[164] Rounding out the figure, the right panel shows that the Court is fifteen times more likely to cite materials from a country where per capita income is high than from one where it is low. As Table 6 shows, however, whether the United States maintains a preferential trade agreement with a nation does not have any statistically significant effect on the probability that the Court will borrow that country's law.

VI. DISCUSSION

Our results show that legal academic debates about the Supreme Court's practice of citing transnational law are woefully off point or mistaken in key assumptions. Clearly, certain critiques of the practice hinge more on one's *theory* of law—a dimension our empirical analysis cannot resolve. Yet insofar as one's concern is with the *patterns* by which the Court cites transnational law, our findings effectively undercut many simple and reductionist critiques of the process.

As discussed above, one of the concerns about the Court's citation of transnational law centers on a belief that the Court cites such law opportunistically, using a source when it supports one's position and ignoring it when it does not. Our findings support this belief. Majority coalitions are more likely to cite foreign law the more the holding aligns with their ideology and the more extreme the ideology of the coalition is. We find that the Court is essentially citing transnational law in cases where ideological preferences of the majority coalition drive the Court to hold statutes unconstitutional or alter precedent. Together, these covariates seem to suggest that the Court's use of transnational law is really a form of overcompensation: as the Court renders controversial decisions, it resorts to citation to transnational authorities to create the illusion that it is acting with considerable supporting precedent.

On the other hand, Justices appear to be at least somewhat circumscribed to the extent that they borrow primarily from countries that are most like the United States. It seems that the Court is limiting itself to citation of transnational law that is likely understandable and relatable to the American experience. One of the strongest defenses offered by Justice Breyer is that the citations, although not controlling, are at least a reflection of a process designed to make valid comparisons across similar legal and sociopolitical circumstances—to draw upon the expertise gathered through similar experiences in similar nations. To the extent that the Court does borrow, it appears to borrow from countries the public sees as the most legitimate. Perhaps there are—at least some—bounds on the citation of transnational law after all.

164. The maximum plotted value—about 55 billion dollars—corresponds to exports to Canada in the early 1970s. With 218 billion dollars, the sample maximum is Canada in 2000.

At the same time, these findings address the conventional view that ideology divides supporters and opponents of transnational law. Speaking to the ongoing normative debate over whether the Court should use transnational legal sources to interpret U.S. law, the seasoned journalist Tony Mauro stated:

> [T]his is an important debate about the Court's role. Conservatives who believe in a limited role for judges say the Supreme Court should interpret the U.S. Constitution as written, and should ignore current fads here or abroad. But the counterargument is strong. If globalization has flattened the world in terms of the economy and culture, isn't it time that our legal system also look beyond our borders?[165]

The comment, we believe, gives too much credence to the normative rhetoric offered by academics and judges alike. The discussion over whether conservatives have legitimate reasons to resist the citation of transnational law is a red herring. Liberals and conservatives *both* employ foreign law because they are both ideologically motivated, strategic judicial actors who seek support for their ideological positions. The Court employs transnational law in the most controversial of cases—when Justices strike federal law, when they overturn precedent, and when they render ideologically anchored decisions. The practice is not, therefore, based on an ideological or theoretical divide; rather, it is a function of modern Justices seeking to effectuate their policy goals in the face of extralegal resistance. Indeed, in nontreaty cases, moderately conservative coalitions rendering liberal decisions employ a variety of transnational sources. In fact, they cite more transnational sources of law than liberal coalitions that render conservative decisions. Put plainly, normative debates should turn away from whether a liberal or conservative position on the matter is correct as a normative matter. Political scientists and legal scholars alike should not make the mistake of thinking that the Justices on the Supreme Court care much at all about the theoretical, legal, and normative debates about whether it is proper to cite transnational law. The Justices instead seem to have embraced foreign law, in deed if not in word.

Finally, it is worth mentioning that, as in some previous studies, we find that the citation of transnational material is the exception rather than the rule. Although the substantive changes in the probability of citing transnational law or the law of a particular country are significant, the absolute probabilities are low, at least in majority opinions.[166] The Supreme Court is still indeed a domestically centered court.

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165. Curry & Miller, *supra* note 53, at 1097 (alteration in original).

166. It seems probable, though we do not test it here, that a good deal of the total references to foreign law comes in dissents—a practice that presents fewer concerns. Indeed, prior research suggests that most citations come in dissent. *See* O'Brien, *supra* note 39, at 108–11.

CONCLUSION

This Article started with a vignette on the recent *Kiobel* case. While that case was controversial in certain ways and with certain legal communities, the fact that the unanimous Supreme Court cited transnational law was not particularly controversial. How could this be after all the criticism the Court received for citing transnational law in cases like *Lawrence v. Texas*, *Roper v. Simmons*, and *Atkins v. Virginia*? Why were there no objections?

One reason is that the dispute itself turned on a domestic statute that by its terms triggered a discussion about transnational law. A second reason, however, and one supported by our data, is that there were no complaints because there were no losers on the Court—indeed, the decision was unanimous, and the only disagreements were relatively minor ones about the appropriate test for invoking extraterritorial jurisdiction. Our models support a theoretical perspective that puts the ideological and strategic goals of all Justices at the forefront. If the Court is deeply divided on a controversial case that departs from precedent or breaks new ground, the Justices in the majority have every reason to cite foreign law in an effort to legitimate their opinion, and the Justices in the minority have every reason to focus on the majority's use of foreign law. Indeed, it may be the only kind of legalistic (that is, non-ideological) complaint that dissenters can lodge. But if, as in *Kiobel*, all or most of the Justices agree on the basic outcome (by far the typical pattern), the use of transnational law carries no importance except insofar as it can help all the Justices support their opinions. The citations still occur regularly in these kinds of cases (since the incentives to support a decision are still there), but the controversy fades. The contrast between the response in *Kiobel* and the response in *Lawrence*, for instance, shows that what drives debates about the practice is really outcomes, not the citations themselves. Political scientists have long noted the ideological behavior of Justices in high-stakes constitutional judicial review, and our findings suggest that the battle over transnational law citation is simply a proxy battle in important, highly ideological cases that would have likely been decided the same way with or without the citation to transnational law. When Justices criticize the practice, we ought to read their protests as little more than protests of defeat because there is now ample evidence to suggest that the same Justices will do the same thing in another case when the stars are more aligned in their favor.

If the use of transnational law is instrumental, then there may be good reason to accept critiques of the practice that center on the opportunism and inconsistency of the practice. Our evidence speaks to these practical concerns, though the findings ultimately cut both ways. There is indeed significant evidence of opportunism. Liberal majorities reaching liberal outcomes are more likely to cite foreign law, and conservative majorities reaching conservative outcomes are more likely to cite foreign law, suggesting that the more extreme an opinion is ideologically speaking, the more the majority feels the need to use transnational law to justify what might be an insupportable decision. This opportunistic use of transnational law does pose some risks of inconsistency and incoherence

in the law, especially if future Courts treat these opportunistic citations with precedential effect. On the other hand, we also present evidence that the Justices are consistent in citation practices, and that they mostly cite nations whose characteristics, traditions, and relations with the United States provide a high likelihood that the Justices will in fact find meaningful similarities and comparisons. In short, practical critiques of the use of transnational law to interpret domestic law turn on how the Justices actually go about citing transnational law, and our findings suggest that the Court engages in the practice primarily to advance ideological or policy goals but limits itself to maximize the persuasive and legitimizing value of transnational law.

Altogether, our findings caution against reading too much into the often-vigorous debates about the importance of using or excluding transnational law. The findings may counsel caution in similar debates about other judicial practices, such as the citation of canons of construction or the citation of legislative history. Consistent with the larger political science literature on judicial behavior, we suggest that the Justices in practice are driven more by political and pragmatic considerations than any highbrowed theoretical account of proper interpretation. Efforts to generate a comprehensive and objective normative theory of transnational law citation are not necessarily flawed or hopeless,[167] but they certainly cannot expect the root behavioral and institutional causes of the practice to magically disappear.

167. *See, e.g.*, Waldron, *supra* note 2, at 129–30 (describing the bare minimum essentials of any defensible theory of the citation of transnational law and sharply critiquing the Court for failing to live up to expectations).