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Should Courts Fear Transnational Engagement?

*Olga Frishman**

ABSTRACT

Judicial citation of foreign law worries many people, including justices of the U.S. Supreme Court, politicians, and legal academics. The critics in the United States argue that judges “cherry-pick” foreign citations and use them to import foreign norms that do not accord with the Constitution or the will of the American people. This Article argues, based on insights from organizational theory, that the critics overlook another, much greater, concern: the danger does not come from citing or looking at foreign law, but rather, from other types of interaction, such as meetings at judicial organizations, judicial delegations, or judicial conferences. The result of these transnational judicial interactions will be convergence on certain practices of courts, especially in the way courts understand their national roles, the ways they present themselves to their national audiences, and the methods they use to do so. The adoption of these similar practices across national borders is likely to distance the courts from their national audiences and cause courts to lose their national support.

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TABLE OF CONTENTS

I.	INTRODUCTION	60
II.	TRANSNATIONAL JUDICIAL DIALOGUE	62
III.	TRANSNATIONAL ORGANIZATIONAL FIELD OF COURTS: THEORETICAL FRAMEWORK	65
IV.	STRUCTURATION OF THE TRANSNATIONAL ORGANIZATIONAL FIELD OF COURTS	70
	A. <i>Increase in the Extent of Interaction among Organizations in the Field</i>	71
	B. <i>Emergence of a Sharply Defined Interorganizational Structure of Domination and Pattern of Coalition</i>	76
	C. <i>Increase in the Information Load with which Organizations in the Field Must Contend</i>	80
	D. <i>Development of a Mutual Awareness among Participants in a Set of Organizations that they are Involved in a Common Enterprise</i>	82
	E. <i>Structuration of the Transnational Organizational Field of Courts: Conclusion</i>	85
V.	IMPLICATION FOR COURTS: INSTITUTIONAL ISOMORPHISM	86
	A. <i>Institutional Isomorphism: Theoretical Framework</i>	88
	B. <i>Transnational Institutional Isomorphism of Courts</i>	92
VI.	A REASON TO WORRY: NORMATIVE IMPLICATIONS OF INSTITUTIONAL ISOMORPHISM FOR COURTS	97
VII.	CONCLUSION.....	104

I. INTRODUCTION

Courts and justices around the world are involved in transnational interactions with their foreign colleagues. They meet with each other, send e-mails, and cite each other's decisions. Many scholars, politicians, and justices criticize this phenomenon. The critics argue that it is not useful and not legitimate for courts to use foreign law. The main arguments focus on the cherry-picking of foreign legal sources that courts refer to and the court's use of those sources to import legal norms that do not accord with the will of the people. The adoption of such norms is therefore claimed to be non-democratic and disruptive to the national legal system. This Article uses concepts from organizational theory and argues that courts' transnational engagement raises other and more pressing concerns.

The Article focuses on supreme, constitutional, and highest courts and argues that the increasing communication between judges

in different national, regional, and international jurisdictions—what is often called the transnational judicial dialogue—may be expected to influence these courts. Accordingly, the Article contends that these interactions create special relationships between courts. In terms of organizational theory, the courts have become a transnational organizational field. Thus, they see each other as fulfilling similar roles in their jurisdictions and thus as their reference group (i.e., the group to which they should compare themselves).

As a result of the emergence of this organizational field, certain “field level” processes affect the courts. This Article will focus on one of those processes—the process of institutional isomorphism through which courts become similar (and sometimes different) over time. The focus here is on specific and important characteristics of the courts—the ways courts understand their national roles (their identities), the ways courts want others to understand their roles (their intended images), and the means courts use to communicate these messages. This Article will argue that due to transnational influence courts may be expected to act on and look at these issues in a similar way.

This convergence, it will be claimed, is likely to have negative implications for courts. It is expected to distance them from at least some of their national audiences. To clarify, courts’ audiences, as referred to in this Article, may be any social group or institution that is directly or indirectly affected by the courts’ decisions. For example, a court’s audience may be the legislative or the executive branch, the public, a racial or socioeconomic group, a specific organization, or the legal academe.¹ Courts are also likely to have different relationships with their different audiences. The result of the rift between courts and their audiences, at least between courts and some of their audiences, is expected to decrease courts’ social legitimacy. Thus, because courts have neither purses nor swords,² they are likely to

1. There are a number of approaches to the question of who courts’ audiences are. See Nuno Garoupa & Tom Ginsburg, *Judicial Audiences and Reputation: Perspectives from Comparative Law*, 47 COLUM. J. TRANSNAT’L L. 451, 453 (2009) (distinguishing between courts’ internal audiences within the judiciary and external audiences (lawyers, the media, the general public) and arguing that the importance of each of these audiences to courts depends on different characteristics of the legal system); Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 96 CALIF. L. REV. 1619, 1625 (2007) (arguing that the public is not a single monolithic group and that courts’ audiences are divided into a variety of professional communities, each with its own logic.). See generally LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2008) (claiming that judicial audiences consist of a large number of influential groups that include, among others, the general public, other government branches, social groups, professional groups, policy groups, and the news media).

2. See THE FEDERALIST No. 78 (Alexander Hamilton) (implying that courts do not control the treasury (“the purse”) and do not have the power to enforce their decisions by themselves (“the sword”); thus, courts have to convince the executive to enforce their decisions).

experience more backlashes, and as a result, the chance that their unpopular decisions will be enforced will decrease.

The Article unfolds as follows: Part II addresses the existing literature on transnational judicial interactions. Part III discusses the theory behind the concept of an organizational field. Part IV provides evidence that a transnational organizational field of courts is emerging. Part V turns to discussing the process of institutional isomorphism. It begins by providing the theoretical background to the concept and then turns to applying this theory to courts. Part VI discusses the normative concerns that arise from institutional isomorphism among courts. Part VII concludes and ties the discussion here to other concerns regarding the phenomenon of transnational judicial dialogue that have already been raised in the literature.

II. TRANSNATIONAL JUDICIAL DIALOGUE

Transnational judicial dialogue is the most common manifestation of the globalization of courts, in the framework of which judges and courts as institutions interact with each other above, below, and through borders.³ For example, national judges meet or cite judges from another national jurisdiction, regional judges, or international judges. This phenomenon is currently at the forefront of current discussions and controversies.⁴ The idea that judges from different countries engage in a conversation with each other—through meetings or cross citation—is an occurrence that intrigues many observers.⁵

In the United States, some scholars, politicians, and judges publicly object to cross citation of foreign law.⁶ Their critique focuses

3. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1104 (2000).

4. The phenomenon has additional names, such as “transjudicial dialogue,” “community of courts,” “judicial globalization,” “judicial comity,” “dialogue among courts,” “constitutional dialogue.” See, e.g., Carl Baudenbacher, *Judicial Globalization: New Development or Old Wine in New Bottles?*, 38 TEX. INT'L L.J. 505, 505 (2003); Maria Rosaria Ferrarese, *When National Actors Become Transnational: Transjudicial Dialogue Between Democracy and Constitutionalism*, 9 GLOBAL JURIST (2009), <http://www.bepress.com/gj/vol9/iss1/art2> [<http://perma.cc/UMJ2-5A7D>] (archived Oct. 10, 2015); Michal Bobek, *Comparative Reasoning in European Supreme Courts: A Study in Foreign Persuasive Authority* 13 (2011) (unpublished Ph.D. dissertation, European University Institute) (on file with the author).

5. For a discussion of whether this phenomenon is new, see Baudenbacher, *supra* note 4.

6. For a short description of the controversy, see RICHARD A. POSNER, *HOW JUDGES THINK* 347–68 (2008); Francine Banner, Ken Miller & Doris Marie Provine, *Foreign Law in American Jurisprudence*, in *GLOBALIZING JUSTICE* 27, 29–32 (Donald W. Jackson, Michael C. Tolley & Mary L. Volcansek eds., 2010); Vlad Perju,

on three main problems regarding the use of foreign law. The first concerns the relevancy of foreign law. Foreign law should not be consulted, so it is claimed, because the differences between the countries and their legal systems make their experiences irrelevant. Second, some object to the use of foreign citations because it is open to manipulation, and these individuals claim that judges merely pick foreign examples that fit their objectives. Third, it is argued that the use of foreign law is not legitimate because it expands judicial discretion and in fact constitutes the importation of legal norms that were not enacted by the national democratic institutions.⁷ Others present arguments supporting the use of foreign law and explain why it is important for judges to engage with each other.⁸ Nevertheless, to date, scholars have not explored or theorized the effects or the desirability of such dialogue.

The use of the term “transnational judicial dialogue” by scholars usually refers to two things: (1) direct interaction between judges, and (2) citation of foreign opinions in national court decisions. Direct interaction can be achieved through face-to-face communication as

Constitutional Transplants, Borrowing, and Migrations, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1304, 1322 (Michel Rosenfeld & András Sajó eds., 2012); Michel Rosenfeld, *Comparative Constitutional Analysis in United States Adjudication and Scholarship*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 38 (Michel Rosenfeld & András Sajó eds., 2012); Norman Dorsen, *The Relevance of Foreign Legal Materials in US Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CON. L. 519 (2005); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 653–57 (2005); David S. Law, *Judicial Comparativism and Judicial Diplomacy*, 163 U. PA. L. REV. 927 (2015) [hereinafter Law, *Judicial Comparativism*]; Sanford Levinson, *Looking Abroad When Interpreting the U.S. Constitution: Some Reflections*, 39 TEX. INT'L L.J. 353 (2003); Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 AM. SOC. INT'L L. PROC. 305 (2004); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1567 (2006); and Lisa Sofio, *Recent Developments in the Debate Concerning the Use of Foreign Law in Constitutional Interpretation*, 30 HASTINGS INT'L & COMP. L. REV. 131 (2006). The practice, such as cross-citation by the European Court of Human Rights (ECtHR), is also criticized outside the United States. See Carla M. Zoethout, *The Dilemma of Constitutional Comparativism*, 71 HEIDELBERG J. INT'L L. 787, 803–05 (2011) (criticizing the practice of the European Court of Human Rights, which uses foreign law as the basis of decisions without explaining why foreign law was decisive in the particular case).

7. Adam Shinar & Anna Su, *Religious Law as Foreign Law in Constitutional Interpretation*, 11 I-CON 74, 77–82 (2013).

8. One reason for supporting judicial dialogue is that it provides judges with the opportunity to learn from the experience of other judges. See, e.g., Guy Canivet, *Trans-Judicial Dialogue in a Global World*, in HIGHEST COURTS AND GLOBALIZATION 21, 29–30 (Sam Muller & Sidney Richards eds., 2010); A. Usacka, *Globalization of the Judiciary: Ways of Interaction*, in HIGHEST COURTS AND THE INTERNATIONALISATION OF LAW 139, 144 (Sam Muller & Marc Loth eds., 2009); Jeremy Waldron, *The Theoretical Basis of the Demand for Legal Unity*, in HIGHEST COURTS AND GLOBALIZATION 99, 101–04 (Sam Muller & Sidney Richards eds., 2010).

well as through Information Technology (IT) facilities.⁹ Face-to-face communication can occur in different settings. The most common way for judges to meet is at conferences or in judicial delegations from one national court to another. In those situations, judges have an opportunity to talk to each other about their judicial work and their judicial opinions. The other mode of judicial dialogue is the citation of foreign opinions by national judges.¹⁰ Judges around the world sometimes cite foreign decisions when those decisions are mandatory—for example, when applying an international rule or deciding in a conflict of laws case. At other times, judges are not obliged to cite the foreign cases, but nonetheless choose to do so. This can happen when the citations are advisable, and judges are explicitly allowed to look at foreign law, but not obliged to do so. It can also happen when the citations are discretionary, when there are no instructions regarding the use of foreign law, and when the judges choose to do so because it is useful.¹¹

A few scholars have tried to conceptualize and theorize the transnational judicial dialogue. These conceptualizations are important for understanding the implications of the transnational interaction for both courts and national legal systems. One theory sees the courts as belonging to a single global community,¹² one that is possibly an epistemic community.¹³ According to this view, courts, or at least some of them, constitute a group that has common goals and acts together to achieve those goals. In many cases, this

9. See Monica Claes & Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, 8 *UTRECHT L. REV.* 100, 109–10 (2012) (discussing the working of the horizontal European judicial networks).

10. The idea that cross-citations are a means of communication can be criticized. It is not obvious that citations are used for communication with other courts. Currently, the reasons for the use of foreign citations are not yet fully explored. For one possible explanation, see Erik Voeten, *Borrowing and Nonborrowing among International Courts*, 39 *J. LEGAL STUD.* 547 (2010) (suggesting that judges cite foreign opinions for strategic reasons). For the purposes of this Article, the exact reasons for the citations are not important, and they are used as one indicator for the relationships between courts.

11. See Bobek, *supra* note 4, at 25–26. Cf. Martin Gelter & Mathias Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts*, 8 *UTRECHT L. REV.* 88, 89–91 (2012) (dividing cross-citation into three types: (1) case history and jurisdiction; (2) international or European law; and (3) purely comparative reasons).

12. Anne-Marie Slaughter, *A Global Community of Courts*, 44 *HARV. INT'L L.J.* 191 (2003).

13. Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law: A Rejoinder to Nikolaos Lavranos, Jacob Katz Cogan and Tom Ginsburg*, 20 *EUR. J. INT'L L.* 1027, 1029 (2010); Antje Wiener & Philip Liste, *Lost Without Translations? Cross-Referencing and a New Global Community of Courts*, 21 *IND. J. GLOBAL LEGAL STUD.* 263 (2014).

community can be conceptualized as a network,¹⁴ and therefore the relationships between courts should be analyzed through the analytical tools used to understand networks. These analytical tools provide a map of courts' interactions, focusing on why and how cooperation and interaction between courts take place.¹⁵ Nevertheless, the current approaches are not fully developed and provide only a starting point for analyzing the phenomenon of transnational judicial dialogue and its influence on courts. They do not map all of the relationships between courts or explain in full how those relationships affect courts.

The next Part follows an argument I have made elsewhere and proposes to use the concept of organizational field for analyzing the transnational relationships among courts and their influences on courts.¹⁶ The concept of organizational field highlights the ways in which the transnational judicial dialogue influence the courts. Therefore, this concept may be used not only for mapping and identifying the phenomenon of transnational judicial dialogue, but also for understanding the influence it has on courts, more specifically how it may disrupt the relationships of courts with their national audiences and lead to the loss of national legitimacy. Before discussing the influence of the transnational judicial dialogue on courts, this Article now turns to introducing the concept of organizational field, which will be used in the following Parts for analyzing the transnational influences on courts.

III. TRANSNATIONAL ORGANIZATIONAL FIELD OF COURTS: THEORETICAL FRAMEWORK

Organizational field is a concept that was developed in the new institutionalism approach to organizational studies.¹⁷ Meyer and

14. See ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) [hereinafter SLAUGHTER, *A NEW WORLD ORDER*] (conceptualizing transnational relationships as networks).

15. Claes & Visser, *supra* note 9, at 101.

16. Olga Frishman, *Transnational Judicial Dialogue as an Organizational Field*, 19 EUR. L.J. 739 (2013) (arguing that transnational judicial dialogue should be conceptualized as an organizational field).

17. See Mellissa Wooten & Andrew J. Hoffman, *Organizational Fields: Past, Present and Future*, in *THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM* 130, 131 (Royston Greenwood et al. eds., 2008) (noting that in the past organizational fields were referred to as institutional spheres, institutional fields, societal sectors, and institutional environment); Henry L. Tosi, *About Theories of Organization*, in *THEORIES OF ORGANIZATION* 1, 15 (Henry L. Tosi ed., 2009) (discussing the new institutionalism approach belongs to the open systems model in organization theory); see also JOHN L. CAMPBELL, *INSTITUTIONAL CHANGE AND GLOBALIZATION* 17–23 (2004). It evolved in response to views that were accepted until the late 1970s and focused primarily on the rational and material aspects of organizational life. New

Rowan, in their classic 1977 article, provided an early statement of this approach.¹⁸ They draw attention to the way organizational structure is modeled by “institutional rules.”¹⁹ These “institutional rules” become “rational myths” that appear to be the rational way of achieving the organizational goal without necessarily promoting it.²⁰ For example, a rational myth may be that all invoices should be printed on blue-colored paper. Although this myth has no logical connection to the quality of the invoice system, members of the organization may insist on it even if yellow-colored paper would be cheaper and easier to use. In extreme situations, following the institutional rule becomes the end, and the connection between the rule and the performance diminishes in importance.²¹ In this framework, conformity to institutional rules is rewarded with increased legitimacy and reduction of uncertainty.²²

The new institutionalism approach focuses most of its investigation of organizations at the level of organizational fields.²³ The concept of organizational field was developed by Paul DiMaggio and Walter Powell in 1983.²⁴ Despite the concept’s growing popularity

institutionalism focuses on the causal power of culture and cognition, highlighting the role-bound and ceremonial aspects of organizational life. See Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 L. & SOC. INQUIRY 903, 909 (1996). For a brief summary of the history of new institutionalism, see Royston Greenwood et al., *Introduction*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 1, 5 (Royston Greenwood et al. eds., 2008). As such, this approach concerns itself with such phenomena as social institutions, organizational fields, institutional environments, and societal sectors. See Greenwood et al., *supra*; William McKinley & Mark A. Mone, *Micro and Macro Perspectives in Organizational Theory: A Tale of Incommensurability*, in THE OXFORD HANDBOOK OF ORGANIZATIONAL THEORY 345, 361 (Haridimos Tsoukas & Christian Knudsen eds., 2005). Although the new institutionalism approach has been criticized for holding an ambivalent position on rationality and for loose conceptualization. See McKinley & Mone, *supra*, at 364. For additional criticism, see W. Richard Scott, *The Adolescence of Institutional Theory*, in THEORIES OF ORGANIZATION 215, 215 (L. Tosi ed., 2009); W. Richard Scott, *Approaching Adulthood: the Maturing of Institutional Theory*, 37 THEORY & SOC’Y 427 (2008) (still extensively used).

18. John W. Meyer & Brian Rowan, *Institutional Organizations: Formal Structure as Myth and Ceremony*, 83 AM. J. SOC. 340 (1977).

19. *Id.* at 343–53.

20. *Id.* at 359–60.

21. McKinley & Mone, *supra* note 17, at 361.

22. *Id.* at 362.

23. W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS: IDEAS AND INTERESTS 85–87 (3d. ed., 2008); Trish Reay & C. R. (Bob) Hinings, *The Recomposition of an Organizational Field: Health Care in Alberta*, 26 ORG. STUD. 351, 351 (2005) (noting that, recently, institutional theory and organizational fields provide important insights into both convergent and radical change processes); see, e.g., Gerald F. Davis & Christopher Marquis, *Prospects for Organizational Theory in the Early Twenty-First Century*, 16 ORG. SCI. 332 (2005) (arguing that theory and research that takes the field, rather than the organization, as the unit of analysis is the most appropriate style of organizational research under conditions of major economic change).

24. See Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM.

and importance,²⁵ scholars do not yet fully agree on its definition.²⁶ DiMaggio and Powell originally defined an organizational field as “those organizations that, in the aggregate, constitute a recognized area of institutional life: key suppliers, resource and product consumers, regulatory agencies, and other organizations that produce similar services and products.”²⁷ Another definition of organizational field, by W. Richard Scott, asserts that “[t]he notion of field connotes the existence of a community of organizations that partakes of a common meaning system and whose participants interact more frequently and fatefully with one another than with actors outside of the field.”²⁸ A more recent work, by Klaus Dingwerth and Philipp Pattberg, explains that “[a]n organizational field includes communities of organizations with similar functions or roles insofar as these organizations are aware of each other, interact with each other and perceive each other as peers or “like units” in some important sense.”²⁹ It is important to note that organizations do not need to be constructed in the same way to belong to the same organizational field; they only need to share the same identity statement.³⁰ Thus, in a nutshell, an organizational field is a group of organizations that see each other as performing similar social roles and that influence each other in a variety of ways.³¹

SOC. REV. 147 (1983) (explaining the concept of organizational field was developed based on Bourdieu’s concept of social field as well as on concepts explored by other scholars); see also SCOTT, *supra* note 23, at 183–84 (describing the intellectual history of organizational fields).

25. Davis & Marquis, *supra* note 23, at 337.

26. Roy Suddaby et al., *Transnational Regulation of Professional Services: Governance Dynamics of Field Level Organizational Change*, 32 ACCT. ORG. & SOC’Y 333, 335 (2007).

27. DiMaggio & Powell, *supra* note 24, at 148.

28. SCOTT, *supra* note 23, at 86.

29. Klaus Dingwerth & Philipp Pattberg, *World Politics and Organizational Fields: The Case of Transnational Sustainability Governance*, 15 EUR. J. INT’L RELATIONSHIPS 707, 720 (2009); see SCOTT, *supra* note 23, at 165 (noting it is important to differentiate between similar organizations—those that “occupy similar positions in the social structure, and those organizations that are connected to each other. Organizations that operate in the same organizational field do not have to be connected to each other.”).

30. Dingwerth & Pattberg, *supra* note 29, at 738.

31. See SCOTT, *supra* note 23, at 185–90 (explaining that, in general, there are four main components to the definition of organizational field: relational systems, cultural-cognitive systems, organizational archetypes, and repertoires of collective action). Relational systems in an organizational field have two main characteristics: the links between organizations and the “interorganizational structures of dominance and patterns of coalitions,” meaning that there are governance systems that work at the level of the organizational field. SCOTT, *supra* note 23, at 185–86; DiMaggio & Powell, *supra* note 24. Thus, organizations in the field interact among themselves. In addition, in an organizational field some organizations are more important than others. There are also groups of organizations that tend to interact more among themselves than with other organizations. As for cultural-cognitive systems, the second component, DiMaggio and Powell refer to it as “the development of a mutual awareness

Scholars have already studied a number of organizational fields, such as art museums in the United States³² and healthcare organizations in Alberta.³³ Art museums in particular are a good example of how an organizational field affects the organizations operating in it. Not all art museums communicate directly with each other. Nevertheless, the design of most art museums around the United States is similar, and they are aware that all of them are a similar kind of organization.³⁴ This similarity between museums developed over time. Therefore, today, even the audiences of those organizations expect them to look a certain way: the same way as other organizations in the same organizational field.

Belonging to an organizational field affects the organization—it constrains as well as enables its actions.³⁵ For example, the organizational field of museums may determine or limit the kinds of collections that a museum may hold. A museum, for instance, may decide not to hold a collection of comic books because doing so would be contrary to what is expected from a museum. The concept of

among participants in a set of organizations that they are involved in a common enterprise.” DiMaggio & Powell, *supra* note 24, at 148. More recent literature has divided this component into two main concepts. See Roger Friedland & Robert R. Alford, *Bringing Society Back In: Symbols, Practices, and Institutional Contradictions*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 232, 248 (Walter W. Powell & Paul J. DiMaggio eds., 1991) (explaining the first is *institutional logic* defined as “a set of material practices and symbolic constructions which constitutes its organizing principles and which is available to organizations and individuals to elaborate”); SCOTT, *supra* note 23, at 186–87 (noting each organizational field has its own institutional logic and a field’s institutional logic dictates to organizations how things “should be done” and what the acceptable and common paths of action are). The second concept is *cultural frames*. It refers to how things are interpreted and represented in the field. See SCOTT, *supra* note 23, at 187–88. Here, too, in different fields, *cultural frames* will be different. Unlike institutional logic, cultural frames define the ways organizations in the field should “think” about situations and how they should understand them. The third component, *organizational archetypes*, describes templates around which the rules, systems, and activities in the organizational field are organized. In each field there are a number of ideal models for individual actors as well as for organizations to follow. Archetypes provide baselines for evaluating the organizations in an organizational field. See Paul J. DiMaggio, *Constructing an Organizational Field as a Professional Project: U.S. Art Museums, 1920–1940*, in *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* 267 (Walter W. Powell & Paul J. DiMaggio eds., 1991). For example, an archetype of a museum will be an idea about how a museum should be designed. All other museums will be compared to that archetype. The last component, *repertoires of collective action*, refers to the limitations on the options that are available to organizations in the field. As a result, each organization in an organizational field perceives only a limited set of actions as possible. The available actions are determined by the rules, norms, and beliefs of the organizations in the same organizational field. See *id.* at 189–90.

32. See generally DiMaggio, *supra* note 31 (discussing how museums are often used as an archetype for how other museums are designed).

33. Reay & Hinings, *supra* note 23.

34. DiMaggio, *supra* note 31.

35. DiMaggio, *supra* note 31, at 181–209; Wooten & Hoffman, *supra* note 17, at 130.

organizational field therefore incorporates parameters relevant to the understanding of organizations, such as the ways they may or may not behave. Not taking the concept of organizational field into account when analyzing organizations excludes from the analysis important parameters, such as other organizations and organizational logics. In addition, it forestalls an investigation of differences between organizational fields that can be conducted by identifying their structure. It also limits the ability to study the ways in which these structures change over time,³⁶ especially the convergence and the radical change processes of organizations.³⁷

The concept of organizational field is useful for understanding organizations operating on the local, national, or transnational level. In a similar way to this Article, some recent studies have focused on the emergence and effects of transnational organizational fields.³⁸ For example, Dingwerth and Pattberg have argued that in the early 1990s an organizational field of transnational rulemaking emerged in global sustainability politics.³⁹ The interactions among organizations in this organizational field, according to the authors, explain their shared set of core features, including characteristics that appear too costly for organizations to adopt.⁴⁰ Suddaby et al. have described the creation of a transnational regulatory field in professional services, examining how the structural boundaries, regulatory logics, and institutional power of actors in the field have changed.⁴¹ Tim Bartley has explored the development of the transnational organizational field of organizations involved in forest certification.⁴² And Julie Collins-Dogrul has discussed the emergence and characteristics of a U.S.-Mexico transnational organizational field dealing with health problems in their border areas.⁴³

Before turning to applying the concept of organizational field to the transnational relationships between courts, it is necessary to introduce structuration. Structuration is the process through which an organizational field emerges. Although the term structuration is also used to describe changes in the structure of organizational fields, in this Article it will be used specifically to describe the initial

36. SCOTT, *supra* note 23, at 208–09.

37. Laura Cruz-Castro & Luis Sanz-Menéndez, *Legitimation Models and the Transformation of the Public Research Organizational Field*, 37 INT'L STUD. MGMT. & ORG. 27, 28 (2007).

38. SCOTT, *supra* note 23, at 87.

39. Dingwerth & Pattberg, *supra* note 29.

40. *Id.*

41. Suddaby et al., *supra* note 26.

42. Tim Bartley, *How Foundations Shape Social Movements: The Construction of an Organizational Field at the Rise of Forest Certification*, 54 SOC. PROBS. 229 (2007).

43. Julie Collins-Dogrul, *Managing US-Mexico "Border Health": An Organizational Field Approach*, 63 SOC. SCI. & MED. 3199 (2006).

emergence of the field. Historically and logically, structuration comes before all other processes that happen at the level of the organizational field.⁴⁴ In other words, there has to be a transnational organizational field of courts before courts can change their behavior and their characteristics due to these transnational influences. Therefore, for those processes to occur, the organizational field needs to emerge at least to a certain degree. Accordingly, to determine whether a certain organizational field exists, one must examine the characteristics of its structuration and establish its existence.

Structuration of an organizational field is an ongoing process. The emergence of the field induces organizations within it to cooperate and communicate with each other by providing rules and resources. This cooperation and communication, in turn, sustain the existing level of structuration and drive the organizational field towards greater structuration.⁴⁵

DiMaggio and Powell describe the four parameters of the process of structuration as

an increase in the extent of interaction among organizations in the field; the emergence of sharply defined interorganizational structures of domination and patterns of coalition; an increase in the information load with which organizations in a field must contend; and the development of a mutual awareness among participants in a set of organizations that they are involved in a common enterprise.⁴⁶

The next Part turns to applying these parameters to the transnational relationships among courts in order to establish the emergence of a transnational organizational field of courts. After establishing the existence of this transnational field, the Article will turn to discussing its possible problematic influence on courts' relationships with their different audiences.

IV. STRUCTURATION OF THE TRANSNATIONAL ORGANIZATIONAL FIELD OF COURTS

The previous Part of the Article presented the theoretical framework of the organizational field concept. This Part applies the theoretical framework to the transnational relationships of courts and elaborates on the argument that a new organizational field, the

44. DiMaggio, *supra* note, 31, at 267. The list of processes that may occur at the field level includes, among others, the process of institutional isomorphism. This process will be discussed later in this paper.

45. Nelson Philips, Thomas B. Lawrence & Cynthia Hardy, *Inter-Organizational Collaboration and the Dynamics of Institutional Fields*, 37 J. MGMT. STUD. 23 (2000); Wooten & Hoffman, *supra* note 17, at 136.

46. DiMaggio & Powell, *supra* note, 24, at 148.

transnational organizational field of courts, is emerging.⁴⁷ It discusses the elements of structuration of an organizational field and explains how each of those elements is manifested in relation to the transnational organizational field of courts. It shows that the relationships between courts that result from the transnational judicial dialogue follow most of the patterns of structuration.⁴⁸ Due to the early stage that the structuration process is currently at, the transnational organizational field of courts satisfies some criteria of structuration better than others. Nevertheless, the existing state of the organizational field may already result in organizational processes at the organizational field level, such as institutional isomorphism. The following Parts of the Article will explain how these processes may influence courts.

A. Increase in the Extent of Interaction among Organizations in the Field

According to this criterion, when an organizational field is emerging, the organizations belonging to it will communicate with each other more than before, regardless of the reason for the increase in interaction or what the organizations achieve by it.⁴⁹ Nor do the exact means used to communicate matter much. The communication itself shows that the organizations identify each other as the relevant group that they should be communicating with. This Part demonstrates that the emerging organizational field of courts fulfills this criterion by focusing on the different ways courts interact, the courts that are involved in the interaction, and the issues around which the interaction revolves.⁵⁰

There are three main ways in which courts and judges interact:⁵¹ face-to-face interactions, IT-based communication, and cross citations. As mentioned above, face-to-face interactions include judicial meetings in different settings. The most common way for judges to meet is at conferences organized by a variety of bodies and

47. Frishman, *supra* note 16.

48. A similar argument can be made in regard to other, law-related, organizational fields. For example, one could argue that there is an organizational field of legal professionals, legal academics, or national courts. These discussions, although important, fall outside the scope of this Article.

49. The goals and the consequences of the interaction are influential in other criteria of structuration.

50. This Article will address only the issues that are important for its purpose. For a list of additional issues, see Claes & Visser, *supra* note 9, at 100–01.

51. There are a number of different classifications of the ways courts interact. See, e.g., Emmanuel Lazega, *Mapping Judicial Dialogue Across National Borders: An Exploratory Network Study of Learning from Lobbying Among European Intellectual Property Judges*, 8 *UTRECHT L. REV.* 115, 118 (2012); SLAUGHTER, A NEW WORLD ORDER, *supra* note 14, at 192; Slaughter, *supra* note 3, at 1104; cf. Law, *supra* note 6.

organizations. The volume of these kinds of conferences can be illustrated by the report written by the Hague Institute for the Internationalisation of Law. It listed thirty-two international judicial organizations that organize judicial face-to-face interactions.⁵² Some examples of these kinds of meetings include: meetings organized by the International Association of Judges,⁵³ the meeting of European intellectual property judges,⁵⁴ meetings of the Chief Justices of supreme courts of the European Union,⁵⁵ as well as international and regional conferences organized by the International Organization for Judicial Training of which judges from the United States are members.⁵⁶ In addition to judicial conferences, there are certain academic conferences that judges from different countries attend. An example of this kind is the Conference on Transnational Judicial Dialogue: Concept, Method, Extent, Effects, which took place in Oslo from June 21–22, 2013. Six judges participated at this conference: Lord Carnwath, Judge of the UK Supreme Court; Andreas Paulus, of the Bundesverfassungsgericht; Raffaele Sabato, of the Court of Cassation of Italy; Luis López Guerra, of the European Court of Human Rights (ECtHR); Erik Møse, of the ECtHR; and Angelika Nußberger, of the ECtHR.⁵⁷ Moreover, judges meet by taking part in judicial delegations from one court to another. They perceive these judicial delegations as important. For example, David Law and Wen-Chen Chang note that judges from the Taiwanese Constitutional Court strive to take part in such delegations, despite the obstacles

52. LAW OF THE FUTURE CONFERENCE, HAGUE INST. FOR THE INTERNATIONALISATION OF LAW, THE CHANGING ROLE OF HIGHEST COURTS IN AN INTERNATIONAL WORLD: INVENTORY AND BIBLIOGRAPHY 63–70 (2008) [hereinafter FUTURE CONFERENCE], http://www.hiil.org/data/sitesmanagement/media/Highest_courts_ac2008_inventory_bibliography.pdf [<http://perma.cc/G76L-NFW6>] (archived Oct. 10, 2015). The Hague Institute for the Internationalisation of Law organized judicial meetings. See Michael Kirby, *Transnational, Judicial Dialogue, Internationalisation of Law and Australian Judges*, 9 MELB. J. INT'L L. 171 (2008).

53. *News & Events*, INTERNATIONAL ASSOCIATION OF JUDGES, <http://www.iaj-uum.org/news/> [<http://perma.cc/MA5H-5BHK>] (archived Oct. 28, 2015).

54. Lazega, *supra* note 51.

55. GUY CANIVET, *New Methods for the International Coherency of Law, in HIGHEST COURTS AND THE INTERNATIONALISATION OF LAW* 145, 150 (Sam Muller & Marc Loth eds., 2009).

56. THE INT'L ORG. FOR JUD. TRAINING, <http://www.iojt.org/> [<http://perma.cc/S9VB-E3BH>] (archived Sept. 28, 2015) (“The mission of the IOJT is realized through international and regional conferences and other exchanges that provide opportunities for judges and judicial educators to discuss strategies for establishing and developing training centers, design effective curricula, developing faculty capacity, and improving teaching methodology.”).

57. *Conference on Transnational Judicial Dialogue: Concept, Method, Extent, Effects*, UIO, <http://www.jus.uio.no/pluricourts/english/projects/multirights/events/2013/annual-conference-2013.html> [<http://perma.cc/32J5-VTE4>] (archived Oct. 10, 2015).

they face.⁵⁸ Moreover, some judges even participate in exchange programs where a judge from one jurisdiction spends time and gets training in another jurisdiction.⁵⁹

A second method of judicial communication is through technology (e.g., through the Internet or the telephone). Judges use technology to talk to each other or to read each other's decisions. Of course, communication through the medium of "decisions-reading" is different from a conversation. Nevertheless it is still a way to communicate—a judge can write in a way that transmits a certain message to the judges who read her decision. The judge who reads the decisions decides whose and which decisions she wants to read. As a result, the judge decides whose messages she wishes to receive. By making their decisions accessible on their website and by translating them to other languages, courts can send specific messages such as what they believe to be the best solution for a certain situation. Technology used for judicial communication of this sort includes general legal databases such as LexisNexis⁶⁰ and Westlaw⁶¹ and specific databases such as the "international law in domestic courts" database.⁶² All of these databases include judicial decisions from different jurisdictions. Although subscribing to some of these databases may be costly and therefore some judges will have only limited access to them, others are free and publicly available. In addition, communication through technology includes online forums open only to particular judges, where judges can write to each other directly.⁶³ With the development of new technologies and the lowering costs of existing technologies, it is likely that additional databases and methods of communication will be developed.

The third kind of judicial interaction occurs through cross citation. As mentioned in the Introduction, this type of interaction is

58. David S. Law & Wen-Chen Chang, *The Limits of Transnational Judicial Dialogue*, 86 WASH. L. REV. 523, 523 (2011); see also Wen-Chen Chang & Jiunn-Rong Yeh, *Internationalization of Constitutional Law*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1165 (Michel Rosenfeld & András Sajó eds., 2012); cf. Law & Chang, *supra* (analyzing the involvement of justices from the Supreme Court of Japan, the Constitutional Court of Korea, and the Constitutional Court of Taiwan in different practices of transnational judicial dialogue).

59. See, e.g., *Exchange 2013*, ACA EUROPE, <http://www.juradmin.eu/index.php/en/exchanges/2013> (last visited Oct. 10, 2015) [<http://perma.cc/GFN6-RU3D>] (archived Sept. 28, 2015) (providing a table showing judges exchanging foreign jurisdictions).

60. LEXISNEXIS, <http://www.lexisnexis.com> (last visited Oct. 10, 2015).

61. WESTLAW, <http://www.westlaw.com> (last visited Oct. 10, 2015).

62. *Domestic Court Decisions*, OXFORD REPORTS ON INTERNATIONAL LAW, <http://opil.ouplaw.com/search?ct=6f151ede-c53f-4613-8bea-f62a076a1355> (last visited Oct. 10, 2015).

63. See, e.g., Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 263 (2008) (describing the benefits judges or decision makers gain from access to a members-only online database).

sometimes considered normatively problematic due to the possible influence on national law.⁶⁴ In the literature, cross citation is conceptualized as a “dialogue,” “intellectual interaction,” or a mutual judicial communication, and not merely as legal “borrowing.” It is considered to be not just a direct application of foreign law⁶⁵ or a situation where there is a clear-cut division between “importers” and “exporters” of law,⁶⁶ but a way for courts to exchange their understandings of the best legal solution to a certain problem. The literature divides the judicial dialogue through cross citation into two categories. The first category is a weak form of judicial dialogue, where judges take inspiration from foreign decisions when making their decisions. The second category, although rare, is a strong form of judicial dialogue, where judges use foreign decisions as precedent.⁶⁷ Although complete empirical data on cross citation are lacking, there are indications that cross citation is increasing in numbers around the world, especially in areas concerning global or regional issues that require the courts’ cooperation.⁶⁸

64. See, e.g., POSNER, *supra* note 6, at 347–68 (discussing when it is appropriate for judges to cite foreign courts); see also Scalia, *supra* note 6 (discussing the impact of foreign comparative law on the U.S. Constitution). This Article argues that another type of influences on the courts is of graver concern than the possible importation of foreign law. The reason is that unlike the importation of foreign law, which is made willingly by national judges, transnational judicial dialogue may cause judges and courts to change their behavior in a way that they are not aware of.

65. Sir Basil Markesinis & Jörg Fedtke, *The Judge as Comparatist*, 80 TUL. L. REV. 11, 17 (2005). I believe that there should be a stronger analytical distinction between cross-citation and other means of engaging in judicial dialogue. This point will be developed in another work. For the purpose of the argument here, it suffices to address all kinds of communication in the same way.

66. Ferrarese, *supra* note 4, at 5.

67. See Ronald J. Krotoszynski, Jr., “*Td Like to Teach the World to Sing (in Perfect Harmony)*”: *International Judicial Dialogue and the Muses—Reflections on the Perils and the Promise of International Judicial Dialogue*, 104 MICH. L. REV. 1321, 1324 (2006) (explaining that foreign legal precedent has been used in support of U.S. Supreme Court decisions and that this use of precedent demonstrates one aspect of international judicial dialogue).

68. The claim that there is an increase in cross-citation and in judicial interactions in general is supported by anecdotal evidence. See, e.g., Benvenisti, *supra* note 63; see also Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 103–12 (1994) (discussing three forms of transjudicial communication: horizontal, vertical, and mixed vertical-horizontal). The first extensive account of the use constitutional courts make of foreign law was published in 2013. See *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* (Tania Groppi & Marie-Claire Ponthoreau eds., 2013) (finding that some courts tend to cite foreign law more than others—in most cases, according to the authors, courts from a common law background will tend to cite more foreign law than courts from a civil law background). See generally Ryan C. Black et al., *Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court’s Use of Transnational Law to Interpret Domestic Doctrine*, 103 GEO. L.J. 1 (2014) (analyzing empirically the use of transnational law for interpreting domestic law by the U.S. Supreme Court).

The different types of interaction can occur between courts on different levels. These interactions are both vertical and horizontal.⁶⁹ Vertical interaction—voluntary or mandatory⁷⁰—includes communication between regional or international courts and national courts, for example, the interaction between national courts in Europe and the Court of Justice of the European Union or the European Court of Human Rights.⁷¹ Horizontal communication includes interactions between courts on the same level, such as between the highest courts of different countries.⁷²

Moreover, some courts take part in judicial communication more than others. For example, courts from new democracies tend to cross cite more often than older courts.⁷³ Courts in new democracies will tend to cross cite more because it helps them establish their authority and to convince the other branches that they are experts in law. Regional networks also promote horizontal communication. Courts in some regions, such as the European Union, have a stronger incentive to interact with each other. Regional integration requires them to deal with similar problems and address the same legal documents (documents on the regional level). As a result, the courts of countries belonging to the European Union have an incentive to develop a common understanding of European law and create a legal system that all national courts in Europe find acceptable.⁷⁴ The referral of a preliminary ruling to the Court of Justice is an example of a way in which courts can act together to create this common understanding. Of course, other methods such as direct communication, discussed above, can promote similar goals.

69. See Slaughter, *supra* note 3, at 1104 (noting that judicial globalization can involve “both ‘vertical’ relations between national and international tribunals and ‘horizontal’ relations across national borders”).

70. *Id.* As for other types of cross-citation, there are situations that the national law requires courts to look at the decisions of supra-national courts. For example, when they apply already established supra-national law. In other cases, such as when there supra-national court’s decision are in similar situation but not an exact one, courts can look at this decision voluntarily.

71. *Id.*

72. For an empirical analysis of horizontal communication between the highest courts in the European Union, see generally Martin Gelter & Mathias M. Siems, *Language, Legal Origins, and Culture Before the Courts: Cross-Citations Between Supreme Courts in Europe*, 21 SUP. CT. ECON. REV. 215 (2013).

73. Chang & Yeh, *supra* note 58, at 1175; see also Antonie Hol, *Highest Courts and Transnational Interaction: Introductory and Concluding Remarks*, 8 UTRECHT L. REV. 1, 5 (2012) (“[C]ourts in countries with new democracies, such as South Africa and the countries of Central and Eastern Europe, are more open to foreign law than the courts of other countries.”).

74. See Hol, *supra* note 73, at 5; see also Diana Piana & Carlo Guarnieri, *Bringing the Outside Inside: Macro and Micro Factors to Put the Dialogue Among Highest Courts into Its Right Context*, 8 UTRECHT L. REV. 139, 140 (2012) (explaining that European domestic courts are inclined to engage in a pattern of dialogue by citing to other foreign case law).

The topics discussed in these judicial interactions are also important for understanding these interactions. Sometimes judges share thoughts about institutional and organizational subjects, such as judicial independence, efficiency, and high-quality justice.⁷⁵ At other times, judges communicate about specific matters that concern transnational problems or common issues that courts need to deal with on the national level. For example, courts communicate on issues such as judicial review of counterterrorism measures, protection of the environment, asylum seekers,⁷⁶ intellectual property,⁷⁷ and constitutional questions.⁷⁸ A third option is “judicial comity,” that is, when judges interact in order to resolve a particular transnational case and minimize forum shopping by the parties.⁷⁹

As has been discussed in this section, nowadays courts interact with each other extensively. The communication between courts fulfills the first criterion of structuration and is therefore a strong indicator for the emergence of a transnational organizational field of courts.

B. *Emergence of a Sharply Defined Interorganizational Structure of Domination and Pattern of Coalition*

In an organizational field there are distinct hierarchies and coalitions between organizations. For example, some organizations are considered to be leading organizations, while others are not; some are more dominant and legitimate than others; some are disregarded as irrelevant. Thus, one can identify the status of an organization in comparison to others. With regard to courts, the argument is that a defined interorganizational structure emerges. This structure defines the status of each court in comparison to other courts, determines coalitions of courts, and indicates which courts are considered to be prestigious. At the current level of structuration of the transnational organizational field of courts, no clear and defined patterns of domination have thus far been established. Nevertheless, it is possible to identify, to a certain extent, the inception of such patterns. For example, Martin Gelter and Mathias Siems have identified

75. Claes & Visser, *supra* note 9, at 110–11.

76. See Benvenisti, *supra* note 63, at 253 (discussing inter-judicial cooperation in the areas of global counterterrorism measures, the protection of the environment and the status of asylum seekers).

77. See generally Lazega, *supra* note 51.

78. VICKI C. JACKSON, CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA 1–15 (2010).

79. See Anne-Marie Slaughter, *Court to Court*, 92 AM. J. INT'L L. 708, 709 (1998) (explaining how judicial comity helps courts work in harmony).

coalitions among courts in the European Union.⁸⁰ It is also possible to spot the first indications regarding which courts are more important than others, and to distinguish between courts that belong to the center of the field and those that belong at its periphery, on all issues or only on some of them.

The status of a court is not determined merely by its official role. Courts that have an official rank, such as regional courts, may adjust their behavior in order to comply with what lower (national) courts expect of them. Regional courts, such as the courts of the European Union, may communicate with national courts as equals and sometimes adjust their decisions' bottom line or rhetoric according to their audiences. For example, the European Court of Human Rights adjusts some of its rhetoric (i.e., the number of citations used), according to the country that its decision refers to.⁸¹

It is important to remember that a court's position is not necessarily the same in relation to all courts in the field, but sometimes only in relation to other courts in a certain group (such as a group of courts in the same region). The reason why such subgroups among courts exist is that the relationships between courts in the organizational field differ. Some courts are more connected between themselves than with other courts. This may be the result of belonging to the same transnational space (such as the same region)⁸² or to legal systems that have strong historical or structural relationships (such as common law systems).⁸³ One can identify and analyze groups of courts, to a certain extent, through cross citations.⁸⁴ Usually, courts that cite each other more often than they cite other

80. See Gelter & Siems, *supra* note 72, at 241 (identifying groups of courts by using cluster analysis).

81. See, e.g., Yonatan Lupu & Erik Voeten, *Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights*, 42 BRITISH J. POL. SCI. 413, 413 (2012) (suggesting that international courts adjust case citations to the demands of their audiences).

82. See Piana & Guarneri, *supra* note 74, at 151 ("Courts are more inclined to refer to a precedent decided by a foreign court which belongs to its own transnational legal space . . .").

83. Hol, *supra* note 73, at 3.

84. Using cross-citation is an acceptable way to identify relationships between courts. There are some problems with this criterion; for the purpose of this Article, the main problem is that some courts use foreign decisions without openly citing them. For example, the French Court of Cassation does not openly cite foreign decisions. See Canivet, *supra* note 55, at 147–48. Nevertheless, this is currently the most useful tool for measuring judicial dialogue. I therefore use it in this Article, while keeping in mind its limitations. For a discussion of the correlation between the amount of citations a court is accorded, and its other transnational judicial relationships, see Law & Chang, *supra* note 58.

courts will belong to the same subgroup. For this purpose, one can use methods such as network analysis.⁸⁵

Citation patterns of foreign law may be used to reveal the status of a specific court.⁸⁶ While the full argument will be developed elsewhere, I next provide a brief explanation about the way citation patterns can be used to understand the status of different courts. For example, leading courts are those that other courts look up to when they are considering how to decide or behave in a certain situation. It is therefore safe to assume that when a court has a leading position, other courts will cite it extensively.⁸⁷ Its decisions will be cited to a larger extent than decisions by more marginal courts and will frequently be the only comparative citation. Moreover, leading courts will rarely cross cite other courts in their decisions because they will not need to use foreign support to establish the legitimacy of their decisions. These trends can be identified in the behavior of the U.S. Supreme Court and of the Constitutional Court of Germany.⁸⁸

Courts that have a weak position in the field will tend to cite the leading courts, because they perceive those citations as increasing the legitimacy of their own decisions.⁸⁹ For example, the Supreme Court of Ireland frequently cites decisions by the Supreme Court of the

85. Network analysis is a tool increasingly used in the natural and social sciences. The basic purpose of network analysis is to map the relationships among actors or items in a network and to measure the latent positions these actors or items occupy in the network. Researchers have used this method of analysis to evaluate the nature of social interactions and, for example, to identify key individuals who communicate most extensively with others. See, e.g., JEROEN BRUGGEMAN, *SOCIAL NETWORK: AN INTRODUCTION* (2008); PETER J. CARRINGTON ET AL., *MODELS AND METHODS IN SOCIAL NETWORK ANALYSIS* (2005); STANLEY WASSERMAN & KATHERINE FAUST, *SOCIAL NETWORK ANALYSIS: METHODS AND APPLICATIONS* (1994). For the application of social network analysis to the U.S. judiciary, see Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of their Use and Significance*, 2010 U. ILL. L. REV. 489, 523 (2010) (explaining that network analysis has been used to examine the relationships between court cases); Daniel M. Katz & Derek K. Stafford, *Hustle and Flow: A Social Network Analysis of the American Federal Judiciary*, 71 OHIO ST. L. J. 457, 464 (2010) (“[N]etwork analysis should illuminate the social structure of the federal judiciary.”); Thomas A. Smith, *The Web of Law*, 44 SAN DIEGO L. REV. 309, 346 (2007) (explaining that network analysis can show which cases and articles judges find significant).

86. Cf. Law, *supra* note 68 (discussing judicial diplomacy of East Asian courts and examining the ways they are involved in transnational judicial dialogue and the non-legal goals of this involvement).

87. See generally Gelter & Siems, *supra* note 72 (addressing frequently cited courts as leading courts).

88. Chang & Yeh, *supra* note 58, at 1176.

89. There are additional reasons why courts, especially in new democracies, may cite foreign law. These reasons may be connected more to the national sphere than to the international sphere. See Johanna Kalb, *The Judicial Role in New Democracies: A Strategic Account of Comparative Citation*, 38 YALE J. INT’L L. 423, 428–29 (2013) (discussing how foreign citations are used not only a tool of judicial autonomy but also a democratic tool used to allow political bodies to reflect majoritarian preferences).

United Kingdom, and the Constitutional Court of Austria frequently cites decisions of the Constitutional Court of Germany.⁹⁰ Another example is the extensive citation of European and international human rights case law by the Inter-American Court of Human Rights.⁹¹

In addition to identifying leading courts, through cross citation it is possible to identify courts that are attempting to improve their own status and become leading courts. Of course, it should be kept in mind that cross citation patterns are merely one indication of courts' statuses, and there may be many others. Cross citation patterns of courts that are attempting to improve their status will be different from those of leading courts and low-status courts. They will cite a large number of courts, both leading and low-status, without distinguishing between them, thereby trying to show the cited courts that they are taking their opinions into consideration and that they respect them. This in turn should improve the position of the citing court in the eyes of the cited courts. Madhav Khosla has argued that this explains the Supreme Court of India's cross citation pattern in the *Naz Foundation v. Government of NCT of Delhi*⁹² case.⁹³ According to Khosla, the case provides an example of the use of cross citations in a way that is indicative of an attempt to improve the court's status and position it as a "leader" within Asia.⁹⁴ The case addressed the constitutionality of the criminal prohibition on sodomy and cited an unlikely range of courts, including not only leading courts, but also courts not considered to be leading or important on the transnational level, from countries such as Fiji and Nepal—courts that are usually ignored.⁹⁵ Of course, as will be explained next, courts may have additional reasons for citing decisions of specific courts.

There are many parameters that influence the relative status of a certain court, a status that as explained above can sometimes be identified through cross citation patterns. One of these parameters is the reputation of the court. Courts will usually cite other courts if

90. Gelter & Siems, *supra* note 72, at 245.

91. See generally Gerald L. Neuman, *Import, Export, and Regional Consent in the Inter-American Court of Human Rights*, 19 EUR. J. INT'L L. 101 (2008) (criticizing the Inter-American Court of Human Rights' tendency to cite European and international human rights case law).

92. *Naz Foundation v. Delhi*, [2009] AIR 160 (Delhi) 277.

93. Madhav Khosla, *Inclusive Constitutional Comparison: Reflections on India's Sodomy Decision*, 59 AM. J. COMP. L. 909, 927–28 (2011) ("By not making distinctions between foreign jurisdictions, the Court may be sending a signal to the rest of the world that Asia needs to be included in the conversation.")

94. *Id.* at 927 ("The Court could have been presenting India as a 'leader' within Asia, where she is in competition with China both economically and diplomatically.")

95. *Id.* at 911. An alternative explanation is that the court referred to non-Western precedents because it sustained the prohibition on sodomy. Thus, the court did not have a Western precedent to refer to for supporting its decision.

those courts have a good reputation.⁹⁶ In turn, cross citations sometimes will make it possible to identify the good reputation certain courts enjoy. In some cases, a court's reputation may be even more important than the quality of the solution it offers.⁹⁷ Thus, a court may be cited due to its reputation and not because it offers useful experience to the citing court. This may occur, as mentioned above, when citing a particular court increases the legitimacy of the decision. National parameters play an important part in determining the status of courts as well. For example, in most cases a leading court will be one from a large, old, or powerful country.⁹⁸ Other national parameters that affect the position of the court include economic development, democratic standards, and constitutional standards, as well as the prestige of the national legal system.⁹⁹

Unfortunately, the lack of comprehensive research in this area means that it is currently difficult to determine the domination and coalition patterns among courts. Moreover, the existing state of affairs does not yet make it possible to talk about a single leading court or a specific group of leading courts. The system is currently multipolar and will probably remain so at least in the near future.¹⁰⁰ It is a dynamic system—courts that were considered leading in the past, such as the U.S. Supreme Court, can lose their leading position and others may gain leadership.¹⁰¹ In addition, there is no clear hierarchy between courts. Nevertheless, since some patterns of domination are already apparent, the second criterion of structuration is fulfilled.

C. Increase in the Information Load with which Organizations in the Field Must Contend

The criterion of information load addresses the amount of information that comes before organizations in the organizational field. There are two kinds of information: the relevant information that the organizations are able to access, and the information that the

96. See John Bell, *The Argumentative Status of Foreign Legal Arguments*, 8 *UTRECHT L. REV.* 8, 17–18 (2012) (discussing the significance of a court system's reputation). See generally Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 *CHI. J. INT'L L.* 115 (2011) (discussing how reputation is linked to compliance with judgments).

97. See Hol, *supra* note 73 at 1–2 (explaining that reputation is one of the reasons why courts strive for coherence).

98. For an example of an analytical work on the subject, see Gelter & Siems, *supra* note 72. The existence of stronger courts is mentioned in Hol, *supra* note 73, at 5.

99. Ferrarese, *supra* note 4, at 15.

100. See Slaughter, *supra* note 12, at 194; see also Christopher A. Whytock, *Transnational Judicial Governance*, 2 *ST. JOHN'S J. INT'L & COMP. L.* 55, 64–66 (2012).

101. See *id.* at 64–66 (discussing the U.S. Supreme Court's declining influence in judicial governance globally).

organizations have to take into account when making their decisions. The upsurge in information load increases the level of uncertainty that organizations have to deal with because the additional information can cause an information overload in the organizational decision making.¹⁰² As a result, organizations are driven to look more at each other's solutions in an attempt to figure out how the existing information should be addressed.

The amount of relevant information that courts are exposed to has grown significantly in recent decades.¹⁰³ The increase in the amount of information is, for the most part, the product of globalization and of better and faster methods of communication. This is, of course, a general phenomenon not limited to courts. Due to the development of the Internet, more information is available to more people and more organizations.¹⁰⁴ As a result of improvements in communication technology, more data than ever is accessible by courts. For example, due to the development of new legal databases, foreign decisions are more accessible. A report published in 2008 listed seventy-six databases, and the number has probably increased since.¹⁰⁵ Courts, at least theoretically, can use all of this information as a basis for their decisions.

In addition, due to new global challenges there has been an increase in the complexity of cases that come before courts and, as a result, in the information courts need to take into account when making their decisions. Nowadays, courts have to deal with new problems that present complex conditions of uncertainty and global effects. Many of these challenges are too extensive for one court to deal with alone or have cross border effects. Possible solutions to these challenges require at least some coordination between courts and must take into account the ways various courts have dealt with similar challenges.¹⁰⁶ These challenges include, among others, "the

102. See e.g., Martin J. Eppler & Jeanne Mengis, *The Concept of Information Overload: A Review of Literature from Organization Science, Accounting, Marketing, MIS, and Related Disciplines*, 20 INFO. SOC'Y 325, 329-31 (2004) (explaining that information improves the quality of decision making up to a point but that after a certain amount, additional information decrease the quality of decisions).

103. Information is relevant to the courts if it provides data that can be used in the case before them. The availability of this information does not mean that the courts will take it into account or even look for it. See Michael R. Harris, *Intervention of Right in Judicial Proceedings to Review Informal Federal Rulemakings*, 40 HOFSTRA L. REV. 879, 879 (discussing the information overload and duplicative legal arguments through which court must sift to make judicial determinations).

104. See DAVID WEINBERGER, *TOO BIG TO KNOW* 10 (2011) (arguing that the internet has led to an information overload and issues of filtering).

105. FUTURE CONFERENCE, *supra* note 52, at 74-77. Good examples of this kind of database are LEXISNEXIS and WESTLAW. LEXISNEXIS, *supra* note 60; WESTLAW, *supra* note 61.

106. See, e.g., Benvenisti, *supra* note 63, at 263.

war on terror,”¹⁰⁷ protection of human rights,¹⁰⁸ and refugees.¹⁰⁹ Another type of challenge that requires courts to look beyond their borders is difficult problems that do not have one easy solution (e.g., the possible cultural clashes that happen in a multicultural society).¹¹⁰ In an attempt to find a suitable solution to those problems, courts aim to learn from the experience of other courts and countries that have dealt with similar problems.¹¹¹ For example, when deciding on the difficult issue of the constitutionality of private prisons, the Supreme Court of Israel studied the experience of other countries with privatization of prisons.¹¹² In both types of cases, transnational challenges and complicated problems, courts have access to more information that they need to take into consideration when making their decisions.

All in all, the amount of information available to courts is on the rise. Courts can access a larger amount of relevant data due to the development of technology. In addition, they have to deal with global challenges and therefore must take a larger amount of data into consideration. The increase in information load makes the tasks of courts more difficult and induces them to look at each other's decisions. It also encourages courts to communicate more with each other in order to get the information they require and as a result perceive each other as organizations in the same organizational field, thus fulfilling the third criterion of field structuration.

D. *Development of a Mutual Awareness among Participants in a Set of Organizations that They are Involved in a Common Enterprise*

According to this criterion, organizations in an organizational field need to see themselves as involved in a common enterprise and as sharing the same goal. When they do, they perceive the other

107. See generally Glenn M. Sulmasy, *The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting the Last War*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 309 (2005).

108. See generally Christopher McCrudden, *A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights*, 20 O.J.L.S. 499 (2000) (“It is now commonplace in many jurisdictions for judges to refer to the decisions of the courts in foreign jurisdictions when interpreting domestic human rights guarantees.”).

109. See generally H el ene Lambert, *Transnational Law, Judges and Refugees in the European Union*, in THE LIMITS OF TRANSNATIONAL LAW 1 (Guy S. Goodwin-Gill & H el ene Lambert eds., 2010).

110. See, e.g., ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES 4 (Richard A. Shweder et al. eds., 2002).

111. See Sofio, *supra* note 6, at 136 (arguing that the use of foreign law is justified when it helps judges better identify the consequences of their decisions).

112. See generally H CJ 2605/05 Academic Center of Law and Business v. Minister of Finance (Nov. 11, 2009) (Isr.).

organizations in the organizational field as being similar to them and as doing the same thing that they are doing.

It is hard to find clear-cut proof that courts believe that they are involved in a common enterprise. Nevertheless, indications that there is a common enterprise can be identified.¹¹³ Moreover, this is not the first attempt to identify the existence of this enterprise. Anne Marie Slaughter, for example, claims on the descriptive level that courts have developed a common identity and have become a community of courts.¹¹⁴ According to Slaughter, the interactions between judges make them “see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavor that transcends national borders.”¹¹⁵ Moreover, “they are increasingly coming to recognize each other as participants in a common judicial enterprise.”¹¹⁶ According to her findings, judges from different legal systems share common values and beliefs as well as a perception of their role in the legal system and in society,¹¹⁷ and they sometimes relate more to judges in other jurisdictions than to their national bodies and institutions.¹¹⁸

If judges see themselves as involved in a common enterprise, it is important to inquire into the goals of this enterprise. The current literature suggests different answers to this question. One of them is that the goal of this enterprise is to promote the strategic interests of judges at the national or transnational level. One of these arguments is made by Eyal Benvenisti. According to him, courts aim to join forces to restrict executive latitude,¹¹⁹ which has increased due to the processes of globalization. These processes of globalization may result in harm to national interests, especially due to pressures at the international level. The courts are trying to coordinate the limits on executive branches so that all of the executive branches will be in the

113. See, e.g., Adrian Vermeule, *The Judiciary Is a They, Not an It: Two Fallacies of Interpretative Theory* 1–2 (Chi. Pub. L. & Legal Theory, Working Paper No. 49, 14 2005). Unlike in the critique, the argument made here refers merely to one specific court as an “it” and not to the judiciary in general. Moreover, unlike the critique, the discussion here refers to the preferences, goals, and actions of the court regarding itself as an organization (i.e., legitimacy) and not regarding its professional work (i.e., legal interpretation).

114. See Slaughter, *supra* note 3, at 1108

115. SLAUGHTER, *A NEW WORLD ORDER*, *supra* note 14, at 193.

116. *Id.*

117. See *id.* (“[Judges] face common substantive and institutional problems; they learn from one another’s experiences and reasoning; and they cooperate directly to resolve specific disputes.”).

118. See Claes & de Visser, *supra* note 9, at 100.

119. Benvenisti, *supra* note 63, at 243; see also Eyal Benvenisti & George W. Downs, *Court Cooperation, Executive Accountability, and Global Governance*, 41 N.Y.U. J. INT’L L. & POL. 931, 932 (2009) (discussing judicial oversight’s role in stemming the power given to executive branches of certain nations regarding international organization policy).

same position, and their national interests will not be compromised. The goal of the courts' enterprise may also be to strengthen their position domestically as well as in the international legal community.¹²⁰ For example, courts can strengthen their position by ensuring judicial independence and professional integrity and as a result protect an individual court's position at the national level or increase its influence on the development of international law.¹²¹ Acting as a group allows the courts to escape negative domestic consequences that might occur if they acted unilaterally, by increasing the legitimation of their actions.¹²² Another goal may be the development of regional law in cases of regional integration, such as the law of the European Union—a law whose application and development requires judges to act as a group.¹²³

Another possibility is that courts have an ideological goal. For example, the goal may be the promotion of human rights. In that case, courts may see their common enterprise as being mediators between international human rights norms and their domestic legal systems.¹²⁴ Or the goal may be the promotion of the rule of law, in which case the task of courts is to make sure that the national institutions follow the rule of law norms.¹²⁵ The goal may also be the promotion of coherence between legal systems (i.e., to ensure that like cases will be treated alike at the transnational level).¹²⁶

Indications that support these scholarly claims regarding common goals can be found in judicial behavior as well as in intention statements of judicial organizations. First, as discussed above, interaction among judges has increased during the last two decades. The issue areas around which the interaction revolves may indicate the different goals that are driving it. Second, different organizations to which courts or judges belong have declared which goals they aim to promote.¹²⁷ For example, the International Association of Judges

120. See Benvenisti & Downs, *supra* note 119, at 936–37.

121. Ferrarese, *supra* note 4, at 5.

122. Benvenisti & Downs, *supra* note 119, at 941

123. See Hol, *supra* note 73, at 6 (“In some cases there is a strong and direct incentive to participate in a network, because applying European law requires cooperation between the courts of different countries.”).

124. See Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 PROCS. ANN. MEETING (AM. SOC'Y INT'L L.) 465, 466 (2010).

125. See generally TOM BINGHAM, *THE RULE OF LAW* (2010).

126. See Waldron, *supra* note 8. *But see* Bell, *supra* note 96, at 17–18 (suggesting that foreign lawyers are unlikely to adopt the legal rationale of foreign legal systems in which domestic attorneys question legal merits).

127. Of course, different courts and different judges may vary in their understanding of the best way of promoting a specific goal. They can also differ on their definition of the goal. Nevertheless, a goal can be understood as a common goal if courts agree on the general idea or a general value they promote. In this case, exactly how this goal is defined and promoted will be designed in a dialogical process among the participants in this enterprise. See Brian Ostrom & Roger Hanson, *Achieving High*

states: “The main aim of the Association is to safeguard the independence of the judiciary, which is an essential requirement of the judicial function, guaranteeing human rights and freedom.”¹²⁸ The International Association of Women Judges, whose members hail from a number of countries including the United States, defines itself as sharing “a commitment to equal justice and the rule of law.”¹²⁹ The Network of the Presidents of the Supreme Judicial Courts of the European Union asserts that it “provides a forum through which European institutions are given an opportunity to request the opinions of Supreme Courts and to bring them closer by encouraging discussion and the exchange of ideas. The members gather for colloquiums to discuss matters of common interest.”¹³⁰

As this Part describes, there are indications of the involvement of courts in a common enterprise. Courts’ awareness of their common enterprise may have developed in a variety of ways, such as through legal education, media coverage, judicial interaction, and more.¹³¹ Currently, scholars have identified signs of this involvement and suggested different understandings of the common goal. Identifying the exact goals of this enterprise lies outside the scope of this Article, but future research focusing on this question will probably be able to identify them more clearly.¹³²

E. Structuration of the Transnational Organizational Field of Courts: Conclusion

This Part of the Article has discussed the four criteria of structuration with regard to the transnational organizational field of courts and established that it is an emerging organizational field. For the first criterion, it showed that there is a large amount of interaction among the courts. For the second criterion, it showed that patterns of domination and coalition are emerging. For the third criterion, it explained that there has been an increase both in the

Performance: A Framework for Courts, HIGH PERFORMANCE COURT FRAMEWORK V (April 2010), http://www.ncsc.org/~media/Files/PDF/Services%20and%20Experts/CTF/Achieving_HPC_April_2010.ashx [<http://perma.cc/3WXN-DX3H>] (archived Oct. 4, 2015).

128. *Welcome to the International Association of Judges*, INT’L ASS’N OF JUDGES, <http://www.iaj-uim.org> [<http://perma.cc/EB3W-43YW>] (archived Oct. 3, 2015).

129. *LAWJ Worldwide*, THE INT’L ASS’N OF WOMEN JUDGES, <http://www.iawj.org/> [<http://perma.cc/CU7V-KRPF>] (archived Oct. 3, 2015).

130. *The Network*, THE NETWORK OF THE PRESIDENTS OF THE SUPREME JUDICIAL COURTS OF THE EUR. UNION, <http://www.network-presidents.eu/page/network-0> [<http://perma.cc/LVF7-SYSZ>] (archived Oct. 3, 2015).

131. *See, e.g., Law, Judicial Comparativism*, *supra* note 6, at 928.

132. The disagreements regarding the goal of the common enterprise can be understood as a competition between different logics in the field. *See* SLAUGHTER, A NEW WORLD ORDER, *supra* note 14, at 194 (asserting that if there is to be a unified community of courts, “judges will have to take a further step and acknowledge, either explicitly or implicitly, a set of common principles that define their mutual relations”).

amount of accessible relevant information that courts can look at and in the information that courts need to take into account when making their decisions. For the fourth criterion, it addressed indications of the existence of a common enterprise that the courts are involved in as well as its possible goals. This discussion suggests that there are strong indications of the emergence of a transnational organizational field of courts. Of course, this is not and never will be a monolithic field. The position of courts, as well as their relationships with one another, will always depend on factors such as legal systems, prestige, and cultural ties.¹³³ Thus, having established that the transnational organizational field of courts is emerging, the Article now turns to discussing its possible effects on courts. The discussion below focuses on the convergence between courts' characteristics that is expected to negatively affect courts' national social legitimacy.

V. IMPLICATION FOR COURTS: INSTITUTIONAL ISOMORPHISM

Belonging to one transnational organizational field may have a major influence on the courts.¹³⁴ It may affect how courts understand their roles and their behavior (hereinafter "courts' identity"),¹³⁵ the ways courts want to present themselves to their audiences (hereinafter "courts' intended images" or "intended images"),¹³⁶ and

133. See Wooten & Hoffman, *supra* note 17, at 134–35.

134. See *id.* at 130 (noting that belonging to an organizational field changes the very concept of the organizational self); *cf.* CAMPBELL, *supra* note 17, at 124–71 (analyzing the influence of globalization on taxation and arguing that it does not cause rapid changes in taxation institutions).

135. The concept of court's identity used here is based on a concept of organizational identity developed in the organizational theory literature. Organizational identity is a type of collective identity. It is the shared meaning that members, who are aware of belonging to the organization. See Stuart Albert & David A. Whetten, *Organizational Identity*, 7 RES. ORGANIZATIONAL BEHAV. 263 (1985); Kevin G. Corley et al., *Guiding Organizational Identity Through Aged Adolescence*, 15 J. MGMT. INQUIRY 85, 89–90 (2006) (explaining the controversy regarding whether organizational identity is a metaphor or a phenomenon); Joep P. Cornelissen, S. Alexander Haslam & John M. T. Balmer, *Social Identity, Organizational Identity and Corporate Identity: Towards an Integrated Understanding of Processes, Patternings and Products*, 18 BRITISH J. MGMT. 1, 3 (2007) (defining organizational as "relating to the identity of the organization as a whole"); Dennis A. Gioia et al., *Organizational Identity Formation and Change*, 7 ACAD. MGMT. ANNALS 123, 124–25 (2013) (reviewing the literature on organizational identity). In other words, it is the answer that members of the organization give to the question "who are we?" or "what do we stand for?" as an organization. Anu Puusa, *Conducting Research on Organizational Identity*, 11 ELECTRONIC J. BUS. ETHICS & ORGANIZATIONAL STUD. 24, 24 (2006).

136. The concept of court's intended image is based on a concept of intended image developed in the organizational theory literature. Intended image, according to Brown et al., consists of "[m]ental associations about the organization that organization leaders want important audiences to hold." In other words, intended image answers the question, "What does the organization wants others to think about it?" Tom J.

the means that they use to do so.¹³⁷ Such changes occur because different processes at the organizational field level impact the courts to make them more compatible with the transnational field they operate in.¹³⁸ This Part discusses one such process—institutional isomorphism, which causes organizations operating in the same organizational field to converge in their practices and main characteristics. Of course, caution needs to be exercised when predicting these changes because not all courts will become similar to each other, and the exact operation of this process depends on the relationships between the courts in the field and the intensity of those relationships, as well as on additional factors that are extraneous to these relationships.

This Part now turns to explaining the process of institutional isomorphism that, the Article argues, influences the courts. It discusses both the theoretical aspect of the process and its existing applications at the transnational level and then turns to discussing how this process may be expected to affect courts. This influence, as the Article argues, is likely to threaten courts' abilities to maintain their national legitimacy.

Before turning to the discussion itself, a few preliminary comments are due on the timeframe of this influence. The process of institutional isomorphism is a likely result of the structuration of an organizational field. Therefore, if the emergence of a transnational organizational field of courts has been identified, an institutional isomorphism between the courts may be expected. That does not mean that courts are already converging, although, as will be explained below, there is already some degree of convergence. The argument made here suggests that convergence is a possible, and even probable, path of globalization's influence on courts. Courts need to take this path into account when making their decisions regarding transnational engagement and be concerned about it when foreign

Brown et al., *Identity, Intended Image, Construed Image and Reputation: An Interdisciplinary Framework and Suggested Terminology*, 34 J. ACAD. MARKETING SCI. 99, 102 (2006). The intended image of an organization may or may not reflect the actual identity of the organization. An organization can choose which attributes it wants to communicate to its different audiences. It can create a tailor-made intended image for different audiences. Each of those intended images will highlight specific (relevant) positive characteristics of the organization. See Kristin Price & Dennis A. Gioia, *The Self-Monitoring Organization: Minimizing Discrepancies Among Differing Images of Organizational Identity*, 11 CORP. REPUTATION REV. 208, 210 (2008).

137. For a discussion of the ways in which an organizational field may influence identity, see Jesper Standgaard Pedersen & Frank Dobbin, *In Search of Identity and Legitimation: Bridging Organizational Culture and Neoinstitutionalism*, 49 AM. BEHAV. SCIENTIST 897 (2006); and Mary Ann Glynn, *Beyond Constraint: How Institutions Enable Identities*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 413, 413 (Royston Greenwood et al. eds., 2008).

138. See Wooten & Hoffman, *supra* note 17, at 141.

practices and conceptions are adopted. If courts do so, they may avoid the negative implications discussed in this Article.

A. Institutional Isomorphism: Theoretical Framework

Institutional isomorphism is a process through which organizations operating in the same organizational field become similar over time.¹³⁹ The process can influence all kinds of organizations—for profit, nonprofit, and governmental organizations.¹⁴⁰ There are three classic mechanisms through which institutional isomorphism occurs: coercive isomorphism, mimetic isomorphism, and normative isomorphism.¹⁴¹ Although they are analytically distinct, in practice it is difficult to distinguish between these mechanisms.¹⁴² Coercive isomorphism is the result of formal and informal pressures exerted on organizations. These pressures may be applied by other organizations or stem from cultural expectations of the society in which organizations operate.¹⁴³ Mimetic isomorphism is the result of uncertainties that organizations in the field have to deal with, such as ambiguous goals or a poorly understood technology.¹⁴⁴ In situations of uncertainty, organizations model themselves after other organizations that they perceive as legitimate or successful. Normative isomorphism is primarily the result of professionalization in the organizational field,¹⁴⁵ with

139. For a detailed discussion of the theory and its implementations, see, e.g., SCOTT, *supra* note 23, at 152; Jens Beckert, *Institutional Isomorphism Revisited: Convergence and Divergence in Institutional Change*, 28 SOC. THEORY 150, 150 (2010); DiMaggio & Powell, *supra* note 24, at 151; Dingwerth & Pattberg, *supra* note 29, at 721–22; Young S. Kim et al., *Structural Expansion and the Cost of Global Isomorphism: A Cross-National Study of Ministerial Structure, 1950–1990*, 17 INT'L SOC. 481 (2002); and Mark S. Mizruchi & Lisa C. Fein, *The Social Construction of Organizational Knowledge: A Study of the Uses of Coercive, Mimetic, and Normative Isomorphism*, 44 ADMIN. SCI. Q. 653, 656 (1999).

140. See generally Peter Frumkin & Joseph Galaskiewicz, *Institutional Isomorphism and Public Sector Organizations*, 14 J. PUB. ADMIN. RES. & THEORY 283 (2004) (empirically analyzing the difference between these three kinds of organizations in relation to isomorphic pressures).

141. See DiMaggio & Powell, *supra* note 24, at 154–56 (discussing twelve predictors of isomorphic change, organization-level predictors and field-level predictors).

142. See Mizruchi & Fein, *supra* note 139, at 657 (“[T]hese three mechanisms through which institutional isomorphism is diffused are not necessarily empirically distinguishable.”).

143. DiMaggio & Powell, *supra* note 24, at 150–51.

144. *Id.* at 151–52.

145. See *id.* at 152–54 (“The increased professionalization of workers whose futures are inextricably bound up with the fortunes of the organizations that employ them has rendered obsolescent (if not obsolete) the dichotomy between organizational commitment and professional allegiance that characterized traditional professionals in earlier organizations.”).

organizations tending to model themselves according to the views of relevant professionals. Those views may be developed through similar education (e.g., through similar legal education that judges underwent when attending top law schools). In some cases, institutional isomorphism might be symbolic, where organizations adopt common attributes and create identification between themselves and other organizations in order to increase their legitimacy.¹⁴⁶ For example, judges may adopt the practice of wearing wigs and use it to indicate their connection to judicial traditions.

In a recent work, Jens Beckert suggested an updated view of the process of institutional isomorphism, introducing a fourth mechanism: competition. On the one hand, the mechanism of competition may induce organizations to converge “because inefficient institutional solutions are eliminated.”¹⁴⁷ On the other hand, organizations may develop diversities by finding niches to specialize in.¹⁴⁸ Beckert therefore argued that institutional isomorphism might result not only in homogeneity, but also in heterogeneity among organizations in the field. Thus, according to him, the four mechanisms of institutional isomorphism can explain not only institutional convergence but also institutional change in general.¹⁴⁹ Moreover, the new mechanism that he identified is compatible, for example, with the findings that political parties operating in the same political system tend to converge on policies over time.¹⁵⁰

Some questions regarding institutional isomorphism on the transnational level are examined within globalization studies. The neo-institutional approach to globalization is commonly referred to as the world society theory.¹⁵¹ This approach refers to the world as an environment in which nation-states, multinational corporations, and international organizations are embedded.¹⁵² According to the world society theory, globalization is the process through which a consolidation of global fields occurs.¹⁵³ The theory discusses, among

146. See generally Mary Ann Glynn & Rikki Abzug, *Institutionalizing Identity: Symbolic Isomorphism and Organizational Names*, 45 ACAD. MGMT. J. 267 (2002) (discussing the impact of symbolic isomorphism on organizational identity and names).

147. Beckert, *supra* note 139, at 160.

148. See *id.*

149. *Id.* at 160–62.

150. See Alberto Alesina, *Credibility and Policy Convergence in a Two-Party System with Rational Voters*, 78 AM. ECON. REV. 796, 796 (1988) (noting that in a two-party system full convergence of policies will result from electoral competition).

151. See Gili S. Drori, *Institutionalism and Globalization Studies*, in THE SAGE HANDBOOK OF ORGANIZATIONAL INSTITUTIONALISM 449, 449 (Royston Greenwood et al. eds., 2008). See generally WORLD SOCIETY: THE WRITINGS OF JOHN W. MEYER (Georg Krücken & Gili S. Drori eds., 2009) (explaining world society theory and its implications).

152. See Drori, *supra* note 151, at 449.

153. See *id.* at 453–54 (stating that the contribution of the world society theory is highlighting consolidation of the global system).

other issues, the way actors at the world level become isomorphic.¹⁵⁴ Although this literature does not discuss the existence of organizational fields, it obviously assumes that similar organizations operating at the world level are part of the same organizational field.

A number of works belonging to the world society literature have demonstrated the operation of institutional isomorphism at the transnational level.¹⁵⁵ For example, Kim et al. showed that governments around the world expanded and became structurally similar due to the process of institutional isomorphism.¹⁵⁶ Mark Thatcher and Alec Stone Sweet discussed how the process of institutional isomorphism has contributed to the delegation of powers to non-majoritarian institutions across Europe.¹⁵⁷ Claudio Radaelli examined institutional isomorphism within Europe that has resulted in policy transfer among the Union's members.¹⁵⁸ Gulter et al. analyzed transnational isomorphism among firms regarding the adoption of ISO 9000 quality certification.¹⁵⁹ LeTendre et al. found that there is institutional isomorphism of teachers' beliefs and practices in Germany, the United States, and Japan.¹⁶⁰ Finally, Colin Beck, Gili Drori, and John Meyer discussed the adoption of human rights language in constitutions around the world, noting that a country's position in the global order influences its inclination to adopt human rights in its national constitution.¹⁶¹

The concept of institutional isomorphism provides useful insights for studying the transnational organizational field of courts. First, it allows scholars to make educated guesses regarding how the emergence of the field will affect courts. Based on research on other organizational fields and isomorphic processes, at least some courts will be expected to become similar over time.¹⁶² These courts may

154. See generally John W. Meyer & Ronald L. Jepperson, *The 'Actors' of Modern Society: The Cultural Construction of Social Agency*, 18 SOC. THEORY 100 (2000) (evaluating modern actors in terms of their isomorphism).

155. Cf. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES* (2013) (discussing the process of acculturation through which countries can learn to follow human rights).

156. Kim, *supra* note 139.

157. Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, 25 W. EUR. POL. 1, 12–13 (2002)

158. Claudio M. Radaelli, *Policy Transfer in the European Union: Institutional Isomorphism as a Source of Legitimacy*, 13 GOVERNANCE 25 (2000).

159. Isin Gulter, Mauro F. Guillén & John Muir Macpherson, *Global Competition, Institutions, and the Diffusion of Organizational Practices: The International Spread of ISO 9000 Quality Certificates*, 47 ADM. SCI. Q. 207 (2002).

160. Gerald K. LeTendre et al., *Teachers' Work: Institutional Isomorphism and Cultural Variation in the U.S., Germany, and Japan*, 30 EDUC. RESEARCHER 3 (2001).

161. Colin J. Beck, Gili S. Drori & John W. Meyer, *World Influences on Human Rights Language in Constitutions: A Cross-National Study*, 27 INT'L SOC. 483 (2012).

162. Taking into account the three mechanisms developed by DiMaggio and Powell as well as Beckert's fourth mechanism will provide information regarding which

converge on the doctrines they use, the way they write their decisions, the norms they adopt, or the relationships they have with their national and international audiences. An example of this kind of convergence is the process through which the doctrine of proportionality has spread around the world.¹⁶³ Other examples include cross border convergence of decisions in hard cases, such as in the “wrongful life” cases,¹⁶⁴ and the use of concurring and dissenting opinions by courts.¹⁶⁵ Second, using the concept of institutional isomorphism enables scholars to apply the quantitative methodologies used by scholars of organizational fields to the transnational relationships of courts. For example, a scholar can use statistical analysis to compare the amount of citations different courts use. These methods will be able to expose whether different courts and legal systems affect their tendency to cite foreign law. Third, the mechanism of institutional isomorphism may be used to explain changes in courts. For example, scholars may be able to explain changes in courts’ behavior that do not practically affect their activities—for example, in judicial seating arrangements or the design of courtrooms—as a result of symbolic isomorphism. In addition, understanding the operation of institutional isomorphism may allow scholars to identify the “role model” court that other courts follow.

In the context of this Article, institutional isomorphism predicts convergence of courts in the way they understand their roles and the way they interact with their national audiences. The institutional structure of courts can also be influenced by institutional

courts are likely to become more similar over time, and which are likely to become more different over time.

163. See JACKSON, *supra* note 78, at 60–64 (arguing that the convergence on the use of proportionality may lead to both convergence and divergence of substantive law); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 161–63 (2008) (discussing how different legal systems use proportionality analysis).

164. See Ivo Giesen, *The Use and Influence of Comparative Law in ‘Wrongful Life’ Cases*, 8 UTRECHT L. REV. 35 (2012) (analyzing the use of comparative law in the decisions of ‘wrongful life’ cases and arguing that in addition to local norms, comparative law had some influence on the decisions); Frans van Waarden & Michaela Drahos, *Courts and (Epistemic) Communities in Convergence of Competition Policies*, 9 J. EUR. PUB. POL’Y 913 (2002) (providing another example of convergence—competition policy, which has moved toward convergence in Europe due to courts’ actions among other things).

165. See, e.g., Michael D. Kirby, *Judicial Dissent: Common Law and Civil Law Traditions*, 123 LAW Q. REV. 379 (2007) (discussing dissenting opinions in common law and civil law traditions and mentioning the current debates regarding the adoption of the practice of dissenting opinions in civil law courts); Elaine Mak, *Why do Dutch and UK Judges Cite Foreign Law?*, 70 CAMBRIDGE L.J. 420, 430 (2011) (showing that justices serving on the Supreme Court of the United Kingdom began writing concurring and dissenting opinions in 2009).

isomorphism.¹⁶⁶ In most cases, however, institutional change will not be a direct result of judicial actions, but the doing of reformers, politicians, and scholars. This type of influence therefore falls outside the scope of this Article. The next section explains how the mechanisms of institutional isomorphism operate in the case of courts and cause them to converge on their different characteristics.

B. *Transnational Institutional Isomorphism of Courts*

Previous Parts of the Article argued that supreme courts, constitutional courts, and other courts are becoming part of the same organizational field, and that therefore there is a high probability that these courts will undergo the process of institutional isomorphism.¹⁶⁷ This section focuses on institutional isomorphism of courts' identities and courts' intended images, as well as on the ways courts communicate their intended images.¹⁶⁸ It will address the different mechanisms of institutional isomorphism and the ways they are likely to influence courts in this respect. The normative consequences and concerns of this institutional isomorphism will be discussed in the next section.

A few preliminary words of caution are necessary before turning to the analysis itself. There is currently no empirical way to measure the future developments of convergence and divergence of courts' identities and courts' intended images. For the time being, it is only possible to predict the plausible developments in this area and attempt to identify some of the early effects of institutional

166. See, e.g., Toby S. Goldbach, Benjamin Brake & Peter J. Katzenstein, *The Movement of U.S. Criminal and Administrative Law: Processes of Transplanting and Translating*, 20 IND. J. GLOBAL LEGAL STUD. 141 (2013) (providing examples of institutional isomorphism of criminal and administrative law systems around the world).

167. Cf. Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 VA. J. INT'L L. 985 (2009) (arguing that national courts are expected to converge in their structures and their protection of human rights due to top-down and bottom-up pressures).

168. Courts can communicate their intended images to their audiences in a variety of ways. A full discussion of those methods, as well as their importance, will be developed elsewhere. For the purpose of this Article, it is enough to sketch the variety of these methods. The methods courts use for communicating messages to their audiences can be divided into three main categories. The first is messages that courts communicate when fulfilling their official roles, for example, official decisions. The second category includes actions of individual judges that reflect on the court, for example, talks that judges give or non-judicial roles that judges perform. The third category, and the most important in my eyes, includes organizational actions that are beyond the official role of courts. These actions are important because they have the power to communicate a more nuanced and even subconscious message that may influence audiences' attitudes toward the court. These methods include movies and books about the court, courts' buildings, courts' museums, courts' websites, and courts' visual representations such as logos.

isomorphism. Hence, this Article will not provide any proof of institutional isomorphism of courts, but rather will provide a prognosis of courts' future developments. In general, as mentioned above, institutional isomorphism will not affect all courts in the same way.¹⁶⁹ First, convergence is likely to occur between groups of courts, especially courts belonging to the same legal system or in legal systems using the same language.¹⁷⁰ Second, some courts will be more resistant to convergence pressures than others. For example, courts that enjoy high prestige at the national and transnational level or those with a long and venerable tradition will probably be less affected by institutional isomorphism than new courts of low status.

This section now turns to discussing the mechanisms of institutional isomorphism. Three of them are the "classical" mechanisms: coercive isomorphism, normative isomorphism, and mimetic isomorphism. The fourth mechanism is the mechanism proposed by Beckert—competition.¹⁷¹ These mechanisms are expected to affect different characteristics of courts: structure, norms, practices, self-understanding, and courts' relationships with their different audiences. Thus, they are expected to change courts' organizational identities and intended images.

Coercive isomorphism. In theory, there are no other organizations that can coerce supreme courts and constitutional courts into certain behaviors or identity structures. Nevertheless, in practice, there are some institutions—mainly regional and international courts—that may exert a coercive influence on courts. Of course, not all of these supranational courts have the same influence on national courts. However, some courts, such as the European Court of Justice, the European Court of Human Rights, the Inter-American Court, and the International Court of Justice, may profoundly affect national courts. These supranational courts may make decisions concerning the powers or procedures of national courts—for example, that national courts must take international law into consideration and that not doing so is a breach of the country's obligations under international law. National courts may consequently adapt their institutional practices and begin looking at

169. Cf. Gulter, Guillén & Macpherson, *supra* note 159 (using network analysis to study how institutional isomorphism affects different firms and showing that role-equivalent firms are likely to imitate each other).

170. See, e.g., Bobek, *supra* note 4 (discussing how courts engage in comparative arguments especially as part of the same legal system); Gelter & Siems, *supra* note 11 (arguing that language is an important factor for cross citations between two different legal systems); Martin Gelter & Mathias Siems, *Networks, Dialogue or One-Way Traffic? An Empirical Analysis of Cross-Citations Between Ten of Europe's Highest Courts*, 8 *UTRECHT L. REV.* 88, 93 (2012) (noting that the most important factor for cross-citation was language skills).

171. Beckert, *supra* note 139, at 160.

international law, and addressing international law may even become an integral part of courts' organizational identities.¹⁷² Through coercive practices, supranational courts can also influence the way courts communicate with their audiences. For example, they may decide that not publishing all of a court's decisions online or not translating all decisions into all of the national official languages is a violation of the country's international obligations. Such decisions may make national courts change how they communicate with national audiences, thereby influencing how the courts communicate their intended images to these audiences.

An additional practice that may result in coercive isomorphism rests on the variety of international ranking systems. These measurements classify and give different scores to legal systems and courts based on parameters they consider important. The ranking may convey to courts that the parameters on which the ranking is based are very important for a "good" court. Consequently, courts may integrate the parameters of the ranking into their identities or focus on them when communicating with their audiences (change their intended images). For example, the World Justice Project ranks countries based on their rule of law scores.¹⁷³ The scores are compiled based on a variety of parameters; some of these parameters are court related. Due to the grave importance of this ranking (e.g., its influence on the World Bank's attitude toward a country), courts need to take it into account when making their decisions if they want to promote their country on the international level. Therefore, courts may highlight these parameters in reports they publish. The pressure is especially strong when the World Bank organizes programs to teach courts how to follow these criteria.¹⁷⁴

Normative isomorphism. Normative isomorphism develops as a result of professionalization pressures. Regarding courts, there are three main ways in which this type of influence operates. First, justices across the world may acquire a similar education—for example, from elite law schools in the United States or Europe. During their studies, justices may internalize a specific court identity as normatively superior and therefore be inclined to ascribe this organizational identity to the court they serve on, or at least communicate this identity to their audiences (promote a specific intended image). Second, the close relationships between courts make

172. Of course, as with other pressures, courts may attempt to oppose and defy the coercive pressure. In this case, they are likely to adopt the opposite identity characteristic—an organizational identity focused on a national view.

173. THE WORLD JUSTICE PROJECT, <http://worldjusticeproject.org> (last visited Oct. 11, 2015) [<http://perma.cc/C6LT-Y9ET>] (archived Oct. 4, 2015).

174. See Toby S. Goldbach, *Reimagining Judges and Legal Change* (May 2014) (unpublished dissertation) (on file with the author) (showing that the World Bank spent US\$850 million since 1994 in thirty-six projects aimed at achieving this goal).

justices see each other as peers and as a professional group. As a result, certain beliefs regarding courts' identities or intended images may become common among justices—the desirable and obvious ways for courts to understand their identities and to communicate their intended images. Third, transnational legal networks may play a role in normative isomorphism. For example, non-governmental organizations (NGOs) or transnational law firms that bring similar cases before different courts may convey the idea that normatively there is a specific way courts should understand their role when approaching these similar cases.¹⁷⁵

Mimetic isomorphism. Courts operate in situations of uncertainty both regarding specific issues, for example technological developments, as well as regarding possible reactions to their decisions at the national and international level. Of course, some courts are more vulnerable than others to these kinds of uncertainties. For example, courts that enjoy less legitimacy at the national level may suffer more negative consequences from unpopular decisions than courts that enjoy higher national legitimacy,¹⁷⁶ because courts that enjoy higher diffuse support are less influenced by lack of specific support for a particular decision.¹⁷⁷ It is therefore

175. See Margaret E. Keck & Kathryn Sikkink, *Transnational Advocacy Networks in International and Regional Politics*, 51 INT'L SOC. SCI. J. 89 (1999) (discussing transnational advocacy networks and their importance).

176. Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES IN L. 455, 477 (2013)

177. The literature divides courts' legitimacy into two types: specific support and diffuse support. See James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 344 (1998) (analyzing legitimacy using both types: specific support and diffuse support). Specific support is the direct awareness of, and agreement with, courts' decisions. See Dean Jaros & Robert Poper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. RES. 85, 90–91 (1980). Diffuse support is institutional loyalty and the willingness to accept or tolerate decisions that the public (or a particular group within the public) does not agree with. See James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 188–89 (2005) ("The most useful way to conceptualize diffuse support, we argue, is to think of it as institutional loyalty—support not contingent upon satisfaction with the immediate outputs of the institution."). Although the two kinds of support do not have a clear and direct correlation, studies show that in general specific support leads to diffuse support. See Gibson, Caldeira & Baird, *supra* (showing empirically that direct support leads to diffuse support. In addition, the authors show that familiarity with the court leads to diffuse support). According to studies, the level of specific support is not stable over time and may change as a result of courts' actions or external political factors. See generally Gregory L. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209 (1986) (examining the patterns of public support of the U.S. Supreme Court between the years 1966 and 1984); Gregory L. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 636 (1992) (examining diffuse and specific support for the Supreme Court of the United States);

reasonable to expect at least some courts to look at the behavior of other courts in cases of uncertainty. The less legitimate courts will look to courts that they consider to be legitimate and successful and attempt to learn from them. Some will choose to adopt or mimic behaviors and characteristics they perceive to be successful because they believe they know the (positive) consequences of such behavior.¹⁷⁸ Courts may adopt parts of “successful” identities, attempt to communicate intended images that are similar to “successful” intended images that other courts communicate, or use communication methods that are employed by other courts. For example, judges from Ghana learn “the best practices” for administering their courts from Canadian judges as part of a cooperation project between the two judiciaries.¹⁷⁹

Competition. The transnational competition between courts, unlike competition among other organizations, is limited because each operates in its own country and has its own jurisdiction. Nevertheless, there are circumstances when competition between courts may occur.¹⁸⁰ First, courts may compete for the leading position in the organizational field so that they can influence other courts. In some cases, the competition may induce them to develop specialization in certain specific areas of law, such as social rights, in order to be considered leading courts at least in those, if not all, areas. If courts choose to do so, they are then likely to develop an organizational identity and intended image that revolve around their specialization. Second, courts may compete for attention from NGOs or other organizations. A court may want to be the first to decide on a controversial issue in order to improve its transnational position or influence the development of law around the world, and may therefore craft its identity and especially its intended image in a way

Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44 AM. J. POL. SCI. 768 (2000) (suggesting that the divergence between public opinion and the Supreme Court’s decisions affect the level of support for the court; the authors examine this measure of support for the years 1973 through 1993). James L. Gibson, *The Legitimacy of the U.S. Supreme Court in a Polarized Polity*, 4 J. EMPIRICAL LEGAL STUD. 507 (2007) (examining the legitimacy level of the U.S. Supreme Court between the years 1987 and 2005 and concluding that the support of the court did not decline). Moreover, research shows that diffuse support can vary among audiences. See, e.g., James L. Gibson & Gregory A. Caldeira, *Defenders of Democracy? Legitimacy, Popular Acceptance, and the South African Constitutional Court*, 65 J. POL. 1 (2003) (analyzing the differences in the legitimacy level of the Constitutional Court of South Africa in the eyes of different racial groups in South Africa).

178. Like other processes of isomorphism, this process will not affect all courts in a similar way. “Weaker” or “less successful” courts will tend to mimic other courts much more than “strong” or “successful” courts will.

179. Goldbach, *supra* note 174.

180. Cf. David S. Law, *Globalization and the Future of Constitutional Rights*, 102 NW. U. L. REV. 1277 (2008) (arguing that competitive pressures influence the development of national constitutional rights).

that makes it attractive to interest groups. Given that the court cannot initiate the litigation, it can use this tactic to increase the likelihood that a litigant will turn to it. For example, courts may publicly highlight that they offer a flexible right of standing. Courts can also hint in their decisions that they will be sympathetic to certain arguments if they will come before them.

All in all, as discussed above, courts' identities, intended images of courts, and the ways courts communicate these intended images will probably be vulnerable to isomorphic pressures. As a result of globalization and the emergence of an organizational field of courts, courts' identities, intended images of courts, and the methods courts use to communicate their intended images may be expected to change. Although there will probably be some divergence, convergence is more likely to be the dominant trend because the pressures at this direction will be greater. It will be stronger, of course, among courts belonging to specific groups, and it will not influence all courts in the same way. As will be explained next, this tendency should worry courts.

VI. A REASON TO WORRY: NORMATIVE IMPLICATIONS OF INSTITUTIONAL ISOMORPHISM FOR COURTS

To date, scholars discussing the phenomenon of transnational judicial dialogue have raised a number of normative concerns.¹⁸¹ These discussions have focused mostly on judicial discretion to change national law as a result of foreign influence, contrary to the will of the people. This Article focuses on a different concern, one that should worry the courts most of all: losing national support as a result of changes in courts' identities, intended images, and the ways courts to communicate intended images. In other words, it focuses not on the ways courts understand and apply the law, but on the ways courts understand their own roles in the national system. This concern is unlike other concerns raised in the literature in that it does not refer to the ability of judges to do "whatever they want," but to the likelihood that judges will lose power and the ability to do "what they are expected to do" (i.e., have their decisions enforced).¹⁸²

181. See discussion, *supra* Part II, regarding judicial dialogue.

182. The question whether courts should follow the people's preferences, especially in cases of expected outrage, is contested. See Cass R. Sunstein, *If People Would be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 212 (2007) (arguing that in most cases judges should not care about possible outrage over their controversial decisions and should not change their decisions accordingly). The argument made here is different for two main reasons. First, while Sunstein discusses the substance of courts' decisions, the argument here focuses on courts' organizational identity and self-presentation. Normatively, it is less problematic if courts adapt these

First, the assumption in this paper is that the separation of powers at the national level is important.¹⁸³ In addition, it is taken for granted that it is important to have checks and balances between the different branches of government in order to maintain good governance.¹⁸⁴ Under these assumptions, this Part argues that the changes in courts' identities and in intended images of the judicial branch—especially of various supreme courts—may disturb this balance. Specifically, the argument is that changes in courts' identities and intended images resulting from transnational judicial interaction may result in courts falling out of sync with the other national branches, disrupting the existing balance between them; courts may check the other branches too much or too little (depending on the transnational influence in practice) and thereby lose the support of their audiences. Losing support may, in turn, affect courts' ability to perform their social roles.

In addition, these changes in courts' identities and intended images may result in courts falling out of sync with the general public or with some of their other audiences. This is especially true regarding the way the audiences and the courts understand the courts' social role. In other words, courts may understand their social role differently than how the other branches, the public, and even the constitution expect them to. Thus, if courts act according to their own understanding of their roles, they will be defying the expectations of other national groups. These groups are likely to object to those actions and critique the courts as a result. This critique, in turn, may result in loss of support for the courts' actions and even for the courts themselves as a social and legal institution. For example, judges may adopt foreign practices that allow judges to voice their minds about political questions that have not come before the court. In this situation, the public may see the court as biased or merely political, lacking objectivity, and thus lose trust in it.

Theoretically, one could argue that globalization may have a similar influence on audiences and on courts regarding their perception of suitable solutions to social and political problems and regarding the courts' social roles (i.e., that there is no danger to courts' legitimacy). While this may be true regarding solutions to

characteristics to meet audiences' expectations. Second, the discussion here is conducted from the court's point of view. In some cases, the court, when making a decision that will cause outrage, is risking its legitimacy. Nevertheless, making this decision may still be normatively preferable. Thus, similarly, in some cases a court may converge with other foreign courts and lose national legitimacy, even though the convergence will be normatively desirable to the court or to its society.

183. See, e.g., JAMES MADISON, THE FEDERALIST No. 47; CHARLES DE MONTESQUIEU, THE SPIRIT OF LAWS 24 (A. Donaldson ed., 4th ed.).

184. See, e.g., JAMES MADISON, THE FEDERALIST No. 51; Benvenisti, *supra* note 63 (discussing how delegation of authority to international organizations could undermine the checks and balances system).

legal questions, it will not be the case regarding perception of the courts' role in the national legal and political order. That is because courts will be much more subject than their audiences to transnational influences regarding their own roles and actions. The reason for the difference is the amount of time and effort that courts devote to reflecting on their role in comparison to the time their audiences devote to this task. This Article will elaborate on this point at the end of this Part.

As discussed above, the transnational influence on courts is likely to result in institutional isomorphism of courts' identities and courts' intended images. Therefore, it will result in changes in courts' identities and their intended images, toward either convergence or divergence.¹⁸⁵ For the purpose of the argument made here, the direction of the change is unimportant, because any change may disturb the balance of courts' relationships with their national audiences, including their relationships with other branches.

Although the process of institutional isomorphism of courts is only beginning, illustrations of this possible influence are already identifiable. For example, Justice Breyer, when visiting Panama, said that he wants to learn from the Supreme Court of Panama how it manages its relationship with the press.¹⁸⁶ There is no good reason to doubt the sincerity of Justice Breyer's intention when making the statement. The U.S. Supreme Court, then, may adopt practices used by the Supreme Court of Panama. If adopted, these practices may not conform to the social expectations of the internal audience in the United States, causing a disruption in the Court's relationship with this audience.

These transnational influences may cause courts to act in ways that will be highly criticized by at least some of their national audiences because they will not fit the expectations of those audiences. Courts, learning from the positive experience of other courts in the transnational organizational field, are likely to design their intended images to be similar to the intended images of foreign "successful" courts. These intended images may not fit the national political and social circumstances within the country and the national expectations of the court. The result may be a decrease in the court's legitimacy and may have grave consequences for the court, especially

185. Cf. Gili S. Drori et al., *Branding the University: Relational Strategy of Identity in a Competitive Field*, in *TRUST IN UNIVERSITIES* 137 (Lars Engvall & Peter Scott eds., 2013) (discussing the way globalization influences the branding of universities and some of the normative concerns it raises).

186. See Hon. Stephen Breyer, *Communication Media and Its Relationship with Supreme Courts*, 42 *ST. LOUIS U. L.J.* 1083, 1083 (1998).

regarding the public support it enjoys and the likelihood that its decisions, especially controversial ones, will be enforced.¹⁸⁷

Of course, a court and its audiences may not see eye-to-eye regarding the court's role, even before the transnational influence. Thus, this Article does not claim that transnational influence is the only possible cause of the disruption in the relationships between courts and their audiences, but that it is an additional factor that may aggravate the disruption between the court and at least some of its audiences. Two examples, one from the U.S. Supreme Court and the other from the Supreme Court of Israel, will illustrate how transnational influence may cause this type of disruption.

For the U.S. Supreme Court, the citing of foreign decisions in its own opinions constitutes the adoption of a transnational practice. Currently, only some justices serving on the court cross cite foreign decisions, and this practice is still much debated among them.¹⁸⁸ Nevertheless, there is already a heated debate regarding this practice outside the Court, both among the other branches and in the general public.¹⁸⁹ It is evident, even without going into the merits of the arguments made by both sides that this practice draws widespread critique and has implications for the Court. The opponents of citation of foreign law believe that the use of foreign law in decisions of the U.S. Supreme Court is illegitimate and therefore any decision that is based, or appears to be based, on foreign sources would probably be considered illegitimate in their eyes. Thus, if the Court understands its role to include learning from foreign practices and basing many of its decisions on foreign law, it is likely to lose a great deal of its national support. This concern will intensify if justices on the Court give speeches supporting the practice and draw even more attention to the practice that may draw more extensive and vocal critique of the Court. As a result of this transnational engagement and influence,

187. The level of courts' social legitimacy is important because courts have no sword, and they must depend on others to enforce and follow their judgments. See HAMILTON, *supra* note 2, (explaining that the Executive holds the sword and the judiciary has no influence over the sword or the purse); Bassok, *The Sociological-Legitimacy Difficulty*, 26 J.L. & POL. 239, 240-41 (2011) ("[B]ecause the Court lacks direct control over either the 'sword or the purse,' sociological legitimacy is instead necessary for the Court's proper function."); Reichman, *supra* note 1, at 1621 (stating that the Supreme Court must maintain public confidence in its performance of law). Therefore, if a court enjoys a high level of legitimacy then political majorities will enforce its decisions, even if they contradict the majority's preferences. See Gibson, Caldeira & Baird, *supra* note 177, at 343; Matthew C. Stephenson, *Court of Public Opinion: Government Accountability and Judicial Independence*, 20 J.L. ECON. & ORG. 379 (2004) (arguing that the public will support the courts and therefore will ensure that their decisions be enforced, if it believes that the courts are likely to act in its interest when performing judicial review).

188. See, e.g., Dorsen, *supra* note 6.

189. See discussion, *supra* Part II, regarding the debate on cross-citing foreign decisions.

the Court's legitimacy may be expected to decrease, and there may even be a backlash from the Court's audiences.¹⁹⁰

The Supreme Court of Israel provides another example of these possible implications for courts' legitimacy. In 1995, in the famous Mizrahi Bank case, the Supreme Court established its power of judicial review of legislation.¹⁹¹ The decision in the case explained the reasons why the Supreme Court of Israel has the power to perform judicial review of legislation. This argument was based mainly on foreign sources, especially on American judicial theory and the canonic *Marbury v. Madison* case,¹⁹² a decision that to this day is understood as the basis of judicial review in the United States. Of course, for the argument made here, the importance of these citations lies not in their existence, but in being indicators of the foreign influence that caused the change in the court's organizational identity. Thus, the result of the Mizrahi Bank decision was a change in the court's identity—from a court that does not perform judicial review of legislation to one that does. The court's new identity, at least in this respect, is similar to the identities of other leading foreign courts, especially that of the U.S. Supreme Court. This change in the court's identity received mixed reactions from the other governmental branches in Israel as well as from the court's different national audiences. In general, the criticism of the court by members of the Knesset, the Israeli legislative branch, focused and still focuses on the court's deviation from its original role (original identity).¹⁹³ In addition, the court's legitimacy in the eyes of the public, especially in the eyes of certain groups, was greatly reduced,¹⁹⁴ and the public's trust in the court dropped in 2008 to below 50 percent.¹⁹⁵

190. Cf. David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence from a National Experiment*, 112 COLUM. L. REV. 731, 768–71 (2012) (suggesting that in order to avoid backlashes, people, and the court itself, should talk differently about the court—the argument made here focuses on the way courts talk to their audiences and suggests that in some cases convergence in these methods may increase or even create a backlash).

191. CA 6821/93 United Mizrahi Bank v. Migdal Cooperative Village 49(4) PD 221 [1995] (Isr.).

192. See *id.* at 247–49 (mentioning additional decisions from the United States, Australia, the United Kingdom, International Courts, Germany, South Africa, India, and Canada).

193. See, e.g., Moran Azolai, “*Hukai Beit Ha'mishpat*” Ushro: *Netanyahu ve'Barak Barhu* [“*Laws of the Court*” Were Approved: *Netanyahu and Barak Ran Away*], YNET (Isr.) (Nov. 14, 2011), <http://www.ynet.co.il/articles/0,7340,L-4148173,00.html> [<http://perma.cc/BR4N-UFKD>] (archived Oct. 4, 2015).

194. See, e.g., Yael Hadar, *Amon Ha'zibur Ha'israeli bemosadot ha'shilton baasor ha'ahron* [The Trust of the Israeli Public in Governmental Institutions in the Last Decade], 66 PARLIAMENT (2009) (Isr.), [http://www.idi.org.il/ספרים-מאמרים/פרלמנט/מאמרים-ספרים-מאמרים-ספרים](http://www.idi.org.il/ספרים-מאמרים/פרלמנט/מאמרים-ספרים/63-גיליון/פרלמנט/מאמרים-ספרים-מאמרים-ספרים) [האחרון-בעשור-השלטון-במוסדות-הישראל-הציבור-אמון/63] (<http://perma.cc/A2RW-X7KX>) (archived Oct. 4, 2015).

195. Compare ARIE RATNER, *TARBUT HA'HOK, THE CULTURE OF LAW* (2009) (serving the trust of the Israeli public and different social groups in the courts and the

These two examples show that there are cases where the gaps between a court's identity, intended images (including the ways courts communicate these images), and audiences' expectations are products of transnational influence. These gaps can add to possible, some already existing, tensions between courts and their national audiences and endanger courts' national legitimacy and their status even more. It is therefore important that courts keep these dangers in mind when taking part in the transnational judicial dialogue. If courts' identities, intended images, and means of communicating those images change, via institutional isomorphism or other processes, they may fall out of sync with the national audiences' expectations of courts. The result may be a decrease in courts' legitimacy and even attempts by other branches to change the courts' role through legislation.¹⁹⁶ Of course, this does not mean that courts should not engage in transnational interactions. It means that they should do so carefully, keeping in mind the possible dangers of the process.

Before turning to the Conclusion, two additional clarifications are needed. First, one could argue that the danger that such a gap will emerge is not great because other branches and courts' audiences encounter transnational influences as well, so audiences' expectations from courts may change to fit courts' practices. For example, Erik Voeten found that citizens in European countries are as interested in international and regional courts as they are in their national courts.¹⁹⁷ It could therefore be argued that these audiences may be expected to change their perception of their national courts in a way that is compatible with the courts' new identities and intended images. On the face of things, if courts and their audiences are subject to similar influences, then the audiences' expectations may well fit the reformed identities and intended images of courts, and there is no danger to the courts' legitimacy and no need for normative concerns. Unfortunately, this is not the case.

law enforcement agencies), with Adam Shinar, *Accidental Constitutionalism: The Political Foundation and Implication of Constitution-Making in Israel*, in *THE SOCIAL AND POLITICAL FOUNDATION OF CONSTITUTIONS* 207, 227–29 (2013) (arguing that the decrease in the level of the court's legitimacy brought it to a normal level that is similar to the level of courts' legitimacy in other countries and claiming that the new, lower level of public trust is desirable because it shows that the public critically examines the court's actions).

196. See, e.g., Draft Bill Basic Law: Constitutional Court, 2007, HH No. 2261/17/P (Isr.); Draft Bill Constitutional Court, 2002, HH No. 3380/P (Isr.); Draft Bill Constitutional Court, 2006, HH 468/17/P (Isr.); Draft Bill Constitutional Court, 2009, HH No. 607/18/P (Isr.); Draft Bill The Judiciary (Amendment—Authority to Nullify a Law), 2006, HH No. 401/17/P (Isr.).

197. Erik Voeten, *Public Opinion and the Legitimacy of International Courts*, 14 *THEORETICAL INQUIRIES IN L.* 411, 413 (2013) (finding that citizens from the United Kingdom, France, and Germany seek information in similar amounts about the European courts as they do about their national high courts).

Even if the influence on the court and on its audiences is of the same kind (i.e., pressuring both the courts and the audiences to accept the same identities of courts), which is not likely, it will not be of the same magnitude. While courts and their audiences may devote a similar amount of attention to transnational influence in specific issues (e.g., wrong life cases or war on terrorism cases) because they are equally of interest to them, this is not true regarding courts' identities and intended images. Courts focus on their judicial roles much more than other audiences. In fulfilling their roles, courts look at other foreign courts when deciding how they should behave or decide, especially in situations of uncertainty. Courts' audiences are busy with their own social roles and have fewer resources to use when looking at the national court and other courts in the transnational arena and wonder about their respective roles. The isomorphic pressures will therefore be stronger on courts than on their audiences. To be clear, even if courts and audiences may see eye-to-eye on certain new legal doctrines, that is different from courts and their audiences seeing eye-to-eye on the courts' roles. Thus, even if the pressure drives both the courts and their audiences into accepting similar changes in courts' identities and courts' intended images, these courts' identities and intended images will converge much faster than the audiences' perceptions of the courts. As a result, a gap between audiences' expectations of courts and courts' identities and intended images is likely to emerge, even if courts' audiences do follow foreign courts.

Second, each court has a variety of different national audiences.¹⁹⁸ These audiences may have different expectations of the court and may see the court's role differently. Moreover, the global influence on these audiences may differ. Thus, the process of institutional isomorphism of courts may be expected to affect the relationships of these audiences with the court differently. In some cases the changes in the court will create greater distance between it and a specific audience and may decrease the court's legitimacy in the eyes of that audience. In other cases, the changes will fit well with the audience's expectations and may even increase the legitimacy of the court in the eyes of that audience. The exact direction of the influence will be determined by the court's initial legitimacy in the eyes of that audience, the audience's expectation of the court, and the isomorphic changes in the court. As a result, institutional isomorphism may have benefits for the court in terms of its legitimacy. The goal of this Article was not to dismiss or underestimate these possible benefits, but to identify, highlight, and

198. See, e.g., BAUM, *supra* note 1 (noting the different national audiences such as the general public, other government branches, social groups, professional groups, policy groups, and the news media).

raise awareness of the possible dangers of globalization's influences on courts. It has therefore argued that courts should be aware of these possible dangers and should take them into account, to the extent possible, when adopting foreign practices. Of course, at the same time, courts need to consider the possible benefits of institutional isomorphism and the varied ways in which globalization will influence their relationships with their different audiences. They should also take into account their existing relationships with their different audiences regarding both practical considerations (e.g., the importance of the audience for the ability of the court to function) and normative considerations (e.g., the role of the court in protecting that audience).

VII. CONCLUSION

This Article has highlighted that transnational interactions of courts have implications that ought to worry courts. To establish this claim, it first addressed the main manifestation of the globalization of courts—transnational judicial dialogue—arguing that this globalization process should be understood as the emergence of a transnational organizational field of courts. It also supported this claim with evidence from the existing transnational engagement of courts. Next, the Article turned to discussing the influence of globalization on courts and focused on the process of institutional isomorphism. Through this process, courts operating in the same organizational field will become similar over time. The Article argued that as a result of this process, courts' identities, intended images of courts, and the ways courts communicate their intended images will become similar across national borders. The process may result in the widening of existing gaps and emergence of new ones between courts and their audiences. These gaps, the Article explained, raise normative concerns, especially regarding the courts' ability to properly react to and interact with their national audiences in the future and their ability to maintain their national legitimacy.

Thus, the concerns regarding transnational judicial dialogue raised by Justice Scalia and others are not without basis.¹⁹⁹ Transnational judicial dialogue may have negative implications. Nevertheless, the danger posed by this transnational judicial engagement is not the adoption of foreign law that does not fit the national circumstances. Most justices are familiar enough with the national situation and legal environment to avoid that. The real concern raised by transnational judicial dialogue is the possibility

199. See, e.g., Scalia, *supra* note 6.

that a court will lose touch with its national audience and allow a gap to develop between its perception of its role and its audiences' perceptions of this role. Therefore, the main concern that courts cannot ignore is the possibility of a decrease in their social legitimacy.
