DOMESTIC COURTS AND GLOBAL GOVERNANCE: THE POLITICS OF PRIVATE INTERNATIONAL LAW

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Political Science in the Graduate School of Duke University

2007
ABSTRACT

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Abstract

Since the mid-1980s, U.S. and foreign parties have filed more than 100,000 lawsuits in U.S. federal courts asking for adjudication of disputes arising from transnational activity. These lawsuits raise a fundamental question of global governance: Who governs? Should the United States assert its authority to adjudicate a transnational dispute, or should it defer to the adjudicative authority of a foreign state that also has connections with the underlying activity? Should the United States assert its authority to prescribe the rules governing that activity, or should it defer to foreign prescriptive authority? U.S. district courts routinely face these questions in transnational litigation, and by answering them they help allocate governance authority among states.

To shed light on the role of domestic courts in global governance, this dissertation asks: How often and under what circumstances do U.S. district courts defer to foreign authority to govern transnational activity rather than asserting domestic authority? Drawing on private international law scholarship and theories of international relations, judicial behavior, and bounded rationality, I develop a series of hypotheses about the legal and political factors that influence judicial allocation of governance authority. I then statistically test these hypotheses using original data on U.S. district court decisionmaking in two transnational litigation settings: the allocation
of adjudicative authority under the forum non conveniens doctrine, and the allocation of prescriptive authority under various choice-of-law methods.

Contrary to the conventional wisdom that U.S. judges are reluctant to defer to foreign authority, I find that they defer at a rate of approximately 50% in both settings. And notwithstanding claims that legal doctrine does not significantly affect judicial decisionmaking, I present evidence suggesting that the forum non conveniens doctrine and choice-of-law doctrine both influence judicial allocation of governance authority. There is evidence of both direct doctrinal effects, as contemplated by legalist theory, and indirect doctrinal effects, resulting from the use of judicial heuristics which allow judges to conserve scarce decisionmaking resources while making decisions that achieve acceptable levels of legal quality. Significant political factors include whether the foreign state is a liberal democracy, the domestic political environment, and U.S. parties’ preferences.
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1. Transnational Judicial Governance

1.1 Domestic Courts and Global Governance

On a December night in 1984, a chemical plant in the city of Bhopal, India leaked a highly toxic gas, methyl isocyanate, killing over 2,000 people living in the vicinity and injuring over 200,000 others.¹ The plant was operated by an Indian subsidiary of the U.S. chemical company Union Carbide. Activity relating to the design and operation of the plant and the training of plant employees occurred in both the United States and India.² Many of the injured and representatives of the deceased sued Union Carbide in U.S. courts. The U.S. District Court for the Southern District of New York, before which the cases were consolidated, confronted a fundamental question: should the dispute be adjudicated by the courts of the United States or India? Because the case had connections to both states—Union Carbide was a New York corporation and the accident occurred in India—the answer was not obvious.

¹ This account is taken from the opinion of judge John F. Keenan in In re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India, 634 F. Supp. 842 (S.D.N.Y. 1986).
² However, the parties vigorously disagreed about the relevance and extent of the U.S. activity, with plaintiffs emphasizing, and Union Carbide deemphasizing, its importance. While agreeing with Union Carbide that India was the primary locus of the activity giving rise to the disaster, the court noted that Union Carbide conducted business in the United States that “may have been directly related to development or operation of [its subsidiary’s] facility in Bhopal.” 634 F. Supp. 842, at 861.
The plaintiffs argued that a U.S. court should adjudicate the dispute. In particular, they argued that deficiencies in the Indian judicial system—including endemic delays and a lack of procedural devices necessary to adjudicate complex cases—would thwart their quest for justice. Moreover, adjudicating the dispute in a U.S. court would create a precedent that would “bind all American multinationals henceforward,” deterring wrongful conduct both inside and outside the United States. Failure to hold Union Carbide accountable in the United States, they argued, would create a double standard of responsibility for U.S. multinational corporations.

Union Carbide disagreed. India, it argued, had a stronger interest than the United States in having its courts adjudicate the dispute. And as one commentator worried, the “export of [U.S.] ideas about social policy” that would result from adjudicating the case in the United States would be troubling: “All law represents a compromise among many policy objectives; if an American court, even one applying Indian . . . law, were to award damages many times higher than would an Indian court, Indian policy necessarily would be disrupted. The relatively low risk of an award of significant damages probably plays a role in India’s ability to attract foreign business. The Indian government (including its courts) might find that risk an acceptable price to pay for attracting an American company to build a plant there and stimulate a depressed economy” (Reynolds 1992, 1708).
The U.S. district court ruled in favor of Union Carbide, dismissing the case in favor of the courts of India. As part of its analysis, the court also decided that Indian rather than U.S. law prescribed the standards of behavior applicable to Union Carbide’s conduct. The United States may have some interest in “deterring multinationals from exporting allegedly dangerous technology,” reasoned the court, but India’s interest “in creating standards of care, enforcing them or even extending them, and [in] protecting its citizens,” is simply stronger. Regarding the victims’ argument, the court said that it was “well aware of the moral danger of creating the ‘double-standard’ feared by plaintiffs,” but concluded that “to retain litigation in this forum, as plaintiffs request, would be yet another example of imperialism, another situation in which an established sovereign inflicted its rules, its standards and values on a developing nation.”

Each year, U.S. district court judges make hundreds of decisions like these in transnational litigation—decisions about whether a U.S. court or a foreign court should adjudicate disputes arising from transnational activity, and about whether domestic or foreign law should govern that activity. These decisions are made in cases dealing with matters as diverse as transnational activity itself, ranging from cross-border business transactions to human rights, from intellectual property to terrorism, from tourism to

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3 As used in this dissertation, the adjective “transnational” means “having connections to more than one state.” This definition is discussed in more detail below.
large-scale incidents like the Bhopal disaster. Moreover, they are made not only by federal judges in the United States, but also by their counterparts in U.S. state courts and in foreign courts. But these decisions have a fundamental characteristic in common: they involve choices between assertion of domestic governance authority and deference to foreign governance authority, including the authority to adjudicate transnational disputes and prescribe the rules governing transnational activity. By making such decisions, domestic court judges around the world help determine how governance authority is allocated among states. One must therefore understand judicial allocation of governance authority in order to answer satisfactorily the question which international relations scholar Miles Kahler (2004, 3) says is first and prior to all other questions about global governance: “Who governs?”

Yet the role of domestic courts in the governance of transnational activity has received little scholarly attention. Although international relations scholars are increasingly interested in international courts and public international law, they have virtually ignored domestic courts and private international law—a body of law that includes principles intended to guide judges’ choices between domestic and foreign authority. For their part, legal scholars have engaged in little positive theoretical or

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4 See also Pollack and Shaffer (2001, 287) (also emphasizing the “who governs” question).
5 A more thorough definition of private international law is provided below.
empirical work on judicial decisionmaking in transnational litigation or on private international law. As a result, we know little about the role of domestic courts in global governance. In particular, how often, and under what circumstances, do domestic courts defer to foreign governance authority?

This dissertation seeks to answer these questions. To that end, it presents a systematic empirical study of the role that domestic courts play in the governance of transnational activity. More precisely, it develops a series of hypotheses about the legal and political factors that influence the choices judges make between domestic and foreign governance authority, and tests them using original data on U.S. district court decisionmaking in two transnational litigation settings. The first setting is the allocation of adjudicative authority under the forum non conveniens doctrine, a doctrine that gives domestic courts the discretion to dismiss a lawsuit in favor of a foreign court on the ground that the foreign court is a more appropriate forum for resolving the dispute—this was the doctrine used by the U.S. district court in the Bhopal case to dismiss that litigation in favor of the courts of India. The second setting is the allocation of prescriptive authority under various choice-of-law doctrines, according to which judges are to choose between domestic and foreign law.

Before turning to these questions, this chapter lays the conceptual and interdisciplinary foundations for the study of domestic courts and global governance.
First, it develops a concept of “transnational judicial governance” to clarify and draw attention to the various global governance functions performed by domestic courts. It then connects the concept to relevant fields of study in the disciplines of political science and law, showing how the study of transnational judicial governance in general, and the dissertation’s examination of judicial allocation of governance authority in particular, can contribute to efforts to solve some of the leading problems of international relations theory and private international law. Finally, this chapter outlines the theoretical and empirical plan followed by the remainder of the dissertation.

1.2 The Concept of Transnational Judicial Governance

1.2.1 Transnational Judicial Governance Defined

“Concept formation concerns the most basic question of research: What are we talking about?” Gerring (2001, 35). Because little prior scholarship exists on the role of domestic courts in global governance, it is not obvious what one is talking about when one refers to this topic. Therefore, the first goal of the dissertation is to develop a concept of “transnational judicial governance” that can provide a useful point of departure for the study of domestic courts and global governance.
I define “transnational judicial governance” as the governance of transnational activity by domestic courts (Whytock 2006a, 2006b).6 “Governance” refers to processes and institutions that guide and restrain collective activity (Keohane and Nye 2000, 12).7 More precisely, governance is “the setting of rules, the application of rules, and the enforcement of rules” (Kjaer 2004, 10).8 The term “judicial” refers to who governs: domestic courts.9 And the term “transnational” refers to what is governed: transnational activity, that is, activity with connections to more than one state, as opposed to purely domestic activity.10 These connections can be territorial, when the activity or its effects

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6 Transnational judicial governance may sometimes take the form of transgovernmental relations, defined by Keohane and Nye (1974, 43) as “sets of direct interactions among subunits of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments,” or transgovernmental networks, defined by Slaughter (2004, 14) as “pattern[s] of regular and purposive relations among like government units working across . . . borders.” Most of the time, however, domestic courts make transnational judicial governance decisions outside the context of any direct interaction or network of regular and purposive relations with foreign courts. Although cross-border communication among domestic court judges may be increasing (Slaughter 1994, 2004; Waters 2005), most transnational judicial governance decisions are made by busy trial court judges that are unlikely to have the time or resources to consult with foreign counterparts before making decisions having transnational governance implications. This diminishes the significance of neither the broader phenomenon of transjudicial communication, nor transgovernmental networks as a form of global governance. The point is simply that transnational judicial governance usually does not involve transgovernmental networks.

7 Similarly, Prakash and Hart (1999, 2) “define governance simply as organizing collective action. In the instrumental sense, governance entails the establishing of institutions; institutions being the rules of the game that permit, prescribe, or prohibit certain actions. . . . By altering incentives, governance institutions encourage actors to adopt strategies that overcome collective action dilemmas.”

8 See also Kahler and Lake (2003, 7) (“governance is characterized by decisions issued by one actor that a second actor is expected to obey”).


10 My definition of transnational activity is similar to Risse-Kappen’s (1995, 3) definition of “transnational relations” (“regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization”), but it does not insist on the regularity of activity. My definition also is similar to Nye and Keohane’s (1971, 331) earlier
touch the territory of more than one state, or they can be based on legal relationships between a state and the actors engaged in or affected by that activity, such as nationality; and the actors involved in the activity can be either state or nonstate actors.\footnote{Whereas the term “transnational” refers to activity involving one or more nonstate actors, the term “international” typically refers to interactions between unitary states (Nye and Keohane 1971, 329). The term “transnational” also reinforces the distinction between transnational judicial governance, in which domestic courts are the governors, from formal “international” governance arrangements concluded by states, including international courts such as the International Court of Justice, the International Criminal Court, or the European Court of Justice. This transnational conception of global governance differs from others which restrict themselves to international solutions to global problems. See, e.g., Väyrynen (1999, 25) (defining global governance as “collective actions to establish international institutions and norms to cope with the causes and consequences of adverse supranational, transnational, or national problems”) (emphasis added).}

The remainder of this section develops this concept further by answering several preliminary questions about transnational judicial governance. Where, how, and how often does transnational judicial governance decisionmaking take place? What are the primary functions of transnational judicial governance? How does domestic court decisionmaking affect transnational activity? And, as a distinct form of global governance, how is transnational judicial governance structured?

\footnote{Whereas the term “transnational” refers to activity involving one or more nonstate actors, the term “international” typically refers to interactions between unitary states (Nye and Keohane 1971, 329). The term “transnational” also reinforces the distinction between transnational judicial governance, in which domestic courts are the governors, from formal “international” governance arrangements concluded by states, including international courts such as the International Court of Justice, the International Criminal Court, or the European Court of Justice. This transnational conception of global governance differs from others which restrict themselves to international solutions to global problems. See, e.g., Väyrynen (1999, 25) (defining global governance as “collective actions to establish international institutions and norms to cope with the causes and consequences of adverse supranational, transnational, or national problems”) (emphasis added).}
1.2.2 Transnational Judicial Governance and Transnational Litigation

The principal setting of transnational judicial governance decisionmaking is transnational litigation. Because transnational litigation arises from transnational activity, which by definition has connections to more than one state, it is in this setting that domestic judges are most likely to be faced with choices between domestic and foreign governance authority. International relations scholars understand that international courts adjudicate certain matters that have connections to more than one state. But how are domestic courts, which are branches of domestic government, able to adjudicate transnational disputes? In the United States, the legal authority of federal courts to adjudicate transnational disputes is based on Article III of the U.S. Constitution and legislative grants of subject matter jurisdiction made by Congress pursuant to Article III.12 These grants include “alienage jurisdiction” over disputes between “citizens of a [U.S.] state and citizens or subjects of a foreign state”;13 “federal question jurisdiction” over disputes “arising under the Constitution, laws, or treaties of the

12 According to Article III, “The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.” For an overview of subject matter jurisdiction of the U.S. federal courts over transnational disputes, see Born and Rutledge (2007, chap. 1).
United States”;\textsuperscript{14} maritime jurisdiction;\textsuperscript{15} and jurisdiction over claims against foreign states when there is no sovereign immunity.\textsuperscript{16} In addition, the Alien Tort Claims Act gives federal courts jurisdiction over claims by foreign citizens for torts “committed in violation of the law of nations or a treaty of the United States.”\textsuperscript{17}

Data on alienage jurisdiction cases collected by the Administrative Office of the United States Courts indicates that U.S. district court judges frequently have the occasion to exercise this authority. Since 1986, there have been well over 120,000 lawsuits involving a non-U.S. party in the U.S. district courts (Clermont and Eisenberg 2007, Table 4).\textsuperscript{18} In 2005, the most recent year for which there is data, 1,976 alienage jurisdiction cases terminated in the U.S. district courts (Clermont and Eisenberg 2007, Table 4). These figures underestimate the total amount of transnational litigation because they exclude litigation not involving foreign parties but nevertheless involving activity with territorial connections with a foreign state, and matters involving foreign parties over which the court’s authority is based on grounds other than alienage jurisdiction.

\begin{itemize}
\item \textsuperscript{14} 28 U.S.C. §1331.
\item \textsuperscript{15} 28 U.S.C. §1333.
\item \textsuperscript{16} 28 U.S.C. §1330 and §§1601-1611 (the Foreign Sovereign Immunities Act).
\item \textsuperscript{17} 28 U.S.C. §1350.
\item \textsuperscript{18} Unfortunately, there is no existing data on the overall amount of transnational litigation in the U.S. federal courts, not to mention U.S. state courts or foreign courts.
\end{itemize}
They nevertheless provide a rough estimate of the frequency with which domestic courts make decisions with implications for global governance.

1.2.3 The Allocative Functions of Transnational Judicial Governance

But what, precisely, is the nature of these decisions, and what are their implications for global governance? At the core of transnational judicial governance are two allocative functions—one jurisdictional, the other substantive—that are performed in the course of transnational litigation. Jurisdictionally, domestic courts allocate governance authority among states. This transnational judicial governance function is the focus of the theoretical and empirical analyses in Chapters 2, 3, and 4. Substantively, when domestic courts apply legal rules to resolve disputes arising from transnational activity, they allocate risks and resources among transnational actors.

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19 This figure presumably includes a number of cases brought by foreign citizens residing in the United States against U.S. citizens also residing in the United States. These cases may or may not involve territorial connections to more than one state; but in either case, they are “transnational” according to my definition (because of nationality connections with both a foreign state and the United States, and territorial connections with the United States), and they indeed involve the governance of affairs between citizens of different states.

20 Regarding the parties to these disputes, although most are nonstate actors, my own analysis of the Administrative Office data indicates that between 1995 and 2005, an average of 475 cases per year involved a foreign government. Regarding the substantive nature of these disputes, insurance, financial instrument, general contract, personal injury, and product liability matters are among the most common types of disputes over which the U.S. federal district courts have exercised alienage jurisdiction (Clermont and Eisenberg 1996, Table 1). Consistent with the Administrative Office data, the random samples of U.S. district court decisions in transnational litigation used in the empirical analyses in Chapters 3 and 4 consist primarily of disputes like these—essentially disputes arising from transnational economic activity and its externalities—but they also include cases involving human rights and terrorism.
1.2.3.1 Allocation of Governance Authority among States

The first allocative function of transnational judicial governance is jurisdictional: it involves the allocation of governance authority among states. Two basic types of governance authority are at stake: adjudicative authority, which is the authority of a state to use its courts to resolve disputes involving particular actors or things, and prescriptive authority, which is the authority of a state to prescribe rules of behavior applicable to particular actors or activities (see American Law Institute 1987, sec. 401).

This dissertation does not address the allocation of a third type of governance authority: the authority of a state to enforce its laws. However, domestic courts perform a related governance function by deciding whether to enforce foreign judgments. If a State B court adjudicates a dispute and enters a judgment against the defendant, the plaintiff may ask a State A court to enforce the State B court’s judgment in State A. Strictly speaking, these decisions do not involve judicial allocation of enforcement authority. As defined above, enforcement authority is the authority of a state (in this case, State B) to induce or compel compliance with its own law. But decisions whether to enforce foreign judgments are about whether a state (in this case, State A) will exercise its own enforcement authority to help enforce another state’s law—not about whether State B can itself directly enforce its judgment in State A territory. Enforcement-of-foreign-judgment decisions nevertheless have implications for the allocation of governance authority, and they therefore merit closer examination from a transnational judicial governance perspective. For example, refusals to enforce foreign judgments typically are based on a determination by the State A court that the State B court that rendered the judgment did not have proper jurisdiction over the dispute, that the defendant did not enjoy certain minimum standards of fairness in the State B court, that enforcement of the State B judgment would violate State A public policy, or that the State B court’s judgment is in some other way defective (Born and Rutledge 2007, 1013-1015). In other words, the refusal involves displacement of the State B court’s authority in favor of State A’s own authority to determine the proper dispute resolution process or outcome. Under these circumstances, a decision not to enforce a foreign judgment can be understood as an assertion of domestic governance authority. But the refusal to enforce may sometimes be based on lack of reciprocity—that is, on a finding that the State B court would not enforce a State A judgment under similar circumstances (Born and Rutledge 2007, 1014). The decision still is a refusal to enforce, but now unaccompanied by a displacement of State B authority that could be characterized as an assertion of domestic governance authority. On the other hand, a State A decision to enforce a State B judgment gives the State B judgment an effect in State A territory that it would not otherwise have. Such a decision may also imply an affirmation by the State A court that it was appropriate under the circumstances for State B to assert its authority to adjudicate the dispute. This affirmation may be explicit when a judgment debtor argues against enforcement of a foreign judgment by raising the issue of whether the
Thus, this first allocative function corresponds to two variants of the “who governs” question: who adjudicates, and whose law applies? But the answers to these questions rarely are obvious. Because transnational activity has connections to more than one state, more than one state may have a basis for legitimately exercising the authority to govern it.\textsuperscript{22} The challenge is that law is “the prerogative of territorial sovereigns, whereas human affairs freely cross . . . national boundaries” (Juenger 2005, 3).\textsuperscript{23}

In transnational litigation, domestic courts help answer the “who governs” question by deciding how these two types of governance authority should be allocated.\textsuperscript{24}

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\textsuperscript{22} In addition, nonstate actors may claim the authority to govern transnational activity. Thus, domestic courts can also be called upon to allocate governance authority between state and nonstate actors as well as among states. This private-public dimension of transnational judicial governance, while arguably of increasing importance, is not covered in this dissertation.

\textsuperscript{23} See also Ruggie (1993, 164) (explaining what he calls the “paradox of absolute individuation” raised by the territorial approach to sovereignty: “Having established territorially fixed state formations, having insisted that these territorial domains were disjoint and mutually exclusive, and having accepted these conditions as the constitutive bases of international society, what means were left to the new territorial rulers for dealing with problems of society that could not be reduced to territorial solution?”).

\textsuperscript{24} International legal scholars commonly use the term “allocation” to refer to the distribution of adjudicative, prescriptive and enforcement authority among states (Carter and Trimble 1991, 699-700; Reisman, et al. 2004, 1381-1383; Sweeney, Oliver, and Leech 1988, 82-83). However, given the highly decentralized nature of transnational judicial governance, it must be understood that individual domestic courts cannot unilaterally allocate that authority with finality. Even if a State A court asserts its own governance authority over a particular transnational activity, it cannot prevent State B from also asserting authority over that activity; as Scoles, et al., (2004, 2) point out, there is not “an impartial mechanism of hierarchically superior authority for resolving such conflicts.” Conversely, even if State A defers to State B’s governance authority, it cannot compel State B to exercise that authority. How authority actually is allocated ultimately is the aggregate result of decisions by courts of multiple states. Thus, the allocation of governance authority among states generally is a collective function, although not necessarily a coordinated function, of transnational judicial governance.
These decisions share a common domestic-foreign dimension of variation: each decision is either an assertion of domestic authority to govern transnational activity, or deference to a foreign state’s authority to govern that activity. For example, imagine a dispute arising out of activity with connections to both State A and State B. One party may argue that State A law should govern the transnational activity, while the other may argue that State B law should govern. Such international choice-of-law issues are often highly contested, as differences between different states’ laws can determine which party prevails.\(^{25}\) In addition to the implications for the litigants, these decisions also allocate prescriptive authority between State A and State B.\(^{26}\) If the State A court decides that State A law should govern the transnational activity that gave rise to the dispute, it asserts domestic prescriptive authority. If it instead decides that State B law should govern, it defers to foreign prescriptive authority.

In addition, the plaintiff having brought the dispute before a State A court, the defendant may then ask the court to dismiss the case in favor of a State B court.\(^{27}\) Like international choice-of-law, these choice-of-forum questions are frequently contested. And appropriately so. Empirical research by Clermont and Eisenberg (1995; 1998)

\(^{25}\) Indeed, if litigants are rational, they will not invest legal resources for arguments about choice of law unless they expect the choice to affect the outcome.

\(^{26}\) Note that there are also cases, not studied in this dissertation, in which a State A court is faced with a choice between the law of two foreign states—say State B and State C law—or with choices between national and international law.

\(^{27}\) The doctrinal basis for such a motion is discussed below.
reveals a strong forum effect: when the plaintiff’s initial choice of forum is defeated, its chance of winning decreases by about one-fifth. As Clermont (2005, 83) argues, the choice of forum is especially important in transnational litigation: “Shifting inconveniences and changing biases from one forum to a foreign forum become staggeringly effective. Moreover, the differences in substantive and procedural law—as well as the matters of remedies and expenses—dwarf the small variations within American law.”28 The answer to the choice-of-forum question has implications not only for the litigants, but also for the allocation of governance authority. If the State A court decides to adjudicate the dispute, it asserts domestic adjudicative authority. If it dismisses the case so it can be adjudicated by the State B court, it defers to foreign adjudicative authority.29

28 See also Bell (2003, 335) (“the venue in which a transnational dispute is to be resolved may be of vital importance for the ultimate outcome of the dispute. This will especially be so the greater the differences, whether in matters of procedure, substantive principles of law, or conflict of law rules, between potentially available forums”).

29 A clarification regarding my use of the term “deference” is in order. By deference I mean, at a minimum, a decision by a State A court not to assert State A’s governance authority, coupled with an affirmation that, under the circumstances, it is appropriate for State B to exercise its authority. Thus, deference implies an understanding by State A that authority should be allocated to State B. The term does not, however, imply that State B is necessarily interested in exercising that authority. For example, a State A court may defer to State B’s adjudicative authority by declining to exercise its own adjudicative authority over a lawsuit originally brought in the State A court and dismissing it in favor of a State B court; but State B may or may not actually exercise its authority. On the other hand, declining to assert domestic authority without a corresponding affirmation of a foreign state’s authority is mere abstention, not deference, and does not imply an understanding of the appropriate allocation of governance authority. Deference also may be more active. For example, a State A court may defer to State B’s prescriptive authority by applying State B’s law to transnational activity, and a State A court may defer to State B’s enforcement authority by ordering the enforcement within State A territory of a judgment of a State B court.
It is important to emphasize that the allocation of adjudicative authority and the allocation of prescriptive authority involve distinct inquiries. Most fundamentally, whereas the former is about which state’s courts should resolve a dispute, the latter is about which state’s law a court should apply to the parties’ behavior to resolve the dispute. This means that a State A court may assert State A adjudicative authority, so that the transnational dispute is adjudicated by the State A court, but defer to State B prescriptive authority by applying State B law to adjudicate the dispute. Indeed, if the litigants agree that their dispute should be adjudicated in the State A court but disagree about whether State A or State B law should apply, the State A court may allocate prescriptive authority but not address the adjudicative authority issue at all. Thus, there are many cases in which international choice of law, but not international choice of forum, is an issue. Moreover, different legal doctrines apply to the allocation of different types of governance authority.\footnote{These doctrines, which comprise an important part of private international law, are discussed below in section 1.3.2. Two such doctrines—the doctrines of forum non conveniens and choice of law—are discussed extensively in Chapters 3 and 4, respectively. As explained in these discussions, notwithstanding the conceptual separateness of adjudicative authority and prescriptive authority, the concepts are sometimes interrelated. For example, as illustrated in the Bhopal case summarized at the beginning of this chapter, the allocation of adjudicative authority under the forum non conveniens doctrine depends in part on whether domestic or foreign law applies.} Thus, from a legal perspective, it can be perfectly
appropriate for different types of authority to be allocated differently in a single case.\textsuperscript{31} Simply put, judicial allocation of governance authority is not wholesale.

1.2.3.2 Allocation of Risks and Resources among Transnational Actors

In addition to the allocation of governance authority among states, domestic courts perform a substantive allocative function in a variety of transnational litigation settings: they allocate risks and resources among transnational actors.\textsuperscript{32} It is well understood that the allocation of risks and resources among litigants is a general judicial function.\textsuperscript{33} However, it is only recently that scholars have begun to focus on the implications of this function for transnational activity.

For example, in transnational public law litigation, “[p]rivate individuals, government officials, and nations sue one another directly, and are sued directly, in a variety of judicial fora, most prominently domestic courts . . . based not solely on domestic or international law, but rather, on a body of ‘transnational’ law that blends the two” (Koh 1991, 2348-2349). As Slaughter and Bosco (2000, 102) note, “[i]creasing

\textsuperscript{31} From a positive theoretical perspective, however, these expectations would depend on the extent to which one assumes that these doctrines influence judges’ decisions. Moreover, as I argue in Chapter 2, judges may use similar decisionmaking shortcuts to allocate different types of governance authority, which would suggest that different types of authority might be allocated in ways that are more similar than would be expected from a strictly doctrinal perspective.

\textsuperscript{32} By transnational actors, I simply mean state or non-state actors who are engaged in transnational activity.

\textsuperscript{33} See, for example, Shapiro (1972), adopting the definition of politics as the authoritative allocation of values, and arguing that judicial decisionmaking plays a central role in domestic political processes precisely because law is an important instrument of value allocation.
numbers of individuals, including torture and terrorism victims, Holocaust survivors, and denizens of the dwindling Amazon rain forest, are now using lawsuits to defend their rights under international law [in U.S. courts]. The defendants in these cases include multinational corporations, foreign government officials, and even foreign states themselves.” Transnational public law litigation has been an increasingly important strategy for human rights protection, whereby individual victims seek compensation, frequently from foreign government officials (Koh 1991, 2349). In the United States, the Alien Tort Claims Act, as interpreted by the Second Circuit of the U.S. Court of Appeals in *Filartiga v. Pena-Irala*, provides an important legal foundation for this type of transnational public law litigation. Private actors may also be subject to liability under the Act for sufficiently “state-like or state-related activities” (Steinhardt 1999, 9). When these cases result in the award of compensatory or punitive damages, domestic courts are, in effect, allocating economic resources between state (or quasi-state) and

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34 28 U.S.C. § 1350 (providing that federal district courts have jurisdiction over any civil action brought by an alien for a tort committed in violation of international law).
35 630 F.2d 876 (2d Cir. 1980). In that case, two Paraguayan citizens sued a Paraguayan official in U.S. federal court for the politically-motivated killing of a member of their family.
private actors. More fundamentally, these decisions implicate governmental duties and individual rights rooted in basic values of safety and human dignity.

In transnational regulatory litigation, domestic courts apply explicitly regulatory domestic legal rules to transnational activity (Buxbaum 2006). For example, U.S. courts frequently apply U.S. antitrust law to regulate global cartels and other anticompetitive transnational activity, and U.S. securities laws to regulate cross-border securities transactions (Born 2007, 640-683; Buxbaum 2006, 271-278). Underlying regulations like these are national policies concerning matters ranging from consumer and investor protection, promotion of competitive markets, and provision of capital, to environmental protection, public health, and worker safety. By applying domestic regulatory rules to transnational activity, U.S. courts allocate risks and resources among transnational actors in accordance with such policies. This can be controversial when

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36 However, plaintiffs that are successful in transnational public law litigation against states or state officials rarely are able to fully collect compensation. See Koh (1991, 2368) (noting that “no Filartiga-type plaintiff has apparently collected full compensation for his injuries”).
37 These are among the values identified by Myres McDougal (1960, 349) as being allocated by the authoritative decisionmaking that constitutes international law.
38 Buxbaum (2006, 268) defines transnational regulatory litigation as litigation in domestic courts involving the application of domestic regulatory norms that are shared by the international regulatory community to transnational activity, in a manner that provides global regulatory benefits. For my descriptive purposes, I adopt a broader definition of transnational regulatory jurisdiction, dropping the requirement that the domestic regulatory rules that are applied necessarily are shared by the regulatory community or have a beneficial effect on transnational activity. I treat the extent to which these rules are in fact shared and the extent to which they yield global regulatory benefits as open questions to be answered using empirical and normative analysis.
these policies differ from those of other states with a connection to the activity being regulated.\textsuperscript{40}

Transnational private litigation involves claims based on private law, including the law of torts, property, and contracts (Wai 2005b, 243). These fields of private law—although generally not explicitly regulatory—are also policy instruments by which states authoritatively allocate economic risks and resources (Brand 2005; Cooter and Ulen 2000; Kaplow and Shavell 1999; Shapiro 1972).\textsuperscript{41} Disputes over property rights—including intellectual property rights—explicitly involve conflicting claims over economic resources. In such disputes, domestic courts allocate those resources by assigning property rights to one party or another.\textsuperscript{42} Transnational actors enter contracts to reduce their uncertainty about how they will share the costs and benefits of their economic interactions. In contract disputes, domestic courts allocate these costs and benefits by determining how the contract is interpreted and whether and how it is

\begin{footnotesize}
\begin{enumerate}
\item See Bermann (2003, 240) \textsuperscript{40} (noting that “[i]n countless antitrust cases, federal courts have applied the relevant federal statutes to regulate genuinely multinational scenarios, because of substantial effects in the US, thus arousing objections by foreign parties and foreign governments alike . . .”) and Buxbaum (2006, 268-270) \textsuperscript{40} (noting that “the extraterritorial application of domestic law creates substantial conflict between nations” when there are “differences in substance between the law applied and the law of the other country or countries involved . . .”).
\item See also Michaels (2006a, 146) \textsuperscript{41} (“tort law stands on the borderline between (public) regulatory interests of states and (private) individual interests in private ordering”).
\item For discussions of the economics of property law, see e.g., Cooter and Ulen (2000, chaps 4-5), Kaplow and Shavell (1999, 14-29), and Posner (2007, chap. 3).
\end{enumerate}
\end{footnotesize}
In addition, transnational economic activity may generate externalities; that is, it may have effects on an actor who does not have a contractual relationship with the person engaged in that activity. In tort disputes, domestic courts allocate the costs of negative externalities among transnational actors by determining the extent to which the party generating the externalities must compensate the party that bears the associated costs. As Wai (2005a, 471) summarizes, the function of transnational private law is “not simply facilitation of transactions, but also compensation for harms and social regulation of transnational conduct.”

In summary, legal scholars have started to draw attention to the global governance implications of transnational litigation, but so far they have done so in a piecemeal manner. While reinforcing the basic claims of the scholarship on transnational public law litigation, transnational regulatory litigation, and transnational

43 See, e.g., Paul (1988, 153) (noting that “[t]he [l]egal realists showed that the rules of classical contract law represent the exercise of public power as much as the rules of antitrust law”). For more general discussions of the economics of contract law, see, e.g., Cooter and Ulen (2000, chaps. 6-7), Kaplow and Shavell (1999, 29-45), and Posner (2007, chap. 4).

44 See, e.g., Shapiro (1972, 413-414) (noting that tort law “is anxious to define justice between man and man almost exclusively in terms of what treatment of individual litigants will best achieve preferred social goals”). For more general discussions of the economics of tort law, see, e.g., Cooter and Ulen (2000, chaps. 8-9), Kaplow and Shavell (1999, 2-13), and Posner (2007, chap. 6).

45 To clarify, I adopt this statement as an empirical claim—that private law in fact not only facilitates transactions, but also compensates for harms and regulates transnational conduct—not as a claim that all private law necessarily has, or, as a project for global governance, should have, the purpose of performing these functions.
private law litigation,\textsuperscript{46} the basic point of this subsection is that these implications relate to the same fundamental transnational judicial governance function: the allocation of risks and resources among transnational actors.

1.2.4 Domestic Courts and the Transnational Shadow of Domestic Law

As the foregoing discussion suggests, decisions regarding the allocation of governance authority or risks and resources have a direct impact on the litigants themselves. But an important finding of social science research on domestic legal systems is that the impact of court decisions extends beyond the parties to a particular dispute (Cooter, Marks, and Mnookin 1982; Galanter 1983; Mnookin and Kornhauser 1979; Shapiro 1975, 329). There is, in other words, a “flow of influence outward from courts to the wider world of disputing and regulating” (Galanter 1983, 118). This phenomenon is commonly known as the “shadow of the law” (Mnookin and

\textsuperscript{46} In addition, at the intersection of transnational public law litigation and transnational private litigation are disputes involving the economic activity of sovereign states, including disputes over sovereign debt (Gulati, Buchheit, and Thompson 2007) and, more generally, transnational litigation in which a foreign sovereign does not enjoy immunity from suit in U.S. courts under the commercial activity exception of the Foreign Sovereign Immunities Act. 28 U.S.C. §§ 1602-1611.

Bargaining is facilitated by the knowledge of each party that, if the two do not reach a consensual resolution to the conflict, the other may go to court and seek an imposed outcome. Just as important, the previously judicially announced rules that will determine what a court will impose if litigation does occur fix the parameters within which the two parties bargain even if neither ever goes to court. The relative legal strengths of the two parties, as defined by those rules judicially announced to resolve previously litigated disputes, are crucial factors in determining the bargaining strengths of negotiating parties in other disputes that are not litigated but, in form, are resolved by purely private, consensual agreements. Thus courts generate a huge hinterland of resolutions whose private, mediatory character is actually crucially determined by the rules judicially imposed upon others.48

In addition to the rules that would apply to prospective disputes, courts “communicate . . . possible remedies and estimates of the difficulty, certainty, and costs of securing particular outcomes,” thereby further shaping bargaining behavior (Galanter 1983, 121). The essential point is that court decisions have two types of effects: “First, in settling the dispute at hand, the judge produces a legal act that is particular (it binds the two disputants) and retrospective (it resolves an existing dispute). Second, in justifying

47 Although this literature focuses on courts, it is important to note that in areas of the law that are primarily statutory, legislatures play a fundamental role in defining the content of the law’s shadow. By emphasizing the role of domestic courts in global governance, I do not mean to downplay the significance of other actors in global governance.

48 See also Sandholtz and Stone Sweet (2004, 245) (“a norm can prevent disputes from arising in the first place, by providing individuals with behavioral guidance, and by structuring choices concerning compliance. . . . [O]nce a dispute has erupted, norms may provide the contracting parties with the materials for settling the dispute on their own, dyadically as it were, to the extent that norms furnish the bases for evaluating both the disputed behavior and potential solutions to the conflict”).
the decision, the judge signals that she will settle similar cases similarly in the future; this legal act is a general and prospective one (it affects future and potential disputants)” Stone Sweet and Brunell (1998, 64).  

Likewise, the impact of domestic court decisionmaking in transnational litigation—including the allocative decisions discussed above—can extend beyond the parties to a particular dispute. In this way, the concept of transnational judicial governance draws attention to what can be called the “transnational shadow of domestic law.” Although international relations scholars have paid little attention to domestic courts, the notion that domestic law and legal institutions cast a transnational shadow finds theoretical support in strategic choice models of international relations. From the strategic choice perspective, the behavior of transnational actors depends not only on their preferences, but also on their beliefs about what other actors will do (Lake and Powell 1999, 8-11). Legal rules and how they are interpreted can influence these beliefs, thus shaping the outcomes of strategic interactions (Keohane 2002, 14). Thus, when domestic courts apply legal rules in transnational litigation, they can affect not only the parties to the dispute, but also the strategic behavior of other transnational actors.

49 See also Friedman (2006, 266) (“[i]n judicial opinions are found the rules that govern the next case, and thus the conduct of institutions and actors in society”).
Both the jurisdictional and substantive allocative decisions made by domestic courts in transnational litigation can have this type of transnational shadow effect. Jurisdictionally, the international allocation of governance authority by domestic courts has implications that extend beyond particular cases. Because transnational activity has connections to more than one state, transnational actors may be uncertain about which state’s laws are applicable to their activity. When domestic courts make decisions allocating prescriptive authority in a particular case, they can increase predictability by giving transnational actors information about which state’s law is likely to be applied under similar legal and factual circumstances in the future. This has several broader implications. First, “[i]f people cannot ascertain the applicable rules, or if they have no way of knowing the probability that it will cover the conduct they contemplate, they are less able to conform their conduct to the rule and the state cannot use legal rules to influence their behavior” (Brilmayer 1991, 173). Increased predictability can help remedy this problem. Second, predictability can facilitate bargaining in the transnational shadow of domestic law, because “[i]ncreased certainty about the likely choice of law permits parties to identify the settlement range, in which settlement terms

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50 Of course, the extent to which these decisions actually increase predictability is an empirical question, the answer to which depends largely on the consistency of these decisions.
are mutually beneficial” (Whincop and Keys 2001, 27). Third, predictability may enhance regulatory competition (Carbonara and Parisi 2007; Guzman 2002; O’Hara and Ribstein 1999; Parisi and Ribstein 1998). The logic is that if actors know the circumstances in which efficient State A law would apply to their activity rather than inefficient State B law, they will structure their transactions so as to ensure the application of the former rather than the latter (O’Hara and Ribstein 1999, 634). This creates what Carbonara and Parisi (2007, 2) call “demand-side forces” for efficient legal rules. These forces in turn induce legislators to supply more efficient rules (Carbonara and Parisi 2007, 2; O’Hara and Ribstein 1999, 634). In summary, domestic courts help determine the shape and size of the transnational shadow of domestic law, with

51 See also Michaels (2006a, 156) (from the perspective of an economic private law model, “[p]redictability of the applicable tort rules becomes the most important consideration . . . . Ex ante predictability enables parties to optimize their conduct vis-à-vis the incentives set by the applicable tort rules. Ex post predictability enables parties to either settle rationally in the shadow of a defined substantive law or litigate matters of that substantive law without too much regard to issues of choice of law”).

52 In contractually-based activity, for example, the parties may include a clause in their contract whereby they agree to State A law. When ex ante agreement is not possible, parties may select a place to conduct their activity where State A law is likely to be applied rather than State B law. See, e.g., Michaels (2006a, 172) (comparing party autonomy and exit as drivers of regulatory competition).

53 It is important to note that the regulatory competition logic relies several assumptions that require further empirical investigation. First, it assumes that private parties seek the most efficient rules, whereas they in fact may not take into account third party externalities (Michaels 2006a, 172). Moreover, it is unclear that states necessarily benefit from having their laws apply (Michaels 2006a, 172; Rühl 2006, 813; but see Carbonara and Parisi 2007, 2). Finally, as I discuss in more detail in Chapter 5, the logic assumes that choice-of-law rules will be predictably applied by judges: if they do not, the logic is far less convincing. Even assuming the logic is correct, it is debatable whether increased predictability is likely to cause “races to the top” or “races to the bottom” (Rühl 2006, 813-814). As Brilmayer (1991, 173) puts it: “While predictability and uniformity of outcome are . . . desirable from the point of view of legal control, countervailing considerations arise when choice of law is viewed from a dynamic, as opposed to a static perspective. The analysis changes somewhat when people start to plan their actions based on the choice of law rules, altering the location of their conduct as well as what it is that they do.”
consequences for private parties, and possibly for the substantive laws adopted by states and how effectively they are implemented (Guzman 2002, 971; Trachtman 1994, 979).

Similarly, when domestic courts make decisions allocating adjudicative authority, they provide information that influences “forum shopping”—that is, the choices transnational actors make about where to take their disputes to be resolved. When deciding where to file a lawsuit, plaintiffs consider, among other things, which state’s laws are most favorable to their claim (Bell 2003, 24). For example, if the plaintiff is more likely to win under State A’s law than under State B’s law, the plaintiff may file its lawsuit in a State A court, even if the transnational activity giving rise to the dispute occurred primarily in State B. Prior State A court decisions in similar circumstances applying the law of the place of the underlying transnational activity rather than its own law would discourage this form of forum shopping, as would State A court decisions dismissing similar cases that arise from activity occurring outside State A territory. Whether domestic court decisions discourage (or encourage) forum shopping in turn influences whether plaintiffs in general are able to obtain the benefits

54 However, cross-national differences in applicable substantive law are not the only factors influencing forum shopping. As Bell (2003, 24) emphasizes, a plaintiff also seeks “the forum with which he is most familiar or in which he gains the greatest procedural advantage or puts the defendant at the greatest procedural disadvantage. In the most extreme cases, a choice of forum will be dictated by a genuinely held view that an alternate, obvious forum will not yield a fair trial or where the sheer expense of litigation in that forum will be prohibitive.”

55 For discussions of how rules allocating adjudicative and prescriptive authority can affect strategic behavior, see Brilmayer (1991, 167-175), O’Hara and Ribstein (1999, 634-635), and Whincop and Keyes (26-30).
of their preferred court, which is a matter raising systemic questions of justice (Clermont and Eisenberg 1995) and economic efficiency (O’Hara and Ribstein 1999, 635; Rühl 2006, 808-812).

A particularly important manifestation of the transnational shadow of domestic law is the influence of domestic court decisionmaking on other forms of global governance. International legal scholars and international relations scholars generally emphasize interstate institutions, including international law, as tools of global governance. To a great extent, however, the effectiveness of these institutions depends on domestic legal institutions, including courts (Brilmayer 1991; Keohane, Moravcsik, and Slaughter 2000; Koh 1997). For example, by applying international law to transnational activity, domestic courts enhance the effectiveness of formal interstate governance arrangements; by declining to do so, they limit the effectiveness of these arrangements. In addition, there is growing interest among both political scientists and legal scholars in private modes of transnational governance. Domestic courts can facilitate or hinder them, as well. Without third-party dispute resolution, “the costs of

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56 For summaries of the vast literature on international institutions and international law, see Martin and Simmons (1998), Keohane and Martin (2003), and Raustiala and Slaughter (2002). Recent contributions by international relations scholars include Gruber (2000), Ikenberry (2001), Koremenos, Lipson and Snidal (2001), Simmons (2000), Simmons and Hopkins (2005) and Von Stein (2005). Recent contributions by international legal scholars include Norman and Trachtman (2005), Goldsmith and Posner (2005), and Raustiala (2005).

exchanges may be prohibitive, since each prospective party may doubt that the other will abide by promises made over the life of a contract” (Stone Sweet and Brunell 1998, 64). By providing transnational dispute resolution services, domestic courts help support contracting as a form of private governance. Similarly, domestic courts can support arbitration as a form of private dispute resolution by enforcing arbitration agreements and arbitral decisions—or they can undermine it by declining to do so. As Slaughter (1995, 519) puts it, “the availability of judicial enforcement—the coercive apparatus of the State—undergirds the entire system of international commercial arbitration.” In these ways, domestic courts perform what might be called a “judicial support function” for other forms of global governance.

Substantively, judicial allocation of risks and resources also has implications that extend beyond particular cases. The aim of transnational public law litigation, for example, is not only retrospective—to obtain compensation for individual plaintiffs—but also prospective: “to provoke judicial articulation of a norm of transnational law, with an eye toward using that declaration to promote a political settlement in which

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58 As Wai (2002, 212) argues, one consequence of this is the potential for “transnational liftoff of international business transactions from national regulatory oversight.” See also Paul (1988) (noting that “[t]he judicial enforcement of pre-dispute arbitration agreements in international contracts, even where national law prohibits arbitration of certain statutory causes of action, allows some private parties to exempt themselves from public regulation of certain transactions”).

59 See also Slaughter Burley (1993, 232) (highlighting “the intersection of the public and private spheres underpinning a law that formally regulates individual merchants outside national legal systems but is ultimately dependent on them”). For an overview of the rules governing the enforcement of arbitration agreements and arbitral awards, see Born and Rutledge (2007, chap. 13).
both governmental and nongovernmental entities will participate” (Koh 1991, 2349). In this litigation setting, judges may claim to be resolving only a particular dispute, but they are “actually declaring (or not declaring) international norms that litigants transport to other fora for use in political bargaining” (Koh 1991, 2395). Likewise, transnational regulatory litigation not only involves the resolution of particular disputes, but also “enable[s] national courts to participate in implementing effective regulatory strategies for global markets” (Buxbaum 2006, 316). For its part, transnational private litigation “might be able to introduce [new] policy values (sometimes through new policy actors) into political negotiations or decision making in other venues, domestic or international” (Wai 2005b, 250).

Galanter (1983, 121) argues in the domestic context that “[t]he contribution of courts to resolving disputes cannot be equated with their resolution of those disputes that are fully adjudicated. The principal contribution of courts to dispute resolution is the provision of a background of norms and procedures, against which negotiations and regulation in both private and governmental settings takes place.” The main point of the foregoing discussion of domestic courts and the transnational shadow of domestic

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60 See also Wai (2002, 232) (emphasizing “the important [transnational] regulatory functions of the underlying domestic private law regimes”).
law is that the same is true for the influence of domestic courts on negotiation and regulation in the transnational realm.

### 1.2.5 The Decentralized, Non-Hierarchical Structure of Transnational Judicial Governance

The distinctiveness of transnational judicial governance as a form of global governance can be clarified further by specifying its structure. One of the ways that different forms of governance vary is according to the extent to which authority is centralized. As Kahler and Lake (2003, 8) explain, “[a]uthority can be highly concentrated—vested in a single, hierarchical entity with claims to exclusive jurisdiction . . . . Governance can also be widely dispersed among individual nodes exercising only limited jurisdiction.” Transnational judicial governance is characterized by an extremely low degree of centralization. It consists of domestic courts around the world acting as global governors, allocating governance authority among states and risks and resources among transnational actors. But they generally do so independently, and although there are a number of bilateral and multilateral agreements dealing with private international
law matters,\textsuperscript{61} transnational judicial governance takes place outside the context of any overarching hierarchical arrangement.

Due to the decentralized, non-hierarchical structure of transnational judicial governance, this dissertation’s use of the term “allocation” requires further explanation. Consistently with its use here, international law scholars commonly use the term to refer to the distribution of adjudicative, prescriptive and enforcement authority among states.\textsuperscript{62} However, given the highly decentralized nature of transnational judicial governance, the limited ability of domestic courts to unilaterally allocate governance authority needs to be emphasized. Even if a State A court asserts its own governance authority over a particular transnational activity, it cannot prevent State B from also asserting authority over that activity. There is not “an impartial mechanism of

\textsuperscript{61} These include the European Union’s Brussels Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and the Hague Convention on Choice of Court Agreements. The latter was adopted in 2005 by the Hague Conference on Private International Law, but as of August 21, 2007, had yet to be signed or ratified by any states. A complete list of conventions developed within the framework of the Hague Conference, and their status, is available at http://www.hcch.net. For a very brief overview of relevant international arrangements, see Symeonides, Perdue, and Von Mehren (2003, 702-708) (noting, among other things, the failure of efforts to negotiate a Hague Convention on International Jurisdiction and Foreign Judgments). Transnational judicial governance also is decentralized in another sense: domestic courts generally can only hear cases that are brought to them by other actors who file their suits as plaintiffs. See Knight and Johnson (2007, 58) (noting that “the agenda setting power in judicial institutions is largely exogenous. Although judges often are authorized to refuse to hear various kinds of cases, they typically cannot initiate causes of action. The must instead rely on interested parties to bring controversies before the court”). However, “it is nevertheless the machinery of the state that transnational litigation uses to achieve a regulatory end” (Buxbaum 2006, 304).

hierarchically superior authority for resolving such conflicts” (Scoles et al. 2004, 2). Conversely, even if State A defers to State B’s governance authority, it cannot compel State B to exercise that authority. How authority actually is allocated often is the aggregate result of decisions by multiple courts in multiple states. Thus, the international allocation of governance authority generally is a collective function of transnational judicial governance, but not necessarily a coordinated one.

### 1.3 Transnational Judicial Governance, International Relations Theory, and Private International Law

By describing the role of domestic law and domestic courts in global governance, the concept of transnational judicial governance implies that it has connections to the study of both international relations and law. This section makes these connections explicit. The lack of theorizing in either discipline about the role of domestic courts in global governance means that these connections are more thematic than theoretical. Nevertheless, they demonstrate that the study of transnational judicial governance in general, and this dissertation’s examination of judicial allocation of governance

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63 See also Muir Watt (2003, 387) (“In the absence of a central authority, the extent to which public interest concerns interfere with party choice is left to the unilateral decision of each state, which then defines independently the scope of its own legislation and pursues its own conception of the best way of dealing with social costs in an international setting. Risks of under- or over-regulation are thus endemic to the global market and surely not conducive to general well-being, which would seem to require, at the very least, a coherent allocation of regulatory authority”).
authority in particular, can contribute to efforts to solve important problems of international relations theory and private international law. They also reveal the fundamentally interdisciplinary nature of transnational judicial governance research.

1.3.1 International Relations: Connections between Domestic Courts and World Politics

As emphasized by the concept of transnational judicial governance, domestic courts play a central role in the governance of transnational activity. Yet international relations scholars—even those interested in global governance—have virtually ignored domestic courts.\(^{64}\) This neglect may be due partly to the state-centric approach that traditionally dominated international relations theory (Milner 1998),\(^{65}\) as well as skepticism in the discipline of political science about the significance of law and legal institutions (Friedman 2006). As the rapidly growing political science literatures on international law\(^{66}\) and international courts suggest,\(^{67}\) these barriers are being overcome.

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\(^{65}\) According to this approach, the state is conceived of as a territorial unit and the governmental institutions of which the state is comprised—including the executive, legislative, and judicial branches—are not analyzed as independent actors in world politics.

But domestic courts remain essentially uncharted territory for international relations scholars. This section shows how a better understanding of transnational judicial governance can contribute to the understanding of some of the central issues of contemporary international relations scholarship. It also reveals a common theme in the connections between transnational judicial governance and international relations scholarship: that domestic courts are significant actors in world politics.

1.3.1.1 Global Governance

First, consider again the “who governs” question, which political scientist Miles Kahler (2004, 3) characterizes as “[f]irst and prior to all subsequent questions” about global governance. Transnational judicial governance offers at least two types of answers to this question. As the concept of transnational judicial governance emphasizes, domestic courts govern: they allocate governance authority among states and risks and resources among transnational actors. Thus, an understanding of transnational judicial governance is an integral part of a broader understanding of global governance.

Moreover, when it is uncertain who governs, domestic courts often provide answers by allocating governance authority. Recall also the judicial support function

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discussed above, whereby domestic courts can either facilitate or hinder interstate and private governance arrangements. By describing and explaining the judicial support function, international relations scholars can improve their understanding of these alternative forms of governance and the relationships among them. In addition, together with scholarship on private governance (e.g. Büthe 2004, Cutler, Haugler, and Porter 1999, Hall and Biersteker 2002, and Mattli 2001) and transgovernmental networks (e.g. Raustiala 2002, Slaughter 2004, Slaughter and Zaring 2006, and Whytock 2005), transnational judicial governance can help explain how transnational activity is or could be governed in the absence of formal interstate institutions.

1.3.1.2 International Political Economy

In addition, a better understanding of transnational judicial governance can contribute to the study of international political economy, broadly defined as the study of the relationship between politics and the global economy (Katzenstein, Keohane and Krasner 1998, 645). A central premise of international political economy scholarship is that markets depend on “larger sociopolitical systems” (Gilpin 2001, 41). Among other things, they depend on possessive and transactional security. As Rühl (2006, 801) explains, “[p]ossessive security exists where property rights are clearly assigned to

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*68 For example, one of the central questions raised by the private governance literature is the role of the state in the empowerment of private actors (Büthe 2004, 284).
individuals and where those individuals can be sure that their rights will be protected against intrusion by third parties. Transactions security exists where individuals are ensured that promises to transfer property rights will be kept.” The lack of a global legal order means that both forms of security are lower in transnational economic activity than in purely domestic activity (Rühl 2006, 802). But by adjudicating transnational economic disputes—including disputes over property rights and the enforcement of contracts, as well as disputes over the negative externalities of transnational economic activity—domestic courts mitigate this economic security deficit, thus facilitating the operation of transnational markets.69

In particular, the study of transnational judicial governance can contribute to a growing body of international political economy scholarship that relaxes the unitary

69 See Shapiro (1993, 367) (noting the “major roles” played by private international law in international political economy); Slaughter (1993, 231) (arguing that private international law “helps structure patterns of individual and group interaction in transnational society” and asking “how do domestic legal doctrines encourage or discourage transnational economic interaction?”); and Guzman (2002) (arguing that “[w]ithout a better understanding of how international choice-of-law issues impact international business, the legal regime that governs such transactions will stand in the way of economic development and growth, rather than promote them. . . . Because choice-of-law rules determine which countries’ laws govern a particular transaction, they can influence the efficiency of the global legal system” (2002, 889, 900). See also Rodrick (2002, 11-12) (arguing that the transaction costs arising from problems with cross-national contract enforcement have important implications for international development: Given that “[d]omestic courts may be unwilling—and international courts unable—to enforce a contract signed between residents of two countries . . . [a] key reason why more capital does not flow to poorer countries is that there is no good way such a promise can be rendered binding across national jurisdictions—short of resorting to the gunboat diplomacy of old”).
state assumption and treats domestic institutions as distinct actors in world politics. As Jeffry Frieden and Lisa Martin (2002, 119) note, “[t]he most challenging questions in IPE have to do with the interaction of domestic and international factors as they affect economic policies and outcomes.” They add that “[t]he core of the domestic-international connection is the impact of domestic institutions and interests on international interaction, and vice versa” (2002, 120). The essence of transnational judicial governance is the relationship between domestic court decisionmaking and transnational activity. Thus, the study of transnational judicial governance promises to shed light on precisely the kind of domestic-international interactions that international political economy scholars currently emphasize.

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70 Milner (1998, 761) argues in favor of “bringing domestic politics back in” by “moving away from using the state as the basic unit of analysis; instead, other domestic actors—such as the executive, the legislature, bureaucracies, political parties, and interest groups—become the primary units of analysis.” Although courts are absent from her list of domestic actors, I argue that they deserve attention from IPE scholars. 71 See, e.g., Martin (2000) (on the role of legislatures in international cooperation), Milner (1997) (on the role of executive and legislative branch politics on international relations), Moravcsik (1997) (proposing a liberal theory of international relations that focuses on the domestic sources of national interests in the context of state-society relations), Slaughter (2004) (treating executive, legislative and judicial institutions as autonomous actors in transgovernmental relations), Raustiala (2002) and Whytock (2005) (both on the role of domestic governmental agencies as transgovernmental actors). Much of this work is influenced by Keohane and Nye’s (1974) work on transgovernmental relations. 72 Frieden and Martin in fact include courts in their list of domestic institutions that IPE scholars should pay attention to: “Future work will need to allow for more nuance and development, incorporating such other domestic institutions as political parties, courts, and central banks and a more sophisticated treatment of domestic interests” (p. 125). Political scientist Isaac Unah (1998), while writing in the judicial behavior tradition more than the IPE tradition, demonstrates that the U.S. Courts of International Trade play an important role in the implementation of U.S. trade policy.
1.3.1.3 Sovereignty

Transnational judicial governance also is an example of, and arguably a solution to, a problem that has preoccupied scholars of the institution of sovereignty: the relationship between authority and territory (e.g. Biersteker 2002; Krasner 1999; Rudolph 2005). The classic Westphalian conception of sovereignty is based on territoriality and the exclusion of external authority: “states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior” (Krasner 1999, 20). But Westphalian sovereignty can be compromised by either invitation or intervention (Krasner 1999, 22). One reason for this is that “[t]erritory involves the merging of physical space and public authority but the congruence between the two is far from perfect. It is precisely this variability in fit that provides leverage for research” (Caporaso 2000, 12). By deciding between assertion of domestic authority and deference to foreign authority over transnational activity, domestic courts help define the domestic reach of external authority and the extraterritorial reach of domestic authority. In this way, domestic courts play an important role in regulating the extent to which sovereignty is compromised, and explaining the “variability in fit” between territory and authority.

A second problem is posed when territorially-based authority confronts transnational activity. Ruggie (1993, 164) describes the paradox as follows: “Having
established territorially fixed state formations, having insisted that these territorial domains were disjoint and mutually exclusive, and having accepted these conditions as the constitutive bases of international society, what means [are] left to . . . territorial rulers for dealing with problems of society that [can] not be reduced to territorial solution?” The concept of transnational judicial governance draws attention to how domestic courts—by resolving transnational disputes, allocating governance authority among sovereign states, and defining the transnational shadow of domestic law—can help mitigate the practical, governance-related dimensions of this problem.73

More generally, the sovereignty literature raises questions about how competing claims to authority are reconciled in world politics. As Biersteker (2002, 171) argues, “empirical research on the making, ceding and recognition of claims of authority (by states and non-states alike) holds great promise for our understanding of the changing meaning of sovereignty.” The study of transnational judicial governance can help answer such questions by explaining the circumstances in which domestic courts recognize different sources of authority—both public and private—in the governance of transnational activity.

73 This is not to say that transnational judicial governance can solve the theoretical problems that result when territorial conceptions of sovereignty confront the empirical reality of extraterritorial assertions of authority.
1.3.1.4 Judicialization

In addition to global governance, international political economy, and sovereignty, the study of transnational judicial governance addresses one of the core concerns of the political science literature on the judicialization of politics—the role of courts in political processes—and it addresses it in a context that the literature so far has left essentially unexamined. Very broadly speaking, scholars of judicialization argue that courts perform political functions, and they seek a better understanding of those functions and how they may be expanding (e.g. Hirschl 2004; Shapiro and Stone Sweet 2002; Tate and Vallinder 1995). Judicialization has constituted an important research agenda in the American politics subfield of political science since the seminal work of Robert Dahl (1957) and Martin Shapiro (1964) on the U.S. Supreme Court as a policymaker. Political scientists also have been studying the phenomenon of judicialization in comparative perspective, exploring the increasingly important role of domestic courts in domestic governance in countries other than the United States (e.g., Helmke 2005; Hirschl 2004; Shapiro 1981; Shapiro and Stone 1994; Stone Sweet 2000; Tate and Vallinder 1995). Thus, there exists a rich and growing literature on the judicialization of domestic politics.

74 According to one definition, judicialization is “the infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside” (Vallinder 1995, 13).
More recently, international relations scholars are turning their attention to the judicialization of world politics. So far, however, the focus has been on international courts and similar adjudicatory mechanisms, such as the European Court of Justice, the European Court of Human Rights, and the World Trade Organization’s dispute resolution system (e.g., Alter 2006; Cichowski 2006; Helfer and Slaughter 1997; Keohane, Moravcsik and Slaughter 2000; Sandholtz and Stone Sweet 2004; Volcansek and Stack 2005). What this scholarship generally neglects is that domestic courts are leading participants in transnational political processes. By shedding light on how domestic courts participate in these processes—including how they interact with international courts—the study of transnational judicial governance can make an original contribution to the judicialization literature’s efforts to understand the political functions performed by courts.

1.3.1.5 Domestic Courts and World Politics

There is a common theme to these connections between transnational judicial governance and international relations scholarship: that domestic courts play a significant role in world politics. By improving their understanding of this role, international relations scholars can improve their understanding of some of the...
discipline’s leading problems, from global governance and international political economy, to sovereignty and judicialization. This chapter provides conceptual foundations for such an endeavor and, together with the theoretical and empirical portions of the dissertation, demonstrates one way that domestic courts can be incorporated into the study of international relations, and provides some preliminary insights into the behavior of domestic courts when dealing with matters having transnational implications.

1.3.2 Private International Law: Connections between Doctrine and Judicial Decisionmaking

Viewed through the lens of legal scholarship, transnational judicial governance is intimately related to private international law. This section explains this relationship in two steps. First, because most international relations scholars are unfamiliar with private international law, it provides a brief introduction to the field. Second, it highlights the ways in which transnational judicial governance research can contribute to private international law scholarship.

76 See also Whytock (2006c), proposing both “second-image” and “second-image reversed” approaches to incorporating domestic courts into the study of world politics (the former focusing on the international implications of constitutional interpretation of foreign affairs powers, international legal interpretation, allocation of governance authority, transnational adjudication, and transnational judicial cooperation, and the latter on domestic courts as pathways for the internalization of foreign and international norms and on international influences on judicial decisionmaking).
1.3.2.1 The Field of Private International Law

As Juenger (2005, 3) puts it, the central problem of private international law is that “law [is] the prerogative of territorial sovereigns, whereas human affairs freely cross . . . national boundaries.” This “tension between sovereignty and mobility” (Juenger 2005, 3) gives rise to the questions that define the three major branches of private international law: jurisdiction, choice of law, and recognition and enforcement of foreign judgments (Michaels 2005, 3; Scoles et al. 2004, 3). First, which state’s courts should adjudicate a dispute when the activity giving rise to the dispute has connections to more than one state? Domestic courts face this question when they allocate adjudicative authority among states, and the branch of private international law that seeks to answer it is called “jurisdiction.” Second, which state’s law should apply to govern that activity? Domestic courts face this question when they allocate prescriptive authority. The branch of private international law that seeks to answer this question is called “choice of law.” Third, should a foreign court’s decision be enforced domestically?

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77 As Von Mehren (2003, 27-28) puts it, “Were the spheres of economic and social intercourse, on the one hand, and of governmental and legal authority, on the other, so intertwined as to expand and contract together and in a manner such that the former never escaped the confines of the latter, there would be no private international law. But the forces that determine the boundaries of economic and social activities and of legal and governmental authority differ.”

78 On the relationship between adjudicative authority, prescriptive authority, and choice of law, see Chapter 4, section 4.1.
The branch of private international law that corresponds to this question is called “recognition and enforcement of judgments.”

Two of these branches correspond to the two examples of judicial allocation of governance authority that are the focus of this dissertation. Doctrines studied in the jurisdiction branch of private international law, including the doctrine of forum non conveniens, govern the allocation of adjudicative authority among states. Choice-of-law doctrines govern the allocation of prescriptive authority among states. In this sense, private international law is the doctrinal counterpart to transnational judicial governance and, more precisely, to the allocative decisions of domestic courts that this dissertation attempts to describe and explain.

Several clarifications will help avoid confusion about the domain of private international law. First, although this body of legal doctrine often is called “conflict of laws” (Scoles et al. 2004, 3), this label generally is interchangeable with “private international law” (Reimann 1995, xxiii). Second, private international law is not exclusively “private.” Between 1995 and 2005, for example, an average of 475 diversity cases in U.S. federal district courts each year involved a foreign sovereign; this does not count suits involving foreign sovereigns in which subject matter jurisdiction is based on

79 “Conflict of laws” is the more common label in the United States, while “private international law” is preferred in Europe (Reimann 1995, xxiii). I prefer the term “private international law” because of its emphasis on “international,” which corresponds to my focus on international allocation of governance authority.
grounds other than diversity. Transnational public law litigation and transnational regulatory litigation—each discussed above—are important examples of transnational litigation involving “public” law (Buxbaum 2006; Koh 1991; Slaughter and Bosco 2000). Even contract, tort and property disputes, which traditionally are categorized as “private law” matters, are “public” in the sense that they are backed by the coercive authority of the state and embody important public policies.

Third, the word “international” in private international law can mislead. On the one hand, it helps highlight the international allocation of authority that is one of the core functions of transnational judicial governance. Moreover, private international law is, loosely speaking, international in the sense that it deals with transnational disputes—but the correspondence is imperfect insofar as “international” ordinarily is used to

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80 Author’s calculations, based on Federal Judicial Center (2005).
81 See, e.g., Shapiro (1972, 412-413) (arguing that “nearly all law is an instrument of value allocation,” and noting the rise of law and economics, which analyzes private law in terms of its “overall benefits to the social system rather than or in addition to fairness and justice as between two disputants”). Political scientists studying law traditionally have focused on “public law”—which is commonly understood as law governing relationships between private individuals and the state (Shapiro 1993). However, recognizing the economic importance and policy implications of the legal rules governing private relationships, social scientists interested in political economy are increasingly studying private law (see, e.g., Barzel 2002; Casper 2001; Hall and Soskice 2001; North 1990; Williamson 1985). Law and economics scholars have long emphasized the efficiency and distributional consequences of private law (see, e.g., Kaplow and Shavell (1999) (surveying work of economists on contract, tort and property law). Political scientist Martin Shapiro has long argued forcefully against the private law/public law distinction, and in favor of political scientists embracing the study of private law as a form of policy-making and social control (Shapiro 1972; Shapiro 1981, 24-26; Shapiro and Stone Sweet 2002, 95). “Once political science defines itself as dealing with the authoritative allocation of values, and the modern state is seen not as a neutral policeman but a positive achiever of welfare, the public law/private law distinction becomes less tenable. The ‘private’ law of property and contract authoritatively allocate most of the values in a capitalist society” (Shapiro 1993, 366).
describe only state-to-state activity, whereas “transnational” also includes activity involving private actors (Nye and Keohane 1971; Risse 1995). On the other hand, private international law is, for the most part, domestic law. In other words, the legal rules dealing with jurisdiction, choice of law, and enforcement and recognition of foreign judgments are largely domestic legal rules, the product of either common law or legislation rather than international agreement. In the United States, both federal and state laws address these issues. There are significant international conventions dealing with transnational litigation, including important European Union arrangements.

Generally speaking, however, the rules of private international law remain domestic, and they are subject to significant cross-national variation.

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82 Strictly speaking, “international” refers to interactions between sovereign states, whereas “transnational” refers to interactions involving at least one nonstate actor. See, e.g., Nye and Keohane (1971, 330-331).
83 For this reason, “the term ‘American conflicts law’ is a misnomer—there is no single American conflicts law. Rather, there are as many conflicts laws in the United States as there are states or jurisdictions that constitute the United States. Today this includes 50 states and the District of Columbia [and Puerto Rico], as well as the United States itself as a separate sovereign with its own system of laws” (Symeonides 2006, 2-3). In addition to the international conflicts emphasized in this dissertation, there are vertical conflicts between federal and state law and horizontal conflicts between the law of different states of the United States (Symeonides 2006, 3).
84 A complete list of conventions developed within the framework of the Hague Conference, and their status, is available at http://www.hcch.net. For a very brief overview of relevant international arrangements, see Symeonides, Perdue, and Von Mehren (2003, 702-708).
85 See Scoles and Hays (1992, 2) (“Rules of conflicts law, or of private international law, . . . do not emanate from an international consensus, such as ‘customary (public) international law.’ Instead, they are part of each state or nation’s domestic law and therefore often differ from one jurisdiction to another”) and Scoles et al. (2004, 2) (“Besides the few international conventions that avoid or resolve conflicts through substantive or conflicts rules, international law has little to say on the subject. Thus, for the most part, the task of resolving multistate private-law disputes is left to individual countries, subject perhaps to certain mild restraints imposed by international law. Accordingly, conflicts law is essentially national law”).
Private international law often is defined in contrast to public international law. “Public international law primarily governed the activities of governments in relation to other governments. Private international law dealt with the activities of individuals, corporations, and other private entities when they crossed national borders” (Carter and Trimble 1991, 2). However, the line between private and public international law is a blurry one: in addition to the previously discussed difficulties with the characterization of private international law as “private,” public international law increasingly regulates the activity of nonstate actors. As Paul (1988, 174) argues, whether domestic courts are considering questions of public or private international law, the fundamental issue being decided is essentially the same: “which legal system applies.” Indeed, two of the most influential figures in private international law scholarship conceived of the field as part of the law of nations (Lowenfeld 1996, 2-3; Story 1972, 9). Nevertheless, “private international law” remains a widely accepted term. I use it here with no intention of downplaying its analytical limitations.

1.3.2.2 Private International Law in Action

The study of transnational judicial governance can contribute to private international law scholarship by providing knowledge about the causes, consequences,

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86 For a thorough critique of the private international law/public international law distinction, see Paul (1988).
and normative implications of private international law decisionmaking. Whereas the focus of most private international law scholarship has been on private international law doctrine, the concept of transnational judicial governance draws attention to private international law in action—that is, to how private international law is actually applied by domestic courts to allocate governance authority among states and risks and resources among transnational actors. This is important for several reasons. First, because transnational judicial governance is a form of judicial behavior—namely, domestic courts behaving as global governors—the focus on law in action is necessary as a descriptive matter, for it is not plausible to assume that legal doctrine alone fully describes this behavior. Second, the focus on private international law in action is important for explaining why domestic courts behave the way they do as global

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87 However, important efforts have been made to describe and explain domestic choice-of-law decisionmaking (e.g. Borchers 1992; Solimine 1989; Symeonides 2006, Thiel 2000). Moreover, because of the implications that private international law has for public policy and the global economy, legal scholars and economists are increasingly applying economic analysis to private international law issues (e.g. Guzman 2002, Michaels 2006a, Muir Watt 2003, O’Hara and Ribstein 1999, Rühl 2006, Trachtman 2001, and Whincop and Keyes 2001). So far, however, most of this work has normative rather than positive (Michaels 2006, 145). In addition, Robert Wai (2005a; 2005b) and Hannah Buxbaum (2006) have drawn attention to the global governance implications of transnational litigation. But relatively little effort has been devoted to describing and explaining how domestic courts actually behave in transnational litigation (but see include Clermont and Eisenberg (1996 and 2007), empirical studies of how foreign parties fare in U.S. federal courts, and Putnam (2006), an empirical study of U.S. federal court decisionmaking on the extraterritorial application of U.S. law).

88 See Pound (1910) (“if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one”).

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governors, for it is not plausible to assume that legal doctrine is necessarily the only
determinant of judicial decisionmaking in transnational litigation. 89

Third, the focus on private international law in action is normatively important. 
Even the best laws may not be applied by courts in a normatively desirable fashion. If 
we want to assess critically not only private international law doctrine but also the real-
world outcomes produced by courts when they apply private international law, then we 
need an understanding of private international law decisionmaking. The study of 
transnational judicial governance thus has affinities with legal realism—“[w]e first must 
determine how law is working, so that when we set forth our own ideals, we can say 
how present law is actually fitted to them” (Fisher, Horwitz, and Reed 1993, 52)—as well 
as with the New Haven school of international law, which seeks to provide, “in lieu of 
anecdotal historicism, for the systematic description of past trends in decision in terms 
of their approximations to clarified goals” (McDougal 1960, 344).

The proposition that a better understanding of private international law in action 
is important is neither particularly novel nor likely to be controversial. Nevertheless, the 
fact remains that legal scholars have devoted little effort toward developing such an 
understanding. While legal scholars are increasingly using empirical methods to test

89 See Borchers (1992, 358 and 367) (“Wide differences now exist between courts as to what they say about 
choice of law. But, as Walter Wheeler Cook once enjoined lawyers, what courts do, not what they say, is 
important. . . . It is one thing to speculate about how the various conflicts theories might operate in practice 
and quite another to determine their actual operation.”).
positive theories of behavior in public international law (e.g. Hathaway 2002), this has not been the case for private international law—even as some private international law scholars acknowledge that “[t]he field is ripe for empiricists who can cut through the legal and academic thicket to view the landscape” (O’Hara and Ribstein 1999, 642). Therefore, to the extent transnational judicial governance research can improve our knowledge about private international law decisionmaking, it can make an important contribution to private international law scholarship.

Yet just as an exclusive focus on private international law doctrine is insufficient, so is an exclusive focus on law in action. To adopt the Holmesean equation of law with “[t]he prophecies of what the courts will do in fact” (Holmes 1897) is to conflate what transnational judicial governance research seeks to explain (the behavior of courts as global governors) with a potentially important explanatory variable (legal doctrine), making causal inference impossible. It also would complicate the common conception of the rule of law as including among its values judicial decisionmaking in accordance with recognized legal principles, a conception which becomes incoherent if law and judicial decisionmaking are not kept analytically distinct. For these reasons, it is important to emphasize that the emphasis placed by transnational judicial governance

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90 See also Richman and Reynolds (2000) (proposing an agenda for empirical conflict of laws research).
91 See Finnemore and Sikkink (1998, 892) (“[b]ecause one central question of norms research is the effect of norms on state behavior, it is important to operationalize a norm in a way that is distinct from the state or the nonstate behavior it is designed to explain”).
research on private international law in action is a complement to, not a substitute for, doctrinal scholarship.

1.4 Toward a Better Understanding of Transnational Judicial Governance

Domestic courts are global governors. They allocate governance authority among states and risks and resources among transnational actors. They help define the transnational shadow of domestic law, thus influencing the strategic behavior of transnational actors, and they can either facilitate or hinder alternative forms of global governance such as international law and institutions and private contracting. As suggested by the connections between transnational judicial governance and important fields of inquiry in international relations and private international law scholarship, the study of the role of domestic courts in global governance can make substantial contributions to both disciplines. But so far, we know very little about how domestic courts behave as global governors, and why they govern the way they do.

The goal of this dissertation is to provide some answers to these questions. This chapter has constructed the conceptual and interdisciplinary foundations for that undertaking. The dissertation proceeds as follows. Chapter 2 focuses on the domestic-foreign dimension of variation in transnational judicial governance and asks: under what circumstances are domestic courts likely to defer to foreign authority to govern
transnational activity instead of asserting domestic authority? In particular, Chapter 2 theoretically investigates the legal and political determinants of the choice between domestic and foreign governance authority. The extent of legal and political influences is important both normatively and for positive theory. Normatively, if legal factors dominate, then one might view domestic courts as fostering transnational rule-of-law. But if political factors dominate, such a view would be more difficult to maintain. In terms of positive theory, the answer is important because it speaks to debates in the political science subfields of both international relations and judicial decisionmaking about whether law has any independent influence on behavior.

Contrary to the conventional wisdom in the international relations and judicial decisionmaking literatures, and contrary to the claims of some private international law scholars that private international law doctrine is too indeterminate to shape outcomes, Chapter 2’s basic argument is that legal factors do have an important influence on judicial allocation of governance authority. The argument is not that legal doctrine is necessarily a direct constraint on judges’ decisions, as traditional legalist theories of judicial decisionmaking suggest. Rather, Chapter 2 defines legal factors broadly to include the influence of judicial heuristics. Defined as heuristics that not only reduce decisionmaking costs but also result in decisions that achieve at least a minimally acceptable level of legal quality, judicial heuristics are decisionmaking shortcuts used by
judges to abide by norms of good faith judging while conserving scarce decisionmaking resources. Chapter 2 develops general hypotheses about how both doctrine and judicial heuristics affect the likelihood of deference to foreign governance authority. Chapter 2 also strives to take seriously arguments that political factors are important. Thus, in addition to the legal hypotheses, it derives hypotheses from leading theories of judicial decisionmaking (including the so-called “attitudinal” and “strategic” models) and international relations (including realism and liberalism).

Chapters 3 and 4 empirically evaluate these theories. The scope of the empirical investigation is limited to two types of transnational judicial governance decisions in the U.S. district courts. Chapter 3 focuses on forum non conveniens decisionmaking as an example of judicial allocation of adjudicative authority, and asks: under what circumstances are U.S. district court judges more likely to grant motions to dismiss transnational litigation in favor of a foreign court, thus deferring to foreign adjudicative authority, rather than denying the motion and adjudicating the case in the U.S. district court, thus asserting domestic adjudicative authority?

Using logit analysis of an original dataset consisting of a random sample of published forum non conveniens decisions by U.S. district court judges between 1990 and 2005, the chapter finds that, consistent with the forum non conveniens doctrine, judges are less likely to defer to foreign authority when there is a U.S. plaintiff, but that
the nationality of the U.S. defendant does not have a statistically significant effect. In addition, the chapter finds that judges are more likely to defer to foreign authority when the activity giving rise to the litigation occurred mostly or all outside U.S. territory. Consistent with the judicial heuristics theory developed in Chapter 2, this result provides preliminary evidence that judicial allocation of governance authority is based on what the chapter calls a “territoriality heuristic,” according to which the heuristic attribute is the locus of the activity giving rise to the litigation, and the greater the extent to which that activity occurred outside U.S. territory, the more strongly this attribute weighs in favor of deference. The findings also support the proposition derived from liberal international relations theory that a judge is more likely to dismiss a case in favor of a foreign state’s court if the foreign state is a liberal democracy. On the other hand, the evidence does not suggest that partisan politics or the economic power of the foreign state has a general effect on the probability of deference, or that there is a general bias in favor of U.S. parties in forum non conveniens decisionmaking.

Chapter 4 focuses on international choice-of-law decisionmaking in transnational tort cases as an example of judicial allocation of prescriptive authority, and asks: under what circumstances are U.S. district court judges more likely to apply foreign law in transnational litigation, thus deferring to foreign prescriptive authority, rather than applying domestic law, thus asserting domestic prescriptive authority? Using logit
analysis of an original dataset consisting of a random sample of published international choice-of-law decisions by U.S. district court judges in transnational tort cases between 1990 and 2005, the chapter provides evidence supporting the proposition that legal doctrine has an independent effect on judicial allocation of prescriptive authority: different choice-of-law doctrines tend to lead to different outcomes, with some doctrines more likely to lead to deference to foreign prescriptive authority than others. In addition, the likelihood of deference to foreign authority is greater when the activity giving rise to the dispute occurred mostly or all outside U.S. territory, providing additional, albeit still preliminary, evidence that judges use a territoriality heuristic to help them allocate governance authority. Chapter 4 also provides evidence of pro-U.S. party bias in international choice-of-law decisionmaking.

Together, Chapters 3 and 4 provide the first systematic empirical account of the determinants of forum non conveniens and international choice-of-law decisionmaking. The overall results suggest that legal factors predominate in both cases. But the findings are less conclusive regarding whether the legal influences reflect the systematic application of legal doctrine, or the use of judicial heuristics. The logit results are consistent with the hypothesis that judicial allocation of adjudicative and prescriptive authority is based at least partly on the use of a territoriality heuristic, and qualitative evidence provided by both chapters suggests that the judicial heuristics interpretation is
indeed plausible. However, given the challenge of discriminating between the effects of legal doctrine and judicial heuristics, this evidence should be considered tentative.

Chapter 5 concludes the dissertation. After reviewing the key findings, it emphasizes the dissertation’s limitations and proposes several avenues for future research designed to address those limitations. It then draws attention to the broader implications of the dissertation’s findings for global governance, the role of law and territoriality in world politics, the relationship between international political economy and private international law, and judicial decisionmaking. Finally, it proposes a governance-oriented approach to the study of transnational law that takes these implications into account.
2. Toward a Positive Theory of Transnational Judicial Governance

2.1 Law and Politics in Transnational Judicial Governance

One of the basic transnational judicial governance functions discussed in Chapter 1 is the allocation of governance authority among states. But what are the determinants of judicial allocation of governance authority? More precisely, under what circumstances are domestic courts more likely to defer to foreign governance authority over transnational activity—including adjudicative and prescriptive authority—rather than asserting domestic authority? Drawing on theories of judicial decisionmaking, bounded rationality, and international relations, this chapter develops a series of hypotheses about the factors that explain this domestic-foreign dimension of variation in transnational judicial governance.

The analysis is organized around two types of factors, legal and political. According to David Easton’s classic definition (1971, 129, 135), the study of politics is concerned with the “authoritative allocation of values”—that is, with “authoritative social decisions about how goods, both spiritual and material, are to be distributed.” In this sense, transnational judicial governance, whereby domestic courts allocate governance authority among states and rights and resources among transnational actors,
is intrinsically political in its outcomes. But to what extent might the determinants of these decisions be legal rather than political?

This framing links dissertation’s central question to broader positive theoretical debates in the judicial decisionmaking and international relations literatures about the relative importance of law and politics. As explained below, the dominant view in both disciplines is that political factors—understood by judicial decisionmaking scholars primarily in left-right ideological terms, and by international relations scholars primarily in terms of power—exert the stronger influence. But this understanding has not gone unchallenged. While some judicial decisionmaking scholars argue that judges’ political attitudes or the partisan orientation of the executive and legislative branches of government are primary determinants of judicial behavior (e.g. Segal and Spaeth 2002; Epstein and Knight 1998), others argue that legal considerations are more fundamental (e.g. Gillman 2001). And while some international relations scholars argue that international law exerts little or no independent force in world politics (e.g. Von Stein 2005), others argue that it has a significant influence on state behavior (e.g. Kelley 2007; Simmons 2000).

Legal scholar Barry Friedman (2006, 262) accuses political scientists of having “an almost pathological skepticism” about whether law matters. But even some legal scholars argue that legal doctrine is not a significant determinant of private international
law decisionmaking. Questioning the importance of choice-of-law methodology in explaining or predicting court decisions, Symeonides (2006, 70) concludes that “of all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court.” Sterk (1994, 951) argues that “the result in the case often appears to have dictated the judge’s choice of law approach at least as much as the approach itself generated the result.” By shedding light on the legal and political factors that influence the choice between domestic and foreign governance authority, this dissertation seeks to contribute to debates about the role of law in judicial decisionmaking and in world politics.

Accordingly, this chapter develops a series of general hypotheses about legal and political factors that influence judicial allocation of governance authority. First, it assesses two existing theories of judicial decisionmaking: positivist legalism and new institutionalist legalism. Both suggest that legal doctrine should affect the choice between foreign and domestic governance authority, but the former fails to account for the limited determinacy of legal doctrine, and the latter fails to account for the environmental constraints on judging posed by heavy caseloads and limited decisionmaking resources. Combining new institutionalist findings about the norms of judging with research on bounded rationality, the chapter proposes a judicial heuristics theory of decisionmaking that suggests that legal doctrine can influence judicial
allocation of governance authority even in the face of these constraints. Although the chapter’s basic argument is that legal factors matter, it also takes seriously theories of political influence. Therefore, it derives a series of hypotheses from the so-called “attitudinal” and “strategic” models of judicial decisionmaking, from realist and liberal theories of international relations, and from an emerging literature on pro-domestic-party bias in transnational litigation. As formulated in this chapter, the hypotheses are about judicial allocation of governance authority in general. In Chapters 3 and 4, they will be adapted to the specific contexts of judicial allocation of adjudicative authority under the doctrine of forum non conveniens and judicial allocation of prescriptive authority under various choice-of-law doctrines, and then tested empirically.

2.2 Theories of Legal Influence

2.2.1 “Positivist” and “New Institutionalist” Legalism

Why should one expect legal doctrine to influence judicial decisionmaking? According to what Gillman (2001, 471, 485) calls “positivist legalism,” law is understood as a set of clear and determinate rules that act as an external constraint on judges. Legal doctrine specifies which facts are relevant to a decision, and which decision should be made in light of those facts. The process of judicial decisionmaking is therefore simple and syllogistic: the judge begins with the applicable legal rule as a premise, applies that
rule to the facts of the case, and thus reaches a decision. From the perspective of positivist legalism, legal doctrine, whether expressed in constitutions, statutes, or judicial precedents, is the primary determinant of judicial decisionmaking.¹

Positivist legalism suggests two hypotheses about the relationship between legal doctrine and judicial allocation of governance authority. First, the facts that the applicable legal doctrine specifies as relevant to the choice between domestic and foreign authority should influence judges’ choices (H1-A). Suppose, for example, that the applicable legal doctrine, Doctrine #1, states that the choice should be based on factor A, and that if A=a, this factor weighs in favor of deference to foreign authority. According to this hypothesis, there should be a correlation between judges’ choices and factor A. More precisely, one would expect the likelihood of deference to foreign authority to be higher when A=a than otherwise. Second, different legal doctrines should be associated with different allocations of governance authority (H1-B). For example, suppose that according to Doctrine #2, the choice between domestic and foreign governance authority should be based on factor B. One would then expect the allocation of governance authority by judges applying Doctrine #1 to be different from the allocation of governance authority by judges applying Doctrine #2.

¹ George and Epstein (1992, 324) summarize this understanding as follows: “At its core, legalism centers around a rather simple assumption about judicial decision making, namely, that legal doctrine, generated by past cases, is the primary determinant of extant case outcomes.”
Positivist legalism, labeled the “legal model” by its critics (Segal and Spaeth 2002), is the focal point—and arguably a straw man (Rosenberg 1994, 7; Smith 1994, 8-9)—in the debate in the judicial decisionmaking literature about whether law has a significant influence on judges’ decisions. Critics claim that legal doctrine does not limit judges’ discretion (Segal and Spaeth 2002, 111). In legal realist terms, the problem is that legal doctrine, like all language, is indeterminate. It is rationally indeterminate; that is, legal doctrine often is insufficiently precise to justify a unique conclusion, and at one hypothetical extreme, it may justify any conclusion (Leiter 1996, 265). Moreover, to the extent legal doctrine is rationally indeterminate, it is also causally indeterminate; that is, it cannot constrain in the manner supposed by positivist legalism. As Leiter (1996, 267) explains: “[T]his follows immediately given two assumptions: first, that law exercises its causal influence through reasons; and second, . . . that reasons cannot be the sole cause of a decision if they do not uniquely justify that decision. . . . [I]f the law is rationally indeterminate on some point, then legal reasons justify more than one decision on that point: thus, we must look to additional factors to find out why the judge decided as he did.”

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2 Segal and Spaeth (2002, 48) define the legal model as positing that court decisions are based on “the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent.”

3 As Gillman (2001, 471) explains, “[t]his conception of law allowed many behavioralists to discount the significance of legal influences whenever it could be demonstrated that different judges reached different decisions . . . .”
In response to the indeterminacy claim and other criticisms, a new understanding of legal influence emerged, one called “postpositivist” or “new institutionalist” legalism (Clayton 1999; Gillman 2001). As Gillman (2001, 486) explains:

[P]ostpositivist legalists make claims, not about the predictable behavior of judges, but about their state of mind—whether they are basing their decisions on honest judgments about the meaning of law. What is postpositivist about this version is the assumption that a legal state of mind does not necessarily mean obedience to conspicuous rules; instead, it means a sense of obligation to make the best decisions possible in light of one’s general training and sense of professional obligation. On this view, decisions are considered legally motivated if they represent a judge’s sincere belief that their decision represents their best understanding of what the law requires.

What is institutionalist about this version of legalism is its emphasis on the norms embodied in the institution of judging (e.g. Clayton and Gillman 1999; Gillman and Clayton 1999; Smith 1988). Judges make decisions in an institutional context that informs the choices they make; they “believe that they are required to act in accordance with particular institutional and legal expectations and responsibilities” (Kahn 1999, 175-176). One of the norms constituting the institution of judging is the aforementioned obligation “to make the best decisions possible in light of one’s general training” and based on one’s “best understanding of what the law requires” (Gillman 2001, 486) or, as

4 The “new institutionalist” label is used in Clayton and Gillman (1999), and the “postpositivist” label is used in Gillman (2001).
described by Lindquist and Klein (2006, 136), to make “good-faith efforts to find the most persuasive solutions” to legal problems.⁵

According to Segal and Spaeth (2002, 48), this approach is no more productive than positivist legalism: “[t]o postpositive legalists, the only required influence of law is a subjective influence that resides within the justice’s own mind. Needless to say, this internal program is essentially nonfalsifiable . . . and provides almost no leverage as to which decisions judges will actually make.”⁶ But the limited determinacy of legal doctrine does not mean that it cannot constrain judicial decisionmaking. To the contrary, even if a doctrine is not sufficiently determinate to justify a unique decision in a particular case, it nevertheless limits the range of decisions that can be legally justified.⁷ As Lindquist and Klein (2006, 138) argue, “[E]ven where various interpretations . . . are possible, some will frequently be more plausible than others—not

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⁵ According to Burton (1992, xii), the norm of good faith judging does not rely on claims about the determinacy of legal doctrine: “It understands the law as a provider of legal reasons, not necessarily results. It understands the legitimacy of adjudication to depend on respect for the reasons, not agreement with the results, in cases. The good faith thesis claims that judges are bound in law to uphold the conventional law, even when they have discretion, by acting only on reasons warranted by that law as grounds for judicial decision.”

⁶ On the one hand, this criticism seems to go too far. As Lindquist and Klein (2006) demonstrate, postpositivist legalism does have observable implications that can be empirically tested; and conducting such a test, they find strong support for “the view that judges and justices engage in sincere efforts to find solutions that are persuasive according to a commonly held set of [legal] criteria” (2006, 156). On the other hand, Lindquist and Klein (2006, 156) concede that they “[do not] claim to have found direct evidence that the law as an independent entity shapes or constrains the justices’ decisions. Our argument and inferences concern only the justices’ motivations or mental processes.”

⁷ See also George and Epstein (1992, 326) (reviewing scholarship that has “stressed that the language of law (precedents, etc.) channels and constrains judicial choices”).
because the law mandates a particular conclusion, but because the methodological and professional conventions of judging make some arguments more persuasive than others.” Similarly, Dworkin (1986, 255-256) argues that judges consider different decisions and reject those that do not adequately fit with past official actions, particularly legislation and judicial precedent. In this way, fit provides “a rough threshold requirement” that a decision must satisfy if it is to be legally valid. Dworkin acknowledges that hard cases arise in which this threshold test might not discriminate between two or more possible decisions. Nevertheless, the test “will eliminate interpretations that some judges would otherwise prefer” (Dworkin 1986, 255).

New institutionalist legalism therefore implies that legal doctrine can constrain judicial decisionmaking even if it does not dictate outcomes. This understanding of legal influence is not inconsistent with the positivist legalism hypotheses discussed above—that the facts that applicable legal doctrine specifies as relevant to the choice between domestic and foreign authority should influence judges’ choices (H1-A) and that different legal doctrines should be associated with different allocations of governance authority (H1-B). However, as doctrinal indeterminacy increases, the range of legally persuasive arguments increases, and one would expect these hypothesized relationships between legal doctrine and judicial decisionmaking to become increasingly weak, to the extent that they may become difficult to discern. This consequence of
limited determinacy is likely to be particularly acute when the applicable legal doctrine takes the form of a standard, which provides a relatively low degree of ex ante specification of how a decision should be made, rather than a rule, which provides a relatively high degree of ex ante specification (Kaplow 1992, 562-563; Rühl 2006, 831-832; Schäfer and Lantermann 2005, 91).

But limited determinacy is not the only reason why legal doctrine might not have an observable effect on judicial decisionmaking. Generally speaking, the more time and effort a judge devotes to a particular decision—that is, the more exhaustively the judge researches and analyzes the applicable legal doctrine and the facts of the case—the higher the legal quality of the decision should be, and the stronger the relationship one would expect between doctrine and decision.\(^8\) The problem is that judges face a combination of heavy caseloads and limited decisionmaking resources that severely limits the amount of time and effort that they can devote to individual decisions. The workload of courts is heavy for all levels of the federal judiciary (Carp, Stidham, and Manning 2004, 52); but unlike the U.S. Supreme Court, district courts are unable to control their caseload. Since 1995 there have been approximately 400 to 500 pending

\(^8\) Of course, it is likely that judges eventually reach a point of diminishing returns on the decisionmaking resources they invest in a particular decision.
cases per judge in the U.S. district courts each year. Because judicial appointments have not kept pace with growing dockets, “federal judges, at both the trial and circuit court levels, are under severe resource and expertise constraints”; they face “an overwhelming caseload and limited time and resources with which to decide those cases” (Bainbridge and Gulati 2002, 86, 102). Simply put, judges have to make a vast number of legal decisions with a limited amount of decisionmaking resources. Under these circumstances, not only the limited determinacy of legal doctrine, but also the limited decisionmaking resources of judges, may weaken the relationship between legal doctrine and judges’ decisions.

2.2.2 A Judicial Heuristics Theory of Legal Influence

Is legal influence still possible when judges make decisions in an environment of limited doctrinal determinacy, heavy caseloads, and scarce decisionmaking resources? Research on bounded rationality suggests that the answer is yes. Beginning with the work of Herbert Simon (1955, 1956), this research has challenged theories of decisionmaking from neoclassical economics which assume, among other things, that decisionmakers “maximize”—that is, “that every actor possesses a utility function that induces a consistent ordering among all alternative choices that the actor faces, . . . that

\footnote{The data is from the Federal Court Management Statistics published by the Administrative Office of the U.S. Courts, available at http://www.uscourts.gov/fcmstat/index.html.}
he or she always chooses the alternative with the highest utility . . . [or] [i]f the choice situation involves uncertainties, . . . the actor will choose the alternative for which the expected utility is the highest” (Simon 1985, 295-296). As an alternative to such theories—which are sometimes called theories of “substantive” (Simon 1985, 294-297) or “comprehensive” (Jones 1999, 299) rationality—bounded rationality scholars have sought explanations of decisionmaking that “replace the global rationality of economic man with a kind of rational behavior that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist” (Simon 1955, 99). To that end, bounded rationality research focuses on decisionmaking “within the constraints imposed both by the external situation and by the capacities of the decision maker” (Simon 1985, 294).

The central conclusion of one branch of bounded rationality research is that decisionmakers adapt to the cognitive and environmental constraints of the real world by using decisionmaking shortcuts or rules of thumb called “heuristics” (Gigerenzer and Todd 1999; Kahneman and Frederick 2005). Like other models of bounded rationality, models of heuristic-based decisionmaking “dispense with the fiction of optimization,

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10 As Simon (1985, 296) further explained, “By expected utility of an alternative is meant the average of the utilities of different possible outcomes, each weighted by the probability that the outcome will ensue if the alternative in question is chosen.”
which in many real-world situations demands unrealistic assumptions about the knowledge, time, attention, and other resources available to humans” (Gigerenzer and Selten 2001, 4). In the language of cognitive psychology, heuristics involve a process of “attribute substitution”: “whenever the aspect of the judgmental object that one intends to judge (the target attribute) is less readily assessed than a related property that yields a plausible answer (the heuristic attribute),” individuals may substitute the former with the latter (Kahneman and Frederick 2005, 269). In plain English, “difficult questions are often answered by substituting an answer to an easier one” (Kahneman and Frederick 2005, 269). An essential feature of heuristic-based decisionmaking is that it conserves decisionmaking resources: heuristics “often provide an adequate solution cheaply whereas more elaborate approaches would be unduly expensive” (Conlisk 1996, 671). Consistent with the premises of bounded rationality, this allows decisionmakers to reach their decisions using realistic amounts of time, information, and computational resources (Gigerenzer and Todd 1999, 24).

Building on bounded rationality research, I argue that U.S. district court judges use heuristics to allocate governance authority. That judges are boundedly rational actors who use heuristics is not a novel proposition. Bainbridge and Gulati (2002), Beebe

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11 For example, “A professor who has heard a candidate’s job talk and now considers the question ‘How likely is it that this candidate could be tenured in our department?’ may answer the much easier question: ‘How impressive was the talk?’” (Kahneman and Frederick 2005, 269).
(2006), Guthrie, Rachlinski, and Wistrich (2001), and Segal (1986) have all found that judicial decisionmaking relies heavily on heuristics. Given the environment of judging, this is not surprising. Optimizing typically is out of reach for judges (Gigerenzer 2006, 40). As Carp, Stidham, and Manning (2004, 282) put it, due to heavy caseloads and limited resources, “a significant portion of [lower court] decision making must be done on the spur of the moment, without the luxury of lengthy reflection or discussion with staff or colleagues.” Similarly, as Guthrie, Rachlinski, and Wistrich (2001, 783) note, “judges make decisions under uncertain, time-pressured conditions that encourage reliance on cognitive shortcuts.”

More precisely, I argue that judges use a particular class of heuristics, which I call “judicial heuristics.” By judicial heuristics, I mean decisionmaking shortcuts that meet two conditions, one relating to decisionmaking costs, the other to legal quality. I do not mean to suggest that satisfaction of these conditions demonstrates that judges use a particular heuristic. Rather, these conditions are intended to facilitate ex ante identification of plausible judicial heuristics; whether judges in fact use them can then be investigated empirically.\textsuperscript{12}

\textsuperscript{12} In other words, I am not arguing that judicial heuristics can necessarily be deduced (although Gigerenzer and Todd (1999) suggest that this may be possible for some types of heuristics). However, I do suggest that by specifying their conditions, identifying possible judicial heuristics need not be a purely inductive exercise.
The first condition is that decisions based on the heuristic entail lower
decisionmaking costs than decisions based on comprehensive analysis of the applicable
legal doctrine and the doctrinally relevant facts. To use the cognitive psychology
terminology, the heuristic attributes must be easier to assess than the doctrinally-
specified target attributes. This condition follows from the very definition of heuristics
as decisionmaking processes that conserve decisionmaking resources. For example, say
the applicable legal doctrine, Doctrine #1, states that the judge shall defer to foreign
governance authority if $A=a$, $B=b$, and $C=c$, and otherwise shall assert domestic
governance authority. The set of target attributes $T$ is thus defined as $T=\{A, B, C\}$. Let
$D_A$, $D_B$, and $D_C$ represent the average decisionmaking costs incurred by the judge to
apply target attributes $A$, $B$, and $C$, respectively, such that $D_T=D_A+D_B+D_C$, representing
the total average decisionmaking costs incurred by the judge to make the decision based
on Doctrine #1. Let $H$ be the set containing the heuristic attributes, and let $D_H$
represent the total average decisionmaking costs incurred by the judge to make the
decision based on the heuristic attributes. The decisionmaking costs condition can then
be expressed as $D_H < D_T$.

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13 In this example, the doctrine takes the form of a rule. Alternatively, the legal doctrine might take the form
of a standard stating that the judge shall decide whether to defer to foreign governance authority or assert
domestic governance authority based on a consideration of factors $A$, $B$, and $C$.
14 I refer to average decisionmaking costs, because the actually decisionmaking costs in a particular case will
be a function not only of how easily the target attribute can be assessed, but also on the availability and
complexity of the relevant facts, which can vary from case to case.
The second condition is that decisions based on the heuristic achieve some minimally acceptable level of legal quality—that is, that they have a sufficiently persuasive legal justification.¹⁵ Let $L_{MIN}$ be the minimum level of legal quality to which a judge aspires, and let $L_H$ be the legal quality of decisions based on the heuristic. The legal quality condition can then be expressed as $L_H > L_{MIN}$.¹⁶ This condition is based on the assumption that a basic operative goal of judges is to make legally competent decisions, and that judges do not perceive decisions as being legally competent if they lack a persuasive legal justification.¹⁷ To a certain extent, this assumption is based on new institutionalist legalism’s argument that judges are motivated by a norm of good faith judging, according to which they have an “obligation to make the best decisions possible in light of one’s general training and sense of professional obligation,” and one’s “best understanding of what the law requires” (Gillman 2001, 486). But whereas this description of the norm of good faith judging can be understood as suggesting that judges maximize legal quality, the legal quality condition for judicial heuristics posits

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¹⁵ Scholars of bounded rationality differ regarding the extent of error costs entailed by the use of heuristics. One line of research focuses on the error costs that heuristics can produce in the form of biases (e.g. Kahneman, Slovic, and Tversky 1982), whereas another has generated models and empirical findings suggesting that heuristics do not necessarily entail significant losses of accuracy (e.g. Gigerenzer and Goldstein 1996; Gigerenzer and Todd 1999). Judicial heuristics, however, must not entail excessive legal error costs, for if they did, the legal quality condition would not be satisfied.

¹⁶ This notation is intended to express succinctly the relationship that underlies the legal quality condition, not to imply that either $L_H$ or $L_{MIN}$ can be easily quantified.

¹⁷ Baum (1997, 13-14) distinguishes the inherent goals of judges as people from the operative goals of judges that actually affect their judicial behavior.
only that decisions must be good enough to be legally competent. The goal of heuristics “is to find a good solution without the fiction of an optimal one” (Gigerenzer 2006, 20), and in this sense judges use judicial heuristics to satisfice, but not maximize, legal quality.

In addition to the normative grounds provided by new institutionalist legalism, the legal quality condition has instrumental foundations. As Baum (2006, 117) explains, “Judges spend most of their time interacting with members of their profession and their social groups. . . . Their self-esteem depends heavily on their perception of what these audiences think of them.” For this reason, judges seek a good professional reputation in the legal community (Bainbridge and Gulati 2002, 106-108; Baum 1994, 751-753; Posner 1993, 15). When judges make decisions that lack a persuasive legal justification, they attract negative attention, and their reputations suffer (Bainbridge and Gulati 2002, 

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18 Thus, one might restate Gillman’s (2001, 486) description of the norm of good faith judging as an “obligation to make the best decisions possible in light of one’s general training and sense of professional obligation,” and in light of one’s heavy caseloads and limited decisionmaking resources.

19 The term “satisfice” is used in two basic ways in the bounded rationality literature. First, it is used generally to refer to decisionmaking processes aimed not at maximizing expected utility, but rather at achieving some specified level of aspiration (Simon 1955, 107-110; 1956, 136). Based on this understanding, heuristics are types of satisficing devices (Gigerenzer and Goldstein 1996, 651) (referring to heuristics as “satisficing algorithms [that] operate with simple psychological principles that satisfy the constraints of limited time, knowledge, and computational might, rather than those of classical rationality”). I use the term here in this general sense. Second, however, the term is sometimes used specifically to refer to particular decisionmaking processes (sometimes called “satisficing heuristics” (Todd and Gigerenzer 1999 [chap. 16], 360)) whereby “[a]s soon as [the decisionmaker] has discovered an alternative for choice meeting his level of aspiration, he would terminate the search and choose that alternative” (Simon 1979, 503). Based on this understanding, satisficing can be a type of heuristic. See Gigerenzer and Todd (1999, 7) (distinguishing “satisficing heuristics” from “fast and frugal heuristics”).

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Their reputations may also suffer if their decisions are reversed by appellate court judges. Thus, the legal quality condition is based not only on a logic of appropriateness, but also on a logic of expected consequences (March and Olsen 1998). There are two basic ways of simultaneously satisfying the decisionmaking costs and legal quality conditions. The first is for the heuristic attributes to be a subset of the doctrinally-specified target attributes, so that $H \subseteq T$. I call these “subset heuristics.”

Given the set of target attributes $T = \{A, B, C\}$, as specified by Doctrine #1, plausible sets of heuristic attributes might include $H = \{A\}$ or $H = \{A, B\}$. In both instances, $D_H < D_T$ because $D_A < D_A + D_B < D_A + D_B + D_C$. Simply put, decisionmaking costs are saved because a judge using the heuristic analyzes less than all of the doctrinally-specified target attributes. Moreover, since a judge deciding based on the heuristic analyzes some of the same factors that are doctrinally specified, decisions based on the heuristic should be related to decisions based directly on the doctrine; and to the extent of such a relationship, the heuristic-based decision should be legally persuasive. Therefore, in this example it would be plausible to assume that $L_H > L_{MIN}$.

Without using the term, prior empirical research suggests that judges may use subset heuristics in doctrinal fields such as federal

\[20\] As Murphy, Pritchett and Epstein note, “[f]ew jurists have the temerity (or stupidity) to expose themselves to the scorn of fellow judges, scholars, and journalists by announcing decisions for which they cannot give good, even if controversial, reasons” (2002, 312).

\[21\] Of course, to assert the plausibility of this assumption falls far short of demonstration. As noted above, the purpose of these conditions is simply to facilitate the ex ante identification of plausible heuristics.
trademark law (Beebe 2006) and searches and seizures under the sixth amendment (Segal 1984).22

A second basic way of satisfying the two conditions is for the heuristic attributes to be related to one or more target attributes, such that decisions based on the former will be correlated with decisions based on the latter. I call these “correlational heuristics.” For example, $H=\{X\}$ is a plausible correlational heuristic if $X \notin T$; $D_X < D_A + D_B + D_C$ (satisfying the decisionmaking costs condition); and $X$ is correlated with one or more members of $T$, such that decisions based on the heuristic should be related to decisions based directly on the doctrine, again making it plausible to assume that the legal quality condition is satisfied.23

The judicial heuristics theory developed above suggests the following hypothesis about judicial allocation of governance authority: that the heuristic attributes specified by a particular judicial heuristic should influence judges’ choices between domestic and foreign authority (H2). For example, suppose that according to Heuristic #1, the

22 Beebe (2006, 1614) finds that judges deciding cases under the U.S. multifactor test for trademark infringement base their decisions on only a few of the factors, using them as heuristics to “short-circuit” the complete multifactor analysis. Segal (1986, 942) noted that more than 100 legal factors are relevant to search and seizure decisionmaking by U.S. Supreme Court justices, but found the justices in fact “monitor a relatively small number of facts from the case, and that the presence or absence of these facts strongly predisposes the justice in his decision” (1986, 942).
23 In addition to pure subset heuristics and pure correlational heuristics, there may be heuristics that specify a variety of heuristic attributes, some of which are members of $T$, some of which are correlated with members of $T$, and some of which are neither members nor correlated, provided the decisionmaking costs and legal error costs conditions are satisfied.
heuristic attribute is $X$, and $X=x$ weighs in favor of deference to foreign authority. One would expect there to be some correlation between the decisions and heuristic attribute $X$. One would also expect the likelihood of deference to foreign authority to be higher when $X=x$ than otherwise.

An important point is that like the legalist hypotheses derived above, the judicial heuristics hypothesis is a hypothesis about legal influences on judicial decisionmaking. As I have defined them, judicial heuristics are not just any heuristics. They are heuristics that not only reduce decisionmaking costs relative to comprehensive analysis of the applicable legal doctrine and the doctrinally relevant facts, but also lead to decisions that achieve a minimally acceptable level of legal quality. The resulting decisions must, in other words, be legally persuasive as well as relatively inexpensive. Judicial heuristics accomplish this by specifying heuristic attributes that are a subset of, or correlated with, doctrinally-specified target attributes. This link between legal doctrine and judicial heuristics means that the influences of these heuristics on judicial decisionmaking are legal influences. These legal influences are mediated by the realities of judging—including limited doctrinal determinacy, heavy caseloads, and limited decisionmaking resources. Nevertheless, the judicial heuristics theory of judicial decisionmaking that I have developed here suggests that legal influence is indeed possible even in the face of these environmental constraints.
2.3 Theories of Political Influence

2.3.1 The Attitudinal Model and the Role of Ideology

The dominant theory of judicial decisionmaking in the political science literature is known as the “attitudinal model” (Rohde and Spaeth 1976; Spaeth 1995; Segal and Spaeth 2002). According to the attitudinal model, the primary operative goal of judges is for their decisions to reflect their personal policy preferences (Spaeth 1995, 305). As summarized by its leading defenders, “This model holds that the Supreme Court decides disputes in light of the facts of the case vis-à-vis the ideological attitudes and values of the justices. Simply put, Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal” (Segal and Spaeth 2002, 86). Each justice has preferences concerning the policy issues faced by the Court, and makes the decision that approximates as nearly as possible those preferences (Rohde and Spaeth 1976, 72). Justices may pursue their personal policy preferences freely, because legal rules do not limit their discretion (although justices may use legal doctrine as a “cloak” to conceal the real bases for their decisions), they serve for life, they do not need to respond to public opinion, the president, or Congress, and there is no higher court (Segal and Spaeth 2002, 111; Spaeth 1995, 305-307).
To apply this assumption in specific doctrinal settings, different factual circumstances are mapped onto left-right ideological space. For example, in the search and seizure context, “[t]he less prior justification (probable cause or warrant) and the more severe the intrusion (home as opposed to car, or full search as opposed to frisk), the further to the right the search will fall. The more prior justification and the less intrusive the search, the further to the left it will be” (Segal, Songer, and Cameron 1995, 321). Next, the judges are placed in ideological space, according to whether they are liberal (left) or conservative (right); the point where each judge is located is called his or her indifference point. Although more complex methods have been used, a standard way of operationalizing a judge’s ideological position is to use the political party of the president who appointed him or her—Democrat or Republican—as a proxy (George and Epstein 1992, 328).24 According to the attitudinal model, a judge will approve searches to the left of his or her indifference point, but not those to the right. In this example, liberal justices are more likely to disapprove searches than their conservative colleagues (Segal, Songer, and Cameron 1995, 231).

The attitudinal model has found significant empirical support in both the Supreme Court (Segal and Spaeth 2002) and appellate court (George 1998) contexts. But as Segal and Spaeth acknowledge, the assumptions underlying the model do not

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24 See also George (1998, 1650-1655) (defending this approach, and surveying alternatives).
necessarily apply to lower courts. On the one hand, they maintain that the goals of district court judges do not necessarily differ from those of appellate court judges and Supreme Court justices; on the other hand, the constraints faced by those judges differ (Segal and Spaeth 2002, 111). For example, lower court judges are subject to the possibility of being overruled by a higher court, and they face incentives, such as the possibility of promotion, that do not apply to Supreme Court justices, but which limit the extent to which lower court judges are likely to pursue policy (Spaeth 1995, 313). These differences mean that lower-court judges may make decisions based on factors other than their personal policy preferences (Spaeth 1995, 313).

Nevertheless, the theoretical and empirical priors in support of the attitudinal model, and its central position in the judicial decisionmaking literature, demand that it be taken seriously in the study of U.S. district court decisionmaking. The challenge, then, is to map the choice between domestic and foreign governance authority onto left-right ideological space. The solution here is the following hypothesis (H3): Republican judges are less likely to defer to foreign governance authority than Democratic judges. This implication seems plausible in light of recent survey work conducted by the Pew Research Center for the People and the Press (2005a, 2005b). Republicans overall were

25 Some of these differences could, however, be built into strategic models of judicial decisionmaking. See, e.g., Segal, Songer, and Cameron (1995) (integrating current Supreme Court doctrine into a “hierarchical” model of appellate court decisionmaking).
more likely than Democrats to agree that the United States should follow its own national interests even when its allies strongly disagree and less likely than Democrats to agree that U.S. foreign policy should take into account the interests and views of allies (2005a, 21). If Republicans are less likely to consider the interests of other states, one might reasonably expect them to be less likely to defer to the governance authority of other states. Moreover, Republicans were less likely than Democrats to agree that “[t]he U.S. should mind its own business internationally and let other countries get along the best they can on their own” (2005b, 42). Thus, one might reasonably expect Republicans to be more likely to assert U.S. authority over transnational activity.

The problem with this approach is that it tests only the possibility that the allocation of governance authority has an intrinsic left-right ideological dimension. It may miss significant attitudinal effects that manifest themselves along the left-right dimension of policy issues that are affected by the choice between domestic and foreign governance authority in particular types of cases. For example, conservatives and liberals might have different preferences regarding the assertion of U.S. governance authority depending on the nature of the underlying transnational activity. Similarly, they may have different preferences depending on whether deference to foreign

26 Note, however, only the most ideologically driven groups within each party expressed views that differ significantly from the national average (Pew Research Center for People and the Press 2005a, 21).
authority in a particular case would benefit a plaintiff or a defendant, or an individual versus a business, or further policies relating to government regulation, consumer protection, or other policy areas with an identifiable left-right dimension. Thus, a serious effort to develop a sophisticated attitudinal model of judicial decisionmaking in the context of transnational judicial governance might build on political science research on the structure of foreign policy attitudes (e.g. Holsti and Rosenau 1990), or categorize decisions in terms of their underlying substantive policy implications rather than their implications for the allocation of governance authority. But I do not undertake that task here. Therefore, my approach can shed light only on the extent to which the attitudes of judges affect the allocation of governance authority in the aggregate, and not on the more subtle attitudinal effects that might be at play in transnational judicial governance.

2.3.2 The Strategic Model and the Domestic Political Environment

The strategic model of judicial decisionmaking shares the attitudinal model’s basic assumption that “justices, first and foremost, wish to see their policy preferences etched into law. They are . . . ‘single-minded seekers of legal policy’” (Epstein and Knight 1998, 9-10). However, in contrast to the attitudinal model’s emphasis on justices’ freedom to make decisions based on their personal preferences, the strategic

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27 The strategic model of judicial decisionmaking discussed here was developed specifically to explain the behavior of judges. Therefore, it is distinct from strategic theories of international relations, which generally seek to explain the behavior of states as unitary actors (e.g. Powell 1999).
model emphasizes the constraints that justices face. To maximize their preferences, justices must act strategically; that is, they must consider not only their own preferences, but also the preferences and actions of other political actors such as Congress, the president, and the public, with which the achievement of justices’ policy goals are interdependent (Epstein and Knight 1998, 12). Simply put, “the choices of justices can best be explained as strategic behavior, not solely as responses to either personal ideology or apolitical jurisprudence” (Epstein and Knight 1998, xiii).

An important implication of the strategic model is that the political environment has an influence on judicial decisionmaking. Congress and the president have a “vast array of powers over matters important to the Court” (George and Epstein 1992, 325). For example, Congress can propose constitutional amendments or pass legislation overriding court decisions. It also can use judicial salaries, impeachment, or legislative limits on jurisdiction to “punish” justices for their decisions—and although this rarely occurs, the possibility of such measures gives justices an incentive to consider the policy preferences of the other branches (Epstein and Knight 1998, 141-143). In addition, “government actors can refuse, implicitly or explicitly, to implement particular constitutional decisions, thereby decreasing the Court’s ability to create efficacious policy” (Epstein and Knight 1998, 144). Thus, the strategic model suggests that “Congress and the president affect Supreme Court decision making and that the
direction of their influence reflects their partisan composition” (George and Epstein 1992, 325).28

Based on the discussion above regarding the ideological implications of the international allocation of governance authority, the following hypothesis can be derived from the strategic model (H4): Judges are less likely to defer to foreign governance authority in a Republican political environment than otherwise. However, the caveats regarding the sufficiency of a left-right conception of allocation for evaluating the attitudinal model apply with equal strength to the strategic model.

2.3.3 Realist International Relations Theory and the Role of Power

Theories of international relations reinforce the attitudinal and strategic models’ emphasis on the political determinants of transnational judicial governance, but with a focus on power rather than ideology. The concept of power occupies a central place in international relations scholarship (Baldwin 2002). Indeed, a focus on power is one of the defining characteristics of realist theories of international relations. Morgenthau (1978, 5) assumes that “statesmen think and act in terms of interest defined as power”; Waltz (1979, 97-98) argues that the distribution of power among states is a fundamental structural variable affecting state behavior; Grieco (1988, 488) emphasizes that “states in

28 In addition to the executive and legislative branches, strategic choice models also have been developed to understand judges’ strategic interactions with colleagues on their own courts, judges on other courts, and public opinion (see, generally, Epstein and Knight 1998).
anarchy are preoccupied with power and security”; and Mearsheimer (2001, 2) posits that “[t]he overriding goal of each state is to maximize its share of world power.”

The emphasis on power is particularly strong in the structural realist literature, according to which the structure of the international system is anarchic—that is, it lacks a central authority that can enforce promises and prevent states from using power against each other (Grieco 1988, 497-498; see also Waltz 1979). According to some international relations and international law scholars, this account implies that international institutions in general, and international law in particular, affect state behavior only marginally (Goldsmith and Posner 2005; Grieco 1988; Waltz 1979). As Steinberg and Zasloff (2006, 74-75) describe this perspective, “state behavior and associated international outcomes may appear to be shaped by international law, but because international law mirrors the interests of powerful states, international law is merely an epiphenomenon of underlying power. . . . [I]nternational law may explain the

\[29\] As Grieco (1988, 488) puts it, a basic proposition of realism is that “international institutions affect the prospects for cooperation only marginally.”
details of process, but it has no autonomous power to explain international outcomes.”

Rather, it is state power that shapes outcomes. Because realist theory generally treats states as unitary actors, it is not clear from a realist perspective how national power should affect how domestic courts allocate governance authority. However, as Alter (2001, 40) notes, some scholars of the role of domestic courts in European integration argue that the national interest is the primary determinant of domestic court decisionmaking. If this is the case, then insofar as national interests are defined in terms of power, power should influence judges’ decisions. Moreover, as a general matter, the realist emphasis on power suggests that the likelihood of deference by one political actor to another should be greater when the second is more powerful than the first. Guzman and Simmons (2005) explore this basic logic to explain the probability that a state will file complaints with the World Trade Organization’s dispute resolution system. They hypothesize that the political costs of

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30 See also Krasner (1982, 190) (describing this perspective as claiming that institutions, “if they can be said to exist at all, have little or no impact. They are merely epiphenomenal. The underlying causal schematic is one that sees a direct connection between changes in basic causal factors . . . and changes in behavior and outcomes. Regimes are excluded completely, or their impact on outcomes and related behavior is regarded as trivial”).

31 See, e.g., Grieco (1990) and Krasner (1991), who explore the impact of state power on non-tariff trade barrier negotiations and international telecommunications regulation, respectively.

32 However, as Alter (2001, 40) notes, some scholars of European integration argue that the national interest is the primary determinant of judicial decisionmaking. If this is true, then to the extent power defines national interests, it also should influence the decisions of courts.

33 Although neither Guzman nor Simmons identify themselves as “structural realists,” this hypothesis follows from structural realist premises and shares with realism more generally an emphasis on the role of
filing a complaint are a function of the difference in power between the state filing the complaint and the state against which it is filed (2005, 569). The greater the power differential,“ they explain, “the greater the ability of the more powerful state to impose costs on the less powerful state . . . . The notion then is that less powerful states are reluctant to challenge more powerful states for fear of retaliation or retribution” (2005, 569). The same logic suggests that the more powerful a foreign state is, the more able it is to retaliate against a domestic state that fails to defer to the foreign state’s governance authority. This suggests the following hypothesis (H5): The greater the power of a foreign state, the more likely a domestic judge is to defer to its governance authority. It is important to reemphasize that realist assumptions alone do not logically require such an account of the impact of power on courts—after all, realist theories were developed to explain state behavior, not judicial behavior. Nevertheless, realism’s central place in international relations scholarship means that it cannot be ignored, particularly in an investigation of the role of law in world politics.

See also Steinberg (2002) (exploring the role of power in shaping bargaining outcomes in the GATT and WTO).

Their tests do not empirically support this hypothesis.

Weaker states can still harm stronger states. Therefore, this logic holds even if the foreign state is weaker than the domestic state: the greater the power of the foreign state, the smaller the power advantage of the domestic state, and the more able the foreign state is to effectively retaliate against the domestic state (even if the domestic state is relatively strong). Of course, it may be the case that even relatively powerful states rarely contemplate retaliation against states that do not defer to their governance authority. If so, then this power-oriented logic would not operate in transnational judicial governance in the manner hypothesized by Guzman and Simmons (2005) in the context of WTO dispute resolution.
2.3.4 Liberal Theory and the Politics of Regime Type

Beyond attitudes and power, Slaughter’s (1995, 2000; see also Burley 1992 and Slaughter Burley 1993, 232)\textsuperscript{37} liberal theory of international law suggests that a foreign state’s regime type may influence how domestic courts allocate governance authority.\textsuperscript{38} Building on the democratic peace literature (Russett and Oneal 2001) and liberal international relations theory (Moravcsik 1997), Slaughter argues that “the distinctive nature of political-military relations among liberal states has an analog in the legal relations among liberal states” (Burley 1992, 1909). More precisely, liberal international relations theory implies “that courts of liberal states handle cases involving other liberal states differently from the way they handle cases involving nonliberal states” (Burley 1992, 1917).\textsuperscript{39}

According to Slaughter’s theory, legal relations among liberal states are based on principles of tolerance and mutual accommodation. Because they share basic core values and institutions, liberal states inhabit what Slaughter refers to as a “zone of legitimate difference,” in which they generally “can disagree with the specific policy

\textsuperscript{37} Slaughter previously wrote under the names “Burley” and “Slaughter Burley.” For a critique of Slaughter’s theory, see Alvarez (2001).

\textsuperscript{38} Insofar as regime type has ideological foundations, liberal international law theory shares with the attitudinal and strategic models a focus on ideology. However, whereas liberal international law theory focuses on a liberal democracy/not liberal democracy distinction, the attitudinal and strategic models of judicial decisionmaking focus on a liberal/conservative distinction.

\textsuperscript{39} See also Slaughter (2000, 249) (insisting that “differences in domestic regime type drive differences in positive behavior”).
choices embedded in each other’s national laws but nevertheless respect those laws as legitimate means to the same ultimate ends” (Burley 1992, 1919). 40 In contrast, disagreements between liberal and nonliberal states are likely to fall outside the zone of legitimate difference because of their fundamentally different values and institutions (Burley 1992, 1920-1921). In addition, because courts in liberal states are unlikely to find similarly professional and independent courts in nonliberal states, there is little possibility of developing the sort of “reciprocal dialogue” that exists, at least figuratively, among the courts of liberal states (Burley 1992, 1921). Liberal international law theory thus suggests the following hypothesis (H6): Domestic judges in liberal democracies are more likely to defer to the governance authority of a foreign state if the foreign state also is a liberal democracy.41

2.3.5 Nationality and Pro-Domestic-Party Bias

Finally, nationality is a political factor that may influence how domestic courts allocate governance authority. Finding that U.S. parties are substantially more likely to prevail in patent litigation in U.S. courts than foreign parties, Moore (2003) concludes

40 On the other hand, liberal states also “recognize each other’s right to reject such laws when they transgress these common values” (Burley 1992, 1919). Slaughter explicitly suggests that the differential treatment by liberal states’ courts of other liberal states and nonliberal states should manifest itself in both international choice of law and forum non conveniens decisionmaking, which I examine in Chapters 3 and 4, respectively. 41 In her application of liberal international law theory to the Act of State Doctrine, Slaughter focuses on the implication that disputes between liberal and nonliberal states are more likely than those among liberal states to be dealt with politically rather than judicially (Burley 1992).
that U.S. judges and juries exhibit a “xenophobic bias.” Similarly, Bhattacharya, Galpin, and Haslem (2006) find that U.S. corporate defendants are less likely to lose than foreign corporate defendants in U.S. federal courts. In contrast, Clermont and Eisenberg (1996; 2007) identify no such pro-domestic party bias. In fact, they provide evidence that foreign parties fare better than U.S. parties when they litigate in the United States: there is, according to them, xenophilia rather than xenophobia in U.S. courts. Although the empirical evidence is mixed and the theoretical basis for bias underdeveloped, the intuition that domestic judges may favor their fellow citizens is strong (Clermont and Eisenberg 1996, 1120-1121) and the normative implications of possible bias are important (Clermont and Eisenberg 2007, 441). Therefore, I take seriously the possibility of pro-domestic-party bias. This suggests the following hypothesis (H7): When a U.S. party and a non-U.S. party disagree about the allocation of governance authority, a U.S. judge is more likely to decide in favor of the U.S. party than the non-U.S. party.  

### 2.4 Conclusions

Transnational judicial governance, including judicial allocation of governance authority among states, is intrinsically political. But are its determinants also political? Or might they instead be legal? According to positivist legalism, legal doctrine is an

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42 For example, a judge would be more likely to defer to foreign governance authority if the U.S. party prefers foreign authority, and more likely to assert domestic governance authority if the U.S. party prefers domestic authority.
external constraint on judicial decisionmaking, and should have a direct effect on judges’ choices between domestic and foreign governance authority. However, the limited determinacy of legal doctrine poses a challenge to this approach. Responding to this challenge, new institutionalist legalists turned their attention to a basic norm of judging: the obligation to make decisions based on one’s best understanding of the law. To the extent judges are indeed motivated by this norm, one might expect a relationship between legal doctrine and judicial decisionmaking notwithstanding the problem of limited determinacy.

But there is another challenge that legalists have yet to address, namely the environmental constraints imposed on judges by their heavy caseloads and limited decisionmaking resources. I have proposed a theory of judicial decisionmaking according to which judges adapt to these constraints by using judicial heuristics. Moreover, I have argued that the links between legal doctrine and judicial heuristics mean that the influences of these heuristics on judicial decisionmaking are legal influences. These legal influences are mediated by the realities of judging, including limited doctrinal determinacy, heavy caseloads, and scarce decisionmaking resources. Nevertheless, the judicial heuristics theory of judicial decisionmaking suggests that legal influence is indeed possible even in the face of these constraints. A broader implication is that research designs that test only for the sort of direct doctrinal effects contemplated
by positivist legalism may miss heuristic effects, thus underestimating the extent of legal influence.

Although my basic theoretical claim is that legal factors influence judicial allocation of governance authority, this is not to deny that other factors may also be important. The two leading approaches in the judicial decisionmaking literature, the attitudinal model and the strategic model, draw attention to the impact that political attitudes may have on judges’ decisions. Theories of international relations conceive of politics differently: realist theory points to the role of power, and liberal theory to the role of regime type, in judicial allocation of governance authority. Finally, recent research on pro-domestic-party bias suggests that domestic courts may favor domestic nationals when choosing between domestic and foreign governance authority.

The general hypotheses derived from these theories are summarized in Table 2.1. In Chapters 3 and 4, they are refined and tested. Chapter 3 does so in the context of judicial allocation of adjudicative authority under the doctrine of forum non conveniens. Chapter 4 follows by testing the hypotheses in the context of judicial allocation of prescriptive authority under various choice-of-law doctrines.
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3. Domestic Courts, Forum Non Conveniens, and International Allocation of Adjudicative Authority

3.1 Who Adjudicates?

As Miles Kahler (2004, 3) puts it, first and prior to all other questions about global governance is “Who governs?” This chapter focuses on how domestic courts answer the “who adjudicates” variant of that question. Plaintiffs often ask domestic courts to adjudicate disputes arising from activity that has both domestic and foreign connections. Under what circumstances are domestic courts likely to dismiss such disputes in favor of a foreign court, thus deferring to foreign adjudicative authority, instead of keeping the case and asserting domestic adjudicative authority?¹

As the pervasiveness of forum shopping in transnational litigation suggests (Bell 2003),² the answer to the “who adjudicates” question is important from the perspective

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¹ As explained in Chapter 1, this dissertation focuses on how domestic courts allocate governance authority—including adjudicative authority—among states. However, domestic courts also allocate adjudicative authority between state and nonstate actors. For example, when a plaintiff initiates transnational litigation in a domestic court, a defendant may argue that on the basis of a preexisting contract between the parties, the dispute must be submitted to private arbitration. The court would then need to decide whether to enforce the agreement to arbitrate (thus deferring to private adjudicative authority), or to refuse to enforce the agreement and adjudicate the dispute itself (thus asserting public adjudicative authority). On the enforcement of arbitration agreements and arbitral judgments, see generally Born and Rutledge (2007, chap. 13).

² “Forum shopping” generally refers to a party’s “search for the forum that is most advantageous for him” (Von Mehren 2003, 310). On forum shopping in transnational litigation, see generally Bell (2003). See also
of individual litigants. Clermont and Eisenberg (1995, 1998) find a strong “forum effect” in domestic litigation in U.S. federal courts: when the plaintiff’s initial choice of forum is defeated, its chance of winning decreases substantially. Choice of forum is even more important in transnational litigation, due to the “[s]hifting inconveniences and changing biases” associated with a move from a domestic court to a foreign court (or vice versa), not to mention possible differences in applicable law (Clermont 2005, 83).

The “who adjudicates” question is also important from a governance-oriented perspective. When domestic courts answer it, they allocate one of the basic elements of governance authority—namely, adjudicative authority. This, in turn, can affect how both economic resources and the negative externalities of economic activity are distributed across states (Muir Watt 2005, 296-297). In particular, some legal scholars have argued that since litigation in the United States generally is more favorable for plaintiffs than litigation abroad, “[s]ubjecting United States defendants to suit here by foreigners injured abroad places [U.S.] companies at a world-wide competitive advantage.”

Robertson and Speck (1990, 978) (“[t]he battle over where litigation occurs is typically the hardest fought and most important issue in a transnational case; if the defendant wins this battle, the case is often effectively over”) and Stein (1985, 783) (“[t]he choice of forum has . . . become a key strategic battle fought to increase the chances of prevailing on the merits”).

3 “[L]a régulation de la compétence juridictionnelle internationale peut être de nature à influer directement sur les flux transfrontières de coûts et de resources.” Muir Watt (2005, 296). For example, Muir Watt (2005, 297) argues that forum non conveniens dismissals by U.S. courts in favor of foreign courts in cases involving damage caused in a foreign state by the transnational economic activity of U.S. firms effectively externalizes some of the costs of that activity.
disadvantage” (Weintraub 1994, 352). Moreover, as explained in Chapter 1, by making decisions about the allocation of adjudicative authority in particular cases, domestic courts provide information about how adjudicative authority is likely to be allocated under similar circumstances in the future, thus influencing the strategic behavior of transnational actors more generally.⁵

The process of allocating adjudicative authority begins when the plaintiff chooses to file a complaint against the defendant in a U.S. federal district court. Next, the defendant may seek to defeat the plaintiff’s initial choice of forum using a variety of techniques. For example, the defendant may file a motion asking the judge to dismiss the case on the grounds that the court lacks jurisdiction over the defendant (that is, it lacks “personal jurisdiction”) or over the subject matter of the dispute.⁶ However,

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⁴ According to Weintraub puts it (1994, 323): “Simply put, compared with foreign courts, United States forums offer a plaintiff both lower costs and higher recovery. Factors reducing the plaintiff’s costs are the contingent fee for the plaintiff’s attorney and, if the plaintiff loses, no liability for the defendant’s attorney’s fee. Factors likely to provide the plaintiff with a larger recover are: (1) more extensive pretrial discovery than is available anywhere else in the world; (2) liability law that is more likely than foreign law to allow recovery and allow it for more elements of harm; (3) choice-of-law rules that are more likely than foreign rules to select the United States law that is favorable to the plaintiff; and (4) trial by jury.”

⁵ See Chapter 1, section 1.2.4. See also Muir Watt (2005, 302) (discussing the relationship between forum non conveniens and forum shopping), Stein (1985, 783) (noting how evolving doctrines of jurisdiction and venue have “increase[d] the opportunities and incentives of parties to forum shop”), and Whincop and Keyes (2001, 127-128) (arguing that “[jurisdictional procedures designed to control the selection of excessively costly forums (such as applications to stay proceedings on forum non conveniens grounds) may themselves affect the level of strategic behavior, including the nature of bargaining in jurisdictional trade”).

⁶ Federal Rules of Civil Procedure, Rule 12(b)(2) provides for motions to dismiss for lack of jurisdiction over the defendant (that is, for lack of personal jurisdiction), and Rule 12(b)(1) provides for motions to dismiss for lack of subject matter jurisdiction. A defendant may also seek to transfer the case to another forum within the United States (see, e.g., 28 U.S.C. §1404 and §1406).
even if the judge finds that the court does have jurisdiction, another technique is
available: the defendant can file a motion asking the judge to dismiss the case in favor of
a more appropriate foreign court based on the doctrine of forum non conveniens.\(^7\)
Under this doctrine, “a federal district court may dismiss an action on the ground that a
court abroad is the more appropriate and convenient forum for adjudicating the
controversy.”\(^8\) A decision to grant a motion to dismiss on forum non conveniens
grounds is a decision that “a foreign tribunal is plainly the more suitable arbiter of the
merits of the case.”\(^9\) Thus, “the doctrine furnishes criteria for choice” between a
domestic forum and a foreign forum.\(^10\)

This chapter provides the first systematic empirical examination of how U.S.
district court judges allocate adjudicative authority in transnational litigation. It focuses
on judicial application of the doctrine of forum non conveniens. Although domestic
court decisions about personal and subject matter jurisdiction play a significant role in
the international allocation of adjudicative authority (Stein 1985), forum non conveniens
decisionmaking is a particularly appropriate object of analysis for the purposes of this

\(^7\) For detailed discussions of the forum non conveniens doctrine, see Born and Rutledge (2007, chap. 4) and
Wright, Miller, and Cooper (2007, 614-746).
\(^8\) Sinochem International Co. v. Malaysia International Shipping Corp., 549 U.S. _ (2007) (slip opinion
\(^9\) 549 U.S. _, slip op. at 1.
U.S. 443, 454 (1994) (describing forum non conveniens as a doctrine for “determining which among various
competent courts will decide the case”).
dissertation. Unlike U.S. doctrines of jurisdiction, which are unilateral in the sense that “[t]hey determine whether the courts of a state have jurisdiction or not, regardless of whether the courts of other states also have jurisdiction,” the forum non conveniens doctrine is multilateral: it explicitly calls for a choice between a domestic court and a foreign court (Michaels 2006b, 1036-1035). Moreover, with its incorporation of both private interest and public interest factors—both of which will be discussed below in more detail—the forum non conveniens doctrine explicitly addresses both the litigant-oriented and governance-oriented implications of the allocation of adjudicative authority.

This chapter is motivated by two basic goals. First, beyond merely analyzing the forum non conveniens doctrine, it seeks to describe how U.S. district court judges apply that doctrine to allocate adjudicative authority in practice. Second, in addition to the descriptive task, the chapter attempts to explain why U.S. district court judges allocate adjudicative authority the way they do. In particular, to what extent do legal versus political factors influence forum non conveniens decisionmaking? The chapter proceeds as follows. First, it introduces the sample of forum non conveniens decisions used in the

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11 See also Stein (1985, 786) (describing forum non conveniens as “a means of allocating political authority”).
12 See Burbank (2004) (emphasizing the transnational regulatory implications of the forum non conveniens doctrine). In addition, the policies underlying the forum non conveniens doctrine appear to include deterrence of forum shopping. See Piper v. Reyno, 454 U.S. 235, 251-252 (1981) (noting the doctrine’s role in discouraging forum shopping).
chapter’s empirical analyses, and describes the domestic-foreign dimension of variation in the allocation of adjudicative authority in the forum non conveniens context. Then, refining the general hypotheses developed in Chapter 2, it specifies a series of hypotheses about the legal and political determinants of judicial allocation of adjudicative authority under the forum non conveniens doctrine. Next, it explains the data and methods used to evaluate the hypotheses, and presents and discusses the results. The chapter concludes by summarizing its key findings.

3.2 Variation in Judicial Allocation of Adjudicative Authority

For reasons of both legal doctrine and positive theory, one might expect U.S. federal district court judges to defer only rarely to foreign adjudicative authority in the forum non conveniens context. In one of its leading cases on forum non conveniens, the U.S. Supreme Court stated that “a plaintiff’s choice of forum should rarely be disturbed.”13 The court has also emphasized that “[a] defendant invoking forum non conveniens ordinarily bears a heavy burden in opposing the plaintiff’s chosen forum.”14 Likewise, scholars of transnational litigation have noted the “high hurdle” facing defendants seeking forum non conveniens dismissals (Bermann 2003, 93) and

14 Sinochem, 549 U.S. __slip op. at 6.
emphasized that the doctrine “make[s] it clear that dismissal of the action is to be the exception, not the rule” (Wright, Miller, and Cooper 2007, 647). From the perspective of positive theory, Alter (2001, 45) argues that “[j]udges are primarily interested in promoting their independence, influence, and authority.” This suggests that judges would ordinarily deny motions to dismiss on forum non conveniens grounds, thus asserting their authority to adjudicate transnational disputes and preserving their ability to influence transnational activity. On the other hand, dismissals in favor of foreign courts should be rare, since this would go against the interest judges have in promoting their influence and authority.

But how often do judges actually defer to foreign adjudicative authority? To find out, I created a random sample of published forum non conveniens decisions made by U.S. district court judges. The sample was generated in three steps. First, I searched the LexisNexis Academic database of U.S. district court decisions for the term “forum non conveniens” between 1990 and 2005. Second, I randomly sorted the results. Third, I analyzed each case in the randomly generated order, discarding those that were not

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15 For a discussion of the potential threats to inference posed by my reliance on published decisions, see section 3.6.3 below.
16 By published decisions, I mean decisions published in the Federal Supplement reporter or in the LexisNexis electronic database. The latter includes all of the former, as well as decisions not published in the Federal Supplement. The restriction of the analysis to the post-1990 period helps control for the effect that post-Cold War changes to the international system may have had on judicial allocation of governance authority; and, in the interest of policy relevance, it places an emphasis on contemporary judicial behavior.
actual decisions by U.S. district court judges to either grant or deny a motion to dismiss in favor of a foreign court on forum non conveniens grounds, until I had a sample of 210 decisions. Discarded cases included decisions on motions to transfer from one U.S. district court to another under the federal change-of-venue statute rather than motions to dismiss in favor of a foreign court, but which nevertheless used the term “forum non conveniens”; decisions made by magistrate judges rather than district court judges; and decisions in which a forum non conveniens issue was discussed, but no forum non conveniens motion was granted or denied. To indicate whether each decision in the sample is a decision to defer to foreign adjudicative authority, I created the variable “Deference to Foreign Adjudicative Authority,” and coded it as 1 if the decision was to grant the motion (thus dismissing the case in favor of a foreign court), and 0 if the

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17 To obtain this number, I had to screen 848 cases out of a total of 2,791 hits for the search term “forum non conveniens.” Thus, I estimate that there are a total of 691 actual forum non conveniens decisions in the LexisNexis database between 1990 and 2005, with my dataset constituting 30% of those decisions. This screening approach is based on Koremenos (2005, 554).
19 Exceptions were made in two cases in which the magistrate judge was authorized to enter a final order. Ordinarily, magistrate decisions are merely recommendations to district court judges which the latter may or may not adopt.
20 Decisions granting motions to dismiss on both forum non conveniens grounds and alternative grounds (such as lack of personal jurisdiction) were included. There are six such observations in my dataset. However, there are no observations in my dataset in which a forum non conveniens motion was denied, but the case was dismissed from the U.S. district court on alternative grounds, with the exception of two observations. In the first observation, the court denied the forum non conveniens motion but dismissed the case without prejudice for failure to join a necessary and indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure. In the other, the court denied the forum non conveniens motion but granted a motion to remand the case from the U.S. district court back to the U.S. state court in which the suit originally was brought.
decision was to deny the motion (thus keeping the case and asserting domestic adjudicative authority). Table 3.1.

The results are summarized in Table 3.1. U.S. district court judges defer to foreign adjudicative authority at an estimated rate of 47 percent in published decisions. However, one cannot attribute too much meaning to this estimate without understanding potential selection effects. For example, because the U.S. legal system often offers substantial pro-plaintiff advantages, plaintiffs may file many cases in U.S. district courts even under circumstances in which the probability of defeating a forum non conveniens motion is low. If so, the 47 percent rate is not necessarily surprising, notwithstanding Supreme Court precedents emphasizing that a plaintiff’s choice of forum should rarely be disturbed. On the other hand, because filing a motion to dismiss on forum non conveniens grounds ordinarily will be a relatively inexpensive element of

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21 For a discussion of the difficulties that selection effects pose for the interpretation of win rates in litigation, see Clermont and Eisenberg (2002). Early work on selection effects suggested that plaintiff win rates at trial should approach 50 percent, regardless of the substantive standard of law (e.g. Priest and Klein 1984)—this is sometimes called the “50 percent hypothesis.” The 47 percent dismissal rate might be interpreted as evidence in support of the 50 percent hypothesis. However, subsequent positive theoretical and empirical research seriously challenges the 50 percent hypothesis. Due, among other things, to asymmetric information and differential stakes for opposing parties, not to mention the existence of legal standards that sometimes favor plaintiffs and sometimes defendants (whether explicitly in statements of legal doctrine or, as I would emphasize, as applied by judges even if not doctrinally explicit), “reality is too complicated to produce a 50% win rate” (Clermont and Eisenberg 2002, 138). Therefore, even if various selection effects might help explain the forum non conveniens dismissal rate, the 50 percent hypothesis would not seem to provide an adequate explanation.
an overall defense strategy, defendants may file many such motions even under
circumstances in which the probability of prevailing is low. If so, the 47 percent rate
would be even more striking than in light of Supreme Court precedents alone.

| Number of Decisions to Defer to Foreign Adjudicative Authority | 99 |
| Percent of Total Decisions                                      | 47.1 |
| 95 Percent Confidence Interval                                  | 40.5, 53.9 |

Note: N=210

Beyond potential selection effects relating to litigants’ choices, there may be
selection effects relating to judges’ choices—particularly, their decisions whether or not
to publish their decisions. It is possible that judges feel a greater need to announce
publicly their reasons for granting forum non conveniens motions than to do so when
denying them (precisely because the Supreme Court precedents indicate that dismissal
should be the exception).22 If so, dismissals may be overrepresented in my sample,

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22 I thank Kevin Clermont for his suggestions on this point. See also Reynolds (1992, 1690) (“Opinions that
granted the motion to dismiss were generally better than those denying it. This circumstance is easy to
explain: the consequences of the dismissal for the plaintiff generally will be greater than the consequences
for the defendant if the motion is denied; the court, therefore, is likely to take more care in explaining its
result”).
because it includes only published decisions. More specifically, it is possible that dismissal rates in unpublished decisions may be lower than the 47 percent rate estimated for published decisions. On the other hand, it is possible that in cases which judges perceive to be particularly important, judges are more likely to publish their decisions (Olson 1992, 796-797) but less likely to grant motions to dismiss on forum non conveniens grounds.23 If so, dismissals may be underrepresented in my sample. This raises the possibility that dismissal rates in unpublished cases may be higher than the 47 percent rate estimated for published decisions. The important point is that dismissal rates may not be the same in published and unpublished cases, and that one should use caution when generalizing my descriptive inferences about these rates from my sample of published forum non conveniens decisions to the overall population of forum non conveniens decisions.

From a governance-oriented perspective, however, it is published cases which are of the greatest importance, for it is these cases that provide information that can influence the strategic behavior of transnational actors beyond the parties to particular disputes. From this perspective, a 47 percent dismissal rate sends a clear signal to

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23 The second possibility is based on the forum non conveniens doctrine itself, which specifies the local public interest in adjudicating a dispute as a factor to weigh when deciding whether to dismiss a case in favor of a foreign court. It also is based on the proposition that judges seek to promote their influence (Alter 2001, 45): judges motivated by this goal might be expected to keep cases that are particularly important, although strategic considerations may sometimes lead to different results.
transnational actors that U.S. district courts are willing to defer to foreign governance authority by dismissing cases in favor of foreign courts, and to do so frequently. Thus, published decisions are only part of the picture, but for purposes of this dissertation, they are the most important part of the picture. And, from the perspective of positive theory testing, the key point is that there is variation: domestic courts sometimes assert domestic adjudicative authority, and sometimes defer to foreign adjudicative authority. It is that variation which the remainder of this chapter attempts to explain.

3.3 Law and Politics in Judicial Allocation of Adjudicative Authority

3.3.1 Legal Influences

3.3.1.1 The Forum Non Conveniens Doctrine and Legalist Theory

As discussed in Chapter 2, one of the general hypotheses derived from legalist theory is that the facts that the applicable legal doctrine specifies as relevant to the choice between domestic and foreign authority should be correlated with judges’ choices.24 In the forum non conveniens context, the applicable legal doctrine is the

24 Hereafter, I generally do not distinguish between positivist legalism and new institutionalist legalism, because both of them provide a basis for hypothesizing the existence of a relationship between legal doctrine and judges’ decisions (although, as discussed in Chapter 2, new institutionalist legalism would seem to suggest that the relationship should be weaker than that posited by its positivist counterpart).
doctrines of forum non conveniens as stated by the U.S. Supreme Court. This doctrine specifies three sets of criteria upon which a U.S. district court judge’s decision should be based.

First, “[a]t the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum.”25 According to the Supreme Court, “Ordinarily, this requirement will be satisfied when the defendant is ‘amenable to process’ in the other jurisdiction.”26 Because a plaintiff presumably bases its initial choice of forum largely on the legal advantages offered by that forum relative to alternative forums, the law applicable in the alternative forum often will be less favorable to the plaintiff—if such unfavorable changes were a relevant factor, then “the forum non conveniens doctrine would become virtually useless.”27 However, “[i]n rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.”28

27 Piper, 454 U.S. 235, 250 (explaining that “[m]any plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in the substantive law is given substantial weight in the forum non conveniens inquiry, dismissal would rarely be proper”).
28 Piper, 454 U.S. 235, 254-255 (clarifying that “[w]e do not hold that the possibility of an unfavorable change in law should never be a relevant consideration in a forum non conveniens inquiry. Of course, if the remedy
Second, the district court judge must consider a list of private and public interest factors that are intended “[t]o guide trial court discretion.”\textsuperscript{29} The relevant factors, described by the U.S. Supreme Court in one of its seminal forum non conveniens decisions, are the following:

An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, “vex,” “harass,” or “oppress” the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed.

Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice”).

\textsuperscript{29} Piper, 454 U.S. 235, 241. See also 454 U.S. 235, 257 (“The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference.”).
law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.\textsuperscript{30}

Finally, the district court must consider the nationality of the plaintiff. In the forum non conveniens context, “there is ordinarily a strong presumption in favor of the plaintiff’s choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum.”\textsuperscript{31} However, “the presumption applies with less force when the plaintiff . . . is foreign.”\textsuperscript{32} According to the Supreme Court, “a plaintiff’s choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient.”\textsuperscript{33} In contrast, “When the plaintiff is foreign . . . this assumption is much less reasonable. Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference.”\textsuperscript{34}

\textsuperscript{30} Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-509 (1947) (footnotes omitted). See also Piper, 454 U.S. 241, note 6 (reiterating these factors).
\textsuperscript{31} 454 U.S. 235, 255-256.
\textsuperscript{32} 454 U.S. 235, 256.
\textsuperscript{33} 454 U.S. 235, 256.
\textsuperscript{34} 454 U.S. 235, 256. The court emphasized, however, that “[a] citizen’s forum choice should not be given dispositive weight . . . . Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial is in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.” 454 U.S. 235, 256. The Supreme Court refers here to conveniences, the doctrine’s name itself invokes the notion of convenience, and the private interest factors focus on convenience to the parties (e.g. ease of access to proof). However, the more general concern of the
From the perspective of legalist theory, then, it is these three groups of factors that should influence judicial allocation of adjudicative authority in the forum non conveniens context. However, most of the forum non conveniens factors do not exist independently from the judge’s analysis. That is, they are not strictly factual. Rather, they involve subsidiary judgments about the legal implications of various facts. For example, the availability of a foreign forum, the adequacy of the remedy it provides, ease of access to evidence, whether a judgment will be enforceable, administrative difficulties, jury burden, and familiarity with the applicable substantive law are not mere facts, but criteria for evaluating facts that are not specified in the doctrine itself. Therefore, it would be difficult to determine whether these factors have an independent effect on judges’ decisions.\textsuperscript{35}

But there is one forum non conveniens factor that does lend itself to such a determination: the nationality of the plaintiff. Nationality is, of course, a legal concept that will sometimes require subsidiary legal judgments. In practice, however, the

document is with identifying the more appropriate forum. See Michaels (2006b, 1036) (under the forum non conveniens doctrine “a court can decide not to exercise jurisdiction if it finds itself to be an inappropriate forum and if there is a clearly more appropriate form elsewhere”) and Von Mehren (2003, 317) (the doctrine “allows, where an appropriate alternative forum is available, a court to stay—and ultimately refuse to hear—a case within its adjudicatory authority on the basis that it is, in the circumstances, not an appropriate forum”).

\textsuperscript{36} It is, on the other hand, easy to determine whether these factors are mentioned in a judge's opinion, which is something that I do below. However, the mere mention of a factor does not reveal whether it is an ex ante reason for a judge’s decision, as legalist theory would suggest, or an ex post rationalization for a decision already made (see Segal 1984, 894).
nationality of the plaintiff rarely is in question in the forum non conveniens context.\textsuperscript{36} Thus, unlike the other forum non conveniens factors, nationality generally can—at least as a practical matter—be treated as a fact. Recalling that the forum non conveniens doctrine as stated by the U.S. Supreme Court explicitly states that more deference is owed to a U.S. plaintiff’s choice of a U.S. forum than a foreign plaintiff’s choice of a U.S. forum, this implies the following testable hypothesis:

\textbf{FNC-1 (Legalist Theory):} A judge is less likely to dismiss a case in favor of a foreign court when there is a U.S. plaintiff than when there is not.

\textit{3.3.1.2 The Forum Non Conveniens Doctrine and Judicial Heuristics Theory}

In opposition to the legalist account, there is no shortage of forum non conveniens skeptics who argue that the effect of the doctrine, if it has any influence at all, is to create disorder.\textsuperscript{37} In his dissent in \textit{Gulf Oil Corp. v. Gilbert}, one of the Supreme Court’s seminal forum non conveniens decisions, Justice Black argued that the doctrine would only generate “uncertainty, confusion, and hardship,” and that “[t]he broad and indefinite discretion” the doctrine leaves to the federal courts based on “a welter of factors . . . will inevitably produce a complex of close and indistinguishable decisions

\textsuperscript{36} For example, in my forum non conveniens dataset, there were only four cases in which the nationality of a party was unclear.

\textsuperscript{37} However, given the relative clarity of the concept of nationality, even these skeptics may find the hypothesis just derived from this account to be plausible.
from which accurate prediction of the proper forum will become difficult, if not impossible.” 38 More recent commentary agrees. Justice Scalia argues that “[t]he discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, make uniformity and predictability of outcome almost impossible.” 39 Robertson (1994, 359), in an article entitled “The Federal Doctrine of Forum Non Conveniens: ‘An Object Lesson in Uncontrolled Discretion,’” comments that with its “non-exhaustive, unweighted, and unranked listing of factors,” the doctrine “does not afford much if any doctrinal guidance, particularly when virtually every factor on the list is itself somewhat vague and amorphous.” 40 Stein (1985, 785) laments the “crazy quilt of ad hoc, capricious, and inconsistent decisions” the doctrine has produced.

The judicial heuristics theory developed in Chapter 2 suggests that forum non conveniens decisionmaking may exhibit more order than these skeptics suggest. The very nature of the forum non conveniens doctrine implies that its application entails high decisionmaking costs, which puts pressure on judges to use techniques such as heuristics. The doctrine specifies a large number of factors to be analyzed. As discussed above, most of these factors require subsidiary legal judgments. The doctrine as a whole

40 Indeed, Robertson (1994, 360) suspects that “some of the key determinants are not even on the ‘multifarious list.’”
is far more standard-like than rule-like—that is, it provides a very low level of ex ante specification of the proper decision—which implies relatively high decisionmaking costs (Kaplow 1992, 562-563; Rühl 2006, 831-832; Schäfer and Lantermann 2005, 91).

The question then becomes, are there heuristics that judges might use in lieu of comprehensive legal and factual analysis under the forum non conveniens doctrine? Concepts of territoriality and nationality have played an important role in the historical development of doctrines of adjudicative jurisdiction.⁴¹ Therefore, even if the forum non conveniens doctrine does not explicitly refer to territoriality and nationality, one might expect these concepts to cross judges’ minds as they make decisions involving the allocation of adjudicative authority—they are, to use the language of heuristics research, “accessible.”⁴² For example, according to a heuristic based on territoriality, the heuristic attribute would be the locus of the activity giving rise to the litigation, and the greater the extent to which that activity occurred outside U.S. territory, the more strongly this

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⁴¹ See, e.g., Michaels (2004, 105) (“[t]erritory has long shaped our thinking about adjudicative jurisdiction”); Michaels (2006b, 1057) (“[t]erritoriality is still central to jurisdictional thinking”); and Restatement of the Law, Third, Foreign Relations Law of the United States, §421(2) (emphasizing both territoriality and nationality as principles for determining jurisdiction to adjudicate). To be sure, jurisdiction and forum non conveniens are legally distinct concepts (Michaels 2006b, 1037) (noting, for example, that in the United States, jurisdiction is a primarily unilateral concept, whereas forum non conveniens is multilateral). I am simply arguing that the prominence of territoriality, and to a lesser extent, nationality, in the development of jurisdictional thinking means that these attributes should be accessible to most judges, and that this accessibility reinforces the plausibility of territoriality and nationality as judicial heuristics in the forum non conveniens decisionmaking.

⁴² Accessibility refers to “the ease (or effort) with which particular mental contents come to mind” (Kahneman and Frederick 2005, 270-271).
attribute would weigh in favor of dismissal: \( H_{\text{TE}} = \{\text{territoriality}\} \). According to a
nationality heuristic, the heuristic attribute would be the nationality of the parties to the
litigation, and the greater the extent to which the parties are non-U.S., the more strongly
this attribute would weigh in favor of dismissal: \( H_{\text{NA}} = \{\text{nationality}\} \).

But in order for territoriality and nationality to be plausible judicial heuristics,
they must satisfy the two requirements discussed in Chapter 2: they must lower
decisionmaking costs and achieve a minimum level of legal quality such that the
resulting decisions are legally persuasive.\(^4^4\) A comparison of the heuristic attributes and
the doctrinally specified target attributes strongly suggests that the territoriality
heuristic and the nationality heuristic both satisfy the decisionmaking costs condition.
The forum non conveniens doctrine specifies the following target attributes: the
availability of an alternative forum, private interest factors (relative ease of access to
sources of proof, relative ease of access to witnesses, enforceability of a judgment if one
is obtained), public interest factors (extent of administrative difficulties from court
congestion, burden on juries, local interest in localized controversies, and familiarity

\(^{43}\) As in Chapter 2, I use basic set notation to compare heuristic attributes and doctrinally-specified target
attributes, where \( H \) represents a set of heuristic attributes and \( T \) represents a set of doctrinally-specified
target attributes, and \( D \) represents the decisionmaking costs associated with a particular set of heuristic or
target attributes.

\(^{44}\) These conditions were expressed in simplified terms in Chapter 2 as \( D_H < D_T \) (decisionmaking costs
associated with the heuristic attributes less than decisionmaking costs associated with the doctrinally-
specified target attributes) and \( L_H > L_{\text{MIN}} \) (decisions based on the heuristic must achieve the minimum level of
legal quality to which a judge aspires).
with governing law), and the plaintiff’s nationality: \( T_{FNC} = \{ \text{alternative forum, proof, witnesses, enforceability, congestion, jury burden, local interest, governing law, plaintiff’s nationality} \} \). The heuristic attributes are \( H_{TERR} = \{ \text{territoriality} \} \) and \( H_{NAT} = \{ \text{nationality} \} \). Thus, it would seem that \( D_{HTERR} < D_{FNC} \) and \( D_{HNAT} < D_{FNC} \), respectively.\(^4\) That is, it should be less costly in terms of time and effort for a judge to make decisions based on these heuristic attributes than based on the target attributes specified by the forum non conveniens doctrine.

Moreover, it is plausible to expect that decisions based on these heuristics generally will be legally persuasive, thus achieving a minimum level of legal quality— that is, that \( L_{HTERR} > L_{MIN} \) and \( L_{HNAT} > L_{MIN} \). Regarding the territoriality heuristic, the forum non conveniens doctrine does not explicitly refer to the locus of the activity giving rise to the litigation. The doctrine does, however, specify a number of target attributes that are likely to be related to the locus of the activity. For example, ease of access to proof and witnesses, which is among the doctrine’s private interest factors, depends on the location of relevant sources of evidence, which in turn will often overlap with the place of the activity giving rise to the litigation. In addition, one of the public interest factors is whether the underlying dispute is a “localized controversy.” The meaning of the

\(^4\) This is not to say that determining the locus of transnational activity is necessarily easy. See, e.g., Berman (2005) and Michaels (2004) (each highlighting the difficulties that cyberspace poses for territorial approaches to private international law).
phrase is not defined, but it implies that one of the parties or some part of the underlying activity is local. Thus, the territoriality heuristic is a plausible correlational heuristic: \( \text{territoriality} \notin T \subseteq FNC \), but \( D_{\text{Hterr}} < D_{\text{FNC}} \) and territoriality should be correlated with proof, witnesses, and local interest. This implies the following hypothesis:

FNC-2A (Judicial Heuristics Theory—Territoriality): A judge is more likely to dismiss a case in favor of a foreign court when the activity giving rise to the litigation occurred mostly or all outside U.S. territory.

Regarding the nationality heuristic, the doctrine does not explicitly refer to the nationality of the parties. But it does refer to the nationality of the plaintiff.\(^{46}\) Moreover, as just noted, “local controversies” would seem to include controversies involving local parties. Thus, the nationality heuristic also is a plausible correlational heuristic:

\( \text{nationality} \notin T \subseteq FNC \), but \( D_{\text{HNAT}} < D_{\text{FNC}} \) and nationality is correlated with plaintiff’s nationality and local interest. This implies the following hypothesis:\(^{47}\)

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\(^{46}\) Indeed, insofar as the forum non conveniens doctrine refers to the nationality of the plaintiff (as discussed above), the nationality heuristic might alternatively be understood as a subset heuristic: \( H_{\text{HNAT}} \subseteq T \subseteq FNC \). The fit, however, is imperfect, since the doctrine is explicitly concerned only with the plaintiff’s nationality.

\(^{47}\) Because it would require even fewer decisionmaking resources to decide based solely on the plaintiff’s nationality than on overall nationality of the parties, and because plaintiff’s nationality is a target attribute explicitly specified by the forum non conveniens doctrine, the hypothesis that judges use a nationality heuristic in the forum non conveniens context is less convincing than the hypothesis that they use a territoriality heuristic. Nevertheless, because it is plausible to assume that the nationality heuristic satisfies the decision costs and legal quality conditions vis-à-vis the forum non conveniens doctrine as a whole (as argued above), I include the nationality heuristics hypothesis here and will test it empirically below.
FNC-2B (Judicial Heuristics Theory—Nationality): The presence of either a U.S. plaintiff or a U.S. defendant decreases the likelihood that a judge will dismiss a case in favor of a foreign court.

In summary, skeptics argue that forum non conveniens decisionmaking is in a state of disorder. According to them, the forum non conveniens doctrine does not have the sort of direct constraining effect on judicial decisionmaking posited by positivist legalism. The judicial heuristics theory suggests that the forum non conveniens doctrine may nevertheless influence judicial allocation of adjudicative authority through a decisionmaking process in which judges use judicial heuristics in order to conserve scarce decisionmaking resources. Because the heuristic attributes are correlated with doctrinally-specified target attributes, the use of judicial heuristics is likely to lead to decisions which are legally persuasive. Forum non conveniens decisionmaking might therefore exhibit more order than forum non conveniens skeptics would expect.

### 3.3.2 Political Influences

It is of course possible that legal doctrine has neither the direct effects contemplated by legalist theory nor the indirect effects contemplated by judicial heuristics theory. Other theories—including leading theories of judicial decisionmaking and international relations—suggest that political factors may dominate the choice between domestic and foreign adjudicative authority. Chapter 2 discussed these
theories in detail and used them to derive general hypotheses about the allocation of governance authority. Here, I adapt these hypotheses to the specific context of judicial allocation of adjudicative authority.

The attitudinal model of judicial decisionmaking would expect Republican judges to be less likely to defer to foreign governance authority than Democratic judges, and the strategic model of judicial decisionmaking would expect judges to be less likely to defer to foreign governance authority in a Republican political environment than otherwise. This implies the following hypotheses:

FNC-3 (Attitudinal Model): A Republican judge is less likely to dismiss a case in favor of a foreign court than a Democratic judge.

FNC-4 (Strategic Model): A judge is less likely to dismiss a case in favor of a foreign court in a Republican political environment.

Realist international relations theory suggests that the greater the power of a foreign state, the more likely a judge is to defer to its governance authority. Liberal theory suggests that domestic judges in liberal democracies are more likely to defer to the governance authority of a foreign state if the foreign state also is a liberal democracy. This implies the following hypotheses:

FNC-5 (Realist Theory): The greater the power of a foreign state, the more likely a judge is to dismiss a case in favor of a court of that state.
FNC-6 (Liberal Theory): A judge is more likely to dismiss a case in favor of a foreign state’s court if the foreign state is a liberal democracy.

Finally, research on the so-called “home court advantage” enjoyed by U.S. parties in U.S. courts suggests that when a U.S. party and a non-U.S. party disagree about the allocation of governance authority, the judge is more likely to decide in favor of the U.S. party. In the forum non conveniens context, dismissal in favor of a foreign court necessarily favors the defendant who has moved to dismiss the case on forum non conveniens grounds, and disfavors the plaintiff who initially chose the U.S. forum. This implies the following hypothesis:

FNC-7 (Pro-Domestic-Party Bias): A judge is less likely to dismiss a case in favor of a foreign court if there is a U.S. plaintiff and more likely to do so if there is a U.S. defendant.

3.4 Data and Methods

To test these hypotheses, I used the forum non conveniens sample discussed above. My dependent variable, “Deference to Foreign Adjudicative Authority,” indicates whether the judge decided to deny the motion to dismiss, thus keeping the case and asserting domestic adjudicative authority (0), or to grant the motion, thus dismissing the case in favor of a foreign court and deferring to foreign governance authority (1). Because the dependent variable is dichotomous, I use logit analysis
(Aldrich and Nelson 1984) to assess the influence of the legal and political variables discussed below on the likelihood that a judge will defer to foreign adjudicative authority.

To test the legalist theory hypothesis (FNC-1), I created the variable “U.S. Plaintiff,” indicating whether there is a U.S. plaintiff in the litigation (0 if no, 1 if yes). According to this hypothesis, the coefficient for U.S. Plaintiff should be statistically significant and have a negative sign, indicating that a judge is less likely to dismiss a case in favor of a foreign court when there is a U.S. plaintiff.

To test the territoriality heuristic hypotheses (FNC-2A), I created the variable “Activity Mostly/All Outside U.S. Territory,” indicating whether the activity giving rise to the litigation occurred mostly or all outside U.S. territory (0 if no, 1 if yes). I coded the variable based on two factors: the place of defendant’s conduct and the place of the plaintiff’s alleged injury, each as stated in the judge’s opinion. I coded it as “yes” if both the place of conduct and the place of injury were entirely foreign, if the place of conduct was entirely foreign and the place of injury mixed, or if the place of injury was entirely foreign and the place of conduct mixed. When the place of conduct and place of injury were both mixed or when either the place of conduct or the place of injury was entirely

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48 I coded U.S. Plaintiff based on the citizenship of the plaintiffs indicated in the judge’s opinion or, in the absence of citizenship information, based on residence, domicile, or jurisdiction of incorporation. I counted only parties that joined in or opposed the forum non conveniens motion.
domestic, I coded Activity Mostly/All Outside U.S. Territory as “no.” According to the territoriality heuristic hypothesis, the coefficient for the variable should be statistically significant and have a positive sign, indicating that a judge is more likely to dismiss a case in favor of a foreign court when the activity giving rise to the litigation occurred mostly or all outside U.S. territory.

To test the nationality heuristic hypothesis (FNC-2B), I used the U.S. Plaintiff variable described above, and I created the variable “U.S. Defendant,” indicating whether there is a U.S. defendant in the litigation (0 if no, 1 if yes). In the forum non conveniens doctrine, only the plaintiff’s nationality is a specified target attribute, suggesting that only U.S. Plaintiff (and not U.S. Defendant) should be statistically significant. According to the nationality heuristic, however, the heuristic attribute is the nationality of the parties generally, and the greater the extent to which the parties are non-U.S., the more strongly this attribute weighs in favor of dismissal. Therefore, according to the nationality heuristic hypothesis, the coefficients for both U.S. Plaintiff and U.S. Defendant should be statistically significant and have negative signs, indicating

49 By basing this measurement on separate place-of-conduct and place-of-injury elements, and by including a category for “mixed” activity for both of these elements, this approach accounts for the fact that activity frequently cannot be categorized as solely inside or outside a particular territory.

50 I coded U.S. Defendant based on the citizenship of the defendants indicated in the judge’s opinion or, following the same convention used for coding U.S. Plaintiff, in the absence of citizenship information, based on residence, domicile, or jurisdiction of incorporation. I counted only parties that joined in or opposed the forum non conveniens motion.
that the presence of either a U.S. plaintiff or a U.S. defendant decreases the likelihood that a judge will dismiss a case in favor of a foreign court.

To test the attitudinal model hypothesis (FNC-3), I created the variable “Republican Judge,” which indicates whether the judge’s party affiliation is Republican (0 if no, 1 if yes). The use of party affiliation as a measure of a judge’s ideology follows George and Epstein (1992, 328) and George (1998, 1651-1652). According to this hypothesis, the coefficient for Republican Judge should be statistically significant and have a negative sign, indicating that a Republican judge is less likely to dismiss a case in favor of a foreign court than a Democratic judge. To test the strategic model hypothesis (FNC-4), I created the variable “Republican Environment,” which indicates whether, in the year of the court’s decision, the political environment is Republican (0 if no, 1 if yes). I coded the political environment as Republican if the president and at least one house of Congress were Republican. According to this hypothesis, the coefficient for

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Republican Environment should be statistically significant and have a negative sign, indicating that a judge is less likely to dismiss a case in favor of a foreign court in a Republican political environment.

To test the realist theory hypothesis (FNC-5), I created the variable, “Foreign State’s GDP (Log),” which equals the natural logarithm of the foreign state’s annual gross domestic product. The use of GDP as a measurement of power follows Guzman and Simmons (2005, 574). According to this hypothesis, the coefficient for Foreign State’s GDP (Log) should be statistically significant and have a positive effect, indicating that the greater the power of a foreign state, the more likely a judge is to dismiss a case in favor of a court of that state. To test the liberal theory hypothesis (FNC-6), I created the variable “Foreign State Liberal Democracy,” which indicates whether the foreign state was rated “Free” by the Freedom House Freedom in the World Survey for the year prior to the court’s decision (0 if no, 1 if yes).

However, I use a dummy variable rather than their three-level measure to help ensure adequate cell size for the logit analysis. For simplification and to account for lame-duck status, I did not account for January when coding presidential transition years. For the Senate, I coded 2001 and 2002 as Democratic, because Democrats were in the majority for 8 of 12 months in 2001 and 11 of 12 months in 2002.\footnote{I use data for the year 2000 and apply a natural logarithmic transformation to improve symmetry. The data source is the World Bank’s World Development Indicators, available at \url{http://devdata.worldbank.org/data-query/}.}

\footnote{Although these ratings generally are stable over time during the period covered by my dataset, I use a one-year lag on the theory that a boundedly rational judge is unlikely to become immediately aware of even substantial changes in a foreign state’s politics. For purposes of her theory, Slaughter defines “liberal” states as those “with juridical equality, constitutional protections of individual rights, representative republican governments, and market economies based on private property rights” (Burley 1992, 1909). The Freedom}
Finally, to test the pro-domestic-party bias hypothesis (FNC-7), I used the two previously described variables, U.S. Plaintiff and U.S. Defendant. According to this hypothesis, the coefficient for U.S. Plaintiff should be statistically significant and have a negative sign, indicating that a judge is less likely to dismiss a case in favor of a foreign court if there is a U.S. plaintiff; and the coefficient for U.S. Defendant should be statistically significant and have a positive sign, indicating that a judge is more likely to dismiss a case in favor of a foreign court if there is a U.S. defendant.\textsuperscript{55} In contrast, the legalist theory hypothesis would expect only the U.S. Plaintiff variable to be statistically significant (a bias in favor of U.S. plaintiffs is consistent with the forum non conveniens doctrine, but a general bias in favor of U.S. parties is not), and the nationality heuristic hypothesis would expect both the U.S. Plaintiff and U.S. Defendant variables to have negative coefficients. Summary statistics for all variables are presented below in Table 3.2; a correlation table is presented in Appendix 3.1; and cross-tabulations and chi-

\textsuperscript{55} Recall that in the forum non conveniens context, dismissal in favor of a foreign court necessarily favors the defendant who has moved to dismiss the case on forum non conveniens grounds, and disfavors the plaintiff who initially chose the U.S. forum.
squared statistics are provided in Appendix 3.2 to illustrate the bivariate relationships between the dependent variable and each dichotomous independent variable.

Table 3.2. Summary Statistics

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs.</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min.</th>
<th>Max.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deference to Foreign Adjudicative Authority</td>
<td>210</td>
<td>.471</td>
<td>.500</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>U.S. Plaintiff</td>
<td>207</td>
<td>.512</td>
<td>.501</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>U.S. Defendant</td>
<td>207</td>
<td>.469</td>
<td>.500</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>206</td>
<td>.524</td>
<td>.501</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Republican Judge</td>
<td>208</td>
<td>.548</td>
<td>.499</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Republican Environment</td>
<td>210</td>
<td>.381</td>
<td>.487</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Foreign State’s GDP (Log)</td>
<td>200</td>
<td>12.634</td>
<td>1.799</td>
<td>5.780</td>
<td>15.373</td>
</tr>
<tr>
<td>Foreign State Liberal Democracy</td>
<td>203</td>
<td>.769</td>
<td>.423</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
3.5 Results and Discussion

3.5.1 Legal and Political Influences: A Statistical Analysis

The results of the logit analysis are presented in Table 3.3. Model 1 is a “legal” model of transnational judicial governance, including the U.S. Plaintiff, U.S. Defendant, and Activity Mostly/All Outside U.S. Territory variables to capture not only the direct effects of the forum non conveniens doctrine, which provides for greater deference to a U.S. plaintiff’s choice of a U.S. forum than a non-U.S. plaintiff’s choice, but also indirect doctrinal effects that may exert themselves through the territoriality and nationality heuristics. Consistent with the legalist theory hypothesis (FNC-1), the likelihood of deference to foreign adjudicative authority is lower when there is a U.S. plaintiff: the coefficient for U.S. Plaintiff is negative and statistically significant above a 99 percent level of confidence.66 Moreover, the results provide strong support for the territoriality heuristic hypothesis (FNC-2A). The likelihood of deference to foreign authority is greater when the activity giving rise to the litigation occurred mostly or all outside U.S. territory: the coefficient for Activity Mostly/All Outside U.S. Territory is positive and

66 That is, the p-value indicates that there is less than a 1 percent (.01) probability that the apparent relationship between the explanatory and dependent variable is a result of Type I error (i.e., that the null hypothesis—that there is no relationship between the explanatory and dependent variable—is true, and the relationship suggested by the coefficient simply is a result of chance). Political scientists generally do not consider an effect to be statistically significant if the p-value is greater than .05 (i.e. if there is more than a 5 percent likelihood of Type I error).
statistically significant above a 99 percent level of confidence. The coefficient for U.S. Defendant is not statistically significant. This is again consistent with the legalist theory hypothesis, because the forum non conveniens doctrine does not specify the defendant’s nationality as a target attribute. But this result does not support the nationality heuristic hypothesis (FNC-3), according to which the nationality of both parties should affect the likelihood of deference to foreign adjudicative authority. Nevertheless, these results do provide preliminary support for the propositions that the forum non conveniens doctrine affects the allocation of adjudicative authority by specifying the plaintiff’s nationality as a relevant factor, and that the doctrine has an indirect effect by way of a territoriality heuristic.
Table 3.3. Logit Analysis, Dependent Variable: Deference to Foreign Adjudicative Authority (Forum Non Conveniens)

<table>
<thead>
<tr>
<th></th>
<th>Model 1 Legal</th>
<th>Model 2 Political</th>
<th>Model 3 Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Plaintiff</td>
<td>-1.267***</td>
<td>-1.826***</td>
<td>-1.450***</td>
</tr>
<tr>
<td></td>
<td>(0.363)</td>
<td>(0.376)</td>
<td>(0.402)</td>
</tr>
<tr>
<td></td>
<td>[0.000]</td>
<td>[0.000]</td>
<td>[0.000]</td>
</tr>
<tr>
<td>U.S. Defendant</td>
<td>-0.506</td>
<td>-0.379</td>
<td>-0.418</td>
</tr>
<tr>
<td></td>
<td>(0.361)</td>
<td>(0.362)</td>
<td>(0.386)</td>
</tr>
<tr>
<td></td>
<td>[0.161]</td>
<td>[0.295]</td>
<td>[0.279]</td>
</tr>
<tr>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>1.477***</td>
<td></td>
<td>1.709***</td>
</tr>
<tr>
<td></td>
<td>(0.327)</td>
<td></td>
<td>(0.378)</td>
</tr>
<tr>
<td></td>
<td>[0.000]</td>
<td></td>
<td>[0.000]</td>
</tr>
<tr>
<td>Republican Judge</td>
<td>-0.490</td>
<td>-0.529</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.331)</td>
<td>(0.362)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.140]</td>
<td>[0.143]</td>
<td></td>
</tr>
<tr>
<td>Republican Environment</td>
<td>-0.636*</td>
<td>-0.629*</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.340)</td>
<td>(0.373)</td>
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<tr>
<td></td>
<td>[0.061]</td>
<td>[0.092]</td>
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<tr>
<td>Foreign State GDP (Log)</td>
<td>-0.061</td>
<td>0.038</td>
<td></td>
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<td></td>
<td>(0.093)</td>
<td>(0.100)</td>
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<tr>
<td></td>
<td>[0.508]</td>
<td>[0.704]</td>
<td></td>
</tr>
<tr>
<td>Foreign State Liberal Democracy</td>
<td>1.234**</td>
<td>1.420**</td>
<td></td>
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<tr>
<td></td>
<td>(0.431)</td>
<td>(0.456)</td>
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<tr>
<td></td>
<td>[0.004]</td>
<td>[0.002]</td>
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</tr>
<tr>
<td>Constant</td>
<td>-0.061</td>
<td>1.369</td>
<td>-1.095</td>
</tr>
<tr>
<td></td>
<td>(0.389)</td>
<td>(1.200)</td>
<td>(1.372)</td>
</tr>
<tr>
<td></td>
<td>[0.876]</td>
<td>[0.254]</td>
<td>[0.425]</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>204.000</td>
<td>195.000</td>
<td>193.000</td>
</tr>
<tr>
<td>LR Chi-Squared</td>
<td>47.418</td>
<td>37.419</td>
<td>61.076</td>
</tr>
<tr>
<td>Prob.&gt;LR Chi2</td>
<td>0.000</td>
<td>0.000</td>
<td>0.000</td>
</tr>
</tbody>
</table>

Notes: Standard errors in parentheses, p-values in brackets, *p<.10, * p<0.05, ** p<0.01, ***p<0.001, two-tailed tests.

Model 2 is a “political” model of transnational judicial governance, including Republican Judge, Republican Environment, Foreign State GDP, Foreign State Liberal Democracy, U.S. Plaintiff, and U.S. Defendant. The results are mixed. On the one hand, they support the liberal theory hypothesis (FNC-7): the positive sign of the coefficient for
Foreign State Liberal Democracy indicates that the probability of deference to foreign adjudicative authority is higher when the foreign state is a liberal democracy, and the effect is statistically significant at a 99 percent confidence level.\textsuperscript{57} Regarding the strategic model hypothesis (FNC-5), the negative sign of the coefficient for Republican Environment suggests that a Republican political environment may decrease the probability of deference; but this effect is only significant at a 90 percent confidence level. On the other hand, contrary to the attitudinal model hypothesis (FNC-4) and the realist theory hypothesis (FNC-6), neither the judge’s political party nor the foreign state’s economic power has a statistically significant effect on the probability of deference to foreign adjudicative authority. The results also suggest that, contrary to the pro-domestic-party bias hypothesis (FNC-7), there is no general bias in U.S. federal courts toward domestic parties in forum non conveniens decisionmaking. The coefficient for U.S. Defendant has a negative sign, and in any event is not statistically

\textsuperscript{57} It is possible that the statistically significant effect of Foreign State Liberal Democracy may be evidence that judges are engaging in the available and adequate alternative forum analysis called for by the forum non conveniens doctrine—but for the following reasons, this is unlikely. First, the availability prong of the analysis turns strictly on whether the defendant is amenable to process in the foreign state (Piper, 454 U.S. 235, 255), which has no obvious relationship to whether the foreign state is a liberal democracy. Likewise, the adequacy prong of the analysis depends on whether there is a legal remedy for the plaintiff in the proposed foreign forum, and is strictly interpreted to weigh against dismissal only “in rare circumstances . . . where the remedy offered by the other forum is clearly unsatisfactory,” that is, “so clearly inadequate . . . that it is no remedy at all” (Piper, 454 U.S. 235, 254-255). Finally, in the 22 cases in the forum non conveniens sample in which a judge concluded that the alternative forum requirement was not satisfied, the foreign state was a liberal democracy in 10 and not a liberal democracy in 12 (as measured by the Foreign State Liberal Democracy Variable), which suggests that judges do not use regime type as a proxy for forum adequacy.
significant. Although U.S. Plaintiff has a negative coefficient and is statistically significant, this is consistent with the legalist theory hypothesis, since the forum non conveniens doctrine specifies that the plaintiff’s nationality is a relevant factor.

Model 3 combines the legal and political factors. Regarding legal influences, even after controlling for the various political factors, the coefficient for U.S. Plaintiff is again negative and highly statistically significant, as expected by the legalist theory hypothesis, and the coefficient for Activity Mostly/All Outside U.S. Territory is again positive and highly statistically significant, as expected by the territoriality heuristic hypothesis. As in Model 1, however, the coefficient for U.S. Defendant is negative and not statistically significant. This is inconsistent with the nationality heuristic hypothesis, which posits that the nationality of the parties in general, not merely that of the plaintiff, should affect the likelihood of deference.

Regarding political influences, the results are again mixed. On the one hand, the coefficient for Liberal Democracy remains positive and highly statistically significant even after controlling for the various legal factors, which provides additional support for the liberal theory hypothesis. On the other hand, contrary to the attitudinal model, strategic model, and realist theory hypotheses, respectively, the coefficients for Republican Judge, Republican Environment, and Foreign State GDP are not statistically significant at traditionally acceptable levels. The coefficient for Republican Environment
is, however, significant at a 90 percent level of certainty, which suggests that further research is necessary before rejecting the possibility that the political environment affects judicial allocation of adjudicative authority. Finally, the coefficient for U.S. Defendant is again negative and not statistically significant, which is inconsistent with the hypothesis that there is a general bias in favor of U.S. parties. If there were such a bias, one would expect the presence of a U.S. defendant to increase the likelihood of dismissal just as the presence of a U.S. plaintiff decreases the likelihood of dismissal.

58 When all independent variables that are not statistically significant at a 95 percent confidence level or higher, except for Republican Environment, are dropped from Model 3, Republican Environment loses statistical significance altogether (p=.173). When Republican Environment also is dropped, all remaining independent variables—Domestic Plaintiff, Activity Mostly/All Outside U.S. Territory, and Foreign State Liberal Democracy—are statistically significant at or above a 95 percent confidence level.
<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>Variable</th>
<th>Expected Effect</th>
<th>Finding</th>
</tr>
</thead>
<tbody>
<tr>
<td>FNC-1 (Legalist Theory): A judge is less likely to dismiss a case in favor of a foreign court when there is a U.S. plaintiff.</td>
<td>U.S. Plaintiff</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>U.S. Defendant</td>
<td>not significant</td>
<td>not significant</td>
</tr>
<tr>
<td>FNC-2A (Judicial Heuristics Theory—Territoriality): A judge is more likely to dismiss a case in favor of a foreign court when the activity giving rise to the litigation occurred mostly or all outside U.S. territory.</td>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FNC-2B (Judicial Heuristics Theory—Nationality): The presence of either a U.S. plaintiff or a U.S. defendant decreases the likelihood that a judge will dismiss a case in favor of a foreign court.</td>
<td>U.S. Plaintiff</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>U.S. Defendant</td>
<td>not significant</td>
<td></td>
</tr>
<tr>
<td>FNC-3 (Attitudinal Model): A Republican judge is less likely to dismiss a case in favor of a foreign court than a Democratic judge.</td>
<td>Republican Judge</td>
<td>-</td>
<td>not significant</td>
</tr>
<tr>
<td>FNC-4 (Strategic Model): A judge is less likely to dismiss a case in favor of a foreign court in a Republican political environment.</td>
<td>Republican Environment</td>
<td>-</td>
<td>approaches significance</td>
</tr>
<tr>
<td>FNC-5 (Realist Theory): The greater the power of a foreign state, the more likely a judge is to dismiss a case in favor of a court of that state.</td>
<td>Foreign State GDP (Log)</td>
<td>+</td>
<td>not significant</td>
</tr>
<tr>
<td>FNC-6 (Liberal Theory): A judge is more likely to dismiss a case in favor of a foreign state’s court if the foreign state is a liberal democracy.</td>
<td>Foreign State Liberal Democracy</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>FNC-7 (Pro-Domestic-Party Bias): A judge is less likely to dismiss a case in favor of a foreign court if there is a U.S. plaintiff and more likely to do so if there is a U.S. defendant.</td>
<td>U.S. Plaintiff</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>U.S. Defendant</td>
<td>+</td>
<td>not significant</td>
</tr>
</tbody>
</table>
The results of the logit analysis, which are summarized in Table 3.4, suggest that the choice between domestic and foreign adjudicative authority in the forum non conveniens context is based on a combination of a political factor, whether the foreign state is a liberal democracy, and two legal factors, the plaintiff’s nationality and territoriality. Another political factor—the political environment—may also play a role. But which factors are substantively most important? Table 3.5 provides estimates of the impact that a change in each statistically significant independent variable has on the probability of deference to foreign adjudicative authority in forum non conveniens decisionmaking, and for each estimate it also provides a 95 percent confidence interval. U.S. district court judges are an estimated 33.3 percent more likely to defer to the adjudicative authority of foreign states that are liberal democracies than those that are not, with 95 percent certainty that the actual increase in probability is between 12.5 and 49.6 percent. They are an estimated 24.3 percent less likely to defer to foreign adjudicative authority when there is a U.S. plaintiff, with 95 percent certainty that the actual decrease is between 12.0 and 38.3 percent. The strongest substantive impact is from the place of the transnational activity: U.S. district court judges are an estimated

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59 I used the Clarify software program (Tomz, Wittenberg, and King 2001) to simulate a change in the expected value of the dependent variable caused by increasing each independent variable from 0 to 1 (in the case of dummy variables) and from the 25th to the 75th percentile (in the case of continuous variables), setting each of the other variables at their mode (for dummy variables) or mean (for continuous variables), and based on Model 3.
38.5 percent more likely to defer to foreign adjudicative authority when the underlying
transnational activity occurred all or mostly outside U.S. territory, with 95 percent
certainty that the actual increase is between 22.4 and 53.9 percent. Judges are an
estimated 15.3 percent less likely to defer in a Republican political environment;
however, the 95 percent confidence interval for this variable includes zero, which
indicates (consistent with the logit results) that this effect is not statistically significant at
a 95 percent confidence level.

| Table 3.5. Simulated Effects of Independent Variable Changes on Probability
<table>
<thead>
<tr>
<th>of Deference to Foreign Adjudicative Authority</th>
</tr>
</thead>
<tbody>
<tr>
<td>Independent Variable</td>
</tr>
<tr>
<td>U.S. Plaintiff</td>
</tr>
<tr>
<td>Activity Mostly/All</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Republican Environment</td>
</tr>
<tr>
<td>Foreign State Liberal Democracy</td>
</tr>
</tbody>
</table>

Note: Simulations based on Model 3.

Overall, the legal model appears to do a better job predicting actual decisions
than the political model. Table 3.6 compares various measures of fit for Model 1 (Legal)
and Model 2 (Political), with observations with missing data dropped to ensure that the
tests are run on the same samples. The legal model correctly classifies the choice
between domestic and foreign adjudicative authority approximately 4.7 percent more
often than the political model, and the adjusted count $R^2$ figures indicate that the legal
model contributes about 10 percent more accuracy beyond simply predicting the more
frequent outcome than the political model contributes. The area under the ROC curves
for the two models suggest that the legal model may be slightly more discriminating,
and the results also provide very strong evidence that the legal model is preferable
according to the Bayesian information criterion. Although the measures of fit
presented in Table 3.6 provide only rules of thumb for comparing statistical models,

---

60 The correctly classified figure indicates the proportion of outcomes that were correctly classified by the
model using a .5 probability cutoff to translate predicted probabilities into dichotomous predictions
(Hamilton 2004, 270-271). Thus, it indicates the proportion of outcomes for which the model estimated at
least a .5 probability of deference to foreign governance authority, and the court in fact defers.
61 Adjusted count $R^2$ is the proportion of correct predictions beyond the number that would be correctly
predicted simply by choosing the outcome with the largest percentage of observed cases, using a .5
probability cutoff (Long and Freese 2006, 111-112).
62 The ROC curve plots 1 minus the specificity (the false positive rate) on the x-axis and sensitivity (the true
positive rate) on the y-axis for each possible probability cutoff. The area under the ROC curve is equal to the
probability that a random decision granting a forum non conveniens motion has a higher value of the
dependent variable than a random decision denying a forum non conveniens motion (Altman and Bland
1994, 188). The larger the area under the curve, the more discriminating the model. Although the area is
higher for the rule-of-law model than the politics model, the difference is not statistically significant
($p=.602$).
63 The BIC is the Bayesian information criterion. The more negative the BIC, the better the fit, and the
greater the absolute difference between the BIC of two models, the stronger the evidence that one is to be
preferred over the other. As a rule of thumb, an absolute difference of 0-2 is considered weak, 2-6 positive,
6-10 strong, and greater than 10 very strong evidence (Long and Freese 2006, 112-113).
they all suggest that legal factors may be playing a more important role than political factors in the choice between domestic and foreign adjudicative authority.

Table 3.6. Comparing the Legal and Political Models

<table>
<thead>
<tr>
<th></th>
<th>Model 1 Legal</th>
<th>Model 2 Political</th>
<th>Difference</th>
<th>Model 3 Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Correctly Classified</td>
<td>71.5%</td>
<td>66.8%</td>
<td>4.7%</td>
<td>72.5%</td>
</tr>
<tr>
<td>Adjusted Count R²</td>
<td>.402</td>
<td>.304</td>
<td>.098</td>
<td>.424</td>
</tr>
<tr>
<td>Area under ROC Curve</td>
<td>.7626</td>
<td>.7440</td>
<td>.0186</td>
<td>.8084</td>
</tr>
<tr>
<td>Bayesian Information Criterion</td>
<td>-772.485</td>
<td>-750.605</td>
<td>-21.880</td>
<td>-767.539</td>
</tr>
</tbody>
</table>

3.5.2 Legalism and Judicial Heuristics: A Qualitative Analysis

The foregoing results suggest that legal doctrine does influence the allocation of adjudicative authority in the forum non conveniens context. But does this influence reflect direct doctrinal effects, as contemplated by legalist theory, or indirect doctrinal effects through a decisionmaking process based on judicial heuristics, as posited by judicial heuristics theory? The logit analysis alone cannot clearly discriminate between these two possibilities. As discussed above, a change from “no” to “yes” in the Activity Mostly/All Outside U.S. Territory variable has a substantively larger impact on the
probability of dismissal (38.5 percent) than the same change in the U.S. Plaintiff variable (24.3 percent). In addition, the Activity Mostly/All Outside U.S. Territory variable alone more accurately classifies outcomes than that the U.S. Plaintiff variable alone.64 These quantitative indicators suggest that the indirect effects of the foreign non conveniens doctrine through the mechanism of judicial heuristics may play a more important role than the direct doctrinal effects contemplated by legalist theory in the choice between domestic and foreign adjudicative authority. But because the only element of the forum non conveniens doctrine that is directly accounted for in my analysis is the plaintiff’s nationality, this is far from conclusive.

Moreover, as Baum (1994, 762) points out, in judicial decisionmaking “a particular pattern of behavior usually is susceptible to more than one reasonable interpretation.” This problem cannot be taken lightly in the study of judicial heuristics. For a particular heuristic to be a plausible explanation for judicial decisionmaking, it must result in decisions that achieve a minimally acceptable level of legal quality, which means that there must be some relationship between the heuristic attributes and the

---

64 The principal measures of fit all favor Activity Mostly/All Outside U.S. Territory over U.S. Plaintiff (proportion correctly classified 69.8 percent versus 66.8 percent; adjusted count R^2 of .347 versus .284, area under ROC curve of .7002 versus .6687, and BIC of -831.280 versus -821.143), with observations with missing data dropped to ensure that the tests are run on the same samples.
doctrinally-specified target attributes. But this creates a risk that a pattern of
decisionmaking that appears to be driven by such a heuristic may in fact partly reflect
systematic analysis of doctrinally-specified target attributes rather than the use of
decisionmaking shortcuts.

To mitigate this risk and to discriminate more effectively between direct
doctrinal effects and indirect doctrinal effects resulting from the use of judicial
heuristics, I conducted a qualitative analysis of each of the 210 judicial opinions in my
dataset using the method of structured, focused comparison (George and Bennett 2005,
chap. 3). The comparison focuses on the judge’s legal analysis of the forum non
conveniens issue as set forth in the opinion, with the goal of evaluating the extent to
which the judge actually analyzed the factors specified in the U.S. Supreme Court’s
statement of the forum non conveniens doctrine. Legalist theory posits that judges’
decisions are based on the factors specified by the applicable legal doctrine. An
observable implication is that judges will analyze those factors in their opinions. In
contrast, the judicial heuristics theory posits that judges generally will base their
decisions on decisionmaking shortcuts rather than systematic analysis of the doctrinally-

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65 For example, as discussed in Chapter 2, the heuristic attributes may be a subset of the target attributes
(subset heuristics) or correlated with one or more target attribute (correlational heuristics).
66 As explained above, however, the forum non conveniens doctrine—except for its specification of the
plaintiff’s nationality as a relevant fact—simply may not lend itself to the type of syllogistic analysis implied
by legalist theory.
specified factors. Thus, an observable implication of the judicial heuristics theory is that judges will not analyze all of the doctrinally-specified factors in their opinions. To structure the comparison, I divided the forum non conveniens doctrine, as set forth by the U.S. Supreme Court, into eleven doctrinally-specified target attributes, which are presented in Table 3.7. I then systematically analyzed each case, giving one point for each target attribute analyzed in the opinion, so that the sum indicates the total number of attributes analyzed in the judge’s opinion.

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67 See above, section 3.3.1.1
68 Legal analysis is the application of applicable legal principles to the facts in order to generate a legal conclusion. Therefore, I gave points for combined statements of law and fact, but not for mere recitation of legal principles or summary legal conclusions not explicitly based on some fact. Although mentioned in the Supreme Court’s statement of the doctrine, I did not include view of the premises or “other” private interest factors in my specification of target attributes, because these will not always be factually relevant, which means checking for them as part of the qualitative analysis would have risked creating bias against the legalist theory. The factors that are included in this analysis are relevant regardless of the specific facts of the case and therefore should, in principle, be analyzed in all cases.
Table 3.7. Doctrinally-Specified Target Attributes (Forum Non Conveniens Doctrine)

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff’s Nationality</td>
<td>1</td>
<td>Determination of the level of deference owed to the plaintiff’s choice of a U.S. court, based on whether the plaintiff is a U.S. citizen.</td>
</tr>
<tr>
<td>Alternative Forum</td>
<td>2</td>
<td>Whether the proposed foreign court is an available and adequate alternative.</td>
</tr>
<tr>
<td>Private Interest Factors</td>
<td>3</td>
<td>Relative ease of access to sources of proof.</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>Availability of compulsory process for, and cost of obtaining, witnesses.</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>The enforceability of a judgment if one is obtained.</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>Whether the balance of private interest factors favors the defendant.</td>
</tr>
<tr>
<td>Public Interest Factors</td>
<td>7</td>
<td>Extent of administrative difficulties from court congestion.</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>Burden of jury duty imposed on people of the community.</td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>Local interest in localized controversies.</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>Whether the court is at home with the governing law.</td>
</tr>
<tr>
<td></td>
<td>11</td>
<td>Whether the balance of public interest factors favors the foreign court.</td>
</tr>
</tbody>
</table>
One would not necessarily expect all courts to analyze all factors in all cases. The forum non conveniens doctrine does not explicitly command judges to consider all factors. However, the factors listed in Table 3.7 generally are sufficiently general to be relevant in most if not all cases, and one might therefore expect most of them to be addressed in judges’ written opinions in most cases—at least from the perspective of legalist theory.69 Conversely, just because a judge’s written opinion analyzes a particular factor does not necessarily mean that the factor had a significant influence on the court’s decision.70 Nevertheless, if the forum non conveniens doctrine indeed directly influences forum non conveniens decisionmaking, there should be some evidence of this influence in judges’ written opinions. And as a general proposition, the stronger the doctrinal influence, the more systematic and complete one would expect this analysis to be.

Consistent with judicial heuristics theory, judges on average do not apply even half of the doctrinally-specified target attributes. As Table 3.8 indicates, U.S. district

69 As just noted, I excluded from the list factors that are likely to be relevant in only some cases. Moreover, even if a particular factor is not relevant given the facts of a particular case, one would expect a judge who is systematically applying a legal doctrine to explain why that factor is not relevant instead of simply ignoring it in his or her written opinion.

70 As Segal (1984, 894) and Spaeth (1995, 296) note, the presence of analysis in a judicial opinion does not necessarily mean that it was an ex ante basis for a judge’s decision rather than an ex post rationalization of it. To the extent this is the case, my method here may be biased in favor of the legalist theory. On the other hand, it is plausible that a judge may analyze all of the doctrinally-specified factors, but only include some of them in the opinion. However, given the justificatory function of judicial opinions, and the sunk costs represented by the legal analysis, my intuition is that already-completed doctrinally-relevant analysis ordinarily will be included in the opinion.
court judges analyze an average of only five of eleven of the target attributes specified by the forum non conveniens doctrine. This represents an estimated average of 48 percent of the elements, with a 95 percent level of confidence that the actual average is between 44 and 52 percent. The result is consistent across the four main parts of the forum non conveniens doctrine, with only 47 percent of cases analyzing the level of deference owed to the plaintiff’s choice of forum based on the plaintiff’s nationality, and only 55 percent including an analysis of the proposed alternative forum. Similarly, judges analyzed an average of only 2.15 private interest factors out of four and only 2.11 public interest factors out of five. While not conclusive, these results provide little evidence that judges’ decisions are based on the type of thorough and systematic application of the forum non conveniens doctrine contemplated by legalist theory. The implication is not that legal doctrine does not matter. To the contrary, legal doctrine may have an indirect effect on judicial allocation of adjudicative authority due to the use of judicial heuristics even if it does not have the direct effect contemplated by legalist theory.

Note that in some cases the judge may omit analysis of the alternative forum because the plaintiff does not challenge its availability and adequacy.

Another observable implication of the judicial heuristics theory might be that the busier judges will rely more heavily on judicial heuristics. This in turn implies an interaction term equal to the product of judicial caseload and Activity Mostly/All Outside U.S. Territory, which should have a positive and statistically significant coefficient. When added to the logit analysis above, the interaction term had the expected positive sign, but it was not statistically significant. Therefore, this test does not provide additional support for the judicial heuristics hypothesis. I thank David Klein for suggesting this additional test.
Table 3.8. Forum Non Conveniens Target Attributes Analyzed in Judges’ Opinions

<table>
<thead>
<tr>
<th>Elements of Forum Non Conveniens Analysis</th>
<th>Points Possible</th>
<th>Mean</th>
<th>Std. Error</th>
<th>95% Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Plaintiff’s Nationality</td>
<td>1</td>
<td>.467</td>
<td>.034</td>
<td>.400, .534</td>
</tr>
<tr>
<td>Alternative Forum</td>
<td>1</td>
<td>.552</td>
<td>.034</td>
<td>.485, .618</td>
</tr>
<tr>
<td>Private Interest Factors</td>
<td>4</td>
<td>2.152</td>
<td>.081</td>
<td>1.993, 2.311</td>
</tr>
<tr>
<td>Public Interest Factors</td>
<td>5</td>
<td>2.110</td>
<td>.108</td>
<td>1.900, 2.323</td>
</tr>
<tr>
<td>Total</td>
<td>11</td>
<td>5.281</td>
<td>.206</td>
<td>4.875, 5.687</td>
</tr>
</tbody>
</table>

3.5.3 Threats to Inference

Like all research designs, mine involves tradeoffs that may pose threats to my causal inferences. First, my measure of territoriality is based on statements contained in court opinions. The problem is that to the extent judges selectively report the facts of a case as part of an ex post legal rationalization of decisions made ex ante based on non-legal considerations, these statements may not be reliable (George and Epstein 1992, 328; Spaeth 1995, 296). If judges include in their opinions a disproportionate number of facts indicating domestic connections with the activity giving rise to the litigation when they decide to assert domestic adjudicative authority (and vice versa), then such selectivity might create bias, exaggerating the effect of the territoriality heuristic. For two reasons,
however, my assessment is that this does not seriously threaten my analysis. First, one would expect judges who engage in selective fact reporting as a method of ex post legal rationalization to selectively state facts that are legally relevant according to the applicable legal doctrine—in this case, facts that are explicitly specified in the Supreme Court’s forum non conveniens precedents as relevant to the choice between domestic and foreign adjudicative authority. However, the location of the activity giving rise to the dispute is not one of those factors. Moreover, my measure of territoriality excludes statements about the location of witnesses and other sources of evidence, which could be used to rationalize decisions since ease of access to witnesses and documents are among the private interest factors specified by the forum non conveniens doctrine.

Second, a comparison of two different measures of territorial statements in court opinions—one quantitative measure designed to capture selectivity and another qualitative measure designed to be less sensitive to selectivity—shows that they have very similar values for decisions to grant forum non conveniens motions and decisions to deny them. The first measure is a percentage equal to the raw number of statements in the court’s opinion connecting the activity giving rise to the litigation to a location

73 Ordinarily, however, it should be related to the “local interest in . . . localized controversies” factor. Although this phrase is not defined in the Supreme Court precedents on forum non conveniens, the location of the activity giving rise to the dispute would seem to be one fact relevant to determining the extent of the localized interest. Thus, this does not eliminate the risk posed by selective statements of facts about territoriality to justify decisions under the “local interest in localized controversies” factor of forum non conveniens analysis.
outside U.S. territory, divided by the total number of statements connecting the activity
to places either inside or outside U.S. territory. This quantitative measure is deliberately
sensitive to opinions that overstate extraterritorial connections relative to domestic
connections (or vice versa). The second measure is a percentage representing the extent
to which the two conceptual elements of the activity giving rise to the litigation are
outside U.S. territory: the place of the plaintiff’s injury and the place of the defendant’s
conduct. I coded each element as purely domestic (0), mixed (1), or purely foreign (2),
regardless of the total number of related statements about domestic or foreign location,
such that their sum can range from 0 out of 4 (0 percent) to 4 out of 4 (100 percent). By
disregarding the quantity of territorial statements, this qualitative measure should be
less sensitive to factual selectivity. Thus, to the extent judges are creating post hoc
justifications for their decisions by selectively stating facts about territoriality in their
opinions, the first measure should be higher than the second for decisions to grant
forum non conveniens motions (indicating overstatements of foreign contacts), and
lower than the second for decisions to deny them (indicating understatements of foreign
contacts).

74 Even if the qualitative measure reduces sensitivity to selective statements of facts, it would still be
sensitive to judicial mischaracterization of facts. However, it is reasonable to assume that
mischaracterization is uncommon (Hall and Wright 2006, 18). Moreover, even if there is occasional
mischaracterization, judges presumably are more willing to be selective than to mischaracterize, which
means the quantitative measure should nevertheless be more sensitive than the qualitative measure to
efforts to use statements of facts for ex post rationalization.
Table 3.9 indicates that this is not the case. When U.S. district courts assert
domestic adjudicative authority, the quantitative measure is slightly higher on average;
and when they defer to foreign adjudicative authority the qualitative measure is slightly
higher on average. However, as the t-tests indicate, neither difference is statistically
significant. Therefore, my assessment is that the possibility of selective statements of
territorial facts does not pose a serious threat to my inferences about the influence of the
territoriality heuristic.

<table>
<thead>
<tr>
<th>Table 3.9. Selectivity in Statements of Territorial Facts in Forum Non Conveniens Opinions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Measures of Territoriality</td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td>Assert Domestic Adjudicative Authority</td>
</tr>
<tr>
<td>Forum Non Conveniens Decision</td>
</tr>
<tr>
<td>Defer to Foreign Adjudicative Authority</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

A second potential threat to my causal inferences arises because my sample
includes only decisions that have been published either in the *Federal Supplement* or
electronically in the LexisNexis database; but not all U.S. district court decisions are
published. If published forum non conveniens decisions are not representative of the overall population of forum non conveniens decisions, then selection bias may limit the generalizability of my causal inferences to that population. However, from a governance-oriented perspective, the primarily population of interest is published cases, because it is these cases that not only affect the litigants to particular cases, but also provide public information that can more broadly influence the strategic behavior of transnational actors. Without discounting the importance of unpublished decisions from a litigant-oriented perspective, they simply cannot play the same role in transnational judicial governance that published decisions can.

Nevertheless, findings that also apply to unpublished decisions would be of greater value for explaining judicial decisionmaking as a general phenomenon. It therefore is worth noting the conditions in which selection bias would pose a threat: Even if my sample is not representative of the overall population, selection bias, understood as an omitted variable problem (Heckman 1979, 154-155), will threaten my causal inferences only if a determinant of publication has a causal effect on forum non

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Moreover, only published decisions are likely to be used as binding legal precedent—as a practical matter, because attorneys cannot readily research unpublished decisions, and sometimes as a legal matter, when court rules prohibit citation to opinions that are designated as “unpublished” (Gerken 2004). Olson (1992, 795) notes that despite the limitations of reliance on only published decisions, such an approach “may be most justifiable for a researcher who is trying to study efficiently the ‘public policy’ output of district courts.”
conveniens decisionmaking and is correlated with one or more of my included independent variables (King, Keohane, and Verba 1994, 169).

Assessing the threat of selection bias therefore requires an understanding of how U.S. district court judges decide whether or not to publish. Although the determinants of the publication decision are not well understood, there is some evidence that U.S. district court judges are less likely to publish decisions in which the federal government is a party, and that they are more likely to publish cases establishing a new rule of law or in which large companies or law firms are involved, or if they are in the first or second federal judicial circuits (Swenson 2004, 131-136). Moreover, one would expect judges to be less likely to publish when they have heavier caseloads (Vladeck and Gulati 2005, 1-5) and more likely to publish decisions that they find more salient (Olson 1992, 796-797).

However, there are not obvious reasons to expect most of these possible determinants of publication to have a causal effect on forum non conveniens decisionmaking. For example, any effect of federal government, large company, or large law firm involvement would likely depend on whether such a party prefers that

76 Caseload might be an exception: if, as caseload increases, the likelihood of publication decreases but reliance on heuristics increases, my sample would under-represent cases in which heuristics are most important, thus biasing my results against a finding that heuristics affect decisionmaking. If this is the case, then the impact of heuristics may be stronger than my results suggest. Similarly, if, as salience increases, the likelihood of publication increases but the likelihood of dismissal decreases, my sample might over-represent dismissals. If this is the case, my descriptive statistics may underestimate dismissals, but because salience would not seem to be correlated with any of my included independent variables.
the forum non conveniens motion be granted or denied, and the establishment of a new rule of law would not seem to be systematically more or less likely in connection with grants rather than denials of forum non conveniens motions. Likewise, there is no apparent reason to expect membership in the first or seventh circuit to make a U.S. district court judge more or less likely to grant these motions. Even if one or more of these factors do have a causal effect, there are not obvious reasons to expect them to be correlated with any of my included independent variables. In summary, although the possibility of selection bias resulting from skewed publication patterns must be taken seriously (Clermont and Eisenberg 2002, 125-126), my preliminary assessment is that my

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77 Existing research suggests that ideology does not influence publication by the federal courts of appeals (Merritt and Brudney 2001, 98). Consistent with these priors, Swenson (2004, 132) finds that the interaction between the ideological direction of the decision and the judge’s party has no effect on publication. However, one of the constitutive terms of this interaction, the ideological direction of the decision, does have a statistically significant effect in her model, indicating that conservative decisions are less likely to be published (2004, 132). This finding raises the possibility that my sample may under-represent denials of forum non conveniens motions (assuming judges in fact perceive denials as intrinsically more conservative than grants), and that selection bias may limit my ability to generalize my findings about potentially correlated variables (including judges’ ideologies and the political environment) to the overall population of forum non conveniens decisions. However, Swenson omits the other constitutive term, the judge’s party, from her statistical model (2004, 132). The almost inevitable result is that her estimates of the coefficients for the ideological direction of the decision and for the interaction term are biased and inconsistent (Brambor, Clark and Golder 2005, 67). Moreover, the coefficient for a constitutive term only captures the impact it has on the dependent variable when the other constitutive variable equals 0 (and vice versa) (Braumoeller 2004, 809). By omitting the judge’s party constitutive term, she in effect forces it to 0 (Braumoeller 2004, 813), but since we do not know whether 0 indicates Democrat or Republican, we do not know whether her finding about the ideological direction of the decision, if valid at all, is capturing its effect on publication when judges are Democrat or when they are Republican. Therefore, although the possibility of selection bias caused by the relationship between the ideological direction of decisions and the decision to publish cannot be eliminated, there does not appear to be sound empirical evidence suggesting that such bias is likely.
causal inferences about published forum non conveniens decisions might nevertheless be soundly generalizable to the overall population of forum non conveniens decisions.\footnote{In contrast to my causal inferences, and as discussed above, to attribute legal meaning to my descriptive statistics about the forum non conveniens decisions in my sample (Table 3.1), it is essential to understand the selection process (Clermont and Eisenberg 2002, 137-14).}

3.6 Conclusions

Under what circumstances are U.S. district courts more likely to grant motions to dismiss in favor of a foreign court on forum non conveniens grounds, thus deferring to foreign adjudicative authority, instead of denying such motions, thus asserting domestic adjudicative authority? This chapter’s findings suggest that the plaintiff’s nationality, the locus of the activity giving rise to the litigation, and whether the foreign state is a liberal democracy are all factors that influence judicial allocation of adjudicative authority: deference to foreign authority is less likely if there is a U.S. plaintiff, and more likely if the activity giving rise to the litigation is mostly or all outside U.S. territory or if the foreign state to which deference is being considered is a liberal democracy.

I have characterized the first two factors—plaintiff’s nationality and the locus of the underlying activity—as legal factors. However, it is difficult to discriminate between two plausible causal mechanisms by which these factors may exert their influence: the thorough and systematic decisionmaking process posited by legalistic theory, or the heuristic-based decisionmaking process contemplated by judicial heuristics theory.
specificity of the plaintiff’s nationality factor suggests that its application entails relatively low decisionmaking costs, and that judges may indeed apply it in a legalist manner. At the same time, the chapter’s qualitative analysis of judges’ opinions is consistent with the proposition that overall, judicial heuristics may be playing a more important role.

Moreover, although not a possibility that this chapter specified ex ante, an ex post interpretation of these results might be that judicial allocation of governance authority in the forum non conveniens context is based on a hybrid subset-correlational heuristic, the attributes of which include both the plaintiff’s nationality (a doctrinally-specified target attribute that entails relatively low decisionmaking costs) and territoriality (which, as discussed above, is correlated with one or more doctrinally-specified target attributes). In short, even though the chapter’s findings suggest that legal factors influence the choice between domestic and foreign adjudicative authority, they are not conclusive regarding the predominant causal mechanism.

Regarding political factors, the findings are consistent with Slaughter’s (1995, 2000, Burley 1992) liberal theory of international law: U.S. district court judges indeed appear to distinguish among foreign states based on their levels of democracy. In

Nevertheless, this factor speaks only to the level of deference owed to the plaintiff’s initial choice of a U.S. forum, and thus cannot, from a legalist perspective, indicate an outcome by itself.
addition, there is some evidence that the political environment matters: deference to foreign adjudicative authority may be less likely in a Republican political environment. On the other hand, the evidence does not support the attitudinal model that has dominated the judicial decisionmaking literature: partisan ideology does not appear to have a general impact on the choice between domestic and foreign adjudicative authority.\textsuperscript{80} Nor does the analysis support the realist theory account: the foreign state’s economic power does not appear to influence judges’ choices. Finally, there is no evidence of systematic bias in favor of U.S. parties. Rather, the bias appears to be limited to U.S. plaintiffs, a bias which is doctrinally sanctioned.

\textsuperscript{80} As noted above, however, it may have more subtle effects that might be promising to explore in future work.
4. Domestic Courts, Choice of Law, and International Allocation of Prescriptive Authority

4.1 Whose Law Governs?

It is generally understood that a state has the authority to prescribe rules governing activity occurring wholly within its territory (Lowenfeld 1996, 14). But imagine a dispute arising from transnational activity, say activity in or affecting both State A and State B, or involving actors from both State A and State B. Under these circumstances, both State A and State B may have legal grounds for asserting prescriptive authority. The question then becomes whether, with respect to that activity, prescriptive authority should be allocated to State A or State B. In practical terms, should State A or State B law be applied to govern transnational activity? This is the “whose law governs” variant of the fundamental “who governs” question.

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1 As Lowenfeld (1996, 14) elaborates, “Everyone understands that a state has jurisdiction over activities carried out wholly within that state, i.e., where both conduct and effect are confined to the state that exercises jurisdiction to apply its law.” See also American Law Institute (1987, §402) (“a state has jurisdiction to prescribe law with respect to . . . conduct that, wholly or in substantial part, takes place within its territory”).

2 This possibility of overlap or “concurrent jurisdiction” exists because there are alternative legal bases for asserting prescriptive authority—including territoriality and nationality—such that “the same conduct or activity may provide a basis for exercise of jurisdiction both by the territorial state and by the state of nationality of the actor” (American Law Institute 1987, §402, note b). See also Born and Rutledge (2007, 574) (discussing the problem of concurrent jurisdiction).

3 This chapter focuses on the domestic-foreign dimension of the “whose law applies” question. However, as noted in Chapter 1, this question, as well as the broader “who governs” question, has not only an international dimension, but also a public-private dimension—that is, should public or private authority be asserted over transnational activity (see, e.g., Büthe 2004). Legal scholars are now beginning to consider the relationship between “state” and “nonstate” law (e.g. Berman 2002; Michaels 2005).
Domestic courts can help answer this question in two ways. First, they can decide whether a particular state has prescriptive authority at all. This involves what private international law scholars call “prescriptive jurisdiction” analysis (Lowenfeld 1996, chap. 2). The most prominent examples of prescriptive jurisdiction decisions in the U.S. federal courts are decisions about whether U.S. federal statutes and regulations should be applied extraterritorially (Born and Rutledge 2007, 613). These decisions help allocate prescriptive authority among states because they determine whether or not the law of one state—the United States—will be applied to transnational activity. But when U.S. courts decide that U.S. federal law does not apply extraterritorially, they typically proceed to dismiss the lawsuit because, given the inapplicability of the U.S. law, either the plaintiff no longer has a legal basis for its claim or the court no longer has the authority to adjudicate (Born and Rutledge 2007, 674; Lowenfeld 1996, 16-17). As a result, prescriptive jurisdiction analysis in U.S. federal courts generally leaves half of the allocative question unanswered: if not U.S. law, then which state’s law should apply to particular transnational activity?

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4 Prescriptive jurisdiction is sometimes also referred to as “legislative jurisdiction” or “regulatory jurisdiction” (Lowenfeld 2006, 55).

5 For an empirical analysis of U.S. federal court decisions about the extraterritorial application of U.S. law, see Putnam (2006).

6 In more technical terms, a party may challenge the extraterritorial application of federal law by filing either a motion to dismiss for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, or a motion to dismiss for failure to state a claim, under Rule 12(b)(6) (Born and Rutlege 2007, 674; Dam 1993, 309). Some scholars have lamented the fact that some U.S. courts describe what is fundamentally a problem of prescriptive jurisdiction as a problem of subject matter jurisdiction (e.g. Dam 1993, 309-313; Lowenfeld 2006, 102).
The second way that domestic courts help allocate prescriptive authority is by making international choice-of-law decisions; that is, by deciding whether State A law or State B law should apply to activity that has connections to both states.\(^7\) International choice-of-law analysis is closely related to prescriptive jurisdiction analysis: unless a state has prescriptive jurisdiction, its law is not eligible for selection as applicable law (Born and Rutledge 2007, 561).\(^8\) But whereas prescriptive jurisdiction analysis is unilateral in the sense that it determines whether or not a given state has authority, international choice-of-law analysis is multilateral or “allocative” in the sense that it determines which state’s law should apply.\(^9\) Thus, international choice-of-law decisionmaking provides a more complete answer to the “whose law governs” question than prescriptive jurisdiction analysis.

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\(^7\) For simplicity’s sake, I limit the discussion to activity with connections to only two states, but in fact choice-of-law decisions often deal with activity with connections to more than one state. Given the federal structure of the U.S. government, U.S. courts also engage in domestic choice-of-law analysis, whereby judges decide whether the law of one U.S. state or the law of another U.S. state should apply to activity having connections to more than one U.S. state (Symeonides 2006, 2-5).

\(^8\) In fact, several private international law scholars have argued against the distinction between prescriptive jurisdiction analysis and choice-of-law analysis, noting that they both involve the allocation of the authority of states to apply their laws to govern activity. See, e.g., Jessup (1956, 35-39) (questioning whether there is a good reason to insist on different analytical approaches for prescriptive jurisdiction and conflict of laws); Lowenfeld (1996, 16-17) (acknowledging differences between the concepts in practice, but suggesting a more unified analytical approach); Trachtman (2001, 3) (emphasizing that “[t]he durable technical legal questions of choice of law and prescriptive jurisdiction resolve into a core normative public policy issue: how should authority be allocated within an interstate or international system”).

\(^9\) Another difference between prescriptive jurisdiction analysis and choice-of-law analysis is that courts typically use the former in cases involving public law (e.g. antitrust, securities regulation) and the latter in cases involving “private law” (e.g. contracts, torts, property). One explanation for this difference is the so-called “public law taboo,” which refers to the reluctance of U.S. courts to apply foreign public law. Insofar as it causes foreign law to be excluded from the analysis, this taboo reduces prescriptive jurisdiction analysis to a unilateral exercise (either U.S. law applies or it does not) rather than a multilateral choice-of-law exercise (either U.S. or foreign law applies) (Lowenfeld 2006, 55; see also Dodge 2002; McConnaughay 1999).
International choice-of-law issues often are vigorously contested because legal rules of behavior vary substantially across nations in ways that can determine which party prevails and how much a successful plaintiff can recover from the defendant.\textsuperscript{10} For example, the plaintiff may prefer State A law because the defendant’s conduct would give rise to liability under State A law or because State A law would allow unlimited recovery. The defendant, on the other hand, may prefer State B law because its conduct is legally permissible under State B law or because State B law limits the amount of recovery. Moreover, in the forum non conveniens context, choice of law may be an important issue because the doctrine states that the applicability of foreign law is a factor that weighs in favor of dismissal, thus increasing the likelihood that the defendant will be able to defeat the plaintiff’s preference for a U.S. forum.\textsuperscript{11} For these reasons, international choice-of-law decisionmaking is important from a litigant-oriented perspective.

\textsuperscript{10} As Born and Rutledge put it (2007, 562): “Different nations have profoundly different legal systems. . . . The differences between U.S. substantive laws and the laws of other jurisdictions are often particularly significant. . . . In particular, U.S. approaches to issues of economic and market regulation, product liability, environmental matters, and on tort law can be fundamentally different from the laws prevailing in foreign legal systems. Because of these differences, the same dispute can readily be resolved in dramatically different ways under different nations’ laws. As a consequence, the outcome of choice of law analysis is often directly relevant to the outcome of the dispute.”

\textsuperscript{11} According to Gulf Oil v. Gilbert, 330 U.S. 501, 508-509 (1947), “[t]here is an appropriateness . . . in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself.” Whether foreign law governs depends on a choice-of-law analysis (Davies 2002, 356). In principle, choice of law also is an important part of the forum non conveniens doctrine’s alternative forum analysis: the foreign forum must offer an adequate remedy for the plaintiff, and the adequacy of the remedy cannot be analyzed soundly without first determining which state’s law the foreign forum would apply.
International choice-of-law decisionmaking also is important from a governance-oriented perspective. As just explained, by deciding whether domestic or foreign law applies to transnational activity, domestic courts help allocate prescriptive authority among states. This is a basic transnational judicial governance function, one which helps define the internal reach of foreign prescriptive authority and the extraterritorial reach of domestic prescriptive authority.\textsuperscript{12} Underlying cross-national legal variation is cross-national variation in public policy, which in turn reflects different political judgments about how to govern social interactions or, in the language of Easton’s (1971, 129) classic definition of politics, about “the authoritative allocation of values.” Thus, the choice between State A and State B law entails a choice between State A and State B governance policy,\textsuperscript{13} even if the court’s decision is not explicitly motivated by a conclusion about which state’s policy is better.\textsuperscript{14} Moreover, by making international choice-of-law decisions, domestic courts provide information about whether domestic or foreign law will be applied to transnational activity under similar circumstances in the

\textsuperscript{12} As explained below, choice-of-law doctrine—embodied either in common law or legislation—prescribes the methods which judges are to use when allocating governance authority. When there is applicable choice-of-law legislation—as is the case in Louisiana and Oregon (Symeonides 2006, 4-5)—legislative as well as judicial bodies can be said to contribute to the allocation of prescriptive authority. However, even when choice-of-law legislation does exist, it is the courts, not the legislature, which apply the legislation to particular cases to make case-by-case choice-of-law decisions.

\textsuperscript{13} As Scoles et al. (2004, 6) put it, choice-of-law involves important “[s]ocietal interests includ[ing] the furtherance of the policies underlying particular rules of law and concern for uniformity in the adjudication of similar problems to assure predictability and efficiency in the administration of justice.”

\textsuperscript{14} As discussed below, Leflar’s (1966, 295-304) choice-of-law methodology explicitly invites courts to make judgment about whether domestic law or foreign law is the “better law.”
future, thus influencing the strategic behavior of transnational actors. Finally, as law and economics scholars emphasize, international choice-of-law has important implications for the global political economy (Guzman 2002; Muir Watt 2003; Muir Watt 2005; Rühl 2006; Stephan 2002; Whincop and Keyes 2001).

Yet, as much as we know about choice-of-law doctrine, we know very little about how domestic courts actually make international choice-of-law decisions. In particular, how often, and under what circumstances, do domestic courts apply foreign law, thus deferring to foreign prescriptive authority, rather than applying domestic law, thus asserting domestic prescriptive authority? To what extent does choice-of-law doctrine influence choice-of-law decisionmaking, and to what extent do political factors influence these decisions?

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15 See Chapter 1, section 1.2.4. See also Rühl (2006, 807-814) (discussing the impact of choice-of-law rules on how private parties structure their transactions, and on their ability to conform their behavior to substantive legal rules).

16 Michaels (2006a) identifies three general economic models of choice-of-law. According to the “economic private law model,” international choice-of-law rules should be designed to give individual actors optimal incentives to maximize global social welfare, defined as the sum of all individual utilities (p. 153). According to the “international law model,” choice-of-law rules should be designed to enable states to maximize the sum of their interests in the application and enforcement of their laws (p. 163). According to the “incentivizing model,” which is inspired by regulatory competition theory, the goal is, like the private model, the maximization of global efficiency among individuals, but the mechanism is different: international choice-of-law rules should be designed to reduce the ability of states to externalize the costs of globally inefficient substantive laws, thus strengthening the incentives states have to pass laws that maximize overall efficiency among individuals (p. 171-172). Although these are normative models, they are all based on assumptions about the empirical consequences of different choice-of-law rules on the global political economy.

17 These questions are not new to choice-of-law scholarship. To the contrary, they are similar to the question posed decades ago by private international law scholar Albert Ehrenzweig (1965, 343): what are the “true” yet “unformulated” rules that govern choice-of-law decisionmaking? As Richman and Reynolds (2000, 432) explain, “Ehrenzweig coined [the term ‘true rules’] to refer to a set of rules or generalizations that in fact predict the decisions of courts in choice-of-law cases. . . . [T]hese rules would be induced or abstracted from the tendencies of courts to reach certain choice-of-law results regardless of their announced methodology.”
To answer these questions, this chapter provides the first systematic empirical examination of international choice-of-law decisionmaking in the U.S. federal courts. Its substantive focus is on transnational tort cases between 1990 and 2005. This follows prior empirical research on choice-of-law decisionmaking in domestic litigation which has focused on torts (Borchers 1992; Solimine 1989; Thiel 2000), and a growing body of law and economics literature on choice-of-law that likewise focuses on torts (see Michaels 2006a), thus facilitating comparison and serving the interest of cumulative scholarship. The chapter begins by introducing the sample of international choice-of-law decisionmaking in the U.S. district courts, Solimine (1989), Borchers (1992), and Thiel (2000) have empirically analyzed choice-of-law decisionmaking in general in state and federal courts. Symeonides (2006) is probably the most exhaustive treatment of choice-of-law decisionmaking to date, albeit with an emphasis on patterns of outcomes rather than the determinants of judicial decisionmaking and, like Solimine (1989), Borchers (1992), and Thiel (2000), without an international focus.

In a similar spirit, Borchers (1992, 358) notes specifically in the choice-of-law context, “Wide differences now exist between courts as to what they say about choice of law. But, as Walter Wheeler Cook once enjoined lawyers, what courts do, not what they say, is important.” While I agree with the point that what courts do is important and too often neglected, I believe that what courts say—that is, what they declare in advance to be the applicable choice-of-law methodology—also is extremely important, and I pay close attention to both in this analysis. See also Symeonides (2006, 1) (arguing that the role of the courts matters more in resolving actual conflicts than academic theory and methodology).

Although I am not aware of any systematic empirical studies of international choice-of-law decisionmaking in the U.S. district courts, Solimine (1989), Borchers (1992), and Thiel (2000) have empirically analyzed choice-of-law decisionmaking in general in state and federal courts. Symeonides (2006) is probably the most exhaustive treatment of choice-of-law decisionmaking to date, albeit with an emphasis on patterns of outcomes rather than the determinants of judicial decisionmaking and, like Solimine (1989), Borchers (1992), and Thiel (2000), without an international focus.

From a law and economics perspective, Cooter and Ulen (2000, 289-290) explain tort law as follows: “Contract law concerns relationships among people for whom the transaction costs of private agreements are relatively low, whereas tort law concerns relationships among people for whom transaction costs of private agreement are relatively high. Economists describe harms that are outside private agreements as externalities. The economic purpose of tort liability is to induce injurers to internalize these costs. Tort law internalizes these costs by making the injurer compensate the victim. When potential wrongdoers internalize the costs of the harm that they cause, they have incentives to invest in safety at the efficient level. The economic essence of tort law is its use of liability to internalize externalities created by high transaction costs.” A more traditional dictionary definition of tort is “[a] private or civil wrong or injury, other than a breach of contract, for which the court will provide a remedy in the form of an action for damages” or “[a] violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which is involved in a given transaction” (Black 1979, 1335).

As Borchers (1992, 369) notes, tort cases are particularly interesting for choice-of-law scholars because the “principal battlefield” of the so-called “revolution” in choice-of-law doctrine—whereby traditional choice-of-law rules were discarded in favor of more modern rules—was tort litigation, and because the new
law decisions used in the chapter’s empirical analyses, and describes the domestic-
foreign dimension of variation in the allocation of prescriptive authority in transnational
tort cases. Then, refining the general hypotheses developed in Chapter 2, it presents a
series of hypotheses about the legal and political factors that influence judicial allocation
of prescriptive authority. Next, it explains the data and methods used to evaluate the
hypotheses, and presents and discusses the results. It concludes by discussing the
implications of its key findings.

4.2 Variation in Judicial Allocation of Prescriptive Authority

In the U.S. choice-of-law literature, it is a virtual truism that choice-of-law
decisionmaking in U.S. courts exhibits a strong pro-forum-law bias—that is, a bias in
favor of the law of the court’s own state. Some scholars attribute this bias to the nature
of judges. As O’Hara and Ribstein (1999, 639) argue, “judges are always tempted . . . to
apply more easily ascertained local laws.” Similarly, Guzman (2002, 893) notes that

approaches “have their principal application in tort cases.” Likewise, Michaels (2006, 146) notes that among
the reasons for focusing on tort cases is that “tort law stands on the borderline between (public) regulatory
interests of states and (private) individual interests in private ordering.” Methodologically, I am not
convinced that the unit homogeneity assumption upon which causal inference relies would be reasonable in
a combined analysis of multiple types of cases (King, Keohane, and Verba 1994, 91-94; Gerring 2001, 174-
178) —at least without a very substantially more complex statistical model than the one deployed in this
chapter and a larger sample to accommodate such a model. This is because different choice-of-law
methodologies apply, and different facts are doctrinally relevant, to different types of cases. For example,
the methodologies applied to tort cases differ from those applied to contract or property cases. However, I
do think separate studies of international choice-of-law decisionmaking in other types of cases would be
very valuable.

21 In addition to the claims discussed here, which are directed at modern choice-of-law methodology in
general, a particular methodology—Brainerd Currie’s (1963) interest analysis—has been criticized for
having a particularly strong pro-domestic-law bias (see, e.g., Symeonides 2006, 391-394).
“judges tend to be biased in favor of local law” and Scoles et al. (2004, 54) assert that “to the extent that judges tend to prefer domestic over foreign law . . . , these preferences are bound to be reflected in the judges’ decisions.” And there is a plausible economic rationale for this bias. For one thing, the application of foreign law requires the expenditure of more judicial resources for research and analysis than the application of domestic law, with which judges are more familiar (O’Hara and Ribstein 1999, 634; Thiel 2000, 301-302). In addition: “the precedent created by applying forum law provides valuable information to primary actors as well as courts and litigators regarding future legal treatment of the issues. In contrast, an investment in foreign law is less valuable locally because foreign precedent is less binding and therefore less important in guiding local conduct or judicial decisions” (O’Hara and Ribstein 1999, 634; Thiel 2000, 301-302).

Other scholars attribute the pro-forum-law bias not to judges, but to the nature of modern U.S. choice-of-law doctrines. The argument is that the modern doctrines have an inherent pro-forum-law bias (Brilmayer 1980, 398; Juenger 2005, 148) and have “mostly served as a justification for application of the law that the courts know best” (Rühl 2006, 839). There is considerable empirical support for these claims: Borchers (1992, 377), Solimine (1988, 87-88), and Thiel (2000, 310) all find that judges using

22 The First Restatement’s traditional lex loci delicti method, as well as various modern approaches (including significant contacts analysis, interest analysis, the Second Restatement’s most significant relationship approach, and the lex fori and Leflar approaches) are discussed below.
modern choice-of-law methods are more likely than those using traditional methods to apply forum law. Simply put, “Both the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law” (Whitten 2002, 560).

The existing research on pro-forum-law bias deals with choice-of-law decisionmaking in general—that is, it does not distinguish between domestic choice-of-law, which involves choices between the laws of two or more U.S. states, and international choice-of-law, which involves choices between the laws of the United States or a U.S. state and the law of a foreign state. Because domestic choice-of-law decisions are more common in U.S. courts than international choice-of-law decisions (Symeonides 2006, 5), this general approach means that the pro-forum-law bias claim is based primarily on analysis of domestic choice-of-law decisionmaking. But what if international choice-of-law decisionmaking is different from choice-of-law decisionmaking in general? There may be pro-forum-law bias in domestic choice-of-law decisionmaking, but is there such a bias in international choice-of-law decisionmaking?

To answer this question, I created a random sample of published international choice-of-law decisions made by U.S. district court judges in tort cases. The sample was generated in three steps. First, I searched the LexisNexis Academic database of U.S. district court decisions between 1990 and 2005 using the following search term: “(choice
or conflict or applic! or govern!) w/r 5 law)) w/100 tort).”23 I repeated this search separately for each country in the world. Second, I consolidated the results of these searches and randomly sorted them. Third, I analyzed each case in the randomly generated order, discarding those that were not actual decisions about whether domestic or foreign law applies in tort cases, until I had a sample of 213 observations.24 Discarded cases included cases referring to a foreign state but not involving a choice between domestic and foreign law; decisions identifying, but not deciding, choice-of-law issues; and cases referring to tort law, but not deciding a choice-of-tort-law issue.25 To indicate whether each decision in the sample is a decision to apply foreign law (that is, to defer to foreign prescriptive authority), I created the variable “Deference to Foreign Prescriptive Authority,” and coded it as 1 if the decision was to apply foreign law and 0 if the decision was to apply domestic law.26

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23 By published decisions, I mean decisions published in the Federal Supplement reporter or in the LexisNexis electronic database. The latter includes all of the former, as well as decisions not published in the Federal Supplement. The restriction of the analysis to the post-1990 period helps control for the effect that post-Cold War changes to the international system may have had on judicial allocation of governance authority; and, in the interest of policy relevance, it places an emphasis on contemporary judicial behavior. The international choice-of-law sample used in this chapter was generated separately from the forum non conveniens sample used in Chapter 3. Although some choice-of-law decisions are made in the context of forum non conveniens analysis, most are not. A choice-of-law sample drawn solely from the forum non conveniens context would therefore suffer from two problems: it would not be a random sample, and while representative of international choice-of-law decisionmaking in the forum non conveniens context, it would not be representative of international choice-of-law decisionmaking in general.

24 This screening approach is based on Koremenos (2005, 554).

25 I also discarded duplicate cases.

26 Some lawsuits raise multiple choice-of-law issues. This can occur when there are multiple legal claims involving substantive areas of the law to which different choice-of-law methods are applied (for example, a plaintiff in transnational litigation may assert both contract and tort claims against the defendant, in which case the judge may need to engage in two separate choice of law analyses). This can also occur when the laws of different states apply to different elements of a single claim, which is known as “depeçage”
The results are summarized in Table 4.1. U.S. district court judges apply foreign law, thus deferring to foreign prescriptive authority, at an estimated rate of 63 percent in published decisions. Some of these decisions are made in the context of forum non conveniens analysis, because one doctrinally-specified factor in that analysis is whether a U.S. court is “at home” with the law that governs the case,27 and a choice-of-law analysis is necessary to determine which law governs (Davies 2002, 356). When the sample is limited to cases not involving forum non conveniens decisions, the estimated rate of deference is 45 percent.28

<table>
<thead>
<tr>
<th>Number of Decisions to Defer to Foreign Prescriptive Authority</th>
<th>Overall Sample (N=213)</th>
<th>Forum Non Conveniens Cases Excluded (N=128)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Decisions to Defer to Foreign Prescriptive Authority</td>
<td>134</td>
<td>57</td>
</tr>
<tr>
<td>Percent of Total Decisions</td>
<td>62.9</td>
<td>44.5</td>
</tr>
<tr>
<td>95 Percent Confidence Interval</td>
<td>56.2, 69.1</td>
<td>36.2, 53.2</td>
</tr>
</tbody>
</table>

(Symeonides, Perdue, and Von Mehren 2003, 259). For each case in my sample that includes more than one international choice-of-tort-law decision, my coding was based on the first such decision that appears in the court’s opinion.  

28 Choice of law decisions in the context of forum non conveniens decisions favored foreign law at an estimated rate of 91 percent.
In neither case do the results support the claim of pro-forum-law bias. On the one hand, this might suggest that the conventional wisdom in the choice-of-law literature is wrong. Alternatively, it might suggest that international choice-of-law decisionmaking is different than choice-of-law decisionmaking in general, and that the conventional wisdom therefore needs to be qualified. The essential point for the remainder of the chapter is simply that judges often assert domestic prescriptive authority and often defer to foreign prescriptive authority, and it is this variation that the chapter tries to explain.

But not all of my findings differ dramatically from those of Borchers (1992). His point estimate for the rate of pro-forum-law decisions under the modern approaches range from 55 to 77 percent (Borchard 1992, 374). My estimate of the rate of pro-forum-law decisions in international choice-of-law decisionmaking overall is 37 percent (that is, 100 percent minus the 63 percent rate of deference to foreign prescriptive authority), which is not consistent with his findings; but excluding forum non conveniens decisions, my estimate is 55 percent (100 percent minus the 45 percent rate of deference to foreign prescriptive authority), which is closer to his findings.

However, one should not attribute definitive meaning to these estimates without understanding potential selection effects (Clermont and Eisenberg 1998). For example, if judges are more likely to publish decisions to apply foreign law than decisions to apply domestic law, my sample may over-represent the former (or vice versa). Nevertheless, because the research upon which the pro-forum-law bias claim is based also relies on published decisions, my reliance on published cases in fact makes my results more comparable to the prior research than would be the case if unpublished cases were included.
4.3 Law and Politics in Judicial Allocation of Prescriptive Authority

4.3.1 Legal Influences

4.3.1.1 Choice-of-Law Doctrine and Legalist Theory

According to legalism, different legal doctrines should be associated with different allocations of governance authority. International choice-of-law decisionmaking provides an opportunity to test this hypothesis because choice-of-law doctrine varies within the United States. The U.S. Supreme Court has held that when a federal court’s subject matter jurisdiction is based on diversity of citizenship, it must follow the choice-of-law doctrine of the U.S. state in which it sits. For example, a judge

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31 See Chapter 2, section 2.2.1, deriving from positivist legalism the general hypothesis that different legal doctrines should be associated with different allocations of governance authority.
32 As Symeonides (2006, 2-5) explains, “Strictly speaking, the term ‘American conflicts law’ is a misnomer—there is no single American conflicts law. Rather, there are as many conflicts laws in the United States as there are states or jurisdictions that constitute the United States. Today this includes 50 states and the District of Columbia, as well as the United States itself as a separate sovereign with its own system of laws” and Puerto Rico. For comprehensive treatments of choice-of-law doctrine in the United States, see Juenger (2005), Scoles et al. (2004), and Symeonides (2006).
33 Diversity of citizenship jurisdiction exists when “the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between (1) citizens of different [U.S.] states; (2) citizens of a [U.S.] state and citizens or subjects of a foreign state; (3) citizens of different [U.S.] states and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . . as plaintiff and citizens of a [U.S.] state or of different [U.S.] states.” 28 U.S.C. §1332(a). Thus, diversity jurisdiction includes alienage jurisdiction (that is, jurisdiction in cases involving citizens of a U.S. state and citizens of a foreign state).
for a U.S. district court in New York must follow New York choice-of-law doctrine and a
judge for a U.S. district court in California must follow California choice-of-law doctrine
to allocate prescriptive authority in diversity cases. Therefore, an investigation of
possible doctrinal influences on the decisions of U.S. district court judges relies on an
understanding of the diverse choice-of-law doctrines that have been adopted by the
separate states of the United States, sometimes by their appellate courts as a matter of
common law, and in several cases by their legislatures as a matter of statutory law.35

Different choice-of-law doctrines call on judges to use different methods for
determining whether domestic or foreign law applies. Symeonides (2006, chap. 4)
organizes the methods used in tort cases into seven categories: lex loci delicti, significant
contacts, interest analysis, the Second Restatement, lex fori, Leflar, and “combined
modern” approaches.36 First, the lex loci delicti or “traditional method” adopted in the
American Law Institute’s First Restatement of Conflict of Laws begins by asserting that
“[n]o state can make a law which by its own force is operative in another state; the only
law in force in the sovereign state is its own law” (American Law Institute 1934, sec. 1).
Based on this territorial premise, the First Restatement’s general choice-of-law rule for
torts is that a court should apply “[t]he law of the place of wrong” (e.g. American Law
Institute 1934, sec. 378 and sec. 379). For this reason, the traditional approach is

35 The states that have adopted legislation dealing with choice of law include Oregon and Louisiana; and, in
addition, Puerto Rico has adopted choice-of-law legislation (Symeonides 2006, 4-5).
36 His coding is based on a systematic analysis of each state’s common law or statutory choice-of-law
doctrines.
sometimes called the “lex loci delicti” method. The Restatement defines the place of wrong as “the state where the last event necessary to make an actor liable for an alleged tort takes place” (American Law Institute 1934, sec. 377), which ordinarily is the place of the plaintiff’s injury because liability does not arise unless there is an injury (Scoles et al. 2004, 713). Thus, if the injury occurs in State A, then the court should apply State A law.

Second, as summarized by Symeonides (2002, 129), the “significant contacts” approach provides that “[t]he state that has the ‘most significant contacts’ with the case and the parties is the center of gravity of the dispute, and thus its law governs.” By considering multiple contacts, not merely the place of the wrong, it broke from the traditional method (Symeonides, Perdue and Von Mehren 2003, 123). But while this method “[p]ermits a court to consider both party and governmental interests” in making choice of law decisions, it calls for neither an examination of the content of domestic and foreign law nor a consideration of the policies of the states involved (Symeonides 2002, 129), which distinguishes it from later approaches.

Third, “interest analysis,” a choice-of-law method developed by Brainerd Currie, begins with the premise that “[t]he central problem of conflict of laws [is] that of determining the appropriate rule of decision when the interests of two or more states are

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37 In practice, this means that if the law of the place of the plaintiff’s injury and the place of the defendant’s conduct are different, the law of one state (the place of injury) may be applied to govern conduct that occurred in another state.
in conflict—in other words, of determining which interest shall yield” (Currie 1963, 178).

Rejecting the notion “that the choice of law could be made on the basis of territorial contacts alone and without regard to the content of the substantive laws that have those contacts” (Symeonides, Perdue and Von Mehren 2003, 125), Currie (1963, 189) argued that state interests should drive choice of law decisionmaking:

When it is suggested that the law of a foreign state, rather than the law of the forum, should furnish the rule of decision, the court should first of all determine the governmental policy—perhaps it is helpful to say the social, economic, or administrative policy—that is expressed by the law of the forum. The court should then inquire whether the relationship of the forum state to the case at bar—that is, to the parties, to the transaction, to the subject matter, to the litigation—is such as to bring the case within the scope of the state’s governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance. If necessary, the court should similarly determine the policy expressed in the proffered foreign law, and whether the foreign state has a legitimate interest in the application of that policy to the case at bar.

Currie emphasized that courts should not weigh or balance competing state interests. According to him, “assessment of the respective values of the competing legitimate interest of two sovereign states, in order to determine which is to prevail, is a political function of a very high order” that “should not be committed to courts in a democracy” (Currie 1963, 182). Thus, Currie proposed a method for avoiding such balancing. If only domestic State A or foreign State B has an interest in having its law apply, then that state’s law applies. This is what Currie called a “false conflict” (Currie

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38 Thus, Currie presumably would object to judicial allocation of governance authority insofar as it relies on interest balancing.
If neither State A nor State B has such an interest, then State A law applies. This is a so-called “unprovided-for case.” Finally, if State A and State B both have an interest in having their law apply, then there is a true conflict, but State A’s law applies because a court should not “hold[] the policy, or interest, of its own state inferior and prefer[] the policy or interest for the foreign state” (Currie 1963, 182). Using these rules, interest balancing is avoided.

Currie’s version of interest analysis had a major impact on choice-of-law methodology in the United States, and courts in several states continue to use the concepts of “state interests” and “false conflicts” that he developed. However, it is important to note that the doctrine as it has been adopted in practice requires states to “engage in the very weighing of state interests that Currie proscribed,” by either applying the law of the state with the greater interest in having its law applied or applying the law of the state whose interests would be most impaired by not having its law applied (Scoles et al. 2004, 103; Symeonides 2006, 71-72).

Fourth, the American Law Institute’s Second Restatement of Conflict of Laws begins by emphasizing why choice of law doctrine is important: “The world is

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39 Currie’s actual terminology was “false problem,” but “false conflict” is the generally accepted term among choice-of-law scholars today.
40 In Currie’s words, “If the court finds that the forum state has no interest in the application of its law and policy, but that the foreign state has such an interest, it should apply the foreign law. If the court finds that the forum state has an interest in the application of its law and policy, it should apply the law of the forum even though the foreign state also has such an interest, and, a fortiori, it should apply the law of the forum if the foreign state has no such interest” (Currie 1963, 189). Later, Currie conceived of a fourth type of conflict situation, the “apparent conflict,” which exists when a “restrained interpretation” of either domestic or foreign law would reveal that that state does not have a significant interest and that what initially may have appeared to be a true conflict is therefore in fact a false conflict (Scoles et al. 2004, 32).
composed of territorial states having separate and differing systems of law. Events and
transactions occur, and issues arise, that may have a significant relationship to more
than one state, making necessary a special body of rules and methods for their ordering
and resolution” (American Law Institute 1971, sec. 1). Section 145(1) of the Restatement
then states the general principle that “[t]he rights and liabilities of the parties with
respect to an issue in tort are determined by the local law of the state which, with respect
to that issue, has the most significant relationship to the occurrence under the principles
stated in §6.” Section 6 in turn states that:

the factors relevant to the choice of the applicable rule of law include (a) the
needs of the interstate and international systems, (b) the relevant policies of the
forum, (c) the relevant policies of other interest states and the relative interests of
those states in the determination of a particular issue, (d) the protection of
justified expectations, (e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and (g) ease in the
determination and application of the law to be applied.

According to Section 145(2), in applying the principles of Section 6, the court
should take into account (1) the place where the injury occurred, (2) the place where the
conduct causing the injury occurred, (3) the domicile, residence, nationality, place of
incorporation and place of business of the parties, and (4) the place where the
relationship, if any, between the parties is centered.

The Restatement also contains presumptive choice-of-law rules for specific types
of torts. For example, Section 147 states that in cases involving injury to tangible
property, the court should apply the law of the state where the injury occurred, “unless,
with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the occurrence, the thing and the parties, in which event the local law of the other state will be applied.” Section 146 has a similar place-of-injury assumption for cases involving personal injuries.

Fifth, the lex fori method is characterized by a general presumption that domestic law should apply (Scoles et al. 2004, 737-741). Sixth, the so-called “Leflar approach,” named after Robert Leflar, the legal scholar who developed it, proposes five “choice-influencing considerations” for choice-of-law decisionmaking: (1) predictability of results, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum’s governmental interest, and (5) the application of the better rule of law (Leflar 1966). Unlike prior methods, but consistent with how Leflar claimed judges actually make choice-of-law decisions, the final consideration explicitly calls on courts to take into account the relative substantive merits of domestic and foreign law (Leflar 1966, 295-304).

Seventh, “combined modern” methods blend interest analysis with other methods. Several states combine interest analysis with Second Restatement considerations. However, one “combined modern” state, New York, is distinguished by its emphasis on the distinction between laws that regulate conduct and laws that allocate losses, and its development of rules intended to govern choice-of-law issues involving the latter (Symeonides 2006, 101-114). When the issue is whether domestic or foreign law should regulate disputed conduct, New York choice-of-law doctrine generally calls
for the application of the law of the state where the tort occurred (Scoles et al. 2004, 842).

When the issue is whether domestic or foreign law should govern the allocation of losses resulting from that conduct, New York uses a series of more specific rules. If the parties are domiciled in the same state, then that state’s law applies. Otherwise, the applicable law depends on a combination of domicile and the place of conduct and injury (Scoles et al. 841-842).

When U.S. federal rather than U.S. state choice-of-law principles apply, U.S. federal courts generally use the Second Restatement’s most significant relationship method (Born and Rutledge 2007, 750). However, in maritime cases, they use the method developed in a series of U.S. Supreme Court cases beginning with Lauritzen v. Larsen.41 In Lauritzen, the Supreme Court explained the aims of maritime choice-of-law:

[I]t aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law . . . has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. . . . [I]n dealing with international commerce, we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.42

42 345 U.S. at 582.
The court then listed seven factors “which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim”: (1) the place of the wrongful act, (2) the law of the flag of the ship, (3) the allegiance or domicile of the injured party, (4) the allegiance of the shipowner, (5) the place of the contract, (6) the inaccessibility of an alternative foreign forum, and (7) the law of the domestic forum. Later, in its decision in Hellenic Lines Limited v. Rhoditis, the Supreme Court drew attention to an eighth factor, the shipowner’s base of operations, and reemphasized that “[t]he significance of one or more factors must be considered in light of the national interest served by the assertion of . . . jurisdiction.”

Two essential points deserve emphasis. First, there is variation not only in choice-of-law decisionmaking (Table 4.1), but also in choice-of-law doctrine (Table 4.2). Different U.S. states have different choice-of-law doctrines directing judges to use different choice-of-law methods. The first column in Table 4.2 shows the number of U.S. states (plus the District of Columbia and Puerto Rico) that have adopted each method discussed above, according to Symeonides (2007, Table 1). The second column shows the distribution of choice-of-law methods in my sample, including not only methods adopted by U.S. state law, but also the federal Lauritzen method adopted by the U.S. Supreme Court for maritime cases.

Table 4.2. Choice-of-Law Methods in the United States

<table>
<thead>
<tr>
<th>Choice-of-Law Method</th>
<th>Number of U.S. States using Method</th>
<th>Frequency of Methods in Sample</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lex Loci Delicti</td>
<td>10 (19%)</td>
<td>6 (3%)</td>
</tr>
<tr>
<td>Significant Contacts</td>
<td>3 (6%)</td>
<td>3 (1%)</td>
</tr>
<tr>
<td>Interest Analysis</td>
<td>3 (6%)</td>
<td>16 (8%)</td>
</tr>
<tr>
<td>Second Restatement</td>
<td>23 (44%)</td>
<td>60 (28%)</td>
</tr>
<tr>
<td>Lex Fori</td>
<td>2 (4%)</td>
<td>7 (3%)</td>
</tr>
<tr>
<td>Leflar</td>
<td>5 (10%)</td>
<td>2 (&lt;1%)</td>
</tr>
<tr>
<td>Combined Modern</td>
<td>6 (12%)</td>
<td>76 (36%)</td>
</tr>
<tr>
<td>Lauritzen</td>
<td>N/A (federal)</td>
<td>42 (20%)</td>
</tr>
<tr>
<td>Total</td>
<td>52</td>
<td>212</td>
</tr>
</tbody>
</table>

Notes: Total in “Number of U.S. States” column includes not only the 50 U.S. states, but also the District of Columbia and Puerto Rico. Data in “Number of U.S. States” column is as of 2006.

Second, U.S. district court judges are not free to select whichever choice-of-law method may suit their preferences in a particular case, or in general. To the contrary, as discussed above, when their subject matter jurisdiction is based on diversity of citizenship, they are required to apply the choice-of-law method called for by the doctrine of the U.S. state in which they sit. Otherwise, they apply federal choice-of-law principles—the Second Restatement or, in maritime cases, the Lauritzen method. This is not to say that the various choice-of-law methods necessarily influence the decisions of
U.S. district court judges—that is a separate question, one which this chapter attempts to answer. But it does suggest that choice-of-law method is an independent rather than an endogenous variable in choice-of-law decisionmaking in the U.S. district courts.\(^4\)

Given this doctrinal context, how can the general legalist theory hypothesis—that different legal doctrines should be associated with different allocations of governance authority—be adapted to judicial allocation of prescriptive authority in particular? First, if choice-of-law doctrine influences the allocation of prescriptive authority, then different choice-of-law doctrines should differently affect the probability that a judge will apply foreign law. After all, if one accepts the proposition that courts take choice-of-law doctrine seriously, “different approaches should yield different patterns of results” (Borchers 1992, 364). This reasoning suggests the following hypothesis:

| CL-1A (Legalist Theory—Different Doctrines, Different Effects): Different choice-of-law doctrines differently affect the probability that a judge will apply foreign law. |

\(^4\)To reiterate: the applicable choice-of-law doctrine is determined externally: by the state legislature or judiciary in diversity cases, the U.S. Supreme Court in maritime cases, or the judicial precedents that comprise the federal common law in other non-diversity cases. It should be noted, however, that different choice-of-law doctrines have been developed for different types of cases. Thus, how a case is characterized determines the applicable legal choice-of-law doctrine. In some tort claims that are related to a contract, it may be plausible to characterize the claim as either a tort or contract claim. In such cases, a judge does have some discretion regarding the applicable choice-of-law doctrine. However, a tort/contract characterization issue was raised in only one case in my dataset, suggesting that in practice, this discretion is not commonly available.
A second and more specific implication is based on the prior choice-of-law scholarship discussed above, which posits that modern choice-of-law methods—those developed after the First Restatement’s lex loci delicti approach—are biased in the sense that they are systematically more likely to result in the application of domestic law (e.g. Brilmayer 1980, 398; Juenger 2005, 148). There are at least two possible explanations for such a bias: methodological bias and methodological permissiveness. At least two methods exhibit methodological bias: the lex fori approach, which is defined by its explicit and general presumption in favor of domestic law, and Currie’s interest analysis, which explicitly favors the application of domestic law under most circumstances.\textsuperscript{45} As explained above, however, Currie’s version of interest analysis is not used in practice. Because of its “better law” factor, the Leflar approach arguably has a methodological bias as well. According to this argument, when deciding whether domestic or foreign law is “better,” judges simply are more likely to decide that their own law is better (Borchers 1992, 366; Scoles et al. 2004, 54).\textsuperscript{46} In addition, the Leflar

\textsuperscript{45} Under Currie’s version of interest analysis, “almost all roads lead homeward” (Scoles et al. 2004, 33). See also Juenger (2005, 103) (calling Currie’s interest analysis “unabashedly parochial” and “little more than a pretext for applying the lex fori in all but the rarest circumstances”). This is because his method points to foreign law in only two situations, both of which are comparatively rare: (1) false conflicts in which the forum state is not interested, and apparent conflicts in which domestic rather than foreign law is subjected to restrained interpretation (Scoles et al. 2004, 33). As Currie (1963, 188) himself argued, “Normally, even in cases involving foreign factors, a court should as a matter of course look to the law of the forum as the source of the rule of decision.”

\textsuperscript{46} As Borchers (1992, 367) explains, “In cases in which the relevant forum rule is judge-made, the courts are likely to view their own work product as better. In cases in which the relevant forum rule is legislative, there is probably a less consistent view among the state judiciary as to its wisdom, but there is still likely to be some preference for the familiar forum rule.”
method is arguably biased because it considers the forum’s interests, but not the interests of the foreign state (Leflar 1966).

Other methods exhibit methodological permissiveness—that is, they lack neutral presumptive rules that may operate to constrain judges’ biases in favor of applying domestic law.\textsuperscript{47} The First Restatement generally calls for the application of the law of the place of the wrong and the Second Restatement has a presumption in favor of the law of the place of injury.\textsuperscript{48} Similarly, New York’s approach has a presumption in favor of the law of the state where the tort occurred in conduct-regulation cases and provides specific rules for choice of law in loss-allocation cases (Scoles et al. 2004, 841-842). In contrast, the remaining choice-of-law doctrines—the balancing approach to interest analysis, Leflar, significant contacts, combined modern (other than New York),\textsuperscript{49} and

\begin{footnotesize}
\textsuperscript{47} See O’Hara and Ribstein (1999, 639) and Guzman (2002, 893) (both arguing that judges generally prefer to apply domestic law), and Borchers (1992, 365). See also (Scoles et al. 2004, 54) (noting that “[t]o the extent that judges tend to prefer domestic over foreign law . . . , these preferences are bound to be reflected in the judges’ decisions”).
\textsuperscript{48} Although a variety of doctrinal escape devices give judges using the First Restatement’s lex loci delicti approach significant flexibility, its general rule that the law of the place of the tort applies bestows upon it an “urbane neutrality” (Juenger 2005, 103). Similarly, with its presumptive rules in favor of the law of the state where the injury occurred for most types of torts (see, e.g., Second Restatement, §146) and its “universalistic perception of private international law” (Scoles et al. 2004, 59), the Second Restatement should be at least “partially immune” from pro-domestic-law bias, even though it invites courts to override the presumption when another state has a more significant relationship to the occurrence and the parties (Borchers 1992, 365).
\textsuperscript{49} Of the combined modern approaches other than New York, Hawaii combines interest analysis and Leflar with the Restatement’s “most significant relationship” test; Louisiana does not have presumptive rules, but rather begins with the principle a court should apply the law of the state “whose policies would be most seriously impaired if its law were not applied” (Scoles et al. 2004, 750); Massachusetts uses a variety of factors, including factors drawn from the Second Restatement, but applies them in a way that resembles interest analysis; Oregon has “an almost irresistible forum presumption” (Scoles et al. 2004, 105); and Pennsylvania, while drawing on the Second Restatement’s principles, incorporates other approaches, including interest analysis, Leflar, and Caver’s principles of preference (Scoles et al. 2004, 104-105).
\end{footnotesize}
Lauritzen\textsuperscript{50}—do not possess these potentially bias-constraining features. Therefore, these methods may be systematically more likely to result in the application of domestic law than the lex loci delicti, Second Restatement, and New York methods, not because of methodological bias, but because of their methodological permissiveness.

Thus, one can place choice-of-law methods into two categories: unbiased and biased, as summarized in Table 4.3.\textsuperscript{51} The first category includes the First and Second Restatements and the New York approaches; and the second category includes the other doctrines, which exhibit either methodological bias or methodological permissiveness, or both. Prior empirical findings provide support for these categories. Borchers (1992), Solimine (1989), and Thiel (2000) all find that the modern approaches as a group are more likely to lead to the application of domestic law than lex loci delicti. There are, however, two exceptions to this general finding. First, Thiel (2000, 312) finds that the Second Restatement does not exhibit the pro-domestic-law bias of the other modern methods.

\textsuperscript{50} In addition to its doctrinal permissiveness, the Lauritzen test arguably also exhibits a certain degree of doctrinal bias due to its base-of-operations factor, which was added by the U.S. Supreme Court in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970). According to Scoles et al. (2004, 892-893), this factor has emerged “as the most common, if not the most decisive, basis for applying American law, in the sense that, when the court finds that the shipowner has such a base in the United States, American law will govern, even if the other factors do not point to American law.”

\textsuperscript{51} In principle, bias need not be measured dichotomously. For example, bias resulting from methodological bias arguably should be stronger than bias resulting from methodological permissiveness. However, there is insufficient variation within the group of “biased” methods to allow for reliable statistical testing with separate treatment of this category of methods, as there are only seven lex fori and two Leflar observations in the international choice-of-law sample, for a total of only nine observations. Moreover, as discussed above, empirical priors are consistent with the separate categorization of the “unbiased” methods; but they do not provide a basis for more fine grained categorization of the “biased” methods.
methods. In addition, the existing evidence does not suggest that New York’s choice-of-law method is biased in favor of domestic law.

Table 4.3. Biased Choice-of-Law Methods

<table>
<thead>
<tr>
<th>Biased</th>
<th>Unbiased</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lex Fori</td>
<td>Lex Loci Delicti</td>
</tr>
<tr>
<td>Interest Analysis</td>
<td>Second Restatement</td>
</tr>
<tr>
<td>Leflar</td>
<td>New York</td>
</tr>
<tr>
<td>Significant Contacts</td>
<td></td>
</tr>
<tr>
<td>Combined Modern</td>
<td></td>
</tr>
<tr>
<td>Lauritzen</td>
<td></td>
</tr>
</tbody>
</table>

If biased choice-of-law methods are in fact more likely to result in the application of domestic law (and thus less likely to result in the application of foreign law) than other methods, this would be evidence in support of legalist theory: it would suggest that choice-of-law doctrine indeed affects international choice-of-law decisionmaking.

On the other hand, if choice-of-law doctrine doesn’t matter, decisions based on biased

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52 In earlier work using basic cross-tabulations rather than Thiel’s (2000) multivariate analysis, Borchers (1992, 377) found that the propensity of the Second Restatement to favor domestic law was not significantly different from that of other modern approaches. However, Borchers (1992, 377) also notes that the 95 percent confidence interval for the percentage of pro-domestic-law decisions by federal courts applying the Second Restatement is 48 to 62 percent, which means we cannot be 95 percent certain whether the Second Restatement is more likely to lead to the application of domestic or foreign law.

53 Borchers (1992, 377) notes that the 95 percent confidence interval for the percentage of pro-domestic-law decisions by federal courts applying New York choice-of-law doctrine is 45 percent to 69 percent. This means that we cannot be 95 percent certain whether that doctrine is more likely to lead to the application of domestic or foreign law. Thiel’s (2000, 303, note 14) study does not provide empirical support for the proposition that New York’s choice-of-law approach exhibits a pro-domestic-law bias because his dataset did not include New York cases.
and unbiased methods should not be significantly different. This implies the following legalist theory hypothesis:

CL-1B (Legalist Theory—Biased Doctrine): A judge is less likely to apply foreign law if the applicable choice-of-law doctrine is biased in favor of domestic law.

4.3.1.2 Choice-of-Law Doctrine and Judicial Heuristics Theory

Given the tremendous amount of scholarly effort that has been devoted to the development and analysis of choice-of-law doctrine, it is striking how skeptical choice-of-law scholars are about the possibility that choice-of-law doctrine may actually influence choice-of-law decisionmaking. Referring to the “relative inconsequence of methodology,” Symeonides (2006, 70; see also Scoles et al. 2004, 83) argues that “of all the factors that may affect the outcome of a conflicts case, the factor that is the most inconsequential is the choice-of-law methodology followed by the court.” Borchers (1992, 364) rejects his “tentative hypothesis that courts take these choice-of-law approaches seriously and make a sincere effort to follow their dictates.” Similarly, Kramer (1991, 466) concludes that “judges really do seem driven by their desire to apply a preferred substantive law without regard for independent choice of law considerations.” Sterk (1994, 951, 987) asserts that “choice of law theory exerts at best a marginal influence on choice of law decisions,” and that it “provides ample authority to permit a court to reach virtually any result in any litigated case.” Gottesman (2000)
refers to choice-of-law doctrine as “adrift on the sea of indeterminacy.” As Roosevelt (1999, 2449) puts it, “Choice of law is a mess.”

Judicial heuristics theory, on the other hand, suggests that choice-of-law decisionmaking might be more coherent and predictable than the skeptics suggest. Taken as a whole, choice-of-law methods are standard-like—that is, they provide very low levels of ex ante specification of appropriate decisions—which implies high decisionmaking costs (Kaplow 1992, 562-563; Rühl 2006, 831-832; Schäfer and Lantermann 2005, 91). The Second Restatement, interest analysis, Leflar, significant contacts, combined modern, and Lauritzen all specify multiple target attributes. Moreover, many of those attributes are difficult to assess or require subsidiary legal judgments, such as the balancing of state interests or significant contacts, determination of the “better” law, and Second Restatement factors such as the needs of the international system, the relevant polices of interested states, and the policies underlying a particular field of law. High decisionmaking costs, combined with heavy caseloads, put pressure on U.S. district court judges to use techniques like heuristics to conserve scarce decisionmaking resources. This pressure should be lower for judges using the relatively rule-like lex loci delicti and lex fori methods—but even these methods are not
without complexities that can lead to substantial decisionmaking costs, and therefore not without incentives to find heuristics that can simplify decisionmaking.\footnote{The complexities of the lex loci delicti approach include its so-called “escape devices” which allow departures from the general rule that the law of the place of the wrong must be applied—including characterization, renvoi, and public policy considerations (Richman and Reynolds 2002, 182-188; Scoles et al. 2004, 119-145). For its part, the lex fori presumption can be overridden for “valid” (Kentucky) or “rational” (Michigan) reasons, or if the foreign state has an “overwhelming interest” (Nevada) (Symeonides 2006, 76-81).}

What sorts of heuristics are judges likely to use in the international choice-of-law decisionmaking? Territoriality and nationality are again plausible candidates. According to the territoriality heuristic, the heuristic attribute is the locus of the activity giving rise to the litigation, and the greater the extent to which that activity occurred outside U.S. territory, the more strongly this attribute weighs in favor of dismissal:

\[ H_{\text{Terr}} = \text{territoriality} \]. \footnote{As in Chapters 2 and 3, I use basic set notation to compare heuristic attributes and doctrinally-specified target attributes, where \( H \) represents a set of heuristic attributes and \( T \) represents a set of doctrinally-specified target attributes, and \( D \) represents the decisionmaking costs associated with a particular set of heuristic or target attributes.}

According to the nationality heuristic, the heuristic attribute is the nationality of the parties to the litigation, and the greater the extent to which the parties are non-U.S., the more strongly this attribute weighs in favor of dismissal:

\[ H_{\text{NAT}} = \text{nationality} \].

Both territoriality and nationality are deeply embedded in the way lawyers think about the allocation of prescriptive authority. As Scoles et al. (2004, 942) explain, “From the beginning of its history, private international law approached the task of delineating the operation of state and national laws by posing questions [about whether] laws attach to a territory, or to the citizens or domiciliaries of that territory.” The American Law...
Institute’s Third Restatement of Foreign Relations Law (1987, sec. 402)—a summary of U.S. law concerning international relations that, while lacking official status, nevertheless has considerable prestige and influence—emphasizes territoriality and nationality as the two principal foundations of prescriptive jurisdiction.\(^56\) And as Symeonides (2004, 402) puts it: “[T]he history of private international law in general and the law of choice of law in particular is a story of clash and tension between two grand operating principles—territoriality and personality [that is, domicile or citizenship]. This is particularly true in tort conflicts.” Thus, the concepts of territoriality and nationality are characterized by a high degree of accessibility in judicial allocation of prescriptive authority.\(^57\)

But judicial heuristics must also satisfy the two conditions specified in Chapter 2: they must lower decisionmaking costs and achieve a minimum level of legal quality such that the resulting decisions are legally persuasive.\(^58\) A comparison of the target attributes specified by the various choice-of-law doctrines on the one hand, and the heuristic attributes on the other hand, suggests that the territoriality and nationality heuristics satisfy the decisionmaking costs condition. For some choice-of-law doctrines, this is clearly the case. The significant contacts approach calls on judges to identify the

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\(^{56}\) For a brief explanation of the process by which the restatement was drafted, see Lowenfeld (1996, 17-18).

\(^{57}\) In heuristics research, “accessibility” refers to “the ease (or effort) with which particular mental contents come to mind” (Kahneman and Frederick 2005, 270-271).

\(^{58}\) These conditions were expressed in simplified terms in Chapter 2 as \(D_H < D_T\) (decisionmaking costs associated with the heuristics less than decisionmaking costs associated with the doctrinally-specified target attributes) and \(L_H > L_{MIN}\) (decisions based on the heuristic must achieve the minimum level of legal quality to which a judge aspires).
contacts that two or more states have with the activity giving rise to the litigation, and to
determine which state has the “most significant contacts”: \( T_{\text{SIG}} = \{ \text{state A’s contacts, state B’s contacts, most significant contacts} \} \). Interest analysis requires judges to analyze the
interests of at least two different states, and to balance those interests: \( T_{\text{INT}} = \{ \text{state A’s interests, state B’s interests, balancing} \} \). The Second Restatement specifies a long list of
target attributes, including not only its seven Section 6 factors, but also the place of
injury, the place of conduct, nationality, and the center of the parties’ relationship:
\( T_{\text{2ND}} = \{ \text{international system, forum policies, policies and interests of other relevant states,}
expectations, underlying policies, predictability, ease in determination of applicable law, injury, conduct, nationality, relationship} \}. \) Leflar specifies five target attributes:
\( T_{\text{LEF}} = \{ \text{predictability, international order, simplification, forum’s interests, and better law} \} \). The combined modern approaches combine target attributes from interest
analysis, the Second Restatement, Leflar, and other methods: \( T_{\text{COM}} = T_{\text{INT}}, T_{\text{2ND}}, T_{\text{LEF}}, \) etc.\(^{59}\)
The Lauritzen approach specifies eight target attributes: \( T_{\text{LAUR}} = \{ \text{wrongful act, flag, domicile, shipowner, contract, inaccessibility, domestic law, base of operations} \} \). Thus,
given \( H_{\text{TERR}} = \{ \text{territoriality} \} \) and \( H_{\text{NAT}} = \{ \text{nationality} \} \), both \( D_{\text{HTERR}} \) and \( D_{\text{HNAT}} \) are likely to be

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\(^{59}\) New York’s approach arguably entails lower decisionmaking costs than other combined modern approaches, because of its presumption of the place of the tort in conduct-regulating cases and its rule-oriented approach in loss-allocating cases. But the place of the tort presumption is not absolute, and the third rule for loss-allocating cases also calls for consideration of whether “relevant substantive law purposes” can be advanced “without impairing the smooth workings of the multi-state system or producing greater uncertainty for litigants.” Neumeier v. Kuehner, 286 N.E. 2d 454, 457-458 (NY 1972). See also Symeonides (2006, 105-106).
less than $D_{SIG}$, $D_{INT}$, $D_{2ND}$, $D_{LEF}$, $D_{LAUR}$, and $D_{COMB}$. That is, it should be less costly in terms of time and effort for a judge to make decisions based on the territoriality heuristic or nationality heuristic than based on the target attributes specified by these choice-of-law doctrines.

The decisionmaking costs savings are likely to be lower with respect to the lex loci delicti and lex fori methods, for they are likely to entail relatively low decisionmaking costs in the first place: $T_{LOC}=$[place of wrong] and $T_{FORI}=$[forum law]. As noted above, however, these methods can be difficult to apply. Determining applicable law under the lex loci delicti approach can involve complicated problems of characterization, renvoi, and public policy (Scoles et al. 2004, 119-145). For its part, the lex fori method’s presumption in favor of domestic law is only that—a presumption—even if it is a “blatant” one (Scoles et al. 2004, 737). Depending on the state, a judge may override this presumption for “valid” (Kentucky) or “rational” (Michigan) reasons, or if the foreign state has an “overwhelming interest” (Nevada) (Symeonides 2006, 76-81). Nevertheless, it is unclear whether, on average, the territoriality and nationality heuristics are likely to entail lower decisionmaking costs than use of the lex loci delicti and lex fori methods. This implies that it is plausible, but less certain than with respect

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60 This is not to say that determining the location of transnational activity is necessarily easy. See, e.g., Berman (2005) and Michaels (2004) (each highlighting the difficulties that cyberspace poses for territorial approaches to private international law).
to other methods, that the decisionmaking costs condition is satisfied with respect to the lex loci and lex fori methods.

It also is plausible that decisions based on the territoriality heuristic or the nationality heuristic will be legally persuasive, thus achieving a minimally acceptable level of legal quality—that is, that $L_{\text{HTERR}} > L_{\text{MIN}}$ and $E_{\text{HNAT}} > L_{\text{MIN}}$. Territoriality and nationality are both subset heuristics with respect to the significant contacts approach, because relevant contacts include territorial contacts such as the place of injury and place of conduct, as well as nationality of the parties; and the Second Restatement, because it explicitly refers to the place of injury, place of conduct, and domicile of the parties: thus, $H_{\text{TERR}} \subseteq T_{\text{SIG}}$ and $H_{\text{TERR}} \subseteq T_{\text{2ND}}$, and $H_{\text{NAT}} \subseteq T_{\text{SIG}}$ and $H_{\text{NAT}} \subseteq T_{\text{2ND}}$. Nationality also is a subset heuristic with respect to the Lauritzen approach, because it specifies both the domicile of the injured and the allegiance of the shipowner—who typically are the parties in Lauritzen cases: thus, $H_{\text{NAT}} \subseteq T_{\text{LAUR}}$. With respect to other approaches, territoriality or nationality is a correlational heuristic. For example, the target attribute specified by the lex loci delicti method is the place of injury and one of the target attributes specified by the Lauritzen test is the place of the wrongful act—territoriality is correlated with each of these target attributes because each of them is one aspect of territoriality: territoriality $\in T_{\text{LOCI}}$ but territoriality is correlated with a member of $T_{\text{LOCI}}$; and likewise, territoriality $\in T_{\text{LAUR}}$ but territoriality is correlated with a member of $T_{\text{LAUR}}$.

In addition, interest analysis, Leflar, and combined modern approaches involve determinations of one or more state’s interests, and the territorial locations of the
conduct and injury, as well as the nationality of the parties, are often factors that are relevant to these determinations, such that territoriality and nationality are correlated with one or more members of $T_{\text{INT}}$, $T_{\text{LEF}}$, and $T_{\text{COMB}}$. An exception, however, is the lex fori approach, which calls for a presumption in favor of domestic law regardless of territoriality and nationality, and with respect to which territoriality and nationality are neither subset heuristics nor correlational heuristics.

The foregoing analysis implies the following:

CL-2A (Judicial Heuristics Theory—Territoriality): A judge is more likely to apply foreign law when the activity giving rise to the litigation occurred mostly or all outside U.S. territory.

CL-2B (Judicial Heuristics Theory—Nationality): A judge is more likely to apply foreign law when the parties to the litigation are mostly or all foreign.

Skeptics claim that choice-of-law is a field in disarray and, contrary to legalism, that choice-of-law doctrine does not have a significant influence on choice-of-law decisionmaking. But judicial heuristics theory suggests that choice-of-law doctrine may nevertheless influence judicial allocation of prescriptive authority through a decisionmaking process in which judges use judicial heuristics in order to conserve scarce decisionmaking resources. Because the heuristic attributes—territoriality and nationality—are either members of one or more sets of doctrinally-specified target attributes, or correlated with one or more of those attributes, they are likely to result in

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decisions which are legally justifiable. Thus, even if choice-of-law doctrine does not influence judicial allocation of prescriptive authority in the direct manner posited by legalism, it may have an indirect influence that produces more order and predictability than choice-of-law skeptics would expect.

4.3.2 Political Influences

Contrary to the hypotheses developed above, leading theories of judicial decisionmaking and international relations suggest that political rather than legal factors may dominate the choice between domestic and foreign prescriptive authority. Chapter 2 discussed these theories in detail and used them to derive general hypotheses about the allocation of governance authority. Here, I adapt these hypotheses to the specific context of judicial allocation of prescriptive authority in the international choice-of-law context.

The attitudinal model of judicial decisionmaking would expect Republican judges to be less likely to defer to foreign governance authority than Democratic judges, and the strategic model of judicial decisionmaking would expect judges to be less likely to defer to foreign governance authority in a Republican political environment than otherwise. This implies the following hypotheses:

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61 Note, however, the lex fori exception, discussed above.
62 Insofar as tort law in the United States is pro-plaintiff compared to tort law in other states and Republicans seek to limit tort recovery, an alternative hypothesis would be that Republican judges (or judges in a Republican environment) are more likely to defer to foreign prescriptive authority than Democratic judges (or judges in a Democratic environment).
CL-3 (Attitudinal Model): A Republican judge is less likely to apply foreign law than a Democratic judge.

CL-4 (Strategic Model): A judge is less likely to apply foreign law in a Republican political environment.

Realist international relations theory suggests that the greater the power of a foreign state, the more likely a judge is to defer to its governance authority. Liberal theory suggests that domestic judges in liberal democracies are more likely to defer to the governance authority of a foreign state if the foreign state also is a liberal democracy. This implies the following hypotheses:

CL-5 (Realist Theory): The greater the power of a foreign state, the more likely a judge is to apply that state’s law.

CL-6 (Liberal Theory): A judge is more likely to apply a foreign state’s law if that state is a liberal democracy.

Finally, the research discussed in Chapter 2 on the so-called “home court advantage” suggests that when a U.S. party and a non-U.S. party disagree about the

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63 Extending the logic of Slaughter’s liberal theory of international law, the increased likelihood of deference to the prescriptive authority of other liberal democracies has both normative and instrumental explanations. Normatively, judges in liberal democracies sense a duty to respect the applicable laws of other liberal democracies, provided they fall within a “zone of legitimate difference” (see Burley 1992, 1918-1919). Instrumentally, deference to foreign prescriptive authority is based on reciprocity among judges of liberal states, with domestic judges deferring to foreign prescriptive authority in cases in which the foreign interest in prescribing the rules governing transnational activity is particularly strong, with the expectation that foreign courts will reciprocate in cases in which the domestic interest in prescribing the rules is particularly strong (see Slaughter 1995, 524). There is little possibility of developing such a reciprocal relationship vis-à-vis nonliberal states, and thus no such incentive to defer to their prescriptive authority, because they lack similarly professional and independent judges (Burley 1992, 1921).
allocation of governance authority, the judge is more likely to decide in favor of the U.S. party. Prominent choice-of-law scholars make the same argument. Brilmayer (1980, 398) accuses modern choice-of-law theory as having a “pro-resident” bias. O’Hara and Ribstein (1999, 639) note that “judges are always tempted to defect from individual rules in favor of local litigants.” Scoles et al. (2004, 54) argue that “[t]o the extent that judges tend to prefer . . . domestic over foreign litigants . . . , these preferences are bound to be reflected in the judges’ decisions.” Prior empirical studies support the proposition that U.S. courts are biased in favor of U.S. parties in choice-of-law decisionmaking (Borchers 1992, 377; Solimine 1988, 88). This implies the following hypothesis:

CL-7 (Pro-Domestic-Party Bias): If a U.S. party and a non-U.S. party disagree about the applicable law, a judge is more likely to apply foreign law if it is the U.S. party that prefers foreign law.

4.4 Data and Methods

To test these hypotheses, I used the international choice-of-law sample described above. My dependent variable, “Deference to Foreign Prescriptive Authority,” indicates whether the court decided that domestic law should apply, thus asserting domestic prescriptive authority (0), or that foreign law should apply, thus deferring to foreign prescriptive authority (1). Because my dependent variable is dichotomous, I used logit

 Solimine (2000), however, rejects the pro-resident bias hypothesis in his empirical study.
analysis (Aldrich and Nelson 1984) to empirically assess the influence of political and legal factors on the likelihood that courts will defer to foreign prescriptive authority.

To test the legalist theory hypothesis that different choice-of-law doctrines differently affect the probability that a judge will apply foreign law (CL-1A), I created indicator variables for four categories of choice-of-law methods. The first category, “Second Restatement,” includes only the Second Restatement method. The second category, “Interest Analysis” includes interest analysis and combined modern methods, because both the former and the latter are aimed at identifying the state with the greater interest in having its law applied (Scoles et al. 2004, 104-105). The third category, “Lauritzen,” includes only the Lauritzen method. The fourth category, “Other Method,” is a residual category which includes the lex loci delicti, Leflar, lex fori, and significant contacts approaches. With the exception of the “Lauritzen” indicator, the indicator variable for a given category is coded as 1 if (a) the federal court’s subject

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65 As explained above, the combined modern methods also incorporate factors from other methods, but these factors do not change the basic inquiry regarding the balance of state interests so much as they guide that inquiry. See generally Scoles et al. (2004, 104-105).

66 Although similar in some respects to the Second Restatement method, the Lauritzen method deserves its own category because, in addition to other differences, the former has a presumption in favor of the law of the place of injury, whereas the latter, although including the “place of the wrongful act” as a factor, explicitly limits the role of the place of injury in choice-of-law analysis. See, e.g., Lauritzen, 345 U.S. at 583 (“[t]he test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts”) and Romero, 358 U.S. at 384 (choice of law “should not depend on the wholly fortuitous circumstance of the place of injury”).

67 These methods were grouped together due to concern about the limited number of observations in the sample in which judges were required to use them (6 for lex loci delicti, 3 for significant contacts, 7 for lex fori, and 2 for Leflar). See Table 2.2 above.
matter jurisdiction is based on diversity of citizenship, and (b) the choice-of-law doctrine of the state where the U.S. district court making the choice-of-law decision is located calls for the application of a method included in that category to determine whether domestic or foreign tort law applies. Otherwise, the indicator is coded as 0. For example, if the court making the choice of law decision is a U.S. district court in the state of Illinois, the indicator variable “Second Restatement” would be coded as 1, because Illinois choice-of-law doctrine calls for the application of the Second Restatement method to determine whether domestic or foreign tort law applies. The “Lauritzen” indicator was coded as 1 for maritime tort cases, and 0 otherwise.

To test the legalist theory hypothesis that a judge is less likely to apply foreign law if the applicable choice-of-law doctrine is biased in favor of domestic law (CL-1B), I created the variable “Biased Doctrine” indicating whether the method that the judge is required to use is biased in favor of domestic law in the sense that it is either methodologically biased or methodologically permissive of judicial bias (0 if no, 1 if yes). The coding is based on Table 4.4. To test the territoriality heuristic hypothesis (CL-2A), I used the same Activity Mostly/All Outside U.S. Territory variable used in

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68 This requirement is discussed above.
69 Information about the methods required by different states was taken from Symeonides (2006, Table 4) and the same author’s annual surveys of choice-of-law doctrine in the United States from 1990 through 2006. Some states changed choice-of-law doctrines during the 1990-2005 period covered by my dataset. In all cases, the indicator variables were coded based on the doctrine in effect in the court’s state in year of the court’s decision.
70 To determine which method a judge was required to apply, I used the same approach described above for the construction of the indicator variables described above.
Chapter 3. To test the nationality heuristic hypothesis (CL-2B), I created the variable Parties Mostly/All Foreign, which indicates whether the parties to the litigation are mostly or all foreign (0 if no, 1 if yes).

To test the attitudinal model (CL-3), strategic model (CL-4), realist theory (CL-5), and liberal theory (CL-6) hypotheses, I used the same variables that I used in Chapter 3: Republican Judge, Republican Environment, Foreign State GDP (Log), and Foreign State Liberal Democracy, respectively. To test the pro-domestic-party bias hypothesis (CL-7), I created the variable “U.S. Party Prefers Foreign Law,” which indicates whether there was a U.S. party on one side of the litigation but not the other, and the U.S. party preferred the application of foreign law (0 if no, 1 if yes). If U.S. district court judges favor domestic parties over foreign parties, then this variable should have a positive sign and be statistically significant, indicating that judges are more likely to follow domestic parties’ preferences than foreign parties’ preference; otherwise, its coefficient should not

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71 For a description of the coding process, see Chapter 3, section 3.4.
72 I coded this variable based on the citizenship of the parties indicated in the judge’s opinion or, in the absence of citizenship information, based on residence, domicile, or jurisdiction of incorporation.
73 If there are U.S. parties on both sides, the variable is coded as 0, on the grounds that these domestic party preferences would cancel each other out and that such instances do not indicate whether the domestic party’s preference is being favored over a foreign party’s preference. Assuming a domestic party on one and only one side of the litigation, I coded the variable as 1 if the domestic party explicitly argued in favor of foreign law or, in the case of a forum non conveniens decision in which the domestic party does not explicitly argue in favor of foreign law, 1 if the domestic party is the defendant (since foreign law weighs in favor of dismissal) and 0 if the domestic party is the plaintiff (for the same reason). The reason this variable is used rather than dummy variables indicating whether the plaintiff and defendant is domestic is because, unlike the forum non conveniens context in which a domestic plaintiff would always prefer assertion of domestic adjudicative authority given its choice to file its lawsuit in a U.S. court in the first place, one cannot determine whether a domestic party prefers domestic or foreign law on the sole basis of whether or not that party is a plaintiff or a defendant. Both this variable and the nationality variable are based on the citizenship of the plaintiffs indicated in the court’s opinion or, in the absence of citizenship information, based on residence, domicile, or jurisdiction of incorporation.
be statistically significant. Summary statistics for all variables are presented below in Table 4.4; a correlation table is presented in Appendix 4.1; and cross-tabulations and chi-squared statistics are provided in Appendix 4.2 to illustrate the bivariate relationships between the dependent variable and each dichotomous independent variable.

Table 4.4. Summary Statistics

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs.</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Min.</th>
<th>Max.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deference to Foreign Prescriptive Authority</td>
<td>213</td>
<td>.629</td>
<td>.484</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Second Restatement</td>
<td>213</td>
<td>.277</td>
<td>.449</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Interest Analysis</td>
<td>213</td>
<td>.432</td>
<td>.497</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Lauritzen</td>
<td>213</td>
<td>.197</td>
<td>.399</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Other Method</td>
<td>213</td>
<td>.094</td>
<td>.292</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Biased Method</td>
<td>213</td>
<td>.427</td>
<td>.496</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>212</td>
<td>.646</td>
<td>.479</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Parties Mostly/All Foreign</td>
<td>212</td>
<td>.226</td>
<td>.420</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Republican Judge</td>
<td>210</td>
<td>.576</td>
<td>.495</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Republican Environment</td>
<td>213</td>
<td>.385</td>
<td>.488</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Foreign State GDP (Log)</td>
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<td>12.457</td>
<td>1.637</td>
<td>8.22</td>
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<td>Foreign State Liberal Democracy</td>
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<td>.449</td>
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<tr>
<td>U.S. Party Prefers Foreign Law</td>
<td>213</td>
<td>.272</td>
<td>.446</td>
<td>0</td>
<td>1</td>
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</table>

4.5 Results and Discussion

4.5.1 Legal and Political Influences: A Statistical Analysis

The results of the logit analysis are presented in Table 4.5. Models 1 and 2 are “legal” models of transnational judicial governance, designed to test for not only the direct effects of legal doctrine, but also indirect doctrinal effects that may exert themselves through the use of judicial heuristics. Model 1 tests for doctrinal effects
using the choice-of-law method indicator variables: Second Restatement, Interest Analysis, Lauritzen, and Other Method. I treated the first category, Second Restatement, as the reference category, and therefore excluded it from the model. A statistically significant coefficient for a particular method’s indicator variable suggests that using that method instead of the reference category methodology affects the probability that a judge will apply foreign law (Long and Freese 2006, 417). Model 2 uses the Biased Method variable to test for doctrinal effects. Both models use the Activity Mostly/All Outside U.S. Territory and Parties Mostly/All Foreign variables to test for legal influence that may manifest itself through the use of judicial heuristics.

The results of both models suggest that legal factors do influence judicial allocation of prescriptive authority in the international choice-of-law context. In Model 1, the coefficients for all of the choice-of-law method indicator variables are negative, suggesting that, compared to each of them, the Second Restatement increases the probability that a judge will apply foreign law, thus deferring to foreign prescriptive authority. However, this result is statistically significant only for Lauritzen (90 percent confidence level) and Other Doctrine (95 percent confidence level). Thus, as expected by the first legalist theory hypothesis (CL-1A), at least some of the different choice-of-law methods differently affect the probability that a judge will apply foreign law. As expected by the second legalist theory hypothesis (CL-1B), in Model 2 the coefficient for

74 When analyzing categorical variables, the indicator for the reference category must be excluded from the model (Long and Freese 2006, 417).
Biased Method is negative and statistically significant at about a 95 percent confidence level. The methods identified as biased in favor of domestic law—because of methodological bias, methodological permissiveness, or both—indeed appear to decrease the probability that a judge will apply foreign law. In addition, as expected by the judicial heuristics hypotheses (CL-2A and CL-2B), the coefficients for Activity Mostly/All Outside U.S. Territory and Parties Mostly/All Foreign both have positive signs and are statistically significant at or above a 99 percent confidence level.

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75 When Activity Mostly/All Outside U.S. Territory and Parties Mostly/All Foreign variables are dropped, the coefficients for the doctrinal variables in Models 1 and 2 are no longer statistically significant. The same is the case in Models 4 and 5, discussed below. This result may be interpreted in at least two different ways. First, insofar as territoriality and nationality are relevant facts under various choice-of-law doctrines, it is not surprising that the relationship between doctrine and decisions would not appear until after controlling for these facts. Second, these results may suggest the primacy of indirect doctrinal effects through the mechanism of judicial heuristics over the direct doctrinal effects contemplated by legalist theory.
Table 4.5. Logit Analysis, Dependent Variable: Deference to Foreign Prescriptive Authority (International Choice of Law)

<table>
<thead>
<tr>
<th></th>
<th>Model 1 Legal</th>
<th>Model 2 Legal</th>
<th>Model 3 Political</th>
<th>Model 4 Combined</th>
<th>Model 5 Combined</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interest Analysis</td>
<td>-0.423</td>
<td>-0.393</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.380)</td>
<td>(0.433)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.266]</td>
<td>[0.364]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lauritzen</td>
<td>-1.013*</td>
<td>-1.413*</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.524)</td>
<td>(0.579)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.053]</td>
<td>[0.015]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Method</td>
<td>-1.271*</td>
<td>-1.472*</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.583)</td>
<td>(0.646)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.029]</td>
<td>[0.023]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>1.310***</td>
<td>1.251***</td>
<td>1.699***</td>
<td>1.602***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.330)</td>
<td>(0.322)</td>
<td>(0.405)</td>
<td>(0.393)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.000]</td>
<td>[0.000]</td>
<td>[0.000]</td>
<td>[0.000]</td>
<td></td>
</tr>
<tr>
<td>Parties Mostly/All Foreign</td>
<td>1.348**</td>
<td>1.331**</td>
<td>1.950***</td>
<td>1.918***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.475)</td>
<td>(0.454)</td>
<td>(0.559)</td>
<td>(0.529)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.005]</td>
<td>[0.003]</td>
<td>[0.000]</td>
<td>[0.000]</td>
<td></td>
</tr>
<tr>
<td>Biased Method</td>
<td>-0.655*</td>
<td>-1.048**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.336)</td>
<td>(0.376)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.051]</td>
<td>[0.005]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Republican Judge</td>
<td>0.326</td>
<td>0.461</td>
<td>0.421</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.311)</td>
<td>(0.353)</td>
<td>(0.348)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.295]</td>
<td>[0.191]</td>
<td>[0.226]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Republican Environment</td>
<td>0.379</td>
<td>0.317</td>
<td>0.220</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.327)</td>
<td>(0.365)</td>
<td>(0.361)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.247]</td>
<td>[0.386]</td>
<td>[0.542]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign State GDP (Log)</td>
<td>-0.069</td>
<td>-0.005</td>
<td>-0.035</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.101)</td>
<td>(0.113)</td>
<td>(0.111)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.499]</td>
<td>[0.964]</td>
<td>[0.753]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign State Liberal Democracy</td>
<td>-0.047</td>
<td>0.691</td>
<td>0.696</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.376)</td>
<td>(0.449)</td>
<td>(0.451)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.900]</td>
<td>[0.124]</td>
<td>[0.123]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>U.S. Party Prefers Foreign Law</td>
<td>0.761*</td>
<td>1.023*</td>
<td>1.024*</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>(0.365)</td>
<td>(0.419)</td>
<td>(0.414)</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>[0.037]</td>
<td>[0.015]</td>
<td>[0.013]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-0.008</td>
<td>-0.196</td>
<td>0.975</td>
<td>-1.236</td>
<td>-0.883</td>
</tr>
<tr>
<td></td>
<td>(0.328)</td>
<td>(0.254)</td>
<td>(1.225)</td>
<td>(1.467)</td>
<td>(1.420)</td>
</tr>
<tr>
<td></td>
<td>[0.980]</td>
<td>[0.439]</td>
<td>[0.426]</td>
<td>[0.400]</td>
<td>[0.534]</td>
</tr>
<tr>
<td>Number of Observations</td>
<td>212,000</td>
<td>212,000</td>
<td>201,000</td>
<td>200,000</td>
<td>200,000</td>
</tr>
<tr>
<td>LR Chi-Squared</td>
<td>32.139</td>
<td>29.351</td>
<td>8.952</td>
<td>46.940</td>
<td>45.693</td>
</tr>
<tr>
<td>Prob.&gt;LR Chi-Squared</td>
<td>0.000</td>
<td>0.000</td>
<td>0.111</td>
<td>0.000</td>
<td>0.000</td>
</tr>
</tbody>
</table>

Notes: Standard errors in parentheses, p-values in brackets, * p<0.10, * p<0.05, ** p<0.01, *** p<0.001, two-tailed tests.
Model 3 is a “political” model of transnational judicial governance. The results are mixed. On the one hand, they support the pro-domestic-party bias hypothesis (CL-7): the coefficient of the U.S. Party Prefers Foreign Law variable has the expected positive sign, indicating that when a domestic party and a foreign party disagree about applicable law, the probability that a judge will apply foreign law is higher when it is the domestic party rather than the foreign party that prefers foreign law. This effect is statistically significant at a 95 percent confidence level. On the other hand, the results do not support the attitudinal model (CL-3), strategic model (CL-4), realist theory (CL-5), and liberal theory (CL-6) hypotheses: the Republican Judge, Republican Environment, Foreign State GDP, and Foreign State Liberal Democracy variables do not have the expected signs, and are not statistically significant.

Models 4 and 5 are combined models. To test for doctrinal effects, Model 4 uses the choice-of-law method indicator variables and Model 5 uses the Biased Method variable. In Model 4, the coefficients for all of the choice-of-law method indicator variables are again negative, but again this result is statistically significant only for the Lauritzen and Other Doctrine categories (both at a 95 percent confidence level). This suggests that compared to Lauritzen and the residual category of choice-of-law methods, the Second Restatement increases the probability that a judge will apply foreign law. When the reference category is changed, additional relationships are revealed: compared to Lauritzen and the residual category (but not compared to the Second Restatement), interest analysis appears to increase the probability that a judge
will apply foreign law. Taken together, these results—which are summarized in Table 4.6—suggest that the four categories of choice-of-law methods can be tentatively placed in the following order, from most likely to result in the application of foreign law, to least likely: Second Restatement, Interest Analysis, and other doctrines (including Lauritzen).  

Table 4.6. Relative Effects of Choice-of-Law Doctrines (Based on Model 4)

<table>
<thead>
<tr>
<th>Reference Category</th>
<th>Effect on Probability of Deference to Foreign Prescriptive Authority Relative to Reference Category</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Second Restatement</td>
</tr>
<tr>
<td>Second Restatement</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>p=.364</td>
</tr>
<tr>
<td>Interest Analysis</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>p=.364</td>
</tr>
<tr>
<td>Lauritzen</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>p=.015</td>
</tr>
<tr>
<td>Other Doctrine</td>
<td>+</td>
</tr>
<tr>
<td></td>
<td>p=.023</td>
</tr>
</tbody>
</table>

From one perspective, the place of the Lauritzen method in this order is to be expected: as Scoles et al. (2004, 893) note, the Lauritzen method’s “base of operations” factor “has emerged as the most common, if not the most decisive, basis for applying American law, in the sense that, when the court finds that the shipowner has such a base in the United States, American law will govern, even if the other factors do not point to American law.” There is, however, a threat to the inference that the apparent effect of the Lauritzen method is a doctrinal effect. As explained above, the Lauritzen method applies to a particular class of tort cases, namely maritime tort cases. This raises the possibility that the probability of deference is lower for the Lauritzen method than for the Second Restatement method and interest analysis not because the methods are different, but because judges have some systematically different reaction to maritime cases as such that makes them more reluctant to apply foreign law (or more interested in applying domestic law) than in other types of tort cases.
In Model 5, the coefficient for Biased Method is negative and statistically significant at a 99 percent confidence level. The methods identified as biased in favor of domestic law again appear to decrease the probability that a judge will apply foreign law. In addition, the coefficients for Activity Mostly/All Outside U.S. Territory and Parties Mostly/All Foreign both have positive signs and are statistically significant above the 99 percent confidence level in both Model 4 and Model 5. These findings suggest that, even after controlling for political influences, choice-of-law doctrine systematically affects judicial allocation of prescriptive authority in the international choice-of-law context—directly, as contemplated by legalism; indirectly, as posited by judicial heuristics theory; or perhaps through a combination of these direct and indirect processes.

Regarding political factors, the results are again mixed. On the one hand, the coefficient for U.S. Party Prefers Foreign Law is positive and statistically significant at a 95 percent confidence level in Model 4 and Model 5. This suggests that, even after controlling for legal influences, there is a pro-domestic-party bias in international choice-of-law decisionmaking. However, when the data is limited to choice-of-law decisions outside the forum non conveniens context, U.S. Party Prefers Foreign Law is no longer statistically significant in Model 4 and statistically significant at only a 90 percent
confidence level in Model 5. This suggests that the apparent pro-domestic-party bias in international choice-of-law decisionmaking may be at least partly the result not of general bias but rather of the pro-domestic-plaintiff bias that is explicit in the forum non conveniens doctrine. The Foreign State Liberal Democracy variable has a positive sign and approaches statistical significance at a 90 percent confidence level in Models 4 and 5. This suggests that after controlling for legal influences, U.S. district court judges may indeed be more likely to apply the law of a foreign state when that state is a liberal democracy, thus providing tentative support for the liberal theory hypothesis (CL-6).

But none of the other political factors—the judge’s ideology, the domestic political environment, or the foreign state’s GDP—have a statistically significant effect. The results of the foregoing hypothesis tests are summarized in Table 4.7.

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77 The p-values are .154 and .099, respectively. The Lauritzen, Other Doctrine, and Biased Doctrine variables remain statistically significant (all at a 95 percent confidence level: p=.022, p=.042, and p=.012, respectively), and the Activity Mostly/All Outside U.S. Territory and Parties Mostly/All Foreign variables remain statistically significant at a 99 percent confidence level (in both models, p=.001 and p=.000, respectively).

78 In the forum non conveniens context, a U.S. plaintiff who has selected a U.S. court ordinarily will argue in favor of domestic law, because the applicability of foreign law would weigh toward dismissal in favor of a foreign court. According to the forum non conveniens doctrine, a court is to give a higher level of deference to a U.S. plaintiff’s choice of a U.S. forum. Thus, a U.S. judge may have a disproportionately strong inclination to defer to a U.S. plaintiff’s choice-of-law preference in the forum non conveniens context compared to choice-of-law decisions outside the forum non conveniens context.

79 P-values for the Foreign State Liberal Democracy variable are .124 and .123 in Models 4 and 5, respectively.
Table 4.7. Results of Hypothesis Tests: Expected and Actual Effects on Probability of Deference to Foreign Prescriptive Authority

<table>
<thead>
<tr>
<th>Hypothesis</th>
<th>Variable</th>
<th>Expected Effect</th>
<th>Finding</th>
</tr>
</thead>
<tbody>
<tr>
<td>CL-1A (Legalist Theory): Different choice-of-law doctrines differently affect the probability that a judge will apply foreign law.</td>
<td>Method Indicator Variables</td>
<td>some statistically significant effect</td>
<td>+</td>
</tr>
<tr>
<td>CL-1A (Legalist Theory): A judge is less likely to apply foreign law if the applicable choice-of-law doctrine is biased in favor of domestic law.</td>
<td>Biased Method</td>
<td></td>
<td>-</td>
</tr>
<tr>
<td>CL-2A (Judicial Heuristics Theory—Territoriality): A judge is more likely to apply foreign law when the activity giving rise to the litigation occurred mostly or all outside U.S. territory.</td>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>CL-2B (Judicial Heuristics Theory—Nationality): A judge is more likely to apply foreign law when the parties to the litigation are mostly or all foreign.</td>
<td>Parties Mostly/All Foreign</td>
<td>+</td>
<td>+</td>
</tr>
<tr>
<td>CL-3 (Attitudinal Model): A Republican judge is less likely to apply foreign law than a Democratic judge.</td>
<td>Republican Judge</td>
<td></td>
<td>not significant</td>
</tr>
<tr>
<td>CL-4 (Strategic Model): A judge is less likely to apply foreign law in a Republican political environment.</td>
<td>Republican Environment</td>
<td></td>
<td>not significant</td>
</tr>
<tr>
<td>CL-5 (Realist Theory): The greater the power of a foreign state, the more likely a judge is to apply that state’s law.</td>
<td>Foreign State GDP (Log)</td>
<td>+</td>
<td>not significant</td>
</tr>
<tr>
<td>CL-6 (Liberal Theory): A judge is more likely to apply a foreign state’s law if that state is a liberal democracy.</td>
<td>Foreign State Liberal Democracy</td>
<td>+</td>
<td>approaches significance</td>
</tr>
<tr>
<td>CL-7 (Pro-Domestic-Party Bias): If a U.S. party and a non-U.S. party disagree about the applicable law, a judge is more likely to apply foreign law if it is the U.S. party that prefers foreign law.</td>
<td>U.S. Party Prefers Foreign Law</td>
<td>+</td>
<td>+</td>
</tr>
</tbody>
</table>
Taken as a whole, the foregoing analysis suggests that a combination of legal and political factors influence the allocation of prescriptive authority by U.S. federal district court judges in the international choice-of-law context. But which factors are substantively most important? Using Model 5’s results, Table 4.8 provides estimates of the impact that a change in each of the independent variables has on the probability of deference to foreign prescriptive authority in international choice-of-law decisionmaking, and for each estimate it also provides the 95 percent confidence interval. Activity Mostly/All Outside U.S. Territory has a stronger effect than any other variable: U.S. district court judges are an estimated 34.0 percent more likely to defer to foreign prescriptive authority when the activity giving rise to the dispute is mostly or all outside U.S. territory, with 95 percent certainty that the actual effect is between 17.4 and 49.9 percent. Second in importance is legal doctrine: deference is an estimated 20.7 percent less likely when the applicable choice-of-law doctrine calls for the use of a method that is biased in favor of domestic law, with 95 percent certainty that the actual effect is between 6.3 and 35.4 percent. The probability of deference is an estimated 16.3 percent higher when the parties are mostly or all foreign, and an estimated 11.5 percent higher when the U.S. party prefers foreign law. The probability of deference is an estimated 13.3 percent higher when the foreign state is a liberal democracy; however,

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80 I used the Clarify software program (Tomz, Wittenberg, and King 2001) to simulate a change in the expected value of the dependent variable caused by increasing each variable from 0 to 1 (in the case of continuous variables) and from the 25th to the 75th percentile (in the case of continuous variables), setting each other variable at its mode (for dummy variables) or mean (for continuous variables), and based on Model 5.
this variable’s 95 percent confidence interval includes zero, which indicates (consistent with the logit results) that this effect is not statistically significant at a 95 percent confidence level.

Table 4.8. Estimated Effects of Independent Variable Changes on Probability of Deference to Foreign Prescriptive Authority (Model 5)

<table>
<thead>
<tr>
<th>Independent Variable</th>
<th>Value Change</th>
<th>Probability Change</th>
<th>95% Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Biased Method</td>
<td>no→yes</td>
<td>-.207</td>
<td>-.354, -.063</td>
</tr>
<tr>
<td>Activity Mostly/All Outside U.S. Territory</td>
<td>no→yes</td>
<td>.340</td>
<td>.174, .499</td>
</tr>
<tr>
<td>Parties Mostly/All Foreign</td>
<td>no→yes</td>
<td>.163</td>
<td>.075, .286</td>
</tr>
<tr>
<td>Foreign State Liberal Democracy</td>
<td>no→yes</td>
<td>.133</td>
<td>-.025, .314</td>
</tr>
<tr>
<td>U.S. Party Prefers Foreign Law</td>
<td>no→yes</td>
<td>.115</td>
<td>.028, .220</td>
</tr>
</tbody>
</table>

Beyond individual factors, does law or politics better account for the likelihood that U.S. district court judges will defer to foreign prescriptive authority in transnational litigation? Obviously, there may be significant legal and political factors that are not captured by this chapter’s analysis. However, Table 4.8 suggests that law may predominate: the substantive effect of each of the legal factors is stronger than that of any of the political factors. To further evaluate the models, Table 4.9 compares various measures of fit for Model 2, the legal model with the Biased Method variable, and Model 3, the political model. Observations with missing data were dropped to ensure that the tests were run on the same samples. The results uniformly favor the legal model over
the political model. The legal model correctly classifies the choice between domestic and foreign prescriptive authority approximately 5 percent more often than the political model, and the adjusted count R-squared figures indicate that the legal model contributes 14.3 percent more accuracy beyond simply predicting the more frequent outcome than the political model contributes. The area under the receiver operating characteristic (ROC) curves for the two models indicates that the legal model is more discriminating than the political model. Finally, the Bayesian information criterion (BIC) provides very strong support for the legal model over the political model.

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81 The correctly classified figure indicates the proportion of outcomes that were correctly classified by the model using a .5 probability cutoff to translate predicted probabilities into dichotomous predictions (Hamilton 2004, 270-271). Thus, it indicates the proportion of outcomes for which the model estimated at least a .5 probability of the court deferring to foreign governance authority, and the court in fact did so.

82 The adjusted count R² is the proportion of correct predictions beyond the number that would be correctly predicted simply by choosing the outcome with the largest percentage of observed cases, again using a .5 probability cutoff (Long and Freese 2006, 111-112).

83 A ROC curve plots 1 minus the specificity (the false positive rate) on the x-axis and sensitivity (the true positive rate) on the y-axis for each possible probability cutoff. The area under the ROC curve is equal to the probability that a random decision to apply foreign law has a higher value of the dependent variable than a random decision to apply domestic law (Altman and Bland 1994, 188). The larger the area under the ROC curve, the more discriminating the model is. One rough rule of thumb is that an area of .50 to .75 is fair, .75 to .92 is good, .92 to .97 is very good, and .97 to 1.00 is excellent (Simon 2007). The difference between the areas for the two models is statistically significant at about a 95 percent level of confidence (p=.057).

84 The BIC is the Bayesian information criterion for measuring fit. The more negative the BIC, the better the fit, and the greater the absolute difference between the BIC of two models, the stronger the evidence that one is to be preferred over the other. As a rule of thumb, an absolute difference of 0-2 is considered weak, 2-6 positive, 6-10 strong, and greater than 10 very strong evidence (Long and Freese 2006, 112-113).
Although the measures of fit presented in Table 4.9 provide only rules of thumb for comparing statistical models, they all suggest that legal factors may be playing a more important role than political factors in the choice between domestic and foreign prescriptive authority. This is not to say that political factors can be ignored. To the contrary, most of the measures suggest that the combined law-and-politics model, Model 5, does the best job predicting whether a judge asserts domestic prescriptive authority or defers to foreign prescriptive authority.

<table>
<thead>
<tr>
<th></th>
<th>Model 2 (Law)</th>
<th>Model 3 (Politics)</th>
<th>Difference</th>
<th>Model 5 (Combined)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Correctly Classified</td>
<td>70.0%</td>
<td>65.0%</td>
<td>5.0%</td>
<td>72.0%</td>
</tr>
<tr>
<td>Adjusted Count R²</td>
<td>.143</td>
<td>.000</td>
<td>.143</td>
<td>.200</td>
</tr>
<tr>
<td>Area under ROC Curve</td>
<td>.7397</td>
<td>.6234</td>
<td>.1163</td>
<td>.7736</td>
</tr>
<tr>
<td>Bayesian Information Criterion</td>
<td>-814.197</td>
<td>-777.524</td>
<td>-36.673</td>
<td>-798.693</td>
</tr>
</tbody>
</table>

As Long and Freese (2006, 104) put it, “Within a substantive area, measures of fit can provide a rough index of whether a model is adequate. However, there is no convincing evidence that selecting a model that maximizes the value of a given measure results in a model that is optimal in any sense other than the model’s having a larger (or, in some instances, smaller) value of that measure.”
4.5.2 Legalism and Judicial Heuristics: A Qualitative Analysis

The logit analyses presented above provide evidence that legal doctrine influences the allocation of prescriptive authority by U.S. district court judges in the international choice-of-law context. But does this influence reflect direct doctrinal effects, as contemplated by legalist theory, or indirect doctrinal effects through a decisionmaking process based on judicial heuristics, as posited by judicial heuristics theory? This question is difficult to answer empirically, because one can interpret the impact of territoriality and nationality—as measured by the Activity Mostly/All Outside U.S. Territory and Parties Mostly/All Foreign variables—in two different ways. Territoriality and nationality may have the impact they have because these factors are taken into account as part of the very choice-of-law analysis called for by the applicable choice-of-law methodology, in which case the importance of territoriality and nationality is evidence of direct doctrinal effects. Alternatively, the impact of territoriality and nationality may be due to their use by judges as decisionmaking shortcuts in lieu of the thorough and systematic application of the applicable choice-of-law method to the facts of the case, in which case their importance is evidence of indirect doctrinal effects. Both interpretations support the general proposition that legal doctrine influences judicial allocation of prescriptive authority. But to gain a better understanding of the causal mechanism by which this influence exerts itself, I conducted a series of additional tests designed to probe empirically the observable implications of legalist decisionmaking and heuristic-based decisionmaking.
A first series of observable implications is based on the basic proposition that some choice-of-law methods emphasize territoriality and nationality more than others. Beginning with territoriality, Table 4.10 classifies methods according to how strongly they emphasize territorial factors. Strongly territorial methodologies have a general rule or explicit presumption in favor of the law of the place of conduct or injury. These include the lex loci delicti methodology and the New York approach to conduct-regulating rules. Moderately territorial methodologies either have a presumption in favor of the law of the place of conduct or injury combined with explicit provisions allowing courts to override that presumption by considering other factors, or simply include territorial contacts among other factors to consider. Such methodologies include

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86 As explained above, New York’s choice-of-law approach to tort law issues is a version of interest analysis, and generally is categorized as such by choice-of-law scholars because it, like other versions of interest analysis, are aimed at identifying the state with the greater interest in having its law apply. There are, however, significant methodological differences between the New York approach and the approaches of other interest analysis states that suggest that they be treated differently for purposes of explaining judicial decisionmaking. Unlike the open-ended interest balancing of other interest analysis states, the New York method is based on presumptions and rules about which state has a greater interest in having its law applied. Moreover, these presumptions and rules are different for choices involving conduct-regulating laws (a place-of-the-tort presumption) and loss-allocating laws (rules based on domicile or, if the parties are not domiciled in the same state, based on a combination of domicile and the places of conduct and injury). Although some other interest analysis or “combined modern” states may occasionally distinguish between conduct-regulating and loss-allocating laws, this is not the case my international choice-of-law sample: in only 15 out of 213 observations in my sample (and 15 out of 92 observations in which the judge used interest analysis or a “combined modern” method) did judges distinguish between conduct regulation and loss allocation, and in all 15 cases the judge doing so was applying New York choice-of-law methods. Because the New York method for conduct-regulating laws has a territorial presumption, whereas the New York Method for loss-allocating laws and other states’ interest analysis methods do not, I classify the New York method for conduct-regulating laws as more strongly territorial than the other methods.
the Second Restatement and significant contacts approaches, as well as those “combined modern” approaches that blend interest analysis with Second Restatement factors. Weakly territorial methodologies either do not explicitly refer to territorial factors, or are structured in such a way that territorial factors are subordinate to other factors. The lex fori approach does not refer to territorial factors, but rather presumptively applies domestic law. Territorial contacts may be indirectly relevant to both interest analysis and the Leflar approach as part of the analysis of governmental interests. However, neither approach (except for the New York approach to conduct-regulating laws discussed above) explicitly refers to territorial factors. Moreover, the Leflar method can easily be dominated by its completely non-territorial “better law” factor (Scoles et al. 2004, 53). New York’s approach to choice-of-law issues involving loss allocating rules relies first on whether or not the parties share a common state of domicile. If they do, then the law of that state applies, regardless of the place of injury. In split-domicile loss allocation cases, territoriality and nationality “continue to challenge each other” (Scoles et al. 2004, 944), with the applicable law in some cases depending on whether the defendant’s conduct occurred in his state of domicile or

87 This excludes New York’s approach to conduct-regulating laws, which I categorize as “strongly territorial,” and New York’s approach to loss-allocating laws, which I categorize as “weakly territorial.”
88 For its part, Currie’s version of interest analysis focused more on the parties’ domiciles than on territorial contacts to establish governmental interests (Juenger 2005, 131).
89 As Scoles et al. (2004, 53) elaborate, “Although the better-law criterion is ‘only one of five,’ it can easily become the controlling criterion. Indeed, by not expressly assigning to it a residual role, Leflar allowed it to become the decisive criterion in all the close cases.” Richman and Reynolds (2004, 263) note the criticism that since domestic judges are more likely to find that domestic law is “better” than foreign law instead of vice versa, Leflar’s approach “probably leans too far in the direction of lex fori.”
whether the plaintiff’s injury occurred in her state of domicile. In other cases, the choice between domestic and foreign law depends on whether overriding a presumptive application of the law of the state where tort occurred will advance the purposes of the law without impairing the operation of the multi-state system or creating great uncertainty for litigants (Scoles et al. 2004, 775). Finally, although the Lauritzen test’s eight factors include the place of the wrongful act and the place of the contract, the U.S. Supreme Court adopted the test as an alternative to “giving controlling significance to the place of the tort,” and noted that in most cases the place of the wrongful act and the place of contract will be unimportant (Scoles et al. 2004, 891-892). “Base of operations” is a territorial concept, but the base generally is unrelated to the plaintiff’s conduct and the defendant’s injury. Therefore, the base of operations ordinarily is not territorially related to the transnational activity giving rise to the dispute, but rather more akin to concepts of domicile or nationality that legally connect parties to a particular state.

90 There may be some exceptions to this general proposition in cases where the shipowner is a defendant and the plaintiff alleges that a decision made by the owners at the base of operations rather than on the ship is the conduct that caused plaintiff’s injury.

91 See Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 310 (1970) (adopting the base of operations factor in order to disregard the nationality of the shipowner and the flag when they are merely a “façade”).
Table 4.10. Territoriality in Choice-of-Law Methodologies

<table>
<thead>
<tr>
<th>Strongly Territorial (N=58, 27%)</th>
<th>Moderately Territorial (N=81, 38%)</th>
<th>Weakly Territorial (N=71, 33%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lex Loci Delicti N.Y. Conduct Regulation</td>
<td>Second Restatement Significant Contacts Combined Modern</td>
<td>Lex Fori Interest Analysis Leflar N.Y. Loss Allocation Lauritzen</td>
</tr>
</tbody>
</table>

Notes: N=number of cases of this category in the sample. Percentages do not add up to 100 because three cases in the sample neither applied the Lauritzen test nor fall into any of Symeonides’ categories.

This leads to the first test of doctrine versus heuristics. If the impact of territoriality reflects direct doctrinal effects rather than indirect doctrinal effects through a heuristic-based decisionmaking process, then an increase in the foreign locus of activity should be associated with an increase in the probability of deference to foreign prescriptive authority, but only (or especially) when the applicable choice-of-law methodology is strongly territorial. This relationship can be statistically modeled as follows: the impact of \( X_1 \) on \( Y \) depends on the level of \( X_2 \), where \( Y \) is the probability of deference to foreign prescriptive authority, \( X_1 \) is the Activity Mostly/All Foreign dummy variable, \( X_2 \) is a Strongly Territorial Methodology dummy variable based on the above classification, and the conditional effect of territoriality is represented by the multiplicative interaction term Activity Mostly/All Foreign*Strongly Territorial Methodology. If the conditional relationship exists, the coefficient for the interaction...
term should be positive and statistically significant. However, in a logit analysis including both the interaction term and the constitutive terms (Brambor, Clark and Golder 2005; Braumoeller 2004), this is not the case. Although the coefficient for the interaction term has a positive sign, it is not statistically significant (p=.151). On the other hand, the coefficient for Activity Mostly/All Foreign is positive and statistically significant (p=.021), indicating that territoriality has an effect even when the applicable choice-of-law doctrine is not strongly territorial. Moreover, even when Strongly Territorial Method is set to 0, a change in the value of Activity Mostly/All Foreign from 0 to 1 causes a 20.3 percent increase in the probability of deference to foreign prescriptive authority. These results suggest that territoriality has an important impact on the probability of deference even when the applicable choice-of-law doctrine is only moderately or weakly territorial.93

A second way of testing this observable implication is by comparing the marginal effect that a change from activity not mostly/all outside U.S. territory to activity mostly/all outside U.S. territory has on the probability of deference when courts use strongly territorial methodologies, with that effect when courts use moderately and

92 The basic result is the same when the Strongly Territorial Methodology variable is replaced with a dummy variable indicating whether the applicable choice-of-law methodology is either strongly or moderately territorial (p=.656), and when the political variables and Parties Mostly/All Foreign variable are added as controls (p=.160 when the Strongly Territorial Methodology dummy variable is used, and p=.815 when the Strongly or Moderately Territorial Methodology variable is used.
93 The coefficient for a constitutive term (in this case Activity All/Mostly Foreign), captures its impact on the dependent variable when the other constitutive term (in this case Strongly Territorial Methodology) equals 0 (and vice versa) (Braumoeller 2004, 809).
weakly territorial methodologies. If the impact of territoriality reflects direct doctrinal effects, then the more strongly territorial the methodology, the greater the change in probability should be. If the impact of territoriality reflects indirect doctrinal effects through a process of heuristics-based decisionmaking, then territoriality should have a consistent impact across categories of doctrine. The results, presented in Table 4.11, are mixed. On the one hand, the estimated change in probability is greater (41.0 percent) with strongly territorial methodologies than those that are moderately or weakly territorial (28.0 percent and 29.6 percent, respectively). But this is not particularly strong evidence in favor of direct doctrinal effects, given that the 95 percent confidence intervals for the three doctrinal categories substantially overlap. On the other hand, the results suggest that the impact of territoriality is strongly positive even with weakly territorial methodologies.

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94 On the other hand, given the legal quality condition that judicial heuristics must satisfy, the territorial heuristic is itself more plausible for more territorial methods. From this perspective, differences in the effect of territoriality across different methods are to be expected. Consistent with this logic, I plan to focus future work on heuristics that are more precisely tailored to particular choice-of-law methods.

95 The estimates were generated by the Clarify software program (Tomz, Wittenberg, and King 2001).
A third test is based on the same observable implication applied to the nationality of the parties. If the impact of Parties Mostly/All Foreign reflects doctrinal effects, then its impact should be weaker (or nonexistent) when the court applies conflict-of-law methods according to which nationality is not an important factor. Such methods include lex loci delicti, lex fori, and the New York approach to conduct-regulating laws. On the other hand, if the impact reflects indirect effects resulting from the use of the nationality heuristic, it should be consistent across methodological categories. To test this observable implication, I ran a bivariate logit analysis with the court’s decision as the dependent variable and Parties Mostly/All Foreign as the independent variable, limited to cases in which the applicable legal doctrine was the lex loci delicti, lex fori, or New York conduct-regulating approach. The coefficient for Parties Mostly/All Foreign is positive but, consistent with direct doctrinal effects, it is not 96

In contrast, the nationality of the parties is relevant, either explicitly or implicitly, in interest analysis, the Second Restatement, Leflar, significant contacts, and the combined modern approaches.

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96 In contrast, the nationality of the parties is relevant, either explicitly or implicitly, in interest analysis, the Second Restatement, Leflar, significant contacts, and the combined modern approaches.
statistically significant ($p=.825$). Together, these three tests provide some evidence that the effect of territoriality reflects indirect doctrinal effects resulting from the use of judicial heuristics rather than direct doctrinal effects, but that the effect of nationality reflects direct doctrinal effects rather than the use of the hypothesized nationality heuristic.

A second observable implication of direct doctrinal effects rather than indirect doctrinal effects based on the use of judicial heuristics is this: to the extent a particular choice-of-law method influences a court’s choice between domestic and foreign prescriptive authority, one would expect the factors identified in that method as relevant to the choice-of-law decision to be analyzed explicitly in the court’s opinion. For example, one would expect a court using the Second Restatement to apply the applicable presumptive rule and then analyze the Restatement’s Section 6(2) choice-of-law principles in light of the factors identified in Section 145(2) to determine which state has the most significant relationship to the occurrence and the parties. Likewise, one would expect a court applying the Lauritzen method to analyze the eight Lauritzen factors. One would not necessarily expect all courts to analyze all factors in all cases. For one thing, a particular factor might not be relevant given the facts of a particular case, in which case the judge may simply ignore it rather than explaining why it is irrelevant. Moreover, the choice-of-law methods themselves should not necessarily be interpreted as commanding a court to consider all factors. Conversely, just because a judge’s written opinion analyzes a particular factor does not necessarily mean that the factor
had a significant influence on the court’s decision. Nevertheless, if choice-of-law doctrine indeed directly influences choice-of-law decisionmaking, there should be some evidence of this influence in judges’ written opinions. As a general proposition, the stronger the doctrinal influence, the more systematic and complete one would expect this analysis to be.

To test this implication, I conducted a qualitative analysis of all of the cases applying either the Second Restatement or the Lauritzen methodology, using the method of structured, focused comparison (George and Bennett 2005, chap. 3). The comparison focuses on the judge’s legal analysis of the international choice-of-law issue as set forth in the opinion, with the goal of evaluating the extent to which the judge actually analyzed the factors specified in the applicable choice-of-law methodology. To structure the comparison, I divided the Second Restatement and Lauritzen methods into their distinct methodological elements, and systematically applied them by giving each case one point for each element of method analyzed in the opinion.

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97 Some choice-of-law scholars argue that doctrinal analysis is merely a façade for the real reasons for a decision (e.g., Kramer 1991, 466 and Sterk 1994, 951). Similarly, some judicial decisionmaking scholars argue that the presence of analysis in a judicial opinion does not necessarily mean that it was an a priori basis for the judge’s decision rather than a post hoc justification for it (Segal 1984, 894; Spaeth 1995, 296). As Segal (1984, 900) argues, a judge’s decision is dependent upon many factors that may “go largely undiscussed in the main body of the opinion.” Thus, there is some risk that my method overestimates the impact of legal analysis.

98 Legal analysis is the application of applicable legal principles to the facts in order to generate a legal conclusion. Therefore, I gave points for combined statements of law and fact (including such combined statements made to point out that a particular doctrinal element is not relevant to the case), but not for mere recitation of legal principles or summary legal conclusions not explicitly based on some fact.
Table 4.12 presents the results of my qualitative analysis of Second Restatement decisions. U.S. district court judges apply an average of only 4.2 of the Second Restatement’s thirteen elements. Consistent with judicial heuristics theory, this suggests that judges indeed use shortcuts to avoid thorough and systematic application of the method. Moreover, these results suggest that judges may be using a subset heuristic, that is, a heuristic with heuristic attributes that are a subset of the doctrinally-specified target attributes.99 The evidence here suggests that the doctrinally-specified target attributes included in the subset heuristic may be place of injury, place of conduct, and nationality, because these are the three most commonly applied elements of Second Restatement analysis. And these are precisely the Second Restatement elements that correspond to the hypothesized territoriality and nationality heuristics.100 That courts tend to simplify the otherwise complex analysis of the Second Restatement in a manner that emphasizes territoriality and nationality is further evidence that judicial heuristics—particularly the hypothesized territoriality and nationality heuristics—play a significant role in judicial allocation of prescriptive authority.

99 The distinction between subset heuristics and correlational heuristics is discussed in Chapter 2, section 2.2.2.
100 Insofar as the “center of relationship” is a geographical concept, this also is a territorial factor.
Table 4.12. Content Analysis of International Choice-of-Law Decisions, Second Restatement

<table>
<thead>
<tr>
<th>Elements of Doctrinal Analysis</th>
<th>Mean</th>
<th>95% Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Application of Presumptive Rule</td>
<td>.203</td>
<td>.119, .324</td>
</tr>
<tr>
<td>Needs of International System</td>
<td>.119</td>
<td>.056, .228</td>
</tr>
<tr>
<td>Policies of the Forum</td>
<td>.102</td>
<td>.044, .208</td>
</tr>
<tr>
<td>Policies of Other Interested States and Their Interests</td>
<td>.085</td>
<td>.033, .188</td>
</tr>
<tr>
<td>Protection of Justified Expectations</td>
<td>.119</td>
<td>.056, .228</td>
</tr>
<tr>
<td>Policies Underlying the Field of Law</td>
<td>.085</td>
<td>.033, .188</td>
</tr>
<tr>
<td>Certainty, Predictability, Uniformity of Result</td>
<td>.102</td>
<td>.044, .208</td>
</tr>
<tr>
<td>Ease in Determination and Application of the Law</td>
<td>.102</td>
<td>.044, .208</td>
</tr>
<tr>
<td>Most Significant Relationship Analysis</td>
<td>.610</td>
<td>.482, .724</td>
</tr>
<tr>
<td>Place of Injury</td>
<td>.695</td>
<td>.568, .798</td>
</tr>
<tr>
<td>Place of Conduct</td>
<td>.763</td>
<td>.639, .854</td>
</tr>
<tr>
<td>Domicile, Residence, Nationality</td>
<td>.695</td>
<td>.568, .798</td>
</tr>
<tr>
<td>Center of Relationship</td>
<td>.559</td>
<td>.433, .679</td>
</tr>
<tr>
<td>Total out of 13 Possible</td>
<td>4.239</td>
<td>3.119, 5.633</td>
</tr>
</tbody>
</table>

Note: N=59

In contrast, in maritime tort cases, U.S. district court judges tend to include relatively thorough and systematic analyses of the Lauritzen factors in their opinions.

As Table 4.13 demonstrates, they apply an average of 6.7 of the Lauritzen methodology’s eight factors in each maritime choice-of-law opinion. On the one hand, three of the most commonly applied factors are those that correspond to territoriality and nationality—place of the wrongful act, domicile of injured party, allegiance of the defendant—which provides some evidence of a subset heuristic. On the other hand, even non-territorial elements that do not necessarily relate to the nationality of the parties are frequently applied, including the law of flag, inaccessibility of the foreign forum, and law of the
These results do not necessarily mean that judges reach their choice-of-law decisions based on their application of these factors rather than on decisionmaking shortcuts, but they do provide stronger evidence of the type of direct doctrinal effects contemplated by legalism than was the case for the Second Restatement.\footnote{An interesting question, albeit one beyond the scope of this chapter, is \textit{why} courts apply the Lauritzen methodology relatively thoroughly but short-circuit most of the Second Restatement’s provisions, including its presumptive rules which, in theory, could simplify decisionmaking considerably. To speculate, one possibility is that federal courts take their own choice-of-law doctrine, announced by the U.S. Supreme Court, more seriously than state choice-of-law doctrine.}

<table>
<thead>
<tr>
<th>Elements of Doctrinal Analysis</th>
<th>Mean</th>
<th>95% Confidence Interval</th>
</tr>
</thead>
<tbody>
<tr>
<td>Place of Wrongful Act</td>
<td>.905</td>
<td>.774, .968</td>
</tr>
<tr>
<td>Law of the Flag</td>
<td>.905</td>
<td>.774, .968</td>
</tr>
<tr>
<td>Allegiance or Domiciled of Injured Party</td>
<td>.929</td>
<td>.803, .982</td>
</tr>
<tr>
<td>Allegiance of the Defendant Shipowner</td>
<td>.905</td>
<td>.774, .968</td>
</tr>
<tr>
<td>Place of the Contract</td>
<td>.833</td>
<td>.691, .920</td>
</tr>
<tr>
<td>Inaccessibility of the Foreign Forum</td>
<td>.786</td>
<td>.638, .885</td>
</tr>
<tr>
<td>Law of the Forum</td>
<td>.738</td>
<td>.588, .848</td>
</tr>
<tr>
<td>Defendant Shipowner’s Base of Operations</td>
<td>.667</td>
<td>.515, .791</td>
</tr>
<tr>
<td>Total out of 8 Possible</td>
<td>6.668</td>
<td>5.557, 7.330</td>
</tr>
</tbody>
</table>

Note: N=42
resulting from the use of judicial heuristics, as contemplated by judicial heuristics
theory. The results suggest that at least some of the legal influence is due to the use of
heuristics: judges apply only some of the factors called for by the Second Restatement
and Lauritzen methods. Moreover, these factors tend to be precisely those that involve
territoriality and nationality, particularly in the case of the Second Restatement, which
suggests that territoriality and nationality are subset heuristics with respect to those
methods. The proposition that the effect of territoriality reflects indirect rather than
direct doctrinal effects is further supported by the finding that the effect persists even in
the context of choice-of-law methods that are only moderately or weakly territorial; but
the same is not the case for the effect of nationality, which loses statistical significance in
the context of choice-of-law methods that do not explicitly include nationality as a
factor. Ultimately, whether the influence of law on international choice-of-law
decisionmaking flows directly from legal doctrine or indirectly through the mechanism
of judicial heuristics cannot be answered conclusively in this chapter. But this
uncertainty does not undermine the chapter’s main finding: that law has an important
influence on judicial allocation of prescriptive authority among states.

4.5.3 Threats to Inference

As in my analysis of forum non conveniens decisionmaking in Chapter 3, I coded
the Activity Mostly/All Outside U.S. Territory variable based on statements contained in
the opinions announcing judges’ international choice-of-law decisions. If judges
selectively describe territorial contacts so as to exaggerate the extent of domestic contacts when deciding to apply domestic law and the extent of extraterritorial contacts when deciding to apply foreign law, then my findings may exaggerate the effect of this variable on the probability of deference to foreign prescriptive authority. Therefore, I again compared two different measures of territoriality. The first is a quantitative measure designed to be highly sensitive to selectivity: the percentage equal to the raw number of statements in the court’s opinion connecting the activity giving rise to the litigation to a location outside U.S. territory, divided by the total number of statements connecting the activity to places either inside or outside U.S. territory. The second is a qualitative measure designed to be less sensitive to selectivity: the percentage representing the extent to which the two conceptual elements of the activity giving rise to the litigation are outside U.S. territory: the place of the plaintiff’s injury and the place of the defendant’s conduct. I coded each element as purely domestic (0), mixed (1), or purely foreign (2), regardless of the total number of related statements about domestic or foreign location, such that their sum can range from 0 out of 4 (0 percent) to 4 out of 4 (100 percent). By disregarding the quantity of territorial statements, the qualitative measure is less sensitive to factual selectivity.  

102 Thus, if judges are selectively 

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102 Even if the qualitative measure reduces sensitivity to selective statements of facts, it would still be sensitive to judicial mischaracterization of facts. However, it is reasonable to assume that mischaracterization is uncommon (Hall and Wright 2006, 18). Moreover, even if there is occasional mischaracterization, judges presumably are more willing to be selective than to mischaracterize, which means the quantitative measure should nevertheless be more sensitive than the qualitative measure to efforts to use statements of facts for ex post rationalization.
describing territorial contacts in order to create ex post justifications for ex ante international choice-of-law decisions, the quantitative measure should be lower than the qualitative measure for decisions to apply domestic law (indicating understatements of foreign contacts), and higher than the qualitative measure for decisions to apply foreign law (indicating overstatements of foreign contacts).

The results, presented in Table 4.14, suggest that this is not the case. When U.S. district court judges decide to apply domestic law, there is not a statistically significant difference between the two measures; and when they decide to apply foreign law, they do not exaggerate extraterritorial contacts—in fact, the qualitative measure is slightly higher on average than the quantitative measure. Therefore, my assessment is that the possibility of selective statements of territorial facts does not pose a serious threat to my inferences about the influence of the territoriality heuristic.

| Decision                  | Measures of Territoriality | Quantitative Measure | Qualitative Measure | Paired t-test (P>|t|) |
|---------------------------|----------------------------|----------------------|---------------------|-----------------------|
| Apply Domestic Law        |                            | .548                 | .558                | .763                  |
| Apply Foreign Law         |                            | .725                 | .795                | .000                  |
| Total                     |                            | .660                 | .708                | .007                  |

Regarding the possibility of biased causal inferences resulting from my sample’s inclusion of published decisions only, such bias may occur if a determinant of publication has a causal effect on international choice-of-law decisionmaking and is correlated with one or more of my included independent variables (King, Keohane, and Verba 1994, 169). As in the case of forum non conveniens decisionmaking, there do not appear to be any strong a priori reasons to expect the presence of a federal government party, the establishment of a new rule of law, the involvement of a large company or law firm, or salience—each of which have been identified as possible determinants of publication (Swenson 2004, 131-136; Vladeck and Gulati 2005, 1-5)—to have a systematic effect on the choice between domestic and foreign prescriptive authority.\footnote{Even if the preferences of federal government or large business parties disproportionately influence judges’ decisions, whether these parties would prefer domestic or foreign law depends on the circumstances. In any event, my dataset includes only two cases involve a domestic government party. Arguably, higher caseload may both reduce the likelihood of publication and reduce the likelihood of applying foreign law—but the latter does not appear to be the case: when caseload is added to Model 5, it is not statistically significant (p=.977). Moreover, salience may be increase the likelihood of publication and reduce the likelihood of applying foreign law—but again, the latter does not appear to be the case: when a variable is added to Model 5 to control for political issues, it is not statistically significant (p=.155).} Even if one or more of these factors do have a causal effect on international choice-of-law decisionmaking, there are not obvious reasons to expect any of them to be correlated with any of my included independent variables. Nevertheless, the possibility of selection bias resulting from skewed publication patterns cannot be eliminated.
Therefore, one should use caution when generalizing this chapter’s results beyond published decisions.\(^{104}\)

4.6 Conclusions

How often, and under what circumstances, do U.S. district court judges apply foreign law in transnational litigation, thus deferring to foreign prescriptive authority, rather than applying domestic law, thus asserting domestic prescriptive authority? In this chapter, I have found that in published international choice-of-law decisions in tort cases, U.S. district court judges defer to foreign prescriptive authority at an estimated overall rate of 63 percent, and at an estimated rate of 45 percent when forum non conveniens decisions are excluded from the sample.

I also have found that a combination of legal and political factors influence judicial allocation of governance authority. Contrary to scholars who claim that choice-of-law doctrine is not a significant determinant of choice-of-law decisionmaking, different doctrines, which call on judges to use different choice-of-law methods, are associated with different results: the results suggest that the probability that a judge will apply foreign law is greater under the Second Restatement than under interest analysis, and greater under interest analysis than under the Lauritzen method. In addition, the

\(^{104}\) In contrast to causal inferences, however, to attribute legal meaning to my descriptive statistics about the rate at which judges apply foreign law (Table 4.1), it is absolutely essential to understand the selection process (Clermont and Eisenberg 2002, 137-14).
likelihood that a judge will apply foreign law is lower under choice-of-law methods that are biased in favor of domestic law, in the sense that these methods are either methodologically biased or methodologically permissive of judicial bias. These findings support the legalist theory proposition that legal doctrine has a direct effect on judicial decisionmaking.

The results also suggest that there may be indirect doctrinal influences on international choice-of-law decisionmaking resulting from the use of heuristics in the decisionmaking process. The probability of deference to foreign prescriptive authority is higher when the activity giving rise to the litigation occurred mostly or all outside U.S. territory, and when the parties to the litigation are mostly or all foreign. In the Second Restatement and Lauritzen contexts, judges tend to apply only some of the methodologically-specified elements of analysis. The elements applied correspond to territoriality and nationality, reinforcing the possibility that judges use subset heuristics to reduce the decisionmaking costs of otherwise complex choice-of-law analyses while ensuring an acceptable level of legal quality.

Regarding political influences, the results do not suggest that the partisanship of judges or the political environment has a general effect on judicial allocation of prescriptive authority. Nor does the economic strength of the foreign state to which deference is being considered appear to have an effect. On the other hand, international choice-of-law decisionmaking in U.S. district courts does exhibit a statistically significant and substantively important pro-domestic-party bias. Moreover, the findings provide
some evidence that U.S. district court judges are more likely to defer to the prescriptive authority of other liberal democracies, as expected by liberal theory, although this effect is not statistically significant at customary levels.

The chapter’s results challenge several pieces of conventional wisdom. Contrary to that wisdom, U.S. federal district courts frequently apply foreign law. Contrary to that wisdom, choice-of-law doctrine does appear to matter for choice-of-law decisionmaking. But the main point is not that the conventional wisdom is necessarily wrong. Rather, it may be that the conventional wisdom, developed primarily with a focus on domestic litigation and appellate courts, is not readily transferrable to transnational litigation and district courts. For example, claims about the negligible impact of choice-of-law doctrine and about pro-domestic-law bias were both developed primarily in scholarship focusing on domestic choice-of-law decisionmaking; but transnational judicial governance involves international choice-of-law decisionmaking. The judicial decisionmaking scholarship from which the attitudinal model and strategic model hypotheses were derived was developed primarily to explain U.S. Supreme Court decisionmaking, not U.S. district court decisionmaking. And the realist claim regarding the primacy of power was developed by scholars focusing on the unitary state as the essential unit of analysis, whereas domestic institutions—namely domestic courts—are the primary actors in transnational judicial governance. From this perspective, this chapter’s findings reinforce the argument that transnational litigation is
“different” (Baumgartner 2004), and suggest that there is a need for further study of transnational judicial governance as a distinct field.
5. From Domestic Courts and Global Governance to Law and World Politics

5.1 Domestic Courts and Global Governance

United States courts hear more than a thousand transnational disputes each year. The decisions they make in these cases help allocate governance authority among states and risks and resources among transnational actors. Substantively, these decisions involve matters that are as diverse as transnational activity itself, ranging from cross-border economic transactions and their negative externalities, to human rights and terrorism. These decisions directly affect the litigants; and when courts publish them, they provide information about how similar decisions may be made in the future, thus influencing the strategic behavior of transnational actors beyond the parties to a particular dispute. Domestic courts play an important role in determining the effectiveness of attempts to govern transnational activity through international law, regional and international courts, and other formal interstate arrangements. Likewise, they can either help or hinder efforts to govern transnational activity privately. Simply put, domestic courts are global governors.

Yet international relations scholars have virtually ignored domestic courts, and judicial decisionmaking scholars have focused primarily on domestic policy issues. For
their part, legal scholars generally have emphasized doctrinal analysis, and devoted relatively little effort to understanding how domestic courts actually apply private international law in transnational litigation. As a result, we know very little about how domestic courts behave as global governors and why they govern the way they do.

The goal of this dissertation has been to shed some light on the role of domestic courts in global governance. To draw attention to the governance of transnational activity by domestic courts, it developed the concept of transnational judicial governance. The dissertation then turned to its central question: How often do U.S. district courts defer to foreign authority to govern transnational activity rather than asserting domestic governance authority, and under what circumstances? I found that they frequently defer to foreign governance authority. In the forum non conveniens context, they dismiss transnational litigation in favor of foreign courts, thus deferring to foreign adjudicative authority, at an estimated rate of 47 percent. In the international choice-of-law context, U.S. district courts apply foreign law, thus deferring to foreign prescriptive authority, at an estimated rate of 63 percent (45 percent when choice-of-law decisions made as part of a forum non conveniens analysis are excluded).

One can interpret these results in at least two ways. First, they can be understood as challenging the conventional wisdom that domestic judges are biased in favor of domestic authority. Second, and more intriguing, this result might be
understood not as challenging the conventional wisdom, but as suggesting that this wisdom’s domain may be limited to domestic litigation. Indeed, theories of pro-domestic-law bias in choice-of-law decisionmaking have been developed and tested primarily in the context of domestic litigation, in which “foreign” law is the law of another U.S. state rather than a foreign country (e.g. Borchers 1992 and Brilmayer 1980). That such bias is not obvious in international choice-of-law decisionmaking may simply suggest that transnational litigation is fundamentally different than domestic litigation (Baumgartner 2004). However, to reach firmer conclusions about differences between domestic and transnational litigation, further theoretical work will be needed to explain why we might expect such differences, and further empirical work will be needed to determine whether hypothesized differences actually exist.

I also found that a combination of legal and political factors influence judicial allocation of governance authority among states. According to the forum non conveniens doctrine, U.S. district courts are to give more deference to a U.S. plaintiff’s choice of a U.S. forum than that of a non-U.S. plaintiff. Consistent with the doctrine, judges are an estimated 24 percent less likely to dismiss transnational litigation in favor of a foreign court when the plaintiff is domestic rather than foreign. If this result were due to a general bias in favor of U.S. parties, one also would expect the likelihood of dismissal to be higher when the defendant is domestic rather than foreign. But this is
not the case: the nationality of the defendant does not have a statistically significant
effect on the probability of dismissal. Depending on the applicable choice-of-law
doctrine, U.S. district court judges are required to use different choice-of-law methods.
If legal doctrine matters in transnational judicial governance, one would expect these
different methods to result in different allocations of prescriptive authority. This is
indeed the case: the Second Restatement method is more likely to result in the
application of foreign law than other methods, and interest analysis appears more likely
to result in the application of foreign law than the Lauritzen method. Moreover, choice-
of-law methods that are “biased” in favor of the application of domestic law, in the sense
that they are either methodologically biased or methodologically permissive of possible
judicial bias, are less likely to result in the application of foreign law than other methods.

These findings provide some support for the legalist hypothesis that legal
document influences transnational judicial governance judicial decisionmaking.
However, this is not the only evidence of legal influence on judicial allocation of
governance authority. The judicial heuristics theory developed in Chapter 2 suggests
that due to limited resources and heavy caseloads, U.S. district court judges may use
decisionmaking shortcuts or “heuristics” to make decisions. But not any heuristics will
do. Rather, judges are only likely to use what I call “judicial heuristics”—that is,
heuristics that not only reduce decisionmaking costs compared to thorough and
systematic application of legal doctrine, but also yield decisions that achieve an acceptable level of legal quality. In both forum non conveniens and international choice-of-law decisionmaking, I hypothesized that U.S. district court judges use a territoriality heuristic, according to which the heuristic attribute is the locus of the activity giving rise to a dispute, and the greater the extent to which that activity occurred outside U.S. territory, the more strongly this attribute weighs in favor of deference to foreign authority. I also hypothesized that judges use a nationality heuristic, according to which the heuristic attribute is the nationality of the parties to the litigation, and the greater the extent to which the parties are non-U.S., the more strongly this attribute weighs in favor of deference to foreign authority.

Consistent with the territoriality heuristic hypothesis, I found that U.S. district court judges are an estimated 39 percent more likely to dismiss transnational litigation in favor of a foreign court, and 34 percent more likely to apply foreign law, thus deferring to foreign governance authority, when the activity giving rise to the dispute occurred mostly or all outside U.S. territory. But the results for the nationality heuristic hypothesis were mixed. On the one hand, in the international choice-of-law context, U.S. district court judges are an estimated 16 percent more likely to apply foreign law when the parties are mostly or all non-U.S. On the other hand, the effect of nationality
in the forum non conveniens context is statistically significant only where one would expect this doctrinally: on the side of the plaintiff.

More fundamentally, however, it is difficult to discriminate empirically between the direct doctrinal effects expected by legalist theory and the indirect doctrinal effects expected by judicial heuristics theory. Although I attempted to mitigate this problem using qualitative analysis, my general findings on this point remain inconclusive. Nevertheless, there is fairly strong evidence that judges required to apply the Second Restatement method use a territoriality heuristic in international choice-of-law decisionmaking. Of the 13 elements of the Second Restatement method, U.S. district court judges apply an average of only 4, showing that judges indeed use shortcuts as an alternative to thorough and systematic application of the method; and the 3 most frequently applied elements are precisely those which correspond to the territoriality heuristic or the nationality heuristic: the place of injury, the place of conduct, and nationality.

Although the dissertation’s central argument is that legal doctrine matters in judicial allocation of adjudicative and prescriptive authority among states, this is not to say that political factors do not matter. To the contrary, in the forum non conveniens context, I found that U.S. district court judges are an estimated 33 percent more likely to defer to foreign adjudicative authority when the foreign state is a liberal democracy.
The results also suggest that judges may be less likely to defer in a Republican political environment. In the international choice-of-law context, I found that when U.S. and non-U.S. parties disagree about applicable law, U.S. district court judges are an estimated 12 percent more likely to apply foreign law when it is the U.S. party that prefers it. I also found evidence, albeit not as strong as in the forum non conveniens context, that judges are more likely to defer to foreign prescriptive authority when the foreign state is a liberal democracy. Other political factors—including the foreign state’s economic power and whether the judge is Republican—were not statistically significant in my analyses.

Finally, the dissertation’s findings suggest that judicial decisionmaking on private international law matters might not be as unpredictable as some skeptics suppose. In his dissent in Gulf Oil Corp. v. Gilbert, one of the U.S. Supreme Court’s seminal forum non conveniens decisions, Justice Black argued that the forum non conveniens doctrine would “inevitably produce a complex of close and indistinguishable cases from which accurate prediction of the proper forum will become difficult, if not impossible.”\(^1\) Similarly, Justice Scalia has argued that the forum non conveniens doctrine makes “uniformity and predictability of outcome almost

impossible.” Private international law scholars have expressed similar concerns about the unpredictability of choice-of-law decisionmaking (e.g. Kramer 1991; Sterk 1994). Yet Chapters 3 and 4 show that it is possible to predict judicial allocation of governance authority fairly well. Statistical models combining legal and political factors correctly classify the choice between domestic and foreign governance authority in the forum non conveniens and international choice-of-law contexts at a rate of about 72 percent, which represents contributions of about 42 percent and 20 percent more accuracy, respectively, beyond simply predicting the more frequent outcome.

5.2 Limitations and Future Avenues of Transnational Judicial Governance Research

It is important to understand these findings in light of the dissertation’s limitations, both in terms of scope and data. The dissertation focused on the determinants of one transnational judicial governance function (the allocation of governance authority among states), with an emphasis on two examples (the allocation of adjudicative authority in the forum non conveniens context, and the allocation of prescriptive authority in the international choice-of-law context), in one set of courts and in one country (the federal district courts in the United States).

Future research should begin by relaxing these limitations. Beyond adjudicative and prescriptive authority, how do domestic courts contribute to the allocation of enforcement authority among states? Beyond judicial allocation of governance authority, how do domestic courts allocate governance authority between state and nonstate actors, and between domestic and international governance arrangements? And what is the relationship between transnational judicial governance and other forms of governance—including private, transgovernmental, and interstate governance arrangements—which domestic courts may either support or undermine? Beyond the allocation of governance authority, how do domestic courts allocate risks and resources among transnational actors, including responsibility for the negative externalities of transnational economic activity? Beyond the U.S. district courts, how do U.S. state courts and courts in other countries behave as global governors? And beyond understanding the factors that influence how domestic courts behave as global governors, future research should focus on improving our understanding of the transnational shadow of domestic law—that is, the effect of domestic law and domestic

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3 See e.g. Berman (2002), Büthe (2004), and Michaels (2005), all discussing nonstate norms.
4 See, e.g., Büthe (2004, 284) (calling for research on the role of the state in the empowerment of private actors).
5 The U.S. district courts are a global center for transnational litigation (Weintraub 1994, 323-324). This makes them particularly important to study, and a natural starting point for building knowledge about transnational judicial governance. However, they are not necessarily representative of domestic courts in general.
court decisionmaking on the behavior of transnational actors. Until these additional research tasks are accomplished, caution must be used when generalizing the dissertation’s results to other dimensions of transnational judicial governance and to courts other than the U.S. district courts.

In terms of data, a basic limitation of the dissertation’s findings is that they are based solely on analysis of published court decisions. This means that the dissertation’s findings may not be valid for unpublished decisions. This is a greater threat for the dissertation’s descriptive inferences than for its causal inferences. To the extent the rate of deference to foreign governance authority is systematically higher in published cases than in unpublished cases (or vice versa), estimates based on the former cannot be validly generalized to the latter. On the other hand, such differences would bias my inferences about the determinants of judicial allocation of governance authority only if a determinant of the publication decision is both causally related to the choice between domestic and foreign authority and correlated with one or more of the independent variables included in my statistical models (King, Keohane, and Verba 1994, 169). For the reasons given in Chapters 3 and 4, my assessment is that the dissertation’s findings

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6 See, e.g., Berkowitz, Moenius, and Pistor (2004) (analyzing the effects of domestic legal institutions on international trade flows) and Daude and Stein (2007) (analyzing the effect of domestic law and legal institutions on foreign direct investment).
about the factors that influence judicial allocation of governance authority may indeed be validly generalized to unpublished cases.

That said, from a global governance perspective, the most important decisions are in any event published decisions, for those are the decisions that provide information that can influence the strategic behavior of transnational actors beyond the parties to particular lawsuits. This is not to say that unpublished decisions are unimportant. To the contrary, from the perspective of the individual litigants who are directly affected by judges’ decisions, unpublished decisions are every bit as important as published decisions. Moreover, from the perspective of judicial decisionmaking theory, it would be desirable to reach conclusions that are valid for court decisions in general. But given the substantial costs associated with the collection and analysis of unpublished decisions, the limited ability to generalize beyond published cases is a reasonable tradeoff.7

7 Unpublished decisions generally are available only from the clerk of a given U.S. district court. Due to the lack of search tools, each decision must be analyzed to determine whether it is relevant. Given the caseloads of U.S. district court judges, this could entail reviewing thousands of decisions in any given court for any given year. In addition, significant fees are charged for copying court documents. Simply put, this is not a practicable research strategy. As an alternative, Clermont and Eisenberg (2002) advocate the use of “publicly available, usually governmental, databases” such as those generated by the Administrative Office of the United States Courts, which include information on both published and unpublished cases. However, these databases are not useful for all purposes. They include only a relatively small number of variables, and these are selected by someone other than the researcher. As a result, although such databases may certainly provide fertile ground for inductive research, they will often be of somewhat limited use for testing deductively derived a priori theories and hypotheses—unless there happens to be an existing database that includes the variables implied by one’s theory. Unfortunately, there no such databases that
5.3 Broader Implications: Governance, Territoriality, Private International Law, and Judicial Decisionmaking

Beyond its specific findings, the dissertation has implications for some of the central problems in the study of world politics and private international law. The concept of transnational judicial governance challenges the notion that global governance requires international institutions. It also suggests that the processes by which law influences world politics are more diverse than those studied by international relations scholars, and that notwithstanding the doctrinal decline of territoriality and the challenges of globalization, territoriality is still important in practice. And notwithstanding skepticism on the part of both political scientists and legal scholars, the dissertation provides theoretical and empirical support for the proposition that private international law matters for international political economy and global governance, and that legal doctrine indeed influences judicial decisionmaking in transnational litigation.

include the data necessary to test the hypotheses developed in this dissertation. Furthermore, such databases do not include the text of the opinions that accompany court decisions, so even if such a database was available, it would not be possible to identify potentially important case-related facts and to analyze the judges' legal reasoning.
5.3.1 Alternatives to Interstate Governance Arrangements

When people think about global governance, they tend to think about international law, international courts, and other international organizations. For some observers, these arrangements are necessary responses to important transnational challenges, while for others they raise fears of an emerging world government. By drawing attention to the role of domestic courts in global governance, this dissertation reinforces an essential point: that global governance does not necessarily require formal interstate arrangements. To the contrary, many, and possibly most, areas of transnational activity are not governed by such arrangements. But this does not mean that they are ungoverned. These “nonregime” (Dimitrov et al. 2005) areas of activity may be governed by domestic law and domestic courts, as described by the concept of transnational judicial governance. Or they may be governed by transgovernmental networks (e.g. Raustiala 2002; Slaughter 2004; Whytock 2005) or by primarily private arrangements (e.g. Büthe 2004; Coen and Thatcher 2005; Mattli and Büthe 2003). As these highly decentralized forms of governance suggest, global governance does not necessarily require a high degree of centralization or a hierarchical structure.

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8 As Slaughter (2004, chap. 2) illustrates, domestic courts sometimes do act in the context of transgovernmental networks. However, as explained in Chapter 1, most transnational judicial governance does not take the form of transgovernmental networks.
To be sure, formal interstate arrangements may, under some circumstances—and indeed perhaps many circumstances—be more desirable than these more decentralized alternatives. However, transnational judicial governance and other alternative concepts of global governance can help scholars and policymakers avoid a sense of false necessity about the role of international law and international organization in global governance. This in turn can help focus research and policymaking on identifying the most appropriate forms of governance for particular types of transnational activity. Moreover, while pundits and scholars devote considerable attention to understanding and critiquing international arrangements such as the World Trade Organization, the World Bank, and the International Criminal Court, they pay far less attention to alternative forms of governance by which transnational activity is regulated.⁹ Yet these alternative arrangements arguably play an even more fundamental role in regulating transnational activity than international arrangements. They therefore deserve far more careful empirical and normative scrutiny than they currently receive.

Future research should be aimed at systematic functional and normative evaluation of transnational judicial governance compared to other forms of global governance. Functional evaluation of transnational judicial governance would seek a

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⁹ There is, however, an emerging critical literature on transgovernmental networks. See, e.g., Bignami (2005) and Slaughter (2004, chap. 6).
better understanding of the types of governance situations in which domestic courts may have a comparative advantage regarding the accomplishment of specified governance objectives. This research could build on the literature on rational institutional design (e.g. Koremenos, Lipson, and Snidal 2001), with sensitivity to criticisms of rational design theory (e.g. Wendt 2001). Normative evaluation of transnational judicial governance could build on recent work on the accountability of power wielders in world politics (e.g. Grant and Keohane 2005). If domestic courts are the “governors” in transnational judicial governance, to whom are they accountable? And to what extent and by what mechanisms are they held accountable?

5.3.2 The Role of Law in World Politics

Another implication of transnational judicial governance is that the ways in which law influences world politics are more varied than international relations scholarship often suggests. In most international relations scholarship on law, the dependent variable is the behavior of the unitary state and the independent variable is international law (e.g. Raustiala and Slaughter 2002; Simmons 2000; Von Stein 2005). Thus, the relationship between law and world politics is understood as an outside-in process, in which international law is an independent variable external to the state that influences state behavior.
At the risk of stating the obvious, legal rules influence the behavior of nonstate actors as well. Of particular importance to scholars of international political economy, these actors include transnational economic actors, both individual and corporate. Legal rules also influence domestic state institutions, including domestic courts and domestic regulatory agencies that make decisions with extraterritorial implications or give domestic effect to foreign or international rules. Therefore, on the dependent variable side, a thorough understanding of the role of law in world politics requires an examination not only of the behavior of the unitary state, but also of the behavior of nonstate transnational actors and domestic institutions.

On the independent variable side, international law is not the only law, and international courts are not the only courts, that influence the behavior of state and nonstate actors in world politics. As this dissertation has argued, domestic law and domestic courts play an equally if not more fundamental role in global governance, by allocating governance authority among states and risks and resources among transnational actors, and by either supporting or undermining alternative forms of global governance—including international legal arrangements.

Another way of making the point is this: the legalization of world politics does not necessarily require legalized international institutions. Abbott et al. (2000, 37) define legalization as “a particular set of characteristics that institutions may (or may not)
possess”: obligation, precision, and delegation. According to their concept, “Obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. . . . Precision means that rules unambiguously define the conduct they require, authorize, or proscribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules” (Abbott et al. 2000, 37). Like legalization, transnational judicial governance involves the setting, application, and enforcement of rules that often have relatively high levels of obligation and precision, and it implies high levels of delegation, given that domestic courts have the authority to determine which state’s rules apply to transnational activity and to interpret and implement those rules. Thus, both concepts are about the legalization of world politics. However, whereas Abbott et al. emphasize the international institutional foundations of legalized world politics,10 transnational judicial governance highlights its domestic institutional foundations—namely, domestic courts and domestic law.11 The essential point of this comparison is that the legalization of world politics can arise not only through legalized international

10 See Abbott et al. (2000, 406, Table 1) (listing international institutions). However, international relations and international law scholars have done important work on the role of domestic actors, including domestic courts and domestic compliance constituencies, on the outside-in process of state compliance with international law (e.g. Dai 2005; Keohane, Moravcsik, and Slaughter 2000; Koh 1997).
11 Critics of the legalization concept have called for greater attention to be paid to domestic law (Finnemore and Toope 2001, 754)—but even their critique neglects domestic rules of private international law like the forum non conveniens doctrine and the various choice-of-law doctrines examined in this dissertation.
institutions, but also through processes of transnational judicial governance, whereby
domestic courts help determine the size and shape of the transnational shadow of
domestic law within which transnational actors behave.

Whereas international relations scholars tend to think of the relationship
between law and world politics as an outside-in process, this dissertation draws
attention to inside-out processes, whereby domestic law and domestic courts affect
transnational activity. These inside-out processes involve not only judicial allocation of
governance authority among states and risks and resources among transnational actors,
but also the domestic constitutional rules (and the domestic court decisions that
interpret and apply them) that influence state behavior by helping to define foreign
policymaking processes and the power of different branches of government in those
processes (Whytock 2006b). They also include processes whereby domestic courts help
shape the evolution of international law (Waters 2005).

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12 For an earlier statement of the inside-out/outside-in distinction in terms of “second image” and “second
image reversed” approaches to the study of international relations, see Whytock (2006b).
13 This line of research could draw on legal scholarship on foreign relations law (e.g. Bradley and Goldsmith
2006; Franck 1992; Henkin 1972) as well as democratic peace theory (e.g. Russett and Oneal 2001), the
foundations of which include the basic constitutional arrangements of states.
14 Indeed, according to Article 38(1) of the Statute of the International Court of Justice, domestic judicial
decisions are a “subsidiary means” of determining the rules of international law.
The foregoing comments are not intended to downplay the role of international law or the importance of understanding state behavior. Rather, they are meant to suggest that international relations scholars need a broader conception of the role of law in world politics, one that encompasses the influence of not only international law and international courts but also domestic law and domestic courts; one that investigates influences on the behavior of not only state but also nonstate actors; and one that examines both inside-out and outside-in legal processes.

5.3.3 The Persistence of Territoriality

The dissertation’s results also shed light on the status of territoriality, the notion that the scope of state authority is defined with reference to state borders, and a notion that is at the core of the classic Westphalian concept of sovereignty. A central question for legal scholars and international relations scholars is to what extent globalization has eroded the significance of territoriality (Raustiala 2006). According to Symeonides (2004, 431), territoriality no longer has a central place in choice-of-law doctrine:

In terms of general methodology, territoriality lost its dominant position the moment modern methodologies rejected the first Restatement’s method of basing the choice of law on a single connecting factor, and instead relied on multiple factors. Most of the new factors, such as the parties’ domicile and their pre-existing relationship, were non-territorial. This is true not only of the center-of-gravity approach and its contemporary equivalent, the significant-contacts approach, but also of the Second Restatement, interest analysis, the better law, and other contemporary approaches.
Similarly, territoriality is less prominent in doctrines of adjudicative jurisdiction today than it once was (Raustiala 2006, 220). In 1945, the U.S. Supreme Court rejected the strict territorial approach according to which U.S. states were deemed to have power only over persons or property within their respective territories,\(^{15}\) and adopted a more flexible approach, according to which the assertion of adjudicative jurisdiction by a state is deemed proper only if the defendant has “certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”\(^{16}\)

Yet even if territoriality no longer is the foundation of private international law doctrine, the findings of Chapters 3 and 4 suggest that it may nevertheless dominate private international law decisionmaking.\(^{17}\) Quantitatively, when the activity giving rise to a dispute is mostly or all extraterritorial, forum non conveniens dismissals are an estimated 39 percent more likely, and choices in favor of foreign law are an estimated 34 percent more likely than otherwise. These effects are stronger than those of any other factor included in my analysis.\(^{18}\)

\(^{15}\) Pennoyer v. Neff, 95 U.S. 714 (1877).


\(^{17}\) Similarly, Symeonides (2004, 430) concludes that “at least in tort conflicts, the American choice-of-law revolution did not bring about a complete dislodging of the principle of territoriality.”

\(^{18}\) Of course, there may be omitted factors that might have an even stronger influence.
Qualitatively, however, this is not the strict Westphalian territoriality of the past, according to which a state’s authority was deemed not to extend beyond its borders (Krasner 1999, 20-25). Rather, it is a more relaxed neo-territorial conception, a conception that relies not on a strict territorial/extraterritorial distinction, but rather on an estimation of the territorial locus of transnational activity, activity which by definition has both territorial and extraterritorial connections. Territoriality—even in this relaxed form—is not necessarily the ideal conceptual guide for the allocation of authority. For example, legal pluralists argue that alternative jurisdictional principles that take into account non-territorial attachments would be preferable (Berman 2002). But for better or for worse, territoriality persists in world politics, at least in judicial allocation of governance authority.

5.3.4 Private International Law, International Political Economy, and Global Governance

More than a decade ago, Martin Shapiro (1993, 367) and Anne-Marie Slaughter (1993, 230-232) called on international relations scholars to pay more attention to private international law, arguing that this area of legal doctrine was highly relevant to the study of international political economy. Yet international relations scholars, while increasingly studying public international law, have virtually ignored private international law. By making explicit the relationship between private international law
and global governance, and by shedding preliminary empirical light on how this relationship works in practice, this dissertation provides a foundation for international relations scholars to take seriously Shapiro and Slaughter’s advice.

For law-and-economics scholars, the notion that private international law has important implications for the global economy is nothing new. According to them, properly designed rules of private international law can enhance regulatory competition, thus leading to more efficient domestic legal rules, more efficient economic transactions, and greater global welfare, whereas poorly designed rules allow states to externalize the costs of inefficient domestic legal rules (Carbonara and Parisi 2007; Guzman 2002; Muir Watt 2003; O’Hara and Ribstein 1999; Parisi and Ribstein 1998; Whincop and Keys 2001). Other scholars are concerned that private international rules that focus too narrowly on economic efficiency or private party autonomy may compromise other important regulatory objectives (Trachtman 1994; Wai 2002).

However, if skeptics are correct in asserting that private international law doctrine has little or no systematic impact on judicial decisionmaking (e.g. Robertson 1994, 359; Stein 1985, 785; Sterk 1994, 951; Symeonides 2006, 70), then these claims may be largely theoretical.

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19 See Chapter 1, section 1.2.4
This dissertation provides an essential (albeit preliminary) empirical foundation for the theoretical work of law-and-economics scholars by challenging the skeptical view with evidence that private international law doctrine may indeed systematically influence judicial decisionmaking in transnational litigation. Additional empirical research on private international law will of course be necessary to strengthen this foundation. But given the lack of empirical priors, the dissertation’s findings are a significant step forward.

On the other hand, the dissertation’s judicial heuristics theory provides a cautionary message about efforts to improve private international law: such efforts need to take judicial decisionmaking costs seriously. Because they face a daunting combination of limited decisionmaking resources and heavy caseloads, judges faced with doctrinal changes that represent improvement in the abstract but entail high decisionmaking costs in practice are likely to revert to the use of judicial heuristics. The implication is that the most effective improvements in private international law are likely to be those involving doctrinally-specified target attributes that are relatively few in number, clear, and easily assessable, thus reducing the need for boundedly rational judges to use decisionmaking shortcuts. In the context of the rules-versus-standards debate in the private international law literature (O’Hara and Ribstein 1999,635-638; Symeonides 2006, 411-421), this logic is one consideration weighing in favor of rules,
since rules entail lower decisionmaking costs (Kaplow 1992, 562-563; Rühl 2006, 831-832).

5.3.5 Legal Doctrine and Judicial Decisionmaking

The dissertation’s findings also have implications for the study of judicial decisionmaking. A central debate in the judicial decisionmaking literature—perhaps the central debate—has been about whether law matters. And the dominant framing of this debate pits a so-called “legal model” against “extralegal” models such as the attitudinal and strategic models (George and Epstein 1992). The former is characterized in this debate by “the belief that, in one form or another, the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent” (Segal and Spaeth 2002, 48). The latter models tend to emphasize political attitudes, defined in left-right terms, as they express themselves in individual judges and in the broader political environment.

The problem is that the legal model is an ideal type. It is based on a legal positivist theory of judicial decisionmaking which rests upon questionable

20 An alternative approach to improving transnational judicial governance might be to increase judicial resources or reduce caseloads, thus reducing the constraints imposed by bounded rationality. However, this is likely to be more costly than doctrinal simplification.

21 George and Epstein (1992) ultimately combine the two models to avoid this dichotomous approach.
assumptions—not the least of which is the assumption of determinacy or “plain meaning” of legal doctrine—that under many circumstances are difficult to support.\textsuperscript{22} This framing of the debate has two unfortunate consequences. It stacks the deck against the “law matters” side of the debate by representing it with a model based on assumptions that are widely recognized as questionable. Furthermore, it suggests that if law does not have the direct effects contemplated by the legal model, then it must have no effect at all on judicial decisionmaking.\textsuperscript{23}

A “new institutionalist” or “postpositivist” account of judicial decisionmaking emerged in the judicial decisionmaking literature which offers an alternative understanding of legal influence that takes into account the limited determinacy of legal doctrine (Clayton and Gillman 1999; Gillman and Clayton 1999; Smith 1988). According to this account, judges make decisions in an institutional context that informs the choices they make (Kahn 1999, 175-176), including norms of good faith legal decisionmaking that constitute the institution of judging (Gillman 2001, 486). The approach makes claims “not about the predictable behavior of judges, but about their state of mind—

\textsuperscript{22} See Chapter 2, section 2.2.1. As Gillman (2001, 471) puts it, it is “premised on a fairly controversial conception of law as a set of clear, determinate rules. It was the same sort of formalist conception that had been the object of realist ridicule . . . .”

\textsuperscript{23} This has led to a subsidiary debate between critics who argue that “the ‘legal model’ . . . is a straw man as far as modern judicial scholarship is concerned” (Smith 1994, 8) and attitudinalists who deny this by claiming that “[t]o various degrees, jurist, legal scholars, and political scientists [still] propound variants of the legal model” (Segal and Spaeth 2002, 48).
whether they are basing their decisions on honest judgments about the meaning of law” (Gillman 2001, 486). Yet this approach tells us little about the extent to which legal doctrine influences judicial decisionmaking, and therefore does not directly respond to the claims of extralegal modelers. Moreover, it fails to take into account an important reality of judging: limited decisionmaking resources and heavy caseloads. Thus, we are left with a gap in the judicial decisionmaking literature.

The judicial heuristics theory developed in Chapter 2 is an initial step toward filling that gap. Because judges need to conserve scarce resources, they use decisionmaking shortcuts or “heuristics” to reduce decisionmaking costs. But for normative and instrumental reasons, they only use heuristics that are likely to yield decisions that have an acceptable level of legal quality. Therefore, judicial heuristics must satisfy not only a decisionmaking costs condition, but also a legal quality condition. Judicial heuristics meet the latter requirement by specifying heuristic attributes that are a subset of, or correlated with, doctrinally-specified target attributes. This link between legal doctrine and judicial heuristics means that even if legal doctrine

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24 The judicial heuristics theory also contributes to the filling of another gap in the judicial decisionmaking literature. The leading theories in that literature were developed primarily to help explain Supreme Court decisionmaking. But as proponents of the attitudinal model acknowledge, theories of Supreme Court decisionmaking are not necessarily easily transferred to explain lower court decisionmaking (Segal and Spaeth 2002, 111; Spaeth 1995, 313). In contrast, the judicial heuristics theory developed in Chapter 2 seeks to explain district court decisionmaking, and is based on assumptions that take into account the special constraints faced by U.S. district court judges as a result of their particularly heavy caseloads and limited decisionmaking resources.
does not have the direct effects on judges’ decisions contemplated by positivist legalism, it may indirectly affect decisions through a heuristic-based decisionmaking process. Thus, the influence of judicial heuristics is a legal influence. This influence is mediated by the realities of judging—including limited doctrinal determinacy, heavy caseloads, and limited decisionmaking resources. Nevertheless, judicial heuristics theory suggests that legal influence is possible even in the face of these environmental constraints.

Taken together, the empirical findings presented in Chapters 3 and 4 suggest that the judicial heuristics theory is plausible. However, to move beyond mere plausibility, further research is required. First, further theoretical work is needed, aimed above all at adapting the latest research on bounded rationality and heuristics to the distinctive institutional context of judging. Although identification of judicial heuristics is inevitably at least a partially inductive affair, theoretical efforts should also aim at further specification of the conditions of judicial heuristics so as to facilitate a priori identification of likely heuristics. Second, further efforts should be devoted to the development of empirical tests that can more effectively detect when judicial heuristics are being used. Efforts like these will be necessary to move beyond the general proposition that there are doctrinal effects of one kind or another to more specific propositions about processes of judicial decisionmaking.
5.4 Governance-Oriented Analysis of Transnational Law

My basic claim has been that domestic courts are global governors. International relations and international legal scholars generally emphasize the role of formal interstate governance arrangements as tools for regulating transnational activity. But a preoccupation with international institutions obscures the important role that domestic institutions—including domestic courts—play in global governance. As a corrective to this preoccupation, and to draw attention to the role of domestic courts in global governance, I developed a concept of transnational judicial governance. And, as a preliminary step toward improving our understanding of why domestic courts govern the way they do, I developed and empirically tested a series of hypotheses about the factors that influence judicial allocation of governance authority in the forum non conveniens and international choice-of-law contexts.

But this chapter demonstrates that a full understanding of the role of law in world politics must go beyond the empirical scope of this dissertation, and beyond transnational judicial governance. What is needed is an approach to the study of law and world politics that encompasses both domestic and international legal institutions, and both state and nonstate actors. The foundations for such an approach can be found in the literature on transnational law. Resisting the preoccupation with interstate forms of governance, Jessup (1956, 1) argued for an alternative conception of “the law
applicable to the complex interrelated world community.” Jessup pointed out that “the term ‘international’ is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)” (Jessup 1956, 1). In its place, he proposed the concept of “transnational law,” which he defined as the body of law “which regulates actions or events that transcend national frontiers,” a concept meant to embody both public and private international law (Jessup 1956, 2).

Challenging the distinction between national and international as a basis for legal classification, he also explicitly included in his definition domestic legal rules that apply to transnational activity (Jessup 1956, 70 and 106). Doctrinally, then, the concept of transnational law includes both domestic and international legal rules that apply to transnational activity. Thus, transnational law includes, but is not limited to, the private international law rules analyzed in this dissertation, the domestic constitutional rules of foreign relations that define and allocate national foreign policymaking authority, and

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25 Interestingly, it was only some time later that American international relations scholars made a similar critique of then-mainstream international relations theory, proposing a “world politics” approach encompassing not only interstate relations, but also transnational relations—“contacts, coalitions, and interactions across state boundaries that are not controlled by the central foreign policy organs of governments” (Nye and Keohane 1971, 331).

26 Anne-Marie Slaughter proposes a narrower definition of transnational law: “all municipal law and a subset of intergovernmental agreements that directly regulate transnational activity between individuals and between individuals and state governments” (Slaughter Burley 1993, 230). Because I understand transnational judicial governance as encompassing the role of domestic courts in the governance of activity involving only states—as in some instances of transnational public law litigation (see Koh 1991), I use Jessup’s definition. See also Zumbansen (2006) (providing an overview of the development of the concept of transnational law).
Building on these foundations, and as an interdisciplinary framework for pursuing the broader law and world politics research agenda for which I have argued, I propose a governance-oriented approach to the analysis of transnational law (Whytock 2007). The governance-oriented approach has two defining characteristics. First, it focuses on the implications of transnational law not only for litigants in particular disputes, but also for the strategic behavior of transnational actors who are not among the parties to a particular lawsuit. That is, it seeks a better understanding of the shadow of transnational law.

Second, the governance-oriented approach involves not only doctrinal analysis of transnational law, but also descriptive, causal, and normative analysis of transnational law in action—that is, transnational law as it is actually applied by domestic courts.27 This is important for several reasons. The focus on law in action is

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27 See Pound (1910, 15) (“if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction between legal theory and judicial administration is often a very real and a very deep one”). However, just as an exclusive focus on private international law doctrine is insufficient from a governance-oriented perspective, so is an exclusive focus on law in action. To adopt the Holmesian equation of law with “[t]he prophecies of what the courts will do in fact” (Holmes 1897, 461) is to conflate what the governance-oriented approach wants to explain (the behavior of courts as global governors) with a potentially important explanatory variable (legal doctrine), making causal inference impossible. See Finnemore and Sikkink (1998, 892) (noting that “[b]ecause one central question of norms research is the effect of norms on state behavior, it is important to operationalize a norm in a way that
necessary descriptively, for it is not plausible to assume that legal doctrine alone fully
describes the behavior of the judges that apply it. To pursue its descriptive goal,
governance-oriented analysis would deploy standard social science methods of
descriptive inference to identify broad patterns of judicial decisionmaking on matters of
transnational law. The focus on transnational law in action also is important for
explaining why domestic courts behave the way they do as global governors, for it is not
plausible to assume that legal doctrine is necessarily the only determinant of judicial
decisionmaking in cases involving transnational legal issues. To pursue its explanatory
goal, a governance-oriented approach would draw on political science theories of
international relations and judicial decisionmaking, and employ both qualitative and
statistical methods of causal inference.

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28 See King, Keohane, and Verba (1994, chap. 2) and Epstein and King (2002, 29-34) (explaining basic
methods of descriptive inference).
29 To the contrary, in addition to skeptics in the legal academy ranging from legal realists to critical legal
scholars, a substantial body of judicial decisionmaking research provides strong evidence that legal doctrine
is not the only explanatory factor. See, e.g., George and Epstein (1991) (providing an overview of the
literature and a nuanced empirical analysis) and Friedman (2006) (criticizing the excessive skepticism about
law’s influence that pervades much of the political science literature on judicial decisionmaking).
30 See King, Keohane, and Verba (1994, chap. 3), and Epstein and King (2002, 34-37) (explaining basic
methods of causal inference).
Finally, the focus on transnational law in action is important for normative analysis. Even if a transnational legal rule is desirable, do domestic courts apply it in a desirable fashion? Do domestic courts govern in a manner that fosters or frustrates the rule of law in transnational relations?\footnote{For an analysis of transnational judicial governance from a rule-of-law perspective, see Whytock (2007).} If we want to assess critically not only transnational law itself, but also its real-world consequences, then we need an understanding of transnational law in action.
### Appendix 3.1. Correlation Table

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<th>Republican Environment</th>
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<th>Foreign State Liberal Democracy</th>
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Pearson chi-squared=33.4168, Pr.=0.000

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Pearson chi-squared=1.0731, Pr.=0.300
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Pearson chi-squared=2.6460, Pr.=0.104

### Foreign State Liberal Democracy

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Pearson chi-squared=2.4386, Pr.=0.118
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<th>Biased Doctrine</th>
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### Second Restatement vs. Other Variables

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Appendix 4.2. Cross-Tabulations for Dichotomous Independent Variables

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Pearson chi-squared=0.3561, Pr.=0.551

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Pearson chi-squared=0.0632, Pr.=0.801

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Pearson chi-squared=0.8444, Pr.=0.358
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Pearson chi-squared=3.0347, Pr.=0.082.

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Pearson chi-squared=0.0051, Pr.=0.943

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<td>Domestic Law</td>
<td>42</td>
<td>36</td>
<td>78</td>
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<td></td>
<td>56.00%</td>
<td>26.28%</td>
<td>36.79%</td>
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<td>Foreign Law</td>
<td>33</td>
<td>101</td>
<td>134</td>
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<td></td>
<td>44.00%</td>
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<td>Total</td>
<td>75</td>
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Pearson chi-squared=18.4116, Pr.=0.000.
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<tr>
<td>Domestic Law</td>
<td>70 (42.68%)</td>
<td>8 (16.67%)</td>
<td>78 (36.79%)</td>
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<td>Foreign Law</td>
<td>94 (57.32%)</td>
<td>40 (83.33%)</td>
<td>134 (63.21%)</td>
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<tr>
<td>Total</td>
<td>164 (100.00%)</td>
<td>48 (100.00%)</td>
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Pearson chi-squared = 10.8072, Pr. = 0.001

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<td>Domestic Law</td>
<td>37 (41.57%)</td>
<td>41 (33.88%)</td>
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<td>52 (58.43%)</td>
<td>80 (66.12%)</td>
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<td>Total</td>
<td>89 (100.00%)</td>
<td>121 (100.00%)</td>
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Pearson chi-squared = 1.2985, Pr. = 0.254

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<tr>
<td>Domestic Law</td>
<td>53 (40.46%)</td>
<td>26 (31.71%)</td>
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<td>Foreign Law</td>
<td>78 (59.54%)</td>
<td>56 (68.29%)</td>
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<td>Total</td>
<td>131 (100.00%)</td>
<td>82 (100.00%)</td>
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Pearson chi-squared = 1.6551, Pr. = 0.198
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Pearson chi-squared=0.1784, Pr.=0.673.

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<td>42.58%</td>
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Pearson chi-squared=7.3567, Pr.=0.007

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References


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Shapiro, Martin. 1962. The Supreme Court and Public Policy. Glenview, IL: Scott, Foresman.


Biography

Christopher Alexander Whytock was born in Glendale, California, on August 8, 1966. He attended the University of California, Los Angeles, where he earned a Bachelor of Arts degree in Political Science, magna cum laude, in 1988, and was inducted into Phi Beta Kappa. From 1986-1987, he attended the Institut d’Études Politiques, Université de Grenoble, France, where he wrote a thesis on “L’Europe communautaire et les questions de sécurité.” In 1993, he earned a Juris Doctor degree from the Georgetown University Law Center, where he was a Ford Foundation Fellow in Public International Law and an editor of the international law review, and a Master of Science in Foreign Service degree from the Georgetown University School of Foreign Service, where he received the Dean’s Award for Academic Excellence. While in law school, he participated in law reform projects in Eastern Europe and Mongolia through the United Nations Food and Agriculture Organization and the University of Maryland IRIS Center.

After becoming a member of the State Bar of California in 1993, he practiced corporate and securities law at Paul, Hastings, Janofsky & Walker LLP and O’Melveny & Myers LLP; taught law, history, and AP U.S. and comparative government and politics at Midland School, a college preparatory boarding school near Santa Barbara, California; and taught international law, international relations, and conflict resolution
as a visiting professor at the University of California, Irvine, where he twice received a Department Chair Letter of Recognition for Outstanding Teaching.

In 2003, he began his doctoral studies in the Department of Political Science at Duke University, earning a Master of Arts degree in 2005 and a Doctor of Philosophy degree in 2007. While at Duke, he received a Duke University Departmental Tuition Grant and Political Science Graduate Award; a Foreign Language and Area Studies Fellowship; and grants from the Carnegie Corporation/Terry Sanford Institute for Public Policy/Triangle Institute for Security Studies, the Duke University Graduate School, the Duke University Program for the Study of Democracy, Institutions and Political Economy, and the International Studies Association. He joined the faculty of the University of Utah S.J. Quinney College of Law as Associate Professor of Law in August 2007.