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Myth of Mess? International Choice of Law in Action

Christopher A. Whytock

University of California, Irvine School of Law, cwhytock@law.uci.edu

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ARTICLES

MYTH OF MESS? INTERNATIONAL CHOICE OF LAW IN ACTION

CHRISTOPHER A. WHYTOCK*

Choice of law is a mess—or so it is said. According to conventional wisdom, choice-of-law doctrine does not significantly influence judges' choice-of-law decisions. Instead, these decisions are primarily motivated by biases in favor of domestic over foreign law, domestic over foreign litigants, and plaintiffs over defendants. They are also highly unpredictable.

This Article argues that these “mess” claims do not accurately describe at least one domain of choice of law—international choice of law—and it demonstrates what is at stake in this debate for global governance. Part I provides a brief overview of choice-of-law doctrine in the United States. Part II documents the mess claims. Part III then shows how the mess claims, if correct, would be bad news for global governance. Choice-of-law doctrine can increase or decrease global economic welfare, enhance or undermine transnational rule of law, and facilitate or hinder transnational bargaining. The extent of these effects, and whether they are beneficial or harmful, depends largely on the degree to which choice-of-law doctrine actually influences judges' international choice-of-law decisions and the extent to which those decisions are biased and unpredictable. The mess claims thus imply that if choice of law has any systematic effects on global governance they are likely to be harmful.

Part IV uses statistical analysis of an original dataset of published international choice-of-law decisions by U.S. district courts in tort cases to present evidence that choice-of-law doctrine indeed influences these decisions; that these decisions are not biased in favor of domestic law, domestic litigants, or plaintiffs; and that they are actually quite predictable. The mess claims, it turns out, may be myths—at least in transnational tort cases.

Part V explores the broader implications of my analysis. In particular, it explains why these findings are encouraging from a global-governance perspective and why they might plausibly extend to unpublished international choice-of-law decisions and domestic choice-of-law decisions. Overall, the Article's findings suggest that the conventional wisdom exaggerates what is wrong with choice of law and implicitly underestimates its contributions to global governance.

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INTRODUCTION	721
I. CHOICE OF LAW DOCTRINE	724
II. THE “MESS” CLAIMS.....	730
A. <i>The Marginal Influence of Choice-of-Law Doctrine</i> .	730
B. <i>Biases in Choice-of-Law Decisionmaking</i>	732
1. <i>Pro-Domestic-Law Bias</i>	732
2. <i>Pro-Domestic-Party Bias</i>	733
3. <i>Pro-Plaintiff Bias</i>	734
C. <i>The Unpredictability of Choice-of-Law Decisionmaking</i>	734
III. INTERNATIONAL CHOICE OF LAW, THE MESS CLAIMS, AND GLOBAL GOVERNANCE	735
A. <i>Global Economic Welfare</i>	736
B. <i>Transnational Rule of Law</i>	739
C. <i>Transnational Bargaining</i>	742
D. <i>The Special Significance of Published Choice-of-Law Decisions</i>	743
IV. MYTH OF MESS? EMPIRICAL EVIDENCE REGARDING INTERNATIONAL CHOICE OF LAW	745
A. <i>Empirical Priors</i>	746
1. <i>The Solimine, Borchers, Thiel, and Symeonides Studies</i>	746
2. <i>Limitations of Prior Studies</i>	751
B. <i>Empirical Strategy</i>	753
1. <i>Sample</i>	754
2. <i>Dependent Variable</i>	756
3. <i>Explanatory Variables</i>	757
a. <i>Choice-of-Law Doctrine</i>	757
b. <i>Pro-Domestic-Party Bias</i>	761
c. <i>Pro-Plaintiff Bias</i>	761
4. <i>Control Variables</i>	762
C. <i>Findings</i>	764
1. <i>Little or No Pro-Domestic-Law Bias</i>	764
2. <i>Additional Findings</i>	769
a. <i>The Influence of Choice-of-Law Doctrine</i> ..	770
b. <i>Little Evidence of Pro-Domestic-Party or Pro-Plaintiff Bias</i>	774
c. <i>The Predictability of International Choice-of-Law Decisionmaking</i>	776
d. <i>Effect of Control Variables Is Ambiguous</i> ..	777
V. IMPLICATIONS AND EXTENSIONS	778
A. <i>Implications for Global Governance</i>	778
B. <i>Extension to Unpublished Decisions</i>	781

1. <i>Descriptive Inferences</i>	782
2. <i>Causal Inferences</i>	784
C. <i>Extension to Domestic Choice-of-Law Decisions</i>	785
CONCLUSION	786

INTRODUCTION

Choice of law is a mess—or so it is said.¹ According to conventional wisdom, choice-of-law doctrine does not significantly influence judges' choice-of-law decisions.² These decisions are instead motivated by strong biases favoring domestic over foreign law,³ domestic over foreign litigants, and plaintiffs over defendants.⁴ Furthermore, choice-of-law decisions are commonly thought to be highly unpredictable.⁵

This Article argues that these “mess” claims do not accurately describe at least one domain of choice of law—*international* choice of law—and it demonstrates what is at stake in this debate for global governance.⁶ Part I provides a brief overview of choice-of-law doctrine in the United States. Part II documents the mess claims.

¹ See, e.g., Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2449 (1999) (“Choice of law is a mess. That much has become a truism.”); Hillel Y. Levin, *What Do We Really Know About the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247, 248 (2007) (reviewing SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* (2006)) (“[M]odern conflicts theory and doctrine is a mess . . .”).

² See, e.g., Stewart E. Sterk, *The Marginal Relevance of Choice of Law Theory*, 142 U. PA. L. REV. 949, 951 (1994) (noting popular belief that “choice of law theory exerts at best a marginal influence on choice of law decisions”); Symeon C. Symeonides, *Choice of Law in the American Courts in 1994: A View “From the Trenches,”* 43 AM. J. COMP. L. 1, 2 (1995) (“[O]f 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.”) (emphasis omitted).

³ See, e.g., Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 59 (1989) (“In practice, it is quite clear that what courts ordinarily do in conflicts cases is to apply forum law.”); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 560 (2002) (“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.”).

⁴ See, e.g., Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 398 (1980) (describing modern choice-of-law approaches as “pro-resident, pro-forum-law, and pro-recovery”).

⁵ See Shirley A. Wiegand, *Fifty Conflict of Laws “Restatements”: Merging Judicial Discretion and Legislative Endorsement*, 65 LA. L. REV. 1, 4 (2004) (“[I]t has become difficult to predict what a court will do when faced with choice of law issues, and each case seems to demand an ad hoc determination.”); see also Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 319 (1992) (“No set of choice-of-law rules has yet achieved a high degree of predictability in hard cases . . .”).

⁶ Global governance consists of “the processes and institutions . . . that guide and restrain” transnational activity. Robert O. Keohane & Joseph S. Nye Jr., *Governance in a*

Part III argues that the mess claims, if correct, would be bad news for global governance. According to law-and-economics theories of international choice of law, well-designed choice-of-law rules can increase global economic welfare by creating incentives for private parties to act efficiently and for governments to adopt efficient substantive laws. If the mess claims are correct, however, they present a serious challenge to these theories—after all, if choice-of-law rules do not significantly affect judges' choice-of-law decisions, then these rules are unlikely to have important consequences for global welfare.⁷ Transnational rule of law requires that judges make decisions impartially and that transnational actors generally comply with applicable law. Choice-of-law doctrine can bolster transnational rule of law by providing rules for impartial international choice-of-law decision-making and by helping transnational actors determine which laws will govern their activity. Likewise, it can facilitate bargaining among transnational actors by clarifying mutual expectations about which state's law a court will apply in the event of litigation. If the mess claims are correct, however, then choice-of-law doctrine instead leads to unpredictable choice-of-law decisionmaking by the courts, which undermines mutual expectations and hinders transnational bargaining. In summary, the mess claims imply that if choice of law has any systematic effects on global governance they are likely to be harmful.

Having established the mess claims' significance for global governance, Part IV then evaluates whether these claims accurately describe international choice of law. Part IV.A begins by examining prior empirical studies of choice-of-law decisionmaking; taken together, these studies provide significant, if mixed, support for the mess claims. However, there are reasons to suspect that these studies underestimate the influence of choice-of-law doctrine on judges' decisions and overestimate the extent of bias in those decisions. Moreover, these prior studies address choice of law generally, rather than

Globalizing World, in *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* 193, 202 (Robert O. Keohane ed., 2002). For purposes of this Article, "transnational activity" means activity having connections to more than one nation-state. I use the terms "international" and "transnational" purposefully. The former refers to relations between nation-states; the adjective "international" most accurately describes choice-of-law decisions that choose between the law of one nation-state and another. The latter refers more broadly to relations among states and/or non-state actors that cross nation-state borders. Thus, the adjective "transnational" describes the type of litigation in which international choice-of-law decisions most frequently arise: litigation concerning activity with connections to more than one nation-state, rather than purely domestic activity. See Joseph S. Nye, Jr. & Robert O. Keohane, *Transnational Relations and World Politics: An Introduction*, 25 INT'L ORG. 329, 330–32 (1971) (distinguishing "transnational" and "international" relations).

⁷ See *infra* Part III.A.

international choice of law specifically. This limits the light they can shed on the global governance implications of judges' choice-of-law decisions.⁸

In response to the limitations of these prior studies, Parts IV.B and C develop and implement an alternative empirical strategy. Using statistical analysis of an original dataset of published international choice-of-law decisions by U.S. district court judges in tort cases, I present evidence that (1) choice-of-law doctrine indeed influences these decisions; (2) these decisions are not biased in favor of domestic law, domestic litigants, or plaintiffs; and (3) the decisions are actually quite predictable.⁹ This Article's empirical approach has several distinctive features.¹⁰ Unlike prior studies, it attempts to measure more accurately the effects of doctrine on judges' choice-of-law decisions by separating out what the different choice-of-law methods have in common and by controlling for the legal merits of litigants' arguments. This is only the second empirical study of choice of law to use multivariate statistical analysis to account for other factors likely to influence judges' choice-of-law decisionmaking.¹¹ More importantly, it is the first study to focus specifically on the *international* choice-of-law decisions of U.S. district courts, allowing it to shed empirical light on choice of law's implications for global governance.

Part V explores the broader implications of these findings and shows why the Article's results are good news for global governance. Part V also argues that these findings might plausibly extend to unpublished international choice-of-law decisions and domestic choice-of-law decisions.¹² As it turns out, the mess claims appear to be myths with regard to published transnational tort cases, and they may not accurately describe choice-of-law decisionmaking in other contexts either.

No statistical analysis can "prove" or "disprove" the mess claims, and ultimately messiness is in the eye of the beholder. But the evidence presented in this Article at least suggests that conventional wisdom exaggerates what is wrong with choice of law and underestimates its positive contributions to global governance.

⁸ See *infra* Part IV.A.

⁹ See *infra* Part IV.C.

¹⁰ See *infra* Part IV.B (describing empirical strategy).

¹¹ The other is Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291, 305 (2000), which uses multivariate regression analysis to analyze choice-of-law decisions.

¹² See *infra* Part V.B–C.

I CHOICE-OF-LAW DOCTRINE

Choice of law is the branch of conflict-of-laws doctrine that seeks to identify the appropriate law to apply in disputes with connections to more than one state.¹³ These connections may be territorial (i.e., when the activity sparking the dispute touches the territories of more than one state) or may be based on legal relationships between a state and the persons involved (e.g., citizenship).¹⁴ In these situations, more than one state may have a legitimate interest in having its law applied to the activity.¹⁵ Choice-of-law doctrine prescribes how judges should make choice-of-law decisions—that is, decisions whether to apply domestic or foreign law to the legal issues before them.

There is no uniform choice-of-law doctrine in the United States. To the contrary, different U.S. states have adopted different doctrines, which use a variety of methods for making choice-of-law decisions.¹⁶ Moreover, different methods apply to different types of substantive legal issues, such as torts and contracts.¹⁷ For tort cases—the focus of this Article’s analysis—Symeon Symeonides classifies the available methods into seven categories, as listed in Table 1.¹⁸

According to the method set forth in the First Restatement of Conflict of Laws (also called the “traditional” or *lex loci delicti* method), the general choice-of-law rule for torts is that a court should apply “the law of the place of wrong.”¹⁹ The First Restatement defines the place of wrong as “the state where the last event necessary

¹³ See EUGENE F. SCOLES ET AL., CONFLICT OF LAWS §§ 1.1–2, at 1–3 (4th ed. 2004) (defining choice of law). Although the term “conflicts” is sometimes used to refer to choice of law, the field of conflict of laws is generally understood as composed of not only choice of law but also jurisdiction as well as recognition and enforcement of judgments. *Id.* at 3. For comprehensive treatments of the field see generally *id.* and RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS (5th ed. 2006). Choice-of-law doctrine varies considerably between nations. See generally MATHIAS REIMANN, CONFLICT OF LAWS IN WESTERN EUROPE: A GUIDE THROUGH THE JUNGLE (1995) (detailing choice-of-law doctrine in civil law countries). This Article focuses exclusively on choice-of-law doctrine in the United States.

¹⁴ SCOLES ET AL., *supra* note 13, § 1.1, at 1.

¹⁵ See Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 62 (1989) (noting that in litigation with interstate elements, more than one sovereign will inevitably claim governing authority).

¹⁶ See *infra* Table 1 (indicating number of U.S. jurisdictions that have adopted each choice-of-law method for tort cases).

¹⁷ See generally SCOLES ET AL., *supra* note 13 (surveying choice-of-law methods applicable to domestic relations, torts, contracts, property, and other areas of substantive law).

¹⁸ See SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 64 tbl.4 (2006) (listing seven categories presented in Table 1 *infra*).

¹⁹ RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378–379 (1934).

to make an actor liable for an alleged tort takes place.”²⁰ Usually this is the location where the plaintiff was injured, since liability does not arise without injury.²¹ Thus, under the First Restatement, if the injury occurs in State A, the judge should apply the law of State A.

TABLE 1
CHOICE-OF-LAW METHODS IN THE UNITED
STATES (TORTS)

<i>Choice-of-Law Method</i>	<i>Number of U.S. Jurisdictions</i>
First Restatement	10 (19%)
Significant Contacts	3 (6%)
Interest Analysis	3 (6%)
Second Restatement	23 (44%)
Leflar	5 (10%)
Combined Modern	6 (12%)
Lex Fori	2 (4%)
Total	52

NOTES: The first column of this table lists the seven categories of choice-of-law methods identified by Symeonides. The second column indicates the number of U.S. states (plus the District of Columbia and Puerto Rico) that have adopted each choice-of-law method for torts as of 2006. See Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 713 tbl.1 (2006).

Beginning in the 1960s, with the onset of the so-called “American choice-of-law revolution,” a growing number of states began replacing the First Restatement method with one of several “modern” methods.²² One of these modern methods, the “significant contacts” method, 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”²³

A second, closely related modern method is “interest analysis”: When domestic and foreign laws conflict, the judge applies the law of the state with the greater interest in having its law applied²⁴ or the law of the state whose interests would be most impaired if its law were not

²⁰ *Id.* § 377.

²¹ SCOLES ET AL., *supra* note 13, § 17.2, at 713.

²² For a leading account of this revolution, see Chapter III of SYMEONIDES, *supra* note 18, at 37–62.

²³ *Id.* at 98–99.

²⁴ SCOLES ET AL., *supra* note 13, § 2.24, at 102–03.

applied.²⁵ The introduction of state interests into choice-of-law analysis was inspired largely by the scholarship of Brainerd Currie.²⁶ According to Currie:

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.²⁷

Currie's approach thus depends on analysis of competing state interests, but it does not require courts to balance these interests against those of the forum state. In fact, Currie was strongly opposed to such judicial balancing.²⁸ As actually adopted by U.S. states, however, interest analysis calls on judges to "engage in the very weighing of state interests that Currie proscribed."²⁹

The Second Restatement of Conflict of Laws sets forth a third modern method. According to the Second Restatement, "[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 and the parties under the principles stated in § 6,"³⁰ which enumerates a variety of policy considerations that should influence judges' choice-of-law decisions.³¹ Section 145(2) then provides that, when applying the section 6

²⁵ This version of interest analysis is called the "comparative impairment" method and was developed by William Baxter. *Id.* § 2.9, at 31. It has been adopted by California. *Id.* § 2.24, at 103.

²⁶ See generally BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

²⁷ BRAINERD CURRIE, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, in *SELECTED ESSAYS ON THE CONFLICT OF LAWS*, *supra* note 26, at 188, 189.

²⁸ See *id.* at 182 ("[A]ssessment of the respective values of the competing legitimate interests of two sovereign states, in order to determine which is to prevail, is a political function of a very high order. This is a function that should not be committed to courts in a democracy.").

²⁹ SCOLES ET AL., *supra* note 13, § 2.24, at 103.

³⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(1) (1971).

³¹ According to section 6:

[T]he 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 interested states and the relative interests of those states in the determination of the 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.

Id. § 6(2).

principles, judges should take into account the place of injury, the place of conduct, the domicile or nationality of the parties, and the place of the parties' relationship.³² The Second Restatement also provides presumptive choice-of-law rules for specific types of torts. For example, section 146 provides that in personal injury cases, the law of the state where the injury occurred "determines the rights and liabilities of the parties, unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied."³³ As Scoles and his co-authors note, the Second Restatement is a "kindred approach" to the significant contacts method; however, "courts following the significant-contacts approach do not engage in the in-depth policy analysis the Restatement requires nor are they bound by its presumptive rules."³⁴

The fourth modern method is known as the Leflar or "better law" method. It proposes five "choice-influencing considerations" to help judges decide which law to apply: predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interest, and application of the better rule of law.³⁵

Fifth are the "combined modern" approaches that blend interest analysis with other methods.³⁶ In particular, several states combine interest analysis with Second Restatement considerations.³⁷ One "combined modern" state, New York, emphasizes the distinction between laws that regulate conduct and laws that allocate losses; it has developed its own relatively clear rules to govern choice-of-law issues involving the latter.³⁸ When the issue is whether domestic or foreign law should regulate disputed conduct, New York choice-of-law doctrine generally calls for application of the law of the state where the tort occurred.³⁹ When the issue is allocation of losses resulting from that conduct, however, New York uses a series of more specific rules. If the parties are domiciled in the same state, then that state's law

³² *Id.* § 145(2).

³³ *Id.* § 146.

³⁴ SCOLES ET AL., *supra* note 13, § 2.22, at 98.

³⁵ Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 282 (1966).

³⁶ SYMEONIDES, *supra* note 18, at 115–16.

³⁷ *Id.* (identifying New Jersey, District of Columbia, Massachusetts, Oregon, Hawaii, North Dakota, and Pennsylvania as "combined modern" jurisdictions, which employ interest analysis and Second Restatement factors in at least some contexts).

³⁸ *Id.* at 101–15.

³⁹ SCOLES ET AL., *supra* note 13, § 17.48, at 842.

applies; otherwise, the applicable law depends on a combination of domicile and the place of conduct and injury.⁴⁰

Finally, the *lex fori* method presumes that the law of the judge's jurisdiction should apply.⁴¹ Depending on the state, this presumption is rebuttable when the forum state lacks significant contacts with the case or the parties, the foreign state has an interest in having its law apply and the forum state's interests do not mandate that forum law apply, or the foreign state has an "overwhelming" interest in having its law apply.⁴²

In the United States, the applicable choice-of-law method is generally a question of state rather than federal law.⁴³ When federal subject matter jurisdiction is based on diversity of citizenship, a federal court must follow the choice-of-law doctrine of the state in which it sits.⁴⁴ In non-diversity cases, federal courts generally follow the Second Restatement.⁴⁵ For maritime torts with transnational elements, however, federal courts use a choice-of-law method developed in a series of U.S. Supreme Court cases beginning with *Lauritzen v. Larsen*.⁴⁶ In *Lauritzen*, the Supreme Court listed seven factors to guide maritime choice-of-law decisions: the place of the wrongful act, the law of the flag of the ship, the allegiance or domicile of the injured party, the allegiance of the shipowner, the place of contract, the inaccessibility of an alternative foreign forum, and the law of the domestic

⁴⁰ *Id.* § 17.47, at 841–42.

⁴¹ *Id.* § 17.15, at 737–41.

⁴² See SYMEONIDES, *supra* note 18, at 76–81 (describing circumstances in which forum law presumption can be rebutted).

⁴³ SCOLES ET AL., *supra* note 13, § 1.1, at 2. More specifically, as Symeonides explains, choice-of-law doctrine is usually part of state common law:

Although each state legislature has the inherent power to enact choice-of-law legislation, very few states have exercised this power. Only one state [Louisiana] has a comprehensive conflicts codification and, although many other states have piecemeal, narrowly drawn statutes, the great bulk of American conflicts law is found in the law reports, not the statute books. It has been created judicially through the pronouncements of the courts in adjudicating conflicts cases and through the operation of the doctrine of *stare decisis*.

SYMEONIDES, *supra* note 18, at 4–5.

⁴⁴ See *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that *Erie* doctrine extends to choice of law and federal courts sitting in diversity must therefore apply state choice-of-law rules).

⁴⁵ GEORGE A. BERMAN, *TRANSNATIONAL LITIGATION IN A NUTSHELL* 224 (2003); GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 750 (4th ed. 2007).

⁴⁶ *Lauritzen v. Larsen*, 345 U.S. 571 (1953); see also *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970) (applying *Lauritzen* choice-of-law principles); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) (same).

forum.⁴⁷ Later, in *Hellenic Lines Ltd. v. Rhoditis*, the Supreme Court added an eighth factor, the shipowner's "base of operations."⁴⁸

Courts face both "domestic" and "international" choice-of-law problems.⁴⁹ "Domestic" choice-of-law problems involve choosing between the laws of two different U.S. states.⁵⁰ In this context, "domestic" or "forum" law refers to the law of the U.S. state in which the court sits; "foreign law" refers to the law of the other U.S. state. "International" choice-of-law problems require a court to choose between United States, or a U.S. state's, law on the one hand and the law of a foreign nation-state (or a governmental subunit thereof) on the other hand.⁵¹ In this context, "domestic" law or "forum" law again refers to the law of the forum state, "foreign state" refers to a foreign nation-state, and "foreign law" refers to the law of that foreign nation-state.⁵²

U.S. judges generally apply the same choice-of-law methods described above in both domestic and international contexts (except for the Lauritzen method, which applies only in transnational maritime cases).⁵³ However, this Article takes international choice of law

⁴⁷ *Lauritzen*, 345 U.S. at 583–91.

⁴⁸ 398 U.S. at 308–09.

⁴⁹ SYMEONIDES, *supra* note 18, at 3–4.

⁵⁰ *Id.* (describing "horizontal" interstate conflicts).

⁵¹ *See id.* (defining "international (state) conflicts" as conflicts between laws of U.S. states and laws of foreign countries and "international (federal) conflicts" as conflicts between laws of United States and laws of foreign countries).

⁵² Alternatively, the relevant "foreign law" may be the law of a governmental subunit of a federally-organized foreign nation-state, such as the law of a Canadian province.

⁵³ *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 10 (1971) ("The rules in the Restatement of this Subject apply to cases with elements in one or more States of the United States and are generally applicable to cases with elements in one or more foreign nations."). My data confirm this tendency: Except for transnational maritime cases, all of the randomly selected international choice-of-law decisions in my dataset used one of the seven choice-of-law doctrines identified in Table 1 *supra*. This tendency to apply the same solutions to domestic and international choice-of-law problems is part of a broader tendency in U.S. courts to solve transnational problems using domestic analogues. *See* Stephen B. Burbank, *Jurisdictional Equilibration, the Proposed Hague Convention, and Progress in National Law*, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 117, 122 (John J. Barcelo III & Kevin M. Clermont eds., 2002) ("This disposition to assimilate international to domestic interjurisdictional cases has been reinforced by the very powerful impulse of modern American procedural law, including choice of law for these purposes, to apply the same rules to all cases."); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 307–08 (2008) (noting this practice as part of broader phenomenon of "interstate-international equivalence" whereby U.S. judges and scholars tend to "approach transnational scenarios from the perspective of interstate frameworks"). Whether or not choice-of-law doctrine *should* distinguish between domestic and international problems is much debated. *Compare* ROBERT A. LEFLAR ET AL., AMERICAN CONFLICTS LAW § 6, at 9–11 (4th ed. 1986) (arguing that existence of differences between international and domestic contexts "does not mean that a separate set

as its subject in order to investigate the relationship between choice of law and global governance.⁵⁴

II

THE “MESS” CLAIMS

The foregoing overview describes what legal doctrine says about choice of law; but what doctrine says is not necessarily what judges do.⁵⁵ In fact, choice-of-law scholars tend to be deeply skeptical about whether legal doctrine plays a significant role in judges’ choice-of-law decisionmaking.⁵⁶ This Part documents five widely made claims that inform this skepticism and have led scholars to conclude that choice of law is a “mess”: (1) choice-of-law doctrine does not significantly influence judges’ choice-of-law decisions; instead, (2) these decisions are biased in favor of domestic over foreign law, (3) they are biased in favor of domestic over foreign parties, and (4) they are biased in favor of plaintiffs over defendants; and (5) these decisions are highly unpredictable.

A. *The Marginal Influence of Choice-of-Law Doctrine*

The first “mess” claim is that choice-of-law doctrine does not significantly influence judges’ choice-of-law decisionmaking. One might expect the differences among the choice-of-law methods discussed in Part I to lead to different outcomes in choice-of-law cases. But in a leading modern treatise, Eugene Scoles, Peter Hay, Patrick Borchers, and Symeon Symeonides assert that “methodology rarely drives judicial decisions.”⁵⁷ According to Symeonides, “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.”⁵⁸ Similarly, Stewart Sterk concludes that “choice of law

of conflicts rules for international cases can or should be devised”) with ALBERT A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 19–21 (1967) (arguing for separation of doctrine applicable to domestic and international conflicts).

⁵⁴ See *infra* Part III.

⁵⁵ Cf. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 358 (1992) (“[W]hat courts do, not what they say, is important.”); William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 IND. L.J. 417, 427 (2000) (encouraging empirical choice-of-law scholarship that, following legal realists, seeks to understand “what courts do, rather than what they say”).

⁵⁶ This skepticism is not unlike that which pervades social science scholarship on law and courts. See Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261, 262 (2006) (“[R]eflecting an almost pathological skepticism that law matters, positive scholars of courts and judicial behavior simply fail to take law and legal institutions seriously.”).

⁵⁷ SCOLES ET AL., *supra* note 13, § 2.19, at 83.

⁵⁸ Symeonides, *supra* note 2, at 2.

theory exerts at best a marginal influence on choice of law decisions.”⁵⁹

A different version of the marginal-influence claim asserts that it does matter whether judges use the First Restatement or one of the modern methods but that *which* modern method is used does not significantly influence choice-of-law decisions.⁶⁰ For example, Patrick Borchers concludes that “[c]ourts do *not* take the new approaches seriously. Because all of the [modern] competitors to the First Restatement start from different analytical premises, if courts were faithful to their tenets they would inevitably generate different result patterns. Yet in practice the outcomes are largely indistinguishable.”⁶¹ According to Shirley Wiegand, “it appears [that] it does not matter too much what modern methodology courts follow.”⁶²

These marginal-influence claims are based on two assumptions. First, they assume that modern choice-of-law methods are indeterminate. Sterk, for example, argues that “modern choice of law theory provides ample authority to permit a court to reach virtually any result in any litigated case.”⁶³ Likewise, Borchers reasons that the new approaches “perform nearly identically in practice [because] none of them is much of a check on judicial discretion.”⁶⁴ The title of a commentary by Michael Gottesman, “Adrift on the Sea of Indeterminacy,”⁶⁵ reflects this view of choice-of-law doctrine.

The second assumption is that judges’ biases are driving choice-of-law decisionmaking. As Larry Kramer puts it, “judges really do seem driven by their desire to apply a preferred substantive law without regard for independent choice of law considerations.”⁶⁶ Or, as Borchers suggests, “the new theories usually amount to little more than long-winded excuses to do what courts wanted to do in the first place.”⁶⁷

⁵⁹ Sterk, *supra* note 2, at 951.

⁶⁰ See Patrick J. Borchers, *Empiricism and Theory in Conflicts Law*, 75 IND. L.J. 509, 509 (2000) (referring to this view as “widely held”).

⁶¹ Borchers, *supra* note 55, at 379.

⁶² Wiegand, *supra* note 5, at 21.

⁶³ Sterk, *supra* note 2, at 987; see also Jack L. Goldsmith & Alan O. Sykes, *Lex Loci Delictus and Global Economic Welfare: Spinozzi v. ITT Sheraton Corp.*, 120 HARV. L. REV. 1137, 1137 (2007) (“[M]odern choice-of-law methodologies are famously indeterminate”); Levin, *supra* note 1, at 251 (“[M]any contemporary scholars agree that, in practice, the various doctrinal approaches do not provide much guidance for, or constraints on, judges at all.”).

⁶⁴ Borchers, *supra* note 55, at 379–80.

⁶⁵ Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527 (2000).

⁶⁶ Larry Kramer, *Choice of Law in the American Courts in 1990: Trends and Developments*, 39 AM. J. COMP. L. 465, 466 (1991).

⁶⁷ Borchers, *supra* note 55, at 382.

B. Biases in Choice-of-Law Decisionmaking

The next three commonly voiced mess claims point to specific supposed biases in choice-of-law decisionmaking. These claims assert that choice-of-law decisions are biased in favor of domestic law, domestic litigants, and plaintiffs.

1. Pro-Domestic-Law Bias

Choice-of-law scholars widely assume that choice-of-law decisionmaking is biased strongly in favor of domestic law—that is, the law of the forum.⁶⁸ For example, Joseph Singer states that “[i]n practice, it is quite clear that what courts ordinarily do in conflicts cases is to apply forum law.”⁶⁹ Larry Ribstein argues that “even if courts apply the laws of other states under choice-of-law clauses, they will apply forum law most often across their whole range of cases.”⁷⁰ Louise Weinberg similarly notes that “historically, forum law has been the overwhelming judicial choice.”⁷¹

The claim is not necessarily that this bias inheres in judges. Some instead attribute it to the modern choice-of-law methods themselves, such as interest analysis and the Second Restatement, which have substantially replaced the First Restatement’s approach.⁷² Friedrich

⁶⁸ See, e.g., SCOLES ET AL., *supra* note 13, at 107 (noting “homeward trend” in American choice of law); Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002) (“[J]udges tend to be biased in favor of local law”); Erin Ann O’Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 631, 639 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (“[J]udges are always tempted . . . to apply more easily ascertained local laws.”); Antony L. Ryan, *Principles of Forum Selection*, 103 W. VA. L. REV. 167, 192 (2000) (“One feature of many modern approaches . . . is a marked tendency to apply the law of the forum (the *lex fori*.”); Joseph William Singer, *A Pragmatic Guide to Conflicts*, 70 B.U. L. REV. 731, 746 (1990) (“In general, the courts tend to apply forum law to benefit plaintiffs”); Sterk, *supra* note 2, at 968 (“[I]n many tort cases . . . courts find little reason to depart from forum law”); Thiel, *supra* note 11, at 293 (“[J]udges . . . exhibit a tendency to apply their own forum law.”); Willis L.M. Reese, *Conflict of Laws*, 33 AM. J. COMP. L. 332, 335 (1985) (reviewing EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* (1984)) (“[T]he great majority of the choice-of-law cases that have arisen in tort have resulted in the application of a local law rule favorable to the plaintiff.”); see also SYMEONIDES, *supra* note 18, at 334 (noting “widely held assumption” that courts applying modern methods have very strong pro-forum-law biases).

⁶⁹ Singer, *supra* note 3, at 59.

⁷⁰ Larry E. Ribstein, *From Efficiency to Politics in Contractual Choice of Law*, 37 GA. L. REV. 363, 431 (2003).

⁷¹ Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1652 (2005).

⁷² See, e.g., Borchers, *supra* note 55, at 359 (noting frequently made assertion that new theories are pro-forum-law); Brilmayer, *supra* note 4, at 398 (arguing that Currie’s version of interest analysis has “three discernible biases: pro-resident, pro-forum-law, and pro-recovery”); Laycock, *supra* note 5, at 251 (asserting that “[c]hoice-of-law rules . . . [should] not prefer forum law to the law of sister states” and arguing that “[m]any modern choice-

Juenger argues that the modern approaches have an “inherent forum law preference.”⁷³ According to Jack Goldsmith and Alan Sykes, “compared to the *lex loci* rule, the modern rules have one unmistakable consequence: they make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction.”⁷⁴ As Ralph Whitten summarizes, “[b]oth the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law.”⁷⁵

2. *Pro-Domestic-Party Bias*

Another common mess claim is that judges’ choice-of-law decisions are biased in favor of domestic litigants.⁷⁶ According to Brilmayer, the new theories are “pro-resident.”⁷⁷ And Erin O’Hara and Larry Ribstein note that “judges are always tempted to defect from individual rules in favor of local litigants.”⁷⁸ This claim is consistent with more general claims of anti-foreigner bias in U.S. courts.⁷⁹

of-law theories violate [that] principle”); Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 839 (2006) (“[T]he American standards that emerged in the course of the American conflicts revolution . . . have mostly served as a justification for application of the law that the courts know best.”); Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the ‘New Critics’*, 34 MERCER L. REV. 593, 595 (1983) (“[T]he forum[,] . . . regardless of its purported approach to choice of law[,] . . . generally will end up applying its own law”); Solimine, *supra* note 15, at 87 (stating that pro-forum hypothesis “appears to be confirmed”).

⁷³ FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 148 (spec. ed. 2005).

⁷⁴ Goldsmith & Sykes, *supra* note 63, at 1137.

⁷⁵ Whitten, *supra* note 3, at 560.

⁷⁶ See, e.g., Borchers, *supra* note 55, at 359 (noting frequently made assertion that “the actual operation of the new choice-of-law theories . . . [is] ‘pro-resident’”); Brilmayer, *supra* note 4, at 398 (arguing that Currie’s version of interest analysis has pro-resident bias); Laycock, *supra* note 5, at 251 (asserting principle that “[c]hoice-of-law rules [should] not prefer local citizens to citizens of a sister state” and arguing that “[m]any modern choice-of-law theories violate [this] principle”); see also Symeon C. Symeonides, *Choice of Law in the American Courts in 2006: Twentieth Annual Survey*, 54 AM. J. COMP. L. 697, 738 (2006) (referring to pro-local-party claim as “common assumption”).

⁷⁷ Brilmayer, *supra* note 4, at 398.

⁷⁸ O’Hara & Ribstein, *supra* note 68, at 639.

⁷⁹ See, e.g., Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1520 (2003) (“Our empirical results . . . substantiate the existence of xenophobic bias in the American courts with American juries in patent suits.”); see also Utpal Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625, 629 (2007) (“Our article supports the conclusion of [Kimberly A.] Moore (2003): foreign firms are disadvantaged in U.S. courts.”). But see Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL L. STUD. 441, 464 (2007) (finding that foreigners have higher win-rates than domestic parties, and concluding that “the data offer no support for the existence of xenophobic bias in U.S. courts”).

3. *Pro-Plaintiff Bias*

In addition to pro-domestic-law and pro-domestic-party biases, choice-of-law scholars often assert that judges' choice-of-law decisions have a pro-recovery bias—that is, they favor plaintiffs.⁸⁰ According to Solimine, for example, “the modern theories of choice of law, at least in application, are inevitably pro-recovery.”⁸¹ Likewise, Borchers finds that judges have a “strong prorecovery bent.”⁸²

C. *The Unpredictability of Choice-of-Law Decisionmaking*

The final mess claim is that judges' choice-of-law decisions have become highly unpredictable as a result of the American choice-of-law revolution's shift from the First Restatement's relatively rigid place-of-the-wrong (or *lex loci delicti*) rule to the highly flexible modern approaches.⁸³ Choice of law was fairly predictable under the

⁸⁰ See, e.g., Brilmayer, *supra* note 4, at 398–99 (arguing that Currie's version of interest analysis has pro-recovery bias); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 9 (1991) (arguing that modern choice-of-law approaches give “a distinct advantage to the party initiating the lawsuit”); Michael I. Krauss, *Product Liability and Game Theory: One More Trip to the Choice-of-Law Well*, 2002 BYU L. REV. 759, 791, 795 (arguing that “plaintiffs fare better in ‘interest analysis’ states, on average, than do defendants” (emphasis omitted) and that modern movement from traditional rules to interest analysis “has been a shift from one conflicts rule favoring local plaintiffs to a different rule that favors local plaintiffs even more”); Reese, *supra* note 68, at 335 (“[T]he great majority of the choice-of-law cases that have arisen in tort have resulted in the application of a local law rule favorable to the plaintiff.”); Singer, *supra* note 68, at 746 (“In general, the courts tend to apply forum law to benefit plaintiffs”); see also SYMEONIDES, *supra* note 18, at 332 (noting “widely-held assumption” that courts favor plaintiffs in choice-of-law decisions); cf. JUENGER, *supra* note 73, at 149 (“[O]n the whole the current doctrines have, in practical application, strengthened the protection of multistate accident victims by filtering out substandard torts rules.”). But see SCOLES ET AL., *supra* note 13, § 17.1, at 712–13 (suggesting that plaintiff bias may be subsiding).

⁸¹ Solimine, *supra* note 15, at 93.

⁸² Borchers, *supra* note 55, at 380.

⁸³ See, e.g., SCOLES ET AL., *supra* note 13, § 17.33, at 786 (arguing that modern methods are “flexible, perhaps too flexible,” resulting in “conspicuous judicial polyphony”); SYMEONIDES, *supra* note 18, at 423 (arguing that choice-of-law revolution “went too far in denouncing all choice-of-law rules,” leading to “an unprecedented degree of judicial flexibility in choice-of-law decisions”); Goldsmith & Sykes, *supra* note 63, at 1137 (“[The] modern choice-of-law methodologies are famously indeterminate and do not permit systematic generalizations about which substantive tort law governs in particular cases.”); Laycock, *supra* note 5, at 319 (“No set of choice-of-law rules has yet achieved a high degree of predictability”); Levin, *supra* note 1, at 251 (“[M]any contemporary scholars agree that, in practice, the various doctrinal approaches do not provide much guidance for, or constraints on, judges at all.”); Alan Reed, *The Anglo-American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box*, 18 ARIZ. J. INT'L & COMP. L. 867, 878, 898 (2001) (arguing that choice-of-law revolution “has only increased obfuscation in an area characterized more by mud than by crystal” and that “[t]he tale of American choice of law principles has become the story of a thousand and one inconsistent tort

First Restatement because of its clear place-of-injury rule for torts,⁸⁴ but the modern methods “allow wide areas of discretion.”⁸⁵ As a result, “it has become difficult to predict what a court will do when faced with choice of law issues, and each case seems to demand an ad hoc determination.”⁸⁶ Similarly, O’Hara and Ribstein express concern that modern choice-of-law methods “undermine predictability.”⁸⁷ As Symeonides puts it, the choice-of-law revolution “has gone too far in embracing flexibility to the exclusion of all certainty.”⁸⁸

In sum, for a variety of reasons, many critics have claimed that choice of law is a mess, characterized by too much discretion, bias, and unpredictability.

III

INTERNATIONAL CHOICE OF LAW, THE MESS CLAIMS, AND GLOBAL GOVERNANCE

If the mess claims are correct, this would be bad news for global governance, since one of its central concerns is determining *who* gov-

cases”); Weinberg, *supra* note 71, at 1645 (arguing that Second Restatement has led to “a predictably large quotient of arbitrary and unjust results”); *see also* Solimine, *supra* note 15, at 49–50 (noting criticism that modern approaches lack predictability and “permit free-wheeling and unprincipled choices by judges”).

⁸⁴ Wiegand, *supra* note 5, at 2. Notwithstanding the place-of-injury rule, various “escape devices” may reduce the First Restatement’s predictability. O’Hara & Ribstein, *supra* note 68, at 632.

⁸⁵ Wiegand, *supra* note 5, at 4.

⁸⁶ *Id.*

⁸⁷ O’Hara & Ribstein, *supra* note 68, at 636–37.

⁸⁸ SYMEONIDES, *supra* note 18, at 425. It should be noted, however, that some scholars argue that even if choice-of-law decisions cannot be predicted based on the factors expressly identified by choice-of-law doctrine, they could be predicted if one discovered the “true rules” that judges actually use to make those decisions. *See* Albert A. Ehrenzweig, *A Proper Law in a Proper Forum: A “Restatement” of the “Lex Fori Approach,”* 18 OKLA. L. REV. 340, 340–44 (1965) (coining term “true rules”). As Richman and Reynolds explain, Ehrenzweig searched for “a set of rules or generalizations that in fact predict the decisions of courts in choice-of-law cases,” rules not deduced from choice-of-law theory but rather “induced or abstracted from the tendencies of courts to reach certain choice-of-law *results* regardless of their announced methodology.” Richman & Reynolds, *supra* note 55, at 432; *see also* SYMEONIDES, *supra* note 18, at 427 (“Fortunately, and importantly, despite the lack of [doctrinal] guidance . . . judicial decisions have produced much more consistent *results* than the critics assume.”); Sedler, *supra* note 72, at 598 (asserting that choice-of-law outcomes in tort cases “tend to fall into certain fact-law patterns”); Singer, *supra* note 68, at 746 (rejecting notion that “we cannot predict how courts will rule on choice-of-law questions” and noting that “[i]n general, the courts tend to apply forum law to benefit plaintiffs”); Sterk, *supra* note 2, at 977 (referring to “remarkable consistency in tort cases involving localized activity”). Consistent plaintiff, domestic-law, or forum bias might serve as such a predictable “true rule.”

erns.⁸⁹ For example, which state's law should govern activity with connections to multiple states? The answer is not obvious; multiple connections mean that more than one state may have a legitimate interest in having its law apply.⁹⁰ By answering this basic "who governs" question, a choice-of-law system can have potentially important consequences for global governance.⁹¹ In theory, it can increase or decrease global economic welfare, enhance or undermine transnational rule of law, and facilitate or hinder transnational bargaining. This Part argues that the extent of these effects, and whether they are beneficial or harmful, depends largely on the extent to which choice-of-law doctrine actually influences judges' international choice-of-law decisions and the extent to which those decisions are biased and unpredictable. According to the mess claims, choice-of-law doctrine does not significantly influence choice-of-law decisionmaking, which is biased and highly unpredictable. The mess claims thus imply that if choice of law has any systematic effects on global governance, they are likely to be harmful.

A. *Global Economic Welfare*

According to theories developed by law-and-economics scholars, choice-of-law rules can have an important influence on global economic welfare.⁹² These scholars generally posit one of two basic causal mechanisms to explain this relationship. The first involves private activity. Some states have more efficient substantive laws than others in the sense that they create stronger incentives for private actors to engage in welfare-enhancing activity and refrain from welfare-reducing activity.⁹³ Choice-of-law rules enhance global eco-

⁸⁹ See Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. (forthcoming 2009) (manuscript at 8–22), available at <http://ssrn.com/author=386558> (discussing judicial allocation of global governance authority).

⁹⁰ *Id.* at 21.

⁹¹ *Id.* at 12–13 (analyzing relationship between international choice-of-law decision-making and global governance).

⁹² See, e.g., MICHAEL J. WHINCOP & MARY KEYES, *POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS* 27–30 (2001) (arguing that properly designed choice-of-law rules can minimize social costs of litigation, facilitate international coordination, facilitate optimal contracting, and limit regulatory monopolies and spillovers); Guzman, *supra* note 68, at 885–86 (“[T]he objective of a choice-of-law regime should be to provide a legal ordering that goes as far as possible toward maximizing global welfare.”). For a very useful overview of different theories regarding the global economic implications of choice-of-law systems, see Ralf Michaels, *Two Economists, Three Opinions? Economic Models for Private International Law—Cross-Border Torts as Example*, in *AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW* 143, 146 (Jürgen Basedow & Toshiyuki Kono eds., 2006).

⁹³ See, e.g., STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 196–98 (2004) (arguing that in unilateral accident cases, strict liability is socially optimal tort rule, whereas ordinary negligence is sub-optimal).

conomic welfare if they result in application of the more efficient substantive law.⁹⁴

The second mechanism involves substantive lawmaking by governments. Governments ordinarily consider the domestic costs and benefits of proposed laws, but they do not necessarily account for extraterritorial costs and benefits.⁹⁵ As a result, governments may adopt laws that are efficient domestically but inefficient globally.⁹⁶ Choice-of-law rules can increase global economic welfare by encouraging governments to internalize extraterritorial costs, resulting in substantive laws that are more efficient globally.⁹⁷ For example, Erin O'Hara and Larry Ribstein argue that choice-of-law rules favoring the law contractually selected by the parties to a transaction can foster inter-jurisdictional competition for more efficient laws.⁹⁸ According to this theory, if transnational actors are free to contract around inefficient substantive legal rules, then states will need to compete for legal business by efficiently revising their laws.⁹⁹

The mess claims challenge these law-and-economics theories regarding the impact of choice-of-law systems on global welfare. Most fundamentally, the mess claims imply that choice-of-law rules are

⁹⁴ See, e.g., Guzman, *supra* note 68, at 896 (“In framing choice-of-law rules, the objective should be to identify and implement rules that will permit transactions to take place when the total impact on welfare is positive, and prevent transactions from taking place when the total impact on welfare is negative.”); Michaels, *supra* note 92, at 153 (“For a private law model, an economic analysis . . . should focus on individuals as rational agents and set private international law rules so as to give the optimal incentives to these individuals in order to maximize global social welfare.”).

⁹⁵ Guzman, *supra* note 68, at 897.

⁹⁶ See *id.* (“For example, a government will permit activities whose impact on global welfare is negative if the costs are borne by foreigners and the benefits are enjoyed locally.”).

⁹⁷ See, e.g., Guzman, *supra* note 68, at 897 (“[C]hoice-of-law rules should be crafted to encourage governments to internalize the costs of their actions (and to allow them to internalize the benefits.”); Michaels, *supra* note 92, at 173 (“Private international law rules are efficient if they give states the incentives to pass substantive laws that in turn give individuals the right incentives for efficient conduct.”); Emanuela Carbonara & Francesco Parisi, *Choice of Law and Legal Evolution: Rethinking the Market for Legal Rules* 2–3 (Univ. of Minn. Law Sch. Legal Research Paper Series, Research Paper No. 07-38, 2007), available at <http://ssrn.com/abstract=1011376> (starting from premise that “competition among legal rules can significantly affect the evolution of law” and arguing that poorly designed choice-of-law rules allow inefficient substantive law to persist, whereas well-designed choice-of-law rules can facilitate evolution toward efficient substantive laws).

⁹⁸ O'Hara & Ribstein, *supra* note 68, at 643.

⁹⁹ *Id.* Law-and-economics scholars continue to debate the strength of the assumption that states have an incentive to promote selection of their law. See *id.* at 644–45 (discussing competing theories of state motivation to compete for efficient laws); Rühl, *supra* note 72, at 813–14 (discussing plausibility of this assumption and noting possibility that this logic may result in “race-to-the-bottom” (i.e., toward inefficient laws) rather than “race-to-the-top”).

unlikely to have systemic economic consequences, beneficial or harmful. In effect, the law-and-economics theories posit an explanatory variable, an intervening variable, and a dependent variable: They hypothesize that choice-of-law rules (the explanatory variable) influence private and governmental behavior (the intervening variable), which in turn affects global welfare (the dependent variable). However, another variable intervenes: judges. If the mess claims are correct, this intervening variable breaks the causal chain, because choice-of-law rules do not significantly influence judges' choice-of-law decisions and those decisions are unpredictable.¹⁰⁰ The mess claims therefore suggest that even optimally designed choice-of-law rules are likely to have neither the behavioral consequences nor the welfare effects hypothesized by law-and-economics theorists.¹⁰¹

Even if choice of law does have global economic consequences, the mess claims imply that those consequences are likely to be harmful since choice-of-law decisions are biased in favor of domestic

¹⁰⁰ See LEA BRILMAYER, CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS § 4.3.2, at 173 (1991) ("If 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."); Michaels, *supra* note 92, at 156 ("*Ex-ante* predictability enables parties to optimise their conduct *vis-à-vis* the incentives set by the applicable tort rules.").

¹⁰¹ This does not mean that choice-of-law doctrine cannot independently influence behavior (although if it is too indeterminate to guide judges' decisions, it is also likely to be too indeterminate to guide the behavior of transnational actors), but it does mean that doctrine's influence depends largely on how judges actually apply it. Insofar as judges do not make choice-of-law decisions in accordance with the applicable choice-of-law doctrine, and transnational actors know this, the doctrine is likely to have a substantially diminished influence on the actors' behavior. Rule-based choice-of-law methods may more effectively limit judicial discretion than standards-based methods, resulting in greater doctrinal influence and more predictable choice-of-law decisions. See Rühl, *supra* note 72, at 832 ("Compliance costs . . . are usually low for rules because their simplicity and clarity makes them easily accessible. For standards, in contrast, the costs of determining the content are usually high because individuals have to engage in the difficult, if not at times impossible, prediction of how a court will eventually determine the desired degree and level of conduct."). Thus, the version of the marginal-influence-of-doctrine claim that focuses its criticism on the modern methods rather than the more rule-like First Restatement, *see supra* notes 60–62 and accompanying text, seems to leave open the possibility that choice-of-law methods could be developed which would both influence judges' decisions and be economically efficient. In fact, some law-and-economics scholars argue that the First Restatement itself is economically efficient, at least compared with the modern methods. See Goldsmith & Sykes, *supra* note 63, at 1143–47 (making economic argument in favor of First Restatement's *lex loci delicti* approach). The problem is that the First Restatement allows judges to deviate from the ostensibly predictable and certain place-of-wrong tort rule by means of "escape devices." As a result, the mess claims may describe the First Restatement more accurately than the place-of-wrong rule alone would suggest, and thus it may not foster the posited economic efficiencies. See Borchers, *supra* note 55, at 365 (noting two such escape devices: recharacterization and public policy exception).

law.¹⁰² For example, one recent critique of modern choice-of-law methods begins with the proposition that the modern methods “make it more likely that the forum court will apply local tort law to wrongs that occurred in another jurisdiction.”¹⁰³ This gives transnational tort plaintiffs an incentive to sue in the United States to take advantage of more plaintiff-friendly tort law.¹⁰⁴ However, under U.S. rules of personal jurisdiction, these plaintiffs can only sue in U.S. courts against U.S. firms and firms with close U.S. connections.¹⁰⁵ U.S. firms therefore suffer disproportionately: “Non-U.S. firms that operate outside the United States are potentially subject to lower tort liabilities for their activities than their U.S. competitors in the same markets.”¹⁰⁶ This causes global welfare-reducing inefficiencies: “Other things being equal, the greater the cost disadvantage suffered by U.S. firms when they are subjected to U.S. tort standards on a discriminatory basis, the greater the degree to which less efficient competitors who do not confront such liability will displace the U.S. firms.”¹⁰⁷ The seriousness of the resulting harm to global economic welfare depends on the extent to which judges’ choice-of-law decisions—particularly decisions based on the modern methods—are actually biased in favor of domestic law. By asserting that this bias is strong, the mess claims imply that this economic harm may be substantial.

B. Transnational Rule of Law

“At its core,” writes Brian Tamanaha, the rule of law “requires that government officials and citizens are bound by and act consistent with the law.” Accordingly, Tamanaha argues, the law must conform to “a set of minimal characteristics: [it] must be set forth in advance (be prospective), be made public, be general, be clear, be stable and

¹⁰² See, e.g., Goldsmith & Sykes, *supra* note 63, 1147 (concluding that pro-domestic-law bias of modern methods reduces global economic welfare); Guzman, *supra* note 68, at 908 (arguing that interest analysis is flawed from efficiency perspective because its pro-domestic-law tendency leads to systematic overregulation).

¹⁰³ Goldsmith & Sykes, *supra* note 63, at 1137.

¹⁰⁴ See *id.* (“The substantive tort law and related procedural mechanisms available in U.S. courts are generally much more favorable to plaintiffs, and produce much larger recoveries, than the law and procedures available in foreign courts.”).

¹⁰⁵ *Id.* at 1144.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 1145–46. Goldsmith and Sykes summarize their argument as follows:

U.S. personal jurisdiction rules combine with modern choice-of-law rules to apply U.S. tort laws discriminatorily to U.S. firms in a way that, under standard principles of trade law, can reduce global welfare. *Lex loci* eliminates this distorting economic effect by ensuring that all firms are subject to the same standard of liability for torts committed in a particular place.

Id. at 1147.

certain, and be applied to everyone according to its terms.”¹⁰⁸ Whether global governance possesses these rule-of-law characteristics depends partly on whether international choice-of-law decision-making is unbiased, predictable, and based on publicly announced choice-of-law rules.

For example, the rule of law requires that judges, as officials of the state, make decisions based on “public, prospective laws, with the qualities of generality, equality of application, and certainty.”¹⁰⁹ But according to the mess claims, judges make international choice-of-law decisions based on factors other than “public, prospective” choice-of-law rules. Worse, contrary to the principles of generality and equality of application, the mess claims suggest that the dispositive factors in these decisions are various biases—biases in favor of domestic law, domestic litigants, and plaintiffs. Moreover, because it is highly unpredictable, international choice-of-law decisionmaking reduces rather than increases certainty.

The rule of law also requires that actors generally comply with applicable legal rules.¹¹⁰ Focal point,¹¹¹ reputational,¹¹² and norma-

¹⁰⁸ Brian Z. Tamanaha, *A Concise Guide to the Rule of Law* 3 (St. John’s Univ. Sch. of Law Legal Stud. Research Paper Series, Paper No. 07-0082, 2007), available at <http://ssrn.com/abstract=1012051>.

¹⁰⁹ BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 119 (2004).

¹¹⁰ See *supra* note 108 and accompanying text.

¹¹¹ See generally Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (describing focal point theory of legal compliance). Focal point theory is based on one of the central insights of game theory: Often there will be “multiple paths toward capturing the gains from cooperation and no obvious way for a set of decentralized actors to converge on one of them.” Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in IDEAS AND FOREIGN POLICY: BELIEFS, INSTITUTIONS, AND POLITICAL CHANGE 173, 175 (Judith Goldstein & Robert O. Keohane eds., 1993). In game-theoretic terms, this is the folk theorem for repeated games, according to which there can be many equilibria in a single game. HERBERT GINTIS, GAME THEORY EVOLVING: A PROBLEM-CENTERED INTRODUCTION TO MODELING STRATEGIC BEHAVIOR 126 (2000). If actors follow different paths, they will not enjoy these gains; but absent direct communication, they may not know on which path to converge. This is known as a coordination problem. However, if one path stands out from the others in such a way that each actor expects other actors to take that same path, then actors in general will tend to take that path, thus solving the coordination problem. THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 54–55 (1980). Importantly, there must be a common understanding among the relevant actors about what this path is. McAdams, *supra*, at 1657. Such a path is called a “focal point.” As McAdams argues, “law is one means of creating a focal point, and therefore, one means of achieving coordination. Even without threatening sanctions, the state can focus attention on one of several equilibrium solutions to a coordination game by commanding or merely recommending that individuals coordinate around that solution.” *Id.* at 1663. In these situations, because the law helps solve actors’ coordination problems, they have a reason to comply even without enforcement. *Id.* at 1666.

tive¹¹³ processes may all contribute to compliance by transnational actors.¹¹⁴ All three processes require that transnational actors have some degree of certainty about the applicable legal rules. Otherwise, actors cannot identify the relevant focal point around which they should coordinate their behavior. Nor can they know which law to use as a standard for determining the reputational costs of particular behavior or as a source of norms for assessing the appropriateness of that behavior.¹¹⁵ A choice-of-law system can enhance compliance by

¹¹² See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 33–41 (2008) (setting forth reputational theory of legal compliance). According to reputational theories, if an actor's reputation for compliance is good, that reputation will increase the actor's opportunities for entering into profitable transactions with other actors who are aware of that reputation. If that reputation is bad, it will decrease those opportunities. Therefore, an actor's reputation for complying with legal obligations is a valuable asset. The actor has an incentive to comply with legal obligations because noncompliance will harm that reputation. See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 393 (1990) (explaining this general logic); Kenneth A. Shepsle, *Institutional Equilibrium and Equilibrium Institutions*, in *POLITICAL SCIENCE: THE SCIENCE OF POLITICS* 51, 71 (Herbert F. Weisberg ed., 1986) (same); GUZMAN, *supra*, ch. 3, at 71–117 (applying this logic to explain compliance with international law).

¹¹³ See James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 INT'L ORG. 943, 949–52 (1998) (distinguishing normative processes of compliance from instrumental processes driven by “logic of expected consequences”). The focal point and reputational theories of compliance are based on a behavioral logic of anticipated consequences: They both “see actions as driven by expectations of consequences” and “imagine that human actors choose among alternatives by evaluating their likely consequences for personal or collective objectives, conscious that other actors are doing likewise.” See *id.* at 949 (describing logic of anticipated consequences). But compliance can also be explained by a logic of appropriateness, according to which actions are rule-based. See *id.* at 951 (explaining that according to logic of appropriateness, “[h]uman actors are imagined to follow rules that associate particular identities to particular situations” and “[a]ction involves evoking an identity or role and matching the obligations of that identity or role to a specific situation”). From this perspective, actors are understood as “acting in accordance with rules and practices that are socially constructed, publicly known, anticipated, and accepted.” *Id.* at 952.

¹¹⁴ See Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155, 170–85 (2004) (providing overview of all three processes).

¹¹⁵ Cf. BRILMAYER, *supra* note 100, § 4.3.2, at 173 (arguing that choice-of-law rules must be clear in order to influence individual behavior); Johan P. Olsen, *Understanding Institutions and Logics of Appropriateness: Introductory Essay* 6 (Arena Ctr. for European Studies, Univ. of Oslo, Working Paper No. 13, 2007), available at http://www.arena.uio.no/publications/working-papers2007/papers/wp07_13.xml (noting that “[t]he clarity and consistency of rules and identities are variables” and that actors may find it particularly challenging to act according to logic of appropriateness “when several institutions structured according to different principles and rules provide competing analyses and behavioral prescriptions for the same area of action”). In fact, if actors are too uncertain about the applicable rule, they may revert to non-rule-based consequentialist decisionmaking. See March & Olsen, *supra* note 113, at 952 (“When preferences and consequences are precise and identities or their rules are ambiguous, a logic of consequences tends to be more important.”).

clarifying which law applies to transnational actors. However, by positing that choice-of-law rules do not significantly influence choice-of-law decisions, and that those decisions are highly unpredictable, the mess claims suggest that the choice-of-law system is more likely to hinder than facilitate these compliance processes.

C. *Transnational Bargaining*

Much the same analysis holds true for transnational bargaining. As Robert Mnookin and Lewis Kornhauser famously put it, people bargain in the “shadow of the law.”¹¹⁶ Likewise, transnational actors bargain in the transnational shadow of domestic law.¹¹⁷ Whether and how this shadow influences bargaining depends largely on choice of law. The question is: In the shadow of which state’s domestic law are transnational actors bargaining? In terms of process, relative certainty about which law a judge will apply can facilitate bargaining.¹¹⁸ Substantively, bargaining outcomes are likely to be different if the actors expect a judge to apply the law of one state rather than the law of another.

If the mess claims are correct, there would be little certainty about applicable law: Choice-of-law doctrine only marginally influences judges’ choice-of-law decisions, which are instead driven by various biases and are highly unpredictable. Transnational actors would therefore have difficulty developing clear, mutual expectations about which law will apply to their relationships in the event of litigation. This, in turn, would make it more difficult for transnational actors to structure relationships and resolve disputes outside of

¹¹⁶ Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950–51, 972–73 (1979); see also Martin Shapiro, *Courts*, in 5 HANDBOOK OF POLITICAL SCIENCE: GOVERNMENTAL INSTITUTIONS AND PROCESSES 321, 329 (Fred I. Greenstein & Nelson W. Polsby eds., 1975) (“[L]egalized bargaining under the shadow supervision of an available court . . . is not purely mediatory, because the bargain struck will depend in part on the ‘legal’ strength of the parties, that is, predictions of how each would fare in court.”).

¹¹⁷ Whytock, *supra* note 89, pt. II, at 27–44 (arguing that domestic court decisions influence strategic choices of transnational actors, such as negotiation and forum selection strategies); Christopher Alexander Whytock, *Domestic Courts and Global Governance: The Politics of Private International Law* 22–31 (2007) (unpublished Ph.D. dissertation, Duke University), available at <http://hdl.handle.net/10161/452> (arguing that “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”).

¹¹⁸ See WHINCOP & KEYES, *supra* note 92, at 27 (“Increased certainty about the likely choice of law permits parties to identify the settlement range, in which settlement terms are mutually beneficial.”); Michaels, *supra* note 92, at 156 (“*Ex-post* predictability [of applicable law] 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.”).

court.¹¹⁹ The mess claims thus imply that the choice-of-law system fails to facilitate, and may even hinder, transnational bargaining.

D. The Special Significance of Published Choice-of-Law Decisions

The foregoing discussion explained the global governance implications of judges' international choice-of-law decisions, including the broad effects these decisions can have on global economic welfare, transnational rule of law, and bargaining among transnational actors. An important caveat, however, is that these effects are unlikely to be widespread when choice-of-law decisions are unpublished, because unpublished decisions generally do not affect transnational actors beyond the parties to particular lawsuits.¹²⁰

Assuming that the litigation and bargaining success of transnational actors depends on domestic court decisions, a strategic-choice perspective suggests that parties' behavior will be, in part, a function of their expectations about how courts will make those decisions.¹²¹ These expectations in turn depend on available information about prior domestic court decisions. Thus, transnational actors must know

¹¹⁹ See Borchers, *supra* note 60, at 509 ("Because cases settle (at least for economically rational litigants) when the parties' assessments of the value of the case converge to within the expected cost of pursuing the case to judgment, the ever-present wild card of choice of law may discourage settlement."); Wiegand, *supra* note 5, at 4 (stating that lack of predictability in choice of law may discourage settlement because it inhibits accurate case valuation).

¹²⁰ Following Siegelman and Donohue, I define "published decisions" as decisions published in the Federal Supplement reporter or in the LexisNexis electronic database. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133, 1138 (1990).

¹²¹ Strategic-choice theory helps explain this relationship between knowledge and behavior. Strategic behavior is behavior by one actor based on the anticipated behavior of other actors. See David A. Lake & Robert Powell, *International Relations: A Strategic-Choice Approach*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS 3, 3-6 (David A. Lake & Robert Powell eds., 1999) (defining strategic-choice approach). Strategic behavior occurs when one actor's ability to further its goals depends on how other actors behave; under these conditions, each actor's decisions must take into account the expected actions of the other actors. See *id.* ("[International actors'] choices . . . are frequently strategic; that is, each actor's ability to further its ends depends on how other actors behave, and therefore each actor must take the actions of others into account."). As game theorist James Morrow explains, "[a]n actor cannot simply choose a course of action that produces its preferred outcome because the choices of others also affect the final result." James D. Morrow, *The Strategic Setting of Choices: Signaling, Commitment, and Negotiation in International Politics*, in STRATEGIC CHOICE AND INTERNATIONAL RELATIONS, *supra*. Since actors generally do not know for sure how others will behave, they typically infer future behavior from past behavior. See Lake & Powell, *supra*, at 9 (observing that without knowing how other party will act, "the [actor] has to base her decision on the [other party's] past behavior"). Thus, strategic behavior is largely a function of available information, upon which inferences can be made about the future behavior of others.

about judges' international choice-of-law decisions in order for those decisions to have widespread effects on global economic welfare, legal compliance, and bargaining. But transnational actors generally do not have knowledge of unpublished decisions.¹²² As a result, the content of those decisions—including the circumstances of the decision and whether the judge applied domestic or foreign law—is unlikely to influence their behavior.¹²³

Published international choice-of-law decisions are therefore especially relevant from a governance-oriented perspective.¹²⁴ The fact that most grievances do not lead to disputes and most disputes do not lead to litigation¹²⁵ only underscores the importance of focusing on those decisions—namely, published decisions—that are most likely to influence the behavior of actors beyond the parties to particular lawsuits.¹²⁶ Of course, even if published decisions are of special relevance for understanding global governance and the transnational shadow of the law, unpublished decisions are also important.¹²⁷ Nev-

¹²² See Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. CAL. INTERDISC. L.J. 67, 96 (2004) (noting that unpublished decision “‘is, more or less, a letter from the court to parties familiar with the facts’ . . . [and] ‘is not written in a way that will be fully intelligible to those unfamiliar with the case’” (quoting *Hart v. Massanari*, 266 F.3d 1155, 1178 (9th Cir. 2001))); Hillel Y. Levin, *Making the Law: Unpublication in the District Courts*, VILL. L. REV. (forthcoming) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1006101 (“[U]npublished district court opinions are not meaningfully available for review and study by anyone.”).

¹²³ Arguably, however, non-publication itself may have global governance implications insofar as it decreases information about how judges are likely to behave in the future and thus increases uncertainty among transnational actors.

¹²⁴ This is a core insight of governance-oriented analysis of transnational law. See Whytock, *supra* note 89, at 29 (“[P]ublished court decisions are more likely to affect the strategic behavior of transnational actors than unpublished decisions.”).

¹²⁵ See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 545–46 (1980–1981) (analyzing number of claims that lead to disputes and litigation).

¹²⁶ Shapiro writes:

The bulk of conflict resolution through legal channels occurs by negotiation between the parties and their attorneys under the compulsion of eventual court proceedings should negotiations fail. To dismiss the vast bulk of conflict resolution by law in modern societies as somehow extrajudicial would both direct the student of courts away from the central phenomenon and lead to fundamental distortions of reality. For previously announced judicial rules and the anticipation by the disputants of the costs and benefits of eventually going to trial are key parameters in such negotiations.

Shapiro, *supra* note 116, at 329.

¹²⁷ From a litigant-oriented perspective, a court's decision on a choice-of-law issue is important to the parties disputing that issue whether or not the decision is published. See Borchers, *supra* note 60, at 510 (“Real people, after all, are litigants in multistate cases. We ought to take account of what we . . . are doing [via conflicts rules] to these real people.”); Levin, *supra* note 1, at 259–60 (drawing attention to impact of choice of law on individual lawyers and litigants). And even from a governance-oriented perspective, court

ertheless, published choice-of-law decisions are more likely than unpublished choice-of-law decisions to have broad effects on global economic welfare, transnational rule-of-law, and bargaining among transnational actors. Published international choice-of-law decisions are therefore particularly relevant for developing an understanding of the contributions of the choice-of-law system to global governance.

IV

MYTH OF MESS? EMPIRICAL EVIDENCE REGARDING INTERNATIONAL CHOICE OF LAW

Do the mess claims accurately describe international choice-of-law decisionmaking? Is it true that choice-of-law doctrine does not significantly affect international choice-of-law decisions and that those decisions are instead motivated by biases in favor of domestic law, domestic parties, and plaintiffs? Are those decisions in fact highly unpredictable? The answers clearly matter for choice-of-law scholarship. “After all,” ask William Richman and William Reynolds, “why continue to debate the relative merits of competing [choice-of-law] theories if all produce the same pattern and frequency of results?”¹²⁸ The answers also matter for litigants, who are directly affected by judges’ choice-of-law decisions.¹²⁹ Which state’s law applies can determine the litigation outcome.¹³⁰ Most importantly for purposes of this Article, the answers can shed light on whether choice of law significantly affects global governance and, if so, whether its impact is beneficial or harmful.¹³¹

This Part seeks to answer these questions empirically. First, it reviews prior empirical studies that have assessed one or more of the mess claims. These studies may have underestimated the influence of choice-of-law doctrine, and they focused on choice of law generally rather than international choice of law specifically. In response to

decisions that are not based on “public, prospective laws, with the qualities of generality, equality of application, and certainty,” TAMANAHA, *supra* note 109, at 119, are at odds with core rule-of-law principles and thus undermine transnational rule of law whether or not they are published. This Article’s emphasis on published decisions is not intended to downplay the importance of unpublished decisions.

¹²⁸ Richman & Reynolds, *supra* note 55, at 429.

¹²⁹ See *supra* note 127 (describing importance of choice of law from litigant-oriented perspective).

¹³⁰ Insofar as legal differences are even more pronounced cross-nationally than between U.S. states, international choice-of-law decisions are particularly likely to affect litigation outcomes. See BORN & RUTLEDGE, *supra* note 45, at 750 (discussing international case, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), where appellate judges’ disagreement over applicable choice-of-law and substantive rules proved important to result).

¹³¹ See *supra* Part III (arguing that choice-of-law system can have important consequences for global governance).

these earlier efforts, this Part proposes an alternative empirical strategy for evaluating the accuracy of the mess claims as descriptions of international choice-of-law decisionmaking. Using statistical analysis of an original dataset of published international choice-of-law decisions by U.S. district court judges in tort cases, this Part presents evidence that choice-of-law doctrine does influence these decisions; that these decisions are not biased in favor of domestic law, domestic litigants, or plaintiffs; and that they are in fact quite predictable. The evidence suggests that the mess claims may be myths, at least in transnational tort litigation.

A. *Empirical Priors*

This Article is not the first to evaluate empirically the conventional wisdom about choice of law. Four previous studies are particularly important.¹³² Taken together, they provide significant, if mixed, support for the mess claims. However, as explained below, these prior studies may overestimate the role of bias and underestimate the influence of choice-of-law doctrine on judges' choice-of-law decisions. Moreover, these prior studies address choice of law generally rather than international choice of law specifically; this limits their ability to shed light on the implications of judges' choice-of-law decisions for global governance.

1. *The Solimine, Borchers, Thiel, and Symeonides Studies*

The seminal empirical study in this area is Michael Solimine's *An Economic and Empirical Analysis of Choice of Law*.¹³³ Solimine noted the frequent criticism that modern choice-of-law methods exhibit pro-domestic-law, pro-domestic-party, and pro-plaintiff biases, but observed that "there has been no empirical survey to confirm or deny these anecdotal accounts."¹³⁴ He therefore empirically analyzed choice-of-law decisions in tort cases in state supreme courts and U.S. circuit courts between 1970 and 1988.¹³⁵

Solimine's findings seemed to indicate that modern methods favored both domestic law and plaintiffs. Regarding pro-domestic-law bias, Solimine found that courts using one of the modern methods—that is, a method other than the First Restatement—applied domestic

¹³² See SYMEONIDES, *supra* note 18; Borchers, *supra* note 55; Solimine, *supra* note 15; Thiel, *supra* note 11. Another empirical study focuses on choice-of-law decisions in Wisconsin. Wiegand, *supra* note 5.

¹³³ Solimine, *supra* note 15.

¹³⁴ *Id.* at 50, 81.

¹³⁵ *Id.* at 81.

law more often than not.¹³⁶ These courts frequently applied domestic law even when the tort did not occur in the forum state, whereas courts using the First Restatement rarely did so.¹³⁷ Regarding pro-plaintiff bias, he found that courts using one of the modern methods applied the law favoring plaintiffs more often than not¹³⁸ and that these courts did so more frequently than courts using the First Restatement.¹³⁹ Thus, Solimine's findings provided significant support for the claims that modern choice-of-law methods are biased in favor of domestic law and in favor of plaintiffs.¹⁴⁰

The study's support for the mess claims was not unequivocal, however. Solimine found that the pro-plaintiff bias of the modern methods was only slightly greater when the plaintiffs were residents of the forum state than when they were not,¹⁴¹ which would seem to limit significantly the study's support for the pro-domestic-party bias claim.¹⁴² Moreover, the differences Solimine observed between the First Restatement and the modern methods in terms of pro-domestic-law and pro-plaintiff bias suggest that at least some doctrinal differences may influence choice-of-law decisions.

The next important study in this area was Patrick Borchers's *The Choice-of-Law Revolution: An Empirical Study*,¹⁴³ a groundbreaking analysis of choice-of-law decisions in tort cases in state and federal

¹³⁶ State supreme courts and U.S. appellate courts using one of the modern methods applied domestic law at a rate of 66% and 61%, respectively. *Id.* at 85 tbls.4 & 5.

¹³⁷ Courts using one of the modern methods applied domestic law even when the tort did not occur in the forum state at a rate of 43% (state supreme courts) and 27% (U.S. appellate courts), whereas courts using the First Restatement did so at a rate of 13% (state supreme courts) and 7% (U.S. appellate courts). *Id.*

¹³⁸ Courts using one of the modern methods applied plaintiff-favoring law at a rate of 63% (state supreme courts) and 51% (U.S. appellate courts). *Id.* at 83–84 tbls.2 & 3.

¹³⁹ Courts using the First Restatement applied plaintiff-favoring law at a rate of 45% (state supreme courts) and 23% (U.S. appellate courts). *Id.*

¹⁴⁰ *See id.* at 86–88 (interpreting data as confirming pro-domestic-law and pro-plaintiff hypotheses); *id.* at 50 (concluding that data “suggest some support for the empirical assumptions of the critics of modern choice of law theory”).

¹⁴¹ *Id.* at 89 (“[R]esident plaintiffs are favored under modern choice of law theories Plaintiff recovery rates under the modern approach are somewhat more pronounced in both federal and state courts in this subsample as compared to all the cases. Perhaps what is most surprising is that the differences are relatively small.”). Specifically, the pro-domestic-plaintiff decision rate for courts using one of the modern methods was 65% for state supreme courts and 67% for U.S. appellate courts, *id.* at 88 tbls.6 & 7, compared to an overall pro-plaintiff rate of 63% for state supreme courts and 51% for U.S. appellate courts, *id.* at 83–84 tbls.2 & 3.

¹⁴² *See id.* at 89 (finding “empirical support for the proposition that modern choice of law theories inevitably tend to hold against defendants in general and out-of-state defendants in particular” but noting that results suggest “courts are not making an *extra* effort to permit recoveries against nonresident defendants”).

¹⁴³ Borchers, *supra* note 55.

courts at both the trial and appellate levels from 1960 to 1992.¹⁴⁴ Like Solimine, Borchers distinguished between the First Restatement and the modern methods¹⁴⁵ and found that, compared to the First Restatement, the modern methods more frequently resulted in pro-domestic-law and pro-plaintiff decisions.¹⁴⁶ Borchers also found evidence that courts using modern methods are more likely to apply the law preferred by domestic parties than courts using the First Restatement.¹⁴⁷ In addition, he found that each of the modern methods he analyzed resulted in pro-domestic-law, pro-domestic-party, and pro-plaintiff decisions more often than not in his dataset, though not always with 95% confidence.¹⁴⁸

Thus, on the one hand, the Borchers study is consistent with claims that the modern methods are biased in favor of domestic law, domestic parties, and plaintiffs, both in absolute terms and when compared to the First Restatement. On the other hand, this very difference between outcomes under the modern methods and the First Restatement suggests that some doctrinal differences may significantly influence choice-of-law decisions.

Unlike Solimine, Borchers went beyond comparisons between the First Restatement and the modern methods, making more fine-grained distinctions among several of the modern methods themselves. He began by assuming that if differences among the modern choice-of-law methods mattered, then they “should yield different patterns of results in tort cases.”¹⁴⁹ More specifically, he hypothesized that relative to the First Restatement, the Leflar method and interest analysis should be strongly biased, and the Second Restatement mildly biased, toward domestic law;¹⁵⁰ the Leflar method should be

¹⁴⁴ *Id.* at 367–70.

¹⁴⁵ *Id.* at 377.

¹⁴⁶ *Id.*

¹⁴⁷ *See id.* (“The picture is somewhat foggier with respect to the propensity of the approaches to favor local parties. . . . [But] the First Restatement is probably the least generous to locals.”).

¹⁴⁸ *See id.* at 374 tbl.III (showing percentages for decisions overall); *id.* at 375 tbl.IV (breaking down data by state and federal court). Among the findings with 95% confidence are that interest analysis and the Leflar method are both more likely than not to result in pro-domestic-law and pro-plaintiff outcomes. *Id.* at 374 tbl.III.

¹⁴⁹ *Id.* at 364.

¹⁵⁰ Borchers’s predictions were based on the assumption (which he ultimately found false) that courts apply these methods faithfully and that the differences between the methods should therefore lead to different patterns of outcomes. *Id.* Because the First Restatement is neutral on its face, he predicted that this method should not exhibit bias. *Id.* at 364–65. But according to Borchers, the Second Restatement should have a mild pro-domestic-law bias because two factors in section 6 point toward forum law, and the Leflar method and interest analysis should have strong pro-domestic-law biases because the former calls for application of the “better law” (and judges are likely to find that the law of

strongly biased, and interest analysis and the Second Restatement mildly biased, in favor of plaintiffs;¹⁵¹ and interest analysis should be strongly biased, the Leflar method mildly biased, but the Second Restatement not biased in favor of domestic parties.¹⁵²

Contrary to these hypotheses—but consistent with the mess claim that choice-of-law doctrine does not significantly influence choice-of-law decisionmaking—Borchers found that the different modern methods generally did not lead to different patterns of outcomes.¹⁵³ He therefore concluded that “[c]ourts do *not* take the new approaches seriously.”¹⁵⁴

In *Choice of Law and the Home-Court Advantage: Evidence*,¹⁵⁵ Stuart Thiel built on the Borchers and Solimine studies. Thiel applied multivariate statistical techniques to analyze Borchers’s data on choice-of-law decisions, and he used variables identified by Solimine to control for the effect of legal culture on whether particular states adopt one of the modern methods in the first place.¹⁵⁶ With respect to the mess claims, Thiel’s findings were mixed. On the one hand, he concluded that “the data do not support an inference that there is any difference in pro-resident or pro-recovery tendencies between [modern-method and First Restatement states]”; but he also concluded that the modern-method states “do seem to prefer forum law.”¹⁵⁷ Moreover, after disaggregating the modern methods, Thiel found significant differences among them in terms of pro-domestic-law and pro-plaintiff, but not pro-domestic-party, decision rates.¹⁵⁸ In

their forum is “better”) and the latter requires application of forum law “in all cases except those in which the parties have a common domicile outside the state.” *Id.* at 365–67.

¹⁵¹ *Id.* at 364–67. According to Borchers, this is because the pro-domestic-law biases of the Second Restatement and interest analysis are likely to lead “plaintiffs to file cases in states having favorable substantive rules,” and the Leflar method tends to equate the “better” law with plaintiff-favoring law. *Id.*

¹⁵² *Id.* at 364–67. According to Borchers, this is because “[n]one of the factors in either section 6 or section 145 [of the Second Restatement] make any overt distinctions between locals and nonlocals.” By contrast, interest analysis’s “fundamental assumption that laws are enacted for the benefit of local parties is bound to favor local parties over nonlocals,” and the Leflar method’s governmental interest factor “must favor locals somewhat, but the better law determinant should dilute this significantly.” *Id.*

¹⁵³ *Id.* at 377–79.

¹⁵⁴ *Id.* at 379.

¹⁵⁵ Thiel, *supra* note 11.

¹⁵⁶ *Id.* at 303–05.

¹⁵⁷ *Id.* at 310; *see also id.* at 313 (noting that his findings are “in accord with the estimate . . . that [modern-method] states are more likely at the margin to apply their own law” than First Restatement states). According to Thiel, much of the pro-domestic-law, pro-domestic-party, and pro-plaintiff biases of courts using modern methods identified by Borchers may be due to the forum state’s legal culture rather than modern methods themselves. *Id.* at 307.

¹⁵⁸ *Id.* at 312.

particular, he found that compared to the First Restatement and the Second Restatement, interest analysis is the most pro-domestic law, followed by the Leflar method,¹⁵⁹ and that the Leflar method is the most pro-plaintiff, followed by interest analysis.¹⁶⁰ For their part, “Second Restatement states are on average in agreement with the First Restatement states in any category.”¹⁶¹ Thus, although Thiel detected some evidence of bias, his findings suggest that prior studies may have underestimated the influence of some doctrinal differences and overestimated the extent of bias in choice-of-law decisionmaking.

Most recently, Symeon Symeonides closely examined 100 choice-of-law decisions by state and federal courts at both the trial and appellate levels in product liability cases between 1990 and 2005.¹⁶² Based on his analysis, he concluded that “[d]espite impressions to the contrary, courts do not favor plaintiffs as a class; courts do not favor local over non-local litigants; and courts do not unduly favor the law of the forum.”¹⁶³ Although Symeonides concludes that choice-of-law doctrine is not an important influence on choice-of-law decisions,¹⁶⁴ his study provides further evidence that choice-of-law decisionmaking might not be as biased as the conventional wisdom suggests.

Taken together, these earlier empirical studies provide significant, if mixed, support for the mess claims. Consistent with the marginal-influence-of-doctrine claim, Borchers found no significant differences among the pro-domestic-law, pro-domestic-party, and pro-plaintiff tendencies of the different modern methods. Thiel’s study confirmed the pro-domestic-party bias finding. On the other hand, Thiel found significant differences among the modern methods in terms of their pro-domestic-law and pro-plaintiff tendencies. Moreover, all three studies comparing the First Restatement with modern methods found significant differences between their outcomes, suggesting that at least some doctrinal differences do influence judges’ choice-of-law decisions.

Regarding the specific bias claims, three of the four prior studies (Solimine, Borchers, and Thiel, but not Symeonides) found evidence that the modern methods were biased in favor of domestic law. Two

¹⁵⁹ *See id.* at 313 (“Interest Analysis favors forum law, with Leflar being a significant runner up.”).

¹⁶⁰ *See id.* (“Leflar states are enthusiastic pro-recovery states with Interest Analysis states a significant runner up.”).

¹⁶¹ *Id.* at 312.

¹⁶² SYMEONIDES, *supra* note 18, at 273–364.

¹⁶³ *Id.* at 338 (emphasis omitted).

¹⁶⁴ To the contrary, he 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.” *Id.* at 70 (emphasis omitted).

out of four (Solimine and Borchers, but not the others) found evidence that the modern methods were biased in favor of domestic parties and plaintiffs.¹⁶⁵ However, the Thiel and Symeonides studies both raised questions about the extent of these biases. Although several studies expressed concern about the uncertainties surrounding modern choice-of-law methods,¹⁶⁶ none of them attempted to estimate the predictability of judges' choice-of-law decisions.

2. *Limitations of Prior Studies*

These prior studies collectively represent an important step forward in choice-of-law scholarship.¹⁶⁷ They provide a valuable complement to the field's rich doctrinal and theoretical work by improving understanding of the real-world consequences of choice-of-law doctrine and by basing that understanding on systematic empirical analysis rather than anecdotes and impressions.¹⁶⁸

Nevertheless, these studies have significant limitations. First, because they do not control for what different choice-of-law methods have in common, they may underestimate the effects of doctrinal differences on judges' choice-of-law decisions. Two common factors in particular permeate choice-of-law doctrine: territoriality (the connections between activity and the territory of a state) and personality (the legal connections between actors and a state, such as citizenship).¹⁶⁹

¹⁶⁵ See also Wiegand, *supra* note 5, at 31–33 (finding that in Wisconsin, modern methodologies do not favor domestic parties or plaintiffs).

¹⁶⁶ See SYMEONIDES, *supra* note 18, at 362 (noting “high uncertainties regarding the final outcome” of choice-of-law decision); Borchers, *supra* note 55, at 382–83 (concluding that “[a]ll of the new approaches are extraordinarily malleable” and “usually amount to little more than long-winded excuses to do what courts wanted to do in the first place,” which “makes it difficult to advise clients”).

¹⁶⁷ See Richman & Reynolds, *supra* note 55, at 428 (praising Borchers and Solimine studies as “show[ing] the potential to solve persistent choice-of-law problems” and “tak[ing] the debate [over whether the modern methods lead to different results] to a new and more informed level”).

¹⁶⁸ O'Hara and Ribstein have noted this tendency in conflicts scholarship:

More empirical studies could help clarify the choice of law debate. In the conflicts field . . . legal academics make bald statements claiming that various approaches or rules will work in particular ways or have specific effects on primary behavior. Those statements are supported at best with slight anecdotal evidence. The field is ripe for empiricists who can cut through the legal and academic thicket to view the landscape.

O'Hara & Ribstein, *supra* note 68, at 642.

¹⁶⁹ See Symeon C. Symeonides, *Territoriality and Personality in Tort Conflicts*, in *INTERCONTINENTAL COOPERATION THROUGH PRIVATE INTERNATIONAL LAW: ESSAYS IN MEMORY OF PETER E. NYGH* 401, 402 (Talia Einhorn & Kurt Siehr eds., 2004) (“[T]he history of [conflict of laws] is a story of clash and tension between two grand operating principles—territoriality and personality of the laws. This is particularly true in tort conflicts.”). See generally SCOLES ET AL., *supra* note 13, § 17.83, at 942–45 (tracing history of territoriality and personality in choice-of-law doctrine).

Except for the First Restatement's traditional *lex loci delicti* method, which emphasizes a single territorial connection (the place of the wrong),¹⁷⁰ both territoriality and personality are explicitly or implicitly relevant factors in each of the choice-of-law methods discussed in Part I.¹⁷¹ Statistical tests that do not control for these factors fail to separate out what these methods have in common and therefore risk being insensitive to their differences. The lack of controls for this common emphasis on territoriality and personality may account for prior empirical findings suggesting that different modern methods do not lead to significant differences in choice-of-law decisionmaking.¹⁷²

Second, the analyses of bias (in all but Thiel's study) were based only on pro-domestic-law, pro-domestic-party, and pro-plaintiff decision rates.¹⁷³ However, factors other than bias may also contribute to these rates, and case selection effects make them difficult to interpret.¹⁷⁴ For example, by looking at pro-domestic-law, pro-domestic-party, and pro-plaintiff decision rates alone, one cannot tell whether

¹⁷⁰ See *supra* text accompanying notes 19–21 (describing *lex loci delicti* method).

¹⁷¹ The traditional *lex loci delicti* method emphasizes a single territorial factor: the place of the wrong. See RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378–379 (1934) (stating that “law of the place of wrong” should determine whether plaintiff has sustained “legal injury” and whether defendant is responsible for harm). The Second Restatement instructs courts to consider four factors in tort cases: place of injury, place of conduct, nationality of the parties, and place of the parties’ relationship. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971). All four are factors of territoriality or personality. In addition, for specific types of torts, including personal injuries, the Second Restatement presumes that the “law of the state where the injury occurred” should apply. *Id.* §§ 146–148; see also Solimine, *supra* note 15, at 55 (“[T]he *Second Restatement* [] contains a heavy dose of territorial views.”). Judges following the significant contacts approach usually consider the same four factors listed in the Second Restatement. SCOLLES ET AL., *supra* note 13, at 98. The Lauritzen method also includes territoriality and personality. See *supra* text accompanying notes 46–47. Territoriality and personality are implicit in interest analysis and the Leflar method (in which one factor is advancement of the forum’s governmental interest), because the extent of a government’s interest is largely a function of its territorial connections to the underlying activity and the nationality of the parties. See SYMEONIDES, *supra* note 18, at 15 (noting Currie’s definition of governmental interest as depending on relationship between state and transaction, parties, or litigation). The factors are even implicit in the *lex fori* method, according to which governmental interests determine whether the forum law presumption can be overcome. See SYMEONIDES, *supra* note 18, at 76–81 (surveying states following *lex fori* method and explaining circumstances in which forum law presumption can be rebutted, all of which depend on “significant contacts” or government interests).

¹⁷² See *supra* text accompanying notes 60–67 (discussing mess claim that modern methods all lead to substantially similar outcomes).

¹⁷³ These decision rates reflect the frequency with which courts apply domestic law, rule in favor of domestic parties, and rule in favor of plaintiffs, respectively.

¹⁷⁴ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 137–40 (2002) (explaining case-selection effects, i.e., effects of parties’ choices about which disputes to litigate and which disputes not to litigate, and consequences for interpreting judicial decision rates).

high rates are due to bias (as the mess claims imply) or simply due to the frequency of particular pro-domestic-law, pro-domestic-party, or pro-plaintiff decisions based on good faith application of the appropriate choice-of-law rule to the facts of the case. The latter explanation suggests that even very high pro-domestic-law, pro-domestic-party, and pro-plaintiff decision rates do not necessarily imply bias but may instead be a function of the legal merits of the parties' arguments as assessed by unbiased judges. To mitigate the interpretive problems posed by case-selection effects, it is important to isolate this case-strength factor;¹⁷⁵ none of the prior empirical studies attempted to do so.

Third, the prior studies do not statistically analyze the predictability of judges' choice-of-law decisions. Therefore, notwithstanding the mess claim that judges' choice-of-law decisions are highly unpredictable,¹⁷⁶ it remains to be seen just how unpredictable those decisions are.

Finally, the prior studies may not accurately reflect international choice-of-law decisionmaking, thus limiting their relevance to global governance. The prior studies are based on analysis of choice-of-law decisions in general and do not distinguish between domestic and international decisions. Because the former are much more common than the latter,¹⁷⁷ interstate choice-of-law decisions probably influenced the prior studies' results disproportionately. And if, as some argue, transnational litigation is fundamentally different from domestic litigation,¹⁷⁸ this disproportionate influence may render the findings inapplicable to international choice-of-law decisions.

B. Empirical Strategy

My study builds on these prior empirical analyses of choice-of-law decisionmaking, but it uses a different empirical strategy to address their limitations.¹⁷⁹ It increases sensitivity to doctrinal differ-

¹⁷⁵ *Id.* at 140 (explaining importance of controlling for case-strength factor when interpreting decision rates).

¹⁷⁶ See *supra* Part II.C.

¹⁷⁷ See SYMEONIDES, *supra* note 18, at 5 (noting horizontal interstate conflicts far outnumber international conflicts).

¹⁷⁸ See generally Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297 (2004) (arguing that transnational litigation should be treated as distinct field).

¹⁷⁹ Editors' Note: In reviewing this Article for publication, the *New York University Law Review* also reviewed the author's data. To do so, the *Review* collected a dataset by recoding the cases that the author had sampled, reran his models, and tested the results against the author's. Although the *Review's* results were not identical to the author's, the differentiation was neither noteworthy in magnitude nor statistically significant and was due entirely to a number of judgment calls on close issues in the coding process.

ences by taking into account what different choice-of-law methods have in common, and it mitigates case-selection effects by controlling for the legal merits of parties' choice-of-law arguments. It also attempts to estimate the predictability of judges' choice-of-law decisions. Finally, it focuses specifically on international choice of law.

1. *Sample*

My goal is to shed empirical light on the global governance implications of choice-of-law doctrine and choice-of-law decisionmaking.¹⁸⁰ To that end, my analysis focuses on published international choice-of-law decisions. Published court decisions—decisions which appear either in official reporters or in widely available electronic databases such as Lexis and Westlaw¹⁸¹—are more likely than unpublished decisions to be known to transnational actors beyond the parties to particular lawsuits.¹⁸² As discussed above, this means published decisions are more likely to have broad global governance effects than unpublished decisions.¹⁸³ Likewise, international choice-of-law decisions are more likely to affect global governance than domestic choice-of-law decisions. Because of its connections to multiple nation-states, transnational activity frequently poses questions about which nation-state's law should govern that activity. Courts help answer these questions when they make international choice-of-law decisions, creating a body of case law that parties can refer to moving forward.¹⁸⁴ For these reasons, published international choice-of-law decisions are my primary population of interest.¹⁸⁵

I therefore created a dataset consisting of a random sample of published international choice-of-law decisions made by U.S. district

¹⁸⁰ See *supra* Part III (noting that choice-of-law doctrine can affect global governance to extent that doctrine actually influences judicial decisionmaking).

¹⁸¹ This definition of “published decisions” follows Siegelman and Donohue. See *supra* note 120.

¹⁸² See *supra* Part III.D.

¹⁸³ See *supra* Part III.D.

¹⁸⁴ See *supra* notes 121–22 and accompanying text.

¹⁸⁵ This is not to say that unpublished and domestic choice-of-law decisions are irrelevant to global governance. As noted above, whether or not a judge's choice-of-law decision in a transnational tort case conforms to core rule-of-law values is normatively important regardless of whether that decision is published. See *supra* notes 123, 127. Similarly, one can certainly imagine transnational disputes in which the choice-of-law issue is not whether U.S. or foreign law applies, but rather whether the law of one U.S. state or another U.S. state applies. Nevertheless, given the special relevance of published decisions to this Article's focus on global governance—combined with the impracticability of obtaining a random sample of unpublished choice-of-law decisions—this study focuses on published international choice-of-law decisions.

court judges in tort cases between 1990 and 2005.¹⁸⁶ I generated this sample in three steps. First, I searched the LexisNexis U.S. District Court database for decisions in the indicated time period in which a judge decided whether domestic law or foreign law should apply to a tort claim.¹⁸⁷ 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 did not actually decide whether domestic or foreign law should apply to a tort claim, until my sample included approximately 200 decisions.¹⁸⁸

Eighty-five of these choice-of-law decisions were made in the context of decisions on motions to dismiss transnational litigation on forum non conveniens grounds. One of the factors to be considered by a judge when deciding whether to grant a forum non conveniens

¹⁸⁶ The 1990–2005 time period follows Symeonides. See SYMEONIDES, *supra* note 18, at 266. My focus on tort claims also follows prior empirical studies of choice of law. See, e.g., *id.*; Borchers, *supra* note 55, at 369; Solimine, *supra* note 15, at 81; Thiel, *supra* note 11, at 303. Tort cases are particularly interesting from a choice-of-law perspective because tort litigation was the “principal battlefield” of the so-called “choice-of-law revolution”—in which traditional choice-of-law rules were discarded in favor of more flexible modern approaches—and the new approaches “have their principal application in tort cases.” Borchers, *supra* note 55, at 369. Thus, tort cases “are an excellent vehicle for re-examining the methodological . . . foundations of American choice of law in general.” SYMEONIDES, *supra* note 18, at 2. Moreover, my focus on tort cases facilitates comparison of my findings with those of prior studies and serves the interest of cumulative scholarship. Because state courts (in general) and federal appellate courts (in non-diversity cases) both make choice-of-law decisions and play leading roles in developing choice-of-law doctrine, there is a risk of endogeneity. By focusing on federal district court decisions, I reduce this risk, at least with respect to state choice-of-law doctrine. To reduce the risk of selection bias, I used random sampling to generate my sample. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 110 (2002) (explaining how random sampling avoids selection bias).

¹⁸⁷ Domestic law includes both U.S. federal law and the law of a U.S. state. Foreign law includes the law of a foreign state (e.g., Canada) and the law of a political subdivision thereof (e.g., British Columbia).

I used the following query: “([COUNTRY SEARCH TERM] w/3 law) w/200 ((choice or conflict or appli! or govern!) w/2 law) and tort!” I used the first element of the query to identify cases involving foreign law; I repeated the search for each country in the world, inserting appropriate country search terms into the query. I used the second element of the query to limit the search to choice-of-law decisions. The third element limited the search to tort cases. It is unlikely that search results would be significantly different using Westlaw. See Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 134 (2007) (finding Lexis and Westlaw highly consistent in cases they report).

¹⁸⁸ The exact number of decisions in my sample is 213. Discarded cases include: 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. I also discarded duplicate cases. See Barbara Koremenos, *Contracting Around International Uncertainty*, 99 AM. POL. SCI. REV. 549, 554 (2005) (applying similar screening approach to create random sample of international treaties for statistical analysis). I conducted all screening.

dismissal is whether domestic or foreign law is likely to apply; domestic law weighs in favor of denying the motion and foreign law in favor of granting it.¹⁸⁹ In principle, choice-of-law decisions in the forum non conveniens context should be made in the same way as choice-of-law decisions outside that context.¹⁹⁰ Therefore, I did not exclude these decisions from my overall dataset.

In practice, however, there is likely to be at least one significant difference between these two contexts. Because foreign law weighs in favor of granting forum non conveniens motions, decisions that foreign law should apply are more likely to appear in opinions granting forum non conveniens motions than in opinions denying them.¹⁹¹ Moreover, U.S. district court judges include a choice-of-law analysis in only about half of their forum non conveniens opinions, and they are more likely to do so when they grant forum non conveniens motions than when they deny them.¹⁹² Thus, a disproportionately high number of choice-of-law decisions on forum non conveniens motions are likely to hold that foreign law should apply.¹⁹³ To check whether any of my findings are affected by the inclusion of these decisions, I performed each statistical analysis twice, once with and once without forum non conveniens cases. Except for pro-domestic-law decision rates, inclusion of the forum non conveniens cases generally did not affect my basic findings.¹⁹⁴ I report any significant differences below.

2. *Dependent Variable*

The mess claims are about judges' choice-of-law decisions and the factors that explain (or fail to explain) them. Therefore, the depen-

¹⁸⁹ See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508–09 (1947) (listing factors to be considered by courts in forum non conveniens analysis).

¹⁹⁰ See Martin Davies, *Time To Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 356 (2002) (arguing that proper consideration of need-to-apply-foreign-law factor in forum non conveniens decision requires choice-of-law analysis).

¹⁹¹ See Memorandum from Christopher A. Whytock to the *New York University Law Review* (Feb. 13, 2009) (on file with the *New York University Law Review*) (describing data, variables, and analysis used and providing code for Stata statistical software and output predicting likelihood that decisions applying foreign law will appear in opinions granting or denying forum non conveniens). This unpublished study found that decisions that foreign law should apply appear in an estimated 64.6% [54.8, 73.4] of opinions granting forum non conveniens motions, but in only an estimated 14.4% [9.0, 22.2] of opinions denying them. *Id.* Figures in brackets are the lower and upper bounds of the estimate's 95% confidence interval.

¹⁹² See *id.* (finding that U.S. district court judges include choice-of-law analysis in estimated 66.7% [57.0, 75.2] of opinions granting forum non conveniens motions, but in only 28.8% [21.2, 37.9] of opinions denying them).

¹⁹³ See *id.* (finding that estimated 82.5% [73.6, 88.9] of choice-of-law decisions in forum non conveniens opinions are decisions that foreign law should apply).

¹⁹⁴ See *infra* Part IV.C.

dent variable in my statistical analyses—the variable to be explained—is whether the judge decided that domestic law, rather than foreign law, should apply. I labeled this variable “*Domestic Law*,” and coded it as “Yes” (1) if the judge decided that domestic law should apply and “No” (0) if the judge decided that foreign law should apply.¹⁹⁵

3. *Explanatory Variables*

The mess claims posit various factors that purportedly influence (or fail to influence) choice-of-law decisionmaking. To test these claims, I created a series of explanatory variables that correspond to those factors and used statistical methods to estimate their effects on the probability that a judge will decide in favor of domestic rather than foreign law.

a. Choice-of-Law Doctrine

To test the marginal-influence-of-doctrine claim, I created the variable “*Second Restatement*” and coded it as “Yes” (1) if the applicable choice-of-law method was the Second Restatement—the most widely adopted choice-of-law method¹⁹⁶—and “No” (0) if otherwise. If, as the mess claims suggest, choice-of-law doctrine does not significantly influence choice-of-law decisionmaking, then the *Second Restatement* variable should not significantly affect the probability that a judge will apply domestic law.

This should be a relatively easy test for the marginal-influence-of-doctrine claim to pass, since choice-of-law scholarship suggests that the Second Restatement is especially unlikely to have a significant influence on choice-of-law decisionmaking.¹⁹⁷ According to Sterk, the

¹⁹⁵ All coding was done by the author. Note that some lawsuits raise multiple choice-of-law issues. This can occur when there are multiple legal claims involving different substantive areas of law to which different choice-of-law methods apply (e.g., 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 substantive issues in a single cause of action, an approach known as *depeçage*. SYMEON C. SYMEONIDES, WENDY COLLINS PERDUE & ARTHUR T. VON MEHREN, *CONFLICT OF LAWS: AMERICAN, COMPARATIVE, INTERNATIONAL* 259 (2d ed. 2003). For each case in my sample that includes more than one international choice-of-law decision, my coding was based on the first such decision that appears in the court’s opinion.

¹⁹⁶ As of 2006, 44% of U.S. states had adopted the Second Restatement for tort cases. See *supra* Table 1.

¹⁹⁷ See, e.g., Kramer, *supra* note 66, at 466 (arguing that Second Restatement’s “undirected, multifactor analysis invites post-hoc rationalizing of intuitions about the applicable law”); Levin, *supra* note 1, at 251 (referring to Second Restatement as “a fairly meaningless mixture” of various approaches); Roosevelt, *supra* note 1, at 2449, 2466 (calling Second Restatement “hopelessly underdeterminative” and “an indigestible stew” that

Second Restatement is “perhaps the most malleable of choice of law approaches.”¹⁹⁸ Borchers asserts that “citation to the *Second Restatement* is often little more than a veil hiding judicial intuition.”¹⁹⁹ And Gottesman characterizes the Second Restatement as “a cacophonous formula of formulae, a blend of indeterminate indeterminacy. A total disaster in practice, as all [choice-of-law scholars] now acknowledge.”²⁰⁰ From this perspective, it would be unsurprising if the Second Restatement does not significantly affect choice-of-law decisionmaking and surprising if it does.

On the other hand, if choice-of-law doctrine matters, then the probability that a judge will apply domestic rather than foreign law should depend significantly on whether the applicable choice-of-law method is the Second Restatement.²⁰¹ In particular, a doctrinal perspective suggests that the Second Restatement should have a negative effect on the likelihood of a judge applying domestic law.²⁰² The

“lists a dizzying number of factors with no hint as to their relative weight”); Weinberg, *supra* note 71, at 1645 (arguing that Second Restatement has led to “a predictably large quotient of arbitrary and unjust results”).

¹⁹⁸ Sterk, *supra* note 2, at 951.

¹⁹⁹ Patrick J. Borchers, *Courts and the Second Conflicts Restatement: Some Observations and an Empirical Note*, 56 MD. L. REV. 1232, 1233 (1997).

²⁰⁰ Gottesman, *supra* note 65, at 527.

²⁰¹ See Borchers, *supra* note 55, at 364 (arguing that if judges take choice-of-law doctrine seriously, “different approaches should yield different patterns of results in tort cases”).

²⁰² Compared to the First Restatement in particular, rather than other methods in general, it is less clear from a doctrinal perspective whether the Second Restatement should have a negative effect on the probability of a pro-domestic-law decision. Both Restatements have presumptions in favor of the law of the place of injury. RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 378–379 (1934); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146–148 (1971). Both also include “escape devices” that judges can use to avoid applying the law of the place of injury. Under the First Restatement, judges can apply forum law rather than foreign law by “re-characterizing” a substantive issue as a procedural issue. COLES ET AL., *supra* note 13, §§ 3.3–4, at 122–25. Characterizing a claim as sounding in contract (calling for application of the law of the place of contract) rather than tort (calling for application of the law of the place of injury) might allow for this as well, depending on the factual context. *Id.* Additionally, courts can refuse to apply foreign law based on “public policy” considerations. *Id.* § 3.15, at 143. Under the Second Restatement, judges can avoid the law of a foreign place of injury by finding that the forum state has the more significant relationship to the occurrence and parties. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146–148 (1971). Which of the two Restatement methods is more doctrinally “biased” would seem to depend largely on how easily, on average, judges can make convincing legal arguments that an applicable escape device applies. Borchers hypothesized that the Second Restatement would have a mild pro-domestic-law bias relative to the First Restatement, but his empirical findings on this point were mixed: The overall pro-domestic-law decision rate for the First Restatement was lower than for the Second Restatement, but in federal courts the difference was not statistically significant (48% +/- 12% for the First Restatement, 55% +/- 7 for the Second Restatement, using a 95% confidence interval). Borchers, *supra* note 55, at 374 tbl.III, 375 tbl.IV. For his part, Thiel found that “Second Restatement states are on average in agree-

Second Restatement's presumptive rules in favor of the law of the state where the injury occurred should help restrain any judicial bias in favor of domestic law.²⁰³ Moreover, the Second Restatement was "drafted from the perspective of a neutral forum."²⁰⁴ It calls on courts to consider not only the relevant policies of the forum state but also "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue."²⁰⁵ In addition, it looks to "the needs of the interstate and international systems" and the objectives of "certainty, predictability, and uniformity of result."²⁰⁶ As the official comments to the Second Restatement indicate, these factors matter because "[p]robably the most important function of choice-of-law rules is to make the interstate and international systems work well. . . . [They] should seek to further harmonious relations between states and to facilitate commercial intercourse between them."²⁰⁷ Thus faithful application of the Second Restatement should reduce the effect of pro-domestic-law bias and, compared to other modern methods, increase the likelihood that foreign law will apply.

The problem is that the *Second Restatement* variable alone is likely to underestimate the impact of choice-of-law doctrine on choice-of-law decisionmaking. As explained above, two factors permeate choice-of-law doctrine: territoriality and personality.²⁰⁸ Statistical tests that fail to control for these factors fail to separate out what these methods have in common and thus risk being insensitive to their differences.²⁰⁹

ment with the First Restatement states" in terms of their pro-domestic-law tendencies. Thiel, *supra* note 11, at 312.

²⁰³ See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 146–148 (1971) (establishing presumption that law of state where injury occurred applies). However, this presumption can be rebutted by a finding that the forum state has "the most significant relationship" to the occurrence and the parties. *Id.* § 145(1). If not applied objectively, the "most significant relationship" test could allow bias to reenter the decisionmaking process. Even though Borchers's findings did not reveal statistically significant differences among the modern methods in terms of pro-domestic-law tendencies, he did note that "the Second Restatement shares many of the neutral features of the First Restatement. By making territorial connecting factors the thrust of its approach in tort cases, the Second Restatement should be expected to be partially immune to preferences for [domestic law]." Borchers, *supra* note 55, at 365 (citation omitted).

²⁰⁴ SCOLES ET AL., *supra* note 13, § 2.14, at 60.

²⁰⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

²⁰⁶ *Id.*

²⁰⁷ *Id.* § 6 cmt. d.

²⁰⁸ See *supra* Part IV.A.2 (discussing territoriality and personality as factors in choice-of-law doctrine).

²⁰⁹ This is one limitation of the prior empirical studies discussed in Part IV.A.2, *supra*.

Therefore, in addition to *Second Restatement*, I created variables to control for territoriality and personality. To measure territoriality, I created the variable “*Activity Mostly/All Outside U.S. Territory*” and coded it based on two factors: the place of the defendant’s conduct and the place of the plaintiff’s alleged injury, each as stated in the judge’s opinion. I coded this variable as “Yes” (1) if the place of conduct was entirely outside U.S. territory and the place of injury was partly inside and partly outside U.S. territory; if the place of injury was entirely outside U.S. territory and the place of conduct partly inside and partly outside U.S. territory; or if both the place of conduct and the place of injury were entirely outside U.S. territory.²¹⁰ Otherwise, I coded the variable as “No” (0).²¹¹ Second, I created the variable “*Parties Mostly/All Foreign*” and coded it as “Yes” (1) if all plaintiffs and all defendants were foreign; if all plaintiffs were foreign and the defendants were mixed; or if all defendants were foreign and the plaintiffs were mixed. Otherwise, I coded this variable as “No” (0).²¹²

In addition to controlling for what the Second Restatement has in common with other methods, the territoriality and personality variables provide further indicators of doctrinal effects. Insofar as territoriality and personality are doctrinally relevant to judges’ choice-of-law decisions, the hypothesis that choice-of-law doctrine influences choice-of-law decisionmaking implies that *Activity Mostly/All Foreign* and *Parties Mostly/All Foreign* should have negative effects on *Domestic Law*. In other words, a judge should be less likely to apply domestic law when the underlying activity occurred mostly or entirely outside U.S. territory or the parties are mostly or all foreign.²¹³ In contrast, the marginal-relevance-of-doctrine claim implies that these variables should not significantly influence the probability that a judge

²¹⁰ I coded the variable based on the territorial connections indicated in the judge’s opinion. 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 purely inside or outside U.S. territory. In a different statistical study, I found no evidence of biased judicial statements of territorial contacts. See Whytock, *supra* note 117, at 220–22 (testing for bias in judicial statements of fact using same dataset).

²¹¹ Thus, *Activity Mostly/All Outside U.S. Territory* is “No” (0) 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 inside U.S. territory.

²¹² I coded the 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.

²¹³ One might interpret the effects of territoriality and personality as indirect doctrinal effects that exert themselves through judges’ use of “judicial heuristics.” Whytock, *supra* note 117, at 68–77, 180–88.

will decide in favor of domestic law. By controlling for territoriality and personality, the analysis should provide a more accurate estimate of doctrinal effects than studies that do not control for these factors.

b. Pro-Domestic-Party Bias

To test the pro-domestic-party bias claim, I created the variable “*U.S. Party Prefers Domestic Law*.” I coded it as “Yes” (1) if there was a U.S. party on one side of the litigation and a non-U.S. party on the other and the U.S. party preferred domestic law; otherwise, I coded it as “No” (0).²¹⁴ If judges are biased in favor of domestic parties, as the mess claims suggest, then this variable should have a positive effect on *Domestic Law*. This would indicate that, other things being equal, if the domestic party and foreign party disagree on applicable law, the probability that a judge will apply domestic law is higher when the domestic party prefers domestic law than otherwise. Following the same logic, I created the variable “*U.S. Party Prefers Foreign Law*,” which, if the mess claims are correct, should have a negative effect on *Domestic Law*.

c. Pro-Plaintiff Bias

To test the pro-plaintiff (or “pro-recovery”) bias claim, I created the variable “*Plaintiff Prefers Domestic Law*.” I coded it as “Yes” (1) if the plaintiff preferred domestic law and “No” (0) otherwise.²¹⁵ If judges are biased in favor of plaintiffs or recovery, then this variable should have a positive effect on *Domestic Law*, indicating that other things being equal, the probability that a judge will apply domestic law is higher when the plaintiff prefers domestic law than otherwise.

²¹⁴ If there were U.S. parties on both sides, I coded *U.S. Party Prefers Domestic Law* as “No” (0), on the assumption that conflicting domestic party preferences cancel each other out and that such instances, in any event, do not indicate whether the domestic party’s preference is being favored over a foreign party’s preference. Assuming a U.S. party on one and only one side of the litigation, I coded the variable as “Yes” (1) if the U.S. party explicitly argued in favor of domestic law. In the case of a forum non conveniens decision in which the U.S. party did not explicitly argue in favor of domestic or foreign law, I coded “Yes” (1) if the U.S. party was the plaintiff (since domestic law weighs against dismissal) and “No” (0) if the U.S. party was the defendant (for the same reason). Whether a party is a U.S. party or a non-U.S. party is based on the citizenship of the parties indicated in the court’s opinion or, in the absence of citizenship information, on residence, domicile, or jurisdiction of incorporation.

²¹⁵ I coded the variable as “Yes” (1) if the plaintiff explicitly argued in favor of domestic law. In forum non conveniens cases, I also coded “Yes” (1) if the plaintiff did not explicitly argue in favor of domestic or foreign law (since domestic law weighs against dismissal).

4. Control Variables

There are theoretical reasons to expect that at least three other factors may influence international choice-of-law decisionmaking; I created additional variables to control for these factors.²¹⁶ First, it takes more time for a judge to understand and apply foreign law than more familiar domestic law.²¹⁷ Therefore, other things being equal, judges with heavier caseloads might be more likely to apply domestic law. To control for this factor, I created the variable “*Caseload*,” using the “weighted filings” figure from the Federal Court Management Statistics maintained by the Administrative Office of the U.S. Courts.²¹⁸ If this caseload hypothesis is correct, *Caseload* should have a positive effect on *Domestic Law*, indicating that other things being equal, the busier a judge, the higher the probability that she will apply domestic rather than foreign law.

Second, according to liberal international law theory, “courts of liberal states handle cases involving other liberal states differently from the way they handle cases involving nonliberal states.”²¹⁹ This theory suggests that the probability that a U.S. judge will apply a foreign nation-state’s law depends at least in part on whether the foreign nation-state is a liberal democracy. To test this hypothesis, I created the variable “‘Free’ Foreign State.” I coded it as “Yes” (1) if the for-

²¹⁶ Thiel argues that empirical studies of choice-of-law decisionmaking should also control for state-by-state differences in legal culture (such as levels of innovation and lawyers per capita) that may (1) cause states to adopt a modern method in place of the traditional *lex loci delicti* method and (2) influence judges’ choice-of-law decisions. Thiel, *supra* note 11, at 303–04. I do not attempt to control for such factors in my analysis. With regard to Thiel’s first suggested effect, my results do not change when I drop *lex loci delicti* states from my dataset; this suggests that omitting these legal cultural factors might not be affecting my findings. Regarding Thiel’s second suggested effect, however, his finding that adding such controls increases the statistical significance of the effects of different choice-of-law methods on choice-of-law decisionmaking suggests that by not including them, my analysis may underestimate the impact of choice-of-law doctrine. Additionally, if there are more discrete legal-cultural factors that both systematically influence judges’ choice-of-law decisions and are correlated with the Second Restatement in particular, there is a risk that my analysis may either overestimate or underestimate the impact of that method, depending on the direction of that influence.

²¹⁷ See O’Hara & Ribstein, *supra* note 68, at 634 (describing “efficiency advantages” of forum law over foreign law); Thiel, *supra* note 11, at 301 (“There is a powerful efficiency argument to favor forum law: it is the law in which the judges are expert.”).

²¹⁸ See Administrative Office of the U.S. Courts, Fed. Court Mgmt. Statistics, Judicial Caseload Profile Reports (1997–2008), <http://www.uscourts.gov/fcmstat> (follow “District Courts” hyperlinks; then select District Court and click “Generate” button). I used a one-year lag because, due to the typical duration of cases, the prior year’s filings are likely to be a more accurate measure of the district’s current workload.

²¹⁹ Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1917 (1992). This hypothesis builds on liberal international relations theory.

ign nation-state was rated “Free” by the Freedom House *Freedom in the World* report (a leading annual survey of national levels of democracy) and “No” (0) otherwise.²²⁰ If the liberal international law hypothesis is correct, “Free” *Foreign State* should have a statistically significant effect on *Domestic Law*.

Finally, according to the “attitudinal model,” the most important factor influencing a judge’s decision is the judge’s ideological attitude.²²¹ The attitudinal model implies that the probability that a judge will apply domestic rather than foreign law depends at least in part on whether the judge is conservative or liberal. As two of the theory’s proponents put it, “Rehnquist votes the way he does because he is extremely conservative; Marshall voted the way he did because he was extremely liberal.”²²² A common measure of judges’ ideological attitudes is the political party—Democrat or Republican—of the judge’s appointing president.²²³ Accordingly, I created the variable “*Judge Nominated by Republican*,” and coded it as “Yes” (1) if the judge was nominated by a Republican president and “No” (0) if the judge was nominated by a Democratic president. If *Judge Nominated by Republican* has a statistically significant and substantively strong effect on *Domestic Law*, this would support the attitudinal model hypothesis.²²⁴

Neither the mess claims nor choice-of-law doctrine suggests that these factors should influence international choice-of-law decision-making. Nevertheless, if these variables have more impact than the *Second Restatement, Activity Mostly/All Outside U.S. Territory*, and

²²⁰ FREEDOM HOUSE, *FREEDOM IN THE WORLD 2006* (2006), available at <http://www.freedomhouse.org/template.cfm?page=278&year=2006>. I used a one-year lag because judges are unlikely to become immediately aware of changes in a foreign state’s politics.

²²¹ One leading statement of the attitudinal model has noted that “[t]he attitudinal model represents a melding together of key concepts from legal realism, political science, psychology, and economics. 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.” JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002) (citation omitted).

²²² *Id.*

²²³ See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 328 (1992) (using party of nominating president as proxy for ideological attitudes); see also Tracey E. George, *Developing a Positive Theory of Decisionmaking on U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1650–55 (1998) (defending this approach and introducing alternatives).

²²⁴ However, tests using the party of the nominating president as a proxy for a judge’s ideological attitudes may underestimate the impact of those attitudes. Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL’Y (forthcoming 2009) (manuscript at 25), available at <http://ssrn.com/abstract=1121228>. Therefore, such tests are “best interpreted as providing only a lower bound on ideology.” *Id.*

Parties Mostly/All Foreign variables, then that finding would seem to resonate with the general tenor of the mess claims—namely, that factors other than legal doctrine are driving choice-of-law decisionmaking.

C. Findings

This section presents my findings. Table 2 shows actual pro-domestic-law decision rates, and Table 3 compares these actual rates with hypothesized merits-based decision rates. Table 4 compares the estimated actual effect of each explanatory variable with the effect posited by the mess claims. Finally, Table 5 compares the Second Restatement's pro-domestic-law decision rates with those of other choice-of-law methods.

The findings suggest that choice-of-law doctrine does influence judges' international choice-of-law decisions in tort cases; that these decisions are not biased in favor of domestic law, domestic parties, and plaintiffs; and that these decisions are quite predictable. These results suggest that the mess claims do not accurately describe international choice-of-law decisionmaking in tort cases. They also suggest that choice-of-law doctrine—and the judges that apply it—may make more productive contributions to global governance than conventional wisdom implies.

1. Little or No Pro-Domestic-Law Bias

First, the evidence suggests that U.S. district court judges are not biased in favor of domestic law, or that if they are, the bias is not strong. As Table 2 indicates, U.S. district court judges decide that domestic law should apply at an estimated rate of only 37.1%. There is 95% confidence that the actual pro-domestic-law decision rate in the overall population of international choice-of-law decisions by U.S. district court judges in published tort cases is between 30.9% and 43.8% (hereinafter, I include this 95% confidence interval in brackets following each estimate, using the following notation: 37.1% [30.9, 43.8]).²²⁵

As expected,²²⁶ the pro-domestic-law decision rate is particularly low in the forum non conveniens context (an estimated 9.4% [4.6,

²²⁵ This convention follows Epstein's approach. See Epstein & King, *supra* note 186, at 49–54 (asserting importance of including indicators of uncertainty); Lee Epstein, Andrew D. Martin & Matthew M. Schneider, *On the Effective Communication of the Results of Empirical Studies* (pt. 1), 59 VAND. L. REV. 1811, 1827–38 (2006) (arguing for better integration of substance and statistics and proposing this reporting model).

²²⁶ See *supra* Part IV.B.1 (discussing study's methodology and inclusion of forum non conveniens cases).

TABLE 2
INTERNATIONAL CHOICE-OF-LAW DECISIONS BY U.S. DISTRICT
COURT JUDGES IN PUBLISHED TORT CASES

	Overall	Forum Non Conveniens Context	Outside Forum Non Conveniens Context
Domestic Law	79 37.1% [30.9, 43.8]	8 9.4% [4.6, 17.7]	71 55.5% [46.8, 63.8]
Foreign Law	134 62.9% [56.2, 69.1]	77 90.6% [82.3, 95.4]	57 44.5% [36.2, 53.2]
Total	213 100.0%	85 100.0%	128 100.0%

NOTES: This table shows the number and percentage of cases in my international choice-of-law dataset in which judges decided that domestic law should apply and in which judges decided that foreign law should apply. The percentages provide estimates of pro-domestic-law and pro-foreign-law decision rates (i.e., the respective rates at which U.S. district court judges decide in favor of domestic and foreign law) in the overall population of international choice-of-law decisions in published tort cases. The figures in brackets are the lower and upper bounds of each estimate's 95% confidence interval.

17.7]), which lowers the overall pro-domestic-law rate. But even outside the forum non conveniens context, U.S. district court judges decide that domestic law should apply at an estimated rate of only 55.5%, a figure that does not indicate strong bias. Moreover, the estimate's 95% confidence interval ([46.8, 63.8]) indicates that one cannot be 95% confident that the actual pro-domestic-law decision rate outside the forum non conveniens context is in fact greater than 50%. The decision rates in Table 2 therefore suggest that international choice-of-law decisions are not biased in favor of domestic law.

Due to potential case-selection effects,²²⁷ however, pro-domestic-law decision rates cannot conclusively demonstrate lack of bias. For example, differences in the relative merits of litigants' cases could complicate interpretation of these rates. If, in the aggregate, the merits of litigants' pro-domestic-law arguments are systematically weaker than the merits of their pro-foreign-law arguments, one might conclude that pro-domestic-law decision rates should be even lower than those indicated in Table 2 and that the reason they are not is pro-domestic-law bias. On this theory, higher than expected pro-foreign-

²²⁷ See Clermont & Eisenberg, *supra* note 174, at 135–40 (discussing problem of case-selection effects in context of interpreting litigation win rates).

law decision rates would not necessarily indicate pro-foreign-law bias either, since one would expect higher pro-foreign-law decision rates from unbiased judges faced with systematically weak pro-domestic-law arguments. To interpret pro-domestic-law decision rates accurately, then, one must control for the merits of litigants' pro-domestic-law arguments.²²⁸

To accomplish this, Table 3 compares hypothesized merits-based pro-domestic-law decision rates with estimates of actual pro-domestic-law decision rates for pro-domestic-law arguments of varying strength, from strongest (beginning at the top of the table) to weakest (at the bottom). Because territoriality and personality pervade choice-of-law doctrine,²²⁹ I used these factors to approximate the strength of pro-

²²⁸ See *id.* at 140 (interpreting win-rate data in face of case-selection effects requires “teas[ing] out . . . the remaining implications of the case-strength factor”). The extent of the parties' information about pro-domestic-law bias poses another interpretive challenge. Suppose that Party A prefers domestic law, Party B prefers foreign law, and the parties decide for themselves whether to settle the case or to litigate the choice-of-law dispute before a particular judge. Even if the judge has a pro-domestic-law bias, one might expect a 50% pro-domestic-law decision rate if two conditions hold: (1) The parties have very accurate information about the extent of that bias, and (2) the information possessed by the parties is identical. Under these conditions, the parties would factor judicial bias into their choice between settlement and litigation, thus selecting out cases in which bias would strongly favor one party or the other. Cf. Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 499–501 (1996) (introducing parallel conditions for achieving 50% win rate and concluding that 50% plaintiff win rate is not “central tendency, either in theory or in fact”). These conditions are rarely likely to hold, *id.* at 500, but insofar as they do, one cannot infer from a 50% pro-domestic-law decision rate that there is no pro-domestic-law bias.

Inferences of bias based on pro-domestic-law decision rates are also difficult when information is asymmetric—a more likely situation. If Party A knows about the judge's pro-domestic-law bias but Party B lacks this information, the choice-of-law issue will more likely be litigated and is more likely to result in a pro-domestic-law decision. Cf. *id.* at 495 (noting that when defendants possess private information, cases going to trial are those in which plaintiffs are relatively unlikely to win). Under such conditions, it would be difficult to determine how much of a pro-domestic-law decision rate greater than 50% is due to pro-domestic-law bias and how much is due to asymmetric information. Analogous interpretive challenges may exist when making inferences based on pro-domestic-party and pro-plaintiff decision rates. See *infra* note 251 and accompanying text.

However, unless information asymmetries systematically favor (or disfavor) parties preferring domestic law (or domestic litigants or plaintiffs), the inferential threat appears not to be substantial. Furthermore, because it is relatively inexpensive to add a choice-of-law issue to the issues being litigated, parties may tend to litigate choice-of-law issues without considering information about bias. More importantly, insofar as informational considerations do pose a threat to my inferences, this threat is mitigated (but not eliminated) by my reliance on statistical techniques designed to detect bias by (1) comparing actual pro-domestic-law decision rates with the rates that would be expected if judges based their choice-of-law decisions solely on the merits of litigants' choice-of-law arguments, see *infra* Table 3, and (2) controlling for the preferences of domestic litigants and plaintiffs, preferences which are partly a function of information, see *infra* Table 4. I thank Andrew Guzman for encouraging me to reflect on these problems.

²²⁹ See *supra* Part IV.A.2 (noting failure of other studies to account for these factors).

domestic-law arguments.²³⁰ I assume that, other things being equal, pro-domestic-law arguments generally are strongest on the merits when the locus of the activity giving rise to the litigation is mostly or all inside U.S. territory and when the parties are mostly or all domestic. Under these conditions, the pro-domestic-law decision rate of unbiased judges should approach 100%. When either the locus of activity or the nationality of the parties is balanced between domestic and foreign, and the other factor is mostly or all domestic, the argument is not quite as strong, but the pro-domestic-law decision rate should still be greater than 50%. When both factors are balanced, the rate should approximate 50%. This should also be the case when one factor is mostly or all domestic and the other is mostly or all foreign.²³¹ I assume that pro-domestic-law arguments generally are weakest when the locus of activity is mostly or all outside U.S. territory and the parties are mostly or all foreign. Under these conditions, the pro-domestic-law decision rate of unbiased judges should approach 0%.

If U.S. district court judges are biased in favor of domestic law, then the actual pro-domestic-law decision rates should be greater than the hypothesized merits-based pro-domestic-law decision rates. The evidence suggests that this is not the case. As Table 3 indicates, pro-domestic-law decision rates are highest when pro-domestic-law arguments are strongest (90.0% [57.4, 100.0] with forum non conveniens cases; 88.9% [54.3, 100.0] without forum non conveniens cases) and lowest when those arguments are weakest (15.0% [6.7, 29.5] with forum non conveniens cases; 15.4% [5.5, 34.1] without).²³²

Moreover, the estimated actual decision rates generally approximate the hypothesized merits-based rates. With forum non conveniens decisions included, estimated actual rates approximate the hypothesized merits-based rates for all combinations except (Bal-

²³⁰ This measurement is certainly imperfect. It fails to account for differences between choice-of-law methods and for legal arguments based on those differences, which might diverge from arguments based solely on territoriality and personality. Moreover, some choice-of-law doctrines are more territorial than others. See Whytock, *supra* note 117, at 211 tbl.4.10 (classifying territorial tendencies of different doctrines). Therefore, territoriality and personality are only rough proxies for the merits of choice-of-law arguments. While more accurate measures might reveal stronger doctrinal effects, these proxies can at least show basic patterns in judges' international choice-of-law decisions.

²³¹ This assumes that the influence of these two factors would cancel each other out.

²³² I coded territoriality and nationality using the same techniques used to code the *Activity Mostly/All Outside U.S. Territory* and *Parties Mostly/All Foreign* variables. However, for Table 3, I expanded each measure into three categories: mostly/all domestic, balanced (equal number of U.S. and non-U.S. territorial connections, equal number of U.S. and non-U.S. parties), and mostly/all foreign (which have the same values as *Activity Mostly/All Outside Territory* and *Parties Mostly/All Foreign* variables).

TABLE 3
 PRO-DOMESTIC-LAW DECISION RATES IN PUBLISHED
 TRANSNATIONAL TORT CASES, CONTROLLING
 FOR HYPOTHESIZED MERITS

Locus of Activity	Nationality of Parties	Hypothesized Merits-Based Pro-Domestic-Law Decision Rate	Pro-Domestic-Law Decisions/ Total Decisions (with FNC)	Estimated Actual Pro-Domestic-Law Decision Rate (with FNC)	Pro-Domestic-Law Decisions/ Total Decisions (without FNC)	Estimated Actual Pro-Domestic-Law Decision Rate (without FNC)
Mostly/All Domestic	Mostly/All Domestic	≈100% (Strongest)	9/10	90.0% [57.4, 100.0]	8/9	88.9% [54.3, 100.0]
Mostly/All Domestic	Balanced	>50%	15/17	88.2% [64.4, 98.0]	14/16	87.5% [62.7, 97.8]
Balanced	Mostly/All Domestic	>50%	5/8	62.5% [30.4, 86.5]	4/5	80.0% [36.0, 98.0]
Balanced	Balanced	≈50%	11/32	34.4% [20.3, 51.8]	8/14	57.1% [32.6, 78.7]
Mostly/All Domestic	Mostly/All Foreign	≈50%	2/4	50.0% [15.0, 85.0]	2/3	66.7% [20.2, 94.4]
Mostly/All Foreign	Mostly/All Domestic	≈50%	16/36	44.4% [29.5, 60.4]	16/25	64.0% [44.4, 79.8]
Mostly/All Foreign	Balanced	<50%	14/61	23.0% [14.1, 35.0]	14/29	48.3% [31.4, 65.6]
Balanced	Mostly/All Foreign	<50%	0/4	0.0% [0.0, 54.6]	0/0	N/A
Mostly/All Foreign	Mostly/All Foreign	≈0% (Weakest)	6/40	15.0% [6.7, 29.5]	4/26	15.4% [5.5, 34.1]

NOTES: This table compares hypothesized merits-based international choice-of-law decision rates with estimates of actual rates for various combinations of territoriality and nationality. It presents results both with and without forum non conveniens (FNC) decisions. Insofar as judges are biased in favor of domestic law, estimates of actual pro-domestic-law decision rates should be significantly higher than the hypothesized merits-based rates. As the table indicates, this is not the case.

anced, Balanced), and for that combination the estimated pro-domestic-law decision rate is actually lower than hypothesized. With forum non conveniens decisions excluded, the estimated actual rates approximate the hypothesized merits-based rates for all combinations except (Balanced, Mostly/All Foreign), for which there are no observations. However, the 95% confidence intervals indicate that there is not 95% confidence that the overall estimate for (Balanced, Mostly/All Domestic) is actually greater than 50%, or that the estimates for (Mostly/All Foreign, Balanced) without forum non conveniens decisions and (Balanced, Mostly/All Foreign) with forum non conveniens decisions are actually less than 50%. Ultimately, there is not 95% confidence for any of the combinations, with or without forum non

conveniens decisions, that the actual pro-domestic-law decision rate is substantially greater than the hypothesized merits-based rate.

These findings suggest that, contrary to the mess claims, judges are not biased in favor of domestic law, at least in published transnational tort cases. These findings also provide preliminary evidence that choice-of-law decisions may be more predictable than the mess claims imply. Furthermore, insofar as territoriality and nationality are accurate indicators of the legal strength of litigants' choice-of-law arguments, these findings indicate that the merits of litigants' choice-of-law arguments significantly influence judges' choice-of-law decisions.

2. *Additional Findings*

Several mess claims remain: that choice-of-law doctrine does not significantly influence choice-of-law decisionmaking; that choice-of-law decisions are biased in favor of domestic over foreign litigants and plaintiffs over defendants; and that choice-of-law decisionmaking is highly unpredictable.²³³ To evaluate these claims empirically, I used logit analysis, a standard statistical technique for estimating the effects that hypothesized explanatory variables have on dependent variables with only two possible values.²³⁴

Table 4 presents the results, excluding forum non conveniens cases.²³⁵ It compares the effects posited by the mess claims with estimates of the actual effect of each explanatory variable on the probability that a U.S. district court judge will apply domestic rather than foreign law in published transnational tort cases. The explanatory variables are listed in the first column. For each explanatory variable, the second column indicates its effect as predicted by the mess claims on the probability that a judge will apply domestic rather than foreign law (no significant effect [≈ 0], or positive effect [+]). The last three columns present estimates, according to three statistical models, of the actual effect of each explanatory variable on the probability of

²³³ For discussion of these claims see *supra* Part II.

²³⁴ Here, the dependent variable is *Domestic Law*, which either has the value of Yes (1) for decisions that domestic law should apply, or No (0) for decisions that foreign law should apply. See *supra* Part IV.B.2. On logit analysis, see generally DAVID W. HOSMER & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* (2d ed. 2000).

²³⁵ Whenever inclusion of forum non conveniens cases changed results significantly, I reported the differences. As urged by leading empirical legal scholars, my presentation of results emphasizes substance and estimates of uncertainty rather than technical statistical measures. See, e.g., Epstein, Martin & Schneider, *supra* note 225, at 1827–38 (arguing for better integration of substance and statistics). Thus, Table 4 includes estimates of the actual effect of each variable on the dependent variable, along with confidence intervals conveying the degree of uncertainty associated with each estimate, rather than logit coefficients, standard errors, and p-values. The latter statistics are available upon request.

a pro-domestic-law decision, with 95% confidence intervals in brackets.²³⁶

These three models test for effects by controlling for successively more variables. The dependent variable in all models is *Domestic Law*. Model 1 tests for doctrinal effects using only the *Second Restatement* variable, without controlling for territoriality or nationality. Model 2 builds on Model 1 by adding *Activity Mostly/All Outside U.S. Territory* and *Parties Mostly/All Foreign* to control for territoriality and personality. Model 3 builds on Model 2 by adding the additional control variables *Caseload*, “Free” *Foreign State*, and *Judge Nominated by Republican*.

a. The Influence of Choice-of-Law Doctrine

The results are contrary to the mess claim that choice-of-law doctrine does not significantly influence choice-of-law decisionmaking.²³⁷ In Model 1, *Second Restatement* has a negative effect on *Domestic Law*. This is consistent with the theory that choice-of-law doctrine matters; the Second Restatement should have a relatively low pro-domestic-law decision rate if judges take the doctrine seriously.²³⁸ However, the confidence interval indicates there is not 95% certainty that there is a negative effect. This uncertainty is consistent with prior findings about the effect of the Second Restatement, as compared to the effects of other methods, in studies that do not control for territoriality and personality.²³⁹

Model 2, however, shows that the level of certainty increases, as expected, when the analysis controls for territoriality and personality.²⁴⁰ The estimated effect of *Second Restatement* on *Domestic Law* is again negative, now with 95% certainty. Judges are an estimated

²³⁶ I used the Clarify software program in Stata to simulate a change in the expected value of the dependent variable caused by increasing each dichotomous explanatory variable from 0 to 1 (and *Caseload*, a continuous variable, from its 25th to 75th percentile), setting each of the other variables at its mode (for dichotomous variables) or mean (for *Caseload*). Michael Tomz, Jason Wittenberg & Gary King, CLARIFY: Software for Interpreting and Presenting Statistical Results, Version 2.0 (2001), available at <http://gking.harvard.edu/stats.html> (last visited Feb. 9, 2009) (only version 2.1 is currently available).

²³⁷ For discussion of that claim see *supra* Part II.A.

²³⁸ See *supra* note 202 and accompanying text (discussing Second Restatement’s expected doctrinal effect).

²³⁹ See, e.g., Borchers, *supra* note 55, at 378 (finding Second Restatement’s propensity to favor forum law indistinguishable from that of other modern methods).

²⁴⁰ As discussed above, the expectation was that certainty should increase because the statistical test controls for commonalities between the Second Restatement and other methods and therefore is better able to detect effects resulting from their differences. See *supra* Part IV.B.3.a.

TABLE 4
 EXPECTED AND ACTUAL EFFECTS ON PROBABILITY THAT
 JUDGE WILL APPLY DOMESTIC LAW

Explanatory Variable	Effect Expected by Mess Claims	Actual Effect (Estimate and 95% Confidence Interval)		
		Model 1	Model 2	Model 3
Second Restatement	≈0	-9.8% [-29.3, 10.3]	-22.8%** [-44.4, -2.6]	-26.8%** [-46.3, -6.9]
Activity Mostly/All Outside U.S. Territory	≈0		-26.3%** [-41.6, -10.4]	-35.9%** [-55.5, -14.6]
Parties Mostly/All Foreign	≈0		-40.2%** [-58.3, -18.3]	-40.2%** [-60.4, -21.1]
U.S. Party Prefers Domestic Law	+	-1.3% [-20.8, 18.7]	-18.1% [-39.4, 4.0]	-13.8% [-35.5, 9.5]
Plaintiff Prefers Domestic Law	+	-17.9%* [-33.8, 1.1]	-18.0%* [-36.6, 2.8]	-18.1% [-41.7, 8.2]
Caseload	N/A			2.8% [-11.9, 17.5]
“Free” Foreign State	N/A			-12.6% [-35.2, 11.9]
Judge Nominated by Republican	N/A			-18.5%* [-38.5, 3.2]
Number of Observations		128	127	118
Decisions Correctly Classified		56.25%	74.02%	78.81%
Adjusted Count R-squared		1.75%	42.1%	54.6%
Area under Receiver Operating Characteristic (ROC) Curve		0.5859	0.7954	0.8457
NOTES: This table compares the effects posited by the mess claims with the estimated actual effect of each explanatory variable on the dependent variable, <i>Domestic Law</i> , indicating the probability that a judge will apply domestic rather than foreign law. The explanatory variables are listed in the first column; the effects expected by the mess claims are indicated in the second column (no significant effect [≈0], positive effect [+]). The last three columns present estimates of the actual effect of each explanatory variable on the probability of a pro-domestic-law decision, with 95% confidence intervals in brackets. The estimates were generated using logit analysis and Clarify software, with forum non conveniens cases excluded. Positive or negative relationships for which there is 90% certainty are indicated by an asterisk (*), and those for which there is 95% certainty are indicated by two asterisks (**).				

22.8% less likely to make pro-domestic-law decisions when the Second Restatement, rather than another method, provides the applicable choice-of-law rule. As Model 3 shows, this result holds even after controlling for caseload, whether the foreign state is a liberal democracy, and whether the judge was nominated by a Republican. *Second Restatement* continues to have a negative effect on *Domestic Law* with 95% certainty when forum non conveniens decisions are included in the analysis.²⁴¹ These results suggest that, contrary to the mess claims, choice-of-law doctrine does affect decisions: Application of the Second Restatement is less likely to result in a pro-domestic-

²⁴¹ With forum non conveniens decisions included, the estimated effect of *Second Restatement* is -15.5% [-28.6, -1.1] in Model 2 and -14.6% [-26.7, -3.5] in Model 3.

law decision compared to the other modern methods as a group and more likely to result in a pro-foreign-law decision.

The strong negative effects of *Activity Mostly/All Outside U.S. Territory* and *Parties Mostly/All Foreign* indicated in Models 2 and 3 provide additional evidence that doctrine matters. Contrary to the claim that choice-of-law doctrine does not significantly influence choice-of-law decisions, these findings suggest that territoriality and personality—two factors that pervade choice-of-law doctrine—in fact have strong effects; these effects persist when forum non conveniens decisions are included in the analysis.²⁴²

Table 5 provides a more fine-grained analysis of doctrinal effects. In Table 4, the *Second Restatement* variable estimates the effect of the Second Restatement on choice-of-law decisions compared to other choice-of-law methods in general. Table 5 estimates the effect of the Second Restatement in comparison with three additional indicator variables²⁴³: an *Interest Analysis* variable, indicating use of interest analysis or a combined modern method;²⁴⁴ a *Lauritzen* variable, indicating use of the Lauritzen method;²⁴⁵ and an *Other Methods* variable, which serves as a residual category indicating use of a method other than the Second Restatement, interest analysis, a combined modern

²⁴² With forum non conveniens decisions included, the estimated effect of *Activity Mostly/All Outside U.S. Territory* is -35.0% [-48.9, -20.4] in Model 2 and -38.3% [-55.0, -21.7] in Model 3; the estimated effect of *Parties Mostly/All Foreign* is -20.5% [-34.1, -6.9] in Model 2 and -20.3% [-34.6, -8.9] in Model 3.

²⁴³ Coding of the additional indicator variables is based on Symeonides's annual choice-of-law surveys, except for the *Lauritzen* indicator, which is not included in Symeonides's classification scheme. For citations to the surveys, see Symeon C. Symeonides, *Choice of Law in the American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243, 244 n.1 (2008). All of the surveys are also available at <http://www.willamette.edu/wucl/journals/wlo/conflicts/>. The *Lauritzen* indicator was coded according to whether the court's opinion indicated application of the Lauritzen method.

²⁴⁴ I coded these together because both interest analysis and combined modern methods aim to identify the state with the greatest interest in having its law applied. See SCOLES ET AL., *supra* note 13, §§ 2.24–25, at 102–05 (examining both approaches and relationship between them). Combined modern methods incorporate factors from methods other than interest analysis, but these factors merely guide the analysis and do not change the basic inquiry regarding the balance of state interests. See *id.* § 2.24, at 103 (identifying interest analysis as integral to virtually all combined-modern methods).

²⁴⁵ Although similar in some respects to the Second Restatement, the Lauritzen method deserves its own category due to a variety of differences. Most significantly, the former has a presumption in favor of the law of the place of injury, whereas the latter includes the “[p]lace of the [w]rongful [a]ct” as a factor but explicitly limits the role of the place of injury in its choice-of-law analysis. See *Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) (“The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts”); see also *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 384 (1959) (holding that choice of law in maritime context “should not depend on the wholly fortuitous circumstance of the place of injury”).

method, or the Lauritzen method.²⁴⁶ I then re-analyzed Model 3 with each of these new indicators included and with the *Second Restatement* variable excluded as the reference category.²⁴⁷ The results are presented in Table 5.

TABLE 5
COMPARATIVE EFFECTS OF CHOICE-OF-LAW METHODS

	Effect of Indicated Choice-of-Law Methods on Probability of Pro-Domestic-Law Decision, Compared to the Second Restatement		
	Interest Analysis	Lauritzen	Other Methods
With Forum Non Conveniens Decisions	+* 9.2% [-1.7, 22.6]	+** 27.1% [6.8, 49.5]	+* 18.3% [-1.5, 43.9]
Without Forum Non Conveniens Decisions	+* 19.5% [-1.6, 42.3]	+** 37.7% [6.1, 67.0]	+** 40.5% [1.7, 72.1]

NOTES: This table indicates whether each listed choice-of-law category is more (+) or less (-) likely to lead to a pro-domestic-law decision than the Second Restatement, based on Model 3. Results are presented both with and without forum non conveniens decisions. One asterisk (*) indicates 90% certainty, and two asterisks (**) indicate 95% certainty regarding the specified positive or negative effect. The table also estimates the substantive impact of each method on the probability of a pro-domestic-law decision compared to the reference category, along with associated 95% confidence intervals.

Table 5 indicates whether each choice-of-law category is more (+) or less (-) likely to lead to a pro-domestic-law decision than the Second Restatement. It also estimates the substantive difference in the probability that a judge will apply domestic law, along with associated 95% confidence intervals. The results suggest that each of the

²⁴⁶ Due to the limited number of observations in the sample in which judges used “other methods” (six for *lex loci delicti*, three for significant contacts, seven for *lex fori*, and two for Leflar), these are grouped together into a single category. Unfortunately, this study’s data limitations do not allow reliable statistical analysis with separate indicators for each of these other methods. For this reason, the earlier Borchers and Thiel studies may shed more light on subtle differences among the choice-of-law methods included in this category. See *supra* notes 143–61 and accompanying text (analyzing Borchers and Thiel studies).

²⁴⁷ When analyzing categorical variables, the indicator variable for the reference category must be excluded from the model. See J. SCOTT LONG & JEREMY FREESE, REGRESSION MODELS FOR CATEGORICAL DEPENDENT VARIABLES USING STATA 417 (2d ed. 2006) (explaining by way of example that to avoid perfect collinearity one categorical variable must be excluded and serve as reference point relative to which included indicators’ coefficients are interpreted).

other categories is more likely than the Second Restatement to result in pro-domestic-law decisions.²⁴⁸

As one choice-of-law scholar has argued, “the great divide in American choice of law is . . . between the First Restatement and everything else.”²⁴⁹ My results suggest that in international choice-of-law, there is a significant divide between the Second Restatement and other choice-of-law methods.²⁵⁰ Thus, the analysis not only indicates that choice-of-law doctrine matters but also sheds light on how it matters.

b. Little Evidence of Pro-Domestic-Party or Pro-Plaintiff Bias

My results also challenge the mess claims that judges are biased in favor of domestic over foreign litigants and plaintiffs over defendants. Overall, when a U.S. party and a foreign party disagree about the applicable law, U.S. district court judges decide in favor of the domestic party at an estimated rate of 58.3%, although there is not 95% certainty that the actual rate is indeed greater than 50%.²⁵¹ Moreover, as Table 4 indicates, a U.S. party’s preference for domestic law does not increase the probability that a judge will apply domestic law in any of the models. In fact, the estimates suggest a negative effect, though without 90% certainty.²⁵²

The results change when the variable is whether the U.S. party prefers foreign law. With forum non conveniens decisions included in the analysis, there is at least 90% certainty in all models that *U.S. Party Prefers Foreign Law* has a negative effect on *Domestic Law*,

²⁴⁸ It is unclear how these results might change if there were sufficient data to disaggregate the *Interest Analysis* category into Symeonides’s separate categories for pure interest analysis and combined modern methods or to disaggregate *Other Methods* into Symeonides’s separate categories for First Restatement, significant contacts, *lex fori*, and Leflar. See *supra* note 246. Even with the aggregated categories, the results generally were not statistically significant at a 95% level of confidence when using categories other than the Second Restatement as the reference category (i.e., when estimating the effects of the different methods compared to the *Interest Analysis*, *Lauritzen*, or *Other Methods* category rather than the *Second Restatement*).

²⁴⁹ Borchers, *supra* note 55, at 377.

²⁵⁰ Because my data do not allow me to disaggregate the First Restatement from the other methods in the analysis, the First Restatement’s status is unclear.

²⁵¹ The 95% confidence interval is [45.7, 69.9]. When forum non conveniens cases are included, the estimated rate is 53.3% [44.5, 61.9]. As discussed above, the possibility of case-selection effects makes it difficult to interpret these decision rates. See *supra* notes 174–75 and accompanying text. For this reason I also use the party preference variables to test for bias.

²⁵² However, there is 95% certainty of a negative effect in one specification of the model: Model 2, with forum non conveniens cases included. When forum non conveniens cases are included, the estimated effect of *U.S. Party Prefers Domestic Law* is –5.8% [–18.5, 8.7] in Model 1; –13.8% [–26.8, –0.4] in Model 2; and –9.4% [–22.9, 2.5] in Model 3.

indicating that when a U.S. party and a foreign party disagree about the applicable law, the probability that a judge will decide in favor of domestic law is lower if the U.S. party prefers foreign law.²⁵³ These results suggest that there may indeed be some degree of pro-domestic-party bias. However, there is not 90% certainty of this effect when forum non conveniens decisions are excluded from the analysis.²⁵⁴ In the forum non conveniens context, the U.S. party is often a defendant seeking to dismiss a lawsuit brought against it by a foreign plaintiff.²⁵⁵ Therefore, the negative effect of *U.S. Party Prefers Foreign Law* may reflect judicial efforts to discourage forum shopping by foreign plaintiffs, rather than general pro-domestic-party bias in choice-of-law decisionmaking.

Nor do the results support the mess claim of pro-plaintiff-bias. Overall, U.S. district court judges decide in favor of the plaintiff's preferred law at an estimated rate of 47.7% [38.6, 57.0].²⁵⁶ And as Table 4 indicates, a plaintiff's preference for domestic law does not appear to increase the probability that a judge will decide that domestic law should apply. In fact, the opposite may be true: In Models 1 and 2 there is 90% certainty that when the plaintiff prefers domestic law and the defendant prefers foreign law, a judge is *less* likely to decide in favor of domestic law. When forum non conveniens cases are included, there is 95% certainty regarding this negative effect in all models.²⁵⁷ This is not necessarily a surprising finding, particularly in the forum non conveniens context. Judges may simply be trying to deter international forum shopping by removing one of the incentives that draw plaintiffs to U.S. courts—U.S. law. This impulse to deter forum shopping may be outweighing any pro-plaintiff bias in judges' choice-of-law decisions.

²⁵³ When forum non conveniens cases are included, the estimated effect of *U.S. Party Prefers Foreign Law* is -13.8% [-26.1, 0.0] in Model 1; -13.7% [-27.0, 1.0] in Model 2; and -12.2% [-24.2, -1.0] in Model 3.

²⁵⁴ When forum non conveniens cases are excluded, the estimated effect of *U.S. Party Prefers Foreign Law* is -15.9% [-37.6, 7.2] in Model 1; -15.6% [-38.1, 9.7] in Model 2; and -12.8% [-35.4, 10.8] in Model 3.

²⁵⁵ In an estimated 32.4% [26.4, 39.0] of forum non conveniens decisions in U.S. district courts, there is a foreign plaintiff and a U.S. defendant. See Memorandum from Christopher A. Whytock to the *New York University Law Review*, *supra* note 191 (describing author's empirical data based on analysis of random sample of published U.S. district court forum non conveniens cases).

²⁵⁶ When forum non conveniens cases are included, the estimated pro-plaintiff decision rate is even lower: 31.1% [25.0, 37.9].

²⁵⁷ When forum non conveniens cases are included, the estimated effect of *Plaintiff Prefers Domestic Law* is -34.5% [-50.0, -16.8] in Model 1, -37.5% [-54.4, -16.6] in Model 2, and -35.4% [-54.9, -11.8] in Model 3.

c. The Predictability of International Choice-of-Law Decisionmaking

My results also indicate that international choice-of-law decision-making may be more predictable than conventional wisdom suggests.²⁵⁸ Model 3 correctly predicts international choice-of-law decisions at a rate of 78.8%.²⁵⁹ The adjusted count R-squared figure indicates that this represents a 54.6% improvement over the rate at which decisions would be correctly predicted by always guessing the more frequent outcome.²⁶⁰ Also, the area under the receiver operating characteristic (ROC) curve, 0.8457, indicates that Model 3 does an excellent job discriminating between pro-domestic-law and pro-foreign-law decisions.²⁶¹

More importantly, international choice-of-law decisionmaking appears to be predictable in a manner that may be useful to litigants. Even relatively simple Model 2 has good predictive power.²⁶² And as

²⁵⁸ Because the mess claims do not posit a specific level of unpredictability, I cannot precisely compare it to my findings. Therefore, a more definitive conclusion is not possible.

²⁵⁹ This “correctly classified” figure indicates the proportion of outcomes that were correctly classified by the model using a 0.5 probability cutoff to translate predicted probabilities into dichotomous predictions. See LAWRENCE C. HAMILTON, STATISTICS WITH STATA: UPDATED FOR VERSION 9, at 270–71 (2006) (explaining correctly classified statistic). Thus, it indicates the proportion of outcomes for which the model estimated at least a 0.5 probability of a pro-domestic-law decision and in which the court in fact decided that domestic law should apply. When forum non conveniens decisions are included in the analysis, the correctly classified figure is 76.12%.

²⁶⁰ When a dependent variable has only two possible outcomes (as is the case here), one can correctly predict at least 50% of outcomes without any explanatory variables by always guessing the outcome that is most frequent. LONG & FREESE, *supra* note 247, at 111. Adjusted count R-squared uses this guessing strategy as a baseline to measure the improvement in predictive power provided by a statistical model. More precisely, adjusted count R-squared 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 0.5 probability cutoff. *Id.* at 111–12. When forum non conveniens decisions are included, the adjusted count R-squared is 32.4%.

²⁶¹ 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. See Douglas G. Altman & J. Martin Bland, *Diagnostic Tests 3: Receiver Operating Characteristic Plots*, 309 BRIT. MED. J. 188, 188 (1994) (explaining ROC curve in medical diagnostic context). The area under the ROC curve is equal to the probability that a random pro-domestic-law decision has a higher value of the dependent variable than a random pro-foreign-law decision. *Id.* The larger the area under the curve, the more discriminating the model. *Id.* One rule of thumb is that an area of 0.7 to 0.8 is acceptable discrimination, 0.8 to 0.9 is excellent discrimination, and greater than 0.9 is outstanding discrimination. HOSMER & LEMESHOW, *supra* note 234, at 162. When forum non conveniens decisions are included in the sample, the area under the ROC curve is 0.7862.

²⁶² Model 2 requires knowledge of the applicable choice-of-law method (whether or not it is the Second Restatement), the territorial locus of the activity, the nationality of the parties, the U.S. party’s preference, and the plaintiff’s preference. This information should

Table 3 indicates, a judge is most likely to apply domestic law when the locus of the underlying activity is mostly or all inside U.S. territory and the parties are mostly or all domestic, and she is least likely to do so when the locus of activity is mostly or all outside U.S. territory and the parties are mostly or all foreign. This approach to prediction decreases in usefulness as territoriality and personality become more balanced, and it does not incorporate other factors that may influence choice-of-law decisionmaking. Nevertheless, it provides a fairly simple rule of thumb that may help transnational actors reduce their uncertainty about applicable law.

d. Effect of Control Variables Is Ambiguous

Model 3 indicates that at least one of my control variables may significantly affect choice-of-law decisionmaking, although this effect is less certain than others in the study. *Caseload* has the hypothesized positive effect on the pro-domestic-law decision rate (judges apply domestic law more often when they have higher caseloads); and “*Free Foreign State*” has a negative effect (judges apply domestic law less often when a “free” state supplies the applicable foreign law). However, neither of these effects reaches a 90% level of certainty.²⁶³

The evidence regarding the effect of judges’ ideological attitudes is more intriguing. Judges nominated by Republican presidents are an estimated 18.5% less likely to apply domestic law; this effect is statistically significant at a 90% (but not 95%) level of confidence. This result might be explained by a particularly strong conservative desire to deter plaintiffs seeking more favorable U.S. law from engaging in international forum shopping in U.S. courts. However, when forum non conveniens cases are included, even 90% certainty about the existence of this effect is lost. Moreover, the estimated substantive effects of *Second Restatement* (–26.8%), *Activity Mostly/All Outside U.S. Territory* (–35.9%), and *Parties Mostly/All Foreign* (–40.2%) are all stronger than that of *Judge Nominated by Republican* (–18.5%). This suggests that even if judges’ ideologies do significantly influence inter-

ordinarily be available to litigants. Model 2 correctly predicts international choice-of-law decisions at a rate of 74.0%; the adjusted count R-squared figure indicates that this represents a 42.1% improvement over the rate at which decisions would be correctly predicted by always guessing the more frequent outcome; and the area under the ROC curve is 0.7954, which is on the border between acceptable and excellent discrimination. See *supra* Table 4.

²⁶³ When forum non conveniens cases are included, there still is neither 90% nor 95% certainty as to whether *Caseload* or “*Free Foreign State*” affects *Domestic Law*.

national choice-of-law decisions, the influence of doctrinal factors—including territoriality and personality—is likely stronger.²⁶⁴

As indicated by the test statistics reported for Models 2 and 3 in Table 4, the predictive power of the statistical model increased when the *Caseload*, “Free” *Foreign State*, and *Judge Nominated by Republican* variables were included.²⁶⁵ This suggests that, taken together, these factors may play at least some role in choice-of-law decisionmaking. The caseload, liberal international relations theory, and attitudinal hypotheses may therefore merit further investigation. Although not expressly contemplated by the mess claims, a finding that one or more of these factors do in fact significantly affect choice-of-law decisions would be consistent with the general tenor of those claims: that choice-of-law decisions are based on factors other than the relevant facts and applicable choice-of-law method. For example, if further analysis were to confirm that judges’ partisan ideologies significantly influence their choice-of-law decisions, this would seem to support a new mess claim—namely, that choice-of-law decisions are ideological. Overall, however, the present findings suggest that the mess claims may be myths—at least in published transnational tort cases.

V

IMPLICATIONS AND EXTENSIONS

My study has implications beyond international choice-of-law decisionmaking; in particular, it provides preliminary empirical support for theories about the contributions choice of law makes to global governance. Moreover, although my findings are based on analysis of published international choice-of-law decisions in tort cases, they might plausibly extend to unpublished decisions and choice of law in the domestic arena as well. This Part discusses these implications and possible extensions.

A. *Implications for Global Governance*

In theory, a choice-of-law system has the potential to make important contributions to global governance.²⁶⁶ Law-and-economics

²⁶⁴ However, Joshua Fischman and David Law argue that tests of ideological effects using party of appointment as a proxy tend to underestimate the impact of ideology. Fischman & Law, *supra* note 224 (manuscript at 25). According to them, results of this type are “best interpreted as providing only a lower bound on ideology.” *Id.*

²⁶⁵ See *supra* notes 259–62 and accompanying text. Differences between the “decisions correctly classified,” “adjusted count r-squared,” and “area under ROC curve” figures for Models 2 and 3 are particularly indicative. See *supra* Table 4.

²⁶⁶ See *supra* Part III.

scholars argue that choice-of-law doctrine can enhance global economic welfare by creating incentives for private actors to behave efficiently and for states to adopt efficient laws. Rule-of-law theories require official decisionmaking—including judicial decisionmaking—to be impartial, predictable, and based on publicly announced rules. They also require that private actors generally comply with applicable legal rules. Choice-of-law doctrine can enhance transnational rule of law by providing judges with publicly announced rules for making impartial and predictable choice-of-law decisions. Focal point, reputational, and normative theories of compliance suggest that a choice-of-law system can also enhance transnational rule of law by increasing certainty about which law private actors should follow when their activities have connections to more than one state.²⁶⁷ According to theories of bargaining in the shadow of the law, bargaining outcomes among transnational actors depend on their expectations about which law will apply to their transactions in the event of litigation. A choice-of-law system can facilitate transnational bargaining by clarifying these expectations. Together, these theories suggest that choice-of-law doctrine—and the judges who apply it—provide an essential foundation for global governance.

However, the mess claims raise serious doubts about these theories.²⁶⁸ They suggest that if the choice-of-law system affects global governance at all, its impact is more likely harmful than beneficial. Specifically, the mess claims posit that choice-of-law doctrine does not significantly affect choice-of-law decisionmaking. If this were true, then contrary to rule-of-law principles, judges' choice-of-law decisions would be based on factors other than publicly announced rules, and even the best designed choice-of-law rules would not systematically benefit global economic welfare. Another mess claim asserts that choice-of-law decisions are biased in favor of domestic over foreign law, domestic over foreign litigants, and plaintiffs over defendants. If this claim were correct, choice-of-law decisions would systematically undermine the rule-of-law values of generality and impartiality. Finally, according to the mess claims, choice-of-law decisionmaking is highly unpredictable. Insofar as this claim is accurate, a choice-of-law system cannot hope to make beneficial contributions to global governance because the potential contributions discussed above all require some degree of certainty about the applicable law. Worse, to the extent that the choice-of-law system itself creates this uncertainty, it may actually reduce global economic welfare, undermine transna-

²⁶⁷ See *supra* notes 110–14 and accompanying text.

²⁶⁸ See *supra* Part III.

tional rule of law, and hinder transnational bargaining. Thus, the mess claims—if true—would be discouraging from a global governance perspective.

In contrast, the evidence presented in this Article offers support for the idea that choice-of-law systems may positively contribute to global governance.²⁶⁹ My finding that choice-of-law doctrine does significantly affect judges' choice-of-law decisions provides preliminary empirical support for law-and-economics theories about the potentially positive global economic consequences of choice-of-law doctrine. It also indicates that, consistent with rule-of-law principles, judges' international choice-of-law decisions may generally be based on good faith analysis using the applicable choice-of-law methods. Even the Second Restatement—long criticized as indeterminate and subject to judicial manipulation²⁷⁰—appears to have a distinct influence on international choice-of-law decisionmaking.

My finding that judges' choice-of-law decisions are not systematically biased in the ways posited by the mess claims is another reason to be hopeful about choice of law's contributions to global governance. This finding suggests both that bias generally will not trump the efficiency concerns embodied in future well-designed choice-of-law rules and that U.S. district courts usually demonstrate impartiality in international choice-of-law decisionmaking, thus supporting transnational rule of law. This finding also suggests that modern choice-of-law methods may not have the negative economic consequences posited by some economic analyses. For example, according to one law-and-economics critique, the pro-domestic-law bias of modern choice-of-law methods results in discriminatory application of more stringent U.S. tort standards to U.S. businesses, thus reducing global economic welfare.²⁷¹ However, my findings suggest that the modern methods are not systematically biased in favor of domestic law and that the Second Restatement—the most widely adopted modern method—is less likely than the other methods as a group to result in application of domestic law. Thus, it is not clear that the modern methods pose a threat to global economic welfare.²⁷²

²⁶⁹ See *supra* Part IV.

²⁷⁰ See *supra* notes 197–200 and accompanying text.

²⁷¹ See *supra* notes 102–07 and accompanying text.

²⁷² As already noted, my data do not permit me to compare directly the pro-domestic-law tendencies of the First and Second Restatements. It may be that from the perspective of this particular law-and-economics critique of the modern methods, the First Restatement is generally more desirable. However, Thiel's findings suggest that the Second Restatement is "on average in agreement" with the First Restatement. Thiel, *supra* note 11, at 312.

Finally, the finding that judges' international choice-of-law decisions are fairly predictable has positive implications for global governance, because some degree of predictability is necessary for choice of law to increase global economic welfare, enhance transnational rule of law, or facilitate transnational bargaining. Even higher levels of predictability may be necessary or desirable for truly effective governance. At a minimum, however, the findings suggest that choice-of-law decisionmaking is more predictable than conventional wisdom assumes: With control variables included, this Article's statistical model correctly predicted international choice-of-law decisions at a rate of almost 80%.²⁷³ Perhaps of more practical interest, it appears that a rule of thumb based on two factors that permeate choice-of-law doctrine—territoriality and personality—may often help reduce uncertainty surrounding transnational actors' expectations about choice-of-law decisionmaking.²⁷⁴

This Article thus provides new empirical support for the proposition that choice of law can increase global economic welfare, enhance transnational rule of law, and facilitate bargaining among transnational actors. To be sure, the evidence falls far short of conclusively demonstrating these effects. However, the results suggest that choice of law's contributions to global governance may be more significant and beneficial than the mess claims imply.

B. Extension to Unpublished Decisions

My findings are based on analysis of published court decisions. However, published court decisions are not necessarily representative of court decisions in general.²⁷⁵ This has led some scholars to criticize choice-of-law studies that rely solely on the analysis of published decisions.²⁷⁶ As explained above, published international choice-of-law decisions are my primary population of interest because these decisions are most likely to affect global governance.²⁷⁷ As long as I limit

²⁷³ See *supra* Part IV.C.2.c.

²⁷⁴ *Id.*

²⁷⁵ See Clermont & Eisenberg, *supra* note 174, at 125–26 (explaining that published decisions are small percentage of total judicial decisions).

²⁷⁶ See, e.g., Levin, *supra* note 1, at 257–58 (criticizing Symeonides study for basing its empirical analysis on published decisions).

²⁷⁷ See *supra* Part IV.B.1. Similarly, focusing on published cases is appropriate when one seeks to understand the “shadow of the law”—that is, the broad impact of court decisions on both litigants and non-litigants. See Mnookin & Kornhauser, *supra* note 116, at 968–69 (explaining concept of bargaining “in the shadow of the law” in divorce context). It also is appropriate when the analytic goal is to understand the development of legal doctrine, Kevin M. Clermont & Theodore Eisenberg, *CAFA Judicata: A Tale of Waste and Politics*, 156 U. PA. L. REV. 1553, 1559–60 (2008) (arguing that published—not unpublished—decisions “move the law”), or the public policy output of courts, Susan M. Olson,

my conclusions to this population, this Article's reliance on published cases does not pose a representativeness problem.²⁷⁸ But can I extend my findings to the broader population of all decisions (both published and unpublished)? The answer depends on the relationship between the determinants of publication and the variables included in my statistical model. While I draw no firm conclusions, it appears, as demonstrated below, that for both descriptive and causal inferences my findings may plausibly extend to unpublished international choice-of-law decisions.

1. *Descriptive Inferences*

Descriptive inference is the analysis of observed facts (the features of a sample) to learn about unobserved facts (the features of a population).²⁷⁹ For example, I made the descriptive inference based on my sample that in 37.1% [30.9, 43.8] of published international choice-of-law decisions by U.S. district court judges in tort cases, judges decided that domestic rather than foreign law should apply.²⁸⁰ Unrepresentativeness leads to selection bias if any criterion used to select the sample upon which those inferences are based (here, whether a decision was published) is correlated with the feature of the population about which the inferences are being drawn (here, whether the judge applied domestic law).²⁸¹

Relatively little is known about the determinants of U.S. district court judges' publication decisions. However, evidence suggests that a judge may be more likely to publish a decision if it is "complex";²⁸²

Studying Federal District Courts Through Published Cases: A Research Note, 15 JUST. SYS. J. 782, 795 (1992) ("[U]sing reported cases may be most justifiable for a researcher who is trying to study efficiently the 'public policy' output of district courts.").

²⁷⁸ The question of representativeness asks: "[A]re we entitled to generalize from a given case or cases under study to a larger universe of cases? Do we have reason to believe that what is true for the sample is also true for the population?" JOHN GERRING, *SOCIAL SCIENCE METHODOLOGY: A CRITERIAL FRAMEWORK* 181 (2001); *see also* DAVID FREEDMAN ET AL., *STATISTICS* 334 (2007) ("Estimating parameters [of the population] from the sample is justified when the sample represents the population."). If the population of interest is defined as all U.S. judicial decisions (both published and unpublished), there is a potential representativeness problem. *See* Siegelman & Donohue, *supra* note 120, at 1134 ("The unrepresentative nature of appellate cases is now widely accepted among social scientists. But a similar problem has commanded far less attention: district court cases with published opinions may be subject to the same kinds of sample selection problems that confront users of appellate cases."). But if the population of interest is published decisions only, reliance on a random sample of published decisions is appropriate because the sample is representative of the population. *See* Epstein & King, *supra* note 186, at 106–07 (discussing representativeness problem).

²⁷⁹ Epstein & King, *supra* note 186, at 29–30.

²⁸⁰ *See supra* Table 2.

²⁸¹ Siegelman & Donohue, *supra* note 120, at 1145.

²⁸² *Id.* at 1150.

the amount in controversy is high;²⁸³ the decision “lays down a new rule of law, or alters or modifies an existing rule,” “involves a legal issue of continuing public interest,” “criticizes existing law,” or “resolves an apparent conflict of authority” (I refer to these factors collectively as “official factors”);²⁸⁴ the parties include a large company or law firm;²⁸⁵ the judge sits in the Northern District of Illinois, the Southern District of New York, or the Northern District of Texas,²⁸⁶ or in the First or Seventh Circuit;²⁸⁷ the judge finds the issue particularly salient;²⁸⁸ or the decision is consistent with her ideology.²⁸⁹ A judge may be less likely to publish a decision when her caseload is high²⁹⁰ or when the federal government is a party.²⁹¹

Available data allowed me to measure the correlations between most of these potential determinants of publication and international choice-of-law decisions: All correlations were weak.²⁹² Due to a lack

²⁸³ *Id.* at 1152.

²⁸⁴ COMM. ON USE OF APPELLATE COURT ENERGIES, ADVISORY COUNCIL FOR APPELLATE JUSTICE, STANDARDS FOR PUBLICATION OF JUDICIAL OPINIONS 15–17 (1973). I refer to these as “official factors” because they are the factors identified in the formal publication guidelines for U.S. district courts issued by the 1973 Advisory Council for Appellate Justice Report. *Id.*; see also Karen Swenson, *Federal District Court Judges and the Decision to Publish*, 25 JUST. SYS. J. 121, 121, 136–37 (2004) (listing these factors).

²⁸⁵ Swenson, *supra* note 284, at 137.

²⁸⁶ Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 166 (2006).

²⁸⁷ Swenson, *supra* note 284, at 136.

²⁸⁸ See C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN FEDERAL DISTRICT COURTS 19 (1996) (“[A]lmost by definition West publishes only those decisions which the judges themselves (or their clerks) regard as inherently significant and worthy.”).

²⁸⁹ See Swenson, *supra* note 284, at 125 (“Ideology may affect publication rates because judges place more stock in or have more attachment to opinions that agree with their ideology and, thus, are more likely to deem these opinions worthy of publication.”).

²⁹⁰ See David C. Vladeck & Mitu Gulati, *Judicial Triage: Reflections on the Debate over Unpublished Opinions*, 62 WASH. & LEE L. REV. 1669–70 (2005) (noting that with increased case loads, growing percentage of opinions are unpublished).

²⁹¹ Swenson, *supra* note 284, at 135.

²⁹² I tested for correlations between my dependent variable, *Domestic Law*, and the following potential determinants of publication (the first number in parentheses is the correlation coefficient excluding forum non conveniens decisions; the second is the correlation coefficient including forum non conveniens decisions): “complexity,” measured by the number of pages devoted to the choice-of-law analysis (0.0044, 0.1850); involvement of a large company or law firm, measured by the presence of a business entity as a plaintiff and/or as a defendant (–0.0059, –0.0395); Northern District of Illinois, Southern District of New York, or Northern District of Texas (–0.0587, –0.1352); First or Seventh Circuit (–0.1897, –0.1173); various measures of salience, including the existence of a political issue (coded as “yes” if there is a human-rights, constitutional-rights, cross-border environmental, terrorism, or war-related issue) (–0.0354, 0.0653) and whether federal law is involved (–0.0408, –0.0077); the judge’s ideology, measured by the party of the nominating president (–0.1431, –0.0637); caseload, measured in the same way described in Part IV.B.4 of this Article (0.0611, 0.0233); and the presence of a federal government party (0.1129, 0.1268).

of data, I could not measure the correlations for amount in controversy and official factors, but there do not appear to be strong theoretical reasons for expecting these potential determinants to be correlated with judges' international choice-of-law decisions.²⁹³ This analysis suggests that my descriptive inferences might be generalizable to unpublished decisions. However, given limited data and limited knowledge about the determinants of publication, this analysis is far from conclusive. Any generalizations of my descriptive inferences to unpublished decisions should be considered tentative until they are confirmed by an analysis of unpublished decisions.

2. Causal Inferences

Causal inference is the analysis of observed facts about a sample in order to estimate cause-and-effect relationships between hypothesized explanatory variables and a specified dependent variable.²⁹⁴ For example, I made the causal inference that the territorial locus of the activity giving rise to litigation influences the likelihood that a judge will decide that domestic law should apply.²⁹⁵ Unrepresentativeness creates sample-selection bias in causal inferences if both of two conditions are met: (1) a criterion used to select the sample upon which the inferences are based (e.g., whether a decision was published) is a cause of the dependent variable (e.g., whether the judge applied domestic law); and (2) that criterion is correlated with an explanatory variable of interest (e.g., the territorial locus of activity) but is not itself included as an explanatory variable in the model.²⁹⁶

Regarding the first condition, I used a series of bivariate logit analyses to evaluate whether various potential determinants of publication also affect the likelihood of a pro-domestic-law decision. The

All of these correlations are very weak. See ANTHONY STEWART, BASIC STATISTICS AND EPIDEMIOLOGY: A PRACTICAL GUIDE 65 (2007) ("When assessing the strength of an association using r [the Pearson correlation coefficient], 0 to 0.19 is regarded as very weak, 0.2 to 0.39 weak, 0.40 to 0.59 moderate, 0.6 to 0.79 strong and 0.8 to 1 very strong. These values can be plus or minus.").

²⁹³ A possible exception: If one assumes that judges are more likely to apply domestic law in cases where more is at stake economically, then both the likelihood of publication and the likelihood of a pro-domestic-law decision would potentially increase as the amount in controversy increases. If this theory is correct, then my sample may overrepresent pro-domestic-law decisions and actual pro-domestic-law decision rates may be even lower than my analysis suggests.

²⁹⁴ Epstein & King, *supra* note 186, at 34–36.

²⁹⁵ See *supra* Table 4.

²⁹⁶ GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 169 (1994) (explaining causes of omitted variable bias); James J. Heckman, *Sample Selection Bias as a Specification Error*, 47 *ECONOMETRICA* 153, 153–54 (1979) (explaining that sample selection bias is analogous to omitted variable bias).

results were generally negative.²⁹⁷ Regarding the second condition, available data allowed me to measure the correlations between most of the potential determinants of publication and the explanatory variables included in my statistical models.²⁹⁸ These correlations were generally weak.²⁹⁹ Again, due to a lack of data, I could not measure the correlations with amount in controversy or official factors, but there do not appear to be strong theoretical reasons for expecting these potential determinants to be correlated with the explanatory variables. This analysis suggests that my causal inferences might be generalizable to unpublished decisions, though again, the analysis is not conclusive. As with my descriptive inferences, any generalizations of my causal inferences to unpublished decisions should be considered tentative until they are confirmed by an analysis of unpublished decisions.

C. *Extension to Domestic Choice-of-Law Decisions*

This Article's findings are based on analysis of international choice-of-law decisions; it is unclear whether they can be extended to other choice-of-law decisionmaking contexts. At a minimum, these findings suggest a caveat to the conventional wisdom about choice of law: Even if the mess claims describe *domestic* choice of law accurately, they do not appear to describe *international* choice of law accurately.

But might my findings have implications for choice of law more generally? A definite answer would require further empirical analysis using data from both domestic and international choice-of-law deci-

²⁹⁷ The independent variables in the logit analyses were the same potential determinants of publication used in the correlation tests above, and the dependent variable was *Domestic Law*. The resulting p-values were greater than 0.100 (indicating that there is not 90% confidence in such a relationship), with only the following exceptions: "complexity," as measured by the number of pages of choice-of-law analysis (only with forum non conveniens decisions included); Northern District of Illinois, Southern District of New York, or Northern District of Texas (only with forum non conveniens decisions included); First Circuit or Seventh Circuit (both with and without forum non conveniens decisions included); and presence of a federal government party (only with forum non conveniens decisions included).

²⁹⁸ As Model 3 shows, my results hold when measures of caseload and judicial ideology are included. See *supra* Part IV.C.2.

²⁹⁹ The correlation coefficients for each combination are available upon request. The correlation between the *Lauritzen* variable and one measure of salience (whether federal law is involved) was high (0.8860 without forum non conveniens cases, 0.8834 with them), which is unsurprising since the *Lauritzen* method applies to maritime cases and maritime cases in federal courts usually involve federal law. The correlation between the *Interest Analysis* variable and this federal law measure of salience was moderate (-0.4735 without forum non conveniens decisions, -0.4459 with them). However, logit analysis indicates that this salience measure is not causally related to the dependent variable, *Domestic Law*.

sions. Until then, any generalization to domestic choice of law must be made with caution, particularly in light of arguments that transnational litigation is fundamentally different than domestic litigation.³⁰⁰

Such an extension seems plausible, however, for at least two reasons. First, prior empirical studies generally supporting various mess claims in the context of choice of law might have reached different results had they attempted—as this Article does—to control for territoriality and personality. Controlling for these variables would have allowed these studies to measure more accurately the effect of choice-of-law doctrine on judges' choice-of-law decisions by controlling for the merits of litigants' choice-of-law arguments in order to mitigate potential case-selection effects. Second, insofar as there is pro-domestic-law and pro-domestic-party bias in choice-of-law decision-making, one might expect this bias to be even more pronounced in the international context.³⁰¹ If the mess claims exaggerate the effect of bias on international choice-of-law decisionmaking, they may exaggerate this effect even more in the domestic context.

CONCLUSION

Choice of law can have important effects on global governance. In particular, it can increase or decrease global economic welfare, enhance or undermine transnational rule of law, and facilitate or hinder bargaining among transnational actors.³⁰² But according to conventional wisdom, choice of law is a mess: Choice-of-law doctrine does not significantly influence judges' choice-of-law decisions; those decisions are instead motivated by judicial biases in favor of domestic law, domestic parties, and plaintiffs; and the decisions are highly unpredictable.³⁰³ If the mess claims are accurate, then international choice of law's effects on global governance—if any—are more likely to be harmful than beneficial.³⁰⁴

This Article has presented evidence that the mess claims do not accurately describe international choice of law.³⁰⁵ My analysis suggests that choice-of-law doctrine does significantly influence international choice-of-law decisionmaking by U.S. district courts in

³⁰⁰ See Baumgartner, *supra* note 178, at 1304, 1391 (noting factors that differentiate “the process of lawmaking for transnational litigation” from “purely domestic lawmaking process”).

³⁰¹ Some studies indicate a U.S. court bias against foreign parties, while others contradict this finding. See *supra* note 79 and accompanying text.

³⁰² See *supra* Part III.

³⁰³ See *supra* Part II.

³⁰⁴ See *supra* Part III.

³⁰⁵ See *supra* Part IV.C.

published tort cases. For instance, two factors that permeate choice-of-law doctrine, territoriality and personality, have an important impact on international choice-of-law decisionmaking.³⁰⁶ Moreover, the Second Restatement is apparently less likely to lead to the application of domestic law (and more likely to lead to the application of foreign law) than other choice-of-law methods as a group.³⁰⁷ My analysis also suggests that there is neither a pro-domestic-law nor a pro-plaintiff bias. Although judicial efforts to discourage forum shopping by foreign plaintiffs may influence choice-of-law decisions, there does not appear to be any general bias in favor of U.S. litigants.³⁰⁸ In addition, choice-of-law decisionmaking appears to be quite predictable.³⁰⁹ These findings offer some good news concerning choice of law's contributions to global governance.³¹⁰

These findings have significant implications for choice-of-law scholarship. At a minimum, they suggest a caveat to the conventional wisdom about choice of law: However accurately the mess claims may describe domestic choice of law, *international* choice of law does not appear to be as much of a mess as conventional wisdom suggests. Further, preliminary analysis indicates that the Article's findings may plausibly extend from published international choice-of-law decisions to unpublished and domestic choice-of-law decisions.³¹¹ Insofar as such extensions are possible, the Article's findings pose a more general challenge to the mess claims, reinforcing some results from prior empirical studies³¹² while differing from others.³¹³

³⁰⁶ See *supra* notes 169–71, 208–13, 229–42 and accompanying text and tables.

³⁰⁷ More specifically, the evidence suggests that the Second Restatement is less likely to lead to the application of domestic law than each of the following three categories of choice-of-law methods: (1) interest analysis and combined modern methods; (2) the Lauritzen method; and (3) a residual category of other methods (including the First Restatement, *lex fori*, Leflar, and significant contacts). However, due to data limitations, my analysis was not able to compare the effects of the Second Restatement with those of the First Restatement specifically. See *supra* note 248 and accompanying text and table.

³⁰⁸ See *supra* Part IV.C.2.b.

³⁰⁹ See *supra* Part IV.C.2.c.

³¹⁰ See *supra* Part V.A.

³¹¹ See *supra* Part V.B–C.

³¹² For example, I found significant differences between the pro-domestic-law decision rates of the Second Restatement and other methods, consistent with Thiel's similar findings. See *supra* notes 157–61 and accompanying text. I also found no systematic pro-domestic-law, pro-domestic-party, or pro-plaintiff bias, consistent with Symeonides's similar findings in the products liability context. See *supra* notes 162–64 and accompanying text.

³¹³ For example, my evidence indicates significant doctrinal effects on choice-of-law decisions, while Borchers's study revealed no statistically significant differences in outcomes among the modern methods. See *supra* notes 149–54 and accompanying text. Similarly, I found no systematic pro-domestic-law, pro-domestic-party, or pro-plaintiff bias,

Choice-of-law scholars have sometimes used the mess claims to call for doctrinal reform.³¹⁴ While reform may still be necessary, this Article's findings indicate that judges are doing a better job of making choice-of-law decisions under the current methods than is widely believed. One choice-of-law reform effort seeks to identify the "true rules" that drive judges' choice-of-law decisions; this could increase transparency in choice-of-law decisionmaking by making these rules explicit in choice-of-law doctrine.³¹⁵ My findings suggest that the principles of territoriality and personality together may constitute one such "true rule." These factors permeate choice-of-law doctrine, explicitly in some choice-of-law methods but only implicitly in others.³¹⁶ Thus transparency might be enhanced by consistently making these factors more explicit in doctrine. Ultimately, as Richman and Reynolds note, "[w]hat to make of these 'true rules' is a separate normative question. . . . Regardless of the answer, however, drafters of a future [conflict of laws] restatement should at least know of the existence of all colorable candidates for 'true rule' status."³¹⁷

This Article's findings also have significance beyond choice of law and global governance. Contrary to the skeptical views of many political scientists and a growing number of legal scholars,³¹⁸ my findings suggest that legal doctrine matters in judicial decisionmaking. Furthermore, contrary to common claims of "xenophobia" in U.S. courts,³¹⁹ district court judges' international choice-of-law decisions do not appear to be systematically biased against foreign litigants.³²⁰

The results also shed light on the modern meaning and significance of territoriality—the notion that the scope of state authority is defined by reference to state borders. Territoriality is central to the classic Westphalian concept of sovereignty, and legal scholars and international relations scholars have become very interested in determining the extent to which globalization has eroded its significance.³²¹ Quantitatively, my findings indicate that territoriality persists strongly

while the Borchers study suggested such biases. *See supra* notes 143–48 and accompanying text.

³¹⁴ *See, e.g.*, Borchers, *supra* note 55, at 382–84 (using findings as basis for prescribing changes to choice-of-law doctrine); Solimine, *supra* note 15, at 89–92 (same).

³¹⁵ Richman & Reynolds, *supra* note 55, at 432–33.

³¹⁶ *See supra* notes 169–72 and accompanying text.

³¹⁷ Richman & Reynolds, *supra* note 55, at 433.

³¹⁸ *See* Friedman, *supra* note 56, at 262–65 (analyzing this scholarly view).

³¹⁹ *See supra* note 79.

³²⁰ *See supra* Part IV.C.2.b. This finding is consistent with Clermont & Eisenberg, *supra* note 79, at 464 (“[T]he data offer no support for the existence of xenophobic bias in U.S. courts.”).

³²¹ *See generally* Kal Raustiala, *The Evolution of Territoriality: International Relations and American Law*, in *TERRITORIALITY AND CONFLICT IN AN ERA OF GLOBALIZATION*

in international choice-of-law decisionmaking.³²² Qualitatively, however, this persistent territoriality is not the strict Westphalian territoriality of the past, according to which a state's authority was deemed not to extend beyond its borders.³²³ Rather, it is a more relaxed neoterritorial conception: It depends not on a strict territorial/extra-territorial distinction but rather on an estimate of the territorial locus of transnational activity.³²⁴ Territoriality—even in this relaxed form—is not necessarily the ideal guide for allocating prescriptive authority.³²⁵ But, for better or worse, territoriality persists in international choice-of-law decisionmaking, at least in tort cases.

More broadly, this Article is an example of “governance-oriented analysis” of transnational law, which seeks to improve understanding of the role of domestic courts in global governance.³²⁶ Governance-oriented analysis has two principal methodological characteristics. First, as a complement to doctrinal analysis of transnational law, it studies “transnational law in action.” Specifically, it analyzes how judges actually apply transnational law to determine the rights and obligations of transnational actors, and how judges allocate governance authority among states, between national and international institutions, and between public and private actors.³²⁷ When they make international choice-of-law decisions, domestic courts allocate prescriptive authority among states.³²⁸ While taking the role of choice-of-law doctrine seriously, this Article has analyzed how U.S. district court judges actually apply that doctrine to allocate prescriptive authority.

219 (Miles Kahler & Barbara F. Walter eds., 2006) (arguing that in United States “territoriality has been slowly unbundled from sovereignty”).

³²² See *supra* notes 240–42 and accompanying text; see also SYMEONIDES, *supra* note 18, at 387 (concluding that territoriality continues to play important role in modern choice-of-law decisionmaking).

³²³ See generally STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 20–25 (1999) (explaining “Westphalian sovereignty”).

³²⁴ Whytock, *supra* note 117, at 247–48.

³²⁵ For example, legal pluralists argue that alternative jurisdictional principles that take non-territorial attachments seriously would be preferable. See generally Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819 (2005) (arguing for “cosmopolitan approach” to choice of law, focusing less on territoriality and more on international system).

³²⁶ See Whytock, *supra* note 89, pt. III, at 44–50 (arguing for governance-oriented analysis of transnational law, with “a focus on transnational law in action as a complement to doctrinal analysis, and a focus on the transnational shadow of the law as a complement to litigation-oriented analysis”).

³²⁷ *Id.* pt. III.A.1, at 45–46.

³²⁸ *Id.* pt. I.A.1.b, at 12–13.

Second, as a complement to litigant-oriented analysis, governance-oriented analysis also examines the “transnational shadow of domestic law”: It analyzes the implications of domestic court decisions not only for particular litigants in particular lawsuits but also for transnational activity more generally.³²⁹ This Article has emphasized the transnational implications of international choice-of-law decisions, including the effects on global economic welfare, transnational rule of law, and bargaining among transnational actors.

Choice-of-law scholarship is doctrinally and theoretically rich, but it still lacks a sufficient body of knowledge about how courts actually make choice-of-law decisions. Such knowledge is important; without it, choice-of-law scholars can continue to debate theories and methods in the abstract, but they cannot meaningfully evaluate and critique the ways in which choice of law actually functions. Without a realistic understanding of the decisions themselves, we cannot begin to understand their consequences. Courts are not the only actors relevant to choice of law; but because judges’ choice-of-law decisions affect both litigants in particular lawsuits and non-litigants in the broader shadow of the law, these decisions deserve focused scholarly attention.

Of course, neither this study nor any other can “prove” or “disprove” the mess claims. Statistical analyses increase knowledge by improving descriptive and causal inferences and by narrowing our estimates of the uncertainty surrounding these inferences—not by providing proof. Even if a study could prove some level of bias or unpredictability, “messiness” is ultimately in the eye of the beholder. I have argued that my findings are good news with regard to international choice of law’s impact on global governance; others might insist that such a conclusion would require even stronger doctrinal influences and a higher level of predictability. On balance, however, the conventional wisdom seems to exaggerate what is wrong with choice of law and implicitly underestimate its positive contributions to global governance. At least in the context of international choice-of-law decisionmaking, judges appear to be doing a better job than scholars have commonly assumed.

³²⁹ *Id.* pt. III.A.2, at 47–48.