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## ARTICLE

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### FOREIGN SOVEREIGN IMMUNITY AND COMPARATIVE INSTITUTIONAL COMPETENCE

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#### ABSTRACT

*Policymakers and legal scholars routinely make “comparative institutional competence” claims—claims that one branch of government is better at performing a specified function than another, and that the more competent branch should be in*

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*charge of that function. Such claims pervade American law and policy, but they are rarely evaluated with rigor.*

*We take advantage of an unusual legislative experiment to conduct what we believe to be the first systematic empirical analysis of the comparative institutional competence of the executive and judicial branches in a critical field of American law and policy: U.S. foreign relations. From 1952 to 1976, the U.S. State Department decided whether foreign nations would receive sovereign immunity from suits in U.S. courts. Based on the perception that the State Department's sovereign immunity decisions were overly influenced by political considerations, Congress passed the Foreign Sovereign Immunities Act of 1976 (FSIA), which transferred immunity decisionmaking authority to the judiciary. This transfer was based on an explicit comparative institutional competence claim: that courts are better equipped than the State Department to make immunity decisions based on law rather than politics.*

*To rigorously evaluate this fundamental claim, we created and analyzed an extensive dataset of foreign sovereign immunity decisions made by the State Department and the U.S. district courts over the last fifty years. Our principal findings are threefold. First, we find little evidence that political factors systematically influenced the State Department's immunity decisions. Second, there is strong evidence that political factors have systematically influenced the courts' decisions. Third, the transfer of immunity decisionmaking authority to the courts did not significantly affect the likelihood of immunity.*

*All three findings challenge both the underlying comparative institutional competence claims that supported the FSIA's passage and more general conventional understandings about the proper allocation of authority between the executive and judicial branches. To be sure, there may be valid reasons for the judiciary to play a leading role in immunity decisionmaking, and possibly other areas of U.S. foreign relations as well. But our analysis casts doubt on the widely made comparative institutional competence claim that the judicial branch is necessarily better equipped than the executive branch to make foreign relations law decisions free from systematic political influence.*

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## INTRODUCTION

Judges, legislators, and legal scholars often make “comparative institutional competence” claims—claims that one branch of government is better at performing a specified function than another. Based on such claims, they argue for legal rules delegating a function to a particular branch of government, or requiring one branch to defer to another when performing that function.<sup>1</sup>

Comparative institutional competence claims pervade American law and policy.<sup>2</sup> For example, one of the Supreme Court’s rationales for its *Chevron* doctrine of judicial deference to agency interpretation of statutes is that the agencies charged with administering those statutes are better suited than courts to interpret them.<sup>3</sup> Whether a federal court will dismiss a suit based on the political question doctrine in deference to a political branch of government depends on whether there are “judicially discoverable and manageable standards for resolving [the question]” and whether it is possible to decide the question “without an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>4</sup> Comparative institutional competence claims are also at the center of debates over the appropriate role of the judicial and executive branches in numerous other fields, such as counterterrorism,<sup>5</sup> government mining of personal data,<sup>6</sup> extradition,<sup>7</sup> and human rights.<sup>8</sup>

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<sup>1</sup> See Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 CALIF. L. REV. 919, 949-50 (1989) (describing how comparative institutional competence arguments articulate a system whereby “[t]he allocation of decisionmaking power and responsibility in government is built upon a principle of comparative advantage, a principle built in turn on the assumption that certain institutions are better suited than others to perform particular tasks”).

<sup>2</sup> See NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 5 (1994) (noting that “[e]mbedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution”); Rodriguez, *supra* note 1, at 949 (“The comparative institutional competence argument is a familiar one in public law discourse.”).

<sup>3</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984) (explaining the advantages of agencies over courts); see also William N. Eskridge Jr., *Expanding Chevron’s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 414 (arguing that the competence of agencies to interpret statutes is so superior to that of courts that the *Chevron* doctrine should be applied even more liberally than the Supreme Court itself has called for); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L. J. 1170, 1204-07 (2007) (arguing for extension of *Chevron* deference to executive interpretation of foreign relations law).

<sup>4</sup> *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>5</sup> See Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 893 (2012) (critiquing “claims of comparative institutional competence lodged on behalf of the

As these examples suggest, comparative institutional competence claims are important.<sup>9</sup> Lawmaking and policymaking depend not only on setting social goals, but also on deciding who has the authority to determine how to pursue those goals.<sup>10</sup> Because one institution may be better able to implement those goals than another, the impact of a legal rule or policy depends on which institution has that authority.<sup>11</sup> As Neil Komesar concludes in his landmark book on the subject, “institutional choice is an essential part of law and public policy choice, and, therefore, comparative institutional analysis is an essential part of any analysis of law and public policy.”<sup>12</sup> “[D]eciding who decides” matters.<sup>13</sup> But that crucial institutional choice can only be as sound as the comparative institutional competence claims upon which it is based.

Unfortunately, comparative institutional competence claims are rarely evaluated rigorously.<sup>14</sup> As Komesar laments, too often competence claims in favor of particular institutions are simply treated as “intuitively obvious,” dealt with “as an afterthought,” or defended with a recitation of “a long parade of horrors” that would result from an allocation of authority to a

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executive or Congress” in counterterrorism cases and arguments for judicial deference to the political branches based on such claims).

<sup>6</sup> See Daniel J. Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 347-53 (2008) (arguing against judicial deference to the executive branch regarding data mining programs as an “abdication of their function . . . to [determine] whether [a government security measure] passes constitutional muster”).

<sup>7</sup> See John T. Parry, *International Extradition, the Rule of Non-Inquiry, and the Problem of Sovereignty*, 90 B.U. L. REV. 1973, 2004 (2010) (assessing the claim that judges are less competent than executive branch officials to determine extradition matters).

<sup>8</sup> See Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1139 (2011) (summarizing comparative institutional claims used to argue for judicial deference to the executive branch in human rights litigation).

<sup>9</sup> See KOMESAR, *supra* note 2, at 4 (emphasizing “the importance of institutional choice and comparative institutional analysis”).

<sup>10</sup> See *id.* at 5 (“Goal choice and institutional choice are both essential for law and public policy. They are inextricably related. On the one hand, institutional performance and, therefore, institutional choice cannot be assessed except against the bench mark of some social goal or set of goals. On the other, because in the abstract any goal can be consistent with a wide range of public policies, the decision as to who decides determines how a goal shapes public policy. It is institutional choice that connects goals with their legal or public policy results.”).

<sup>11</sup> See *id.* (“Embedded in every law and public policy analysis that ostensibly depends solely on goal choice is the judgment, often unarticulated, that the goal in question is best carried out by a particular institution.”).

<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See *id.* at 4 (“Although important and controversial decisions about who decides are buried in every law and public policy issue, they often go unexamined, are treated superficially, or, at best, are analyzed in terms of the characteristics of one alternative.”).

rival institution.<sup>15</sup> Contributing to this problem is a lack of systematic empirical analysis of comparative institutional competence claims.<sup>16</sup> As William Eskridge notes,

most of the generalizations needed to advance a comparative institutional analysis rest upon factual beliefs that are not supported by empirical data or even a representative array of case studies . . . . [P]recious little empirical work [has] even been attempted . . . . [I]t is disturbing that comparative institutional analysis of public law often rests upon confident, even dogmatic, factual assertions that are completely unsupported.<sup>17</sup>

Foreign relations law is one area where comparative institutional competence claims are frequently made with little empirical evidence. At the most general level, scholars and policymakers are debating whether the executive branch is better equipped to make foreign relations law decisions because of its superior ability to weigh political considerations, or whether these determinations should be left to the courts because they are insulated from political pressures. In these debates, arguments for judicial deference to the executive branch in foreign relations are both defended<sup>18</sup> and criticized<sup>19</sup>

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<sup>15</sup> *Id.* at 5-6.

<sup>16</sup> See Eskridge, *supra* note 3, at 414 (noting “the dearth of solid empirical work” on comparative institutional analysis).

<sup>17</sup> *Id.*; see also KOMESAR, *supra* note 2, at 6 (“In a world of institutional alternatives that are both complex and imperfect, institutional choice by implication, simple intuition, or even long lists of imperfections is deeply inadequate. These approaches do not take institutional choice or analysis seriously.”).

<sup>18</sup> See, e.g., Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT’L L. 507, 539-44 (2011) (criticizing judicial involvement in foreign affairs based on comparative institutional competence claims); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181 (arguing that “as a matter of institutional competence, the federal judiciary suffers significant disadvantages [in a foreign affairs role] compared to the executive branch”); Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors under the Act of State Doctrine*, 35 STAN. L. REV. 327, 344 (1983) (arguing on comparative institutional competence grounds that “the judiciary is the least appropriate branch of the federal government to be making decisions concerning foreign affairs”); Posner & Sunstein, *supra* note 3, at 1202 (arguing for judicial deference because the executive branch is more institutionally competent than the judicial branch in matters involving foreign policy).

<sup>19</sup> See, e.g., THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? 46-60 (1992) (critiquing arguments against judicial involvement in matters touching on foreign affairs based on comparative competence claims); Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805, 807-12 (1989) (using comparative institutional competence claims to critique arguments for judicial deference to the executive branch in foreign policy cases); Parry, *supra* note 7, at 2004 (using comparative institutional competence arguments to critique calls for judicial deference to the executive branch in extradition cases); Solove, *supra* note 6, at 349-50 (using comparative institutional competence

based on claims about the competence of the courts and the executive branch. But these debates have unfolded based almost exclusively on anecdotes and untested assumptions.<sup>20</sup>

The debate over comparative institutional competence in foreign relations law has not been confined to academia, but frequently plays out in the courts as well. For example, when the Supreme Court established the act of state doctrine—which bars courts from questioning the validity of public acts of foreign sovereigns within their borders—in the landmark case *Banco Nacional de Cuba v. Sabbatino*, the decision directly hinged on the “competency of dissimilar institutions [i.e., the executive and the judiciary] to make and implement particular kinds of decisions in the area of international relations.”<sup>21</sup> More recently, since the Supreme Court’s 2010 decision in *Samantar v. Yousuf*,<sup>22</sup> the lower courts have been grappling with whether the executive or judicial branch should determine whether individuals should be given immunity from suit because they were acting as foreign government officials. The U.S. government argues that the courts should give it absolute deference on foreign official immunity matters,<sup>23</sup> while others argue that the courts should decide these matters.<sup>24</sup> Both the academic debate and judicial decisions have been hampered, however, by the lack of rigorous, empirical evidence about whether there are systematic differences in the way that the executive and judicial branches make decisions about foreign relations law.

In this Article, we begin tackling this problem. We take advantage of an unusual historical occurrence—a legislative experiment, whereby a specific governmental function was transferred from one branch of government to another—to undertake a systematic empirical analysis of the comparative institutional competencies of the executive and judicial branches to make foreign relations law decisions.

The function we investigate is foreign sovereign immunity decisionmaking. According to the foreign sovereign immunity doctrine, a foreign state is immune from suit in a U.S. court unless an exception to immunity

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arguments to critique calls for judicial deference to the executive branch regarding government programs to mine private data).

<sup>20</sup> See Ku & Yoo, *supra* note 18, at 181 (noting that the institutional assessments are based on “generalizations and assumptions”).

<sup>21</sup> 376 U.S. 398, 423 (1964).

<sup>22</sup> 130 S. Ct. 2278, 2286–89 (2010).

<sup>23</sup> See, e.g., *Yousuf v. Samantar*, 699 F.3d 763, 769 (4th Cir. 2012) (noting that “[t]he United States, participating as *amicus curiae*, takes the position that federal courts owe absolute deference to the State Department’s view of whether a foreign official is entitled to sovereign immunity”).

<sup>24</sup> See generally Ingrid Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT’L L. 915 (2011).

applies.<sup>25</sup> Foreign sovereign immunity is a core doctrine of U.S. foreign relations law,<sup>26</sup> implementing a fundamental principle of international law: one nation ordinarily cannot be sued in another nation's courts.<sup>27</sup> The doctrine is important both formally, as an expression of the independence and legal equality of sovereign states,<sup>28</sup> and practically, as a way of fostering friendly international relations.<sup>29</sup> For many years, the U.S. State Department was responsible for deciding whether foreign states would enjoy immunity in particular lawsuits.<sup>30</sup> However, legal scholars and lawyers—including lawyers from the State Department itself—argued that the State Department's immunity decisions were overly influenced by political factors and insufficiently based on the law of sovereign immunity.<sup>31</sup> In response to these concerns, Congress passed the Foreign Sovereign Immunities Act of 1976 (FSIA),<sup>32</sup> which transferred the foreign sovereign immunity decisionmaking function to the judiciary.<sup>33</sup>

This transfer of authority was based on an explicit comparative institutional competence claim: that the courts would be better than the State Department at making immunity decisions based on law rather than

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<sup>25</sup> In the context of foreign sovereign immunity, the term “state” has its international legal meaning—that is, it refers to a “country” such as the United States or Kenya rather than a U.S. state such as California or Utah. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (“Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”).

<sup>26</sup> See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW ch. 2 (2008) (providing an overview of foreign sovereign immunity).

<sup>27</sup> See United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, at 4, U.N. Doc. A/RES/59/38 (Dec. 16, 2004) [hereinafter UN Convention] (“A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.”).

<sup>28</sup> See HAZEL FOX, THE LAW OF STATE IMMUNITY 57 (2d ed. 2008) (noting that foreign sovereign immunity is based on “the maxim *par in parem non habet imperium*: one sovereign State is not subject to the jurisdiction of another State”).

<sup>29</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, introductory note at 391 (1987) (justifying foreign sovereign immunity as “necessary for the effective conduct of international intercourse and the maintenance of friendly relations”). For a more detailed discussion of the formal and functional bases of the foreign sovereign immunity doctrine, see generally Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033 (2013).

<sup>30</sup> See CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 231-33 (2013) (describing the State Department's approach to immunity during this period).

<sup>31</sup> See *infra* Section I.C.

<sup>32</sup> Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified as amended at 28 U.S.C. §§ 1330, 1602–1611 (2012)).

<sup>33</sup> See 28 U.S.C. § 1602 (2012) (“Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”).



politics.<sup>34</sup> Because the validity of this claim could not be established *ex ante*, the FSIA's transfer of foreign sovereign immunity decisionmaking from the executive branch to the judicial branch represents an experiment in comparative institutional competence. Since the passage of the FSIA, experts have argued that the transfer did indeed substantially depoliticize foreign sovereign immunity decisionmaking.<sup>35</sup> But these *ex post* assessments have yet to be empirically scrutinized.

By statistically analyzing newly collected data on executive branch and judicial branch performance of foreign sovereign immunity decisionmaking, we evaluate the FSIA's experiment in comparative institutional competence. We find little evidence that political factors were systematically related to the State Department's foreign sovereign immunity decisions.<sup>36</sup> And, contrary to the FSIA's underlying comparative institutional competence claim and *ex post* assessments of that claim, we find significant evidence that political factors are related to the judiciary's immunity decisions.<sup>37</sup> Moreover, although the transfer of foreign sovereign immunity decisionmaking was partly intended to facilitate court access for suits against foreign states,<sup>38</sup> we find that even after controlling for a variety of case-specific legal and political factors, the courts are as likely as the State Department was to grant immunity.<sup>39</sup>

We present our analysis in four main parts. Part I sets the stage by explaining the foreign sovereign immunity doctrine and its relationship to institutional choice, and by analyzing the FSIA's legislative history to

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<sup>34</sup> See JURISDICTION OF UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 94-1487, at 7 (1976) ("A principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds."); see also *infra* Section I.C.

<sup>35</sup> See FRANCK, *supra* note 19, at 105 (arguing that the FSIA "succeed[ed] in largely depoliticizing the issue of foreign sovereign immunity"); Wuerth, *supra* note 24, at 952 (noting problems associated with the State Department having immunity decisionmaking authority and concluding that "[r]eturning immunity to the courts resolved these problems").

<sup>36</sup> See *infra* Section III.A.

<sup>37</sup> See *infra* Section III.B.

<sup>38</sup> See H.R. REP. NO. 94-1487, at 23 (1976) (noting that some procedural provisions of FSIA were intended to "insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts"); see also *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 24, 29 (1976) (testimony of Monroe Leigh, Legal Adviser, Department of State) [hereinafter Leigh Testimony] (noting that the FSIA's general purpose is "[t]o assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions" and "to facilitate . . . litigation against foreign states").

<sup>39</sup> See *infra* Section III.C.

uncover the comparative institutional competence claim that provided the rationale for the FSIA's transfer of the foreign sovereign immunity decisionmaking function from the executive branch to the judicial branch. In short, the FSIA promised to depoliticize foreign sovereign immunity decisionmaking by transferring the function to a supposedly more competent institution—the judicial branch. The FSIA's legislative history also indicates that another purpose for the transfer was to enhance court access for litigants in claims against foreign sovereigns.

Part II presents our empirical methodology. We began by creating a foreign sovereign immunity dataset (FSI Dataset) containing detailed information about all 118 available foreign sovereign immunity decisions by the State Department between 1952 and 1976 and approximately 380 foreign sovereign immunity decisions by U.S. district courts since 1976. We then assembled extensive additional data on a wide range of legal and political factors that potentially influence foreign sovereign immunity decisionmaking, and incorporated that data into the FSI Dataset. Finally, we used statistical methods to analyze the dataset. We used these techniques to test for legal and political factors that predict the State Department's and U.S. district courts' foreign sovereign immunity decisions, and to determine whether the likelihood of a grant of immunity is related in a statistically significant way to which institution has decisionmaking authority.

Part III presents our results. While we explore many nuances in the pages that follow, our principal findings are threefold. First, we find little evidence that political factors were systematically related to the State Department's immunity decisions. Of course, political factors may have played an important role in some individual cases. But our results suggest that the State Department was more competent as a foreign sovereign immunity decisionmaker than was widely believed at the time of the FSIA's adoption.

Second, we find evidence that political factors—including the foreign state's economic strength, the nature of the foreign state's political system, and the judge's political ideology—are systematically related to the judiciary's foreign sovereign immunity decisions. All else being equal, the courts appear more likely to grant immunity to wealthy, democratic allies than to other nations; conservative judges appear less likely to grant immunity than liberal judges; and judges appear more likely to grant immunity when there is a U.S. plaintiff than when there is not. On the other hand, there is evidence that legal factors have an influence, too. In particular, two legal factors—commercial activity and U.S. contacts—affect the courts' foreign sovereign immunity decisions in commercial activity exception cases. More

subtly, it also appears that ideological influences are more subdued in areas where the foreign sovereign immunity doctrine is better developed, which is consistent with prior findings that doctrinal clarity can constrain judicial discretion.

Third, it does not appear that it has been any easier for plaintiffs to gain court access in suits against foreign sovereigns since the FSIA's transfer of immunity decisionmaking from the State Department to the courts. Overall, our findings suggest that the FSIA's experiment in institutional choice may not have been as successful—and perhaps may not have been as necessary—as is almost uniformly assumed. Contrary to the FSIA's comparative institutional competence rationale, the State Department's decisions do not appear to have been systematically politicized, yet there do appear to be systematic political influences on the district courts' decisions.

Part IV explores the broader implications of our analysis. Beyond our specific findings regarding foreign sovereign immunity decisionmaking by the State Department and the district courts, our analysis informs intensifying post-*Samantar* debates over the appropriate roles for the executive branch and the judicial branch in foreign official immunity decisionmaking. The analysis sheds much needed empirical light on more general debates about comparative institutional competence in foreign relations law, reinforces prior research on the relationship between doctrinal clarity and judicial impartiality, and illustrates a methodological approach that can be used for evaluating comparative institutional competence claims in ways that move beyond mere theory and anecdotal evidence.

As two prominent foreign relations law scholars acknowledge in the context of their own comparative institutional competence claims in favor of the executive branch, those claims necessarily rely “on certain generalizations and assumptions about how these institutions work because it is difficult to imagine a sufficiently rigorous empirical test of these functional claims.”<sup>40</sup> We do not claim to have a perfect empirical solution; but given the dearth of empirical analysis of comparative institutional competence claims—in foreign relations law or otherwise—we think our analysis is a step forward. And while generalizations from our specific findings should be made with caution, our analysis suggests that, even if the judiciary may have institutional advantages over the executive branch, it is not clear that these advantages include the ability to depoliticize matters that touch on foreign affairs or that the executive branch is unable to make sound legal decisions.

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<sup>40</sup> Ku & Yoo, *supra* note 18, at 181.

## I. THE FSIA'S COMPARATIVE INSTITUTIONAL COMPETENCE CLAIMS

The State Department was widely criticized for making foreign sovereign immunity decisions that were excessively influenced by political considerations and insufficiently based on the law of foreign sovereign immunity. One of the primary purposes of the FSIA was to depoliticize foreign sovereign immunity decisionmaking. To accomplish this, the FSIA transferred the foreign sovereign immunity decisionmaking function from the State Department to the courts. Underlying this institutional solution to the problem of politicization was a particular comparative institutional competence claim: that the courts would be better able than the State Department to make decisions based on law without being influenced by political concerns. With the passage of time, this claim can now be evaluated. In this Part, we set the stage for our empirical assessment of the FSIA's underlying comparative institutional competence claims by explaining the foreign sovereign immunity doctrine and its relationship to institutional choice, and analyzing the FSIA's legislative history to uncover the comparative institutional competence claims that provided the principal rationale for transferring the foreign sovereign immunity decisionmaking function from the executive to the judiciary.

### A. *Foreign Sovereign Immunity and Institutional Choice*

Under the doctrine of foreign sovereign immunity, “states”—sovereign nations and their governmental organs and instrumentalities<sup>41</sup>—generally are immune from suit in the courts of other states.<sup>42</sup> When the doctrine emerged in the nineteenth century, the so-called “absolute theory” of foreign sovereign immunity prevailed, according to which immunity was essentially unconditional.<sup>43</sup> But by the mid-twentieth century, a “restrictive

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<sup>41</sup> See *supra* note 25 and accompanying text (defining “state”).

<sup>42</sup> See UN Convention, *supra* note 27, at art. 5 (“A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.”). Foreign sovereign immunity is the immunity of a State as a distinct entity, and is different from head-of-state immunity, diplomatic immunity, consular immunity, and foreign official immunity. See SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 295-304 (2d ed. 2012) (distinguishing these different types of immunity). This Article addresses only foreign sovereign immunity.

<sup>43</sup> See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, introductory note at 391 (1987) (“Until the twentieth century, sovereign immunity from the jurisdiction of foreign courts seemed [to] have no exceptions.”). However, some scholars argue that the absolute theory never reflected actual practice. See, e.g., GAMAL MOURSI BADR,

theory” of immunity had developed.<sup>44</sup> According to the restrictive theory, a state is immune against claims arising out of its public or sovereign acts (*jure imperii*), but not its private or commercial acts (*jure gestionis*).<sup>45</sup> Today, the restrictive approach predominates,<sup>46</sup> and a variety of exceptions to immunity—most prominently, the restrictive approach’s commercial activity exception—are widely recognized.<sup>47</sup> Thus, unless an exception to immunity applies, the foreign sovereign immunity doctrine requires a state to refrain from exercising jurisdiction in a suit before its courts against another state.

Foreign sovereign immunity is a doctrine of customary international law.<sup>48</sup> However, because it is a doctrine of immunity from suit in domestic courts, it depends on domestic implementation.<sup>49</sup> In fact, the U.S. Supreme Court’s 1812 decision in *The Schooner Exchange v. McFaddon*<sup>50</sup> is widely cited as the seminal statement and application of the doctrine.<sup>51</sup> If one state allows a suit in its courts to proceed against another state in the absence of an applicable exception from immunity, the defendant state may attempt to pursue an international legal claim against the forum state for violation of

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STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 18-19 (1984) (challenging the existence of the absolute theory of state immunity).

<sup>44</sup> See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, introductory note at 391 (“The restrictive principle of immunity spread rapidly after the Second World War.”).

<sup>45</sup> See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 327-28 (7th ed. 2008) (explaining that the restrictive sovereign immunity doctrine distinguishes “between acts of government, *jure imperii*, and acts of a commercial nature, *jure gestionis*, denying immunity from jurisdiction in the latter case”).

<sup>46</sup> See MALCOLM N. SHAW, INTERNATIONAL LAW 707 (6th ed. 2008) (noting that “[t]he majority of states now have tended to accept the restrictive immunity doctrine”).

<sup>47</sup> See, e.g., UN Convention, *supra* note 27, at arts. 7 (express consent of State), 9 (counter-claims against State), 10 (commercial activity), 13 (suits involving property in the forum State), 17 (suits involving arbitration agreements or awards).

<sup>48</sup> See 1 OPPENHEIM’S INTERNATIONAL LAW § 109, at 342-43 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (noting that foreign sovereign immunity is a rule of customary international law); see also Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening), 2012 I.C.J. 1031, ¶¶ 27-29, available at <http://www.icj-cij.org/docket/files/143/16883.pdf> (confirming customary international law status of foreign sovereign immunity doctrine).

<sup>49</sup> See UN Convention, *supra* note 27, at art. 6(1) (“A State shall give effect to State immunity under article 5 by refraining from exercising jurisdiction in a proceeding before its courts against another State and to that end shall ensure that its courts determine on their own initiative that the immunity of that other State . . . is respected.”).

<sup>50</sup> 11 U.S. (7 Cranch) 116 (1812).

<sup>51</sup> See Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 122 (1980) (“Chief Justice Marshall in *The Schooner Exchange v. McFaddon* is regularly cited as the first judicial expression of the doctrine of absolute immunity.” (footnote omitted)).

the international legal principle of foreign sovereign immunity.<sup>52</sup> But the day-to-day implementation of the doctrine occurs domestically in the states where other states are sued.

This raises a fundamental institutional question: which institution of a state's government should be in charge of implementing the foreign sovereign immunity doctrine? That is, which branch should examine particular cases to determine whether the general rule of immunity applies (requiring dismissal of the suit) or whether an exception to immunity applies (allowing the suit to proceed)? In the United States, the answer to this question has changed over time.<sup>53</sup> In the nineteenth century and early twentieth century, both the executive branch and the courts played a role in foreign sovereign immunity decisionmaking.<sup>54</sup> During this period, "although courts gave some weight to the executive branch's views about whether to grant sovereign immunity, the courts ultimately made their own determinations."<sup>55</sup>

### B. Foreign Sovereign Immunity and the State Department

Later in the twentieth century, the State Department took the lead in foreign sovereign immunity decisionmaking. In the 1930s, the courts increasingly deferred to the State Department's immunity determinations.<sup>56</sup> In its 1943 decision in *Ex parte Republic of Peru*, the U.S. Supreme Court explicitly held that the judicial branch was bound to follow the executive branch's suggestions of immunity.<sup>57</sup> Additionally, in its 1945 decision in

<sup>52</sup> See, e.g., *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, 2012 I.C.J. 1031, ¶ 107 (ruling that Italy violated the doctrine of foreign sovereign immunity by allowing a suit to proceed in its courts against Germany).

<sup>53</sup> In other countries, the courts generally have been responsible for foreign sovereign immunity decisionmaking. See H.R. REP. NO. 94-1487, at 7 (1976) (noting that "in virtually every other country . . . sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency").

<sup>54</sup> For a detailed discussion of foreign sovereign immunity in the nineteenth and early twentieth century courts, see G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 27-28, 134-37 (1999).

<sup>55</sup> BRADLEY, *supra* note 30, at 229.

<sup>56</sup> *Id.* at 230 ("[C]ourts . . . began giving absolute deference to suggestions from the State Department."). Yet "[i]t is not entirely clear why the Court shifted toward giving absolute deference to the executive branch." *Id.* Bradley speculates that this shift may be related to a more general shift toward expanded presidential power "due in part to the broader role of the United States in the world and the advent of the Second World War." *Id.*

<sup>57</sup> 318 U.S. 578 (1943). The Court recognized that

courts are required to accept and follow the executive determination that the vessel is immune. . . . The Department has allowed the claim of immunity and caused its action to be certified to the district court through the appropriate channels. The certification and the request that the vessel be declared immune must be accepted

*Republic of Mexico v. Hoffman*, the Supreme Court reiterated the rule of deference and further held that, in the absence of State Department guidance in specific cases, the courts must still follow principles of immunity accepted by the State Department—even if those principles diverge from customary international law principles of immunity as discerned by the courts.<sup>58</sup>

Meanwhile, the State Department refined its approach to foreign sovereign immunity decisionmaking both substantively and procedurally. Substantively, the State Department officially adopted the “restrictive theory” of sovereign immunity in a 1952 letter to the Acting Attorney General from the Acting Legal Adviser to the U.S. State Department, Jack Tate (the “Tate Letter”).<sup>59</sup> According to the restrictive theory, “the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”<sup>60</sup> In other words, states should enjoy immunity from suits arising out of the exercise of their governmental functions, but not from suits arising out of the types of activities in which private parties engage.

Procedurally, the State Department increasingly formalized its process for foreign sovereign immunity decisionmaking. It began by requiring a formal diplomatic request from the embassy of the foreign state seeking immunity.<sup>61</sup> The Department based its immunity decisions “on either

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by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.

*Id.* at 588-89 (citation omitted).

<sup>58</sup> 324 U.S. 30, 35-36 (1945) (holding that courts should look to “the principles accepted by the [executive branch]” and that “[i]t is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize”); see also BRADLEY, *supra* note 30, at 230 (explaining that the Court in *Hoffman* went further than it did in *Ex parte Republic of Peru* by holding that “even in the face of executive branch silence, U.S. courts should look to ‘the principles accepted by the [executive branch]’” (quoting *Hoffman*, 324 U.S. at 35)); White, *supra* note 55, at 143 (noting that “*Mexico v. Hoffman* made it clear that the Executive’s position on an immunity prevailed even when it diverged from customary international law”).

<sup>59</sup> Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep’t of State, to Philip B. Perlman, Acting Attorney Gen., U.S. Dep’t of Justice (May 19, 1952) [hereinafter Tate Letter], in 26 DEP’T ST. BULL. 984, 985 (1952) (“[I]t will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.”).

<sup>60</sup> Tate Letter, *supra* note 59, at 984.

<sup>61</sup> See SOVEREIGN IMMUNITY DECISIONS OF THE DEPARTMENT OF STATE, MAY 1952 TO JANUARY 1977, 1977 DIG. U.S. PRAC. INT’L L. 1017, 1019 (Michael Sandler, Detlev F. Vagts & Bruno A. Ristau eds., 1977) [hereinafter STATE DEPARTMENT REPORT] (tracing the origins of

representations of the embassy concerned, copies of pleadings filed with the court, or reports from the Department of Justice.”<sup>62</sup> By the late 1960s, the Department introduced opportunities for both litigants to submit written memoranda supporting their positions, and also to make oral presentations on the immunity issue, albeit “as informal conferences and not as on-the-record administrative proceedings.”<sup>63</sup> If the State Department then decided that immunity should be granted, it would ask the Justice Department to file a “suggestion of immunity” with the court.<sup>64</sup>

Despite these refinements, the State Department’s performance of the foreign sovereign immunity decisionmaking function presented two serious concerns. First, the State Department itself complained that being in charge of that function created foreign relations problems. For example, foreign states sued in U.S. courts exerted pressure on the State Department to suggest immunity, while denials of immunity sometimes resulted in negative diplomatic repercussions.<sup>65</sup> As one State Department Legal Adviser explained,

State Department involvement [in foreign sovereign immunity decisionmaking] can be detrimental because some foreign states may be led to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations. Consequently, foreign states are sometimes inclined to regard a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision.<sup>66</sup>

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the doctrine of foreign sovereign immunity beginning with the Tate Letter and evolving into the FSIA).

<sup>62</sup> *Id.* at 1019.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1022.

<sup>65</sup> See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 60 (1976) (testimony of Peter D. Trooboff, Cochairman, Committee on Transnational Judicial Procedure, American Bar Association, International Law Section) [hereinafter Trooboff Testimony] (“[T]he [State] Department becomes embroiled in a pending case when another sovereign state chooses to thrust the issue upon the Department by requesting a suggestion of immunity. The Department then finds itself with a political problem that it did not create and which, more [often] than not, it may not need or want.”).

<sup>66</sup> *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims and Governmental Relations of the H. Comm. on the Judiciary*, 93d Cong. 14 (1973) (statement of Charles N. Brower, Legal Adviser, Department of State) [hereinafter Brower Statement].



Second, State Department immunity decisionmaking was perceived to be politicized and inconsistent.<sup>67</sup> As noted at the hearings on the FSIA, the State Department sometimes “granted immunity in cases involving unquestionably commercial transactions [for which immunity should have been denied].”<sup>68</sup> It was also noted that

[t]here is always the risk, which is an unfair one for private litigants to run, that the Department will reach a decision to suggest immunity in order to achieve some foreign policy objective during what might be a period of delicate diplomatic negotiations with that particular foreign government.<sup>69</sup>

One study published shortly before the FSIA’s adoption noted the probability that “diplomatic and political considerations were deemed to be of overriding importance,”<sup>70</sup> which the executive branch conceded to be a problem.<sup>71</sup> Simply put, the concern was that immunity decisions—and, from a claimant’s perspective, court access decisions—were being decided based on political, rather than legal considerations.<sup>72</sup>

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<sup>67</sup> See H.R. REP. NO. 94-1487, at 9 (1976) (“The foreign state . . . decides when it will attempt to exert diplomatic influences, thereby making it more difficult for the State Department to apply the Tate letter criteria. From the standpoint of the private litigant, considerable uncertainty results. A private party who deals with a foreign government entity cannot be certain that his legal dispute with a foreign state will not be decided on the basis of nonlegal considerations through the foreign government’s intercession with the Department of State.”); Monroe Leigh, *Sovereign Immunity—The Case of the “Imias,”* 68 AM. J. INT’L L. 280, 281 (1974) (noting that “lively criticism of the State Department [is] less concerned with a consistent application of international law than with whatever short term diplomatic objectives seemed appropriate at the moment”).

<sup>68</sup> Trooboff Testimony, *supra* note 65, at 60 (explaining this inconsistency within the State Department’s decisions).

<sup>69</sup> *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 95 (1976) (testimony of Michael Marks Cohen, Chairman of the Committee on Maritime Legislation of the Maritime Law Association of the United States) [hereinafter Cohen Testimony].

<sup>70</sup> Leigh, *supra* note 67, at 288.

<sup>71</sup> See *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Administrative Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 35 (1976) (testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice) [hereinafter Ristau Testimony] (testifying that “in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist [diplomatic] pressures” in immunity decisionmaking).

<sup>72</sup> Of course, it is worth noting that it is possible that these publicly stated concerns were not the true motivations of the actors lobbying for the passage of the FSIA. Instead, self-serving interest groups may have been publicizing these concerns as cover for their own agendas. For example, it may have been the case that members of the private bar were tired of losing, or that members of the State Department simply wanted to eliminate the paperwork. That said, the rationales that we have laid out were not only presented by actors at the time, but have since been consistently offered by legal scholars studying the subject. See, e.g., FRANCK, *supra* note 19, at 104-05 (describing the concerns

### C. Foreign Sovereign Immunity and the Courts

It was against this background that Congress enacted the FSIA in 1976.<sup>73</sup> Legally, the FSIA codified the restrictive theory of foreign sovereign immunity adopted in the Tate Letter, including an exception for certain suits based upon the commercial activity of a foreign state.<sup>74</sup> In terms of institutional choice, the FSIA transferred the foreign sovereign immunity decisionmaking function away from the State Department and vested it exclusively in the courts. Under the FSIA, “[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States.”<sup>75</sup>

By transferring the immunity decisionmaking function to the courts, the FSIA promised to rectify the problem of politicization of immunity decisions.<sup>76</sup> As the House Report on the FSIA put it,

[a] principal purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process.<sup>77</sup>

This rationale for the transfer is made clear in the FSIA’s legislative history. As stated in Department of Justice testimony in support of the FSIA, “the bill is designed to depoliticize the area of sovereign immunity by placing the responsibility for determining questions of immunity in the courts.”<sup>78</sup> According to State Department testimony, transferring the

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relating to the State Department that led to the FSIA’s enactment); Wuerth, *supra* note 24, at 952 (explaining the policy reasons for passing the FSIA).

<sup>73</sup> Pub. L. No. 94-583, § 1602, 90 Stat. 2891, 2892 (1976).

<sup>74</sup> These exceptions are codified in 28 U.S.C. §§ 1605, 1605A, and 1607 (2012).

<sup>75</sup> 28 U.S.C. § 1602 (2012); *see also* Leigh Testimony, *supra* note 38, at 25 (emphasizing that the bill would “vest sovereign immunity decisions exclusively in the courts”); H.R. REP. NO. 94-1487, at 12 (1976) (stating that the FSIA is designed to “leav[e] sovereign immunity decisions exclusively to the courts, thereby discontinuing the practice of judicial deference to ‘suggestions of immunity’ from the executive branch”).

<sup>76</sup> *See* Brower Statement, *supra* note 66, at 14 (“We at the Department of State are now persuaded . . . that the foreign relations interests of the United States as well as the rights of litigants would be better served if these questions of law and fact were decided by the courts rather than by the executive branch.”).

<sup>77</sup> H.R. REP. NO. 94-1487, at 7.

<sup>78</sup> Ristau Testimony, *supra* note 71, at 31.

foreign sovereign immunity decisionmaking function to the courts would “insure that sovereign immunity questions are decided on legal grounds.”<sup>79</sup>

The private bar’s support for the FSIA was based largely on the promise of depoliticizing immunity decisionmaking by transferring the function to the courts. As one prominent practitioner testified, “[t]he net effect of this bill will be to depoliticize the treatment of legal questions that properly belong exclusively in a judicial forum.”<sup>80</sup> According to another, the transfer to the courts would ensure that litigants “would be able to rely upon the resolution of immunity questions in commercial cases by courts free from diplomatic or political influence.”<sup>81</sup>

The State Department, on the other hand, was said to be institutionally ill-suited to make immunity decisions based on legal rather than political considerations. According to the House Report, the State Department was “in the awkward position of a political institution trying to apply a legal standard to litigation already before the courts. Moreover, it does not have the machinery to take evidence, to hear witnesses, or to afford appellate review.”<sup>82</sup> As Monroe Leigh wrote shortly before becoming the Legal Adviser to the State Department, “there is [a] fundamental question whether it is reasonable to expect the Executive Branch to exercise the juridical function of applying the law of sovereign immunity free from the distorting effect of political considerations.”<sup>83</sup> The House Report asserted

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<sup>79</sup> Brower Statement, *supra* note 66, at 15; *see also* Leigh Testimony, *supra* note 38, at 29 (“[T]he broad purposes of the bill are ‘to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation.’”).

<sup>80</sup> Trooboff Testimony, *supra* note 65, at 60.

<sup>81</sup> *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 94th Cong. 80 (1976) (testimony of Cecil J. Olmstead, Chairman, The Rule of Law Committee, Vice President, Texaco Co.); *see also id.* at 88 (statement of the International Law and Transactions Division of the District of Columbia Bar) (“Elimination of the Department’s role . . . will be fairer to litigants and will result in a more coherent and predictable body of doctrine.”); *id.* at 72 (statement of the Committee on International Law of the Association of the Bar of the City of New York) (“By removing the question of sovereign immunity from the political sphere and placing it with the courts, where it belongs, the State Department is relieved of a burden it is ill equipped to bear and provides the private litigant with assurance that his claim will be determined under comprehensive rules and before a tribunal not subject to the daily exigencies of foreign policy.”).

<sup>82</sup> H.R. REP. NO. 94-1487, at 8 (1976).

<sup>83</sup> Leigh, *supra* note 67, at 285; *see also* Leigh Testimony, *supra* note 38, at 25 (noting “outdated practice of having a political institution, namely the State Department, decide many of these questions of law”); Trooboff Testimony, *supra* note 65, at 58 (“As a political and policymaking agency, the Department of State is an inappropriate forum for dispassionate determination of the commercial/noncommercial question and related issues. Moreover, . . . it is ill-equipped to perform that judicial function.”); Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?*, 40 AM. J. INT’L L. 168, 169 (1946) (“[T]his is a most unsatisfactory role for the

that transferring the authority to make these decisions to the courts would “assur[e] litigants that [they] are made on purely legal grounds.”<sup>84</sup> Testimony in support of the FSIA emphasized the importance of immunity decisionmaking of “impartial and disinterested character” and argued that this “can only be assured by open judicial determination of that issue.”<sup>85</sup>

A second, less explicitly articulated, comparative institutional competence claim underlying the passage of the FSIA was that transferring immunity decisionmaking authority to the judiciary would increase access to U.S. courts for private litigants in suits against foreign sovereigns. The House Report noted that provisions of the FSIA would “insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts.”<sup>86</sup> Similarly, State Department Legal Adviser Monroe Leigh testified that one purpose of the FSIA is “[t]o assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions” and “to facilitate . . . litigation against foreign states.”<sup>87</sup>

In summary, the FSIA’s proposed solution to the problem of the politicization of immunity decisionmaking was based on a fundamental—yet untested—comparative institutional competence claim: the courts are better equipped to make foreign sovereign immunity decisions than the State Department, and, in particular, better equipped to ground their decisions in legal, rather than political, considerations. The House Report makes this claim explicitly, stating that the FSIA’s “central premise” is that “decisions on claims by foreign states to sovereign immunity are *best made by the judiciary* on the basis of a statutory regime which incorporates standards recognized under international law.”<sup>88</sup> A second underlying claim was that transferring immunity decisionmaking authority to the judiciary would facilitate suits against foreign sovereigns.

## II. EVALUATING THE CLAIMS: AN EMPIRICAL STRATEGY

It has now been almost forty years since the adoption of the FSIA and its transfer of the foreign sovereign immunity decisionmaking function from the State Department to the judiciary. Thus, it is now possible to

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Department of State to discharge. It is not organized in such a way as to facilitate its rendering what are essentially judicial decisions.”).

<sup>84</sup> H.R. REP. NO. 94-1487, at 7 (1976).

<sup>85</sup> Cohen Testimony, *supra* note 69, at 94.

<sup>86</sup> H.R. REP. NO. 94-1487 at 23.

<sup>87</sup> Leigh Testimony, *supra* note 38, at 24, 29 (quotation marks omitted).

<sup>88</sup> H.R. REP. NO. 94-1487, at 14 (emphasis added).

evaluate the FSIA's underlying comparative institutional competence claims. Are the courts better able than the State Department to make decisions based on law without being influenced by political factors? Were the State Department's decisions influenced by political rather than legal factors, as assumed in the FSIA's legislative history? After the FSIA, have the courts based their decisions on legal rather than political considerations, as the FSIA promised? Are there other systematic differences between immunity decisionmaking in the State Department and in the courts? In particular, do litigants have improved opportunities to pursue claims against foreign sovereigns in U.S. courts? The answers to these questions are relevant to analyzing the FSIA and, more broadly, provide insights about the appropriate roles of the executive and judicial branches in foreign relations.

In this Part, we present our empirical strategy for shedding light on these questions. As explained in detail below, we began by identifying hundreds of foreign sovereign immunity decisions made by the State Department before the FSIA was passed, and subsequently by the U.S. district courts after the enactment of the FSIA. We then carefully analyzed each decision and coded it to indicate whether or not it resulted in a grant of immunity. We also coded these decisions using data to measure a wide range of legal and political factors that potentially influenced them.

The result was an extensive dataset of foreign sovereign immunity decisions—the FSI Dataset. Using statistical methods, we then used the FSI Dataset to evaluate the FSIA's underlying comparative institutional competence claims. This strategy cannot uncover all differences between the two institutions' immunity decisions, but it does allow us to provide systematic empirical evidence on the FSIA's underlying comparative institutional competence claims and on the competence of the executive and judicial branches in foreign relations more generally.

#### *A. Building the Foreign Sovereign Immunity Dataset*

Our first step was to assemble the considerable amount of data needed for our analysis. The result was an original dataset that contains detailed information about foreign sovereign immunity decisions made by both the State Department and the U.S. district courts.

##### 1. State Department Decisions

The FSI Dataset includes information about 118 requests for immunity that the State Department received from 1952 (the year of the Tate Letter)

to 1977 (the year the FSIA became effective). Our primary source of information about these requests is an appendix to the 1977 edition of the State Department's *Digest of U.S. Practice of International Law*, entitled *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977* (hereinafter State Department Report).<sup>89</sup> Although the editors of the State Department Report do not guarantee that it includes every immunity decision made by the State Department, they explain that it includes "all diplomatic requests for sovereign immunity, and Department decisions in response to those requests, that could be gleaned from a search of Department of State and Department of Justice files."<sup>90</sup> Thus, while it is possible that the State Department Report does not contain all of the State Department's immunity decisions from that period, it is the most comprehensive source available.<sup>91</sup>

## 2. U.S. District Court Decisions

The FSI Dataset also includes 381 randomly selected U.S. district court opinions from the Lexis online database in which courts decided whether to grant immunity under the FSIA.<sup>92</sup> The decisions available in Lexis include

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<sup>89</sup> See STATE DEPARTMENT REPORT, *supra* note 61, at 1018 ("The following case reports trace the history of Department of State decisions concerning the immunities of foreign states, their agencies and instrumentalities, their property, and their nondiplomatic and nonconsular officials, beginning with the Tate Letter of May 19, 1952, and ending with the entry into force on January 19, 1977, of the Foreign Sovereign Immunities Act of 1976."). The State Department Case Reports were compiled by Michael Sandler, Special Assistant to the Legal Adviser, Department of State, 1975–1977; Detlev F. Vagts, Professor of Law, Harvard University, and Counselor on International Law, Department of State, 1976–1977; and Bruno A. Ristau, Chief, Office of Foreign Litigation, Department of Justice. *Id.* at 1017.

<sup>90</sup> *Id.* at 1021.

<sup>91</sup> The State Department Report contains 110 numbered cases. Several cases involved suits against multiple countries arising out of the same incident. For these cases, we treated each country requesting immunity as a unique observation, resulting in a dataset of 118 observations.

<sup>92</sup> We used random selection to reduce the risk of selection bias. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 110 (2002) ("[R]andom selection is the only selection mechanism in large-*n* studies that automatically guarantees the absence of selection bias." (emphasis omitted)). Specifically, we searched the Lexis Database for potentially relevant U.S. district court opinions using the following search query in the Lexis "DIST" ("U.S. District Court Cases, Combined") database on May 11, 2011:

"FOREIGN SOVEREIGN IMMUNITIES ACT" OR ("28 USC" OR "28 USCA")  
W/2 (1330 OR 1602 OR 1603 OR 1605 OR 1605A OR 1606 OR 1607 OR 1608 OR  
1609 OR 1610 OR 1611))

The search produced 2104 U.S. district court opinions. The opinions were randomly sorted and then screened to determine which of them contained actual FSIA immunity decisions. We included such opinions in the FSI Dataset and discarded all others. Of the total of 2104 opinions, we screened 1235. Of the screened opinions, 381 (30.1%) contained FSIA immunity holdings and

all decisions published in the *Federal Supplement* and many, but not all, decisions that are not. It is well known that published decisions are not necessarily representative of unpublished decisions<sup>93</sup> and that electronic databases such as Lexis tend to be overpopulated with published decisions.<sup>94</sup> In Section III.D., we analyze whether this tendency poses a threat to the inferences we draw from this sample of decisions, and conclude that it is unlikely to affect our central findings.<sup>95</sup>

### B. Coding Decisions and Measuring Legal and Political Influences

We coded each foreign sovereign immunity decision in the FSI Dataset to create variables that both describe the outcome of the immunity decision and test for a wide range of legal and political factors that can potentially influence these decisions.<sup>96</sup>

#### 1. Decision

To indicate the outcome of each decision, we created the variable, *Decision*. We coded it as 1 (“Yes”) if the decisionmaker (either the State Department or the U.S. district court) granted immunity and 0 (“No”) if the decisionmaker did not grant immunity.

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were included in the FSI Dataset. On this basis, we estimate that there are approximately 633 (30.1% of 2104) district court opinions in the Lexis database containing determinations whether to grant immunity under the FSIA, and that the FSI Dataset therefore includes well over half of all such decisions. It is unlikely that using Lexis’s major competitor, Westlaw, as a source of decisions would significantly change any of the results of the analysis. See Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 WIS. L. REV. 107, 134 (finding that “Lexis and Westlaw were highly consistent in the cases they reported”).

<sup>93</sup> See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 781-82 (2009) (discussing the potential for selection bias in a choice-of-law study that only considers published decisions).

<sup>94</sup> See David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1215 (2013) (explaining how recent Supreme Court cases relating to the pleadings standard may influence whether lower court judges publish their summary judgment opinions). In the FSI Dataset, 62.2% of decisions were published in the *Federal Supplement*, while the remaining 37.8% were not.

<sup>95</sup> See *infra* Section III.D. Ideally, we would have liked to draw our sample from PACER, which includes a more comprehensive set of unpublished decisions. However, this is not practicable for our study because PACER is not able to perform the full-text searches needed to identify foreign sovereign immunity decisions and because of the high cost of obtaining access to decisions on PACER. See Engstrom, *supra* note 94, at 1237 (noting the barrier that judges have imposed “by refusing to use their statutory discretion to grant academic fee waivers for research conducted using the PACER system”).

<sup>96</sup> We coded the decisions in two phases. First, the decisions were allocated among the authors and several research assistants for initial coding. Second, the authors reviewed all coding to ensure accuracy.

In thirty cases it reviewed, the State Department either took no action in response to a request for immunity or the request was withdrawn prior to any State Department action.<sup>97</sup> These cases are difficult to classify: on the one hand, the State Department did not grant immunity; but on the other hand, immunity was not formally denied. Out of caution, we took two different approaches to these cases. First, we performed our analyses without these thirty cases. These are the analyses we generally report. Second, we repeated our analyses with these thirty cases included and *Decision* coded as 0 (“No”) (since the State Department did not grant immunity). Generally, the results were similar, and we report them where they differed significantly.

## 2. Potential Legal Influences on Immunity Decisions

We also created variables to test for potential legal influences on foreign sovereign immunity decisionmaking.<sup>98</sup> While one might not necessarily expect the State Department’s decisions to be based primarily on legal factors,<sup>99</sup> one might be tempted to take for granted that legal influences exert a dominant force on the courts’ immunity decisions. Indeed, the FSIA’s legislative history suggests that this was taken for granted by the FSIA’s supporters.<sup>100</sup> But there is a well-established line of interdisciplinary scholarship on judicial decisionmaking. Although there is great debate over what factors influence judicial decisionmaking, much of this scholarship has suggested that politics, not law, dominates judicial decisionmaking.<sup>101</sup> At least one legal scholar has argued that political considerations enter into the

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<sup>97</sup> These thirty cases appear in the State Department Report as the entry numbers 8, 20, 35, 45A, 68, 70, 72, 76, 78, 80, 80, 83, 84, 87, 88, 89, 90, 91, 92, 95, 98, 100, 100, 101, 103, 103, 104, 105, 106, and 109. STATE DEPARTMENT REPORT, *supra* note 61, *passim*. We treated cases 80, 100, and 103 as two observations each, although a single country was being sued in each case, because the cases involved two different lawsuits. *See id.*

<sup>98</sup> Unfortunately, the information available for pre-FSIA State Department decisions is much more limited than that available for post-FSIA court decisions. This missing data problem means that some variables used to test for legal and political influences are available for district court decisions but not for some or all State Department decisions. However, we were able to collect enough data for both institutions to make systematic comparisons.

<sup>99</sup> *See supra* Section I.B. (describing some of the diplomatic pressures the State Department faced when considering whether to grant immunity).

<sup>100</sup> For a discussion of the motives and rationale behind the FSIA and the transferring of foreign sovereign immunity decisionmaking to the judicial branch, see *supra* Section I.C.

<sup>101</sup> *See, e.g.*, JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 115 (2002) (analyzing Supreme Court decisions and processes and suggesting that political factors dominate judicial decisionmaking).



courts' foreign sovereign immunity decisions.<sup>102</sup> Therefore, we investigate rather than assume potential legal influences. Specifically, we investigate two legal factors that potentially influence foreign sovereign immunity decisions: whether the plaintiff's claim is based upon the foreign state's commercial activity and whether that activity has connections to the territory of the United States.

a. *Commercial Activity*

We measure the first factor—whether the plaintiff's claim is based upon the foreign state's commercial activity—because it is necessary to trigger the commercial activity exception, which is the principal exception to foreign sovereign immunity and the hallmark of the restrictive theory embodied in the Tate Letter and the FSIA.<sup>103</sup> Therefore, if legal factors influence foreign sovereign immunity decisionmaking, we would expect commercial activity to be among those factors.

To measure commercial activity, we created two variables. First, we created the variable *Corporate Defendant* and coded it as 1 (“Yes”) if the foreign state defendant was a corporate business entity and 0 (“No”) otherwise. This measure is imperfect insofar as a plaintiff's suit against a corporate defendant will not always necessarily arise out of that defendant's commercial activity. However, this is unlikely to be the case with much frequency since corporate business entities ordinarily engage in commercial activity.

For analysis of court decisions, we also created the variable *Commercial Activity* and coded it as 1 (“Yes”) if the plaintiff's claim was based on the foreign state's purchase or sale of goods or services, or its investment or other financial activity (such as issuing or purchasing debt or equity securities, lending or borrowing money, or guaranteeing debt obligations). Otherwise, we coded *Commercial Activity* as 0 (“No”).<sup>104</sup> Of course, the variable does not necessarily capture all activity that could conceivably be classified as commercial in nature. However, it is designed to capture most

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<sup>102</sup> See Joseph W. Dellapenna, *Foreign State Immunity in Europe*, 5 N.Y. INT'L L. REV. 51, 61-62 (1992) (“In the United States, the core bases of immunity are prescribed in such utterly ambiguous terms that the [Act] leaves a large measure of discretion in the hands of the courts. U.S. courts have often exercised their discretion in a highly political fashion.”).

<sup>103</sup> See 28 U.S.C. § 1605(a)(2) (2012) (containing the FSIA commercial activity exception); *supra* Section I.B (discussing Tate Letter's adoption of restrictive theory); see also GEORGE A. BERMAN, TRANSNATIONAL LITIGATION 132 (2003) (stating that “[b]y any measure,” the commercial activity exception is the FSIA's “principal exception” to immunity).

<sup>104</sup> We were careful to code the *Commercial Activity* variable based on our independent assessment of whether the activity satisfied our coding criteria, and not on whether the court labeled the activity as “commercial.”

forms of commercial activity.<sup>105</sup> Due to lack of information in the State Department Reports, we were unable to code this variable for the State Department cases. Therefore, while the *Commercial Activity* variable is more precise, the *Corporate Defendant* variable offers a consistent measure across the pre-FSIA and post-FSIA periods.

b. *Territorial Connections*

Another legal factor that potentially influences foreign sovereign immunity decisions—at least in the post-FSIA period—is the connection between U.S. territory and the activity of the foreign state giving rise to the plaintiff’s claim. Most (but not all) exceptions to immunity under the FSIA require some territorial connection, including the commercial activity exception, which requires an “activity carried on in the United States by the foreign state,” “an act performed in the United States,” or an act that “causes a direct effect in the United States.”<sup>106</sup> Other FSIA exceptions also require a territorial connection.<sup>107</sup>

To measure territorial connections to the United States, we created the variable *U.S. Contacts* and, for each decision in the dataset, we coded it as 1 (“Yes”) if the conduct or injury at issue occurred entirely or partially on U.S. territory, and 0 (“No”) if the conduct and injury occurred purely outside U.S. territory.<sup>108</sup>

### 3. Potential Political Influences on Immunity Decisions

The concerns expressed in the FSIA’s legislative history about the politicization of the State Department’s foreign sovereign immunity decisions focused on a particular class of political factors: factors related to U.S. relations with the foreign state seeking immunity that might lead a U.S.

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<sup>105</sup> We also coded an alternative, broader commercial activity variable that was coded as 1 (“Yes”) if the plaintiff’s claim was based on the foreign state’s employment activity or activity related to real estate or intellectual property. The use of this alternative variable did not significantly affect our findings.

<sup>106</sup> 28 U.S.C. § 1605(a)(2) (2012).

<sup>107</sup> See *id.* §§ 1605(a)(3),(4), and (5) (listing these exceptions as: takings, U.S. property, and non-commercial tort, respectively). The terrorism exception does not explicitly require a territorial connection. See *id.* § 1605A.

<sup>108</sup> Specifically, the variable was coded in three steps. First, we coded a place of conduct variable to indicate the place of the foreign state’s activity: 0 (purely inside U.S. territory), 1 (mixed), or 2 (purely outside U.S. territory). Second, we coded a place of injury variable to indicate the place of the injury from that conduct: 0 (purely inside U.S. territory), 1 (mixed), or 2 (purely outside U.S. territory). Third, we created the *U.S. Contacts* variable and coded it as 1 (“Yes”) if either of the other two variables were coded as 0 or 1 (that is, if the conduct or injury were either partly or all in U.S. territory), and 0 (“No”) otherwise.

decisionmaker to grant (or withhold) immunity even if the law of foreign sovereign immunity would indicate otherwise.<sup>109</sup> Supporters of the FSIA made the comparative institutional competence claim that while such factors influenced the State Department's immunity decisions, they would not influence the courts' decisions.<sup>110</sup>

To shed empirical light on the validity of this claim, we created variables to measure five types of potential political influences: (a) the foreign state's formal relationship with the United States; (b) the foreign state's political importance to the United States; (c) the foreign state's economic power; (d) the foreign state's military power; and (e) the foreign state's political system. In addition, we created two additional variables to measure potential political influences rooted in the decisionmaker, rather than the foreign state: (f) the U.S. decisionmaker's ideological preferences and (g) the nationality of the plaintiff.<sup>111</sup>

a. *Foreign State's Formal Relationship with the United States*

For several reasons, a U.S. decisionmaker may be more likely to grant immunity to a foreign state with which the United States has a formal relationship. A formal relationship provides a channel of communication that a foreign state can use to exert diplomatic pressure on the United States. Moreover, a U.S. decisionmaker may have a sense of duty to provide the benefit of immunity to a foreign state with which the United States has a formal relationship, and may be concerned that a denial of immunity could damage that relationship. One might expect the existence of a formal relationship to be most significant in State Department decisionmaking since, as the diplomatic branch of the U.S. government, it is more likely than the courts to be the target of diplomatic pressure from foreign states and to be aware of the status and importance of U.S. relationships with particular foreign states.

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<sup>109</sup> See *supra* Section I.B (discussing the State Department's administration of immunity).

<sup>110</sup> See *supra* Section I.C (discussing the transfer of immunity decisionmaking authority from the State Department to the courts).

<sup>111</sup> Of course, there may be particular political influences in specific cases that these variables cannot detect; but our goal here is to identify *systematic* influences resulting from institutional choice, not factors that might have played a role in one or a few individual cases. In our judgment, our approach is well suited to accomplish that goal.

To assess whether the existence of a formal relationship between the foreign state and the United States affects the likelihood that a U.S. decisionmaker will grant immunity, we created three variables:

*U.S. Ally:* We coded this variable as 1 (“Yes”) if the country requesting immunity had a formal alliance with the United States in the year of the decision and 0 (“No”) otherwise.<sup>112</sup> Since one of the primary justifications for the passage of the FSIA was that the State Department was making politically motivated decisions,<sup>113</sup> one might expect that formal allies would be more likely to receive immunity during the pre-FSIA period.

*Diplomatic Representation:* We coded this variable as 1 (“Yes”) if either the United States had diplomatic representation in the foreign state or the foreign state had diplomatic representation in the United States and 0 (“No”) otherwise.<sup>114</sup> If diplomatic pressure is being used to influence immunity decisions, one would expect *Diplomatic Representation* to have a positive effect on the probability of immunity.

*Troop Deployment:* We coded this variable as 1 (“Yes”) if there are U.S. troops deployed in the country requesting immunity in the year of the decision, and 0 (“No”) otherwise.<sup>115</sup> Prior research suggests that the United States must offer concessions to foreign governments in exchange for the right to station troops upon their soil.<sup>116</sup> As a result, one might expect that

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<sup>112</sup> We gathered this data from the Correlates of War Formal Alliance dataset. DOUGLAS M. GIBLER, INTERNATIONAL MILITARY ALLIANCES, 1648–2008 (2009), available at <http://www.correlatesofwar.org/COW2%20Data/Alliances/alliance.htm> (follow hyperlink leading to “Data Set” and then hyperlink to access the data depending on the desired format). This dataset includes an observation for every pair of countries between 1648 to 2009, coded for the level of alliance that existed between the pair. Our variable was coded as 1 (“Yes”) if the foreign state held either a formal alliance of defense, nonaggression, neutrality, or entente. If one of these alliances did not exist in the decision year, the variable was coded as 0 (“No”).

<sup>113</sup> See *supra* Sections I.B–C.

<sup>114</sup> We obtained the underlying data from Reşat Bayer’s Correlates of War Diplomatic Exchange Dataset. REŞAT BAYER, DIPLOMATIC EXCHANGE DATA SET, 1817–2005 (V2006.1), available at <http://www.correlatesofwar.org/COW2%20Data/Diplomatic/Diplomatic.html> (last visited Nov. 7, 2014) (follow “diplomatic 2006.1.zip” hyperlink). This dataset provides information on whether a given country has diplomatic representation in another country. Specifically, we used the variable “de” from the dataset. Although the data covers 1817 to 2005, it is presented only in five-year intervals. Therefore, the *Diplomatic Representation* variable was coded based on whether there was diplomatic representation in the Decision Year or within a five-year period prior to the Decision Year.

<sup>115</sup> This data was taken from data compiled by the Heritage Foundation that documents all U.S. troop deployments through 2005. Tim Kane, *Global U.S. Troop Deployment, 1950–2005*, HERITAGE FOUND. (May 24, 2006), <http://www.heritage.org/research/reports/2006/05/global-us-troop-deployment-1950-2005> (follow hyperlink indicating availability of the Troop Dataset).

<sup>116</sup> See, e.g., Glen Biglaiser & Karl DeRouen Jr., *Following the Flag: Troop Deployment and U.S. Foreign Direct Investment*, 51 INT’L STUD. Q. 835, 850 (2007) (finding that troop deployment and alignment of foreign policy priorities lead to increased foreign direct investments or “U.S. capital

the United States would have political incentives to grant immunity to foreign governments where U.S. troops are deployed.

b. *Foreign State's Political Importance*

Whether a U.S. decisionmaker grants immunity to a foreign state may also depend partly on the foreign state's political importance. Regardless of the existence of a formal relationship between the United States and a foreign state, the United States may have an interest in eliciting the support or assistance of politically important foreign states to advance U.S. foreign policy. To that end, a U.S. decisionmaker may be more likely to grant immunity to politically important foreign states. Moreover, U.S. decisionmakers may be concerned that a denial of immunity may prompt a politically important foreign state to withhold support or assistance. We created three variables to measure political importance:

*UNSC Member*: We coded this variable as 1 ("Yes") if the foreign state was a member of the United Nations Security Council (UNSC) in the year of decision, and 0 ("No") otherwise.<sup>117</sup> Prior research suggests that major powers increase aid to states that become members of the Security Council to influence their votes and obtain their support on matters before the Council.<sup>118</sup> It is thus quite possible that keeping a Security Council member happy is exactly the kind of political consideration that would lead the State Department to grant immunity to a foreign state. Therefore, at least in the pre-FSIA period, one might expect *UNSC Member* to have a positive effect on the probability of immunity.

*Communist Border*: We coded this variable as 1 ("Yes") if the country requesting immunity shared a land border with a Communist state in the

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inflows"); Glen Biglaiser & Karl De Rouen, Jr., *The Interdependence of U.S. Troop Deployments and Trade in the Developing World*, 5 FOREIGN POL'Y ANALYSIS 247, 253 (2009) ("We propose that developing countries seek incentives, mostly of an economic nature, from the U.S. before agreeing to accept U.S. troop deployments.").

<sup>117</sup> We obtained information about whether a country was a member of the UN Security Council based on information from the United Nations website. *Current Members*, UNITED NATIONS SEC. COUNCIL, <http://www.un.org/en/sc/members/>, archived at <http://perma.cc/XJ8D-WSLM> (last visited Nov. 7, 2014).

<sup>118</sup> See Axel Dreher, Jan-Egbert Sturm & James Raymond Vreeland, *Development Aid and International Politics: Does Membership on the UN Security Council Influence World Bank Decisions?*, 88 J. DEV. ECON. 1, 8 (2009) (citing World Bank panel data that indicated UNSC membership increases the number of World Bank projects a country receives by approximately 14%); Axel Dreher, Jan-Egbert Sturm & James Raymond Vreeland, *Global Horse Trading: IMF Loans for Votes in the United Nations Security Council*, 53 EUR. ECON. REV. 742, 746 (2009) (citing International Monetary Fund (IMF) panel data that indicates UNSC membership increases the number of IMF loans a country receives and reduces the number of conditions on the loans).

decision year, and 0 (“No”) otherwise.<sup>119</sup> During the Cold War, a goal of U.S. foreign policy was containing Communism. As a result, states that shared a border with Communist countries were more likely to receive assistance from the United States.<sup>120</sup> Since these states may be more likely to receive grants of immunity, we coded this variable for all requests received in 1991 or earlier.

*Communist State:* We coded this variable as 1 (“Yes”) if the country requesting immunity was a Communist country in the year that it requested immunity, and as 0 (“No”) otherwise.<sup>121</sup> Given the political salience of communism during the Cold War, we have included this variable to assess whether being a Communist state influenced the likelihood of immunity.

### c. *Foreign State’s Economic Power*

The likelihood of immunity may also depend on the foreign state’s economic power. A U.S. decisionmaker may grant immunity to attract or preserve economic benefits from a foreign state, and may be concerned that a denial of immunity could prompt a foreign state to withhold those benefits. The more economically powerful a foreign state, the more heavily these considerations are likely to weigh in favor of granting immunity. We created three variables to measure economic power:

*GDP Per Capita:* This variable equals the estimated per capita gross domestic product (“GDP Per Capita”) for the citizens in the state requesting immunity in the decision year.<sup>122</sup>

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<sup>119</sup> This variable was coded by the authors based on whether the foreign state shared a land border with a Communist state in the decision year. For the list of Communist countries used to make this determination, see *Communism*, in THE ENCYCLOPEDIA OF LIBERTARIANISM 81, 83 (Ronald Hamowy et al. eds., 2008). The countries that have had a Communist regime are: USSR (1917–1991), China (1949–present), Poland (1945–1990), East Germany (1949–1990), Hungary (1948–1989), Czechoslovakia (1948–1989), Yugoslavia (1946–1990), Albania (1944–1991), Bulgaria (1946–1990), North Korea (1948–present), Cuba (1959–present), North Vietnam (1954–1976), Vietnam (1976–present), Laos (1975–present), Cambodia (1975–1993), Ethiopia (1975–1991), Angola (1976–1993), Mozambique (1974–1994), Nicaragua (1979–1990), and Afghanistan (1978–1992). *Id.*

<sup>120</sup> See James Meernik, Eric L. Krueger & Steve C. Poe, *Testing Models of U.S. Foreign Policy: Foreign Aid During and After the Cold War*, 60 J. POL. 63, 78 (1998) (finding that “[n]ations that bordered Communist states were statistically more likely to receive aid and increased amounts of assistance during the Cold War”).

<sup>121</sup> See *Communism*, in THE ENCYCLOPEDIA OF LIBERTARIANISM, *supra* note 119, at 85.

<sup>122</sup> For our GDP data, we used imputed values of the Penn World Tables. ALAN HESTON, ROBERT SUMMERS & BETTINA ATEN, CTR. FOR INT’L COMPARISONS OF PROD., INCOME & PRICES AT THE UNIVERSITY OF PENNSYLVANIA, PENN WORLD TABLE VERSION 7.1, (Nov. 2012), available at [https://pwt.sas.upenn.edu/php\\_site/pwt\\_index.php](https://pwt.sas.upenn.edu/php_site/pwt_index.php); see also Spencer L. James et al., *Developing a Comprehensive Time Series of GDP Per Capita for 210 Countries from 1950 to 2015*, 10 POPULATION HEALTH METRICS, no. 12, 2012, at 1, 5–6, available at <http://www.pophealthmetrics.com/content/>

*U.S. Exports:* This variable equals the value in millions of U.S. dollars of the goods that the United States exported to the country requesting immunity in the decision year.<sup>123</sup>

*OECD Member:* We coded this variable as 1 (“Yes”) if the foreign state was a member of the Organization for Economic Cooperation and Development (OECD), which includes many of the world’s most economically powerful states, in the decision year and 0 (“No”) otherwise.<sup>124</sup>

#### d. *Foreign State’s Military Power*

The United States may have an interest in fostering the support of or good relations with foreign states that have a powerful military. A U.S. decisionmaker may view a grant of immunity as one way to foster these relationships, and a denial of immunity as potentially undermining them. As a measure of the foreign state’s military power, we used the variable *CINC*, which represents the Correlates of War Composite Index of National Capability score (CINC Score) for each country in the decision year.<sup>125</sup>

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pdf/1478-7954-10-12.pdf (updating the widely used Penn World Tables GDP Per Capita estimates by using statistical techniques to “impute” missing values from 1950 to the present). The advantage of the James data over other sources is that it allows a consistent GDP estimate for all observations in the FSI Dataset.

<sup>123</sup> Our data come from the Correlates of War Project Trade Data Set Codebook version 2.01. KATHERINE BARBIERI ET AL., CORRELATES OF WAR PROJECT TRADE DATA SET CODEBOOK, VERSION 2.01, available at <http://www.correlatesofwar.org/COW2%20Data/Trade/Trade.html> (last visited Nov. 7, 2014) (follow hyperlink under “Earlier Version” section); see also Katherine Barbieri, Omar M.G. Keshk & Brian M. Pollins, *Trading Data: Evaluating Our Assumptions and Coding Rules*, 26 CONFLICT MGMT & PEACE SCI. 471, 477-80 (2009), available at <http://cmp.sagepub.com/content/26/5/471> (introducing the Correlates of War Bilateral Trade dataset). This dataset provides estimates of the trade flows between pairs of countries in each year between 1870 and 2006. The data used here is taken from the “flow2” variable, where “importer” is the United States.

<sup>124</sup> See *Members and Partners: Current Membership*, OECD.ORG, <http://www.oecd.org/about/membersandpartners>, archived at <http://perma.cc/PDK8-5Y3E> (last visited Nov. 7, 2014) (noting that OECD members “include many of the world’s most advanced countries but also emerging countries like Mexico, Chile and Turkey”).

<sup>125</sup> Our data come from version 4.0 of the Correlates of War National Material Capabilities dataset. *National Material Capabilities (v4.0)*, CORRELATES OF WAR, <http://www.correlatesofwar.org/COW2%20Data/Capabilitites/nmc4.htm> (follow hyperlink under “Data Availability and Download” section) (last visited Nov. 7, 2014). This dataset covers the period from 1816 to 2007. The data used come from the *CINC* variable. This variable is a composite of six factors that measure a country’s material national capability: total population, urban population, military personnel, military expenditures, primary energy consumption, and iron and steel production. *Id.*; see also J. David Singer, Stuart Bremer & John Stuckey, *Capability Distribution, Uncertainty, and Major Power War, 1820–1965* (describing how the distribution of national capabilities contributes to the likelihood of war in foreign states), in *PEACE, WAR, AND NUMBERS* 19-48 (Bruce M. Russett ed., 1972).

e. *Foreign State's Political System*

The foreign state's political system is another factor that may influence foreign sovereign immunity decisions. According to liberal international law theory, legal relations between two liberal democracies differ systematically from legal relations between liberal and non-liberal democracies and between two non-liberal democracies.<sup>126</sup> Specifically, the "courts of liberal states handle cases involving other liberal states differently from the way they handle cases involving nonliberal states."<sup>127</sup> Critics of liberal international law theory reject the claim that U.S. courts relate differently to liberal democracies than to other regimes.<sup>128</sup> Moreover, the theory does not yield clear predictions about whether a U.S. court will be more or less likely to grant immunity to a democracy or non-democracy.<sup>129</sup> Nevertheless, if the theory is correct, then U.S. foreign sovereign immunity decisions should depend, at least in part, on whether the foreign state is a liberal democracy.

To assess this hypothesis, we created the variable *Democracy*. To do so, we used the Polity IV dataset, which rates governments on a scale from -10 (most autocratic) to +10 (most democratic).<sup>130</sup> Following conventional practice in international relations scholarship,<sup>131</sup> we coded foreign states as 1

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<sup>126</sup> See Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1917 (1992) ("Liberal internationalist theory locates the origins of differences in international behavior between liberal and nonliberal states in the actions of domestic political institutions.").

<sup>127</sup> *Id.*

<sup>128</sup> See generally José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183, 217 (2001) (arguing that regime type does not determine interactions by U.S. courts with other courts).

<sup>129</sup> See Burley, *supra* note 126, at 1923 ("The determining factor guiding the actual legal outcome [when liberal courts are called upon to adjudicate transnational disputes involving nonliberal states] will be the particular strategy adopted to mediate the tension between a preference for political rather than legal resolution and a desire to preserve judicial autonomy.").

<sup>130</sup> MONTY G. MARSHALL, TED ROBERT GURR & KEITH JAGGERS, POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2010 (2011), available at <http://www.systemicpeace.org/inscrdata.html> (follow the "Excel Series" hyperlink under the section "Polity IV: Regime Authority Characteristics and Transitions Dataset") (last visited Nov. 7, 2014). For each country between 1800 and 2010, the Polity IV dataset provides scores of how autocratic to democratic its government is. *Id.* The dataset is widely used in empirical work studying international relations and international law. The specific Polity IV variable used is the polity2 variable, which is a composite indicator of democracy and autocracy. *Id.*

<sup>131</sup> For more information on using this method to classify a state as a democracy, see Jason Lyall, *Do Democracies Make Inferior Counterinsurgents? Reassessing Democracy's Impact on War Outcomes and Duration*, 64 INT'L ORG. 167, 176–77 (2010) (describing the variable as "follow[ing] standard practice in international relations and treat[ing] democracy as a binary variable [by coding a regime] as a democracy if its Polity2 score is  $\geq 7$  in the Polity IV dataset" (footnote omitted)).



(“Yes”) if they had a Polity score of 7 or higher in the decision year, and as 0 (“No”) otherwise.

f. *U.S. Decisionmaker’s Ideological Preferences*

The decisionmaker’s ideological preferences are another political factor that may influence foreign sovereign immunity decisionmaking.<sup>132</sup> On the one hand, other things being equal, one might expect conservatives to be more likely than liberals to grant immunity. Prior scholarship suggests that conservatives have a more anti–forum shopping and “pro-defendant tilt,” and may generally more strongly disfavor litigation than liberals.<sup>133</sup> Moreover, conservative judges may, on average, have a stronger preference for an expansive norm of sovereignty (and hence sovereign immunity) than liberals. On the other hand, foreign state immunity is an international law principle involving deference to foreign states. If conservatives are, on average, less supportive of international law and less likely to defer to foreign interests than liberals, they may be less likely than liberals to grant immunity to foreign states.<sup>134</sup>

To assess this hypothesis, we created two variables. First, we created the variable *Decisionmaker’s Party* and coded it as 1 (“Republican”) if the State Department was the decisionmaker and the President in the year of the decision was Republican.<sup>135</sup> We also coded this variable as 1 if the decisionmaker was a judge nominated by a Republican president.<sup>136</sup> Otherwise, we coded *Decisionmaker’s Party* as 0 (“Democrat”).

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<sup>132</sup> In the social science literature on judicial decisionmaking, this theory is known as the “attitudinal model.” See generally SEGAL & SPAETH, *supra* note 101 (theorizing that justices make decisions based on policy preferences).

<sup>133</sup> See George D. Brown, *The Ideologies of Forum Shopping—Why Doesn’t a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 680–94 (1993) (investigating a possible connection between conservatism and forum shopping, pro-defendant actions and litigation and providing support for this connection but also alternate explanations).

<sup>134</sup> Cf. *Opinion Leaders Turn Cautious, Public Looks Homeward: America’s Place in the World*, PEW RESEARCH CTR. FOR THE PEOPLE AND THE PRESS (Nov. 17, 2005), <http://www.people-press.org/2005/11/17/opinion-leaders-turn-cautious-public-looks-homeward>, archived at <http://perma.cc/E NZ7-FTWQ> (finding that Republicans were less likely than Democrats to agree that the “U.S. should mind its own business internationally and let other countries get along the best they can on their own” and that the U.S. “should cooperate fully with the United Nations”).

<sup>135</sup> This coding is based on the assumption that, on average, the State Department’s legal advisor is more likely to be conservative if the President is a Republican.

<sup>136</sup> This is a common measure of judges’ ideological attitudes. See Tracey E. George & Lee Epstein, *On the Nature of Supreme Court Decision Making*, 86 AM. POL. SCI. REV. 323, 328 (1992) (using the party of the nominating president as a proxy for ideological attitudes). We obtained the data on nominating presidents from the *Biographical Directory of Federal Judges, 1789–present*, FEDERAL JUDICIAL CENTER, <http://www.fjc.gov/history/home.nsf/page/judges.html> (last visited Nov. 7, 2014), archived at <http://perma.cc/H8Y2-HDLJ>.

Second, for post-FSIA decisions only, we used the variable *Judicial Common Space*, which equals the Judicial Common Space score for the judge.<sup>137</sup> The score ranges from -1 (most liberal) to +1 (most conservative).<sup>138</sup> The Judicial Common Space score is “the state-of-the-art measure” of the ideological preferences of U.S. district court judges.<sup>139</sup> However, the Judicial Common Space measure, like the party of the nominating president, may underestimate the impact of judicial ideology.<sup>140</sup> Therefore, our results are “best interpreted as providing only a lower bound on [the impact of] ideology.”<sup>141</sup>

g. *Nationality of the Plaintiff*

Finally, the nationality of the plaintiff may influence foreign sovereign immunity decisions.<sup>142</sup> The State Department, though charged with the conduct of U.S. foreign relations, may nevertheless be less inclined to deny court access to a U.S. claimant than to a foreign claimant against a foreign

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<sup>137</sup> The source of the data is Christina L. Boyd, *Federal District Court Judge Ideology Data*, CHRISTINA L. BOYD (2010), <http://cLboyd.net/ideology.html> (last visited Nov. 7, 2014), archived at <http://perma.cc/8ZZJ-H5L8>.

<sup>138</sup> *Id.* Developed by judicial decisionmaking scholars, the Judicial Common Space scores are based on the NOMINATE Common Space scores that are widely used to measure the ideology of presidents and members of Congress, taking into account the practice of senatorial courtesies. See Lee Epstein, Andrew D. Martin, Jeffrey A. Segal & Chad Westerland, *The Judicial Common Space*, 23 J. L. ECON. & ORG. 303, 306 (2007) (discussing the history of the NOMINATE Common Space scores and their influence in developing the Judicial Common Space score); Michael W. Giles, Virginia A. Hettinger & Todd Peppers, *Picking Federal Judges: A Note on Policy and Partisan Selection Agendas*, 54 POL. RES. Q. 623, 631 (2001) (explaining the factors impacting the Judicial Common Space score). Specifically, in the *Judicial Common Space* data,

[i]f a judge is appointed from a state where the President and at least one home-state Senator are of the same party, the nominee is assigned the NOMINATE Common Space score of the home-state Senator (or the average of the home-state Senators if both members of the delegation are from the President's party). If neither home-state Senator is of the President's party, the nominee receives the NOMINATE Common Space score of the appointing president.

Epstein et al., *supra*, at 306.

<sup>139</sup> *Id.*

<sup>140</sup> See Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133, 170-71 (2009) (finding that using the party of the nominating president as a measure of judicial ideology is “systematically biased toward understating the impact of ideology” due to inherent inaccuracies).

<sup>141</sup> *Id.* at 171.

<sup>142</sup> The terrorism exception to immunity contained in the FSIA is tied to the citizenship of the claimant or victim. See 28 U.S.C. § 1605A(2)(ii) (2012) (requiring the claimant to be a national of the United States, a member of the armed forces, an employee of the U.S. government, or performing a U.S. government contract for a U.S. court to hear a claim against a foreign state based on this exception).

state. Prior scholarship provides support for this hypothesis in judicial decisionmaking.<sup>143</sup> At least one study, however, suggests that foreign claimants may actually fare better in U.S. courts.<sup>144</sup> To assess the hypothesis that a grant of immunity is less likely when a U.S. citizen is a plaintiff, we created the variable *U.S. Plaintiff*, and we coded it as 1 (“Yes”) if the plaintiff is a U.S. citizen and 0 (“No”) otherwise.<sup>145</sup>

Table 1 summarizes the variables used in our analysis, along with the sources of the data. Appendix A presents complete summary statistics.

Table 1: Variables in the FSI Dataset

Category	Variable	Values	Source
OUTCOME	<i>Decision</i>	0=immunity denied; 1=immunity granted	State Department Reports, court opinions
<b>LEGAL FACTORS</b>			
<i>Commercial Activity</i>	<i>Corporate Defendant</i>	0=no; 1=yes	State Department Reports, court opinions
<i>Territorial Connections</i>	<i>Commercial Activity</i>	0=no; 1=yes	State Department Reports, court opinions
	<i>U.S. Contacts</i>	0=no; 1=yes	State Department Reports, court opinions
<b>POLITICAL FACTORS</b>			
<i>Formal Relationship</i>	<i>U.S. Ally</i>	0=no alliance; 1=alliance	COW Formal Alliance Database
	<i>Diplomatic Representation</i>	0=no diplomatic representation; 1=diplomatic representation	COW Diplomatic Exchange Dataset

<sup>143</sup> See Utpal Bhattacharya, Neal E. Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625, 648 (2007) (finding that U.S. corporate defendants have a “home court advantage” and are less likely to lose in U.S. federal courts than foreign corporate defendants); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1504 (2003) (finding that U.S. parties are substantially more likely than foreign parties to prevail in patent litigation in U.S. courts, and concluding that U.S. judges and American juries exhibit a “xenophobic bias”).

<sup>144</sup> See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1139 (1996) (finding no pro-domestic party bias, and presenting evidence that foreign parties fare better than U.S. parties when they litigate in U.S. courts).

<sup>145</sup> If there were both U.S. and non-U.S. plaintiffs, we coded *U.S. Plaintiff* as 1 (“Yes”).

	<i>Troop Deployment</i>	0=U.S. troops not deployed; 1=U.S. troops deployed	Heritage Global U.S. Troop Deployment Data
<i>Political Importance</i>	<i>UNSC Member</i>	0=not UNSC member; 1=UNSC member	United Nations Records
	<i>Borders Communist</i>	0=does not border Communist state; 1=borders Communist state	Encyclopedia of Libertarianism
	<i>Communist State</i>	0=not Communist; 1=Communist	Encyclopedia of Libertarianism
<i>Economic Power</i>	<i>GDP Per Capita</i>	257 (min) to 51,450 (max) USD	Imputed Penn World Tables
	<i>U.S. Exports</i>	0 (min) to 176,300 (max) million USD	COW International Trade Dataset
	<i>OECD Member</i>	0=not OECD member; 1=OECD member	OECD Records
<i>Military Power</i>	<i>CINC Score</i>	0.0 to 0.20 (continuous scale)	COW National Material Capabilities Data
<i>Political System</i>	<i>Democracy</i>	0=not democratic; 1=democratic	Polity IV Project
<i>Decisionmaker's Ideology</i>	<i>Decisionmaker's Party</i>	0=Democrat; 1=Republican	Federal Judicial Center Bio Data
	<i>Judicial Common Space</i>	-1 (most liberal) to 1 (most conservative)	Boyd Federal District Court Judge Ideology Data
<i>Plaintiff's Nationality</i>	<i>U.S. Plaintiff</i>	0=no; 1=yes	State Department Reports, court opinions

### III. EVALUATING THE CLAIMS: FINDINGS

Using the FSI Dataset described in Part II, we now present the results of our empirical assessment of the FSIA's underlying comparative institutional competence claims. First, we analyze the State Department's foreign sovereign immunity decisions to assess the claim made by the FSIA's supporters that those decisions were influenced by political more than legal factors. Contrary to that claim, we do not find evidence of systematic political influences on the State Department's decisions, but we do find evidence of legal influences. Second, we analyze the U.S. district courts'

decisions to assess whether, as the FSIA's legislative history promised, the courts base their immunity decisions on legal rather than political factors. We do find evidence of legal influences on the courts' decisions, but we also find evidence of systematic political influences. Third, we analyze the two institutions' decisions together to assess whether, other things being equal, the transfer from the State Department to the courts enhanced court access for litigants in suits against foreign sovereigns by reducing the likelihood of immunity. We do not find evidence of a significant change.

Overall, these findings challenge the FSIA's motivating comparative institutional competence claims. Beyond foreign sovereign immunity, these findings suggest that the executive branch may be more institutionally capable of making sound foreign relations decisions than the conventional wisdom suggests, and that merely transferring foreign relations decisions to the judiciary does not ensure that those decisions will be free from political influences.

A. *Before the FSIA: Factors Influencing the State Department's  
Foreign Sovereign Immunity Decisions*

To assess the extent to which legal and political factors may have systematically influenced the State Department's foreign sovereign immunity decisions, we analyze those decisions using two statistical methods: simple bivariate logit regression analysis and multiple logit regression analysis. Logit analysis is the standard social science method for estimating the effects of hypothesized influences or "independent variables" (in our case, our hypothesized legal and political factors) on an outcome that has only two possible results (referred to as a "binary dependent variable"—in our case, a grant or a denial of immunity).<sup>146</sup> We use this method to estimate the effects of the legal and political variables discussed above on the probability that the State Department granted immunity.

Bivariate logit analysis does this while only examining a single variable (measuring the influence of a single legal or political factor),<sup>147</sup> whereas multivariate logit analysis does this while controlling for the influence of a number of other variables (representing multiple legal and political factors).<sup>148</sup> Bivariate analysis can efficiently detect possible influences of individual factors on immunity decisions, while multivariate analysis can often provide a more nuanced understanding by estimating the effect of

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<sup>146</sup> See ANDREW GELMAN & JENNIFER HILL, DATA ANALYSIS USING REGRESSION AND MULTILEVEL HIERARCHICAL MODELS 79 (2007).

<sup>147</sup> See *id.* at 79-81 (providing an example of a logistic regression using only one variable).

<sup>148</sup> See *id.* at 90-92 (providing a more complex example using multiple predictors or variables).

each individual factor taking into account the effects of other factors. When the results of bivariate but not multivariate analysis indicate that a particular factor has an influence (or vice versa), the evidence of influence is still important to consider but not as strong as when the results are consistent.

### 1. Bivariate Analysis: The Influence of Individual Legal and Political Factors

Figure 1 graphically presents the results of fifteen bivariate logit regressions that estimate the influence of a wide range of legal and political factors on foreign sovereign immunity decisionmaking.<sup>149</sup> Each box represents a separate regression.<sup>150</sup> The circles are estimates of the effects of the indicated legal and political variables on the likelihood of immunity when those variables change from 0 to 1 (for binary variables) or from their 25th to their 75th percentile values (for continuous variables).<sup>151</sup> Because no statistical estimate can be absolutely certain, we also include a line that indicates each estimate's 90% confidence interval: in 90% of applications of the same sampling procedure, the actual effect will lie within that interval.<sup>152</sup> The circle and line are solid when there is at least 90% confidence of a

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<sup>149</sup> Traditional regression tables for all regression results are presented in Appendix B. For a defense of presenting regression results graphically, see generally Jonathan P. Kastellec & Eduardo L. Leoni, *Using Graphs Instead of Tables in Political Science*, 5 PERSP. ON POL. 755 (2007) (arguing that graphs increase clarity and facilitate reader understanding).

<sup>150</sup> All regressions conducted for this project were done using the statistical package "Zelig" for R. See generally Kosuke Imai, Gary King, & Olivia Lau, *Toward a Common Framework for Statistical Analysis and Development*, 17 J. COMPUTATIONAL & GRAPHICAL STAT. 892 (2008) (summarizing the structured aspects of "Zelig"); Gary King, *Zelig: Everyone's Statistical Software*, GARY KING, <http://gking.harvard.edu/zelig> (last visited on Nov. 7, 2014), archived at <http://perma.cc/G4VN-2QVE>.

<sup>151</sup> For binary explanatory variables, the estimated effect is the simulated first difference for the variable moving from 0 to 1. For continuous explanatory variables, the estimated effect is the simulated first difference for the variable moving from its 25th to its 75th percentile values. For an explanation of how and why first differences are simulated, see Gary King, Michael Tomz, & Jason Wittenberg, *Making the Most of Statistical Analyses: Improving Interpretation and Presentation*, 44 AM. J. POL. SCI. 347, 351 (2000). For a technical explanation of estimating first differences to interpret logit regression, see GARY KING, UNIFYING POLITICAL METHODOLOGY: THE LIKELIHOOD THEORY OF STATISTICAL INFERENCE 107-08 (1998).

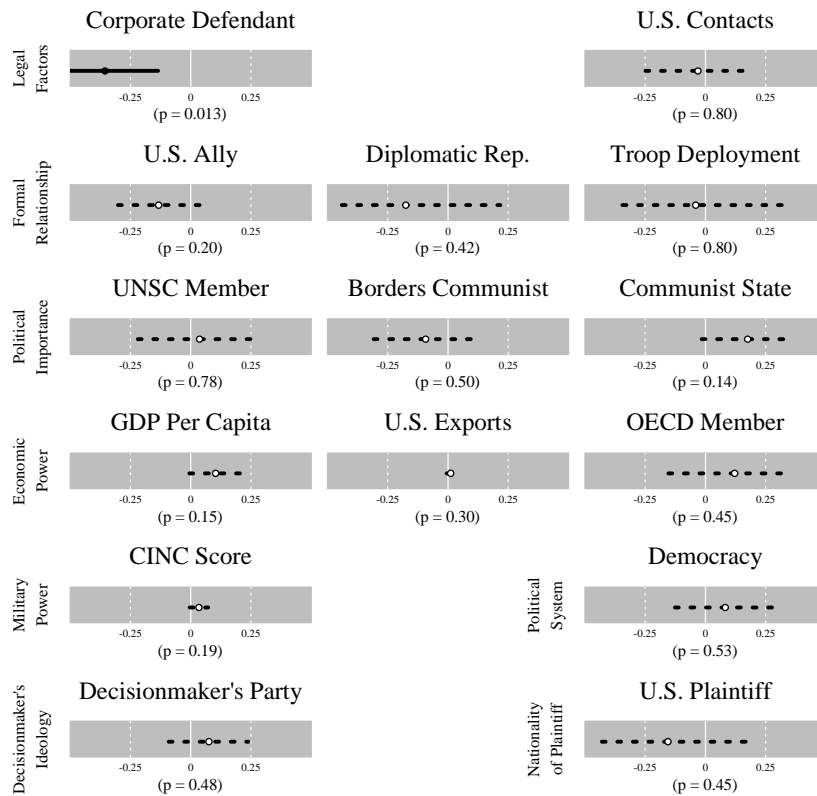
<sup>152</sup> See Epstein & King, *supra* note 92, at 50 & n.145 (noting that uncertainty is inherent in all statistical methods of inference, and explaining that confidence intervals communicate the extent of this uncertainty by indicating that, for a 95% confidence interval, the true population mean "will be captured within the stated confidence interval in 95 of 100 applications of the same sampling procedure"). Many studies use a 95% confidence interval. *Id.* However, it is acceptable to use a 90% confidence interval; the key is that the level of uncertainty must be communicated clearly. *Id.* at 50. Moreover, other empirical legal scholarship has used a 90% confidence interval. See, e.g., Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1082 n.143 (1998); Adam S. Chilton,

positive or negative effect on the likelihood of immunity. Otherwise, the circle is open and the line is dotted. Thus, circles show the estimated percentage change in the likelihood of immunity for each variable, black lines to the left of zero mean that the variable indicates a statistically significant lower likelihood of immunity, and black lines to the right of zero indicate a statistically significant higher likelihood of immunity.

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*The Influence of International human Rights Agreements on Public Opinion: An Experimental Study*, 15 CHI. J. INT'L L. 110, 127 (2014); Lee Epstein, Daniel E. Ho, Gary King & Jeffery A. Segal, *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 73 (2005); Jeffrey L. Fisher, *A Clinic's Place in the Supreme Court Bar*, 65 STAN. L. REV. 137, 153 n.48 (2013); Thomas J. Forr, *Want Less Ideology on the Federal Bench? Pay Judges More*, 158 U. PA. L. REV. 859, 883-84 (2010).

Figure 1: Estimated Effects of Legal and Political Factors on Probability of Immunity (State Department, Bivariate Analysis)<sup>153</sup>



<sup>153</sup> This figure presents bivariate logit estimates of the effects of individual legal and political factors on the likelihood of immunity in the State Department's foreign sovereign immunity decisions. Specifically, in this figure and the regression figures that follow, the circles are estimates of the effects of the indicated legal and political variables on the likelihood of immunity in State Department decisions when those variables change from 0 to 1 (for binary variables) or from their 25th to 75th percentile values (for continuous variables). The lines are 90% confidence intervals. The circles and lines are solid when the 90% confidence interval does not cross zero. Otherwise, circles are open and lines are dotted.



The results do not reveal evidence that political factors systematically influenced the State Department's immunity decisions. The only variable that achieves statistical significance at the 90% level is a legal variable, *Corporate Defendant*. In cases where the foreign state defendant was a corporate entity, the State Department was an estimated 36% less likely to grant immunity.<sup>154</sup> As explained above, customary international law reflected, and the State Department officially recognized, the restrictive theory of foreign sovereign immunity, according to which foreign states are not immune from suits based on their commercial activity.<sup>155</sup> The negative effect of the *Corporate Defendant* variable suggests that the prevailing legal standard did indeed systematically influence the State Department's immunity decisions: immunity was less likely when the foreign state was a corporate entity (and thus presumably engaged in commercial activity).

The fourteen other variables presented in Figure 1 do not have a statistically significant influence on the likelihood of immunity. This suggests that formal relationships, political importance, economic power, and military power did not systematically affect the State Department's immunity determinations. This was true for the variables presented in Figure 1 and for a range of other political variables that we coded as part of this project.<sup>156</sup> Although these results do not prove that there were no political influences on the State Department's immunity decisions, they challenge the conventional account by suggesting that any such influences were not consistent and systematic.<sup>157</sup>

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<sup>154</sup> The  $p$ -value of the statistic is 0.01. The result is the same when including the thirty cases dropped from our dataset because the foreign state either withdrew its request or the State Department did not respond. See *supra* subsection II.B.1. When including these cases, *Corporate Defendant* predicts a 35% lower likelihood of immunity ( $p$ -value $\leq$ 0.01).

<sup>155</sup> See *supra* Section I.B.

<sup>156</sup> We also tested whether a country was more likely to receive a suggestion of immunity if it was a member of the North Atlantic Treaty Organization, European Union, General Agreement on Tariffs and Trade, or World Trade Organization, or a recipient of U.S. economic or military aid. None of these variables were statistically significant predictors of suggestions of immunity at the 0.10 level.

<sup>157</sup> These results are also robust to including the thirty cases that were dropped from our dataset. See *supra* subsection II.B.1. Only one variable, *Communist State*, achieves statistical significance after re-estimating the regressions presented in Figure 1 when including these additional cases. *Communist State* predicts a 21% increased likelihood of receiving immunity ( $p$ -value=0.05) when these cases are included.

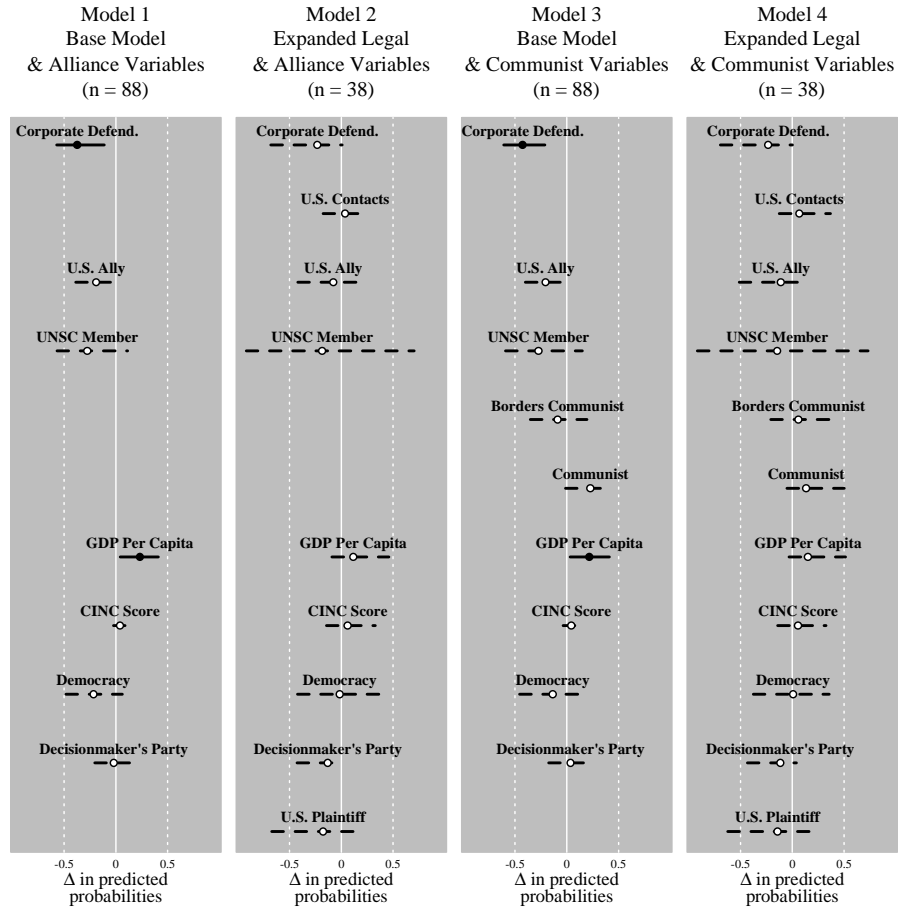
## 2. Multivariate Analysis: The Combined Influence of Multiple Legal and Political Factors

Although the bivariate analysis did not reveal systematic political influences, it is possible that some political influences may become apparent after controlling for the effects of other variables. To explore this possibility, we used multivariate logit regression, which controls for a range of political and legal factors simultaneously. The results are presented in Figure 2. The figure presents four separate regression analyses or “models.” The circles are estimates of the effects of the indicated legal and political variables on the likelihood of immunity when those variables change from 0 to 1 (for binary variables) or from their 25th to 75th percentile values (for continuous variables), while all other variables are held constant at their mean.<sup>158</sup> As with our bivariate analyses, circles and lines are solid when there is at least 90% confidence of a positive or negative effect on the likelihood of immunity. Otherwise, the circles are open and the lines are dotted.

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<sup>158</sup> See *supra* note 151.

Figure 2: Estimated Effects of Legal and Political Factors on Probability of Immunity (State Department, Multivariate Analysis)<sup>159</sup>



Model 1 includes the legal variable *Corporate Defendant*, the formal relationship variable *U.S. Ally*, the political importance variable *UNSC Member*, the economic power variable *GDP Per Capita*, the military power variable *CINC*, the political system variable *Democracy*, and the decisionmaker's

<sup>159</sup> This figure presents multivariate logit estimates of the effects of each indicated legal and political variable on the likelihood of immunity in the State Department's foreign sovereign immunity decisions, while holding other variables constant at their means.

ideology variable *Decisionmaker's Party*. Model 2 includes these same variables, but adds the variables *U.S. Contacts* and *U.S. Plaintiff*. Model 3 contains the same variables as Model 1, but adds the variables *Borders Communist* and *Communist State*. Finally, Model 4 contains all of these variables. Unfortunately, Models 2 and 4 contain only a small number of observations (thirty-eight) due to the lack of information about U.S. contacts and the plaintiff's nationality for many State Department decisions. This reduces these models' sensitivity to the effects of legal and political factors.

Consistent with the bivariate results, there is evidence that legal factors influenced the State Department's decisions. *Corporate Defendant* has a negative effect on the likelihood of immunity in all four multivariate models. The effect is statistically significant in Models 1 and 3, and barely misses significance at the 0.1 level in Models 2 and 4.<sup>160</sup>

In contrast, the results provide little evidence that political factors systematically influenced the State Department's immunity decisions. However, there is some evidence that as the foreign state's *GDP Per Capita* increases, the likelihood of immunity increases. This effect is statistically significant in Models 1 and 3. The other variables designed to assess whether the State Department was systematically rewarding allies did not achieve statistical significance in any of the model specifications. This is not only true of the models presented, but also for a range of alternative models that we investigated.<sup>161</sup>

Overall, the results of these bivariate and multivariate logit analyses suggest that at least one key legal factor—*Commercial Activity*—influenced the State Department's foreign sovereign immunity decisions.<sup>162</sup> On the other hand, our analyses do not reveal consistent evidence of systematic political influences on the State Department's foreign sovereign immunity decisions. This runs counter to the perceptions expressed in the FSIA's legislative history.<sup>163</sup> Of course, the absence of systematic influences does not preclude the possibility that political factors influenced certain individual decisions. Nevertheless, our analysis raises doubts about the

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<sup>160</sup> For Models 2 and 4, the *p*-value for *Corporate Defendant* is 0.12.

<sup>161</sup> This includes adding in the thirty cases where the foreign state withdrew its request for immunity or the State Department did not respond.

<sup>162</sup> Another legal variable, *U.S. Contacts*, does not have a significant effect in our analyses of immunity decisions. However, because territorial connections were considered as part of an independent judicial analysis of personal jurisdiction in the pre-FSIA period—rather than incorporated into the immunity analysis as it is under the FSIA—we do not interpret the lack of an effect as an indication that the State Department was neglecting a legal factor that it should have considered.

<sup>163</sup> See *supra* Sections I.B–C.

FSIA's underlying assumption that the State Department was insufficiently competent to make immunity decisions based on legal rather than political factors, and that a transfer of authority to the judicial branch was necessary to depoliticize foreign sovereign immunity decisionmaking. This is one side of the comparative institutional competence equation.

B. *After the FSIA: Factors Influencing the Courts'*  
*Foreign Sovereign Immunity Decisions*

The other side of the equation is the competence of the judicial branch. The FSIA was motivated not only by the perception that the State Department's foreign sovereign immunity decisions were excessively influenced by political rather than legal factors—a perception, as we have just seen, that may have been exaggerated—but also by a comparative institutional competence claim that the judiciary would be better able to make immunity decisions based on law, not politics. We empirically assess the validity of this claim by applying the same methods used above. While we find evidence of legal influences for certain types of foreign sovereign immunity decisions by the U.S. district courts, we also find strong evidence of political influences. Thus, these findings—together with our findings regarding the State Department presented above—do not support the claim that the courts are more institutionally competent than the State Department to make immunity decisions independent from political factors.

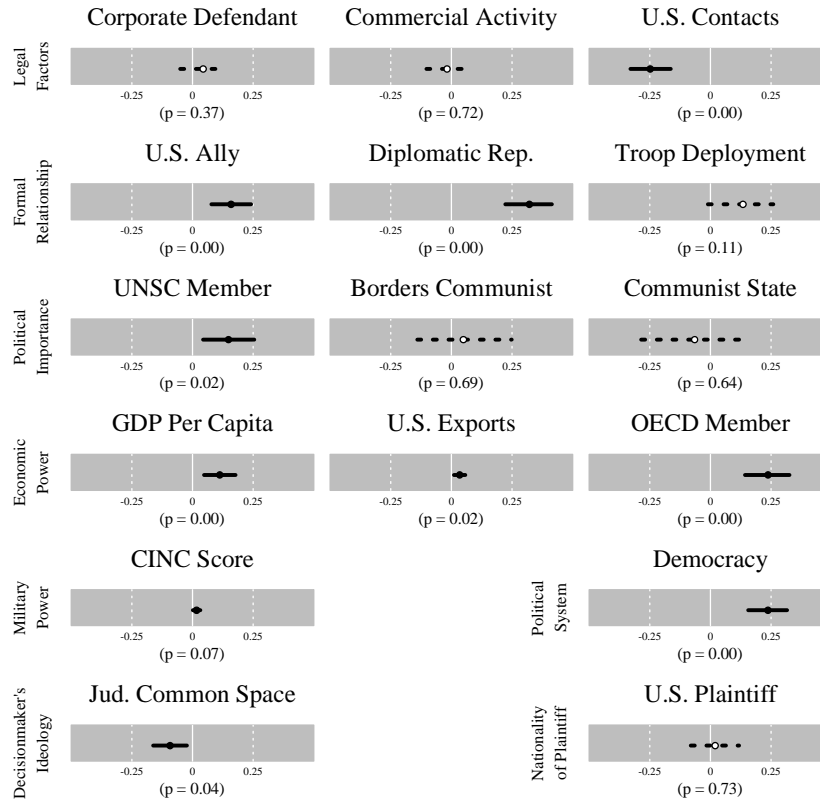
1. Bivariate Analysis: The Influence of Individual  
Legal and Political Factors

We again begin with bivariate analysis to explore the potential influences of individual legal and political factors on immunity decisions. Figures 3A, 3B, and 3C graphically depict the results of sixteen bivariate logit regressions that estimate the effects of legal and political variables on the likelihood that a U.S. district court will grant immunity.

Figure 3A analyzes all district court decisions in the FSI Dataset together. One legal factor—*U.S. Contacts*—has the expected negative effect on the likelihood of immunity. However, while the bivariate regression results for the State Department's decisions did not reveal evidence of systematic political influences, the same cannot be said of the U.S. district courts' decisions. A wide range of political factors appear to influence outcomes: *U.S. Ally*, *Diplomatic Representation*, *UNSC Member*, *GDP Per Capita*, *U.S. Exports*, and *OECD Member* are all associated with states being between 10% and 30% more likely to receive a grant of sovereign immunity. In addition,

*Judicial Common Space* has a statistically significant negative effect on the likelihood of immunity, suggesting that more conservative judges are less likely to grant immunity than more liberal judges.

Figure 3A: Estimated Effects of Legal and Political Factors on Probability of Immunity (Courts, Bivariate Analysis, All Decisions)<sup>164</sup>



The commercial activity exception is the FSIA’s most frequently litigated exception to immunity.<sup>165</sup> The FSIA defines the scope of the exception with

<sup>164</sup> This figure presents bivariate logit estimates of the effects of individual legal and political factors on the likelihood of immunity in the U.S. district courts’ foreign sovereign immunity decisions.

<sup>165</sup> See BERMANN, *supra* note 103, at 132 (explaining that “[b]y any measure,” the commercial activity exception is the FSIA’s “principal exception” to immunity). Of the 381 district court decisions in the FSI Dataset, 221 (58.0%) are commercial activity exception decisions.

some specificity.<sup>166</sup> It provides that “[a] ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act.”<sup>167</sup> It does not define the term “commercial” other than to specify that “[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”<sup>168</sup> The Supreme Court, however, has concluded that a state engages in “commercial activity” within the meaning of the FSIA when it “acts, not as regulator of a market, but in the manner of a private player within it.”<sup>169</sup> Although confusion can arise in specific cases about the commercial character of a foreign state’s activity, the Supreme Court’s clarification provides useful guidance for the lower courts.<sup>170</sup> Therefore, it is possible that foreign sovereign immunity decisions involving commercial activity will differ from other foreign sovereign immunity decisions. In particular, insofar as the number of commercial activity decisions has allowed the common law governing the commercial activity exception to develop more than the common law governing the FSIA’s other exceptions to immunity, judges may be more doctrinally constrained when deciding that issue: legal influences may be stronger and political influences may be weaker in commercial activity exception decisions than other decisions.<sup>171</sup>

Figures 3B and 3C explore this possibility. Figure 3B presents bivariate logit regression results only for U.S. district court decisions other than those in which the issue was whether the commercial activity exception

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<sup>166</sup> See 28 U.S.C. § 1605(a)(2) (2012) (requiring two conditions to be satisfied for the exception to apply: the foreign state’s activity must be “commercial” and there must be some territorial nexus to the United States).

<sup>167</sup> *Id.* § 1603(d) (2012).

<sup>168</sup> *Id.*

<sup>169</sup> *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992). The Court further explained:

[T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in “trade and traffic or commerce.”

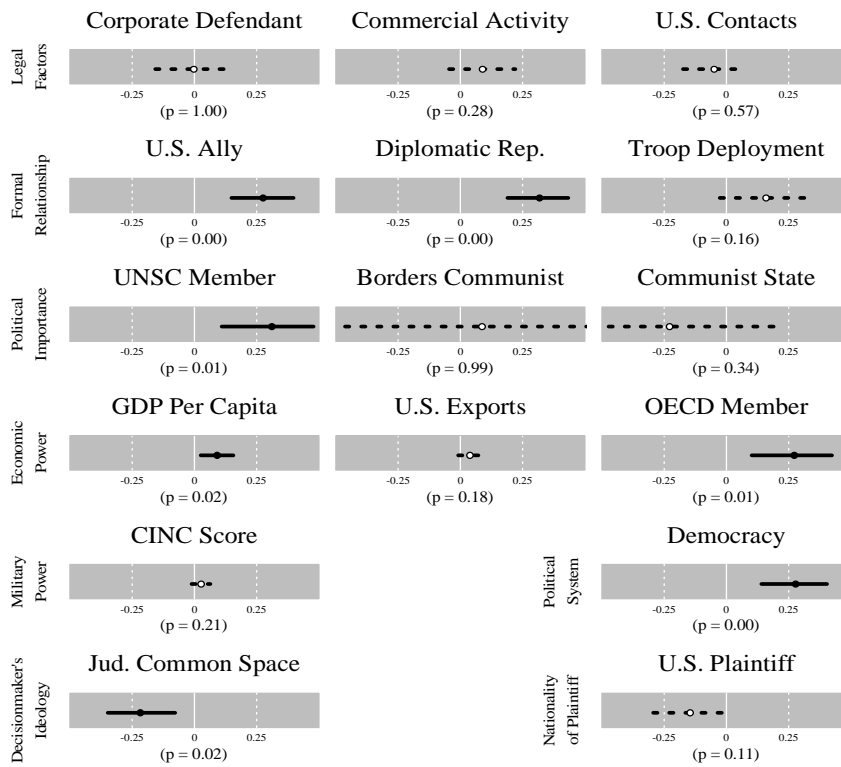
*Id.*

<sup>170</sup> See Working Grp. of the Am. Bar Ass’n, *Reforming the Foreign Sovereign Immunities Act*, 40 COLUM. J. TRANSNAT’L L. 489, 552 (2002) (suggesting that there is no need for statutory clarification given the Supreme Court’s guidance).

<sup>171</sup> See Andrew Eggers & Arthur Spirling, *Legal Ambiguity and Judicial Bias: Evidence from Electoral Corruption Trials in 19th-Century Britain* 2-3 (July 1, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2099025> (arguing that increasing legal clarity reduces bias in judicial decisionmaking).

applies. None of the legal variables have statistically significant effects on the likelihood of immunity, but a variety of political variables do have significant effects, including *U.S. Ally*, *Diplomatic Representation*, *UNSC Member*, *GDP Per Capita*, *OECD Member*, *Democracy*, and *Judicial Common Space*.

Figure 3B: Estimated Effects of Legal and Political Factors on Probability of Immunity (Courts, Bivariate Analysis, Non-Commercial Activity Decisions Only)<sup>172</sup>

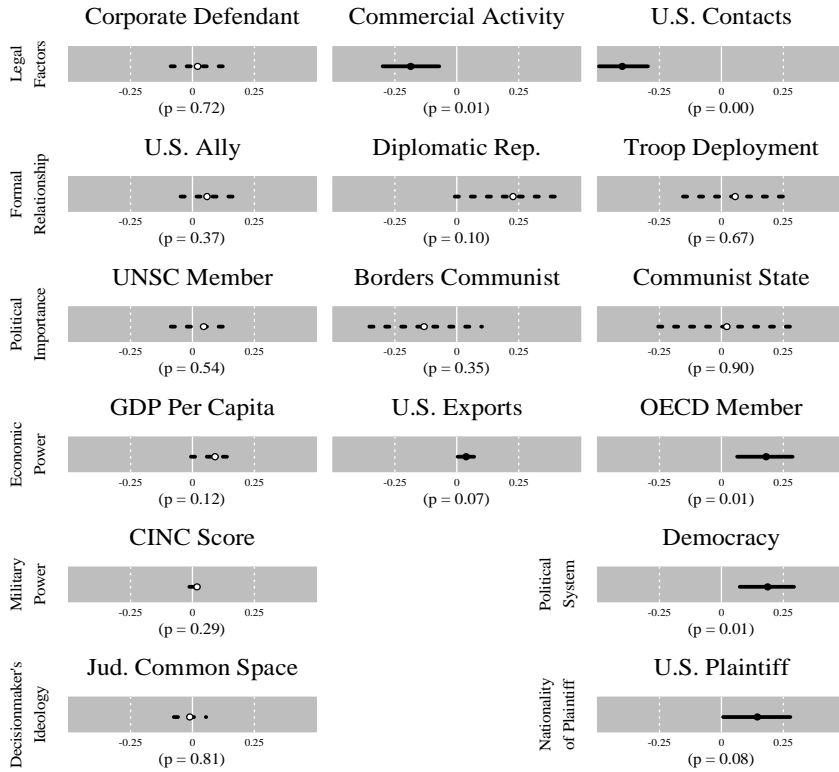


<sup>172</sup> This figure presents bivariate logit estimates of the effects of individual legal and political factors on the likelihood of immunity in the U.S. district courts' foreign sovereign immunity decisions (other than commercial activity exception decisions).



In contrast, Figure 3C indicates that two legal factors associated with the commercial activity exception—*Commercial Activity* and *U.S. Contacts*—have the expected negative effects on the likelihood of immunity in district court decisions in which the issue is whether the commercial activity exception applies. Consistently with the FSIA's commercial activity exception, granting immunity is less likely (since the exception is likely to apply) when the plaintiff's claim is based on the foreign state's commercial activity and when that activity has territorial connections to the United States. Although there continues to be some evidence of political effects (both *OECD Member* and *Democracy* have statistically significant positive effects), these effects are more limited than in Figure 3B. These results suggest a more nuanced assessment of the FSIA's underlying comparative institutional competence claim: while the courts may not be completely immune from political influences in foreign sovereign immunity decisionmaking, they are more constrained by legal factors and less likely to base their decisions on political factors in doctrinally well-developed areas such as the commercial activity exception.

Figure 3C: Estimated Effects of Legal and Political Factors on Probability of Immunity (Courts, Bivariate Analysis, Commercial Activity Decisions Only)<sup>173</sup>



## 2. Multivariate Analysis: The Combined Influence of Multiple Legal and Political Factors

To further assess the legal and political factors influencing the district courts' foreign sovereign immunity decisions, we again used multivariate logit analysis. To facilitate comparison to our analysis of the State Department's

<sup>173</sup> This figure presents bivariate logit estimates of the effects of individual legal and political factors on the likelihood of immunity in the U.S. district courts' commercial activity exception decisions.

decisions, the four models presented in Figure 4A mirror the four models presented in Figure 2, with one exception: we use *Judicial Common Space* instead of *Decisionmaker's Party* because the former is considered a more accurate measure of judges' political ideologies.<sup>174</sup>

Figure 4A contains mixed evidence of the influence of the legal and political factors over courts' immunity decisionmaking during the post-FSIA period. For the legal factors, the variable *Corporate Defendant* does not achieve statistical significance in any of the four models. This stands in contrast to the State Department's decisions, where the effect of *Corporate Defendant* was associated with a statistically significant lower likelihood of immunity in the two models estimated with the complete data.<sup>175</sup> However, the *U.S. Contacts* variable is statistically significant and associated with countries being an estimated 36% less likely to receive immunity in Model 2 and 58% less likely in Model 4.

For the political factors, the variables *GDP Per Capita*, *Democracy*, *Judicial Common Space*, and *U.S. Plaintiff* all achieve statistical significance in at least one model. Specifically, there is some evidence, albeit not consistent evidence, that higher GDP per capita is associated with a higher likelihood of immunity (Models 3 and 4), the courts are more likely to grant immunity to democracies than non-democracies (Models 1 and 2), conservative judges are less likely than liberal judges to grant immunity (Model 2), and judges are more likely to grant immunity when there is a U.S. plaintiff (Models 2 and 4).<sup>176</sup>

It is possible that one reason political effects are more apparent in our analysis of U.S. district court decisions than in our analysis of State Department decisions is that there are more district court decisions in the FSI Dataset. This makes our analysis of those decisions better able to detect effects. Additionally, some variables capturing political relationships that were statistically significant in the bivariate district court results—like *U.S. Ally*—are no longer statistically significant after conditioning on the political and legal factors used in the multiple logit analysis. Nevertheless, the results provide additional evidence of some of the political effects apparent in the bivariate analysis. This further suggests that, contrary to the FSIA's

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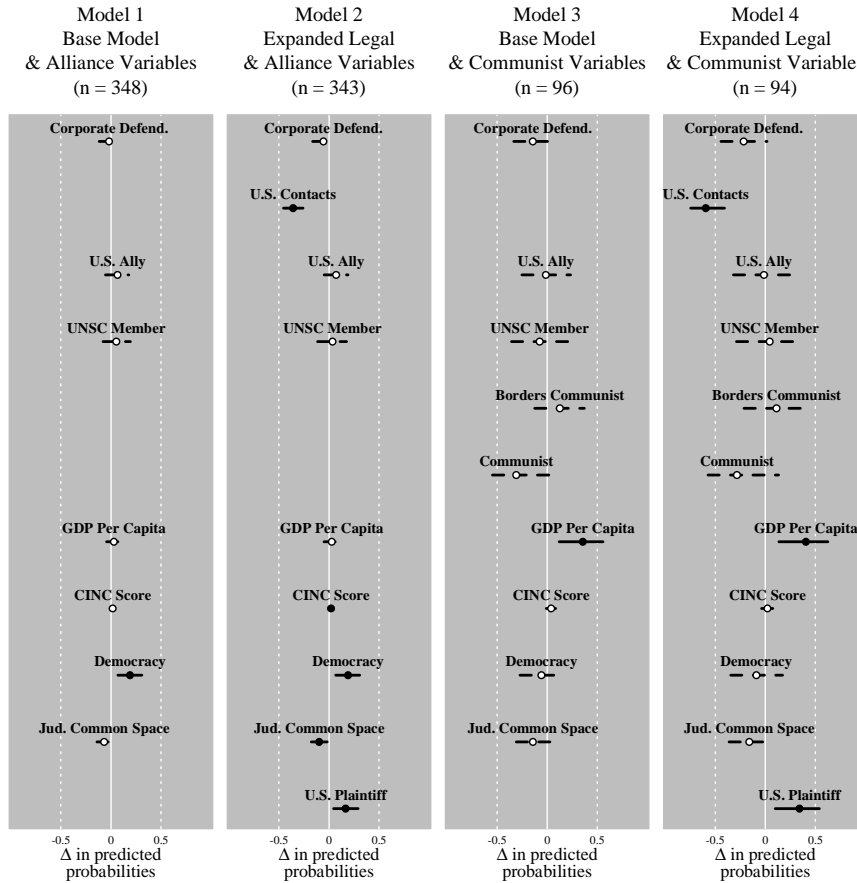
<sup>174</sup> This is because after the passage of the FSIA, district court judges made sovereign immunity decisions, and *Judicial Common Space* is a preferred measure of judicial ideology. See *supra* subsection II.B.3.

<sup>175</sup> See *supra* Figure 2, Models 1 & 3. When we replaced *Corporate Defendant* with *Commercial Activity*, the results did not significantly change.

<sup>176</sup> *CINC Score* is also statistically significant in Model 2, but its substantive effect is less than a 2% change in the likelihood of immunity.

underlying comparative institutional competence claim, political factors do significantly influence the judiciary’s immunity decisions.

Figure 4A: Estimated Effects of Legal and Political Factors on Probability of Immunity (Courts, Multivariate Analysis)<sup>177</sup>



In Figure 4B, we further explore potential differences between the U.S. district courts commercial activity exception decisions and their other immunity decisions. Figure 4B separates the U.S. district court decisions

<sup>177</sup> This figure presents multivariate logit estimates of the effects of each indicated legal and political variable on the likelihood of immunity in the U.S. district courts’ foreign sovereign immunity decisions, while holding other variables constant at their means.

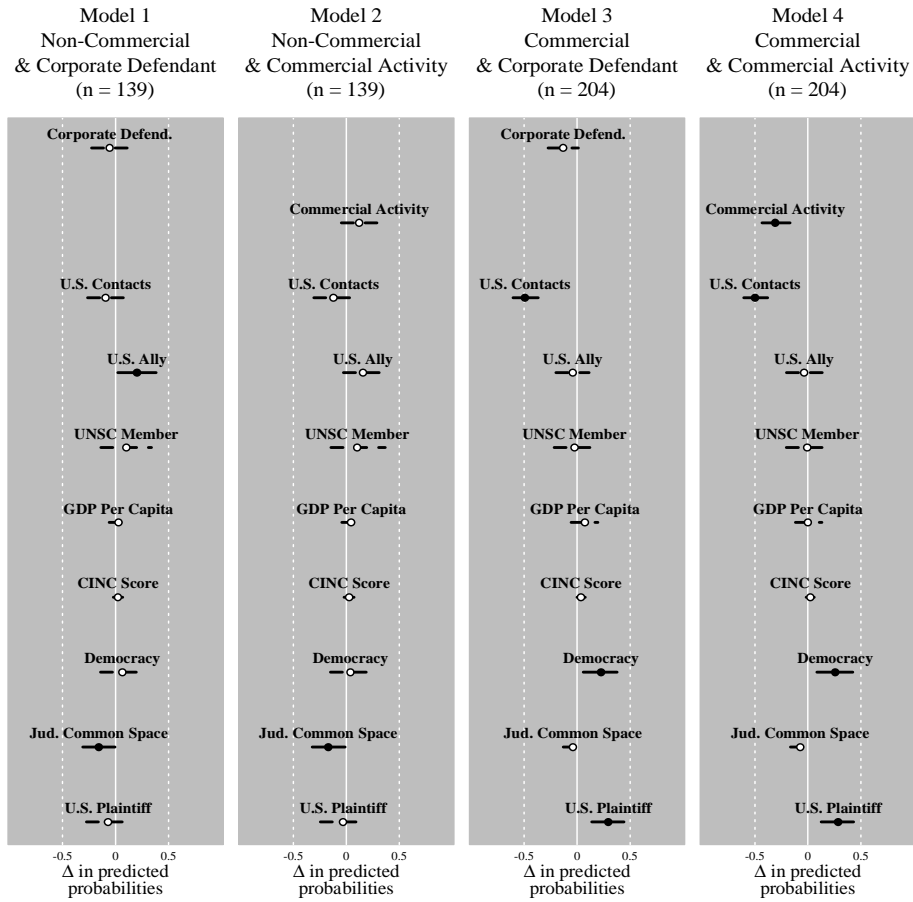
into two groups: decisions other than those where the issue was whether the commercial activity exception applied (Models 1 and 2), and decisions where the issue was whether the commercial activity exception applied (Models 3 and 4). As we hypothesized above, with more developed doctrine to guide judicial decisionmaking, legal factors may be particularly important, and political factors relatively constrained, in commercial activity decisions compared to other decisions.

Consistent with our expectations and with the bivariate results presented above,<sup>178</sup> the legal variables *Corporate Defendant*, *Commercial Activity*, and *U.S. Contacts* do not have statistically significant effects on the likelihood of immunity in non-commercial activity exception decisions (Models 1 and 2). Both *U.S. Contacts* and *Commercial Activity*, however, have the expected negative effects on the likelihood of immunity in commercial activity exception decisions (Models 3 and 4). Regarding political factors, the results are mixed. While there is some indication of political effects in non-commercial activity decisions (*U.S. Ally* has a positive effect in Model 1, and *Judicial Common Space* has a negative effect in Models 1 and 2), there are also political effects in the commercial activity decisions (*Democracy* has a positive effect in Models 3 and 4, and *GDP Per Capita* has a positive effect in Model 4).

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<sup>178</sup> See Figures 3B and 3C.

Figure 4B: Estimated Effects of Legal and Political Factors on Probability of Immunity (Courts, Multivariate Analysis, Commercial Activity Exception Decisions and Other Decisions Compared)<sup>179</sup>



<sup>179</sup> This figure presents multivariate logit estimates of the effects of each indicated legal and political variable on the likelihood of immunity in the U.S. district courts' foreign sovereign-immunity decisions (only decisions other than commercial activity exception decisions in Models 1 and 2, and only commercial-activity-exception decisions in Models 3 and 4), while holding other variables constant at their means.

### 3. Legal and Political Influences on the U.S. District Courts' Immunity Decisions: Interpreting the Evidence

Together, the bivariate and multivariate analyses provide strong evidence that political factors systematically influence the U.S. District Courts' foreign sovereign immunity decisions. However, because some of the political influences evaluated are related to each other and are statistically significant in some but not all models—for example, *GDP Per Capita*, *Democracy*, and *U.S. Ally*—it is difficult to specify precisely which factor is primarily responsible for the apparent influence. Therefore, while our analysis indicates political influences, we cannot isolate those particular political influences with confidence. Nevertheless, the basic implication is that, other things being equal, U.S. district courts are more likely to grant immunity to wealthy, democratic allies than to other nations.

We can be more confident about the discrete influences of judicial ideology and the plaintiff's nationality on the courts' immunity decisions. The hypothesis that conservative judges have a more anti-forum shopping and pro-defendant tilt than liberal judges would suggest that conservative judges would be *more* likely to grant immunity.<sup>180</sup> But *Judicial Common Space* is negative and statistically significant in both Models 1 and 2 of Table 4B, suggesting that, all else being equal, conservative judges are instead *less* likely to grant immunity than liberal judges in non-commercial activity exception cases. This finding is somewhat puzzling and deserves further investigation. However, another hypothesis might plausibly explain it: conservative judges may be less supportive of international law doctrines like foreign sovereign immunity and less deferential to the interests of foreign nations than liberal judges.<sup>181</sup> The effect of judicial ideology appears to dissipate in the commercial activity exception cases—perhaps, as we hypothesize, because the relative doctrinal clarity of that exception constrains judges in a way that leaves less room for ideological influence.

The hypothesis that judges in transnational disputes tend to favor U.S. parties over foreign parties would suggest that judges are *less* likely to grant immunity when there is a U.S. plaintiff.<sup>182</sup> But *U.S. Plaintiff* has a positive and statistically significant effect in Models 2 and 4 of Table 4A, which uses the full dataset. The effect is not statistically significant in Models 1 and 2 of Table 4B, which analyze only noncommercial activity exception cases. But the effect is again positive and statistically significant in Models 3 and 4 of

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<sup>180</sup> See *supra* subsection II.B.3.

<sup>181</sup> See *id.*

<sup>182</sup> See *id.*

Table 4B, which analyze only commercial activity exception cases. This suggests that, in cases in which the issue is whether the commercial activity exception applies, the U.S. district courts are *more* likely to grant immunity—and thereby deny court access—when the plaintiff is a U.S. citizen than when the plaintiff is a foreign citizen.

Does this suggest a “bias” against U.S. plaintiffs in these cases? Perhaps. But a more plausible explanation is case selection. Foreign parties are generally more reluctant than U.S. parties to litigate in U.S. courts due to, among other things, the costs of litigating far away from home. This reluctance makes foreign plaintiffs more careful to select only the strongest claims to bring in U.S. courts.<sup>183</sup> If this theory is correct, then U.S. plaintiffs’ arguments against immunity (based, for example, on the commercial activity exception) are likely to be weaker on the merits, on average, than those of foreign plaintiffs, thus making U.S. plaintiffs less likely to convince U.S. judges to deny immunity and allow court access.

In summary, after the FSIA’s transfer of the foreign sovereign immunity decisionmaking function from the State Department to the courts, there has not been a simple relationship between law and politics on the one hand, and foreign sovereign immunity decisions on the other hand. The relationship is instead complex and contingent. Our findings provide evidence of several political influences on the U.S. district courts’ immunity decisions. Other things being equal, the positive effects of *GDP Per Capita*, *Democracy*, and *U.S. Ally* suggest that the courts are more likely to grant immunity to wealthy, democratic allies than to other nations. The negative effect of *Judicial Common Space* indicates that conservative judges are less likely to grant immunity than liberal judges. It also appears that nationality matters: there is evidence that judges are more likely to grant immunity in cases involving a U.S. plaintiff. However, this is likely due to case selection rather than bias.

In contrast, there is also evidence that legal factors have an influence. In particular, two legal factors—*Commercial Activity* and *U.S. Contacts*—affect the courts’ foreign sovereign immunity decisions, at least in commercial activity exception cases, which is where we would expect those factors to have an influence. More subtly, it appears that the relative doctrinal clarity of the commercial activity exception may limit ideological influences, as the effect of *Judicial Common Space* is not statistically significant in commercial activity exception cases.

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<sup>183</sup> This case selection theory is developed in Clermont & Eisenberg, *supra* note 144, at 1133-34, where the authors explain that foreign litigants “persist in the cases that they are most likely to win,” causing foreigners to often have a “stronger hand.”



This evidence suggests that the FSIA's transfer of foreign sovereign immunity decisionmaking from the State Department to the courts has not realized its promise of depoliticizing these decisions—if these decisions were systematically politicized in the State Department in the first place. If the goal was to take politics out of immunity decisionmaking, the FSIA's transfer of that function to the courts was at best a partial, but not a complete, success. That in itself is arguably a considerable accomplishment of the FSIA's experiment in institutional choice.

### C. *The FSIA and the Likelihood of Immunity*

In addition to the goal of depoliticizing foreign sovereign immunity decisionmaking, the FSIA was intended to improve court access for suits against foreign states.<sup>184</sup> Has the FSIA accomplished this? Evidence of systematic differences in the likelihood of immunity in the pre- and post-FSIA periods would support the claim that institutional differences matter—a claim underlying both sides of the comparative institutional competence debate. Observed differences would also improve understanding of *how* institutional differences matter. The absence of such evidence might suggest a need to reconsider, or at least refine, existing comparative institutional competence claims.

In this Section, we present our analysis of the effect of the passage of FSIA on the likelihood of immunity. First, we present the data on the overall rates of immunity during the two periods. Second, we attempt to control for factors that may have influenced immunity rates during both periods (other than the FSIA itself) using multivariate logit analysis.

#### 1. Comparison of Immunity Rates Before and After the FSIA

Beginning with the most straightforward approach, Table 2 presents the rate at which immunity is granted by the State Department in the pre-FSIA period and by the U.S. district courts in the post-FSIA period.

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<sup>184</sup> See Leigh Testimony, *supra* note 38, at 24, 29 (noting that the general purpose of the FSIA is “[t]o assure that American citizens are not deprived of normal legal redress against foreign states who engage in ordinary commercial transactions” and “to facilitate . . . litigation against foreign states”); H.R. REP. NO. 94-1487, at 23 (1976) (noting provisions of the FSIA intended to “insure that private persons have adequate means for commencing a suit against a foreign state to seek redress in the courts”).

Table 2: Immunity Rates Before and After FSIA<sup>185</sup>

Before/After FSIA	Total Decisions	Grants of Immunity	Estimated Percentage
Before—(State Department)	88	48	54.5% [43.9, 65.2]
After—(District Courts)	381	181	46.5% [42.5, 52.5]
Total	469	229	48.8% [44.3, 53.4]

Although the estimated immunity rate for the State Department (54.5%) is higher than for the U.S. district courts (47.5%), we have very low confidence that this represents a systematic difference in immunity rates.<sup>186</sup> The 95% confidence intervals for the two estimates substantially overlap, and the chi-squared statistic does not reach traditionally acceptable levels of statistical significance.<sup>187</sup>

<sup>185</sup> This table presents estimates of the percentage likelihood of immunity in pre-FSIA State Department decisions and post-FSIA U.S. district court decisions. Ninety-five percent confidence intervals for the estimates are in the brackets. The Pearson chi-square value is 1.4176, and the  $p$ -value is 0.234. This table does not include thirty pre-FSIA decisions in which the State Department took no action or the foreign state withdrew its request.

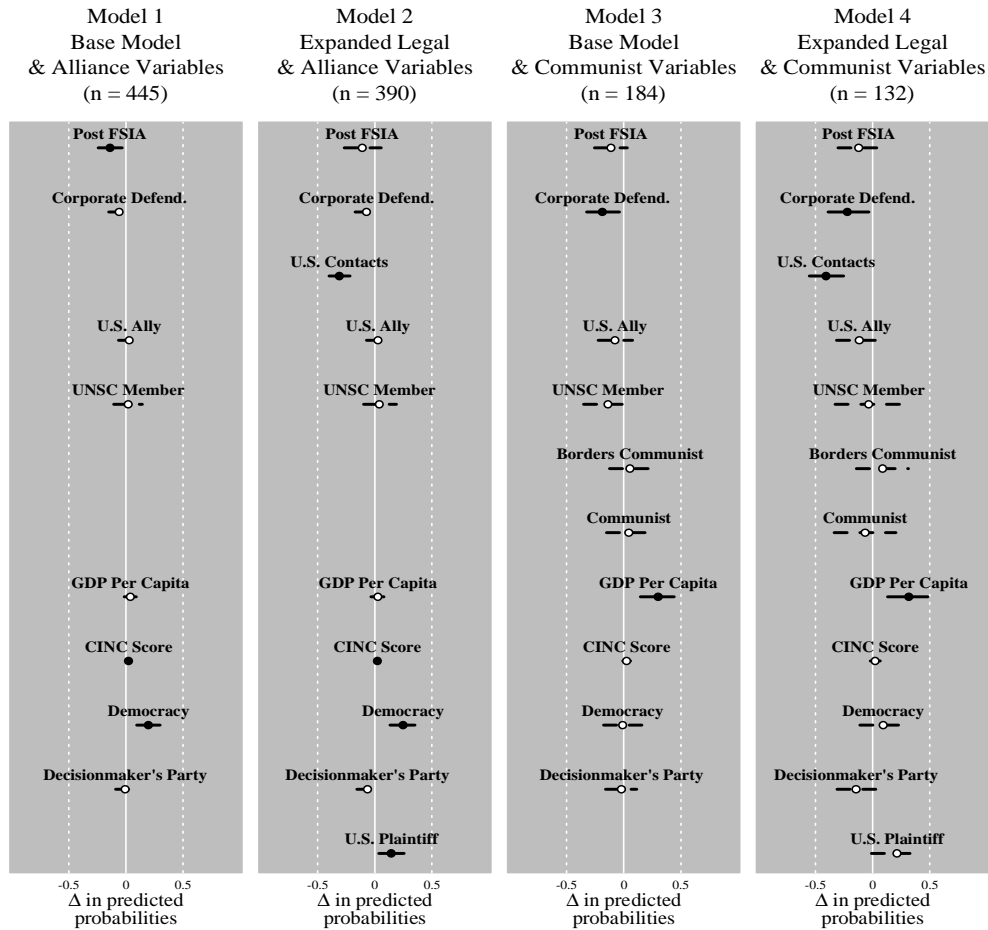
<sup>186</sup> Both State Department and district court immunity rates are near 50%, which is consistent with the so-called “50% hypothesis,” according to which litigant case-selection effects can cause litigation win rates to naturally converge to 50%. See generally George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 31-54 (1984) (developing the 50% hypothesis). However, the 50% hypothesis depends on assumptions about accurate and symmetrical information that are rarely likely to be realistic. See Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 499-501 (1996) (arguing that the 50% plaintiff win rate is not a “central tendency, either in theory or in fact”). Nevertheless, to take potential selection effects into account in our analysis, we also use multivariate analysis below, *infra* subsections III.B.2-3, to control for case strength factors that may influence selection of disputes for litigation. See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 137-40 (2002) (noting that interpreting win-rate data in the face of case-selection effects requires “teas[ing] out residual meaning in [the] data . . . by isolating the remaining implications of the case-strength factor”).

<sup>187</sup> The  $p$ -value of 0.234 indicates that, given the characteristics of the population, the probability of obtaining the Pearson chi-squared statistic of 1.4176 solely by chance is 23.4%. See ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 252 (2010) (explaining the meaning of the chi-squared statistic). Thus, using either a 5% or 10% level of statistical significance we cannot reject the null hypothesis that immunity rates are not associated with whether the State Department or the courts make immunity decisions.

## 2. Multivariate Analysis: Controlling for Other Potential Influences on the Likelihood of Immunity

Of course, it is possible that the characteristics of the cases during both periods were not identical. The raw data do not tell us whether, if an identical case was filed before and after the FSIA, the likelihood of immunity would be different. Although it is not possible to know the definitive answer to that hypothetical question, one way to estimate the answer is to examine the influence of the FSIA on immunity rates while holding legal and political considerations for the cases constant. To do so, we performed a series of multivariate logit analyses similar to those presented above. The results are presented in Figure 5.

Figure 5: Estimated Effect of Institutional Choice on Likelihood of Immunity (Multivariate Logit Analysis)<sup>188</sup>



The four models presented here mirror those presented in Figures 2 and 4A except in one key respect: we added the variable *Post-FSIA*, which equals 0 (“No”) if the decision was made by the State Department and 1 (“Yes”) if

<sup>188</sup> This figure presents multivariate logit estimates of the effects of each indicated legal and political variable on the likelihood of immunity in the State Department’s and the U.S. district courts’ foreign sovereign immunity decisions, while holding other variables constant at their means.

the decision was made by a U.S. district court. In all four models, *Post-FSLA* is negatively associated with the probability that a country's request for foreign sovereign immunity will be granted. However, *Post-FSLA* only achieves statistical significance in Model 1.<sup>189</sup> The result is thus roughly comparable to our analysis in the previous section: there does not appear to be a statistically significant difference in the likelihood of immunity before and after the FSIA.

#### D. *Assessing the Strength of Our Findings*

Throughout this Article, we have used statistical analysis of the FSI Dataset to make findings based on inferences regarding the effects of various legal and political factors on foreign sovereign immunity decisions. Yet all statistical inferences entail uncertainty, and it is good practice to report potential threats to inferences that may result from a particular empirical research strategy.<sup>190</sup> For example, selection bias may occur when the sample selected for analysis differs systematically from the population about which inferences are being made.<sup>191</sup> The conditions in which such differences can cause selection bias are narrow.<sup>192</sup> Nevertheless, several potential sources of selection bias deserve mention. First, the State Department Reports might not include all State Department immunity decisions between 1952 and 1976,<sup>193</sup> and the included decisions might differ systematically from State Department decisions overall. Although the source we use has been previously relied on by academics and we are unaware of any claims that it is incomplete, it is not possible to confirm that it is complete.

Second, published court decisions are not necessarily representative of unpublished court decisions. While Lexis—from which we drew our U.S. district court sample—includes all decisions published in the Federal

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<sup>189</sup> The *p*-value for *Post-FSLA* in Model 1 is 0.05.

<sup>190</sup> See Epstein & King, *supra* note 92, at 49-50 (noting that “[a]ll knowledge and all inference in research is uncertain” and calling on scholars to estimate the degree of uncertainty associated with their inferences).

<sup>191</sup> See *id.* at 111 (discussing the circumstances in which selection bias may occur).

<sup>192</sup> Specifically, unrepresentativeness of a sample creates selection bias in causal inferences if (1) a criterion used to select the sample upon which the inferences are based is a cause of the dependent variable (here, foreign sovereign immunity decisions) and (2) that criterion is also correlated with an explanatory variable of interest (e.g., whether the foreign state is a democracy). See GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 169-70 (1994) (explaining the circumstances in which an omitted variable can cause biased results).

<sup>193</sup> See STATE DEPARTMENT REPORT, *supra* note 61, at 1021-22 (“While no assurance can be given that the list is complete, all diplomatic requests for immunity which were located have been included.”).

Supplement, it does not include all unpublished decisions.<sup>194</sup> Therefore, systematic differences between unpublished and published immunity decisions might introduce selection bias. To probe the extent of this threat to inference, we compared decisions published in the Federal Supplement with unpublished decisions and tested for the effects of publication on the likelihood of immunity. While there are some differences, they do not alter our key findings.<sup>195</sup>

Third, it is possible that suits filed against foreign states after the passage of the FSIA were systematically different than those filed before the FSIA in ways that may be related to the likelihood of immunity. For example, plaintiffs' arguments against immunity or foreign states' arguments for immunity might have been stronger (or weaker) on the merits than they were before, or the types of foreign state defendants sued by plaintiffs might have been more (or less) strongly correlated with political factors influencing the likelihood of immunity. While the possibility of this source of bias cannot be eliminated, we mitigate this risk by using multivariate regression in an effort to control for such factors.<sup>196</sup> In any event, our

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<sup>194</sup> See *supra* subsection II.A.2.

<sup>195</sup> In the bivariate logit analyses in Figure 3A, the only significant differences between published and unpublished decisions are as follows: (1) *Troop Deployment* is not statistically significant in published decisions, but barely significant in unpublished decisions; (2) *GDP Per Capita* is statistically significant in published decisions but not unpublished decisions; and (3) *Judicial Common Space* is significant in published but not unpublished decisions. In the multivariate analyses in Figure 4A, the only significant differences are: (1) in Model 2, *Corporate Defendant* is statistically significant in unpublished but not published decisions; (2) in Models 1, 3, and 4, *GDP Per Capita* is statistically significant in published but not unpublished decisions; (3) in Models 1 and 2, *Democracy* is statistically significant in unpublished decisions but not published decisions; (4) in Model 2, *Judicial Common Space* is statistically significant in published but not unpublished decisions; and (5) in Model 2, *U.S. Plaintiff* is statistically significant in unpublished but not published decisions. Statistical significance for all of the foregoing comparisons is measured at the .10 level ( $p \leq .100$ ). This analysis suggests that, insofar as published decisions are disproportionately influencing our results, our results may be exaggerating the effects of the foreign state's economic power and judicial ideology. This analysis also suggests that our results might understate the effects of the foreign state's political system, the plaintiff's nationality, and of troop deployment. These results do not affect our basic finding that political factors influence the U.S. district courts' foreign sovereign immunity decisions, but they do suggest that the nature of those influences may be different in published and unpublished decisions. In addition, when *Federal Supplement* is added to the logit regression models, it has a negative and statistically significant effect in a number of models. This indicates that immunity is less likely in published decisions than unpublished decisions, and that insofar as published decisions are disproportionately influencing our results, our results may be understating the likelihood of immunity in district court decisions. If that is the case, then it is possible that actual overall immunity rates may have increased after the FSIA's transfer of immunity decisionmaking to the courts.

<sup>196</sup> See Clermont & Eisenberg, *supra* note 186, at 137-40 (asserting that interpreting win rate data in the face of case-selection effects requires "teas[ing] out . . . the remaining implications of the case-strength factor").

motivating research question is not “What were the effects of the passage of FSIA on litigation?” Instead, it is “What are the systematic differences in the factors that influenced the State Department and the judiciary when confronted with a request for immunity?”

Another potential source of bias is omitted variable bias due to legal change. Specifically, whereas the Tate Letter expressly recognized only the commercial activity exception,<sup>197</sup> the FSIA established other exceptions to foreign sovereign immunity.<sup>198</sup> Given this change, there is a risk that we are comparing apples and oranges. This risk is mitigated by two features of our analysis. First, we complemented our overall analysis of the U.S. district courts’ immunity decisions with separate analysis of their commercial activity exception decisions (see Figures 3C and 4B, *supra*), which are arguably more directly comparable to the State Department’s decisions. As we note above, political influences appear more muted in the separate analysis—but even then, such influences are more apparent in the district courts’ decisions than in the State Department’s decisions, which is consistent with our overall results.<sup>199</sup> Second, in Section III.C, we control for the passage of the FSIA and do not find that it significantly changes immunity rates.

Finally, it is important to note that our results should not be interpreted as causal analysis. Causal analysis would require some plausible source of random variation.<sup>200</sup> For example, causal analysis would be possible if cases were randomly assigned to be decided by the State Department or by the courts. Unfortunately, this is simply not possible. As a result, we have relied on examining the cases that actually occurred while acknowledging that there may be systematic differences between the cases filed before and after the FSIA.

We encourage readers to keep these potential threats to inference in mind when interpreting our findings. However, in our judgment, they do not threaten our overall results.

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<sup>197</sup> See Tate Letter, *supra* note 59, at 985 (recognizing that “the widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts”).

<sup>198</sup> See *supra* note 107 and accompanying text.

<sup>199</sup> See generally *supra* Section III.B.

<sup>200</sup> See Daniel E. Ho & Donald B. Rubin, *Credible Causal Inference for Empirical Legal Studies*, 7 ANN. REV. LAW SOC. SCI. 17, 21-22 (2011) (discussing the importance of random assignment for causal inference).

## IV. BROADER IMPLICATIONS

Our analysis has implications not only for foreign sovereign immunity decisionmaking, but also for broader comparative institutional competence debates in foreign relations law and beyond. In this Part, we discuss the implications of our analysis for current debates over institutional competence in foreign official immunity decisionmaking, for more general ongoing debates about how foreign relations law decisionmaking authority should be allocated between the executive and judicial branch, for the relationship between doctrinal clarity and impartial judicial decisionmaking, and for future empirical research on comparative institutional competence.

A. *Foreign Official Immunity*

Our analysis has implications for the intensifying debate over the proper allocation of responsibility for a different type of immunity decisionmaking: foreign *official* immunity decisionmaking. In its 2010 decision in *Samantar v. Yousuf*, the U.S. Supreme Court held that the FSIA does not govern issues concerning the immunity of individual foreign government officials.<sup>201</sup> Instead, such issues are governed by common law.<sup>202</sup> However, unlike the FSIA, which clearly allocates foreign sovereign immunity decisionmaking to the courts, the common law does not clearly allocate foreign official immunity decisionmaking.<sup>203</sup>

Since the Supreme Court's decision, both scholars and the parties in the *Samantar* litigation have continued to debate this question. While the U.S. government argues that the courts should give it absolute deference on foreign official immunity matters,<sup>204</sup> others argue that the courts should decide these matters.<sup>205</sup> And in the *Samantar* litigation itself, the Fourth Circuit Court of Appeals concluded that the degree of deference owed to the

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<sup>201</sup> 130 S. Ct. 2278, 2286 (2010).

<sup>202</sup> *Id.* at 2292.

<sup>203</sup> See *Yousuf v. Samantar*, 699 F.3d 763, 768 (4th Cir. 2012) ("The FSIA displaced the common law regime for resolving questions of foreign *state* immunity and shifted the Executive's role as primary decision maker to the courts . . . . After *Samantar*, it is clear that the FSIA did no such thing with respect to the immunity of *individual* foreign officials; the common law, not the FSIA, continues to govern foreign official immunity.").

<sup>204</sup> See *id.* at 769 (noting that "[t]he United States, participating as *amicus curiae*, takes the position that federal courts owe absolute deference to the State Department's view of whether a foreign official is entitled to sovereign immunity").

<sup>205</sup> See generally Wuerth, *supra* note 24 (critiquing the argument that the executive branch should have authority to make binding foreign official immunity decisions).



executive depends on the type of foreign official immunity issue presented.<sup>206</sup> Our analysis of foreign sovereign immunity decisionmaking suggests that the executive branch may indeed be capable of making legally principled foreign official immunity decisions in the aftermath of *Samantar*, independently from systematic political influences.

B. *Comparative Institutional Competence and  
Foreign Relations Law*

More generally, our analysis has implications for continuing debates over comparative institutional competence in the field of foreign relations law. While foreign relations law scholars make claims about the comparative institutional competence of the executive and judicial branches, they simultaneously lament the difficulty of assessing those claims empirically.<sup>207</sup> Although our analysis is only a first step, it sheds preliminary empirical light on comparative institutional debates in foreign relations law.

For example, our analysis has implications for whether the executive branch should be trusted to make foreign relations law decisions that are not systematically political. Arguments for judicial deference to the executive branch in the area of foreign affairs are both defended and criticized based on claims about the competence of the courts and the executive branch.<sup>208</sup> Our analysis suggests that even if the judiciary has advantages over the executive branch,<sup>209</sup> these advantages do not necessarily include the ability to depoliticize matters that touch on foreign affairs and transform them into strictly legal issues. Indeed, under some circumstances, executive branch agencies may be as capable as courts—sometimes, perhaps, even more capable—of making decisions based on law, relatively free from political influences. This is a sobering, although still preliminary, finding for judges, scholars, and policymakers who might hope to bring the rule of law to bear on foreign relations matters by vesting decisionmaking authority in the

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<sup>206</sup> See *Yousuf*, 699 F.3d at 773 (“[W]e give absolute deference to the State Department’s position on status-based immunity doctrines such as head-of-state immunity. The State Department’s determination regarding conduct-based immunity, by contrast, is not controlling, but it carries substantial weight in our analysis of the issue.”).

<sup>207</sup> See *Ku & Yoo*, *supra* note 18, at 181 (admitting that their institutional competence analysis is based on “generalizations and assumptions . . . because it is difficult to imagine a sufficiently rigorous empirical test of these . . . claims”).

<sup>208</sup> See *supra* notes 18-19 and accompanying text.

<sup>209</sup> See *infra* Section IV.B.

courts.<sup>210</sup> And it is a potentially encouraging finding for those who argue that the executive branch is itself capable of making principled legal decisions, even in the politically charged field of foreign relations.<sup>211</sup>

Our analysis does not necessarily imply that having courts make foreign sovereign immunity decisions leads to worse consequences than having the executive branch make the decisions. There may be other reasons for the judiciary to play a leading role in immunity decisionmaking as well as in other areas of foreign relations. For example, courts provide disputants with more expansive due process protections than those ordinarily offered by executive branch agencies, and the transfer of immunity decisionmaking to the courts relieved the State Department of a burden that was said to have complicated its core diplomatic functions.<sup>212</sup> But our analysis casts doubt on a primary justification for delegating these decisions to the judiciary: that the courts are best equipped to perform these functions in an apolitical manner.

Moreover, if policymakers did believe that there are compelling reasons to leave this decisionmaking authority with the courts, our analysis suggests that centralized decisionmaking authority may incentivize depoliticization. During the pre-FSIA period, the State Department was able to unilaterally grant immunity to foreign governments without the decision being overruled by another branch of government. Despite the fact that this allowed the State Department to reward allies with impunity, our results suggest that it did not actually make systematically political decisions. Although further research would need to be conducted to determine exactly why this is the case, one plausible theory is that the centralized nature of the decisionmaking during the pre-FSIA period made it easy for private actors and academics to monitor the State Department's decisions and criticize any examples that were seen as overly political.<sup>213</sup> After the passage of the FSIA, however, federal district courts across the country ruled on questions of foreign sovereign immunity. As a result, these decisions were more difficult to closely monitor, and trends were more difficult to detect. It thus may have been

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<sup>210</sup> See generally FRANCK, *supra* note 19 (arguing for independent judicial decisionmaking in foreign relations matters, without excessive deference to the executive branch, to have those matters governed by law).

<sup>211</sup> See, e.g., Posner & Sunstein, *supra* note 3, at 1204-07 (arguing that, because resolutions of statutory ambiguities in foreign relations cases involve policy, the executive branch is more institutionally competent than the judiciary to make these resolutions). See generally Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013) (discussing how the President's legal authority is tempered through law, not politics, and through historical norms of executive authority).

<sup>212</sup> See *supra* Section I.B.

<sup>213</sup> E.g., Leigh, *supra* note 67.

easier for decisions incorporating political considerations to go unnoticed than it previously had been for the State Department.<sup>214</sup> If policymakers were interested in leaving the authority to make foreign sovereign immunity decisions to the courts, but wanted to depoliticize the decisions further, a potential reform would be to concentrate these cases in one jurisdiction. For example, cases that have a clear foreign relations law component could be removed to a single district—perhaps the D.C. district court—in the same way that many intellectual property cases are appealed directly to the Federal Circuit.

### C. Doctrinal Clarity and Impartiality

Our analysis also reinforces the findings of prior research on the relationship between doctrinal clarity and judicial discretion. As scholars have demonstrated, legal ambiguity can undermine impartial legal decisionmaking.<sup>215</sup> One way of “shoring up impartial justice” is to reduce the ambiguity of the law.<sup>216</sup> The theory behind this proposition is that even if judges are politically partial, they also care about making decisions that are viewed as legally correct. Therefore, “the degree to which their decisions will be biased will depend not only on how partial the judges are but also on how clear it is which decision is ‘right.’”<sup>217</sup> For this reason, both legal philosophers and social scientists have argued that “[c]larity is strongly connected to the rule of law.”<sup>218</sup>

Our comparison of commercial activity exception decisions to the courts’ other foreign sovereign immunity decisions reinforces these findings. The commercial activity exception has been frequently litigated and is relatively well developed and clear compared to other aspects of the foreign sovereign immunity doctrine.<sup>219</sup> Consistent with the theory that doctrinal clarity enhances impartiality, we found weaker political influences on the courts’ commercial activity exception decisions than on their other foreign

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<sup>214</sup> Of course, it would be reasonable to argue that this is a virtue of the FSIA—after all, perhaps concerns for foreign relations should be driving foreign sovereign immunity decisions more than they did prior to the passage of the FSIA.

<sup>215</sup> See Eggers & Spirling, *supra* note 171, at 2-3 (discussing the relationship between ambiguity in legal rules and the impartiality of judges’ decisions).

<sup>216</sup> *Id.* at 2.

<sup>217</sup> *Id.*

<sup>218</sup> Ryan J. Owens & Justin P. Wedeking, *Justices and Legal Clarity: Analyzing the Complexity of U.S. Supreme Court Opinions*, 45 LAW & SOC’Y. REV. 1027, 1029 (2011).

<sup>219</sup> *Cf.* Working Grp. of the Am. Bar Ass’n, *supra* note 170, at 551-52 (suggesting that there is no need for statutory clarification of the definition of “commercial activity” in the FSIA given the Supreme Court’s clarifications of its meaning).

sovereign immunity decisions.<sup>220</sup> This suggests an important point about comparative institutional design: absent a sufficiently well-defined legal framework, an institutional choice may not have its intended consequences.

D. *Empirical Research on Comparative Institutional Competence*

Finally, our analysis has methodological implications. As discussed above, our empirical strategy, like any, is imperfect.<sup>221</sup> But by presenting our methodology and assessing potential threats to our inferences, we hope to stimulate and contribute to scholarly discussions about giving comparative institutional competence claims the empirical attention they deserve. Even on this methodological dimension alone, we believe the effort is worthwhile. As Komesar emphasized:

There are no shortcuts around the issues of institutional choice. Every law and public policy choice involves institutional choice. That is unavoidable. The question is whether these institutional choices are made implicitly or explicitly; whether they are made thoughtfully or haphazardly. In other words, the issue is the quality of law and public policy analysis.<sup>222</sup>

We hope this Article encourages further efforts to improve the quality of comparative institutional analysis, and thus the quality of law and public policy, in foreign relations law and beyond.

CONCLUSION

The FSIA's supporters claimed that political factors excessively influenced the State Department's foreign sovereign immunity decisions.<sup>223</sup> The FSIA aimed to depoliticize immunity decisions by transferring the authority to make those decisions from the executive branch to the courts.<sup>224</sup> This transfer was based on an explicit comparative institutional competence claim: that the courts would be better than the State Department at making immunity decisions based on law rather than politics.<sup>225</sup> The FSIA also promised to facilitate court access for claims against foreign states.<sup>226</sup>

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<sup>220</sup> See *supra* Section III.B.

<sup>221</sup> See *supra* Section III.D.

<sup>222</sup> KOMESAR, *supra* note 2, at 11.

<sup>223</sup> See *supra* Section I.B.

<sup>224</sup> See *supra* Section I.C.

<sup>225</sup> *Id.*

<sup>226</sup> See *supra* note 38 and accompanying text.

How has the FSIA's experiment fared? There is extensive doctrinal scholarship on foreign sovereign immunity,<sup>227</sup> and experts on U.S. foreign relations law have concluded that the FSIA has largely accomplished its goals.<sup>228</sup> But we are aware of no prior systematic empirical analysis of the factors influencing foreign sovereign immunity decisionmaking by either the State Department or the courts. In this Article, we have used empirical analysis to examine not only what the foreign sovereign immunity doctrine says, but also how U.S. institutions apply it to reach real-world outcomes. Thus, to use Roscoe Pound's well-known distinction, our analysis complements the traditional "law in the books" focus of the doctrinal scholarship by providing an analysis of foreign sovereign immunity "in action."<sup>229</sup>

Our analysis raises significant doubts about the FSIA's experiment in comparative institutional competence. First, we found evidence that the law of foreign sovereign immunity—in particular, the commercial activity exception—systematically influenced the State Department's immunity decisions; but using a wide variety of indicators, we found hardly any evidence of systematic political influences on those decisions.<sup>230</sup> Second, we found evidence that political factors—including the foreign state's economic power and political system, the judge's ideology, and the plaintiff's nationality—may affect the U.S. district courts' foreign sovereign immunity decisions.<sup>231</sup> Third, we found little evidence that the FSIA has significantly enhanced court access by reducing the likelihood of immunity in particular cases.<sup>232</sup> Overall, these findings significantly challenge the basis for the comparative institutional competence claims that motivated the FSIA, and suggest that the FSIA's experiment in institutional choice may not have been as

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<sup>227</sup> For a comprehensive doctrinal treatment of foreign sovereign immunity, see JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* (2d ed. 2003).

<sup>228</sup> See FRANCK, *supra* note 19, at 105 (claiming that the FSIA succeeded in depoliticizing foreign sovereign immunity decisions); Wuerth, *supra* note 24, at 952 (noting problems associated with State Department immunity decisionmaking and concluding that "[r]eturning immunity to the courts resolved these problems").

<sup>229</sup> See Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (distinguishing between "law in the books" and "law in action"). This Article thus joins prior scholarship that takes an empirical approach to decisionmaking in transnational law. *E.g.*, Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (providing an empirical analysis of extraterritorial application of domestic law); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (employing empirical analysis of forum non conveniens decisionmaking); Whytock, *supra* note 93 (presenting an empirical analysis of international choice-of-law decisionmaking).

<sup>230</sup> See *supra* Section III.A.

<sup>231</sup> See *supra* Section III.B.

<sup>232</sup> See *supra* Section III.C.

successful—or perhaps may not have been as necessary—as commonly assumed.

Beyond foreign sovereign immunity, our findings provide preliminary evidence suggesting that the executive branch may be more competent at making foreign relations law decisions than conventional wisdom suggests, and that judicialization cannot necessarily immunize foreign relations decisions from politics. As we have emphasized, there are many criteria to take into account when evaluating which institutions are best suited to perform particular foreign relations functions—but competence to make decisions based on law rather than politics has been a central criterion in debates over comparative institutional competence, including in the foreign relations field. Our analysis shows that this criterion deserves reconsideration, or at least closer scrutiny, as these debates continue.

## APPENDIX A: SUMMARY STATISTICS

## Appendix A1: Pre-FSIA Summary Statistics

Variable	Mean	SD	Min	Max
<i>Decision</i>	0.55	0.50	0	1
<i>Corporate Defendant</i>	0.18	0.39	0	1
<i>Commercial Activity</i>	-	-	-	-
<i>U.S. Contacts</i>	0.48	0.50	0	1
<i>U.S. Ally</i>	0.60	0.49	0	1
<i>Diplomatic Representation</i>	0.95	0.21	0	1
<i>Troop Deployment</i>	0.94	0.23	0	1
<i>UNSC Member</i>	0.14	0.35	0	1
<i>Borders Communist</i>	0.17	0.38	0	1
<i>Communist State</i>	0.25	0.44	0	1
<i>GDP Per Capita</i>	5504	5167	303	21,251
<i>U.S. Exports</i>	1287	4482	0	28,740
<i>OECD Member</i>	0.10	0.30	0	1
<i>CINC Score</i>	0.01	0.03	0	0.17
<i>Democracy</i>	0.20	0.41	0	1
<i>Decisionmaker's Party</i>	0.47	0.50	0	1
<i>U.S. Plaintiff</i>	0.86	0.35	0	1

## Appendix A2: Post-FSIA Summary Statistics

Variable	Mean	SD	Min	Max
<i>Decision</i>	0.48	0.50	0	1
<i>Corporate Defendant</i>	0.32	0.47	0	1
<i>Commercial Activity</i>	0.55	0.50	0	1
<i>U.S. Contacts</i>	0.61	0.49	0	1
<i>U.S. Ally</i>	0.44	0.50	0	1
<i>Diplomatic Representation</i>	0.84	0.37	0	1
<i>Troop Deployment</i>	0.85	0.36	0	1
<i>UNSC Member</i>	0.19	0.39	0	1
<i>Borders Communist</i>	0.21	0.41	0	1
<i>Communist State</i>	0.12	0.33	0	1
<i>GDP Per Capita</i>	12,791	10,784	257	51,449
<i>U.S. Exports</i>	8864	21,221	0	176,258
<i>OECD Member</i>	0.24	0.43	0	1
<i>CINC Score</i>	0.02	0.03	0	0.20
<i>Democracy</i>	0.48	0.50	0	1
<i>Decisionmaker's Party</i>	0.53	0.50	0	1
<i>U.S. Plaintiff</i>	0.78	0.41	0	1



## APPENDIX B: TRADITIONAL REGRESSION TABLES

## Appendix B1: Regression Results for Figure 2

	(1)	(2)	(3)	(4)
<i>Corporate Defendant</i>	-1.71** (0.69)	-2.13 (1.36)	-1.98*** (0.75)	-2.36 (1.53)
<i>U.S. Contacts</i>		0.38 (0.94)		0.57 (1.01)
<i>U.S. Ally</i>	-0.82 (0.54)	-0.73 (1.17)	-0.89 (0.56)	-1.04 (1.29)
<i>UNSC Member</i>	-1.29 (1.02)	-4.96 (37.06)	-1.27 (1.11)	-4.33 (41.48)
<i>Borders Communist</i>			-0.36 (0.74)	0.51 (1.32)
<i>Communist State</i>			1.06 (0.66)	1.37 (1.11)
<i>GDP Per Capita</i>	0.00** (0.00)	0.00 (0.00)	0.00* (0.00)	0.00 (0.00)
<i>CINC Score</i>	21.74 (19.14)	74.04 (130.96)	23.57 (25.43)	62.61 (130.67)
<i>Democracy</i>	-0.91 (0.76)	-0.05 (1.67)	-0.59 (0.82)	0.20 (1.68)
<i>Decisionmaker's Party</i>	-0.08 (0.49)	-1.14 (0.85)	0.15 (0.51)	-1.11 (0.98)
<i>U.S. Plaintiff</i>		-1.84 (1.96)		-1.58 (1.94)
Intercept	0.29 (0.50)	1.79 (1.68)	0.08 (0.56)	0.95 (1.73)
N	88	38	88	38
AIC	121.42	58.60	121.92	60.93
Log L	-28.71	10.70	-20.96	17.54

Asterisks denote statistical significance \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .

## Appendix B2: Regression Results for Figure 4A

	(1)	(2)	(3)	(4)
<i>Corporate Defendant</i>	-0.07 (0.25)	-0.22 (0.27)	-0.61 (0.49)	-0.94 (0.59)
<i>U.S. Contacts</i>		-1.52*** (0.27)		-2.84*** (0.65)
<i>U.S. Ally</i>	0.26 (0.28)	0.28 (0.30)	-0.08 (0.66)	-0.06 (0.80)
<i>UNSC Member</i>	0.21 (0.35)	0.14 (0.37)	-0.31 (0.77)	0.13 (0.88)
<i>Borders Communist</i>			0.53 (0.66)	0.50 (0.84)
<i>Communist State</i>			-1.59 (1.18)	-1.61 (1.35)
<i>GDP Per Capita</i>	0.00 (0.00)	0.00 (0.00)	0.00*** (0.00)	0.00** (0.00)
<i>CINC Score</i>	6.38 (3.97)	7.23* (4.22)	14.73 (10.92)	7.69 (13.31)
<i>Democracy</i>	0.78*** (0.29)	0.78** (0.31)	-0.21 (0.55)	-0.37 (0.65)
<i>Judicial Common Space</i>	-0.46 (0.31)	-0.67** (0.34)	0.99 (0.72)	-1.12 (0.84)
<i>U.S. Plaintiff</i>		0.71** (0.31)		1.67** (0.75)
Intercept	-0.80*** (0.21)	-0.39 (0.31)	-0.79 (0.58)	-0.44 (0.87)
N	348	343	96	94
AIC	468.90	433.01	138.78	114.14
Log L	-202.45	-176.50	-29.39	-9.07

Asterisks denote statistical significance \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .

## Appendix B3: Regression Results for Figure 4B

	(1)	(2)	(3)	(4)
<i>Corporate Defendant</i>	-0.28 (0.48)		-0.56 (0.36)	
<i>Commercial Activity</i>		0.50 (0.45)		-1.39*** (0.40)
<i>U.S. Contacts</i>	-0.41 (0.44)	-0.53 (0.46)	-2.28*** (0.40)	-2.35*** (0.41)
<i>U.S. Ally</i>	0.84* (0.48)	0.67 (0.49)	-0.15 (0.41)	-0.15 (0.43)
<i>UNSC Member</i>	0.42 (0.66)	0.41 (0.66)	-0.10 (0.48)	-0.10 (0.49)
<i>GDP Per Capita</i>	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)	0.00 (0.00)
<i>CINC Score</i>	8.10 (9.65)	9.82 (10.32)	8.32 (5.15)	5.15 (5.15)
<i>Democracy</i>	0.25 (0.53)	0.14 (0.53)	0.95** (0.42)	1.10** (0.45)
<i>Judicial Common Space</i>	-0.82* (0.50)	-0.88* (0.51)	-0.33 (0.51)	-0.64 (0.54)
<i>U.S. Plaintiff</i>	-0.28 (0.53)	-0.11 (0.55)	1.26*** (0.43)	1.21*** (0.43)
Intercept	-0.63 (0.45)	-0.93* (0.50)	0.01 (0.47)	0.97* (0.57)
N	139	139	204	204
AIC	187.46	186.56	246.77	236.06
Log L	-53.73	-53.38	-83.38	-78.03

Asterisks denote statistical significance \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .

## Appendix B4: Regression Results for Figure 5

	(1)	(2)	(3)	(4)
<i>Post-FSLA</i>	-0.56** (0.27)	-0.46 (0.39)	-0.46 (0.36)	-0.53 (0.49)
<i>Corporate Defendant</i>	-0.24 (0.22)	-0.30 (0.25)	-0.77** (0.36)	-0.92* (0.47)
<i>U.S. Contacts</i>		-1.30*** (0.25)		-1.77*** (0.46)
<i>U.S. Ally</i>	0.12 (0.24)	0.09 (0.27)	-0.30 (0.37)	-0.49 (0.51)
<i>UNSC Member</i>	0.06 (0.31)	0.16 (0.35)	-0.58 (0.58)	-0.17 (0.82)
<i>Borders Communist</i>			0.23 (0.44)	0.39 (0.57)
<i>Communist State</i>			0.18 (0.48)	-0.30 (0.70)
<i>GDP Per Capita</i>	0.00 (0.00)	0.00 (0.00)	0.00*** (0.00)	0.00*** (0.00)
<i>CINC Score</i>	8.11** (3.65)	8.10** (3.96)	8.62 (7.16)	8.06 (9.28)
<i>Democracy</i>	0.80*** (0.25)	1.00*** (0.28)	-0.05 (0.42)	0.37 (0.51)
<i>Decisionmaker's Party</i>	-0.03 (0.20)	-0.26 (0.22)	-0.09 (0.33)	-0.60 (0.43)
<i>U.S. Plaintiff</i>		0.58** (0.29)		0.91 (0.60)
Intercept	-0.16 (0.28)	0.19 (0.46)	-0.11 (0.41)	0.42 (0.75)
N	445	390	184	132
AIC	603.39	501.66	257.06	174.53
Log L	-265.70	-206.83	-84.53	-35.26

Asterisks denote statistical significance \* $p < 0.1$ ; \*\* $p < 0.05$ ; \*\*\* $p < 0.01$ .