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ENFORCEMENT OF FOREIGN JUDGMENTS, SYSTEMIC CALIBRATION, AND THE GLOBAL LAW MARKET

Samuel P. Baumgartner and Christopher A. Whytock***

There are important reasons for states to recognize and enforce the judgments of other states' courts. There are also reasons that may militate against recognition or enforcement of certain foreign judgments, making it appropriate to calibrate or "fine tune" the presumption favoring recognition and enforcement so it is not applied too broadly. Most calibration principles, such as the principle that a judgment from a court lacking jurisdiction should not be recognized, are case-specific. However, one calibration principle that is, to our knowledge, unique to the law of the United States stands out: the principle of systemic calibration, according to which U.S. courts must not recognize or enforce foreign judgments "rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law." In this Article, we aim to shed empirical light on how U.S.-style systemic calibration operates in practice. We find that state-of-origin indicator scores related to systemic adequacy are on average higher when U.S. courts recognize or enforce foreign judgments than when they refuse to do so. Moreover, the probability of recognition and enforcement increases as these indicator scores increase. However, in only six of the 587 opinions in our dataset did a court refuse recognition or enforcement based explicitly on the systemic inadequacy ground. Thus, while the level of systemic calibration in U.S. courts is high, it is mostly achieved implicitly. Finally, even judgments from states with low systemic adequacy scores are sometimes recognized or enforced by U.S. courts.

Introduction

There are important reasons for states to recognize and enforce the judgments of other states' courts, that is, to treat those judgments as if they were judgments of their own courts. These reasons are expressed by what we call "recognition-favoring

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principles," which include comity,[1] efficiency,[2] and access to justice,[3] and they are reflected in a general presumption that foreign judgments will be recognized and enforced.[4] Refusal by requested states to recognize and enforce foreign judgments, or review by requested states of those judgments on the merits (*révision au fond*), would tend to undermine those principles, creating uncertainty and increasing litigation costs.[5]

There are also reasons that may militate against recognition or enforcement of certain foreign judgments, making it appropriate to calibrate or "fine tune" the presumption favoring recognition and enforcement so it is not applied too broadly.

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1 *See* Hilton v. Guyot, 159 U.S. 113, 163 (1895) ("The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'"). *See also* William S. Dodge, *International Comity in American Law*, 115 Colum. L. Rev. 2071, 2089 (2015) (noting that "[c]omity [has] served . . . as the basis for recognizing foreign judgments").

2 *See* Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, Max Planck Encyclopedias of International Law, https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1848 (Mar. 2009) (noting that "the general public has an interest in avoiding resources spent on re-litigation and in international decisional harmonies"); Arthur T. Von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1603 (1968) (noting "desire to avoid the duplication of effort and consequent waste involved in reconsidering a matter that has already been litigated"); Gerhard Walter & Samuel P. Baumgartner, *General Report: Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions*, *in* Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions 1, 3 (Gerhard Walter & Samuel P. Baumgartner eds., 2000) (noting the importance of judicial economy and decisional harmony).

3 *See also* Antônio Augusto Cançado Trindade, The Access of Individuals to International Justice 71 (2011) ("[T]he right of access to justice comprises . . . the right to protection by means of faithful compliance with judicial decisions."); Walter & Baumgartner, *supra* note 2 (noting the importance of "the winner's protection from relitigation"); Christopher A. Whytock, *Transnational Access to Justice*, 38 Berkeley J. Int'l L. 154, 168-69 (2020) (arguing that failures to enforce foreign judgments can produce access-to-justice gaps).

4 *See, e.g.*, Restatement (Fourth) of Foreign Relations Law of the United States § 481 (Am. L. Inst. 2018) ("Except as [otherwise] provided . . . a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, is entitled to recognition by courts in the United States."); Peter Hay et al., Conflict of Laws 1376, § 24.1 (6th ed. 2018) ("There is a strong and pervasive policy in all legal systems to limit repetitive litigation of claims and issues."); Regulation (EU) No 1215/2012, of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast), 2015 O.J. (L 351) 1, §§ 36, 39 [hereinafter Brussels I Regulation (Recast)] (stating general rules in favor of recognition and enforcement); Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, art. 4(1) [hereinafter Hague Convention] ("A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State (requested State) in accordance with the provisions of this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.").

5 For this reason, rules governing foreign judgment recognition and enforcement generally forbid review of the merits. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113, 203 (1895) (stating the general rule that "the merits of the case should not, in an action brought in this country upon the [foreign] judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact"); Hague Convention, *supra* note 4, art. 4(2) ("There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.").

For example, a foreign judgment or the proceedings leading to it may violate the fundamental rights of the party against whom the judgment was entered or offend the public policy of the state being asked to recognize or enforce it (the "requested state").[6] Such reasons are expressed by what we call "calibration principles" and reflected in various grounds for refusing recognition and enforcement.

The calibration principles expressed in the domestic law of most states and in international conventions tend to be case-specific—that is, they call on courts to examine the qualities of the foreign proceedings that led to the judgment or the qualities of the foreign judgment itself. Case-specific calibration principles are reflected in public policy grounds for refusing recognition and enforcement, and in more particular grounds for refusal, such as fraud, lack of notice or jurisdiction, violation of basic procedural standards in the proceedings that led to the judgment, and inconsistent prior or later judgments.[7]

Against this comparative and international legal backdrop, one calibration principle that is, to our knowledge, unique to the law of the United States stands out:[8] the principle of systemic calibration.[9] The principle is reflected in a systemic inadequacy ground for refusal, according to which a U.S. court must not recognize or enforce a foreign judgment that "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."[10] With its roots in the U.S. Supreme Court's seminal 1895 decision on the recognition and enforcement of foreign judgments—*Hilton v. Guyot*—the principle is well established in both American common law and the legislation of U.S. states.[11]

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6 *See* Arthur T. Von Mehren, *Recognition and Enforcement of Foreign Judgments—General Theory and the Role of Jurisdictional Requirements*, 167 Recueil des Cours 22 (1981) (noting that the rules governing foreign judgments express "the concern that legal justice, as understood by the society in both substantive and procedural terms, be done").

7 *See* Peter Hay, Advanced Introduction to Private International Law and Procedure 114-24 (2018) (surveying common grounds for refusing recognition and enforcement); Walter & Baumgartner, *supra* note 2, at 17-35 (reviewing requirements for recognition and enforcement in 18 European countries). *See also* Hague Convention, *supra* note 4, art. 7 (listing grounds for refusing recognition and enforcement).

8 Thanks to Celia Wasserstein Fassberg for emphasizing this point.

9 *See* Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 Am. J. Comp. L. 1, 37 (1988) (concluding, based on a broad comparative survey, that the systemic inadequacy ground for refusal "does not appear in the laws of any legal system, other than the United States, for which a national report has been submitted").

10 Unif. Foreign Money-Judgments Recognition Act § 4(a)(1), 13 U.L.A 263 (1962). *See also* Unif. Foreign-Cnty Money Judgments Recognition Act § 4(a)(1) (2005) ("A court of this state may not recognize a foreign-country judgment if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law."); Restatement (Fourth) of Foreign Relations Law of the United States § 483(a) (Am. L. Inst. 2018) ("A court in the United States will not recognize a judgment of a court of a foreign state if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness.").

11 *See* Hilton v. Guyot, 159 U.S. 113, 203 (1895) (recognition or enforcement requires that the state of origin have "a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries").

The theory underlying systemic calibration is that comity is rightfully extended to judgments produced by legal systems with impartial courts and fundamentally fair procedures, but not legal systems lacking those qualities. Legal systems with those systemic qualities are more likely to provide fair proceedings in particular cases than legal systems lacking those qualities. Systemic calibration thus promises to protect litigants' rights without requiring U.S. courts to engage in detailed reexaminations of those proceedings.[12] Foreign judgment decisions are systemically calibrated to the extent that courts refuse to recognize or enforce judgments produced by legal systems lacking impartial courts or fundamentally fair procedures.

However, systemic calibration entails certain costs. It poses problems of false positives and false negatives: systemic calibration may prevent recognition and enforcement of judgments produced by states that fall short of systemic standards even when the particular proceedings satisfied basic procedural norms, and it may allow recognition and enforcement of judgments produced by states that satisfy systemic standards even when the particular proceedings failed to satisfy basic procedural norms.[13] In addition, courts are not necessarily institutionally well suited to draw conclusions about the systemic adequacy of other legal systems.[14]

Even if systemic calibration is a comparative oddity, it is not merely a U.S. concern. It can result in the legal systems of other states being characterized by U.S. courts as of insufficient quality to merit recognition or enforcement of their courts' judgments—a characterization that, needless to say, those other states may find objectionable. Moreover, not only U.S. parties, but also many non-U.S. parties, have assets located in the United States. As a result, non-U.S. parties are often judgment creditors or judgment debtors in U.S. foreign judgment enforcement actions. Systemic calibration may sometimes protect non-U.S. persons—namely, when they are judgment debtors with assets in the United States and a U.S. court refuses to enforce on systemic inadequacy grounds. But systemic calibration may also hinder the efforts of non-U.S. persons when they are judgment creditors seeking enforcement against U.S. assets and a U.S. court refuses to enforce on systemic inadequacy grounds. Like all calibration principles and the grounds for refusal based on them, systemic calibration may increase litigation costs and uncertainty at the recognition and enforcement stage—for U.S. and non-U.S. litigants alike.

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12 This is one reason to favor the systemic inadequacy ground while opposing proceeding-specific inadequacy grounds. *See* Am. L. Inst., Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 5 cmt. c (2006) (declining to adopt a proceeding-specific ground for refusal because "[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement philosophy of this Act").

13 *See* Paul B. Stephan, *Unjust Legal Systems and the Enforcement of Foreign Judgments*, *in* Foreign Court Judgments and the United States Legal System 84, 90 (Paul. B. Stephan ed., 2014) (noting "the possibility that the proceedings of the rendering court could be woefully inadequate even though the foreign system as a whole functioned properly").

14 *Id.* at 85. By the same token, however, courts in one state are not necessarily in a good position to assess the specific proceedings that unfolded in a foreign state, having not participated in or witnessed those proceedings and being far from evidence and witnesses that may be needed to make a sound case-specific assessment.

More broadly, we argue that the U.S. approach to foreign judgments plays a significant role in the operation of the global law market.[15] Contracting parties need to consider not only whether their chosen law will in fact be enforced by the court whose jurisdiction they might invoke, but also whether a judgment of that court will be recognized and enforced in a state within which the judgment debtor has assets.[16] If not, the parties are deterred from choosing the optimal law and court for their contractual relationship, thus distorting the global law market.

In this Article, we aim to shed empirical light on how U.S.-style systemic calibration operates in practice. For this purpose, we distinguish actual systemic calibration—however brought about—from explicit findings by U.S. courts that a certain foreign legal system lacks systemic adequacy for purposes of recognition and enforcement. In particular, we wonder to what extent actual systemic calibration is achieved in U.S. courts' foreign judgment recognition and enforcement decisions. Low levels of actual systemic calibration may be one indication that the systemic inadequacy ground for refusal is not accomplishing its purpose and, therefore, may not justify its potential costs. In addition, we ask to what extent actual systemic calibration depends on explicit findings by U.S. courts that certain foreign legal systems are systemically inadequate. Even if high levels of actual systemic calibration are achieved in practice, the systemic inadequacy ground for refusal in U.S. law may be unnecessary may best be discarded if courts do not explicitly rely on that ground when making recognition and enforcement decisions.

We use an original dataset of more than 580 foreign judgment recognition and enforcement decisions by U.S. state and federal courts from 2000 through 2017 to examine systemic calibration in action.[17] For each case, our data indicates whether the court recognized or enforced the foreign judgment and identifies the state from which the foreign judgment originated (the "state of origin"). In order to assess systemic calibration, we need to measure the concept of "impartial tribunals or procedures compatible with the requirements of due process of law"[18]—the standard stated in U.S. law. However, there are no cross-national data directly measuring this concept. Thus, we use multiple indicators that we believe should be correlated with those systemic qualities and generally conducive to fair legal proceedings: rule of law, judicial independence, and control of corruption.[19]

Our principal findings are threefold. First, the state-of-origin scores on rule of law, judicial independence, and control of corruption indicators are on average higher when U.S. courts recognize and enforce foreign judgments than when they refuse to do so (although even judgments from states with low systemic adequacy scores are sometimes recognized or enforced by U.S. courts). Second, the probability

15 *See* Erin A. O'Hara & Larry E. Ribstein, The Law Market (2009).

16 *See infra* Part I.

17 On the distinction between law in books and law in action, see Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12 (1910).

18 Unif. Foreign Money-Judgments Recognition Act § 4(a)(1), 13 U.L.A 263 (1962). *See also* sources cited *supra* note 10.

19 Our foreign judgments dataset is explained in more detail below. *See infra* Part II.

of recognition and enforcement increases as the indicator scores increase. Together these first two findings suggest that there is a significant degree of systemic calibration in the foreign judgment decisions of U.S. courts. Third, however, in only 6 of the 587 opinions in our dataset did a court refuse recognition or enforcement based explicitly on the systemic inadequacy ground for refusal, according to which a U.S. court "may not recognize a foreign-country judgment if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . ."[20] In other words, we observe *implicit* systemic calibration—calibration implicit in the results of the decisions rather than evident in explicit judicial reasoning leading to a finding that a legal system is inadequate. Therefore, we consider alternative explanations for the correlation between foreign judgment decisions and the qualities of state-of-origin legal systems. Our findings raise the possibility that the systemic inadequacy ground for refusal in U.S. law is not only unusual, but perhaps also superfluous and unnecessary.

The Article proceeds as follows. In Part I, we motivate our empirical inquiry by demonstrating the significance of foreign judgment recognition and enforcement decisions for the global law market. In Part II, we describe our data and methods. In Part III, we present and discuss our results. In Part IV, we explore explanations for the correlation between foreign judgment decisions and the qualities of state-of-origin legal systems. We conclude by drawing out the implications of our analysis for the systemic inadequacy ground for refusal in U.S. law.

I. Foreign Judgments, Systemic Calibration, and the Global Law Market

The law market model posits that enabling parties to select the applicable law through the enforcement of choice-of-law clauses can create jurisdictional competition among states for more socially optimal laws.[21] The model recognizes that not all courts will necessarily be willing to enforce choice-of-law clauses, particularly when those clauses call for the application of foreign law. For this reason, the combination of a forum selection clause and a choice-of-law clause choosing the law of the state of the selected court may "enhance the buyers' side of the law market" by increasing

20 Unif. Foreign-Cnty Money Judgments Recognition Act § 4(b)(1) (2005). *See also* Restatement (Fourth) Foreign Relations Law of the United States § 483(a) (Am. Law L. Inst. 2018) ("A court in the United States will not recognize a judgment of a court of a foreign state if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with fundamental principles of fairness . . .").

21 *See* O'Hara & Ribstein, *supra* note 15, at 32 ("The jurisdictional competition fostered by choice-of-law clauses encourages states and parties to experiment with new legal rules. Experimentation can help legal systems to generate better legal rules. Party choice both enables parties to avoid the results of failed experiments and provides feedback to the states regarding the appeal of the new laws."). Although the authors do not posit a fixed definition of socially optimal laws, they extensively discuss the normative implications of the law market model. *Id.* at ch. 2.

the likelihood that the court hearing a dispute will apply the chosen law.[22] Beyond enabling this enhancement effect, the enforcement of forum selection clauses can promote jurisdictional competition among states for optimal dispute resolution services.[23]

So far, the treatment of foreign judgments has not featured prominently in accounts of the law market.[24] We argue, however, that recognition and enforcement is a foundation of the global law market, that the rules governing recognition and enforcement have the potential to distort the global law market, but that they also can help ensure its normative integrity.[25]

A foreign judgment problem arises when litigation in a court of one state (the "state of origin") produces a judgment, and a party seeks recognition or enforcement of that judgment in another state (the "requested state").[26] A party may seek recognition of a foreign judgment to prevent re-litigation in the requested state of a claim or issue already decided in the litigation in the state of origin. Alternatively, a party may seek enforcement of a foreign judgment in the requested state to compel another party to comply with the judgment, for example by ordering enforcement against assets of the noncomplying party in the requested state. If the losing party lacks sufficient assets in the state of origin to satisfy the judgment, enforcement in the requested state may be the only opportunity for the prevailing party to obtain the remedy it is entitled to under the judgment. Technically, recognition is a step prior to enforcement; but in practice, courts (at least in the United States) often decide

22 *Id.* at 71. *See also id.* at 70 ("In general, a court is more inclined to apply the parties' choice of law if the parties choose local law. Thus, parties commonly use choice-of-law and choice-of-court clauses that both designate the same state."). *But see* Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. Rev. 719 (2009) (an empirical analysis of choice-of-law decisions by U.S. courts challenging the view that those decisions are biased in favor of local law).

23 *See* Christopher A. Whytock, *Enforcement of Foreign Judgments: Governance, Rights, and the Market for Dispute Resolution Services*, *in* The Transformation of Enforcement: European Economic Law in Global Perspective 47, 65-67 (Hans-W Mickitz & Andrea Wechsler eds., 2016).

24 *But see* Michael E. Solimine, *Recognition and Enforcement of Foreign Judgments in American Courts and the Limits of the Law Market Model*, 23 Theoretical Inquiries L. 97 (2022) (applying the law market model to party choice to contractually waive or select the law governing recognition and enforcement of judgments). *See also* Gregory H. Shill, *Ending Judgment Arbitrage: Jurisdictional Competition and the Enforcement of Foreign Money Judgments in the United States*, 54 Harv. Int'l L.J. 459 (2013) (applying the law market model to domestic competition among U.S. states for better rules governing recognition of foreign judgments).

25 More general arguments about the distortive effects of limiting the recognition and enforcement of judgments and of certain other procedural rules on the market for goods and services have been repeatedly made within the European Union over the last few decades. *See* Brussels I Regulation (Recast), *supra* note 4, at recital 4 (assuming that "[c]ertain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market"); Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. Pa. J. Int'l Econ. L. 1297, 1363-64 (2004) (noting that "[i]n the early 1990s, scholars eloquently argued that the four freedoms guaranteed by the EC Treaty directly mandate the abolition of procedural rules that in effect operate as barriers to inter-EC trade").

26 The "state of origin" and "requested state" terminology follows that used in the Hague Convention, *supra* note 4. This Article limits its analysis to the international context—that is, to issues involving foreign *country* judgments. Analogous issues arise domestically in federal systems such as the United States, within which states have separate judicial systems.

whether to enforce foreign judgments without explicit and separate determination of the issue of recognition.[27]

There are a variety of bilateral, regional, and multilateral legal instruments governing foreign country judgments.[28] However, there is no general international legal obligation for a requested state to recognize or enforce a foreign judgment,[29] and the problem of foreign country judgments remains largely governed by each state's domestic law. In the United States, U.S. state law, not federal law, governs most aspects of the recognition and enforcement of foreign country judgments.[30] Most U.S. states have adopted legislation based on one of two uniform acts: the 1962 Uniform Foreign Money-Judgments Recognition Act (the "1962 Act") or the 2005 Uniform Foreign-Country Money Judgments Recognition Act (the "2005 Act"). For states lacking legislation and foreign judgments not covered by one of the uniform acts, common law generally governs.[31]

A lack of reliable recognition and enforcement would undermine the jurisdictional competition among states for more socially optimal laws and dispute resolution services that is posited by the law market model. Even if choice-of-law and forum selection clauses are reliably enforced, the effectiveness of the resulting dispute resolution outcomes will be uncertain unless the parties can expect those outcomes to be enforceable. If the defendant lacks assets in the selected forum, the parties' expectations will depend on whether a different state where the defendant does have assets would enforce the judgment against those assets. Other things being equal, parties would have weaker incentives to select the law and courts of a given state

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27 *See* Restatement (Fourth) of Foreign Relations Law of the United States § 481 cmt. b (Am. L. Inst. 2018) ("Recognition of a foreign judgment is a prerequisite to its enforcement . . . but recognition can serve other purposes as well. A party to a U.S. proceeding may rely on a foreign judgment to preclude relitigation of a claim governed by the foreign judgment (claim preclusion), or to resolve an issue of law or fact addressed in the foreign proceeding (issue preclusion).").

28 *See, e.g.*, Brussels I Regulation (Recast), *supra* note 4; Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2007 O.J. (L 339) 3 (also known as Lugano Convention); Inter-American Convention on General Rules of Private International Law, 8 May 1979, 1457 U.N.T.S. 3; Convention of 30 June 2005 on Choice of Court Agreements (concluded by the Hague Conference on Private International Law); Hague Convention, *supra* note 4. For an overview of bilateral, regional and multilateral international legal instruments governing foreign country judgment recognition and enforcement, see Peter Hay et al., *supra* note 4, at §§ 24.6-24.7.

29 *See* Restatement (Fourth) of Foreign Relations Law of the United States pt. iv, ch. 8, intro. note (Am. L. Inst. 2018) ("Customary international law imposes no obligation on states to give effect to the judgments of other states. Instead, domestic law and treaty regimes typically govern recognition and enforcement.").

30 *See id.* ("In the United States, State law generally governs the recognition and enforcement of foreign judgments . . . . Various proposals have been made to federalize this body of law by statute. The ALI's Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute, adopted in 2005 and published in 2006, has informed thinking in the field but has not been enacted. Congress has adopted the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), 28 U.S.C. §§ 4101-4105, which applies federal law specifically to the recognition and enforcement of foreign judgments for defamation.").

31 *See* Restatement (Fourth) of Foreign Relations Law of the United States § 481 n.1 (Am. L. Inst. 2018) ("For other judgments, and in States without legislation, the recognition and enforcement of foreign judgments is governed by State common law.").

if they do not expect a resulting judgment to be enforceable.[32] Those expectations depend, in turn, on the rules governing the enforcement of foreign judgments. Insofar as those rules favor recognition and enforcement, they provide a foundation for the law market by assuring parties that the dispute resolution outcomes produced under their selected law and by their selected court will be given effect.

However, the rules governing the recognition and enforcement of foreign judgments can also distort the global law market. Insofar as enforcement of foreign judgments is not assured under those rules, the location of assets may outweigh considerations of optimal law and dispute resolution services in parties' forum selection decisions. Thus, the existence of grounds for refusing recognition and enforcement can create uncertainty and increase litigation costs and produce distortive effects that can reduce the efficiency of the global law market.

For example, suppose that two parties are negotiating a forum selection agreement. State A's court and the law that a State A court would apply are optimal. Either or both parties lack assets in State A, but have assets in State B. Other things being equal, the lower the perceived likelihood that State B will enforce an eventual State A judgment, the higher the likelihood that either or both of the parties will prefer a State B court so that enforcement against assets can be assured—even though a State A court would otherwise be optimal. In other words, the parties may prefer a court that can produce a judgment that is likely to be enforced even if it is otherwise less optimal (in terms of procedures or applicable law, for example) than another court whose judgment is unlikely to be enforced. After all, "[w]ithout the possibility of recognition and enforcement of a judgment in a country in which the judgment debtor has assets, the judgment itself is of little practical value."[33] Thus, as Professor Brand explains, the rules governing the recognition and enforcement of foreign judgments "provide the legal framework for private party planning . . . . Those rules are the tools of the transactions lawyer who must plan for the possibility of disputes and structure a relationship so that his or her client is well positioned not only to obtain a judgment but to be able to have that judgment satisfied."[34]

Similarly, suppose that a dispute arises in the absence of a forum selection agreement. The plaintiff prefers a State A court and the law that a State A court would apply. The defendant lacks assets in State A, but has assets in State B. Other things being equal, the lower the perceived likelihood that State B will enforce an eventual State A judgment against the defendant's State B assets, the higher the likelihood that the plaintiff will select a court in State B instead. In either situation, the perceived likelihood of enforcement in State B will depend partly on the grounds for refusal

32 A party may voluntarily comply with a dispute resolution outcome, but a decision whether to do so is made in the shadow of the law—that is, it is based at least partly on whether the party expects that noncompliance will be met with an enforcement decision by a court in a state where it has assets. One solution to this problem might be to enable parties to choose the law governing recognition and enforcement. *See* Solimine, *supra* note 24.

33 Ronald A. Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments*, 358 Recueil des cours 96 (2013).

34 *Id.*

that exist in State B's rules governing the recognition and enforcement of foreign judgments. The lower that likelihood, the more likely the parties' choices will reflect the location of assets rather than optimal law and dispute resolution services, thus distorting the law market and limiting its ability to foster jurisdictional competition for optimal law and dispute resolution services.

Despite their potential distortive consequences, the rules governing the recognition and enforcement of foreign judgments can enhance the normative legitimacy of the global law market. Just as it would be undesirable to enforce choice-of-law agreements in all situations,[35] it would be undesirable to enforce foreign judgments in all situations. This is the basic premise of calibration principles—including systemic calibration. By protecting important values of fundamental rights and public policy, calibration in foreign judgment recognition and enforcement decision-making can enhance the normative integrity of the global law market.

The U.S. approach to foreign judgment recognition and enforcement is of particular significance for the global law market given the place of the United States in the global economy and its unusual systemic inadequacy ground for refusal. Transnational disputes often involve U.S. parties. In those disputes, the U.S. party will ordinarily have assets in the United States and—because the United States is a center for finance and investment—the non-U.S. party will often have assets there, too.[36] As a result, the prospect of enforcing a dispute resolution outcome in the United States will often be an important consideration when parties are negotiating dispute resolution agreements and when, in the absence of such an agreement, a plaintiff is making a forum selection decision. If the parties believe that a U.S. court would be unlikely to enforce an eventual judgment from a given foreign state, the parties may select a U.S. forum even if a forum in that foreign state would otherwise be optimal. The potential of U.S. law to create this type of distortion is increased both by the status of the United States as a location of assets against which judgments might be enforced and by the unusual nature of the systemic inadequacy ground for refusing enforcement of foreign judgments against those assets.

In this Part, we have attempted to establish that U.S. law governing the recognition and enforcement of foreign judgments is significant beyond U.S. borders. It can affect the global law market and its non-U.S. as well as its U.S. participants. We now turn to our examination of U.S. recognition and enforcement law in action, with a focus on systemic calibration.

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35 *See* O'Hara & Ribstein, *supra* note 15, at 17 (acknowledging that "states might legitimately choose to accept the operation of the law market in some . . . contexts while attempting to shut it down in others").

36 *See* Christoph A. Kern, *New Obstacles for the Recognition of Foreign Judgments in the U.S. after the Chevron v. Donziger Case?*, *in* US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger? 261, 263 (Andrea Bonomi & Krista Nadakavukaren Schefer eds., 2018) (arguing that it is increasingly common for non-U.S. parties to have significant U.S. assets).

II. Estimating Systemic Calibration: Data and Methods

A. The Foreign Judgment Decision Dataset

To evaluate the extent to which foreign judgment recognition and enforcement decisions in U.S. courts are systemically calibrated, we use an original dataset of U.S. state and federal court decisions since 2000.[37] To identify decisions whether to recognize or enforce foreign judgments, we searched the full text of opinions in the Westlaw electronic database.[38] To reduce the number of foreign judgment decisions missing from the dataset, we designed our search terms to be overinclusive.[39] We then screened each opinion produced by our search and included in the dataset only those containing a foreign judgment decision. This process produced a dataset of 587 opinions with a foreign judgment decision.

To indicate whether the court decided to recognize or enforce a foreign judgment, we created the variable *Decision* and coded it as "Yes" (1) if the court decided to recognize or enforce the judgment and "No" (0) if it did not.[40] Figure 1 provides a visual summary of the *Decision* variable. It shows that U.S. courts recognize or enforce foreign judgments more often than not in the opinions included in the dataset. The overall recognition and enforcement rate in the dataset is 62.4%. Some opinions decide whether to recognize before deciding whether to enforce; some decide only whether to enforce; and some decide only whether to recognize (for example, when determining the preclusive effect of a foreign judgment in U.S. courts).[41] The outcome rates are similar when the data is limited to enforcement decisions (370 decisions, 64.3% enforcement rate) and when limited to decisions on recognition only (217 decisions, 59.0% recognition rate).

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37 We included both trial court and appellate court decisions. We conducted our search in 2018, and included only opinions issued through 2017.

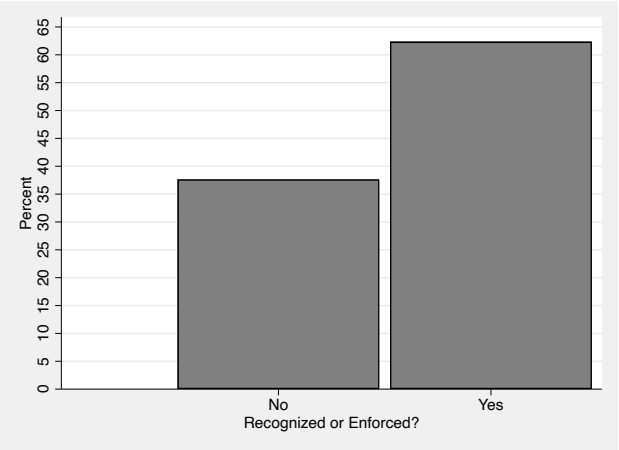
38 Specifically, we searched the "All State Cases (ALLSTATES)" database and the "All Federal & State Cases (ALLCASES)" database. We believe that the results of our search would not have been significantly different if we had used the Lexis electronic database. *See* Brian N. Lizotte, *Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts*, 2007 Wis. L. Rev. 107, 134 (2007) (finding that "Lexis and Westlaw were highly consistent in the cases they reported").

39 We used the following search query: (228K830 ((RECOGNI! ENFORC! DOMESTICAT! CONVERS!) /7 FOREIGN /7 (JUDGMENT ORDER DECREE INUNCTION DECISION)) (HILTON /5 GUYOT) (REST! /10 CONFLICT /10 (SEC! +5 98)) (REST! /10 "FOREIGN RELATIONS" /10 (SEC! +5 (481 482)))).

40 For appellate court decisions, we coded *Decision* as "Yes" if the court held that the foreign judgment should have been recognized or enforced (and on that basis affirmed or reversed the lower court decision), and "No" if it held that the foreign judgment should not have been recognized or enforced (and on that basis affirmed or reversed the lower court decision).

41 As noted above, recognition is typically a step prior to enforcement; but in practice, courts (at least in the United States) often decide whether to enforce foreign judgments without explicit and separate determination of the issue of recognition. This explains why there are many decisions in our dataset that address enforcement but not recognition.

Figure 1: Overall Rate of Foreign Judgment Recognition and Enforcement in U.S. Courts



To indicate the state of origin—that is, the country of the court producing the foreign judgment—we created the variable *State of Origin*. Figure A-1 in the Appendix shows the frequency of different states of origin in the dataset.[42]

We are not aware of data directly indicating whether a given state's legal system has "impartial tribunals or procedures compatible with the requirements of due process of law"—which is the standard in the systemic inadequacy ground for refusing recognition and enforcement of a foreign judgment under U.S. law.[43] Therefore, we estimate those systemic qualities using multiple indicators that we believe should be correlated with them and generally conducive to fair legal proceedings: rule of law, judicial independence and control of corruption. For rule of law, we used the Worldwide Governance Indicators' ("WGI") Rule of Law indicator, and for control of corruption, we used the WGI's Control of Corruption indicator.[44] The indicators' values may range from -2.5 to 2.5, with a mean of 0 and higher values indicating higher levels of rule of law and control of corruption.[45] For judicial independence, we used

42 Judgments from the United Kingdom and Canada together account for 150 (25.6%) of the cases in our dataset. Due to concerns that these cases may be disproportionately influencing outcomes, we checked our results with those cases excluded. The results were not significantly different.

43 *See supra* text accompanying note 10.

44 *See* Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *The Worldwide Governance Indicators: Methodology and Analytical Issues* (World Bank Pol'y Rsch., Working Paper No. 5430, 2010), https://ssrn.com/abstract=1682130; Information about the WGI project and its methodology is also available here: Worldwide Governance Indicators, https://info.worldbank.org/governance/wgi (last visited Apr. 28, 2021).

45 *See WGI Aggregation Methodology*, Worldwide Governance Indicators, https://info.worldbank.org/governance/wgi/Home/Documents (last visited Apr. 28, 2021) ("The composite measures of governance generated by the UCM are in units of a standard normal distribution, with mean zero, standard deviation of one, and running from approximately -2.5 to 2.5, with higher values corresponding to better governance.").

the CIRI Judicial Independence score.[46] The score ranges from 0 (Not Independent) to 1 (Partially Independent) to 2 (Generally Independent).[47] Unfortunately, the CIRI data extends only through 2011. Figures A-2, A-3, and A-4 in the Appendix show the distribution of different values in the WGI and CIRI data since 2000.

We acknowledge that these indicators are imperfect.[48] With that in mind, we also present results using alternative indicators in the Appendix so that the reader may compare them.[49] Using those alternatives does not change the basic results. To provide further context, Table 1 shows the mean values of each of the indicators for selected states, including a variety of states that appear multiple times in the dataset, for the years covered by our dataset.

Table 1: Mean Values of Indicators for Selected States (2000-2017)

State	Rule of Law	Judicial Independence	Control of Corruption
Argentina	-0.61	0.86	-0.40
Brazil	-0.20	1.05	-0.10
Canada	1.77	2.00	1.96
China	-0.47	0.05	-0.44
Finland	1.98	2.00	2.31
France	1.44	2.00	1.38
Iraq	-1.59	0.20	-1.36
Mexico	-0.47	0.91	-0.42
Norway	1.95	2.00	2.12
Russian Federation	-0.85	0.70	-0.96
Somalia	-2.32	0.00	-1.65
Ukraine	-0.79	0.60	-0.95
United Kingdom	1.72	1.95	1.82
United States	1.59	2.00	1.47

46 *See* David L. Cingranelli & David L. Richards, *The Cingranelli and Richards (CIRI) Human Rights Data Project*, 32 Hum. Rts. Q. 401 (2010).

47 *See* CIRI Human Rights Data Project, http://www.humanrightsdata.com (last visited May 21, 2021).

48 For a comprehensive analysis and critique of indicators such as those used here, see Governance by Indicators: Global Power Through Quantification and Rankings (Kevin E. Davis et al. eds., 2012); The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law (Sally Engle Merry et al. eds., 2015). Regarding the WGI specifically, see, for example, Marcus J. Kurtz & Andrew Schrank, *Growth and Governance: Models, Measures, and Mechanisms*, 69 J. Pol. 538 (2007). For a response from the developers of the WGI, see Daniel Kaufmann et al., *Growth and Governance: A Reply*, 69 J. Pol. 555 (2007).

49 The alternative measures are the Freedom House Rule of Law Score and the Transparency International Corruption Perceptions Index. *See infra* App. B.

B. Published and Unpublished Opinions

Not all U.S. court opinions are "published" in the sense of being published in one of the principal reporters, such as the *Federal Reporter* (for U.S. Court of Appeals opinions) and the *Federal Supplement* (for U.S. District Court opinions).[50] Prior studies have demonstrated that certain characteristics of published and unpublished opinions may vary systematically. For example, studies have found that, at least in certain contexts, published opinions tend to involve more complex, novel, and important issues, and unpublished opinions tend to involve more straightforward and routine issues.[51] The Westlaw electronic database, which we used to create our dataset, includes all published decisions. Although it includes some unpublished decisions, and reportedly captures more unpublished decisions than most other full-text searchable electronic databases, it does not include the bulk of them.[52] Overall, 376 (64%) of the opinions in the dataset were published in a reporter, and 211 (36%) were not.

The distinction between published and unpublished decisions has several implications for our analysis. First, and most importantly, systematic variation between the characteristics of published and unpublished opinions creates the risk of biased descriptive or causal inferences in studies relying on the analysis of published opinions if the determinants of publication are correlated with case outcomes.[53] We therefore urge caution when generalizing this Article's findings to foreign judgment decisions that are not published in reporters and, especially, to those not included in Westlaw at all.[54]

Second, however, because our dataset does include a large number of opinions that were not published in a reporter, we can compare our results for published and unpublished foreign judgment decisions to estimate whether and how these two categories of decisions may vary in ways relevant to our analysis.[55] Insofar as there is variation, we would conjecture that unpublished decisions not included at all in full-text searchable electronic databases like Westlaw vary in the same direction,

50 *See* Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 Cornell L. Rev. 119, 125-26 (2002) (explaining that published decisions are a small percentage of total court decisions).

51 *See* Lizotte, *supra* note 38, at 146; Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 Law & Soc'y Rev. 1133, 1137 (1990).

52 Edward K. Cheng, *Detection and Correction of Case-Publication Bias*, 47 J. Legal Stud. 151, 159 (2018). One increasingly used resource—PACER—includes information about all cases filed in the U.S. federal courts. However, while it provides access to dockets, it does not (yet) allow a Westlaw-like full-text search capability that would facilitate identification of foreign judgment decisions. Moreover, it does not provide access to state court opinions.

53 *See id.* at 152.

54 Siegelman & Donohue III, *supra* note 51, at 1167-68 (cautioning against such generalizing from published cases to all cases).

55 *Id.* at 1137 ("If we know that there are systematic divergences between cases with published opinions and those without, we can interpret results accordingly."). For a prior study taking advantage of the variation between published and unpublished opinions in this manner, see, for example, Gbemende E. Johnson, *Adjudicating Executive Privilege: Federal Administrative Agencies and Deliberative Process Privilege Claims in U.S. District Courts*, 53 Law & Soc'y Rev. 823, 838 (2019) (using data from opinions in the Lexis electronic database, and controlling for whether each opinion was published).

and perhaps to a greater extent, than those that are. We report on this variation in Appendix C.[56]

Third, there are theoretical reasons to focus on court opinions that can be readily obtained in electronic databases like Westlaw, versus those that cannot.[57] Domestic court opinions affect not only the litigants, but also actors beyond particular lawsuits.[58] When transnational actors plan, negotiate, and participate in cross-border personal and business relationships, their behavior is partly a function of their expectations about how courts would—if a future dispute arises—select, interpret, and apply the governing law. One of us has elsewhere described this phenomenon as the "transnational shadow of the law."[59] However, for court opinions to have this shadow effect, transnational actors must be aware of them. It is more likely that they (or their legal advisors) will be aware of them if they are published or readily available in electronic databases than if they are not.[60] Courts, too, are more likely to be influenced by earlier decisions of other courts that are more readily available. These decisions are therefore especially relevant from a governance-oriented perspective and from the perspective of the global law market.[61] The fact that most grievances do not lead to disputes and most disputes do not lead to litigation[62] only underscores the importance of focusing on those decisions—namely, published decisions—that may influence the behavior of actors beyond the parties to particular lawsuits.[63] As to

56 As App. C reports, the recognition and enforcement rate is lower in published opinions than unpublished opinions. The difference is statistically significant. As explained in that appendix, this difference may imply that recognition or enforcement is the more routine outcome, which would be consistent with the general legal presumption favoring that outcome. However, the other results are substantially similar in published and unpublished opinions.

57 *Cf.* Sepehr Shahshahani & Lawrence J. Liu, *Religion and Judging on the Federal Courts of Appeals*, 14 J. Empirical Legal Stud. 716, 720 (2017) (relying on published opinions for analysis; arguing that a benefit of focusing on published opinions in empirical analysis is that they have precedential force and weed out cases with frivolous claims).

58 Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 950-51, 972-73 (1979). *See also* Martin Shapiro, *Courts*, *in* 5 Handbook of Political Science: Governmental Institutions and Processes 321, 329 (Fred I. Greenstein & Nelson W. Polsby eds., 1975) ("[L]egalized bargaining under the shadow supervision of an available court . . . is not purely mediatory, because the bargain struck will depend in part on the 'legal' strength of the parties, that is, predictions of how each would fare in court.").

59 Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 Tul. L. Rev. 67, 69, 123 (2009).

60 *See* Stephen L. Wasby, *Unpublished Court of Appeals Decisions: A Hard Look at the Process*, 14 S. Cal. Interdisc. L.J. 67, 96 (2004) (noting that an unpublished decision "'is, more or less, a letter from the court to parties familiar with the facts' . . . . [and] 'is not written in a way that will be fully intelligible to those unfamiliar with the case'" (quoting Hart v. Massanari, 266 F.3d 1155, 1178 (9th Cir. 2001)).

61 This is a core insight of governance-oriented analysis of transnational law. *See* Whytock, *supra* note 59, at 119 ("the published decisions of domestic courts are likely to have broader global governance implications than those that are unpublished.").

62 *See* Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 Law & Soc'y Rev. 525, 545-46 (1980) (analyzing a number of claims that lead to disputes and litigation).

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

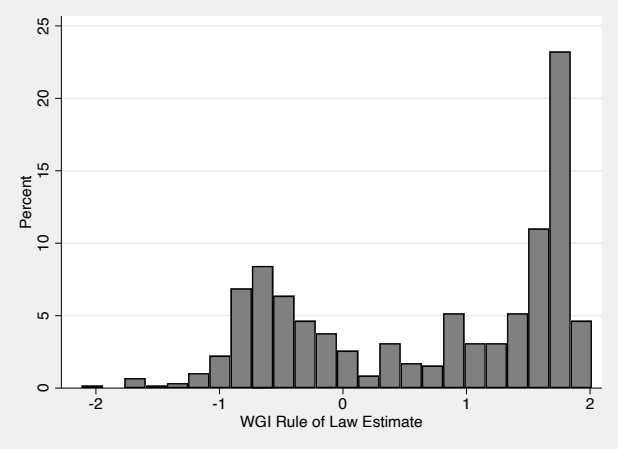
foreign judgments in particular, insofar as the rules governing their recognition and enforcement and the court opinions interpreting and applying those rules encourage or discourage the free circulation of judgments or otherwise affect transnational behavior—including the choice-of-law and forum selection behavior of participants in the global law market—those effects are likely to be most pronounced in published or otherwise readily available opinions.

III. Results

A. State of Origin Legal Systems

To place our analysis of systemic calibration in context, we begin by presenting the distribution of scores on the systemic indicators for states of origin producing judgments brought to the United States for recognition or enforcement.[64]

Figure 2: State of Origin Rule of Law



of the costs and benefits of eventually going to trial are key parameters in such negotiations." Shapiro, *supra* note 58.

64 These distributions are similar for opinions published in a reporter and those not published but available in Westlaw.

Figure 3: State of Origin Judicial Independence

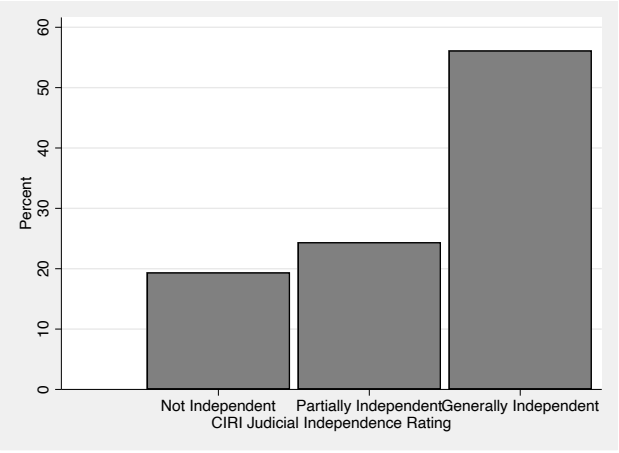
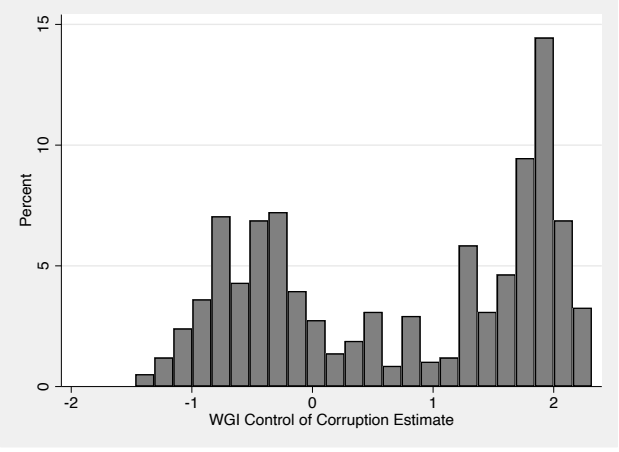


Figure 4: State of Origin Control of Corruption



As the figures show, among states of origin producing judgments brought to U.S. courts for recognition or enforcement, the distribution tends to be concentrated toward higher rule of law, judicial independence, and control of corruption scores, with longer tails on the left (this is referred to as negative skew).[65] As Table 2 indicates, the means and medians for all three indicators are higher for states of origin producing foreign judgments brought to U.S. courts for recognition or enforcement than for all states covered by the indicator. Table 2 also shows that in the distribution for all states covered by the indicator, rule of law is positively skewed (more concentrated

65 For a succinct summary of skewness, see Lee Epstein & Andrew D. Martin, An Introduction to Empirical Legal Research 128-29 (2014).

toward lower levels); judicial independence is negatively skewed, but less so than among states of origin; and control of corruption is positively skewed.[66]

These results indicate that the states of origin producing foreign judgments brought to U.S. courts for recognition and enforcement tend to have higher rule of law, judicial independence, and control of corruption scores than states in general. There are at least three possible selection effects that might help explain this pattern. First, parties with assets in the United States might tend to avoid business transactions or other relations with parties in states with low rule of law, judicial independence, or control of corruption, thus reducing the number of potential disputes that may result in judgments from those states' courts.[67]

Second, the systemic inadequacy ground for refusal that exists in U.S. law may send a signal to judgment creditors that U.S. courts are unlikely to recognize or enforce judgments from states of origin that those courts may perceive as lacking impartial courts or fundamentally fair procedures. That signal may influence parties' forum selection choices, leading them to choose courts in states with legal systems that tend to have higher scores on the rule of law, judicial independence, and control of corruption indicators.[68]

Table 2: Skewness of Distributions
(States of Origin Compared to States Worldwide)

		Std. Dev.	Mean	Median	Skewness
WGI Rule of Law Indicator	States of Origin	1.06	0.69	0.99	-0.38
	States Worldwide	1.00	0.00	-0.14	0.22
CIRI Judicial Independence Rating	States of Origin	0.79	1.37	2.00	-0.75
	States Worldwide	0.82	1.04	1.00	-0.07
WGI Control of Corruption Indicator	States of Origin	1.13	0.72	0.87	-0.19
	States Worldwide	1.00	0.00	-0.24	0.56

Notes: Negative skewness indicates that outlier observations tend to fall on the left of the distribution (reflected by a longer left tail), with the data more concentrated on the right. Positive skewness indicates that outlier observations tend to fall on the right of the distribution (reflected by a longer right tail), with the data more concentrated on the left.

Third, at the post-judgment stage, the same signal may discourage a judgment creditor from seeking enforcement in the United States if it believes the state of origin

66 *See infra* App. A, Figures A-2-A-4 (presenting the worldwide distributions graphically).

67 We note that this account is less likely to explain patterns in family disputes than in commercial disputes, and we conjecture that this difference may explain the bimodal distributions (i.e., distributions with two peaks) apparent in Figs. 2 and 4. Our preliminary analysis supports this conjecture, indicating that skewness for family disputes is closer to 0 and positive (0.25), while skewness for other disputes is negative and greater (-.75) than for the states of origin in our dataset overall.

68 Alternatively, the parties may select a state where they have (or, in post-dispute forum selection, the prospective plaintiff may select a state where the prospective defendant has) assets, so that a resulting judgment could be enforced in that state, making enforcement in the United States unnecessary.

is unlikely to satisfy the systemic adequacy standard. In that case, the judgment creditor's expected value of an enforcement action in the United States might not exceed the anticipated costs of that action.

If, hypothetically, these selection effects resulted in *all* foreign judgments brought to U.S. courts being from states of origin that were systemically adequate, then actual systemic calibration would be achieved in the decisions of U.S. courts even if they *always* recognized and enforced foreign judgments. But this clearly is not the case in practice. The results reveal that a considerable portion of the foreign judgments brought to U.S. courts are produced by states of origin with low scores on the systemic indicators—scores which we expect to be correlated with the likelihood that U.S. courts would find them systemically inadequate for judgment recognition and enforcement purposes. To achieve higher levels of systemic calibration, U.S. courts would need to refuse recognition and enforcement of some of these judgments, which is a possibility we will now explore.

B. Recognition and Enforcement Decisions

To what extent do the foreign judgment recognition and enforcement decisions of U.S. courts achieve systemic calibration? To shed light on this question, Figures 5, 6 and 7 present the distribution of state-of-origin scores on the rule of law, judicial independence, and control of corruption indicators for opinions in which U.S. courts decide not to recognize or enforce foreign judgments and for opinions in which they decide to recognize or enforce foreign judgments. Higher scores when U.S. courts recognize or enforce, and lower scores when they do not, would be one indication of systemic calibration.

Figure 5: State of Origin Rule of Law and Foreign Judgment Decisions

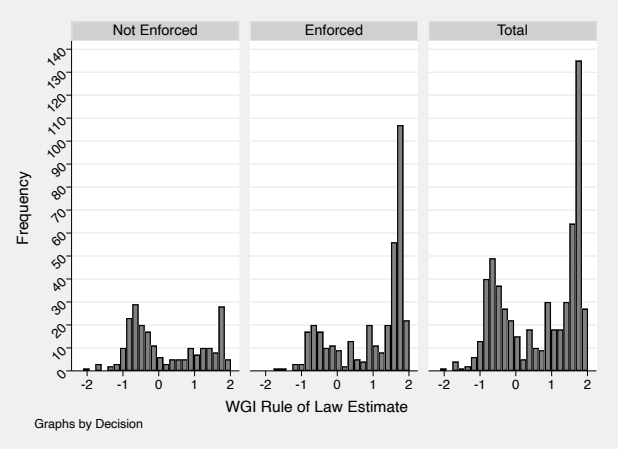


Figure 6: State of Origin Judicial Independence and Foreign Judgment Decisions

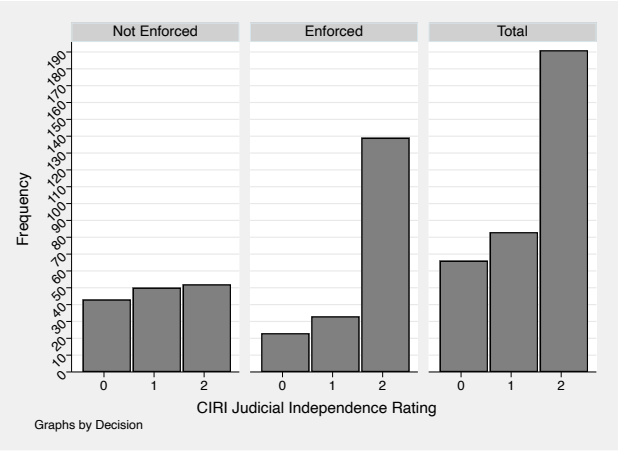
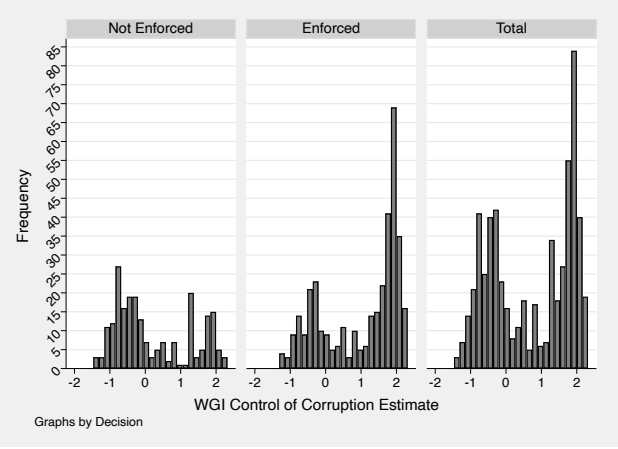


Figure 7: State of Origin Control of Corruption and Foreign Judgment Decisions



As these figures show, the levels of rule of law, judicial independence, and control of corruption are considerably higher overall when foreign judgments are recognized and enforced than when they are not.[69] As Tables 3, 4 and 5 indicate, the mean values for all three indicators are higher when foreign judgments are recognized and enforced than when they are not, and the differences are both substantively and statistically significant.[70]

69 The results are similar using the Freedom House Rule of Law indicator and the Transparency International Corruption Perceptions Index indicator. *See infra* App. B, Figures B-3 & B-4.

70 These results are similar for opinions published in a reporter and those not published but available in Westlaw. *See infra* App. C, Figures C-2-C-4.

Table 3: Rule of Law (Difference of Means)

		WGI Rule of Law Estimate	
		Mean	95% C.I.
	Total	.69	.60, .77
Recognized or Enforced?	Yes	.98	.88, 1.08
	No	.21	.08, .35
	Difference	.77	.60, .93
p=.000			

Table 4: Judicial Independence (Difference of Means)

		CIRI Judicial Independence Rating	
		Mean	95% C.I.
	Total	1.37	1.28, 1.45
Recognized or Enforced?	Yes	1.59	1.50, 1.69
	No	1.06	.93, 1.20
	Difference	.53	.37, .69
p=.000			

Table 5: Control of Corruption (Difference of Means)

		WGI Control of Corruption Estimate	
		Mean	95% C.I.
	Total	.72	.63, .81
Recognized or Enforced?	Yes	1.03	.92, 1.14
	No	.22	.08, .36
	Difference	.81	.63, .99
p=.000			

If one looks only at states of origin on the left sides of the "Not Enforced" and "Enforced" panels in Figures 5 and 7—that is, those states of origin with lower rule of law and control of corruption scores—the distributions of those scores for "Not Enforced" appear similar to those for "Enforced." This suggests that any relationship between those scores and recognition and enforcement decisions may be weaker for lower scoring states of origin than for states of origin overall. Table 6 confirms this. When we limit the analysis to states of origin with rule of law and control of corruption scores lower than 0, the mean indicator scores when judgments are not enforced are still lower than when they are enforced, but the differences are less significant both substantively and statistically. We therefore speculate that any relationship that may exist between differences in the systemic adequacy of states

of origin and recognition and enforcement decisions becomes weaker once their systemic adequacy falls below a certain level.[71]

Table 6: Low Rule of Law and Control of Corruption Scores (Difference of Means)

		Rule of Law <=0		**Control of Corruption <=0**	
		Mean	95% C.I.	Mean	95% C.I.
	Total	-.61	-.56, -.66	-.57	-.62, -.54
Recognized or Enforced?	Yes	-.56	-.63, -.50	-.52	-.58, -.45
	No	-.64	-.58, -.71	-.62	-.68, -.57
	Difference	.05	.02, -.17	.10	.12, .19
		p=.051		p=.010	

These results suggest considerable but imperfect systemic calibration. The state-of-origin scores on the rule of law, judicial independence, and control of corruption indicators tend to be higher when U.S. courts recognize or enforce foreign judgments than when they decline to do so, and the differences are both substantively and statistically significant. However, the results also show that U.S. courts sometimes do recognize or enforce foreign judgments from legal systems with low scores on the rule of law, judicial independence, and control of corruption indicators.[72] Moreover, the results indicate that differences in the scores on the rule of law and control of corruption indicators are less substantively and statistically significant when the analysis is limited to states of origin with lower scores.

71 To develop a firmer understanding of this finding, further theoretical and empirical analysis would be necessary that is beyond the scope of the present Article. However, our conjecture is that, on average, the lower the scores regarding systemic adequacy, the lower the numbers of commercial and other cases involving repeat players and the higher the number of family law and administrative law cases, such as immigration and social security cases. Parties in commercial cases are more likely carefully to plan whether to do business in a particular country; whether to choose a forum there; or whether to try to have a judgment from there recognized and enforced in the United States. On this, see *supra* text accompanying notes 67-68. In general, parties in family law and administrative law cases, on the other hand, might either not have the luxury of planning or not know enough about the legal systems involved to do so. We suspect that parties in such cases simply try to have a foreign judgment recognized or enforced in the United States and that they are sometimes successful in their attempt—even if the state of origin has low levels of systemic adequacy.

72 To get a sense of the circumstances in which U.S. courts recognize or enforce judgments from states of origin with low scores on these indicators, we examined such decisions for the bottom fifth percentile of rule-of-law indicator scores. In all of those cases, there was no indication that the party opposing recognition or enforcement raised the systemic inadequacy ground for refusal. One might worry that U.S. courts often decline to recognize and enforce foreign judgments from legal systems with high rule of law, judicial independence, and control of corruption. However, when this occurs in our dataset, the decision is not based on the systemic inadequacy ground for refusal, but rather on case-specific grounds for refusal.

C. Probability of Recognition or Enforcement

Another way of assessing the extent of systemic calibration in the recognition and enforcement decisions of U.S. courts is to estimate how state-of-origin scores on the rule of law, judicial independence, and control of corruption scores are associated with the probability of recognition and enforcement. To that end, Figures 8, 9 and 10 present the predicted probabilities of recognition or enforcement for different scores on each of the systemic indicators.

Figure 8: State of Origin Rule of Law and Probability of Recognition or Enforcement

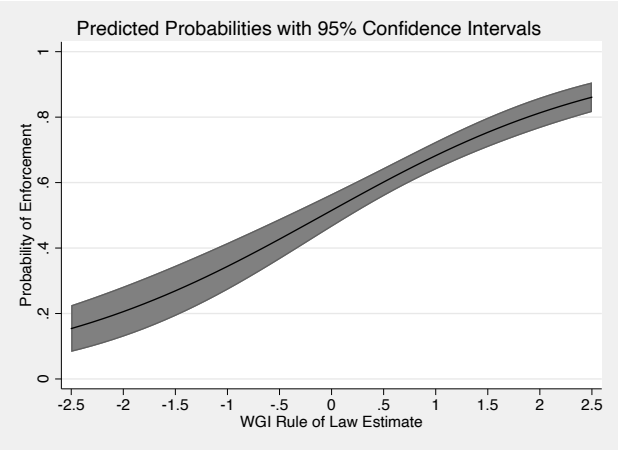


Figure 9: State of Origin Judicial Independence and Probability of Recognition or Enforcement

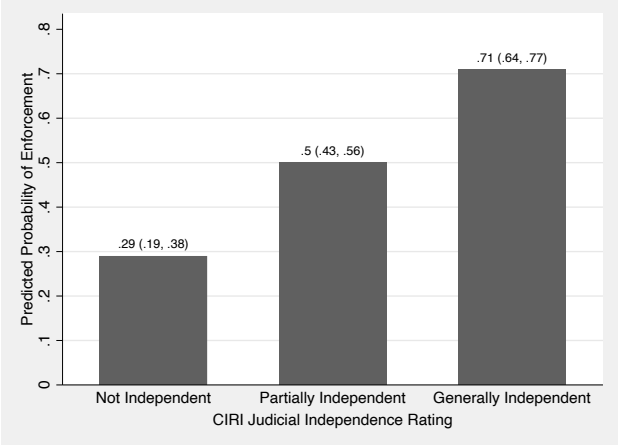
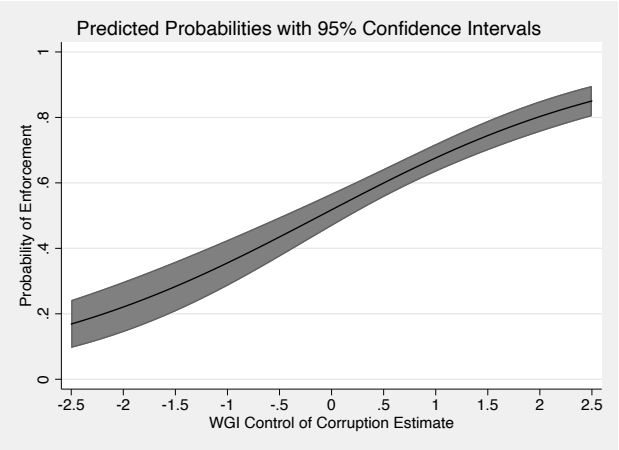


Figure 10: State of Origin Control of Corruption and Probability of Recognition or Enforcement



These figures show that as state-of-origin scores on the rule of law, judicial independence, and control of corruption indicators increase, the probability that a U.S. court will recognize or enforce a foreign judgment increases. The lower the level of these indicators, the lower the probability of recognition or enforcement.[73] Along with Section III.B's results, these results suggest a significant degree of actual systemic calibration. As the figures and tables in Appendix B and Appendix C indicate, the results are similar using the alternative rule of law and corruption indicators and when limiting the data to only published or unpublished opinions. Although these findings may suggest a cause-and-effect relationship, we make no causal claims here. Building on this Article's analysis, we plan further work using multivariate analysis to investigate factors—including, but not limited to, the qualities of state-of-origin legal systems—that may influence the recognition and enforcement decisions of U.S. courts.

IV. Explaining Systemic Calibration

We have found that the rule of law, judicial independence, and control of corruption scores for states of origin are significantly higher on average when U.S. courts recognize or enforce a foreign judgment than when they do not. The higher those scores, the higher the probability that U.S. courts will recognize and enforce a foreign judgment. Overall, these results suggest a significant degree of systemic calibration in the recognition and enforcement decisions of U.S. courts.

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73 These results are similar for opinions published in a reporter and those not published but available in Westlaw. The results are also similar using the Freedom House Rule of Law indicator and the Transparency International Corruption Perceptions Index indicator. *See infra* App. B, Figures B-5 & B-6.

What explains these results? We believe there are at least four possibilities. First, judicial application of the systemic inadequacy ground for refusing recognition and enforcement may be producing systemic calibration by filtering out judgments from states of origin that lack "a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law." Our analysis does not support this explanation. We found only 6 opinions in our dataset in which the court declined recognition or enforcement based explicitly on the systemic inadequacy ground for refusal.[74] The rule of law, judicial independence, and control of corruption scores for the states of origin in those opinions were indeed on the low end of the spectrum, which lends support to the courts' assessments of those states of origin and suggests that false positives (incorrect classifications of legal systems as inadequate for recognition and enforcement purposes) tend not to occur.[75] However, the very small number of refusals on systemic inadequacy grounds means that express judicial application of the systemic inadequacy ground for refusal cannot by itself explain the correlation between foreign judgment decisions and the qualities of legal systems. Instead, the systemic calibration we observe must be due primarily to other factors, and is therefore aptly characterized as "implicit" systemic calibration.

Why is explicit systemic calibration so rare? Our intuition is that judges are generally reluctant to publicly label a foreign legal system as systemically inadequate. Thus,

74 *See* Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d. Cir. 2000) (Liber.); DeJoria v. Maghreb Petroleum Exploration S.A., 38 F. Supp. 3d 805 (W.D. Tex. 2014) (Morocco); Chevron Corp. v. Donziger, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) (Ecuador); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (Nicar.); Osorio v. Dole Food Co., 2010 WL 571806 (S.D. Fla. 2010); Osorio v. Dow Chemical Co., 635 F.3d 1277, 1279 (11th Cir. 2011) (Nicar. Affirming the lower court's decision to deny recognition and enforcement, including on the lower court's ground that "the judgment was "rendered under a system which does not provide . . . procedures compatible with the requirements of due process of law," but "not address[ing] the broader issue of whether Nicaragua as a whole 'does not provide impartial tribunals' and declin[ing] to adopt the district court's holding on that question.").

75 The average scores for these states of origin in the respective decision years were -.94 for rule of law and -.78 for control of corruption (on a -2.5 to 2.5 scale), and in all cases the judicial independence rating was 0 (not independent). In each of these opinions, the scores on the rule of law and control of corruption indicators were negative, and the scores on the judicial independence indicator was 0. We do not argue, however, that any particular score necessarily means a legal system is inadequate for recognition and enforcement purposes. Our review of the cases cited here indicates that the findings of systemic inadequacy were done carefully, typically based not only on the parties' arguments, but also on evidence including expert testimony and U.S. government reports. Judgments from states of origin characterized in these opinions as systemically inadequate were not enforced in other opinions, with three exceptions. One court's decision to refuse recognition and enforcement was reversed on appeal. *See* DeJoria v. Maghreb Petroleum Exploration S.A., 804 F.3d 373 (5th Cir. 2015) (reversing the district court's refusal to recognize and enforce a Moroccan judgment). In two other cases, none of the parties raised the systemic inadequacy ground for refusal. *See* Madidi v. U.S. Citizenship & Immigration Services, 2011 WL 6415370 (D. Nev. 2011) ("The Defendants explicitly declined to address the nature of the Moroccan judicial system, and, thus, waive any argument as to the Moroccan court's procedural or substantive competency."); Abad v. Ochoa, 2003 WL 21716359 (Conn. Super. 2003) (neither party raised the systemic inadequacy ground for refusal; judgment was issued "by a court in Ecuador in a procedure arranged, with [the parties'] consent, through the Ecuadorian Consulate wherein neither party appeared in person."). Aside from the reversal on appeal, no inconsistencies appeared in the dataset regarding a state of origin's characterization as systemically inadequate.

they may use several methods to avoid explicit reliance on the systemic inadequacy ground for refusal. First, even when judges privately conclude that a state-of-origin's legal system is systemically inadequate, they are in most cases likely to prefer refusing recognition and enforcement based on a case-specific ground whenever that is possible, to avoid passing judgment on an entire foreign legal system. Second, for the same reason, they are unlikely to raise questions about systemic adequacy on their own if the party opposing recognition and enforcement fails to invoke the systemic inadequacy ground itself. Third, when there are strong non-legal reasons to avoid explicit systemic calibration, such as a concern about labeling a close economic or strategic ally's legal system as systemically inadequate, a judge may reconsider a preliminary conclusion that the foreign legal system should be characterized as systemically inadequate for recognition and enforcement purposes, or try harder to find a plausible case-specific ground for refusing recognition and enforcement. In some cases—including, we suspect, in the 6 cases noted above—these avoidance mechanisms might not be plausibly available or there may be no strong non-legal reason to use them, in which case a court may on rare occasions refuse recognition and enforcement based explicitly on the systemic inadequacy ground.

A second possible explanation for systemic calibration in the recognition and enforcement decisions of U.S. courts is that the existence of the systemic inadequacy ground for refusal in U.S. law signals to prospective judgment creditors that U.S. courts may decline to recognize and enforce judgments from states of origin that judges are likely to view as lacking impartial tribunals or procedures compatible with the requirements of due process of law.[76] At the forum selection stage, this signal may discourage parties from selecting forums in those states of origin, and at the post-judgment stage it may discourage them from investing in an action to enforce judgments from those states of origin in a U.S. court.[77] This may help explain the correlation between foreign judgment decisions and the state-of-origin scores on the systemic indicators even if courts only rarely use the systemic inadequacy ground expressly to refuse recognition or enforcement.

Third, judges' intuitions or implicit biases about different states of origin and their legal systems may influence foreign judgment recognition and enforcement decisions, even when court opinions reveal no explicit consideration of the systemic inadequacy ground for refusal. If those intuitions and biases are correlated with scores on the rule of law, judicial independence, and control of corruption indicators used in our analysis, they may help explain the patterns in our data.[78]

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76 *Cf.* Stephan, *supra* note 13, at 94 ("Reported cases do not tell us about party decisions not to seek recognition or enforcement of a foreign judgment, or of settlements that devalued the foreign judgment because of a concern about nonrecognition.").

77 *See supra* Part III.A. (discussing possible selection effects resulting from this signal).

78 On the other hand, it may be that these intuitions and biases may be unrelated to perceptions of systemic adequacy or inadequacy as such, but rather to levels of judicial familiarity with a given foreign legal system or judicial perceptions about how similar the system is to the U.S. legal system, in which case such a correlation may be more attenuated.

Finally, our findings may be due to an inverse correlation between state-of-origin scores on the rule of law, judicial independence, and control of corruption indicators on the one hand, and various case-specific grounds for refusing recognition and enforcement that are applied by U.S. courts. Those case-specific grounds include lack of personal jurisdiction, lack of notice, fraud, repugnancy to public policy, and incompatibility of the specific proceedings leading to the foreign judgment with the requirements of due process of law.[79] Other things being equal, case-specific defects like these may be less likely to occur in states of origin with higher scores on the rule of law, judicial independence, and control of corruption indicators.[80]

These explanations are not mutually exclusive. To the contrary, our conjecture is that they together explain much of the correlation between recognition and enforcement decisions and the qualities of legal systems. To reach firmer conclusions, further theoretical and empirical investigation of these and other hypotheses would, of course, be necessary.

Conclusion

Our primary findings are threefold. First, when U.S. courts recognize and enforce foreign judgments, state-of-origin scores on rule of law, judicial independence, and control of corruption indicators are on average higher than when U.S. courts refuse to do so. Second, the probability of recognition and enforcement increases as the indicator scores increase. Together these first two findings suggest that there is significant systemic calibration in the recognition and enforcement decisions of U.S. courts. Third, however, in only a tiny fraction of the opinions in our dataset did a court refuse recognition or enforcement based explicitly on the systemic inadequacy ground for refusal. Thus, systemic calibration in U.S. courts' recognition and enforcement decisions is more aptly referred to as implicit rather than explicit. We explored a variety of possible alternative explanations for the implicit systemic calibration we observe that could serve as focal points for further investigation.[81] We also found that the correlation between state of origin scores on rule of law and control of corruption on the one hand and recognition and enforcement on the other is weaker for states with low scores, and that even judgments from states of origin with very low scores are sometimes recognized and enforced.

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79 *See* Foreign Money-Judgments Recognition Act §§ 4(a)-(b) 13 U.L.A 263 (1962). *See also* Unif. Foreign-Cnty Money Judgments Recognition Act §§ 4(b)-(c) (2005); Restatement (Fourth) of the Foreign Relations Law of the United States §§ 483-484 (Am. L. Inst. 2018).

80 Indeed, at least some types of case-specific defects in a given state may contribute to lower scores for that state on the rule of law and judicial independence indicators. Although such a relationship is not inconsistent with the hypothesis that case-specific defects may be less likely to occur in states of origin with higher scores, this likely endogeneity means that the hypothesis could not be reliably tested using those indicators alone. On the other hand, insofar as lack of control of corruption may be a cause of rather than merely correlated with case-specific defects, the fact that our findings are similar when using that indicator lends some support to this hypothesis.

81 *See supra* Part IV.

What are the implications of our analysis for the systemic inadequacy ground for refusal in U.S. recognition and enforcement law? On the one hand, it may offer some reasons to support (or at least tolerate) it. As noted above, the low state-of-origin scores on the rule of law, judicial independence, and control of corruption indicators when U.S. courts refuse recognition and enforcement on this ground suggests that it does not tend to produce false positives.[82] In the opinions in our dataset in which courts concluded that a state of origin was systemically inadequate, the conclusion was reached only after careful consideration, including analysis of expert testimony, government reports, or both.[83] Because refusals on this ground are rare, it presumably has only rarely (if ever) caused genuine offense to other states.[84] Even if rarely applied, its existence may have a signaling effect that results in higher state-of-origin systemic quality on average for judgments brought to U.S. courts for recognition and enforcement than would be the case without it.[85]

On the other hand, our findings can be interpreted as evidence against the systemic inadequacy ground for refusal. They show that there is a significant degree of systemic calibration in U.S. courts' recognition and enforcement decisions even though explicit judicial reliance on the systemic inadequacy ground for refusal is extremely rare—and this, in turn, suggests that the systemic inadequacy ground may be redundant to other grounds for refusal and unnecessary to achieve actual systemic calibration. The highly infrequent use of the systemic inadequacy ground for refusal also suggests that U.S. courts may find it largely unnecessary.[86] Moreover, the fact that U.S. courts sometimes recognize and enforce judgments from states with low scores on the systemic adequacy indicators suggests that they are capable of making nuanced decisions on the fairness of the foreign proceedings in particular cases. Even courts in states with low levels of rule of law, judicial independence, and control of corruption may sometimes produce fair proceedings and fair judgments.

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82 *See supra* Part IV.

83 *See, e.g.*, Bridgeway Corp. v. Citibank, 201 F.3d 134 (2d Cir. 2000) (relying on both expert testimony and State Department reports to conclude that the systemic inadequacy ground applied); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307 (S.D. Fla. 2009) (same). *Cf.* Armadillo Distribution Enterprises, Inc. v. Hai Yun Musical Instruments Manufacture Co. Ltd., 2015 WL 12732417, at *8 (M.D. Fla. 2015) (declining to apply the systemic inadequacy ground where a judgment debtor "offer[ed] no expert testimony, instead relying solely on hearsay evidence in the form of a [State Department] Country Report and a travel warning").

84 *See supra* text accompanying note 15.

85 *See supra* Part IV.

86 *See, e.g.*, Anyang Xinyi Electric Glass Co., Ltd. v. B & F International (USA) Inc., 2016 WL 7435482, at *5 n.5 (C.D. Cal. 2016) (after finding that a case-specific ground for refusal applied, the court declined to decide whether the systemic inadequacy ground applied "[g]iven that the Court has already concluded that [judgment debtor] has a meritorious defense . . ."); Burgan Exp. for General Trading and Contracting Co. v. Atwood, 2012 WL 4473210, at *8 (S.D. Ohio 2012) ("In light of the evidence that the Defendants actually received due process, the Court need not address Defendants' unsupported argument that the Kuwaiti justice system ;systemically' fails to provide due process."); Maersk, Inc. v. Neewra, Inc., 2010 WL 2836134, at *13 (S.D.N.Y. 2010) ("[I]n this case, the Court need not make any broad pronouncements regarding the Kuwaiti system; after inquiring into these particular Kuwaiti proceedings, and finding a lack of any discovery or witness testimony, and minimal presentation of evidence, the Court is unwilling to defer to the judgments reached.").

In such cases, there may be no good reason to force the winning party to relitigate the matter in the United States.

Might the systemic ground for refusal nevertheless be a useful complement to the case-specific grounds for refusal in U.S. law? Perhaps. In some cases, a foreign judgment or the proceedings leading to it may be defective in ways that violate fundamental rights or public policy, but which do not fall within the scope of a case-specific ground for refusal. Whether a court should recognize and enforce such a judgment may depend on the state of origin's systemic adequacy. If it is systemically adequate, the judgment might in that case be appropriately recognized or enforced because that legal system should, in principle, be capable of satisfactorily addressing allegations of case-specific deficiencies itself through procedures analogous to those that exist in the U.S. legal system for the same purposes—such as rehearing and appellate procedures.[87] In circumstances in which the state of origin's legal system would be incapable of doing so, recognition and enforcement could be refused based on the systemic inadequacy ground. In this manner, the systemic inadequacy ground might serve as a "backstop," helping to ensure calibration of recognition and enforcement decisions when case-specific grounds do not apply.

However, given the wide range of case-specific grounds for refusal that exist in U.S. law, it is not clear such a backstop is needed. The case-specific grounds include lack of personal jurisdiction, inadequate notice, fraud, and repugnance to public policy, as well as two relatively new grounds that allow U.S. courts to refuse recognition and enforcement "if . . . the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment . . . or . . . the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."[88] It is unclear what reasons there would be to refuse recognition and enforcement if the foreign court had personal jurisdiction over and gave sufficient notice to the party against whom the judgment was entered, the foreign proceedings were

87 Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 Colum. L. Rev. 1444, 1502 (2011) (arguing that "[i]f . . . the [foreign] judiciary is systemically adequate, then the case-specific inquiry should be unnecessary at the enforcement stage, because [the foreign judiciary] should be able to address case-specific inadequacies internally, through its own rehearing or appellate processes").

88 Unif. Foreign-Cnty Money Judgments Recognition Act §§ 4(c)(7)-(8) (2005). In earlier work, one of us argued against these additional case-specific grounds for refusal. *See* Christopher A. Whytock, *Some Cautionary Notes on the "Chevronization" of Transnational Litigation*, 1 Stan. J. Complex Litig. 467, 480-81 (2013). In addition to suggesting that the systemic inadequacy ground's "backstop" role made the additional case-specific grounds unnecessary, he noted that the American Law Institute rejected a case-specific due process exception, explaining that "[s]uch a detailed inquiry into the foreign judgment is inconsistent with the pro-enforcement philosophy of this Act." Am. L. Inst., *supra* note 12, §5, cmt. c. Similarly, the U.S. Court of Appeals for the Seventh Circuit reasoned that a case-specific approach would be "inconsistent with providing a streamlined, expeditious method for collecting money judgments rendered by courts in other jurisdictions" and "would in effect . . . [allow] a further appeal on the merits . . . thus converting every successful multinational suit for damages into two suits . . ." Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000). Now that these two case-specific grounds for refusal are widely accepted, it is instead, perhaps, the systemic inadequacy ground for refusal that is now unnecessary.

"compatible with the requirements of due process of law," the resulting judgment is not repugnant to public policy, and none of the other case-specific grounds for refusal applies. Absent such reasons, it would seem all the more doubtful that the systemic inadequacy ground is necessary, even as a complement to case-specific grounds. Relying solely on case-specific grounds may offer a more nuanced approach to calibration in recognition and enforcement decision-making. For these reasons, we believe the time is ripe for reconsideration of the systemic inadequacy ground for refusing recognition and enforcement of foreign judgments in U.S. courts.

Appendix A: Descriptive Statistics

Figure A-1: States of Origin in Foreign Judgment Decisions Dataset

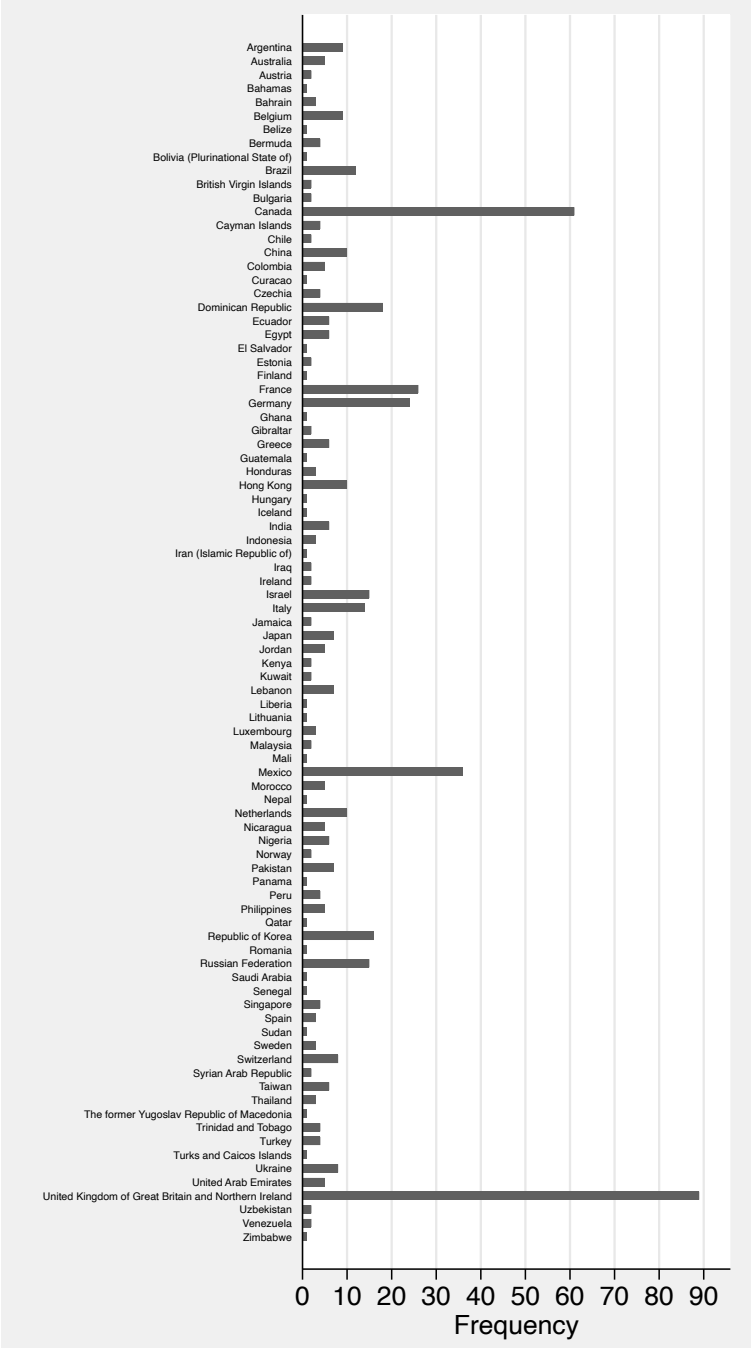


Figure A-2: WGI Rule of Law Estimate (All States) (2000-2017)

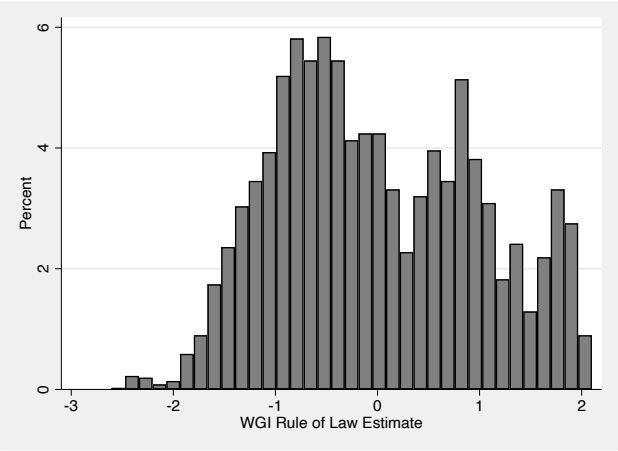


Figure A-3: CIRI Judicial Independence Rating (All States) (2000-2017)

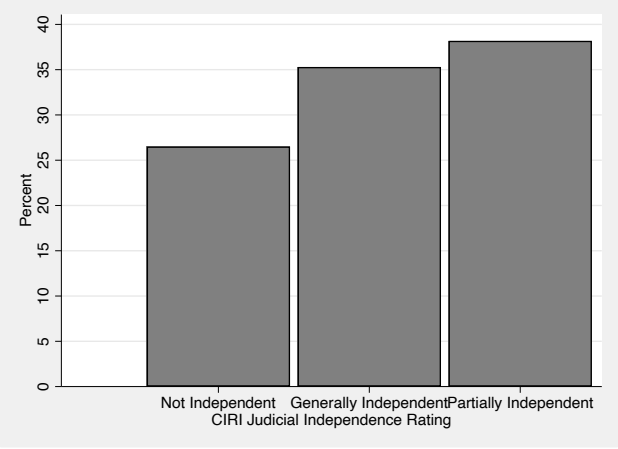
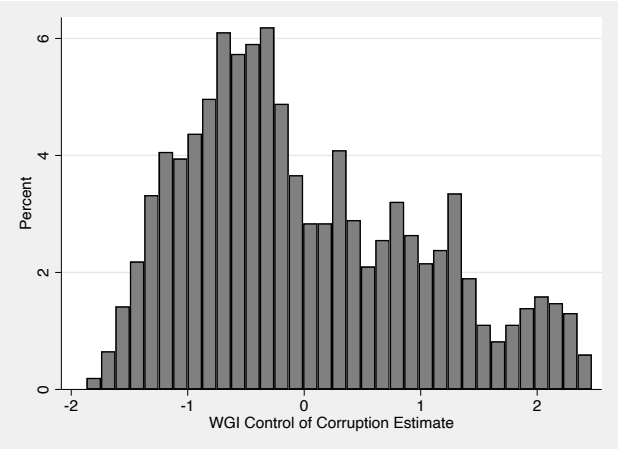


Figure A-4: WGI Control of Corruption Estimate (All States) (2000-2017)



Appendix B: Alternative Indicators

Figure B-1: State of Origin Rule of Law (Alternative Indicator—Freedom House)

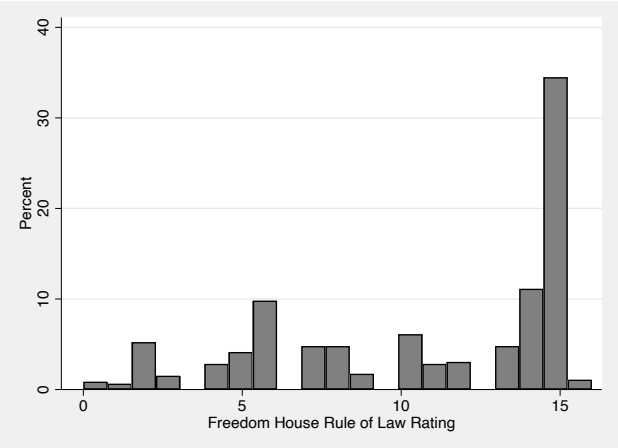


Figure B-2: State of Origin Corruption (Alternative Indicator—Transparency International)

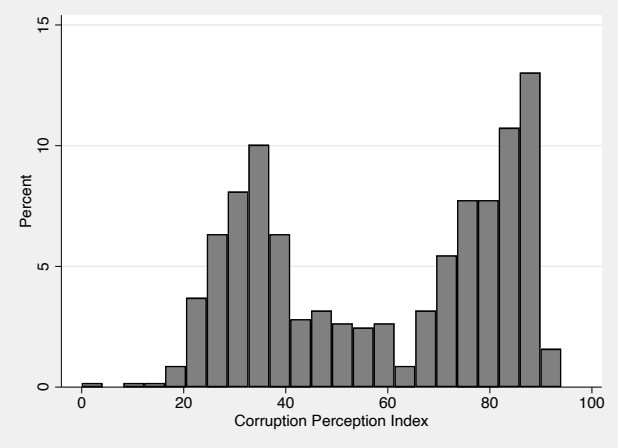


Figure B-3: State of Origin Rule of Law and Foreign Judgment Decisions (Alternative Indicator—Freedom House)

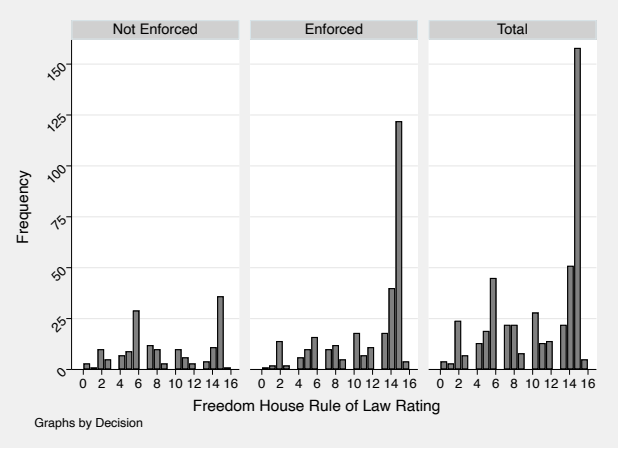


Figure B-4: State of Origin Corruption and Foreign Judgment Decisions (Alternative Indicator—Transparency International)

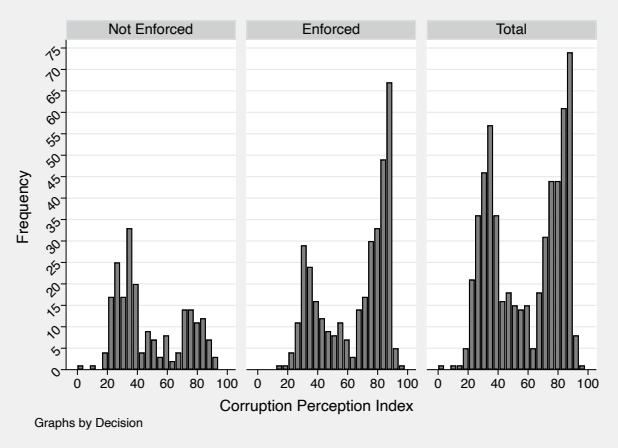


Figure B-5: State of Origin Rule of Law and Probability of Recognition or Enforcement (Alternative Indicator)

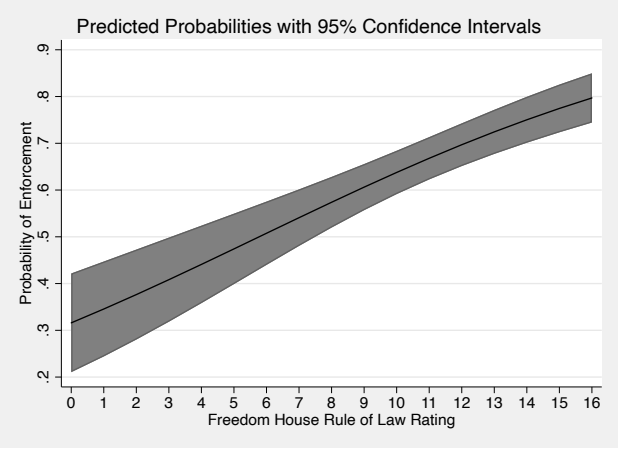
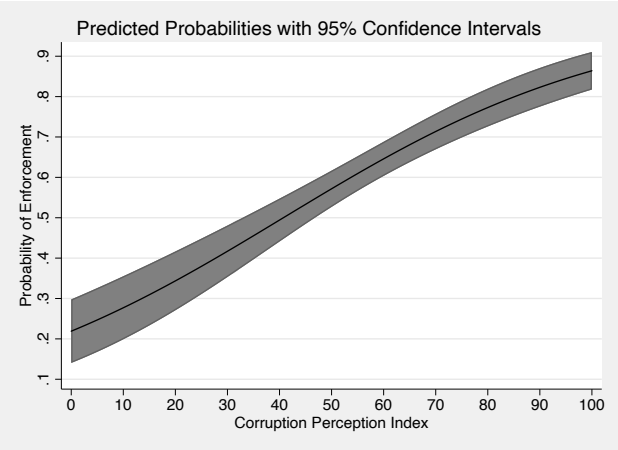


Figure B-6: Origin State Corruption and Probability of Recognition or Enforcement (Alternative Indicator)



Appendix C: Published and Unpublished Decisions

Overall Recognition and Enforcement Rates

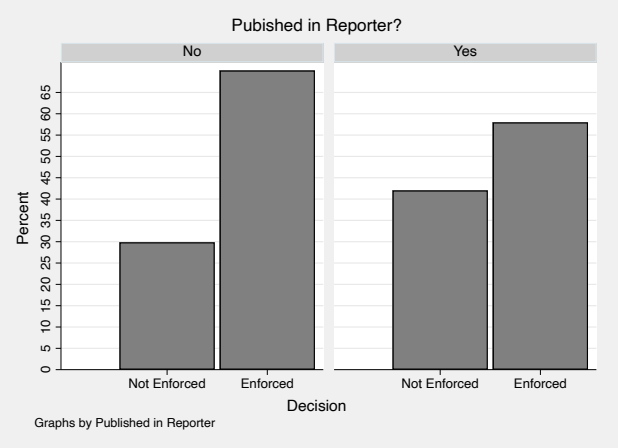
As Figure C-1 indicates, the foreign judgment recognition and enforcement rate is lower in published opinions (58%) than in unpublished opinions (70%), and the difference is statistically significant (p=.004). As discussed above, prior studies suggest that published opinions tend to be more complex and novel than unpublished opinions, and that one would expect win rates to be closer to 50% in published opinions than in unpublished opinions because the outcomes of complex and novel cases are more uncertain and difficult for parties to predict.[89] This may help explain the difference between recognition and enforcement rates in published and unpublished decisions. This difference may also imply that recognition and enforcement is the more routine or presumptive outcome, and that deviations from that outcome call for a justification in a published opinion. This would be consistent with the general legal presumption favoring recognition and enforcement.[90] As discussed above, we would expect the difference between published opinions and opinions not available in Westlaw to be in the same direction, but even greater—that is, even higher recognition and enforcement rates.[91]

89 Siegelman & Donohue III, *supra* note 51, at 1155 (finding that win rates are closer to 50% in published cases than in unpublished cases).

90 *See supra* text accompanying note 4.

91 *See supra* Part II.B.

Figure C-1: Recognition and Enforcement Rates in Published and Unpublished Opinions



State of Origin Indicator Scores

Figure C-2: WGI Rule of Law Estimate for States of Origin (Unpublished and Published Opinions)

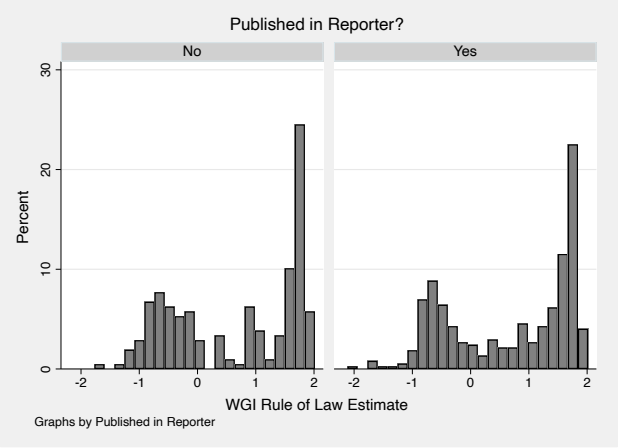


Figure C-3: CIRI Judicial Independence Rating for States of Origin (Unpublished and Published Opinions)

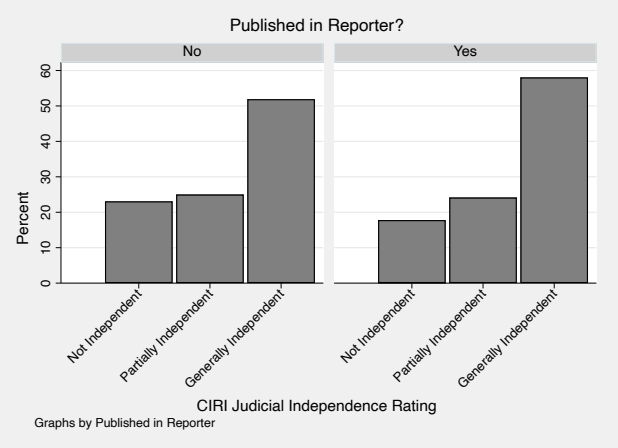
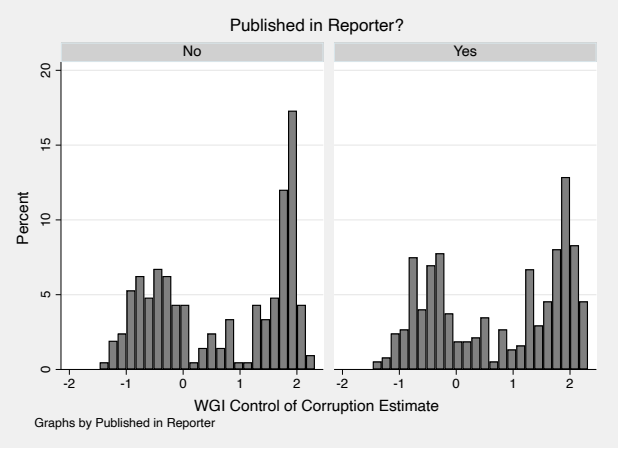


Figure C-4: WGI Control of Corruption Indicator for States of Origin (Unpublished and Published Opinions)



State-of-Origin Indicator Scores by Foreign Judgment Decision

Figure C-5: State of Origin Rule of Law and Foreign Judgment Decisions (Published Opinions)

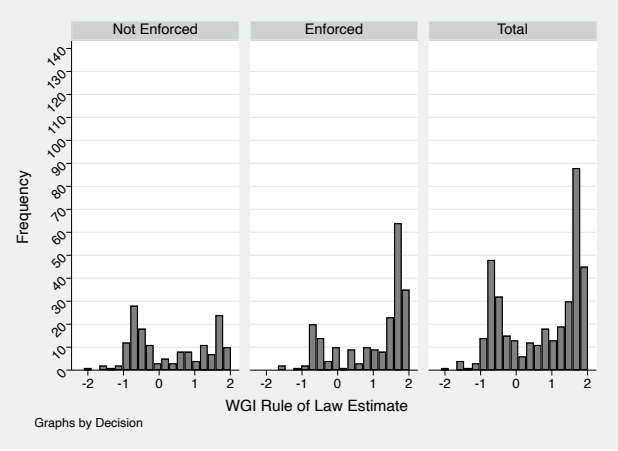


Figure C-6: State of Origin Rule of Law and Foreign Judgment Decisions (Unpublished Opinions)

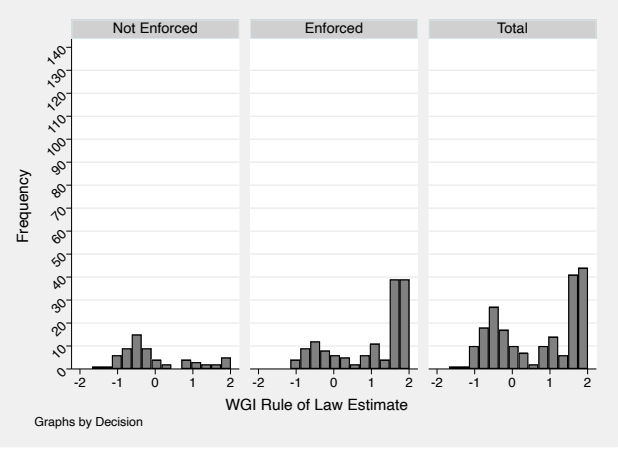


Figure C-7: State of Origin Judicial Independence and Foreign Judgment Decisions (Published Opinions)

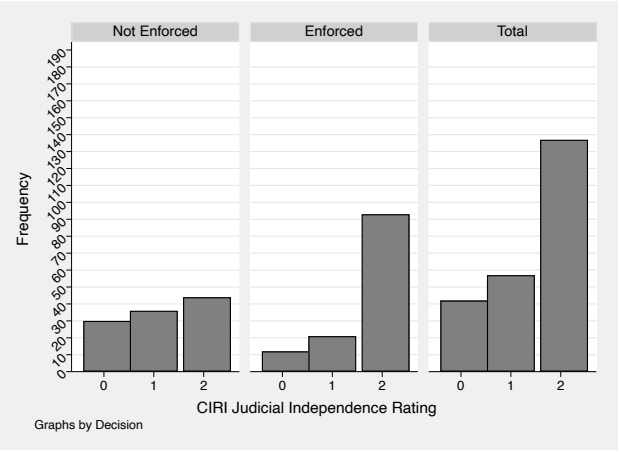


Figure C-8: State of Origin Judicial Independence and Foreign Judgment Decisions (Unpublished Opinions)

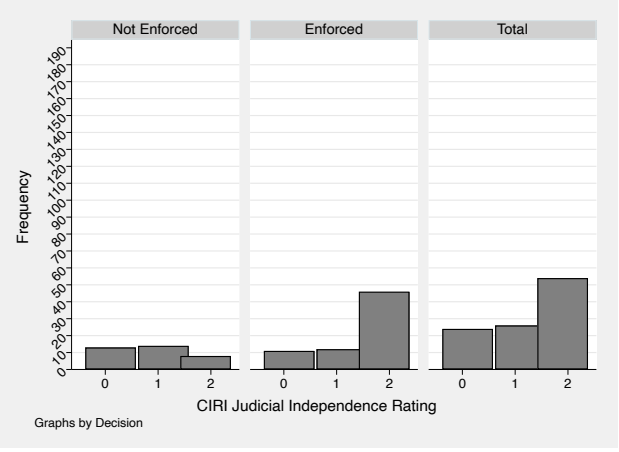


Figure C-9: State of Origin Control of Corruption and Foreign Judgment Decisions (Published Opinions)

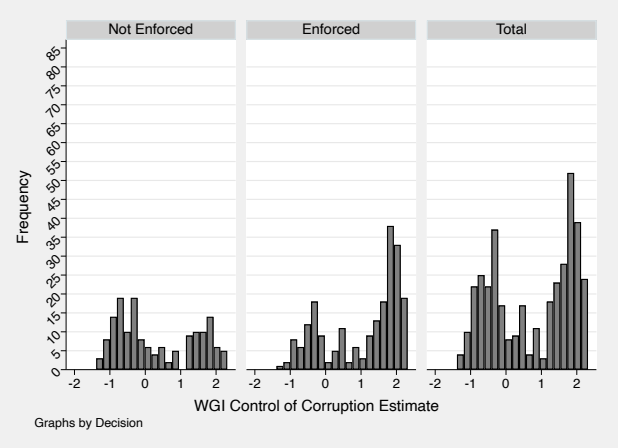
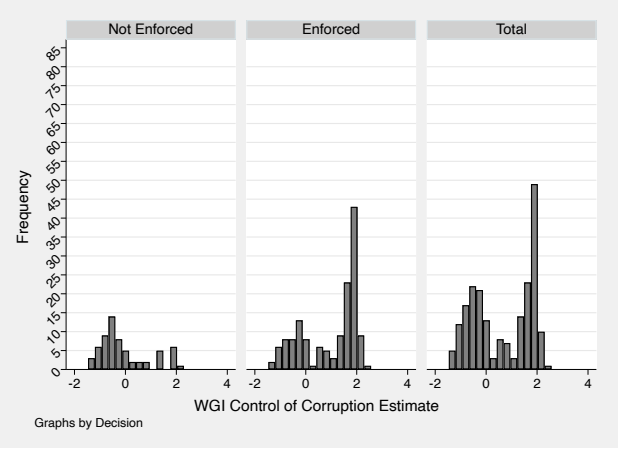


Figure C-10: State of Origin Control of Corruption and Foreign Judgment Decisions (Unpublished Opinions)



State-of-Origin Indicator Scores and Probability of Recognition or Enforcement

Figure C-11: State of Origin Rule of Law and Probability of Recognition or Enforcement (Published Opinions)

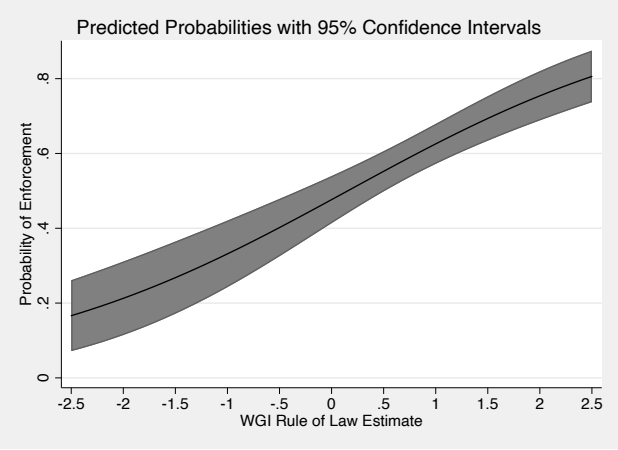


Figure C-12: State of Origin Rule of Law and Probability of Recognition or Enforcement (Unpublished Opinions)

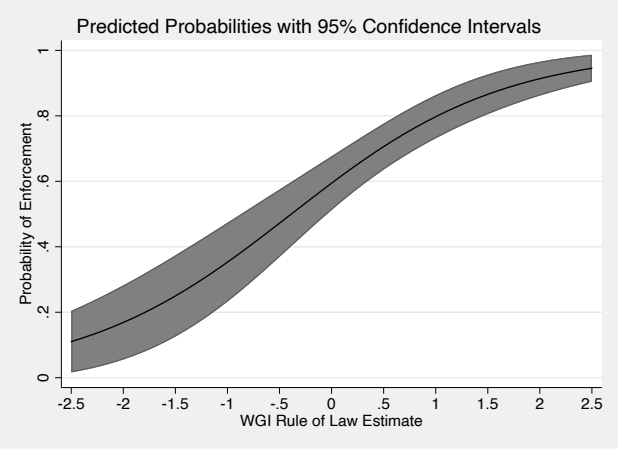


Table C-1: State of Origin Judicial Independence and Probability of Recognition or Enforcement (Published Opinions)

		Predicted Probability of Recognition or Enforcement	p-value	95% Confidence Interval
CIRI Judicial Independence Rating	Not Independent	.24	0.000	.13, .35
	Partially Independent	.44	0.000	.36, .52
	Generally Independent	.66	0.000	.59, .74

Table C-2: State of Origin Judicial Independence and Probability of Recognition or Enforcement (Unpublished Opinions)

		Predicted Probability of Recognition or Enforcement	p-value	95% Confidence Interval
CIRI Judicial Independence Rating	Not Independent	.37	0.000	.20, .55
	Partially Independent	.62	0.000	.51, .72
	Generally Independent	.81	0.000	.72, .91

Figure C-13: State of Origin Control of Corruption and Probability of Recognition or Enforcement (Published Opinions)

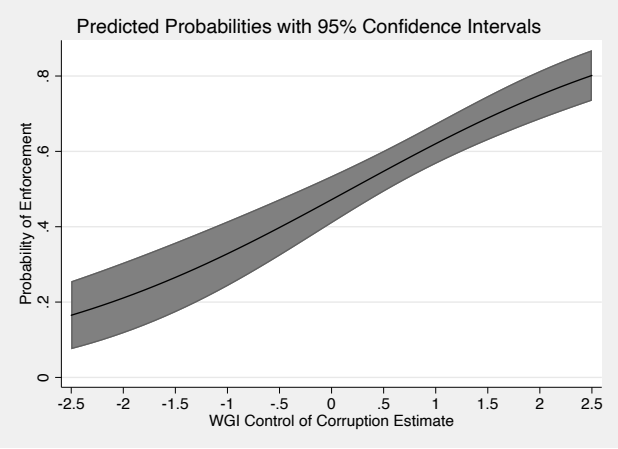
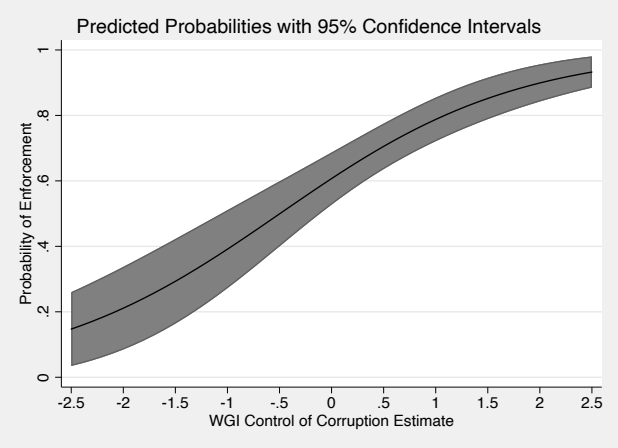


Figure C-14: State of Origin Control of Corruption and Probability of Recognition or Enforcement (Unpublished Opinions)



Appendix D: Recognition Only Decisions Compared to Enforcement Decisions

Figure D-1: State of Origin Rule of Law and Probability of Recognition

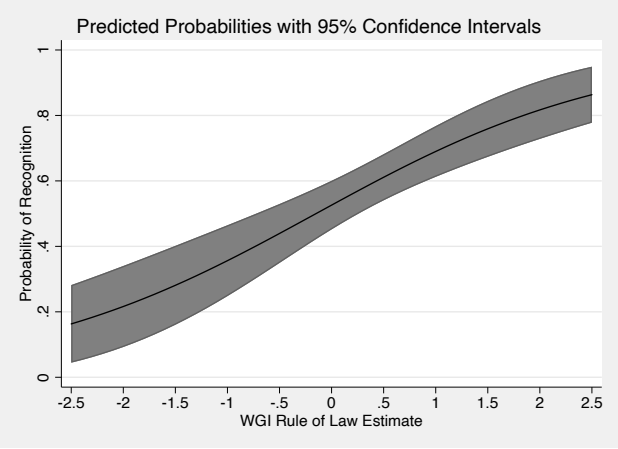


Figure D-2: State of Origin Rule of Law and Probability of Enforcement

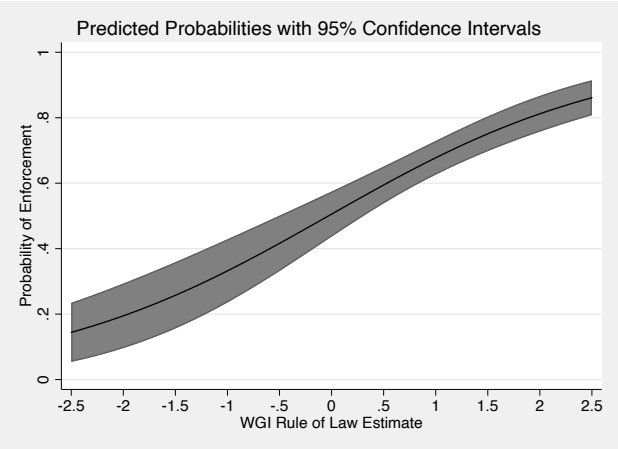


Table D-1: State of Origin Judicial Independence and Probability of Recognition

	CIRI Judicial Independence Indicator		
	Not Independent	**Partially Independent**	**Generally Independent**
Predicted Probability of Enforcement	.36	.53	.69
95% C.I.	.21, .51	.43, .63	.57, .82

Table D-2: State of Origin Judicial Independence and Probability of Enforcement

	CIRI Judicial Independence Indicator		
	Not Independent	**Partially Independent**	**Generally Independent**
Predicted Probability of Enforcement	.23	.46	.71
95% C.I.	.11, .34	.38, .55	.64, .78

Figure D-3: State of Origin Control of Corruption and Probability of Recognition

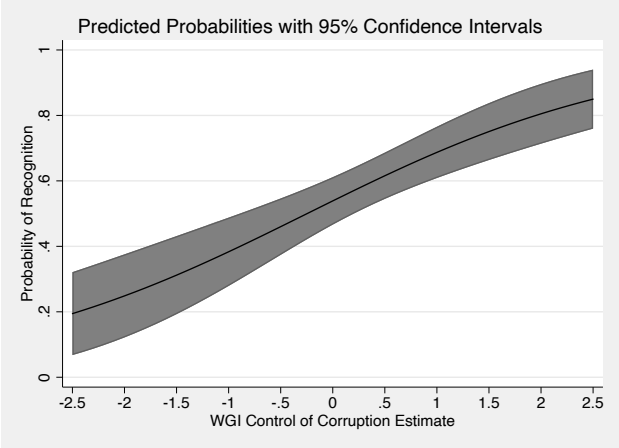


Figure D-4: State of Origin Control of Corruption and Probability of Enforcement