1

Courts without borders

Many foreign governments and transnational actors consider the United States a "judicial bully."[1] Time and again on issues ranging from international cartel activity to torture, U.S. courts have asserted the primacy of U.S. law over the legal authority of foreign states within their own territories and in areas of shared sovereignty, such as the high seas and outer space. This book is about the politics and law of judicial extraterritoriality – the practice of domestic courts unilaterally applying domestic laws to conduct and persons outside a state's borders – and how it influences processes of international rulemaking and enforcement. Its focus is the world's foremost practitioner of judicial extraterritoriality: the United States.

For much of the post-World War II era, the United States has been a frequent though selective regulator of activities outside its territory. Among U.S. institutions, the federal courts often have been on the front line in battles over the extraterritorial reach of U.S. law – enabling it in some instances and restricting it in others.

It may strike some readers as odd to consider domestic courts as consequential actors in international politics. However, when a U.S. court decides to apply U.S. law to disputes with an extraterritorial dimension – for example, to protect the rights of U.S. trademark holders or to thwart a conspiracy to defraud U.S investors – it is, in effect, bringing the regulatory power of the United States to bear in ways that determine who gets what, when, and how.[2] It follows that domestic judicial actions in the transnational sphere have political importance as well as legal importance. Accordingly, we need to understand better how and why U.S. courts behave as they do when presented with matters involving extraterritorial applications of U.S. law.

[1] Wai (2001:248).
[2] Lasswell (1936). See, for example, *Levi Strauss & Co. v. Sunrise International Trading Company* 51 F.3d 982 (11th Cir. 1995) and *Alfadda v. Fenn* 935 F.2d 475 (2d Cir. 1995).

The authority that allows courts to hear and decide legal claims is called adjudicatory jurisdiction. In liberal democracies, jurisdiction to adjudicate is typically delegated to domestic courts by domestic political bodies through constitution-making powers, or indirectly by legislation.[3]

Jurisdiction claiming among states in the international system is generally governed by customary international law.[4] Under the post-Westphalian international law of jurisdiction, the default is to assume that jurisdiction to make and apply law within territorially defined states belongs exclusively to the territorial sovereign. In transnational legal disputes, however, this default may not apply straightforwardly since, almost by definition, more than one sovereign's territory is implicated. Another common basis by which states may assert jurisdiction over disputes relies on the nationality of alleged perpetrators of legal wrongs or that of victims.[5] It takes little imagination to see that in the context of transnational activity, nationality-based claims of jurisdiction can conflict with territory-based claims.

A further complication is that the territorial principle itself embodies two potentially contradictory faces. The first ("subjective") face is the more mundane. It confers jurisdiction on sovereigns to make and enforce law to govern acts undertaken inside their own territories. The second ("objective") face allows for jurisdiction over acts that originate outside a state's borders but generate effects inside its territory.[6] It is this second "effects-based" face of territorial jurisdiction that has been at the center of the more controversial aspects of U.S. extraterritorial practice.[7]

[3] See Chapter 2 for more detailed discussion of the types of jurisdiction at issue in extraterritorial claims.

[4] Ryngaert (2008). European states have codified these rules among themselves in the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (now the Brussels I Regulation) and the 1988 Lugano Convention.

[5] This area of the law is most fully developed with respect to criminal jurisdiction, but the same categories are used to describe the bases of jurisdiction in transnational civil claims.

[6] Wharton (1905:71–72). Whether a state's regulation of the external conduct on the basis of effects inside its territory qualifies as "territorial" or "extraterritorial" is thus at times a matter of definitional debate. See, for example, Taylor (1979).

[7] A third and considerably less common principle of jurisdiction, known as the "protective principle," allows states to assert jurisdiction over internationally recognized criminal acts that directly threaten its security or governmental operations such as treason. A fourth principle of jurisdiction that is more frequently discussed, but rarely used, is the universality principle, which allows any sovereign to assert jurisdiction over violations of international peremptory norms – known as *jus cogens* or "compelling law," such as prohibition of genocide, slavery, or torture – regardless of where such violations occur.

The argument in brief

The research presented here is structured around two inquiries: first, what drives U.S. courts to claim jurisdiction over extraterritorial conduct, and why have they done so in some situations but not in others? Second, how has variability in U.S. judicial extraterritoriality influenced broader processes of international and transnational rulemaking and rule diffusion? The answers to these questions are important to explaining how law and international legal processes mediate political interactions among sovereign states.

The analysis mainly concerns extraterritorial applications of domestic law in the civil realm. U.S. courts have considered a wide variety of civil (non-criminal) claims involving extraterritorial conduct.[8] The willingness of U.S. courts to find and exercise jurisdiction extraterritorially has varied both over time and across issues. For example, for more than half a century, U.S. courts have been willing to enforce domestic statutes extraterritorially to disrupt international trading cartels and to protect U.S. trademarks. Likewise, for decades, U.S. courts used U.S. law to counter transnational securities fraud, to award compensation to victims of torture ordered by foreign officials, to restrict re-exports of sensitive materials and technologies, and to protect migratory bird and animal species. At the same time, U.S. courts have generally declined to exercise extraterritorial jurisdiction over product liability claims, over alleged patent violations, to secure compensation for U.S. citizens killed in foreign plane crashes, or to require extraterritorial compliance with U.S. labor and anti-pollution laws.

In most instances, the texts of the underlying U.S. laws offer no justification for these differences. Nor has U.S. extraterritoriality varied neatly by legal issue area (as indicated, for example, by different trends within intellectual property law and across different areas of environmental law). This variation also cannot be explained by looking to the presence or absence of international treaties. In short, the extraterritorial regulatory behavior of U.S. courts exhibits a puzzling empirical pattern from a legal perspective.

Adopting a more political lens, one might expect extraterritorial applications of U.S. law to be directed toward promoting U.S. legal ideals in

[8] Civil and criminal laws often differ regarding who (or what) has the legal capacity to initiate proceedings to enforce them. In the United States, only government prosecutors may bring criminal charges, although many U.S. laws allow private entities to initiate civil claims.

foreign settings, toward improving U.S. economic competitiveness, or toward safeguarding the interests of Americans abroad. Alternatively, one might expect that U.S. courts would apply U.S. law extraterritorially in response to growth in cross-border judicial communication and cooperation. As I demonstrate, however, each of these expectations is wrong.

I find, instead, that U.S. federal court behavior is more generally consistent with judges seeking to apply U.S. law to decide the disputes before them in ways that support (or at least do not undermine) the integrity or operation of U.S. law. At times this requires U.S. judges to interpret geographically ambiguous laws as having extraterritorial reach – though often it does not.

More specifically, I argue that U.S. courts have applied U.S. law extraterritorially in two types of situations. The first is when extraterritorial conduct poses a threat to the functioning of U.S. law inside U.S. territory. Threats of this type exist where limiting the reach of U.S. law to conduct inside the United States would push the regulated behavior outside U.S. borders but would not simultaneously exclude its unwanted effects. Thus, for example, a U.S. law barring companies with U.S. ties from conspiring inside U.S. territory to fix prices on commodities but not elsewhere will not shield U.S. purchasers from price distortions if those commodities are traded internationally. The foreseeable result of a decision not to apply U.S. law extraterritorially in such circumstances would be to highlight loopholes for circumventing that law, thereby undercutting the public policy the law is intended to serve. Throughout this volume, I refer to this basis of judicial extraterritoriality as the "domestic rule integrity logic."

The second situation in which U.S. courts are likely to find extraterritorial jurisdiction appropriate is when U.S. citizens and others with close U.S. ties are accused of violating a short list of rights at the core of American political identity. This list includes the rights not to be subjected to torture, extrajudicial killing and other crimes against humanity, or forced labor. In rights-based disputes, unlike those in the regulatory sphere, there is often far less international disagreement about what the law requires. Instead, the governance challenge involves finding states that are willing and able to enforce those rules transnationally. Animating this logic of U.S. extraterritoriality, therefore, is the idea that if members of the U.S. polity, or others who benefit from close associations to the United States, are permitted to violate these fundamental rights with impunity anywhere, it undermines their status as American

values everywhere. I call this second basis of judicial extraterritoriality the "rights-based logic."

This argument breaks new ground in political science as well as in international law scholarship. It advances international relations theory by demonstrating how the actions and inactions of domestic courts influence whether and how U.S. legal and policy preferences are projected internationally. It also advances legal understandings of U.S. extraterritoriality by providing an empirically vetted account of why some types of domestic effects matter more than others in accounting for patterns of U.S. extraterritorial practice. My analysis also seeks throughout to explain the politics of U.S. judicial extraterritoriality without losing sight of the fact that courts and judges are first and foremost interpreters of legal rules.

Elaborating and testing a novel theory of U.S. judicial behavior to explain patterns of U.S. extraterritorial practice is only part of the task of this book, however. Equally important are my efforts to embed this theory in a broader set of claims about the international political consequences of U.S. judicial extraterritoriality.

Although the international system lacks a central lawgiver, the behavior of transnational actors is rarely subject to wild unpredictability. Instead, consistencies emerge from the self-interested, strategic behavior of transnational private actors among themselves and when interacting with the governments of states touched by their conduct.[9] Strategic maneuvering around legal obligations, along with the bets that individual transnational actors place on the likelihood that one state or another will seek to enforce its legal preferences, help to shape, from the bottom up, the transnational "rules of the game" as they are experienced by transnational actors.

U.S. court decisions on the extraterritorial applicability of U.S. law matter to several categories of actors, including most immediately to the litigating parties. Foreign governments too often have an interest in decisions that purport to expand or contract U.S. extraterritorial jurisdiction – whether the government in question welcomes extraterritorial assertions of U.S. legal authority, or whether it views them as an illegitimate, or even internationally unlawful, form of overreaching. However, the impact of U.S. court decisions on the reach of U.S. law and adjudicatory authority does not stop there.

[9] For private actors "strategic behavior" entails efforts to make oneself as well off as possible, given known features of the decision environment and what one anticipates others will do.

Wider audiences of transnational actors likewise observe U.S. courts applying U.S. law extraterritorially or opting not to do so. Where U.S. courts decide to exercise jurisdiction extraterritorially, and their decisions have costly results for those found to be violating U.S. law, this catches the attention of others engaged in similar conduct – particularly when U.S. laws are more restrictive than those of foreign states. Evidence that U.S. courts are willing to apply specific statutory or constitutional rules extraterritorially can encourage additional plaintiffs to initiate similar claims.[10] This, in turn, creates incentives for prospective defendants to adjust their behavior so as to minimize this threat.

Patterns of domestic rule following (or rule evasion) among regulated actors also shape U.S. government incentives to engage with the governments of other states on transnational issues. Where U.S. extraterritoriality has been proven effective in safeguarding the transnational interests of U.S. entities, there is often little urgency for the U.S. government to bargain with others over coordinated rules. This has long been the case, for example, with regard to antitrust policy.[11] Where, by contrast, U.S. federal courts have shown themselves unwilling or unable to protect the interests of those seeking extraterritorial application of U.S. law, the U.S. government has come under considerably more domestic pressure to reach formal agreements with other states. For example, the failure of holders of U.S.-granted patent rights and copyrights failed to convince U.S. courts in the 1960s and 1970s that those rights should be interpreted as extending extraterritorially. This helped to fuel U.S. engagement in efforts to remake international intellectual property rules during the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade.[12]

In the remainder of this chapter, I first situate my argument within theories of international relations and transnational politics. Next, I briefly describe how judicial extraterritoriality relates to older forms of extraterritorial practice, some of which still persist. Thereafter, I provide a short clarification of the scope of my inquiry and an overview of the remaining chapters.

[10] U.S. ties matter here because of constitutional due process restrictions on the ability of U.S. courts to force defendants to appear before them. See Chapter 2 for additional discussion.
[11] See Chapter 4 for development of this example.
[12] See Chapter 5 for development of this example.

Judicial extraterritoriality and international relations theory

Regulating transnational activities in an international system in which legal authority is formally apportioned among territorial states is complicated. Governments often disagree over how much (or how little) to regulate. As a result, efforts among states to forge shared laws and policies at the international level frequently fail or are never attempted in the first place. Even when agreements are reached, they invariably contain ambiguities that require elaboration. Different states' officials and institutions may implement shared rules differently, or they may prefer clashing modes of enforcement. New gaps and ambiguities also may emerge as underlying circumstances change, as regulated actors engage with and attempt to alter the laws in question, and as other laws are adopted or discarded. Under these conditions, states that are able and willing to apply legal rules extraterritorially can more effectively project their preferences onto others outside their borders.

As a means of creating or maintaining transnational rules, extraterritorial applications of domestic law and jurisdiction differ markedly from top-down, government-to-government modes of bargaining.[13] Standard approaches to international rulemaking involve the representatives of governments, or specialized agencies within them, sitting down to hammer out mutually acceptable solutions to shared problems, which domestic agencies are then presumed to implement. Judicial extraterritoriality, by contrast, is characterized by direct assertions of domestic legal authority over conduct and persons outside the state, often without the prior consent or cooperation of foreign governments. These contrasting approaches meet where extraterritorial regulation (or its credible threat) starts to influence the type, content, or timing of international bargaining.

Another distinguishing feature of judicial extraterritoriality is that its utility is not limited to any particular stage of international rulemaking and rule implementation. Indeed, disputes over extraterritorial jurisdiction in U.S. courts can arise in the absence of international treaties, while states are attempting to negotiate international agreements, or as part of efforts to interpret and apply international treaties and customary law *ex post*.[14]

[13] Slaughter (2009), Newman (2008), Raustiala (2002).
[14] The case study chapters that follow explore U.S. judicial extraterritoriality in each of these contexts.

The theory and analysis in this book draw upon several foundational ideas in contemporary international relations theory. Chief among them are the importance of state power in determining winners and losers in international political and regulatory contests,[15] and the influence of mobilized domestic actors in setting government policies and preferences for international bargaining.[16] The analysis also incorporates some less common actors and themes – beginning with domestic courts and judges. Also important is the strategic behavior of actual and prospective litigants, since without active, formalized disputes U.S. courts have no opportunity to act – extraterritorially or otherwise.

The power to compel compliance with domestic law

State power matters immensely for how legal jurisdiction is defined and exercised in the international system. The aspect of "power" I am most concerned with here is the ability of a state to compel transnational actors – whether its own citizens or those of other states – to behave in ways that are consistent with the state's domestic laws and policies.[17] In general, this entails leveraging ties to private and public institutions and citizens inside the state in order to extract compliance extraterritorially.

In its position as the economic hegemon of the capitalist world in the decades following World War II, the United States has had an uncommon degree of this type of leverage. Many transnational entities have, or desire to have, ties to the United States – for access to U.S. consumer and industrial markets, investment capital, financial services, or to benefit from its technological, educational, and organizational resources. The global allure of access to the United States has resulted in the presence of large amounts of foreign-owed assets inside U.S. territory. These assets have provided U.S. courts with a domestic constitutional basis for asserting jurisdiction over foreign entities and also with a ready capacity to enforce legal judgments against unsuccessful defendants without the assistance of foreign governments.

To be sure, the power of U.S. courts to enforce U.S. law extraterritorially has never been absolute. And, even when U.S. courts have had the

[15] Krasner (1976), Keohane and Nye (1977), Drezner (2007).
[16] Milner (1997), Moravcsik (1998), Hafner-Burton (2008), Simmons (2009).
[17] Simmons (2001). Switzerland, for example, is not a powerful state under standard indices. However, it has considerable leverage to shape international banking rules because of the sizeable proportion of global private wealth served by its banking institutions.

capacity to enforce U.S. laws extraterritorially, they have not always used it or used it to the fullest extent possible. Nor is this type of power unique to the United States. Most countries' legal systems contemplate applying some domestic law to conduct outside the state's borders, particularly where doing so is unlikely to interfere with the laws of other states. For example, when a government taxes the foreign income of its residents or threatens to prosecute foreign acts of treason by its citizens, this constitutes extraterritorial regulation.[18] A few other relatively powerful states, among them Germany, the United Kingdom, France, Spain, Australia, Canada, Japan, South Korea, have also enacted domestic laws that expressly contemplate extraterritorial application in competition policy and banking.[19] The Court of Justice of the European Union likewise has issued several decisions applying EU competition law extraterritorially, and has begun doing so with growing frequency.[20]

Still, the United States has been by far the most assertive practitioner of judicial extraterritoriality in the contemporary era, particularly when it comes to claims involving the conduct of non-citizens. It is therefore essential to understand how and why U.S. courts came to have this role, how that role might now be changing, and why it matters for international politics and for international law.

Private litigants as strategic agents

Regulated actors are rarely passive recipients of attempts to limit their behavior using legal rules. This is so whether the focus is on private entities or on governmental officials. To the contrary, regulated actors can be counted upon to champion rules and procedures that they expect to benefit them and to try to circumvent or reshape those that impose unwanted costs or constraints.

Domestic legal systems vary according to how they allocate responsibility for the enforcement of regulatory and rights-based laws. The United States is unique among its economic peers in the degree to

[18] Jennings (1957:150).

[19] Tamura *et al.* (2005), Harding and Joshua (2003), Ahn and Kim (2005), Griffin (1999), Gerber (1983), Taylor (1979).

[20] Judgment of the European Court of Justice (now CJEU) of September 27, 1988, in *A. Ahlström Osakeyhtiö and others v. Commission of the European Communities (Wood Pulp Case)*, joining cases 89, 104, 114, 116, 117 and 125 to 129/85. See also "European Court Confirms Extraterritorial Jurisdiction of EU in Antitrust Cases" *Global Investigations Review* July 13, 2015, http://globalinvestigationsreview.com/article/3440/european-court-confirms-extraterritorial-jurisdiction-eu-antitrust-cases.

which litigation functions as a mechanism of regulatory enforcement.[21] It is also unusual in the degree to which the ability to bring civil suits for alleged legal violations – including for violations of many public (regulatory) laws – is shared between private actors and public officials.[22] Many other countries rely far more on government regulators to police compliance with laws governing the economic and social policy spheres.[23] Not only may U.S. officials initiate legal proceedings against private entities (including foreign nationals), under many U.S. statutes, private plaintiffs too may file suits against other private entities and also at times against government bodies, including foreign governments or their officials. As a result, U.S. law can be projected internationally into situations that have not been previously vetted by U.S. government officials outside the judiciary.

This research thus complements and extends several recent studies that examine how non-state actors affect international governance. The means by which non-state actors can influence national and international rulemaking examined in this literature are several: Private groups lobby legislatures to pass preferred laws (or block undesirable ones). Likewise they may ask executive officials to adopt international bargaining positions that favor their interests, to join desired agreements, and to avoid others.[24] Advocacy groups gather and disseminate information and organize public support to pressure elected officials.[25] Corporations and industry associations create institutions for informal self-regulation in order to preempt creation of formally binding laws.[26] Government agencies delegate the task of defining standards to private

[21] Smith (2000), Krisch (2005), Michaels (2005).

[22] Farhang (2008), Mattei and Lena (2001). Many federal statutes expressly give private entities a right to sue, and U.S. courts also have been willing to imply private rights of action in cases of government under-enforcement of statutory rules. However, not every situation where U.S. courts have acted extraterritorially involves private rights of action, and not every area where there are private rights of action involves extraterritoriality. For example, in the U.S. legal system only the government may bring criminal charges. And, in the civil realm, some statutes with clear extraterritorial applicability, for example, the 1977 Foreign Corrupt Practices Act (15 U.S.C. §§ 78dd–1, *et seq.*), restrict initiation of claims to government agents.

[23] Greve (1989). Legal systems in European states have long allowed private suits to address nominally "private" harms associated with violations of public law. Examples include compensatory claims for specific damages or for unjust enrichment related to violations of competition rules. In general, however, these suits are narrowly circumscribed and thus not readily comparable to U.S.-style private rights of action.

[24] See Singer (2007), Sell (2003), Milner (1997), Moravcsik (1998), and Legro (1996).

[25] Keck and Sikkink (1998).

[26] See Culter *et al.* (2001).