

# The Word Commons and Foreign Laws

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Dual trends are colliding in U.S. courts. The first trend is a tidal wave of cases requiring courts to engage the domestic laws of foreign legal systems; globalization is the principal driver of this escalation. The second trend is a profound and ever-increasing skepticism of our ability to understand foreign law; the literature of pluralism and postmodernism has illuminated the uniquely local, language-dependent, and culturally embedded nature of law. Courts cope with this dissonance by finding some way to avoid the application of foreign law. However, these outcomes are problematic because parties are denied access to court or have their rights and responsibilities determined pursuant to the incorrect law.

This Article offers an exposition of lexical meaning to explain the source of these oppositional trends and to illuminate possible solutions. Legal words and ideas transcend geographic, social, and cultural boundaries. For this reason, the words of another legal system look familiar and, thus, appear knowable to an outsider. Yet autonomous national legal systems tend to tailor the meanings of these shared words for idiosyncratic purposes. Thus, ironically—even paradoxically—the more commonly a word is used, the less predictable is its meaning. This differentiation of meanings makes actual knowledge of the foreign law difficult to achieve.

As a framework for examining this phenomenon, this Article demonstrates that the common meaning of a word is a limited resource. The common meaning of a word erodes when legal systems assign a new meaning to a shared word. Idiosyncratic meanings are useful and generative, but they also introduce an important negative externality because the common meaning of a word is essentially the starting point for measuring the meaning of that word in a foreign system. The more robust the common meaning, the lower the measurement costs. The prototypical solutions to common-pool problems—privatization and regulation—are infeasible here. Moreover, ubiquitous efforts to unify, approximate, or harmonize laws tend to exacerbate the problem rather than help solve it.

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We could drop the pretense that we are able to understand foreign law and eliminate the demand for it. Alternatively, if the doctrines are going to presume familiarity with foreign law, we must address the supply side and ensure that courts are, in fact, better able to understand the idiosyncracies of foreign law.

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## Introduction

In the article that popularized the tragedy of the commons, Professor Garrett Hardin suggested that a common-pool resource might remain usable for a substantial period before it ultimately collapses.<sup>1</sup> Providing an open pasture for farmers to graze their cattle, for example, worked satisfactorily for a long time because wars, theft, and disease prevented the population of farmers and cattle from rising significantly and, thus, limited pressures on the land. But there arrives a moment in time when conditions demand that this approach be abandoned as unsustainable. The “day of reckoning” inevitably comes, when the “inherent logic of the commons . . . generates tragedy.”<sup>2</sup>

Globalization is leading to a similar tipping point regarding the ascertainment of foreign law. There are an ever-increasing number of disputes with multi-national contacts. These cases implicate constellations of doctrines and statutes that, in turn, require courts to engage foreign laws. “As you read these words, there are half a dozen U.S. courts that are assiduously citing foreign law . . . .”<sup>3</sup> Courts confront matters involving Korean contract law,<sup>4</sup> Egyptian corporate law,<sup>5</sup> Peruvian civil procedure,<sup>6</sup> Russian

1. Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243, 1244 (1968).

2. *Id.*

3. Stephen Yeazell, *When and How U.S. Courts Should Cite Foreign Law*, 26 CONST. COMMENT. 59, 61 (2009).

4. *See, e.g., LG Elecs., Inc. v. ASKO Appliances, Inc.*, No. 08-828-RGA, 2012 WL 2365901 (D. Del. June 21, 2012).

criminal process,<sup>7</sup> and so on. And this spectacle is just getting underway.<sup>8</sup>

Yet rather than actually applying the foreign law that they cite, courts usually avoid it.<sup>9</sup> The artful dodge comes in many forms, and the consequences of evasion can be serious. Courts frequently dismiss cases that would otherwise require them to apply foreign law.<sup>10</sup> In other instances, litigants may have their rights and responsibilities determined pursuant to the wrong law.<sup>11</sup>

The salient reason for the avoidance of foreign law is the mismatch between what the courts are able to do and what the doctrines and statutes require. Ascertaining foreign law presents a formidable challenge. The inherent complexity of a legal system poses a tremendous burden for someone not trained in that system to navigate and decipher. The legal pluralism literature warns of nuance in layers of ordering: a mandate considered out of context can be incomplete or misleading.<sup>12</sup> Furthermore, scholars of different orientations have sharply illuminated the vagaries of cultural and language translations.<sup>13</sup>

Moreover, the content of foreign law cannot be buried as a question of fact in the black box of jury decision-making. Rather, it is a question of law.<sup>14</sup> Accordingly, this shines a spotlight on judicial resolution of the question for both trial and appellate judges. Unfortunately, the adversarial system tends to magnify the problem.<sup>15</sup>

The difficulty of ascertaining foreign law is somewhat peculiar since many legal systems throughout the world use thousands of the same Latin,<sup>16</sup> French,<sup>17</sup> and English<sup>18</sup> words in their codes and discourse. The

5. See, e.g., *Bigio v. Coca-Cola Co.*, 675 F.3d 163 (2d Cir. 2012).

6. See, e.g., *In re Consorcio Minero, S.A. v. Renco Grp., Inc.*, No. 11 Mc. 354., 2012 WL 1059916 (S.D.N.Y. Mar. 29, 2012).

7. See, e.g., *Starski v. Kirzhnev*, 682 F.3d 51 (1st Cir. 2012).

8. See *infra* notes 171-75, and accompanying text.

9. See *infra* notes 281-87 and accompanying text.

10. See *infra* notes 288-92 and accompanying text.

11. See *infra* notes 310-24 and accompanying text.

12. See *infra* notes 191-95 and accompanying text.

13. See *infra* notes 196-223 and accompanying text.

14. See FED. R. CIV. P. 44.1.

15. See *infra* notes 254-80 and accompanying text.

16. Popular Latin words include: *certiorari*, *coram nobis*, *ex parte*, *in rem*, *mandamus*, *pro rata*, *quantum meruit*, *res ipsa loquitur*, and *respondeat superior*. For a longer list, see DAVID MELLINKOFF, *THE LANGUAGE OF THE LAW* 14-15 (1963). Latin has a well-documented place in the history of the development of the law. *Id.* All major sources of our knowledge of Roman law are written in Latin, including the *Corpus Iuris Civilis*, arguably “the most influential [set of] law book[s] ever written.” JUSTINIAN, *JUSTINIAN’S INSTITUTES* 9, 18 (Peter Birks & Grant McLeod trans., Cornell Univ. Press 1987) (c. 535 B.C.E.). Legal Latin is especially durable as a technical language for the legal profession. See 3 WILLIAM BLACKSTONE, *COMMENTARIES* \*319-21 (“[L]aw-latin is . . . a mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action.”).

17. Popular French words include: *cestui que, cy pres, demurrer, mortgage, and voir dire*. See L. Susan Carter, *Oyez, Oyez, “O Yes”*: *American Legal Language and the Influence of the French*, MICH. B.J., Oct. 2004, at 39. “It would be hardly too much to say that at the present day almost all our words that have a definite legal import are in a certain

translation of words between languages creates another large corpus of words that are shared between and among legal systems. For example, *purchase and sale* in English resembles *compra y venta* in Spanish, *compravendita* in Italian, *achat et vente* in French, *einkauf und verkauf* in German, and so on.

However, shared words do not necessarily have shared meaning. Legal systems tailor the meanings of words to reflect the unique priorities, preferences, and goals of a judicial, political, or social system.<sup>19</sup> The meaning of the word *class action*, for example, will vary among countries for good, but idiosyncratic, reasons. In one country, the word can refer to a joinder device that only a government actor can initiate; in another, it can refer to a joinder device permissible only for consumer cases. Difference in word meaning can range from subtle to dramatic.

Because words have more than one meaning, we can discern from those variant meanings what we might call a common meaning—defined here as that which is common to all of the variant meanings. For example, if the term *class action* has different meanings in the systems of the United States, Finland, and Norway, the common meaning of that term is the common ground among the various extant meanings.

The most novel contribution of this Article is the characterization of a word's common meaning as a limited resource. Common meaning is a limited resource because the introduction of variant meanings can dimin-

sense French words.” 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 80 (2d ed. Cambridge 1968) (1895). Other examples include:

Contract, agreement, covenant, obligation, debt, condition, bill, note, master, servant, partner, guarantee, tort, trespass, assault, battery, slander, damage, crime, treason, felony, misdemeanor, arson, robbery, burglary, larceny, property, possession, pledge, lien, payment, money, grant, purchase, devise, descent, heir, easement, marriage, guardian, infant, ward . . . . We enter a court of justice: court, justices, judges, jurors, counsel, attorneys, clerks, parties, plaintiff, defendant, action, suit, claim, demand, indictment, count, declaration, pleading, evidence, verdict, conviction, judgment, sentence, appeal, reprieve, pardon, execution, every one and every thing, save the witnesses, writs and oaths, have French names.

*Id.* at 81; see also PETER M. TIERSMA, *LEGAL LANGUAGE* 28–33 (1999).

18. Popular English words include: *class action*, *due diligence*, *franchise*, *lease*, and *whistleblower*, for example. EVERSHEDES, *LEGAL DRAFTING IN ENGLISH: THE BIG PICTURE ON SMALL PRINT* 10 (2011), available at <http://www.eversheds.de/files/en/LegalDraftingInEnglish%28updatedSept2011%29.pdf>. For more on the increasing use of legal English worldwide, see HEIKKI E.S. MATTILA, *COMPARATIVE LEGAL LINGUISTICS* 240–41 (2006); Celia Wasserstein Fassberg, *Language and Style in a Mixed System*, 78 *TUL. L. REV.* 151, 164 (2004) (discussing Hebrew as a modern legal language and the incorporation of English loanwords therein).

19. See, e.g., William P. Alford, *On the Limits of “Grand Theory” in Comparative Law*, 61 *WASH. L. REV.* 945, 954–56 (1986) (discussing the Chinese criminal justice system); George P. Fletcher, *Constitutional Identity*, 14 *CARDOZO L. REV.* 737 *passim* (1993) (comparing U.S. and European legal cultures); Frederick Schauer, *Free Speech and the Cultural Contingency of Constitutional Categories*, 14 *CARDOZO L. REV.* 865, 868–72 (1993) (exploring different countries’ treatment of speech and expression rights); Arthur Taylor von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 *HARV. L. REV.* 347, 350–56 (1975) (explaining that differing expectations complicate multistate litigation).

ish, but will never enhance, the content or scope of a word's common meaning. By using the word *class action*, for example, each system's variant meaning may progressively erode the common ground. The more disciplined and uniform the meanings assigned to a word, the more robust its common meaning. At the other extreme, promiscuous use of the word could deplete its common meaning rather quickly.

Characterizing the common meaning of a word as a limited resource invites consideration of this language phenomenon as a common-pool problem. In the classic scenario, the tragedy of the commons is a product of the fact that the farmers enjoy all the benefits of their actions yet bear only part of the expense of those actions. The part of the expense borne by the others is a negative externality.<sup>20</sup> Here, a legal system that introduces an idiosyncratic meaning to a shared word likewise enjoys all the benefits from that customization. Yet that system bears only a fraction of the expense it creates. Idiosyncratic meanings create a negative externality because they diminish the content or scope of a word's common meaning. Like the farmers who bring additional cattle to graze on the commons, national systems, acting independently and rationally, will introduce variant meanings that progressively consume the common meaning of a word not only in the system that introduces the variation, but everywhere else as well.<sup>21</sup>

While it may be easy to see why a common grazing land is valuable to cattle farmers, the utility of a word's common meaning is less obvious. To understand why the dilution of a word's common meaning is, in fact, a tragedy, one must appreciate how often participants in a legal system ascertain or "measure" the meanings of words. Participants measure the meaning of words in their own legal system; however, they also measure the meaning of words in other legal systems. This measurement is undertaken to ascertain the tailored meaning of the word in the foreign system, not the word's common meaning, but the common meaning of the word can play an important role in this exercise. Specifically, the cost of measuring the tailored meaning rises as content in the common meaning falls. Common meaning is like the starting point, and the closer that the starting point is to the finish line (that of understanding foreign law), the shorter the distance traveled. Because idiosyncratic meanings erode common meaning, idiosyncrasy in one system can increase the information processing costs of *all* other systems interacting with *any* other system.<sup>22</sup>

The erosion of a word's common meaning helps explain why courts may be ill-equipped to reliably and confidently measure the meaning of foreign words. For courts navigating these waters, a robust common meaning could operate as something of an anchor of familiarity. The absence of that anchor leaves them adrift. Avoidance of foreign law is a predictable

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20. See Hardin, *supra* note 1, at 1244; see also RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 39-43 (2d ed. 1996) (expanding on different types of externalities).

21. See *infra* notes 105-08 and accompanying text.

22. See *infra* notes 234-37 and accompanying text.

consequence. Unfortunately, avoidance converts an information problem into a justice problem.

This Article brings into sharper relief a problem that is inchoately understood but poorly addressed. Ubiquitous reform efforts to draft model legislation, to promote the harmonization of laws, or to advance multilateral protocols are premised, explicitly or implicitly, on the notion that difference among national laws is expensive, problematic, archaic, or unnecessary.<sup>23</sup> I refer to these reforms as *demand-side* efforts because they would reduce the demand for customization (which, in turn, consumes common meaning). There is no foreign law to measure, the thinking goes, when the foreign and forum laws are the same. But I argue that this is not a text problem, and, therefore, there is no textual solution. Demand-side efforts cannot solve the problem because the common meaning of a word is a limited resource that will inevitably (or “tragically”) degrade. Harmonization efforts, in fact, exacerbate the information problem.<sup>24</sup>

To solve the problem, attention must turn to *supply-side* efforts: obtaining better information about the content of foreign law. I survey several supply-side techniques that are already available to courts but are comparatively under-utilized, such as appointing special masters and using court-appointed experts.<sup>25</sup> I also identify a role for new foreign law institutes.<sup>26</sup> Yet, more important than these particular suggestions is the argument for supply-side reforms (and against demand-side reforms) more generally.

## I. Common Words

Countries can design their own legal systems with whatever components and words they desire. Although most national systems have some distinctive and unique features, there is also commonality between and among many legal systems. Some of this overlap is a product of countries’ shared histories and common traditions.<sup>27</sup> Another primary source of overlap is the transplantation of practices and concepts from one system into another.<sup>28</sup> Especially (although not exclusively) in these many areas of overlap, legal systems throughout the world draw from a common well of

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23. See *infra* notes 328-53 and accompanying text.

24. See *infra* notes 354-56 and accompanying text.

25. See *infra* notes 365-77 and accompanying text.

26. See *infra* notes 395-400, and accompanying text.

27. See H. Patrick Glenn, *Comparative Legal Families and Comparative Legal Traditions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 421, 432-34 (Mathias Reimann & Reinhard Zimmerman eds., 2006). See generally KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW (Tony Weir trans., 3d ed. 1998).

28. See ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 95 (2d ed. 1993) (“Most changes in most systems are the result of borrowing.”). For arguments suggesting that Watson’s thesis should be limited to the spread of Roman private law in Western Europe, see William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489, 500-04 (1995); Eric Stein, *Uses, Misuses—And Non-uses of Comparative Law*, 72 NW. U. L. REV. 198, 203-04 (1978).

words.<sup>29</sup>

Legal words and ideas move from one system into another for a variety of reasons. Such movement can be characterized as diffusion, transplantation, approximation, harmonization, evolution, hegemony, reception, unification, or something else.<sup>30</sup> These labels suggest subtly different levels of intent and intensity, but each conveys the notion of the movement of laws and words across national borders. The importation of a word from another legal system may be deliberate, voluntary, and wise—or it might be none of these.<sup>31</sup> This migration of words is not a new phenomenon—quite the contrary.<sup>32</sup> However, technology and globalization can introduce network effects that create new incentives or pressures to transplant, and these might affect the pace of a word's movement.<sup>33</sup>

Shared words need not have shared meanings. Indeed, legal systems can ascribe whatever meaning(s) they desire to the words that they borrow, inherit, or invent.<sup>34</sup> And of course, difference in meaning can range from subtle to obvious. Common examples of *faux amis* (false friends)<sup>35</sup> include the following words: *brief*, *contempt*, *demand*, *doctrine*, *domicile*, *fact*, *jurisprudence*, *law*, *magistrate*, *notary*, *process*, *res judicata*, and *trial*.<sup>36</sup>

29. See, e.g., Paolo G. Carozza, "My Friend is a Stranger": *The Death Penalty and the Global Jus Commune of Human Rights*, 81 *TEX. L. REV.* 1031, 1045 (2003) (describing how, in virtually all foreign nations, courts "borrow[ ] from, respond[ ] to, or otherwise interact[ ] substantially with external sources of law, including foreign sources").

30. See Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 *J. LEGAL STUD.* 339, 343 (2006); Pierre Legrand, *On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations*, 10 *EUR. REV. PRIVATE L.* 61, 68 (2002); David Nelken, *Towards a Sociology of Legal Adaptation*, in *ADAPTING LEGAL CULTURES* 7, 15–20 (David Nelken & Johannes Feest eds., 2001); William Twining, *Diffusion and Globalization Discourse*, 47 *HARV. INT'L L.J.* 507, 510–12 (2006).

31. This Part explores normative implications of the diffusion of laws and language only peripherally. For a full discussion, see *infra* notes 328–356 and accompanying text.

32. See WATSON, *supra* note 28, at 22.

33. For a discussion of network effects, see *infra* note 332 and accompanying text.

34. See BASIL MARKESINIS & JÖRG FEDTKE, *ENGAGING WITH FOREIGN LAW* 337 (2009); see also James Gordley, *When Is the Use of Foreign Law Possible? A Hard Case: The Protection of Privacy in Europe and the United States*, 67 *LA. L. REV.* 1073, 1075 (2007) (discussing, in general, the inherent uniqueness and idiosyncrasy of each country's legal system).

35. See W.E. Weisflog, *Problems of Legal Translation*, in *SWISS REPORTS PRESENTED AT THE XII<sup>TH</sup> INTERNATIONAL CONGRESS OF COMPARATIVE LAW* 179, 213–15 (1987).

36. For more examples, see Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 *NW. U. L. REV.* 602, 629 n.121 (1976) ("The French *contrat*, *domicile*, *tribunal administratif*, *notaire*, *prescription* and *juge de paix*, are not the English 'contract', 'domicile', 'administrative tribunal', 'notary public', 'prescription' and 'justice of the peace.'" (quoting ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 11 (1974)); H.C. Gutteridge, *The Comparative Aspects of Legal Terminology*, 12 *TUL. L. REV.* 401, 402 (1938) (discussing, among other examples, the difficulty of translating the American concept of a "trust" into foreign languages); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I of II)*, 39 *AM. J. COMP. L.* 1, 20 (1991) (discussing different meanings of trespass); Gloria M. Sanchez, *A Paradigm Shift in Legal Education: Preparing Law Students for the Twenty-First Century: Teaching Foreign Law, Culture, and Legal Language of the Major U.S. American Trading Partners*, 34 *SAN DIEGO L. REV.* 635, 662 (1997) (considering the word *invest-*

The French word *contrat* includes agreements that Americans would instead regard as gifts, conveyances, or trusts, and excludes various documents that Americans would label contracts.<sup>37</sup> Marriage is a *contrat* in France but it is not a *contratto* in Italy.<sup>38</sup> *Administrative law* means very different things in civil law and common law countries.<sup>39</sup> What the Japanese call *discovery* does not resemble its supposed American forbearer.<sup>40</sup> And American corporate lawyers might not recognize as *directors* of Japanese companies individuals who are also employees.<sup>41</sup>

The complete list of shared words with different meanings may be almost as long as the list of shared words itself.<sup>42</sup> In support of this basic proposition, anthropologists emphasize that legal language develops characteristics that conform to the unique history and culture of the system in

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ment which, in Spanish, is *inversión*; in English the term means “long-term benefits,” while in Mexico it means “short-term profit”; *id.* at 663 (discussing how different meanings of the word *chicken* led to litigation). The phenomenon is not limited to translations across languages. See DEBORAH CAO, *TRANSLATING LAW* 68-69 (2007) (discussing the changing meaning of words even within one language, using the term *warranty* in England and the United States as an example). “The word ‘law’ in Western languages has four different interpretations in Chinese as in *li* [order], *li* [rites, rules of propriety], *fa* [human-made laws] and *zhi* [control].” *Id.* at 1. Cao also distinguishes *demand* in English from *demand*s in French; *domicile* in English, from *domicile* in French and *domizil* in German; *la doctrine* in French, which means legal writing or legal scholarship, from the English notion of *doctrine*; *notaire* in French and *notary* in English; *common law* in English and *droit commun* in French; the *Haute Cour de justice* of French and the English notion of the *High Court of Justice*. *Id.* at 58-59.

37. See Sacco, *supra* note 36, at 12-15; see also Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1200-07 (1993).

38. “In France, for example, these contracts are called *contrat de mariage*.” Peter M. Walzer, *A World of Agreements Enforcing and Attacking Foreign Prenups in the United States*, Fam. Advoc., Winter 2011, at 30.

39. See, e.g., Susan Rose-Ackerman, *American Administrative Law Under Siege: Is Germany a Model?*, 107 HARV. L. REV. 1279, 1289-96 (1994); see also John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 851 (1985). See generally COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

40. See Richard Marcus, *Exceptionalism and Convergence: Form Versus Content and Categorical Views of Procedure*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 521, 538 (Janet Walker & Oscar G. Chase eds., 2010) (“[D]iscovery in Japan or Germany . . . [is] so different in content from the American version that [it is] insignificant as evidence of meaningful convergence.”).

41. See generally Kenichi Osugi, *What is Converging? Rules on Hostile Takeovers in Japan and the Convergence Debate*, 9 ASIAN-PAC. L. & POL’Y J. 143, 154 (2007).

42. For contours of the debate regarding the transplantability *vel non* of words, compare Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1, 5-6 (1974) (suggesting translatability is generally possible, though dependent on the content of the legal concept or provision at issue), with Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L L.J. 517, 527 (2006) (“[E]ach manifestation of law is an event, that is, it occurs or deploys itself as ‘something’ that is never the repetition of anything else and that will never be repeated either—it occurs as something operating within a specific historical situation . . . which, because time is what it is, is inevitably specific.”). For more background on the transferability debate, see Nicholas Foster, *Transmigration and Transferability of Commercial Law in a Globalized World*, in 4 COMPARATIVE LAW IN THE 21ST CENTURY 55, 58-60 (Andrew Harding & Esin Örüçü eds., 2002).



which it operates.<sup>43</sup> Put another way, there is “no transportation [between systems] without transformation.”<sup>44</sup> Philosophers reach a similar conclusion by focusing on the fact that legal words have meaning and meaningfulness only within the context of a specific legal system and particular rules of law.<sup>45</sup> Finally, linguists and semioticians emphasize that the legal language of any system is an autonomous technical language.<sup>46</sup> These literatures confirm what experience and common sense suggest about geographic variance and the differentiation of a word’s meaning.

Part I demonstrates two basic facts: that legal systems share words and that the meanings of those words can differ. Both of these observations should be obvious and uncontroversial. Yet, notice that a paradox is already taking shape. On one hand, words are shared between and among legal systems. In this respect, legal language, like many other professional

43. See PETER GOODRICH, *LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS* 2 (1987); Susan Šarčević, *Translation of Culture-Bound Terms in Laws*, in 4 *MULTILINGUA* 127, 127 (1985); see also *infra* notes 200–23 and accompanying text.

44. WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* 284 (2009). Twining elaborates on this point:

[N]o serious student of diffusion can assume that what is borrowed, imposed or imported *remains the same*. This is not just a matter of the interpretation and application of received law, but also of its use or neglect, impact, and local political, economic and social significance. . . . How and to what extent any particular ‘import’ retains its identity or is accepted, ignored, used, assimilated, adapted, rooted, resisted, rejected, interpreted, enforced selectively, and so on depends largely on local conditions.

*Id.*; see also Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 *MICH. L. REV.* 785 (1982) (reviewing ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977)); Anna Lise Kjær, *A Common Legal Language in Europe?*, in *EPISTEMOLOGY AND METHODOLOGY OF COMPARATIVE LAW* 377, 377–79 (Mark Van Hoecke ed., 2004); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 *IND. J. GLOBAL LEGAL STUD.* 383, 408 (2003) (“Legal reception is a highly creative activity.”).

For examples of how transplanted law often operates quite differently in the target country than in the source country, see Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect*, 47 *EUR. ECON. REV.* 165, 165–68 (2003); Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 *AM. J. COMP. L.* 163, 163–65 (2003); Bernard Black, Reinier Kraakman & Anna Tarassova, *Russian Privatization and Corporate Governance: What Went Wrong?*, 52 *STAN. L. REV.* 1731, 1754–57 (2000); Mark D. West, *The Puzzling Divergence of Corporate Law: Evidence and Explanations from Japan and the United States*, 150 *U. PA. L. REV.* 527 (2001).

45. H. L. A. HART, *THE CONCEPT OF LAW* 167–84 (2d ed. 1994); see also Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 *CLEV. ST. L. REV.* 271, 271–72 (1989). “Legal language . . . describes a metaphysical phenomenon. Law does not exist in the physical world. Since it is entirely created by humans, law is always linked to the culture of any particular society: it therefore constitutes a social phenomenon.” MATILA, *supra* note 18, at 105.

46. See CAO *supra* note 36, at 24 (“[L]aw is culturally and jurisdictionally specific.”); BERNARD S. JACKSON, *SEMIOTICS AND LEGAL THEORY* 46–50 (1985); FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 114–15 (Charles Bally, Albert Sechehaye, & Albert Riedlinger eds., Wade Baskin trans., 1966) (“Language is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others . . . . [A]ll values are apparently governed by the same paradoxical principle.”).

languages,<sup>47</sup> transcends geographic, social, and cultural boundaries. But on the other hand, legal systems are also autonomous and unique. Each national law constitutes an independent legal system with its own vocabulary, structure, and methodology.<sup>48</sup> Thus, the shared words may have different uses, purposes, and meanings. Accordingly, the more popular a word is internationally, the less predictable its meaning is.

## II. Word Meanings

This Part focuses more deliberately on what I intend by reference to the meaning of a word. For the purposes of this Article, *meaning* refers to a word's "purpose, or intent, or function or aim or effect . . ." <sup>49</sup> The goal here is not to provide a philosophical theory of meaning; this Article does not focus on why or how a word has the meaning it does, nor even what meaning it has.<sup>50</sup> Indeed, everything that follows in this Article can stand while remaining agnostic about a particular conception of meaning, provided one accepts the premise that legal words *have* meaning.

Most importantly, this Part defines three terms: *original meaning*, *local meaning*, and *common meaning*. These terms are defined so that we can use them in later parts to explore the overlap and interaction of meanings that result when different legal systems use the same words.

### A. The Meaning of Lay Words and Legal Words

The meaning of a word, whether it be lay or legal, is not a function of that word itself (nor the letters that constitute that word), but rather the use to which that word is put.<sup>51</sup> A word is a symbol for something else—often a

47. See, e.g., Gutteridge, *supra* note 36, at 401 ("The physician, the theologian, the mathematician, the chemist and the economist employ technical terms which are well understood throughout the scientific world . . .").

48. See FREDERICK CHARLES VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 27 (Legal Classics Library 1986) (1831) (noting the "organic connection of law with the being and character of the people," and analogizing a people's law to their language); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 411 (2003) ("Legal systems reflect the cultures within which they are situated and thus have unique and highly contingent identities. . . . Given this close connection between law and local culture, foreign law seems to have very little place in judicial reasoning."); Susan Šarčević, *Legal Translation and Translation Theory: A Receiver-Oriented Approach*, in LEGAL TRANSLATION: HISTORY, THEORY/IES AND PRACTICE 329, 336-37 (2000); see also *infra* notes 196-204 and accompanying text.

49. Lessig, *supra* note 37, at 1177 n.46.

50. C.K. Ogden and I.A. Richards collected sixteen definitions of *meaning*—the "arch-ambiguity." C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING* 186-87, 104 n.1 (8th ed. 1946); see also Lessig, *supra* note 37, at 1181; *infra* note 71.

51. The notion that words are not intrinsically meaningful is built largely upon the assumption of modern analytic thought that the function of language is to communicate. See, e.g., RICHARD LARSON & GABRIEL SEGAL, *KNOWLEDGE OF MEANING: AN INTRODUCTION TO SEMANTIC THEORY* 45-47 (1995) (noting that, for example, the difference between a "bank" of a river and a financial "bank" indicates that words lack inherent meaning; meaning must be supplied by the larger context of the communication). For a general introduction to Locke's theory of language, see E. J. LOWE, *LOCKE ON HUMAN UNDERSTANDING* 143-65 (Tim Crane & Jonathan Wolff eds., 1995) (dealing with Locke's account of language); E.J. Ashworth, *Locke on Language*, 14 CAN. J. PHIL. 45, 46-52

thing, idea, or concept.<sup>52</sup> The word *cat*, for example, is a symbol that means something. It may be useful to think of that word written on the exterior of a box; inside that box is the meaning or meanings of the word (i.e., what the symbol represents). When one sees or hears the word *cat*, the brain invokes a meaning or meanings akin to something within the content of the box that corresponds to that word-symbol. Of course this is no ordinary “box”: it must contain cats of different breeds and sizes, both tame and wild, cartoon and real, young and old, metaphoric and literal, and so forth. Exactly which of these various *cats* our brain invokes when the word is read or heard is a function of the word’s use and context.<sup>53</sup>

Words also symbolize ideas and concepts, not just things (like cats) that one places inside a box. Still, a word like *catch* or *catatonic* has an associated box of meaning(s), even if that box includes only metaphysical entities or abstract propositions.<sup>54</sup> The words *cat*, *catch*, and *catatonic* are symbols that evoke something because of the association between these words and certain things, ideas, and concepts.<sup>55</sup> There is an infinite loop because a word symbolizes something that can be described with words that, in turn, symbolize more concepts and more words, and so on.<sup>56</sup> But

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(1984). See generally H. P. Grice, *Meaning*, 66 PHIL. REV. 377 (1957) (investigating the meaning of the word “meaning”).

52. See OGDEN & RICHARDS, *supra* note 50, at 186-89.

53. Wittgenstein is credited for emphasizing the connection between a word’s use and its meaning in the “language-game.” See generally LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 4 (G.E.M. Anscombe trans., 3d ed. 2001).

When a word is read or heard without any corresponding context, prototype theorists suggest that our brains are inclined to evoke prototypes for the word. Upon seeing or hearing the word *cat*, for example, we are more inclined to consider a specific prototype of cat (from the box of meaning) rather than to survey all of the different cats in the “box.” The *locus classicus* for prototype theory is Eleanor H. Rosch, *Natural Categories*, 4 COGNITIVE PSYCHOL. 328, 328-30 (1973).

54. Words that push the box metaphor toward its breaking point are words like *behalf* or *is*. But the simplicity of the box metaphor will suffice here.

55. See Gerald Graff, “*Keep off the Grass*,” “*Drop Dead*,” and *Other Indeterminacies: A Response to Sanford Levinson*, 60 TEX. L. REV. 405, 408 (1982). Graff stated:

[M]eaning is not a substance but an activity and has the determinacy of an activity rather than of a physical object. . . . The question of what any text means, then, is neither more nor less open to “determinate” inference than the question of . . . whether a historical event occurred or didn’t occur. Just as we have reason to believe that we know a lot about some historical occurrences [and] less about others, . . . so it is with texts: the degree to which we can be confident about our inferences depends on the amount of evidence available, evidence which itself is open to criticism and may well be fallible.

*Id.* This is deconstruction at work. See generally CHRISTOPHER NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 31 (1982) (“Deconstruction is . . . an activity of reading which remains closely tied to the texts it interrogates.”); CHRISTOPHER NORRIS, *THE DECONSTRUCTIVE TURN: ESSAYS IN THE RHETORIC OF PHILOSOPHY* 6 (1983) (“Deconstruction is first and last a textual activity . . .”).

56. For a discussion of this infinite regress, see F. H. BRADLEY, *APPEARANCE AND REALITY: A METAPHYSICAL ESSAY* 17-18 (Clarendon Press, 1930) (1893). The same sort of regress occurs when one considers looking at the dictionary for the meaning of a word, because dictionaries use words to define words. See Cliff Goddard, *Can Linguists Help Judges Know What They Mean? Linguistic Semantics in the Court-Room*, 3 FORENSIC LINGUISTICS 250, 252-53 (1996).

the essential learning here is very simple: it is our *associations* with a word-symbol that suggest the meanings of words, not anything that is intrinsic to the words themselves. After all, these letters and words could just as easily symbolize anything else.

The association between a word symbol and its meaning(s) is the product of dynamic inter-subjective social construction.<sup>57</sup> The meanings of lay words like *cat*, *catch*, and *catatonic* are neither officially announced nor formally policed.<sup>58</sup> Instead, the box that informs a word's meaning contains something contingent upon the social discourse within the applicable community.<sup>59</sup> Words mean what we construct them to mean.<sup>60</sup> Of course, what one speaker envisions as a word's meaning may or may not match what the listener assigns to that symbol. From the perspective of a discourse community, then, the meaning of a word may be contained in a "black box" (or at least an opaque one), rather than a transparent container. What some members think is inside the box, others may not, and neither group is necessarily right or wrong.<sup>61</sup>

Language is famously indeterminate.<sup>62</sup> Even within a single discourse community, one word can have multiple meanings.<sup>63</sup> Multiple words can share one meaning.<sup>64</sup> The meaning of words can change over

57. See WILLIAM G. LYCAN, *PHILOSOPHY OF LANGUAGE* 66–68 (Paul K. Moser ed., 2000) (describing a thought experiment to demonstrate the impact of social interaction with the environment on the construction of a word-symbol and its meaning).

58. Dictionaries are private, non-binding, and, in any event, descriptive rather than prescriptive. "A dictionary definition is, after all, just a meaning postulate." Brian G. Slocum, *Linguistics and "Ordinary Meaning" Determinations*, 33 *STATUTE L. REV.* 39, 41 (2012). But see ACADEMIE FRANÇAISE, <http://www.academie-francaise.fr> (last visited May 26, 2013) (acting as an official authority on the French language).

59. See LAWRENCE VENUTI, *THE TRANSLATOR'S INVISIBILITY: A HISTORY OF TRANSLATION* 18 (Susan Bassnett & André Lefevere eds., 1995); Dennis M. Patterson, *Realist Semantics and Legal Theory*, 2 *CAN. J. L. & JURISPRUDENCE* 175, 177 (1989).

A "discourse community" refers to the social context in which speaking or writing takes place. See STANLEY FISH, *DOING WHAT COMES NATURALLY* 87–140, 372–98 (Stanley Fish & Frederic Jameson eds., 1989). Individuals may be members of various discourse communities simultaneously—at one's church, workplace, home, gym, and so forth. Linguists also use the term *register* when referring to a discourse community's use of the language and instruments of communication. *Register* incorporates the lexicon or specialized terms created by the community. See JOHN M. SWALES, *GENRE ANALYSIS: ENGLISH IN ACADEMIC AND RESEARCH SETTINGS* 40 (1990).

60. LYCAN, *supra* note 57, at 67 ("[M]eaning 'ain't in the head.'").

61. See Glanville L. Williams, *Language and the Law-IV*, 61 *LAW Q. REV.* 384 (1946), *reprinted in* *LAW AND LANGUAGE* 97, 141–42 (Frederick Schauer ed., 1993).

62. Contemporary discussion of the "indeterminacy of meaning" is rooted in Willard Van Orman Quine's *Word and Object* and challenges to his thesis. See generally WILLIAM VAN ORMAN QUINE, *WORD AND OBJECT* 113–37 (2d ed. 2013). Notwithstanding decades of criticism, an irreducible indeterminacy persists. See JAN G. KOOIJ, *AMBIGUITY IN NATURAL LANGUAGE: AN INVESTIGATION OF CERTAIN PROBLEMS IN ITS LINGUISTIC DESCRIPTION* 3 (S. C. Dik & J. G. Kooij eds., 1971) (suggesting that ambiguity is an unavoidable part of any natural language) (citing OTTO JESPERSEN, *LANGUAGE: ITS NATURE, DEVELOPMENT, AND ORIGIN* (1964)).

63. See Geoffrey Nunberg, *The Non-Uniqueness of Semantic Solutions: Polysemy*, 3 *LINGUISTICS & PHIL.* 143, 144–45 (1979).

64. LARSON & SEGAL, *supra* note 51, at 45–47. See generally Klaas Willems, *Logical Polysemy and Variable Verb Valency*, 28 *LANGUAGE SCI.* 580 (2006).

time.<sup>65</sup> New ideas and concepts spawn new words.<sup>66</sup> And ambiguity,<sup>67</sup> vagueness,<sup>68</sup> and generality<sup>69</sup> are *de rigueur*.<sup>70</sup> Accordingly, the study of meaning can be the study of something ephemeral, elusive, and enigmatic.

Our discussion so far has focused on the meaning of *words*. Yet meaning is a function not only of words, but also of sentences, punctuation, paragraphs, and more. Most of the contemporary philosophy and linguistics literature focuses on the construction of meaning in the sentential context (sentence-level), rather than at the word-level.<sup>71</sup> Indeed, the sentential context is critical because the words and punctuation marks of a sentence can be rearranged to convey very different things. However, it is important to appreciate that “words are . . . *atomic* in an account of meaning.”<sup>72</sup> We can break down the meaning of an essay into paragraphs, divide the meaning of a paragraph into sentences, and divide the meaning of a sentence into words. Yet we must stop there because, as we have already seen, the meaning of a word does not depend systematically on the letters that comprise that word.<sup>73</sup> To focus on the meaning of *words*, then, is to focus on

65. See Andreas Blank, *Why Do New Meanings Occur? A Cognitive Typology of the Motivations for Lexical Semantic Change*, in *HISTORICAL SEMANTICS AND COGNITION* 61 (Andreas Blank & Peter Koch eds., 1999).

66. See *FIFTY YEARS AMONG THE NEW WORDS: A DICTIONARY OF NEOLOGISMS, 1941-1991* 1-17 (John Algeo ed., 1991).

67. See D. A. CRUSE, *LEXICAL SEMANTICS* 49 (B. Comrie et al. eds., 1986); Arnold M. Zwicky & Jerrold M. Sadock, *Ambiguity Tests and How to Fail Them*, in *4 SYNTAX AND SEMANTICS* 1 (John P. Kimball ed., 1975).

68. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 177-78 (1989); ROSANNA KEEFE, *THEORIES OF VAGUENESS* 6 (2000).

69. See, e.g., NOAM CHOMSKY, *LANGUAGE AND MIND* 91 (3d ed. 2006).

70. I do not intend to suggest that this indeterminacy is necessarily pathologic. It may even be virtuous. Contrary to what some authors have suggested, indeterminacy is not “the common cold of the pathology of language.” KOOIJ, *supra* note 62, at 1 (quoting ABRAHAM KAPLAN, *AN EXPERIMENTAL STUDY OF AMBIGUITY AND CONTEXT* 1 (1950)).

71. For the traditional theories of meaning, see generally OGDEN & RICHARDS, *supra* note 50. For a discussion of the more contemporary use theories, psychology theories, verificationism, and truth-condition theories, see LYCAN, *supra* note 57, at 88, 100, 115, 129.

The distinction between lexical meaning and sentential meaning is somewhat artificial since the meaning of words is fundamentally constitutive: words are involved in the constitution of sentences, and the meaning of words is constituted through sentences. See Gottlob Frege, *On Sense and Meaning*, in *COLLECTED PAPERS ON MATHEMATICS, LOGIC, AND PHILOSOPHY* 157 (Brian McGuinness ed., Max Black et al. trans. 1984) (suggesting that individual words make sense only in the context of sentences); CRUSE, *supra* note 67, at 51 (“[T]he meaning of any word form is in some sense different in every distinct context in which it occurs.”).

72. MICHAEL MORRIS, *AN INTRODUCTION TO THE PHILOSOPHY OF LANGUAGE* 15 (2007).

73. *Id.* Onomatopoeia may be something of an exception that proves this rule. These are words that imitate the sound they convey—e.g., *moo*, *meow*, *pow*, *hiccup*, *sizzle*. See Hugh Bredin, *Onomatopoeia as a Figure and a Linguistic Principle*, 27 *NEW LITERARY HIST.* 555, 557 (1996). Even these words are somewhat culture-bound, however. See W. G. Aston, *Japanese Onomatopes and the Origin of Language*, 23 *J. ANTHROPOLOGICAL INST. GR. BRIT. & IR.* 332, 353 (1894) (noting how the Japanese use “*nya*” to describe the mewing of a cat). In any event, these are exceptional words with a relatively insignificant role in legal discourse.

the building blocks of meaning.<sup>74</sup> One might analogize the study of word-meaning to playing chess, and the study of sentential-meaning to playing three-dimensional chess.<sup>75</sup>

Lexical meaning is a more focused—and less complicated and controversial—inquiry than studying sentence-meaning. But more importantly, it is also the core of legal discourse.<sup>76</sup> Researchers of language distinguish between nomothetic sciences (which focus on universal rules) and idiographic sciences (which describe the unique and non-recurrent cases).<sup>77</sup> The nomothetic sciences, which include the law, formulate generalizations and thus have a greater need for *terminology* than the idiographic sciences, which focus on individual phenomena.<sup>78</sup> This emphasis on terminology in legal discourse suggests that words are important not only for their role as building blocks in the constitution of sentences, but often as the focus of the legal inquiry itself.<sup>79</sup> Indeed, many judicial opinions announce something along the lines of: “This case turns on the meaning of the word x.”<sup>80</sup>

Meaning is also far less abstract in legal discourse as compared with

74. MORRIS, *supra* note 72, at 15. “The principle of compositionality states that the meaning of a complex linguistic expression is built up from the meanings of its composite parts in a rule-governed fashion.” M. LYNNE MURPHY & ANU KOSKELA, *KEY TERMS IN SEMANTICS* 36 (2010) (emphasis omitted).

75. Analogizing language to a game is one of the major contributions of Ludwig Wittgenstein. See generally WITTGENSTEIN, *supra* note 53.

76. Note that a reference to a single discourse of law is a shorthand. In fact, legal discourse is not homogenous, but is rather “a set of related legal discourses.” See Yon Maley, *The Language of the Law*, in *LANGUAGE AND THE LAW* 11, 13 (John Gibbons ed., 1994).

77. See generally James T. Lamiell, ‘Nomothetic’ and ‘Idiographic’: *Contrasting Windelband’s Understanding with Contemporary Usage*, 8 *THEORY & PSYCHOL.* 23 (1998); Wilhelm Windelband, *Address on Occasion of the Assumption of the Rectorship of Kaiser-Wilhelm University of Strassburg* (1894), in 8 *THEORY & PSYCHOL.* 6 (1998).

78. See Stefan Ziemski, *Two Types of Scientific Research*, 10 *J. FOR GEN. PHIL. SCI.* 338, 338–39 (1979).

79. See Weisflog, *supra* note 35, at 207.

80. See, e.g., *Astrue v. Capato ex rel. B.N.C.*, 132 S. Ct. 2021, 2027 (2012) (“To resolve this case, we must decide whether the Capato twins rank as ‘child[ren]’ under the Act’s definitional provisions.” (alteration in original)); *Hall v. United States*, 132 S. Ct. 1882, 1886 (2012) (“Our resolution of this case turns on the meaning of a phrase in § 503(b) of the Bankruptcy Code: ‘incurred by the estate.’”); *Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1706 (2012) (“The ordinary meaning of the word [“individual”], fortified by its statutory context, persuades us that the Act authorizes suit against natural persons alone.”); *Argonaut Great Cent. Ins. Co. v. Mitchell*, No. 11-12063, 2012 WL 2947757, at \*1 (11th Cir. July 20, 2012) (“[T]he instant case which turns on the meaning of ‘getting on’ and ‘getting off’ the insured vehicle.”); *Hall v. United States*, 677 F.3d 1340, 1344 (Fed. Cir. 2012) (“This case centers on the proper meaning of the word ‘summoned’ in 5 U.S.C. § 6322(a).”); *St. Paul Fire & Marine Ins. Co. v. Schilli Transp. Servs. Inc.*, 672 F.3d 451, 457 (7th Cir. 2012) (“At the center of the dispute in this case is the meaning of the word ‘you’ in this [contract].”); *Foothills Texas, Inc. v. MTGLQ Investors, L.P.*, No. 09-10452, 2012 WL 2974907, at \*5 (Bankr. D. Del. July 20, 2012) (“[T]he dispute turns on the meaning of the term ‘executory contract’ under the Code.”); *Egan v. Planning Bd. of Stamford*, No. 32371, 2012 WL 2546806, at \*6 n.17 (Conn. App. July 10, 2012) (“[O]ur analysis turns on the meaning of the term ‘front lot line.’”). For a classic example that Professor Brian Landsberg brought to my attention, see *Gibbons v. Ogden*, 22 U.S. 1 (1824) (tracing the meaning of “regulate,” “commerce,” and “among”).

other discourse communities.<sup>81</sup> For practical reasons, as opposed to epistemological considerations, legal words and legal sentences must have meaning and authority in a way that the words in a poem need not. A judge or a statute, for example, can definitively resolve the scope of a word's meaning in a particular context.<sup>82</sup> This is an unusual condition compared to other language discourse, which is more open-textured and unregulated, sometimes even anarchic.<sup>83</sup> The meaning of a word in a William Blake poem, for example, may be discussed for centuries without definitive resolution.<sup>84</sup>

In the legal context, legislators and judges actualize the semantic potential of words and utterances in particular speech acts.<sup>85</sup> Social conventions recognize and accept judicial authority to declare the meaning of words, albeit for a limited purpose and for a particular discourse commu-

Remember also Kenneth Starr's account of President Clinton's testimony in his report to Congress: "It depends on what the meaning of the word 'is' is." OFFICE OF THE INDEP. COUNSEL, REFERRAL TO THE UNITED STATES HOUSE OF REPRESENTATIVES PURSUANT TO TITLE 28, UNITED STATES CODE, § 595(c) n.1091 (1998), reprinted in THE STARR REPORT: THE FINDINGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR 325 n.1091 (1998).

81. To be sure, when a philosopher or semiotician examines laws as a patterned system of meanings, the insubstantiality of legal language becomes evident, and the inquiry presses on both jurisprudence and epistemology. See Mary Douglas, *The Future of Semiotics*, 38 SEMIOTICA 197, 199 (1982). Yet in legal practice, laws are treated as though they are substantial—with boundaries and consequences. This Article focuses on these practical outcomes.

82. This is not necessarily because they always get the meanings "right"; instead, they get the meanings "right" only in the sense that they are the final arbiters. And the discourse community recognizes that authority. See *id.*

83. For an early discussion of the phrase "open texture," see Friedrich Waismann, *Verifiability*, in LOGIC AND LANGUAGE 117, 119 (Antony Flew ed., 1968). Hart later used the same phrase in the legal context. See HART, *supra* note 45, at 123, 272–76 (discussing the indeterminacy of language in the context of his theory on the proper scope of judicial discretion).

84. Blake scholars have debated, among other things, the meaning of the titular flowers in *The Lily* from WILLIAM BLAKE, SONGS OF INNOCENCE & EXPERIENCE (1794). Traditional readings cast it as a symbol of purity, innocence, modesty, and humility. See S. FOSTER DAMON, A BLAKE DICTIONARY: THE IDEAS AND SYMBOLS OF WILLIAM BLAKE 240 (1965); E.D. HIRSCH JR., INNOCENCE AND EXPERIENCE: AN INTRODUCTION TO BLAKE 256–57 (1964). In contrast, D. G. Gillham offers an ironic interpretation of the lily, as the flower appears white and virginal because it "knows (or senses) that it is enticing to appear to be so." D. G. GILLHAM, BLAKE'S CONTRARY STATES: THE SONGS OF INNOCENCE AND OF EXPERIENCE AS DRAMATIC POEMS 174 (1966). John Grant directly refutes Gillham's "theory of radical irony," championing the more traditional reading of the flower. See John E. Grant, *Two Flowers in the Garden of Experience*, in WILLIAM BLAKE: ESSAYS FOR S. FOSTER DAMON 333, 341–45 (Alvin H. Rosenfeld ed., 1969).

85. According to the theory of speech acts, originally developed by John L. Austin and John Searle, human language is used to not only transmit messages or influence people's behavior, but acts are also realized through this language. See J. L. AUSTIN, HOW TO DO THINGS WITH WORDS 6 (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975); JOHN R. SEARLE, SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE 16 (1969). Building on this framework, Brenda Danet classified legal language use into different types of speech acts. See Brenda Danet, *Language in the Legal Process*, 14 LAW & SOC'Y REV. 445, 457–60 (1980).

nity.<sup>86</sup> Thus, a statute or judicial opinion may definitively resolve whether *cat* includes cougars, which of two baseball fans *caught* a foul ball, or whether an individual is in a *catatonic* state. The performative nature of language is indispensable for a legal system to execute its mandate to define the rights and responsibilities of its citizenry.<sup>87</sup>

To be sure, linguistic indeterminacy is neither avoidable nor avoided in legal discourse.<sup>88</sup> Even when the meaning of a word or concept is judicially determined to include or exclude a situation presented, other indeterminacies can persist—polysemy,<sup>89</sup> synonymy,<sup>90</sup> evolution,<sup>91</sup> neologisms,<sup>92</sup> ambiguity,<sup>93</sup> vagueness,<sup>94</sup> and generality<sup>95</sup> are endemic. However, unlike other discourse communities, as there is a judicial infrastructure with the recognized authority to interpret or construct that meaning, we can confidently refer to legal words as having meaning within that community. The interpretive infrastructure can determine the content of any box that contains the meaning of any legal word. Thus, the meaning of a legal word unquestionably exists even if it is deliberately protean or hopelessly unclear prior to (or even after) it is interpreted.

Because there is an arbiter of meaning, legal language is fundamentally different from ordinary discourse. When analyzing the interaction of meanings in such legal language, the existence of a meaning or meanings is much more important than either the content of any particular word's

86. “There is a famous passage in *Alice Through the Looking-Glass* (Chapter VI) where, to Humpty Dumpty’s claim to use words in unusual senses, Alice made what may seem to the ordinary person to be an unanswerable objection. ‘The question is,’ said Alice, ‘whether you *can* make words mean different things.’ ‘The question is,’ replied Humpty Dumpty, ‘which is to be master—that’s all.’” Williams, *supra* note 61, at 141.

87. See MATTILA, *supra* note 18, at 31 (“Speech acts are of fundamental importance from the standpoint of the legal order. Given that the law is a metaphysical phenomenon that is only ‘alive’ in language, it is only by language means that it is possible to change legal relationships. The language of the law is thus an instrument of speech acts: it has a performative function.”).

88. “[F]ew would now deny the indeterminacy side of H.L.A. Hart’s repeated claim that language and the rules based on it contain both a core of settled meaning and a penumbra of uncertainty. The disputes are over whether the core is as comparatively large as Hart and others maintain, whether the core is as settled as it is supposed, and whether the notion of core (or plain or literal) meaning is coherent at all.” LAW AND LANGUAGE, *supra* note 61, at xiv. See generally BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY (1993); TIMOTHY A. O. ENDICOTT, VAGUENESS IN LAW 190 (2000); VAGUENESS IN NORMATIVE TEXTS (Vijay K. Bhatia et al. eds., 2005).

89. See MATTILA, *supra* note 18, at 109-11; TIERSMA, *supra* note 17, at 111-12.

90. See TIERSMA, *supra* note 17, at 113-14.

91. See KOOIJ, *supra* note 62, at 3; FERENC KOVÁCS, LINGUISTIC STRUCTURES AND LINGUISTIC LAWS 354 (B. R. Grüner & Akadémiai Kiadó eds., Sándor Simon trans., 1971).

92. See TIERSMA, *supra* note 17, at 97-100.

93. See Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in THE OXFORD HANDBOOK OF LANGUAGE AND LAW 128, 129 (Peter M. Tiersma & Lawrence M. Solan eds., 2012).

94. See generally ENDICOTT, *supra* note 88; Ólafur Páll Jónsson, *Vagueness, Interpretation, and the Law*, 15 LEGAL THEORY 193 (2009); Lawrence M. Solan, *Vagueness and Ambiguity in Legal Interpretation*, in VAGUENESS IN NORMATIVE TEXTS, *supra* note 88, at 73; Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CALIF. L. REV. 509 (1994).

95. See Poscher, *supra* note 93, at 128.



meaning or the philosophical methodology by which a word's meaning is derived.

## B. Original Meaning, Local Meaning, and Common Meaning

Legal words begin with what I call an *original meaning*. The first legal system to introduce a word determines the original meaning of that word.<sup>96</sup> This Article uses the word *class action* as an example of a word-symbol. But, of course, the word could just as easily be alimony, bond, consideration, or something else. When the word-symbol (or word) *class action* was introduced, its original meaning embodied all that the legal discourse and the associated conventions embedded in that word. The box of original meaning for that word-symbol included the text of the new rule and all of its attendant features.<sup>97</sup> The original meaning of the word *class action* could include a trans-substantive joinder device with four prerequisites, a provision for opt-outs, limits on compromising suits without court approval, a protocol for the appointment of class counsel, and so forth.<sup>98</sup> For expository purposes, let us refer to this original meaning of class action as  $M_1$ , and its originator legal system as First Country.

The *original meaning* of a word, as defined here, is broad. Why isn't the original meaning of *class action* instead defined as something narrow, such as "litigation by a representative on behalf of a group," and nothing more than that? The answer is that we are trying to describe the meaning assigned to the word by the system that introduced it. If First Country introduced the word *class action* with a rule that has prescribed objectives, prerequisites that must be satisfied, and a number of accompanying technicalities that must be met, there is no basis for including some of these and subordinating others in an original meaning. In the same way that a statute might introduce the word *disability* with a definition that includes a detailed list of specific medical conditions, the original meaning of a word should include all, not just some, of those enumerated conditions. If we are trying to ascertain the meaning that is in the original "box," the best evidence of the original meaning of  $M_1$  is what First Country has said (or would say) that it is. The inclination to suggest a narrower characterization of original meaning would often lead to a meaning that would reflect hindsight bias<sup>99</sup>—invoking more of the word's legacy or essence based

96. For a theoretical discussion of whether meanings are created or discovered, see Patterson, *supra* note 59, at 177.

97. Cf. Steven G. Calabresi, Introduction to ORIGINALISM: A QUARTER-CENTURY OF DEBATE 1-40 (Steven G. Calabresi ed., 2007) (discussing various meanings of original meaning); Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999); John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 31 HARV. J.L. & PUB. POL'Y 917, 917-19 (2008).

98. This history is suggested only for expository purposes. For an historical account of the class action, see generally STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

99. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 204, 236 (2006); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 574 (1998) (describing steps courts take to correct for the human propensity to view past events with a hindsight bias).

upon the subsequent uses of the word. A word's legacy or essence tells us something important about a word's meaning, but not about its *original* meaning.

Once one country introduces a word and its associated concept, we might expect some other countries to find the new idea useful. And, of course, some of these countries may even wish to use the same word-symbol.<sup>100</sup> Although some of these countries might precisely replicate the original meaning,<sup>101</sup> countries can—and should—tailor the device for their desired purpose.<sup>102</sup> Because the meaning of a word in any legal system is a product of the legal discourse in that system, each legal system can assign whatever meaning it desires to the words it uses.<sup>103</sup> Put another way, the system can fill the box of meaning with any mixture of borrowed and unique content.<sup>104</sup>

Thus we might imagine another legal system, called Second Country, that replicates the original meaning of *class action* except for a new provision that limits the scope of the subject matter of *class actions* to certain substantive areas (e.g., available only in consumer cases). Because  $M_1$  has a trans-substantive scope in this scenario, meaning no restriction as to subject matter, Second Country has introduced a slightly unique meaning of the word *class action*, which we shall label  $M_2$ . Third Country might then replicate the original ( $M_1$ ), but change only the requirements for appointment of class counsel, introducing  $M_3$ . At this stage in the hypothetical we have three different countries—each with a meaning of the word *class action* that is tailored to its respective system. This Article refers to these tailored meanings of the word as *local meanings*. Thus, for example, the local meaning of the word *class action* in Third Country happens to be the third iteration,  $M_3$ .

A local meaning is not necessarily a unique meaning. Continuing with our hypothetical, Fourth Country might replicate the original,  $M_1$ , and Fifth Country might replicate  $M_2$ . Finally, Sixth Country might replicate  $M_3$ , but also require members of the class to opt-in (as opposed to opting out of the class, as in the other five countries), introducing the fourth variant meaning,  $M_4$ . A tailored local meaning can replicate another system's

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100. For a discussion of the phenomenon of transplants, see *supra* notes 27-33 and accompanying text.

101. In some instances, the enthusiastic nature of the borrowing creates unique problems. See Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, 2009 BYU L. REV. 1813, 1858 (2009) ("Singapore decided to ad[o]pt the new English company law outright before the English had even finished drafting it, and they did not even adjust the numbering in cross-references of their securities law copied from Australia.").

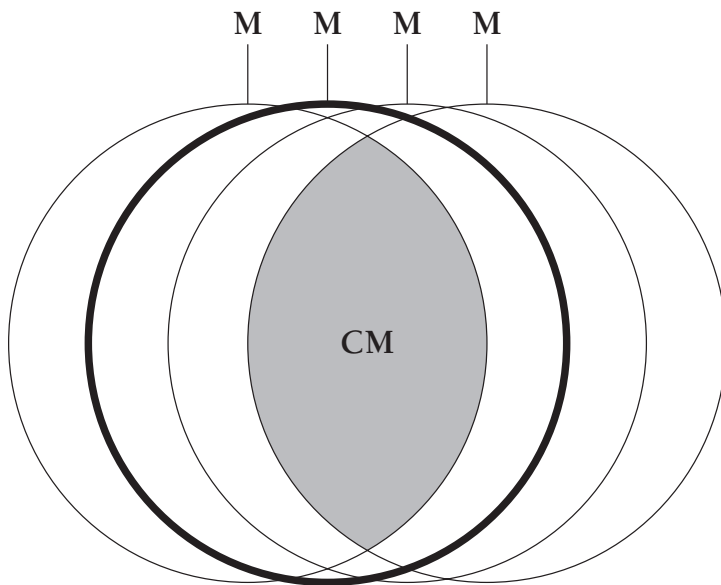
102. See MARKESINIS & FEDTKE, *supra* note 34, at 336-37 ("[B]orrowing a particular legal idea does not . . . mean that the system on the receiving end need[s] to follow the model in each and every detail.").

103. See Patterson, *supra* note 59, at 177.

104. See generally JACKSON, *supra* note 46, at 46 (noting that, once constituted as a system, "[t]he language of law represents an entire universe of legal meanings, the choice of any one of which . . . reflects the exclusion or absence of the other available legal meanings").

meaning or it can be subtly (or dramatically) distinctive. From a global perspective, each distinctive meaning adds another, variant meaning to the word. In the hypothetical, we have six countries using the word and thus six local meanings; we also have four variant meanings of the word, including the original meaning.

This Article is principally about the *common meaning* of a word. Common meaning is defined here as that which is common among all of the local (or variant) meanings.<sup>105</sup> Drawing from the above example, the common meaning of the word *class action* would be the content that M<sub>1</sub>, M<sub>2</sub>, M<sub>3</sub>, and M<sub>4</sub> have in common. The following Venn diagram illustrates the common meaning (CM) of the word *class action* in light of the four variant local meanings:



Put another way, the common meaning of the word is the content of the original meaning, M<sub>1</sub>, less the provisions regarding subject matter (removed by M<sub>2</sub>), less the provisions regarding class counsel (removed by M<sub>3</sub>), and less the provisions regarding opt-in/opt-out procedures (removed

105. This defined term is not a synonym of “plain meaning,” nor of “ordinary meaning.” Unfortunately, the Supreme Court has used the term as such a synonym. *See, e.g.,* Perrin v. United States, 444 U.S. 37, 42 (1979) (referring to the “ordinary, contemporary, common meaning” of statutory text). Quite fittingly given the thesis of this Article, however, the Court has *also* used the term “common meaning” in essentially the sense that I use it here. *See, e.g.,* United States v. Santos, 553 U.S. 507, 511 (2008) (noting that the term “proceeds” “has not acquired a common meaning in the provisions of the Federal Criminal Code”).

For a general discussion of plain meaning and original meaning, see Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 280 (1998); Alani Golanski, *Linguistics in Law*, 66 ALB. L. REV. 61, 63 (2003); Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2036–38 (2005).

by  $M_4$ ). The mathematical symbols and suggested calculation provide more precision than is intended or necessary, but they can be conceptually useful.<sup>106</sup>

Thus, within any particular legal system, a word has both a local meaning and, as a subset thereof, a common meaning. The common meaning includes those components of the local meaning that are also manifest in all other legal systems. In the *class action* example, the word's common meaning after  $M_1$ ,  $M_2$ ,  $M_3$ , and  $M_4$  might include such components as adequate representatives, notice requirements, numerosity, and whatever else of the original meaning is incorporated within and unaltered by  $M_2$ ,  $M_3$ , and  $M_4$ .

Common meaning has an empirical quality that might reveal the essence of the word. For the word *class action*, for example, the common meaning, after forty or fifty variant meanings, could be reduced to "litigation by a representative on behalf of a group," and nothing more than that.<sup>107</sup> The common meaning could also resemble—or even be—what logicians would label as necessary and/or sufficient conditions to define the word.<sup>108</sup> But, as defined here, common meaning could be more or less than these alternative characterizations. Instead, the term identifies an empirical core of common meaning that includes a word's shared characteristics.

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106. Whether mercifully or unfortunately, the Venn diagram does not reflect the infinitely regressive nature of word meaning. See BRADLEY, *supra* note 56, at 17-18. Each of the circles above theoretically circumscribes an infinite number of circles since a word symbolizes something that can be described with words that, in turn, symbolize more concepts and more words, and so on. The meaning of each word is theoretically its own circle. For example, if a circle represents the meaning of the word "class action" in First Country, then that includes the "trans-substantive joinder device with four prerequisites, [and] a provision for opt-outs . . ." *Supra* text accompanying note 98. But each of these words ("trans-substantive," for example), in turn, has a *meaning*, and that meaning is describable by words that have meanings.

The Venn diagram also suggests that the meaning of a word is static, when of course it is dynamic. See JAMES BOYD WHITE, *JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM* 239-41 (1990); Arthur Schopenhauer, *On Language and Words*, in *THEORIES OF TRANSLATION* 32-35 (Rainer Schulte & John Biguenet eds., 1992); James Boyd White, *Judicial Criticism*, in *INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER* 393 (Sanford Levinson & Steven Mailloux eds., 1988). Because meaning is dynamic,  $M_1$ ,  $M_2$ ,  $M_3$ , and  $M_4$  could be the evolution of the meaning of the word within *one* system.

107. The Global Class Actions Exchange website, maintained by Deborah Hensler of Stanford Law School, contains reports on contemporary variations on the class action device. *Global Class Actions Exchange*, STAN. UNIV., <http://globalclassactions.stanford.edu/> (last visited May 26, 2013). The variations among countries include, for example, restricting the subject matter (non-trans-substantive), see Klaus Viitanen, *Finland*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 209, 213 (2009) (consumer cases only); requiring that the action address a shared public concern, see Camilla Bernt, *Norway*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 220, 223 (2009); emphasizing the role of a government official in the initiation of actions, see Viitanen, *supra*, at 213-14; and requiring class members to opt in, see Elisabetta Silvestri, *Italy*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 138, 146 (2009).

108. See generally Roger Wertheimer, *Conditions*, 65 J. PHIL. 355 (1968).

### C. Common Meaning as a Limited Resource

The common meaning of a word is a limited resource. In contrast to words and meanings generally—which are shared but not limited resources<sup>109</sup>—*common* meaning is a global, shared, limited resource, much like water or a species of fish. The common meaning of a word is a limited resource because it erodes progressively as legal systems assign new meanings to the shared word. Viewing lexical meaning through a lens of analysis reserved for limited resources offers a unique perspective. Importantly, it allows us to consider a word’s common meaning as a common-pool problem.<sup>110</sup>

The prototypical common-pool resource is a plot of public grazing land that all cattle farmers can use to graze cattle.<sup>111</sup> The grass on the commons is a sustainable resource so long as it consumed no faster than its natural rate of replenishment. As soon as consumption exceeds that rate, the resource will provide diminishing aggregate returns. The optimal strategy for the society as a whole, then, is to consume the resource at a sustainable rate.<sup>112</sup>

Unfortunately, individual farmers will usually harvest for themselves at a rate higher than their share of the sustainable aggregate rate. Indeed, each farmer, acting independently and rationally, will bring more than their share of cattle to the commons.<sup>113</sup> The economic explanation is that each farmer receives all of the *benefit* of each additional cow they graze on the commons (because their cattle are fed), but bears only part of the *expense* of each additional cow (since the effects of overgrazing are shared

109. Words and meanings are *shared* resources because multiple users can enjoy the same word. Words and meanings generally are not *limited* resources because one person’s use of the word does not compromise another’s use of that word. Cf. N. Stephan Kinsella, *Against Intellectual Property Rights*, 15 J. LIBERTARIAN STUD. 1, 22–23 (2001).

110. The origin of the common-pool line of inquiry is usually traced to Garrett Hardin. See Hardin, *supra* note 1, at 1244; see also ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 2* (James E. Alt & Douglass C. North eds., 1990) (deducing that Aristotle was the first person known to identify the tragedy of the commons). For more contemporary analyses of Hardin’s theory, see generally Ronen Avraham & K. A. D. Camara, *The Tragedy of the Human Commons*, 29 CARDOZO L. REV. 479 (2008) (applying the theory of the commons to health insurance); Jerry Brito, *The Spectrum Commons in Theory and Practice*, 2007 STAN. TECH. L. REV. 1 (2007) (applying the theory of the commons to radio frequencies); Gary D. Libecap, *Open-Access Losses and Delay in the Assignment of Property Rights*, 50 ARIZ. L. REV. 379 (2008) (applying the theory of the commons to fishing, gas and oil extraction, and air pollution). For the articulation of a new generation of commons phenomena, see generally Michael J. Madison, Brett M. Frischmann & Katherine J. Strandburg, *Constructing Commons in the Cultural Environment*, 95 CORNELL L. REV. 657 (2010).

111. Hardin, *supra* note 1, at 1244.

112. “Examples of typical common-pool resource systems include lakes, rivers, irrigation systems, groundwater basins, forests, fishery stocks, and grazing areas. Common-pool resources may also be facilities that are constructed for joint use, such as main-frame computers and the Internet.” Charlotte Hess & Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, 66 LAW & CONTEMP. PROBS. 111, 121 (2003).

113. See WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 106–107, 109–16 (2007); Hardin, *supra* note 1, at 1244.

by all the farmers). The part of the expense that the other farmers bear is the externality.<sup>114</sup> Predictably, the grass is consumed faster than it grows, and the independent rational actors in a community create losses for everyone. As a result, “[f]reedom in a commons brings ruin to all”—even though it is clear that it is not in anyone’s long-term interest for this to happen.<sup>115</sup> Such is the tragedy of the commons.

The common meaning of a word is likewise a shared limited resource that is vulnerable to this tragedy. I emphasize that this is *dramatic* tragedy—a tragedy not in the sense of unhappiness, but rather in the sense that it is something that the actors bring upon themselves because of the “solemnity of the remorseless working of things.”<sup>116</sup> I explore the normative consequences of preserving or losing this particular common-pool resource separately later.<sup>117</sup> However, before considering those issues, let us confirm the inevitability of the devolution of a word’s common meaning.

The marginal benefit of introducing a new meaning to a shared word is largely internal. Legal systems have different preferences, priorities, and goals,<sup>118</sup> and these legitimate differences are manifest in slightly (or dramatically) unique versions of, say, the *class action* device. Second Country may have legitimate reasons to limit the scope of its device to consumer cases, regardless of the approach of other countries. Yet, this customization has very little, or no, positive externality; in other words, no other country directly benefits from Second Country’s innovation. Rather, like the farmer who alone benefits from maintaining a larger herd of cattle, any particular legal system will receive all of the benefit of its idiosyncrasy.<sup>119</sup>

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114. See CORNES & SANDLER, *supra* note 20, at 39–43 (discussing externalities); see also JAMES E. MEADE, *THE THEORY OF ECONOMIC EXTERNALITIES: THE CONTROL OF ENVIRONMENTAL POLLUTION AND SIMILAR SOCIAL COSTS* 15 (1973).

115. Hardin, *supra* note 1, at 1244.

116. ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* 11 (Pelican Mentor Books 1948) (1925).

117. See *infra* notes 332–56 and accompanying text.

118. See *supra* note 19 and accompanying text.

119. To be sure, there could be a *positive* externality if innovation in one legal system were so enlightened (or so problematic) that other legal systems adopted it (or avoided it, as the case may be) and would not have done so but for the experience of the former. In this sense, idiosyncrasy might add to the interpretive stock of a word, and this could be independently useful. The analogue is Justice Brandeis’ famous “laboratories” metaphor about federalism. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

But this is surely a modest externality; although some idiosyncrasies could be transplanted widely, see *supra* notes 27–33 and accompanying text, the purpose of customization is to tailor the device to local conditions, which are, almost by definition then, unique, see *supra* note 19. Even were the positive externality of a particular innovation substantial and compelling, understand that it would not forestall or directly offset the loss of the word’s common meaning. If, for example, five additional countries introduced a class action device and followed Sixth Country’s lead (codifying the opt-in component), the idiosyncrasy in Sixth Country provided something useful elsewhere (to-wit, a positive externality), but the word’s common meaning is still compromised as a result of Sixth Country’s customization. The values of common meaning, on one hand, and

However, a system bears only a fraction of the costs it creates when it introduces a new meaning to a shared word. The common meaning of a word operates as a commons. Like the depletion of the commons by the farmers, national legal systems, acting independently and rationally, will introduce variant meanings that progressively erode the common meaning of a word. Differences in the variant meanings of a word may range from subtle to dramatic, with the latter presenting the bigger threat to a thick common meaning.

While the social value of a commons for grazing cattle is surely obvious, the value of a word's *common meaning* is probably less so. In other words, so what if a word's common meaning is thick or thin? The answer to this question must be addressed in two stages. To appreciate the significance of losing this global, shared, limited resource we must first comprehend why, and how often, understanding the *local meaning* of foreign words is important. Thereafter, we can explore the relationship between common meaning and local meaning.

### III. The Relevance of Foreign Laws

Knowing the local meaning of a word—whether in one's own or another system—may be necessary or useful for myriad reasons. For example, individuals or institutions may want such information to ensure compliance with a law, so as to avoid penalties for noncompliance. Alternatively, they may want information about some law in order to enjoy its incentives or protections, or to avoid, win, or delay litigation. Further, if the matter comes before a court, judges will review all of the available information to determine the meaning of a particular word or provision.

Participants routinely study the meaning of words in their own legal system, but they occasionally must also ascertain the meaning of words in other legal systems. The need to have information on foreign law<sup>120</sup> can

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entrepreneurship, on the other, are not equivalents in the sense that one can *directly* offset the other.

To emphasize this point, consider the following analogue: if the cattle farmers sharing the common grazing land had to purchase more horses to shepherd their ever-burgeoning cattle herds to and from the commons, the stimulus to the market for horses would be a positive externality—the more cattle brought to the commons, the more horses and horse equipment purchased by each farmer. But this positive externality would not forestall or directly offset the consumption of the common-pool resource. Theoretically, the positive externality might *outweigh* the negative externality—if, say, the marginal stimulus to the horse market spurred other economic growth worth far more than the commons—but it would not save the commons. I address the normative consequences of preserving common meaning at *infra* notes 332–356 and accompanying text.

There is a possibility that if an innovation introduced in one system was adopted by all other systems, the innovation would become part of the word's common meaning. If, for example, the five countries that followed Sixth Country's lead were instead First, Second, Third, Fourth, and Fifth Country, the common meaning may ultimately even reset to include Sixth Country's opt-in. *But see infra* Part IV.B.

120. In this Article, unless otherwise noted, "foreign law" refers to the national law of foreign countries and to international law. The challenge of applying unfamiliar law can even be manifest in the application of sister-state law. Alexander, *supra* note 36, at 620–21. But these challenges are "usually not as acute as that of applying the rule of

arise in many contexts and affect almost anyone involved in the legal process. In the course of everyday business—in drafting contracts or considering trade with foreign countries, in dealing with foreign nationals or companies, or merely in buying or selling foreign goods at home—the need to consider the laws of a foreign nation arises.<sup>121</sup> “Even people’s personal lives are increasingly affected by contacts with foreign countries.”<sup>122</sup> Vacationers, potential immigrants, expatriates, retirees, investors, and persons contemplating marriage to or adoption of foreigners “all may wish at one time or another to inform themselves as to the operation and effect of foreign laws on their activities.”<sup>123</sup>

When a transnational transaction or occurrence leads to litigation, courts often need to consider foreign laws. A casual glance of very recent opinions from U.S. courts reveals dozens of such cases—implicating the laws of Argentina, Australia, the Bahamas, Canada, the Cayman Islands, Costa Rica, the Dominican Republic, Ecuador, England, Finland, French Polynesia, Germany, India, Indonesia, Iraq, Israel, Kuwait, Malaysia, Mexico, the Netherlands, Nigeria, Saudi Arabia, Switzerland, Taiwan, and Venezuela, for example.<sup>124</sup> As seen in these cases, there is also a vast

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another nation. While some material differences do exist among the laws of the several states, they are not nearly as frequently encountered as differences with foreign national laws. In a similar vein,” some applications of foreign law are more difficult than others. *Id.* at 603 n.3. “[T]he foreign law ‘problem’ is not monolithic.” *Id.*; see also Catherine Valcke, *Global Law Teaching*, 54 J. LEGAL EDUC. 160, 161 (2004) (“Foreign law typically refers to the internal law of states other than our own.” (emphasis omitted)).

121. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMP. L. 581, 581 (1995) (“Aside from foreign law issues arising in cases relating to foreign trade, federal courts throughout this nation are faced daily with immigration matters, tort claims, public law disputes, arbitration enforcement proceedings, domestic relation suits and even criminal cases that call for the determination and application of foreign law.”).

122. Douglas R. Tueller, *Reaching and Applying Foreign Law in West Germany: A Systemic Study*, 19 STAN. J. INT’L L. 99, 101 (1983). International treaties have also extended the domain of international law to include private acts and transactions, such as wills, trusts, decedents’ estates, “the adoption of children, the abduction of children, the commercial sale of goods, electronic funds transfers, bills of exchange, and promissory notes.” Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 812 (1990).

123. Tueller, *supra* note 122, at 101–02.

124. The following list provides a number of examples: Argentina (Ubiquiti Networks, Inc. v. Kozumi USA Corp., No. C 12-2582 CW, 2012 WL 2343670 (N.D. Cal. June 20, 2012)); Australia (Seed Servs., Inc. v. Winsor Grain, Inc., 868 F. Supp. 2d 998 (E.D. Cal. 2012)); Bahamas (Matthews v. Whitewater West Indus., Ltd., No. 11-24424-CIV, 2012 WL 1605184 (S.D. Fla. May 8, 2012)); Canada (Sonoco Products Co. v. ACE INA Ins., 877 F. Supp. 2d 398 (D.S.C. 2012)); Cayman Islands (Loukianoff v. Galitsky, No. C 12-00296 CRB, 2012 WL 1144289 (N.D. Cal. Apr. 4, 2012)); Costa Rica (Lucas v. Hertz Corp., 875 F. Supp. 2d 991 (N.D. Cal. 2012)); Dominican Republic (Font Paulus ex rel. P.F.V. v. Vittini Cordero, No. 3:12-cv-986, 2012 WL 2524772 (M.D. Pa. June 29, 2012)); Ecuador (Tobar v. United States, No. 07cv817 WQH (W.Mc), 2012 WL 2190766 (S.D. Cal. June 13, 2012)); England (Howden N. Am. Inc. v. Ace Property & Cas. Ins. Co., 875 F. Supp. 2d 478 (W.D. Pa. 2012)); Finland (Frederiksson v. HR Textron, Inc., 484 F. App’x 610 (2d Cir. 2012)); French Polynesia (Putz v. Golden, No. C10-0741JLR, 2012 WL 2565017 (W.D. Wash. July 2, 2012)); Germany (Mageba Textilmaschinen GmbH & Co. KG v. Archibald, No. 3:12-CV-00126-FDW, 2012 WL 2568075 (W.D.N.C. July 2, 2012)); India (Shire Dev. LLC v. Cadila Healthcare Ltd., No.



geographic spread of courts that encounter questions of foreign law.

Foreign law is invoked for many reasons. The most frequently used conflict of laws doctrine requires the application of foreign substantive law when a foreign jurisdiction has the “most significant relationship” with the underlying event.<sup>125</sup> In a tort action, the foreign country may have been the place of injury or wrongful conduct; in a contract action, the foreign country may have been the place of contracting or of performance.<sup>126</sup>

Choice of law clauses may also direct a court to apply foreign law.<sup>127</sup> Because respect for party autonomy is an important norm in conflict of law theory surrounding contracts,<sup>128</sup> choice of law clauses are especially popular in commercial and contract law.<sup>129</sup> Even matters without a transnational component may be subject to a determination of foreign law if a robust “law market” emerges.<sup>130</sup>

Policies such as the internal affairs doctrine in corporate law disputes

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1:10-CV-00581-KAJ, 2012 WL 2564134 (D. Del. June 28, 2012)); *Indonesia (JPMorgan Chase Bank, N.A. v. PT Indah Kiat Pulp & Paper Corp. Tbk*, 854 F. Supp. 2d 528 (N.D. Ill. 2012)); *Iraq (Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205 (4th Cir. 2012)); *Israel (Estate of Botvin v. Islamic Rep. Iran*, 873 F. Supp. 2d 232 (D.D.C. 2012)); *Kuwait (Shah v. Kuwait Airways Corp.*, No. 08 Civ. 7371(LAP)(JCF), 2012 WL 1631624 (S.D.N.Y. May 7, 2012)); *Malaysia (Nestle Waters N. Am., Inc. v. Malaysian Assur. Alliance Berhad*, No. 8:12-cv-180-T-30AEP, 2012 WL 2305940 (M.D. Fla. June 18, 2012)); *Mexico (Gen. Motors Corp. v. Albert Weber GmbH*, No. 08-12671, 2012 WL 2184564 (E.D. Mich. June 14, 2012)); *Netherlands (United States v. Omar*, No. 09-242 (MJD/FLN), 2012 WL 2277821 (D. Minn. June 18, 2012)); *Nigeria (Aeons Centro de Administracao de Empresas, Ltd. v. Cent. Bank of Nigeria*, No. BEL-11-3447, 2012 WL 2675259 (D. Md. July 3, 2012)); *Saudia Arabia (Douglas v. Smith Int'l, Inc.*, 481 F. App'x 917 (5th Cir. 2012)); *Switzerland (Nuvo Research Inc. v. McGrath*, No. C 11-4006 SBA, 2012 WL 1965870 (N.D. Cal. May 31, 2012)); *Taiwan (SignalQuest, Inc. v. Tien-Ming Chou*, 284 F.R.D. 45 (D.N.H. 2012)); *Venezuela (Skanga Energy & Marine Ltd v. Avenca S.A.*, 875 F. Supp. 2d 264 (S.D.N.Y. 2012)).

Of course, reported cases reveal only part of the picture. See John R. Schmertz, Jr., *The Establishment of Foreign and International Law in American Courts: A Procedural Overview*, 18 VA. J. INT'L L. 697, 697 (1978) (“Foreign law, and to a lesser extent international law, play an ever-increasing role in U.S. federal and state adjudications. In addition to the reported cases, there are many more unreported cases,” including those where the parties and the court overlooked the foreign law issues.).

125. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6.2 cmt. (1971). The most significant relationship test of the Restatement (Second) of Conflicts is the most popular, but is not the only extant conflicts methodology. See generally Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 AM. J. COMP. L. 303 (2011).

126. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145, 188 (1971).

127. For a discussion of the increasing use of choice of law clauses, see Erin Ann O'Hara, *Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law*, 53 VAND. L. REV. 1551, 1556 (2000); see also Jan M. Smits, *The Complexity of Transnational Law: Coherence and Fragmentation of Private Law*, 14 ELEC. J. COMP. L. (2010), available at <http://www.ejcl.org/143/art143-14.pdf>.

128. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. 211, 229 (2005) (“In recent decades, national courts have shown increasing respect for party autonomy . . .”).

129. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971).

130. See generally ERIN A. O'HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* (2009) (arguing states must, when developing domestic laws, account for individuals' potential desire to evade that law by, for example, contracting under the law of another state).

may also compel the application of foreign law.<sup>131</sup> Tax,<sup>132</sup> intellectual property,<sup>133</sup> and immigration<sup>134</sup> matters routinely implicate foreign laws. Domestic laws such as the Foreign Corrupt Practices Act,<sup>135</sup> Title VII,<sup>136</sup> the Age Discrimination in Employment Act,<sup>137</sup> and many other statutes<sup>138</sup>

131. See FRANKLIN A. GEVURTZ, *GLOBAL ISSUES IN CORPORATE LAW* 6-11 (2006) (discussing *McDermott Inc. v. Lewis*, 531 A.2d 206 (Del. 1987)).

132. See Paul N. Iannone, *The Critical Role of Foreign Law and Tax Court Rule 146: Determination of Foreign Law by the United States Tax Court in I.R.C. Section 482 Cases*, 16 Q.L.R. 445, 453 (1997) ("Foreign law plays a vital role for corporations that must determine an allocation of income and expenses among domestic and foreign affiliated businesses for tax purposes."); see also I.R.C. § 901 (concerning foreign tax credits).

133. See Graeme W. Austin, *Does the Copyright Clause Mandate Isolationism?*, 26 COLUM. J.L. & ARTS 17, 59 (2003); Stephen Breyer, *Assoc. Justice of the Supreme Court of the United States, Keynote Address Before the Ninety-Seventh Annual Meeting of the American Society of International Law* (Apr. 4, 2003), in 97 AM. SOC'Y INT'L L. PROC. 265, 265-66 (2003); Edward Lee, *The New Canon: Using or Misusing Foreign Law to Decide Domestic Intellectual Property Claims*, 46 HARV. INT'L L.J. 1, 5, 13 (2005). See generally David E. Miller, *Finding a Conflicts Issue in International Copyright Litigation: Did the Second Circuit Misinterpret the Berne Convention in Itar-Tass?*, 8 CARDOZO J. INT'L & COMP. L. 239 (2000) (describing how the *Itar-Tass* decision is implicating foreign law issues).

134. See, e.g., *Pazcoguín v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2002) (applying Philippine law to determine if immigrant was excludable). Foreign law may also determine the validity of a marriage, see *Colbert v. Colbert*, 169 P.2d 633, 635 (Cal. 1946), the effectiveness of an adoption, see *In re Adoption of Doe*, 923 N.E.2d 1129, 1134 (N.Y. 2010), or the legitimacy of a child, see *Perez v. Gardner*, 277 F. Supp. 985, 992 (E.D. Wis. 1967). Amnesty cases may require inquiry into both international and local laws. See generally Ronald C. Slye, *The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?*, 43 VA. J. INT'L L. 173 (2002).

135. See 15 U.S.C. §§ 78dd-1(c), 78dd-2(a)(1)(A), 78dd-2(c) (2006). See generally Elizabeth Spahn, *Discovering Secrets: Act of State Defenses to Bribery Cases*, 38 HOFSTRA L. REV. 163, 181-82 (2010).

136. See 42 U.S.C. § 2000e-1(b) (2006).

137. See 29 U.S.C. § 623(f)(1) (2006). See generally Andrew P. Walsh, *Employment Discrimination—Mahoney v. RFE/RL, Inc.: The "Foreign Laws" Exception to the ADEA—When a Collective Bargaining Agreement Equals a Law*, 19 W. NEW ENG. L. REV. 455, 455 (1997).

138. See, e.g., *Registration and Regulation of Brokers and Dealers*, 15 U.S.C. § 78o(b)(4)(B), 78c(a)(39)(B), (D) (2006) (granting the SEC and self-regulatory organizations authority to bar, suspend, or limit securities professionals based upon the findings of a foreign court or foreign securities authority that such persons committed specified types of violations of foreign law); *Tariff Act of 1930*, 19 U.S.C. § 1527(a) (2006) (prohibiting the importation of any wild mammal or bird "[i]f the laws or regulations of any country" forbid it); *Marine Mammal Protection Act of 1972*, 16 U.S.C. § 1372(c) (2006) (prohibiting importation of marine mammals taken or possessed in violation of foreign law); *The Lacey Act of 1990*, 16 U.S.C. § 3372(a)(2)(A) (2006) (making it unlawful to possess or sell fish or wildlife taken "in violation of any foreign law"); *Death on the High Seas Act*, 46 U.S.C. § 30306 (2006) (allowing foreign cause of action for wrongful death on the high seas to be brought in U.S. courts); *National Stolen Property Act*, 18 U.S.C. § 2315 (2006) (prohibiting the importation or transportation of "stolen" goods); *United States v. Schultz*, 333 F.3d 393, 404 (2d Cir. 2003) (interpreting "stolen" under U.S.C. § 2315 to mean "taken in violation of a patrimony law").

Some other statutes include reciprocity rules that allow recovery by citizens or subjects of a foreign state only if that foreign state would allow an American citizen to recover were the situation reversed. See, e.g., 28 U.S.C. § 2502(a) (2006) ("Citizens or subjects of any foreign government which accords to citizens of the United States the

incorporate foreign law by reference.<sup>139</sup>

In addition to those situations where courts are expected to *apply* foreign law,<sup>140</sup> many doctrines require courts to *consider* or *evaluate* foreign law as part of the decisional calculus. On every motion to dismiss on grounds of *forum non conveniens*, for example, the court must evaluate the adequacy of the alternative forum.<sup>141</sup> Similarly, every recognition and enforcement of a foreign judgment is premised on the notion that the judgment is “final and conclusive and enforceable where rendered,” and is not the product of procedures incompatible with due process of law.<sup>142</sup> Further, whenever there is concurrent parallel litigation in a foreign forum, the local court must assess the nature, content, and significance of the foreign proceedings.<sup>143</sup>

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right to prosecute claims against their government in its courts may sue the United States in the United States Court of Federal Claims if the subject matter of the suit is otherwise within such court’s jurisdiction.”); 46 U.S.C. § 31111 (2006) (applying a similar reciprocity rule in cases in which an alien sues the United States for damages caused by a public vessel, or for compensation for towage or salvage services).

139. Similarly, some domestic statutes refer to citizens or subjects of a foreign state. In these instances, foreign law may determine a party’s status thereunder. See, e.g., *JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91 (2002) (testing the meaning of a “corporation of a foreign [s]tate” in the context of diversity subject matter jurisdiction); see also Antonin Scalia, Assoc. Justice of the Supreme Court of the United States, Keynote Address: Foreign Legal Authority in the Federal Courts (Apr. 3, 2004), in 98 AM. SOC’Y INT’L L. PROC. 305, 305 (2004) (“Much of our [*JP Morgan Chase Bank*] opinion was devoted to consideration of English law, since whether the corporation was a citizen or subject of a foreign state depended on its legal status under foreign law.”).

140. To be clear, it is the domestic law that binds, not the foreign mandate. The foreign law is *binding* in the sense that it is recognized by or incorporated by reference into the domestic law. See 1 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 53 (1935) (“[S]ince the only law that can be applicable in a state is the law of that state, no law of a foreign state can have there the force of law.”); JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 7, at 10 (5th ed. 1857).

141. See *Usha (India), Ltd. v. Honeywell Int’l, Inc.*, 421 F.3d 129, 135 (2d Cir. 2005) (assigning burden to moving party); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981) (identifying adequacy as a threshold issue).

142. UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 2 (1962), available at <http://www.uniformlaws.org/shared/docs/foreign%20money%20judgments%20recognition/ufmjra%20final%20act.pdf>; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482 (1987). See generally Walter W. Heiser, *The Hague Convention on Choice of Court Agreements: The Impact on Forum Non Conveniens, Transfer of Venue, Removal, and Recognition of Judgments in United States Courts*, 31 U. PA. J. INT’L L. 1013 (2010) (discussing the requirements of finality and due process for the enforcement of foreign judgments under the Uniform Foreign Money Judgments Act and under the Restatement).

143. See, e.g., Kimberly Hicks, *Parallel Litigation in Foreign and Federal Courts: Is Forum Non Conveniens the Answer?*, 28 REV. LITIG. 659, 685 (2009) (explaining that international comity, *Colorado River* abstention, and inherent power theories require the U.S. courts to examine details of the foreign proceeding); Austen L. Parrish, *Duplicative Foreign Litigation*, 78 GEO. WASH. L. REV. 237, 247–51 (2010). See generally Cortelyou Kenney, *Disaster in the Amazon: Dodging “Boomerang Suits” in Transnational Human Rights Litigation*, 97 CALIF. L. REV. 857 (2009); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1 (2005).

The list of situations in which foreign law can arise is as diverse as it is lengthy. In sentencing a criminal defendant, prior foreign convictions can raise foreign law issues.<sup>144</sup> Criminal or tort defendants may raise a “cultural defense.”<sup>145</sup> In contract cases, foreign law may serve as a de facto excuse for nonperformance of a contract.<sup>146</sup> When a witness invokes the privilege against self-incrimination, the issue can be the risk of prosecution under the law of a foreign country.<sup>147</sup> A foreign forum selection clause may be unenforceable after review of the foreign jurisdiction’s substantive or procedural law.<sup>148</sup> A class action that includes foreign plaintiffs usually leads the court to consider, as part of the certification process, whether a foreign court is likely to give res judicata effect to any dismissal, judgment, or settlement.<sup>149</sup> Finally, foreign laws are also routinely implicated when there is service<sup>150</sup> or discovery<sup>151</sup> abroad.

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144. See Alex Glashauser, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134, 142 (1995) (discussing courts’ consideration of foreign convictions in criminal sentencing); A. Kenneth Pye, *The Effect of Foreign Criminal Judgments in the United States*, 32 U. MO. KAN. CITY L. REV. 114, 128 (1964) (“A number of states specifically give effect to foreign criminal convictions by providing that a conviction in any other . . . country] of a crime which . . . would be a ‘felony’ . . . may be used as a basis for imposing increased punishment on the offender.”).

145. See generally Leti Volpp, *(Mis)Identifying Culture: Asian Women and the “Cultural Defense,”* 17 HARV. WOMEN’S L.J. 57 (1994).

146. See, e.g., U.C.C. § 2-615 (1987); see also *Perutz v. Bohemian Disc. Bank in Liquidation*, 110 N.E.2d 6, 7 (N.Y. 1953) (“A contract made in a foreign country by citizens thereof and intended by them to be there performed is governed by the law of that country.”).

147. See generally Diane Marie Amann, *A Whipsaw Cuts Both Ways: The Privilege Against Self-Incrimination in an International Context*, 45 UCLA L. REV. 1201 (1998) (examining the privilege against self-incrimination where there is a possibility of being prosecuted abroad for a foreign crime).

148. See, e.g., *McDonnell Douglas Corp. v. Islamic Rep. of Iran*, 758 F.2d 341, 345–46 (8th Cir. 1985).

149. See Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT’L L. 14, 33–34 (2007); Stephen J. Choi & Linda J. Silberman, *Transnational Litigation and Global Securities Class-Action Lawsuits*, 2009 WIS. L. REV. 465, 480–86 (2009) (discussing the impact of possible non-recognition on class certification).

150. The forum’s procedural rules govern the mechanics for serving process upon foreign defendants. However, some of these rules incorporate by reference the foreign practice rules. See, e.g., FED. R. CIV. P. 4(f)(2)(A) (“[I]f there is no internationally agreed means . . . [service can be done] as prescribed by the foreign country’s law . . .”). The rules also contemplate use of an international treaty that, in turn, incorporates by reference foreign practice rules. See Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

151. See, e.g., FED. R. CIV. P. 28(b)(1)(C) (“A deposition may be taken in a foreign country . . . on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination . . .”). Moreover, all of the forum’s rules are to be administered with “special vigilance to protect foreign litigants” from discovery abuse. *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court S.D. Iowa*, 482 U.S. 522, 546 (1987). Specifically, this includes “due respect . . . for any sovereign interest expressed by a foreign state.” *Id.* Demonstrating such respect may involve evaluating foreign discovery practices—and the history behind and justifications for those rules. See, e.g., *In re Anshuetz & Co., GmbH*, 838 F.2d 1362, 1364 (5th Cir. 1988)

Courts may also be obliged to consider foreign law when enforcing treaty obligations, applying uniform laws, or advancing multinational harmonization efforts.<sup>152</sup> In these contexts, courts may need to consider foreign interpretations of the shared mandate as part of the decisional calculus.<sup>153</sup> Litigation under the United Nations Convention on Contracts for the International Sale of Goods (CISG) is one prominent example.<sup>154</sup> The CISG is domestic law by virtue of a self-executing treaty, but the purpose of the multilateral treaty is to achieve uniformity in its application.<sup>155</sup> Accordingly, courts must look to foreign case law for guidance in interpreting the relevant provisions of the CISG.<sup>156</sup>

A similar situation arises when domestic statutes or common law doctrines require knowledge of customary international law or the law of nations. This is similar because international law is “foreign law” not only

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(“[T]he courts of this circuit, when considering discovery requests . . . will be sensitive to interests expressed in the Hague Convention.”).

152. See Scalia, *supra* note 139, at 305. The United States is a bilateral, regional, or international party to more than 10,000 treaties and international agreements. See U.S. DEP’T OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2011 (2011), available at <http://www.state.gov/documents/organization/169274.pdf>.

For a discussion of the relevance of foreign law with regard to extradition treaties in Brazil, see Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT’L & COMP. L. 225, 241–42 (1995).

With regard to the role of foreign law in harmonization efforts, see generally Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001) (suggesting that domestic courts should use foreign law as a way to develop international copyright norms in transnational disputes). With regard to harmonization, consider also the borrowed-statute doctrine in the context of canons of statutory interpretation: “when a legislator copies a statute from a foreign legislator, it can be presumed that she was aware of the way in which the statute had been construed by the foreign courts.” Carlos F. Rosenkrantz, *Against Borrowings and Other Nonauthoritative Uses of Foreign Law*, 1 INT’L J. CONST. L. 269, 275 (2003); see also *infra* notes 343–347.

153. When interpreting the text of a treaty, for example, foreign precedents should not simply be considered but be given “considerable weight.” *Olympic Airways v. Husain*, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (citing *Air France v. Saks*, 470 U.S. 392, 404 (1985)).

154. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 (codified at 15 U.S.C.A. app. at 52 (West Supp. 1997)).

155. See FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION FOR THE INTERNATIONAL SALE OF GOODS, CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS 8–9 (1992); see also *International Sale of Goods: Hearing on Treaty Doc. No. 98–99 Before the S. Comm. on Foreign Relations*, 98th Cong. 1, 13 (1984) (statement of Sen. Christopher J. Dodd) (commenting that Congress intended the CISG to create a “uniform international legal system to which each party to an international sales contract could refer”).

156. See United Nations Convention on Contracts for the International Sale of Goods, *supra* note 154, art. 7(1) (“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application.”). Further, Article 7(2) implicitly provides that courts should not rely exclusively on domestic law. See *id.* art. 7(2); John Linarelli, *Analytical Jurisprudence and the Concept of Commercial Law*, 114 PENN ST. L. REV. 119, 154 (2010); see also Franco Ferrari, *The Relationship Between the UCC and the CISG and the Construction of Uniform Law*, 29 LOY. L.A. L. REV. 1021, 1024–26 (1996).

in the sense that it is not state or federal law, but also because the substantive content of international law can require a review of foreign domestic laws to determine whether there is a broad international consensus on a particular point of law.<sup>157</sup> Further, *all* federal laws are to be construed so as to avoid “violat[ing] the law of nations if any other possible construction remains.”<sup>158</sup>

The foreign law inquiry can also require combinations of international and foreign domestic laws. The Foreign Sovereign Immunities Act, for example, allows suits against foreign sovereigns when property is taken in violation of international law.<sup>159</sup> Yet, whether international law has been violated will sometimes require a threshold determination under foreign domestic law—e.g., who owned the property in question?<sup>160</sup>

In a standard functionalist account of lawmaking,<sup>161</sup> the incorporation and consideration of foreign law in all of these statutes and doctrines is neither casual nor accidental. The application, consideration, or evaluation of foreign law may be central to a fair and just result in a particular case. The many situations where courts must apply or evaluate foreign law constitute efforts to calibrate a balance among competing interests, to achieve the right levels of deterrence and compensation, to ensure respect for the interests of foreign nations, or to encourage reciprocal treatment from such foreign nations.<sup>162</sup>

The above examples regarding the application of foreign law should not be confused with the controversy regarding when and how foreign law should be used as persuasive or moral authority in interpreting the U.S. Constitution.<sup>163</sup> For example, the U.S. Supreme Court has cited foreign authority in deciding when the death penalty constitutes “cruel and un-

157. See, e.g., Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 (2006); see also Yeazell, *supra* note 3, at 62–63. See generally *supra* note 120.

158. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.); see also Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 *YALE L.J.* 2277, 2279–80 (1991) (discussing U.S. courts’ tendency to view questions of foreign law as political questions, thus finding them “unsuited for domestic adjudication”).

159. 28 U.S.C. § 1605(a)(3) (2006).

160. See Scalia, *supra* note 139, at 305.

161. See Lynn M. LoPucki, *The Systems Approach to Law*, 82 *CORNELL L. REV.* 479, 484–86 (1997).

162. See generally Harold Hongju Koh, *Internalization Through Socialization*, 54 *DUKE L.J.* 975 (2005) (discussing the socialization and internalization of international law as a vehicle for the coordination of and unity within the international community).

163. See Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 *CALIF. L. REV.* 1335, 1337 (2007). See generally Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 *WM. & MARY L. REV.* 743 (2006); M.H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 *AM. J. COMP. L.* 753 (2002); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *HARV. L. REV.* 109 (2006); John O. McGinnis, *Foreign to Our Constitution*, 100 *NW. U. L. REV.* 303 (2006); Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 *U. ILL. L. REV.* 637 (2007); Rosenkrantz, *supra* note 152.

sual punishment” under the Eighth Amendment<sup>164</sup> and in determining whether particular rights are protected under a substantive due process analysis.<sup>165</sup> These opinions have generated several arguments against the use of foreign legal authority in domestic constitutional interpretation. These include concerns that selective invocation of foreign precedent gives judges too much discretion in their interpretive process,<sup>166</sup> that reliance on foreign law undermines democratic accountability,<sup>167</sup> and that foreign law reflects local conditions and values incompatible with unique aspects of American history, culture, and government.<sup>168</sup> This controversy raises a

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164. See *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (noting that the fact that no other country permits the juvenile death penalty is not controlling, but confirming the conclusion that the death penalty is disproportionate for killers younger than eighteen); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion) (citing the virtual unanimity of “civilized nations” to support the conclusion that the Eighth Amendment bars the imposition of statelessness as a punishment for crime).

165. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 560, 576–77 (2003) (noting that other nations have protected the “right of homosexual adults to engage in intimate, consensual conduct” and finding “no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent”); *Washington v. Glucksberg*, 521 U.S. 702, 734–35 (1997) (finding that the experience with physician-assisted suicide in the Netherlands supported state claims of potential for abuse).

166. See, e.g., Scalia, *supra* note 139, at 309 (“Adding foreign law to the box of available legal tools is enormously attractive to judges because it vastly increases the scope of their discretion. In that regard it is much like legislative history, which ordinarily contains something for everybody and can be used or not used, used in one part or in another, deemed controlling or pronounced inconclusive, depending upon the result the court wishes to reach.”); Melissa A. Waters, *Treaty Dialogue in Sanchez-Llamas: Is Chief Justice Roberts a Transnationalist, After All?*, 11 LEWIS & CLARK L. REV. 89, 91 n.8 (2007) (“[R]elying on foreign precedent doesn’t confine judges. It doesn’t limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges. Foreign law, you can find anything you want . . . [a]nd that actually expands the discretion of the judge.” (quoting *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 200–01 (2005) [hereinafter *Roberts Confirmation Hearing*] (alteration in original)).

167. See, e.g., Waters, *supra* note 166, at 91 n.8 (“If we’re relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he’s playing a role in shaping the law that binds the people in this country. I think that’s a concern that has to be addressed.” (quoting *Roberts Confirmation Hearing*, *supra* note 166, 200–201 (2005))); J. Harvie Wilkinson III, *The Use of International Law in Judicial Decisions*, 27 HARV. J.L. & PUB. POL’Y 423, 426 (2004) (“[W]hen judges rely on foreign sources, especially for difficult constitutional questions concerning domestic social issues, they move the bases for judicial decision-making even farther from the realm of both democratic accountability and popular acceptance.”).

168. See, e.g., Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337 (2006) (“Americans are more individualistic, more religious, more patriotic, more egalitarian, and more hostile to unions and Marxism than are the people of any other advanced democracy. This positive account of the ways in which the United States truly is exceptional will call into question the practicality and wisdom of our Supreme Court imposing foreign ideas about law on us.”); Diarmuid F. O’Scannlain, U.S. Circuit Judge, U.S. Court of Appeals for the Ninth Circuit, *What Role Should Foreign Practice and*

fundamentally different issue, however, because in this narrow category of constitutional interpretation, the *relevance* of the foreign law is often genuinely debatable. Indeed, even the advocates of using foreign law in the context of constitutional adjudication acknowledge that, in the above examples, the foreign laws are merely useful rather than necessary.<sup>169</sup> By contrast, this Article regards situations where foreign laws are unquestionably relevant and, in many circumstances, even binding.<sup>170</sup> So let us put the contentious debate about constitutional interpretation aside and focus instead on those matters of foreign law that are not, in this sense, controversial.

Whatever the total number of cases and situations where courts encounter, evaluate, or apply foreign law, it is reasonable to speculate that that number will likely increase.<sup>171</sup> In a world where global travel is commonplace and daily transactions routinely involve multiple countries, the number of disputes with transnational and international components will surely grow.<sup>172</sup> Citizens of all countries will find themselves connected

Precedent Play in the Interpretation of Domestic Law?, Address Before the Institute of Advanced Legal Studies of the University of London (Oct. 11, 2004), in 80 NOTRE DAME L. REV. 1893, 1907 (2005) (noting unique aspects of the United States that may make reliance on foreign law inappropriate).

169. See, e.g., Jackson, *supra* note 163, at 111-12. Likewise, commentators who are suspicious of foreign law in the context of constitutional adjudication concede its applicability in the sort of contexts examined in this Article. See, e.g., Scalia, *supra* note 139, at 305-06 (recognizing “appropriate” uses of foreign laws).

170. See *supra* notes 125-48 and accompanying text.

171. The steady increase in the number of cases implicating foreign law has been acknowledged in each of the last five decades. See, e.g., Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT’L L. 37, 38 (1998) (“U.S. courts increasingly must decide issues involving the laws of foreign nations.”); Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT’L L. 301, 302 (2008) (noting “steady growth in the volume of litigation with an international dimension”); Arthur R. Miller, *Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613, 615 (1967) (recognizing a “steady increment in the number of lawsuits with international aspects”); Rudolf B. Schlesinger, *A Recurrent Problem in Trans-National Litigation: The Effect of Failure to Invoke or Prove the Applicable Foreign Law*, 59 CORNELL L. REV. 1, 1 (1973) (observing that foreign law questions are presented “with considerable frequency”); John G. Sprankling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT’L L. 3, 4, 9 (1983) (noting foreign law issues come before American courts “quite often” and “no doubt will appear more frequently”); see also HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS V* (2008) (noting “the last thirty years have seen a growing torrent of cases” filed in the United States with foreign and international issues); Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT’L L. 31, 48 (2011) (“Our overarching conjecture is that, as we move toward 2021, transnational litigation will be increasingly multipolar.”).

172. See generally THOMAS O. MAIN, *GLOBAL ISSUES IN CIVIL PROCEDURE I* (2005); Ronan E. Degnan & Mary Kay Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 HASTINGS L.J. 799, 799 (1988) (“It is trite but true to observe that disputes between United States nationals and people from other lands have been increasing steadily and doubtless will continue to do so.”).

For a discussion of the pressures on territorial boundaries generally, see JACK GOLD-SMITH & TIM WU, *WHO CONTROLS THE INTERNET? ILLUSIONS OF A BORDERLESS WORLD*



through the electronic global information system.<sup>173</sup> Nations chasing prosperity will further integrate into a global development system.<sup>174</sup> Necessity—"practical *commercial* necessity"—will make issues of foreign law even more common and ever more urgent.<sup>175</sup>

#### IV. Measuring Foreign Meaning

When individuals, courts, or other institutions want or need information such as the tailored local meaning of a foreign word, they face what economists call a measurement problem.<sup>176</sup> Humans can process and understand familiar things relatively quickly: we "know what to look for,

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179-83 (2006) (describing and responding to the perception that notions of sovereignty are eroding in a borderless world); Parrish, *supra* note 143, at 238 n.4.

173. See ANDREW S. BELL, *FORUM SHOPPING AND VENUE IN TRANSNATIONAL LITIGATION* 3 (James Fawcett ed., 2003) (describing how the growth of transnational litigation is fueled by "great technological advances, particularly in the fields of transportation and telecommunications and, more generally, through the internet's facilitation of international commerce"); Sanchez, *supra* note 36, at 636 ("[T]he U.S. American practitioner, now more than ever before, operates in a world society and economy constituted not only of an international society and economy but also of interdependent nations' societies and economies. The globalization process has given rise to the development of transnational law practice." (footnotes omitted)); Tueller, *supra* note 122, at 101-02 ("The need to have information on foreign law can arise in many contexts and affect almost anyone involved in the legal process. Thus, in the course of everyday business—in drafting contracts or considering trade with foreign countries, in dealing with foreign nationals or companies, or merely in buying or selling foreign goods at home—the need to consider the laws of a foreign nation arises with increasing frequency.").

174. See Harold J. Berman, *World Law*, 18 *FORDHAM INT'L L.J.* 1617, 1617 (1995); Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT'L L.* 553, 557-58 (2002) ("Without attempting yet another sociology of globalisation, it may be accepted that political communities have become more heterogeneous, their boundaries much more porous, than assumed by the received images of sovereignty and the international order, and that the norms they express are fragmentary, discontinuous, often *ad hoc* and without definite hierarchical relationship—that we now live in a 'global Bukowina.'" (citing B. DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* (1995))); Gunther Teubner, "Global Bukowina": *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997). The world has "shrunk." See Robert A. Jefferies, Jr., *Recognition of Foreign Law by American Courts*, 35 *U. CIN. L. REV.* 578, 578 (1966) ("This 'shrinkage' has produced a manyfold increase in the personal and commercial relations between nationals of different countries. As a result, today's attorney is likely to be faced with claims and disputes that are dependent upon foreign law for their solution."); Basil Markesinis, *Ways and Means of Teaching Foreign Law: A Review of James Gordley & Arthur Taylor von Mehren's An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, 23 *TUL. EUR. & CIV. L.F.* 175, 205 (2008) (referring to "a shrinking world which is getting closer and closer together through economic, political, scientific, and environmental concerns which are shared by nations"). For a popular narrative of these events, see generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

175. MARKESINIS & FEDTKE, *supra* note 34, at 75.

176. Measurement costs are the costs required to obtain necessary information. Measurement costs and information costs are usually interchangeable concepts. See Yoram Barzel, *Measurement Cost and the Organization of Markets*, 25 *J.L. & ECON.* 27, 28 n.3 (1982); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 26 (2001).

whom to ask, which issues to trouble over, and which to ignore safely.”<sup>177</sup> Conversely, to understand unfamiliar things, we must invest more time and resources—asking questions, conducting research, and consulting experts, for example—until we can relate that which is unfamiliar to something that is familiar and understandable.<sup>178</sup>

Imagine, for example, that you are invited to join in a card game of “poker.” You have played games of poker before, but you are reluctant to part with your money without knowledge of this particular game, so you watch a couple of hands before joining in. You will quickly process those parts of the game that are already familiar to you: you may notice a deck of fifty-two cards; suits of clubs, diamonds, hearts, and spades; a hierarchy of winning hands involving sets and runs; betting chips; and so forth. Although you *measure* these familiar parts through your observation, this process of *confirmation* is swift and almost automatic because of the familiarity of what you observe.

Before, during, and/or after that process of confirmation, you will undertake something much more complicated: discovering and measuring those parts of this game of poker that are unfamiliar. These differences—whether major or minor—will occupy the bulk of your attention. Why didn’t the bidding proceed in a clockwise fashion around the table? Why didn’t that straight flush beat a full house? Why do these players make such a point of articulating the amount of each of their bids twice? The answers to each of these questions would likely lead you to ask follow-up questions, leading to more answers, and perhaps still more questions. This process of *discovery* is a measurement expense.

These categories of *confirmation* of the familiar on one hand, and *discovery* of the unfamiliar on the other, differ in degree rather than kind. Although the unfamiliar components of a word or concept will require discovery, the process of discovery and measurement will involve relating unfamiliar components to something familiar and digestible.<sup>179</sup> The difference between confirmation and discovery, then, is simply the number of steps taken before knowledge is achieved. However, additional steps require additional investment, whether of time or money. Accordingly, the

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177. Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 428 (1999). See generally Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789 (2002).

178. I draw upon the constructivist viewpoint on learning theory. This literature emphasizes the active role of the learner in building understanding and making sense of new information. See generally JEAN PIAGET, *BIOLOGY AND KNOWLEDGE* (1971); JEAN PIAGET, *STUDIES IN REFLECTING ABSTRACTION* (Robert L. Campbell ed., trans., 2001). People construct new knowledge by using their perceptions (prior conceptual knowledge) to determine the initial path or foundation from which to build. See PIAGET, *BIOLOGY AND KNOWLEDGE*, *supra*, at 147–85. “[P]eople adapt their thinking to include new ideas, as new experiences provide additional information. This adaptation occurs in two ways, through assimilation and accommodation. In the former process, new information is simply added to the cognitive organization already there. In the latter, the intellectual organization has to change somewhat to adjust to the new idea.” KATHLEEN S. BERGER, *THE DEVELOPING PERSON: THROUGH CHILDHOOD AND ADOLESCENCE* 55 (1978).

179. See *supra* note 178.

discovery of something new costs more, by way of measurement, than the confirmation of something familiar.

#### A. The Unique Challenge of Ascertaining Foreign Law

Measuring foreign law is notoriously difficult.<sup>180</sup> As a threshold matter, simply *accessing* foreign law can be challenging.<sup>181</sup> To be sure, enthusiasm for globalization has led to a proliferation of materials about foreigners, foreign legal systems, and foreign laws.<sup>182</sup> However, this information is still difficult to digest, explain, adapt, and “make usable” elsewhere.<sup>183</sup> Unfortunately, “databases do not furnish comprehensive access to foreign law; there are no convenient *Restatements*; [and] American legal education does not systematically equip judges or lawyers to carry out research in a foreign legal system.”<sup>184</sup> “Globalization not only renders legal information more readily available, but often also considerably more

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180. Applying foreign law is “exceedingly difficult.” Alexander, *supra* note 36, at 637; see also Schmertz, *supra* note 124, at 699 (describing why applying foreign law poses “a major intellectual challenge”).

181. Justice Breyer, for example, has admitted (and lamented) that neither he nor his clerks can easily find relevant foreign material (despite their close physical proximity to one of the world’s top legal libraries). See Breyer, *supra* note 133, at 267–68 (suggesting inability to find foreign material); see also Adler, *supra* note 171, at 63 n.110 (“[C]ommentators typically worry that judges ‘may do a half-baked job of research in totally unfamiliar materials and come to a conclusion without basis in foreign or domestic law.’” (quoting Thomas F. Bridgman, *Proof of Foreign Law & Facts*, 45 J. AIR L. & COM. 845, 854 n.38 (1980))); Iannone, *supra* note 132, at 445–46 (“[M]erely identifying the law of a foreign country may be a difficult and perplexing problem . . .”).

182. See Shirley S. Abrahamson & Michael J. Fischer, *All the World’s a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 291 (1998) (describing how advances in technology have led to the growing internationalization of the judiciary); Ruth Bader Ginsburg, Assoc. Justice of the Supreme Court of the United States, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, Address Before the University of Idaho (Sept. 8, 2003) in, 40 IDAHO L. REV. 1, 3 (2003) (“The Internet affords access to foreign judicial decisions, law journals contain all manner of commentary, course materials are well packaged.”); Claire L’Heureux-Dubé, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L.J. 15, 25 (1999) (describing how the internet and other advances in communication technology allow judges to more easily access decisions from foreign jurisdictions); Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 32, 80 (2006) (noting “the growing literature on constitutional courts in other countries—a literature that is growing in part because the number and activity of such courts are growing”); Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671, 675 (2002) (acknowledging the role of comparative law in generating “a veritable panoply of books, articles, and reports about foreign law”).

183. MARKESINIS & FEDTKE, *supra* note 34, at 369–70.

184. William Ewald, *The Complexity of Sources of Trans-National Law: United States Report*, 58 AM. J. COMP. L. SUPP. 59, 65 (2010) (“Although newly-appointed federal judges receive some basic instruction under the auspices of the United States Judicial Conference in how to deal with issues of foreign law, and although some federal courts (e.g., the Southern District of New York), because they deal with a significant number of cases involving multinational corporations, have become familiar with the application of foreign law, still this training falls short of their training in American law. As for judges in the state court systems, their formal training in the application of foreign legal materials is minimal.”).

opaque.”<sup>185</sup> Information, however, is not the same thing as knowledge.

First of all, understanding foreign law is difficult because it incorporates all the challenges inherent in understanding domestic law. For example, the inherently inconstant character of laws aggravates the interpretation of the laws of a foreign system, as the effect of any law may differ from time to time.<sup>186</sup> The measurer must also consider questions of constitutional validity and other threshold matters.<sup>187</sup> The law may vary depending upon whether one adopts the interpretive lens of intentionalism, purposivism, textualism, or something else.<sup>188</sup> The foreign law may be unsettled and controversial.<sup>189</sup> As the instruments of lawmaking are as malleable as words and laws themselves, one may also encounter such phenomena as deliberately ambiguous laws.<sup>190</sup>

Further, to apply or evaluate *foreign* law begs the jurisprudential question: What is law? Trawling the depths of that question, legal pluralism literature explores the characteristics and consequences of the relationship between and among the overlapping, semiautonomous layers of formal law and informal law.<sup>191</sup> The uninitiated often presume the applicable foreign law to be some state code<sup>192</sup> but there may be other formal codifications

185. David J. Gerber, *Globalization and Legal Knowledge: Implications for Comparative Law*, 75 TUL. L. REV. 949, 954 (2001).

186. See Alexander, *supra* note 36, at 633; see also Benjamin Busch, *Recent Developments in the Proof of Foreign Law*, 1959 A.B.A. SEC. INT'L & COMP. L. PROC. 28, 32 (1959) (“Is the law of Cuba the same after Castro as it was before . . . ?”).

187. John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 MAR. L. 179, 191 (1984) (discussing courts’ use of experts on foreign law in determining these threshold questions).

188. For more on lenses of interpretation, particularly in the statutory context, see, for example, WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 141–73 (1994) (providing an overview of these legal process theories); Adler, *supra* note 171, at 51, 72–74.

189. John Henry Merryman, *Foreign Law as a Problem*, 19 STAN. J. INT'L L. 151, 164 (1983) (“A related difficulty is that foreign law is often no less unsettled and controversial than domestic law. The candid expert will so present it: ‘The authorities are divided, the opinions go in different directions, the law is not clear.’”).

190. See Jeffrey W. Barnes, *The Odd Couple: Statutes and Literature*, in *THE HAPPY COUPLE: LAW AND LITERATURE* 296, 303–04 (J. Neville Turner & Pamela Williams eds., 1994); Joseph A. Grundfest & A.C. Pritchard, *Statutes With Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 637–42 (2002); Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 596–97 (2002); see also SEAN FARHANG, *THE LITIGATION STATE* 47 (2010) (recounting how scholars have identified a number of factors that can result in ambiguous Congressional mandates); Ernst-Ulrich Petersmann, *WTO Negotiators Meet Academics: The Negotiations on Improvements of the WTO Dispute Settlement System*, 6 J. INT'L ECON. L. 237 (2003) (discussing the role of constructive ambiguity in treaty language).

191. For an overview of the legal pluralism literature, see generally John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J. L. & SOC'Y 296 (2000); Gordon R. Woodman, *Ideological Combat and Social Observation: Recent Debate About Legal Pluralism*, 42 J. LEGAL PLURALISM & UNOFFICIAL L. 21 (1998); Gordon R. Woodman, *The Idea of Legal Pluralism*, in *LEGAL PLURALISM IN THE ARAB WORLD* 3 (Baudouin Dupret et al. eds., 1999).

192. Ralf Michaels, *The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209, 1215 (2005).

that amplify or qualify that code provision.<sup>193</sup> Some legal systems are formally pluralistic, recognizing various other family, religious, business, or customary legal systems.<sup>194</sup> Further, various influential, if nonbinding, forms of “soft law” complicate the foreign law inquiry.<sup>195</sup> A comprehensive application of foreign law requires the measurer to unpack the normative heterogeneity discussed above and then to apply the relevant mandates faithfully.

For a number of overlapping reasons, knowledge of foreign law is especially and inherently difficult to achieve.<sup>196</sup> “There are very few

193. See, e.g., Thomas O. Main, *The Procedural Foundation of Substantive Law*, 87 WASH. U. L. REV. 801 (2010) (suggesting that substantive law should not be applied without its presumed procedural platform).

194. See, e.g., Angela M. Banks, *CEDAW, Compliance, and Custom: Human Rights Enforcement in Sub-Saharan Africa*, 32 FORDHAM INT’L L.J. 781, 784 (2008) (describing legal reform and the customary legal system in Rwanda). For more on legal pluralism and culture, see M. B. HOOKER, *LEGAL PLURALISM: AN INTRODUCTION TO COLONIAL AND NEO-COLONIAL LAWS* 1 (1975) (“Legal systems typically combine in themselves ideas, principles, rules, and procedures originating from a variety of sources. Both in the contemporary world and historically the law manifests itself in a variety of forms and at a variety of levels.”); see also MASAJI CHIBA, *LEGAL CULTURES IN HUMAN SOCIETY: A COLLECTION OF ARTICLES AND ESSAYS* v (2002); John Flood, *Globalisation and Law*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY* 312 (Reza Banakar & Max Travers eds., 2002); Anne Griffiths, *Legal Pluralism*, in *AN INTRODUCTION TO LAW AND SOCIAL THEORY*, *supra*, at 289, 290–92.

195. TWINING, *supra* note 44, at 362; Sanchez, *supra* note 36, at 656–57.

196. See, e.g., *Wash. v. Glucksberg*, 521 U.S. 702, 787 (1997) (Souter, J., concurring). See generally RICHARD FENTIMAN, *FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW* (1998) (discussing the difficulty of applying foreign law); Richard Fentiman, *Foreign Law and the Forum Conveniens*, in *LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 276 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002) (discussing the difficulty of applying foreign law as a factor in identifying the *forum conveniens*); Ernesto J. Sanchez, *A Case Against Judicial Internationalism*, 38 CONN. L. REV. 185 (2006) (arguing that judges with expertise in U.S. law lack access to adequate resources to research, interpret, and apply foreign law).

Some judges are much more sanguine about applying foreign law. See, e.g., *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 628–29, 633 (7th Cir. 2010) (Judges Posner and Easterbrook both write that applying foreign law is not especially difficult); *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 22 (2d Cir. 1998) (“We think that there is no risk that an American court will commit an error in interpreting foreign law . . .”). Judge Milton Pollack of the U.S. District Court for the Southern District of New York expressed his thoughts on the subject this way:

In any event, though we view another country’s law but through a glass darkly, I am less pessimistic than Justice Holmes as to our ability to handle foreign legal authorities. Of course, arguing foreign law is more complex than when the law is domestic. More of the steps must be spelled out, more assumptions made explicit, less taken for granted. Yet, if what is relied on is *law*, and not some primitive religion or the whim of a tyrant, the form of reasoning will be familiar. In civil law countries, the express language of statutes may be entitled to more weight than we give it, and judicial decision to less—but the law is still proved by pronouncements of suitably constituted authorities. I am told that in Mexico a single decision construing a statute has no precedential effect, but that a line of consistent decisions has. That’s not our rule, but the notions of precedent and construction are familiar, and an American court can understand and apply the Mexican rule if it is called to the court’s attention.

Milton Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 474 (1978). Judge Pollack’s viewpoint is not without contention. See Adler, *supra* note 171, at 78 (noting that deci-

points [of foreign law] which lend themselves to . . . simple treatment.”<sup>197</sup> “‘Applying’ foreign law requires more than mere reference to that law; it demands that foreign law be considered *on its own terms*.”<sup>198</sup> But words are embedded within a legal system, and that system “employs a certain vocabulary, corresponding to certain legal concepts; it uses certain methods to interpret them,” and these methods, in turn, incorporate certain notions of social order and the capacity and functions of law.<sup>199</sup>

“[O]ne of the most problematic features of legal discourse is that it is ‘invisible’ . . . the most serious obstacles to comprehensibility are not the vocabulary and sentence structure employed in law, but the unstated conventions by which language operates.”<sup>200</sup> Part of this extraordinary challenge can be explained as a matter of cognitive science. “[S]peakers produce the *minimum* linguistic information sufficient to achieve the speaker’s communicational needs.”<sup>201</sup> The discourse community contemplated for a national law, for example, is a domestic audience.<sup>202</sup> Effective communication with an outsider is not the purpose of such a text. Thus, the foreign law will not express all of the cues, assumptions, presumptions, exceptions, canons, common sense, and peripheral knowledge essential to a comprehensive understanding.<sup>203</sup> An apt analogy to the task of understanding foreign law is that of trying to learn the law on a complex, unfam-

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sionmakers “are likely to overassess their own competency”) (citing Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 732 (1992)).

197. William B. Stern, *Foreign Law in the Courts: Judicial Notice and Proof*, 45 CALIF. L. REV. 23, 40 (1957).

198. Dolinger, *supra* note 152, at 266 (quoting Gregory S. Alexander, *The Application and Avoidance of Foreign Law in the Law of Conflicts*, 70 NW. U. L. REV. 602, 628-29 (1976)) (emphasis added).

199. Gordley, *supra* note 34, at 1075; see also John C. Reitz, *How to Do Comparative Law*, 46 AM. J. COMP. L. 617, 631-32 (1998) (noting that a high degree of fluency is needed to fully appreciate the legal terminology and concepts of a foreign country).

200. CAO, *supra* note 36, at 28 (quoting James Boyd White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 423 (1982)); see also Vijay K. Bhatia, *Translating Legal Genres*, in TEXT, TYPOLOGY, AND TRANSLATION 203, 208 (Anna Trosburg ed., 1997).

201. Slocum, *supra* note 58, at 47 (emphasis added) (citing JOHN A. HAWKINS, EFFICIENCY AND COMPLEXITY IN GRAMMARS 38 (2004)). The canon of construction that statutes ought to be construed so that no sentence or word will be rendered superfluous, void, or insignificant also supports this principle. See, e.g., *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (stating that it is “a cardinal principle of statutory construction” that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (citations omitted)). This canon discourages over-drafting.

202. See Brainerd Currie, *Married Women’s Contracts: A Study in Conflict of Laws Methods*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 77, 82 (1963) (noting that legislators draft with a domestic audience in mind).

203. See *Diaz v. Gonzalez*, 261 U.S. 102, 106 (1923) (Holmes, J.) (“When we contemplate such a system from the outside it seems a wall of stone . . .”); *Wood & Selick, Inc. v. Compagnie Generale Transatlantique*, 43 F.2d 941, 943 (2d Cir. 1930) (Hand, J.) (“The embarrassment is . . . that we have to interpret another system of law according to notions wholly foreign to it.”).

miliar, specialized subject solely from bar review outlines.<sup>204</sup>

Inevitable cultural differences between the legal systems at issue may produce much of the difficulty in understanding foreign law.<sup>205</sup> Legal words are immersed in a cultural context and are modulated by “systems,”<sup>206</sup> “substructural forces,”<sup>207</sup> “invisible pattern[s],”<sup>208</sup> and “legal formants”<sup>209</sup> that inform and explain each word.<sup>210</sup> Laws do not exist in the abstract;<sup>211</sup> they constitute a cultural understanding “which presupposes a cooperative community of interpreters.”<sup>212</sup> Legal language is a social practice, and the box of meaning for each legal word “necessarily bears the imprint” of distinctive discursive practices.<sup>213</sup> “Law . . . is local knowledge.”<sup>214</sup>

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204. Cf. Adler, *supra* note 171, at 77–78. Others have said that when judges apply their own legal systems they act as architects; but when dealing with foreign law, judges act merely as photographers. See 1 ALBERT A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 193 (1967); FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* 85–86 (1993).

205. See CAO, *supra* note 36, at 31; see also JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 336–37, 344 (1988) (discussing this concept in the domestic context, particularly the difficulties presented in court by cultural differences between non-native U.S. judges and Native Americans).

206. Alexander, *supra* note 36, at 636.

207. Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 452 (2009).

208. Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 TEX. INT’L L.J. 291, 315 (2003).

209. Sacco, *supra* note 36, at 22.

210. Pierre Legrand, *Comparative Legal Studies and Commitment to Theory*, 58 MOD. L. REV. 262, 263 (1995) (reviewing PETER DE CRUX, *A MODERN APPROACH TO COMPARATIVE LAW* (1993)); see also Esin Öricü, *An Exercise on the Internal Logic of Legal Systems*, 7 LEGAL STUD. 310, 311 (1987).

211. William Ewald, *Comparative Jurisprudence (I): What Was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1940 (1995) (“We must . . . conceive of law as a cognitive phenomenon, seeing in it not just a set of rules or a mechanism for the resolution of disputes, but a style of thought, a deliberate attempt, by people in their waking hours, to interpret and organize the social world: not an abstract structure, but a conscious, ratiocinative activity.”). See also MATTILA, *supra* note 18, at 105 (describing how law is inseparable from the context of the society that created it).

212. Adler, *supra* note 171, at 82; see also Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127, 164 (1994) (asserting equilibrium among rule of law and democratic values in other countries’ systems) (citing D. Neil MacCormick & Robert S. Summers, *Interpretation and Justification*, in *INTERPRETING STATUTES: A COMPARATIVE STUDY* 535 (D. Neil MacCormick & Robert S. Summers eds., 1991)); William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 26–30 (1994); Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1090–91 (1995) (“The faithful interpreter, then, is not merely a literal reader, but faithful to the many broader concerns wrapped up in the established practices of the legal interpretive community.”); Allan Hutchinson & Derek Morgan, *The Semiology of Statutes*, 21 HARV. J. ON LEGIS. 583, 594 (1984) (reviewing DAVID R. MIERS & ALAN C. POPE, *LEGISLATION* (1982)) (“Communities of interpretation have their own bonding mechanisms, a mixture of moral values and social customs. Interpretation is inextricably bound up with values . . .”).

213. Goodrich, *supra* note 43, at 2.

214. Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 167, 215 (1983).

For all these reasons, to *understand* foreign law and all of these unique factors upon which it depends is a remarkably ambitious undertaking. According to some, one can understand another legal system only through immersion within that system and its values.<sup>215</sup> Absent intimate contact, the forum will examine unfamiliar laws as a foreigner, interpreting a foreign law in light of its own values.<sup>216</sup> Proper examination “requires some degree of empathy for the values peculiar to that system.”<sup>217</sup> Yet this empathy extends to a long list of influences and factors, including the foreign country’s “political arrangements, social relations, interpersonal interactional practices, economic processes, cultural categorizations, normative beliefs, psychological habits, philosophical perspectives, and ideological values.”<sup>218</sup> It includes understanding a society’s “religion, history, geography, morals, custom, philosophy, or ideology.”<sup>219</sup> (It may even include watching their movies!<sup>220</sup>) To navigate such an inquiry meaningfully, one should have the “skills of a scientist” and the “skills of an anthropologist.”<sup>221</sup> Some insist that it is outright “impossible to avoid distortion in one’s analysis of another legal tradition: it is an inescapable fact of life, for the process of comparison can never become sufficiently objective.”<sup>222</sup>

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215. Eberle, *supra* note 207, at 458 (“Law really cannot be understood without understanding the culture on which it sits. And to understand the culture, we need to employ acute observation, linguistic skill, and immersion in the milieu and social setting.”); Ewald, *supra* note 211, at 1973–74 (suggesting that we need to compare law from an interior point of view); see also PIERRE LEGRAND, FRAGMENTS ON LAW-AS-CULTURE 27–31 (1999); UGO A. MATTEI ET AL., SCHLESINGER’S COMPARATIVE LAW 125 (7th ed. 2009); Oliver Brand, *Conceptual Comparisons: Towards a Coherent Methodology of Comparative Legal Studies*, 32 BROOK. J. INT’L L. 405, 414 (2007) (suggesting that, absent cultural immersion, “the comparatist will always remain bound by his or her preconceptions and cultural disposition; the comparatist will stay ‘one of his [or her] own people.’”); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 43, 51 (1998).

216. MATTEI ET AL., *supra* note 215, at 125–26.

217. Alexander, *supra* note 36, at 636.

218. Janet E. Ainsworth, *Categories and Culture: On the “Rectification of Names” in Comparative Law*, 82 CORNELL L. REV. 19, 28 (1996) (citing Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057, 2063 (1987)); see also Adler, *supra* note 171, at 56 (“[O]ne must dive into philosophy, history, and the social sciences in order to gain pragmatic familiarity with foreign law.”).

219. Eberle, *supra* note 207, at 452; see also CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS at 231–45 (“On the laws in their relation to the nature of the climate.”), 285–307 (“On the laws in their relation with the nature of the terrain.”), and 308–33 (“On the laws in their relation with the principles forming the general spirit, the mores, and the manners of a nation.”) (Anne M. Cohler et al. eds., Cambridge Univ. Press 1989) (1748).

220. *But see* MARKESINIS & FEDTKE, *supra* note 34, at 354–55.

221. Eberle, *supra* note 207, at 453. We need to understand the examined country’s history and “philosophical and religious traditions” and comparativists need “strong linguistic skills and maybe even the skills of anthropological field study in order to collect information about foreign legal systems at first hand.” Reitz, *supra* note 199, at 631–32; see also Giovanni Sartori, *Compare Why and How: Comparing Miscomparing and the Comparative Method*, in COMPARING NATIONS: CONCEPTS, STRATEGIES, SUBSTANCE 14, 27 (Mattei Dogan & Ali Kazancigil eds., 1994); JEROME KIRK & MARC L. MILLER, RELIABILITY AND VALIDITY IN QUALITATIVE RESEARCH 12–14 (1986).

222. Legrand, *supra* note 210, at 266–67 (citing Hans-Georg Gadamer, *Text and Interpretation*, in DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER 21, 27



Although most of this literature about how legal rules are embedded in local dimensions of the law has emerged from postmodernists, this constituency has an unlikely ally in conservatives who make a similar point when arguing against the use of foreign law to interpret the United States Constitution.<sup>223</sup>

Translation of foreign laws from another language presents a related but additional obstacle.<sup>224</sup> Legal translation is almost always difficult, and may in fact be impossible to accomplish.<sup>225</sup> Translations can be difficult to comprehend because the laws are often merely translated into the target

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(Diane P. Michelfelder & Richard E. Palmer eds., 1989)); see also DOUGLAS R. HOFSTADTER, GÖDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID 698 (1980) (“[T]hrough you may imagine that you have jumped out of yourself, you never can actually do so . . . .”); Legrand, *supra* note 42, at 526 (“The singularity of law is that it necessarily exceeds being understandable in universal (or universalizable) terms.”).

223. Compare Anne Peters & Heiner Schwenke, *Comparative Law Beyond Post-Modernism*, 49 INT’L & COMP. L.Q. 800, 801–802 (2000) with McGinnis, *supra* note 163, at 311–12; Rosenkrantz, *supra* note 152, at 293–94. See also *Roper v. Simmons*, 543 U.S. 551, 626–27 (2005) (Scalia, J., dissenting).

224. On the overlap between culture and translation, see ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 372–73 (1988) (observing that a translator must realize that linguistic expression is the product of “beliefs, institutions, and practices” at a “particular time and place”); Reuben A. Brower, *Seven Agamemmons*, 8 J. HIST. IDEAS 383, 383 (1947) (depicting the translator of poetry as attempting to make “the poetry of the past into poetry of his particular present”); David Couzens Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135, 138 (1985) (“To understand is to grasp the relevant context that determines the possible parameters of the sentence or expression.”); Burton Raffel, *Translating Medieval European Poetry*, in THE CRAFT OF TRANSLATION 28, 53 (John Biguenet & Rainer Schulte eds., 1989) (“If then there is any overarching lesson to be learned from my remarks, it is . . . that the literary translator is necessarily engaged with far more than words, far more than techniques, far more than stories or characters or scenes. He is . . . engaged with worldviews and with the passionately held inner convictions of men and women long dead and vanished from the earth. A large part of his task, and perhaps the most interesting . . . , is the mining out and reconstruction of those worldviews, those passionately held and beautifully embodied inner convictions.”).

225. See SUSAN ŠARČEVIČ, NEW APPROACHES TO LEGAL TRANSLATION 272 (1997); see also Olivier Cachard, *Translating the French Civil Code: Politics, Linguistics and Legislation*, 21 CONN. J. INT’L L. 41, 56 (2005) (“[N]inety percent, no doubt, of all translation since Babel is inadequate and will continue to be so.” Although all translation is inadequate in the eyes of a linguist, only some of them must be regarded as faulty from the perspective of a lawyer. For lawyers, a faulty translation is an erroneous translation that so deforms the text of origin that it injures those who trust the translation. Mistranslation leads a judge to decide a case differently.” (quoting GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 417 (2d ed. 1992) (1975))); Gutteridge, *supra* note 36, at 402 (“It would . . . almost be impossible from the standpoint of comparative studies to exaggerate the perils which lie hidden in terminology of this description.”); Legrand, *supra* note 42, at 530 (“[H]ow much longer can interpreters continue to practice vacuous interpretations of law-texts, whether deliberately or through ignorance, to satisfy themselves with atomism (law re-presented as units) or reductionism (law re-presented as ‘thin’ or *disarchivized*), to ‘purchas[e] a sense of universality in law but only at the price of the ideas and arguments that make the law a worthy creation of the human intellect?” (quoting George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 694 (1998))); John E. Joseph, *Indeterminacy, Translation and the Law*, in TRANSLATION AND THE LAW 13, 14 (Marshall Morris ed., 1995) (“[t]ranslation always falls short”).

For an historical overview of translation theories, see Hugo Friedrich, *On the Art of Translation*, in THEORIES OF TRANSLATION, *supra* note 106, at 11–16.

language, “rather than packaged in a manner that made it useable by the judges and lawyers of the receiving system.”<sup>226</sup> Effective packaging would locate the text within the larger context of all those factors described above.<sup>227</sup> However, even if capturing that entire context were possible, there are other dangers in “packaging,” because when translating, “people tend to find what they seek.”<sup>228</sup> Manipulation can occur because translation necessarily requires a certain amount of creativity and interpretation;<sup>229</sup> there is no sense of equivalence in the abstract that can guide the practice of translation.<sup>230</sup> Indeed, elementary hermeneutics teaches us that every interpretation or translation, no matter how conscientious, will involve active participation by the translator.<sup>231</sup> Even if fidelity to the original language were possible,<sup>232</sup> there are always interlinguistic gaps, as some words may be untranslatable.<sup>233</sup>

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226. SIR BASIL MARKESINIS & DR. JÖRG FEDTKE, JUDICIAL RECOURSE TO FOREIGN LAW: A NEW SOURCE OF INSPIRATION? 145 (2006).

227. See CAO, *supra* note 36, at 31.

228. Adler, *supra* note 171, at 54. “The courts’ inquiries . . . very often (implicitly or explicitly) conclude that alien and forum rules correlate quite closely.” *Id.* at 63. Maybe this is because they are more comparable than they appear—a benign explanation. “The general methodological problem of ‘wish-fulfillment’ mars the universality thesis. Put simply, interpreters tend to spot false similarities. Notwithstanding their flattering self-appraisal, jurists who do not contemplate this problem display a troubling lack of knowledge.” *Id.*

229. See Ainsworth, *supra* note 218, at 27 (“The ethnographer is caught in a . . . paradox . . . He must render the foreign familiar and preserve its very foreignness at one and the same time.” (quoting Vincent Crapanzano, *Hermes’ Dilemma: The Masking of Subversion in Ethnographic Description*, in WRITING CULTURE, THE POETICS AND POLITICS OF ETHNOGRAPHY 51, 52 (James Clifford & George E. Marcus eds., 1986))).

230. Lessig, *supra* note 37, at 1201 (“[E]quivalence’ is endogenous to a practice of translation, and . . . the practices themselves determine what will be considered equivalent. Practices will differ, and if practices differ, ‘equivalence’ will differ.”).

231. See Adler, *supra* note 171, at 45 (noting that notwithstanding the challenges and inherent instability of language translations, surprisingly “few in the U.S. legal profession appreciate or discuss the translation process”); Sacco, *supra* note 36, at 20 (“The complexity of the problems involved in legal translation makes the carelessness with which they are approached seem incredible.”); Peter W. Schroth, *Legal Translation*, 34 AM. J. COMP. L. SUPP. 47, 47 (1986) (“Despite its great practical importance, legal translation is little discussed; despite its difficulty, it is frequently assigned to translators without legal training. Plainly both the importance and the difficulty are commonly underestimated.”).

232. Lessig, *supra* note 37, at 1265 (“[F]idelity is not binary. There will be more and less faithful, not faithful and unfaithful, readings.”).

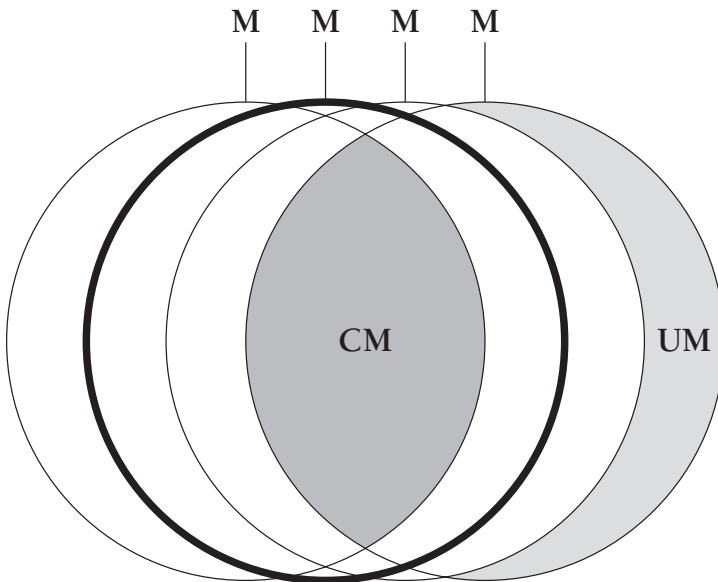
233. MACINTYRE, *supra* note 224, at 375 (“The characteristic mark of someone who has . . . acquired two first languages is to be able to recognize where and in what respects utterances in the one are untranslatable into the other.”); see also Adler, *supra* note 171, at 46-47; CAO, *supra* note 36, at 32; ŠARČEVIĆ, *supra* note 225, at 233; King-Kui Sin & Derek Roebuck, *Language Engineering for Legal Transplantation: Conceptual Problems in Creating Common Law Chinese*, 16 LANGUAGE & COMM. 235, 244-45 (1996); Schopenhauer, *supra* note 106, at 32 (“Not every word in one language has an exact equivalent in another. Thus, not all concepts that are expressed through the words of one language are exactly the same as the ones that are expressed through the words of another.”).

## B. The Significance of a Word's Common Meaning

Sensitivity to the vagaries of translation and the cultural dependence of the law increases the measurement expense. When measuring a foreign word, the measurer must proceed with extra caution (i.e., more measurement) to avoid error. As a practical matter, no foreign word may be so familiar that the measurer can confirm its meaning swiftly or automatically. Still, some parts of the word's meaning will be more familiar than others. Again, we can crudely divide this measurement process into the relatively familiar (which will require measurement resembling *confirmation*) and the relatively unfamiliar (which will require measurement resembling *discovery*).<sup>234</sup>

Building on the hypothetical introduced in Part II, imagine that a judge somewhere outside of Sixth Country is measuring Sixth Country's class action ( $M_4$ ). This judge may be deciding a motion to dismiss on grounds of *forum non conveniens*, for example, and upon consideration of the adequacy of Sixth Country as an alternative forum for the suit, a critical issue may be whether or not the plaintiffs would be able to pursue a class action there. Hence, there is a need for measurement.

The judge who is measuring the foreign device in Sixth Country, then, would be measuring  $M_4$ , the content of the circle with the solid boundary in the figure below. If the judge is familiar with one or more of the other five countries that have a class action (including, perhaps, her own country), she will have a head start in measuring Sixth Country's  $M_4$ . Exactly how much of a head start depends upon which country or countries she is familiar with.



234. On the terms confirmation and discovery, see *supra* notes 176-79 and accompanying text.

This figure demonstrates that the judge need only *confirm* the common meaning (CM) of the word and will necessarily need to *discover* the unique meaning (UM) of the word. Whether the bands that appear in between CM and UM require confirmation or discovery depends on with which device(s) she is already familiar.

Of course, this measurer is not the only measurer of  $M_4$ . When one considers the aggregate of measurers, some measurers may know only  $M_2$ , requiring more discovery, and others will also be familiar with  $M_3$ , requiring less. The more that the measurement process requires only confirmation, the lower the aggregate measurement expense. As common meaning (CM) requires only confirmation, the more robust a word's common meaning, the lower that aggregate expense.

Further, a sophisticated or experienced measurer of foreign laws could have familiarity with several different variant meanings of a particular word, rather than just one.<sup>235</sup> For example, imagine that the judge who is measuring the meaning of Sixth Country's  $M_4$  was already familiar with  $M_1$ ,  $M_2$ , and  $M_3$ . In this situation, almost all of  $M_4$  would be familiar to her because of the slight difference between  $M_3$  and  $M_4$ . Yet, keenly aware of the difficulty in interpreting foreign law generally, and conscious of the variations in the meaning of the word "class action" in particular, one might expect her to "double-check" the meaning of those parts of  $M_4$  that, although similar to  $M_3$ , are unlike  $M_1$  and  $M_2$ . This suggests a three-tiered measurement process: (i) *confirmation* of that which is familiar to all meanings of the word; (ii) *double-check* of that which looks familiar (and, in fact, is familiar) but is known to the measurer to vary elsewhere; and (iii) *discovery* of that which is unfamiliar.

This three-tiered process, even if a rather crude model, resonates with our experience. If you were joining the game of poker described earlier,<sup>236</sup> you would survey and confirm the familiar parts and focus your attention on the unfamiliar parts. But if you had played different versions of poker in the past—say, occasionally with "wild" cards—you would also double-check whether those particular variations were applicable even when they do not appear to be present (and, in fact, are not). A similar situation is present when a driver considers making a U-turn while driving outside of their home state: the other state might have the same rule, yet there is hesitation because of awareness of potential variation on this point. There would be no hesitation, however, regarding the legality of entering an intersection on a green light. In both instances the law could be familiar as a matter of fact—but the known variation elsewhere leads one to double-check (or have second thoughts about) the familiar law regarding U-turns. In contrast, the common meaning of a green light streamlines the measurement process.

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235. The globalization of the judiciary makes such knowledge more likely. See generally Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000).

236. See *supra* text accompanying notes 178-179.

The common meaning of a word, then, plays an important role in the measurement process. Specifically, the more robust a word's common meaning, the lower the measurement cost. If the term class action had only one meaning worldwide, the cost of measuring any particular class action device would be modest. If the measurer had (or obtained) familiarity with any class action device, they would know the meaning of any other class action device. Measurement would be a swift and virtually automatic process of confirmation.

If only sixty percent of a word's meaning were common worldwide, the measurer would need to canvass the remaining forty percent. Only sixty percent of the measurement would necessarily be a swift and virtually automatic process of confirmation. The other forty percent would be a process of confirmation, double-checking, or discovery, depending upon circumstances unique to the measurer and the device being measured. This example demonstrates how measurement costs rise as the content in a word's common meaning falls.

Introducing a variant meaning that consumes even part of a word's common meaning affects not only those who are measuring that system's word meaning; the idiosyncrasy in just one system<sup>237</sup> can increase the information processing costs of *all* other systems that are interacting with *any* other unfamiliar system. Another illustration may solidify this point. Assume that all legal systems use the word *day* in the articulation of certain timing requirements and other obligations—*e.g.*, a response is due in ten *days*. Although we would expect slight variations of meaning in different legal systems with respect to holidays, weekends, and such, the common meaning would surely include that a *day* is a twenty-four-hour period. Then suppose that one rogue country redefines the word *day* for its own system to mean a twelve-hour period. Naturally, this changes the measurement expense for outsiders who will be measuring the meaning of the word in the rogue country, one dimension of the externality. However, awareness that a word has a different meaning in any one system can also change the measurement expense for *all* persons interacting with *any* other foreign system. This is true even if neither the measuring country nor the measured country is the rogue country. Knowledge of the variation can convert a measurement from the category of mere *confirmation* to the category that requires a *double-check*. Accordingly, there are other externalities in this rogue country's decision-making process—they enjoy all the benefits of the decision to adopt this idiosyncratic meaning, but will not suffer all of the social costs that their conduct precipitates. When terms such as *class action* or *day* lose common meaning, the loss of information increases the measurement costs incurred by others.

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237. Because the model this Article proposes is merely conceptual, it is possible that the idiosyncrasies of some national systems may not register elsewhere, or that there would be only a regional effect of the sort of phenomenon described here. It seems that the trigger would be the extent to which knowledge of a particular system is relevant, or known, elsewhere.

## V. The Costs and Benefits of Measurement

An individual or institution will measure until the marginal costs of additional measurement equal the marginal benefits—or until the marginal benefit in reduced error costs exceeds the marginal cost of measurement.<sup>238</sup> Because “[o]ur law is a law of words,”<sup>239</sup> the creation, modification, and vindication of all legal rights, responsibilities, and obligations ultimately rely on the interpretation of words.<sup>240</sup> Accordingly, ascertaining the correct meaning of a word is important for the planning, behavior, and success of individuals and institutions—and it may be essential for the integrity and legitimacy of courts. The interpretation of a word in a foreign law can be as important as the situation or case in which that issue arises.<sup>241</sup> Thus, the marginal benefit of obtaining additional information about the meaning of words is often very high.<sup>242</sup>

Although the marginal *benefit* of additional measurement can be significant, the *cost* of measuring is also substantial. As already described, foreign law is complex, nuanced, and layered—and ascertaining meaning in any particular context is fraught with perilous traps for the unwary and wary alike.<sup>243</sup> Ordinary cost-benefit analysis recognizes some point at which a risk of error becomes preferable to the return on any additional measurement.<sup>244</sup> Accordingly, an individual who is contemplating action in another country may stop measuring laws in the target country as soon as she is willing to assume the risk of interpretive mistakes and overlooked laws. A corporation that is contemplating investment in another country may make a similar decision—or, at the margins, might reject the foreign investment opportunity because of the cost of measuring the applicable foreign laws.<sup>245</sup>

238. Merrill & Smith, *supra* note 176, at 26.

239. TIERSMA, *supra* note 17, at 1 (“Morality or custom may be embedded in human behavior, but law—virtually by definition—comes into being through language. Thus, the legal profession focuses intensely on the words that constitute the law, whether in the form of statutes, regulations, or judicial opinions. Words are . . . a lawyer’s most essential tools. . . . Few professions are as dependent upon language.”).

240. See *supra* notes 76–80 and accompanying text.

241. The importance of properly understanding and applying foreign law cannot be overstated. See Alexander, *supra* note 36, at 632 (“[J]ustice is achieved when the forum judge applies the rules of the legal system most ‘concerned’ in the dispute, thereby disposing of the matter in a manner consistent with that followed in other jurisdictions.”); *id.* at 638 (“[O]ur sense of justice demands that the attempt be made to accommodate foreign elements . . . .”); Benjamin Busch, *Recent Developments in the Proof of Foreign Law*, 1959 A.B.A. SEC. INT’L & COMP. L. PROC. 28, 28 (1959) (noting that tools for pleading and proof of foreign law are “the bulwarks for the protection of rights and the enforcement of obligations.”).

242. James McComish, *Pleading and Proving Foreign Law in Australia*, 31 MELB. U. L. REV. 400, 402 (2007) (regarding proof of foreign law, “its importance can hardly be overstated” (quoting EDWARD I. SYKES & MICHAEL C. PRYLES, *AUSTRALIAN PRIVATE INTERNATIONAL LAW* 278 (3d ed. 1991))); see also Tueller, *supra* note 122, at 108 (“[D]ifficulty of application cannot excuse failure to adhere to norms of law.”).

243. See *supra* Part IV.A.

244. For an introduction to cost-benefit analysis, see E.J. MISHAN & EUSTON QUAH, *COST-BENEFIT ANALYSIS* (5th ed. 2007).

245. For an introduction to margins, see FARNSWORTH, *supra* note 113, at 24–36.

Courts, however, are in a very different position than these individuals and corporations. Prevailing doctrines and laws compel courts to engage with foreign laws,<sup>246</sup> and our judiciary typically has a very low tolerance for error—especially with regard to questions of law. Errors in ascertaining foreign law can happen, of course, but the legitimacy of courts depends upon the faithful execution of their responsibility to identify, interpret, and apply foreign or domestic law, whatever the burden.<sup>247</sup>

#### A. The Process of Measurement

Ascertaining foreign law suggests great expectations of the judiciary.<sup>248</sup> Importantly, judges must decide the content of foreign law as a matter of law.<sup>249</sup> In 1966, Rule 44.1 of the Federal Rules of Civil Procedure was promulgated “to make the process of determining alien law identical with the method of ascertaining domestic law to the extent possible to do so.”<sup>250</sup> In other words, the content of foreign law cannot be buried as a question of fact in the black box of jury decision-making.<sup>251</sup> Judges must resolve these questions of law on the record, with an explanation of the ruling. Moreover, the high expectation of and attention forced upon the judiciary resurfaces anew on appeal since the content of foreign law must be decided by appellate judges *de novo*.<sup>252</sup>

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246. See *supra* notes 125–75 and accompanying text.

247. See Marc Galanter, *The Radiating Effects of Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 123, 135–36, 138 (Keith O. Boyum & Lynn Mather eds., 1983) (on the role of courts generally).

For a somewhat contrary view, see Pollack, *supra* note 196, at 471–72 (“A general concern that people should satisfy their obligations, wherever incurred, opens the courthouse doors to parties asserting rights under foreign law, but that concern is not so pressing as the interest in enforcing domestic law. Certainly it is not so great as to justify devoting more judicial time to cases involving foreign law than to those presenting only domestic law issues.”). See also *Budget Rent-A-Car Corp. of Am. v. Fein*, 342 F.2d 509, 514 n.9 (5th Cir. 1965) (“The traditional function of conflicts-of-laws rules in contracts is to afford a degree of certainty and symmetry as controversies stray to localities which are strangers. They need not, therefore, necessarily make sense.”).

248. Ascertaining the law even of another state within the United States can be difficult; to the extent that that statement is true, much of what I discuss in this Article applies to situations involving the application of non-forum but otherwise “domestic” law. This challenge is evidenced in part by the extant solution: “More than thirty states authorize certification of the disputed question to an appropriate court of the other state in such a case, most of them on the basis of the Uniform Certification of Questions Law, 12 U.L.A. 49 (1975).” DAVID P. CURRIE ET AL., *CONFLICT OF LAWS* 88 (8th ed. 2010) (citing John B. Corr & Ira P. Robbins, *Interjurisdictional Certification and Choice of Law*, 41 *VAND. L. REV.* 411 (1988)).

249. *FED. R. CIV. P.* 44.1. Many states have replicated Rule 44.1 for their state courts. A small number of states have adopted the Uniform Interstate and International Procedure Act of 1962, which has substantially the same content. For more on state practice, see *SOFIE GEEROMS, FOREIGN LAW IN CIVIL LITIGATION* 123–25 (2004).

250. 9 *CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE* § 2444 (1971).

251. Common law courts treated foreign law as a matter of fact to be pleaded and proved by the party relying upon it. See 3 *JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS* § 621.2 (1935). For history and background, see Miller, *supra* note 171, at 624.

252. See Miner, *supra* note 121, at 586 (“[B]oth trial and appellate courts must research and analyze the law independently.”); see also Louise Ellen Teitz, *From the*

In determining the content of foreign law, courts “may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.”<sup>253</sup> It behooves the litigating parties to present expert testimony to assist the court on issues regarding the content of foreign law, and this is the ordinary course.<sup>254</sup> Although the absence of a qualified expert witness can be a problem for courts,<sup>255</sup> the problem is more commonly the opposite. In many cases, each party will have a foreign law expert who contradicts the other.<sup>256</sup>

A battle-of-the-experts can become an “ignominious and unseemly spectacle.”<sup>257</sup> The problems and dangers generally associated with a system of party-controlled experts are likely quite familiar: the process can be expensive and inefficient,<sup>258</sup> experts can become partisans,<sup>259</sup> and sub-

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*Courthouse in Tobago to the Internet: The Increasing Need to Prove Foreign Law in US Courts*, 34 J. MAR. L. & COM. 97, 110 (2003) (“Determination of a foreign country’s law is an issue of law . . . . Even though the District Court heard live testimony from experts from both sides, that Court’s opportunity to assess the witness’s demeanor provides no basis for a reviewing court to defer to the trier’s ruling on the content of foreign law. In cases of this sort, it is not the credibility of the experts that is at issue, it is the persuasive force of the opinions they expressed.” (quoting *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 92 (2d Cir. 1998))).

253. FED. R. CIV. P. 44.1.

254. See *Brown*, *supra* note 187, at 191 (“Although expert testimony is no longer a rigid requirement under 44.1, it is rare for most American judges to admit documents or apply foreign law without some form of expert input.”); *Merryman*, *supra* note 189, at 170 (“[A]s a practical matter, access to foreign law is available only through the use of experts.”).

255. See *GEEROMS*, *supra* note 249, at 143 (referring to the “geographical vastness of the country[,] . . . the absence of any academic tradition in comparative or foreign law and the fact that the [United States] has not created its own colonies”).

256. See Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1218 (1991) (“In civil trials . . . experts on one side are generally opposed by similar experts on the other side.”); *Merryman*, *supra* note 189, at 154 (“The experts may—indeed very probably will—disagree.”); *Miner*, *supra* note 121, at 582 (suggesting that conflicting experts is the norm); *Teitz*, *supra* note 252, at 109–10.

257. See *Merryman*, *supra* note 189, at 158; see also Julius Hirschfeld, *Proof of Foreign Law*, 11 L.Q. REV. 241, 241–42 (1895).

258. See *Gross*, *supra* note 256, at 1126 (noting the process “is inefficient because it produces duplicate investigations”); *Merryman*, *supra* note 189, at 156 (“Experts in foreign law, like other experts, are expensive. . . . [T]he wealthier party can more easily afford to ‘buy’ the better expert,” which leads to an “imbalance in litigative power.”); Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1081, 1029 (1941) (noting that the “[t]he cost of acquiring an expert may become extremely burdensome. . . .”); *Sprankling & Lanyi*, *supra* note 171, at 47 (finding a qualified expert “frequently is an immensely difficult and expensive task. . . . [C]ost may become astronomical . . .”).

259. Hans W. Baade, *Proving Foreign and International Law in Domestic Tribunals*, 18 VA. J. INT’L L. 619, 641–42 (1978) (“Professor Cardozo and others who disfavor expert testimony are concerned primarily with what has been called the ‘venality’ of expert witnesses; that is, their willingness to testify in favor of any proposition for a fee . . . . [They] place more value on ‘principal’ than ‘principle.’”) (internal quotation marks omitted); *Gross*, *supra* note 256, at 1139; *Sprankling & Lanyi*, *supra* note 171, at 52 (“[A party expert] may be biased—either knowingly or innocently—in favor of the party retaining him.”); see also *Bodum USA, Inc. v. La Cafetière, Inc.*, 621 F.3d 624, 629 (7th Cir. 2010) (Easterbrook, J.) (expert testimony “adds an adversary’s spin, which the



stance can be perverted.<sup>260</sup> Some of the most qualified experts may refuse to testify due to the tainted nature of the process.<sup>261</sup> When the well-qualified are less willing to serve, the pool of experts becomes less reliable.<sup>262</sup>

Hosting a battle-of-the-experts can be a source of great embarrassment to the judge who has to determine between the two adversaries.<sup>263</sup> Learned Hand's query is an abiding articulation of the problem facing judges: "[How should one choose] between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all."<sup>264</sup>

Unfortunately, the cross-examination of experts is not the best tool to obtain the truth on foreign law.<sup>265</sup> Judge Pollack argued in this regard that the classic instruments of assuring veracity—the oath and cross-examination—are not appropriate to the problems of determining foreign law.<sup>266</sup> It is less frequently a question of whether the expert is credible or reliable.<sup>267</sup> Indeed, it is possible that legal experts arrive at different conclusions on the law of a foreign legal system in the best of faith; such is certainly the case when reasonable minds disagree about the applicability or meaning of some domestic law.<sup>268</sup> To resolve conflicting expert testimony, then, the court may “be forced either to turn to the qualifications of the experts or to find an answer wholly independent of reliance on the experts.”<sup>269</sup> Let us consider each of those two options in turn.

court then must discount”); *id.* at 633 (Posner, J., concurring) (noting that experts are “paid for their testimony” and are “selected on the basis of the convergence of their views with the litigating position of the client, or their willingness to fall in with the views urged upon them by the client,” and that such problems “are the banes of expert testimony”).

260. See Robert A. Jefferies, Jr., *Recognition of Foreign Law by American Courts*, 35 U. CIN. L. REV. 578, 602-03 (1966) (“[S]killful advocates may succeed ‘in developing confusing divergencies between experts on purely verbal matters’ in situations where no substantive differences exist.”) (citing Nussbaum, *supra* note 258, at 1029); Tahirih V. Lee, *Court-Appointed Experts and Judicial Reluctance: A Proposal to Amend Rule 706 of the Federal Rules of Evidence*, 6 YALE L. & POL’Y REV. 480, 482 (1988) (asserting a system of party-controlled experts favors the “side that has the most money to hire experts”).

261. See Albert A. Ehrenzweig, *Foreign Rules as Sources of Law*, in *LEGAL THOUGHT IN THE UNITED STATES OF AMERICA UNDER CONTEMPORARY PRESSURES* 71, 77 (John N. Hazard & Wenceslas J. Wagner eds., 1970) (“When I was still willing to engage in this less than dignified game of legal craftsmanship, I was repeatedly employed to ‘testify’ in American courts on foreign laws . . .”).

262. See Lee, *supra* note 260, at 483. For the classic explanation of the spiraling nature of this phenomenon, see George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 QJ. ECON. 488 (1970) (examining pathology in the market for used cars).

263. See Merryman, *supra* note 189, at 158; see also Hirschfeld, *supra* note 257, at 241-42.

264. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1902).

265. Sprankling & Lanyi, *supra* note 171, at 50.

266. Pollack, *supra* note 196, at 474.

267. See *id.* at 473-75.

268. See *supra* notes 186-90 and accompanying text.

269. Sprankling & Lanyi, *supra* note 171, at 54.

The first option can be unattractive because “[j]udging the messenger rather than the message is an unsatisfactory mode of evaluating expert information.”<sup>270</sup> Indeed, “[c]redentials . . . are an imperfect proxy for knowledge under the best of circumstances, and far worse in court where they become yet another factor for lawyers to manipulate.”<sup>271</sup> Moreover, there is randomness and unpredictability since it is not clear exactly what qualifications are preferred. Occasionally judges prefer an expert who practices in the foreign legal system;<sup>272</sup> others suggest that an American lawyer who is learned in the law of a foreign country may be better situated to locate the foreign law within the context of the pending litigation.<sup>273</sup> Even within this latter mind-set, questions abound. For example, which expert is more qualified: the mid-career practitioner from a U.S. office of an international law firm who has considerable first-hand experience in the foreign country or the senior comparative law professor from the University of Texas who has studied that foreign system in depth? Experience and expertise can be difficult to compare; for the same reason, these measures can be inadequate criteria for finding one foreign law expert more credible than another.

The Federal Rule, which empowers the court to ascertain the foreign law itself, encourages the second option.<sup>274</sup> In fact, Rule 44.1’s invitation to consider “any relevant material” suggests that the court can (or perhaps even should) play an active role in the process of ascertaining foreign law.<sup>275</sup> After all, the court has the ultimate responsibility for arriving at a correct decision on the content of foreign law.<sup>276</sup> Yet an independent investigation into the content of foreign law—and all of that law’s attendant context<sup>277</sup>—is unappealing to “[m]ost judges [who] do not have the time, the knowledge, or scholarly predilection to undertake their own research.”<sup>278</sup> As one judge expressed: “We have quite a few things to do besides decoding the *Código Civil*.”<sup>279</sup> There is no mystery, then, as to why American “courts are not at all inclined to engage in independent research of foreign law.”<sup>280</sup>

270. Gross, *supra* note 256, at 1187.

271. *Id.* at 1182–83.

272. See Teitz, *supra* note 252, at 109 (citing *In re Union Carbide Corp. Gas Plant Disaster*, 634 F. Supp. 842, 847 (S.D.N.Y. 1986), *aff’d in part and modified in part*, 809 F.2d 195 (2d Cir. 1987)).

273. See Merryman, *supra* note 189, at 155–56; Sprankling & Lanyi, *supra* note 171, at 47.

274. See FED. R. CIV. P. 44.1; see also *supra* note 249 (regarding similar state procedural rules).

275. FED. R. CIV. P. 44.1; see WRIGHT & MILLER, *supra* note 250, at § 2444; Miller, *supra* note 171, at 728 (“Rule 44.1 expresses a philosophy that federal courts should ascertain foreign law accurately whenever possible.”).

276. See Miner, *supra* note 121, at 581.

277. See *supra* Part IV.A.

278. Symeonides, *supra* note 125 at 393.

279. Pollack, *supra* note 196, at 471 (accent added); see also Fletcher, *supra* note 225, at 690 (“One can understand why lawyers and judges pay little attention to foreign law. They have a job to do.”).

280. GEEROMS, *supra* note 249, at 121.

Judges thus find refuge in a third option: avoiding most applications of foreign law.<sup>281</sup> Data empirically supports this perception. For example, Professor Jose Vargas surveyed American state court opinions that relied on Mexican law during the years 2000 through 2007.<sup>282</sup> From 2003 to 2005, Californian courts cited Mexican law twice as often as Canadian law, the next most frequently cited foreign law.<sup>283</sup> Yet Professor Vargas found only “two [cases] in California, two [cases] in Texas, and five in other states”—over the course of eight years—where the court actually based its decision on Mexican law.<sup>284</sup> The author’s “disappoint[ment]” with the paucity of applications may have been tempered, however, by the quality of those applications.<sup>285</sup> Delicately put, in those rare instances when foreign law is applied, mistakes can be made.<sup>286</sup> Indeed, this is primarily why courts try to avoid foreign law in the first place.<sup>287</sup>

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281. Adler, *supra* note 171, at 38 (“Most judges strive mightily to avoid even having to glance at foreign laws.”); Miller, *supra* note 171, at 618–19 (“American adherence to the common-law conception of foreign law cannot be rationalized in the same terms as have been offered for the English experience because foreign causes of action never have been viewed as anathema in this country and our jury institution never has been concerned with the jurors’ testimonial qualifications or tied to notions of fact-venue; most probably our incorporation of the common-law view of foreign law simply represents blind obedience to entrenched attitudes.”); Miner, *supra* note 121, at 581 (“[T]he tendency of the federal courts is to duck and run when presented with issues of foreign law.”); see also Dolinger, *supra* note 152, at 266 (“In actuality, U.S. courts rarely decide legal actions based on a foreign country’s law.”); Sprankling & Lanyi, *supra* note 171, at 9 (“Judges will often go to great lengths to avoid questions of foreign law because they feel uncomfortable dealing with non-U.S. legal systems.”); Teitz, *supra* note 252, at 97–98 (“[F]ederal judges have been slow to apply foreign law often opting to employ the more familiar law of the forum. This reluctance to address the content of foreign law has unfortunately not diminished with the increasing accessibility to courts and parties of foreign sources, especially in the age of the Internet.”).

282. Jorge A. Vargas, *Mexican Law in California and Texas Courts and the (Lack of) Application of Foreign Law in Mexican Courts*, 2 MEX. L. REV. 45, 48 (2009).

283. Jorge A. Vargas, *The Emerging Presence of Mexican Law in California Courts*, 7 SAN DIEGO INT’L L.J. 215, 217–18 (2005); see also Vargas, *supra* note 282, at 53.

284. Vargas, *supra* note 282, at 48. The suggestion that these are cases where the court engaged foreign law is generous. See *infra* note 286.

285. Vargas, *supra* note 282, at 48 (finding the small number of cases “disappointing”).

286. Professor Vargas addresses each of the nine cases in his article. In at least one case, the court may have applied the law incorrectly. In a second, the court simply referred to a Fifth Circuit case and stated only that it agreed with their colleagues’ reasoning. In a third, the court did not cite any Mexican codes or cases on the premise that the concepts of contributory negligence were the same in Mexico and in the U.S. In a fourth, an appeals court was reviewing the judgment of a district court that had applied New York law; the appeals court affirmed, but said that Mexican law should have been applied (with same result). In several cases, Professor Vargas modestly suggests that the court “would have benefited” from more expertise of Mexican law. *Id.* at 54–59.

287. For a discussion of the close connection between the difficulty of applying foreign law and the unwillingness to apply foreign law, see Adler, *supra* note 171, at 95 (“[T]he judge’s extreme uneasiness might cause her to evade the responsibility with such tools as *forum non conveniens* . . . .”); Dolinger, *supra* note 152, at 266–67 (“[I]t appears that any excuse is good enough to apply *lex fori*.”); Merryman, *supra* note 189, at 152 (“Foreign contacts, conflict issues, and foreign-law questions are, in an undetermined but probably significant number of cases, ignored or finessed by counsel and judge in litigation before state and federal courts in the United States.”); Miner, *supra* note 121,

## B. The Avoidance of Measurement

The artful dodge of foreign law comes in many forms. The most popular is the *forum non conveniens* dismissal. In federal courts and in most state courts, judges have the authority to dismiss a case on grounds of *forum non conveniens*.<sup>288</sup> In Professor Vargas's survey, over ninety percent of the hundreds of American state and federal court cases that cited Mexican law were dismissed on *forum non conveniens* motions.<sup>289</sup> Several other recent studies demonstrate: (i) an increasing number of filings of *forum non conveniens* motions,<sup>290</sup> (ii) high percentages of dismissals pursuant to such motions,<sup>291</sup> and (iii) avoidance of foreign law as the most frequent explanation for those dismissals.<sup>292</sup>

Although the large number of dismissals on this basis might surprise some, the difficulty in applying foreign law is one of more than a dozen factors that courts are instructed to consider when deciding *forum non con-*

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at 581 (judges avoid applying foreign law out of "fear of the unknown"); Stephen L. Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97, 118 (1981) ("The difficulty of ascertainment is one of the main reasons for not applying foreign law unless it is invoked and proved by the parties."); Tueller, *supra* note 122, at 101 ("This belief . . . stems from the assumption that the actual application (or avoidance) of foreign law by domestic courts and practitioners depends, to a large extent, on the ready availability of reliable and reasonably-affordable sources of information on the applicable foreign law."); *id.* at 109 ("[D]ifficulties faced in attempting to reach foreign law have a direct effect on the actual resort to such law."); George T. Yates, III, *Foreign Law Before Domestic Tribunals*, 18 VA. J. INT'L L. 725, 727 (1978) ("A major factor impeding or at least often complicating the application of foreign law has been the difficulty of knowing it. A judge must know the law of his own jurisdiction, but generally is not held to know foreign law.").

288. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 251–52 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 84 (1971); *Uniform Interstate and International Procedure Act*, 11 AM. J. COMP. L. 418, 422 (1962). See generally Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 CALIF. L. REV. 380 (1947).

For a discussion of the broadly discretionary nature of the *forum non conveniens* inquiry, see Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1106 (2010); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 (1985); see also *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (Scalia, J.) (noting that the great discretion that district judges have in deciding whether to dismiss, combined with the "multifariousness of the factors relevant to its application . . . make uniformity and predictability of outcome almost impossible").

289. Vargas, *supra* note 282, at 62.

290. See, e.g., Robertson, *supra* note 288, at 1092–93 (describing the increase in *forum non conveniens* decisions).

291. See, e.g., Christopher A. Whytock, *Politics and the Rule of Law in Transnational Judicial Governance: The Case of Forum Non Conveniens* 16 (Feb. 28, 2007) (unpublished manuscript), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969033](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969033) (finding dismissal rates of roughly 50% on *forum non conveniens* motions for the period from 1990 to 2005); Donald Earl Childress III, *When Erie Goes International*, 105 NW. U. L. REV. 1531, 1562 (2011) (updating Whytock's survey and finding dismissal rates of 63%).

292. Childress, *supra* note 291, at 1562–66. See generally Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011).

*veniens* motions.<sup>293</sup> Ironically, however, a threshold determination that courts are instructed to address on *forum non conveniens* motions is the *adequacy* of the foreign forum—an inquiry that requires some engagement with the foreign law and the foreign legal system.<sup>294</sup>

The expense of measuring foreign law is avoided when a case is dismissed on a *forum non conveniens* motion, but at what cost? When a court dismisses such a case, the plaintiff is denied access to a court that had subject matter jurisdiction over the case, personal jurisdiction over the defendant, proper venue, and the authority to vindicate the plaintiff's rights and the defendant's liabilities.<sup>295</sup> Most plaintiffs "who suffer *forum non conveniens* dismissals" are either unable or justifiably unwilling "to go forward in the hypothesized foreign forum."<sup>296</sup> Indeed, as an empirical matter, only a disposition on the merits is more dispositive than a *forum non conveniens* dismissal.<sup>297</sup> Although there undoubtedly are many instances where *forum non conveniens* dismissals are appropriate, this Article is concerned with those dismissals that are occasioned solely or principally by the difficulty of applying foreign law.<sup>298</sup> In these cases, the difficulty of applying foreign law leads to a denial of access to a United States court and, often as a practical matter, to a denial of any legal redress at all. These unfortunate outcomes constitute error costs that are attributable to avoidance of the foreign law question.

A second reason that courts cite but do not apply foreign law is that conflict of laws methodologies give a tremendous amount of discretion to judges. When deciding what substantive law to apply, the Restatement (Second) of Conflicts, for example, provides judges with a list of many fac-

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293. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 508-09 (including among the "public factors" a court is to consider "the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law").

294. See *supra* note 141. Occasionally, the foreign forum is unavailable because the plaintiff intentionally foreclosed that option. In other instances, the foreign forum may be unavailable because the foreign system has enacted a blocking statute to thwart dismissals by U.S. courts. For a discussion of these issues, see Robertson, *supra* note 288, at 1101-05.

295. See Stein, *supra* note 288, at 782 (stating that *forum non conveniens* dismissal is predicated on jurisdiction and venue being properly established).

296. David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L.J. 353, 371 (1994). But see Robertson, *supra* note 288, at 1082, 1130 (suggesting that an increasing number of cases are filed in foreign fora after *forum non conveniens* dismissals).

297. See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 LAW Q. REV. 398, 417-21 (1987). The survey found that, after dismissal in the U.S. courts, none of the plaintiffs in the eighty-five cases in the sample prevailed at trial. In almost fifty percent of the personal injury cases and twenty-seven percent of the commercial cases, plaintiffs gave up their claim or settled for less than ten percent of the potential value. *Id.* at 419-20; see also Martin Davies, *Time to Change the Federal Forum Non Conveniens Analysis*, 77 TUL. L. REV. 309, 351 (2002) (recognizing that suit in the alternative forum is usually a "bluff . . . unlikely to be called"); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 31 (2002) (noting that when cases are re-filed in the alternative forum, damage awards tend to be significantly lower).

298. See *supra* note 287.

tors to evaluate in deciding which jurisdiction has the most significant relationship to the case.<sup>299</sup> Because none of these factors is essential and none is dispositive, there is “total flexibility” in choosing the law that governs<sup>300</sup>—and courts usually find some way to apply forum law.<sup>301</sup> In fact, “ease in the determination and application of the law to be applied” is one of the many factors that courts must consider.<sup>302</sup>

Further, the escape devices of conflict-of-laws doctrine are legendary: characterization, renvoi, the distinction between substance and procedure, and the public policy reservation can each facilitate the application of forum law even when foreign law otherwise applies.<sup>303</sup> Further still, on

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299. For the list of factors that one should take into account in the judicial fashioning of an ad hoc solution, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971); see also *supra* notes 125–30 and accompanying text.

300. Professor Symeon C. Symeonides uses the words *total flexibility* and *anarchy* to describe the open-ended, individualized, and ad hoc choice-of-law decisionmaking under the Second Restatement. SYMEON C. SYMEONIDES, *THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE* 91–98 (2006); see also Michael H. Gottesman, *Adrift on the Sea of Indeterminacy*, 75 IND. L.J. 527, 527 (2000) (characterizing the Second Restatement as “a cacophonous formula of formulae, a blend of indeterminate indeterminacy.”); Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 379–80 (1992) (“[I]n practice none of [the conflicts methodologies] is much of a check on judicial discretion.”).

301. See Erin Ann O’Hara & Larry E. Ribstein, *Conflict of Laws and Choice of Law*, in 5 ENCYCLOPEDIA OF LAW AND ECONOMICS 631, 639 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) (“[J]udges are always tempted . . . to apply more easily ascertained local laws.”); Joseph William Singer, *Real Conflicts*, 69 B.U. L. REV. 1, 59 (1989) (“In practice, it is quite clear that what courts ordinarily do in conflicts cases is to apply forum law.”); Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT’L L.J. 559, 560 (2002) (“Both the empirical evidence and the existing scholarly consensus . . . indicate that there is a strong tendency under all modern conflicts systems to apply forum law.”); see also Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002) (“[J]udges tend to be biased in favor of local law . . . .”); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1652 (2005) (“[H]istorically, forum law has been the overwhelming judicial choice.”).

Several empirical studies have confirmed the prevalence of this so-called “homeward trend.” See generally Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357 (1992); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989); Stuart E. Thiel, *Choice of Law and the Home-Court Advantage: Evidence*, 2 AM. L. & ECON. REV. 291 (2000). A recent study by Christopher Whytock suggests that the homeward trend may be somewhat exaggerated. From a sample of 213 published opinions in transnational tort cases from 1990–2005, eighty-five of the choice-of-law inquiries arose in the *forum non conveniens* context. In only 55.5% of the remaining 128 cases, did the court conclude that domestic law applied. See Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 740–41, 764–77 (2009) (providing overview of all three processes).

The Constitution permits a court to apply forum law, provided that the forum state has some significant interest in the application of its law to the facts of a case. It need not be the only state with an interest, nor the state with the most significant interest. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 303, 315 (1981).

302. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)(g).

303. See David F. Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 201–02 (1933); CURRIE, *supra* note 202, at 180–81; LEA BRILMAYER & JACK L. GOLDSMITH, *CONFLICT OF LAWS* 114–72 (5th ed. 2002) (providing cases and background discussing these methods).

occasions where judges purport to be applying foreign law, a host of implausible presumptions and remarkable fictions invade the judicial process.<sup>304</sup> A presumption of similarity, for example, enables courts to conclude that, absent compelling evidence to the contrary, foreign law is the same as forum law.<sup>305</sup> And, of course, the more difficult it is to ascertain foreign law,<sup>306</sup> the more difficult it is to overcome this presumption. Hence, a court may presume that Mexico and Arizona have the same common property law,<sup>307</sup> or that Illinois and Germany have the same commercial law.<sup>308</sup> For decades courts presumed that absent contrary proof, all civilized countries had essentially the same laws.<sup>309</sup>

The expense of measuring foreign law can be avoided by manipulating the conflict of laws inquiry to require the application of forum law instead,

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304. See Alexander, *supra* note 36, at 610, 613 (discussing the “sophistry of presumptions,” which are “little more than a thin disguise for the application of the forum’s law . . . .”); Adrian Briggs, *The Meaning and Proof of Foreign Law*, 2006 LLOYD’S MAR. & COM. L.Q. 1, 4 (a “truly grotesque proposition”); Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964, 983 (1958) (discussing “artificial” presumptions); McComish, *supra* note 242, at 432 (labeling presumptions “highly implausible,” “unrealistic” and “incredible”—a “regrettable solution”); Miller, *supra* note 171, at 635, 637 (noting many commentators have referred to these presumptions as “naïve” and “unrealistic” evasive procedures); Miner, *supra* note 121, at 582-85 (noting courts “consciously apply the wrong law” by applying forum law pursuant to “fictitious presumptions” and dubious fictions); Nussbaum, *supra* note 258, at 1037 (“The alleged presumption is an obvious non sequitur and nothing but a crude fiction disguising the substitution of the law of the forum for the unproved or unascertainable foreign law.”); *id.* at 1038 (“so unrealistic that it offends common sense”); Sprankling & Lanyi, *supra* note 171, at 87 (commenting that the presumption that common law prevails is a “fantasy”).

305. ALBERT A. EHRENZWEIG, *PRIVATE INTERNATIONAL LAW* 187 (1967) (suggesting that the presumption is “nothing but a crude fiction” and *manifestamente priva di senso*). For explanation and criticism of *presumptio similitudinis*, see Dolinger, *supra* note 152, at 260; Miller, *supra* note 171, at 694; Sass, *supra* note 287, at 107; Konrad Zweigert, *Some Reflections on the Sociological Dimensions of Private International Law or What is Justice in Conflict of Laws?*, 44 U. COLO. L. REV. 283, 293-94 (1973).

Some states have codified this principle. See, e.g., Disputable Presumption no. 39, N.D. CENT. CODE § 31-11-03 (2012).

306. See *supra* notes 180-233 and accompanying text.

307. See *Butler v. IMA Regiomontana S.A. de C.V.*, 210 F.3d 381 (9th Cir. 2000); see also Miner, *supra* note 121, at 582-83 (offering an example involving Vietnamese law).

308. See, e.g., *In re Griffin Trading Co.*, 399 B.R. 862, 865 (Bankr. N.D. Ill. 2009) (presuming similarity of Illinois UCC to English and German laws); see also *Tidewater Oil Co. v. Waller*, 302 F.2d 638 (10th Cir. 1962) (regarding Turkish and Oklahoma tort and worker’s compensation laws); *Commercializadora Portimex, S.A. de CV v. Zen-Noh Grain Corp.*, 373 F. Supp. 2d 645 (E.D. La. 2005) (presuming similarity of Louisiana and Mexican law); *United States v. Hing Shair Chan*, 680 F. Supp. 521, 525 (E.D.N.Y. 1988) (assuming similarity of U.S. and Hong Kong laws and finding “[t]his assumption is bolstered by the fact that Hong Kong, like the United States, is a common law state.”); *Faegre & Benson, LLP v. Lee*, No. 27-CV-09-13602, 2010 WL 5293453 at \*2 (Minn. Ct. App., Dec. 28, 2010) (“Because appellant failed to show that German law differs from Minnesota law . . . , we conclude that no choice-of-law issue was presented and the district court did not err by determining that Minnesota law applies . . . .”); see also ZWEIFERT & KÖTZ, *supra* note 27, at 40 (defending presumption of similarity).

309. See Edwin P. Carpenter, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 WASHBURN L.J. 296, 299 (1971); MATTEI ET AL., *supra* note 215, at 95-125.

but again: at what other cost? Naturally, a legally accurate outcome requires invocation of the proper law.<sup>310</sup> Applying some other system's law is "inconsistent with our most fundamental intuition about law—that its function is to regulate human action and its consequences. One would think that the applicable law ought normally to have *something* to do with the real world events that gave rise to a dispute."<sup>311</sup> Although there undoubtedly are many instances where forum law should be applied to cases with transnational contacts, this Article is concerned only with those applications of forum law that are occasioned solely or principally by the difficulty of the task of applying foreign law.<sup>312</sup> In these cases, the difficulty of applying foreign law leads to the application of forum law to determine the rights and responsibilities of the parties, even though that is the incorrect law. Although this avoids measurement costs, error costs are introduced.

A third technique for avoiding applications of foreign law is to assign a burden to prove foreign law. Most judges "simply refuse to consider foreign law if the parties have not raised it or have not assisted the court in ascertaining its content."<sup>313</sup> Prior to 1966, in federal court, the content of foreign law was a question of fact that the parties had to prove.<sup>314</sup> Accordingly, if the issue of foreign law was not raised or if the content of foreign law was not proven to the satisfaction of the judge, the party's failure of proof would lead either to the application of forum law or to dismissal of the case.<sup>315</sup> Yet, with the application of foreign law now regarded as a question of law, it is less clear whether this relieves the parties of the task

310. See Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26 (2007); see also Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 284 (2003) (discussing values needed to foster compliance with the law).

311. Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L L.J. 245, 255 (1991); see also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 119 (2004) (rule of law requires that judges make decisions based on "public, prospective laws, with the qualities of generality, equality of application, and certainty"); Ralf Michaels, *Two Economists, Three Opinions? Economic Models for Private International Law—Cross-Border Torts as Example*, in AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 143, 146 (Jürgen Basedow & Toshiyuki Kono eds., 2006).

Focal point, reputational, and normative theories of compliance suggest that a choice-of-law system that applies the "wrong" law will undermine transnational rule of law. See ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 33-41 (2008) (setting forth reputational theory of legal compliance); James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, in EXPLORATION AND CONTESTATION IN THE STUDY OF WORLD POLITICS 303, 309-11 (Peter J. Katzenstein et al. eds., 1999) (distinguishing normative process of compliance from instrumental processes driven by "logic of expected consequences"); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (describing focal point theory of legal compliance); Whytock, *supra* note 301, at 740-41 (providing an overview of all three processes).

312. See *supra* note 287.

313. Symeonides, *supra* note 125, at 393.

314. See Miller, *supra* note 171, at 684-88; see also Stern, *supra* note 197, at 27 (discussing foreign law and juries).

315. The harshness of a dismissal is what led to many of the presumptions and fictions described in the preceding paragraph. See Currie, *supra* note 304 at 981; Miller, *supra* note 171, at 635.



of proving the law of a foreign country. On one hand, Rule 44.1 authorizes but does not require the judge to do independent research.<sup>316</sup> On the other hand, because foreign law is a question of law, it may be incumbent upon the court to find and apply foreign law once it becomes apparent that it governs.<sup>317</sup> Contemporary practice follows the former interpretation,<sup>318</sup> offering sufficient opportunity for courts to avoid the question of foreign law by blaming the parties for failure of proof.<sup>319</sup> The more difficult it is to ascertain foreign law,<sup>320</sup> the more readily available this particular mode of avoidance.

Here again, the cost of measuring foreign law is avoided but an error cost is introduced. The concerns about accuracy of legal outcomes already expressed are equally applicable here: the wrong law is used to determine the parties' rights and responsibilities.<sup>321</sup> Yet there is also an interesting twist in this context—the party charged with the burden of proving something about foreign law can be a plaintiff or a defendant. Consider, for example, an action seeking to enforce a foreign judgment; the defendant may be resisting recognition and enforcement on the grounds that the foreign judgment was procured by fraud.<sup>322</sup> Here, the inability of the defendant to satisfy the burden of proof with regard to some aspect of foreign

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316. See Brown, *supra* note 187, at 185 (“Rule 44.1 has freed the hands of judges, but has not freed the parties of their responsibility of informing the court of the foreign law issue and of the content of the pertinent provisions.”); Schlesinger, *supra* note 171, at 3 (“[T]he ascertainment and interpretation of foreign law require[s] skills which the court simply does not possess, the procedural treatment of a foreign law question cannot be quite the same as that of a question of domestic law.”); *id.* at 16 (“These judicial notice statutes, it should be emphasized at the outset, have not displaced the common-law doctrines discussed above. The statutes are merely superimposed on the common-law doctrines, which thus retain their vitality in the many situations in which the statutory provisions do not lead to actual notice being taken of the foreign law.”).

317. Consider the principle *iura novit curia* (the court knows the law). See Sass, *supra* note 287, at 116; see also Schlesinger, *supra* note 171, at 25–26 (noting that expecting more of the court “does not place too heavy a burden on the court . . . . [W]hen dealing with foreign law issues—that is, issues no longer covered by the ancient principle of purely adversary litigation—a judicial duty to seek clarification must go along with the power.”).

The application of foreign law *ex officio* is the approach of some civil law nations. See GEEROMS, *supra* note 249, at 103.

318. See Pollack, *supra* note 196, at 471 (“Rule 44.1 expressly authorizes the Court to do independent research into the foreign law. Yes, it does—but it doesn’t require it to. Trial judges usually can’t. Indeed, they usually shouldn’t. And they probably won’t.”); Sass, *supra* note 287, at 117–18 (“The principle of *iura novit curia* cannot be applied to the law of foreign countries. . . . However, the court should also apply the relevant foreign law on its own volition whenever such application appears to be necessary to protect the justifiable interests of the litigants.”); see also FED. R. CIV. P. 44.1, 1966 advisory committee’s note (“[T]he court is free to insist on a complete presentation by counsel.”).

319. See, e.g., Faegre & Benson, LLP v. Lee, No. 27-CV-09-13602, 2010 WL 5293453, at \*2 (Minn. Ct. App., Dec. 28, 2010) (“Because appellant has failed to show that German law differs from Minnesota law . . . we conclude that no choice-of-law issue was presented and the district court did not err by determining that Minnesota law applies . . .”).

320. See *supra* note 180 and accompanying text.

321. See *supra* notes 310–12 and accompanying text.

322. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482(2)(c) (1987).

law might lead to enforcement of the foreign judgment (and, by extension, the mandate of foreign law) rather than to rejection of it.<sup>323</sup> Interestingly then, the courts, while anti-measurement, are not necessarily isolationist or provincial. Indeed, the United States is probably the most likely jurisdiction in the world to recognize and enforce a foreign judgment.<sup>324</sup>

Therefore, the consequences of avoiding foreign law can lead in several directions. First, pursuant to a *forum non conveniens* dismissal, for example, a party can be denied access to a forum which it may be entitled, and is relegated to a foreign forum (or left without a remedy). Second, pursuant to conflicts analysis, a party can be denied the rights or protections of foreign law, to which, in some sense, it may be entitled, and is subject to *forum* law instead. Finally, pursuant to the enforcement of a foreign judgment, a party can be denied the rights or protections of *forum* law, to which, in some sense, it may be entitled, and is subject to *foreign* law instead.

The purpose of this Part was three-fold: to demonstrate that courts try to avoid applying foreign law; that they may do so because of the difficulty of that task; and that avoidance is consequential.

## VI. Solutions to the Common-Pool Problem

A common grazing pasture faces an impending crisis when the limited resource is consumed at an aggregate rate that exceeds its rate of replenishment. The standard response to avert the tragedy of the commons is to reduce the *demand* on the common-pool resource so that it does not exceed the available supply. For example, regulation or strict cooperation reduces demand by restricting the number of cattle that farmers will graze on the commons.<sup>325</sup> Alternatively, privatization of the commons eliminates each

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323. The United States embraces a policy that presumes that foreign judgments will be recognized and enforced. The presumption is rebuttable on a showing of certain enumerated grounds why the foreign judgment should not be enforced. See *id.* § 481.

324. See, e.g., STEPHEN C. McCAFFREY & THOMAS O. MAIN, *TRANSNATIONAL LITIGATION IN COMPARATIVE PERSPECTIVE* 613 (2010); Matthew H. Adler, *If We Build It, Will They Come?—The Need For a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 *LAW & POL'Y INT'L BUS.* 79, 109 (1994); Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 *AM. J. INT'L L.* 387, 420 (2001); Linda J. Silberman & Andreas F. Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 *IND. L.J.* 635, 638-39 (2000); Russell J. Weintraub, *How Substantial Is Our Need For a Judgments-Recognition Convention And What Should We Bargain Away to Get It?*, 24 *BROOK. J. INT'L L.* 167, 168 (1998).

For computations and collections of cases, see also Brandon B. Danford, Note, *The Enforcement of Foreign Money Judgments in the United States and Europe: How Can We Achieve a Comprehensive Treaty?*, 23 *REV. LITIG.* 381, 417 (2004); J. Noelle Hicks, Note, *Facilitating International Trade: The U.S. Needs Federal Legislation Governing the Enforcement of Foreign Judgments*, 28 *BROOK. J. INT'L L.* 155, 176 (2002).

325. For literature on the use of regulation to avert the tragedy of the commons, see C. Edwin Baker, *Keynote Address: Three Cheers for Red Lion*, 60 *ADMIN. L. REV.* 861, 866 (2008); Lili Levi, *The Four Eras of FCC Public Interest Regulation*, 60 *ADMIN. L. REV.* 813, 819 (2008); Richard J. Pierce, Jr., *State Regulation of Natural Gas in a Federally Deregulated Market: The Tragedy of the Commons Revisited*, 73 *CORNELL L. REV.* 15, 22 (1987). For literature on the use of self-governing forms of class action to avert the tragedy of the

farmer's incentive to introduce more cattle than the commons can naturally sustain.<sup>326</sup> Solutions that address the *supply* of the resource are seldom considered or are presumed exhausted—the premise of a common-pool resource, after all, is that it is *limited*. Yet supply-side solutions may be available: a faster-growing grass or a different combination of vegetation in the commons could enhance the ability of the limited resource to accommodate the existing demand.

Word commons face a crisis when idiosyncratic local meanings progressively consume the content of a word's common meaning, another common-pool resource. The paradigmatic response is to minimize the demand for idiosyncratic meanings. However, unlike a common grazing pasture, supranational regulation cannot effectively manage the meaning of words.<sup>327</sup> Furthermore, because words cannot be converted from common goods into private property, privatization is also not an option.

Reformers thus turn, perhaps instinctively, to another demand-side solution: harmonization. Harmonization reduces the demand for idiosyncratic meanings because the local is universal, and vice versa. Further, harmonization taps into the root of uniformity, which is so deeply embedded in our thought that many find it difficult or unnecessary even to explain why uniformity is seen as good.<sup>328</sup> When there is fragmentation or lack of uniformity, scholars see this as “the problematic issue of consistency.”<sup>329</sup> Difference is often viewed as an unfortunate interim measure, and as a

commons, see OSTROM, *supra* note 110, at 25. See generally Carol M. Rose, *Expanding the Choices for the Global Commons: Comparing Newfangled Tradable Allowance Schemes to Old-Fashioned Common Property Regimes*, 10 DUKE ENVTL. L. & POL'Y F. 45 (1999).

326. See Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 9-10 (1991); James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 609 n.2 (2000); Amy Sinden, *The Tragedy of the Commons and the Myth of a Private Property Solution*, 78 U. COLO. L. REV. 533, 556 (2007).

327. If it were possible to regulate the meaning of words, the costs of the administrative infrastructure would surely overwhelm the benefits of supranational regulation. See Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1147 (2005) (listing administrative costs “such as judicial salaries, legal fees, and discovery”); Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1, 19 (2001) (identifying, in the antitrust context, “administrative costs, monitoring costs, and the misallocation of resources associated with rent-seeking activity.”).

There would also be substantial frustration costs. See *infra* notes 348-51 and accompanying text.

328. Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States That Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 311-12 (2001) (“Whether because of the lure of simplicity, the appearance of neutrality, the likeness to science, the feel of efficiency, the imprimatur of professionalism or some combination of these, the norm of . . . uniformity enjoys virtually universal approval. Thus, it should come as no surprise that the rhetoric of uniformity is both pervasive and predominant . . .”). See generally Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

329. Legrand, *supra* note 42, at 521-22 (quoting Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1003 n.17 (2004)).

target for reform.<sup>330</sup> Indeed, much of the entire discipline of comparative law has an implicit drive toward harmonization.<sup>331</sup>

Because all countries are measuring foreign laws, all could benefit directly from some sort of coordination. In fact, because of standard network effects, we should expect a certain amount of standardization and uniformity.<sup>332</sup> Further, most countries and legal systems want acceptance in the international community—or at least want foreign investment and tourists.<sup>333</sup> One example of effective harmonization is the worldwide acceptance of the standard definitions of eleven terms of trade (the Incoterms) promulgated by the International Chamber of Commerce.<sup>334</sup> A second example is communications between and among airplane pilots and air traffic controllers; governments require communication in one language, usually English.<sup>335</sup> In both of these examples, the desire to preserve the common meaning of shared words reduces the demand for idiosyncrasy.

Additionally, efforts to harmonize or unify laws have found traction in

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330. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 279 (1980) (“The lawyer is likely to become impatient when he hears that social arrangements can be *more or less* legal, that legal systems and the rule of law exist as a matter of degree . . . and so on.”); WERNER MENSKI, *COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA* 29 (2d ed. 2006) (“From a conventional perspective, difference becomes an invitation for lawyers to unify, streamline and harmonise.”); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 *LEIDEN J. INT’L L.* 553, 559 (2002) (“Systemic thinking has always been a preserve of academics.”).

331. Ewald, *supra* note 211, at 1979, 1981; see also MENSKI, *supra* note 330, at 5 (“Yet, mainstream legal science continues to behave as though globalisation simply means uniformisation, resisting evidence, from everywhere in the world, that global harmony and understanding will only be achieved by greater tolerance of diversity, not by enforced uniformity.”); ZWIEGERT & KÖTZ, *supra* note 27, at 61 (describing the lodestar of some comparative law inquiry as the science of a *droit commun législatif*).

332. For a definition of network effects see Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 *CALIF. L. REV.* 479, 483 (1998). For a general discussion of standardization resulting from network effects see *id.* at 488. See also Clayton P. Gillette, *Lock-In Effects in Law and Norms*, 78 *B.U. L. REV.* 813, 813–15 (1998); Marcel Kahan & Michael Klausner, *Path Dependence in Corporate Contracting: Increasing Returns, Herd Behavior and Cognitive Biases*, 74 *WASH. U. L.Q.* 347, 348 (1996); Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 *V.A. L. REV.* 757, 759 (1995).

333. See generally Merrill & Smith, *supra* note 176 (discussing measurement costs of maintaining different rules; these costs would logically drive investors and others to places with lower cost, i.e. where rules are similar).

334. See *Incoterms 2010*, INT’L CHAMBER OF COMMERCE (2010), available at <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/> (the terms are EXW, FCA, CPT, CIP, DAT, DAP, DDP, FAS, FOB, CFR, and CIF); see also Franklin A. Gevurtz et al., *Report Regarding the Pacific McGeorge Workshop on Globalizing the Law School Curriculum*, 19 *PAC. MCGEORGE GLOBAL BUS. & DEV. L.J.* 267, 294 (2006).

335. See STEVEN CUSHING, *FATAL WORDS: COMMUNICATION CLASHES AND AIRCRAFT CRASHES* 2 (1994); Robert Baron, *Barriers to Effective Communication: Implications for the Cockpit*, AIRLINE SAFETY.COM, <http://airlinesafety.com/editorials/?BarriersToCommunication.htm> (last visited Jan. 7, 2013).

particular spheres of interest,<sup>336</sup> and other substantive areas are likely targets for future action.<sup>337</sup> These efforts are qualitatively different from Incoterms, however, because effective harmonization requires two steps: first, the laws must be harmonized; second, the meanings of the words in the shared text must be harmonized. The first step is ambitious; the second step may be naive.

“[T]he actual harmonization of divergent national laws and legal traditions seems to be meagre’ and at times ‘drastically overstate[d] . . .’<sup>338</sup> While globalization intensifies the migration of words and concepts across national boundaries, it does not lead inexorably to the harmonization of laws.<sup>339</sup> Even the concentrated effort to achieve harmonization undertaken in Europe over the last half century has been slow and difficult.<sup>340</sup>

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336. See Ulrich Drobnig, *General Principles of European Contract Law*, in *INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 305, 305-08* (Petar Šarčević & Paul Volken eds., 1986).

International private commercial actors such as the International Chamber of Commerce or the International Institute for the Unification of Private Law (UNIDROIT), have adopted certain standardized rules, definitions, and terms that are used uniformly (or nearly so). The standard trade definitions, known as the International Commercial Terms (INCOTERMS), are one such example. See *Incoterms 2010*, *supra* note 334; see also Gevurtz et al., *supra* note 334, at 294 (“[S]upplementing applicable binding sources of transactional law are standard agreement forms developed by the International Chamber of Commerce, now called ‘Incoterms.’”). Another example is the banking terms enumerated in the Uniform Customs and Practice for Documentary Credits (UCP), which constitute the operative legal rules for many letter of credit transactions. See JH Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 *BERKELEY J. INT’L L.* 129, 167 (2006). Further, “the International Chamber of Commerce has a role in creating international rules in such diverse areas as E-business, telecoms, financial services, insurance, taxation, trade and investment, international transportation, anti-corruption rules, arbitration, and customs, to name just a few.” James D. Wilets, *A Unified Theory of International Law, the State, and the Individual: Transnational Legal Harmonization in the Context of Economic and Legal Globalization*, 31 *U. PA. J. INT’L L.* 753, 759 (2010).

For a general discussion of global networks see generally ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

337. See Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 *HARV. L. REV.* 129, 135 (2005) (“A quick survey of modern scholarship reveals that experts believe that *ius gentium* affords a useful framework for thinking about such topics as data protection, antitrust, and copyright.”); MARKESINIS & FEDTKE, *supra* note 34, at 335 (“Possible candidates for the development of such sub-systems [of transnational law] include maritime practice, the international oil industry, information technology, the construction industry, the insurance sector, and international finance and securitisation.”).

338. Legrand, *supra* note 42, at 519-20 (quoting Harald Halbhüser, *National Doctrinal Structures and European Company Law*, 38 *COMMON MKT. L. REV.* 1385, 1406-08 (2001)). For a specific example of a comparative law scholar exaggerating the degree of harmonization among divergent national laws, see *id.* at 522 (discussing how “[a] 750-page book aiming to promote the view that there is to be found a meta-law of good faith within the European Community chose to overlook a sophisticated argument showing otherwise.”).

339. MENSKI, *supra* note 331, at 10.

340. MARKESINIS & FEDTKE, *supra* note 34, at 333-34 (explaining how various factors “render the concept of ‘uniform’ European law a relative one”). See also Legrand, *supra* note 42, at 519 (“European businesses are not relying on the company law directives.”) (quoting Halbhüser, *supra* note 338)); Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 *DUKE J. COMP. &*

Furthermore, that context is unusually suited for harmonization since there is a supranational central authority that can issue binding regulations, order uniformity, and trump national courts.<sup>341</sup>

Yet, more fundamentally, even where there is harmonization of words, there is not necessarily harmonization of *word meanings*. Indeed, absent disciplined and universal cooperation by all who share the word, common meaning will inevitably erode.<sup>342</sup> Even substantial cooperation will not suffice, because similar to the few cattle farmers who can overgraze the common ground while other farmers exercise restraint, the common meaning of a word can be consumed by a few to the others' detriment.

Consider, for example, the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), which is generally recognized as the most successful multilateral harmonization effort.<sup>343</sup> Although obliged to consider foreign case law when deciding cases under the CISG,<sup>344</sup> American courts tend to look exclusively at domestic cases instead.<sup>345</sup> Because of limited access, language barriers, and cultural differences, "decisions handed down by foreign courts are 'usually ignored' even when they concern uniform law."<sup>346</sup> Accordingly, "[t]he unifying effect of the CISG must thus be taken with a strong pinch of salt."<sup>347</sup> A comprehensive solution would require some sort of effective regulatory enforcement mechanism.

Even if regulating the meaning of words were possible, frustration costs could outweigh the savings in measurement costs.<sup>348</sup> Legitimate goals and objectives could be frustrated if the meaning of words could not be customized for a particular jurisdiction's conditions and demands. The tailoring of a class action device, for example, can be a useful and productive exercise. Idiosyncrasy can reflect the unique priorities, preferences

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INT'L L. 149, 160 (2004) ("[T]here are as many European laws as there are relatively autonomous legal discourses, organized mainly along national, linguistic and cultural lines.").

341. See generally PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 1-36 (4th ed. 2008).

342. See *supra* notes 105-06 and accompanying text.

343. Peter Huber, *Some Introductory Remarks on the CISG*, CISG DATABASE (Dec. 2006), <http://www.cisg.law.pace.edu/cisg/biblio/?huber.html>.

344. United Nations Convention on Contracts for the International Sale of Goods, *supra* note 154, art. 7; see also *supra* note 156 and accompanying text.

345. See Francesco G. Mazzotta, *Why Do Some American Courts Fail to Get It Right?*, 3 LOY. U. CHI. INT'L L. REV. 85, 85, 90 (2005); see also Ingeborg Schwenzer & Pascal Hachem, *The CISG—Successes and Pitfalls*, 57 AM. J. COMP. L. 457, 464 (2009); LARRY A. DIMATTEO, ET AL., *INTERNATIONAL SALES LAW: A CRITICAL ANALYSIS OF CISG JURISPRUDENCE* 177 (2005).

346. MARKESINIS & FEDTKE, *supra* note 34, at 333 (quoting Thomas Simons, *European and International Uniform Law*, 2007 EUR. LEGAL F. 1, 1-4) (emphasis in original); see also Huber, *supra* note 343, at 228.

347. MARKESINIS & FEDTKE, *supra* note 34, at 333.

348. Frustration costs are the costs that result from the systems' inability to tailor words as desired. It is essentially the inefficiency created by the difference between the standardized mandate and the desired idiosyncrasy. For a discussion of frustration costs, see Merrill & Smith, *supra* note 176, at 35. See also *supra* note 327 (regarding administrative costs).

and goals of a judicial, political, or social system.<sup>349</sup> The dynamic nature of word meaning also permits adaptation to changed and unforeseen circumstances.<sup>350</sup> Forced uniformity would thwart this progress and would squelch useful entrepreneurship.<sup>351</sup>

Harmonization is premised on the conviction that there exists a single answer to a particular problem, or a best meaning for a particular word. Yet, in fact, there is much to suggest that while the world may be ontologically unitary, it can only be “understood through epistemological diversity.”<sup>352</sup> Further, the pursuit of uniformity can be an imperialistic threat to the profound diversity of legal experience within and across jurisdictions.<sup>353</sup>

Because of the inevitable differentiation in word meaning, harmonization of laws can exacerbate the problems associated with ascertaining foreign law. When words are shared but the meanings are different, these *faux amis* become terms that the measurer is most likely to overlook or, even if noticed, find the “most difficult to understand.”<sup>354</sup> In the former,

349. See *supra* note 19.

350. For more on the evolving nature of word meaning see *supra* notes 65, 91 & 106.

351. See Jeffrey S. Parker, *Comparative Civil Procedure and Transnational “Harmonization”: A Law-and-Economics Perspective* 3 (George Mason Univ. Law & Econ. Research Papers Series, Working Paper No. 09-03, 2008), available at [http://ssrn.com/abstract\\_id=1325013](http://ssrn.com/abstract_id=1325013); Katharina Pistor, *The Standardization of Law and Its Effect on Developing Economies*, 50 AM. J. COMP. L. 97, 98 (2002); Spamann, *supra* note 101, at 1858.

352. Pierre Legrand, *Codification and the Politics of Exclusion: A Challenge for Comparativists*, 31 U.C. Davis L. Rev. 799, 806 (1998).

353. *Id.* at 807; JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* 197 (1995) (“The suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today.”).

For debates about the relative merits of uniformity and harmonization as opposed to difference and fragmentation, see Legrand, *supra* note 210, at 271-72 (“Is it justifiable . . . to fail to appreciate that the convergence thesis effectively represents an attack on pluralism, a desire to suppress antinomy, an attempt at the diminution of particularity? Is difference not positive? Is it not the case that ‘whatever conclusions [the comparative study of law] comes to must relate to the management of difference not to the abolition of it?’” (citing Geertz, *supra* note 214, at 215-16) (alteration in original)); MENSKI, *supra* note 330, at 11 (“[M]uch of the current debate on globalisation seems still inspired by the theme of ‘civilizing mission,’ now in the name of universalism and human rights. For, in common parlance today, globalisation seems to mean economic and political domination of a Western-focused, even eurocentric process of development in linear fashion, moving more or less inevitably towards global uniformity.”).

354. See Gutteridge, *supra* note 36, at 409 (“[T]he English legal terms which are derived from French or, perhaps, more properly from Anglo-Norman sources, are precisely those which a continental lawyer finds it most difficult to understand.”). Janet Ainsworth described the problem this way:

‘The wise man is careful to . . . regulate names so that they will apply correctly to the realities they designate. In this way he . . . discriminates properly between things that are the same and those that are different.’

. . . .

. . . [A]dopting Western legal terminology to discuss Chinese law would inevitably lead to misinterpretation of Chinese legal discourse and misperception of Chinese legal practice . . . .

. . . .

the measurement expense is traded for an error cost;<sup>355</sup> in the latter, the measurement expense is not avoided (and may even be increased).<sup>356</sup>

The challenge presented is not a textual problem that requires a textual solution. Rather, it is a foreign law problem that requires a foreign law solution. The problem is that judges must often consider, evaluate, and apply foreign law, but are simply unwilling or unable to do so. Some of that reticence may be traceable to the work of a generation of scholars who have described the task of understanding foreign law as “impossible”<sup>357</sup>—impossible because of “the impenetrability of the otherness of the other.”<sup>358</sup> This message deters courts from performing a task that doctrine and statutes require<sup>359</sup>—and when courts avoid foreign law questions, litigants suffer.<sup>360</sup>

If it is impossible for courts to adequately understand foreign law, we should revise all of the relevant statutes and doctrines so that courts need not, or may not,<sup>361</sup> apply, consider, or evaluate foreign law. Of course, this

Some, including Paul Bohannon, insisted on using native words for legal concepts as much as possible, because they believed that Western terminology was inescapably misleading in its connotations.

...  
 . . . . [Using familiar terms to describe unfamiliar terms] obscures the normative framework . . . .

...  
 No matter how neutral and objective descriptive legal categories may appear, they are themselves creatures of a historically and culturally contingent social world, bearing the normative patina of the context from which they were derived.

Ainsworth, *supra* note 218, at 19, 20, 27, 31 (quoting HSÜN TZU, BASIC WRITINGS 142 (Burton Watson trans., 1963) (citing Paul Bohannon, *Ethnography and Comparison in Legal Anthropology*, in LAW IN CULTURE AND SOCIETY 401 (Laura Nader ed., 1969))); Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 811-14 (1991).

355. For the significance of errors in the application of law, see *supra* notes 295-98, 310-12, 321-24 and accompanying text.

356. See *supra* note 176.

357. See *supra* notes 222, 225 and accompanying text.

358. Legrand, *supra* note 210, at 267 (citing Hans-Georg Gadamer, *Text and Interpretation*, in DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER 21, 27 (Diane P. Michelfelder & Richard E. Palmer eds., 1989)) (internal quotation marks omitted).

359. See *supra* notes 125-60 and accompanying text.

360. See *supra* notes 295-98, 310-12, 321-24 and accompanying text.

361. See, e.g., Save Our State Amendment, H.R.J. Res. 1056, 52d Leg., 2d Sess. (Okla. 2010), available at <https://www.sos.ok.gov/documents/questions/755.pdf>, invalidated by *Awad v. Ziriox*, 754 F. Supp. 2d 1298, 1302, 1308 (W.D. Okla. 2010) (The text of the amendment read: “The Courts . . . when exercising their judicial authority, shall uphold and adhere to the law as provided in the United States Constitution, the Oklahoma Constitution, the United States Code, federal regulations promulgated pursuant thereto, established common law, the Oklahoma Statutes and rules promulgated pursuant thereto, and if necessary the law of another state of the United States provided the law of the other state does not include Sharia Law, in making judicial decisions. The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia Law.”). The voter initiative passed with a majority of nearly 70%. John T. Parry, *Oklahoma’s Save Our State Amendment: Two Issues For the Appeal*, 64 OKLA. L. REV. 161, 161 (2012).



approach resembles the status quo somewhat, since the doctrines that require engagement with foreign law also tolerate avoiding it,<sup>362</sup> and since courts rarely genuinely engage foreign law.<sup>363</sup> Although this solution would resolve the measurement problem, the error costs associated with avoiding foreign law would then be entrenched: cases would still be dismissed, and the “wrong” law would still be applied. Prohibiting the consideration or application of foreign law would merely shift *responsibility* for these costs to those who are setting the new policy.

One benefit of such a reform, however, is that it would improve transparency.<sup>364</sup> Such reform would clarify that courts do not, as a practical matter, engage with foreign law. Greater transparency could thus precipitate legal reforms to account for the fact that foreign law is not applied. Doctrines and statutes that assume foreign law is being evaluated may have different complementary provisions if they were (re)constructed under the assumption that foreign law would not be applied. For example, because the *forum non conveniens* framework assumes that foreign law will be fully evaluated to ensure the adequacy of the alternative forum prior to a dismissal, removing the assumption by prohibiting consideration of foreign law may lead reformers to revisit that framework. Specifically, that framework might be adjusted to make it harder for defendants to win a *forum non conveniens* motion. Yet, how or whether such reforms would compensate for the loss of consideration of foreign law is, of course, speculative.

Yet instead of retrenchment, which is yet another demand-side solution, a better approach may exist on the supply-side. In the same way that a faster-growing grass or a different combination of vegetation might increase the supply of the common pasture to accommodate the extant demand, a complement to common meaning could enhance the supply of information about foreign law.

For example, courts should take advantage of two devices that are already available to them, yet are hardly ever used. First, judges could more frequently appoint a neutral expert to assist the court in ascertaining foreign law.<sup>365</sup> Court-appointed experts function essentially as third-party

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362. See *supra* notes 293, 302 and accompanying text.

363. See *supra* notes 289-92, 301, 316-20 and accompanying text.

364. On the importance of transparency in judicial decisionmaking, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72, 388 (1978) (noting that “[b]y and large . . . the fairness and effectiveness of adjudication are promoted by reasoned opinions,” and arguing that reasoned response to reasoned argument is an essential component of the judicial process); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 736-50 (1987) (arguing that honesty and candor in judicial decisions are essential attributes of the judicial process).

365. See FED. R. EVID. 706 (explaining how the authority may appoint a neutral expert); see also GEEROMS, *supra* note 249, at 145.

For the virtues of court-appointed experts, see Miner, *supra* note 121, at 589 (“[A] highly desirable tool for ascertaining the governing foreign law . . .”); see also Theodore I. Botter, *The Court-Appointed Impartial Expert*, in USING EXPERTS IN CIVIL CASES 57 (Melvin D. Kraft ed., 1977); Gross, *supra* note 256, at 1187-208 (1991); Lee, *supra* note 260, at 500. Many states have analogous statutory provisions and common law authority. See generally Stephanie Domitrovich et al., *State Trial Judge Use of Court Appointed Experts: Survey Results and Comparisons*, 50 JURIMETRICS J. 371 (2010).

expert witnesses, but avoid the consequences of partisan choice, compensation, and preparation—all of which can bias the evidence.<sup>366</sup> In some cases, court-appointed experts might alleviate the need for party-controlled experts.<sup>367</sup> In other cases, the neutral expert might help the judge resolve conflicting testimony presented by the parties' experts.<sup>368</sup> In any event, the court may split the expense of a neutral expert between the parties or, as part of court costs, charge them to the losing party.<sup>369</sup>

Second, judges could more frequently appoint a special master to manage the inquiry into the particulars of foreign law.<sup>370</sup> The parties' experts would present their research before the master, and would be subject to cross-examination.<sup>371</sup> The master could invest more time in the endeavor than a judge, and could draw upon his or her expertise in comparative methodology, if not also the laws of the specific country in question. The master would then prepare a report analyzing the foreign law issues,<sup>372</sup> which the court could allow the parties to object to; the court would also review the master's conclusions de novo.<sup>373</sup> Again, the court could split the expense between the parties or, as part of court costs, charge them to the losing party.<sup>374</sup>

Yet courts very rarely use these useful and economical resources.<sup>375</sup>

366. Gross, *supra* note 256, at 1188.

367. See Gross, *supra* note 256, at 1193 n.259 ("Any significant use of neutral experts will ultimately reduce the total bill for experts by reducing the number and the complexity of litigated disputes on expert issues."); Miner, *supra* note 121, at 589 ("[p]ersuasive advice submitted to the court may prompt a stipulation that settles the foreign law question") (alteration in original) (quoting Schmertz, *supra* note 124, at 713) (internal quotation marks omitted)).

368. See Sprankling & Lanyi, *supra* note 171, at 47 ("[A] court often has no way to evaluate the expert, except perhaps by comparison with other experts."); Teitz, *supra* note 252, at 108.

369. See 28 U.S.C. § 1920(6) (2006); Sprankling & Lanyi, *supra* note 171, at 56.

370. See FED. R. CIV. P. 53 (explaining how the authority may appoint a special master). For the virtues of special masters, see Carpenter, *supra* note 309, at 305 ("[S]pecial masters could be appointed to determine foreign law issues."); Merryman, *supra* note 189, at 168 (noting that, with masters, counsel has "two occasions on which to deal with the special master: in the hearing and after submission of the report. With the court-appointed expert, he has only the opportunity to cross-examine after the expert submits his opinion."); Sprankling & Lanyi, *supra* note 171, at 73 ("Probably the most underused method of determining foreign law—yet potentially the most valuable—is reference to a special master. . . . [T]heir potential applicability in the foreign-law arena appears to have gone without notice.").

371. FED. R. CIV. P. 53(c).

372. FED. R. CIV. P. 53(e).

373. FED. R. CIV. P. 53(f).

374. FED. R. CIV. P. 53(g). See, e.g., *Sukumar v. Direct Focus, Inc.*, No. 00CV0304-LAB (AJB), 2008 WL 1860677, at \*11 (S.D. Cal. Apr. 24, 2008) (applying Rule 53(g)).

375. See GEEROMS, *supra* note 249, at 145 (pertaining to the appointment of experts: "[C]ourts rarely use this opportunity."); Edward K. Cheng, *Scientific Evidence as Foreign Law*, 75 BROOK. L. REV. 1095, 1106 (2010) ("[T]he reality on the ground is that court-appointed experts are rarely used." (citing DAVID H. KAYE, ET AL., *THE NEW WIGMORE: A TREATISE ON EVIDENCE, SCIENTIFIC EVIDENCE* § 10.4.1, at 348 (2d. ed. 2010))); Dmitrovich et al., *supra* note 365, at 375; Merryman, *supra* note 189, at 164 ("It is a striking fact that courts infrequently appoint expert witnesses in foreign-law cases . . . . It is striking because the authorities heavily favor their use."); Sprankling & Lanyi, *supra*

Although focusing on the issue of expert testimony generally rather than expert testimony about foreign law in particular, Professor Samuel Gross laments:

Judges simply do not [appoint neutral experts] . . . Attempts to change that fact have been uniformly ineffective. Demonstrating the logic of the procedure has not worked. Enacting rules that codify the courts' authority . . . has changed nothing. Exhorting judges to do so has had no effect.<sup>376</sup>

Indeed, while several surveys of federal and state judges have confirmed that these devices would be helpful in certain types of cases—including those involving foreign law—the majority of these judges have never actually used any of them.<sup>377</sup>

There are two principal reasons that judges may be reluctant to use these devices. One reason is a general hostility to any deviation from the adversarial system.<sup>378</sup> To be sure, neutral experts and special masters are a deviation from the traditional model of party control. Accordingly, there is a risk, real or perceived, that an expert or master may have too much power

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note 171, at 55 (“[C]ourts rarely . . . appoint their own experts.”); see also JOE S. CECIL & THOMAS E. WILLGING, *COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706* (1993); Gross, *supra* note 256, at 1190-91 (lamenting that procedures are “rarely used. Weinstein and Berger, for example, comment on ‘the remarkably few cases in which federal judges have appointed experts,’ and add that ‘the federal experience is not unique.’ This observation was confirmed in two recent studies conducted by the Federal Judicial Center . . .”); Lee, *supra* note 260, at 495 (noting that “judges rarely appoint experts”); Robert F. Taylor, *A Comparative Study of Expert Testimony in France and the United States: Philosophical Underpinnings, History, Practice, and Procedure*, 31 *TEX. INT’L L.J.* 181, 211 (1996).

376. Gross, *supra* note 256, at 1220.

377. See CECIL & WILLGING, *supra* note 375, at 7; Louis Harris & Assocs, *Judges’ Opinions on Procedural Issues: A Survey of State and Federal Trial Judges Who Spent at Least Half Their Time on General Civil Cases*, 69 *B.U. L. REV.* 731, 741 (1989); Sprankling & Lanyi, *supra* note 171, at 93-95.

378. Cheng, *supra* note 375, at 1111 (“[T]he legal system often resists and ignores inquisitorial reforms [such as court appointed experts].”); see also CECIL & WILLGING, *supra* note 375, at 4-5 (“[M]uch of the uneasiness with court-appointed experts arises from the difficulty in accommodating such experts in a court system that values, and generally anticipates, adversarial presentation of evidence”); Gross, *supra* note 256, at 1197-98 (“The true reasons for the failure to use court-appointed experts are social and structural . . . [namely,] the steadfast hostility of trial lawyers. Opposition by the organized trial bar is strong, and the public statements of prominent lawyers run to alarmism: the use of court-appointed experts ‘would fit well into . . . a non-adversary, almost communistic scheme,’ but we should ‘cling with liberty-loving, jealous loyalty to our system.’ The use of court-appointed experts ‘would literally obliterate . . . medical malpractice cases,’; [t]rial by jury . . . [would] become[ ] no more than an empty illusion, a shibboleth . . .”); Merryman, *supra* note 189, at 166 (referring to “the relative strangeness of the idea . . . . For the judge to appoint his own expert on his own motion jars the expectation that lawyers move and argue while judges preside and decide. The court-appointed witness is inconsistent with the model, and this makes those who are totally committed to the model (most lawyers and judges) uncomfortable. For party counsel it threatens some loss of control over the proceeding. It is a step into unfamiliar territory.”). But see Lee, *supra* note 260, at 496 (“Legal historians agree that the Anglo-American trial system has, since the late nineteenth century, been moving closer to the so-called ‘inquisitorial’ system of countries on the European Continent.”); Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374, 376 (1982) (recognizing a shift in the judicial role from passive observer to active participant).

or may lack the incentive to do a good job.<sup>379</sup> A second reason that judges may not use their authority to appoint a neutral expert or a special master is that judges may be unaware of an appropriate individual for the task.<sup>380</sup> How many judges could readily find an appropriate expert on the finer points of Slovakian contract law?

Yet each of these hurdles is surmountable. Regarding the innate resistance to inquisitorial techniques, it is critical to appreciate how foreign law differs both legally and practically from other matters that call for expert testimony. The content of foreign law is a question of law for the judge, not a question of fact.<sup>381</sup> Because there is no question for a jury, nor even any rules of evidence to apply,<sup>382</sup> the usual resistance should find less traction in this context. Moreover, testimony on foreign law does not usually lend itself to the usual alignments; unlike experts on, say, medical testimony, there are not separate camps of experts on foreign law that are sympathetic to plaintiffs or defendants.<sup>383</sup>

Although it is undoubtedly true that litigators prefer control over every aspect of their case (including the appointment of experts), this is a generalized preference; there is no specific constituency of the bar for whom party-control of witnesses is critical.<sup>384</sup> To the extent that expert testimony about foreign law is different from other types of expert testimony, philosophical opposition may not explain judicial behavior as much as inertia; the parties are unlikely to suggest the appointment of a neutral expert or special master.<sup>385</sup> Yet judges could do so on their own initiative—and to their benefit—with or without the parties' blessing.<sup>386</sup>

Second, a judge may be more likely to appoint a neutral expert or special master if an appropriate specialist were readily available. To address this concern, some have suggested creating and maintaining a roster of experts.<sup>387</sup> However, because quality control is a problem with such

379. Gross, *supra* note 256, at 1193–94; Lee, *supra* note 260, at 480 (explaining that judges are reluctant to appoint experts because of the risk of judicial influence on jury deliberation).

380. See GEEROMS, *supra* note 249, at 143 (“[T]he search for a qualified expert can be problematic. All American authors dealing with the issue of expert testimony on foreign law mention this as an important problem. The geographical vastness of the country coupled with the absence of any academic tradition in comparative or foreign law and the fact that the USA has not created its own colonies all probably have to do with this lack of qualified experts.”); Gross, *supra* note 256, at 1191 & 1202–04 (“The judge has no reason to worry about the preparation of a partisan expert; that is the responsibility of the attorney who calls the witness . . . . A court-appointed expert, however, is nobody’s responsibility . . . . [A] court-appointed expert is a horse with no rider.”).

381. See FED. R. CIV. P. 44.1.

382. See *id.* (“[T]he court may consider any relevant material or source . . . whether or not . . . admissible under the Federal Rules of Evidence.”).

383. See Merryman, *supra* note 189, at 171–72.

384. *Id.*

385. See Cheng, *supra* note 375, at 1106.

386. Brown, *supra* note 187, at 194.

387. See OTTO C. SOMMERICH & BENJAMIN BUSCH, FOREIGN LAW: A GUIDE TO PLEADING AND PROOF 42 n.155, 121 (1959); Jefferies, *supra* note 260, at 606–07.

lists, these efforts have consistently failed.<sup>388</sup> Accordingly, there is need for a resource upon which judges could confidently rely for assistance on matters of foreign law. Ideally, the resource would provide assistance no matter the country or subject matter in question. Such a resource could lead to the more frequent appointment of neutral experts and special masters.

Consider, then, an academic institute that aims to provide assistance to courts on inquiries regarding foreign law. Although the United States has no tradition of foreign law institutes,<sup>389</sup> there are many European foundations and academic institutes that could provide inspiration.<sup>390</sup> Some European courts in particular have benefited from research conducted by comparative law centers.<sup>391</sup> In some countries, the burden of researching foreign law is placed entirely on the court, resulting in considerable use of such institutes.<sup>392</sup> In fact, “[t]he availability of this form of research assistance has relieved the burden to a considerable extent, obviating in most cases the need, for example, for expert witnesses.”<sup>393</sup>

Quite fittingly, the issue presented here is the transplantability and tailoring of the foreign law institute. As Professor Merryman recognized long ago, in the United States, with its much greater emphasis on party autonomy and adversary proceedings, an expert from a research institute enters into an entirely different litigation context. Whereas Germans are likely to accept such an opinion, American lawyers may be inclined to sabotage any efficiency gains and to undermine the expert’s authority.<sup>394</sup> Yet if the problem is the lack of a reliable unbiased source of information on matters of foreign law, an institute associated with a law school could be part of a viable solution.

Any number of law schools could establish institutes scaled to a size commensurate with the group of comparative law experts qualified and willing to engage in such activity. The venture could leverage a source of talent that leading educators have recognized as a largely untapped

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388. See Gross, *supra* note 256, at 1220 (suggesting that the assembly of panels of experts has made little difference in the short run, and no difference over the long haul).

389. Robert A. Riegert, *The Max Planck Institute for Foreign and International Private Law*, 21 ALA. L. REV. 475, 476 n.2 (1969) (recounting how the possibility of establishing a comparative law institute as a joint venture of several American law schools was discussed by the American Association for the Comparative Study of Law and by the AALS in the 1960).

390. Consider, for example, in Germany, the Max Planck Institute of Hamburg, the Munich Institute of International and Comparative Law, and the Munich Institute for East-European Law. In the Netherlands, consider The International Legal Institute and the TMC Asser Institute for International Law. In Switzerland, consider the Swiss Institute of Comparative Law. *Id.* at 476.

391. See generally GEEROMS, *supra* note 249, at 151.

392. See *id.*

393. Alexander, *supra* note 36, at 638.

394. See Merryman, *supra* note 189, at 162 (suggesting that institutes may be a “flower that blooms only in German legal soil.”).

resource: a school's foreign LL.M. students.<sup>395</sup> As fellows (or with some other designation), these graduate students could share their interests, foreign contacts, and expertise with the institute.

Such a foreign law institute situated within a law school could be the resource to which judges would confidently turn for assistance on matters of foreign law. The institute would develop and maintain contacts in foreign countries who could provide assistance in solving difficult questions of the law of these nations.<sup>396</sup> Although an institute would not always have in-house expertise on the particular foreign law at issue, the institute could always provide the court with expertise to ascertain any particular foreign law at issue. The institute could also provide the court with an individual who would serve as a neutral expert or as a special master.

Institutes could offer unbiased, authoritative, and credible expertise. Academic institutions are also generally held in high esteem.<sup>397</sup> Concern for the reputation of both the law school and the institute would create incentive to perform this service for the judiciary proficiently and efficiently. The tradition of academic freedom also offers a stark contrast to the partisan expert, who is a hired gun.<sup>398</sup> Finally, the ascertainment of foreign law on a particular subject requires the sort of rigorous scholarly inquiry that is familiar to academics.

The establishment of an organization to perform any public function raises concerns about capture by industry or special interests.<sup>399</sup> Yet that phenomenon is unlikely here. First, courts retain ultimate responsibility for declaring the content of foreign law; neutral experts merely offer testimony, and special masters make recommendations. The judge would always have the benefit of the parties' input. Second, it is difficult to imagine what industry or group would commandeer the institute to benefit themselves. There is no view of foreign law that is systematically pro-plain-

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395. See Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143, 162 (2006) (announcing survey results regarding the content of LL.M. programs).

396. Riegert, *supra* note 389, at 485.

397. See Baade, *supra* note 259, at 642; Thomas F. Bridgman, *Proof of Foreign Law & Facts*, 45 J. AIR L. & COM. 845, 859-60 (1980); Sprankling & Lanyi, *supra* note 171, at 52 n.306; see also David Hricik & Victoria S. Salzmann, *Why there Should Be Fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves*, 38 SUFFOLK U. L. REV. 761, 786 (2005) ("Law professors are . . . the best source for unbiased engaged scholarship.")

398. See Gross, *supra* note 256, at 1130-35.

399. For a classic description of capture, see MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 3 (2d ed. 1971); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 213-14 (2003) ("If administrative regulators are vulnerable to the forces of capture by certain interests, as most everyone agrees they are, then the likelihood of a deeper capture seems undeniable. There is nothing special about administrative regulators—except, perhaps, the general concern that they may be captured. Virtually every other institution in our society seems just as vulnerable."); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (discussing how the state can be used by an industry or group for its own purposes).

tiff, pro-business, or anti-big-government, for example. Finally, no single foreign law institute would have a monopoly on this outsourcing opportunity. Any number of law schools could provide this service—especially since the institutes should be largely self-funding.<sup>400</sup>

These are but some examples of ways that the supply of information regarding foreign law could compensate for lack of common meaning. More important than these specific suggestions, however, is the argument for supply-side reforms more generally. The urgent need is a practical approach to foreign law that could better meet the needs of a judiciary that confronts a docket transformed by globalization.

## Conclusion

The costs of measuring foreign law are inversely related to the amount of content in a word's common meaning. Yet common meaning is a limited resource that is inevitably consumed by national legal systems acting independently and rationally. The loss of common meaning, in turn, is a loss of information that leads courts to avoid the applications of foreign law due to the difficulty of applying it. The information deficit thus becomes a justice deficit because the avoidance of foreign law leads unnecessarily to, depending upon the specific circumstances, a denial of access to court or the application of the wrong law. Efforts to harmonize laws are an instinctive response to this phenomenon—but these efforts are misdirected. The solution to the tragedy is instead an improved supply of information about foreign law.

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400. See *supra* note 374 and accompanying text (discussing a court's ability to split and charge litigation expenses).

