IT'S ALL GREEK TO THEM: OVERCOMING THREE FATAL FLAWS WHEN DOMESTIC COURTS APPLY FOREIGN LAW

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Abstract

Adjudicating cases involving the application of foreign law by domestic courts has become a frequent occurrence in the United States. Take, for example, the case of a U.S. person suing a U.S. hotel chain for a slip and fall that occurred at one of the chain's resorts abroad. Or imagine a contract dispute where the agreement specifies that the laws of a foreign country govern. Assuming there is no issue of jurisdiction, in both cases the domestic court will likely be tasked to apply and interpret a foreign law.

But how can a domestic judge accurately determine the content of that foreign law? To tackle this difficult task, courts generally utilize the tools found in Federal Rule of Civil Procedure 44.1 and its state law counterparts. Specifically, Rule 44.1 allows judges to employ a broad toolkit including, for example, the court's independent research or expert testimony presented by the parties.

This Article argues that the way domestic courts are currently utilizing the resources of Rule 44.1 is flawed and must change. In particular, three fatal flaws are identified and discussed: (1) the overreliance on parties' expert testimony; (2) the undue tendency towards textualism; and (3) the little weight placed on foreign governments' interpretation of their own laws. For each of these flaws, this Article proposes practical and innovative solutions that, if implemented, would minimize errors and improve domestic courts' ability to accurately interpret and apply foreign law when called to do so.

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I. INTRODUCTION

Imagine you are a federal district court judge. You are normally called to resolve disputes involving domestic law, but one day you are assigned to preside over a unique case: a U.S. citizen is suing a hotel chain for a slip-and-fall accident that occurred at one of its resorts in Italy. Although the lawsuit was filed in the United States, conflicts of law principles likely dictate that the applicable law to resolve this action should be that of the place where the tort was committed: Italian law.[1]

Assuming your court has jurisdiction and the forum is *conveniens*, you must now decide the case based on Italian tort law. To navigate this unfamiliar territory, you turn to Rule 44.1 of the Federal Rules of Civil

1. That is the case because Italian law is the law of where the tort was committed (the *lex loci delicti*), or because Italy is the country with the most significant relationship to the occurrence. Jurisdictions in the United States use two main approaches to determine what law applies to a multistate tort action. The first approach mandates the application of the *lex loci delicti*—the law of the state or country where the harm occurred—to determine tort liability and damages. *See, e.g.*, Dowis v. Mud Slingers, Inc., 621 S.E.2d 413, 419 (Ga. 2005) (holding that the State of Georgia follows the principle of *lex loci delicti*); *accord* Bagnell v. Ford Motor Co., 678 S.E.2d 489, 492 (Ga. Ct. App. 2009) (applying Texas substantive law in a Georgia action because the tort occurred in Texas); *see also* McMillan v. McMillan, 253 S.E.2d 662, 633 (Va. 1979) (holding that "the settled rule in Virginia is that the substantive rights of the parties in a multistate tort action are governed by the law of the place of the wrong"); Milton v. IIT Rsch. Inst., 138 F.3d 519, 522 (4th Cir. 1998) (confirming that, in a tort action, Virginia will apply the law of the place where the tort took place even if the effects of the injury are felt elsewhere); *accord* Dreher v. Budget Rent-A-Car Sys., Inc., 634 S.E.2d 324, 327 (Va. 2006) (stating "the law of the place of the wrong governs all matters related to the basis of the right of action."). The second approach, also called the "modern approach" as it is a departure from the "traditional" *lex loci delictus* rule, requires courts to determine which state or country's law has the most significant relationship to the occurrence and the parties. *See* Restatement (Second) of Conflict of Laws § 145 (1971); *see also*, *e.g.*, Taylor v. Mass. Flora Realty Inc., 840 A.2d 1126, 1128 (R.I. 2004) (holding that, in multistate tort actions, Rhode Island courts must use an interest-weighting approach to determine "which state 'bears the most significant relationship to the event and the parties,'" but also noting that "the most important factor is the location where the injury occurred") (internal quotation omitted). For a broader discussion about the two approaches, *see generally* Robert W. Crowe, *Griffith v. United Airlines-The Demise of Lex Loci Delicti?*, 69 DICK. L. REV. 81 (1964). *But see* Vernon A. Melton Jr., *Paul v. National Life, Lex Loci Delicti and the Modern Rule: A Difference without Distinction*, 90 W. VA. L. REV. 542 (1988).

Procedure, which allows you broad discretion to consider any material or source. You start with an English translation of the Italian negligence statute,[2] but you quickly realize it is insufficient to resolve the case.[3]

To deepen your understanding, you request briefings and expert testimony from the parties, but their experts present conflicting interpretations. Seeking clarity, you engage a court-appointed expert, but their interpretation diverges from both parties' experts. Then, to complicate matters further, the Italian government submits an *amicus curiae* brief offering yet another view on how Italian law should be interpreted for the case at hand. Despite your best efforts, you are now faced with a daunting challenge: how do you determine which interpretation is correct?

Unfortunately, situations like the one in our hypothetical are not uncommon.[4] As international business transactions continue to rise,[5] U.S. courts increasingly encounter cases that require the application of foreign law.[6] Yet the current framework for proving foreign law is far from ideal. This raises significant concern because correctly applying foreign law is outcome-determinative and, therefore, imperative.

There are three main flaws in the current system that demand reform: (1) the excessive reliance on parties' experts, a method that is typically reserved to resolve issues of fact; (2) the overemphasis and tendency towards textualism when interpreting foreign statutes; and (3) the insufficient consideration of foreign governments' interpretation of their own laws. Another more systemic flaw that this paper will touch upon is the overwhelming absence of compulsory international and/or comparative law instruction in U.S. law schools.

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2. Art. 2043 Cod. Civ. [codice civile] [Italian civil code] (It.) ("Any fraudulent, malicious, or negligent act that causes an unjust loss to another obliges the person who has committed the act to compensate the damages") (author's own translation).

3. *See infra* Sec. III (b).

4. *See, e.g.*, Owen v. Elastos Found., 343 F.R.D. 268, 281 (S.D.N.Y. 2023) (interpreting Chinese law after being presented with two conflicting expert interpretations); *see also* Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 313 F.3d 70, 92 (2d Cir. 2002) (interpreting Indonesian law in accordance with the submission of the government of Indonesia where the parties' experts provided two different interpretations).

5. International transactions have risen by an astonishing 4500% globally in the last seventy years. *Evolution of Trade Under the WTO: handy statistics*, WTO, https://www.wto.org/english/res_e/statis_e/trade_evolution_e/evolution_trade_wto_e.htm (last visited Oct. 30, 2025).

6. Note that, for purposes of this Article, "foreign law" refers to the laws of a separate sovereign nation that have a common legal system or set of rules. This is distinct from "international law," which is the law governing the relationship among nation-states. *See* Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 888 (2011).

If these flaws remain unaddressed, courts are destined to continue to struggle with such dilemmas, increasing the risk of misinterpretations and misapplications of foreign law.[7] For a country like the United States, whose economy and legal systems are deeply intertwined with global commerce, this is an unacceptable outcome. Addressing these issues is essential to maintaining the nation's role as a global leader in law and business.[8]

This Article is structured as follows. Part II provides an overview of the current approach to proving foreign law in U.S. federal courts, outlining the procedural and doctrinal challenges that arise under the existing framework. Part III identifies and discusses three fundamental flaws with the current system, proposing corresponding solutions. Then, Part IV broadens the discussion to the legal education system, highlighting the absence of mandatory international and comparative law training in U.S. law schools, and considering its impact on judicial decision-making. Finally, Part V concludes by reflecting on potential avenues for reform.

II. Proof of Foreign Law in Federal Court Today: An Overview

The adjudication of cases involving the application of foreign law is a frequent occurrence in U.S. domestic courts. With an increase in the number of companies and individuals conducting transactions internationally, relationships often transcend ordinary domestic norms. As a result, various circumstances may require the interpretation and application of foreign law in domestic courts. For example, foreign law may come into play when a commercial contract includes a choice of

7. That is especially true if we think that an error in the interpretation of foreign law can potentially have a ripple effect on other decisions. Indeed, U.S. domestic courts rely on other United States-based decisions when interpreting the same foreign law, if available. *See* S.E.C. v. Gibraltar Glob. Sec., Inc., No. 13 Civ. 2575 GBD JCF, 2015 WL 1514746, at *3 (S.D.N.Y. Apr. 1, 2015) (relying on a previous U.S. interpretation of a U.K. case).

8. *Countries & Regions*, Off. of the United States Trade Representative, https://ustr.gov/countries-regions (last visited on Nov. 23, 2025) ("The United States is the world's 2nd-largest trading nation, behind only China, with over $7.0 trillion in exports and imports of goods and services in 2022 . . . [it is] the 2nd largest goods exporter in the world . . . [and] the largest goods importer in the world"); *see also Economy & Trade*, Off. of the United States Trade Representative, https://ustr.gov/issue-areas/economy-trade (last visited on Nov. 23, 2025) ("The process of opening world markets and expanding trade, initiated in the United States in 1934 and consistently pursued since the end of the Second World War, has played an important role in the development of American prosperity"); *see also U.S. International Trade in Goods and Services, February 2023*, Bureau of Econ. Analysis (Apr. 5, 2023), https://www.bea.gov/news/2023/us-international-trade-goods-and-services-february-2023 (reporting that, in the sole month of February 2023, U.S. exports were USD 251.2 billion and imports were USD 321.7 billion).

foreign law provision,[9] when a court has jurisdiction over tortious conduct committed abroad,[10] or even when domestic statutes explicitly incorporate foreign law.[11]

Domestic courts are presumed competent to interpret and apply foreign law.[12] Although they are not deemed to possess mastery of the laws of another jurisdiction, they have access to a variety of resources and mechanisms to help them determine what the content of the foreign law is.[13] Federal Rule of Civil Procedure 44.1 (Rule 44.1) governs the determination of foreign law in federal courts. It states,

> A *party* who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider *any* relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a *ruling on a question of law.*[14]

According to Rule 44.1, courts have significant discretion in determining the substance of foreign law. They may consider *any* relevant material or source, even if found independently and even if not admissible

9. Sometimes, foreign law is also involved when a contract is silent as to choice of law, or when the transnational dealing involves non-contractual matters. In such cases, parties will rely on the conflict of law rules in the forum that is handling the litigation. Wilson, *supra* note 6, at 890 (internal citation omitted). Note that U.S. domestic courts generally honor choice of law clauses mutually agreed by parties, so long as the transaction underlying the transnational agreement has some relationship with the law of the selected forum. *See* Matthew J. Wilson, *Improving the Process: Transnational Litigation and The Application of Private Foreign Law in U.S. Courts*, 45 N.Y.U. J. INT'L L. & POL. 1111, 1113 (2013).

10. For example, if a U.S. citizen vacationing in the United Kingdom gets injured due to a slip and fall at a U.S.-owned hotel, and then files a lawsuit in U.S. court after returning from vacation, traditional choice of law rules will likely dictate the application of foreign law. *See, e.g.*, Frummer v. Hilton Hotels Int'l, 19 N.Y.2d 533 (1967) (describing a similar factual pattern, but only discussing personal jurisdiction over the foreign corporation); *see also* Castillo v. Santa Fe Shipping Corp., 827 F. Supp. 1269 (S.D. Tex. 1992) (analyzing whether, in a personal injury case brought in the United States, United States or foreign law applied).

11. Wilson, *supra* note 6, at 888 n.4 (citing the Tariff Act of 1930 §527, 19 U.S.C. §1527(a), which prohibits, among other things, the importation into the United States of any wild mammal or bird, or any part or product thereof, where the animal was taken, killed, possessed or exported in violation of a foreign country's laws).

12. *Id.* at 890 (internal citation omitted).

13. Wilson, *supra* note 9, at 1121 (internal citation omitted).

14. FED. R. CIV. P. 44.1 (emphasis added).

under the Federal Rules of Evidence.[15] Specifically, in determining the foreign law, courts are empowered to "insist on a complete presentation by counsel."[16] Typically, this includes the parties hiring and presenting expert testimony, although a declaration by an attorney of the foreign forum describing the attorney's interpretation of the foreign law is generally considered insufficient.[17] If the parties' submissions – whether for the reasons just noted or for other deficiencies, are deemed insufficient, courts may request additional showings including holding a hearing, with or without oral testimony.[18] Party submissions, however, do not limit the court's inquiry–courts are free to perform their own research and hire their own experts and consultants. [19]

Then, if the parties have failed to conclusively establish what the foreign law is or the judge is not satisfied with the court's own research, courts are entitled to apply the laws of the forum where they are sitting.[20] This ultimate tool of applying the laws of the forum, however, should not be used lightly. Judges may not choose to ignore foreign laws in favor of the application of domestic laws on the basis of mere

15. Trinidad Foundry & Fabricating. Ltd. v. M/V K.A.S. Camilla, 966 F.2d 613, 615 (11th Cir. 1992); *accord* Forzley v. AVCO Corp., 826 F.2d 974, 979 n. 7 (11th Cir. 1987) ("Foreign law . . . need not be 'proved' in an evidentiary sense.").

16. FED. R. CIV. P. 44.1 Advisory Committee Notes 1966.

17. *In re* Avantel, S.A., 343 F.3d 311, 322 (5th Cir. 2003).

18. Eshel v. Comm'r of Internal Revenue Serv., 831 F.3d 512, 522 (D.C. Cir. 2016) (citing CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE, § 2444 Proof of Foreign Law (3d ed. 1998)).

19. *See* Daniel Lumber Co. v. Empresas Hondurenas, S.A., 215 F.2d 465, 469 (5th Circuit 1954) (holding that the trial court may make its own examination of foreign statutes in a case involving foreign law).

20. *In re Avantel, S.A.*, 343 F.3d at 322 (internal citation omitted) ("it is generally agreed that 'the law of the forum should apply when foreign law is not proved.' And, '[i]n the interest of arriving at a just adjudication, the trial judge should have discretion in determining whether the law of the forum . . . should prevail.'"); *see* Seguros Tepeyac v. Bostrom, 347 F.2d 168, 174-75 n. 3 (5th Cir. 1965) (holding that "[i]n the interest of arriving at a just adjudication, the trial judge should have discretion in determining whether the law of the forum . . . should prevail"); *see also* Firefighters' Ret. Sys. v. Citco Grp. Ltd., No. CV 13-373-SDD-EWD, 2018 WL 2323424, at *3 (M.D. La. May 22, 2018), aff'd, No. CV 13-373-SDD-EWD, 2. (M.D. La. Nov. 14, 2018) (finding that the defendants did not carry their burden of proving "with a reasonable certainty" the substance of foreign law, and therefore proceeding pursuant to Louisiana/federal common law). This potentially applies even in cases where the parties agreed to an express choice of law clause. Also, as noted by Matthew J. Wilson, litigants may also seek to capitalize on a court's lack of confidence when it comes to foreign law and purposefully paint an overly complicated picture of what the foreign law is, even if the law is straightforward, to frustrate the judge to the point of resignation to domestic law. Wilson, *supra* note 6, at 891.

convenience.[21] Instead, they should engage in a comprehensive and meticulous analysis to ascertain the content and scope of the foreign laws and, only after exhausting all reasonable efforts, apply the laws of the forum as a last resort.[22]

Based on the text of Rule 44.1, the application of foreign law must necessarily be raised by a party.[23] A party relying on foreign law for its claims or defenses must provide reasonable written notice to the court and the opposition.[24] It follows that even in cases where foreign law is clearly applicable to the case at hand—for example, when there is a valid choice of law agreement among the parties—a judge may not, *sua sponte*, consider or apply foreign law *unless* one of the parties has raised it.[25] The inability of a court to independently ascertain that foreign law applies to the case before it is problematic.[26] Indeed, this approach may produce the absurd result that, if the parties fail to raise the foreign law or they intentionally neglect to do so, courts will "consciously apply the wrong law."[27]

As shown, while the application of foreign law in domestic courts is becoming increasingly common, it is not without its challenges. However, with careful consideration and a willingness to engage in thorough analysis, domestic courts play a pivotal role in ensuring that justice is served in cross-border disputes.

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21. *See* Curley v. AMR Corp., 153 F.3d 5, 10, 16 (2d Cir. 1998) (stating that the lower court erred when it applied New York law instead of Mexican law after finding that Mexican law was consistent with New York law, and that in any case "defendant ha[d] not presented . . . sufficiently comprehensive statement of Mexican law to [allow it] to act upon it with confidence").

22. *Id.*

23. Also, the party seeking the application of the foreign law bears the burden of establishing the substance of such foreign law. *In re Avantel, S.A.*, 343 F.3d at 321-22 (holding that the party moving to apply foreign law had the burden of proving its substance to a reasonable certainty); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. f (A.L.I.1971) ("[T]he party who claims that the foreign law is different from the local law of the forum has the burden of establishing the content of the foreign law").

24. Wilson, *supra* note 9, at 1123. Such notice may be given in pleadings, motions, or even by filing a separate notice or even a motion to apply foreign law.

25. *Accord* Banque Libanaise Pour Le Commerce v. Khreich, 915 F.2d 1000, 1006 (5th Cir. 1990).

26. Vivian Grosswald Curran, *Federal Rule 44.1: Foreign Law in U.S. Courts Today*, 30 MINN. J. INT'L L. 231, 233 (2021) (arguing that the inability of a court to independently ascertain that foreign law applies to the case in front of it effectively establishes a presumption that U.S. and foreign law are identical).

27. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 43 AM. J. COMPAR. L. 581, 583 (1995).

III. THREE FATAL FLAWS WITH THE CURRENT SYSTEM—AND THREE INNOVATIVE SOLUTIONS

Proof and interpretation of foreign law is an inherently complex matter, and the current framework exacerbates this complexity.[28] Indeed, the present scheme is not optimized to mitigate errors.

Three main flaws are observed. First, the regular use of parties' expert testimony, so that the process of proving foreign law more closely resembles a question of fact rather than a question of law. Second, the excessive reliance by domestic courts on textualism when interpreting foreign law, where a mere reading of language according to its plain meaning may not always provide an accurate understanding of foreign legal principles. Third, the existing treatment of a foreign government's interpretation of its own law, which is currently afforded "respectful consideration" is not always appropriate. This part will explore each of these three flaws and provide innovative solutions.

A. *Foreign Law: Question of Law or Fact?*

Under traditional common law, parties had to prove the content of foreign law as a matter of fact.[29] This "fact" characterization meant that parties had to (a) plead the application of foreign law in their first court submission (i.e., in the complaint or the answer), and (b) offer proof to the trier of fact[30] in compliance with the rules of evidence. Typically, such proof involved the examination and cross-examination of expert witnesses to testify on the law of the foreign country.[31] This strictly

28. INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE, PROOF OF FOREIGN LAW AFTER FOUR DECADES WITH RULE 44.1 FRCP AND CPLR 4511 6-7 (2005), https://www.nycbar.org/pdf/report/International_Commercial_Dispute.pdf ("Judges have told us that the present regimen leaves them with many problems.").

29. Arthur Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 615, 617 (1967); Bugliotti v. Republic of Argentina, 952 F.3d 410, 413 (2d Cir. 2020); *see also* Lauro v. United States, 162 F.2d 32, 34-35 (2d Cir. 1947) (rejecting, before the promulgation of Rule 44.1, a claim brought by an Italian plaintiff because "[s]he offered no proof of Italian law in the District Court").

30. *See Fact-Finder*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("One or more persons—such as jurors in a trial or administrative-law judges in a hearing—who hear testimony and review evidence to rule on a factual issue").

31. WRIGHT & MILLER'S FEDERAL PRACTICE AND PROCEDURE § 2444 (3d ed. 2008). Moreover, when proof of foreign law had to be determined as a question of fact, the appellate review was limited by the "clearly erroneous" standard, mostly preventing appellate courts from reviewing foreign law determination. INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE, *supra* note 30, at 3. On the contrary, questions of law, and in particular choice of law determination, are now reviewed on appeal *de novo*. *See, e.g.*, Sheldon v. PHH Corp., 135 F.3d 848, 851-52 (2d Cir. 1998);

evidentiary and party-driven process, however, not only maximized expenses but also did very little to ensure that correct decisions were reached on questions of foreign law.[32] Indeed, treating questions of foreign law as questions of fact had a number of "undesirable practical consequences."[33] Foreign law was required to be asserted in the pleadings and established following the applicable rules of evidence.[34] Appellate review was deferential, confined to the trial court record.[35]

In 1958, the U.S. Congress established the Commission and Advisory Committee on International Rules of Judicial Procedure to enhance the treatment of international cases in U.S. courts.[36] This body collaborated with the Advisory Committee on Civil Rules to revise the Federal Rules of Civil Procedure, ultimately proposing the creation of Rule 44.1.[37] This new rule was designed to provide a uniform and flexible framework for determining foreign law in federal courts.[38]

In 1966, the Supreme Court of the United States adopted Rule 44.1 to abandon the fact characterization of foreign law and "to make the process of determining alien law identical with the method of ascertaining domestic law to the extent . . . possible."[39] The adoption of Rule 44.1 effectively integrated a civil-law methodology into the common-law system of the United States.[40] This integration aimed to streamline the process of determining foreign law and reduce the procedural burdens previously associated with its proof.[41] By treating foreign law as a question of law, the rule facilitates more accurate and efficient adjudication of cases involving international elements. Indeed, Rule 44.1 still today specifies that "[t]he court"—and not the trier of fact—will determine foreign law, and that

see also General Ceramics Inc. v. Firemen's Fund Ins. Cos., 66 F.3d 647, 651 (3d Cir. 1995) (stating that the "application of . . . choice-of-law rules involves the application of legal principles and therefore is subject to plenary review").

32. Wright & Miller, *supra* note 31 (internal citation omitted).

33. Animal Sci. Prod., Inc. v. Hebei Welcome Pharm. Co., 585 U.S. 33, 42 (2018) (internal citation omitted).

34. *Id.*

35. *Id.*

36. Act to Establish a Commission and Advisory Committee on International Rules of Judicial Procedure, Pub. L. No. 85-906, 72 Stat. 1743 (1958), https://www.congress.gov/bill/85th-congress/house-bill/4642.

37. Miller, *supra* note 29, at 616.

38. FED. R. CIV. P. 44.1 advisory committee's notes to 1966 adoption.

39. *Animal Sci. Prod., Inc.*, 585 U.S. at 42. Note that Rule 44.1 was adopted together with its nearly identical counterpart FED. R. CRIM. P. 26.1.

40. Curran, *supra* note 28, at 5.

41. *See generally* Matthew J. Ahn, *44.1 Luftballons: The Communication Breakdown of Foreign Law in the Federal Courts*, 89 N.Y.U. L. REV. 1343 (2014).

such determination "must be treated as a ruling on a question of law."[42] Accordingly, in determining foreign law, courts may take into account any material or source which they deem appropriate, regardless of whether the source complies with the rules of evidence. Such broad discretion means, at least in theory, that a court could take it upon itself to learn the relevant foreign law, submit inquiries to colleagues who have studied the foreign law in question, or visit with foreign scholars.[43]

At the same time, however, Rule 44.1 preserves the courts' freedom to employ "fact-like" procedures to adjudicate foreign legal questions, including taking written and oral testimony.[44] Indeed, it is common practice for U.S. judges to rely on parties' expert testimony to ascertain the substance of foreign law.[45] This common practice, however, presents numerous inherent limitations and should be abandoned in favor of judges undertaking a more independent analysis.[46] Specifically, three fundamental limitations can be observed in relying on parties' expert testimony in the context of foreign law.

First, trying to establish foreign law through the declarations of party experts adds an unnecessary "adversary's spin" to the process where experts are incentivized to present interpretations favorable to the party who retained them.[47] Judges are aware that expert witnesses hired

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42. FED. R. CIV. P. 44.1 [hereinafter Rule 44.1].

43. *See* INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE, *supra* note 30, at 3.

44. Bugliotti v. Republic of Argentina, 952 F.3d 410, 413 (2d Cir. 2020) (stating that "[r]ule 44.1 thus simultaneously requires law-like appellate review of foreign-law determinations, while maintaining a district court's flexibility to tailor fact-like methods of inquiry to the needs of the case").

45. *See* Owen v. Elatos Foundation, 343 F.R.D. 268, 282 (S.D.N.Y. 2023) (citing Jonas v. Est. of Leven, 116 F. Supp. 3d 314, 330 (S.D.N.Y. 2015)) (noting that expert testimony remains the basic mode of proving foreign law). Note that, in the context of proof of foreign law, the parties' experts do not need to meet expert qualifications under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993) (establishing that the subject of an expert's testimony must be founded upon "scientific knowledge" and that this requirement established a "standard of evidentiary reliability," and then setting four factors for the court to determine the admissibility of expert testimony); Grupo Televisa, S.A. v. Telemundo Commc'ns Grp., Inc., No. 04-20073-CIV, 2005 WL 5955701, at *7 (S.D. Fla. Aug. 17, 2005) ("Daubert, however, does not apply in these circumstances. That holding governs the admissibility of expert testimony introduced to help a jury understand a piece of evidence or determine a fact at issue: it does not govern the admissibility of expert testimony introduced to assist a court in making decisions regarding foreign law"); *see, e.g.*, *Owen*, 343 F.R.D. at 281 n. 13 (finding that an expert testifying about Chinese law was qualified even though she was not licensed as a practicing attorney in the relevant jurisdiction).

46. Louise Ellen Teitz, *Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation*, 45 N.Y.U. J. INT'L L. & POL. 1081, 1096-97 (2013).

47. Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 629 (7th Cir. 2010). Individuals serving as legal experts are compensated for their testimony, and therefore their neutrality is

by the parties are often just hired guns whom they cannot adequately check given the judges' own lack of familiarity with the laws in question.[48] The reports or declarations that are produced as a result of this process are likely to be biased, which makes it necessary for the courts to approach them with a degree of skepticism.[49]

Second, the established practice of requiring parties to hire and present experts in cases of foreign law directly undermines one of the core advantages of Rule 44.1: eliminating the need for costly, fact-like proof and streamlining the determination of foreign law. By requiring parties to hire and present experts from foreign jurisdictions, courts are adding a layer of costs and delays to an already expensive and lengthy legal process. Such additional costs and delays become even more unjustifiable when considering that courts will most certainly have to discount the experts' opinions due to the recognized experts' inherent bias.

Third, the presentation of conflicting depictions of foreign law by party-appointed experts can raise a significant concern in the adjudication process.[50] As courts weigh the opinions of the experts while recognizing their inherent biases, they are put in the difficult position to determine which (if any) expert's testimony is the most reliable. As domestic courts recognize that the correct interpretation of foreign law can be outcome-determinative, they must exercise great care and scrutiny when assessing the testimony of a party-appointed expert. Consequently, it is incumbent upon them to conduct independent research to ensure their assessment of each party-appointed expert is fully informed. Failure to conduct this independent research could result in a flawed determination

questionable. Sunstar, Inc. v. Alberto-Culver Co., 586 F.3d 487, 495-96 (7th Cir. 2009) ("But the lawyers who testify to the meaning of foreign law, whether they are practitioners or professors, are paid for their testimony and selected on the basis of 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").

48. *See* INTERNATIONAL COMMERCIAL DISPUTES COMMITTEE, *supra* note 30, at 6 ("[Judges said that] [i]f they rely on expert witnesses whom the parties produce, they are leery of being blindsided by partisan guns for hire whom they cannot adequately check because of their own lack of familiarity with the law in question"); *see also Bodum USA, Inc.*, 621 F.3d at 628-29 (7th Cir. 2010) (criticizing reliance on party experts' "self-serving declarations" to establish foreign law); *id.* at 633 (Posner, J., concurring) (questioning why "judges should prefer paid affidavits and testimony to published materials").

49. *Bodum USA, Inc.*, 621 F.3d at 629 (Power, J., concurring).

50. Note, however, that the opinion of a party's expert as to foreign law does not bind the court even if it is uncontradicted. *See* S.E.C. v. Gibraltar Glob. Sec., Inc., No. 13 Civ. 2575 GBD JCF, 2015 WL 1514746, at *2 (S.D.N.Y. Apr. 1, 2015) (internal citation omitted). Also note that disputes among experts regarding foreign law do not create issues of fact. Rutgerswerke AG v. Abex Corp., No. 93-cv-2914, 2002 WL 1203836, at *16 (S.D.N.Y. June 4, 2002).

of the foreign law and, ultimately, an unjust outcome.[51] It is crucial to acknowledge that, in most cases, party-appointed experts add little to no value to a judge's determination of foreign law.[52]

Based on these three limitations, a party-driven expert process in the context of foreign law is inefficient and should be abandoned. Possible solutions include judges undertaking a more "active" role in the analysis of foreign law and the routine appointment of independent court experts. Because Rule 44.1 was designed to render "the process of determining alien law identical with the method of ascertaining domestic law to the extent ... possible,"[53] judges should avoid requiring parties to provide expert testimony that is, in any case, *ab initio* unreliable.[54] Instead, when a party raises an issue of foreign law identifying what it believes to be applicable, domestic courts should *first* hire their own expert(s) and rely on their own research and material-gathering abilities before assessing the need for parties to submit expert opinions.[55] By eliminating the need for parties to present conflicting and biased expert interpretations, judges can prevent unnecessary expenses, delays, and potential errors.[56] This approach can result in a fair and efficient adjudication process that is informed by accurate and reliable information available.

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51. As the one made by the trial court in *Bodum USA, Inc.*, 621 F.3d 624.

52. Teitz, *supra* note 48.

53. *Animal Sci. Prod., Inc.*, 585 U.S. at42 (internal citation omitted).

54. There are not many differences that can be observed between courts requiring parties to present expert testimony on foreign law, and courts requiring parties to present expert testimony on domestic law in addition to their briefing. Without a doubt, the latter would not be appropriate. *See Bodum USA, Inc.,* 621 F.3d at 628 ("It is no more necessary to resort to expert declarations about the law of France than about the law of Louisiana, which had its origins in the French civil code, or the law of Puerto Rico, whose origins are in the Spanish civil code. No federal judge would admit "expert" declarations about the meaning of Louisiana law in a commercial case").

55. After all, in domestic law cases judges not only look at the parties' submissions as to the law applicable to the case at hand, but also conduct their own legal research to make sure the parties' representations are correct.

56. Generally, in civil cases the parties have to pay the cost of hiring a court-appointed expert in the proportion that the court directs. FED. R. EVID. 706(c). For this reason, courts have been reluctant to appoint neutral experts due to the fact that this would be viewed by parties as just an additional cost. *See* Champagne et al., *Are court-appointed experts the solution to the problems of expert testimony?*, 84 Judicature 178, 182 (2001); *see also generally* JOE S. CECIL & THOMAS E. WILLIGING, COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, 22 (1993), https://www.ojp.gov/pdffiles1/Digitization/145624NCJRS.pdf. It is my opinion, however, that a single court-appointed court expert would be a solution to the high costs of dueling experts. With costs shared by the parties, a single court-appointed expert could actually streamline expert testimony without the need of double-paying experts.

B. *Textualism, Text Interpretation, and the Vineyard Theory*

Novices to comparative law often believe that one can "know" the law of another legal system by simply translating and reading its text.[57] Law, however, cannot be distinguished from culture: law is culture and culture is law.[58] Because it is language that determines the content of the law, where language is used to express legal concepts, it necessarily embeds specific cultural understandings.[59] Translations, as good as they can be, can never fully bring forward such cultural understandings. As a consequence, reading the text of a foreign law without understanding its adopting nation's background, culture, and overall legal system does very little to ascertain what that law "is."

For example, if a French judge was tasked with establishing what the law on freedom of speech is in the United States, most would agree that simply reading a French translation of the First Amendment would not be sufficient. Indeed, the text of the First Amendment, "Congress shall make no law … abridging the freedom of speech, or of the press,"[60] actually says very little about the complexities and depth of the doctrine.[61] Similarly, a U.S. judge would not be able to decide a First Amendment case by just researching in various English dictionaries the meanings of the words "abridging" and "speech."

Even within the same language, words must be given a meaning through an interpretation to become "alive". Interpreters will always, and inevitably, filter the words through their own lenses and give such

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57. S.E.C. v. Gibraltar Glob. Sec., Inc., No. 13 Civ. 2575 GBD JCF, 2015 WL 1514746, at *2 (S.D. N.Y. Apr. 1, 2015) (citing Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999)) ("statutory construction generally begins with an analysis of the language of the statute and, if that language is clear, ends there as well … [t]his principle applies to interpretation of foreign as well as domestic law"); *see also* Brit. Int'l Ins. Co. v. Seguros La Republica, S.A., 2000 WL 713057, at *7 (S.D.N.Y. 2000) (relying primarily on the English rendition of a Mexican rule, after noting that the competing opinions of the parties' experts "add little, if anything, to the plain language of the Rule, and essentially cancel each other out"); *See* Owen v. Elatos Foundation, 343 F.R.D. 268, 281 n.13 (S.D.N.Y. 2023) (internal citation omitted) ("[W]here (as here) "the plain text of the statute" is available in English, that text necessarily takes precedence over whatever spin the parties' retained experts seek to put on it").

58. *See generally* Franz Werro, *European Private Law. Quo Vadis?*, *in* LIBER AMICORUM EN L'HONNEUR DU PROFESSEUR JOËL MONÉGER, 809 (2017); *see also generally* Ruth Sefton-Green, *The European Union, Law and Society: Making the Societal-Cultural Difference*, *in* PRIVATE LAW AND THE MANY CULTURES OF EUROPE, 37 (Thomas Wilhelmsson et al. eds., 2007).

59. *See generally* Werro, *supra*, note 60.

60. U.S. CONST. amend. I.

61. And, to be clear, the First Amendment is not the only legal instrument that protects expressive freedom. *See generally* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021).

words a meaning informed by their views and experiences. As powerfully phrased by Professor William Baude, textualism is "missing something."[62] The statutory text, by itself, "gives incomplete or misleading answers" about the law, so we must supplement it "with attention to [the] entire legal framework," including the background principles, interpretative canons, and structural doctrines against which interpretation takes place.[63]

A prime example of the shortcomings of textualism is the reception of the Swiss Civil Code by Türkiye in 1926.[64] Although the civil codes of Switzerland and Türkiye had almost identical text in 1926, few would say that Switzerland and Türkiye had the same "law." This phenomenon can be explained through a conceptual framework that illustrates the similarities between the nature of law and that of a vine, which I call the "vineyard theory." Per this theory, the same vine planted in two different parts of the world, for example, Italy and California, will not produce the same wine because the soil from which it grew is different. The same is true with law. Although text can be transplanted, the same text will produce different laws in different parts of the world, because law does not exist but through the individuals who interpret it.[65] Another example in support of the vineyard theory is the near-universal adoption of the French Civil Code of 1804 (commonly known as the "Napoleonic code") across Europe in the nineteenth century.[66] Although the Napoleonic code served as the basis for entire legal systems in countries like Italy, Spain, Romania, the Netherlands, and Belgium, it would be unsound to say that the private[67] "law" of each of those countries in the nineteenth century was the same, even where the Napoleonic code was adopted verbatim.[68]

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62. Rachel Reed, *Textualism is 'missing something'*, HARVARD LAW TODAY (Mar. 1, 2023), https://hls.harvard.edu/today/textualism-is-missing-something/.

63. *Id.*

64. *See generally* Hifzi Veldet Velidedeoglu, *The Reception of the Swiss Civil Code in Turkey*, 9 INT'L SOC. SCI. BULL. 60 (1957).

65. As Roland Barthes argued in his 1967 landmark essay *The Death of the Author*, the interpretation of a text is shaped by the dynamic interaction between the text and the reader, as well as other texts. *See* Note, *Textualism's Mistake*, 135 HARV. L. REV. 890, 891 (2022).

66. For more on the Napoleonic code, see generally Xavier Blanc-Jouvan, *Worldwide Influence of the French Civil Code of 1804, on the Occasion of its Bicentennial Celebration*, CORNELL L. SCH. BERGER INT'L SPEAKER PAPERS, Sept. 2004, http://scholarship.law.cornell.edu/biss_papers/3.

67. Used here in the sense of "not criminal nor administrative"—as it is used in civil law-system.

68. *See generally* DUNCAN FAIRGRIEVE, THE INFLUENCE OF THE FRENCH CIVIL CODE ON THE COMMON LAW AND BEYOND (2007).

Disregarding the principles of the vineyard theory is possibly what is causing courts to excessively resort to textualism when interpreting foreign law.[69] A clear example of this extreme use of textualism by domestic courts is *Eshel v. Commissioner of Internal Revenue Service*.[70] In *Eshel*, the D.C. Court of Appeals was called to review a tax court's grant of summary judgment, which revolved around the central question of whether the French laws instituting two taxes after the conclusion of a treaty between the United States and France "amended" or "supplemented" the French laws listed within the treaty. To answer that question, the tax court turned to four U.S. dictionaries to define the words "amend" and "supplement," and based on those definitions concluded that the two laws supplemented the French laws.[71] Luckily, the D.C. Court of Appeals remanded the lower court's decision holding that it "was the product of asking the wrong legal question," as it only asked what "amends or supplements" meant in domestic dictionaries, as it might do when construing a purely domestic statute.[72] The Court of Appeals further specified that whether the new French laws amended or supplemented the French laws enumerated within the treaties was fundamentally an inquiry into the content and meaning of French laws and should have been, at least in part, informed by French law.[73]

Domestic courts and practitioners should recognize that foreign legal systems cannot be fully understood by simply translating and reading their texts. The cultural context, including the societal values and legal principles that inform the interpretation of those texts, is just as important. A comprehensive approach to interpreting foreign law requires judges, at a minimum, to immerse themselves in comparative legal literature highlighting key doctrinal and procedural differences across jurisdictions.[74] Also, they should not forget to interrogate expert witnesses (preferably court-appointed) regarding the cultural framework underpinning the interpretation they present. The vineyard theory illustrates how the same legal text can produce different laws in different parts of the world. Therefore, domestic courts must be cautious when interpreting foreign laws and avoid excessive reliance on textualism.

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69. *See generally* S.E.C. v. Gibraltar Glob. Sec., Inc., No. 13 Civ. 2575 GBD JCF, 2015 WL 1514746 (S.D.N.Y. Apr. 1, 2015); Brit. Int'l Ins. Co. v. Seguros La Republica, S.A., 2000 WL 713057 (S.D.N.Y. 2000); Owen v. Elastos Found., 343 F.R.D. 268, 281 n. 13 (S.D.N.Y. 2023).

70. Eshel v. Comm'r of Internal Revenue Serv., 831 F.3d 512 (D.C. Cir. 2016).

71. *Id.* at 514.

72. *Id.* at 518.

73. *Id.* at 519.

74. Recognizing the significant demands placed on judges, it remains imperative that they fulfill their fundamental duty of determining and interpreting legal principles, including those of foreign jurisdictions.

C. *The Role of Foreign Governments in Interpreting Their Own Law, and the Proposal for a Rebuttable Presumption*

When legal proceedings involve issues of foreign law, it is not unusual for the related foreign government to file an *amicus* brief declaring its interpretation of the law in question. This intervention can be useful for judges when the parties' experts present equally plausible but conflicting interpretations. In such a case, a foreign sovereign's support for a particular interpretation can offer legitimate guidance in resolving such interpretive dilemmas.[75] It does, however, also pose the critical question of how much deference domestic courts should afford to such intervention.[76]

Before the enactment of Rule 44.1, the U.S. Supreme Court's position was that foreign governments' statements on their own laws should be considered "conclusive."[77] Recent case law, however, has moved away from that conclusive view and adopted a more consideration-focused approach. Today, the position of the U.S. Supreme Court is that, while foreign sovereigns' views of their own law merit some degree of deference, they are not controlling.[78]

In the recent case of *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co.*, the U.S. Supreme Court clarified that, when a foreign government whose law is in contention submits an official statement on the meaning and interpretation of such law, federal courts are not "bound to defer" to the foreign government's interpretation.[79] To

75. *Karaha Bodas Co.*,313 F.3d at 92 (utilizing statements of a foreign government that identified one of the parties' interpretation of its law as correct as a basis to agree with such party's reading); *see also* Access Telecom, Inc. v. MCI Telecommunications Corp., 197 F.3d 694, 714 (5th Cir. 1999).

76. For a deeper dive on the topic, see generally Kevin Clermon, *Signaling Deference to Another Sovereign's Law*, 59 GONZ. L. REV. 207 (2024).

77. United States v. Pink, 315 U.S. 203, 217-221 (1942) (accepting as conclusive a declaration from the Russian government interpreting a nationalization decree as to its extraterritorial effects); *see also* Agency of Canadian Car & Foundry Co. v. American Can Co., 258 F. 363, 368-69 (2d Cir. 1919) (holding that a formal declaration from the Russian government recognizing an individual's authority to act on its behalf was "binding and conclusive in the courts of the United States against that government").

78. *Karaha Bodas Co.*, 313 F.3d at 92 (holding that, although a foreign sovereign's interpretation of its own law warrants "some degree of deference," it is not controlling and is simply one factor that the court may consider in resolving ambiguous foreign-law questions); *Animal Sci. Prod., Inc.*, 585 U.S. at 36 36 (2018) ("A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements"); *see also In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522 (E.D.N.Y. 2011) (declining to defer to the Chinese government's statement of its own law where it was incomplete and unsupported by the record, emphasizing that foreign governments' views are not conclusive and courts independently determine foreign law under Rule 44.1).

79. *Animal Sci. Prod., Inc.*, 585 U.S. at 36.

the contrary, the Supreme Court held that federal courts should afford a foreign country's interpretation "respectful consideration," and give it an appropriate weight based on the circumstances at hand as determined on a case-by-case basis.[80] *Animal Science Products* is a case arising from a class-action suit brought by several U.S.-based purchasers of vitamin C against four Chinese companies that manufactured and exported the vitamin.[81] The U.S. purchasers accused the sellers of fixing the price and quantity of vitamin C exported to the United States.[82] The sellers' primary defense was that Chinese law mandated they fix the price and quantity of vitamin C exports.[83] During the lower court proceedings, the Chinese government submitted an *amicus* brief supporting the Chinese sellers' assertions.[84] On appeal, the central question before the Supreme Court was the level of deference that federal courts should accord to official statements made by foreign governments regarding the interpretation of their own laws.[85] First, the Supreme Court rejected the standard used by the Second Circuit, according to which federal courts were "bound to defer" to a foreign government's construction of its own law whenever that construction was "reasonable."[86] Second, the Supreme Court set a new standard and held that federal courts should afford "respectful consideration" to a foreign government's interpretation of its own law, but are not "bound to defer" to it.[87]

Although a federal court should carefully consider a foreign state's views about the meaning of its own laws in the spirit of "international comity," the analysis to establish its weight as described in *Animal Science* has no single formula.[88] Relevant considerations will include (i) the foreign government statements' clarity, thoroughness, and support; (ii) the statements' context and purpose; (iii) the transparency of the foreign legal system as a whole; (iv) the role and authority of the entity or official offering the statement; and (v) the statements' consistency with the foreign government's past positions.[89] This non-exhaustive list of factors also points litigants to a number of ways they can discredit such statements.

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80. *Id.* at 36, 43.
81. *Id.* at 36-37.
82. *Id.*
83. *Id.* at 37.
84. *Id.*
85. *Id.* at 36.
86. *Id.*
87. *Id.*
88. *Id.* at 43.
89. *Id.*; *see also* Société Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 543, n. 27 (1987) (observing that courts evaluating foreign

It is questionable whether domestic courts should have the authority to declare a foreign government's interpretation of its own law as "incorrect."[90] This is especially dubious in situations where the foreign state has no direct interest in the outcome of the case—i.e., when it is not a party and has no demonstrated direct conflict of interest.[91] In such cases, this intrusion may be viewed as inappropriate and unfair.

Instead, an approach that should be considered is a shift to a system based on rebuttable presumptions. Foreign governments' interpretations of their own law should create a rebuttable presumption that it is correct. The presumption could be rebutted by looking at criteria similar to the ones used in *Animal Science*: (i) the foreign government statements' clarity, thoroughness, and support; (ii) the statements' context and purpose; (iii) the role and authority of the entity or official offering the statement; and (iv) the statement's consistency with the foreign government's past positions.[92] On the other hand, in cases where the foreign state is a party to the litigation, or if there is a demonstrated direct conflict of interest in the case at hand, domestic courts could continue

government representations should consider them in light of the government's prior positions and overall legal practice).

90. An interesting question, possibly the subject of a subsequent piece of scholarship, is whether U.S. courts should be entitled to declare "incorrect" a foreign nation's interpretation of a treaty to which both the foreign nation and the United States are parties. Without having conducted in-depth research on this issue, I would argue that the answer should be negative in most cases. Following the vineyard theory principles (*see* Section III.B), a foreign nation's interpretation of a treaty for its domestic application will have to be consistent with such nation's internal constitutional framework, public policies, and societal structure. Therefore, differences in interpretation will merely be a reflection of legal systems "adapting" the treaty to their internal laws, and not an indication that some of these interpretations must be "wrong." It is possible, for example, that a unique interpretation is necessary under that nation's constitution to avoid any conflicts with the treaty. *See, e.g.*, Postanovlenie Konstitutsionnogo Suda Rossii±skoi± Federatsii ot 19 aprelya 2016 g., [Ruling of the Russian Federation Constitutional Court of April 19, 2016], ROSSII±SKAIA GAZETA [ROS. GAZ.] Apr. 22, 2016 (English translation available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2016)033-e) (holding that executing a judgment of the European Court of Human Rights in Russia imposing a specific interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms was "impossible" because such imposed interpretation was directly against the Constitution of the Russian Federation).

91. For example, in cases where a commercial activity is conducted by an entity partially or indirectly owned by the foreign government that is involved in the litigation. *See, e.g.*, The Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1603 for the definition of "agenc[ies] or instrumentalit[ies] of a foreign state" and "commercial activity" under the FSIA.

92. *See Animal Sci. Prod., Inc.*, 585 U.S. at 43. Notably, I suggest not including the currently used criterion from *Animal Science* inquiring about the transparency of the foreign legal system as a whole. I do not believe that domestic courts should have the ability to judge whether a foreign legal system is "transparent."

using the "respectful consideration" deference standard. This approach would allow domestic courts to balance showing respect for interpretations by foreign governments with allowing parties to challenge that interpretation when necessary.

Possibly, the international community should also start working on a better system of judicial assistance in the line of a quasi-interlocutory process that, very similarly to the interlocutory opinions requested by national courts to the European Court of Justice, would allow courts of Member States to request an interlocutory opinion from the court of another member state to ascertain its laws when needed.[93]

By creating a rebuttable presumption in favor of foreign governments' interpretations, courts would avoid constantly engaging in complex case-by-case inquiries as to whether a foreign government is misrepresenting its law. This would reduce the time and resources required to determine foreign law and provide a more efficient process for litigants.

IV. FOOD FOR THOUGHT: THE LACK OF INTERNATIONAL AND COMPARATIVE LAW MANDATORY EDUCATION IN U.S. LAW SCHOOLS

As mentioned in Part I, another, more systemic, flaw that hinders the ability of U.S. courts to engage with these complex issues is the widespread absence of compulsory international and comparative law instruction in U.S. law schools.[94] This gap not only likely limits the capacity of judges and lawyers to analyze foreign legal questions effectively but also restricts their awareness of their own knowledge limitations, increasing the risks of errors.

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93. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, Oct. 26, 2012, 2012 O.J. (C 326) 47. *See generally* JASPER KROMMENDIJK, NATIONAL COURTS AND PRELIMINARY REFERENCES TO THE COURT OF JUSTICE (2021), https://doi.org/10.4337/9781800374171. Note that there are already two international treaties that establish formal mechanisms by which one government may obtain from another an official statement characterizing its laws. Both treaties establish that the information given in reply shall not bind the judicial authority from which the request emanated. *See* European Convention on Information on Foreign Law, June 7, 1968, 720 U.N.T.S. 147; Inter–American Convention on Proof of and Information on Foreign Law, May 8, 1979, 1439 U.N.T.S. 111. Despite their existence, these treaties do not appear to be widely utilized, possibly due to the protracted nature of their procedures or the lack of awareness surrounding them. Furthermore, in the United States—where the adversarial system places primary responsibility for legal research and proof on the parties—these treaties require a more active role from judges, a responsibility that U.S. courts have historically been reluctant to assume.

94. More often than this author would like to admit, even elective offerings in these two areas appear to remain limited.

Although the U.S. Constitution clearly states that international law is the "supreme Law of the Land,"[95] studying international law in U.S. law schools remains overwhelmingly nonmandatory.[96] This void is appalling, especially considering that due to the rise of domestic legal questions across areas that directly involve foreign or international law,[97] the ability of domestic judges to fully grasp these subjects has become increasingly important.[98] Yet, even class offerings continue to be limited, with only a few exceptions, and many graduates lack even the minimal skills necessary to make reliable arguments and determinations of foreign law.[99]

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95. U.S. CONST, art. VI, cl. 2. International law—as embodied in treaties and other international agreements to which the United States is a party—is the supreme law of the land on the same footing with acts of Congress "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

96. Ryan Scoville, *The Study of International Law in American Law Schools: A Brief History*, MARQUETTE UNIV. L. SCH. FAC. BLOG (Mar. 30, 2015), https://law.marquette.edu/facultyblog/2015/03/the-study-of-international-law-in-american-law-schools-a-brief-history (noting how, as of 2015, "[o]nly eight law schools require[d] their students to complete a course on the subject and that, in general, the range of international electives tends to be quite limited").

97. *See* Justice Stephen Breyer, The Supreme Court And The New International Law, Address at The American Society of International Law 97th Annual Meeting (Apr. 4, 2003) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-04-03) (acknowledging that "[the Supreme Court] face[s] an increasing number of domestic legal questions that directly implicate foreign or international law"); *see also* Wilson, *supra* note 6 at 889; World Trade Organization, *supra* note 5.

98. The U.S. legal system has long expected judges to possess a diverse skill set and knowledge base. Indeed, many state and federal judges in the United States are responsible for presiding over both criminal and civil cases, in stark contrast to many foreign jurisdictions. *See, e.g.*, *Eighth Judicial District Court Clark County, Nevada, Department I*, CLARK CTY. CTS., http://www.clarkcountycourts.us/departments/judicial/civil-criminal-divison/department-1 (last visited Aug. 11, 2025) (showing how a district court's department assignment can include criminal, civil, and other matters). This is not the case in other jurisdictions. For example, in Italy courts are split among civil and criminal "sections," so that civil law judges only hear civil law cases and criminal law judges only hear criminal law cases. *See* Simona Grossi, *A Comparative Analysis Between Italian Civil Proceedings and American Civil Proceedings Before Federal Courts,* 20 IND. INT'L & COMP. L. REV. 213, 271-72 (2010). The same applies for the Italian Supreme Court, the *Corte di Cassazione*, which is divided into seven different civil sections, and eight different criminal sections. *See Organizzazione dell'Attività Giurisdizionale* [*Organization of Jurisdictional Activity*], CORTE SUPREMA DI CASSAZIONE [SUPREME COURT OF CASSATION], https://www.cortedicassazione.it/corte-di-cassazione/it/organizzazione_della_corte.page (last visited Apr. 30, 2023). Note that, in Italy, there is also a separation between the Supreme Court and the Constitutional Court, where the latter has jurisdiction to resolve disputes and conflicts concerning the Italian Constitution. Costituzione Italiana [Constitution of the Italian Republic], Art. 134 (It.).

99. Scholars have been advocating for more International Law classes since at least 1907. *See* Charles Noble Gregory, *The Study of International Law in Law Schools*, 2 AM. L. SCH. REV. 41 (1907); *see also* Joseph L. Kunz, *A Plea for More Study of International Law in American Law School*, 40 AM.

Particularly in the context of proof of foreign law, the lack of comparative and international law education in U.S. law schools and beyond is concerning. To make a reliable determination of foreign law, courts should have, at a minimum, an appreciation that different countries have different ways of approaching legal issues based on their unique historical and societal contexts. The lack of comparative and international law education in U.S. law schools means that too many lawyers and judges in the United States are unaware of the different legal systems used around the world. This gap in knowledge and cultural appreciation can lead to potential mistakes and misunderstandings when working with foreign legal systems.[100] In addition, there is a plausible fear that, when confronted with difficult and time-consuming questions of foreign law, domestic judges may look for ways to either dismiss the cases based on *forum non conveniens*,[101] or avoid the application of foreign law altogether.[102]

The tendency to undervalue the significance of international and comparative law within legal education seems to be a phenomenon almost unique to the United States among developed jurisdictions.[103] In many countries such as Italy, France, Spain, and Australia, law schools routinely insert international law and comparative law as part of their mandatory curriculum.[104] This means that most foreign lawyers

J. INT'L L. 624, 624 (1946) ("We are concerned in this paper with the neglect of international law in American law schools. . .").

100. *See* Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 FED. LAW. 20 (1998) ("American businesses have been in the forefront of [globalization] . . . . American judges and lawyers, however, sometimes seem a bit more insular. We tend to forget that there are other legal systems in the world, many of which are just as developed as our own. This short-sightedness begins early in our careers . . . . Judges must be versed in other legal systems to do justice between the parties before them.").

101. The doctrine of *forum non conveniens* allows a court with proper subject-matter jurisdiction, personal jurisdiction, and venue to dismiss a case, on a discretionary basis, if it believes that such case would be better litigated in another court. *See generally* John Bies, *Conditioning Forum Non Conveniens*, 67 U. CHI. L. REV. 489 (2000); *see also generally* Maggie Gardner, *Retiring Forum Non Conveniens*, 2 N.Y.U. L. REV. 390 (2017).

102. *See* Wilson, *supra* note 6, at 891 (internal citation omitted). Also, there is the real risk that domestic courts will choose to ignore foreign laws in favor of the application of domestic laws on the basis of mere convenience. *See supra* Part II.

103. *See* Ryan Scoville, *Why Teaching International Law in American Universities Matters*, JUST SEC. (Mar. 6, 2015), https://www.justsecurity.org/20732/teaching-international-law-american-universities-matters (conducting a study of international law global study patterns, and finding that "the study of international law is globally pervasive and a compulsory part of legal education at a clear majority of universities around the world," compared with only 4% of U.S. law schools).

104. In Italy, virtually all law schools require students to study (i) Ancient Roman Law; (ii) European Union Law; (iii) Comparative Law; (iv) Public International Law; (v) a foreign language. *See, e.g.*, *Regolamento del Corso di Laurea Magistrale in Giurisprudenza* [*Regulations of the Master's Degree in Law*], UNIVERSITÀ COMMERCIALE LUIGI BOCCONI [BOCCONI UNIV.] (2021),

and judges are better equipped to work with foreign laws and understand how they differ from their laws. By contrast, the lack of basic international law education in U.S. law schools makes lawyers and judges in

https://www.unibocconi.it/it/chi-siamo/organizzazione/statuto-regolamenti-e-documenti/regolamenti/regolamenti-dei-corsi-di-studio (last visited Oct. 19, 2025); *Corso di Laurea Magistrale in Giurisprudenza Piano degli Studi* [*Master's Degree in Law Study Plan*], UNIVERSITÀ DI PAVIA [UNIV. OF PAVIA] (2021), https://giurisprudenza.cdl.unipv.it/it/studiare/piano-degli-studi (last visited Oct. 19, 2025); *Piano di studio per la Laurea magistrale in Giurispudenza* [*Study Plan for the Master's Degree in Law*], UNIVERSITÀ DEGLI STUDI DI FIRENZE [UNIV. OF FLORENCE] (2022) (It.), https://www.giurisprudenza.unifi.it/vp-638-piano-di-studio-per-la-laurea-magistrale-in-giurispudenza.html# (last visited Oct. 19, 2025); *Corso Di Laurea Magistrale A Ciclo Unico In Giurisprudenza* [*Single-Cycle Master's Degree Course in Law*], UNIVERSITÀ DEGLI STUDI DI FERRARA [UNIV. OF FERRARA] (2022) (It.), https://docs.google.com/document/d/1344q2V7abAjJaCwLPmA8qj1s2xCinaOU/edit (last visited Oct. 19, 2025); *Regolamento Didattico Corso Di Laurea Magistrale A Ciclo Unico In Giurisprudenza* [*Teaching Regulations Single-Cycle Master's Degree Course in Law*], UNIVERSITÀ DEGLI STUDI DI CATANIA [UNIV. OF CATANIA] (2021), https://www.lex.unict.it/sites/default/files/files/Regolamenti/Regolamenti_didattici/LMG01_Giurisprudenza_2021-2022.pdf (last visited Oct. 19, 2025). In France, many law schools require at least a course in public international law, plus a course in international public relations. *See, e.g.*, *Offre De Formation LMD4* [*LMD4 Training Offer*], UNIVERSITÉ PARIS 8 VINCENNES-SAINT-DENIS [PARIS 8 UNIV. VINCENNES-SAINT-DENIS] (2020), https://www.univ-paris8.fr/IMG/pdf/pdf_fiche_actul_lic_droit_2020.pdf (last visited Oct. 19, 2025); *Licence Droit* [Law Degree], UNIVERSITÉ PARIS 1 PANTHÉON SORBONNE [PARIS 1 UNIV. PANTHÉON SORBONNE], https://formations.pantheonsorbonne.fr/fr/catalogue-des-formations/licence-L/licence-droit-KBT8CDAC/licence-droit-KBT8MN4X.html (last visited Oct. 19, 2025). In Spain, law school curriculum seems to be very similar to the Italian system, where most students are required to study (i) Ancient Roman Law; (ii) European Union Law; (iii) Public International Law; and (iv) Private International Law. *See, e.g.*, *Course plans List of subjects 2025-2026*, UNIVERSITAT DE BARCELONA [UNIV. OF BARCELONA] (Spain), https://www.ub.edu/portal/web/law/bachelor-degrees/-/ensenyaments/detall/1732247/12 (last visited Oct. 19, 2025); *Grado Ciencias Sociales y Jurídicas Derecho* [*Degree in Social and Legal Sciences Law*], UNIVERSIDAD COMPLUTENSE MADRID [COMPLUTENSE UNIV. OF MADRID] (2023), https://derecho.ucm.es/data/cont/docs/titulaciones/2072.pdf (last visited Oct. 19, 2025). In Australia, the Council of Australian Law Deans ("CALD") has adopted "The CALD Standards for Australian Law Schools," which latest version stated that a law curriculum must seek to develop "international and comparative perspectives on Australian law" "international developments of the law." *The CALD Standards for Australian Law Schools*, (July 30, 2020), https://cald.asn.au/wp-content/uploads/2023/11/Australian-Law-School-Standards-v1.3-30-Jul-2020.pdf (last visited Oct. 19, 2025).; *cf. Bachelor of Laws Learning and Teaching Academic Standards Statement December 2010*, AUSTL. LEARNING & TEACHING COUNCIL (Dec., 2010), https://cald.asn.au/wp-content/uploads/2024/04/LLB-TLOsKiftetalLTASStandardsStatement2010-TLOs-LLB2.pdf (last visited Oct. 19, 2025) (first outlining that, to obtain a Bachelor of Laws in Australia, graduates have to demonstrate "an understanding of a coherent body of knowledge that includes: (a) the fundamental areas of legal knowledge, the Australian legal system, and underlying principles and concepts, *including international and comparative contexts*" but then specifying that this phrase does not "mandate the separate study of international law or comparative law. It intends that graduates will have a threshold level awareness of these contexts at a general level, and a deeper knowledge in relation to selected areas of law depending on the options made available in their legal education. Comparative law could also include comparisons amongst the Australian states and territories, and between the states/territories and the Commonwealth in a federal system.").

the United States ill-equipped to understand the legal system of a foreign country and make reliable determinations of foreign law.[105]

Without adequate training in cross-border legal systems, it is more likely that judges will misapply foreign law, potentially resulting in unfair outcomes. In a globalized world where transnational business is the norm rather than the exception, it is no longer sufficient for U.S. judges and practitioners to only have expertise in traditional areas of domestic law. Instead, they must also be equipped to understand international law and foreign legal systems. As transnational issues become increasingly common, U.S. law schools should consider requiring at least an introductory course in international or comparative law, or at least ensure that these offerings are available and meaningfully encouraged.

V. Final Considerations

A review of the current U.S. framework for proof of foreign law revealed three fatal flaws: (1) the overreliance on parties' expert testimony, which increases the length and costs of litigation; (2) the excessive tendency towards textualism, which may not reflect the law's true meaning in context; and (3) the insufficient consideration given to a foreign government's interpretation of its own laws, despite being one of the most important sources of insights. In addition, the endemic issue of the lack of international and comparative law offerings in U.S. law schools exacerbates the risk of errors by limiting the capacity of judges and lawyers to analyze foreign legal questions effectively.

As the correct application of foreign law is outcome-determinative, these flaws must be addressed to prevent judicial errors. First, judges should play a more active role when analyzing foreign law, rather than relying on party-driven expert testimony. This outcome could be achieved by standardizing the engagement of court-appointed experts each time a case involves a question of foreign law and conducting independent research before assessing the need for parties to submit expert opinions. This approach not only would enhance the quality of judicial decision-making, but also save parties the time and cost of retaining their own experts.

Second, courts should avoid excessive reliance on textualism when interpreting foreign law. Instead, they should recognize that, based on the vineyard theory, foreign laws cannot be fully understood by simply

105. Moreover, encouraging the study of comparative and international law subjects in law schools would extend legal education beyond traditional black-letter analysis and promote critical analysis. Such an approach would provide future leaders with a more comprehensive understanding of the law.

translating and reading them. The cultural context, including the societal values and legal principles that inform the interpretation of those texts, is just as important. By emphasizing the cultural and societal context, domestic courts can better understand the nuances of foreign law and improve the accuracy of their interpretations.

Third, the weight afforded to a foreign government's interpretation of its own law should mostly rest on a system of rebuttable presumptions. Specifically, domestic courts should continue to use the "respectful consideration" deference standard in cases where a foreign state either is a party to the litigation or has a special direct interest in the outcome of the case. In all other instances, a rebuttable presumption that the government's interpretation is correct should be utilized. This new system would allow domestic courts to balance showing respect for interpretations by foreign governments with recognizing the right of the parties to challenge that interpretation when necessary.

Lastly, the study of international and comparative law should be encouraged in U.S. law schools, as it already is in most other developed countries. This education would make lawyers and judges better equipped to understand and navigate the legal system of foreign countries and, consequently, avoid potential mistakes and misunderstandings when determining and interpreting foreign law.

As shown, improving the current system of proof of foreign law in domestic courts is a complex endeavor that necessitates a multifaceted approach. Despite the challenges ahead, the stakes are too high to ignore. Accurate interpretation and application of foreign law are essential for ensuring fairness and justice, especially in an increasingly interconnected world.

By addressing the key flaws in the current system and adopting more effective practices, we can build a legal framework that not only reduces errors but also strengthens trust in U.S. courts' ability to handle complex, transnational cases. While the road ahead is challenging, the potential benefits—greater precision, fairness, and confidence in our legal system—make this effort not just necessary but worthwhile. The path may be complex, but the result will be a justice system better prepared for the realities of our interconnected world.