

# Teaching U.S. Civil Procedure to Non-U.S. Students: Educating Students for a World of Legal Pluralism

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## I. Introduction

It has become a truth almost universally acknowledged that law students in search of a degree should be exposed to legal systems other than their own.<sup>1</sup> Less universally agreed upon, however, is exactly what that exposure should consist of. Some argue for incorporating a bit of transnational reference in each course;<sup>2</sup> others argue that students should pursue dual degree programs so they are “residents,” not “tourists,” in both systems.<sup>3</sup> There is still less discussion regarding what needs to be done at the course rather than the program level, and those discussions tend to focus on the needs of students who expect to practice in the country whose law the course primarily teaches.<sup>4</sup>

This article brings my somewhat unusual experience to bear on an issue not so frequently treated but increasingly relevant in a world of globalized legal

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1. See Christophe Jamin & William van Caenegem, *The Internationalization of Legal Education: General Report for the Vienna Conference of the International Academy of Comparative Law, 20-26 July 2014*, in THE INTERNATIONALISATION OF LEGAL EDUCATION 3, 8 (Christophe Jamin & William van Caenegem eds., 2016) (“Most Reporters stress that not just they but also their colleagues regard internationalization of their teaching and their research as a very important priority.”).
2. Claudio Grossman, *Building the World Community: Challenges for Legal Education and the WCL Experience*, 17 AM. U. INT’L L. REV. 815, 829-834 (2002).
3. *Internationalization*, *supra* note 1, at 4.
4. Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479 (2006) (urging integration of comparative viewpoints throughout curriculum to expose U.S. students to other systems); Edward F. Sherman, *Transnational Perspectives Regarding the Federal Rules of Civil Procedure*, 56 J. LEGAL EDUC. 510 (2006) (identifying ways elements of the Federal Rules of Civil Procedure differ from international norms); Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524 (2006) (while recognizing importance of transnational viewpoints, urging caution in diverging from traditional course coverage so as not to obscure those topics most important to U.S. students). Of course, any analysis identifying from the U.S. perspective which aspects of U.S. procedure are exceptional can provide guidance to those teaching foreign students.

education—what non-U.S. students need from a course in U.S. procedural law. My teaching experience is a bit different from most. For more than a dozen years I have taught U.S. civil procedure to students at the Peking University School of Transnational Law<sup>5</sup> who, overwhelmingly, will not ever practice in the United States, much less practice in U.S. courtrooms. Our students take both a full J.D. curriculum and a full Chinese Juris Master curriculum.<sup>6</sup> I have thought a great deal about what non-U.S. students need to learn about U.S. civil procedure; this is an effort to share my experiences. I think a similar course might be good for LL.M. and other foreign students taking civil procedure in the United States who do not or realistically cannot expect to practice in the United States.

Early on, I faced a situation that derived from students' valuing credentialism over substance. Some of my students seemed to feel that a J.D. degree from our school mattered because it showed they could do well in an English-language, culturally American setting, which would help them in a competitive job market. Some of the same students seemed to feel that learning actual substantive law mattered less. Incidentally, this same dynamic often applies to LL.M. students studying away from their home country.<sup>7</sup>

My first response was to think through whether actually learning what I taught could matter, and once I decided it was quite important, coming up with a way to make that clear. I shifted the focus of the course away from the rote tracking of a lawsuit through the American system and toward a presentation centered on why U.S. civil procedure would matter to them, no matter where they practiced. To steal a phrase from Kevin Clermont, I was looking for the “big idea” or ideas that would help make clear that U.S. civil procedure matters to non-U.S. lawyers.<sup>8</sup>

The relevance flows from the world having moved from Westphalian states that might expect to assert exclusive jurisdiction within their borders and into an era of polycentric legal pluralism. Whether the topic is the flow of data,

5. Philip J. McConaughay, *The Evolving Mission of Peking University's School of Transnational Law*, 72 J. LEGAL EDUC. 4 (2023); Philip J. McConaughay & Colleen B. Toomey, *China and the Globalization of Legal Education: A Look Into the Future?* in THE GLOBALIZATION OF LEGAL EDUCATION: A CRITICAL PERSPECTIVE 308, 312-319 (Bryant Garth & Gregory Shaffer eds., 2022) (detailing STL's history).
6. We are not the only school to offer a dual degree program that combines two different systems. McGill, for example, has offered a dual degree program covering civil law and common law since 1968. Aline Grenon et al., *The Global Challenge in Common Law and Civil Law Context: A Canadian Perspective*, in THE INTERNATIONALISATION OF LEGAL EDUCATION 80 (Christophe Jamin & William van Caenegem eds., 2016). Similarly, the University of Puerto Rico School of Law has a robust cooperation with the University of Barcelona law faculty that includes a dual degree offering. Efrén Rivera-Ramos, *Educating the Transnational Lawyer: An Integrated Approach*, 55 J. LEGAL EDUC. 534, 537 (2005). So far as I know, STL is the only school to combine study in a way that leads to separate degrees of the legal systems of the world's two largest economies, the United States and China.
7. See *infra* text accompanying notes 14 and 15.
8. Kevin Clermont, *Civil Procedure's Five Big Ideas*, 2016 MICH. ST. L. REV. 55 (2016).

international mergers and acquisitions, or product safety, the laws of multiple jurisdictions and soft law from many nonstate bodies can and do play a role. As the largest economy with an exceptional procedural system and an above-average appeal to foreign litigants,<sup>9</sup> the United States occupies a position of unique importance with regard to both substantive and procedural law.

To drive home the importance of thinking about procedural law from day one in the context of legal pluralism and polycentricity, I have attempted to follow Karl Llewellyn's wisdom about the power of specific instances:

We have learned that the concrete instance, the heaping up of concrete instances, the present, vital memory of a multitude of concrete instances, is necessary in order to make any general proposition, be it rule of law or any other, mean anything at all. Without the concrete instances the general proposition is bag-gage, impedimenta, stuff about the feet. It not only does not help. It hinders.<sup>10</sup>

To provide layers of concrete instances, I found it necessary to put together my own text, which drops many of the standard U.S. cases and focuses instead on litigation involving foreign parties. The cases I have chosen do just as well to illustrate the on-the-ground operation of the U.S. procedural code and related laws. More to the point, the buildup instance by instance of these cases and rules helps to illustrate that legal pluralism and the extraterritorial reach of other national laws matter even to domestic Chinese clients with no offices abroad. We focus particularly on a major multidistrict litigation involving Chinese drywall to show how Chinese companies with no employees or offices in the United States are nonetheless subject to U.S. procedures, and to show how some of those procedures can have an exceptional effect.

The course also focuses on exceptional elements of the U.S. system, but with an effort to go a bit deeper than how judges interact with others differently in civil law courtrooms than in common-law courtrooms. It is a common but naïve error to assume that litigation systems play the same functional role in overall national governance, or that elements in a litigation system operate more or less in the same way even as the systems differ in other respects. We delve into how the U.S. system plays different roles in overall regulation and in lawmaking, which in turn puts different pressures on individual elements such as discovery, since achieving an accurate outcome has broader consequences than just resolving the dispute between the parties. We talk also about the role money plays in the U.S. civil system, so that issues of access to justice are not obscured. Also, to hold their interest, I focus on specific procedural issues (such as service of

9. Recognizing that developments in both procedural and substantive law have eroded both the ability to get into a U.S. court and the desirability of being in one, the U.S. nonetheless remains an option likely to be considered seriously when international litigants are selecting a forum. For a view of the analysis that may be followed and the issues that may arise, see Donald Earl Childress III, *Escaping Federal Law in Transnational Cases: The Brave New World of Transnational Litigation*, 93 N.C. L. REV. 995 (2015).

10. KARL N. LLEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY II* (Quid Pro Books 2012) (1930).

process on Chinese defendants, enforcement in U.S. courts of judgments from foreign courts, and preclusive effect of non-U.S. judgments) that are of direct, practical application to my Chinese students, but are outside the bounds of a traditional U.S. civil procedure course.<sup>11</sup>

As a result, our course focuses a bit more explicitly on the role of litigation in the U.S. ex post facto regulation system, on presenting the sometimes peculiar features of a common-law process with regard to their impact on other aspects of the system, on issues of federalism and polycentric governance within the United States, on some issues that normally would be reserved for an upper-level course in transnational litigation, and even some overt attention to U.S. history and culture. By necessity, some other features of a standard course have been curtailed. The result, I like to think, much better prepares my students to operate as lawyers than did the standard-issue civil procedure course I once taught.

This article engages with the importance of polycentric governance to lawyers worldwide, and how civil procedure often provides the means for making that polycentric governance real. The article presents a number of unique features of a civil procedure class designed for non-U.S. law students who will not practice in the United States. One such feature is how to use the Chinese drywall cases in the course. Another core issue is to examine how the American system of ex post facto regulation is applied through litigation, at different approaches to statutes, case application, factual development and trial, and at a list of topics particularly relevant to foreign students. Some of these, like personal jurisdiction, are a core part of any civil procedure course; others, like transnational claim preclusion or service of process abroad, may not be.

## II. Demonstrating Relevance in a World of Polycentric Law

Whatever our students' backgrounds, and despite U.S. law being foreign law for them, at STL, we teach U.S. law "from the inside," to steal a useful phrase from Catherine Valcke:

Most typically, law schools in any one country have had their students "do" the law of that country. Canadian law schools have typically had their students learn how to think like a Canadian lawyer, while U.S. law schools have had their students learn how to think like a U.S. lawyer, French law schools . . . like a French lawyer, and so on. Clearly, the state legal system has traditionally been viewed as the primary entity whose insides law students are to explore.<sup>12</sup>

Our students learn U.S. law much as U.S. students do in a J.D. program and learn Chinese law again "from the inside" within a domestic J.M. program. The J.D. faculty do, indeed, endeavor to teach them to think like U.S. lawyers, and

11. Each of these, for example, is treated in GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 963 (2018) and treated from a comparative perspective in OSCAR G. CHASE ET AL., *CIVIL LITIGATION IN COMPARATIVE CONTEXT* 644-71 (2017).
12. Catherine Valcke, *Global Law Teaching*, 54 *J. LEGAL EDUC.* 160, 172 (2004).

the Chinese faculty to think like Chinese lawyers. Both programs are “comparative aware,” but the full reconciliation of the two approaches is done by the students, not the faculty. In both settings, the teaching is done by professors native to that system, avoiding some of the issues of “legal orientalism” that can occur in comparative law settings.<sup>13</sup> In fact, only some of the faculty have anything approaching the fluency in both languages, both cultures, and both legal systems that the students must have by the time they graduate. I certainly do not.

The question, for students and faculty alike, is: What is the real benefit of U.S. civil procedure for such students? Many students saw no real career relevance to mastering U.S. civil procedure, since even if they were to litigate, it would most likely be in Chinese courts or in international arbitrations. As research has shown is also true in U.S. LL.M. programs, some would reap all the career benefit they hoped for by demonstrating competence in English and the ability to pass a demanding course taught entirely in English, topped off with a prestigious degree from China’s top university.<sup>14</sup> Actually remembering and applying any substantive law taught in the class would be a bonus.

Waving the flag of comparative knowledge also fails to resolve the issue. While nearly everyone now agrees that some comparative understanding is a good thing, the literature is much richer in this generalized observation than it is in digging into the details of what specific comparative knowledge truly matters and is helpful. Despite the explosive growth of non-U.S. students sitting in U.S. classrooms in recent years, issues of coverage typically do not address the question from the perspective of foreign students studying from the inside a U.S. system that they will not practice in.<sup>15</sup> Given market realities, however, this is the situation of most students enrolled in even elite LL.M. programs and for many J.D. students who may not easily get a U.S. job or a long term visa.

13. See generally, TEEMU RUSKOLA, *LEGAL ORIENTALISM* 16-23 (2013).

14. Carole Silver, *Internationalizing U.S. Legal Education: A Report on the Education of Transnational Lawyers*, 14 *CARDOZO J. INT’L & COMP. L.* 143, 156-57 (2006) (detailing how for foreign students, important reasons to attend LL.M. programs include improving their English and being exposed to U.S. culture); accord Mindie Lazarus-Black & Julie Globokar, *Foreign Attorneys in U.S. LL.M. Programs: Who’s In, Who’s Out, and Who They Are*, 22 *IND. J. GLOBAL LEGAL STUD.* 3, 49 (2015) (detailing reasons for attending U.S. LL.M. programs consistent with Silver’s earlier work).

15. There has been some suggestion that some schools seeking foreign LL.M. students do not systematically address the question of what these students should gain from their time in these programs, much less individual courses. Julie M. Spanbauer, *Lost in Translation in the Law School Classroom: Assessing Required Coursework in LL.M. Programs for International Students*, 35 *INT’L J. LEGAL INFO.* 396, 397-403 (2007) (noting that while the revenue generated for schools by LL.M. programs is “substantial,” “[F]or the most part, these programs have evolved without real assessment of the students’ needs and the best way to meet those needs.”).

*A. Specifics of What I Teach*

At the outset, I taught from a standard U.S. civil procedure textbook.<sup>16</sup> Over time, both because of the cost of newer editions (staggering enough in the United States but even more so for students from developing economies) and my desire to focus on our particular setting, I reluctantly found it necessary to develop my own text, hosted on Harvard's excellent OpenCasebook H<sub>2</sub>O platform.<sup>17</sup> While creating the book—especially writing the explanatory sections and questions between cases—took an incredible amount of time and pushed me into areas beyond my core expertise, it also enabled me to focus on cases and doctrines that are directly relevant to my students. In addition to focusing a bit more on issues that become more interesting when a transnational perspective is supplied, it allowed me to directly address the applicability of U.S. civil procedure to non-U.S. lawyers. Not incidentally in terms of student interest, I purposefully included several cases where one of the parties is Chinese.

*B. The Big Idea—Polycentric Governance in a Globalized World*

Addressing teaching civil procedure within a domestic U.S. setting, Kevin Clermont argues that the course should not be seen as preparation for a bar exam or background for future litigators, and not even as an entrée to dispute resolution generally.<sup>18</sup> Instead he argues for teaching civil procedure from a structural perspective, using it to set forth the key elements of the U.S. system of justice:

But what is now quite obvious to me, even if I took decades to realize it, is that the course works mainly to orient the students in the structure of the whole legal system. That is the big picture for civil procedure!<sup>19</sup>

Clermont goes on to argue that a civil procedure course should be framed around “big ideas” such as separation of powers, vertical federalism, horizontal federalism, full faith and credit, and procedural due process. The goal is to show how “the rest of the legal system operates within the constitutional structure.”<sup>20</sup>

Clermont's scheme makes sense in any classroom, but especially where many of the students need but lack a prior sophisticated understanding of the U.S. system. The big ideas he identifies are indeed core concepts that anyone seeking to understand U.S. governance or litigation must understand. The idea of separation of powers and limitations on federal power can be hard to grasp for

16. JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE: CASES AND MATERIALS, COMPACT EDITION FOR SHORTER COURSES* (2010).

17. RAY WORTHY CAMPBELL, *US CIVIL PROCEDURE FOR INTERNATIONAL STUDENTS 2022-2023 EDITION* (2023), <https://opencasebook.org/casebooks/7581-us-civil-procedure-for-international-students-2022-2023-edition/>. Under the Creative Commons license, this book may be freely used or modified if all or any part of it seems useful.

18. See Clermont, *supra* note 8, at 57.

19. *Id.* at 57.

20. *Id.* at 58.

those coming from authoritarian or unitary regimes, where similar limitations on power may not exist and, even if they do on paper, may not correlate to limitations on behavior in practice.

That said, when focusing on a transnational setting, Clermont's model lacks a layer. It still does not answer the fundamental question of why any of this is worth the time of students who will not be directly engaged in U.S. practice. The answer to this lies in another big idea that is exogenous to Clermont's model—the reality of polycentric or “legal pluralism” governance in a globalized world.

We have long ago left behind Westphalian notions of unitary national sovereignty, if indeed that ever did correspond fully to reality:

[W]e live in an age of legal pluralism—an age where in any given space the players are subject to multiple formal and informal legal orders. The notion that a single sovereign would have exclusive power over its citizenry has never held true in the compound republic of the United States, and holds even less true today as globalization, the rise of non-state rule making bodies, and inherently non-territorial environments such as the internet further complicate the situation.<sup>21</sup>

This affects the context in which national legal systems should be taught. It should be made clear to all students, but especially to students coming from or heading to a transnational setting, that any national law fits into a complex mix of competing claims of authority:

[N]ation-states must work within a framework of multiple overlapping jurisdictional assertions by state, international, and even nonstate communities. Each of these types of overlapping jurisdictional assertions creates a potentially hybrid legal space that is not easily eliminated.<sup>22</sup>

Thinking of law in the context of overlapping, polycentric, pluralistic assertions of authority has opened up many fascinating avenues of scholarly and theoretical exploration as the impact of this framework becomes better recognized.<sup>23</sup> For my purposes, the immediate aspect was pedagogical. My students

21. Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97, 172 (2020). For a general introduction to the development of the concept of legal pluralism, see Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009).

22. PAUL SCHIFF BERMAN, *GLOBAL LEGAL PLURALISM: A JURISPRUDENCE OF LAW BEYOND BORDERS* 5 (2012).

23. See generally THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM 2 (Paul Berman ed., 2020) (“This complex web of regulatory bodies included some regimes that were state-based, some that were built and maintained by nonstate actors, some that fell within the purview of local authorities and jurisdictional entities, and some that involved international courts, tribunals, arbitral bodies, and regulatory organizations. Global legal pluralism provided scholars with a theoretical lens for conceptualizing the complex interactions among these various legal and quasi-legal entities.”); TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015); FRANCIS SNYDER, *THE EU, THE WTO AND CHINA: LEGAL PLURALISM AND INTERNATIONAL TRADE REGULATION* 29–34 (2010); Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005).

will not practice in small or solo practices in the New England market towns of a bygone day that seem to be the anticipated destination of the early recipients of Langdell's training in thinking like a lawyer;<sup>24</sup> rather, they will be practicing in a fluid, multijurisdictional setting even if they stay close to home. From the outset, they should anticipate that "thinking like a lawyer" must mean more than legal analysis as practiced within one closed legal system, and to achieve that, the "piling up" of examples discussed by Llewellyn matters.

### III. Anchoring U.S. Civil Procedure for Foreign Students: The Chinese Drywall Litigation Case Study

To provide a concrete instance that explains the foundational student question ("why does any of this matter to me?"), I refer throughout the course to a major multidistrict litigation (MDL) involving the sale of defective Chinese drywall into the United States in the years following Hurricane Katrina.<sup>25</sup> Given the booming real estate economy of the mid-2000s, traditional domestic sources of drywall were unable to meet demand when the destruction wrought by Katrina created additional need, creating an opportunity for Chinese manufacturers.

The Chinese manufacturers accessed the U.S. market directly from China. They did not use middlemen distributors but sold directly to U.S. commercial customers. On the other hand, they seem never to have had either employees or offices on the ground in the United States. The sales of Chinese drywall were substantial, hundreds of millions of square feet, and these materials were used in both new construction and home rebuilding across the southeastern United States.<sup>26</sup>

Unfortunately, the drywall seems to have been defective. Due, it appears, to the use of inappropriate materials in its fabrication, much of the Chinese drywall sold into the United States was contaminated with high levels of sulfur. This sulfur led to emissions from the drywall that made the homes where it was used, in at least some cases, uninhabitable. Massive litigation commenced in the United States, including multiple class actions as well as numerous standalone actions.

The various Chinese defendants were properly served. Default judgments were entered. Some defendants—claiming that they had not understood what it meant to receive service because they were unfamiliar with U.S. litigation practice—later appeared and sought to lift the default. After much back and forth, the defaults were sustained, personal jurisdiction was affirmed, classes

24. Ray Worthy Campbell, *The End of Law Schools: Legal Education in the Era of Legal Service Businesses*, 85 *MISS. L.J.* 1, 52-3 (2016). For a history and discussion of Langdell's innovations at Harvard generally, see BRUCE A. KIMBALL, *THE INCEPTION OF MODERN PROFESSIONAL EDUCATION: C.C. LANGDELL*, 1826-1906, at 130-232 (2009).

25. *In re Chinese-Manufactured Drywall Products Liab. Litig.*, No. 2:09-MD-02047 (E.D. La, filed June 15, 2009) Civil Action MDL No. 2047, <http://www.laed.uscourts.gov/case-information/mdl-mass-class-action/drywall> (last visited Feb. 17, 2023).

26. The course of the litigation is discussed in some detail in Ray Worthy Campbell & Ellen Clear Campbell, *Clash of Systems: Discovery in U.S. Litigation Involving Chinese Defendants*, 4 *PEKING U. TRANSNAT'L L. REV.* 129, 157-163 (2016).

were certified, and hundreds of millions of dollars paid in settlement. Even today, some of the actions not included in the settlement continue.

The Chinese drywall litigation provides a very relatable path to a number of relevant subject areas. First, for those thinking that knowing Chinese law is enough for someone expecting to spend a career within China serving Chinese clients, it demonstrates the broad reach of U.S. law. Domestic Chinese companies with no U.S. staff and no U.S. office but with active, direct sales efforts aimed at specific states—which describes innumerable companies in China’s “we make and the world takes” export economy—found themselves subject to U.S. personal jurisdiction and all that entails. The very existence of the litigation, coupled with a recognition that some advance legal planning might have enabled different outcomes, serves to validate the relevance of a transnational perspective.

It also exposes the students to a core, pervasive difference in the U.S. system—we use the *ex post facto* vehicle of litigation not just to obtain compensation but to provide regulatory bite. No ministry banned Chinese drywall from the U.S. market or imposed any fines or penalties against the manufacturers. Rather, setting aside litigation sanctions, litigation damages constituted the entire regulatory response. As discussed below, one of my goals is to have students understand that litigation systems can differ not just in particulars (say, the rules of evidence or who cross-examines witnesses) but also in the role the litigation system plays in the governmental structure. The United States uses litigation for purposes that other countries accomplish in different ways, and any sophisticated comparative understanding needs to grasp that.

Besides the overall regulatory issue, the Chinese drywall cases provide a way to illustrate in a highly relevant context many specific doctrines. Personal jurisdiction, of course, provides the hook for bringing these foreign companies before the court. The case also provides an example of application of two different kinds of long-arm statutes, with one of them, which examined “doing business” in the forum state, a fairly good example of the need to supplement any direct statutory analysis with a careful review of the interpretation given the statute by the courts.

The case also provides a small tutorial on the importance of responding intelligently when service is made. The defendants in the Chinese drywall cases claimed that they did not willfully ignore the U.S. proceeding in the expectation that they could safely disregard any judgment as unenforceable, but rather just failed to understand the summons. Without knowing what was truly the case, it provides an example of a case in which the court’s reach proved potent enough and failure to respond had important consequences.

Other issues examined through the many decisions at multiple levels in the litigation include entry of a default judgment, an effort to have a default

set aside,<sup>27</sup> a 1292(b) appeal issue,<sup>28</sup> a class-action certification and settlement approval,<sup>29</sup> multidistrict litigation, and transnational choice of law issues.

Of particular interest is the case's handling of transnational discovery issues. One aspect of post-colonial China's concerns about sovereignty is that it forbids the operation of any other legal system on Chinese soil,<sup>30</sup> which means that U.S. discovery within China is difficult, even though Chinese defendants can be and have been sanctioned for failure to comply. In the Chinese drywall cases the early efforts at discovery were colorfully described as having "degenerated into 'chaos and old night'" by the presiding MDL judge.<sup>31</sup> The problem was addressed by having discovery depositions go forward in Hong Kong, with the U.S. presiding judge in attendance to resolve disputes and objections. The case does not directly involve the attempted enforcement of a U.S. judgment overseas, but the anticipated unenforceability of any U.S. judgment in China does play a role in the court's evaluation of the class settlement.

The Chinese drywall materials seemed effective at making U.S. litigation relatable, and so I looked for other cases in which Chinese parties ended up in U.S. courts. For some of the matters not covered in the Chinese drywall litigation I turn to another transnational business dispute for a different example. *Glob. Material Techs., Inc. v. Dazheng Metal Fibre Co.*<sup>32</sup> is used to illustrate recognition in the United States of a Chinese civil money damages judgment, transnational application of preclusion doctrine, and sanctions for intentional noncompliance with discovery. Alienage jurisdiction is addressed through another case involving an investor from China.<sup>33</sup>

I have found that the use of actual recent cases helps make the course more real to my students and shifts legal pluralism from an academic theory to something they realize they need to be acutely aware of to be effective lawyers. These cases displace some of the cases more commonly used in U.S. texts for the same doctrine, but only some cases in textbooks are leading cases that establish law while others are just illustrative of the doctrine as applied. Even

27. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 742 F.3d 576 (5th Cir. 2014).
28. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, MDL No. 2047, 2012 WL 4928869 (E.D. La. Oct. 16, 2012).
29. *In re Chinese-Manufactured Drywall Products Liab. Litig.*, 424 F. Supp. 3d 456 (E.D. La. 2020).
30. In taking this approach, China is not unique. GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 963 (7th ed., 2022) ("Civil law nations historically regarded the taking of evidence as a judicial function, requiring the supervision of local judges in order to safeguard nationals and others against undue coercion and to ensure the observance of relevant privileges. In these states, discovery without local judicial supervision was regarded as an infringement of national judicial sovereignty.")
31. *In re Chinese Manufactured Drywall Products Liab. Litig.*, No. 2:09-MD-02047, at 5 (E.D. La. Sep. 9, 2011) (order & reasons resolving personal jurisdiction discovery).
32. No. 12 CV 1851, 2016 WL 4765689 (N.D. Ill. Sep. 13, 2016).
33. *Hebei Tiankai Wood & Land Constr. Ltd. v. Chen*, 348 F. Supp. 3d 198 (E.D.N.Y. 2018).

the leading cases, in some instances, seem not all that essential if one has moved on from the Langdellian conception that we should study cases as a scientist studies the development of a phylum in a laboratory.<sup>34</sup> Immediacy and reliability have value. Abstract issues, such as whether the United States should have the power to assert its law through personal jurisdiction over companies that never entered U.S. territory directly, become more worth arguing about when the parties look a lot like companies that could be future clients. It also, I hope, teaches by clear example that these concerns arising from legal pluralism are issues that need to be thought through just as a matter of competently representing a domestic Chinese client.

#### IV. Coverage Choices

Any course design involves choice. Not everything can be covered. This takes on particular importance in designing a course for students who will not practice in the system taught but who nonetheless are going to need a sophisticated and nuanced understanding of that system. My course and accompanying book address that by focusing throughout on ways in which the U.S. system is structurally exceptional, on more specific doctrines in which it is exceptional, and on issues likely to be of particular interest in transnational practice. Issues of culture and cognitive styles are also addressed directly.

##### *A. Ex Post Facto Regulation—Litigation Systems Do Not All Perform the Same Functions Within a Governmental Structure*

Governmental systems differ, and component parts of those governmental systems, while often showing a surface similarity, serve remarkably different functions in different systems. For example, while many countries are some form of parliamentary democracies, the role actually played by the legislative body differs significantly across systems.

Litigation is one of those functions that, while superficially similar across systems, can serve remarkably different functions. In this regard, the United States is exceptional. All litigation systems resolve disputes between parties. In the United States, however, litigation takes on much of the regulatory burden that in other systems is placed elsewhere.<sup>35</sup>

34. If, in fact, even Langdell ever went as far as that literal comparison. Christopher Columbus Langdell, *Address to the Harvard Law School Association at the Quarter-Millennial Celebration of Harvard University* (Nov. 5, 1886), in *Harvard Celebration Speeches*, 3 L. Q. REV. 118, 124 (1887) (“[L]aw is science, and . . . all the materials of that science are contained in printed books.”). *But see* KIMBALL, *supra* note 24, at 349–51 (noting that even though the record shows that Langdell disciples did compare the study of law to the study of a hard science, the written record is less than clear that Langdell actually held that view).
35. *See* SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES* 8 (2010) (“[I]mplementation of regulatory commands through private lawsuits can effectively encourage and induce compliance behavior by the regulated population . . . .”). *See also* Alexandra D. Lahav, *The Roles of Litigation in American Democracy*, 65 EMORY L.J. 1657, 1660 (2016) (“Litigation is often conflated with dispute resolution and law declaration (or adjudication), but it has its own independent contribution to make to the American system

Understanding the U.S. “ex post facto” regulatory system is essential to any nuanced and sophisticated understanding of its civil procedure system. As Samuel Issacharoff has argued:

What is distinctive about the United States is the extent to which we regulate not entry but consequences. There is a significant difference between an unregulated market and a deregulated market featuring low entry costs but careful scrutiny after the fact.<sup>36</sup>

In some cases, as Sean Farhang has explored in depth, U.S. statutory schemes have been designed in reliance on private litigation as the means of enforcement.<sup>37</sup> In other settings, such as the seeking of recovery with regard to product liability or a mass tort, the common-law tradition, often at the state level, has used deterrence made real through litigation as a principal regulatory tool.

Many aspects of the U.S. litigation system (say, class actions) can be fully understood only if this regulatory function is understood. The practical consequence of other aspects (say, the reach of personal jurisdiction) comes fully into focus only if one realizes that our regulatory scheme substantially depends on courts.

As one leading civil procedure scholar has summarized it:

The efforts of public interest attorneys go well beyond the classic civil rights and legislative reapportionment battles. Asbestos is held in check by the private bar. Tobacco is cabined by the private bar. Defective pharmaceuticals such as diet drugs, Vioxx, and other products are removed from our midst. Illicit financial and market practices of companies such as Enron are halted by the private bar. Today, a number of attempts are underway to hold accountable some of those responsible for the recent financial crisis. Fewer Americans die or become incapacitated by defective products or toxic substances, and important social and economic policies are enforced because of the work of these lawyers.<sup>38</sup>

This can seem, to put it mildly, to be a strange approach to those who come from systems where regulation is carried out principally through government ministries. The importance of ex post facto regulation has not been, in my experience, an insight that many Chinese students come to on their own. To make sure this foundational point is not overlooked, I address it directly.

of government.”).

36. Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 377 (2007).

37. See FARHANG, *supra* note 35.

38. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 299–300 (2013). See also Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997) (“Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress . . .”).

There are reasons regulation by litigation can be a good approach. Most notably, when combined with diminished *ex ante* regulation, it allows companies and individuals more initial freedom to act, which encourages innovation. In the United States, for example, issuing stock on a public market requires remarkably little prior governmental approval; in other countries, companies may have to wait their turn in queue for advance governmental approval that might not be quickly forthcoming. There are also reasons why regulation by litigation can be a bad idea. Courts can be inefficient and sometimes inaccurate vehicles for creating regulatory policy, with access to justice issues exacerbating those concerns.<sup>39</sup> Naming it in class allows this discussion.

Getting into the functional difference litigation plays in the U.S. system also casts the comparative discussion in a more well-rounded light. Litigation in the United States serves functions that in other systems are served by government ministries and regulators. At a governmental systems level, it is incomplete and naïve to stop the comparative look at just comparative litigation systems. A complete comparative look would have to take into account the larger picture and acknowledge that the courts are one part of a larger governmental process.

Understanding how courts function in the overall government regulatory scheme is an essential element of teaching from the “inside.” As civil procedure professors are wont to declare, civil procedure is a system, and no student can truly understand one part without understanding how the system works.<sup>40</sup> In a comparative, transnational context, that requires making clear that all systems do not function in the same way, either internally or as part of the larger system of governance.

I address the role of litigation in regulation directly near the outset of the course. As the course proceeds, when topics intersect with this theme—for example, when we consider injunctive remedies or address class actions—we return to it. For example, the only case we read in the class-action section is the Chinese drywall trial court’s approval of the class certification and class settlement for the Taishan defendants.<sup>41</sup> The nearly \$250 million settlement makes visible the regulatory, deterrent effect of U.S. class-action litigation when its application is understood.

*B. Components of a Litigation System Do Not Necessarily Serve  
All the Same Functions in Different Systems*

Another framing idea I address is that within a litigation system, seemingly similar components do not always serve the same purpose. The degree to which

39. See Issacharoff, *supra* note 36, at 387.

40. See, e.g., Clermont *supra* note 4 at 527 (“The first [quandary] the professor meets is how to get into a subject so marked by interdependencies. To understand anything, the student must understand everything. Where to approach a truly seamless web makes for a tricky problem indeed.”).

41. *In re Chinese-Manufactured Drywall Products Liab. Litig.*, 424 F. Supp. 3d 456 (E.D. La. 2020).

this can be true, as well as the degree to which it can be overstated, is familiar to anyone who has taught or thought about civil law versus common-law systems.

In my class, of course, I must directly discuss civil and common law. Obtaining in-depth training in a common-law tradition is one of the major attractions for potential students. Some students who studied law as undergraduates already have a pretty good understanding of the civil law tradition as it exists in China.

It has been widely noted that the stark contrast some would see between civil- and common-law systems can be overblown. In some ways, neither was all that it has been claimed to be to start with, and in other ways there has been a definite convergence.<sup>42</sup>

In time, all of my students will be expert in the civil-law tradition. My primary job thus becomes not to argue the presence or absence of convergence, but to give my students a nuanced understanding of the U.S. system so they can draw their own conclusions about the possibility and wisdom of convergence. As they debate the wisdom, for example, of importing specific features of the U.S. litigation scheme, they can do so with a level of sophistication that takes into account the different roles litigation plays in different governmental systems, and the different roles aspects of a litigation system play within that system.

In that regard, it is perhaps less helpful to argue how managerial modern U.S. judges are or how adversarial civil law advocates might have become, but to look instead at some durable features that, if not altogether exceptional, are at least different. That involves, in part, looking at how some component aspects of the U.S. system must be approached.

#### 1. Decided Cases Perform Different Functions in Different Systems

One area in which common-law systems differ from civil law systems is in the significance of decided cases. Back when professors like the fictional Professor Kingfield reigned supreme over a lecture hall of fully intimidated acolytes, the role of precedent was fully explored. Students were forced to understand the concept of *stare decisis* and to struggle case by case in identifying what is the binding *ratio decidendi* and what is just *obiter dictum*.

42. Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 12 (2001) (“In the next millennium . . . as a consequence of the globalization of complex legal disputes, the differences in American and civil law procedure may well converge in interesting ways. It may turn out that the litany of comparative differences that comparative scholars enumerate does not consist of as great a chasm as they suggest. Moreover, the convergence of American procedural law with civil adjective law has already begun in many aspects of complex civil litigation . . . [where] this convergence is nascent, if not already evident.”); Scott Dodson & James M. Klebba, *Global Civil Procedure Trends in the Twenty-First Century*, 34 B.C. INT’L & COMP. L. REV. 1, 2 (2011) (“[W]e are convinced that ‘American exceptionalism’ is diminishing in some, if not most, areas of civil procedure. To be sure, the United States is still exceptionalist. But we see trends in both U.S. procedure norms and foreign norms that suggest convergence.”); Guy I. Seidman, *The New Comparative Civil Procedure*, in THE DYNAMISM OF CIVIL PROCEDURE—GLOBAL TRENDS AND DEVELOPMENTS 19, 20 (Colin B. Picker & Guy I. Seidman eds., 2015) (“There is significant agreement that for all parts of comparative law, including comparative civil procedure, the two arch-models of common and civil law are drawing closer.”).

Today, that is not necessarily the case. As Larry Solum observes:

Nowadays, depending on which law school you attend and which set of instructors you are assigned, it is perfectly conceivable that you might make it all the way to your second year, with only a vague sense of what the difference between “holding” and “dictum” really is. This is not an accident. The old-fashioned, but still powerful, distinction between the holding of a case, which has precedential effect, and mere obiter dicta, which have only persuasive effect, does not easily fit in the post-realist landscape of contemporary American legal thought.<sup>43</sup>

In part because there are settings in which the formalist idea of precedent still matters, and in larger part because understanding the “pure” version of precedent is part of why civil law students take common-law courses, I give precedent its due. Students are taken through the holding-versus-dictum dance over and over again.

I try to do a bit more than that, though. I use holdings as a way to introduce these foreign students to Larry Solum’s excellent *Legal Theory Lexicon* blog. The entry on holdings gives a sophisticated view of different ways to address holdings beyond the traditional formalist view.<sup>44</sup> The Solum blog post serves not only to give them a perspective on current legal thinking about precedent but also to introduce them to a resource of great comparative value for those from civil law systems. I also take a glancing look at the “adjudicative model of precedent” adopted by several states and the Ninth Circuit, which adopts a broader version of what is a holding, so as to include within binding precedent discussions of law in a case that are not strictly necessary to the holding.<sup>45</sup> This allows us to address the importance of guidance in a common-law system, and also lets us talk a bit about whether courts should engage in something that verges toward a legislative function. In both cases, the goal is to defetishize the idea of “what is a holding” and place the issue in a broader functional context. Even in a system that makes law through case holdings, how that is done and how that should be done by courts remain topics of active discussion.

As the course goes on, we have ample opportunity to observe precedent in the wild. Students see holdings and their rules abandoned, extended, qualified, distinguished, limited, and ignored. We have occasion to discuss whether statements in cases should be treated as equivalent to statutory language or as something different.<sup>46</sup> We talk about the importance of rules (following Frederick Schauer)<sup>47</sup> and why, given the selection effect, it only seems that each case they encounter could go either way.

43. Lawrence B. Solum, *Legal Theory Lexicon 005: Holdings*, LEGAL THEORY LEXICON (Jan. 29, 2023), [https://lsolum.typepad.com/legal\\_theory\\_lexicon/2003/10/legal\\_theory\\_lc\\_2.html](https://lsolum.typepad.com/legal_theory_lexicon/2003/10/legal_theory_lc_2.html).

44. *Id.*

45. See Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. 1551 (2020).

46. *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1033 (2021) (Alito concurring) (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)).

47. FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING

This may seem like an unnecessary dive into esoteric waters. For my students and other students not likely to practice in the United States, a theoretical understanding of the U.S. system of case precedent is exactly what they came for and exactly what they most need. Of all the tasks they might be given based on their supposed expertise in American law, explaining the import of a U.S. court decision is near the top of the list, and they should be able to do that with a sophistication that includes, but goes beyond, mechanical application of traditional ideas of *stare decisis*.

By the second year of their studies, my students will become thoroughly familiar with the Chinese Guiding Case system.<sup>48</sup> Understanding to what degree this system resembles and does not resemble the Anglo-American concept of binding precedent requires, at a minimum, a nuanced understanding of precedent and theories about precedent. I view my role as providing that understanding.

## 2. Understanding the Different Functions of Case Law, in Turn, Affects How Statutes Must Be Approached

The original setting of the common law—whole bodies of law exclusively created and defined by cases—has largely passed from the earth. It no longer represents cases all the way down. Rather, at some point beneath the court’s body of case law, there is a statute (sometimes a uniform code derived from case law) or a constitutional provision. While the courts should be faithful to the statute or constitutional text, the way forward in applying the code is not always obvious or predetermined.

In some settings, judicial interstitial gap-filling really becomes the law, which is developed on a common-law basis.<sup>49</sup> The Sherman Antitrust Act, for example, is a short document, but the body of antitrust law built upon it is vast.<sup>50</sup> The same could be said for the constitutional provisions referencing due process of law.

At the statutory level, Congress and other legislative bodies can confirm or pull down these interpretive castles with a revision of the statute. A court’s interpretation of a statute can be answered with new statutory language. We explore this a bit when we get to supplemental jurisdiction and see how Justice Scalia’s opinion in *Finley v. United States*<sup>51</sup> was quickly “overridden” by statute.<sup>52</sup> For students who come from a system in which the code itself is the beginning

(2012).

48. See generally Susan Finder, *China’s Evolving Case Law System in Practice*, 9 TSINGHUA CHINA L. REV. 245 (2017); Mark Jia, *Chinese Common Law? Guiding Cases and Judicial Reform*, 129 HARV. L. REV. 2213 (2016).

49. See Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985) (exploring common-law rule making function of judicial review).

50. See note, *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 HARV. L. REV. 2557, 2569 (2020) (“Even though federal antitrust is based in congressionally passed statutes, the judiciary’s interpretations of those statutes have shaped the law far more than has any statutory text.”).

51. 490 U.S. 545 (1989).

52. 28 U.S.C. § 1367.

and end of the actual law, a nuanced understanding of the common law must include a sophisticated understanding of the interplay of cases and statutes.

While a U.S. lawyer should be able to engage in statutory analysis of a statute, in many instances prior judicial application of the law changes the scope of what readings are possible. If the statute has been interpreted already by the highest court in the jurisdiction in which it arose, on the point relevant to the current matter, the statute means what the court says it means. Traditional maxims of statutory analysis, legislative history, agency interpretations, and even common sense fall aside in light of the judicial interpretation. If the holding is squarely on point, showing up with a preferred theory of statutory interpretation is like showing up with the big artillery at the scene of a battle that is long over. Even if the holding is not squarely on point, any arguments will refer to the case law as well as to the statute itself. The need to turn to the cases can be obscured by theories of statutory interpretation, which often seem to assume a virgin statute without case law.<sup>53</sup> While the professors writing about statutory interpretation obviously realize the role of judicial interpretation, students from a civil law jurisdiction may not immediately grasp that given background fact.

What this means for transnational students is that they need to be taught that a necessary step in determining what a statute means is checking to see what meaning the authoritative courts have given it. Arguments on statutory interpretation often turn on reading of case precedent. In line with Llewellyn's maxim, it is not enough to say this; the concrete examples need to pile up.

In our course, one example we turn to is the Florida long-arm statute as invoked against the Chinese companies selling drywall to Florida customers. The court relied upon a provision allowing out-of-state service when the defendant was "[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state."<sup>54</sup> In terms of statutory interpretation, one can argue whether companies that have never sent an employee into the state, have no offices there, and make no products there can be said to satisfy the "*in this state*" requirement of the statute. On the other hand, when the precedents interpreting that language are taken into account, it was sufficiently clear to the Fifth Circuit that deriving a relatively high percentage of its overall business from sales to many consumers in the state was enough to be "doing business" in the state.<sup>55</sup>

53. See, e.g., William N. Eskridge, Jr., & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 321 (1989) ("When practitioners give advice to clients about what a statute means, their approach is usually eclectic: They look at the text of the relevant statutory provisions, any legislative history that is available, the context in which the legislation was enacted, the overall legal landscape, and the lessons of common sense and good policy. But when law professors talk about statutory interpretation, they tend to posit a more abstract, 'grand' theory that privileges one or another of these approaches as 'foundational.'"). Neither group, apparently, looks at case law.

54. FLA. STAT. § 48.193(1)(a)1 (2016).

55. *In re Chinese-Manufactured Drywall Products Liab. Litig.*, 753 F.3d 521, 535-39 (5th Cir. 2014).

This interplay should help students understand some of the subtleties of the U.S. federal system. It is not as simple as legislatures make law and courts interpret law. It is not as simple as interpreting a never-before-interpreted statute. Given that many of the statutes involved are state laws, where a state Supreme Court's interpretation is binding on federal courts, this also helps to illuminate aspects of federalism.

*C. Functions of a System Are Delivered in Different Ways in Different Systems (or Not)*

1. Factual Development

The U.S. discovery system is exceptional, and other countries for the most part do not deputize private lawyers with the extensive investigatory powers civil litigants in the United States possess, something the U.S. system does in support of ex post facto regulation.<sup>56</sup> One leading American civil procedure scholar stated: "The most distinctive feature of American civil procedure is the adversarial acquisition of information under the process known as discovery."<sup>57</sup>

At the same time, going deep into many of the discovery cases featured in regular U.S. civil procedure textbooks seemed a poor investment of class time. Many of those cases are inefficient in transmitting understanding of how rules are applied. More than that, a competent civil litigator facing discovery in the United States has problems not usually addressed in leading cases (for example, how to draft an interrogatory so the answer is actually useful in the litigation, how to handle a difficult witness at a deposition, or how to respond ethically at an acceptable cost).

I am not teaching a U.S. skills course, so this part of the course is covered more at a 60,000-foot level. Relatively few cases are assigned. We cover the various tools of discovery and the rules related to them in a survey format. We do spend time on privilege issues and examine a bit more than a U.S. course might whether and when legal services professionals from China, who are subject to a quite different authorized practice of law and licensing scheme than in the United States, will be allowed to assert attorney-client or work product privilege in U.S. courts. Instead, we focus on the role discovery plays in U.S.

56. Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997) ("We should keep clearly in mind that discovery is the American alternative to the administrative state . . . every day, hundreds of American lawyers caution their clients that an unlawful course of conduct will be accomplished by serious risk of exposure at the hands of some hundreds of thousands of lawyers, each armed with a subpoena power by which misdeeds can be uncovered. Unless corresponding new powers are conferred on public officers, constricting discovery would diminish disincentives for lawless behavior across a wide spectrum of forbidden conduct.").

57. SAMUEL ISSACHAROFF, CIVIL PROCEDURE 49 (2022).

litigation. In a world of vanishing trials,<sup>58</sup> discovery is often where success or failure in the case is decided.<sup>59</sup>

In this regard, access to discovery even when the defendant is outside the U.S. borders is necessary to the success of an ex post facto regulatory regime. As one distinguished judge has noted:

Congress has elected to use the private suit, private attorneys-general as an enforcement mechanism for the anti-trust laws, the securities laws, environmental law, civil rights, and more. In the main, the plaintiff in these suits must discover evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.<sup>60</sup>

We also touch upon the importance of complying ethically with civil discovery demands, including discovery into the existence of jurisdiction. Those not inured to U.S. discovery sometimes find it surprising and even unbelievable that they would be required to provide the information that discovery requires them to provide.<sup>61</sup> To help frame the importance of getting past surprise and shock, we talk about hold orders, which in many instances domestic Chinese lawyers should implement before foreign firms are even retained. One of our transnational cases involves the destruction of outdated computers with relevant files on them, which was read as intentional noncompliance, leading to an entry of a default judgment against the Chinese firm.<sup>62</sup>

In short, I focus on the structural role of pretrial discovery in U.S. practice and try to drive home the potentially severe costs of naïve but intentional non-compliance with discovery burdens. We also discuss—in part to counter outdated perceptions that U.S. discovery rages out of any control—how changes in both

58. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 459 (2004) (“The portion of federal civil cases resolved by trial fell from 11.5 percent in 1962 to 1.8 percent in 2002, continuing a long historic decline.”).
59. Richard A. Nagareda, *1938 All Over Again? Pre-Trial as Trial in Complex Litigation*, 60 DEPAUL L. REV. 647, 649 (2011) (“[T]he pretrial process effectively functions as the trial in the overwhelming majority of civil lawsuits.”); Steven C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 636–7 (“When fewer than one in twenty filed cases reach trial, one can no longer accurately refer to the federal district courts as ‘trial’ courts or their judges as ‘trial’ judges . . . . The picture emerging from these statistics suggests that today’s federal judges have moved their focus away from trial to earlier stages of litigation.”); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 62 (1995) (“The dramatic increase in caseload and the accompanying pressure to dispose of cases more quickly has helped to transform civil litigation from a trial system to a system focused substantially on pretrial.”).
60. Patrick Higginbotham, *Foreword*, 49 ALA. L. REV. 1, 4–5 (1997).
61. See David W. Ogden & Sarah G. Rapawy, *Discovery in Transnational Litigation: Procedures and Procedural Issues* 1 (paper presented at ABA Business Law Spring Section Meeting, Mar. 16, 2007) (“Many outside the U.S. consequently view U.S. discovery as an unrestrained ‘fishing expedition,’ and international discovery can give rise to significant tension.”).
62. *Global Material Techs. v. Dahzeng Metal Fibre Co.*, No. 12-CV-01851, 2016 WL 4765689, at \*3, 11 (N.D. Ill. Sept. 13, 2016).

the Federal Rules of Civil Procedure and judicial practice have substantially contained excessive discovery.<sup>63</sup>

## 2. Trial

Trial is another interesting point of variation. My students are familiar with the caricatures of American trials that are portrayed in TV dramas such as *The Good Wife*. They come to class innately understanding that in many cases U.S. trials involve a good story and that the curious feature of juries can play a role.

As is obvious, any presentation of U.S. civil procedure with even a latent comparative element needs to explore the issue of juries—how they arose, what role they play, when they are available, justifications for the practice, and criticisms of the practice. My students should be conversant with the facts of juries.

Perhaps less obvious, but equally important, is the need to impress upon the students the way that the possibility of a jury trial changes the way lawyers think about a case. Students need to be aware how much the search for a compelling narrative drives U.S. litigation practice. While U.S. trial lawyers know that the record must include those facts essential to their case, the good ones are equally aware that those facts need to fit together into a moving tale. As one author has explained, “Trial lawyers have always agreed that the only way to succeed with a jury is to tell a story.”<sup>64</sup>

A leading trial advocacy guide makes the same point:

Each party to a trial has the opportunity to tell a story, albeit through the fairly stilted devices of jury address, direct and cross-examination, and introduction of evidence. The framework for the stories—or their grammar—is set by the rules of procedure and evidence. The conclusion of the stories—the end to which they are directed—is controlled by the elements of the applicable substantive law. The content of the stories—their plot and *mise-en-scène*—is governed, of course, by the truth, or at least by so much of the truth as is available to the advocate. Thereafter, the party who succeeds in telling the most persuasive story should win.<sup>65</sup>

This is not to say that issues such as the not-always-obvious line between statutes that give a right to a jury and those that do not, or the problems that arise when jury and nonjury issues are raised in the same case, and so on, are not interesting. They are. That said, understanding that U.S. trials are only partly about assembling evidence and otherwise significantly about building

63. See *Clash of Systems*, *supra* note 26, at 140 (“The changed rules, reinforced with more active judicial oversight, bring the U.S. system closer to an also changing international norm that has seen more pretrial investigation allowed in other jurisdictions. In fact, the claim has been made that under current rules the U.S. system may allow less pretrial discovery than would be allowed under the rules requiring pretrial disclosure in the United Kingdom.”).

64. Stephanie Kane, *Narrative, The Essential Trial Strategy*, 34(4) LITIGATION 52, 52 (2008).

65. STEVE LUBET & J.C. LORE, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE, 13 (6th ed. 2020).

a compelling narrative is an important step toward understanding the U.S. litigation system.

#### *D. Doctrinal Areas that Might Matter More to Non-U.S. Lawyers and Clients*

Certain issues matter especially to non-U.S. lawyers. Some of these are segments that will be important in any domestic U.S. course, although my approach may be framed a bit differently. Others are topics that, if addressed in law school at all, will be addressed in an upper-level transnational litigation course. The goal, again, is to help students see how issues related to U.S. civil procedure can matter to their careers and their understanding of litigation systems.

##### i. Personal Jurisdiction

Personal jurisdiction is a mainstay of any civil procedure course, but it takes on special significance in a course aimed at non-U.S. students. First, personal jurisdiction provides the hook that pulls foreign defendants into U.S. courts. Not just litigators but those advising clients on matters ranging from export sales to personal travel need a clear understanding. Second, the U.S. approach differs from international norms in a number of ways, attaching jurisdictional concerns less to effects than to “purposeful availment” of links to the political subdivisions of states. Finally, a deep dive into personal jurisdiction allows exploration of basic concepts like due process and sovereignty.

That said, in most respects I teach personal jurisdiction as I would teach it to domestic students, with only a couple of variations. I strive to have them grasp U.S. personal jurisdiction from the inside.

I do spend more time focusing on how personal jurisdiction provides the tool for bringing foreign defendants into U.S. courts. And, perhaps more than I might in the United States, I cover how some justices of the U.S. Supreme Court have set forth a path for avoiding U.S. personal jurisdiction and thereby bypassing U.S. after-the-fact regulation. Part II-A of Justice O’Connor’s opinion in *Asahi Metal Indus. Co. v. Super. Ct.*<sup>66</sup> and Justice Kennedy’s plurality opinion in *J. McIntyre Mach., Ltd. v. Nicastro*<sup>67</sup> provide tutorials for how these foreign defendants might have accessed the U.S. market while minimizing their risk of facing ex post facto regulation.<sup>68</sup> The net, of course, is that the Supreme Court has sometimes seemed eager to excuse foreign companies from after-the-fact regulatory burdens to which U.S. companies are subject at least somewhere in the country.

From a comparative perspective, I do discuss how this approach, which is intently focused on sales efforts at the level of individual states, differs from the approach more common worldwide, which often treats failure of a product within a jurisdiction as the commission of a tort within the jurisdiction, allowing

66. 480 U.S. 102, 108–13 (1987).

67. 564 U.S. 873, 877–87 (2011).

68. For a more general discussion of how the Supreme Court’s sovereignty approach limits regulating foreign actors through ex post facto litigation, see Ray Worthy Campbell, *Personal Jurisdiction and National Sovereignty*, 77 WASH. & LEE L. REV. 97 (2020).

jurisdiction. We explore how, beyond that, United States courts will require purposeful availment at least at a national level and sometimes seems to require purposeful availment at a state-by-state level.

The importance of states in the analysis, while curious in some ways, does allow and require an in-depth discussion of federalism. Understanding why state boundaries matter, as they do, helps to unpack the relationships between the federal government and states, and among states. My students are no more likely to come into class understanding U.S. states and their roles in government than U.S. students would be to come into law school understanding not just provincial governance in China but also the complex relationship between the Chinese Communist Party and state actors. By the end of the personal jurisdiction and subject matter jurisdiction modules, they should be up the curve on U.S. federalism issues.

Personal jurisdiction also allows an exploration of the common-law process over a long period of time. The path from *Pennoyer v. Neff*<sup>69</sup> to *International Shoe Co. v. Washington*<sup>70</sup> to the most current cases is neither clear nor direct. Different core rationales—due process and personal liberty versus state sovereignty—are highlighted in different cases. In some important cases, the Court does not speak with one voice or make things clear, but requires sorting through a multiplicity of viewpoints, some of which have binding effect and some of which do not. As part of tracking the common-law process, we explore how the reach of U.S. personal jurisdiction has narrowed in recent decades, taking the U.S. from being a country with arguably exorbitant assertion of jurisdiction to one that declines jurisdiction where other countries would assert it.

I cannot make the U.S. approach to personal jurisdiction easy to grasp. What I can do is lead the students through the cases, piling up example after example of courts at work, so they can see the common-law process play out.

Our capstone case for this section is the personal jurisdiction decision in the Chinese drywall litigation. This is not the most recent or the most important case we cover, but it provides an example of an appellate court working through jurisdictional issues in a workmanlike way, addressing both the long-arm statutes and the constitutional issues. It gives them a sense of how lower courts address the issue, a sense that can be hard to grasp from the Supreme Court cases themselves.

The concern of U.S. judges with state sovereignty leads naturally to a discussion of sovereignty in the international context as well as the concept of polycentric governance. One reason U.S. civil procedure has special importance in a transnational or comparative setting is that we have long experience with polycentric governance,<sup>71</sup> which is increasingly the case in a globalized world

69. 95 U.S. 714 (1877).

70. 326 U.S. 310 (1945).

71. See generally, Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369 (2008); Vincent Ostrom & Barbara Allen, *THE POLITICAL*

in which rules from other Westphalian sovereigns, international treaties, and soft law can all come to bear.

## 2. *Forum Non Conveniens*

A domestic U.S. lawyer with a near-exclusive federal court practice can go through a lifetime of active domestic litigation and never make or respond to a serious *forum non conveniens* motion. The venue transfer statutes<sup>72</sup> effectively displace *forum non conveniens* arguments within the federal system. *Forum non conveniens* may still matter in state settings where the other forum is in a different state's system, but that is not a core area for a course limited to federal civil procedure. Despite the fact that *Piper Aircraft Co. v. Reyno*<sup>73</sup> is a fantastic example of litigators' using the tools available to them, step by step, to get a complete victory on procedural grounds, it would not be worth much time in a domestic course.

That changes in a transnational setting. The statutory venue transfer tools do not work in international settings. As a result, *forum non conveniens* becomes the only available tool for a proper but arguably inconvenient forum. Data show that when foreign plaintiffs are involved, courts are more willing to grant *forum non conveniens* motions.<sup>74</sup>

## 3. Service Abroad

In our class I go a bit deeper into international service of process and not as deep into local service of process compared with many domestic civil procedure courses. One reason for this is obvious: Since my students largely will represent non-U.S. clients, understanding the process under which their clients may be served has practical application. By the same token, the question of whether a sixteen-year-old teenager visiting the defendant's home for a month is an appropriate recipient of hand service will be less important.

It also gives an opportunity to explore how international treaties bear on issues such as service of process. We read the *Water Splash, Inc. v. Menon*<sup>75</sup> case, which allows service by mail on an international defendant, then turn to practice in China, where service by mail is not allowed under a reservation to the Hague Service Convention.<sup>76</sup> For transnational lawyers, getting a feel for how treaties and reservations to treaties fit into the polycentric nature of transnational practice is part of the "piling up" of specific instances that Karl Llewellyn wrote about. Transnational lawyers need to be aware that the answer for something

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THEORY OF A COMPOUND REPUBLIC: DESIGNING THE AMERICAN EXPERIMENT (3d ed. 2007).

72. 28 U.S.C. §§ 1404, 1406.

73. 454 U.S. 235 (1981).

74. Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1067, 1095 (2015) ("Today, studies by Chris Whytock and Donald Childress suggest that federal courts are more likely than not to grant *forum non conveniens* motions in cases involving foreign plaintiffs or foreign law.").

75. 581 U.S. 271 (2017).

76. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

as basic as making initial service can lie in the intersection of a federal rule of procedure, a state rule of procedure, an international treaty, national exclusions from that treaty, areas where the treaty does not apply, and cases. They need to understand that their craft requires being able to navigate through all that.

#### 4. Enforcement of Non-U.S. Judgments

One topic that is not typically taught in U.S. civil procedure courses involves the enforcement within the United States of judgments from overseas courts. There are several reasons that I choose to teach this. One is that students can easily see that this topic might be extremely relevant to their future practice.

This is not the only reason I choose to teach this, however. This topic opens the door to some broader topics. One is the role of precedent that, while in no way binding, nonetheless has wide influence. The nineteenth-century case of *Hilton v. Guyot*<sup>77</sup> sets out the idea of “comity” (also an important idea for transnational lawyers to encounter), but as a federal common-law decision it has little direct application in the post-*Erie* landscape. Nonetheless, in the absence of more definite rules, it continues to be followed in most states. Exploring why this might be is worth a few minutes.

Beyond *Guyot*, looking at how state law has developed involves a look at another important topic for transnational lawyers: soft law. The ALI Restatements squarely fit the definition of soft law—that is, “measures which are not legally binding but which nevertheless have practical and even legal effects.”<sup>78</sup> The *Restatement of Foreign Relations Law of the United States*, third and fourth, are often cited in this context and allow an exploration of how soft law, developed by nongovernmental bodies, can have important impact.

For money judgments there generally are more direct rules, however, and how that comes to be also allows a bit of exploration of something else foreign lawyers maybe ought to know about: the pervasive influence and reach of uniform model acts in the United States. Most states have enacted either the 1962 or 2005 version of the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA). This again allows an exploration of how something that starts as soft law (a model act) can transform into hard law (the enacted model act) here when a state government enacts some version of the model law.

All of this also allows an illustration of living federalism in U.S. practice. Despite repeated discussion, the United States remains without a national statute for recognition of foreign judgments, leaving it to the states. This allows a discussion of how the standards can be different state by state, requiring a focus on state-level law. It also allows a discussion of how the lack of a federal standard might cause foreign states not acutely aware of how federalism works to think there would be no reciprocity if U.S. judgments are recognized, even though the U.S. states routinely recognize foreign money judgments.

77. 159 U.S. 133 (1895).

78. Francis Snyder, *The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques*, 56 MOD. L. REV. 19, 33 (1993).

Finally, a quick comparative look suggests that the United States is much more receptive to enforcing foreign judgments than China. One of the goals of transnational legal education is to help students consider whether some foreign rules and policies should be imported. I am not an expert in Chinese law and so do not attempt to unpack why China has made the choices it has made, nor do I go in depth in Chinese practice; but we do discuss in class why some U.S. jurisdictions might allow enforcement of foreign judgments without requiring reciprocity.

### 5. Transnational Claim Preclusion

We also take our exploration of claim preclusion into the transnational setting. To what extent can a decision not from a U.S. court lead to preclusive effect? A domestic casebook might look at preclusive effect from a court-like administrative hearing. We look instead at whether a judgment obtained overseas can be used through claim or issue preclusion to control or limit litigation in the United States. Again, by using a case involving a Chinese party,<sup>79</sup> the goal is to make it relevant. Again, the overlay of a state statute, the Illinois version of the Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA), plays a role.

### 6. U.S. Courts Fit Within a Constitutional System That Limits What Courts Can Do

One recurring theme of the course is that the United States federal government is a government of limited powers, with authority and sovereignty split between the states and the federal government, and among the various branches of state and federal governments. This, of course, is a core element of any domestic course. It matters even more, I think, in the transnational setting because the core notions are unfamiliar and not always easy to grasp. We approach it, as a U.S. course would, both through explorations of sovereignty in the personal jurisdiction section and in limitations on federal judicial power in the subject matter jurisdiction section.

#### *E. Outside the National System*

##### 1. Court Systems May Be the Wrong Way Altogether to Solve Problems

Setting aside those professors who have framed their course around dispute resolution generally, the domestic civil procedure course may give short shrift to active consideration of alternative dispute resolution or taking advantage of the law market to choose a more favorable national forum. For a course that starts with the proposition that multiple legal systems apply and multiple forums for resolution of disputes exist, this becomes a more critical issue.

Unlike U.S. courses, which typically put this at the end of the casebook and the end of the course, I address it near the very beginning. The issue is framed

79. *Global Material Technologies, Inc. v. Dazheng Metal Fibre Co., Ltd.*, No. 12-CV-01851, 2015 WL 1977527, at 8-11 (N.D. Ill. May 1, 2015).

in terms of forum selection clauses, which any transnational deal-maker will recognize as an essential part of any transnational contract. I use an excerpt from an international transactions textbook,<sup>80</sup> which not only describes all the available ADR tools but stresses that forum selection clauses should be selected not rotely but in light of the particular circumstances of any contract. This again stresses the theme of legal pluralism, from the nuts-and-bolts perspective of transnational litigation and deal-making, which happens to be a setting that even my nonlitigation-bound students can see themselves in.

This also allows me to pound home another recurrent theme, which is that lawyers are first and foremost problem-solvers, and that the tools to solve problems are not limited by legal doctrine. Starting with ADR helps frame this. Back when I was in practice, the good lawyers I knew at least considered all the other alternatives before committing to court processes. It is my belief that looking broadly at ways to solve problems is especially important in the polycentric transnational environment, and so we come back to that often.

## 2. American History and Culture

In a domestic course, most students can be assumed to have at least a cursory knowledge of American history. They might not be able to discuss the ins and outs of the politics surrounding the New Deal or the shenanigans surrounding why Samuel Tilden did not become president, but they will be generally aware that there were thirteen separate Colonies, that the Civil War occurred in the 1860s and some version of why it occurred, that there was a civil rights movement that led to important changes, and so on. They also will be aware at some basic level that the state governments and the federal government have sometimes overlapping and sometimes separate spheres of authority. They will know, for example, that a given crime might lead to either state or federal prosecution, and that driver's licenses are obtained from a state but passports from the federal government.

Chinese students cannot be assumed to know any of this. Just as students in an American classroom might or might not possess sophisticated knowledge of the Opium Wars and their effect on China, Chinese students might or might not be up the curve on these basic facts relating to U.S. history. Because this is important background, helpful if not outright essential to understanding some of what follows, failing to provide some base understanding for all students would give an undue advantage to those who have picked up this knowledge.

To address this, we spend a class on a whirlwind tour through U.S. history, followed by an equally brief examination of the basic structure of U.S. federal government. We revisit some of these issues as needed with a more in-depth view, but before assigning students readings that delve into state sovereignty in the context of personal jurisdiction or the limited powers of the federal government in the context of subject matter jurisdiction, it has been my experience that a

80. WILLIAM F. FOX, *INTERNATIONAL COMMERCIAL AGREEMENTS AND ELECTRONIC COMMERCE* (2018).

bit of an introduction reduces needless confusion. Again, this could be handled in a separate course, but, since we do not offer one, I choose to cover it myself.

### V. Conclusion

Foreign students taking U.S. law school courses without a high likelihood of practicing in the United States—and this includes most LL.M. students in the United States and many J.D.s as well as my students—seem to me to have somewhat different needs from domestic students even when studying U.S. law “from the inside.”

Students should leave my course and our school fully aware of the nature of legally pluralistic, polycentric governance, and how it might affect them or their clients. They should develop a fully formed understanding of the nature of the U.S. state and should have a good handle on how and why exceptional aspects of U.S. practice can matter to them. That will give them a durable competitive advantage and tools that they can further develop in the course of their careers.

At one time, the foreign student studying U.S. law but destined to return to practice in their home country was somewhat rare. Today, with the proliferation of LL.M. programs<sup>81</sup> and a growth in those seeking a J.D. to take back home, it has become commonplace. Giving them the education they deserve starts with a recognition that the optimal education for their needs might differ from that given to domestic students. A course concept similar to mine that focuses on the needs of students not likely to practice in the United States but who in a polycentric world will still serve clients subject to American laws might serve their needs better.

81. Carrie W. Teitcher & Kathleen Darvil, *Towards a More Ethical LL.M. Degree: Let's Give International Lawyers the Value They Deserve*, 31 FLA. J. INT'L L. 55, 57 (2019) (“Created for international lawyers seeking American credentials, LL.M. programs have proliferated . . .”); Carole Silver & Swethaa S. Ballakrishnen, *Sticky Floors, Springboards, Stairways & Slow Escalators: Mobility Pathways and Preferences of International Students in U.S. Law Schools*, 3 UC IRVINE J. INTER. TRANSNAT'L AND COMP. L. 39, 42 n.11 (2018) (by 2016, 154 U.S. law schools offered at least one LL.M. program open to foreign students).