

DEFERENCE AND NATIONAL COURTS IN THE AGE OF
GLOBALIZATION: LEARNING, APPLYING, AND
DEFERRING TO FOREIGN LAW*

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“Deference” is among the most under-analyzed concepts in legal theory. The term “deference” can describe many different phenomena, ranging from full adherence to another’s decision to non-trivial weighting of a prior determination; and it can result from many different legal (and non-legal) sources, ranging from constitutional command to voluntary abstention. We plan to explore the entire scope of the concept of deference in a forthcoming book, but in this paper we focus solely on deference as the discretionary decision by one fully competent agency of government to shift the power to make a decision to another interpretative agent. All government institutions can act deferentially, but we specifically address the practice of deference by the judiciary. Judicial deference is an interesting subject given the constitutional role of judges, the independence that they enjoy, and the critique of deference as an illegitimate delegation of powers. We examine a specific example of this practice, which we believe is of concern to jurists in all jurisdictions: national judges’ discretionary decisions to apply foreign legal materials, especially that of fellow judges from other jurisdictions. Our analysis focuses on the delicate differences between a court being “inspired” or “persuaded” by or “deferential” to foreign legal materials. We conclude that much of what sometimes goes by the label “deference” does not meet the definition that we employ, and we further examine the implications of actual instances of deference for national sovereignty. As we emphasize in the paper, as common law jurists, we look forward to comments and corrections from jurists familiar with civil law and other legal systems.

SUMMARY: I. Introduction – II. *What is ‘Deference’ (and Why Does This Concept Merit a Book)?* – III. When Courts Use Foreign Legal Materials - IV. Are Courts ‘Inspired,’ ‘Persuaded’ or Deferential?

I. INTRODUCTION

The 24th Biannual Colloquium of the Italian Association of Comparative Law (*Associazione Italiano di Diritto Comparato* or AIDC)³ convened in Naples in June 2017 to

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discuss “*Ius Dicere in a Globalized World*.” The term “*ius dicere*” – “to speak the law” – corresponds to the common-law term “jurisdiction,” which refers to the power and duty of adjudicators to identify and apply (speak) the governing law in cases before them. In a world of sovereign nations, one naturally assumes that governing law, including the relevant choice-of-law rules, will come from the tribunal’s domestic institutions. The colloquium’s call for papers, however, suggested that the growth of interconnections among legal systems might challenge this traditional sovereignty-based understanding of jurisdiction through “fragmentation,” as legal norms no longer derive solely from within the nation-state and its own court system.⁴ At least one manifestation of such fragmentation might involve national courts deferring to the legal views of other national or supra-national actors. Accordingly, we here pose, and try to frame an outline for answering, two questions: To what extent can one observe this kind of deference to foreign legal sources, and to what extent does engaging in it threaten national sovereignty?

The first question immediately raises a profound definitional problem: What is “deference,” and how might one distinguish deference from other forms of reference to legal sources? As it happens, we are presently writing a book for Oxford University Press on the legal concept of “deference,” which, at least in the common law world, is a term very often used and very rarely analyzed. For purposes of this paper, we understand the term “deference” to mean the *discretionary* decision by one fully competent agency of government to shift the power to make a decision (“to say what the law is”⁵) to another interpretative agent. One can certainly use the concept of deference also to describe non-discretionary transfers of decision-making power that are authoritatively dictated by positive law, as when a constitution or statute requires a court or other body to give way to someone else’s decision. Our book will explore those uses of “deference” as well, and we will very briefly touch upon them here. Our present focus, however, is on deference as a voluntary, discretionary decision by a competent branch of government to yield its judgment of the law to another actor, described by Michal Bobek, in the specific context most relevant to this article, as “non-mandatory references to foreign law by a national judge in interpreting domestic law for the purposes of solving a domestic dispute.”⁶ Such behaviour may seem chivalrous or polite to some, a shirking of legal duties to others, or

⁴ See esclh.blogspot.co.il/2016/11/notice-colloquium-ius-dicere-in.html.

⁵ US Supreme Court, 1803, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178.

⁶ M. BOBEK, *Comparative Reasoning in European Supreme Courts*, Oxford, 2013, p. 19.

simply puzzling and counterintuitive given the usual inclination of public officials to increase power, budgets, staff, turf, or, in short, *jurisdiction*.⁷ We cannot here give a comprehensive account of this phenomenon, even in the limited context of use of foreign legal sources, but we hope to provide a framework for further study.

The present paper has three short sections. Part I discusses some of the features of the judicial practice that in this paper we call “deference,” in order to provide a framework through which to assess the use of foreign law. Part II briefly looks at the practice of national judges with respect to use of foreign legal materials, especially judgments of fellow – if foreign – judges. Part III links the earlier two sections, asking whether or when the use of foreign precedents constitutes an act of deference and whether it raises concerns regarding national sovereignty.⁸ We emphasize that we are primarily familiar with common law jurisdictions, and we especially look forward to comments and corrections from jurists familiar with civil law and other legal systems.

II. WHAT IS ‘DEFERENCE’ (AND WHY DOES THIS CONCEPT MERIT A BOOK)?

The term “deference” has long been extensively used in common law jurisdictions. The term has many different meanings in different contexts, and our long-term project aims, among other things, to sort out those various meanings. For present purposes, we use it quite narrowly to mean the discretionary decision by one agency of government to subject its jurisdiction – its power to speak the law – to the views of another competent agency.

While deference is a phenomenon that can and does occur in all branches⁹ of government (and in everyday life), we observe it most clearly in the judicial branch. Perhaps this reflects our observational bias as common lawyers, but for several reasons the judiciary, and especially a judiciary with a supreme court, is the easiest branch in

⁷ See, e.g., W. A. NISKANEN JR., *Bureaucracy and Representative Government*, New Brunswick & London, 1971.

⁸ These potential concerns about sovereignty have often been noted. See, e.g., E. BENVENISTI, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, in *American Journal of International Law*, 2008, p. 241 (noting these concerns without endorsing them).

⁹ Eighteenth-century terminology in the United States used the term “branch” to describe the different houses of a multicameral legislature and described the larger institutions (legislative, executive, judicial) of government as “departments.” See S. G. CALABRESI & K. H. RHODES, *The Structural Constitution: Unitary Executive, Plural Judiciary*, in *Harvard Law Review*, 1992, p. 1153, 1156 n. 6. We nonetheless speak of the legislative, executive, and judicial “branches” because we believe this usage to be more familiar to modern readers.

which to observe interpretative behaviour of any kind. *First*, other branches are usually much more complex and multi-layered institutions. Even unitary executives, in which all executive power is theoretically exercisable by a single official,¹⁰ in practice carry out almost all functions through a Byzantine network of subordinates; witness the difficulties that President Donald Trump is having with the so-called “deep state.”¹¹ Locating effective exercises – or failures to exercise – interpretative authority within the executive or within a large multi-member legislature is a task calculated to, as James Madison said in another setting, “puzzle the greatest adepts in political science.”¹² Failures to exercise authority are especially elusive. Even for courts, “negative choices remain in most cases undetected”¹³; the task of locating them within complex legislative or executive institutions is much harder. *Second*, courts, at least appellate courts in the common law tradition, explain their decisions and are willing to expose disagreements between majority and dissenters in their panels. To be sure, many executive decisions, in the form of either rules or adjudications, also come with explanations (and sometimes dissents in the case of decisions by multi-member administrative agencies), and legislatures are often prolific producers of “legislative history,” but common law courts have a more thoroughly developed tradition of transparency. *Third*, and perhaps most importantly, the judiciary is a reactive branch. It does not, at least in common-law countries, initiate disputes but merely passes judgment on cases and controversies brought before it by others. Accordingly, a court’s decision *not to intervene*, when the reason is grounded in what we consider to be deference, is a relatively easily observable occurrence. This helps explain why failures of executives or legislatures to act, on grounds of deference or otherwise, are much harder to identify and analyze. *Fourth*, and finally, courts have systematically developed a long list of formal concepts and doctrines which cover somewhat similar ground to the idea of deference. Consider such doctrines as abstention, comity, political question, and purposeful hesitation, for example. They all represent a

¹⁰ We believe that the President of the United States is constitutionally unitary in this respect, though many scholars (and judges) disagree, and modern practice does not reflect a strictly unitary conception of the executive. See G. LAWSON & G. SEIDMAN, *The Jeffersonian Treaty Clause*, in *University of Illinois Law Review*, 2006, pp. 1, 22-43.

¹¹ See www.foreignaffairs.com/articles/2017-08-15/trump-and-deep-state; www.theguardian.com/us-news/2017/aug/13/donald-trump-white-house-steve-bannon-rich-higgins.

¹² THE FEDERALIST No. 37, at 183 (James Madison) (G. W. Carey & J. McClellan eds., 2001). For an intriguing account of one aspect of decisional fragmentation in the United States executive department, see R. INGBER, *The Obama War Powers Legacy and the Internal Forces that Entrench Executive Power*, in *American Journal of International Law*, 2016, p. 680.

¹³ BOBEK, *supra* note 6, at 20.

court's decision to walk away and not review a decision by another branch. Courts thus display a consciousness of the act of deference, if not necessarily a full awareness of the meaning and implications of the concept of deference, that makes it easier to observe and describe their actions.

The term and idea of judicial deference has been around for a long time – certainly long enough so that one would expect to find an extensive body of judicial and academic commentary exploring its varied meanings and applications. One might especially expect modern judges and scholars in the United States to devote much attention to the idea of deference, given the extraordinary prominence of the idea in the federal administrative law of the United States, most notably through a doctrine that is widely (if erroneously) attributed to the 1984 decision of the United States Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*¹⁴ A brief look at that doctrine explains why and how it seems to place the concept of deference at the center of American jurisprudence.

Administrative agencies interpret their organic statutes -- that is, the congressional acts that create administrative agencies and state their powers and goals – in the course of exercising their responsibilities. In a world in which restrictions on delegation (or, more precisely, sub-delegation) of legislative power are relaxed or even non-existent,¹⁵ that interpretative authority is often very substantial, as many statutes are open-ended or ambiguous. Since the agency acts before its decision is reviewed by a court, the question is always raised what weight, if any, is to be given on judicial review to the agency's view of the law. As a general rule, American statutory law does not dictate a rule of judicial deference for such agency interpretations, though statutes almost universally prescribe a strong measure of deference to agency factual determinations.¹⁶ Indeed, to the extent that statutes speak to the matter at all, they seem to counsel against

¹⁴ See US Supreme Court, 1984 *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837.

¹⁵ On the demise of the subdelegation principle in the United States, see G. LAWSON & G. SEIDMAN, *'A Great Power of Attorney': Understanding the Fiduciary Constitution*, UP Kansas, 2017, pp. 104-126. For a perspective on United States law from outside the United States, see B. IANCU, *Legislative Delegation: The Erosion of Normative Limits in Modern Constitutionalism*, Springer, 2012.

¹⁶ See, e.g., 5 U.S.C. § 706(2)(E) (2012) (instructing courts to uphold agency factual findings in formal proceedings if they are supported by "substantial evidence"); US Supreme Court, 1998, *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 366-67 (suggesting that "substantial evidence" is merely enough to allow a "reasonable jury" to reach a conclusion).

any such deference.¹⁷ Nonetheless, from a fairly early date in the emergence of the administrative state, U.S. courts began voluntarily deferring to some agency legal conclusions, at least when those conclusions were closely bound up with factual determinations¹⁸ and sometimes (it was not clear exactly when and why) even to so-called “pure” or abstract legal determinations.¹⁹

In *Chevron*, a unanimous (though shorthanded) U.S. Supreme Court,²⁰ per Justice Stevens, wrote language seeming to say that federal courts, when conducting review of a federal administrative agency’s action, must always defer to the agency’s legal interpretation of the federal law that it administers²¹ when statutory meaning is unclear, there is therefore room for disagreement about proper interpretation, and the agency’s answer is based on a permissible – *i.e.*, reasonable – construction of the statute.²²

The language in *Chevron* did not distinguish between “pure” or “mixed” questions of law, but seemed, on its face, to be categorical. It is nonetheless clear that the Court in *Chevron* did not mean to prescribe any change in pre-existing standards of judicial review; Justice Stevens himself made that clear at his first opportunity to clarify the opinion that he authored.²³ Lower courts, however, seized on the *Chevron* language to construct an elaborate edifice of wide-ranging deference to administrative legal determinations, and the Supreme Court eventually accepted the lower courts’ expansive version of *Chevron* through a process of accretion and default.²⁴ The so-called *Chevron* doctrine of deference has been among the centerpieces of American administrative law for more than thirty years.

Given the importance of the *Chevron* doctrine, one might expect its emergence to lead to significant legal and scholarly discussion of deference as a general concept. But

¹⁷ See 5 U.S.C. § 706 (2012) (“the reviewing court shall decide all relevant questions of law”). For careful study of how a doctrine of deference emerged prior to and shortly after enactment of this statute, see A. BAMZAI, *The Origins of Judicial Deference to Executive Interpretation*, in *Yale Law Journal*, 2017, p. 908.

¹⁸ See, e.g., US Supreme Court, 1941, *Gray v. Powell*, 314 U.S. 402.

¹⁹ See, e.g., US Supreme Court, 1981 *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27.

²⁰ Because of recusals, only six of the nine justices participated in the decision.

²¹ The notion of an agency “administering” a statute is technical; agencies apply and enforce many statutes that they do not “administer” in this specialized sense. See G. LAWSON, *Federal Administrative Law*, 2016, 7 ed., pp. 591-595.

²² See *Chevron*, 467 at 842-43.

²³ See US Supreme Court, 1987, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 445-448.

²⁴ For a lengthy, case-by-case account of this process, see G. LAWSON & S. KAM, *Making Law Out of Nothing At All: The Origins of the Chevron Doctrine*, in *Administrative Law Review*, 2013, p. 1.

while *Chevron* is, we believe, the most cited case in American law – it has been cited almost 83,000 times to date, including more than 18,000 times in secondary sources, which are typically academic analyses²⁵ – and *Chevron* deference is among the best-known topics in American scholarship and jurisprudence, the precise substantive meaning of the term “deference,” in the context of *Chevron* or otherwise, has not enjoyed serious academic analysis. Indeed, outside of our own very modest work on the subject, the most notable scholarship in the United States of which we are aware that makes a serious effort to analyze the concept of deference does so very briefly, in the context of working out some applications to the law of free expression.²⁶ This is truly remarkable. It would be comparable to having human rights take center stage as a legal-political idea for decades without anyone seriously analyzing the concept of rights of which it is one application.

The analytical neglect of “deference” is striking. *Black’s Law Dictionary*, long the pre-eminent legal dictionary in the United States, for many editions did not contain a definition for the term “deference” at all. The Fifth Edition, acquired by one of us in law school, has no entry for “deference,” and its only account of “defer” is “Delay; put off; remand; postpone to a future time.”²⁷ The term “deference” did not merit an entry in this dictionary until its Seventh Edition in 1999, which offered: “To show deference to (another); to yield to the opinion of ...”²⁸ This at least nods towards a judicial attitude of giving way to another’s view. The most recent Tenth Edition, however, takes a step backwards. It moves the previous definition of “deference” to “defer” (which is, in fact, grammatically more appropriate for the definition as it is written), and “deference” becomes merely a linguistic rather than a legal concept, describing rather old-fashioned courteous social conduct: “1. Conduct showing respect for somebody or something; courteous or complaisant regard for another. 2. A polite and respectful attitude or approach, esp. toward an important person or venerable institution whose action, proposal, opinion, or judgment should be presumptively accepted.”²⁹ It is somewhat

²⁵ WESTLAW’s Keycite lists a total of 82,947 citing references to *Chvron*, of them 15,295 cases and 18,217 secondary sources (last checked September 13, 2017).

²⁶ See P. HORWITZ, *Three Faces of Deference*, in *Notre Dame Law Review*, 2008, p. 1061.

²⁷ *Black’s Law Dictionary* (5th ed.), St. Paul, MN, West Publishing Co. 1979, p. 379. The definition unhelpfully adds: “The term does not have, however, the meaning of abolish.”

²⁸ *Black’s Law Dictionary* (7th ed.), St. Paul, MN, West Publishing Co., 1999, p. 432.

²⁹ *Black’s Law Dictionary* (10th ed.), St. Paul, MN, Thomson Reuters, 2014, pp. 513-14.

jarring to see a term as old, central, and vibrant as “deference” receive such dismissive treatment.³⁰

Interestingly, older legal dictionaries were much more attentive to the importance of deference as a legal concept. The newly revived *Bouvier Law Dictionary*, which reprints and updates a classic 1853 dictionary, offers a much fuller, but verbose and meandering, definition of “deference,” which both speaks to the term’s complexity and highlights some of the concerns that we address in this article about its implications:

[D]deference (defer)

To yield to someone or something else, at least for a time. Deference is an act of restraint by a person or entity with the authority or power to act but who chooses not to do so in order to abide the result of another’s action, or at least to await the completion of another’s action to determine whether to act. Deference in law is essential to the functioning of the legal system, in which a single legal determination depends on a division of labor, so that a legal official tasked with one component of a decision must defer to other officials in their respective tasks. The allure of deference in allowing the official to evade responsibility for a decision or action committed to the office, however, endangers the legal system at least as much as the risk of failures of deference. The proper limit of deference may be the same as the proper scope of discretion, but deference, inherently, must fall within the scope of discretion: an official may only defer when the official has the power to act. As such, deference does not ultimately foreclose the possibility of action, as the deferring official retains an obligation to act if the official to which deference is given fails to act or acts unlawfully in some manner.

Deference, in general, is appropriate by one official or entity towards another, when the law creating their officers delegates a particular task or experience to one and not the other. Courts defer to one another in this way, as well as to legislatures and executives, and legislatures and executives defer to one another and to the courts. This is both the essence of separation of powers and the basis of a reasonable division of labor among the creation, execution, and interpretation of law – recognizing that such categories are never perfect.

³⁰ “*Chevron* deference,” incidentally, now gets its own entry. *Ibid.*, p. 289.

Courts in the United States defer routinely to one another, so that trial courts defer to courts of appeal and supreme courts on matters of the interpretation of law, and appellate courts defer to trial courts on matters of trial discretion, such as the admission or significance of evidence. Judges defer to juries on matters found by the jury as fact, and juries defer to judges on matters of law. In addition, federal courts defer to Congress on matters of legislative authority to the agencies, which are created by legislation, to execute and interpret the legislative matters committed to the agency. Both executives and legislatures defer to courts on constitutional matters and on matters in which the courts have a customary expertise or commitment, such as their own rules.³¹

The *Bouvier* definition has elements with which we agree, but it sweeps more broadly than we hope to do in this paper, because it lumps together several quite distinct ideas. All of those ideas can plausibly bear the label “deference” in some contexts, but much is lost by not keeping those ideas clear and distinct from each other.

At the outset, *Bouvier* identifies “deference,” as do we in this article, as (with emphases added) “an act of *restraint* by a person or entity with the authority or power to act but who *chooses* not to do so in order to abide the result of another’s action.” Most of the definition’s subsequent examples of deference, however, such as the obligation of lower courts to follow the rulings of higher courts, the deference given by courts to juries, and at least some of the relationships among courts and executive and legislative actors, do not involve *choice* by the “deferring” agent. Many of those relationships of “deference” are commanded by positive law, either constitutional or statutory. The United States Constitution, for example, explicitly prescribes the appropriate judicial role with respect to jury verdicts,³² and it least implicitly prescribes a binding hierarchical relationship between lower appellate courts and the Supreme Court.³³ Statutes often mandate a measure of deference by appellate courts to fact-finding by lower courts (and administrative agencies).³⁴ As we have said before, there is nothing wrong with using the

³¹ *The Wolters Kluwer, Bouvier Law Dictionary*, New York, 2011, p. 317. This dictionary was used by the likes of Daniel Webster, Abraham Lincoln, and Oliver Wendell Holmes.

³² See U.S. CONST. amend. V (forbidding double jeopardy); amend. VII (“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law”).

³³ See S. G. CALABRESI & G. LAWSON, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, in *Columbia Law Review*, 2007, p. 1002.

³⁴ See, e.g., FED. R. CIV. PROC. 52(a) (providing that findings of fact by federal trial judges in bench trials “shall not be set aside unless clearly erroneous”). This idea may be generalizable to other countries as well. For example, in the French general court system (with jurisdiction

word “deference” to describe both mandatory and discretionary submissions to the authority of another actor, and a full account of the concept of deference must address both usages, but analytically they describe distinct phenomena that require separate treatment. It is one thing for a court to follow someone else’s understanding of the law because the court is ordered to do so by a legitimate authority. It is another thing altogether for a court to follow someone else’s understanding of the law because the court elects to do so.

Relatedly, the *Bowier* definition also folds the idea of appellate review into the concept of deference. Again, this is a possible way to use the term “deference.” We use it more narrowly in this paper, and as we use it, the relationship between deference and standards of appellate review is complex and contingent. Much of the time, as we just noted above, standards of review are fixed by statutes or constitutions. When American courts review findings of fact by administrative agencies under the Administrative Procedure Act, they may only reject those findings if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” or if they are “unsupported by substantial evidence.”³⁵ These sound like deferential standards, and on at least one understanding of deference they are exactly that. But when courts use these provisions to uphold agency factual findings that they think are probably wrong, they are doing so because they have been ordered to do so by a legislature. The court and the agency are both authorized agents of the State. Both have official powers and both are taking part in a process in which they employ judgment and discretion. The agency is entrusted with carrying out functions, and the court is entrusted with making sure that the agency does so in accordance with law. That is not “deference” in the narrow sense used in this article. It would be deference if the court yielded to the agency’s view of whether the agency decision was actually supported by substantial evidence, but the use of a statutorily prescribed “substantial evidence” rather than “preponderance of the evidence” standard of review is not what we mean by deference. The *Chevron* doctrine, by contrast, is a genuine act of deference, because it is judge-made rather than commanded by positive law.

over private and criminal law) there is differentiation between issues that “are treated as one of fact (for the ‘sovereign power of assessment’ of the *juges du fond*) or of law for the control of the Control of the Court de cassation.” See J. BELL, S. BOYRON & S. WHITTAKER, *Principles of French Law*, Oxford, 2008, p. 3-4.

³⁵ 5 U.S.C. § 706(2)(A), (E) (2012). The procedural format of the agency decision determines which of those two standards, which many but not all American courts consider to be equivalent, applies to a given finding.

The *Bouvier* definition also correctly identifies two of the main rationales which might make it appropriate for a competent agency to subject its judgment to that of another agency. One of those rationales might be called “legitimation,” or perhaps “competence.” A more descriptive term would be “separation of powers,” but that term is already taken, and much of what goes under the heading of “separation of powers” is what we have described as *mandatory* deference that is commanded by positive law rather than the exercise of choice by a legal actor. Nonetheless, separation of powers in a loose, functional sense is clearly one of the major justifications behind some decisions by an official that, while she may have the authority to act, it is advisable for her to not employ her own discretion and instead to defer to another officials’ judgment. While more than one branch may formally have power over a decision, one specific branch may have the greater legitimacy – under the constitutional and political order – to be the final arbiter on the matter.³⁶ This is the origin of court-created doctrines such as abstention,³⁷ the political question doctrine,³⁸ or primary jurisdiction,³⁹ under which courts choose to defer to their co-ordinate branches.

A second rationale focuses on the expertise of the decision-maker whose judgment is followed. A trial judge, for example, develops expertise regarding the real-time application of evidence rules in particular trial contexts, so that is a reason to defer to his judgment on the matter. We can generalize this rationale: Oftentimes, in the exercise of independent judgment to figure out the best answer to a problem, one will realize that someone else is actually in a better position to reach that best answer. Someone else’s decision can be strong, and perhaps even the best available, evidence of the right answer. One therefore defers, not as an abandonment of independent judgment but as the result of an exercise of that independent judgment. One of us has called this reasoning process (somewhat unfortunately, he now thinks) “epistemological

³⁶ See Benvenisti, *supra* note 8, at p. 242.

³⁷ In the United States, abstention comes in several varieties, see M. H. REDISH, *The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory*, Carolina AP, 1991, p. 49, but all involve a decision by a federal court not to exercise jurisdiction in order to allow a state court to rule on a matter in the first instance.

³⁸ As with abstention, the political question doctrine involves a refusal by federal courts to exercise granted jurisdiction, on the ground that another branch of the national government is better suited to decide the question. See M. S. PAULSEN, S. G. CALABRESI, M. W. MCCONNELL & S. L. BRAY, *The Constitution of the United States*, 2010, p. 580-600.

³⁹ “The doctrine of primary jurisdiction concerns whether actions filed directly in court should be referred to an agency for initial consideration.” See LAWSON, *supra* note 21, at p. 1151. In this respect, it is similar to abstention, except that the body to which the court defers its jurisdiction is a federal agency rather than a state court.

deference,”⁴⁰ to indicate that deference is here serving as a vehicle for ascertaining the best answer from the standpoint of the deferring decision-maker.

A third potential rationale for deference, which is perhaps implicit in *Bowyer’s* statement that “[d]eference in law is essential to the functioning of the legal system, in which a single legal determination depends on a division of labor,” focuses on the costs of reconsideration. There is economy in letting prior decisions stand. Reconsideration is costly, and full reconsideration is costlier still. Even if one does not think that the prior decision is necessarily the best evidence of the right answer, one might still defer to it if the benefits of full reconsideration, either in the particular case or in the class of cases represented by the specific example, are unlikely to justify the effort.

As we will later see, this is by no means an exhaustive account of the possible reasons for deferring to another’s judgment of the law. Obviously, a full account of deference would require fleshing out, in much more detail, both the varieties of and the rationales for deference. That is the project of our book. Hopefully, this brief summary is enough to provide a framework for the present article, as we apply that framework to the use of foreign legal sources.

At first glance, deference may not fit easily into the judicial role. A core idea in Anglo-American law over the past two and a half-centuries – an idea that has resonance world-wide – is that courts are supposed to exercise judgment independent of the identity of the parties before them and independent of the wishes of executive and legislative actors. Judicial independence, in short, is a crucial feature of modern conceptions of separation of powers.⁴¹ When a court *defers* to the judgment of another actor, does this ever raise concerns whether the court has, in fact, abandoned its duty to employ its own independent reasoning and has, in effect, wrongfully delegated its authority to decide?

One of the prime instances that might raise such concerns, and the topic that we chose to discuss in the present colloquium, concerns the practice of judges in national courts of relying upon “foreign law” – constitutions, statutes, and most notably case law of judges of other nations or of international or supranational courts such as the European Court of Human Rights and European Court of Justice. There are many instances in which domestic law *requires* that foreign law be employed in a specific case.

⁴⁰ LAWSON & KAM, *supra* note 24, at p. 10-11.

⁴¹ See, e.g., P. HAMBURGER, *Law and Judicial Duty*, Harvard, 2008; M. H. REDISH, *Judicial Independence and the American Constitution: A Democratic Paradox*, Stanford, 2017.

More on this, in Part II, below. When judges are *required* to apply foreign law, there is no possible question about loss of national sovereignty from the judicial act itself, because it is precisely the law of the national sovereign that prescribes the rule of decision. (Whether the legislature or constitution has sacrificed sovereignty by making foreign law domestically applicable and instructing courts to apply it is a question we leave for political theorists.) We are instead addressing cases in which judges choose – using their discretion and within their jurisdiction – to base their ruling on foreign legal materials such as foreign case law.

III. WHEN COURTS USE FOREIGN LEGAL MATERIALS

Every independent nation in the world has the authority to set up its own legal system. Democracy never was a requirement for sovereignty in the post-Westphalian world order. Most nations set up court systems to provide for resolution of conflicts. We typically divide the authorities that courts use to decide cases into primary (binding) and secondary (nonbinding) sources. The former are the norms of applicable law, which courts must, as a non-discretionary matter, apply in their decisions. The latter are sources such as scholarly writings. Courts sometimes look to these secondary sources where the primary sources are unclear; they do not affirmatively need to do so, and those sources are generally consulted for their persuasive rather than authoritative value.

On some occasions, national courts, from both common law and civil law countries, use foreign legal materials, *i.e.*, materials that do not originate within their sovereign jurisdiction. They use those materials as both primary and secondary sources. These simple observations require some elaboration.

As Professors Markesinis and Fedtke explain in their 2006 book *Judicial Recourse to Foreign Law – A New Source of Inspiration?*,⁴² national courts' use of foreign legal materials has become commonplace. They explore an overt or covert practice of using foreign law in at least seven major jurisdictions: the United States, where the legitimacy of the practice sometimes draws a rich debate between the liberal and conservative wings of the U.S Supreme Court;⁴³ Italy and France, whose courts use foreign law, but do not overtly

⁴² See B. MARKESINIS, J. FEDTKE, *Judicial Recourse to Foreign Law – A New Source of Inspiration?*, London, 2006 ('Markesinis & Fedtke')

⁴³ See *id.* at p. 54-62.

admit to it;⁴⁴ England and Germany, whose courts openly cite foreign materials;⁴⁵ and Canada and South Africa, whose courts make wide-ranging use of foreign law.⁴⁶ American scholars have further documented the long-standing practice of U.S. courts to cite and employ foreign law.⁴⁷ The precise scope and contours of this practice are not important for our project; it is enough for now to observe simply that the practice of referring to foreign law is widespread.

Some of these uses of foreign law are mandated by domestic law, either because domestic norms incorporate foreign law as part of its content or because domestic choice-of-law rules require recourse to foreign law as a primary source. In all of these cases, the foreign law cannot really be considered totally “foreign” to the jurisdiction, and its use, because non-discretionary, does not amount to deference for our present purposes.

Of course, it is not always obvious whether use of foreign law is discretionary or mandatory. Take, for example, the case of the Abbott family, which came before the U.S. Supreme Court in 2010.⁴⁸ The case concerned a married couple that moved to Chile and then separated. Under Chilean law, the parents each had the *ne exeat* right to veto a decision by the other parent to take their child out of Chile. When Ms. Abbott moved to Texas with the couple’s minor son, Mr. Abbott filed a suit in federal court seeking his son’s return to Chile under the Hague Convention on the Civil Aspects of International Child Abduction (Convention) and the implementing statute, the International Child Abduction Remedies Act (ICARA).⁴⁹ The question was whether that *ne exeat* right amounted to a right to “custody” within the meaning of the Convention. The statute implementing the Convention contained a number of legislative “declarations,” including a declaration that “[i]n enacting this chapter the Congress recognizes . . . the need for uniform international interpretation of the Convention.”⁵⁰ Is that “declaration” enough to make it mandatory for courts to consider the views of countries other than the United States regarding the scope of the term “custody”? The case did not directly resolve that question. The majority opinion made reference to that legislative declaration and

⁴⁴ Id. at p. 62-66.

⁴⁵ Id. at p. 66-82

⁴⁶ Id. at pp. 82-108.

⁴⁷ S.G. CALABRESI, S.D. ZIMDAHL, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, in *William and Mary Law Review*, 2005, p. 743ss.

⁴⁸ See US Supreme Court, 2010, *Abbott v. Abbott*, 560 U.S. 1.

⁴⁹ See 42 U. S. C. §11601 et seq. (2012).

⁵⁰ See 9 U.S.C. § 9001 (2012).

considered the views of other signatory nations to be among several considerations supporting a broad view of “custody,”⁵¹ while the dissent cautioned that “we should not substitute the judgment of other courts for our own.”⁵² Both opinions are consistent with viewing the legislative declaration as either binding or non-binding, as both gave foreign sources a measure of consideration without explaining whether or not they felt obliged to do so. The dissenting justices simply found those sources trumped by what they regarded as the plain meaning of the relevant Convention and statute.

In any event, the line between discretionary and mandatory application of foreign law is a separate topic. Wherever that line is drawn, we exclude from our study cases in which national courts apply sources of foreign origin because they have no discretion to do otherwise but are simply following the domestic rules for choice of law of primary legal sources. With no discretion, any talk of deference, as we are using the term here, is moot.

Many national courts use foreign, or comparative, law not because they must do so, as instructed by primary sources, but because they choose to do so as a matter of their own discretion. The practice has, at times and in some contexts, been very controversial, especially when foreign sources are employed to help interpret domestic public law instruments such as constitutions.

One critique of the practice focuses on the known methodological weaknesses of comparative law. In more than a century of research and study in the modern era, comparative law has failed to adopt or evolve a clear methodology stating how comparisons are to be made, and the result is often a free-for-all in which partisans pick their favorite sources without rigorous guiding principles. A judge who has an interest in comparative law can try to persuade his brethren to take into account-- or reject-- the law of any other jurisdiction – of any size, continent, legal history, or socio-economic makeup – that she sees fit. A second critique argues that discretionary reliance on foreign sources in practice becomes, especially in constitutional cases, a political tool employed primarily by “liberal” or “progressive” judges to impose what they regard as the more enlightened, civil-rights-protecting practices of other nations. Even if one approves of the results in those cases (as the two of us often do), there might be something less than

⁵¹ See 560 U.S. at 16-21.

⁵² See *id.* at 43 (Stevens, J., dissenting). See F.E. MAROUS, *The Role of Foreign Authorities in U.S. Asylum Adjudication*, in *New York University Journal of International Law and Policy*, 2013, p. 391, p. 409-413. See generally P.R. DUBINSKY, *International Law in the Legal System of the United States*, in *American Journal of Comparative Law*, 2010, p. 455.

neutral about the process; after all, when liberal judges find themselves in the avant-garde, where they cannot point to an established practice of liberal nations, they do not always draw the equivalent comparative law conclusion.⁵³ More broadly, when judges advocate the use of comparative law, they say, in essence, “*why can’t we be more like country X,*” and this raises two difficulties: that they mostly refer to a very specific subset of rich, liberal nations, and secondly, that those source nations often have characteristics that cannot readily be copied domestically in other nations.⁵⁴

We note these critiques without endorsing or rejecting them. Any activity, including but not limited to discretionary use of foreign law, can be done well or badly. Rather, we want to focus on an aspect of the use of foreign law which involves not the mechanics or consistency of its application but its underlying relationship to sovereignty. We want to go beneath and behind the debates over methodology, bias, and political skew to something more basic. Are courts that discretionarily use foreign law deferring to other actors and, if so, should this raise concerns for those who value national sovereignty? Neither question is as simple as it might seem.

IV. ARE COURTS ‘INSPIRED,’ ‘PERSUADED,’ OR DEFERENTIAL?

In order to link together the two previous sections, one must know exactly what national courts do when they elect to look into foreign legal materials. Even more, one must know *why* they are doing it. Why would a judge ever choose to take into account the

⁵³ A recent example of this phenomenon would be two Israeli Supreme Court cases regarding prison facilities. In the first, the Court declared in 2009 prison privatization to be unconstitutional *per se* in Israel. It knowingly set a precedent ruling against a backdrop of contradictory comparative law. In the 2017 case, the Supreme Court relied heavily on comparative law regarding incarceration conditions in ordering the State to immediately and significantly reduce prison overcrowding. See Israel Supreme Court, November 19, 2009, case of Academic Center of Law and Business v. Minister of Finance (HCJ 2605/05) available at: elyon1.court.gov.il/files/05/050/026/n39/05026050.n39.pdf (Hebrew) elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf (English); Israel Supreme Court, June 13, 2017, The Association for Civil Rights in Israel v. The Minister of Internal Security (HCJ 1892/14). Analyzed in: H. SOMMER & G. I. SEIDMAN, *Courts, Prisons, Budgets and Human Dignity: An Israeli Perspective*, in *Arizona State University Law Journal for Social Justice*, 2017.

⁵⁴ Consider, for example, Business Insider’s list of the best countries to live in for 2017, where Norway ranks highest for the 13th consecutive year, or Forbes’ best countries for business list for 2016, topped by Sweden, New Zealand, Hong Kong and Ireland, all territories of fewer than 10 million inhabitants; see www.forbes.com/best-countries-for-business/list/; www.businessinsider.com/best-countries-to-live-in-2017-3/#2-australia-education-makes-up-over-5-of-the-national-gdp-in-this-country-which-tied-with-switzerland-the-un-found-that-most-students-go-to-school-for-around-20-years-in-australia-10.

legal ideas, interpretations, and theories – as distinct from facts and descriptions that may be a relevant part of the record upon which a decision is made – of a foreign jurist who is not one of the judges deciding the case?⁵⁵

In the first part of this Article, we suggested a framework for analyzing the possible reasons why judges might rely on foreign (or any other secondary) authority as persuasive in a formal legal sense. They might do so out of concerns for *legitimacy* if they believe that another interpretative source has better claim to answer a question, though this is much more likely to occur with respect to other domestic institutions under a regime of separation of powers. It may be hard for people in developed legal systems to imagine a court regarding a foreign body whose rulings are not authoritatively binding as having more legitimacy than domestic institutions, though perhaps that is not far-fetched in the case of developing legal systems that can, and may seek to, draw upon the knowledge and experience of other bodies.⁵⁶ A full exploration of this possibility must be left to legal anthropologists or others better trained than are we in social science.

A second reason we identified for reliance on other interpreters is *epistemological*. One might reasonably and after due consideration regard another body as better situated to finding the right answer to a legal question. Here, reliance on foreign sources results from a good-faith effort to discern the right domestic answer; for whatever reason, the

⁵⁵ To be sure, one can ask the same question regarding citation of domestic secondary authorities, such as scholarly works. The practices of courts, and sometimes of judges on the same court, vary widely in the extent to which they rely on scholarly sources for guidance. This may be especially true in common law jurisdictions, where the gap between the academy and practice is often enormous, prompting some judges to doubt the value of scholarship to judicial decision-making. Consider, in this regard, the comments of U.S. Chief Justice John Roberts: “Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something. If the academy wants to deal with the legal issues at a particularly abstract, philosophical level, that’s great and that’s their business, but they shouldn’t expect that it would be of any particular help or even interest to the members of the practice of the bar or judges.” www.c-span.org/video/?300203-1/conversation-chief-justice-roberts; www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/chief-justice-roberts-reads-law-reviews-after-all/?utm_term=.e124b390b4f8. One law professor decided to fill “the gap in the literature by exploring Kant’s influence on evidentiary approaches in eighteenth-century Bulgaria.” See harpers.org/archive/2015/09/enlightenment-error/; www.washingtonpost.com/news/volokhconspiracy/wp/2015/06/25/final-version-of-the-influence-of-immanuel-kant-and-what-the-chief-really-said/?utm_term=.4ec126a7e3bd; online.wsj.com/public/resources/documents/kantbulgaria_kerr.pdf. The role of scholarly works in judicial practice is beyond the scope of this Article, though it raises issues analogous to those that we address here.

⁵⁶ See BENVENISTI, *supra* note 8, at p. 243. Smaller states may also be more likely than large states to free-ride on the lawmaking efforts of other nations. See BOBEK, *supra* note 6, at p. 41-42.

judge regards a foreign source as the best source of evidence for the meaning of domestic law. In a world in which concepts are broadly shared across borders and in which legal systems borrow structures and norms from each other, this is far from fanciful. As two American authors have said: “Just as free markets account for information pertaining to costs better than governments ..., and just as large groups are likelier to make better decisions than smaller groups, we think there is inherent value in looking to other sovereign nation states' courts to see how they have resolved the difficult questions that have arisen in our own legal system and that this process may enable American courts to reach better outcomes.”⁵⁷ U.S. Justice Stephen Breyer has made a similar point: “cases sometimes involve a human being working as a judge concerned with a legal problem, often similar to problems that arise here, which problem involves the application of a legal text, often similar to the text of our own Constitution, seeking to protect certain basic human rights, often similar to the rights that our own Constitution seeks to protect.”⁵⁸ Sometimes an independent search for a best answer leads outside one’s chamber.

A third reason we call *economic*: Sometimes reliance on someone else who has already dealt with a problem saves time and other resources. Perhaps such reliance will not yield the absolutely best answer by the criteria of the domestic legal system, but it is an interesting jurisprudential question whether courts are or should be aiming at the best answer without regard to costs. Perhaps an adequate answer that comes cheaply is better than a perfect answer that comes at the expense of many other potentially adequate answers in other cases. As we have said in another context, “[a]nyone who says there is no price tag on justice understands neither price tags nor justice.”⁵⁹ If a foreign actor has already considered a question similar enough to the one before the court, perhaps there are grounds of economy for giving weight to that prior decision.

All of these reasons have in common that they focus on how consideration of foreign sources affects determination of the law, either to find the legally right answer (epistemological reasons), to find the legally appropriate answerer (legitimacy reasons), or to find a legally acceptable answer at an appropriate cost (economic reasons). A judge

⁵⁷ See S. G. CALABRESI, B. G. SILVERMAN, *Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron*, in *Michigan State Law Review*, 2015, p. 1, 17-18.

⁵⁸ See N. DORSEN, *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer*, in *International Journal of Constitutional Law*, 2005, p. 519, 523.

⁵⁹ LAWSON, SEIDMAN, *supra* note 15, at p. 170.

who applies any of these reasons when choosing to give weight to a foreign legal source can fairly be said to have deferred. The scope of the deference can range from taking the foreign answer as definitive to placing that answer within the set of reasonable choices, but it will be an act of what we here call deference.

But there is another possible reason for a court to embrace foreign legal sources that is sharply different from the ones just described, both in its rationale and in its relationship to deference. Do judges employ these authorities because they are convinced by the opinions of the wise and deeply learned authors, or because the writings happen to support the views that the judges already have, and the judges cite “external” sources merely in an effort to strengthen the persuasiveness of their opinion in the eyes of readers, whether those readers be jurists, scholars, or lay persons, present and future? Perhaps the rationale for reliance on foreign law concerns rhetorical strategy and judicial reputation rather than law determination.

The idea that judges might use references to authorities as signaling devices rather than as tools for law determination is hardly new. Eyal Benvenisti has postulated that some courts use citation of foreign sources as a signaling device to fellow courts in order to promote judicial cooperation in restraining supra-national forces that threaten national sovereignty.⁶⁰ More broadly, Professor Shai Dothan, another Israeli scholar now at Copenhagen University, has argued at book length that both national and international courts seek to enhance their reputations through the strategic exercise of judicial power.⁶¹ His point is that as a court's reputation improves, so does the incentive to comply with its judgments. On this reasoning, self-restraint by a court through its alignment, by deference, with stronger actors (nationally or internationally) can serve the interests of the court, if such deference is understood as adoption of views widely regarded as correct.

This kind of reputation-enhancing signaling seems very plausibly to explain much of what one observes in the behavior of at least some courts. For example, it is hardly surprising, given that American legal academia is perceived to be “left-leaning,”⁶² that

⁶⁰ See BENVENISTI, *supra* note 8, at p. 251-52.

⁶¹ See S. DOTHAN, *Reputation and Judicial Tactics: A Theory of National and International Courts*, Cambridge, 2014.

⁶² See prawnsblawg.blogspot.com/2016/08/liberal-bias-in-legal-academia.html; en.wikipedia.org/wiki/Liberal_bias_in_academia; chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2376&context=law_and_economics; brooklynworks.brooklaw.edu/cgi/viewcontent.cgi?article=1075&context=blr. The generally right-leaning American author of this article, who is the only person on a law faculty of about

“[t]he more liberal judges were more likely to cite academic work.”⁶³ Perhaps one reason for this practice, and for the related practice of citing foreign legal materials in public law cases, is that liberal judges want to make clear that they are supported by and are intellectually part of what they consider to be the morally (and hopefully legally) correct view. It may be a form of what is sometimes called “virtue signaling,” in which one demonstrates one’s membership in a particular social group. At the same time, it may put pressure on conservative judges to find matching support, especially when they are defending the constitutionality of practices, such as the death penalty or prohibitions on same sex marriage, that enjoy little support among the intellectual elite that dominate legal education and the governing tiers of the legal profession. It also places such judges at a disadvantage when they have to point to specific nations that support conservative ideas.⁶⁴

This signaling function, to the extent that it really operates, makes sense with reference to citation of foreign materials as well as with domestic scholarly sources. The United States is almost singular, among rich, Western nations, in not providing universal health care,⁶⁵ in keeping and applying the death penalty,⁶⁶ in not participating in the International Criminal Court,⁶⁷ and in its limited control over private ownership of firearms.⁶⁸ Whether one likes it or not,⁶⁹ there is a reason for these differences, and they are deeply rooted in American constitutionalism, tradition, and public policy. It would not be entirely strange

sixty who openly self-identifies in that fashion, would delete the phrase “perceived to be” from this sentence.

⁶³ See www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/21/chief-justice-roberts-reads-law-reviews-after-all/?utm_term=.505dbe18a9ea.

⁶⁴ Consider this: the only nations not party to the Paris climate accord are Syria and Nicaragua; the only European country to hold an execution in 2016 was Belarus; and the only countries to execute persons who were underage when they committed the offense were Iran and Saudi Arabia; see www.sfgate.com/columnists/morfordredesign/article/Here-are-the-countries-not-in-the-Paris-Climate-11186190.php; en.wikipedia.org/wiki/Capital_punishment_by_country.

⁶⁵ See www.salon.com/2017/05/21/why-the-us-does-not-have-universal-health-care-while-many-other-countries-do_partner/.

⁶⁶ See www.businessinsider.com/top-5-death-penalty-countries-in-the-world-us-2017-4; www.thesun.co.uk/news/2525739/death-penalty-how-many-people-executed-world-each-year/.

⁶⁷ See en.wikipedia.org/wiki/United_States_and_the_International_Criminal_Court.

⁶⁸ See www.pbs.org/newshour/rundown/how-do-u-s-gun-laws-compare-to-other-countries/.

⁶⁹ One of us dreads the prospect of socialized medicine, is fine with the death penalty, suspects that the ICC is likely to be a vehicle for politicized anti-Americanism, and is a life member of the National Rifle Association.

for judges, who are people who likely have some regard for their reputations, to use the tools at their disposal to situate themselves along these divides.

References to foreign precedents may be one of the places where these intellectual and cultural fault lines show up in opinions. One of our colleagues wrote eloquently on the gap between the views of liberal elites and the general population in America on citing foreign precedent. “This,” he wrote “is a tale of two cultures.”

The first culture is that of the United States Supreme Court and the lawyerly elite. In that culture, it is not only socially acceptable for the Court and law professors to rely on foreign law in deciding American cases, it is obligatory that they do so.... The other culture... is the popular culture of the vast majority of American citizens, as shaped by those citizens’ political leaders and opinion elites. In this second culture, there is a decidedly different view of the relationship between the United States and foreign legal systems. American popular culture overwhelmingly rejects the idea that the United States has a lot to learn from foreign legal systems, including even those of countries to which we are closely related like the United Kingdom and Canada. Most Americans think instead that the United States is an exceptional country that differs sharply from the rest of the world and that must therefore have its own laws and Constitution.⁷⁰

We will get to the implications of this signaling function for deference and sovereignty shortly, but first a brief detour: If justices, and especially liberal justices, are using references to foreign law as signaling devices, what exactly is the likely consequence of that signal? Using such a signal, as opposed to persuasion and debate employing conventional domestic legal norms, to try to influence their more conservative colleagues by noting how the United States is a holdout among Western nations, may work occasionally, but it is doubtful that this would be an effective path to achieve widespread social, economic, and political reform, especially if the electorate, along with their colleagues, resists such changes.⁷¹ Indeed, it may achieve exactly the opposite result. If the justices’ allies can perceive the signal, so can their opponents, and the signal may reinforce the notion that the justices ally themselves with foreign sovereigns or, perhaps even worse, with an international elite of jurists rather than with “true” American

⁷⁰ See S. G. CALABRESI, *‘A Shining City on a Hill’: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Precedents*, in *Boston University Law Review*, 2006, pp. 1335, p. 1336-1337.

⁷¹ Cf. en.wikipedia.org/wiki/The_Hollow_Hope.

interests. As politicians from John Kerry to Hillary Clinton can verify, this is not always going to be a winning position with many Americans.⁷² Professor Calabresi's conclusion that "American mass culture is thus sharply at odds with the Supreme Court's elite lawyerly culture on the issue of whether U.S. courts have a lot to learn from foreign law"⁷³ thus holds important lessons about the likely effects of using foreign law as a method of virtue signaling.

In this light, consider the recommendation of many American legal academics, primarily on the left, that the U.S. Supreme Court should "engage in a 'dialogue' with their foreign counterparts."⁷⁴ They may come to regret that advice.

To be clear: Neither of us (including the one of us who self-identifies on the right and the other who holds socio-economic views that are much more to the left) is unsympathetic to intellectualism, elitism (at least where the elites deserve that label through deeds and do not claim it simply by virtue of social position and credentials), the wish to raise the standards of human rights, or the wish to be considered among the world's leading nations on such matters. Nor are we saying that a strong argument cannot be made for justices to take note of foreign legal norms in a world with ever growing ties.⁷⁵ We just think it wise to be aware (a) of the importance of judges being careful not to advance the law (significantly) faster and farther than the electorate will allow, (b) of the importance of the judiciary, more than any branch of government, maintaining the widest public trust possible, including trust beyond the judges' no doubt modest social circles, and (c) of the need, in a highly politicized federal judiciary, for judges to be aware that their use of foreign legal materials, setting their eyes to the norms of (a select part of) the international community and viewing themselves as part of an international judicial community, is considered provocative, if not incendiary, by a large part of the electorate, which may not be isolationist but is clearly focused on the idea of "America first." In short, judges should be wary both of runaway elitism *and of signaling*

⁷² And not only Americans. Israeli Court President Aharon Barak was sharply criticized for adjudicating with a lofty, and liberal, "enlightened community" standard in view. Cf. www.economist.com/node/197143; also: newrepublic.com/article/60919/enlightened-despot; www.daat.ac.il/daat/ezechut/english/hillel.html; www.academia.edu/1916766/From_Oslo_to_Gaza_Israel_s_Enlightened_Public_and_the_Re_militarization_of_the_Israeli-Palestinian_Conflict.

⁷³ Calabresi, *supra* note 70, at p. 1337.

⁷⁴ See for detail and critical review in: R. J. DELHUNTY, J. YOO, *Against Foreign Law*, in *Harvard Journal of Law and Public Policy*, 2005, p. 291, 294.

⁷⁵ For such a work from a "liberal" perspective, see S. BREYER, *The Court and the World: American Law and the New Global Realities*, 2015. For a perhaps surprisingly similar view from a "conservative" perspective, see CALABRESI, SILVERMAN, *supra* note 57.

their support for that runaway elitism. It may win them friends in faculty lounges and cocktail parties, but it may lead to things like Brexit and President Trump in the bargain. Perhaps they will be happy with that trade-off, but perhaps not.

We can now, at last, answer the main question(s) that prompted this article: Does discretionary citation to a secondary foreign source constitute deference and, if so, does it threaten national sovereignty in any recognizable way?

Whether it is deference depends. It depends very much on *why* the court makes reference to foreign law. If it is done in pursuit of the determination of the appropriate legal norm, whether for legitimating, epistemological, or economic reasons, then it does constitute deference. At least part of the process of legal decision is being passed off, or delegated, to another (in this case foreign) interpreter. We will address below whether that is in any way jurisprudentially problematic. But if the rationale for a reference to foreign law is some kind of signaling function, then we doubt whether it is plausibly viewed as a kind of deference. In the case of pure signaling, the judge simply does not use foreign law as part of the decision process. It is used as a way to communicate something, which may or may not be an essential part of the decision itself, to an outside audience. The decision process is not actually affected, so no deference to the foreign source takes place. Of course, it is possible that deference and signaling are being combined in any particular case. That is, the foreign source may *both* serve as part of the decision process *and* have a signaling function. The judge is deciding through a particular method that gives weight to foreign law and is also indicating to the target audience that this is in fact what happened. The bottom line is that one cannot determine whether deference is taking place in any given instance without knowing what role, if any, the foreign source plays in the actual decision-making process. Because judges typically do not announce that they are engaging in signaling, it can be very difficult to identify instances of deference when they actually happen.

We have no algorithm for determining when a reference in an opinion is best understood as a signal or as a source of law. Much of the time, we think we can tell when judges are really using foreign law as sources of law, but we have no rigorous methodology for making that judgment. As with many things in the law, we may have to be content with muddling through.

Assuming that we can identify clear instances of deference, as we have defined it, is there any reason for people concerned about sovereignty or the judicial role to oppose the practice?

One worry might be that such a practice is a form of delegation of the court's power to decide – or at least its authority to interpret a specific question of law. If one believes, as we do of courts in the United States, that public officials who exercise constitutionally delegated power have an obligation personally to exercise that power,⁷⁶ a related concern involves judicial independence. This constitutionally protected (in the United States) principle was hard fought and is still widely considered vital: “[l]egal scholars, political scientists, international organizations, and human rights activists all have posited the potentially important role an independent judiciary can play in securing constitutionally promised human rights – indeed, some assert that it is the indispensable link in the machinery for securing individual protection against states’ human rights abuses.”⁷⁷ Is judicial independence threatened by discretionary acts of deference?

There is an easy formalistic answer to these questions: Judges who discretionarily use secondary materials, especially foreign materials reflecting the views of foreign sovereigns, are often careful to state that they are aware that such legal documents do not apply directly and do not have the force of law, and that they look at it because they think it appropriate – again for reasons of either legitimacy, epistemology, or economics – to bring into account all the pertinent opinions and views. As one scholar notes: “[n]o one argues that foreign institutions should control constitutional meaning. Jurists and scholars do not suggest—indeed would be foolish to suggest—that ... foreign rulings are legally binding on American courts; or [that] courts may impose foreign perspectives upon Americans through constitutional interpretation.”⁷⁸ In *Roper v. Simmons*,⁷⁹ one of the most controversial uses of foreign law in the U.S., in which a majority of the Court held unconstitutional the execution of persons under the age of eighteen, Justice Kennedy in the majority opinion wrote that “[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty.”⁸⁰ It is not clear what is

⁷⁶ We develop this point about a “fiduciary” obligation for U.S. federal judges personally to exercise their “judicial Power” in LAWSON, SEIDMAN, *supra* note 15, at p. 127-29.

⁷⁷ See www.utdallas.edu/~linda.keith/JudicatureJudicialIndependence.pdf.

⁷⁸ See A. L. PARRISH, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, in *University of Illinois Law Review*, 2007, pp. 637, 649 & fns. 69-70 (citing Profs. Bruce Ackerman and Sanford Levinson).

⁷⁹ See 543 U.S. 551 (2005).

⁸⁰ *Id.* at 578.

meant by the word “proper.” He somewhat clarified matters in stating “[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”⁸¹ Thus, the opinion does not fully delegate the decision to another actor but merely(?) takes that actor’s view as part of the overall mix of considerations. Of course, if that addition to the mix actually made a difference and was not merely a signal or a makeweight, then there is nothing “mere” about its addition to the analysis. Similar considerations apply to the 2003 landmark case of *Lawrence v. Texas*,⁸² in which the U.S. Supreme Court struck down sodomy laws in 14 states.⁸³ A clearer example is a recent case where Israeli Supreme Court Vice President Justice Elyakim Rubinstein made use of foreign law to reach the conclusion that prisoner overcrowding in Israeli prison was unacceptable and had to be remedied immediately. On the use of foreign legal materials, he wrote:

The topic of the proper living space for prisoners and detainees engaged many countries in the world, of all kinds, both those considered well-ordered and those who have not acquired a good reputation in this area....

While we have not overlooked respondents’ position, arguing for caution in comparing foreign laws to the balance made by the Israeli legislator, and while clearly every country has its nature, needs and capabilities, I am of the opinion that the sheer scope of comparative law treatment of the issue at hand – together with the fact that, to a large extent, this is a universal issue of human dignity – require that we also cast our look overseas. Clearly, this does not mean the outright adoption of the regime applicable at a certain state into our legal system; the survey is only meant to enlighten us, as we seek a solution to an issue that is at our doorstep. The inmate-man in of himself is one and the same across the universe. History and literature are laden with interpretation and stories on incarceration and incarceration conditions in regimes to which we have neither been nor will we be alike in any form and fashion, not only in past eras but also in generations close to us and in our generations, between calaboose and gulag. Israel wishes to be to be

⁸¹ Id.

⁸² See 539 U.S. 558 (2003).

⁸³ See D. A. FARBER, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, in *California Law Review*, 2007, p. 1335, 1336 (noting that Justice Kennedy, who on behalf of the Court majority cited a ruling by the European Court on Human Rights, “clearly did not claim that the ECHR’s ruling had controlling weight; at most those rulings were one of several bases for his arguments”).

seen as the most orderly of states, and this topic, while physically in the ‘back yard,’ is normatively front window.⁸⁴

If the judges are really still deciding for themselves, there is neither delegation nor loss of independence. The key, of course, is whether the judges are really still deciding for themselves. If they defer as a result of an independent process of analysis that leads to the conclusion that a foreign source is likely to be very good evidence of the right answer (what we have called “epistemological deference”), then there is no delegation or loss of independence. The judges are deciding a matter of domestic law using the best available materials. If those materials happen to come from a foreign source, there is no obvious reason why use of that source to help get the right answer is not a full execution of the judicial function. But if deference results from either a concern about political legitimacy or a desire to save on costs, there does seem to be an inescapable element of delegation and at least a modest sacrifice of judicial independence. We are not arguing here that deference of that kind is therefore illegitimate. That would require a complex judgment grounded in a deep theory of jurisprudence that we neither have nor present here. But it does seem to be a feature of the practice that is worth noting.

Whether there is any loss of sovereignty in the process depends on the same considerations. When strict application of national law in pursuit of a right answer points outward, there is no more reason to fear loss of sovereignty from that process than to fear it from mandatory applications of foreign law. The judges are determining domestic law as best they can, and they are merely following where the evidence leads. The domestic courts themselves perform the relevant acts of interpretation. That is no more delegation or loss of independence than is consideration of the briefs and arguments of parties. However, if courts defer to foreign sources in the determination of domestic law out of concerns regarding legitimacy or cost savings, then at least part of the decision has seemingly been “outsourced” to foreign interpreters. Again, we say nothing here about whether that practice is good or bad. We simply observe its consequence for anyone who finds it interesting.

In sum, one needs to know *why* a court defers before one can say much about the merits or consequences of that act of deference. We think this is true universally of all instances of deference, and it is therefore true of the particular case of deference to

⁸⁴ *The Association for Civil Rights in Israel*, supra note 51, Rubinstein J, §48 (our translation from Hebrew).

foreign legal sources. We cannot emphasize too strongly that all of these conclusions, and the analytical framework on which they are based, are tentative. We are not jurists or philosophers of law. Nor are we social scientists. We are doctrinal scholars trying to understand and describe some very complex, underanalyzed phenomena. We welcome comments, criticisms, and corrections from all corners, especially civil law corners with which we might be unfamiliar.