

## COMMENT

### Intersystemic Statutory Interpretation in Transnational Litigation

In a recent article in the pages of this *Journal*,<sup>1</sup> Professor Abbe Gluck highlights an important phenomenon: federal courts do not generally apply state interpretive methodologies when construing state statutes. Gluck argues forcefully that this practice is incorrect as a doctrinal matter under *Erie*, and that the legal academy's failure to examine statutory interpretation from a self-consciously "intersystemic" perspective represents a significant gap in the literature.<sup>2</sup>

In this Comment, I extend Gluck's argument regarding the inconsistent and undertheorized nature of the federal approach to intersystemic statutory interpretation to a new context: federal courts' interpretation of the statutory law of foreign countries<sup>3</sup> in the course of transnational litigation.<sup>4</sup> I argue that

- 
1. Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the Erie Doctrine*, 120 YALE L.J. 1898 (2011).
  2. Gluck suggests that in the domestic statutory interpretation context, "[n]either the federal nor the state courts have any consistent or well-articulated approach to the question of whether they are required to apply one another's interpretive methodologies to one another's statutes" and "[w]hat's more, this phenomenon has gone mostly unnoticed, or no one seems to care." *Id.* at 1901.
  3. Throughout this Comment, I use the term "foreign law" to refer to the law of a foreign country, not (as is sometimes done in the domestic conflicts literature) the law of a non-forum U.S. state. For a typology of domestic courts' uses of foreign law, and for background on the role of foreign law in transnational litigation, see Christopher A. Whytock, *Foreign Law in Domestic Courts: Different Uses, Different Implications*, in GLOBALIZING JUSTICE: CRITICAL PERSPECTIVES ON TRANSNATIONAL LAW AND THE CROSS-BORDER MIGRATION OF LEGAL NORMS 45 (Donald W. Jackson, Michael C. Tolley & Mary L. Volcansek eds., 2010).
  4. In the transnational context, an intersystemic perspective on statutory interpretation has also generally been absent from the literature. For exceptions to this general rule, see Andrew N. Adler, *Translating & Interpreting Foreign Statutes*, 19 MICH. J. INT'L L. 37 (1997); and Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in*

when federal courts are called upon to interpret foreign statutes, they should make greater efforts to employ the interpretive approaches of the relevant foreign jurisdictions. This is particularly important because a number of foreign countries—like certain U.S. states,<sup>5</sup> but unlike the U.S. Supreme Court—accord the status of law (or, at least, law-like status) to methodologies of statutory interpretation. The practice of federal courts in this respect has been inconsistent, often disregarding key aspects of foreign interpretive methodology. Judicial practice is thus in tension with the policies that militate in favor of the use of foreign law in transnational litigation.<sup>6</sup>

## I. FOREIGN LAW IN AMERICAN COURTS: CURRENT PRACTICE

Amid the globalizing forces of the world economy, federal courts are often called upon to apply and to interpret the laws of foreign countries.<sup>7</sup> A court sitting in diversity might apply a state choice-of-law rule that requires the court to apply the tort law of a foreign nation.<sup>8</sup> In a contract dispute, a federal court might apply foreign substantive law pursuant to an international agreement's choice-of-law clause.<sup>9</sup> In the realm of corporate law, a court might find, based on an application of the internal affairs doctrine,<sup>10</sup> that a foreign nation's

---

*Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31, 43-44 (2011), which proposes a "simple" versus "contextualized" dichotomy in foreign law determination analogous to Roscoe Pound's "law in books" versus "law in action" paradigm.

5. See, e.g., *Portland Gen. Elec. Co. v. Bureau of Labor & Indus.*, 859 P.2d 1143 (Or. 1993) (establishing a standard methodological framework for statutory interpretation in Oregon); see also Abbe R. Gluck, *Statutory Interpretation Methodology as "Law": Oregon's Path-Breaking Interpretive Framework and Its Lessons for the Nation*, 47 WILLAMETTE L. REV. 539, 540 (2011) (discussing the *Portland General Electric* framework).
6. See *infra* notes 15-19 and accompanying text.
7. See Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 893-95 (2011).
8. See, e.g., *McGee v. Arkel Int'l, LLC*, 671 F.3d 539 (5th Cir. 2012) (applying Louisiana choice-of-law rules to determine that Iraqi tort law governed a wrongful death suit brought by the Texas-resident parents of a U.S. servicemember killed in Iraq due to the alleged negligence of a Louisiana-domiciled government contractor).
9. See, e.g., *Medline Indus. Inc. v. Maersk Med. Ltd.*, 230 F. Supp. 2d 857 (N.D. Ill. 2002) (finding that English law governs a breach of contract claim, pursuant to Illinois state choice-of-law rules governing the application of choice-of-law clauses in contracts).
10. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971); see also Frederick Tung, *Before Competition: Origins of the Internal Affairs Doctrine*, 32 J. CORP. L. 33 (2006) (providing background on and discussing the history of the internal affairs doctrine).

procedural requirements govern a shareholder derivative suit.<sup>11</sup> Even the direct application of certain federal statutes may require U.S. courts to interpret foreign law: for example, under the anti-bribery Foreign Corrupt Practices Act,<sup>12</sup> a defendant may present the affirmative defense that an allegedly improper payment to a foreign official was “lawful under the written laws and regulations of the foreign official’s . . . country.”<sup>13</sup> A federal court might also be called upon to review federal agencies’ interpretations of foreign law in the context of administrative adjudication.<sup>14</sup> As a general matter, various policy arguments militating in favor of applying foreign law in litigation in domestic forums have been advanced, including international comity,<sup>15</sup> reciprocity,<sup>16</sup> predictability,<sup>17</sup> fairness,<sup>18</sup> and discouragement of forum shopping.<sup>19</sup>

In the United States, the process by which federal courts interpret foreign law is set out in Rule 44.1 of the Federal Rules of Civil Procedure:

- 
11. See, e.g., *In re BP P.L.C. Derivative Litig.*, 507 F. Supp. 2d 302 (S.D.N.Y. 2007) (finding that English law governed whether a shareholder had standing to bring a derivative suit on behalf of a U.K.-domiciled firm).
  12. 15 U.S.C. §§ 78m(b), (d)(1), (g)-(h), 78dd-1 to -3, 78ff (2006).
  13. 15 U.S.C. § 78dd-2(c)(1).
  14. See, e.g., *Kaho v. Ilchert*, 765 F.2d 877 (9th Cir. 1985) (affirming the district court’s reversal of a decision by the U.S. Board of Immigration Appeals on the basis of an erroneous interpretation of the law of customary adoption in the Kingdom of Tonga).
  15. On comity generally, see Joel R. Paul, *Comity in International Law*, 32 HARV. INT’L L.J. 1 (1991).
  16. See GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 688 (4th ed. 2007) (“One reason that U.S. courts should respect the sovereignty of foreign states [by applying foreign law] . . . is to increase the prospects that foreign states will respect U.S. sovereignty.”).
  17. See, e.g., 1 JOSEPH H. BEALE, *A TREATISE ON THE CONFLICT OF LAWS* 4 (1935) (“International trade could not be carried on as has now become necessary unless the trader could be assured that he would not be placed absolutely at the mercy of the vagaries or unknown requirements of the local law, but would find a well-established body of law to protect his rights.”).
  18. See *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (“For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts . . . would be unjust . . .”).
  19. See BORN & RUTLEDGE, *supra* note 16, at 689-90 (“[M]ost . . . choice of law rules . . . seek to ensure that different jurisdictions will apply the same substantive law to the same dispute. This reduces the risk of ‘forum shopping’ . . . .”); accord Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT’L L. 801, 807-16 (2006) (“Essentially four [economic] arguments can be made [for applying foreign law rather than the law of the forum]: first, application of foreign law enhances pre-litigation predictability, second, it discourages forum shopping, third, it promotes regulatory competition, and fourth, it preserves the comparative regulatory advantage of foreign jurisdictions.”).

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.<sup>20</sup>

Under the current procedural regime, which in some respects parallels the "all available data" test employed by federal courts when interpreting state law in the *Erie* context,<sup>21</sup> judges called upon to interpret foreign statutes have relied on a wide variety of sources. These sources have included foreign statutory text,<sup>22</sup> foreign case law,<sup>23</sup> and secondary materials.<sup>24</sup> In contrast to the state law determination process, however, expert testimony has also been a widely employed method of determining the content of foreign law; indeed, many courts regard expert testimony as the primary method for understanding foreign law.<sup>25</sup> In addition to basing a determination on the pleadings and

- 
20. FED. R. CIV. P. 44.1. An analogous rule exists for foreign law determinations in the criminal context. See FED. R. CRIM. P. 26.1. For a discussion of the history of the processes of foreign law determination, see Arthur R. Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613 (1967).
  21. On the "all available data" test generally, see Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. REV. 651, 697-702 (1995). The fact that the foreign law determination process largely parallels the process of determining state law under *Erie* is appropriate given the history and purpose of Rule 44.1. See Doug M. Keller, Comment, *Interpreting Foreign Law Through an Erie Lens: A Critical Look at United States v. McNab*, 40 TEX. INT'L L.J. 157, 179 (2004) (suggesting that because the "purpose of [the current rules governing foreign law determination] was to make determining foreign law as similar to domestic law as possible," the rules should be read to require courts to attempt an "*Erie* guess" when applying foreign law); see also Wilson, *supra* note 7, at 906 ("[T]he adoption of Rule 44.1 was designed—to the extent possible—to make the process of determining foreign law mirror the method of ascertaining domestic law.").
  22. See, e.g., *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 73-76 (D.D.C. 2010) (citing 11 OXFORD ENGLISH DICTIONARY 376 (2d ed. 1989)) (construing an Israeli penal statute based in part on the *Oxford English Dictionary* definition of a word used in the court's translated copy of the Israeli law).
  23. See, e.g., *Aasma v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 95 F.3d 400 (6th Cir. 1996) (referencing case law construing a U.K. statute).
  24. See, e.g., *Ramsay v. Boeing Co.*, 432 F.2d 592, 602 (5th Cir. 1970) (relying in part on an "authoritative treatise on Belgium law"); *Bonsu v. Holder*, 646 F. Supp. 2d 273, 279-80 (D. Conn. 2009) (citing an article on Ghanaian law in a quarterly publication of the American Bar Association).
  25. See *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 459 (3d Cir. 1999) ("[E]xpert testimony is the most common way to determine foreign law . . ." (quoting *In re*

evidence presented by the parties to the litigation, a court may also determine a question of foreign law on the basis of its own research (although it is not required to do so under Rule 44.1).<sup>26</sup>

## II. TRANSNATIONAL INTERSYSTEMIC STATUTORY INTERPRETATION

When federal courts are called upon to construe foreign statutes, they employ highly inconsistent interpretive practices. Just as some federal courts in the domestic *Erie* context seek to pair state statutes with the relevant state interpretive methodologies,<sup>27</sup> some federal courts have made clear efforts to adhere to the interpretive rules of the relevant foreign jurisdiction.<sup>28</sup> At other times, however, courts appear simply to twin the text of a foreign statute with the principles of statutory interpretation commonly relied on by federal courts when interpreting domestic law.

For example, in *United States v. Mitchell*,<sup>29</sup> the Fourth Circuit noted that it “ha[d] drawn upon the canons of statutory construction with which we interpret our own laws”<sup>30</sup> in order to interpret Pakistani legislation. One later

---

Arbitration Between Trans Chem. Ltd. & China Nat’l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 275 (S.D. Tex. 1997)). For examples of the use of expert testimony in foreign law determination, see *Thorsteinsson v. M/V Drangur*, 891 F.2d 1547, 1549 (11th Cir. 1990), which relies on the testimony of an Icelandic attorney; *Ramsay*, 432 F.2d at 600-03, which relies on the testimony of two Belgian law experts; and *Rice Corp. v. Grain Board of Iraq*, 582 F. Supp. 2d 1309, 1312 (E.D. Cal. 2008), which relies on the testimony of an official at the Iraqi Ministry of Justice.

26. See, e.g., *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998). The duality inherent in Rule 44.1—in any given case, the relevant foreign law might have to be pled, or it might not, subject to the discretion of the court—has been sharply criticized by one commentator as “conceptually incoherent,” particularly given the heightened pleading standards of *Iqbal* and *Twombly*. Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1215 (2011).
27. See, e.g., *In re W. Iowa Limestone, Inc.*, 538 F.3d 858, 863 (8th Cir. 2008); *In re Whitaker Constr. Co.*, 439 F.3d 212, 222 (5th Cir. 2006); *Ward v. Utah*, 398 F.3d 1239, 1248 (10th Cir. 2005).
28. See, e.g., *United States v. One Lucite Ball Containing Lunar Material*, 252 F. Supp. 2d 1367, 1380 (S.D. Fla. 2003) (rejecting the suggestion that the court “import[] American principles of statutory construction into the analysis” of Honduran law). In a notable example of proactive engagement with codified foreign interpretive principles, a federal bankruptcy court recently relied on the interpretive approaches codified in the *Acts Interpretation Act 1901* (Cth) s 15AB(2)(e) (Austl.), to justify referencing an Australian statute’s explanatory memorandum because “[p]ursuant to statutory authority, Australian courts may use . . . explanatory memoranda to interpret legislation.” *In re Betcop Ltd.*, 400 B.R. 266, 282 (Bankr. D. Nev. 2009).
29. 985 F.2d 1275 (4th Cir. 1993).
30. *Id.* at 1281.

court, called upon to construe Chinese law, has described *Mitchell* as standing for the blanket proposition that “in making [a] foreign law determination, [the] court may draw upon the canons of statutory interpretation with which U.S. courts interpret American laws.”<sup>31</sup> Courts may sometimes assume that no concession need be made to foreign interpretive practice: one authority suggests that “[i]f the issue is the law of England, for example, American judges have little difficulty reading English statutes and cases . . . [T]he law of England may sometimes be treated like the law of an American sister state.”<sup>32</sup> Such practices, however, risk neglecting the case law—and, in many cases, the codified interpretive rules—that guides foreign courts in the process of statutory interpretation.<sup>33</sup>

In *Anglo American Insurance Group, P.L.C. v. CalFed, Inc.*,<sup>34</sup> the court was called upon to determine whether a U.K. statute<sup>35</sup> permitted the indemnification of corporate officers against claims from third parties. In *CalFed*, the court (citing Second Circuit doctrine from the *Erie-Klaxon*<sup>36</sup> line of cases that was developed in the context of domestic conflicts of law) concluded that “[w]here the issue of foreign law has not been addressed by the courts of the foreign jurisdiction, . . . a federal court must engage in the two-step process

- 
31. United States v. Xu, No. 202-CR-00674PMPLRL, 2008 WL 1315632, at \*3 (D. Nev. Apr. 10, 2008).
  32. Comm. on Int’l Commercial Disputes, *Proof of Foreign Law After Four Decades with Rule 44.1 FRCP and CPLR 4511*, 61 REC. ASS’N BAR CITY N.Y. 49, 56 (2006).
  33. See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1847 n.363 (2010) (noting that some of the “[h]ighest courts in other countries . . . have implemented controlling interpretive regimes”); see also Goh Yihan, *A Comparative Account of Statutory Interpretation in Singapore*, 29 STATUTE L. REV. 195 (2008) (discussing regimes of interpretive methodology established by statute in Singapore, Australia, and New Zealand). In the Republic of Ireland, section 5 of the *Interpretation Act 2005* (Act No. 23/2005) (Ir.), <http://www.irishstatutebook.ie/pdf/2005/en.act.2005.0023.pdf>, codifies a version of the plain meaning rule. In Canada, the purposivist “modern principle” approach to statutory interpretation has been adopted as the preferred approach of the Supreme Court of Canada. See Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 (Can.) (citing RUTH SULLIVAN, DRIEDGER ON THE CONSTRUCTION OF STATUTES (3d ed. 1994)); see also Stéphane Beaulac & Pierre-André Côté, *Driedger’s “Modern Principle” at the Supreme Court of Canada: Interpretation, Justification, Legitimization*, 40 REVUE JURIDIQUE THÉMIS 131, 154 (2006) (discussing the widespread acceptance of the “modern principle”).
  34. 899 F. Supp. 1070 (S.D.N.Y. 1995).
  35. Specifically, section 310 of *The Companies Act, 1985*, c. 6 (U.K.).
  36. In *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), the Supreme Court concluded that the *Erie* “prohibition . . . against . . . independent determinations by the federal courts extends to the field of conflict of laws.” *Id.* at 496. In other words, a federal court sitting in diversity is required to treat state choice-of-law rules as substantive for the purposes of the *Erie* analysis.

of determining what the courts of the forum state would predict that the courts of the foreign jurisdiction would find.<sup>37</sup> The federal court must, in other words, predict the forum state's prediction as to the meaning of the foreign law.<sup>38</sup>

In the United Kingdom, a longstanding exclusionary rule barred citation to legislative history for the purposes of statutory interpretation prior to 1992.<sup>39</sup> In that year, the House of Lords case of *Pepper v. Hart*<sup>40</sup> carved out a limited exception to this rule for the purposes of statements made by ministers that “clearly disclose[] the mischief aimed at or the legislative intention lying behind . . . ambiguous or obscure words.”<sup>41</sup> In interpreting the U.K. statute, however, the *CalFed* court began by citing both a 1983 (pre-*Pepper*) edition of an English treatise and a U.S. Supreme Court opinion for the proposition that “[t]he first source for interpretation of a statute is the words of the statute itself.”<sup>42</sup> The court then rejected several textual and structural arguments, adverting instead to extrinsic aids to interpretation, including nonenactment legislative history and the statements of backbench Members of Parliament.<sup>43</sup> Moreover, the court made no mention of the threshold requirements for

- 
37. *CalFed*, 899 F. Supp. at 1077 (citing *Rogers v. Grimaldi*, 875 F.2d 994, 1002 n.10 (2d Cir. 1989)).
  38. *Cf.* *Nolan v. Transocean Air Lines*, 276 F.2d 280, 281 (2d Cir. 1960), *vacated on other grounds*, 365 U.S. 293 (1961) (“Our principal task, in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.”).
  39. *See* *Pepper v. Hart*, [1993] 1 All E.R. 42 (H.L.) 60 (Lord Browne-Wilkinson) (appeal taken from Eng.) (“Under present law, there is a general rule that reference[] to Parliamentary material as an aid to statutory construction is not permissible.”); *see also* Scott C. Styles, *The Rule of Parliament: Statutory Interpretation After Pepper v Hart*, 14 O.J.L.S. 151, 151 (1994) (describing “[t]he ‘exclusionary rule’” as “one of the best established of our rules of statutory interpretation” before *Pepper*).
  40. 1 All E.R. 42.
  41. *Id.* at 64; *see also* Styles, *supra* note 39, at 151 (“In *Pepper* the Court laid down a clear and strict rule” that “it is only ministerial statements which clearly disclose the mischief at which the legislation is aimed which may be cited.”).
  42. *CalFed*, 899 F. Supp. at 1077 (citing *North Dakota v. United States*, 460 U.S. 300, 312 (1983); 44 HALSBURY’S LAWS OF ENGLAND ¶ 857 (Lord Hailsham of St. Marylebone ed., 4th ed. 1983)). The court, by citing both to foreign *and* forum statutory interpretation principles, mirrored the approach that federal courts often take when construing state statutes. *But see* Gluck, *supra* note 1, at 1933 (noting that “[f]rom a doctrinal perspective, this practice of citing state and federal cases together is confusing” and suggesting that “[f]ederal courts that follow this practice appear either to view the rules as universal or to feel the need to buttress their state methodological choices with federal authority—or perhaps are just uncertain about which court’s rules apply”).
  43. *CalFed*, 899 F. Supp. at 1078-80.

employing legislative history established in *Pepper v. Hart*.<sup>44</sup> The court thus arguably reflected the longstanding<sup>45</sup> liberal approach of many American courts to using extrinsic aids in statutory interpretation, and not the cautious approach of the English courts.

Why might courts be disregarding foreign statutory interpretation methodologies? First, courts could be making a conscious choice to eschew greater engagement with foreign interpretive methods. Such a decision might be taken in the interests of efficiency,<sup>46</sup> or might reflect an intuition that principles of statutory interpretation have a universal character.<sup>47</sup> Indeed, courts might not view interpretive methodology as “law” within the meaning of Rule 44.1 at all. However, while such a view might reflect the current unsettled legal status of some aspects of federal interpretive methodology,<sup>48</sup> it

---

44. See *id.*; *supra* notes 40–41 and accompanying text.

45. The standard account is that the American judicial practice of relying on legislative history essentially began in the late nineteenth century. See, e.g., Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1835 (1998) (asserting that the 1892 case of “*Holy Trinity* . . . overturn[ed] the traditional rule that barred judicial recourse to internal legislative history”). It is worth noting, however, that this oft-repeated narrative is not an accurate reflection of the history of interpretive practice in America’s state courts: in fact, a number of state courts were enthusiastically relying on forms of legislative history as early as the antebellum period. See, e.g., *People v. Brenham*, 3 Cal. 477, 490 (1851) (Murray, J., concurring) (“[C]onsidering that the construction of this section is doubtful, there is no better way of arriving at the intention of the legislature than by consulting the legislative history of the bill.”); *People v. Tyler*, 7 Mich. 161, 217 (1859) (relying on the fact that a bill was “passed without any examination or debate” to conclude that a narrow interpretation of the statute was correct, in an early example of what would more than a century later come to be known as the “dog that did not bark” canon).

46. It could, for example, reflect a sense that foreign interpretive practices are simply unknowable, at least at reasonable cost. Cf. *Grynberg Prod. Corp. v. British Gas*, 817 F. Supp. 1338, 1352 (E.D. Tex. 1993) (“There is no telling what the canons of statutory construction were in the former Soviet Union. There is also no telling what they are in the Republic of Kazakhstan.”).

47. Cf. William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1036–38 (2001) (discussing the historical conception of statutory interpretation methodology).

48. See Sydney Foster, *Should Courts Give Stare Decisis Effect to Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1872–77 (2008); Gluck, *supra* note 1, at 1909 (“The U.S. Supreme Court seems to accept, and perhaps prefers, the unresolved legal status of federal statutory interpretation methodology.”); see also Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1766 (2010) (characterizing the canons as “flexible rules of thumb . . . rather than binding rules”); Jordan Wilder Connors, Note, *Treating Like Subdecisions Alike: The Scope of Stare Decisis as Applied to Judicial Methodology*,

would not comport with the status accorded interpretive methodology in some foreign countries. In fact, a number of foreign countries have—either through codification or through case law—established controlling regimes of statutory interpretation.<sup>49</sup> These regimes, where they exist, should be seen as integral to the meaning of foreign statutory text. Indeed, it is possible that statutory interpretation methodology could be “law” for the purposes of the foreign law determination process (because it is accorded law-like status in the foreign jurisdiction), even if it were not “law” in the domestic *Erie* context.

Alternatively, courts might prefer to apply foreign interpretive methodologies to foreign statutes but find themselves unable to do so, perhaps because the parties have not sufficiently pleaded interpretive methodologies. Under traditional conflict-of-law principles, if a party insufficiently pleads foreign law, the judge may, as one court notes, “look to its own forum’s law in order to fill in any gaps.”<sup>50</sup>

Irrespective of the reasons for this practice, courts should—at the very least—more explicitly justify decisions to pair foreign statutory text with traditional American principles of statutory interpretation. This is particularly important because the factors that justify the use of foreign law in transnational litigation in the first place—comity, predictability, fairness, and the avoidance of forum shopping—similarly militate in favor of interpreting the relevant law as it would have been interpreted in the foreign jurisdiction.<sup>51</sup>

## CONCLUSION

Recently, the practice by many trial courts of relying on expert testimony when determining foreign law has been the subject of increasingly sharp criticism. In a 2009 case, for example, Judge Posner decried the practice of “[r]elying on paid witnesses to spoon feed judges” in foreign law cases.<sup>52</sup> He developed this critique further in the 2010 case of *Bodum USA, Inc. v. La*

---

108 COLUM. L. REV. 681, 682 (2008) (“The pervasive sentiment is that decisions about judicial methodology are left to the discretion of the individual Justice.”).

49. See *supra* note 33 and accompanying text.

50. *Banco de Credito Indus., S.A. v. Tesoreria Gen.*, 990 F.2d 827, 836 (5th Cir. 1993).

51. See *supra* notes 15-19 and accompanying text; cf. 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 37:5, at 143-44 (7th ed. 2009) (noting that “the rules of the state in which the statute was enacted should be followed if they have been pleaded and proved” and that “[b]y applying those rules of construction, decisions are more likely to achieve uniformity in the application of statutory law and avoid some of the uncertainties entailed by foreign actions”).

52. *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487, 496 (7th Cir. 2009).

*Cafetiere, Inc.*<sup>53</sup> Concurring with an opinion authored by Judge Easterbrook (which also criticized, albeit more gently, the use of foreign-law experts), Judge Posner highlighted the risks of biased expert testimony and the responsibilities of judges—who are, after all, “experts on law”<sup>54</sup>—to determine questions of law themselves.

Although the call for judges to conduct more independent research into foreign law is surely a laudable one, there are significant risks in eschewing expert testimony on foreign law questions. As one author has noted, “when U.S. judges . . . resort to independent research, they often mistakenly tend to perceive foreign law as quite similar to domestic law, and they tend to give naive ‘plain’ meanings to foreign provisions.”<sup>55</sup> The risk of falsely analogizing foreign interpretive practices to those of the United States is particularly pronounced given that, in many respects, the scholarly conversation at the intersection of statutory interpretation theory and comparative law remains limited.<sup>56</sup> Consequently, in many cases, the relevant information regarding the foreign country’s interpretive regime may not be accessible to a domestic court absent foreign experts who have been socialized into the legal profession of the country in question, even when the foreign legal system might seem similar to that of the United States. Although imperfect, expert testimony—particularly if focused on the “how” question of the foreign interpretive approach in addition to the “what” question of the foreign substantive law content—can give courts a window into a foreign jurisdiction’s controlling interpretive regime in a way that statutory text or secondary sources simply cannot.

Finally, a possible incidental benefit of a more sensitive approach to foreign interpretive methodology deserves special comment. Just as treating state interpretive methodology as “law” in the *Erie* context might further the process of “dialectical federalism,” as Gluck suggests,<sup>57</sup> so might a greater focus on

---

53. 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring).

54. *Id.*

55. Adler, *supra* note 4, at 39, 63-66.

56. See Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 515 (1996) (noting that the scholarly “literature on statutory interpretation has been quite parochial”); Holger Fleischer, *Comparative Approaches to the Use of Legislative History in Statutory Interpretation*, 60 AM. J. COMP. L. 401, 402 (2012) (noting that “most of the literature on the subject still treats interpretive methodology as a solely national field of study” (emphasis omitted)). For important exceptions, see INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991); James J. Brudney, *Below the Surface: Comparing Legislative History Usage by the House of Lords and the Supreme Court*, 85 WASH. U. L. REV. 1 (2007); and Fleischer, *supra*.

57. Gluck, *supra* note 1, at 1991-95 (highlighting potential benefits of a “conversation between state and federal courts that could shape the evolution of interpretive doctrine itself”). On

foreign interpretive methodology in the foreign law determination context foster transnational judicial dialogue.<sup>58</sup> In the words of one author, exposure to foreign interpretive approaches “cannot help but expand the imaginative space open to us when we contemplate our own legal system.”<sup>59</sup> If U.S. courts were to place greater emphasis on pairing foreign statutory texts with those texts’ associated interpretative methodologies, the resulting sensitivity to alternative interpretive approaches might well come to influence the evolution even of domestic statutory interpretation doctrine. The benefits accruing from a more vibrant “dialogue between the adjudicative bodies of the world community”<sup>60</sup> on such issues could be significant.<sup>61</sup>

NICHOLAS M. MCLEAN\*

---

“dialectical federalism” generally, see Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

58. On the concept of transnational judicial dialogue generally, see, for example, Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT’L L. 1103 (1999). The transnational “dialogue” concept has been the subject of a large scholarly literature in the field of constitutional law, but has drawn significantly less attention in the context of statutory interpretation.
59. Farber, *supra* note 56, at 521-22.
60. *Euromepa S.A. v. R. Esmerian, Inc.*, 51 F.3d 1095, 1101 (2d Cir. 1995).
61. See generally JEREMY WALDRON, “PARTLY LAWS COMMON TO ALL MANKIND”: FOREIGN LAW IN AMERICAN COURTS 76-108 (2012) (arguing that engagement with foreign jurisprudence enables courts to learn from foreign experience with similar legal issues). As Waldron notes, “to ignore foreign solutions or to refrain from attending to them because they are foreign betokens not just an objectionable parochialism, but an obtuseness as to the nature of the problems we face.” *Id.* at 103.

\* The author would like to extend special thanks to Judge Guido Calabresi, Professor Abbe Gluck, and Professor Nicholas Parrillo for their helpful comments on an earlier draft of this Comment, as well as to Travis Silva and the editors of *The Yale Law Journal*.