The Use of Foreign Law in Constitutional Interpretation: Lessons from South Africa

By Jacob Foster*

Introduction

The prospect of using foreign law to interpret the U.S. Constitution has provoked an energetic debate largely unmoored from the limited circumstances under which foreign law is likely to be considered. Proponents, such as Justice Ginsburg, contend that jurists benefit from appropriate consideration of foreign decisions. Opponents, such as Justice Scalia, argue that the practice should be “rejected out of hand” as a poor excuse for imposing “the Justices’ own notion of how the world ought to be, and their diktat that it shall be so henceforth in America.”¹ Since the Supreme Court has rarely cited foreign law, it is difficult to assess the validity and strength of these competing claims using U.S. precedent. One key arena worthy of consideration as this debate continues is one of the newest constitutional courts on the globe, in South Africa.

Examining the history, experience, and jurisprudence of the Constitutional Court of South Africa illuminates the potential risks and benefits of citing foreign law. The South African Constitution states that judges “may consider foreign law” and by neither rejecting nor mandating its use, gives South African judges the discretion to cite foreign law in ways that are advocated by American proponents.² South Africa can be viewed, in a sense, as a laboratory for the use of foreign law. Its experience demonstrates that the risks of citing foreign law are real, but it also suggests that ignoring foreign law entirely

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would foreclose opportunities to learn from relevant jurisprudence around the world.

A common problem cited by opponents of the use of foreign decisions in constitutional interpretation is the potential for political misuse. Nowhere are the acute risks of misusing foreign law for political purposes more compellingly demonstrated than the April 2009 decision by Acting National Director of Public Prosecutions Moketedi Mpshe to drop criminal charges against African National Congress president Jacob Zuma, clearing the way for Mr. Zuma to become president of South Africa. Citing decisions by English courts, Mr. Mpshe concluded that political interference in bringing charges against Mr. Zuma required prosecutors to drop the case. Mr. Mpshe, however, largely plagiarized the citation to English authorities from a decision that had been overturned on appeal. The cited English cases were both distinguishable on the facts and inconsistent with South African precedent.

Yet, the risks exemplified by Mr. Mpshe’s misuse of foreign law ought not to obscure the broader South African record. The Constitutional Court consistently warns against “facile” reliance on foreign authorities and advocates citation of foreign law only with due regard to constitutional text, history, and culture. Foreign law is used to learn from the manner in which other judiciaries have approached similar constitutional problems, illustrate the distinctive functions of the South African system, and provide empirical information about the consequences of interpretive choices. In most cases, foreign authorities are examined but then rejected as unpersuasive and ill-suited for the South African context.

As a result, there is limited evidence from South Africa for those who fear that consideration of foreign law will lead judges to derogate from the constitutional text and compromise national values. However, South Africa’s willingness to consider foreign law may result in a tendency to conform its jurisprudence to an international consensus. While an understanding and discussion of foreign jurisprudence allows the Constitutional Court to clarify the assumptions that underpin

5. See discussion infra Part III.
6. See discussion infra Part II.C.
the South African Constitution, a consensus of foreign nations may be persuasive when a clear cut answer is not compelled by the constitutional text, history, or culture.

The South African experience suggests that measured American engagement with foreign law could create a broader understanding of American constitutional values. Rather than representing a sea change in American jurisprudence, foreign law is likely to be influential in only narrow and limited circumstances. Examining the Constitutional Court’s experience can give American practitioners a better understanding of when consideration of foreign law is illuminating and when it is likely to result in error. If American judges are circumspect, and do not excessively rely on foreign authorities, consideration of foreign law could allow American judges to access a broader range of experience without sacrificing uniquely American values.

Part I of the Article discusses the importance of the Constitutional Court’s extensive experience citing foreign law to the American debate over the practice. In Part II, the Article analyzes Constitutional Court jurisprudence to examine the reasons provided by the Court for citing foreign law, the areas of law where foreign law is frequently or infrequently cited, and the methodological approach taken by the Court. Part III focuses on both theoretical and practical criticisms of citing foreign law and explores their saliency in the South African context. Finally, the Article draws general conclusions from the Constitutional Court’s use of foreign law and suggests the significance of these conclusions for the American use of foreign law in constitutional adjudication.

I. Why South Africa?

At one time, America had a virtual monopoly on constitutional judicial review, and if a doctrine or approach was not tried out here, there was no place else to look. That situation no longer holds. Since World War II, many countries have adopted forms of judicial review, which—though different from ours in many particulars—unmistakably draw their origin and inspiration from American constitutional theory and practice. These countries are our “constitutional offspring” and how they have dealt with problems analogous to ours can be very useful to us when we face difficult constitutional issues. Wise parents do not hesitate to learn from their children.\footnote{United States v. Then, 56 F.3d 464, 469 (2d Cir. 1995) (Calabresi, J., concurring) (citation omitted).}
As one of the newest constitutional courts on the globe, the Constitutional Court of South Africa has, unsurprisingly, attracted attention from legal scholars. In part, this is due to the dramatic nature of the transformation, which the Constitutional Court itself has described as "the leap from minority rule to representative democracy founded on universal adult suffrage; the Damascene about-turn from executive directed parliamentary supremacy to justiciable constitutionalism and a specialist constitutional court . . . ."8 The foundations of the South African Constitution, which seeks to transform a highly stratified and unjust society on non-racial, non-gendered, democratic grounds, were built through study of the American constitutional experience and cultural and educational exchanges between South African and foreign legal scholars. While apartheid illustrated how a legal system could be used to repress fundamental human rights, or exemplified what one scholar has referred to as a “paradigmatic wicked legal system,”9 the South African Constitution has assumed similar importance in illustrating, according to Ronald Dworkin, “the best traditions of an understanding of law as part of political morality . . . .”10

One clear difference between the South African and American Constitutions concerns foreign law. While the U.S. Constitution does not mention foreign law, which is unsurprising given the relative paucity of other constitutional democracies at the time of its drafting, section 39(1) of the South African Constitution states that “[w]hen interpreting the Bill of Rights, a court . . . (b) must consider interna-

8. Du Plessis v. De Klerk 1996 (5) BCLR 658 (CC) at para. 127 (S. Afr.); see also Shabalala v. Attorney-General of the Transvaal 1995 (12) BCLR 1593 (CC) at para. 26 (S. Afr.) ("What is perfectly clear from these provisions of the Constitution and the tenor and spirit of the Constitution viewed historically and teleologically, is that the Constitution is not simply some kind of statutory codification of an acceptable or legitimate past. It retains from the past only what is defensible and represents a radical and decisive break from that part of the past which is unacceptable. It constitutes a decisive break from a culture of Apartheid and racism to a constitutionally protected culture of openness and democracy and universal human rights for South Africans of all ages, classes and colours. There is a stark and dramatic contrast between the past in which South Africans were trapped and the future on which the Constitution is premised. The past was pervaded by inequality, authoritarianism and repression. The aspiration of the future is based on what is ‘justifiable in an open and democratic society based on freedom and equality’. It is premised on a legal culture of accountability and transparency. The relevant provisions of the Constitution must therefore be interpreted so as to give effect to the purposes sought to be advanced by their enactment.").


tional law; and (c) may consider foreign law.”11 Frequently exercising its discretion to cite foreign law, Constitutional Court decisions are described as a "showcase for comparative law in action . . . ."12

A number of legal scholars suggest that an understanding of South African practice can inform the debate over the appropriateness of citing foreign law.13 Most efforts to date focus on using a few South African cases to illustrate and describe how courts cite foreign law.14 All expressly disclaim any attempt at a comprehensive or representative discussion of Constitutional Court practice.15 These reviews resulted in overwhelmingly positive comment. There has been little suggestion for caution based on South African jurisprudence.

A more nuanced understanding of South African practice may better inform the American debate. In this respect, the author seeks to build upon the efforts of Sir Basil Markesinis and Jorg Fedtke, who sought to “start the ball rolling” on a normative set of rules to guide citation of foreign law.16 A close examination of South African practice can “cast an empirical light on the consequences of different solutions to a common legal problem”17: the question of whether and how to use foreign law in domestic constitutional interpretation.

11. The Interim Constitution was in operation from 1994 to February 4, 1997. Section 35(1) provided that “[i]n interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.” S. Afr. (Interim) Const., 1993, available at http://www.info.gov.za/documents/constitution/93cons.htm.


14. See, e.g., Bentele, supra note 13, at 223–24 ("So far the discussion has largely avoided any in-depth analysis of exactly what courts do when they consult foreign authorities. The purpose of this Article is to start to fill that gap.").

15. Id. at 247 n.127; Choudhry, supra note 13, at 841 n.90; Markesinis & Fedtke, supra note 12, at 33 n.87.


Of course, some may contend that the differences in the respective American and South African constitutions render South African practice irrelevant. For Justice Scalia, and other opponents of citing foreign law, “[w]e must never forget that it is a Constitution for the United States of America that we are expounding.”\textsuperscript{18} The difference in constitutional text clearly informs whether American judges should cite foreign sources. In South Africa, the Constitution explicitly grants judges the authority to cite foreign law. The lack of a similar provision makes American\textsuperscript{19} citation of foreign law contestable.

Yet, the question of whether American judges should have the discretion to use foreign law is inextricably linked to the question of how this discretion might be exercised. In South Africa, the Constitutional Court has described the scope of its discretion as follows:

Although we are told . . . that we “may” have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter 3 of our Constitution. This . . . is implicit in the injunction given to the Courts . . . , which in permissible terms allows the Courts to “have regard to” such law. There is no injunction to do more than this . . . .

. . . .

In dealing with comparative law, we must bear in mind that we are required to construe the South African Constitution, and not an international instrument or the constitution of some foreign country, and that this has to be done with due regard to our legal system, our history and circumstances, and the structure and language of our own Constitution. We can derive assistance from public international law and foreign case law, but we are in no way bound to follow it.\textsuperscript{20}

Though evidence of South African practice cannot resolve American concerns regarding democratic legitimacy, it can inform an evaluation of the potential risks. Competing claims about the institutional competence of the judiciary are hard to assess in the absence of direct evidence. Given the paucity of American experience, South African jurisprudence allows an evaluation of the purported risks of citing foreign law.

Examining South Africa’s use of foreign law is particularly important at this point, when American judges are just beginning to turn to foreign law. Professor Mark Tushnet argues that opponents of using

\begin{footnotes}
\item[19] For convenience, the modifier “American” is used to refer to the United States of America, exclusively.
\item[20] S v. Makwanyane 1995 (6) BCLR 665 (CC) at paras. 37–39 (S. Afr.); see also S v. Williams 1995 (7) BCLR 861 (CC) at para. 50 (S. Afr.).
\end{footnotes}
foreign law are not concerned with the current, relatively modest, practice of citing foreign law.\textsuperscript{21} Rather, he believes, their concern is that a defensible practice of citing foreign law will lead to the indefensible practice of overreliance on foreign law.\textsuperscript{22} This is reflected in Justice Scalia's argument that judges will overreach and impose their own morality on the populace.

In the absence of judicial experience, American courts risk crossing the Rubicon without proper guidance as to whether and how to use foreign authority. Initial efforts to experiment with foreign law may lead to unprincipled decisions and, perhaps, a backlash against the practice as a whole. Examining the Constitutional Court's successes and failures can help American courts avoid decontextualized or mistaken use of foreign law.

II. South Africa's Use of Foreign Law

Since its establishment in 1995, the Constitutional Court has frequently cited foreign law.\textsuperscript{23} A review of the Constitutional Court's use of foreign law can help American practitioners resolve three central questions: (A) Why should foreign law be used?; (B) When should foreign law be used?; and (C) How should foreign law be used?

A. Why the Constitutional Court Cites Foreign Law

I said, “If here I have a human being called a judge in a different country dealing with a similar problem, why don’t I read what he says if it’s similar enough? Maybe I’ll learn something.” To which the congressman said, “Fine. Read it. Just don’t cite it.” (Laughter.) I thought, “All right.”\textsuperscript{24}

—Justice Breyer

\textsuperscript{21} Mark Tushnet, \textit{Referring to Foreign Law in Constitutional Interpretation: An Episode in the Culture Wars}, 35 U. Balt. L. Rev. 299, 300 (2006) (“The practice the critics focus on consists of somewhere between four and seven references to non-U.S. law, in a body of constitutional adjudication that runs thousands of pages.”).

\textsuperscript{22} \textit{Id.} at 305–09.

\textsuperscript{23} The Constitutional Court is South Africa's highest court on constitutional matters, while the Supreme Court of Appeal is South Africa's apex court on non-constitutional matters. See S. Afr. Const., 1996, §§ 167–68. Cases reach the Constitutional Court as a result of an appeal from a decision of the High Court or the Supreme Court of Appeal; through a direct application based on urgency; as a result of a court below declaring legislation unconstitutional, which requires confirmation by the Constitutional Court; or as a Bill that Parliament requests that the Court review. \textit{Id.}

\textsuperscript{24} Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law (Jan. 13, 2005), http://domino.american.edu/AU/media/mediarel.nsd/0/1F2F7D0C757FD01E89256F890068E6E0 [hereinafter Scalia/Breyer Debate].
It invites manipulation. You know, I want to do this thing; I have to think of some reason for it. . . . Now, I have to write something that—you know, that sounds like a lawyer, okay?

. . .

I have a decision by an intelligent man in Zimbabwe—(laughter)—or—(laughs)—or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly! (Laughter.) And it lends itself to manipulation. It just does.25

—Justice Scalia

The Constitutional Court’s use of foreign law has been described as “located at the very top end of the scale as far as the use of comparative law is concerned.”26 Its openness to foreign law can be explained by a number of influences. Historically, the South African common law was based on a mix of Roman-Dutch and English law, necessitating consideration of foreign authorities and providing South African practitioners with experience analyzing the law of foreign nations.27 The “close cultural and academic ties” with different legal cultures influenced the drafting and text of the Constitution, which fundamentally rejected the prior system of parliamentary supremacy and established democratic constitutionalism modeled on the experience of foreign nations.28 Of course, the constitutional text itself invites judges to consider foreign law.

Yet, these influences alone fail to explain why the Constitutional Court has shown “a ‘comparative appetite’ that must surely have exceeded the expectations of even the most open-minded politicians.”29 One prominent explanation can be labeled the utility theory; it posits that foreign sources are cited because they are useful and there is no downside to the practice. Ursula Bentele, who summarized eight interviews with current and former Justices of the Constitutional Court, reports that each Justice “echoed this theme: Why not look to wherever wisdom may be found regarding a difficult issue of constitutional law?”30

25. Id.
27. Ackermann, supra note 13, at 173–75 (discussing, among other influences, the role of JC de Wet, one of South Africa’s finest legal academics and professor who used comparative legal methodology in his approach to every area of the law and played an influential role in changing the thinking of South African courts on critical issues of contract and criminal law).
30. Bentele, supra note 13, at 231.
Evidence supporting the utility theory exists in the jurisprudence of the Constitutional Court. In considering whether a criminal punishment of whipping juveniles violated the Constitution’s prohibition on cruel and unusual punishment, Justice Langa noted:

While our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.  

Similarly, in considering the constitutionality of the death penalty, the Constitutional Court explained that foreign authorities were informative and that “for that reason alone they require our attention.” In another case, the Constitutional Court rejected an argument by counsel that foreign authority was irrelevant and held that “[t]here can be no doubt that it will often be helpful for our courts to consider the approach of other jurisdictions to problems that may be similar to our own.” Thus, some jurisprudence reflects the opinions reported by Professor Bentele, and Justice Breyer, that foreign law is cited because it is useful to consider the substantive reasoning used by other courts.

However, as implied by Justice Scalia and the unnamed congressman who rebuked Justice Breyer, there is a distinction between reading foreign judgments and citing them. Under an alternate explanation, labeled by this article as the “legitimacy theory,” foreign law is cited because it evidences legal—as opposed to philosophical or moral—principles. Under the apartheid government, the South African judiciary had no experience interpreting a democratic constitution governed by the rule of law. In 1995, the Constitutional Court

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31. S v. Williams 1995 (7) BCLR 861 (CC) at para. 23 (S. Afr.).
32. S v. Makwanyane 1995 (6) BCLR 665 (CC) at para. 34 (S. Afr.).
33. K v. Minister of Safety & Sec. 2005 (9) BCLR 835 (CC) at para. 34 (S. Afr.).
34. See Pharm. Mfrs. Ass’n of S. Afr., In Re: Ex Parte Application of President of the RSA 2000 (3) BCLR 241 (CC) at para. 40 (S. Afr.) (footnotes omitted), available at http://www.saflii.org/za/cases/ZACC/2000/1.html ("The 1961 Constitution provided in specific terms that Parliament was supreme and that no court had jurisdiction to enquire into or pronounce upon the validity of an Act of Parliament, other than one relating to the entrenched language rights. The 1983 Constitution also entrenched the supremacy of Parliament, though it made provision for courts to have jurisdiction in respect of questions relating to the specific requirements of the Constitution. This, however, has been fundamentally changed by our new constitutional order. . . . The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution.") (footnotes omitted); Ackermann, supra note 13, at 172–73 ("On the other hand, the constitutional law of South
began its first term and, with few relevant domestic constitutional principles, cited foreign law in eighty-six percent of the cases decided.\textsuperscript{35} The Court recognized that “\textit{comparative ‘bill of rights’ jurisprudence will no doubt be of importance, particularly in the early stages of the transition when there is no developed indigenous jurisprudence in this branch of the law on which to draw.”\textsuperscript{36}

If foreign law can substitute for the lack of indigenous jurisprudence, a reasonable inference is that foreign law is more legitimate than other sources. This is in tension with the utility theory, as expressed by Justice Ginsburg, which posits that foreign law is cited solely because of its persuasive value and is no different than other persuasive materials, such as “Restatements, Treatises, what law professors or even law students write copiously in law reviews.”\textsuperscript{37} The Constitutional Court, however, has distinguished between foreign law and other secondary sources.\textsuperscript{38}

Sujit Choudhry has written that this emphasis on the legal nature of foreign sources is “at first blush, puzzling.”\textsuperscript{39} According to Choudhry, a strain of the Constitutional Court’s comparative law jurisprudence reflects the claim made famously by Ronald Dworkin “that the law should be viewed as a body of principles, not as a collection of rules.”\textsuperscript{40} While legal rules are applicable in an all or nothing fashion, through reference to a commonly accepted test, principles are frequently basic moral norms that “incline a decision one way, though not conclusively, and they survive intact when they do not prevail.”\textsuperscript{41} For Choudhry, the emphasis on legal sources is in tension with the idea that transcendent principles shared by foreign nations, rather than legal rules, should guide constitutional interpretation. Choudhry reconciles this tension by positing that the Constitutional Court’s “re-

Africa, after unification in 1910, was closely modelled on that of the British Westminster system. The legislator was omni-competent and supreme; no supreme law (by way, for example, of an entrenched Bill of Rights) existed against which the validity of parliamentary legislation could be tested in the courts. There was, of course, one serious flaw in the model. Even after the suffrage was extended to women, the vast black majority of the population remained disenfranchised.”

\textsuperscript{35} Unpublished database on file with author. \textit{See infra} note 51.
\textsuperscript{36} \textit{Makwanyane} 1995 (6) BCLR 665 (CC) at para. 37.
\textsuperscript{38} \textit{Makwanyane} 1995 (6) BCLR 665 (CC) at para. 207.
\textsuperscript{39} Choudhry, \textit{supra} note 13, at 845.
\textsuperscript{40} \textit{Id.} at 842–44.
\textsuperscript{41} RONALD DWORIN, \textit{TAKING RIGHTS SERIOUSLY} 35 (1977).
liance on legal sources deliberately situates it as part of a transnational discussion among legal tribunals about the interpretation and application of transcendent legal norms.”

The emphasis on the legal nature of foreign sources is also surprising for another reason: the history of the judiciary under apartheid. Relying on the positivist distinction between what the law is and what it ought to be, many apartheid era judges interpreted inequitable apartheid era laws according to legislative intent rather than attempting to imbibe the legal system with moral principles of the equitable common law. This resulted in “a system of law with no constitutional safeguards for individual liberty and a legal profession with neither the power nor, perhaps, the will to resist invasions of the most basic human freedoms.”

If a key focus of the post-apartheid judiciary is “reuniting legality and legitimacy,” or building a bridge “away from a culture of authority . . . to a culture of justification,” one might expect that the Constitutional Court would emphasize the persuasiveness of philosophical principles instead of the authority of formal foreign legal sources.

Instead, in a concurring opinion holding the death penalty unconstitutional, Justice Kriegler held that the interpretive “methods to be used are essentially legal, not moral or philosophical.” Although Justice Kriegler recognized that moral principles such as “good faith” involved value judgments, and that “the field of constitutional adjudication, calls for value judgments in which extralegal considerations may loom large,” he held that “the starting point, the framework and the outcome of the exercise must be legal . . . . The incumbents are judges, not sages; their discipline is the law, not ethics or philosophy and certainly not politics.”

The decreased reliance on foreign law over time suggests that foreign law served as a starting point for post-apartheid legal jurisprudence. Heinz Klug argues that in the judiciary’s initial years, the central challenge facing it was to demonstrate its ability to arbitrate

42. Choudhry, supra note 13, at 845–46.
44. John Dugard, Human Rights and the South African Legal Order, at xii (1978); see also Arthur Chaskalson, Equality and Dignity, 5 Green Bag 2d 189, 191 (2002) (“There was a continuing tension between what might often have been equitable values of the common law and the grossly inequitable values of the apartheid law.”).
45. Crossland, supra note 9, at 863.
47. S v. Makwanyane 1995 (6) BCLR 665 (CC) at para. 207 (S. Afr.).
political conflict that threatened violence in the absence of established rules or conventions.\textsuperscript{48} With no indigenous constitutional jurisprudence, the court cited foreign sources for basic principles instead of relying on historical, sociological, or philosophical sources. In its first year, the only two cases that did not cite foreign law dealt with procedural issues.\textsuperscript{49} For example, the Constitutional Court cited foreign law for relatively basic principles, such as to “illustrate the application of the right to a fair trial,” because it had not yet decided any such cases.\textsuperscript{50} As the court developed its jurisprudence, it became unnecessary to cite foreign law for propositions now firmly established in South African jurisprudence.

To date, the Constitutional Court’s first year is the apex of its use of foreign law. In each of the first three years of reported decisions, citations of foreign law occurred in over seventy-three percent of the cases. As the following chart shows, the percentage of cases citing foreign authority declined after the first three years and has not exceeded sixty percent since 1997. However, foreign law was cited in almost half of the cases decided during the last four years.\textsuperscript{51}

The decreased number of citations suggests that, at least in some instances, the development of indigenous jurisprudence made citation of foreign law unnecessary. Not only did the early cases more frequently cite foreign law, but the early Constitutional Court judgments have some of the most confident and extensive uses of foreign law. Indeed, Ms. Bentele reports that “[s]ome of the justices suggested that the tendency to refer to foreign jurisprudence might decrease with time, as the court not only developed its own precedents, but gained confidence in its constitutional adjudication.”\textsuperscript{52} This suggests


\textsuperscript{50} \textit{Shabalala v. Attorney-General of the Transvaal} 1995 (12) BCLR 1593 (CC) at para. 34 n.56 (S. Afr.) (“Many cases illustrate the application of the right to a fair trial. See for example [a list of foreign cases] . . .”).

\textsuperscript{51} The author reviewed every Constitutional Court decision from 1995–2009. Cases were categorized according to the year in which they were reported. Each listed citation to decisions by the national courts of foreign countries was reviewed and tabulated according to its primary subject matter. A chart categorizing the cases is on file with the author. Overall, 168 of 334 cases (50\%) contained citations of foreign law. From 1995 through 1999, foreign law was cited in 67 out of 100 cases (67\%); from 2000–2004 foreign law was cited in 54 out of 135 cases (40\%); and from 2005–2009, 47 out of 99 cases (47\%) cited foreign law.

\textsuperscript{52} Bentele, \textit{supra} note 13, at 229.
that foreign law is more legitimate than extralegal sources, but less than domestic precedent.

The decreasing number of citations may lead a skeptic to wonder if South Africa’s use of foreign law is explainable solely by necessity.\textsuperscript{53} One might argue that lack of experience forced South Africa to rely heavily on foreign law, while the United States has a rich and deep legal history that makes citation unnecessary. Yet in 2008, the Constitutional Court cited foreign law in almost half its cases. While issues of first impression still come before the Constitutional Court, in many areas of constitutional adjudication the court has developed its own body of law. The continued use of foreign authority, after over a decade of detailed domestic decisions and far ranging jurisprudence, casts doubt on the theory that necessity is the sole reason the Constitutional Court cites foreign law.

In this respect, the legitimacy theory supplements or augments the utility theory but is not completely inconsistent with it. Foreign sources are not only cited because they contain persuasive substantive reasoning but also because the reasoning is grounded in comparable legal sources (albeit sources from a different nation). While legal

\textsuperscript{53} du Bois & Visser, supra note 13, at 646 (suggesting that the primary reason for citation to foreign authority is “bare necessity”); Kentridge, supra note 13, at 246 (“[T]he use of comparative materials is virtually inescapable in countries introducing a justiciable bill of rights for the first time . . . .”).
sources from outside a domestic legal system are not typically considered authoritative, developments in international politics, and the establishment of newly democratic states, situate the Constitutional Court as “part of a global development of constitutionalism and human rights.”

The legitimacy of foreign legal sources stems from the explicit borrowing of foreign text in drafting provisions of the South African Constitution, which provides an *ex ante* reason to consider foreign law; the textual provision licensing comparison with foreign law; and the comparable nature of constitutional texts considered by a global community of courts.

Prior to World War II, very few countries had fully functioning judiciaries producing relevant constitutional jurisprudence. Similar interpretive activities now employed by legal tribunals across the globe encourage the Constitutional Court’s consideration of foreign law:

In construing and applying our Constitution, we are dealing with fundamental legal norms which are steadily becoming more universal in character. When, for example, the United States Supreme Court finds that a statutory provision is or is not in accordance with the “due process of law” or when the Canadian Supreme Court decides that a deprivation of liberty is not “in accordance with the principles of fundamental justice” (concepts which will be dealt with later) we have regard to these findings, not in order to draw direct analogies, but to identify the underlying reasoning with a view to establishing the norms that apply in other open and democratic societies based on freedom and equality.

But if the South African Constitution is “unique in its origins, concepts and aspirations,” according to Justice Kriegler, how are the decisions of foreign courts useful? Unlike Justice Scalia, who views

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55. William H. Rehnquist, *Constitutional Courts—Comparative Remarks* (1989), reprinted in *Germany and its Basic Law: Past, Present and Future*, a German-American Symposium 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (“For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”).

56. *Ferreira v. Levin NO* 1996 (1) BCLR 1 (CC) at para. 72 (S. Afr.).

the unique constitutional texts as reason to reject foreign law altogether, Justice Kriegler argues that they are merely a reason to avoid “blithe adoption of alien concepts or inapposite precedents.” Sound comparative law requires that courts “discern the principles applied by comparable courts in foreign jurisdictions, to establish whether they can be applied here and, if so, to what extent and subject to what modifications.”

In a similar vein, Justice O’Regan has written that any risks of citing foreign law can be effectively managed by sound comparative practice:

It is clear that in looking to the jurisprudence of other countries, all the dangers of shallow comparativism must be avoided. To forbid any comparative review because of those risks, however, would be to deprive our legal system of the benefits of the learning and wisdom to be found in other jurisdictions. Our courts will look at other jurisdictions for enlightenment and assistance in developing our own law. The question of whether we will find assistance will depend on whether the jurisprudence considered is of itself valuable and persuasive. If it is, the courts and our law will benefit. If it is not, the courts will say so, and no harm will be done.

For most scholars, Justice O’Regan’s statements in K have been taken at face value. Yet, as demonstrated below, determining whether foreign jurisprudence is “valuable and persuasive” involves a complex process and consideration of numerous factors that are not discussed in K. The Constitutional Court’s record, in fact, demonstrates that there are occasions where foreign law has been mistakenly viewed as persuasive and other occasions when foreign law was cited even though it was not persuasive. Identification of the situations where the Constitutional Court either erred in applying foreign law, or suggested that foreign law is less relevant, may prove critical for American practitioners hoping to avoid misuse of foreign law.

B. When the Constitutional Court Cites Foreign Law

The Constitutional Court is especially likely to cite foreign law when the constitutional text is similar to that of a foreign country.

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58. Bernstein v. Bester NO 1996 (4) BCLR 449 (CC) at para. 133 (S. Afr.); see also De Klerk 1996 (5) BCLR 658 (CC) at para. 127 (“Therefore, although it is always instructive to see how other countries have arranged their constitutional affairs, I do not start there. And when I do conduct comparative study, I do so with great caution. The survey is conducted from the point of vantage afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.”).

59. K v. Minister of Safety & Sec. 2005 (9) BCLR 835 (CC) at para. 35 (S. Afr.).

60. See, e.g., Bentele, supra note 13, at 231 (citing K with approval).
When the text reflects a value that is shared with a foreign country, the Constitutional Court is likely to find foreign law persuasive. However, when the constitutional value differs as a result of text, history, or culture, the Constitutional Court is likely to cite foreign law solely to illustrate a contrasting approach.

In interpreting the Constitution, the Constitutional Court has rejected the approach which focuses on "original intent." Such an approach would be in error because "rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning." Instead, the Constitutional Court has adopted a purposive (teleological) approach to interpreting the Constitution. Under the purposive approach, adopted from decisions of the Canadian Supreme Court, "[t]he meaning of [a] right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect."

The Constitutional Court has emphasized that the starting point for "extracting" the purposeful values of a right or freedom is the text itself. The constitutional text both sets the limit of interpretation and is the primary source of the guarantee. Though the Constitutional Court seeks to give expression to the "values it seeks to nurture for a future South Africa," the court has stated that "[i]f the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination." Where the constitutional text is similar to the constitutional text of another country, the Constitutional Court is likely to examine decisions interpreting the foreign text. A prime example is Justice Langa's decision that the criminal punishment of whipping juveniles was cruel and unusual punishment:

Whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the United States Constitution and in article 12 of the Canadian Charter, or "inhuman or degrading punish-
ment” as in the European Convention and the constitution of Zimbabwe, or “cruel, inhuman or degrading punishment” as in the Universal Declaration of Human Rights, the ICCPR and the constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society’s concept of decency and human dignity.68

Justice Langa cited a “clear trend” in the jurisprudence of countries as diverse as the United States and Mozambique and stated that “[t]here is unmistakably a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society’s notions of decency and is a direct invasion of the right which every person has to human dignity.”69 After examining the challenged practice of juvenile whipping in the context of international protection of human dignity, Justice Langa held that the punishment was unconstitutional.

1. Areas Where Citation of Foreign Law Is Frequent

The similarity of constitutional text and values is a good predictor of whether the Constitutional Court will cite foreign law. Justice Langa’s citation of foreign law was justified by a shared norm against cruel punishment running through similar constitutional texts. In other cases involving criminal procedure, the Constitutional Court is also likely to cite foreign law.70 Government punishment of criminal activity, and balancing criminal punishment and the constitutional rights of the individual grounded in similar constitutional guarantees, are ubiquitous concerns in most constitutional democracies.71

Foreign cases involving “cruel or unusual punishments” or the right to “fair trial” also establish a community standard with which to

68. S v. Williams 1995 (7) BCLR 861 (CC) at para. 35 (S. Afr.).
69. Id. at paras. 39–40.
70. The Constitutional Court has cited foreign law in 40 out of 58 of the cases adjudicated (68.9%). Criminal procedure cases primarily involve application of the section 35 rights of arrested, detained, and accused persons, as well as the prohibition on cruel and unusual punishment in section 8. See supra note 51.
71. See, e.g., S v. Baloyi 2000 (1) BCLR 86 (CC) at para. 15 (S. Afr.), available at http://www.saflii.org/za/cases/ZACC/1999/19.html (“In open and democratic societies that have adversarial criminal justice systems similar to ours, the centrality of this right to a just criminal process has been strongly emphasised. The requirement that the state must prove guilt beyond a reasonable doubt has been called the golden thread running through the criminal law and a prime instrument for reducing the risk of convictions based on factual error.”).
compare governmental action. The meaning of “unusual” or “unfair” is necessarily defined in part by its opposite—what is “usual” or “fair.” These decisions reflect evolving philosophical judgments about the rights and dignity of defendants, rather than necessarily involving unique national considerations. Jurisprudence involving abstract claims (decency) to evolving moral norms leads the court to survey foreign sources. For example, the Constitutional Court cited foreign law due to the “importance and universality of the right to a fair trial.” The universal moral norm and community standard allows the court to search for the “common thread” of shared values and examine whether the challenged domestic practice is consistent with those values.

Similar constitutional text also leads the Constitutional Court to cite foreign law in every case involving the right to free expression. The Court noted that “South Africa is not alone in its recognition of the right to freedom of expression and its importance to a democratic society,” and that “[t]he right has been described as ‘one of the essential foundations of a democratic society . . . .’” Although the Constitutional Court always cites foreign authority in cases involving free expression, it frequently rejects the persuasiveness of such authority. While the importance of free expression is a constitutional value broadly shared with foreign countries, these broad values can be applied only with significant modification in light of South Africa’s history of apartheid and the constitutional prohibition on hate speech.

Similarly, the Constitutional Court cites foreign law in approximately seventy percent of its equality cases but rarely finds foreign law

72. Jaipal v. S 2005 (5) BCLR 423 (CC) at para. 26 (S. Afr.) (“The basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness. The importance and universality of the right to a fair trial is evident from the fact that it is recognised in key international human rights instruments.”). Cf. Harold Hongju Koh, International Law as Part of Our Law, 98 Am. J. Int’l L. 43, 46 (2004) (“[T]he Court has looked outside the United States when a U.S. constitutional concept, by its own terms, implicitly refers to a community standard . . . .”).


74. The Constitutional Court has cited to foreign law in every freedom of expression case it has adjudicated—13 out of 13 (100%). See supra note 51.


persuasive. While equal protection clauses embody a shared moral norm against differential treatment, and “South Africa shares patterns of inequality found all over the globe,” the history of apartheid and the transformative goals of the Constitution make foreign law less relevant.

Foreign law is frequently cited in the Constitutional Court’s adjudication of substantive enumerated rights. Citations are especially frequent in cases involving civil and political rights, such as the right to privacy, religion, political participation, freedom and security of the person, dignity, and rule of law. Many of these constitutional provisions protect governmental interference with individual rights and are similar to abstract guarantees contained in various foreign constitutions. As a result, the Constitutional Court cited foreign law in every case involving free exercise of religion because of similar texts and the common values shared with foreign countries.

2. Areas Where Citation of Foreign Law Is Occasional

When there are differences in constitutional text, the Constitutional Court is likely to cite foreign law occasionally. Prime examples include cases involving the allocation of governmental powers and decision-making, where the Constitutional Court cites foreign law in more than half of its cases. The importance of constitutional text is

77. The Constitutional Court has cited foreign law in 23 out of 33 (69.6%) of the equality cases that it adjudicated. See supra note 51.

78. *Prinsloo v. Van der Linde* 1997 (6) BCLR 759 (CC) at para. 20 (S. Afr.).

79. The Constitutional Court has cited foreign law frequently in cases involving civil rights, such as in three out of three cases (100%) regarding the right to privacy enumerated in section 14, one of the two cases (50%) regarding the right to human dignity enumerated in section 10, and five of seven cases (71%) involving the right to freedom and security of the person enumerated in section 12. It also cited foreign law frequently in cases involving political rights, such as in seven of nine cases (78%) regarding political rights enumerated in section 19 and in the one case focused on the violation of the rule of law. See supra note 51.

80. The Constitutional Court has cited foreign law in every case regarding free exercise of religion (two out of two cases, or 100%) but has noted in another case that American law regarding the establishment clause is of limited utility in interpreting the equality provision of the South African Constitution. See *S v. Solberg* 1997 (10) BCLR 1348 (CC) at paras. 99–101 (S. Afr.) (“Our Constitution deals with issues of religion differently to the United States Constitution. It does so under the equality provisions of section 8, the freedom of religion, belief and opinion provisions of section 14, and the education provisions of section 32. The only provision relied on by the appellant in the present case is section 14. Section 14 does not include an ‘establishment clause’ and in my view we ought not to read into its provisions principles pertaining to the advancement or inhibition of religion by the state.”).

81. The Constitutional Court has cited foreign law in 30 out of 48 (62.5%) of cases challenging the use of governmental power because it constituted unjust administrative
illuminated by categorizing the constitutional issue according to type of governmental challenge regarding administrative action, allocation of power between the branches of national government, or allocation of power between the nation and the provinces. In cases involving the distribution of powers horizontally—between the executive, legislative and judicial branches—the Constitutional Court almost always cites foreign law.\textsuperscript{82} The frequent citation of foreign law is explained by the “common thread” of separation of powers principles shared with foreign constitutional texts:

The constitutions of the United States and Australia, like ours, make provision for the separation of powers by vesting the legislative authority in the legislature, the executive authority in the executive, and the judicial authority in the courts. The doctrine of separation of powers as applied in the United States is based on inferences drawn from the structure and provisions of the Constitution, rather than on an express entrenchment of the principle. In this respect, our Constitution is no different.\textsuperscript{83}

In contrast, the vertical distribution of powers between the national government and the provinces is enumerated in the Constitution.\textsuperscript{84} From 1995–1999, the Constitutional Court cited foreign law in almost every case involving the vertical distribution of power, yet from 1999–2008, it rarely cited foreign law.\textsuperscript{85} One possible explanation is that the early decisions established that the constitutional text did not reflect shared values, and it was unnecessary to explore foreign law in subsequent decisions.

Evidence for this theory is found in an early decision regarding the National Education Bill.\textsuperscript{86} Advocate Wim Trengove placed heavy reliance on a U.S. Supreme Court case to argue the national government could not constitutionally require provincial officials to implement regulatory policy.\textsuperscript{87} In rejecting this argument, the Constitutional Court held that the provinces were unlike “sovereign
states,” “and have only those powers that are specifically conferred on them under the Constitution.” As a result, “[d]ecisions of the courts of the United States dealing with state rights are not a safe guide as to how our courts should address problems that may arise in relation to the rights of provinces under our Constitution.”

88 After this decision, there was no reason for the Constitutional Court to consider American precedent in subsequent cases regarding the rights of provinces.

In regard to review of administrative action, the Constitutional Court cites foreign law in two-thirds of its cases. 89 Section 33 enforces the right to administrative action that is “lawful, reasonable and procedurally fair,” and provides for national legislation to give effect to these rights. 90 The Constitutional Court has noted that “[a]dministrative law, which forms the core of public law, occupies a special place in our jurisprudence.” 91 The uniqueness of the constitutional structure may limit comparison with foreign nations. To the extent that foreign countries are cited, they are usually limited to English and commonwealth countries because English administrative law informed the South African common law of administrative review 92 (which was the basis for the Promotion of Administrative Justice Act, 93 the legislation giving effect to section 33).

3. Areas Where Citation of Foreign Law Is Rare

The Constitutional Court rarely cites foreign law when other constitutions do not protect similar rights. In cases involving socioeconomic rights protected by the South African Constitution, such as the right to housing, the Constitutional Court rarely cites foreign law. 94 The simple explanation for the paucity of references is that foreign constitutions do not protect these rights, and there is little comparable jurisprudence. 95 The distinctive history and culture of South Africa informs the protection of certain socioeconomic rights in the

88. Id. at para. 23.
89. 10 out 15 cases (66.6%). See supra note 51.
91. Minister of Health v. New Clicks SA (Pty) Ltd. 2006 (1) BCLR 1 (CC) at para. 614 (S. Afr.).
94. The Constitutional Court cited foreign law in none out of its four decisions regarding housing rights. See supra note 51.
South African Constitution. Of particular note is the legacy of apartheid in regard to the forced removal of persons from housing. The Constitutional Court stated that "[t]he focus on security of tenure in section 26 of the Constitution marks an intention to reject that part of our history where invasive legislation was used to remove people from their land and homes forcefully and to intimidate and harass them with senseless evictions rendering them homeless." This unique history, and the lack of a similar right in foreign constitutions, explains the few citations of foreign law.

In adjudicating other socioeconomic rights, the Constitutional Court cited foreign law more frequently. The number of cases adjudicated under these provisions is small, but the Constitutional Court cited foreign law in its singular decision on the right to education and one out of two decisions on the right to the environment. It also cited foreign law in its two decisions interpreting the right to health.

It is unclear whether the Constitutional Court will continue to cite foreign law in these areas, but there are signs that this is unlikely. In a case concerning the right to health, the Constitutional Court noted the differences between the structure of the South African Constitution—which specifically protects the right to medical treatment—and foreign constitutions that do not protect this right. The distinctiveness of the Constitution in regards to socioeconomic rights may militate against continued reference to foreign law as jurisprudence develops. Notably, a major October 2009 decision dealing with the right to water failed to cite foreign law and solely relied on past domestic jurisprudence.

The Constitutional Court cites foreign law the least in cases regarding jurisdiction, practice, or procedure of the judicial system. In

97. The Constitutional Court has infrequently cited foreign law in other cases involving economic rights, such as two out of eight cases (25%) regarding the right to labor relations. The record with regard to the right to property under section 25 is more mixed, with the Constitutional Court citing foreign law in 6 out of 11 (55%) of the cases. A likely explanation is the breadth of the right to property under section 25, which governs both general property rights and land reform issues. While the court was likely to cite foreign law in cases involving challenges to civil asset forfeiture laws governing the instrumentalties of crime under sections 25(1)–(2), it rarely cited foreign law in cases involving land issues under sections 25(4)–(9). See supra note 51.
its first cases in these areas, the Constitutional Court would occasionally cite foreign law to establish foundational principles of constitutional interpretation. For example the Constitutional Court stated in one early case that:

In the United States of America, and as long ago as 1885, Matthews, J said: 
"[N]ever . . . anticipate a question of constitutional law in advance of the necessity of deciding it;" . . . the rule stated by Matthews, J is a salutary rule which has been followed in other countries. It is also consistent with the requirements of section 102 of our Constitution . . . .

Once established in South African jurisprudence, however, it was no longer necessary to cite foreign law for this basic principle of constitutional adjudication. In a later decision, the Constitutional Court simply cited its earlier decision (quoted above) as indigenous authority for the proposition that a constitutional issue should not be decided unless necessary. After its early decisions, the Constitutional Court rarely cited foreign law in cases involving jurisdiction or procedural issues.

4. Contextual Factors Encouraging Citation of Foreign Law

a. The Challenged Practice Is Identical to the Practice Challenged Before Foreign Courts

A few additional circumstances can increase the likelihood that the Constitutional Court will cite foreign law. First, the Constitutional Court is likely to cite foreign law when the challenged practice is identical to a practice challenged in foreign jurisdictions. For example, in adjudicating the constitutionality of the death penalty the Constitutional Court also cites to foreign law when the same statute is being challenged. However, when the statute isn’t directly comparable, the Constitutional Court has declined to utilize foreign law. See Geuking v. President of the RSA 2004 (9) BCLR 895 (CC) at paras. 22–23 (S. Afr.) (“In support of his submission that section 3(2) does not empower the President to grant his consent to the surrender, counsel for the appellant also relied on a decision of the Federal Court of Australia in Oates v. Attorney-General. That case concerned a request for extradition under a power it was held vested in the Crown itself. The Australian court was therefore dealing with the interpretation of a statutory provision the context of which is entirely different to that with which we are concerned in this case. The Oates decision (supra) thus cannot provide support for the appellant’s submission. It follows that there is no substance in this argument and it falls to be dismissed.”).
tional Court stated that “the international and foreign authorities are of value because they analyse arguments for and against the death sentence and show how courts of other jurisdictions have dealt with this vexed issue.” Foreign law assumes increased relevance in this situation because it offers evidence of how other courts have resolved a constitutional dilemma at the most specific level of practice—the exact issue at hand.

When an identical practice or statute was challenged in a foreign jurisdiction, the Constitutional Court examines foreign law to discern how the foreign court approached the constitutional issues. The Constitutional Court cites foreign jurisprudence when it is “both compelling and articulate[s] lucidly the case for and against” the challenged practice. For example, in a case involving regulatory inspections under the North West Gambling Act, the Constitutional Court noted that “[a] careful consideration of the constitutional standard for regulatory inspections of commercial premises should include a review of relevant foreign jurisprudence on the issue.” The Court held that the Canadian and American approach was “sound,” in recognizing that an inspection infringed the right to privacy, and that “invoking the right to privacy is consistent with our constitutional notion of concentric circles of the privacy right.” As a result, the Constitutional Court held that the regulatory inspections were unconstitutional.

b. Issues of First Impression

The Constitutional Court is especially likely to cite foreign law when the challenged practice was adjudicated abroad, and it is an is-

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104. *Barkhuizen v. Napier* 2007 (7) BCLR 691 (CC) at para. 162 (S. Afr.) (“In considering the standards of contractual behaviour required by public policy in South Africa, attention should be paid to the manner in which standard form contracts are being dealt with in other open and democratic societies. As Collins points out, one of the foremost general challenges for legal regulation of markets during the twentieth century was the requirement to limit the advantages which businesses could obtain against consumers by deploying standard form contracts. This has been a world-wide concern.”).
107. *Id.* at para. 59.
108. *Id.* at para. 95.
issue of first impression for South African courts. The Constitutional Court notes that “[c]omparative research is generally valuable and is all the more so when dealing with problems new to our jurisprudence but well developed in mature constitutional democracies.”

One example involves a case where a religious minority group of Rastafarians argued that South Africa’s criminalization of marijuana violated their free exercise of religion. Though the Constitutional Court had not yet addressed the tension between religious freedom and criminal laws, the U.S. Supreme Court had previously addressed a similar argument by Native Americans who challenged the criminalization of peyote. The Constitutional Court rejected the approach taken by the majority of the U.S. Supreme Court, which held that the right to free exercise of religion did not relieve an individual of complying with a valid and neutral law of general applicability. The approach of the minority, which held that limitations on religious practices must be justified by a compelling state interest, was “more consistent with the requirements of [the South African] Constitution,” in particular the jurisprudence on the limitations of rights. Nevertheless, the Constitutional Court cited the American decision as “demonstrat[ing] the difficulty confronting a litigant seeking to be exempted for religious reasons from the provisions of a criminal law of general application” because of the difficulty of distinguishing between religious and recreational uses of illicit drugs. The Constitutional Court thus rejected the claims of the Rastafarians.

A case concerning equality issues is another example. In an equal protection challenge to the Pretoria City Council’s practice of charging individuals in primarily black townships a different rate for electricity and water, the City Council argued that the differential rate was based on geographic location, not race. This argument raised an
issue of first impression in South Africa and the Constitutional Court considered foreign law because "[t]he question of intention, particularly in cases of indirect discrimination has, however, been considered by courts in other jurisdictions."117

c. Shared History or Constitutional Doctrine

Another situation where the Constitutional Court is particularly likely to cite foreign law is when a constitutional text or doctrine is grounded in shared history or is derived from a foreign legal system. During the drafting process, elements from other constitutions were explicitly borrowed in formulating the text of the South African Constitution. As Justice Kriegler notes, "where a provision in our Constitution is manifestly modelled on a particular provision in another country’s constitution, it would be folly not to ascertain how the jurists of that country have interpreted their precedential provision."118

For example, the Constitutional Court cited foreign law in a case deciding the responsibility of the National Council of Provinces ("NCOP"), a secondary legislative provincial body, to hold public hearings and involve the public.119 The Constitutional Court cited German law because "[t]he NCOP shares many of its structural characteristics with the German provincial body known as the Bundesrat, or council of State governments, upon which the NCOP was modelled."120

In a case involving shared constitutional doctrine, the Constitutional Court considered a challenge to a section of the Criminal Procedure Act that placed the burden on the accused to prove that a confession was not free and voluntary. This reversed the traditional burden on the prosecution to prove that a confession was freely and voluntarily made, which "reflects a long-standing principle of the English law of criminal procedure and evidence, [and] was embodied in the Evidence Ordinance of the Cape Colony in 1830."121 The Constitutional Court noted that "[i]n both Canada and South Africa the presumption of innocence is derived from the centuries-old principle of English law . . . that it is always for the prosecution to prove the guilt of the accused person, and that the proof must be proof beyond a reasonable doubt." As a result, the Constitutional Court “appropri-

117. Id. at para. 39.
118. Bernstein v. Bester NO 1996 (4) BCLR 449 (CC) at para. 133 (S. Afr.).
120. Id. at para. 80.
121. S v. Zuma 1995 (4) BCLR 401 (CC) at para. 3 (S. Afr.).
ately applied the principles worked out by the Canadian Supreme Court . . . ,” and held that the Criminal Procedure Act violated the constitutional right to a fair trial.\(^{122}\)

It is worth noting that the Constitutional Court cites foreign law when there is a shared doctrine or legal concept, even if the exact historical relationship is unclear. In one case, for example, the Constitutional Court considered whether the termination of student bursaries was procedurally unfair.\(^{123}\) The Court noted that the doctrine of legitimate expectations arose and was developed in English law and that a similar “recent decision of the English Court of Appeal . . . held that there was a duty . . . to consult” affected members of the public.\(^{124}\) Since both cases involved the application of the doctrine of legitimate expectations, the Constitutional Court applied the principles in the English judgment and held that terminating bursaries without consultation violated students’ rights of procedural fairness.\(^{125}\) A similar legal doctrine was applied even though the historical connection between English and South African law was not clearly explained.

A shared history or constitutional doctrine may lead the Constitutional Court to cite foreign law, but the Court will reject its application when it conflicts with constitutional text. In a case regarding the personal tort liability of local council members, the respondent argued, “the history of absolute privilege with which we are concerned shows that parliamentary privilege came to South Africa from England and, as the term itself indicates, applied only to the legislature in the pre-constitutional era.”\(^{126}\) While the historical shared doctrine of privileges and immunities would have insulated the council members from personal liability, the Constitutional Court rejected the persuasiveness of the doctrine since the “Constitution is now the supreme law.”\(^{127}\)

\(^{122}\) Id. at para. 25; see also Bernstein 1996 (4) BCLR 449 (CC) at para. 28 (noting that “[b]ecause South African and Australian company law share a common ancestry it is instructive to consider the approach of the Australian courts to comparable problems arising out of Australian companies legislation which make provision for the examination by a liquidator or administrator of persons who have knowledge of the affairs of a company”).

\(^{123}\) Premier, Province of Mpumalanga v. Exec. Comm. of Ass’n of Governing Bodies of State-Aided Schs.: Eastern Transvaal 1999 (2) BCLR 151 (CC) (S. Afr.).

\(^{124}\) Id. at para. 41.

\(^{125}\) Id. at para. 42; see also AAA Investments (Pty) Ltd. v. Micro Finance Regulatory Council 2006 (11) BCLR 1255 (CC) at para. 92 (S. Afr.) (Langa, C.J., dissenting) (noting that “[a]lthough decisions in foreign jurisdictions should never be slavishly adopted, a brief examination reveals that there is much that is similar between our law on delegation and the decisions of foreign courts. I consider that the manner in which they have dealt with similar issues on this aspect provides helpful guidance.”).

\(^{126}\) Swartbooi v. Brink (2), 2003 (5) BCLR 502 (CC) at para. 13 (S. Afr.).

\(^{127}\) Id.
Section 161 of the Constitution and legislation enacted pursuant to it governed the personal liability of council members and undermined the relevance of the shared historical doctrine. This case demonstrates that shared values are unlikely to be persuasive when they are inconsistent with the constitutional text.

C. How the Constitutional Court Uses Foreign Law

In his early article classifying the uses of foreign law, Sujit Choudhry argues the methodology used by courts in citing foreign law can be categorized as (1) universalist; (2) dialogical; and (3) genealogical. In universalist interpretation, the court gives meaning to “liberties that transcend national boundaries.” Some provisions of the Constitution protect broad rights with suprapositive values and foreign constitutions protect similar values at a high level of generality. By examining foreign sources and extracting relevant transcendent legal principles, judges learn how abstract values are defined in concrete circumstances. In dialogical interpretation, courts “engage in dialogue with comparative jurisprudence in order to better understand their own constitutional systems and jurisprudence.” Though relevant principles are identified in foreign decisions, they are ultimately found inappropriate in the domestic context. Contrasting the different approaches of other countries nonetheless clarifies values that are distinctly and peculiarly South African. In genealogical interpretation, a historical legal relationship informs interpretation of the Constitution. While Mr. Choudhry uses examples from South Africa to demonstrate universalist and dialogical interpretation, the cases discussed in Part III.B.4 of this Article demonstrate the genealogical approach as well.

128. Id. at paras. 13–14; see also Bato Star Fishing (Pty) Ltd v. Minister of Envtl. Affairs & Tourism 2004 (7) BCLR 687 (CC) at para. 44 (S. Afr.) (“[S]ection 6(2)(h) of PAJA . . . draws directly on the language of the well-known decision of the English Court of Appeal . . . . Section 6(2)(h) should then be understood to require a simple test, namely, that an administrative decision will be reviewable if, in Lord Cooke’s words, it is one that a reasonable decision-maker could not reach.”).

129. See also Shaik v. State 2008 (8) BCLR 834 (CC) at para. 56 (S. Afr.) (“Although the provisions of the English legislation are similar to those of our legislation, the constitutional framework is different; and for this reason, I do not think that the interpretation by the English courts of their legislation is directly applicable to the proper interpretation of our legislation in the light of the spirit, purport and objects of our Bill of Rights.”).


131. Choudhry, supra note 13, at 836.
Numerous other authors have similarly divided the use of foreign law into three or four somewhat similar categories. Notably, in a type of use not discussed by Mr. Choudhry, the Constitutional Court uses foreign sources to provide empirical information about the consequences of certain interpretive choices. Thus, decisions are better informed by previous errors and the results of alternative approaches used by foreign courts to address the constitutional issue at hand.

The Constitutional Court most commonly employs the “dialogical” approach. In these cases, the Constitutional Court notes a similar constitutional text and extracts relevant principles from foreign case law but ultimately concludes that the jurisprudence is not persuasive because of unique features of constitutional text, South African history, politics, or culture.

Of course, citing foreign law is not informative if the Constitutional Court merely notes that South Africa has a different constitu-


133. This use of foreign law is relatively uncontroversial, even to opponents of citing foreign law. For example, in one case, the government argued that liquidators needed authority under the Insolvency Act to compel witnesses to produce evidence and testify. *Ferreira v. Levin NO* 1996 (1) BCLR 1 (CC) at paras. 20–23 (S. Afr.). The Constitutional Court held that such authority was unnecessary because “[t]he state interest in achieving full information must be just as compelling in the United States of America, Canada and the United Kingdom.” Since other countries were able to protect the state interest “by means which are less invasive of the examinee’s rights . . . ,” empirical data suggested the requested authority was unnecessary. *Id.* at para. 127. Similarly, in another case, Justice Sachs in his concurrence argued that the governmental interest in regulating stripteases was minimized by the inability of courts in Canada and the United States to effectively delineate in “what extent and in what way may the state dictate dress and undress in off-the-street places to which the public has access.” *Phillips v. Dir. of Pub. Prosecutions (Witwatersrand Local Div.)* 2003 (4) BCLR 357 (CC) at paras. 62, 64–65 (S. Afr.) (Sachs, J., concurring). As Justice Sachs noted, “[i]nternational experience suggests that this is an area where all those concerned with interpreting and enforcing the law should look with particular care before they leap.” *Id.* at para. 63.

134. Choudhry, *supra* note 13, at 855–58 (describing this “dialogical interpretation” as a three step process whereby (1) foreign law is used to identify important assumptions underlying South African law; (2) the court compares, contrast, and justifies these assumptions in light of foreign law; and (3) the court justifies South Africa’s difference, or similarity, with foreign law.).
tional text and does not explain or discuss what this difference illuminates about constitutional values. In some instances, the Constitutional Court has made a facile observation and not expounded further. In these cases, little cumulative wisdom is gained.

In other cases, however, the Constitutional Court uses foreign law in an oppositional approach that helps define and structure constitutional interpretation. One major difference between South African and U.S. jurisprudence, for example, involves the limitations clause of the South African Constitution. Under the South African Constitution, a generous interpretation is given to fundamental rights, and limitations on those rights must be justified under an enumerated limitations clause. According to the Constitutional Court, this differs from the Constitution of the United States, which does not contain a limitation clause, as a result of which courts in that country have been obliged to find limits to constitutional rights through a narrow interpretation of the rights themselves. Although the "two-stage" approach may often produce the same result as the "one-stage" approach, this will not always be the case.

As a result of the limitations clause, the Constitutional Court frequently uses American jurisprudence to illustrate the distinctiveness of South African constitutional values. In considering possession of sexually explicit material, the Constitutional Court noted that the United States approach [holding that sexually explicit material is not protected by the Constitution] is, at least in part, a reflection of the fact that the American bill of rights does not contain a limitations clause. Where, as in the case of our Constitution, the listing of rights is accompanied by a clause that provided for the limitation, on a principled and considered basis, of all enumerated rights, the better approach would seem to be to define the right generously, and to interpose any constitutionally justifiable limitations only at the second stage of the analysis.

Case v. Minister of Safety & Sec. 1996 (5) BCLR 609 (CC) at para. 21 (S. Afr.). Another example is when the Constitutional Court rejected principles from the United States and Canada in determining whether a lengthy delay prior to trial is unconstitutional: [T]he use of foreign precedent requires circumspection and acknowledgment that transplants require careful management. Thus, for example, one should not resort to the Barker test or the Morin approach without recognising that our society and our criminal justice system differ from those in North America. Nor should one, for instance, adopt the “assertion of right” requirement of Barker.
crime of scandalizing the court violated the free expression clause, for example, the Constitutional Court noted that the First Amendment’s “language is simple, terse and direct, the injunctions unqualified and the style peremptory,” but the free expression clause of the South African Constitution “is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country.”

By defining the South African Constitution in opposition to the First Amendment, the Constitutional Court concluded that the crime of scandalizing the court was constitutional:

The fundamental reason why the test evolved under the First Amendment cannot lock on to our crime of scandalising the court, is because our Constitution ranks the right to freedom of expression differently ... The First Amendment declaims an unequivocal and sweeping commandment; section 16(1), the corresponding provision in our Constitution, is wholly different in style and significantly different in content. It is carefully worded, enumerating specific instances of the freedom and is immediately followed by a number of material limitations in the succeeding subsection.

While categorizing the use of foreign law is undeniably informative, a central presupposition of the effort by Choudhry and others is that foreign law is useful solely for its substantive reasoning—whether universal, dialogical, genealogical, empirical, or other. For example, Professor Bentele wrote that “courts throughout the world that do

without making due allowance for the fact that the vast majority of South African accused are unrepresented and have no conception of a right to a speedy trial. To deny them relief under section 25(3)(a) because they did not assert their rights would be to strike a pen through the right as far as the most vulnerable members of our society are concerned. It would be equally unrealistic not to recognise that the administration of our whole criminal justice system, including the law enforcement and correctional agencies, are under severe stress at the moment.

Sanderson v. Attorney-General, Eastern Cape 1997 (12) BCLR 1675 (CC) at para. 26 (S. Afr.). Thus, the Constitutional Court examined foreign jurisprudence to inform and define the contours of the South African right. Certain elements of foreign jurisprudence, such as the requirement that the right be asserted by the accused, were rejected as ill-suited for the South African context. The remedy used in foreign jurisdictions, of allowing prisoners to go free as a result of violations of the speedy trial right, was explored but limited due to the significant crime problem in South Africa and the fact that foreign jurisdictions “remedial contexts significantly different from our own.” Id. at para. 27. Though the Constitutional Court cited, and discussed at length, the principles behind the foreign decisions, these principles were frequently rejected and used to illustrate differences in context and approach that helped define the South African understanding of the speedy trial right.

139. S v. Mamabolo 2001 (5) BCLR 449 (CC) at para. 40 (S. Afr.).
140. Id. at para. 41.
look to foreign law universally see that law as providing, at most, persuasive reasons for coming to particular decisions.”

Some decisions of the Constitutional Court, however, do not consider the reasoning used by foreign sources. In these decisions, the Constitutional Court cites a consensus or notes the existence of foreign decisions without exploring the reasoning behind them. One opponent of the American use of foreign law, Professor Ernest Young, argues that a risk of citing foreign law is that such “nose counting” occurs “with little regard to the reasons that led to the adoption or rejection of a practice in any particular jurisdiction.” Foreign law is given authoritative, rather than persuasive, weight since the “foreign practice carries weight that is independent of the underlying reasons for that practice.”

A few Constitutional Court cases bear out this concern. For example, in Thebus and Another v S, a case involving the common purpose doctrine, the Court noted that “[r]ules of criminal liability similar or comparable to common purpose are found in many common-law jurisdictions, including England, Canada, Australia, Scotland and the USA. In civil legal systems, such as France and Germany there appear to be no rules, which, in substance, approximate our rule of common purpose.”

It is difficult to know what to make of the Constitutional Court’s use of foreign law in Thebus. Did the Court use foreign law authoritatively? This seems unlikely, since the foreign decisions are not referenced outside the passage of the decision that is quoted above. Yet, the reasons behind various decisions are not discussed. What is presented is merely a laundry list of countries which apparently have rules of criminal liability “similar or comparable” to common purpose. Without any discussions of the similarities between the doctrines—as well as potential differences—it is hard to ascertain the relevance to South African jurisprudence.

141. Bentele, supra note 13, at 233.
142. See, e.g., In re: KwaZulu-Natal Amakhosi & Izikhakanyiswa Amendment Bill of 1995 1996 (7) BCLR 903 (CC) at para. 19 (S. Afr.).
144. Id. at 156.
145. 2003 (10) BCLR 1100 (CC) at para. 21 (S. Afr.). The common purpose doctrine is a rule of joint criminal liability for two or more people who embark on a project with a common purpose that results in commission of a crime. Id.
146. Id. at para. 22.
147. See Jooste v. Score Supermarket Trading (Pty) Ltd. 1999 (2) BCLR 139 (CC) at para. 17 (S. Afr.) (“It may be mentioned in passing that courts in the United States of America,
While *Thebus* is one of the weaker uses of foreign law, other decisions suggest that a universal consensus, or disagreement amongst various nations, may help define or limit the scope of constitutional rights. The Constitutional Court frequently considers it important where “[n]o example, foreign or otherwise, was cited,” or that “there is no analogous precedent anywhere else in the world,” or that in “none of these countries” surveyed was a practice found unconstitutional. In contrast, when “[o]ther democratic countries such as Australia, Germany, India, New Zealand and the United Kingdom, have” upheld similar practices, the Constitutional Court considers that fact important as well.

Canada and Germany have found similar legislation providing for worker compensation and limiting the right of the worker to claim common-law damages not to be irrational or arbitrary.

148. *Minister of Health v. Treatment Action Campaign* (1), 2002 (10) BCLR 1035 (CC) at para. 112 (S. Afr.) (“What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies—particularly when the State’s obligations are not performed diligently and without delay.”).

149. *Bernstein v. Bester NO* 1996 (4) BCLR 449 (CC) at para. 114 (S. Afr.) (“No example, foreign or otherwise, was cited to us where, by way of legislation or judicial pronouncement, the use in civil proceedings of compelled testimony in interrogation proceedings analogous to those under sections 417 and 418 of the Act, has been prohibited.”); *Van Rooyen v. S* 2002 (8) BCLR 810 (CC) at para. 107 (S. Afr.) (discussing the executive and legislative role in judicial appointment procedures in Australia, the United States, and Germany and noting that “in none of these countries would anyone contend that the highest court is a "personal fiefdom" of the executive or legislature”); *South African Broad. Corp. Ltd. v. Nat’l Dir. of Pub. Prosecutions* 2007 (2) BCLR 167 (CC) at para. 59 (S. Afr.) (“It should also be emphasised that an application of this sort to broadcast appeal proceedings on radio and television where all of the parties to the appeal vigorously oppose it, is unprecedented in our legal system. Indeed, as stated above, as far as we have been able to ascertain in the short time available to us, there is no analogous precedent anywhere else in the world.”).

150. *S v. Dodo* 2001 (5) BCLR 423 (CC) at para. 32 (S. Afr.) (“Other democratic countries such as Australia, Germany, India, New Zealand and the United Kingdom, have sentencing statutes which mandate minimum sentences under circumstances that are, in certain instances, more intrusive of the judicial sentencing function than section 51(1) in the present case . . . . It has never, so far as I have been able to determine, been decided in any of these jurisdictions that mere involvement by the legislature in the sentencing field conflicts with the separation of powers principle.”); *see also Kaunda v. President of the RSA* (2), 2004 (10) BCLR 1009 (CC) at para. 71 (S. Afr.) (“The difficulty of dealing with legal claims for diplomatic protection is exemplified by the approach of courts confronted with such claims. The Special Rapporteur draws attention to cases in British, Dutch, Spanish, Austrian, Belgian, and French courts in which claims by individuals against their governments for diplomatic protection were dismissed. He refers to these cases as demonstrating an expectation that courts should come to the assistance of nationals injured by foreign
In these cases, it is not the substantive reasoning of the foreign source that is important but the fact that many foreign courts have decided the issue in the same way. If, for example, every nation with a similar constitutional text and values found a challenged practice unconstitutional, perhaps that is a reason why the practice is inconsistent with a shared understanding of the right. If, in contrast, every nation found a challenged practice constitutional, perhaps courts should be cautious in ruling it unconstitutional without careful consideration of distinctive national norms. While some may find this reasoning unobjectionable, most scholars who have considered the South African record doubt that such cases exist.\footnote{Shaik v. State 2008 (8) BCLR 834 (CC) at para. 56 (S. Afr.) (“The English and European jurisprudence is instructive at least to the extent that it makes plain that the legislation here under consideration has a counterpart in another open democracy.”).}

In \textit{S v Dlamini}, the Constitutional Court used the lack of a universal consensus on the right to receive bail to justify South Africa’s bail restrictions. The case, in part, concerned a challenge to sections of the Criminal Procedure Act that required more rigorous treatment of bail applicants charged with serious crimes. The Act was challenged as a violation of the right of arrested persons to “to be released from detention if the interests of justice permit, subject to reasonable conditions.”\footnote{S. Afr. Const., 1996, § 35(1)(f).}

The Court noted that:

\begin{quote}
In many democratic societies, there are legislative provisions which permit a court to deny bail to accused persons in certain circumstances. . . . The following brief consideration of the rules governing bail in jurisdictions other than our own demonstrates merely that bail is not an absolute right in any jurisdiction, and that limitations on the right to bail vary considerably.\footnote{S v. Dlamini 1999 (7) BCLR 771 (CC) at para. 69 (S. Afr.).}
\end{quote}

The Constitutional Court surveyed law in Australia, Canada, the United Kingdom, and the United States to establish that foreign jurisdictions did not view bail as an absolute right.\footnote{Id. at paras. 69–73.} Requiring that an arrested person demonstrate “exceptional circumstances” in order to receive bail was a constitutional limitation because of the widespread and legitimate concern regarding violent crimes in South Africa.\footnote{Id. at paras. 74–75.} By demonstrating that the right to bail was limited in foreign jurisdictions. The fact that the claims were dismissed shows, however, how difficult it is to do so.”; Shaik v. State 2008 (8) BCLR 834 (CC) at para. 56 (S. Afr.) (“The English and European jurisprudence is instructive at least to the extent that it makes plain that the legislation here under consideration has a counterpart in another open democracy.”).}

\footnote{See, e.g., Bentele, supra note 13, at 225–26 (“Obviously, the substantive law is not what matters, but rather the reasoning at work in confronting a common problem or issue.”).}

\footnote{S. Afr. Const., 1996, § 35(1)(f).}\footnote{S v. Dlamini 1999 (7) BCLR 771 (CC) at para. 69 (S. Afr.).}\footnote{Id. at paras. 69–73.}\footnote{Id. at paras. 74–75.}
tions, the Constitutional Court located the South African provision within the shared understanding of the right.  

While the Constitutional Court in *S v Dlamini* used foreign law to place South Africa within the scope of the international conception of a right, it has also used foreign law to demonstrate that a practice is outside its scope. *De Lange v Smuts NO and Others* scrutinized provisions of the Insolvency Act that governed insolvent corporations and allowed a non-judicial officer to commit a person to prison if the person failed to produce documents or testify.  In holding that such procedures violated the right to a fair trial, the Constitutional Court noted that no foreign jurisdiction allowed an administrative officer to exercise similar powers. The Court stated:

> [T]he fact that no such statutory provision has been cited to us, or is known to us, does strongly suggest that there are no such provisions because they would be inimical to the fundamental norms and values of such countries relating to the separation of powers and the rule of law.  

In other instances, a consensus of most foreign jurisdictions is used to limit the relevance of an outlier judgment from one foreign court. For example, the Constitutional Court declined to apply the actual malice standard established in the U.S. Supreme Court decision of *New York Times v. Sullivan* because “this decision represents the high-water mark of foreign jurisprudence protecting the freedom of speech and many jurisdictions have declined to follow it.”

Does this “nose-counting” of foreign jurisdictions provide evidence for those who fear that foreign law will be used to circumvent democratic decision-making? At first glance, the Constitutional Court appears to treat foreign sources as precedent and ascribe normative value to the fact that many countries reached a certain result irrespective of the reasoning contained in the decisions. Such an approach may be prevalent when the Constitutional Court analyzes limitations on rights under section 36 of the Constitution.  

Section 36 provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;  
(b) the importance of the purpose of the limitation;
that rights should be limited only “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . . .” The requirement that the limitation must be “reasonable and justifiable in an open and democratic society” leads the Constitutional Court to consider whether other “open and democratic” societies allow the challenged practice. When utilizing foreign law in this way, the substantive reasons are relatively unimportant.

Even when citing cases in this fashion, however, the Constitutional Court appears to be using a foreign consensus (or lack thereof) as logical reinforcement for decisions already reached through reference to domestic sources. In the American context, Professor Steven Calabresi and Stephanie Zimdahl note some cases “in which the Court looks to foreign law and practice to demonstrate that its decisions are logical and supported by reason.” 161 If foreign law is not the basis for the decision, but merely confirms or questions a preliminary hypothesis, concerns about democratic legitimacy are reduced.

While some cases focus on the agreement or disagreement of foreign courts, the use of foreign law is most persuasive when both the existence of relevant foreign decisions and the reasoning behind these decisions is fully considered. For example, the decision of Justices Sachs and O’Regan rejecting a privacy challenge to the criminalization of prostitution constitutes an exemplary use of foreign law. 162 At oral argument, counsel “relied heavily on the jurisprudence of the United States Supreme Court which pioneered legal thinking in this area.” 163 Justices Sachs and O’Regan initially noted that “jurisprudence on the question has to be handled with circumspection; there are differences in constitutional text and context.” 164 Nonetheless, the

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(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.


163. Id. at para. 79.

164. Id.
fact that a foreign court reached a certain result provided some normative content, as it was “of interest to note that attempts to strike down anti-prostitution laws in the United States on the grounds of invasions of liberty or privacy have generally failed.”  

The analysis was not confined to the mere fact that anti-prostitution laws were held constitutional in the United States but involved an extensive discussion of the reasoning behind the American approach. The discussion of foreign jurisprudence concluded with the statement that the decision to uphold the criminality of prostitution fell squarely within the shared international conception of the right to privacy, particularly the “attenuated” nature of the right to privacy “because of the commercial character of the activity involved” and the “strong public interest” in regulation.” Of import, nonetheless, was the fact that:

We were not told of any society in which prostitution is regarded as a normal business activity just like any other, or a legitimate form of self-expression just like any other. Neither has any example been brought to our attention of international law or domestic constitutional law which has been used in any country successfully to challenge laws penalising prostitution on the grounds that such laws violated rights of autonomy or rights to pursue a livelihood.

III. South Africa’s Successes and Failures in Citing Foreign Law

Mr. Mpshe’s citation of foreign authority underpinned the high profile decision to drop corruption charges against Jacob Zuma, removing the legal challenge that threatened Mr. Zuma’s ability to assume the presidency. Mr. Zuma was charged after a highly publicized scandal and the conviction of his former financial advisor, Schabir Shaik, on corruption and fraud charges. Mr. Shaik’s highly publicized trial implicated Mr. Zuma in an effort to protect a foreign corporate entity from investigation of an arms-procurement scandal, prompting Mr. Zuma’s dismissal from the nation’s second-highest office in 2005.

165. Id.
166. Id. at para. 93.
Mr. Zuma maintained that the criminal charges were part of a conspiracy aimed at preventing him from replacing Thabo Mbeki as President of the African National Congress ("ANC") and becoming the next President of South Africa.\textsuperscript{170} Though the charges were withdrawn in 2006, prosecutors indicated their intention to re-file more detailed charges at a later date.\textsuperscript{171} After an extremely divisive contest within the ANC, Mr. Zuma defeated Mr. Mbeki to become ANC President.\textsuperscript{172} Mr. Mbeki remained as a lame duck President of the country, however, since the ANC internal elections were one year before the national elections. Shortly after Mr. Zuma's election as ANC President, and prior to the national elections, sixteen counts of criminal charges were filed against Mr. Zuma.\textsuperscript{173}

After charges were brought, Mr. Zuma moved to have them set aside on the basis that he was entitled to make representations to the prosecutors prior to their decision to file the new charges. Though the trial court accepted this argument and dismissed the charges, the Supreme Court of Appeal reversed the decision and held:

A prosecution is not wrongful merely because it is brought for an improper purpose. It will only be wrongful if, in addition, reasonable and probable grounds for prosecuting are absent, something not alleged by Mr. Zuma and which in any event can only be determined once criminal proceedings have been concluded. The motive behind the prosecution is irrelevant because, as Schreiner JA said in connection with arrests, the best motive does not cure an otherwise illegal arrest and the worst motive does not render an otherwise legal arrest illegal. The same applies to prosecutions.\textsuperscript{174}

A few months after the Supreme Court of Appeal’s decision, acting National Director of Public Prosecution Moketedi Mpshe announced that charges against Mr. Zuma would be dropped. In the interim, Mr. Zuma’s lawyers presented Mr. Mpshe with tapes of cell phone conversations in 2007 where prosecutors discussed how best to time the filing of charges against Mr. Zuma in order to damage him from his Responsibilities as Deputy President, National Assembly (June 14, 2005), available at http://www.info.gov.za/speeches/2005/05061415151001.htm.

politically. While ignoring the recent Supreme Court of Appeal decision entirely, Mr. Mpshe cited a litany of cases from England and one from Zimbabwe to argue that the prosecution should not use its powers for an “ulterior purpose.” Citing one case that was properly distinguished by the Supreme Court of Appeal, where an English court held that the police could not seize evidence for the ulterior purpose of putting a criminal out of business, Mr. Mpshe concluded that prosecutors could not manipulate the timing of charges without a legitimate prosecutorial reason such as “the availability of witnesses, or the introduction or leading of specific evidence to fit in with the chain of evidence.” Since there was no such legitimate purpose for changing the timing of Mr. Zuma’s charges, the charges were dismissed because “it would be unfair as well as unjust to continue with the prosecution.”

The subsequent revelation that the cases cited by Mr. Mpshe were plagiarized from a decision reversed on appeal undermined both the legitimacy and logic of the decision. The lower court Hong Kong decision, which cited the same English authorities and contained language plagiarized by Mr. Mpshe, was reversed by the Hong Kong Court of Appeal because it failed to properly consider “the public expectation that persons charged with serious criminal offences will be brought to trial unless there is some powerful reason for not doing so.”

Mr. Mpshe’s decision exemplified the misuse of foreign law. It supports the theoretical criticism that reliance on foreign decisions is undemocratic and divorced from majoritarian values. Indeed, recent South African precedent was ignored in favor of transplanting foreign decisions into the South African context. As a practical matter, Mr. Mpshe simply borrowed language and cited cases from a single Hong Kong decision (that had been reversed on appeal) instead of conducting a comprehensive survey of foreign practice. Since none of the

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176. Mpshe Statement, supra note 3.

177. Id.; see also Nat’l Dir. 2009 (1) SACR 361 (SCA) at para. 38 (distinguishing High- stead Entertainment (Pty) Ltd. t/a ‘The Club’ v. Minister of Law & Order 1994 (1) SA 387 (C) (S. Afr.)).

178. Mpshe Statement, supra note 3.

cited cases dealt with manipulation of the timing of criminal charges, Mr. Mpshe failed to appreciate the context of the foreign decisions. The strong inference is that Mr. Mpshe selected the foreign sources to legitimize a political decision to drop the charges against Mr. Zuma. The question is whether this results-oriented misuse of foreign law is a departure from prevailing practice, or whether judges—as well as prosecutors—may find themselves tempted to misuse foreign law in similar ways.

A. Theoretical Objections to Citing Foreign Law

The Constitutional Court summarizes its use of foreign law as follows: “Where appropriate, this Court has consistently made use of comparative law. At the same time it has cautioned against the uncritical use of comparative material and pointed to its potential dangers.” Yet, we cannot simply take the Constitutional Court at its word. What of the dangers that Justice Scalia is concerned about? Is the fact that Mr. Mpshe went so far awry a sign that other institutional actors cannot be trusted to appropriately apply foreign law? Has the Constitutional Court been successful in only using foreign law “where appropriate?”

One salient criticism is that the use of foreign law lacks democratic legitimacy. Justice Scalia argues that “where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices . . . may think them to be, cannot be imposed upon Americans through the Constitution.” Foreign decisions are divorced from majoritarian values because the institutions issuing them are not responsive to national democratic opinion. Concerns about democratic legitimacy are especially acute when interna-

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180. The English cases deal with whether courts should stay prosecutions based on the conduct of law enforcement officers in investigating crimes and not whether the prosecuting authority should exercise its discretion not to prosecute based on the timing of bringing charges. See, e.g., R v. Latif, [1996] 1 All E.R. 353 (H.L.) (holding that court should not stay prosecution because of entrapment since conduct of law enforcement officers was not egregious); R v. Horseferry Road Magistrates Court ex parte Bennett, [1994] 1 A.C. 42 (H.L.) (considering whether court should stay prosecution because of forcible abduction of accused in violation of extradition laws).
181. Alexkor Ltd. v. Richtersveld Cmty. 2003 (12) BCLR 1301 (CC) at para. 33 (S. Afr.).
tional sources are used to invalidate a domestic executive or legislative act that reflects the will of the people.\textsuperscript{184}

Concerns about democratic legitimacy are less pressing in the South African context because the Constitution authorizes the use of foreign law. Nonetheless, the Constitutional Court addressed concerns about legitimacy by holding that the Constitution “requires us to ‘have regard’ to [foreign law]; we are not bound to follow it but neither can we ignore it. The determinative test will be the values we find inherent in or worthy of pursuing in this society which has only recently embarked on the road to democracy.”\textsuperscript{185} Similarly, in its very first decision, the Constitutional Court held that foreign law should be disregarded when it is inconsistent with the constitutional text:

That section also permits our courts to have regard to comparable foreign case law . . . . While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single “objective” meaning. Nor is it easy to avoid the influence of one’s personal intellectual and moral preconceptions. But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean.\textsuperscript{186}

Some cases, however, appear to substantiate the concern that judges overreach through excessive reliance on foreign law. For example, in \textit{Du Plessis and Others v De Klerk and Another}, 1996 (5) BCLR 658 (CC), the Constitutional Court considered the horizontal application of the interim Constitution.\textsuperscript{187} The case involved a suit for defamation against a newspaper that named the plaintiff as an arms supplier to an Angolan rebel movement.\textsuperscript{188} The defendant argued that publication was in the public interest and constitutionally protected free expression.\textsuperscript{189} In rejecting the defendant’s claims, the majority judgment relied heavily on foreign law since “[t]he ‘horizontality’ issue has arisen in other countries with entrenched Bills of Rights and the parties have supplied us with a wealth of comparative material both judicial and extra-judicial, for which we are grateful.”\textsuperscript{190} After surveying the law of

\begin{itemize}
\item \textsuperscript{184} Larsen, supra note 132, at 1309 (rejecting the use of foreign sources of law in “moral fact-finding” because it would expand counter-majoritarian judicial discretion).
\item \textsuperscript{185} S v. Williams 1995 (7) BCLR 861 (CC) at para. 50 (S. Afr.) (footnotes omitted).
\item \textsuperscript{186} S v. Zuma 1995 (4) BCLR 401 (CC) at para. 17 (S. Afr.).
\item \textsuperscript{187} While vertical application of the Constitution binds the state downwards towards its citizens, horizontal application applies the Constitution between one citizen or private body and another.
\item \textsuperscript{188} \textit{Du Plessis v. De Klerk} 1996 (5) BCLR 658 (CC) at paras. 1–3 (S. Afr.).
\item \textsuperscript{189} \textit{Id.} at paras. 4–5.
\item \textsuperscript{190} \textit{Id.} at para. 31.
\end{itemize}
numerous countries, including Germany and Canada, the majority concluded that “the example of these countries seriously undermines the Defendants’ contention that anything other [than] a direct horizontal application of Chapter 3 must result in absurdity and injustice.”\textsuperscript{191} As a result, the Constitutional Court held that the defendant was not allowed to invoke the provisions of the Constitution as a defense, because the Constitution only applied to government action.\textsuperscript{192}

In a strongly worded dissent, Justice Kriegler criticized the majority’s use of foreign law and advocated a “radically” different approach that focused on constitutional text.\textsuperscript{193} Though the majority decision focused on the fact that most liberal democracies did not apply the bill of rights to private relationships, Justice Kriegler stated, “when I do conduct comparative study, I do so with great caution. The survey is conducted from the point of vantage afforded by the South African Constitution, constructed on unique foundations, built according to a unique design and intended for unique purposes.”\textsuperscript{194}

Viewed in context, both textually and based on South Africa’s history, the Constitution governed all law, including law applicable to private relationships. Any other approach would undermine the commitment to a non-racial, non-gendered, democratic society. In light of the distinctive text and unique history of the Constitution, Justice Kriegler argued that foreign law was irrelevant:

The Constitution promises an “open and democratic society based on freedom and equality”, a radical break with the “untold suffering and injustice” of the past. It then lists and judicially safeguards the fundamental rights and freedoms necessary to render those benefits attainable by all. No one familiar with the stark reality of South Africa and the power relationships in its society can believe that protection of the individual only against the state can possibly bring those benefits. . . .

. . . .

I find it unnecessary to engage in a debate with my colleagues on the merits or demerits of the approaches adopted by the courts in the United States, Canada or Germany. . . . We do not operate under a constitution in which the avowed purpose of the drafters was to place limitations on governmental control. Our Constitution aims at establishing freedom and equality in a grossly disparate society. And I am grateful to the drafters of our Constitution for having spared us the jurisprudential gymnastics forced on some courts abroad. They were good enough to say what they mean. The Con-

\begin{itemize}
\item \textsuperscript{191} Id. at para. 41.
\item \textsuperscript{192} De Klerk 1996 (5) BCLR 658 (CC) at para. 67 (Kriegler, J., dissenting).
\item \textsuperscript{193} Id. at paras. 123–25.
\item \textsuperscript{194} Id. at para. 127.
\end{itemize}
sitution applies to all three of the pillars of state and Chapter 3 applies to everything they do.\footnote{195}{Id. at paras. 145–47 (footnotes omitted).}

Though Justice Kriegler dissented, his argument that the majority overreached eventually carried the day with the drafters of the Final Constitution. The majority applied foreign law without sensitivity to South African context.\footnote{196}{Id. at para. 144 (arguing that the majority decision was “a wholesale importation of doctrines from foreign jurisdictions”); see also Choudhry, supra note 13, at 840 (arguing that the majority decision in Du Plessis “sought to assimilate the South African Bill of Rights into the larger tradition of liberal constitutionalism, within which constitutional rights only operate against the state”).} While South Africa operated under temporary procedures and Constitution during 1994–1996, the drafters of the Final Constitution, in a clear repudiation of the Du Plessis decision, added a provision that expressly stated the Bill of Rights applied horizontally.\footnote{197}{S. Afr. Const., 1996, § 8. This final Constitution was passed and certified in 1996 but only came into operation on February 4, 1997. The drafters of the 1996 Constitution, in a sense overruling the majority judgment in Du Plessis, made express provision in Sections 8(2), 8(3), and 9(4) for the Bill of Rights to have horizontal application. Section 8, subsections (2) and (3) declare:

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

Section 9(4) declares: “No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.”

198. See generally Larsen, supra note 132, at 1303–10 (discussing the shortcomings of the arguments for importing foreign and international law norms into constitutional interpretation).

199. See, e.g., S v. Dlamini 1999 (7) BCLR 771 (CC) at para. 69 (S. Afr.) (“In considering statutory provisions in other jurisdictions, a cautionary note must of course be sounded. Each system of criminal justice will vary and the application of substantive rules will depend upon procedures and practices peculiar to each system.”).}
For example, the Constitutional Court properly avoided simplistic transference of foreign law in a property rights challenge to certain customs regulations.\textsuperscript{200} The regulations allowed the Commissioner of the South African Revenue Service to sell seized goods, of both the debtor and third parties, to satisfy debts without a court order.\textsuperscript{201} The Constitutional Court initially noted that the constitutional text was very similar to property guarantees in foreign constitutions but ultimately found that the South African provision was unique:

At the same time one should never lose sight of the historical context in which the property clause came into existence. The background is one of conquest, as a consequence of which there was a taking of land in circumstances which, to this day, are a source of pain and tension. As already mentioned, the purpose of section 25 is not merely to protect private property but also to advance the public interest in relation to property. Thus it is necessary not only to have regard to foreign law, but also to the peculiar circumstances of our own history and the provisions of our Constitution.\textsuperscript{202}

After surveying the approach of various foreign jurisdictions, the Constitutional Court extracted relevant principles from the decisions but declined to apply any of the foreign approaches directly. The Constitutional Court rejected the foreign approaches because:

The formulation of property rights and their institutional framework differ, often widely, from legal system to system. Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation. The second is that for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve.\textsuperscript{203}

After applying the principles from foreign authority, the Constitutional Court concluded that depriving a third party of property lacked a sufficient nexus to the state interest in ensuring payment of a customs debt.\textsuperscript{204} Limiting the direct application of foreign law because of differences in the purpose of foreign constitutional guaran-

\textsuperscript{200} First Nat'l Bank of S. Afr. Ltd. t/a Wesbank v. Comm'r for South African Revenue Servs. 2002 (7) BCLR 702 (CC) at para. 64 (S. Afr.).
\textsuperscript{201} Id. at para. 4.
\textsuperscript{202} Id. at para. 64.
\textsuperscript{203} Id. at paras. 97–98.
\textsuperscript{204} Id. at paras. 108–09.
tees, but considering relevant principles of jurisprudence, is a prime example of the circumscribed use of foreign law.

B. Practical Objections to Citing Foreign Law

Opponents of engaging with foreign law also make practical arguments. One practical question is whether judges are competent to engage in a process of comparative constitutional law that recognizes the significant social, cultural, and institutional differences between nations. Professor Ernest Young argues the U.S. Supreme Court is not institutionally competent to undertake such a project “given language and cultural barriers and most American lawyers’ lack of training in comparative analysis.”205 Others argue that “the Court fundamentally lacks the institutional capacity to engage in proper comparativism and unduly relies on advocacy at its peril.”206 On the Constitutional Court, Justice Kriegler expressed similar concerns that

the subtleties of foreign jurisdictions, their practices and terminology require more intensive study than I have been able to conduct. Even on a superficial view, there seem to me to be differences of such substance between the statutory, jurisprudential and societal contexts prevailing in those countries and in South Africa as to render ostensible analogies dangerous without a thorough understanding of the foreign systems.207

Even apparently basic foundational issues, such as the establishment and free exercise clauses of the American Constitution, have complexities and nuances that are difficult to recognize in a foreign context.208 Most law clerks and judges have little familiarity and training with legal doctrine in foreign nations. In this respect, the foreign law clerk program of the Constitutional Court may make a material difference in the Court’s willingness and capacity to engage with foreign law. South African law clerks often asked foreign law clerks about details of foreign legal systems and for assistance researching foreign law.

In most cases, however, the Constitutional Court showed proper sensitivity to foreign law. For example, one case considered whether remedial measures to address historic patterns of discrimination vio-

205. Young, supra note 143, at 166.
206. Alford, supra note 182, at 65.
208. S v. Solberg 1997 (10) BCLR 1348 (CC) at para. 99 (S. Afr.) (“It is clear from the United States decisions that although there is an area in which the ‘establishment’ clause and the ‘free exercise clause’ overlap, the two clauses have different concerns. In developing our own jurisprudence under section 14 of the interim constitution and section 15 of the 1996 Constitution we should be careful not to blur this distinction.”).
lated the equality guarantee of the Constitution. The Constitutional Court initially noted that the constitutional text was similar to the American equal protection clause and cited the American approach that required affirmative action programs to pass strict scrutiny. Rather than apply the strict scrutiny test, however, the Constitutional Court noted significant differences between the U.S. and South African contexts that rendered the American approach unsuitable:

Our equality jurisprudence differs substantively from the U.S. approach to equality. Our respective histories, social context and constitutional design differ markedly... We must therefore exercise great caution not to import, through this route, inapt foreign equality jurisprudence which may inflict on our nascent equality jurisprudence American notions of “suspect categories of state action” and of “strict scrutiny.”

Critics of engaging with foreign law presuppose that foreign law will normatively guide the end result. However, equality jurisprudence exemplifies how the Constitutional Court mainly uses foreign law to illustrate the distinctiveness of South African jurisprudence, particularly its deference to the “history and the enduring legacy” of apartheid. By exploring foreign jurisprudence regarding equality, the Constitutional Court realized that the national constitutions are differently worded and that the interpretation of national constitutions, in particular, reflects different approaches to the concepts of equality and non-discrimination. The different approaches adopted in the different national jurisdictions arise not only from different textual provisions and from different historical circumstances, but also from different jurisprudential and philosophical understandings of equality.

209. Minister of Fin. v. Van Heerden 2004 (11) BCLR 1125 (CC) (S. Afr.).
210. Id. at para. 29 (citing McLaughlin v. Florida, 379 U.S. 184, 191 (1964)).
211. Id.
212. Brink v. Kitshoff NO 1996 (6) BCLR 752 (CC) at para. 40 (S. Afr.) (“Perhaps more than any of the other provisions... interpretation [of the equality provision] must be based on the specific language of section 8, as well as our own constitutional context... The deep scars of [apartheid] are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted.”); see also President of the RSA v. Hugo 1997 (6) BCLR 708 (CC) at para. 74 (S. Afr.) (Kriegler, J., dissenting) (“The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution’s focus and organising principle. The importance of equality rights in the Constitution, and the role of the right to equality in our emerging democracy, must both be understood in order to analyse properly whether a violation of the right has occurred.”).
213. Brink 1996 (6) BCLR 752 (CC) at para. 39; see also Prinsloo v. Van der Linde 1997 (6) BCLR 759 (CC) at para. 21 (S. Afr.) (describing the decision in Brink and noting that “[t]he Court emphasised that section 8 is the product of our own particular history, that...
As such, the Constitutional Court rejected “a simplistic transplantation from other countries into our equality jurisprudence of formulae, modes of classification or degrees of scrutiny, [because it] might create more problems than it solved.”

1. Linguistic Barriers to Citing Foreign Law

It is true, however, that the Constitutional Court grapples with institutional barriers to the effective use of foreign law. One of these is undoubtedly linguistic; few judges or law clerks in South Africa are able to understand cases from outside English or Dutch speaking jurisdictions. In one case the Constitutional Court forthrightly recognized that “the German jurisprudence on this subject is not by any means easy to summarise, especially for one who does not read German.” While the Constitutional Court in that case relied upon “accounts of the German approach in some of the South African literature,” this approach risks inaccuracy.

The risks of relying on secondary sources for summarizing foreign cases were illustrated in a case where the Constitutional Court considered whether there was a constitutional right to broadcast judicial proceedings of public importance. Counsel for one party relied extensively on a “fairly recent decision of the German Federal Constitutional Court” holding there was no right to broadcast. However, counsel did not cite a copy of the case (because it was solely published in German) and instead cited a secondary source describing the case. Such an approach poses obvious limitations on the proper use of comparative law, including respect for differences in constitutional text and jurisprudence. One potential difference in context was that the German legislature placed limitations on the openness of German courts, and the German Federal Constitutional Court deferred to the

218. Id.
219. First Respondent’s Written Argument at para. 36, SABC v. NDPP, Case No. CCT 58/06 (Sept. 11, 2006) (citing ERIC BARENDT, FREEDOM OF SPEECH (2005)).
legislature’s determination. No such limitations were placed on South African courts by the Legislature. Yet, despite lacking a full judgment in English, the Constitutional Court placed great weight on the German case and held that “[a]s against all these foreign cases relied on by the applicant that are not on point, reference should be made to a fairly recent decision of the German Federal Constitutional Court relied on by counsel for the first respondent.” The Constitutional Court’s reliance on this case may have been misplaced because it lacked the ability to consider the context, history, and constitutional provisions at issue in the foreign decision.

2. Bias in Selecting Foreign Sources

One other practical difficulty is selectivity in citing foreign sources. This, in part, relates to the linguistic challenge since the Constitutional Court is less likely to cite decisions not in English. Yet in citing foreign judgments, the Court has spent little time discussing its process of selection. The universe of potential nations is somewhat defined, however, by section 36(1) of the Constitution that requires the Court to consider, inter alia, what would be “justifiable in an open and democratic society based on human dignity, equality and freedom.” Section 39(1) further obliges the Constitutional Court to promote the values underlying such a society and encourages judges to consider comparable foreign case law. Thus, as an initial matter, it is unlikely that the Constitutional Court would consider the law of an undemocratic nation.

The Constitutional Court has developed a number of approaches, some of which may be contradictory, for determining which democratic countries to rely upon. One view is that the Court should consider the decisions of its geographic neighbors with similar political histories. The Constitutional Court has stated that

220. Peer Zumbansen, Federal Constitutional Court Affirms Ban of TV-Coverage of Court Proceedings, 2 GERMAN L.J., at paras. 2, 9–10 (2001), http://www.germanlawjournal.com/article.php?id=49 (“As to the rules governing court proceedings and court organization (the GVG), the FCC declared a legislative use of discretion as legitimate as long as the media’s access itself was guaranteed. Because the GVG, in section 169 Sentence 2, only excludes TV-coverage of court proceedings from the permissible methods of media coverage, this limitation [sic] itself does not constitute an infringement [sic] of a constitutionally protected right. The FCC makes clear that the media’s right to access only reaches as far as the legislature sketched the boundaries of that access, within the discretion afforded the legislature.”).

221. South African Broad. Corp. Ltd. 2007 (2) BCLR 167 (CC) at para. 56 (footnote omitted).
[t]he decisions of the Supreme Courts of Namibia and of Zimbabwe are of special significance. Not only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition.222

However, the Constitutional Court rarely cites Namibia or Zimbabwe in its cases. One possible explanation for the paucity of citations may be the qualified nature of judicial independence in these countries, but the Constitutional Court has never expressly renounced the above approach.

In other cases, the Constitutional Court selected foreign authorities based on the similarity of the constitutional text. Francois du Bois and Daniel Visser have suggested that “it is obvious too, that the jurisprudence of those countries whose constitutions have influenced the making of the South African Constitution would be most conspicuous in the range of foreign citations.”223 The Constitution was largely written by academics that drew primarily from foreign constitutions, particularly the Canadian and German constitutions. The text and historical relationship with those countries are not only *ex post* reasons to consider decisions from those countries when interpreting the Constitution but also *ex ante* reasons for why the constitutions are so similar to begin with.224

For example, the Constitutional Court justified citing Canadian jurisprudence because of the similar nature of the two-stage limitations clause of the Canadian Charter.225 The Constitutional Court suggested in one decision that Germany bears special significance because the German Basic Law was conceived in dire circumstances similar to those in South Africa.226 It suggested that German law is

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222. *S v. Williams* 1995 (7) BCLR 861 (CC) at para. 31 (S. Afr.).
223. *du Bois & Visser, supra* note 13, at 646.
225. *S v. Zuma* 1995 (4) BCLR 401 (CC) at para. 21 (S. Afr.) (“The Canadian cases on reverse onus provisions seem to me to be particularly helpful, not only because of their persuasive reasoning, but because section 1 of the Charter has a limitation clause analogous to section 33.”).
226. *Du Plessis v. De Klerk* 1996 (5) BCLR 658 (CC) at para. 92 (S. Afr.) (Ackermann, J., concurring) (“I do believe that the German Basic Law (GBL) was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less powerful a response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution.”).
especially relevant in another decision because the German and South African constitutions both embody a “normative value system.”

The lack of any uniform system for determining which countries should be considered in assessing foreign law raises the question of whether the Constitutional Court only selects foreign courts to support a preconceived result. Justice Scalia argues the practice of the U.S. Supreme Court is that “[w]hen it agrees with what . . . the justice would like the case to say, you use the foreign law, and when it doesn’t agree you don’t use it.” In many cases, the Constitutional Court does not provide sufficient explanation of why it cites certain countries and fails to consider others. Without explanation, it is difficult to rebut criticisms that the citations are results-oriented.

The most likely explanation, however, is that the Constitutional Court simply selects foreign sources on a case by case basis. For example, in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, 1998 (12) BCLR 1517 (CC), the Constitutional Court considered the constitutionality of laws that criminalized sodomy. The Court cited a number of countries (England, Wales, Scotland, Ireland, European Court of Human Rights (“ECHR”), Germany, Australia, New Zealand, and Canada) where the legislature decriminalized sodomy or courts ruled such laws unconstitutional. The U.S. Supreme Court ruling in *Bowers v. Hardwick* was an exception, but properly distinguished by the Court. Though a

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227. *Carmichele v. Minister of Safety & Sec.* 2001 (10) BCLR 995 (CC) at para. 54 (S. Afr.) (“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.”); see also Ackermann, supra note 13, at 180 (discussing “a number of explanations for the influence of German constitutional law on the South African Interim and 1996 Constitutions”).


229. In *S v. Coetzee*, for example, the Court stated that “[i]t has not been contended that other open and democratic societies based on freedom and equality have found it necessary to resort to such an unqualified presumption for the proper enforcement of the criminal law in relation to all offences of which a false representation is an element. I am not aware of, nor have we been referred to any examples in comparable jurisdictions, where a general provision in the same context is employed.” 1997 (4) BCLR 437 (CC) at para. 16 (S. Afr.). However, the court only cited to the U.S., Canada, England, and Australia to support this claim and did not explain why these countries were selected and others were not surveyed. Id. at para. 16 n.12.


231. Id. at paras. 53–56 (distinguishing *Bowers v. Hardwick*, 478 U.S. 186 (1986), because *Bowers* “has been the subject of sustained criticism,” was possibly inconsistent with the more recent U.S. Supreme Court decision in *Romer v. Evans*, and because “the majority
number of other nations still criminalized sodomy, they were not cited because

[unlike the constitutions of these countries, however, our 1996 Constitution specifically mentions ‘sexual orientation’ as a listed ground in section 9(3) on which the state may not unfairly discriminate, it being presumed (until the contrary is established) that discrimination on such ground constitutes unfair discrimination and thus a breach of section 9.]

This demonstrates the appropriateness of the contextual approach to selecting foreign jurisprudence. It was not necessary to consider the law of certain countries because of the distinguishable features of their constitutional text.

The case-specific approach is also useful because, in some circumstances, a foreign source could be relevant to prove one proposition but not its opposite. The Constitutional Court recognized that due to differing standards of review, decisions by the ECHR are only persuasive when the ECHR finds an infringement of a charter right. Since the ECHR allows countries a “margin of appreciation,” a strong showing is required to demonstrate a violation of a charter right. If a charter right is violated, the Constitutional Court takes notice because it is likely that there is a “very clear breach.” If the ECHR holds that a right is not violated, however, it is unlikely to influence the Constitutional Court because the challenged conduct may have simply fallen within the “margin of appreciation.”

The case by case approach of the Constitutional Court is not completely without appeal. It is impossible to consider the law of every nation in every case. To a certain extent the court has to rely on lawyers to bring relevant foreign law to their attention. Relevant foreign countries are likely different on a case by case basis—for one set of questions, one set of countries. The countries relevant to a single case likely depend on a mix of factors, including the constitutional provision being challenged, the use of the specific practice being challenged in other countries, and history. Both sides are free to cite the judgment in Bowers can really offer us no assistance in the construction and application of our own Constitution,” which prohibits discrimination on the basis of sexual orientation.).

232. Id. at para. 56.
233. See also Bhe v. Magistrate, Khayelitsha 2005 (1) BCLR 1 (CC) at paras. 191–210 (S. Afr.) (Ngcobo, J., dissenting) (citing to various African countries as demonstrating a trend away from the rule of male primogeniture and its role in traditional society).
235. Id.
236. Id.
law of whichever countries best support their case. The court should then consider that law and explain why it accepts or rejects it.

The difficulty, of course, is that the selection of countries is rarely justified and delineated in Constitutional Court decisions. It is quite possible that there is no systemic framework for ensuring the selection of appropriate references from foreign jurisprudence and Justices simply cite the legal systems that are familiar to them and their law clerks. This raises questions of fairness and legitimacy, particularly when the Constitutional Court decides to refer to jurisdictions other than those cited in the parties’ briefs. Courts would increase the legitimacy of citing foreign law by providing a transparent framework and express justification for the selection of certain countries.

3. One-Way Ratchet

Selective use of international materials is another practical concern. International sources recently have been used by the U.S. Supreme Court to expand individual liberties. Though Justice Breyer denies that foreign sources are looked at “to move the law in a particular substantive direction,” Professor Roger Alford argues that “to the extent that a comparative analysis supports government interests in lessening civil liberties—or at least certain civil liberties—international sources will likely be ignored.”

This issue raises interesting questions because South Africa is one of the most liberal constitutional democracies, while the United States is one of the most conservative. Former Constitutional Court Justice Richard Goldstone has stated:

The United States is probably the most conservative democracy in the world . . . . The death penalty, gender, welfare—you name it. I think it would be fair to say that the most conservative member of the South African Constitutional Court would be left of the most progressive member of the United States Supreme Court. So, in looking at what other democracies are doing, it would mean looking to the left, not to the right. I think conservatives in the United States are saying, “Don’t do it, because it gives us bad answers.”

In South Africa, one might expect engagement with foreign law to result in more conservative legal jurisprudence. Yet, that hardly seems to square with the argument that foreign law is misused by lib-

eral jurists to move the law in a more substantively liberal direction. Indeed, in a religious challenge to marijuana laws and an equality challenge to the criminalization of prostitution, foreign law was cited in support of denying the respective rights. The Constitutional Court’s jurisprudence provides little evidence for those who fear that judges will be selective, but it may indicate that foreign law can influence domestic jurisprudence in a substantive direction.

The ability of foreign law to influence the substantive direction of the law may be partially explained by the process of judicial reasoning and writing. Justice Ackermann, in an enlightening discussion of the epistemology of judicial reasoning, argues that at a certain stage of the judicial reasoning process, the judge reaches a preliminary conclusion or hypothesis and then attempts to test and rigorously falsify it.\textsuperscript{240} At this point, foreign law is particularly valuable in preventing a “sort of tunnel vision” where the judge is “rehearsing the same line of reasoning or—in a type of inductive process—trying to find additional authority for the provisional conclusions one has already reached.”\textsuperscript{241} Looking beyond national jurisprudence to the efforts of foreign legal systems when addressing similar legal problems can lead a judge to question preconceptions entrenched in national jurisprudence, raise new questions, and explore new and innovative approaches to constitutional dilemmas.

Of course, the new possibilities evidenced by foreign law may generally be more liberal (in the United States) or more conservative (in South Africa) than national jurisprudence. Consideration of these sources may lead judges in a different direction than uniquely national constitutional solutions. As Judge Posner has stated, “[i]f a law could be said to be contrary to world public opinion I would consider this a reason, not compelling but not negligible either, for regarding a state law as unconstitutional even if the Constitution’s text had to be stretched a bit to cover it.”\textsuperscript{242}

Though foreign law may raise new possibilities, the Constitutional Court has rejected its persuasiveness when inconsistent with the Constitutional text. For example, in \textit{Fourie}, opponents of recognizing the marriage rights of same-sex couples pointed to a number of interna-

\textsuperscript{240} Ackermann, \textit{supra} note 13, at 185–86.

\textsuperscript{241} Id. at 185.

tional decisions, including a decision by the United Nations Human Rights Committee that a New Zealand law denying marriage licenses to same-sex couples did not violate the International Covenant on Civil and Political Rights.243 The Constitutional Court held that such decisions were inapplicable because they did not deal with a constitutional text, such as South Africa’s, that prohibited discrimination on the basis of sexual orientation. As the court stated,

[i]t would be a strange reading of the Constitution that utilised the principles of international human rights law to take away a guaranteed right. This would be the more so when the right concerned was openly, expressly and consciously adopted by the Constitutional Assembly as an integral part of the first of all rights mentioned in the Bill of Rights, namely, the right to equality.244

Thus, rather than being used selectively to move the law in a certain direction, the Constitutional Court considers foreign law in cases both contracting and expanding substantive rights. If the domestic interpretation of a right is broader than foreign jurisprudence, Constitutional Court decisions suggest that there is value in understanding why foreign nations differ. Since the benefits of engagement with foreign law stem from the process of comparative analysis, rather than any predetermined result, the court would miss opportunities to benefit from foreign sources if it did not consider them in cases that restrict civil liberties.

The fact that the Constitutional Court cited foreign law in favor of restricting civil rights in closely decided contentious matters may support the beliefs of conservative American practitioners who fear that foreign law will be cited in similar cases to move American law in a more liberal direction. However, it is unlikely that this would lead to a sea change in American law, so long as international materials are used in an appropriate fashion. This is a lesson of Fourie: foreign jurisprudence was not relevant to the South African context because the text of the South African Constitution provided for the right to non-discrimination on the basis of sexual orientation.

The doctrine that foreign sources should be applied only where they are not distinguishable on the basis of text is also consistent with the Constitutional Court’s death penalty decision, Makwanyane.245 In Makwanyane, the Constitutional Court noted that foreign constitutions recognized the existence of the death penalty and that the “wording of the relevant provisions of our Constitution are differ-

243. Minister of Home Affairs v. Fourie 2006 (3) BCLR 355 (CC) at para. 99 (S. Afr.).
244. Id. at para. 103–04.
245. S v. Makwanyane 1995 (6) BCLR 665 (CC) at para. 78 (S. Afr.).
ent."\textsuperscript{246} The foreign jurisprudence regarding the death penalty was informative and established a transcendent principle surrounding the protection of life and the prohibition on cruel and unusual punishment. However, since the text of the South African Constitution did not implicitly recognize the death penalty and limit these principles, it was not dispositive. Thus, the relevance of the fact that foreign courts upheld the constitutionality of the death penalty was limited, and little normative value was placed in the outcome of these decisions.

4. Personal Inclination of Judges

A different type of selectivity surrounds the personal inclinations of each judge. While some judges are inclined to cite foreign law, others rarely consider it. For example, Justice Ackermann was particularly likely to cite foreign law and Justice Kriegler particularly skeptical. In one decision, the majority did not cite foreign law and held that it was not unconstitutional discrimination to provide benefits to surviving spouses and not to the survivor of a permanent life partnership.\textsuperscript{247} In his dissent, Justice Sachs made extensive use of Canadian law to establish the importance of unmarried life partnerships, an argument that was not discussed by the majority.\textsuperscript{248} While this might suggest that the use of foreign law has a certain amount of arbitrariness, resulting from the judge assigned to draft the majority opinion, this is likely unavoidable and little different from other judicial practices (such as the use of legislative history) that are favored by some judges and rejected by others.

Conclusion

Much of the Constitutional Court’s citation of foreign law is uncontroversial. There is little dispute regarding the usefulness of citing foreign law as empirical evidence of the success or failure of a certain approach. Similarly, even Justice Scalia is willing to cite foreign law when there is a direct historical basis for a constitutional provision.\textsuperscript{249} The jurisprudence of the Constitutional Court, however, suggests

\textsuperscript{246} Id.
\textsuperscript{247} Volks NO v. Robinson 2005 (5) BCLR 446 (CC) (S. Afr.).
\textsuperscript{248} Id. at paras. 159–61.
\textsuperscript{249} Scalia/Breyer Debate, \textit{supra} note 24 ("If you have that philosophy, obviously foreign law is irrelevant with one exception: Old English law, because phrases like ‘due process,’ the ‘right of confrontation’ and things of that sort were all taken from English law. So the reality is I use foreign law more than anybody on the Court. But it’s all old English law."); see also Stephen Yeazell, \textit{When and How U.S. Courts Should Cite Foreign Law}, 28 Const. Comment. 59, 61–65 (2009) (noting that most circumstances where courts cite foreign law,
there is also value in using foreign law as a nonbinding persuasive source that informs interpretation of domestic constitutional rights.

For an originalist, any lessons from South African jurisprudence will likely prove unsatisfying. If the role of a judge is only to search for the original intent of the framers, the decisions of foreign nations are, by their nature, irrelevant. Yet, if one does not “employ so starkly originalist a methodology” as Justice Scalia espouses, the experience of South Africa may be of interest in deciding whether the risks of expanding judicial discretion are as real as he believes.

The South African experience demonstrates that the risks of citing foreign law can be acute and substantial but also that ignoring such jurisprudence may increase the risk of error. If judges protect themselves from the unprincipled use of foreign law, American courts would gain the opportunity to access a wider scope of experience around the world in interpreting American constitutional values. While greater openness to foreign experience may affect the substantive direction of American jurisprudence, the failures and successes of the Constitutional Court shed light on how to avoid the risks and maximize the benefits of measured engagement with foreign law.

One lesson from the Constitutional Court is that there are abundant opportunities to deepen and enrich national jurisprudence through a robust use of foreign law, with appropriate care as discussed herein. Developments in international politics increase the amount of jurisprudence regarding similar constitutional texts. It is useful for Constitutional Court judges to understand how others interpret similar phrases, evaluate the constitutionality of similar practices, or interpret shared legal doctrines. According to Justice Ackermann, awareness and understanding of foreign decisions can help inform, explore, and confirm interpretive choices. Exploring the principles applied by foreign courts to similar constitutional issues may be “an important way of testing one’s hypotheses” and “preventing the unwarranted intrusion of one’s personal preferences.”

After identifying the underlying reasoning and discerning the principles at issue in foreign decisions, judges can determine whether

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250. Larsen, supra note 132, at 1309–16.
252. See Ackermann, supra note 13, at 192 (describing the search for “neutral principles of constitutional law”).
253. Id.
and how principles can be applied in light of the distinctive constitutional text, national history, and culture. When foreign judgments articulated transcendent legal principles that were directly relevant to the South African context, they served as a valuable source of persuasive reasoning despite being written by judges construing the constitutional text of another nation.

It is undoubtedly true that the benefits to American courts of citing foreign law are substantially less than for South African courts. The lack of indigenous constitutional jurisprudence made foreign law valuable in the early years of the Constitutional Court. Yet, its continued use suggests that there may be benefits to American engagement with foreign law in certain situations, such as when courts confront new issues. The Constitutional Court’s ability to adjudicate a freedom of religion challenge to the constitutionality of laws criminalizing marijuana, for example, benefited from the fact that American courts previously confronted a similar constitutional challenge regarding the criminalization of peyote.

Using foreign law in American constitutional interpretation “allows the United States to use the experience of other nations that share its common constitutional genealogy as laboratories to test workable social solutions to common constitutional problems.” In the American domestic federalist structure, states serve as laboratories of democracy by testing diverse and innovative social and economic solutions to common problems. Similarly, countries which emulated the American Constitution may devise an innovative solution to a constitutional problem through experimentation. To ignore foreign experiences altogether because of risks of misuse would deprive judges of the “learning and wisdom to be found in other jurisdictions.”

Though the United States has a developed body of jurisprudence (unlike South Africa at the advent of the Constitutional Court), it may still face issues of first impression when new technological or social developments lead other jurisdictions to act first in addressing the

254. Id. at 183–84 (“In my own experience, I have been struck by how often, when difficulties were experienced in finding the right answer in a case, this was caused by an incorrect or inadequate identification of the problem presented by the case. Recourse to foreign law often helped me (at least) to identify the correct problem, or to identify it properly, and I am at a loss to see what danger can lurk herein. There are, after all, few human and societal problems that are not, in their essence, universal. It is also useful to see how foreign courts have solved the problem, what methodology has been used to this end, what the competing considerations have been, and whether any potential dangers were identified in the process.”).

255. Koh, supra note 72, at 47.

256. K v. Minister of Safety & Sec. 2005 (9) BCLR 835 (CC) at para. 35 (S. Afr.).
constitutional controversies caused by these developments. The experience of other nations might be “either legal (experience dealing with the creation of a particular legal rule or experience with how a particular legal rule works) or sociolegal (they have had greater experience dealing with the extralegal elements).”

The second lesson from the Constitutional Court is one of caution. American judges should be hesitant to engage with foreign law in most cases, especially given the absence of textual authority licensing consideration of foreign law similar to that found in the South African Constitution. While Justice Ackermann has “not the slightest doubt” that the Constitutional Court “would have placed the same reliance on foreign law even had there been no such provision in the Constitutions,” the difference in constitutional texts raises concerns about democratic legitimacy in the United States. South African practice cannot resolve an American debate over democratic theory—and nobody argues that it should—but the Constitutional Court’s limitations on citing foreign law do provide guidance for American courts in adopting a circumscribed approach that minimizes the potential risks.

The Constitutional Court only considered foreign law when a constitutional provision was textually similar to a foreign constitution and the constitutional text protected a “common thread” of shared values. A primary example involves the rights of arrested and detained persons and the prohibition on cruel and unusual punishment. These provisions “have 'universal' aspects, reflecting ‘the inescapable ubiquity of human beings as a central concern’ for any legal system and widespread (though not universal) aspirations for law to constrain government treatment of individuals.” In these areas, former Justice O’Connor argues that America’s “evolving understanding of

257. Neuman, supra note 251, at 87.
258. David Fontana, Refined Comparativism in Constitutional Law, 49 UCLA L. Rev. 539, 567 (2001) (arguing that a benefit of “refined comparativism” is better solutions through the use of foreign systems as “laboratories”).
259. See Ackermann, supra note 13, at 175.
260. See, e.g., Neuman, supra note 251, at 84–85 (“In analyzing the relationship between international human rights law and constitutional interpretation, it is useful to distinguish three aspects of legal rights: their consensual, suprapositive, and institutional characteristics. The consensual aspect reflects the positive basis of the right in the consent of the relevant political actors. The suprapositive aspect reflects the claim of the right to normative recognition independent of its embodiment in positive law. The institutional aspect of the right reflects its articulation as a structured legal rule in a manner that facilitates compliance and enforcement within the relevant legal system.”).
261. Jackson, Comparisons, supra note 54, at 118.
human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.\textsuperscript{262}

Despite these similarities, Justice Scalia argues that the judiciary is not institutionally competent to use foreign sources fairly and circumspectly. The South African experience indicates that misuse of foreign law is possible when foreign authority is cited without proper regard for context. For example, Mr. Mpshe argued that a “broad principle” of “misusing the process of the court” justified dropping the charges against Mr. Zuma. While foreign authority supported this broad principle, it only did so in instances involving tampering with evidence or a failure to disclose critical evidence.\textsuperscript{263} There was no analogous authority to the effect that a manipulation of the timing of bringing charges—the issue in Mr. Zuma’s case—constituted a comparable misuse of judicial process. If a proposition is phrased in a general sense, at its highest level of abstraction, it is more likely that some foreign practice is relevant. A circumspect use of foreign law by American judges must ensure that the shared principle is not described so generally as to be meaningless.

The Constitutional Court has been largely successful in avoiding misuse of foreign law, even when there is a shared connection at a high level of generality that could be stretched to justify a preconceived result. For example, at its most general level, freedom of speech is a concept recognized in many domestic constitutions.\textsuperscript{264} Yet, the Constitutional Court rejected the persuasiveness of American law regarding free speech in almost every case. Though both the United States and South Africa share a broad norm supporting free speech, the countries diverge on how to further that norm as a result of the differences in constitutional text, historical practices, and consensus political compromises.

Indeed, it is common for the Constitutional Court to examine the principles underlying foreign decisions simply to illustrate a divergent approach. In cases examined here concerning equality, property rights, socioeconomic rights, judicial processes, the powers of the national government and the provinces, and free expression, the Constitutional Court almost always rejected the persuasiveness of foreign law due to differences in constitutional text, history, and culture. Citing

\textsuperscript{262} Roper v. Simmons, 543 U.S. 551, 605 (2005) (O’Connor, J., dissenting).


foreign law, however, was still useful in clarifying the assumptions and values that underpinned South African constitutional jurisprudence, even though the foreign authorities were ultimately rejected as ill-suited for the South African context. Similarly, uniquely American considerations that relate to consensus political compromises, historical practices, or enforcement of rights will undermine the persuasive force of foreign law in many areas of constitutional adjudication. For example, the historically contingent political compromises that underpin American federalism likely make foreign law less relevant. An awareness of foreign authorities, however, could nonetheless clarify distinctly American constitutional values.

Justice Scalia’s fears regarding the institutional capacity of the courts to effectively engage with foreign law, however, are borne out in part by the South African experience. Linguistic differences risk selectivity or rash adoption of principles without a complete understanding of surrounding context. The selection and citation of certain countries threatens to raise allegations of results-oriented jurisprudence. The American judiciary may have less institutional capacity for citing foreign law than South Africa’s, which gained experience citing foreign law under the Roman-Dutch and Anglo-Saxon common law. If courts in South Africa, which “have a long tradition of engaging in comparative research and displaying this learning in their published judgments,” occasionally err in applying foreign law appropriately, the risks of the practice are likely greater in American courts, which lack similar experience.

These risks are real and must be guarded against if American courts engage more frequently and substantively with foreign law. Judicial engagement with foreign law will necessitate adaptation by government prosecutors, private practitioners, and legal educators. Mr. Mpshe’s mistake illustrates the unique risks posed by prosecutors’ reliance on foreign law and compellingly demonstrates the need for practitioners to receive training in comparative legal practice.


266. Ackermann, *supra* note 13, at 173 (“For well over a century, our courts have, with a minimum of fuss—and mostly without specific mention that they were doing so—adopted a comparative law approach. For the most part, it has been done with care and discretion, particularly since 1910.”); du Bois & Visser, *supra* note 13, at 657 (“The long history of South Africa’s relationship with foreign law has created an intellectual culture which makes comparative legal research a virtual article of faith for South African lawyers working on the frontlines of legal research.”).

Courts should also endeavor to avoid selectivity in citing certain sources and ensure that funding exists for linguistic translation of relevant foreign judgments as necessary. A selective survey of sources too easily can serve to confirm a result already reached. Mr. Mpshe’s failure to consult contrary authority and to appreciate the context of cited authority undermined the legitimacy of his decision to drop the charges against Mr. Zuma.

Yet, to quote Justice Ackermann, “fear of the dangers often obfuscates discussion of the benefits of comparative legal usage.”268 In particular, the fear motivating opposition to American use of foreign law, as identified by Justice Goldstone, is that American law will be moved in a more liberal direction. While proponents have attempted to minimize the possibility that consideration of foreign sources would influence the substantive direction of the law, evidence from South Africa suggests that a consensus (or lack thereof) of foreign courts can either “confirm” or lead a jurist to question the national conception of a right. In this respect, a consensus of foreign courts operates differently than a consensus of scholars or the persuasive arguments of philosophers. Though not precedential or binding in any way on a domestic court, the fact that foreign courts agree or disagree with a position has informed constitutional adjudication in South Africa.

Yet, the contentious American debate likely overestimates the impact of citing foreign law. The Constitutional Court rarely overreached or prioritized foreign sources over the constitutional text, history, and cultural understandings of the rights at issue. In particular, the Constitutional Court’s repeated emphasis on text illuminates a method for American judges to avoid unjustified reliance on foreign authorities. Where rights are specifically entrenched in the U.S. Constitution, foreign law may be of little persuasive value. But, even where foreign authorities are not relevant to the nature and extent of the right being examined by U.S. courts, the reasons provided for not recognizing the right in other constitutions may clarify American jurisprudence and inform the nature of appropriate relief. Such a broader understanding of foreign jurisprudence would properly result in the clarification of uniquely American values and reject the adoption of foreign precedents. To forbid any consideration, under any circumstances, of how judges in other legal systems deal with similar constitutional problems would be, in the words of the Constitutional Court, “unduly parochial.”269

268. Ackermann, supra note 13, at 180.
269. K v. Minister of Safety & Sec. 2005 (9) BCLR 835 (CC) at para. 35 (S. Afr.).