ARTICLE

Against borrowings and other nonauthoritative uses of foreign law

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1. In this article I reflect both on borrowings and on other uses of foreign law. Section 2 describes the relevance of foreign law, especially U.S. law, to the constitutional development of Argentina. Professor Jonathan Miller was correct when he asserted that United States constitutional law was a “talisman” in Argentine history.¹ Section 3 offers what I think are the best reasons in favor of borrowing. In the Argentine legal tradition borrowing did not receive much thought; therefore, the discussion in section 3 will be rather theoretical. Section 4 introduces the problems that borrowing may face and the reasons that it may be resisted. The basic idea is that the heterogeneity of constitutional law and difficulties in the democratic validation of the decision to adopt foreign law makes borrowing, to say the least, a problematic activity. Section 5 focuses on other uses of foreign law, different from borrowings, that I will call here nonauthoritative uses. In section 5, I will discuss the merits of using foreign law as evidence and as a source of legal innovation and knowledge. Section 5 also discusses the “on-going dialogue between adjudicative bodies of the world community,”² taking a view opposed to those judges who would enter into an international conversation, mainly because reference to foreign law adds unnecessary complexity to decisions by courts—which, ideally, should be kept as simple as possible—and because it makes it more difficult for the development of an indigenous constitutional culture. Section 6 concludes with some general remarks.

Two introductory comments are appropriate. First, the perspective of this article is that of someone who lives in a country that has used and abused foreign law but, notwithstanding this use and abuse and probably because of it, has failed in its effort to build a sustainable legal and constitutional culture.

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² Euromeca, S.A. v. R. Esmerian, Inc., 51 F.3d 1095 (2d Cir. 1995).
Therefore, my aspiration is modest. I just want to offer a reason to pause and reflect upon the predominant enthusiasm with which foreign law, in general—and foreign constitutional law in particular—is almost everywhere imitated.

Second, since “borrowing” is an expression we use in many different senses in our legal conversations it is necessary to offer a definition. By “borrowing,” I will mean here the decision to use foreign law based, at least in part, upon the authority that foreign law has in its original jurisdiction. This definition differs from more familiar ones in that it excludes as instances of borrowings all those uses of foreign law that do not follow from the conviction that foreign law should be, for some reason or another—in some fashion—domestically binding. I prefer this, because it helps us to highlight the cases where the use of foreign constitutional law is more problematic.

2.

Argentina has relentlessly practiced constitutional borrowing and has borrowed extensively in two fundamental areas of constitutional law: institutional design and basic rights. Argentina had two short-lived constitutions, of 1819 and 1826, not inspired by the U.S. Constitution. And there were some very influential political figures—Bolivar among them—who argued that Spanish America was not ready to replicate the system of the United States. Yet, in 1853, Argentina organized its power structure along the lines of political competencies established by the founding fathers of the United States Constitution. As José Benjamin Gorostiaga, the most prominent member of the 1853 Constitutional Convention, expressed it, the new Constitution was “cast in the mold of the Constitution of the United States.”

The Constitution of 1853 provided for a president with a fixed term in office; dual territorial sovereigns—the federal state and the provinces; a symmetrical
bicameral congress, where the house and the senate had the same role in the process of lawmaking; and, finally, a judiciary with both a duty to adjudicate cases and the authority to strike down legislation that contradicted the Constitution. Like the U.S. Constitution, the 1853 Argentine document is rigid, in the sense that it cannot be amended with ease, and is supreme, in the sense that its provisions override all other legal norms. The Argentine framers’ fascination with the U.S. Constitution was not due to the absence of other constitutional models. It is true that, in 1853, human history had not yet seen another large republic able to sustain itself as such. The only other living example of a federation was Switzerland. But the decision to replicate the U.S. Constitution was not a consequence of the scarcity of constitutional models. The founders could have unchained their legal imaginations as they had done before, at the conventions that produced the 1819 and 1826 constitutions, when they did not look for inspiration to the U.S. Constitution.

Rather, throughout early Argentine history there was a deep conviction that the U.S. Constitution had instilled the germ of political and economic progress in the United States, and it was assumed that the same germ would penetrate Argentina if we simply adopted the very same constitution. This belief about the U.S. model resurfaced at the time of the drafting of the Constitution in 1853. Thus, Juan Bautista Alberdi, the author of Bases y Puntos de Partida para la Organizacion Politica de la Republica Argentina, a book

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6 The most salient difference between the U.S. and the Argentine Constitution, insofar as the organization of power is concerned is that the Argentine Constitution provides for a much more powerful president. In the Argentine model, the president can appoint members of the cabinet without approval by the Senate; the president can use a line-item veto; and in some circumstances, the president could declare a state of siege without approval by Congress. See Carlos Nino, Transition to Democracy, Corporation and Constitutional Reform in Latin America, 44 U. MIAMI L. REV. 129 (1989); Williams C. Banks & Alejandro Carrio, Presidential Systems in Stress: Emergency Powers in Argentina and the United States, 15 MICH. J. INT’L L. 1 (1993).

7 Our founders also could have followed Chile and Peru. Both had adopted constitutions before 1853 and both could have served as models for the Argentine Constitution.

8 The admiration for the U.S. constitutional model was already present in the first intellectual product of the Argentine revolutionary mood. Thus, in the Plan of Operations for the United Provinces of the Rio de la Plata, authored by Mariano Moreno, the following passage appears:

   My fatherland, what changes you may suffer! Where, Oh noble and grand Washington, are the lessons of your politics? Where are the rules which guided you in the construction of your great work? Your principles and your system would be sufficient to guide us—lend us your genius so that we may accomplish the results which we have contemplated.

Mariano Moreno, Plan de las Operaciones que el Gobierno Provisional de las Provincias Unidas del Río de la Plata debe poner en Práctica para consolidar la Grande Obra de Nuestra Libertad e Independencia, in ESCRITOS POLITICOS Y ECONOMICOS 306 (Norberto Piñero ed., 1915).

9 JUAN BAUTISTA ALBERDI, BASES Y PUNTOS DE PARTIDA PARA LA ORGANIZACION POLITICA DE LA REPUBLICA ARGENTINA, BUENOS AIRES (1852).
that served as a blueprint for the Constitution of 1853—and Domingo F. Sarmiento—a future president and one of the most important political and intellectual figures of the time, both endorsed the idea of breaking away from the Spanish tradition to adopt the institutions of the U.S.\(^\text{10}\) They both held the conviction that adopting the U.S. model would be best for political and economic development. Alberdi claimed that Hispanic American culture would otherwise prevent the creation of a representative republic, accomplished at that point only in the United States and Switzerland.\(^\text{11}\) Sarmiento was even more sanguine about the importation of U.S. constitutional law.\(^\text{12}\) In an introductory book on the new Constitution, Sarmiento argued that to obtain success Argentina should strictly follow U.S. constitutional law.\(^\text{13}\) He thought that the original intention of the drafters of the Argentine Constitution was to assure Argentina “the success of the United States,” which the adoption of U.S. constitutional law would underwrite.\(^\text{14}\)

This idea of incorporating as a final source of normative authority the U.S. Constitution was ratified during the next step of Argentina’s constitutional development. The Province of Buenos Aires had not participated in the Constitutional Convention of 1853. The reason was its opposition to the national government led by Justo José de Urquiza, as well as its interest in keeping control over its port and customs revenues. However, in 1860, after its army lost the battle of Cepeda, Buenos Aires decided to join the federation. In order to protect its interests, Buenos Aires demanded the right to review the constitutional text of 1853 and called for a provincial convention charged with the task of recommending changes.

\(^\text{10}\) DOMINGO FAUSTINO SARMIENTO, ARGIBOPOLIS (1896), reprinted in OBRAS COMPLETAS DE SARMIENTO 17–18 (Editorial Luz del Dia 1950), cited in Miller, supra note 1, at 1505–8.

\(^\text{11}\) ALBERDI, supra note 9, at 233. It is interesting to note that Alberdi not only paid close attention to the Constitution of the United States but also to the constitutions of California and Massachusetts. He thought both were useful guides to unity, liberty, and progress.

\(^\text{12}\) Alberdi was much more cautious than Sarmiento about adopting U.S. constitutional law. Thus, after the 1853 constitution was approved, Alberdi wrote a book, Estudios sobre la Constitución Argentina de 1853, where he argues against Sarmiento’s fascination with the idea that U.S. constitutional law should be imported wholesale. Alberdi was convinced that local history had a role to play in the development of the constitutional practices of Argentina. See JUAN BAUTISTA ALBERDI, ESTUDIOS SOBRE LA CONSTITUCIÓN ARGENTINA DE 1853, 5 OBRAS COMPLETAS DE JUAN BAUTISTA ALBERDI (La Tribunal Nacional 1886); Miller, supra note 1, at 1519.

\(^\text{13}\) “Those in charge of executing our constitution,” Sarmiento claimed, “should not pretend [to] competences they do not have and those that have to abide by it should not claim, as it usually happens, rights that the Constitution does not grant them.” DOMINGO FAUSTINO SARMIENTO, COMENTARIOS DE LA CONSTITUCIÓN DE LA CONFERENCIA ARGENTINA DE 1853 29–30 (Editorial Talleres Graficos Argentinos de L. J. Rosso 1929).

\(^\text{14}\) See Miller, supra note 1, at 1516.
The goal of the provincial convention was to purge the 1853 Constitution of all the clauses that differed from the U.S. Constitution. With this purpose in mind, the provincial convention created the Examining Committee to review the 1853 Constitution. The records reveal that one of the main aspirations of Buenos Aires was to restore “the constitutional law of the United States in the part that was changed” by the drafters of the Constitution of 1853. Velez Sarsfield, drafter of the Civil Code, an eminent jurist, future Secretary of the Treasury and of the Interior, and one of the members of the Examining Committee, was the primary exponent of this view at the provincial convention of 1860.

The importance of the U.S. Constitution as a source of authority emerged again and again throughout the nineteenth century. In almost every instance in which something important was at stake, this view was expressed. Thus, for instance, the question of federalism, the question of the powers of local governments, and the question of whether the federal government could exercise authority within the City of Buenos Aires—this last probably the most important political debate of the 1880s—all were argued with reference to the authority of the U.S. Constitution.

The general expectation of those who forged our constitutional history was that substantive interpretations of the U.S. Constitution should also be binding in Argentina. The idea was that a binding source of normative authority was needed in order to prevent the multiplicity of normative discourses that usually emerge in circumstances where no institution is yet able to provide authoritative interpretations of a constitutional text. Normative multiplicity and interpretative divergence were somehow equated with anarchy, and it was thought, therefore, that the institutional organization of the country required that both be avoided. Sarmiento, as mentioned above, insisted that U.S. constitutional case law should be binding on Argentine courts. He believed that Argentine authorities should adopt the U.S. Constitution as strictly as possible, “not because it is more or less applicable to us, but because we will find ourselves with a case law to which no one will be permitted to say, ‘this is my opinion.’” He was so convinced of the need to obtain a dominant normative discourse that he claimed that to construct a new Argentina, the constitutional interpreter should not focus on domestic reality but trust U.S. law. Thus Sarmiento claimed “North American constitutional law, the doctrine of its statesmen, the declarations of its tribunals, the constant practice in analogous or identical points, are authority in the Argentine Republic, can be alleged in litigation, ... and adopted as genuine interpretation of our own Constitution.”

15 In his speech at the provincial convention, Velez Sarsfield said that the committee “had done nothing other than to restore the constitutional law of the United States.” Informe de la Comisión Examinadora de la Constitución Federal, in 4 Asambleas Constituyentes Argentinas 769 (Emilio Ravignani ed., 1937); Miller, supra note 1, at 1524.

16 See SARMIENTO, supra note 13, at 872; Miller, supra note 1, at 1526.

17 See SARMIENTO, supra note 13, at 59; Miller, supra note 1, at 1517.
Bartolomé Mitre had the same idea. During the debates on the construction of the port, Mitre—by then a former president—argued that Argentina should adopt "subsidiary law, where we must search to discover the true doctrine, [which] is the case law of the Constitution [that] we took for a model." 18

The Argentine Supreme Court approved of the imitative trend. In the famous 1877 case De la Torre,19 the Court addressed the power of Congress to imprison a journalist for having reported on a secret session. In De la Torre, the Supreme Court said, in a style that prevailed throughout the nineteenth century,

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\text{[t]he system of government which rules us is not of our own creation. We found it after it had long years of practice, and we appropriated it. Rightfully it has been said that one of the main advantages of this appropriation has been the vast body of doctrine, practice, and jurisprudence which illustrate and complement the fundamental rules that we can and ought to use in everything which we have not decided to change with specific constitutional provisions.}\]

It is only possible to account for some Supreme Court decisions by explaining them as attempts to follow more closely American precedents. In 1887, in Sojo21 the Supreme Court struck down article 20 of Law 48, which granted original jurisdiction to the Supreme Court to hear habeas corpus cases. The Court maintained that the Constitution prevented such expansion of its original jurisdiction, citing U.S. precedent, and remanded the case for litigation to a lower court. It is difficult to understand this decision. The constitutional text, as Supreme Court Justice Ibarguren stated in his opinion, in no way bans Congress from expanding the original jurisdiction of the Court. Article 101—which closely resembles article III, section 2 of the U.S. Constitution—allowed for a textual interpretation according to which Congress could enlarge the list of cases to be tried initially by the Supreme Court. In addition, as Justice Ibarguren also claimed, numerous members of Congress who voted for Law 48 previously had been members of the Constitutional Convention that drafted the constitutional text, and the fact that they so voted revealed that they saw no problem of constitutionality involved in the creation of new cases that could be originally adjudicated by the Supreme Court. Finally, Sojo did not fit with the Supreme Court’s precedents.22 The only explanation for the decision in Sojo was, as Professor Miller suggests, that the Court followed Marbury v. Madison,23 in which the U.S. Supreme Court decided

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18 See Miller, supra note 1, at 1545.
19 19 Fallos 231 (1877).
20 Id.
21 315 Fallos 120 (1887).
22 The Supreme Court had previously decided cases involving journalists who had brought actions against detentions ordered by the Senate. See, e.g., De la Torre, 19 Fallos 231 (1877); Acevedo, 28 Fallos 406 (1885).
23 5 U.S. 137 (1803).
that original jurisdiction cannot be exercised when not explicitly authorized by the U.S. Constitution.  

Argentina relied on the U.S. Constitution not only to design its political institutions but also to shape the system of basic rights. The Argentine Bill of Rights mirrors many of the amendments of the U.S. Constitution, and the Bill of Rights has been interpreted by courts along U.S. constitutional lines. This reliance on U.S. constitutional law should cause no surprise given the so-called “borrowed statute doctrine.” This canon of interpretation suggests that when a legislator copies a statute from a foreign legislator it can be presumed that she was aware of the way in which the statute had been construed by the foreign courts; it is reasonable, therefore, to conclude that she would want the domestic courts to construe the statute in a manner consistent with the interpretation offered by the foreign courts. In short, it is not difficult to conclude that when the legislator borrows, respect for the foreign legislator requires compliance with the decisions of foreign courts. But whatever the explanatory and justificatory power of the “borrowed statute doctrine,” the reality is that the Argentine Supreme Court incorporated willingly the U.S. Supreme Court’s interpretation of the U.S. Constitution.

The most important case in the realm of economic liberties, *Ercolano v. Lanteri de Renshaw*, was decided in 1922 by resorting to U.S. cases. In *Ercolano*, the Supreme Court was petitioned to decide whether a rent-control scheme—a freeze—was constitutionally permissible. Notwithstanding that the framers of the Argentine Constitution were much more emphatically in favor of laissez-faire economics than the U.S. founding fathers, and that the Argentine constitutional text was more explicit in the protection of economic rights and liberties than its U.S. counterpart, the Supreme Court found the freeze constitutional. The Supreme Court did not have supporting Argentine precedents to decide as it did. On the contrary, the Court had recently decided *Horta v. Harguindeguy* where it declared the rent freeze unconstitutional when applied to existing rent contracts. In spite of *Horta v. Harguindeguy* and other precedents,

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24 See Miller, supra note 1, at 1547.

25 In particular, the First, Fourth, Fifth, Ninth, and Fourteenth amendments.


27 136 Fallos 161 (1922).

28 Article 14 of the Argentine Constitution provides: “All the inhabitants of the Nation are entitled to the following rights, . . . to work and perform any lawful industry; to navigation and trade; . . . to make use and dispose of their property; to associate for useful purposes.” Article 17 states: “Property may not be violated. . . . Expropriation for reasons of public interest must be authorized by law and previously compensated.” CONST. ARG., arts. 14, 17.

29 137 Fallos 47 (1928).
the Supreme Court followed the U.S. case of *Block v. Hirsh*\(^{30}\) where the U.S. Supreme Court found a rent-control statute constitutional—and sided with the tenant.

Similarly, in *Avico v. de la Pesa*,\(^{31}\) which presented the question whether the lowering of interest rates and a moratorium on the foreclosure of existing mortgage contracts was constitutional, the Supreme Court was also heavily influenced by U.S. law. The Court’s precedents were unclear. *Ercolano* pointed toward constitutionality, but *Horta* pointed in the opposing direction. In a long decision, of which two-thirds was devoted to discussing U.S. precedents like *Nebbia v. New York*\(^{32}\) and *Home Building & Loan Ass’n v. Blaisdell*,\(^{33}\) the Supreme Court concluded that it was constitutionally permissible for the legislature to intervene and change the contractual conditions of private mortgage contracts. Over a dissent that insisted on the need to respect the property rights enshrined in the constitutional text, the Supreme Court said that U.S. cases were “the most authentic learned interpretation of the principles that we have incorporated in our own Constitution.”\(^{34}\)

This imitative trend also was apparent in the interpretation of the due process clause.\(^{35}\) Thus, in 1981, in *Montenegro*,\(^{36}\) the Supreme Court had to decide an abhorrent case in which the accused was tortured until he admitted guilt. The Supreme Court, instead of focusing on domestic law, relied on...
Against borrowings and other nonauthoritative uses of foreign law

Spano v. New York. \textsuperscript{37} The Supreme Court, as did its U.S. counterpart, characterized the case as one introducing “a conflict between the interest of society in prompt and efficient law enforcement and the interest of society in preventing rights of its individual members from being abridged by unconstitutional methods of law.”\textsuperscript{38} In following the U.S. Supreme Court, the Supreme Court stripped the confession of all evidentiary force.

There are many other comparable cases,\textsuperscript{39} but the preceding is enough to show the influence U.S. constitutional law has had among us. As Professor Miller puts it “Argentina offers an example not only of the adoption of a foreign constitutional model, but of the foreign model quickly becoming an article of faith,….”\textsuperscript{40} Indeed, each time Argentine legal authorities had to confront a new and difficult problem, instead of looking at their own experiences, traditions, and legal values, the attention was on foreign law. In so doing, I believe constitutional authorities and judges have hampered Argentina’s ability to develop the internal resources required to adjudicate constitutional cases authoritatively. To speculate on what other countries have done in similar circumstances is, indeed, challenging but it seems unlikely that any country will forge a constitutional identity and a constitutional culture through the wholesale adoption of another country’s constitutional doctrines and experiences. As George Fletcher has stated “[t]he acceptable way to resolve disputes and to explain the results is to turn ‘inward’ and reflect upon the legal culture in which the dispute is embedded.”\textsuperscript{41}

3.

Borrowing, however, is not altogether devoid of reason. Although in Argentine tradition there has not been enough critical reflection on borrowing, it is not

\textsuperscript{37} 360 U.S. 315 (1959).

\textsuperscript{38} 310 Fallos 2284 (1981).

\textsuperscript{39} See, e.g., Fiscal v. Fernandez, 310 Fallos 492 (1990), where the Supreme Court was confronted with the issue of whether the activity of an undercover officer is constitutional. The Supreme Court followed Sherman v. United States, 356 U.S. 369 (1958) and Hampton v. United States, 385 U.S. 293 (1966), concluding that the collection of evidence is constitutionally warranted if the officer only takes advantage of the opportunities provided by the defendant and does not commit a crime himself. Compare Fiscal v. Fernandez, 310 Fallos 492 (1990) with Hoffa v. United States, 385 U.S. 293 (1966). On freedom of speech, the Supreme Court also relied extensively on U.S. cases. In Costa v. Municipalidad de la Ciudad de Buenos Aires, 319 Fallos 508 (1987), the Supreme Court stated that U.S. case law “has undeniable value for us given the similar way in which the U.S. Constitution and ours guarantee the freedom of the press.” Id. at 527. In Gesualdi v. Cooperativa Periodistas Independientes Ltda y otro, 319 Fallos 3085 (1996), the Supreme Court used the test set out in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

\textsuperscript{40} See Miller, supra note 1, at 1485.

\textsuperscript{41} See George Fletcher, Constitutional Identity, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY: THEORETICAL PERSPECTIVES 223 (Michel Rosenfeld ed., Duke Univ. Press 1994).
very difficult to find general reasons in support of the practice of importing foreign solutions—and their authority—to solve domestic legal problems. These general reasons could be synthesized in four arguments. This section describes these four arguments, and section 4 will present the difficulties with them.

3.1
We could justify borrowing when domestic law and foreign law are tied together by a relationship of descent and history. This relationship seems to be sufficient in itself to justify the importation of different areas of constitutional doctrine and positive law. Following Sujit Choudhry, I will call this argument “genealogical.”

Choudhry has claimed that “genealogical relationships” differ from “genetic relationships.” “Constitutions are genetically related,” says Choudhry, “if one constitution influences the framing of the other, or if both are framed under the influence of a third.” The genealogical relationship, on the other hand, is the link between one constitutional order bred from another. The genealogical argument claims that the parent constitution and the interpretations thereof should have binding authority in the country adopting the parent constitution. In other words, according to the genealogical argument one can account for the domestic force of foreign law by appealing to the relationship between the constitutions of the countries at stake.

3.2
A second argument in defense of borrowings refers to the context in which the borrowing takes place. This argument does not require the intimacy presupposed by the genealogical argument since it describes a more general way of normatively connecting the legal systems of different countries. Suppose there is a case between A and B. After careful consideration of the arguments put forward by A and B, and review of all the relevant facts of the case and all the applicable norms, Judge J says that B is right and should therefore prevail. If we then have the duty to decide a controversy between C and D, where the question and the applicable norms are similar to those at stake in the case between A and B, is there any general reason to regard the decision J adopted as authoritative?

43 Id. at 838.
44 Id.
45 Id.
46 The genealogical argument explains the use of American jurisprudence by the Canadian Supreme Court—especially the decisions by Chief Justice Marshall in the early nineteenth century, reviewing the history of British dealings with native peoples in America. See Choudhry, supra note 42, at 871.
We may think that one reason in support of granting some authority to the decision by J is the need to avoid normative multiplicity and interpretative divergence. Whatever you think about the substantive merit of the decision of your predecessor J you may think it is necessary to adjudicate the case as he did in order to adhere to and to strengthen people’s expectations. If every judge does what he or she thinks is right in cases like these, the result will be a sort of legal Babel where no one will truly understand his rights and duties. In other words, we have reasons to imitate J’s decision—whatever its intrinsic merit—because in doing so we can avoid the problems of normative multiplicity and interpretative divergence. This is the sort of argument that justifies, say, the practice of *stare decisis*, but it cannot justify borrowings because there is nothing wrong or confusing in two or more national legal systems having different norms or different interpretations thereof. Multiplicity and divergence are not necessarily an evil when they occur in different jurisdictions.

However, one could also say that decisions by J, even when J is a judge of a foreign jurisdiction, should have some degree of authority over us simply because it is quite likely that these decisions were thoroughly reasoned. This second defense of borrowing is contextual. It applies only if (1) the context in the two situations is the same, and (2) the case in the foreign jurisdiction was decided with awareness of its great importance. Something like this contextual argument has been defended by legal scholars and philosophers alike. Thus, for instance, Professor Vicki Jackson has suggested that “foreign constitutional decisions might be worthy of consideration because they reflect [the] reasoned judgments of other judges faced with similar problems.” Bernard Williams has argued that it is reasonable to regard legal decisions as having authority beyond the case at hand, and therefore that past cases can be used to decide future ones when the courts that have decided the past cases were aware of their great importance. Since this argument applies perfectly when the courts that have decided the past cases are foreign, I dare to cite Williams as a potential supporter of the view that borrowings could be defended for contextual reasons.

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47 In Argentina, as in Brazil, precedents do not bind courts. Recently, however, distinguished scholars have argued that the rule of law requires strong deference to past decisions and therefore we should incorporate into our systems the binding nature of precedents. See Alberto Garay, *El Precedente Judicial en la Corte Suprema*, 2 REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO 51 (1997); CAMARGO MANCUSO, DIVERGENCIA JURISPRUDENCIAL E SÚMULA VINCULANTE (Revista dos Tribunais 1999).


49 See Bernard Williams, *What Has Philosophy to Learn from Tort Law?* in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 487 (David G. Owen ed., Clarendon Press 1995). The South African Court has explicitly subscribed to the idea that foreign decisions have credibility because they were taken in contexts where issues of importance turned on the outcome. Thus, the South African Supreme Court has said, “The international and foreign authorities are of value because they . . . show how Courts of other jurisdictions have dealt with [the] vexed issue [of the death sentence]. For that reason alone, they require our attention.” S. v. Makwanyane, 1995 (3) SALR 391 (CC), at 413.
3.3
The third justification for the practice of granting authority to courts’ decisions and statutes beyond one’s national borders is the “procedural argument.” Under the general form of the procedural argument, we have reasons to follow what others have decided about issues we now confront if the decisions were arrived at using procedures designed to increase the reliability of these decisions. The same kind of argument could be offered in the constitutional realm. Sometimes, legislatures, constitutional assemblies, and courts operate within procedural requirements specially tailored to reproduce the ideal conditions of choice. Thus, for instance, in many legislatures there are norms that regulate discussions in order to allow the expression of all points of view. Some courts accept rules to channel the discussions and provide standards to evaluate the evidence produced, and so on. Bound by these and other kinds of procedural requirements, legislatures and courts may arrive at proper—or at least reasonable—norms or principles, and they may do so with greater likelihood than legislatures and courts that are not so bound.

When it is the case that foreign authorities or courts have operated within the contexts of reliable procedures, it is not at all unreasonable to grant some degree of authority to the decisions adopted by these authorities. This sort of argument is not novel; some relied upon it to explain the universal tendency to borrow. Thus, for instance, Jens C. Dammann has argued that borrowing becomes plausible as soon as one “assumes that democratic and legal procedures meeting a certain standard of fairness are apt to lead to desirable laws.”

3.4
There is more ammunition in favor of borrowing than the genealogical, contextual, and procedural arguments would suggest. As some authors have emphasized, expressive reasons may sometimes explain and justify instances of borrowings. Think again about Argentine history. After the traumatic experiences of the massive human rights violations performed by the military juntas in the 1970s and early 1980s, Argentina decided to amend its Constitution in 1994. At the convention called for the purpose, a large majority of its members voted to incorporate into the constitutional text, all the rights and liberties recognized by international human rights treaties that Argentina had signed in the past or would sign in the future. The reason to incorporate these treaties was explained by Alicia Olivera, a member of the 1994 convention. She said that "the decision [to incorporate human right treaties into the Constitution] had as its immediate source the abhorrent crimes committed

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50 See Dammann, supra note 26, at 527.

by the military dictatorships in Argentina, especially the last one . . . .” 52
“Our history,” said Olivera, “was condensed in the expression ‘Never Again,’ 53
and to guarantee [that this will be the case] we should grant constitutional
standing to the principles of jus humanitarios.” 54
Olivera’s comments emphasize that Argentina incorporated foreign law for
an altogether expressive purpose. Argentina borrowed in order to manifest its
adherence to the same restrictions on governmental power that characterized
the foreign or international law it adopted. Argentina was not the only country
that has done so. Hungary, Slovenia, and Czechoslovakia did as much. 55 In
1989, after its communist past, Hungary adopted a constitution that required
that domestic law be harmonized with international law. 56 South Africa also is a
clear example of express constitutional borrowing. 57 Professor Scheppele, in her
contribution to this volume, suggests that European democracies have adopted
foreign law to express their constitutional aspirations. She says that these coun-
tries “may have adopted the model of the Federal Constitutional Court of
Germany precisely to demonstrate that they, too, aspired to realize the constitu-
tional principles that the Constitutional Court had helped Germany achieve.” 58

52 Diario de Sesiones de la Convención Nacional Constituyente, 22 Reunión, 3 Sesión Ordinaria,
53 “Never Again” (Nunca Más) was the title of the final report issued by a special commission
(CONADEP) appointed by President Raul Alfonsin to investigate the human rights violations of the
seventies and early eighties in Argentina. See NUNCA MÁS (Eudeba 1986).
54 See id.
See A MAGYAR KÖZTÁRASÁG ALKOTÁMNYA, art. 7(1); SLOVENIA CONST., art. 153; SLOVAKIA CONST.,
art. 11; CZECHOSLOVAKIA CONST., art. 10.
56 Chapter I, article 7(1) of the Hungarian Constitution of 1989 states “The legal system of the
Republic of Hungary accepts the universally recognized rules and regulations of international
law, and harmonizes the internal laws and statutes of the country with the obligations assumed
under international law.” A MAGYAR KÖZTÁRASÁG ALKOTÁMNYA, art. 7(1).
57 Section 35(1) of the South African Interim Constitution states: “Interpretation: (1) In inter-
preting 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. § 35(1).
In largely the same language, section 39 of the current Constitution states that “[w]hen interpreting
the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open
and democratic society based on human dignity, equality and freedom; (b) must consider interna-
tional law; and (c) may consider foreign law. (2) When interpreting any legislation, and when
developing the common law or customary law, every court, tribunal or forum must promote the
spirit, purport, and objects of the Bill of Rights. (3) The Bill of Rights does not deny the existence
of any other rights or freedoms that are recognised or conferred by common law, customary law
or legislation, to the extent that they are consistent with the Bill.” S. AFR. CONST. § 39.
58 See Kim Lane Scheppele, Aspirational and Aversive Constitutionalism: The Case for Studying Cross-
4.

There is little doubt that the genealogical, contextual, procedural, and expressive arguments have bite. Individually or collectively, they may convince us that, in general, the practice of borrowing is plausible. However, constitutional borrowing is a problematic activity. Even if constitutional texts and constitutional interpretations are adopted in circumstances where a lot rides on decisions by people we have in high regard, by means of procedures tailored to maximize autonomous public deliberation, the incorporation of foreign law introduces problems that are not easy to solve.

A constitution is a charter that distributes political power, organizes the process of lawmaking, and fixes the scope and limits of the basic rights and liberties of citizens. Most constitutions aim to address these issues using much the same mechanisms.

Yet, despite the similarity of aims and means, there is no constitutional canon that provides uniformity across borders. It is possible to conceive of many different yet equally reasonable ways to address each area of constitutional concern. Take the problem of distribution of power. One could think that it is best to have territorial divisions as the U.S. Constitution does or that power should be split between branches, as the current Chilean Constitution does. There is also leeway for diversity in the regulation of basic rights. One could organize the frontier between individual rights and state power by granting maximum space to the individual, as was certainly the case with the regulation of the Establishment Clause of the U.S. Constitution, or one could decide that the space should be divided between the individual and the state—for instance, granting the state some ability to endorse a religion if it does not try to impose it on anyone in particular—as is the case with the regulation of the religious practice in the Argentine Constitution. As Michel Rosenfeld has put it, “Constitutionalism engages a complex interplay between identity and diversity at so many different levels that it seems altogether futile to search for any particular identity or difference as being indispensable to a legitimate constitutional scheme.”

Why is constitutional law so heterogeneous? In my view, the combination of the multiplicity of our relationships as citizens, and our continuous ability to redefine, reshape, and remold them, is what makes constitutional law heterogeneous. This combination—admitting many different forms—makes possible the emergence of various ways of dealing with the problems constitutional law faces. There will always be innovation and creation in

59 See Chile Const., art. 100.
60 See U.S. Const. amend. I.
61 See Const. Arg., art. 2.
62 See Michel Rosenfeld, Modern Constitutionalism as Interplay Between Identity and Diversity, in Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives, supra note 41, at 3, 13.
constitutional law, because there will always be different ways of attempting to solve constitutional problems.63

There is no doubt that the heterogeneity of constitutional law undermines the contextual and the procedural arguments. These two arguments depend on the identity or, at least, the similarity of, the subject matter of constitutional law. If the law of the foreign country provides a set of answers to the problems of constitutionalism different from those of the borrowing country, it makes little sense to borrow at all. This is so, even if the answers adopted by the foreign courts were issued in circumstances where a lot turns on the outcome and through procedures shaped to maximize the likelihood of right—or at least reasonable—results.

However, the heterogeneity of constitutional law does not undermine either the genealogic or the expressive arguments. Argentines who approve of borrowing may insist that the Argentine Constitution was poured into the mold of the U.S. Constitution and this fact by itself justifies granting some degree of authority to the constitutional decisions adopted by the U.S. Similarly, if a country borrows a foreign regulation in order to express fidelity to the values it incarnates, the claim that, constitutionally speaking, the country from which one borrows is different, does not really challenge the decision to borrow since it is precisely this difference that justifies borrowing in the first place. One borrows because one wants to be different from what one is, and therefore the heterogeneity of constitutional law is a precondition for—and not an impediment to—borrowing.

Nonetheless, there is a problem that touches all arguments in favor of borrowings, which I will call here the problem of validation. Constitutional law regulates the background structure of society. The problems it addresses are the most important interpersonal issues that may arise in a democratic community. They define the way in which a democratic community may

63 Private law borrowing is less problematic than borrowing in constitutional law because private law is more homogeneous. The higher homogeneity of private law is not a consequence of the fact that private law serves only one master or because private law is the subject of one, or at most two, overarching aims or goals as, for instance, Rosenfeld has claimed. See Michel Rosenfeld, Constitutional Migration and the Bounds of Comparative Analysis, 58 N.Y.U. Ann. Surv. Am. L. 67, 72 (2001). It is impossible to rationalize private law as a monistic realm in terms of values, aims, or goals. The articles of the Argentine Civil Code, or for that matter the articles of any other sophisticated private law regulation, cannot be seen as normative emanations of the ideal of efficiency or wealth maximization. Rather, what explains the homogeneity of private law is the fact that we happened to have developed historical ways of arguing, a set of responses or forms that, for reasons of repetition and general cross-border and cross-time adherence, have acquired the status of solutions to the different problems that may emerge in the context of our interactions with others as private individuals. Why did we do so in private law and not in constitutional law? Probably because, as Ernest Weinrib has emphasized, private law regulates only one mode of interaction, characterized by the immediate relation of the parties, while constitutional law regulates many interactions of many different kinds. See Ernest Weinrib, The Idea of Private Law 8 (Harvard Univ. Press 1995). On the easier transplantation of “instrumental” matters like private law, see Oscar G. Chase, Legal Process and National Culture, 5 Cardozo J. Int’l & Comp. L. 1 (1997).
attempt to rule itself and the permissible ways in which citizens—and, more generally, members of society—may cooperate with one another throughout their entire lives.64 The most salient consequence of the scope of regulation of constitutional law is that it touches on our lives more deeply and more coercively than all other branches of law. Contract and tort law, for instance, only determine the way in which we should behave in some sort of bracketed interactions. But constitutional law has a deeper impact. We may express this truth by saying that the citizens of a democratic state will always feel the coercive pressure of constitutional law in their daily lives.

Now, in a democratic state, the justification of coercion is rather a difficult task. Given the irreducible pluralism about what we owe each other—we disagree on the scope and the content of most of the rights we know—we cannot try to justify coercion by reference to the content or substance of the law.65 You cannot say, for instance, that the law, being morally plausible, I have reason to abide by it, since I may not agree with you about morality and your invocation, therefore, will be wholly unpersuasive for me.

The way in which we could validate the law in a constitutional democracy and, therefore, the way in which we could pro tanto validate the use of coercion, is not related to content or substance. Rather, what explains why the law is binding is fair participation in the lawmaking process (or the fair opportunity to participate in this process or, even less ambitiously, the existence of normative and factual conditions designed to prevent individual alienation from the lawmaking process).66 It is our participation in the lawmaking process that forfeits all our defenses against the claims and expectations of those who want us to conform to what is collectively decided.67

64 What I say in the text echoes Rawls’s views. See John Rawls, Political Liberalism 339 (Harvard Univ. Press 1993). Rawls has insisted on the importance of the regulation of the basic structure. Thus, he says “everyone recognizes that the institutional form of society affects its members and determines in large part the kind of persons they want to be as well as the kind of persons they are. The social structure also limits people’s ambitions and hopes in different ways; for they will with reason view themselves in part according to their position in it and take account of the means and opportunities they can realistically expect.” Id. at 269.

65 It is usual to refer to pluralism about conceptions of the good since it is characteristic of modern societies that people disagree on what gives true meaning to life. But the pervasive disagreement about what we owe to each other and the way in which this disagreement affects our relationships has received less attention.


67 The idea that the bindingness of law can only be explained and justified procedurally is endorsed by Jürgen Habermas. Habermas has claimed that “in complex societies the citizenry as a whole can no longer be held together by a substantive consensus on values but only by a consensus on the procedures for the legitimate enactment of laws and the legitimate exercise of power.” See Jürgen Habermas, Struggles for Recognition in the Democratic Constitutional State, in Multiculturalism: Examining the Politics of Recognition 107, 135 (Amy Gutman ed., Princeton Univ. Press 1994).
If we accept the idea that we are supposed to comply with the law only when it is the result of the collective choices of the political entity to which we belong, then we might object to constitutional borrowing simply because borrowing essentially consists of deferring to the collective choices taken by others. The conscious adoption of foreign constitutional law as binding law by a constitutional authority or a judge are both cases in which the most basic themes of our interpersonal lives are decided by people with whom we are not politically related and who are not members of the same political entity. This deferral of the final word to others in constitutional matters is what makes constitutional borrowing incompatible with the principle that coercion can only be justified when it is the direct consequence of a collective choice and, as a consequence thereof, impossible to validate in the context of a constitutional democracy.

The validation problem cannot be circumvented by claiming that the choice to borrow is the community’s and, therefore, that borrowing should be seen as an exercise—and not as an infringement—of the nation’s right and duty to govern itself according to its own decisions. It is true that when a community borrows it is the community that does so, but the choice the community makes is, in an important sense, someone else’s. As voluntary slavery is still slavery, voluntary deferral to others is still deferral to others.

The problem of validation is more difficult in the realm of constitutional adjudication than in the realm of constitution making. U.S. Supreme Court Justice Scalia is quite right to distinguish between borrowing comparative constitutional law for constitutional design and borrowing it for constitutional interpretation. Professor Tushnet is also right when he says “that the Constitution must license the use of comparative material for the courts to be authorized to learn from constitutional experience elsewhere.”

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68 The assertions I have made in the text are obviously debatable. The question of the bindingness of law has been an intractable problem since the *Crito* on, and I do not pretend to give a final answer here. However, I want to insist that unless we associate validation and justification of the law with the fair opportunity to participate in the collective decision-making process (or at least with the fact of not being alienated from this process), it is impossible to understand and explain why we think the law is binding in modern democratic societies.

69 I think Frank Michelman will agree that validation is a problem for constitutional borrowing. Indeed, he challenges the process of privatization and globalization resorting to claims that sound like the validation sting. See Frank I. Michelman, *Constitutionalism, Privatization, and Globalization: Whither the Constitution?* 21 CARDOZO L. REV. 1063, 1071 (2000).

70 Choudhry suggests that American jurisprudence, in general, agrees with the idea that reliance on foreign sources is prima facie illegitimate, because these sources are drawn from legal systems authored by others. See Choudhry, *supra* note 42, at 825.


assertion, on the contrary, suggests that constitutional conventions do not need such a license.) Members of legislatures and of constitutional conventions are the rank and file of our society, responsive to public needs and sensitive to public demands. Further, membership in a legislature and in a constitutional convention is an open matter, to the extent that there are no normative limitations disqualifying people from the position, and these members often need to stand for reelection. Consequently, when constitutional conventions and legislatures speak, it is the people who speak, and when they borrow, it makes sense to say that we—the people—have borrowed. The matter is different with courts. Courts are selectively manned with successful members of a profession who have been trained for a long time, and are accountable to no one, not even to those who may be deeply affected by their reasoning and conclusions. Courts are at a distance from us. Therefore, when a court borrows a constitutional norm or a constitutional interpretation of a norm it is not we—the people—who borrow. It is the court that does so. Because it is difficult for us to identify with a court, it is therefore also difficult to validate the coercion implicit in the implementation of a legal norm borrowed by a court.73

5.

Borrowings do not exhaust the possible uses of foreign constitutional materials. Indeed, there is a wide diversity of possible influences that exceeds the rather restricted phenomenon that, in the previous section, I have called borrowings. Recall that borrowing, as I have defined it, is an authoritative use of norms authored beyond our national borders. In previous sections, I have argued that borrowing, in particular constitutional borrowing, is a complicated thing. Yet, in many constitutional contexts, we use and refer to foreign constitutional norms without the normative deference characteristic of borrowing. The crucial difference between borrowings and other uses of foreign constitutional law is that these other uses are nonauthoritative. Here, reference to foreign constitutional law is not accompanied with the aspiration that it be adopted and enforced because of its inner authority. Nonauthoritative uses grant descriptive relevance to foreign law merely as “constitutional fact,”74 that is, as data that inform us about someone else’s constitutional experience. But are nonauthoritative uses of foreign law justified? Are these uses among the

73 Professor Vicki Jackson has reviewed other problems in the importation of foreign law. Among others, she analyzes the way in which the use of foreign law affects the perceived legitimacy of legal institutions. See Vicki Jackson, Narratives of Federalism: Of Controversies and Comparative Constitutional Experience, 51 DUKE L.J. 223, 266 (2001).

permissible ways in which "cross-constitutional influence"\textsuperscript{75} may be exerted from one country to another?

Nonauthoritative uses of foreign law were and are quite popular in Argentina. At Argentine constitutional conventions almost all debatable issues were saddled with references to foreign law. Nor is the popularity of nonauthoritative uses of foreign law an idiosyncratic Argentine tendency. Justice Imre Voros claims that “the solutions in the Hungarian constitution were borrowed from the national constitutions of western democracies.”\textsuperscript{76} Jon Elster points to the same phenomena when he claims that in most constitutional discussions around the globe we find “a large number of references to other constitutions” not only “as models to be imitated,” but also “as disasters to be avoided, or simply as evidence for certain views about human nature.”\textsuperscript{77}

The fact that, constitutionally speaking, we cannot invent ourselves from scratch seems to provide a basis for the study of foreign law. In addition, studying foreign law will make us better able to detect constraints that are the product of our intellectual limitations but not actually rooted in facts.\textsuperscript{78} However, in my opinion to study foreign law is something altogether different from using it. Uses of foreign law, even nonauthoritative uses, are always problematic. In what follows let me try to expand and hopefully clarify this rather bold assertion.

5.1
Sometimes constitutional authorities and courts use foreign law as evidence of facts. Constitutional law regulates the background structure of society, and doing it effectively requires knowing in advance how society may respond to attempts to regulate it. Because there are no social laboratories in which to experiment, the only data a constitutional authority or a court may gather is that provided by the performance of similar regulation abroad (or, in cases of federal countries, with similar regulation in provincial or state jurisdictions). Constitutional authorities and courts replicate the experience of other countries to hypothesize the future of different domestic legal choices. Along these lines, Justice Stephen Breyer of the U.S. Supreme Court has stated that comparative constitutional analysis may cast “empirical light on the consequences of different [legal] solutions to common legal problems.”\textsuperscript{79} This use of foreign


\textsuperscript{78} See Tushnet, supra note 72, at 1227.

\textsuperscript{79} Prinz, 521 U.S. at 976.
law as evidence stands on the idea that notwithstanding the heterogeneity of constitutional law, there are social, cultural, and economic similarities across borders that justify gazing abroad to conjecture what would happen when certain kinds of legal regulations are adopted.

5.2
Constitutional authorities sometimes use foreign law not as evidence of facts but as a source of legal innovation and knowledge. Foreign constitutional materials may liberate, helping us to jettison the conviction of false necessity\textsuperscript{80} that usually accompanies those who have been intellectually bred in the context of fixed institutions. An entire new range of ideas and possibilities may open up when we look abroad. New ways to deal with protracted and common problems may appear feasible. In addition, looking abroad may help us see our own constitutional scheme in a new light, and this, in turn, may lead to results that would not have occurred without resort to foreign materials.

These two nonauthoritative uses of foreign law—as evidence and as a source of legal innovation and knowledge—do not suffer from the validation sting. Because these uses of constitutional law do not aspire to smuggle into our constitutional decision making the authority of foreign law, they are not subject to the objection against borrowings I mentioned in section 4. Therefore, and contrary to Montesquieu’s and Hegel’s claims,\textsuperscript{81} it may be possible that the study, and some uses, of foreign constitutional law may be seen as somehow beneficial.

However, in light of the heterogeneity of constitutional law I referred to above, in section 4, a caveat is here in order. When using foreign constitutional law as evidence and as source of legal innovation and knowledge, we have to be alert enough to identify the fixed features of the national character that distinguish our nation from others. These features represent the limit of what can be achieved through lawmaking. Thus, as Roberto Mangabeira Unger has argued for Brazil,\textsuperscript{82} one may think that presidentialism is a good strategy for circumventing the instability endemic to parliamentary systems, given that presidentialism is the only available political mechanism to transcend the


\textsuperscript{81} Both Montesquieu and Hegel were on the side of those who think it is a bad idea to import or imitate foreign constitutions. Montesquieu declared that it would be pure chance if the political laws of one nation could meet the need of another. See Montesquieu, De l’Esprit des Lois, Book I, ch. 3 (Anne M. Cohler et al., trans. & eds., Cambridge Univ. Press 1989) (1748). Hegel argued that a constitution is “the work of centuries ... the consciousness of rationality so far as the consciousness is developed in a particular nation.” See Friedrich Hegel, The Philosophy of Right 286–87 (T.M. Knox trans., Oxford Univ. Press 1967).

\textsuperscript{82} See Roberto Mangabeira Unger, A Alternativa Transformadora: Como Democratizar o Brasil 345–74 (Editora Guanabara Koogan S.A. 1990).
agreements between political elites that usually prevent popularly needed transformations. One may also think that presidentialism is efficacious in transiting away from communist regimes. With these convictions in mind you may look at the United States and, inspired by the smooth working of its political scheme, decide to amend your constitution to mirror the distribution of power characteristic of the U.S. Constitution. However, if you fail to realize, for instance, that your country has a settled manner of political interaction that differs radically from the United States—where no party discipline exists—you may commit a dreadful mistake. Indeed, if as a consequence of your culture or your recent history, the party system of your country is highly confrontational and tightly knit with strong party discipline, presidentialism will most likely result, as Argentina testifies, in insurmountable deadlocks between the president and the majority of Congress. In short, we have to be careful with legal transplants because always, as Mirjan Damaška has declared, “the music of the law changes . . . when the musical instruments and the players are no longer the same.”

5.3

Constitutional authorities sometimes use foreign constitutional law in a negative fashion. As Professors Epstein and King argue, “nonborrowing”—the conscious refusal to adopt a foreign legal text, norm, or principle as binding law—is also part of a “larger phenomenon” of constitution building. Negative borrowing is a consequence of focusing on the “failures of other constitutional regimes.” The reason for the rejection varies. Sometimes, it is done with a clear awareness of the categorical differences between countries. Thus, for instance, Professor Osiatynski tells us that in 1989 in some Eastern European countries there was a vivid discussion on whether to shape new
constitutions on the American model. He says this idea was rejected, eventually, because of the drastic differences between the region and the U.S.; it was also shunned in the debates regarding the Little Constitution in Poland “primarily because of the differences in party systems and political context.”

At other times, differences in culture or national pride underlie the decision to refuse to resort to foreign models. Finally, a decision not to borrow may follow from a deep conviction about the implausibility of a given constitutional scheme. This motive is what Professor Scheppele calls “aversive constitutionalism,” where the construction of a constitutional text and a constitutional culture is based on the rejection of a particular conception of a constitution.

The negative uses of foreign law do not face problems of constitutional heterogeneity or constitutional validation simply because the rejection of foreign law is an autonomous decision that implies an affirmation of a different and defined constitutional identity. Indeed, negative uses are very efficient instruments in fixing the essential constitutional character of a national polity. Therefore, I have no quarrel with constitutional authorities and courts using foreign constitutional law as models to be avoided.

5.4

Sometimes courts use comparative materials simply to emphasize that the distinctive factual aspects of a case may merit their own solution. Thus, in *Amarilla*, the Argentine Supreme Court contrasted the facts of the case with *New York Times v. Sullivan* in order to show that in *Amarilla* the defendant was charged for opinions, value judgments, and conjectures, while in *New York Times v. Sullivan* the charge was for false or inaccurate statements of fact. Based on this difference, the Court concluded that even if the defendant published judgments knowing that they were false, or with reckless disregard of whether they were false or not, he could not be convicted.

On other occasions, courts have used foreign law to show the distinctiveness of their decisions. In *S.V. v. M.D.A.*, Justice Petracchi, of the Argentine Supreme Court presupposed that those who publish false statements can be convicted only when they intentionally want to cause harm or whether they had “real malice” as defined by *New York Times v. Sullivan*, that is, knowledge of the falsity of the statements being published or reckless disregard about their falsity or truth.
Supreme Court, found that a court order meant to prevent newspapers from publishing any news about a case where a minor had sued a sports figure for parental recognition violated the free speech clause of the Argentine Constitution, even when it had the aim of protecting the minor. Justice Petracchi stated that the prohibition of censorship is a fixed point in the Argentine constitutional tradition—also recognized in article 13 of the American Convention of Human Rights—and the constitutional text explicitly prohibits it. He then referred to U.S. cases such as *Organization for a Better Austin v. Keefe* and *New York Times Co. v. United States*, suggesting that in the United States the decision in a case similar to *S.V. v. M.D.A.* may have been different because even when in the U.S. constitutional tradition there is a strong presumption against censorship, censorship per se is not explicitly prohibited by the Constitution. Finally, courts sometimes use foreign law to show that other systems resolve cases in like manner, which, in turn, shows that their decisions fit with a general consensus on the subject. Thus, for instance, Judge Petracchi and Judge Beluscio in *Bahomondez, Marcelo*, decided that a Jehovah’s Witness is constitutionally entitled to refuse a blood transfusion recommended by his doctors to cure a serious illness. In their joint opinion, they stated that the German Constitutional Court and some U.S. Courts (they mentioned the Court of Appeals for the District of Columbia) had adopted the same criteria, based upon the same principles, the Argentine Constitution honors.

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100 There are many instances of the Argentine Supreme Court citing foreign cases to establish differences in other topics. See, e.g., *Transporte Interprovincial Rosarino S.A. v. Buenos Aires, Provincia s*, sumario, 324 Fallos 3036 (2001) where Judge Fayt claimed that even when in the interpretation of the Argentine Constitution’s Commerce Clause the Supreme Court gave credit to U.S. interpretations of the U.S. Constitution Commerce Clause—mainly the one made in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)—there is a crucial difference between the U.S. and Argentina because in Argentina the Constitution establishes that the federal government dictates common legislation.

101 316 Fallos 479 (1993).

102 11 BVerfGE 111 (1957).

103 Argentine courts sometimes use foreign law strategically. For instance, in *Peralta*, 313 Fallos 1513 (1991), the Supreme Court upheld the constitutionality of an emergency decree issued by the president that converted all deposits at banks above a certain amount into long-term bonds issued by the Argentine government, quoting *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934) (finding that extending the time of redemption of a mortgage did not violate the contract clause of the U.S. Constitution). The same issue had been already decided in the negative in *Avico v. de la Pesa*, 172 Fallos 21 (1934), and *Home Building* was a rather different case.
Obviously, nonauthoritative uses of foreign law by courts are not an Argentine rarity.\textsuperscript{104} Indeed, in many countries it has become fashionable for courts to refer in their decisions to precedents issued by foreign courts, thereby partaking in what Judge Calabresi has called an ongoing dialogue of the adjudicative bodies of the world community.\textsuperscript{105}

Are courts’ nonauthoritative uses of foreign constitutional materials, which I have described and, following Calabresi, we may call “dialogic,” acceptable? Should we endorse them as we endorse the use of foreign law as evidence and as a source of legal innovation and knowledge for constitutional authorities?

For starters, dialogic uses of foreign law by courts, even frequent such uses, cannot be charged either with the validation or the heterogeneity sting. When courts use foreign law merely to highlight the distinctive factual aspect of the cases they adjudicate, or the distinctiveness or correctness of their decisions, they do not necessarily face the additional difficulties of validating what they have done; neither do they increase the risk of ignoring the characteristic features of their own countries. Dialogic uses are nonauthoritative and therefore devoid of the imitative character that pollutes borrowings. Nonetheless, we should prima facie oppose the dialogic use of foreign decisions. This is so for two important reasons: first, because foreign law adds unnecessary complexity to courts’ rulings and, second, because the use of foreign law hinders the


\textsuperscript{105} Euromepa, S.A., 51 F.3d at 1095. The description of the current practice of citing, analyzing, relying on, or distinguishing the decisions of foreign and supranational tribunals as a “dialogue” is taken from Justice Claire L’Heureux-Dubé of the Canadian Supreme Court. See Claire L’Heureux-Dubé, \textit{The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court}, 34 TULSA L.J. 15, 24 (1998).
implantation and development of a constitutional culture. Let me explain these two reasons somewhat more fully.

As the Federalist Papers pointed out, courts have “neither Force nor Will but merely judgment.”\textsuperscript{106} The fact that courts are powerless imposes upon them special demands. Thus, in order to make it possible for litigants and others to understand what the courts say, to reason with courts, and, ideally, to adhere to and enforce their decisions, the courts have to speak in the clearest way possible. Clarity is always a must, but it is even more necessary in the context of constitutional law, since in this case we hope that all constitutional decisions will prompt a robust and widespread debate among the citizenry. Indeed, the survival of the democratic fiber in a modern society, where courts take some of the most difficult social decisions into their hands, is intimately associated with the possibility that all citizens interact with courts, which can only occur in the required way when courts speak in a language that all citizens can easily understand.

Now, since foreign law is a difficult subject and most citizens of a democratic state will be unfamiliar with it, the invocation by courts of foreign decisions—notwithstanding the positive aspect it may have in augmenting the persuasiveness of the courts—necessarily brings complexity to the courts’ rulings. Think, for instance, of the difficulties a lay person will have following the above-mentioned case\textit{V. C. v. M. D. A.}, where not only U.S. cases are cited by the Argentine Supreme Court but also Spanish cases and nonbinding opinions by the Inter-American Human Rights Court and the Inter-American Commission for Human Rights, along with references to international pacts and to German, Italian, Spanish, Brazilian, and Paraguayan constitutional law. It may be true that foreign law is not complex for sophisticated lawyers, comparative law professors, and others of that ilk, and that they can easily follow an opinion where foreign decisions are interwoven. However, sophisticated lawyers and law professors are not the average person in our communities, and it is precisely the average person who should be the privileged audience of democratic courts. Clarity is not served by constant reference to foreign law in a context in which foreign law is an unfamiliar subject. Courts will better promote their interaction with litigants and citizens if they keep their rulings as simple as possible, and, instead of saddling their arguments with references to foreign laws, they display clearly the reasons they have for deciding as they do. We should oppose the dialogic uses of foreign law by courts simply because foreign references add a damaging complexity to the courts’ decisions.

The second reason for avoiding the dialogic use of foreign law by courts—which, as a matter of fact, also applies to all nonauthoritative uses of foreign law—is related to the idea that the implantation and development of a constitutional culture only proceeds where certain requirements are met. Indeed, a constitutional culture is entirely dependent upon constitutional law being

\begin{footnote}
\textsuperscript{106}See\textit{The Federalist No. 78} (Alexander Hamilton).
\end{footnote}
conceived and experienced as a unique and final umpire in all the conflicts that may emerge among citizens of a democratic state. For a constitutional culture, it is essential that citizens, to use an expression also used by Professor Fiss, resist “the compulsion of . . . transcendent rule[s]” and that they abide by the constitutional text, even in those circumstances where the constitutional solution does not coincide with what they think is best.

Unfortunately, the dialogic use by courts of foreign law hampers the development of a constitutional culture. Indeed, as a consequence of its tremendous heterogeneity—foreign law has as many different sources as there are foreign countries, and as various inclinations as there are legal ideologies—foreign law deprives the courts that refer to it of the sense of uniqueness and finality that their rulings must provoke in order to be seen as the last word in our social confrontations.

Think, for instance, of the sense of contingency that Argentines experience when they, for instance, read *Amarilla, B.V. v. M.D.A.* or *Bahomondez*, where decisions by the United States Supreme Court, the Spanish Constitutional Court, and the European Court of Human Rights are mentioned. After reading opinions of this sort, it seems to me impossible that a layman would not think his Constitution at the mercy of the arbitrary choices by courts of the preferred foreign authorities, and, consequently, that his Constitution is not unique and final, as would be required for the development of a constitutional culture, but, on the contrary, is contingent and passing.

Obviously, you may claim that a capable reader will be able to distinguish the holding of the case from the accompanying text, and therefore that she, setting foreign references aside, will identify the normative propositions endorsed by the court in the case, locate it within the context of previous decisions, and thereby regain the sense of necessity and finality that decisions by constitutional courts require. This may be true, but we have to remember that the court should talk to everybody, and not everyone will be able to make this rather sophisticated distinction, particularly at the early stages of constitutional development when it is not yet clear what the constitution requires.

6.

I have argued in this paper that both borrowings and the dialogic use of foreign constitutional norms by courts are problematic. Therefore, my answer to the question of whether we should legally imitate others is in the negative. I deeply believe that it will always be better that our constitutional authorities and courts look inward, rather than outward, in their search for constitutional arguments.

Obviously, what I say here should not be understood as a militant effort to discourage the serious study of comparative constitutional law. On the

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contrary, the study of comparative law is probably the best way to understand the legal character of what we are and what we can be as the creators of law and as its subjects. Since we learn a lot by counterpoint, comparative law should be required in our legal education and our legal culture.

To finish, let me offer an image that, in my understanding, correctly depicts the proper relationship between foreign materials and the process of constitutional construction and adjudication. In order to avoid the problems of the heterogeneity of constitutional law, and to strengthen the communication with domestic audiences and the implantation and development of a constitutional culture, constitutional authorities, including courts, should relate to foreign law as construction workers are related to scaffolds, that is, as artifacts they step on to enlarge and facilitate their own constructive abilities but that are never components of the final work and are never determinants of the shape of what is constructed.