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Constitutions Inside Out: Outsider  
Interventions in Domestic Constitutional  
Contests

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# Constitutions Inside Out: Outsider Interventions in Domestic Constitutional Contests

Rosalind Dixon and Vicki C. Jackson

## **Abstract**

Increased interactions among peoples and states combined with the growth of written constitutions are creating new opportunities for “extra-territorial” forms of constitutional interpretation, that is, the interpretation of domestic constitutions by “outsiders.” This article considers the potential benefits, and dangers, of outsider interpretation. It also identifies factors relevant to the appropriateness or legitimacy of such practices, drawing from analogous rules and doctrines developed in the context of U.S. federalism and international law.

## CONSTITUTIONS INSIDE OUT: OUTSIDER INTERVENTIONS IN DOMESTIC CONSTITUTIONAL CONTESTS

Rosalind Dixon\* & Vicki C. Jackson\*\*

*Increased interactions among peoples and states combined with the growth of written constitutions are creating new opportunities for “extra-territorial” forms of constitutional interpretation, that is, the interpretation of domestic constitutions by “outsiders.” This article considers the potential benefits, and dangers, of outsider interpretation. It also identifies factors relevant to the appropriateness or legitimacy of such practices, drawing from analogous rules and doctrines developed in the context of U.S. federalism and international law.*

Debates over the effects of globalization on constitutional law have thus far tended to focus on questions of the permissibility of domestic courts considering foreign or international law in domestic interpretation, or on the domestic effects of international or supranational norms that are arguably inconsistent with domestic constitutional law;<sup>1</sup> such debates have also considered when national constitutional norms apply extra-territorially to citizens or state actors engaging in conduct outside a nation’s borders.<sup>2</sup> But globalization also provides opportunities for “outsider” or “extraterritorial” actors to interpret other nations’ domestic constitutions.

People are increasingly moving across borders in ways that mean that even relatively low-level executive officials are required to engage in acts of extra-territorial constitutional

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<sup>1</sup> See e.g., Vicki C. Jackson, *Foreword – Comment: Constitutional Comparisons, Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005) [hereinafter, “Comment”]; *Agora: The United States Constitution and International Law*, 98 AM. J. INT’L L. 42 (2004).

<sup>2</sup> See e.g., *Boumediene v. Bush*, 553 U.S. 723, 732-33 (2008); *R. v Hape*, [2007] 2 S.C.R. 292, para. 24 (Can.); *Al-Skeini*, [2007] UKHL 26, para. 1-2 (UK). In Germany, the constitution has been interpreted to impose on the government an affirmative duty to protect fetal life, which may have influenced some within the German system to construe statutes prohibiting illegal abortions to have extraterritorial force with respect to German citizens. See *Debates*, 1991 O.J. (Annex 3-403) 204 (Mar. 14, 1991) (Statement of Rep. Keppelhoff-Wiechert) (defending gynecological examinations by German officials at the Dutch-German border on female German citizens suspected of having abortions while traveling abroad on the grounds that officials “are required by the code of criminal procedure to investigate illegal abortions of this kind carried out abroad where there are grounds for suspecting that such has been committed”).



interpretation, at least by way of a certain presumption of constitutional validity. Academics and judges are progressively turning their outlook “outward”, in many countries, so as to join in an increasingly global “dialogue” over constitutional questions.<sup>3</sup> States are becoming more and more inter-connected, in their economies, stability and security, in ways that mean that foreign governments are taking an ever stronger interest in the constitutional and legal arrangements of their neighbors, and allies. And just as some national constitutions have incorporated aspects of international law as being at a constitutional level domestically,<sup>4</sup> so international organizations (like the OAS) have begun to incorporate into international regimes an obligation to comply with domestic constitutional law.

All of these changes create new and increased openings for foreign actors – of both a state and non-state kind – to form, and express, opinions about the meaning of other countries’ constitutions, or even to take coercive action based on those views. A variety of foreign actors – especially executive officials, but including courts, members of legislatures, and international organizations, governmental or nongovernmental – are taking up this opportunity, contributing to discourses of constitutional interpretation that cross national lines and may occur entirely “outside the courts”.<sup>5</sup> These constitutional interventions cross *both* national *and* institutional boundaries: they are emphatically not limited to exchanges among judges.

Our purpose in this paper is primarily a positive one: to identify and provide an analytical framework for what we believe is an increasing phenomenon of such public acts of outsider interpretation. After describing various situations in which this occurs, we go on to identify potential normative advantages of outsider interpretation, and situations in which those advantages are most likely to be present. We then identify potential normative risks of outsider interpretation, and, again, where those risks are likely to be at their highest. Finally, we offer some very tentative thoughts on factors that may help evaluate the risks and benefits in particular contexts and that more generally bear on the appropriateness or legitimacy of outsider interpretation. To the extent the paper has a normative aim, it is only to suggest the need for critical reflection, and self-awareness, on the part of outsiders, about potential benefits and risks of acts of outsider constitutional interpretation.

Constitutional interpretation by outsiders, we suggest, has at least three potential benefits: first, the ability to deepen and enrich processes of constitutional deliberation by insiders; second, the ability to inform insiders about how different constitutional interpretive choices will affect or be viewed by external audiences, and thus affect potentially important relationships with outsiders; and third, the prospect of offering a more impartial perspective than any insider is able to offer, in sensitive constitutional controversies.

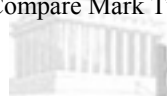
Such outsider acts of interpretation, however, also carry clear potential downside risks. First, compared to insiders, outsiders will often be far less informed about domestic constitutional practices and sources, or about the likely consequences of particular constitutional

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<sup>3</sup> See e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. L. J. 191, 192 (2003).

<sup>4</sup> See, e.g., CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 9; CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.) Art. 75(22).

<sup>5</sup> Compare Mark Tushnet, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).



choices; they may thus see similarities between their own constitutional systems or approaches and those of a foreign jurisdiction, when in fact no real similarity exists. Secondly, and related, outsiders may be perceived as illegitimately ‘meddling’ in domestic constitutional debates -- out of ignorance, self-interest, or misplaced constitutional evangelism – in ways that undermine the position they (and perhaps others on the ground) seek to advance. Third, outsider interpretations may also lack relevance or legitimacy, due to a lack of “fit” with existing interpretive norms, such as coherence, or with commitments to “democratic” control of constitutional meaning at the domestic level. The way in which these potential benefits and risks should be evaluated together, we argue, will depend on particular cases and contexts, in which additional considerations of legitimacy or appropriateness may exist.

In the contexts in which outsider interpretation may occur, it will be helpful to consider several other questions, including these: *who* (i.e. what kind of actor) is engaging in the act of outsider interpretation; *by what means* are outsiders engaging in extraterritorial interpretation and in particular, are they engaged in coercive attempts to influence or not; *how* outsiders are approaching the interpretive exercise (e.g. with how much attention to, or deference to, local expertise and debate, and how much reliable information); *when* they are engaging in such acts (e.g. before or after opportunities for local interpretation); and *why* they are doing so – that is, with what, if any, justification or reason (such as consent, or internal constitutional necessity).

*Who* is engaging in a particular act of outsider interpretation, for example, is likely to bear on both the competence and impartiality of such interpretation, as well as on the degree to which it may have coercive force; all of these factors may bear as well on the potential for such interpretation being viewed as legitimate, or generating nationalistic backlash. Thus, we suggest, academics and NGO’s will often be best placed to engage in those forms of outsider interpretation that are regarded by those in the country in question as appropriate or useful, while executive officials may be least well placed to do so. Foreign or transnational courts, in turn, will tend to occupy a more intermediate position, which suggests the need for careful attention by judges to the specific constitutional context when deciding whether to engage in such acts of interpretation.

*By what means* outsider interpretations are offered is likewise significant. Scholars writing for their own purposes and publishing in ordinary scholarly fora are far less likely to be seen as attempting to coerce others; their work, even if normatively focused on arguing for a change, will more likely be viewed as non-coercive efforts to persuade. Executive officials who “raise concerns” about whether action is constitutional within another domestic order may be understood, implicitly, to present a potential for coercion; and interpretations of constitutionality that are directly linked to sanctions, whether economic, political or military, will be understood as coercive (albeit of different forms and degrees, depending more precisely on the means used).

*How, when, and why* particular actors engage in the interpretive task will also have a clear potential to affect the strength of concerns about outsider competence and democratic legitimacy. The more that outsiders, for example, engage with existing local positions on constitutional interpretation, the more informed and thus legitimate, from the point of view of competency, their acts of interpretation are likely to be; the more access they have to reliable information about on-the-ground conditions, practices and legal sources within a country, the more accurate and useful their acts of interpretation are likely to be.



Timing can thus also be an important factor to consider in the context of any act of extra-territorial interpretation, given the link between delay (by outsiders) and the opportunity for a local dialogue over constitutional meaning to develop. Yet “timing” may matter in non-linear ways to the analysis: the occasions that prompt outsider interpretation may involve perceived emergencies, in which, if outside interpretive action is to be effective, it must be taken quickly.

The “when” question is closely related to the “why” question, of what motivates or justifies particular outside interpretive interventions, a question whose salience increases with the coercive force of the intervention. Drawing on jurisprudences that have developed in the United States federal system, in European law, and in international law, we will suggest that there are a number of emerging public law norms for dealing with situations of interpretive pluralism, that is, where more than one level or type of interpretive decision-maker might have jurisdiction, or interests, in speaking to a particular point, that might come into play in analyzing the questions of “when” and “why” outsider interpretation may be appropriate. These include, first, the significance of consent, which is central to the idea of sovereignty in international law and can be found across federalism doctrines in the United States. Second, externalities – how one state’s law affects the legitimate interests of others – can matter in assessing jurisdictional competence, whether within a federation or as between national and supranational levels of governance, and thus may bear on interpretive competence or stake as well. Third, the adequacy of the local forum – including the allowability and depth of internal debate over the constitutional question within the domestic polity as a whole – may bear on the appropriateness of outsider interventions on constitutional contests; analogous concepts can be found in U.S. judicial federalism doctrines as well as in the requirement of “complementarity” in international criminal law. Fourth, departures from a norm of legal regularity may be seen to invite outsider intervention; the idea of legal regularity includes both a norm of “good faith”, and a somewhat non-positivist idea that “law” has some content apart from what its authorized decision-makers declare, reflected, for example, in the “inadequate state ground” doctrine in U.S. federal courts law, which treats “novel and bizarre” interpretations of state law as not precluding federal intervention. Finally, whether decision-makers face a domestic legal necessity, or duty, to decide on some issue of foreign law, in the course of resolving their own domestic legal questions, or are acting from reasons other than legal necessity, may bear on the perceived appropriateness of their interpretive intervention.

The article is divided into six parts. Following this introduction, Part II defines the scope of outsider forms of constitutional interpretation considered here, and provides recent examples of different forms of such interpretation. Part III sets out several potential benefits of such outsider interpretation, in terms of deliberative and relational information and impartiality, while Part IV explores the potential dangers, or pitfalls, of outsider interpretation from perspectives of internal competence, jurisprudential commitments and democratic or popular legitimacy. Part V then explores how these different advantages and dangers might be evaluated in particular contexts; using case-studies from Afghanistan, Fiji, Honduras, Nicaragua, Pakistan and Zimbabwe, we draw on potential analogies in domestic constitutional law and international law for addressing problems of interpretive pluralism. Part VI then offers a brief conclusion.

## II. What is “Outsider” or “Extraterritorial” Constitutional Interpretation?

As our introduction suggests, the range of activity encompassed within the idea of outsider (or extraterritorial) constitutional interpretation is vast, including interpretive claims

about foreign constitutions that are made in scholarly discussion and analysis as well as judicial pronouncements, statements by NGOs, and statements and actions by diplomats and officials of different countries, and by international organizations.<sup>6</sup>

As we shall see, the territorial component of where the interpretation occurs is not in fact what is significant; what is significant is whether the interpreter is understood as an “insider” or an “outsider” to the system of whose laws she offers an interpretation. But to the extent that territoriality remains a signal identifier of states and of nationality, “extraterritoriality” is a useful way of capturing the (technically more accurate) idea of “outsider” interpretation. We use both terms herein.

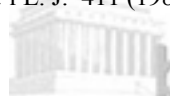
Scholars around the world are increasingly interested in comparative law and analysis. The purposes of such analyses may be positive, that is, an attempt to understand and accurately describe, categorize and analyze legal systems and approaches in comparative perspective. The work may be normative, in at least three senses: it may seek to critique or reform the laws of the scholar’s home country by resort to comparison; it may seek to encourage change or to praise existing interpretations in another country or system; and/or it may be seeking to identify a universal approach that the scholar advances for all countries or systems to follow. Each of these may entail extraterritorial interpretation, in the sense that an actor who is not situated within a particular national community engages in interpretation of that country’s laws or systems. When the scholarly work is normative in the second and third senses – that is, as part of an effort to affect interpretation in another country, or in all the countries of the world – it raises most acutely some of the normative questions identified in the introduction.

There is, to be sure, something uneasy about describing scholars as within or outside particular national communities. It might be thought that a goal of scholarship is to transcend the limits of understanding imposed by any particular national education, to broaden the perspective to achieve a distance from, or stand apart from, a particular system or (alternatively) to stand within multiple systems. And yet, recognizing the pull of particular national affiliations or upbringings is also, arguably, an important step towards improved scholarship. Although there are some true “cosmopolitans,” raised and brought up in multiple countries, who feel little or no sense of affiliation with any of their growing up countries, this is a rarity. Most scholars are influenced, in the frameworks in which they organize the world, by both the systems in which they grow up and the country and cultural context in which they live, and are thus, to that extent, outsiders to systems that they may learn about – from a distance – later on. Recognition of this situatedness may be an important first step towards improved scholarship.<sup>7</sup>

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<sup>6</sup> We are limiting our discussion to interpretive claims that are made publicly and openly; similar considerations may apply to interpretive claims made “in private,” but we do not analyze these here. Nor do we consider the related but quite distinctive questions that surround outsider involvement in the actual drafting of new constitutions. On the increasing role of “outsiders” and the international community in domestic constitution-drafting, see, e.g. FRAMING THE STATE IN TIMES OF TRANSITION: Case Studies in Constitution Making (Laurel E. Miller, with Louis Aucoin eds. 2010); Zaid Ali-Ali, “Constitutional Drafting and External Influence” in COMPARATIVE CONSTITUTIONAL LAW (Tom Ginsburg & Rosalind Dixon eds., Edward Elgar Publishing 2011).

<sup>7</sup> For helpful discussion, see Günter Frankenberg, *Critical Comparisons: Rethinking Comparative Law*, 26 Harv. Int’l L. J. 411 (1985) (discussing techniques of “distancing” and “differencing” to help comparativists overcome





International NGOs that purport to be global might be seen as comprising a mix of insider and outsider participants. Yet in their claim to universality in stance, they proceed from premises not bounded by the internal concerns of particular states, and their efforts to influence domestic constitutional interpretation may share some of the characteristics of outsider scholar comment.

Judges, too, are also increasingly being called on to consider the constitutional practices of other countries or systems, especially in the area of human rights (protected both by international law and by domestic constitutional law). In some contexts, such as within the Commonwealth, outsider interpretation by courts has been a longstanding tradition, by virtue of the role of the Judicial Committee of the Privy Council (PC) in constitutional appeals from former British colonies.<sup>8</sup> Not only has the Privy Council reviewed constitutional decisions of national courts, but national courts within the Commonwealth have long had a practice of referring to and evaluating decisions concerning the constitutions of other countries within the Commonwealth. But beyond these, there has been significant growth in the practice of outsider constitutional interpretation by national courts in more diffuse, horizontal settings.

Two recent instances of such outsider interpretation in relation to U.S. constitutional norms are the decisions of the Supreme Court of Canada (SCC) in *R v. Keegstra*<sup>9</sup> evaluating arguments drawn from U.S. first amendment law in examining the constitutionality of a law prohibiting hate speech, and the Constitutional Court of South Africa in *National Coalition for Gay and Lesbian Equality v. Minister for Justice (National Coalition I)*<sup>10</sup> giving implicit consideration to the ongoing force of the U.S. Supreme Court's decision in *Bowers v. Hardwick*<sup>11</sup> in determining the constitutionality of South Africa's ban on same-sex intercourse.

The majority of the SCC in *Keegstra* argued that U.S. law was unclear, and that there were arguments from within U.S. constitutional law to recognize the speech-enhancing effects of allowing bans on certain forms of hateful speech, thus, thereby, implicitly, suggesting that this might be the better approach to take. But any such suggestion was implicit, at best; the majority

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the limitations and biases of their perspectives, which are based on the legal systems with which they are most familiar). For discussion of the distinct questions that may be presented by the kind of academic writing (or joining in writings) that is designed to influence coercive decisions by government actors (especially courts), see Richard H. Fallon Jr., *Scholars' Briefs and the Vocation of a Law Professor* (NYU Working Paper, 2011).

<sup>8</sup> The degree of coercive outsider interpretation by judges within the Commonwealth may diminish, due to recent changes in the jurisdiction of the Privy Council. See *infra* note 97 and accompanying text. The European courts subject national constitutional provisions to scrutiny under their supranational regimes, although have not thus far engaged in serious interpretive moves concerning the content of those national constitutions. See, e.g., *Sejdić and Finci v. Bosnia and Herzegovina*, App. Nos. 27996/06 & 34836/06 paras. 50, 56 (Eur. Ct. H.R., Dec. 22, 2009) (finding various aspects of the Bosnian Constitution, which restrict election to the House of Peoples and Presidency to the three major ethnic groups involved in the civil war (i.e. Croat, Serb or Bosnian Muslim), in breach of the European Convention of Human Rights and its Additional Protocols).

<sup>9</sup> [1990] 3 S.C.R. 697.

<sup>10</sup> (CCT 11/98) [1998] ZACC 15; 1999 (1) SA 6 (CC) at para. 53 (S. Afr.).

<sup>11</sup> 478 U.S. 186 (1986).

did not reach a conclusion on U.S. constitutional law, writing only that even if U.S. law would prohibit such statutes, Canadian constitutional law – which was the law at issue – was different, in its formulation of the rights and in its commitment to multiculturalism. The purpose of identifying multiple strands of U.S. constitutional law on this issue was not so much to persuade U.S. jurists to change, but to destabilize contrary U.S. law as a persuasive source in Canadian discourse.

The South African Constitutional Court, in finding an apartheid-era ban on sodomy unconstitutional in *National Coalition I*, held that “nothing in jurisprudence of other open and democratic societies based on human dignity, equality and freedom... would lead . . . to a different conclusion”.<sup>12</sup> In fact, on balance, they held that foreign constitutional developments provided “support [for] such a conclusion” because “in many of these countries there ha[d] been a definite trend towards decriminalization” of sodomy.<sup>13</sup> The Court, in reaching this view, also sought not only to distinguish *Bowers v. Hardwick*,<sup>14</sup> but also implicitly sought to raise questions about the degree to which *Bowers* remained controlling authority, under the Due Process or Equal Protection Clauses, given that it had “been the subject of sustained criticism” and was in apparent tension with *Romer v. Evans*.<sup>15</sup>

Opportunities for more direct forms of constitutional interpretation by courts may also arise in the context of extradition processes, decisions by the executive to remove people to third countries, challenges to foreign expropriations, and cases involving the enforcements of judgments or processes from one judicial system in the courts of another country.<sup>16</sup> Thus, in *Soering v. United Kingdom*,<sup>17</sup> the judges of the European Court of Human Rights (ECtHR) wrote at some length about the quality of Virginia’s system, under the controlling authority of U.S. constitutional law, for administering and carrying out the death penalty. The issue before the Court was not what was or was not constitutional in the United States, but rather was whether the possibility for the imposition and carrying out of the death penalty in the United States under current law would pose a risk, for a young man proposed to be extradited to the United States, of violating Article 3 of the European Convention on Human Rights, which prohibits torture and

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<sup>12</sup> *National Coalition I*, 1999 (1) SA at 39-40, para. 39 (Ackermann. J)

<sup>13</sup> *Id.* at paras 39-40.

<sup>14</sup> *Id.* at paras. 53, 55 (noting that U.S. Constitution, unlike the South African, does not include specific protections of privacy and dignity nor an express ban on discrimination based on sexual orientation and that U.S. constitutional jurisprudence imposes different requirements on courts in identifying unenumerated rights than does South Africa).

<sup>15</sup> *Id.* at para. 54. Consistent with general notions of comity, the Court suggested that it was not in fact “consider[ing] ... the present standing of *Bowers* is in the United States,” *see id.* at para 55, but clearly it did so, albeit implicitly.

<sup>16</sup> *Cf., e.g.,* UEJF et LICRA v Yahoo Inc et Yahoo France, Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, Interim Order No. 00/05308, available at <http://www.juricom.net/txt/jurisfr/cti/tgiparis20000522.htm> (Fr.) (noting, but rejecting, the argument by Yahoo that the French court was incompetent to hear the case because any subsequent attempt to enforce the judgment against Yahoo in the United States would contravene the First Amendment to the U.S. Constitution).

<sup>17</sup> 11 Eur. Ct. H.R. (Ser. A) 439, 469-472 paras. 92-99 (1989).



“inhuman or degrading treatment or punishment”. In holding that it would, the ECtHR did not express any view on the constitutionality under U.S. law of the practices it described; and the decision does not appear to have had the normative purpose of affecting U.S. law. However, the decision might also be taken as an implicit critique of U.S. constitutional law, from without, to the extent that it permits practices that would be understood to violate Article 3.

Another example involves the recent decision of the High Court of Australia (HCA) to invalidate the Australian government’s policy of transferring asylum seekers to Malaysia under its so-called “Malaysia solution”. Although members of the HCA in this case expressly *avoided* expressing “any concluded view on matters of Malaysian law or administrative practice”, they had been explicitly urged to consider provisions of the Malaysian constitution protecting various “fundamental liberties”, as part of determining whether the Australian Minister of Immigration had power to declare Malaysia a proper place for the receipt of asylum-seekers under the Australian *Migration Act*.<sup>18</sup> For Malaysia, which clearly wished to pursue this arrangement with Australia, the HCA’s findings on such an issue could also have affected its own domestic institutions’ approach to the interpretation of those norms.

Executive officials, like judges, are also increasingly engaging in foreign policy practices that involve their deciding on the meaning of foreign constitutions. We briefly describe six incidents of executive extraterritorial interpretation below.

**Honduras:** In June 2009, the elected President of Honduras, Manuel Zelaya, was arrested by military authorities, and removed from the country; Roberto Micheletti, a member of the elected legislature, holding the office designated as next in the line of succession, was installed as President. Organs of the international community, and spokespersons for many states, including the United States, expressed deep concern and disapproval, characterizing this event as a coup d’état, and, importantly, a departure from the constitutional order of Honduras.<sup>19</sup> International and foreign diplomats were involved in various efforts to negotiate a resolution of the crisis in Honduras, and some OAS member states indicated that they would refuse to recognize the outcome of elections held in late 2009 unless President Zelaya were restored to office before the election.<sup>20</sup> Honduras was also accused of an “unconstitutional alteration of the democratic order” by the OAS, and of having sustained a “coup” that was “outside the bounds of [its] constitution” by the United States.<sup>21</sup>

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<sup>18</sup> Plaintiff M70/2011 v. Minister for Immigration, [2011] HCA 32, pars 28, 33.

<sup>19</sup> Ginger Thompson & Marc Lacey, *O.A.S. Votes to Suspend Honduras Over Coup*, THE N.Y. TIMES, July 5, 2009, at A5; Background Briefing on the Situation in Honduras, U.S. Dept of State, July 1, 2009 (noting the significance of action by the OAS under Articles 20 and 21 of the Inter-American Democratic Charter, which refers to the “interruption of constitutional and democratic order”).

<sup>20</sup> *Nations divided on recognizing Honduran president-elect*, CNN, Nov. 30, 2009, [http://articles.cnn.com/2009-11-30/world/honduras.elections\\_1\\_president-roberto-micheletti-zelaya-supporters-zelaya-and-micheletti?\\_s=PM:WORLD](http://articles.cnn.com/2009-11-30/world/honduras.elections_1_president-roberto-micheletti-zelaya-supporters-zelaya-and-micheletti?_s=PM:WORLD) (noting that the U.S., Columbia, and Costa Rica had stated they would recognize the results of the election while Argentina, Brazil, and Spain said that they would not recognize the results).

<sup>21</sup> Helene Cooper & Marc Lacey, *In a Coup in Honduras, Ghosts of Past U.S. Policies*, N.Y. TIMES, June 30, 2009, at A1 (quoting senior U.S. official as saying that the U.S. told Honduras that “you can’t do anything outside the bounds of your constitution”); Marc Lacey & Ginger Thompson, *Compromise Is Sought to Honduras Standoff*,

**Pakistan:** In March 2007, in Pakistan, President Musharraf ordered the suspension of Chief Justice Chaudhry from the Supreme Court of Pakistan on the grounds of alleged misconduct.<sup>22</sup> The Chief Justice, however, challenged his suspension before the Supreme Court itself, and in July 2007, a majority of the Court (by a 10-3 vote) issued a decision finding his removal unlawful, and ordering his reinstatement.<sup>23</sup> In November 2007, Musharraf then declared a state of emergency, issuing a Provisional Constitutional Order (PCO),<sup>24</sup> which mandated that judges take a new oath of office and refrain from acting against the PCO, and suspended a number of constitutionally guaranteed rights.<sup>25</sup> Seven members of the Supreme Court (along with 56 high court judges) refused to take this new oath of office, and were accordingly dismissed, so that Musharraf was able to appoint seven replacement justices to the Court.<sup>26</sup> The response of various countries, and the Commonwealth in particular, was to call for repeal of the emergency provisions and “full restoration of the Constitution and the independence of the judiciary”, and to suspend Pakistan from membership in the Commonwealth, pending such action.<sup>27</sup> The U.S., by contrast, expressed no view on the actual meaning, or interpretation, of the constitution, suggesting instead it was a matter for Pakistan rather than the U.S. “to address.”<sup>28</sup>

**Afghanistan:** A major disagreement emerged, in 2009, in Afghanistan between President Karzai and his supporters, and the Independent Electoral Commission (IEC), over the timing of democratic elections under the 2004 Afghan Constitution. Karzai argued for early elections (in April 2009), on the basis that Art 61 of the Constitution required presidential elections to be

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N.Y. TIMES, July 2, 2009, at A5 (quoting the OAS as calling the events in Honduras an “unconstitutional alteration of the democratic order”), See also White House Press Office, Remarks by President Obama and President Uribe of Colombia, June 29, 2008 (referring to the coup in Honduras and stating that the “coup was not legal and that President Zelaya remains the President of Honduras”); Editorial, A Way Out in Honduras, L.A. TIMES, July 14, 2009, at A18 (reporting that Obama has put a pause on U.S. aid and called the actions illegal, with the U.N. and O.A.S. agreeing that the actions were illegal).

<sup>22</sup> Salman Masood, *Suspension of Jurist Unleashes Furor Against Musharaff*, N.Y. TIMES, March 15, 2007; Library of Congress Report, *SUSPENSION AND REINSTATEMENT OF THE CHIEF JUSTICE OF PAKISTAN: FROM JUDICIAL CRISIS TO RESTORING JUDICIAL INDEPENDENCE?*

<sup>23</sup> Mubashir Zaidi and Laura King, *Pakistani Court Reinstates Top Judge*, L.A. TIMES, July 21, 2007.

<sup>24</sup> Proclamation of Emergency, Nov 3, 2007, available at [http://www.pakistani.org/pakistan/constitution/post\\_03nov07/proclamation\\_emergency\\_20071103.html](http://www.pakistani.org/pakistan/constitution/post_03nov07/proclamation_emergency_20071103.html)

<sup>25</sup> CRS Report for Congress, *Pakistan’s Political Crises* (January 3, 2008) <http://www.fas.org/sgp/crs/row/RL34240.pdf> 1-2

<sup>26</sup> *Id.*

<sup>27</sup> Neville De Silva, “Pakistan Faces Second Suspension from Commonwealth in Eight Years”, Asian Tribune, November 14, 2007. <http://www.asiantribune.com/node/8246>. In making such calls, the Commonwealth in particular was clearly motivated by a desire to maintain its own principles and values, but also placed explicit emphasis on deviations from Pakistan’s internal constitutional norms as part of this process.

<sup>28</sup> See White House Press Briefing, March 4, 2008, <http://georgewbush-whitehouse.archives.gov/news/releases/2008/03/20080304-4.html>



called 30-60 days before the expiration of the current president's term (which was deemed to occur on the first of Jawza on the fifth year after the last election)<sup>29</sup>, whereas the IEC favored delaying elections, based on considerations such as weather, logistics and security and the obligation, under Art 33 of the Constitution, to ensure universal access to voting.<sup>30</sup> The international community, in turn, made a number of public statements in support of the IEC position: the U.S. in particular argued forcefully for an August election deadline, in order to allow enough time for electoral campaigning and adequate security.<sup>31</sup>

**Fiji:** In 2006 in Fiji, General Bainimarama, the leader of the Fijian military, led a coup designed, he claimed, to overthrow the then (interim) government, and to restore a democratic, non-racial non-ethnic government.<sup>32</sup> Bainimarama and his supporters also justified the coup as constitutional, according to an implied doctrine of necessity.<sup>33</sup> The international community, however, condemned the coup as illegal, and many countries suspended aid and trade with Fiji.<sup>34</sup> Various countries in their submissions to the United Nations Human Rights Council, in its subsequent periodic report on Fiji, also explicitly labeled the coup as unconstitutional, seeking, for example, the "reestablish[ment] [of] a constitutional order complying with the rule of law."<sup>35</sup>

**Zimbabwe:** In 2010, in Zimbabwe, serious tensions arose between President Mugabe and Prime Minister Tsvangirai over Mugabe's adherence to the terms of their power-sharing

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<sup>29</sup> Jerome Starkey, *Challenge to Karzai's Right to Rule after Poll Date is Delayed*, INDEPENDENT (UK), Jan 30, 2009.

<sup>30</sup> KENNETH KATZMAN, CONG. RESEARCH SERV., RS21922, AFGHANISTAN: POLITICS, ELECTIONS, AND GOVERNMENT PERFORMANCE, 14-15 (2009); Jon Boone, *Hamid Karzai accused of Brinksmanship over Call for Early Afghanistan Election*, THE GUARDIAN, March 1, 2009.

<sup>31</sup> Gordon Duguid, Press Statement, Decision by Independent Election Commission of Afghanistan, U.S. Dept. of State (March 4, 2009), available at <http://www.state.gov/r/pa/prs/ps/2009/03/119977.htm>.

<sup>32</sup> Josaia Vorque Bainimarama, Statement to the U.N. Gen. Assembly (Sept. 28, 2007), available at <http://www.un.org/webcast/ga/62/2007/pdfs/fiji-en.pdf>.

<sup>33</sup> Josaia Vorque Bainimarama, Press Statement Announcing the Military Takeover of the Government (Dec. 5, 2006), available at <http://www.fijitimes.com/extras/TakeOverAddress.pdf>.

<sup>34</sup> For example Australia imposed sanctions including travel restrictions against members of the government and military, an arms embargo, suspension of defense cooperation, and suspension of Ministerial level contact. Australian Government, Dept. of Foreign Affairs and Trade, *Australia's Autonomous Sanctions: Fiji*, [http://www.dfat.gov.au/un/unsc\\_sanctions/Fiji.html](http://www.dfat.gov.au/un/unsc_sanctions/Fiji.html) (last visited Sept. 29, 2011). New Zealand restricted communication with the governing regime and military, instituted travel bans, and limited sporting contacts. New Zealand Ministry of Foreign Affairs and Trade, *Frequently Asked Questions about New Zealand's Policy Towards Fiji*, <http://mfat.govt.nz/Foreign-Relations/Pacific/0-Fiji-FAQ.php> (last visited Sept. 29, 2011). The United States suspended military aid to Fiji and refused to issue travel visas to members of the regime or military. U.S. Dept. of State, U.S. Embassy in Suva, *U.S. Policy Towards Fiji: Section 7008*, [http://suva.usembassy.gov/section\\_7008.html](http://suva.usembassy.gov/section_7008.html) (last visited Sept. 29, 2011).

<sup>35</sup> See Human Rights Council, Report of the Working Group on the Universal Periodic Review: Fiji, I.B.5, U.N. Doc. A/HCR/14/8 (March 23, 2010), Section II para. 20 (Slovakia), 35 (Switzerland); Human Rights Council, Working Group on the Universal Periodic Review. Compilation Prepared By the Office of the High Commissioner for Human Rights, In Accordance with Paragraph 15(B) of the Annex to Human Rights Council Resolution 5/1 U.N. Doc. A/HCR/WG.6/7/FJI/2 (Nov. 13, 2009)2-3



agreement (GPA), and the amendment to the Zimbabwean constitution (amendment 19) designed to give effect to that agreement.<sup>36</sup> Mugabe, for instance, took the position that he was not required to adhere to the agreement while Zimbabwe remained under Western sanctions,<sup>37</sup> while Tsvangirai claimed that Mugabe was breaching the agreement in a number of respects, including by appointing ambassadors, judges and governors without consultation with the opposition.<sup>38</sup> Outsiders, such as the EU, U.S. and South Africa, also took a number of different positions on these issues, with South Africa<sup>39</sup> and the EU<sup>40</sup> supporting the constitutionality of Mugabe's actions in making these appointments, and the U.S. refusing to lift sanctions until Mugabe complied with the GPA.<sup>41</sup>

**Nicaragua:** In 2009 in Nicaragua, in preparation for presidential elections in 2011, President Daniel Ortega, a long-time leader of the Sandinista movement, brought a constitutional challenge to various provisions of the Nicaraguan constitution limiting a president's term in office to two, non-consecutive terms.<sup>42</sup> An earlier proposal by Ortega to amend the constitution, to repeal such limits, had been defeated in the national legislative assembly, but Ortega argued that the relevant limits were in any event ineffective as themselves adopted unconstitutionally.<sup>43</sup> The Constitutional Chamber of the Supreme Court (CSJ) also ultimately accepted this argument, though the panel that delivered the judgment was composed entirely of Sandinista-appointed judges, and the decision was held by the panel to apply only to the petitioners (i.e. Ortega

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<sup>36</sup> *South Africa to Engage Mugabi & Tsvangiri Over Latest Spat*, THE ZIMBABWEAN, Oct. 13, 2010; Paidamoyo Muzulu, *Zim Can Revert to Old Constitution if GPA Fails*, THE INDEPENDENT (ZIMBABWE), Feb. 18, 2011 (Describing the relationship between the 19<sup>th</sup> Amendment and the GPA).

<sup>37</sup> JON LUNN AND GAVIN THOMPSON, HOUSE OF COMMONS LIBRARY, ZIMBABWE SINCE THE GLOBAL POLITICAL AGREEMENT, SN/IA/5793, Dec. 3, 2010, at 5.

<sup>38</sup> *South Africa to Engage Mugabi & Tsvangiri Over Latest Spat*, THE ZIMBABWEAN, Oct. 13, 2010.

<sup>39</sup> Alex Bell, *Zuma Welcome Ambassador Chosen by Mugabe*, SW RADIO AFRICA NEWS, Feb. 4, 2011.

<sup>40</sup> *EU Accepts Zim Ambassador*, MAIL & GUARDIAN, Nov. 1, 2010. However, the EU had expressed concern over the matter, saying that "[i]t is important that the ambassadors be fully empowered to speak on behalf of the whole government," and that "[n]on-respect" for the GPA was "a matter of great concern." *EU to reject Mugabe's ambassadors*, EURACTIV (Oct 15, 2010), <http://www.euractiv.com/foreign-affairs/eu-reject-mugabes-ambassadors-news-498820>. European Parliament members had also petitioned European Commission President Barroso and Council President Rompuy to refuse the credentials of Mugabe's ambassador. *EU Rejects Mugabe's New Ambassadors*, DAILY NEWS (ZIMBABWE), Oct. 20, 2010.

<sup>41</sup> Charles A. Ray, U.S. Ambassador to Zimbabwe, *The Future of U.S.-Zimbabwe Relations*, 6 (July 28, 2011), available at [http://harare.usembassy.gov/uploads/gR/UX/gRUXzj8OPdQTpwO9-A2uzw/20110728\\_RAY\\_SAPES\\_SPEECH.pdf](http://harare.usembassy.gov/uploads/gR/UX/gRUXzj8OPdQTpwO9-A2uzw/20110728_RAY_SAPES_SPEECH.pdf).

<sup>42</sup> Tim Rogers, *Despite Honduran crisis, Nicaraguan President Ortega launches bid to extend his term*, Christian Science Monitor, July 20, 2009 at 6.

<sup>43</sup> Dante Figueroa, *Nicaragua: Supreme Court Decision Permitting President, Others to Seek Reelection*, Law Library of Congress, Dec. 19, 2009, available at [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_l205401739\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_l205401739_text); Jason Beaubien, *Daniel Ortega Seeks Reelection in Nicaragua*, NPR NEWS, Nov 5, 2011 (Ortega unsuccessfully sought legislative agreement to amend the Constitution).



himself, and certain other Sandinista-mayoral candidates).<sup>44</sup> Various outsiders, by contrast, expressed clear doubts about the validity of this interpretation of the constitution. The European Parliament, for example, passed a resolution expressly declaring its belief that the Nicaraguan Constitution was clear in “prohibit[ing] Presidents from serving for two successive terms in office”, and further, in providing that “only the legislature” and not the courts could “pronounce on constitutional reform,” and thus that President Ortega was “attempting illegally to circumvent” the relevant constitutional restrictions.<sup>45</sup> The U.S. government also expressed serious “concerns” about the decision of the Supreme Court, suggesting that it was part of a “larger pattern of questionable and irregular government actions”,<sup>46</sup> while the U.S. Ambassador to Nicaragua, Robert Callahan, went even further, arguing that while “Nicaragua can amend its Constitution...the Constitution itself says that amendments can only come from the Asamblea Legislativa [not the Corte Suprema de Justicia]”.<sup>47</sup>

We do not mean to suggest that these are the only examples of extraterritorial or outsider interpretation of constitutions by executive or diplomatic officials. As Professor Steven Schnably has shown, this may be an emerging trend in state relations, one in which assertions are made about the domestic constitutional bona fides of the actions of another state as a basis for diplomatic or other pressures on those holding power in the state to change their own interpretation.<sup>48</sup> But as he and others point out, such positions raise a number of questions, which we discuss below.

### III. Benefits of Outsider Interpretation

Benefits of outsider interpretation fall into at least three categories: First, they may offer a set of “deliberative” benefits, informational in character, about the historical derivation, or the

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<sup>44</sup> Figueroa, *supra* note 43 (noting that the court’s decision affected only the parties to the case); Beaubien, *supra* note 43 (noting that the judges in the case were Sandinista-appointed).

<sup>45</sup> Resolution of 26 November 2009 on Nicaragua.

<sup>46</sup> Press Statement, Office of the Spokesman, U.S. State Department, Nicaraguan Supreme Court Ruling on Re-elections (Oct. 22, 2009), *available at* <http://www.state.gov/r/pa/prs/ps/2009/oct/130875.htm>.

<sup>47</sup> See Benjamin Witte-Lebhar, *Opposition Infighting Has Nicaraguan President Daniel Ortega Leading Ahead of November*, Central American & Caribbean Affairs, March 24 2011.

<sup>48</sup> See Stephen J. Schnably, *Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal*, 62 U. Miami L. Rev. 417, 460 (2008). Schnably discusses an episode involving Nicaragua, in which the U.S. State Department reportedly accused the Nicaraguan Court of “ignor[ing] the constitutional principle of separation of powers” when it upheld action by the legislative assembly stripping members of the executive branch of immunity over campaign finance violations, action that arguably could be understood as an effort to increase the accountability of the executive. See Schnably, *supra*, at 473. He also describes how in Togo, international pressure was brought to bear to remedy “unconstitutional” action even after the constitution was amended to give formal sanction to a controversial presidential succession. *Id.* at 474-79. For an earlier discussion of the challenges for the OAS in applying then-recent changes in its Charter relating to the suspension of member states in response to an overthrow of democratic government, see Stephen J. Schnably, *Constitutionalism and Democratic Government in the Inter-American System*, in *Democratic Governance and International Law* (Gregory H Fox and Brad Roth eds., 2000).



intended meaning of domestic norms (as where domestic norms are based on international human rights documents, or on a foreign constitution), or of the likely domestic consequences, based on experience elsewhere, of different interpretations of those norms. Second, they may offer what one might call “relational” benefits, informing domestic interpreters –or others – of how interpretations will affect or be viewed by other states or important actors in the transnational communities of law in which states are now situated. Finally, in some circumstances they may offer the prospect of less self-interested or more impartial accounts of certain kinds of domestic sources than those offered by interested parties within a state.

#### A. Deliberative Benefits of Outsider Interpretation

We have each elsewhere argued the benefits, for good deliberation, of domestic courts considering foreign constitutional law and experience.<sup>49</sup> And, as suggested above in the introduction, one could conceptualize this as a form of outsider or extraterritorial interpretation, since in order to consider and use foreign materials a prior act of interpretation –even if not experienced as such – must occur. But in this paper, we are concerned with the possible benefits, to domestic interpretation, of foreign actors offering accounts of the contested domestic law – especially where offered to influence or affect the other state in its own interpretation of its own law. What benefits may accrue from such “outsider” interpretations?

First, foreign actors may have had experience interpreting provisions with similar terms and purposes; they may have useful experience about the range of doctrinal approaches and about the consequences of one as opposed to another interpretive account. Amici filings or interventions before the European Court of Human Rights by U.S.-based “pro-choice” and “pro-life” groups may provide examples. In the “Written Observations” of a group of third party interveners, including a U.S. based pro-life group, arguments were made to the Grand Chamber of the Court about the implications of a holding against the validity of the Irish abortion law, and about the consistency of Irish abortion law with some international treaties (including the American Convention on Human Rights and the International Covenant on the Rights of the Child).<sup>50</sup> Similarly, a U.S. based pro-choice group filed comments in another case involving Ireland’s abortion law before the European Court, arguing to the court the discriminatory consequences of restrictive abortion laws, and identifying global as well as European trends to more permissive regulations.<sup>51</sup> In detainee-rights cases before national constitutional courts, foreign scholars have argued that their own regimes illustrate that the consequences of allowing

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<sup>49</sup> See Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008); VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

<sup>50</sup> See Joint Written Observations Of Third Party Intervenors: · The European Centre for Law and Justice on Behalf of Kathy Sinnott, Member of European Parliament, Ireland, South; The Alliance Defense Fund on Behalf of the Family Research Council, Washington D.C., United States; The Society for the Protection of Unborn Children, London, filed on Nov 14, 2008, before the European Court of Human Rights, at at paras. 17, 30-31, A, B, and C v. Ireland, App. No. 25579/5, [2010] ECHR 2032 (2008).

<sup>51</sup> Written Comments By Center For Reproductive Rights [of New York], on April 14, 2005, before the European Court of Human Rights, as Amicus Curiae at paras. 9, 31-32, D v. Ireland, App. No. 26499/02 (2006), Pursuant To Rule 44, § 2 of the Rules of the Court.





detainees access to judicial process are not inconsistent with protecting national security.<sup>52</sup> Of course, many of the deliberative benefits depend on there being sufficient similarity among legal regimes and their contexts, a knotty problem, as noted further below.

Second, where one constitution has a genealogical or genetic relationship to another,<sup>53</sup> or where a constitution includes provisions embodying rights protected in widely subscribed to international human rights instruments, outsiders may have expert knowledge that is relevant to the domestic constitutional interpretive task. For example, in recent cases in the U.S. Supreme Court, amicus briefs have been filed by British, Commonwealth and Canadian jurists on the meaning and history of the English writ of habeas corpus, from which the U.S. constitutional provision (the Suspension Clause) derived, or on international legal standards.<sup>54</sup>

Third, even in constitutions that do not incorporate international law as of constitutional stature, as in the United States, there are rule of law reasons to interpret a constitution so as not to obstruct compliance with international law.<sup>55</sup> Given the purposes of constitutions, in part, to constitute their countries as respected members of the international community, this is a reasonable interpretive canon to apply. Of course, some constitutional challenges on rights based grounds can be rejected while still leaving the way open to comply with international legal obligations. But making sure courts are aware of their international obligations, both in countries where international obligations are incorporated into the domestic constitution and those in which they are not, can play an appropriate role in constitutional adjudication in which experts in international law, both within and without the country, may have useful expertise to offer.

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<sup>52</sup> See, e.g., Brief for Specialists in Israeli Military Law and Constitutional Law as Amici Curiae in Support of Petitioners at \*2, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2441592 (explaining Israeli law on detainees to suggest that consequences of providing judicial process were not inconsistent with national security; arguing based on Israeli experience that “Judicial review of executive and military detention, the indispensable core of habeas corpus, need not be sacrificed to protect public safety and national security, even in the face of an unrelenting terrorist threat”).

<sup>53</sup> See Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L. J. 819, 839 (1999) (on “genealogical” relationships among constitutions); Louis Henkin, *A New Birth of Constitutionalism: Genetic Influences and Genetic Defects*, 14 CARDOZO L. REV. 533, 536-38 (1993) (on “genetic” relationships among constitutions).

<sup>54</sup> See, e.g., Brief for the Commonwealth Lawyer’s Ass’n as Amicus Curiae in Support of the Petitioners at \*4-9, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2414902 (setting out the English law of habeas corpus, including the scope of the writ in England at the time the U.S. Constitution was enacted); see also Brief of Amici Curiae Canadian Parliamentarians and Professors of Law in Support of Reversal at \*10-18, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2456943 (discussing customary international law relating to treatment of foreign nationals and the right to petition for a writ of habeas corpus). Although such briefs typically have a U.S. “counsel of record,” they nonetheless provide vehicles for information about and arguments from foreign legal sources. Thus, for example, in the Commonwealth Lawyer’s Ass’n Amicus Brief cited above, the listed counsel were Sir Sydney Kentridge, Q.C., and Colin Nicholls, Q.C., both of London, and John Townsend Rich (counsel of record) and Stephen J. Pollak, of Goodwin Procter LLP, Washington, D.C.

<sup>55</sup> See JACKSON, *supra* note 49, at 157-58; cf. Yuval Shany, *How Supreme is the Supreme Law of the Land? Comparative Analysis of the Influence of International Human Rights Treaties Upon the Interpretation of Constitutional Texts by Domestic Courts*, 31 BROOK. J. INT’L L. 341, 349, 350-52 (2006).



## B. Relational Benefits of Outsider Interpretation: Externalities and Perceptions

Outsider interventions may also serve the function of informing domestic constitutional actors of how different interpretive choices will be *viewed* by external audiences, or will affect their interests. So, for example, in addition to informing the court of the nature of the international obligations to which its country is subject, this more relational purpose was perhaps one of the motivations for the EU to file amicus briefs before the U.S. Supreme Court on the constitutionality, under U.S. law, of imposing the death penalty as a punishment for those who are mentally disabled,<sup>56</sup> or juveniles,<sup>57</sup> or on those who commit specific crimes, such as rape.<sup>58</sup> Similarly, in several detainee cases in the U.S., foreign amici appeared to emphasize how actions by the U.S. could adversely affect the development of international law in this area, and thereby also the interests of a variety of foreign actors.<sup>59</sup>

In such cases it is not necessarily the domestic constitution being specifically addressed (though it may be) but other sources – foreign law, or international law –which are claimed to be relevant to the domestic constitutional interpretation, and which carry a message, moreover, of the fact that other countries are concerned about the domestic interpretation.

Are these more “relational” kinds of concerns legitimate sources in constitutional interpretation? There is, of course, considerable normative contest on this point, given the disagreement that exists in many constitutional systems over both the role of pragmatic considerations in constitutional decision-making and the degree to which states should, in the first place, be committed to norms of transnational co-operation. We do believe, however, that consideration of such views may potentially be legitimate in at least some contexts; and thus that increasing information about such concerns may also be legitimate. This is particularly true, for example, where such “relational” interventions are motivated, not simply by ideological views and commitments, but rather by the kinds of economic or legal “externalities” that are believed

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<sup>56</sup> Brief for The European Union as Amicus Curiae in Support of Petitioner, at \*2, in *McCarver v. North Carolina*, O. T. 2001, No. 00-8727, cited in *Adkins v. Virginia*, 536 U.S. 304, 316 n. 21 (2002). See also Joint Motion of all Amici in *McCarver v. North Carolina*, No. 00-8727 to Have Their *McCarver* Amicus Briefs Considered in This Case in Support of Petitioner at \*1, *Adkins v. Virginia*, 536 U.S. 304 (2002) (No. 00-8452), 2001 WL 1682012).

<sup>57</sup> Brief of Amici Curiae the European Union and Members of the International Community in Support of Respondent at \*1, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1619203; Brief for the Human Rights Comm. of the Bar of England and Wales et al. as Amici Curiae in Support of Respondent at \*2-3, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1628523.

<sup>58</sup> Brief for Leading British Law Associations, Scholars, Queen’s Counsel and Former Law Lords as Amici Curiae Supporting Petitioner, at \*25-26, *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 706791 (discussing British and international law and arguing that as a party to the ICCPR, the United States is obligated to limit use of the death penalty to the most serious crimes).

<sup>59</sup> See, e.g., Brief Of Amici Curiae Canadian Parliamentarians And Professors Of Law In Support Of Reversal at \*2, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 06-1195, 06-1196), 2007 WL 2456943 (explaining that “[h]ow this Court construes the obligations of the United States in relation to the treatment and prosecution of alien detainees in an inchoate and potentially indefinite campaign against terrorism will affect how other nations understand their own, identical obligations in this campaign and in future conflicts”).



by many to warrant consideration in domestic decision-making (or even to warrant the exercise of jurisdictional competences by higher levels of governance that include all affected persons).<sup>60</sup>

This does not mean that awareness of such views will, or should, necessarily affect a court's ultimate understanding of its own domestic constitution. Indeed, external voices will often be multi-valenced or cacophonous in a way that makes such influence unlikely; one need look no further than the very different views taken by different political actors in the United States about the Honduran situation in 2009 to see that external voices may be in conflict, on basic interpretive question, just as internal voices can be. It simply means that, in some cases, domestic constitutional decision-makers should be willing to "engage" with such views,<sup>61</sup> so as, at least, to explain and account for their decisions in a way that can make them appear more respectful of the interests, and perspectives, of outsiders.

### C. Outsiders and impartiality?

It is sometimes the case that outsiders to a particular state may be in a better position to offer the kind of "impartial" evaluation that is often associated with the goal of independence in judging.<sup>62</sup> To be sure, like insiders, all "foreign" interpreters inevitably bring their own set of perspectives; indeed, as noted above, conveying their own interests in the "externalities" imposed by domestic decisions may at times be an important motivator for extraterritorial interpretation. But outsiders will tend to have fewer direct interests than insiders in particular local decisional outcomes, and thus, may be somewhat better placed to offer the perspective of what Adam Smith called the "fair and impartial spectator"<sup>63</sup> – or at least, of a more distanced, and less intensely partial, third party.

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<sup>60</sup> Cf. Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship Between Constitutionalism in and Beyond the State*, in *RULING THE WORLD? INTERNATIONAL LAW, GLOBAL GOVERNANCE, CONSTITUTIONALISM* 258, 262 (J. L. Dunoff & J. P. Trachtman eds., 2009); Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States*, in *RULING THE WORLD? INTERNATIONAL LAW, GLOBAL GOVERNANCE, CONSTITUTIONALISM* 326, 328-29 (J. L. Dunoff & J. P. Trachtman eds., 2009).

<sup>61</sup> For this concept of engagement, see Jackson, *supra* note 1; JACKSON, *supra* note 49.

<sup>62</sup> Whether impartiality is possible and whether understandings of law, as opposed to strategic power relations, ever constrain action in the international sphere, are important questions. For present purposes we assume that although everyone is situated in interests and experience, and that "impartiality" as an ideal is not attainable, one can nonetheless speak of greater or lesser, or more direct and less direct, degrees of partiality; and we assume that international relations and state motivations are not limited to, but do not exclude concerns for, the legality (or perceived legality) of their actions.

<sup>63</sup> See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* (1759, David Daiches Raphael & Alec Lawrence Macfie rev. ed. 1790). For an illuminating discussion of the idea of "open impartiality," see also Amartya Sen, *Open and Closed Impartiality*, 99 J. Phil. 445, 445 (2002). Outsiders are "better placed" in two senses: they may be more willing to offer their honest views and they may be able to develop an understanding of the law that is distanced from the particular stakes of local disputants. Outsiders may feel freer to offer critical perspectives, for example, if they do not face the potential-political pressures on and/or reprisals against insiders who offer dissenting interpretations.

How one views the motivations of foreign government actors will depend in part on broader theories of state behavior or international relations; under some theories, other governments may well have an interest in promoting

This, for example, is arguably one reason why in a number of Commonwealth nations “foreign” judges from other Commonwealth nations are allowed to sit on domestic courts of appeal. At a minimum, this practice suggests that these outsiders are seen as no less trustworthy, or impartial, in constitutional matters than “insiders”,<sup>64</sup> and perhaps even that such judges are sometimes seen as *more* trustworthy or impartial. Recent debates in the Caribbean over the potential abolition of appeals to the PC are illustrative: in opposing the creation of a regional “Caribbean Court of Justice” to replace the PC in Jamaica, for example, the opposition leader repeatedly voiced concerns that members of the CCJ would be under a far greater “political shadow” than the privy councillors.<sup>65</sup>

Even the perception of increased independence –or distance –from domestic political pressures may also be particularly valuable in some cases where key insiders lack trust in one another. This seems particularly likely, for example, in cases where states are emerging from a situation of violent civil conflict, in which warring factions have become parties to a new constitutional settlement. In some of these post-conflict settings, an outside judge’s very lack of affiliation with participants in internal conflicts may be a source of appeal, of trustworthiness, and thus may be a reason why outsiders have been given a key vote on adjudicatory bodies responsible for enforcing the terms of instruments that are at once a constitution and a peace accord.<sup>66</sup>

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the rule of law that might tend to produce a more impartial interpretive judgment. “Outsiders” who are officials of other governments will typically be perceived to have interests associated with their own governments, though what those “interests” are will vary, and may include interests in the rule of law.

<sup>64</sup> For an example of a domestic constitution specifically authorizing foreign judges from certain other jurisdictions to sit on national courts, see CONST. BOTSWANA §100(3)(a) (discussing appointments to the Court of Appeal); *id.* §96(3)(a) (discussing appointment of judges to the High Court). See also Sir Anthony Mason, *Reflections of an Itinerant Judge in the Asia-Pacific Region*, 28 INT’L J. LEGAL INFO. 311, 315–22 (2000) (describing his work as a judge on the high courts of Fiji, Solomon Islands and Hong Kong, following his retirement from the High Court of Australia); Gregory Dale, *Appealing to Whom? Australia’s ‘Appellate Jurisdiction’ Over Nauru*, 56 INT’L & COMP. L.Q. 641, 642 (2007) (describing different models under which foreign judges hear cases: when “expatriate” judges are appointed to sit on national courts, as in Botswana; when appeals are to a supranational court, such as the Privy Council or the Caribbean Court of Justice; or when another country’s court is authorized to act as the court of appeals, as for Nauru). In some systems, foreign judges may not have the same tenure protections as domestic judges, a practice that may raise issues of judicial independence, or may be seen as an accommodation to practical exigencies.

<sup>65</sup> *Seaga renews calls for referendum on CCJ*, JAMAICA OBSERVER (May 14, 2003), [http://www.jamaicaobserver.com/news/43759\\_Seaga-renews-calls-for-referendum-on-CCJ](http://www.jamaicaobserver.com/news/43759_Seaga-renews-calls-for-referendum-on-CCJ); see also Victor Jordan, *A Critique of the Caribbean Court of Justice*, Presentation at The Fifth Annual SALISES Conference, Trinidad and Tobago, at \*6 (March 31, 2004), available at <http://sta.uwi.edu/salises/workshop/csme/paper/vjordan.pdf>.

<sup>66</sup> See CONST. BOSNIA-HERZEGOVINA art. VI para. 1(a) (providing that three out of nine judges on the Constitutional Court shall be appointed from outside the territory by the President of the European Court of Human Rights). Technically, the Constitution of Bosnia and Herzegovina was adopted as part of the Dayton Accords. See General Framework Agreement for Peace in Bosnia & Herzegovina art V & Annex 4, Dec. 14, 1995, 35 I.L.M. 89; see also CONST. OF THE REPUBLIC OF KOSOVO art. 152 (2008), draft available at <http://www.kushtetutakosoves.info/?cid=2> (requiring, on a transitional basis, the appointment of three international judges, not from any neighboring country, by the International Civilian Representative to the Kosovo Constitutional Court) (last visited Nov. 21, 2011).



Of course, not all judges sitting in domestic courts experience in actuality the kind of independence to which international and domestic norms of impartiality aspire, and not all significant constitutional questions come before courts, as the Honduran situation illustrates.<sup>67</sup> Executive branch officials do not necessarily act with the same norms of impartiality as do the courts of their countries. Thus, in a fraught situation like that of Honduras, the motivation of outside constitutional interpreters like the United States might have been thought to be ideological, in opposition to the redistributive policies of Zelaya, rather than based on concern with rule of law or democracy values; likewise, the actions of the OAS may have been perceived as motivated more by the fear of incumbent heads of state not to be displaced than by a bona fide concern for the domestic constitutional order of Honduras.

Similarly, in Fiji in 2006 and Afghanistan in 2009, it is also extremely complex to determine whether various constitutional interventions by the U.S. were in fact “independent” and “impartial”, or rather arguably more self-interested. By suspending aid to Fiji under the Foreign Operations, Export Financing and Related Programs Appropriations Act (which prohibits granting “any assistance to the government of any country whose duly elected head of government is deposed by a military coup or decree”),<sup>68</sup> the United States implicitly rejected the constitutional arguments of the 2006 coup-leaders in favor of the validity of the coup.<sup>69</sup> But at the same time, in opposing full-scale sanctions or opposition to the coup, diplomatic cables recently released by Wikileaks suggest that the United States was motivated at least in part by a desire to retain Fijian peacekeepers in Iraq.<sup>70</sup> Other countries in the region, such as Australia, by contrast, which had a stronger interest in regional stability, sought to support their interpretation of the 2006 coup as unconstitutional by arguing that Fijian peacekeepers should be replaced by peacekeepers from Nepal.<sup>71</sup>

Likewise, in Afghanistan, the United States arguably had a similar strategic interest in advancing an interpretation of the Afghan constitution that, as Part II notes, gave precedence to Art 33 (universal access to voting) over Art 61 (elections within a certain period of the expiration

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<sup>67</sup> The principal judicial involvement in the Honduran narrative leading up to then-President Zelaya’s removal was the action of lower courts, enjoining the President’s efforts to hold a referendum on constitutional revision, and the Supreme Court’s agreement with the issuance of warrants allowing for entry into the President’s house and for his arrest. See NOAH FELDMAN ET AL., REPORT TO THE COMMISSION ON TRUTH AND RECONCILIATION OF HONDURAS: CONSTITUTIONAL ISSUES 38, 42 (2011) [hereinafter Feldman Report to the Truth and Reconciliation Commission]. The Court did not explain its decision on the arrest warrant. *Id.*

<sup>68</sup> Foreign Operations, Export Financing and Related Programs Appropriations Act, Pub L. No. 109-102, § 508, 119 Stat. 2172, 2197 (2005); see also U.S. Dept. of State, U.S. Embassy in Suva, *U.S. Policy Towards Fiji: Section 7008*, [http://suva.usembassy.gov/section\\_7008.html](http://suva.usembassy.gov/section_7008.html).

<sup>69</sup> *US Suspends Aid to Post-coup Fiji*, BBC NEWS, Dec. 20, 2006.

<sup>70</sup> Luke Miller, *Wikileaks: U.S. redlined Australia’s Fiji coup sanctions*, CRIKEY (May 2, 2011), <http://www.crikey.com.au/2011/05/02/wikileaks-us-redlined-australias-fiji-coup-sanctions/>.

<sup>71</sup> Ilesia Tora, *Fiji Soliders ‘Top Choice’*, FIJI SUN (Sept. 8, 2011), <http://www.fijisun.co/2011/09/07/fiji-soldiers-%E2%80%99top-choice%E2%80%99/>.

of a presidential term), and thus favored a 3-month delay in the calling of elections.<sup>72</sup> Both the actual, and perceived, success of democratic elections in Afghanistan was seen as critical, by the United States, to the ability to withdraw military force from Afghanistan (itself an important foreign policy objective). By 2009, key policy makers in the United States were also increasingly doubtful as to whether the re-election of President Karzai would help serve those broader objectives:<sup>73</sup> timing the elections in a way that undermined, rather than helped, Karzai win re-election was therefore, arguably, consistent with broader U.S. policy objectives.

This suggests that it would be an error to simply conflate impartiality with outsider status, when outsiders may be motivated –or may be perceived to be motivated – by an agenda unrelated to the bona fides of a domestic interpretation.<sup>74</sup> Rather, whether outside interventions can be understood to benefit from the same kind of impartiality associated with the use of foreign, independent judges will be a highly uncertain and context dependent question.

#### IV. Drawbacks of Outsider Intervention

The potential drawbacks or disadvantages of outsider interpretation, particularly in its more coercive forms, are several. First, there are questions of limited expertise, and limited comparability, that may diminish the deliberative advantages thought to accrue from such extraterritorial constitutional interpretation. Second, relational aspects of interventions come with their own possible dark side, as they may risk eliciting a kind of nationalistic, exceptionalist, raising of barriers against foreign influence; how likely this reaction is to occur will depend on different national political cultures. Likewise, outsider interpretations may suffer from a “democracy deficit”, a form of “illegitimacy” that relates to their being outsiders and not subject to the corrective accountability mechanisms of local democracy. Relatedly, there may be jurisprudential or methodological commitments that limit the openness of domestic actors to receiving outsider advice.

*A. Expertise and comparability:* Just as outsiders may be able to offer useful information, for deliberative purposes, about sources relevant to domestic constitutional interpretation, at the same time they may lack the local knowledge of the entire structure and history of the particular national constitution. It is the very distance from local constitutional politics, which gives outsiders some claim to impartiality in debates over constitutional meanings, that also limits their local constitutional knowledge. This lack of local knowledge may also mean that outsider understandings of a particular (foreign) constitutional text, or transnational development of an international text, may not be found relevant to the interpretation even of similar texts in a domestic constitution in its full context; what the outside experts have expertise on may not be

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<sup>72</sup> See *supra* text at note 30. See also CASEY L. ADDIS AND KENNETH KATZMAN, CONGRESSIONAL RESEARCH SERVICE, *MIDDLE EAST ELECTIONS 2009: LEBANON, IRAN, AFGHANISTAN, AND IRAQ* 9–10 (May 19, 2009) (stating that U.S. interests are more likely to be harmed by elections tainted by fraud or violence than the ultimate outcome).

<sup>73</sup> Dexter Filkins, *Leader of Afghanistan Finds Himself Hero No More*, N.Y. TIMES (Feb. 7, 2009), <http://www.nytimes.com/2009/02/08/world/asia/08karzai.html?ref=hamidkarzai>.

<sup>74</sup> Compare Ali-Ali, *supra* note 6 (noting that, in the context of outsider influences over constitutional design “where a specific state actor has an interest – political or economic– in the outcome of a particular drafting process, some of its contributions to the drafting process can be less than benign”).



controlling in the face of local expertise and interpretive approaches. Additionally, foreign experts may sometimes simply make ‘mistakes’ about parallels between their own domestic constitutional norms and practices and the relevance of these norms in a foreign constitutional context.

Take the 2009 Honduran constitutional crisis and the (initial) response of the U.S. and other international actors to the *constitutionality* of Zelaya’s removal. Opponents of the removal characterized it as an unconstitutional military coup, and indeed, the military had arrested Zelaya and sent him out of the country; the national legislature, which voted to remove Zelaya from office, acted without explicit authority in the constitution’s text, which did authorize the Supreme Court to rule on impeachments of public officials. Yet proponents of his removal argued that Zelaya had violated the constitutional order, by implicitly advocating for repeal of the limitation on a single term presidency (by calling for a popular referendum on holding a constitutional convention to write an entirely new constitution) and by defying earlier orders of the country’s “contentious-administrative” court in connection with that issue;<sup>75</sup> they argued further that the removal of Zelaya by the elected Congress was in accord with the Congress’ larger powers under (and the purposes of) the Constitution.<sup>76</sup> Zelaya was replaced by an elected

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<sup>75</sup> Feldman Report to the Truth and Reconciliation Commission, *supra* note 67, at 31, 42, 45-46. Cf. Edward Schumacher-Matos, *A Dose of Realism in Honduras*, WASH. POST, July 12, 2009, at A11 (arguing that the Honduran Supreme Court did what it was empowered to do; questioning whether to characterize Zelaya’s ouster as a coup; and stating that accordingly Obama and Clinton have ceased calling it a coup). The Feldman report agreed that the Supreme Court had acted properly in issuing an arrest warrant for Zelaya, *id.* at 46, but noted that the Court itself never ruled on Zelaya’s removal from office: *id.* at 21. *But cf.* Law Library of Congress, *Honduras: Constitutional Law Issues*, available at <http://www.loc.gov/law/help/honduras/constitutional-law-issues.php> (prepared by Norma C. Gutierrez, August 2009) (last updated April 4, 2011), text at notes 48, 49 [hereafter Law Library of Congress Report] (“In light of the fact that Zelaya was formally removed from office on June 28 by the Congressional Decree described above, on June 29, the Supreme Court unanimously ordered that the proceedings be forwarded to the Unified District Trial Court to continue through the ordinary proceedings established by the Code of Criminal Procedure, ‘given that citizen José Manuel Zelaya Rosales is no longer a high-ranking government official.’ ”)

<sup>76</sup> Law Library of Congress Report, *supra* note 75, text at notes 39-42; Feldman Report to the Truth and Reconciliation Commission, *supra* note 67 at 55-56 (noting that Zelaya’s opponents interpreted Congress’ right to remove a sitting president broadly, in light of specific constitutional prohibitions against attempts to modify the constitution). One clearly illegal aspect of what occurred, however was President Zelaya’s removal from the country, which appeared to have been undertaken by the military not in conformity with the provisions of the arrest warrant; even commentators who generally supported Zelaya’s removal from office were agreed on the illegality of his removal from the country. *See, e.g.,* Miguel A. Estrada, *Honduras’ non-coup*, LOS ANGELES TIMES (July 10, 2009), <http://articles.latimes.com/2009/jul/10/opinion/oe-estrada10> (concluding that Zelaya’s removal to another country “most likely wasn’t [lawful]”); Law Library of Congress Report, text at note 50; *see also* Feldman Report to the Truth and Reconciliation Commission at 47-48 n.157 (concluding that the Armed Forces’ removal of Zelaya from the country was “not legal, but instead constituted the disobeying both of the judicial warrant and an unconstitutional expatriation”). It was recently reported that the Honduran Supreme Court, by a 12 to 3 vote, upheld a decision dismissing charges against the military joint chiefs for having forcibly removed Zelaya from the country; it is also reported that the military chiefs had claimed a defense of necessity. *See Honduras Culture and Politics: Supreme Blessing on the Coup* (Wednes. October 19, 2011) at <https://hondurasculturepolitics.blogspot.com/2011/10/supreme-blessing-on-the-coup.html>.

member of the Parliament who was next in the constitutional line of succession; elections scheduled for December 2009 were held and a third person was elected president.<sup>77</sup>

Is it possible that assumptions about their own constitutional orders may have obscured the complexity of the constitutional situation in Honduras to those outsiders looking at the situation in its immediate aftermath? <sup>78</sup> Under the 1982 Honduran constitution,<sup>79</sup> an extraordinary emphasis is placed on the importance of a single term presidency, which President Zelaya's actions in prior months were believed by many to threaten. For example, the single term presidency is included in description of the basic character of Honduras as a representative democracy found in Article 4 of the Honduras Constitution, which states: "Alternation in the exercise of the Presidency of the Republic is obligatory. Violation of this norm constitutes a crime of treason against the Fatherland." The Honduran Constitution includes several other provisions designed to secure its one term rule, in provisions that relate to citizenship, amendments, advocacy of unlawful amendments, and the Armed Forces. Article 42 states that among the grounds for loss of citizenship is "inciting, promoting, or abetting the continuation in office or the reelection of the President of the Republic;" the declaration of loss of citizenship on this ground shall be made by a "government resolution, based on a prior condemnatory sentence dictated by the competent tribunals".<sup>80</sup> Article 239 provides that no one who has been president may again be a president or president designate, and that anyone "who violates this provision or

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<sup>77</sup> Feldman Report to the Truth and Reconciliation Commission, *supra* note 67; Rory Carroll, *Honduras Elects Portofino Lobo as New President*, THE GUARDIAN, Nov. 30, 2009. On the constitutionality of Michelletti's succession, see Library of Congress Report, *supra* note 75, at text at note 37-38.

<sup>78</sup> Part of the following paragraphs are drawn from Vicki C. Jackson, *Unconstitutional Constitutional Amendments: A Lens Into Constitutional Theory and Transnational Constitutionalism*, forthcoming as *Reformas constitucionales inconstitucionales: una mirada a la teoría constitucional y el constitucionalismo transnacional*, in Esteban Restrepo Saldarriaga (coordinador), LIBERTAD DE EXPRESIÓN ENTRE TRADICIÓN Y RENOVACIÓN. ENSAYOS EN HOMENAJE A OWEN FISS (2012) (en preparación). See also Frank M. Walsh, *The Honduran Constitution is not a Suicide Pact: The Legality of Honduran President Manuel Zelaya's Removal*, 38 GA. J. INT'L & COMP. L. 339, 362-63 (2010).

<sup>79</sup> We rely in this paper on the English translation of the Honduran Constitution available through Constitutions of the Countries of the World [CCW] (Oceana Law). See Constitution of the Republic of Honduras, 1982 (as amended to 1991), Oceana Law, [http://www.oceanalaw.com/NXT/gateway.dll/CCW/current/honduras/hnd\\_constitution.htm](http://www.oceanalaw.com/NXT/gateway.dll/CCW/current/honduras/hnd_constitution.htm) (as accessed July 16, 2009). A caution: In this translation, notes existed only through 1995 in the CCW introduction, and scholars have disagreed about the import of Section 205(15) of the Honduras Constitution and its history. See *infra* note 65. Moreover, the U.S. State Department website indicates that the Honduran Constitution was amended in 1999, so some of the provisions which are referred to in the text may no longer be extant, though several of them correspond to what has been reported elsewhere, in the press and in scholarly articles. The importance of having a full and up to date translation is emphasized by the disagreement between some scholars writing on the crisis about whether the impeachment referral procedure, by which the Congress could refer the question of removal of the President to the Supreme Court, remained available at the time of Zelaya's ouster. Compare Walsh, *supra* note 78, at 368-71 (stating that the provisions had been removed through inartful drafting of an amendment designed to remove the immunity for legislators) with Doug Cassel, *Honduras: Coup d'Etat in Constitutional Clothing?*, ASIL INSIGHTS, July 29, 2009, available at <http://www.asil.org/files/insight090729pdf.pdf>, text at notes 44-45 & note 61 (suggesting that the impeachment referral process was available and had been suggested by one member of the Congress at the time).

<sup>80</sup> We have not read anything that suggests that there was a process that took place to declare the president's citizenship was terminated.





*advocates its amendment....shall immediately cease to hold ...offic[e]* and shall be disqualified for ten years from exercising any public function.”<sup>81</sup> In addition to making violation of the term limit a criminal offense of treason, and imposing on anyone who even advocates for such an amendment an immediate loss of public office and a 10-year disqualification from office, the Constitution goes to even great lengths to secure this as a permanent feature.<sup>82</sup> There is thus at least some basis to argue that there was a clear basic norm in the Honduran constitution that President Zelaya’s actions in prior months seemed plausibly to threaten.

To those accustomed to the constitutions of the United States, Canada or Australia, however, this emphasis on single-term presidencies has a quite unfamiliar quality. Indeed, to U.S. ears, the provisions of the Honduran constitution prohibiting even the advocacy of a change in the unamendable provisions of the constitution limiting presidents to a single term might themselves have seemed suspect, or inconsistent with general (transnational or international) standards of freedom of expression. It is thus not surprising that, initially at least, most outside actors were also emphatic in arguing that the removal of President Zelaya, for violation of these limits, was “unconstitutional.”<sup>83</sup>

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<sup>81</sup> For thoughtful discussion of the legitimacy of constitutional provisions prohibiting advocacy for change in unamendable constitutional provisions, see Walter F. Murphy, *Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163, 184-87 (S. Levinson eds., 1995) (distinguishing the constitutional legitimacy from the wisdom of restricting such advocacy; suggesting that if it is legitimate to make some provision unamendable, it is also legitimate to prohibit advocacy for such a change, but it will often be wise or prudent *not* to limit such advocacy).

<sup>82</sup> The Armed Forces are specifically charged by the Constitution with protecting the single term rule: Article 272 provides for a permanent and professional Armed Forces, who are “established to defend the territorial integrity and sovereignty of the Republic, to maintain peace, public order and the rule of the Constitution, the principles of free suffrage *and alternation in the exercise of the Presidency of the Republic*” CONST. HONDURAS art. 272 (emphasis added). Finally, Article 374 states that articles of the Constitution “relating to the form of government, national territory, *the presidential term*, the prohibition from reelection to President of the Republic, the citizen who has served as president under any title, and to persons who may not be President of the Republic for the subsequent period may not be amended.” *Id.* at art 374 (emphasis added). In a substantial work in progress that he was kind enough to share with us after our paper was in draft, Professor Steven Schnably explores the Honduran situation in great detail, as presenting a situation of “deep disagreements about the correct interpretation of the Honduran constitution”. See Steven Schnably, *External Construction of Constitutions: Honduras and Beyond* (work in progress) (analyzing both factual uncertainty and legal uncertainty as challenges in evaluating outsider or “external” constitutional interpretations). [PERMISSION NEEDED AND REQUESTED]

<sup>83</sup> Compare, e.g., Cassel, *supra* note 79 (arguing that the action of the Congress in removing Zelaya from office, first based on an alleged but fictitious resignation letter and then based on his failure to appear (produced by the unlawful removal) was thus itself also plainly unlawful) and Feldman Report to the Truth and Reconciliation Commission, *supra* note \_\_, at 59-61 (concluding that the Congress lacked authority to remove the President) with Law Library of Congress, *Honduras: Constitutional Law Issues*, available at <http://www.loc.gov/law/help/honduras/constitutional-law-issues.php> (prepared by Norma C. Gutierrez, August 2009) (last updated April 4, 2011) (concluding that the Congress had interpretive authority to decide on the scope of its power to “censure” the President) and Walsh, *supra* note 78, at 365-66, 369-70 (arguing that because a prior amendment had inadvertently removed provisions for an impeachment procedure, and the Constitution thus provided no textually explicit procedure for removing a President, the actions of the Congress were in accord with the spirit of the Constitution given the threat the President posed to the constitutional order and the rule of law by his defiance of court orders and efforts to circumvent unamendable provisions of the constitution). The Library of Congress report has been sharply criticized, for asserted failures of research into Honduran constitutional law, over-reliance on a single outside source, and developing an interpretation of the Constitution not advanced by any of the internal participants. See Letter to James Billington,

While such outsiders may well have had the better arguments on whether the Honduran Congress had constitutional authority to remove a sitting President,<sup>84</sup> the strength of the position initially taken by outsiders on the issue was surprising.<sup>85</sup> The certainty that what had occurred was an unconstitutional military coup was evidently not tempered by an understanding of possible prior unconstitutional acts by the President, nor by the potential for reasonable competing interpretations of legislative power, involving, *inter alia*, the need for removal of a president for violation of a central constitutional provision and the (arguable) power of the Honduran Congress to engage in constitutional interpretation about the scope of its own powers.<sup>86</sup>

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Librarian of Congress, from Senator John Kerry, Chair, Sen. Comm. on For'n. Relations and Rep. Harold Berman, Chair, House Comm. Foreign Affairs (Oct. 27, 2009), *available at* <http://thehill.com/images/stories/news/2009/october/102909/bermantoloc.pdf>; Letter to Librarian Billington and Director Mulhollan, from Professor Rosemary Joyce, Chair, Anthropology Dept, University of California Berkeley (Sept. 25, 2009), *available at* <http://upsidedownworld.org/main/content/view/2130/68/>.

<sup>84</sup> See Report to the Truth and Reconciliation Commission, *supra* note 67, at 6, 60 (concluding that the Honduran Congress “most likely” acted without authority in removing the President, and construing the legislature’s power to “censure” the president as not extending so far as to have permitted Zelaya’s removal). (For a contemporaneous report of a conspiracy between the Honduran parliament, the Supreme Court and the military unconstitutionally to remove Zelaya, see <http://www.wikileaks.ch/cable/2009/07/09TEGUCIGALPA645.html> (“Wikileaks” document, purporting to be a cable from the U.S. Ambassador in Honduras to the U.S. State Department, July 2009). The Feldman report explains in detail its reasons for concluding that it is “most likely” that Congress acted improperly in removing Zelaya from office, including the absence of a proceeding in which Zelaya could contest the charges against him. *Id.* at 60. For purposes of this essay, what is important is the debatable character of the conclusion in 2009. For the contrary conclusion of the report prepared for the Library of Congress, see Law Library of Congress Report, *supra* note 75, text at notes 40-43 (concluding, *inter alia*, “that the National Congress made use of its constitutional prerogative to interpret the Constitution and interpreted the word ‘disapprove’ to include also the removal from office”). The Honduran Truth and Reconciliation Commission, in July 2011, released a final report in which it described the Congress’ action in removing Zelaya as a coup d’état against the executive, though also finding that Zelaya had engaged in illegal acts leading up to the removal. COMISIÓN DE LA VERDAD Y LA RECONCILIACIÓN, PARA QUE LOS HECHOS NO SE REPITAN: INFORME DE LA COMISIÓN DE LA VERDAD Y LA RECONCILIACIÓN 202 (2011), *available at* <http://www.cvr.hn/assets/Documentos-PDF/Informes-Finales/TOMO-I-FINAL.pdf>. It has quite recently been reported that the Honduran Supreme Court, in October 2011, upheld (by a vote of 12-3) a decision dismissing charges against the military joint chiefs for having forcibly removed Zelaya from the country; it is reported that the military chiefs had claimed a defense of necessity. See *Honduras Culture and Politics: Supreme Blessing on the Coup* (Wednes. October 19, 2011) at <https://hondurasculturepolitics.blogspot.com/2011/10/supreme-blessing-on-the-coup.html>.

<sup>85</sup> Note that under the 2001 Democratic Charter, only an “unconstitutional disruption of the democratic order” warrants suspension. Inter-American Democratic Charter, art. 21, Sept. 11, 2001, *available at* [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm). This phrase is ambiguous. It might mean that both a violation of domestic constitutional law (“unconstitutional”) of a substantial degree (“disruption”), that is also inconsistent with international understandings of the “democratic order” are required; or the phrase, might refer to a “democratic order” as specified in the particular national constitution. This interpretive question about the meaning of article 21 relates, *inter alia*, to whether Zelaya’s actions, if unconstitutional, were also a “disruption of the democratic order”; if these words (“disruption of the democratic order”) are judged only by international standards, they might not include the particular “democratic order” represented by the Honduran constitution’s protection against multi-term presidencies.

<sup>86</sup> The military’s removal of Zelaya from the country clearly was unconstitutional under the Honduras constitution, which prohibits the expatriation of a citizen. CONST. HONDURAS art. 102. Even those who generally defended the

*B. Relational Complications of Impartiality Claims:* Claims by outsiders that are perceived to convey the idea that outsider views matter because of their source (or because of relationships among the states in question) may have unintended, perverse consequences. They may occasion pushback and may, at least in the short run, diminish support for the legal position being asserted, as national states often provide a locus for the expression of nationalism, which can in turn develop into xenophobic resistance to the “foreign.” A good example of this was the popular backlash in Nicaragua, in 2009, to the criticisms of the CSJ by the U.S. Ambassador, Robert Callahan: Following the Ambassador’s comments, thousands of demonstrators gathered outside the U.S. Embassy shouting “Get out”, “Get out” to the Ambassador, and scrawling “Yankees go home” on the Embassy walls,<sup>87</sup> despite the fact that leading local opposition figures, and members of the judiciary, had expressed almost identical positions to those of the Ambassador on the issue.<sup>88</sup>

Especially in those parts of the world which tend to have less well-developed rule of law practices, efforts by those from wealthier parts of the world, where the rule of law may be better developed, to insist on their interpretations of domestic constitutions, may not be regarded as impartially motivated. Rather they may be seen as part of an ideology of constitutional imperialism,<sup>89</sup> or of economic oppression, an insistence on the rule of law (*after* wealth has been distributed through lawless rule by those more powerful) as a way of preventing those less powerful from making social and economic progress.

*C. Democracy, “Fit,” Legitimacy and Self-Authorship:* Jurisprudential and methodological commitments also may limit the utility of outsider interpretations. Consideration of structure and specific history may condition the meaning applied, even to terms that appear identical or similar to those in other constitutions.<sup>90</sup> Apart from considerations of structure and specific histories, constitutions are often subject to norms of coherence in interpretation, in ways that rules of international law are not. Interpretation of specific terms may need to “fit” with a broader range of structures and other judicially determined doctrine.

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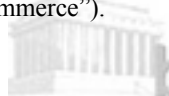
removal of Zelaya from office have conceded the unlawfulness of the military’s action in removing him from the country. See *supra* note 76.

<sup>87</sup> See e.g. “Nicaraguans Protest Remarks by U.S. Envoy”, THE NEW YORK TIMES, October 30, 2009.

<sup>88</sup> See Witte-Lebhar, *supra* note 47, “Nicaragua’s Chief Justice Denounces Pro-Ortega Ruling”, Latin American Herald Tribune (Chief Justice. Manuel Martinez called the method of establishing a quorum for the case illegal); “World Briefing: The Americas; Nicaragua: Dispute Over Election”, ASSOCIATED PRESS, Oct. 21, 2009 (“opponents call the decision illegal and vow to fight it”).

<sup>89</sup> For one example, consider the United States’ insistence that the provisions of the “Platt Amendment,” including provisions authorizing the United States to intervene in Cuba to “preserve[] Cuban independence [and] maintai[n] a government adequate for the protection of life, liberty and individual property . . . ,” be included in the new Cuban Constitution drafted in 1900-01. See Christina Duffy Burnett, *A Guarantee Clause for the Americas: The United States in Cuba, 1898-1902*, (forthcoming, Constitutional Commentary); see also Paul Carrington, *Could and Should America Have Made an Ottoman Republic in 1919?*, 49 WM & MARY L. REV. 1071, 1086-87 & n. 97 (2008).

<sup>90</sup> For example, see JACKSON, *supra* note 49, at 203-05 (discussing how the specific institutional structures and historic concerns of Canadian federalism contributed to a much narrower meaning of a text, similar to (but as a pure matter of text even broader than) that in the U.S. Constitution, giving the national government power over “trade and commerce”).



Furthermore, positivist commitments, especially when combined with democratic ideologies, might well insist on the meanings attributed by particular national lawmakers to constitutional provisions, regardless of their origins. Although one of us has argued that foreign experience can, under specified circumstances, contribute to a better understanding of one polity's democratic preferences,<sup>91</sup> given the nationalistic exceptionalism that, as a matter of sociological reality, may accompany interpretive methods linked to democratic views, experiences elsewhere may be viewed as unpersuasive to the meaning of national constitutional commitments. Moreover, classical international law may lend support to "democratic" or "sovereigntist" objections to outsider efforts to influence domestic constitutional interpretation.<sup>92</sup>

Indeed, it is often suggested that for domestic courts even to consider, on their own, the views and practices of other nations is to violate or interfere with the operation of domestic democracy.<sup>93</sup> A fortiori, it could be suggested, for foreign actors to offer, or especially, to try to *impose* their views of another country's laws on that country raises concerns, particularly since public law is often strongly associated with particular national histories, compromises, and interdependent institutions. In the first case, many scholars, including Mark Tushnet,<sup>94</sup> have responded that so long as it is a domestic judge doing the evaluation of the relevance and bearing of the foreign or international source, the concern from democracy is no different than when the judge considers domestic historical sources, or scholarship, in coming to an interpretive conclusion.<sup>95</sup> The same rationale is not available, however, where an outsider purports to offer an interpretation of another country's own laws.

In the Caribbean, for example, a major factor driving debate over the role of the PC in recent years has been a concern about democracy and the death penalty: a quite clear majority of people in most Caribbean countries favor retention of capital punishment, and most national constitutions in the region also reflect this via the inclusion of "savings clauses" designed to protect the death penalty.<sup>96</sup> The PC, however, has consistently interpreted Caribbean

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<sup>91</sup> See Dixon, *supra* note 49.

<sup>92</sup> See e.g. United Nations Charter, Art 2(7) (providing that "[n]othing ... in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter"). Newer forms of international law, involving human rights, are in some tension with these ideas, and might be invoked to support "outsider" interpretation of domestic constitutions claimed to be more consistent with international human rights law. Compare Ali-Ali, *supra* note 6 at 89-90 (discussing the significance of this erosion in the context of external influences over constitutional design).

<sup>93</sup> See, e.g., Richard A. Posner, *Foreword: A Political Court (The Supreme Court, 2004 Term)*, 119 Harv. L. Rev. 31, 88-89 (2005).

<sup>94</sup> See, e.g., Mark Tushnet, *When is Knowing Less Better Than Knowing More? Unpacking the Controversy over Supreme Court Reference to Non-U.S. Law*, 90 MINN. L. REV. 1275, 1286-87, 1296-97 (2006).

<sup>95</sup> *Id.* at 1296-97 (arguing that non-U.S. law may merely be used as a source for a domestic judge's thinking, and that if mistaken interpretation of foreign law is a concern, this argument is not "distinctive" as judges frequently have poor knowledge of complex areas of domestic law).

<sup>96</sup> Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, 98 Am. J. Int'l. L. 126, 126-28 (2004).



constitutions in a way that narrows scope for the use of the death penalty,<sup>97</sup> so that, in recent years, a major reason for opposition to the PC, as an outside interpreter, has been its role in capital cases.

Finally, there may be costs to both local democracy and local constitutionalism if countries struggling to make a transition to democratic constitutionalism are the objects of too much, or certain forms, of outsider interpretation and advice about their own constitution, especially if such outsider interpretations are acted on because of their provenance. Even assuming good faith, relatively impartial and knowledgeable outsider advice (for example, from nonaligned NGOs who assisted in a transition period), it might be thought that receiving and/or acting on such advice might make it more difficult to develop local commitments and attachments to democratic system and to the state's constitution, commitments that may require a certain amount of struggling together towards solutions.

#### IV. The Potential Risks & Benefits of Outsider Interpretation: A Contextual Analysis

As we have seen, there are competing claims of expertise, competence and legitimacy associated with interpretive insiders and outsiders. Working through the factors discussed in parts II and III, in the context of the five questions laid out in the introduction – who, by what means, how, when and for what reason is outsider interpretation occurring – may give rise to some tentative conclusion about the directions in which different configurations of these factors might point.

##### A. *Who and By What Means: Identity and Coercion*

Who is engaged in the practice of outside constitutional interpretation will matter for a number of reasons: it may affect the impartiality of outsiders, their level of competence or expertise, and also the degree to which they are likely to be involved in coercive forms of interpretation. Possible interpretive interventions by scholars, NGOs, international and domestic courts, and executive branch officials should thus be separately considered in assessing the merits of outsider constitutional interpretation.

One might begin by thinking, for example, that scholars, writing in their customary academic fora, may be most capable of relative impartiality and independence of judgment about how to interpret another state's internal constitution, while executive branch officials of other countries perhaps least so. The institutional security, and reputational motivations, of scholars suggests that, even if their interests may be at some level aligned with those of their country of origin, they will often be well placed to offer a more impartial view. Executive officials, on the other hand, will almost always be influenced by national diplomatic, military, security or economic interests in the process of interpretation; while these perspectives may be of value in understanding relational concerns, they also offer a more limited form of impartiality as to the meaning of legal texts.

A further important difference between scholarly work, on the one hand, and executive decisions, on the other, has to do with their coercive effects. Scholarly work, even if intended as critique or influence, generally lacks the coercive force that almost any government action does.

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<sup>97</sup> See, e.g., *Pratt and Morgan v. Attorney General for Jamaica*, [1994] 2 AC 1.

From this perspective, then, it is less problematic and errors in scholarship can ordinarily be corrected by responsive academic writing. Concomitantly, the benefits of leaving scholarly inquiry free, if unconnected with attempts at coercion, are ordinarily so great that even poor or misinformed scholarship should not be viewed as posing a significant threat to legitimate governmental interests of the countries commented on.

International governmental organizations, such as the United Nations or Organization of American States (OAS), will also tend, in this respect, to be closer to national executive officials, than scholars, in that they can generally rely on member states to enforce their judgments via a range of coercive (or quasi-coercive) measures. Compared to national actors, however, IGO's may be regarded as more impartial, given the degree to which their policies or judgments are informed by an 'overlapping consensus' among countries.<sup>98</sup>

International NGOs, in most cases, will be closer to scholars than executive officials with respect to their potential for coercive power.<sup>99</sup> While some NGO's may exist for the purpose of monitoring "rule of law" compliance in states around the world, NGOs typically have less coercive power – less power to invoke sanctions, less money to dole out as incentives – than state actors. Nonetheless, given the increasing role of such civil society groups, it is important for NGOs to be aware of the difficulties and challenges of outsider constitutional interpretation, and in particular, the limits on their own impartiality and expertise: expertise in international law, for example, may not translate directly into expertise in domestic constitutional provisions that are similar in their text to the international rules.

Courts might be thought to occupy a middle-ground between scholars, on the one hand, and executive officials, on the other: courts issue judgments; the judgments are intended to be binding and to have force and effect. If a judgment is premised on an interpretation of another country's constitution and that judgment has coercive effects on or concerning the other country, it is important that such an attempted use of power be justified. Thus, international courts will, generally, exercise jurisdiction only with the presence of state consent; the scope of the state's consent, however, may matter. Under most human rights treaties with protocols permitting individual complaints, for example, the authorization would be to evaluate the conformity of the state's behavior with the international rule set forth in the particular treaty. Do international norms generally require adherence to domestic constitutional requirements? That is one of the key questions raised by this phenomenon.<sup>100</sup> More commonly, however, for courts, the point of

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<sup>98</sup> To the extent that an IGO is regarded as captured by a single dominant power, this perceived impartiality advantage would diminish.

<sup>99</sup> As for impartiality and interests, there is of course a very wide range of variation among NGOs, and some NGOs will be aligned with a particular set of interests that might be regarded as skewing their perspectives – whether the interest be in an expansive view of human rights being reflected in all legal instruments, or it be an International Chamber of Commerce view that regulation should be kept to a minimum in order to promote free trade. These interests may be more readily identified and accounted for than are the typically far more complex national interests that motivate positions taken by executive branch officials when speaking about other countries' laws. Compare also Ali-Ali, *supra* note 6 (discussing similar questions of institutional identity, in the context of questions of external influences on constitutional design).

<sup>100</sup> See further note 134, *infra*.



referring to other countries' constitutional practices in domestic constitutional adjudication is not to engage in venturesome interpretation, nor to criticize the doctrine of other courts, but rather to note their content and discuss what that content suggests about the problem of interpretation before the domestic court. In this sense, judicial decisions that refer to foreign constitutional law are rarely designed directly to change that country's laws, or to have even indirect coercive effect.<sup>101</sup> And they are, at least arguably, less likely to be influenced by the kinds of foreign policy or other "external" concerns that are so significant in the executive branch. For these and other reasons, "outsider" interpretations by courts may offer greater 'impartiality' than equivalent forms of executive branch interpretation.

These are general, institutional aspects of identity. Other aspects of identity may also be of considerable importance to the effects of any proposed intervention on a domestic constitutional matter. If the outside commenter is a former colonial power, for example, the likely impact of its intervention on its former colony will depend on contextual factors going to their relationship.<sup>102</sup>

Similarly, if the commenter is from a country that is generally allied with the state, with which there are shared legal cultures, such outside comments may be more likely to be found relevant than from more distantly related states.<sup>103</sup> Such commenters are also more likely to be familiar with a country's constitutional system, as a whole, and thus to intervene productively in a specific constitutional dispute. In this sense, the question of *who* is engaged in the practice of outside constitutional interpretation will be closely linked to the question of *to whom* the interpretation is directed.<sup>104</sup>

Yet it is also important to acknowledge that proximity may *increase* the sensitivity of outsider comments on interpretation, if there is a history of competition between the states in question, or of disputes, for example, over access to the sea for landlocked countries. The same applies to outsiders with close territorial, or cultural, connections to a particular jurisdiction: ambassadors or special representatives to a region, for example, may sometimes be perceived by local actors as more informed about, and sensitive to, local concerns than other (more

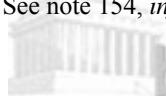
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<sup>101</sup> Even if there is no intent to influence other countries' interpretations of their own laws, those countries may react adversely to the characterizations of their laws by international or foreign tribunals.

<sup>102</sup> Although many independent states that were once colonies have long since replaced their initial, independence constitutions, one could imagine that – in the case of a constitution seen to have been imposed by colonial or occupying powers – efforts by such powers to offer interpretations about the meaning of those texts might be particularly unwelcome. More generally, this essay generally assumes the validity and legitimacy of each nation's constitution; but there may be states in which this assumption is incorrect, and in which, for example, international law would be seen as having greater legitimacy than national constitutional law. In those cases the balance of factors might favor extraterritorial interpretations grounded on international law norms.

<sup>103</sup> On the idea of distinct trans-national legal cultures, and their importance, see, e.g., David Nelken, *Using the Concept of Legal Culture*, 29 Australian J. Leg. Phil. 1 (2004). It is possible that, in some respects, persons from the same family of legal culture might be regarded for some purposes as "insiders", suggesting that perhaps the polar distinction we have worked with ought to be viewed as on a continuum or more complex map. Yet even persons from closely allied cultures but different countries could fairly be viewed as "outsiders" for purposes of concerns over issues of democratic control and accountability within a state.

<sup>104</sup> See note 154, *infra*.



geographically distant) representatives of a foreign state in a way that increases openness to their interventions in constitutional disputes; but equally, they may have a history of conflict with local actors that may increase resistance to such intervention.<sup>105</sup>

## B. How and When

How outsiders approach the task of interpreting a foreign constitution will affect the likely accuracy of their interpretations and, in the case of outsider communications (typically from governments or IGOs) designed to influence the foreign state, may also affect the appropriateness, or utility, of publicly communicating those judgments about constitutional meaning.

To begin with, the depth and clarity of the reasoning offered by outsiders in support of a conclusion about departures from or compliance with domestic constitutional law will bear on its likely deliberative contribution and may also affect its perceived impartiality. The burden of justification on outsiders may vary depending on what has occurred domestically. If a domestic organ of government provides a reasoned justification for an interpretation under the domestic constitution, for example, outside interveners may then have the burden of meeting that reasoning with their own, especially if they are in disagreement with authorized internal interpreters.

One need not be a thoroughgoing *Erie*-style positivist to think that generally, internal organs of a state will be better situated to say what their law means than are external organs. This may be so for several quite different reasons: On one version of the jurisprudential underpinnings of *Erie*, “law” can mean only that which its authorized expositors say it means. But apart from such an ultra-positivist view, the *Erie* approach may be justified on the quite different grounds that, generally, local interpreters will be better in touch with local sentiment and understanding, and thereby better able to give interpretations that keep law grounded in democratic sentiment. Alternatively, it might be argued that, like administrative agencies charged with the interpretation and enforcement of particular statutory schemes, national states have a presumptive degree of expertise in the interpretation of their own laws.

Where, by contrast a domestic organ, including a court, offers *no* reasoning in support of a decision, or introduces *ex post facto* reasons to justify prior action not noted at the time, the relative burden on outsiders might be thought to be diminished. Likewise, if domestic interpretive authority is both shared and in conflict, the burden of justification facing outsiders might also be thought to be somewhat diminished, compared to the situation in which insiders speak with a single voice. Outside interpreters, however, also may be thought to have an

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<sup>105</sup> See e.g. the local resistance to the comments of U.S. Ambassador to Nicaragua, Robert Callahan, in 2009. See note 87, *supra*. A separate question might be raised about interpretive advice that is given privately, by outsiders. Because we focus here only on instances of public interventions, we do not in this paper address questions about how to reconcile the arguable need for confidentiality in executive communications with the benefits of transparency in reasoning about constitutional interpretation.





obligation in such cases to at least recognize the different internal viewpoints and take account of them in whatever ultimate opinion they reach.

The opportunity for domestic interpretation is likewise connected to the timing of when outsiders intervene in debates over domestic constitutional interpretation. Delay in outsider interpretation, for example, will generally have two inter-related benefits: First, it will allow more time for local interpretive debate, and thus avoid the possibility that outsider interpretive intervention will distort, or undermine the possibilities for, robust internal debate.<sup>106</sup> Second, it will also allow more time for careful study by outsiders.

One of the striking features of the Honduran example, noted above, was how quick the international community and particular states within it were to reach conclusions about the domestic constitutional situation.<sup>107</sup> Yet speedy responses to an apparent military coup are to be expected, as such events are rarely consistent with the rule of law and with the operation of democracy. Thus, while time might be thought to allow more study and better reasoned conclusions on constitutional issues, those outside interpreters with the capacity for coercion may have sound reasons, arising from international commitments to democracy and to the avoidance of military interventions, to speak quickly. And where a legal regime ties together international norms with domestic constitutional norms, outsider interpretation may be both inevitable and done on a very short time frame.<sup>108</sup> Such context-specific features, in other words, may justify foregoing the benefits of more time.<sup>109</sup>

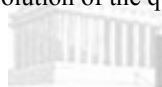
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<sup>106</sup> A potentially useful analogy, in the U.S. federal context, is the way in which the Supreme Court has applied a doctrine of “Pullman abstention” to federal constitutional challenges to state statutes or constitutions, see, e.g., *Reetz v Bozanich*, 397 U.S. 82 (1970) (concerning meaning of Alaska state constitution, which had not yet been subject to state court interpretation), a doctrine based, in part, on the relative expertise and competence of federal and state courts in respect of state laws. See *RR Com’n of Texas v. Pullman*, 312 U.S. 496, 499 (1941) (Frankfurter J.) (suggesting that “as outsiders without special competence in [state] law, [they] would have little confidence in [their] independent judgment regarding the application of that law” absent guidance from state courts).

<sup>107</sup> Cf. *U.S. Waffles on Honduras*, CHICAGO TRIBUNE, Sept. 22, 2009, C14 (noting that although President Obama was quick to protest Zelaya’s overthrow, the State Department took “more than two months to officially declare the action a coup d’etat, a legal determination that requires the suspension of all non-humanitarian aid”). Although State Department spokesperson Philip Crowley referred to the events of June 28, 2009, as a “coup d’etat” in announcing the termination of certain aid, see Paul Richter, *U.S. Cuts Aid to Latin Nation*, L.A. Times, Sept 4 2009, p. A 26, in fact it does **not** appear that the State Department had found that a “coup” had occurred but rather avoided such a finding. See Howard LaFranchi, *WashingtonUps the Pressure on Honduras by Cutting Aid*, CHRISTINA SCIENCE MONITOR, Sept. 4 2009,; Irish Times, *US cuts \$30m aid to Honduras but Stays Silent on Military Coup*, Sept 4 2009, p. 11. One may speculate that perhaps the complications of the Honduran situation contributed to the hesitancy to find a formal coup, though other more pragmatic, political may have played a role as well or instead.

<sup>108</sup> With respect to regimes that tie international obligations to domestic constitutional law, one of us has suggested that there may be normative benefits to some greater degree of separation from international rules, as such, and domestic constitutional rules, as such, to preserve a kind of critical distance between them from which each system can critique the other. See Jackson, *Unconstitutional Constitutional Amendments*, *supra* note 78.

<sup>109</sup> Cf. *City of Houston v Hill*, 482 U.S. 451, 467-68 (1987) (suggesting that *Pullman* abstention may not be appropriate where sensitive First Amendment rights would be chilled by the delay involved in awaiting state court resolution of the questions).



Especially in contexts in which events are moving quickly, as in Honduras, consistency across cases addressed by outsiders will be relevant to perceptions of impartiality. Such even-handedness may, however, be especially difficult to find in executive branch interpretation, in which a variety of national interests may influence when a foreign constitutional dispute is even addressed; in international organizations, as well, there may be dominance by particularly powerful states that will influence the even-handedness with which criteria for interpretive interventions are applied. Even without evidence of such consistency, other factors – such as outsider interpretations that are seen as inconsistent with the national interests of the interpreter (narrowly understood), or the balance and persuasiveness of the analysis, or the institutional structures of independence and impartiality of the decisionmaker, or the reputation for impartiality of a particular person – may support perceptions of impartiality. Organizations that have developed criteria which they apply publicly and across all similar cases may be able to offer higher degrees of impartiality in offering outsider assessments. In these ways, the “how” of interpretation may also be linked to the entity or person offering it.

C. Why? Consent, Externalities, Necessity, Bad Faith, and Inadequate Opportunity for Internal Constitutional Debate: Analogies from Judicial Federalism and International Law

Factors of identity and coercion, of the when and how of outsider interpretation, do not address squarely the most central issue: why should outsiders, particularly officials in other states, ever have occasion to opine on, and base their government’s coercive stance on, interpretations of another states’ domestic constitutional law? After all, as noted earlier, public law in general and constitutional law, in particular, is often thought to be closely linked to expressive features of a legal culture, or to particularly path dependent kinds of constitutional histories.<sup>110</sup> Although this may not be true everywhere, it is the case in a number of countries. Outsider interpretation, moreover, lacks the democratic legitimacy and connection on which internal contests and resolution of constitutional issues are founded; especially in countries with democratically created, ratified or consented to constitutions, and an ongoing democratic system, this would create a significant risk of resistance. Moreover, given the easy-to-anticipate possibility that outsider interventions may create domestic backlashes that do not advance commitment to constitutionalism and the rule of law, whether in democratic or not-so democratic countries, why should such risks ever be undertaken?

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<sup>110</sup> On expressivism, see Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale L. J. 1225, 1269-84 (1999); on the peculiar path dependency of public law and public institutions, see John Bell, *Comparing Public Law*, in *Comparing Law in the 21<sup>st</sup> Century* (Andrew Harding & Esin Orucu eds. 2002). Questions about outsider interventions may arise not only in the area of constitutional law but with respect to other forms of domestic law, and indeed, with respect to nonlegal “policy” based diplomatic or NGO or scholarly interventions. It is beyond the scope of this paper to explore the degrees to which such questions overlap with, or are distinct from, those involved with outsider constitutional interpretation. For now, we suggest only that the degree to which constitutions may be particularly bound up with understandings of national identity and/or are regarded as particularly foundational to a national legal system may give, in some cases, a heightened sensitivity as compared to other areas. See generally Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 Penn St. Int’l L. Rev. 319 (2010).



There are a number of answers to this question; and in this part, we point to four emerging transnational public law norms – concerning consent, externalities, bad faith (legal irregularity) and the (in)adequacy of the local legal forum – that may be thought to provide potential justifications for particular instances of outsider interpretation. In addition, we suggest that decision-makers may face a domestic legal necessity, or duty, to decide on some issue of foreign law, in the course of resolving their own domestic legal questions. Whether readers agree or not with these suggestions, we think that asking the “why” question is itself important, especially if interpretation is linked to forms of coercion, that is, efforts to get a state to change its interpretation through pressures that go beyond the persuasive value of the arguments offered. Attention to the criteria we identify, therefore, should in no way obscure the need for ongoing attention by potential outsider interpreters to the specifics of a particular case.

*1. Consent:* When it comes to concerns about democratic legitimacy in particular, consent may vitiate these objections to an important extent. Consent, for example, is generally the basis for the involvement of outsiders – as advisors – in the process of constitutional drafting. Thus, when foreign “experts” are invited in to a constitution-drafting process by duly authorized lawmakers, as occurred recently in Kenya,<sup>111</sup> objections from democracy to their role in the process may be mitigated, even if not entirely dissolved. A similar position also applies where foreign experts are invited by domestic actors to opine on compliance with domestic constitutional norms (as occurred recently in Honduras).<sup>112</sup> In such cases, entirely indigenous processes (democratic or otherwise) intervene to accept or reject work in which foreign experts participate.

Consent is also the classic basis of “coercive interpretation” through enforcement of treaty norms by outsiders. In Europe, for example, states that are parties to the European Convention on Human Rights have, since 1998, consented to the European Court of Human Rights hearing “applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto”,<sup>113</sup> regardless of whether the source of the violation is a domestic statute, common law norm, policy or constitutional requirement.<sup>114</sup> Within the Commonwealth, there is a tradition of constitutional interpretation by outsiders (i.e. the Judicial Committee of the Privy Council (PC)) based on forms of consent.<sup>115</sup> And in some

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<sup>111</sup> See e.g. Alicia L. Bannon, *Note: Designing a Constitution Drafting Process: Lessons from Kenya*, 116 Yale L. J. 1824 (2007); Constitution Of Kenya Review Bill, 2008, Part II (establishing a Committee of Experts to draft a new constitution).

<sup>112</sup> In this case, the Honduran Truth and Reconciliation Commission asked Professor Noah Feldman, of the Harvard Law School, along with two other U.S. law professors and one Honduran attorney, to examine the constitutionality of the actions that occurred there in 2009. See Feldman Report to the Truth and Reconciliation Commission, *supra* note 67, terms of reference.

<sup>113</sup> Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, E.T.S. 155, entered into force 1 November 1998, Art 34, <http://www1.umn.edu/humanrts/euro/z30prot11.html>

<sup>114</sup> On the application of these European human rights rules to national constitutions, see, e.g., Sejdić and Finci v. Bosnia and Herzegovina, *supra* note 8.

<sup>115</sup> Historically, the Privy Council heard appeals from all British colonies without any form of local consent, but upon obtaining independence, these former colonies were given at least the formal choice of abolishing such

former Commonwealth countries that have created hybrid courts, there is an authorized basis in domestic law for the participation of outsider judges, although typically on multi-member benches there are local judges involved as well.<sup>116</sup>

In the Americas, members of the OAS have likewise at least arguably consented to a form of extra-territorial constitutional interpretation by the General Assembly of the OAS. Article 19 of the Interamerican Democratic Charter of 2001 states:

Based on the principles of the Charter of the OAS and subject to its norms, and in accordance with the democracy clause contained in the Declaration of Quebec City, an unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a member state, constitutes, while it persists, an insurmountable obstacle to its government's participation in sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization, the specialized conferences, the commissions, working groups, and other bodies of the Organization.

Article 21 authorizes the suspension from membership of a state found to have an "unconstitutional interruption of the democratic order", by a two-thirds vote of the membership, from participation in the OAS General Assembly. These provisions were adopted by the OAS member states at a special session of the General Assembly on September 11, 2001. Thus, the Charter itself also created a significant possible justification for the General Assembly of the OAS to opine on the constitutionality of President Zelaya's removal in Honduras in 2009, if a less certain basis for decisions by individual members of the General Assembly (such as the U.S.) to express a separate view of this question. This appears to be part of a growing trend of international agreements arguably consenting to outsider evaluation of domestic constitutional compliance.<sup>117</sup>

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appeals. Both Ireland and India, for example, abolished all appeals to the PC upon gaining independence in 1933 and 1949: see e.g. Abolition of Privy Council Jurisdiction Act 1949 (India); Constitution (Amendment No. 22) Act, 1933. Many countries, of course, were subject to pressure from the UK to retain such appeals, thus creating varying degrees of actual consent in this context. See further, notes 127-130, *infra*.

<sup>116</sup> See, e.g., Mason, *supra* note 64; Dale, *supra* note 64.

<sup>117</sup> See generally Lech Garlicki & Zofia A. Garlicka, *External Review of Constitutional Amendments? International Law as a Norm of Reference*, 44 Isr. L. Rev. 343 (2011). Interestingly, in some treaty language agreed to by the United States there is an arguable basis, in consent, for interpretation of the U.S. constitution by outsiders. The U.S. Senate's reservations to the ICCPR state that it does "not authorize or require" anything that "would restrict the right of free speech and association protected by the Constitution and laws of the United States". Unlike some other treaty reservations, this reservation does not contain language that specifies that the reference to the Constitution is to the Constitution "as interpreted by the United States". For discussion of this treaty language as an implied consent for forms of outsider interpretation, see, e.g., Paust, Van Dyke, Malone, *International Law and Litigation in the U.S.* 329 (3d ed. 2009). In the Commonwealth, member states have agreed, via the Commonwealth Heads of Governments meeting, to give authority to the Commonwealth Ministerial Action Group to "respond to", and thus also identify, "instances where there is an unconstitutional overthrow of an elected government". (see e.g. "Commonwealth Leaders Agree to Strengthen Ministerial Action Group", October 28, 2011, available at <http://www.thecommonwealth.org/press/31555/34582/242191/281011cmag.htm>). In Africa, Article 4 of the Constitutive Act of the African Union also provides that one of the founding principles of the Union is that it is



Likewise, in the context of U.S. federalism doctrines, consent will often permit actions otherwise deemed prohibited by constitutional federalism principles. Thus, for example, suits against states in federal courts are prohibited by the Eleventh Amendment, except when a state consents.<sup>118</sup> States may not discriminate against goods from other states except when the national Congress, acting on behalf of all of the states, so provides or consents.<sup>119</sup> Actions that the national Congress may not compel the states to undertake may become state obligations if the states agree to undertake them (often as a condition for receiving federal funds).<sup>120</sup> And a federal constitutional challenge to state laws may go forward where a state consents, where a federal court would otherwise generally be required to abstain from hearing such a challenge until the conclusion of relevant state court proceedings.<sup>121</sup>

The idea of consent, however, is also a complex one, which cannot simply be accepted across all contexts at face value. Consent to outsider interpretation, for example, may be given at a single moment in time, or may be more ongoing. To the extent that withdrawal or exit from a treaty regime is practically available, moreover, one could say that consent continues. But as with older constitutions, the connection between these legalized forms of consent and ongoing democratic agreement to participation may become more attenuated over time.

Complex questions may also arise as to whom – e.g., chief executive and/or parliament, or what kind of democratic majority, elected in what circumstances – may legitimately act for a state, whether in consenting, or revoking consent to outsider interpretation. Consider the history of attempts to abolish appeals to the PC in Jamaica and the former Rhodesia (now Zimbabwe). In Jamaica, in 2004, the government purported to pass legislation removing appeals to the PC, but the PC held that the Jamaican parliament could not in fact do this, and confer appellate jurisdiction on the CCJ, without obtaining super, rather than simple, majority support in the Jamaican parliament.<sup>122</sup> In Rhodesia, in 1965, there was a clearer democratic deficit in the decision by the Smith government to abolish appeals to the PC, as part of unilateral declaration

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committed to the “condemnation and rejection of unconstitutional changes of governments”. For discussion, see ALISON DUXBURY, *THE PARTICIPATION OF STATES IN INTERNATIONAL ORGANISATIONS: THE ROLE OF HUMAN RIGHTS AND DEMOCRACY* [ ](2011).

<sup>118</sup> See, e.g., *Hans v. Louisiana*, 134 U.S. 1 (1890) (noting the common law rule, entrenched by the 11<sup>th</sup> Amendment, that a state may not be sued without its consent); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Rehnquist CJ.) (affirming the idea that “federal jurisdiction over suits against unconsenting States ‘was not contemplated by the Constitution when establishing the judicial power of the United States’”) (citing *Hans*, at 15).

<sup>119</sup> See, e.g., *Hillside Dairy Inc v Lyons* 539 U.S. 59 (2003) (endorsing such a principle, though requiring a clear statement of Congressional intent for it to take effect).

<sup>120</sup> See e.g. *South Dakota v. Dole* 483 U.S. 203 (1987).

<sup>121</sup> For the general requirement of abstention in such a case, see *Younger v. Harris*, 401 U.S. 37, 41 (1971). For the relevant exception, see *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 480 (1977).

<sup>122</sup> *Independent Jamaica Council for Human Rights (1998) Ltd & Ors v. Marshall-Burnett & Anor (Jamaica)* [2005] UKPC 3 (holding that by conferring appellate jurisdiction on a court whose judges had a different form of independence and security of tenure, from the members of the PC, the Jamaican parliament was effectively amending the provisions of the Jamaican constitution in a way that required legislation to meet these more demanding requirements).

of independence: the government making this declaration was an all-white government reacting to pressure from the UK to recognize a principle of black majority rule.<sup>123</sup> Thus, by rejecting the effectiveness of the UDI, and the associated attempt to abolish appeals to the PC, the PC was arguably advancing, rather than undermining, any meaningful principle of democracy.<sup>124</sup>

Consent may, even at the outset, also be more formal than real, or the result of varying degrees of pressure from outsiders. In Europe, for example, accession to the European Convention on Human Rights is a clear precondition to membership to the European Union, so that many states clearly feel strong economic pressure to consent to the jurisdiction of the European Court of Human Rights, including in respect of constitutional matters.<sup>125</sup> In the Commonwealth, there has also historically been clear diplomatic pressure, from the UK, for former colonies to retain appeals to the PC (though this now appears to be changing<sup>126</sup>). In Australia, for example, at the time of the drafting of the 1901 Commonwealth Constitution, the Australian founders initially sought to remove appeals to the PC in constitutional matters, but Joseph Chamberlain, the then Colonial Secretary, protested.<sup>127</sup> Eventually, a compromise was reached whereby appeals to the PC were retained in all matters, but in matters involving state and federal relations, an Australian court was first required to issue a certificate before such an appeal could be brought.<sup>128</sup> (PC jurisdiction continued until 1975 and 1986 in appeals from the High Court and state courts, respectively.<sup>129</sup>) Similarly, in the case of Ireland, the Attorney-General for England and Wales is reported to have told the Irish Attorney-General that Ireland had no right to abolish such appeals upon gaining independence, but the PC itself upheld this right in a 1935 decision.<sup>130</sup>

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<sup>123</sup> Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 CORNELL INT'L L.J. 49, 60–61 (1994).

<sup>124</sup> See e.g., *Madzimbamuto v. Lardner-Burke*, [1969] 1 AC 645. In this case, of course, the prior 'consent' was more nominal rather than real, and not the product, as in some other Commonwealth countries, of actual substantive consent upon independence. The example illustrates the dangers of accepting the legitimacy any and all attempts to revoke consent, regardless of the fairness of the procedures followed in doing so.

<sup>125</sup> On EU accession pressures, see e.g. Robert J. Goebel, *Joining the European Union: The Accession Procedure for Central European and Mediterranean States*, 1 LOYAL UNI CHICAGO INT'L L. REV. 15, 28 (2003).

<sup>126</sup> See e.g., "Privy Council's Caribbean Complaint", BBCCaribbean.com, Tuesday, 22 September 2009, available at [http://www.bbc.co.uk/caribbean/news/story/2009/09/090922\\_privyccjphillips.shtml](http://www.bbc.co.uk/caribbean/news/story/2009/09/090922_privyccjphillips.shtml) (noting comments by the President of the Supreme Court of the UK, Lord Phillips, that "'in an ideal world' Commonwealth countries — including those in the Caribbean — would stop using the Privy Council and set up their own final courts of appeal instead").

<sup>127</sup> See Andrew Dilley, *Empire and Risk: Edwardian Financiers, Australia and Canada, c. 1899-1914* (Paper presented at Conference on Business History, 2009), at 5-6.

<sup>128</sup> See Commonwealth Constitution 1901, s. 74. For further discussion see Dilley, *supra* note 127, at 6.

<sup>129</sup> See Privy Council (Appeals from the High Court) Act 1975, Australia Acts 1986 (Cth); Australia Acts 1986 (UK).

<sup>130</sup> See *Moore v. Attorney-General of the Irish Free State*, [1935] 1 I.R. 472.



Various forms of more delegated consent, in particular, may also have a more attenuated connection to the democratic decision-making that provides normative weight to consent as a legal value.<sup>131</sup> Consider, for example, the consent involved in the acceptance of the Interamerican Democratic Charter, under which the OAS had a basis for opinion in the Honduras case. As already noted, the Interamerican Democratic Charter of 2001 authorized the suspension from participation in the General Assembly of a state found to have an “unconstitutional interruption of the democratic order,” by a vote of the OAS membership. These provisions were adopted by the General Assembly of the OAS; but the Interamerican Democratic Charter is not itself an international agreement.<sup>132</sup> Consent to the Interamerican Democratic Charter, and thus to suspension under that Charter, is derived from member state agreement to the OAS Charter (which authorized the General Assembly to make policy, generally by majority vote) and then from the more explicit actions of the governments of member states in approving the Charter, which authorized the General Assembly to take further action. This is clearly a form of consent, and pursuant to legally authorized procedures; but it is arguably a more diluted form than can be found in the original terms of a treaty, especially one that must be and has been ratified by a domestic legislature, or than the kind of consent (in a constitution or piece of domestic legislation) to including foreign judges on national courts. The more specific consent to outsider constitutional interpretation, given by the Inter-American Democratic Charter, appears to have resulted only from the actions of executive officials of member states and not the member states’ legislative bodies.

Thus, consent matters significantly to the legitimacy of outsider interpretation; but it may exist in different forms, and have different strengths in particular contexts and may not always be a sufficient basis for all forms of outsider interpretation.

2. *Externalities and Interests/Duties and Internal Necessity:* The interests, or duties, of outsiders are other factors that will affect the appropriateness of outsider forms of constitutional interpretation. In some cases, outsiders may have a legal duty, under domestic law, to make decisions that require consideration of foreign constitutional norms. Courts, for example, may be required to address questions of domestic constitutional law that turn directly on the content of foreign constitutional norms. Courts whose constitutions direct them to consider the meaning of international texts may feel impelled to consider how other courts have interpreted them in the context of their own constitutional systems, and, if there is disagreement, to make choices. This is a form of interpretation not intended as coercive, but which may be experienced as an interference by other countries.

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<sup>131</sup> The relationship between international delegations of authority and domestic “sovereignty” or democratic control of decisions has been explored in a growing literature. For a helpful introduction, see Oona Hathaway, *The Law And Politics Of International Delegation: International Delegation And State Sovereignty*, 71 Law & Contemp. Prob. 115 (2008).

<sup>132</sup> See, e.g., Timothy D. Rudy, *A Quick Look at the Inter-American Democratic Charter of the OAS: What is it and is it ‘Legal’?*, 33 SYRACUSE J. INT’L L. & COM. 237, 241-242 (2005-2006). The Inter-American Juridical Committee of the OAS opined, just before its enactment, that the suspension provisions of the Inter-American Charter may have gone beyond the bounds of interpretation of the OAS Charter. See Annual Report of the Inter-American Juridical Committee (Aug 24, 2001), at 32-33. However, the preamble to the Charter expresses the view of the members, unanimously, that the Inter-American Charter represents a clarification of the meaning of the OAS Charter.

There may be more specific questions in particular areas, such as whether another country's system for providing compensation for takings meets international standards, under which an understanding of what that country's own laws, including its constitution, provide may be relevant. Issues may arise where extradition or other forms of removal to a foreign state are sought, or deportation is at issue, concerning the treatment to be expected in another state; again, it is at least in theory possible that an understanding of foreign constitutions may be relevant to those inquiries, even if they are more likely to be focused on practices on the ground.<sup>133</sup> And under international human rights law, which may be determined by a supra national or international tribunal, there are questions about whether an interference with a right protected under international law is "in accordance with law."<sup>134</sup>

Executive branch officials, moreover, in order to make judgments about their own dealings with foreign governments, may also be obligated by their own laws to consider the constitutional requirements in another country or the constitutional authority of their officials to enter into a binding agreement. In interpreting various statutory requirements, such as the U.S. Foreign Operations Appropriations Act, for example, executive officials may also be required to decide the constitutional status of foreign actors' claim to recognition.<sup>135</sup>

In other cases, constitutional outcomes in another country may affect the legitimate interests of other states in maintaining their own security, or environmental quality, or economic stability, and therefore involve clear forms of constitutional "externality". These externalities may, for example, be financial: if U.S. companies have investments in a foreign state, there may be a perceived national interest in protecting the economic value of those companies interpreting the foreign state's constitution and laws in a way consistent with international obligations of compensation in the event of a taking. Externalities may also be tied to a country's diplomatic or international legal obligations: if citizens of one state are being held and tried in another, for example, the state of the defendant's citizenship may have a strong diplomatic interest in how the foreign state's constitution and laws are interpreted, so as to protect the national.<sup>136</sup> If a foreign state fails to comply with its own basic constitutional rights standards this may also impose obligations on other states under international law (under either the Refugees Convention or Convention Against Torture.<sup>137</sup> for example) that creates a direct interest, on the part of those

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<sup>133</sup> Compare *Soering*, supra note 17; and *M70*, supra note 18.

<sup>134</sup> See, e.g., ICCPR art. 6(2) ("In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime..."); art. 9 (1) ("No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. ")

<sup>135</sup> See supra note 34 (referring to the U.S. State Department's explanation of suspension of aid to Fiji in 2006).

<sup>136</sup> Compare e.g. *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC) (finding a constitutional duty on the part of the state to protect nationals from the danger of violations of certain fair trial rights/rights to freedom and security of the person under relevant foreign legal norms).

<sup>137</sup> See Convention relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.





other states, in ensuring that constitutional norms are interpreted so as to guarantee such standards.

Likewise, as suggested earlier, states with a deep commitment to international law as a binding set of rules may have an interest in the interpretation of an influential constitution, like that of the United States, where the constitutional norms appear to overlap with international norms; as we discussed above, this account may explain why the EU filed amicus briefs in U.S. death penalty cases, or why Commonwealth lawyers and those from Israel filed amicus briefs on questions of what judicial process was due to U.S. held detainees on Guantanamo.<sup>138</sup>

Such externalities might be understood as always present when, in a single *federal* system, a subnational unit is interpreting the national constitution. What each subunit's courts say about the meaning of the national constitution (or even about the meaning of comparable language in subnational unit constitutions) could inform and possibly affect how other members of the federation interpret such language. Within a single federation there may well be an interest in uniformity of the interpretation of the common national constitution; such an interest in uniformity of interpretation is always affected by decisions of the subparts with respect to that national constitution.<sup>139</sup>

The same cannot be said to be true in the international community, or at least not to the same degree. There is no "world constitution;" the Charter of the United Nations is not intended to create a system of world governance and has very few provisions concerning the internal domestic organization of its member states; it embodies as well a principle of member state sovereignty and equality. Nonetheless, recent efforts to allocate jurisdictional authority as between local, national or supranational levels of governance have increasingly placed weight on the idea of externalities – that is, the idea that if an action affects persons outside the jurisdiction, that counts as a reason to enable decisionmaking at a level of governance that includes those affected; the European doctrine of subsidiarity might be understood as in part about the relationship of externalities to jurisdiction.<sup>140</sup> The increasing areas of overlap between

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<sup>138</sup> States with distinctive constitutional positions may also, at least in theory, have interests in trying to prevent the development of either customary international law norms, or "generic" constitutional norms, see generally David Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005), that might later be invoked to try to force change in the non-conforming states. See also John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303, 309 (2006). This theoretical possibility may be based on an assumption of greater possibilities for constitutional convergence than are likely to exist. See, e.g., Rosalind Dixon & Eric Posner, *The Limits of Constitutional Convergence*, 11 CHI. J. INT'L L. 399 (2011).

<sup>139</sup> Cf. *Michigan v. Long*, 463 U.S. 1032 (1983), which might be understood as a doctrinal effort to limit externalities that arise from state court interpretation of state constitutional provisions whose language is similar to that in the national constitution.

<sup>140</sup> See, e.g., Daniel Halberstam, *Federal Powers and the Principle of Subsidiarity in Global Perspectives on Constitutional Law* (V. Amar and M. Tushnet, eds., 2009) (exploring idea of subsidiarity as either requiring delegation up to higher level of governance or down to lower level depending, inter alia, on effects of contemplated area of action); Mattias Kumm, *Democratic Constitutionalism Encounters International Law: Terms of Engagement*, in *The Migration of Constitutional Ideas* (Sujit Choudhry ed., 2006); Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE* (Jeffrey Dunoff and Joel Trachtman eds. 2009).



international law and the subjects of domestic constitutional law may also imply a growing arena in which some degree of externality is imposed by acts of domestic constitutional interpretation, which may warrant some response, by way of outsider interpretation.

3. *Bad Faith or Legal Irregularity as Undermining Deference to Local Interpreters:* As noted above, interpreting a domestic constitution in a world community of states differs from the situation in some federal nations, the U.S. among them, where subnational states are interpreting the same national constitution that binds others. In some federal states, including the United States, however, the subnational states have their own, state-level constitutions and laws. Ordinarily, in the United States, under the rules developed by *Erie RR v. Tompkins*,<sup>141</sup> the state courts are viewed as the “final” interpreters of the meaning of their own state laws. However, some exceptions to this commitment do exist, perhaps most famously illustrated in recent years in *Bush v. Gore*.<sup>142</sup> There, three justices of the U.S. Supreme Court were prepared to hold that the Florida Supreme Court’s interpretation of state law – as authorizing a manual ballot recount under the circumstances before it – was incorrect; the Florida Supreme Court’s interpretation of the state’s election laws was unconstitutional, these three justices thought, under the U.S. Constitution, Article II, Section 1, clause 2 (which says that the state legislatures should provide for the manner in which presidential electors are chosen) because the state court’s interpretation “distorted” those state laws “beyond what a fair reading required.”<sup>143</sup>

In so arguing, the three justices drew on a small but not insignificant line of cases in which the Supreme Court had found certain grounds of state law to be “inadequate” to foreclose federal review of the federal questions presented. (The Court has appellate jurisdiction over cases in the state courts only with respect to federal questions.) Ordinarily, if a state court holding rests on independent and alternative grounds, one of which is based on state law and the other on federal law, the Supreme Court cannot review the federal holding.<sup>144</sup> Likewise, where a state court judgment rejecting a federal constitutional claim rests on an independent and adequate ground of state procedural law –for example, that the issue was not properly or timely raised – further Supreme Court review of that federal issue is precluded. However, where state courts have relied on grounds that appear bizarre, or novel, or invoked in bad faith, to preclude review of claimed violations of the federal constitution, the Supreme Court will ignore the state ground - -treat it as “inadequate” to foreclose review of the federal issue.<sup>145</sup>

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<sup>141</sup> 304 U.S. 64 (1938).

<sup>142</sup> 531 U.S. 98 (2000).

<sup>143</sup> 531 U.S. 98, 113-15 (2000) (Rehnquist C.J., concurring).

<sup>144</sup> *Fox Film Corp v. Muller*, 296 U.S. 207, 209-10 (1935). One of the principal rationales for this doctrine is that, if the judgment rests on an “independent and adequate state ground,” the Court’s judgment on the federal issue would be merely advisory, it could not make a difference to the outcome of the case, and is thus prohibited by “case or controversy” limitations of the Article III courts.

<sup>145</sup> See, e.g., *Staub v. City of Baxley*, 355 U.S. 313 (1958); *NAACP v. Alabama ex rel Patterson*, 357 U.S. 449 (1958); *Lee v. Weems*, 358 U.S. 21 (1958); *Lee v. Kemna*, 534 U.S. 362 (2002). We recognize, of course, considerable differences between regimes of single federated states, under a single national constitution, recognized by all parties as supreme, on the one hand, and the interventions into domestic constitutional interpretation made by outsiders who are not bound by the



Similarly, when national interpretive bodies engage in bizarre or novel explanations of domestic constitutional norms, or appear to show bad faith in the process of constitutional reasoning, it can perhaps be said that the deference typically owed to local decisionmakers will be undermined. This will also be especially true where, in adopting such an interpretation, they also depart from more general norms of democratic constitutionalism.<sup>146</sup>

Consistent with this, in Nicaragua, in 2009, for example, critics of the decision by the CJI to invalidate constitutional term limits, on the Presidency, placed strong emphasis on procedural irregularities in the process by which the relevant panel of the Court was constituted (or the fact that the bench that decided the case was composed entirely of Sandinista-appointed judges).<sup>147</sup> The EU Parliament, for example, expressly noted that the relevant Court panel “met during the night, in the absence of three of the six member judges, who were not invited and who were replaced by three pro- government judges”.<sup>148</sup> The U.S. Ambassador likewise emphasized the degree to which the Court’s processes were “unusual and rushed”.<sup>149</sup> Both sets of outside interpreters ultimately rejected the validity of the domestic court’s decision, as a correct or controlling interpretation of the Nicaraguan constitution.

Similarly, in the context of the constitutional crisis in Honduras, the Feldman report took express note of deviations from what it described as conventional practice as it analyzed whether the Honduran Congress had constitutional authority to remove the president. For example, it noted that although the Congress arguably has interpretive power concerning the Constitution, in the past when it exercised that power it did so with an explicit statement to that effect.<sup>150</sup> It also noted that it was only some days after the Congress had voted to remove Zelaya, invoking several constitutional provisions, that the Congress asserted as an additional ground Article 239 (dealing with the disqualification of persons who advocate for change in the single term presidency to stay in office).<sup>151</sup> These irregularities in procedure contributed to the Feldman report’s conclusion that the Congress had probably acted without authority.

4. *Adequacy of Local Forum and Restrictions on Debate:* Finally, we suggest, outsider constitutional interpretation may be more justified when there is not a well-functioning internal system for debate and contest about constitutional questions, and especially where there is suppression of free debate about constitutional questions.

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instrument they are interpreting. The “inadequate state ground” doctrine can be invoked without holding the state’s procedure independently to have violated the Constitution.

<sup>146</sup> Whether there are transnational norms of democratic constitutionalism, and if so, what they are, can be contested, as can the question whether they exist as rules, principles or values. See, e.g., JACKSON, CONSTITUTIONAL ENGAGEMENT, *supra* note 49. Compare also Rosalind Dixon, Transnational Anchoring (Working Paper, Presented at Conference in Honor of Vicki Jackson, Georgetown Law Center, November 2010).

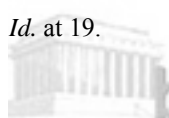
<sup>147</sup> See e.g. the account of the process provided by Chief Justice Martinez: see Witte-Lebhar, *supra* note 47.

<sup>148</sup> EU Parliament Resolution, *supra* note 45, at para D.

<sup>149</sup> See Witte-Lebhar, *supra* note 47.

<sup>150</sup> Feldman Report to the Truth and Reconciliation Commission, *supra* note 67, at 59.

<sup>151</sup> *Id.* at 19.



It is important to recognize that interpretive questions in constitutional law may not always have a single right answer; there may be more than one way reasonably to understand the application of a constitutional provision to a particular setting.<sup>152</sup> Reasoned debate, within accepted discourses norms in the legal community, is relied on both to reach the better interpretation and to procedurally validate the choice that is made as the authoritative choice for the polity.<sup>153</sup> The possibility of reasoned debate also allows for a system to correct its own errors. Where a constitutional question arises in an authoritarian or autocratic system in which there is not reliable freedom of debate on political questions, the question whether the rule of law is being followed can become more difficult to determine – the correctness *vel non* of an interpretation may be more difficult to discern because opposition is silenced; and the quality of contest preceding adoption of an interpretation affects our willingness to assume its correctness. In such cases, outsider interpretation may be able to provide a partial substitute for insider debate.<sup>154</sup>

That there may be a relationship between an inadequate opportunity for decisionmaking in an internal forum, and the propriety of external interventions, finds support in a number of other public law settings. This idea can be seen in the Rome Statute's provisions on "complementarity", under which the International Criminal Court cannot take jurisdiction over a matter if there are local prosecutorial authorities willing and able genuinely to carry out an investigation and prosecution;<sup>155</sup> it may also be seen in the various statutory and judge-made U.S. "abstention" doctrines which forbid the exercise of federal court jurisdiction if "a plain,

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<sup>152</sup> Moreover, countervailing considerations may caution against outsider interventions, even in polities that have suppressed free debate. Such considerations may include not only limitations of competence, and risks of backlash noted already, but the possible threat to the rule of law if, for example, there were a very longstanding but highly contestable interpretation of a constitutional provision. Some settled legal rules in unjust states, however, may be worth unsettling as part of a democratic transition, which adds to the difficulty in going beyond an identification of possibly relevant factors at this stage of analysis.

<sup>153</sup> For both epistemic and more ontological arguments for insisting on widespread participation in debate of public issues, see e.g., Jürgen Habermas, *THE THEORY OF COMMUNICATIVE ACTION, VOLUME 1: REASON AND THE RATIONALIZATION OF SOCIETY* (Thomas McCarthy trans., 1985); Adrian Vermeule, *LAW AND THE LIMITS OF REASON* (2008).

<sup>154</sup> This might suggest that – in addition to asking who is speaking, and by what means, how, when, and why – one should ask "to whom" outsider interpretation is addressed, that is, which country, or who within the country: compare note 104, *supra*. Recent studies, for example, of the effects of treaty ratification have made significant progress in identifying what kinds of countries are most likely to see improvements in human rights following ratification of human rights treaties. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009). However, in the context of the question we are addressing, which spans both consented to and nonconsensual interpretive interventions by a wide range of potential outside commenters, we believe it is more useful to focus on questions such as whether a country has vigorous channels of internal debate open on the issue, and on the *relationships* between the outsiders and the particular country involved.

<sup>155</sup> Rome Statute of the International Criminal Court, 37 I.L.M. 1002 (1998), 2187 U.N.T.S. 90, Art. 17(1)(A). See also, Vicki C. Jackson, "*To Endure for Ages to Come*": *The U.S. Constitution in a Transnational Era*, U. CINCINNATI L. REV. (forthcoming, 2012) (presented as the Taft Lecture, January 2011) (suggesting that growing norm of complementarity, reflecting abhorrence of "lawless" enclaves, provides some reason for national courts to explain decisions affecting what are widely regarded as human rights in terms understandable and respected by other countries).



speedy and efficient remedy may be had in the courts of such state”,<sup>156</sup> or if a state court enforcement proceeding is already pending in which a federal constitutional challenge can be raised.<sup>157</sup>

Admittedly, the idea that a rich internal debate may diminish the need or reasons for outsider interpretation is in some potential tension with an idea expressed earlier, that allowing time for local decisionmakers to reflect is a good thing, all other things being equal, and thus that extraterritorial contributions should perhaps allow time for local development of the issue. But where there is no real local development of the issue because debate is not allowed, the potential benefits of external interpretation may appear greater (relative to the potential risks), assuming that there are communities within the state that can listen and think, even if they cannot speak out without fear of punishment.

One example of this, among recent instances of outsider interpretation, is the intervention by outsiders, *after* November 2007, in constitutional debates in Pakistan over the removal of various Supreme Court judges. Prior to this, for example, when the Chief Justice of Pakistan, Iftikhar Chaudhry, was first removed in March 2007, the Supreme Court itself provided an important forum in which to test arguments about the constitutionality of his removal. While none of the judges on the Court were likely to be fully impartial, given their personal connection to the Chief Justice, the Court’s institutional independence at the time also remained quite strong. The response of the Prime Minister to the Court’s ruling, for example, was that Pakistanis ought to “accept the verdict with grace and dignity reflective of a mature nation.”<sup>158</sup> The fact that the Court ultimately divided on the issue of constitutionality was also further evidence of this (relative) independence.<sup>159</sup> The existence of these various majority and dissenting opinions also itself provided important depth to local interpretive debates over the question in Pakistan.

The “lawyer’s movement”, which mobilized lawyers and judges to protest against the removal of Chief Justice Chaudhry, was also an important source of breadth in this constitutional interpretive debate.<sup>160</sup> As locally-trained lawyers, members of this movement were well-placed to evaluate the arguments that, in removing the Chief Justice, the President did not in fact comply with the requirements of Art 209 of the Constitution.<sup>161</sup> Further, by engaging in mass action, members of this movement were also able to make their arguments heard on broad scale, even in the face of strong counter-arguments by the President.<sup>162</sup>

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<sup>156</sup> Johnson Act, 29 U.S.C. 1342 (dealing with public utility rates)

<sup>157</sup> *Younger v. Harris*, 401 U. S. 37, 40-41 (1971).

<sup>158</sup> See Somini Sengupta, “Musharraf Loses Fight Over Suspension of Judge”, N.Y. TIMES, July 21, 2007.

<sup>159</sup> See “Pakistan’s Top Judge Reinstated”, BBC News, July 20, 2007.

<sup>160</sup> See, e.g., Ali Khan, “A Lawyer’s Mutiny in Pakistan”, Jurist, May 17, 2007.

<sup>161</sup> See, e.g., Sengupta, *supra* note 147.

<sup>162</sup> *Id.*



After November 2007, however, the Supreme Court of Pakistan was no longer anything like independent from the executive, and thus, was less able to contribute to an impartial internal dialogue about the constitutional status of the PCO, or the orders made under it to dismiss various judges. Attempts by civil society to protest against the PCO, and the dismissal of judges, were also increasingly met with direct attempts at suppression by President Musharraf. The president of the Pakistani Supreme Court Bar Association, Aitzaz Ahsan, for example, continued after November 2007 to make repeated calls for the restoration of the pre-emergency judiciary, but was subsequently detained by President Musharraf as part of a broader crack-down against the lawyer's movement.<sup>163</sup>

In moving to suspend Pakistan for constitutional violations *after* November 2007, therefore, the Commonwealth was thus filling an increasing gap in free and open local constitutional debate. The same also applies to the position of individual members of the U.S. Congress, and non-government actors (such as Harvard Law School) who, after November 2007, expressed support for the Chief Justice or members of the lawyer's movement such as Ahsan.<sup>164</sup>

## VI. Conclusion

Outsider intervention in domestic constitutional disputes is far from new, but it has increased in recent years. The first aim of the article is simply to call attention to and identify various aspects of this phenomenon, as a distinctive feature of the complexly porous interpretive relationships of national and international actors around constitutional and international law in the evolving transnational setting in which multiple constitutional orders now operate.

The article also considers the potential advantages, and disadvantages, of such outsider interpretation, and identifies some factors that may be relevant to evaluating the legitimacy, or desirability, of particular instances of constitutional interpretation by outsiders. Three basic arguments for such interpretation are that it may be able to deepen and enrich processes of constitutional deliberation by insiders, to inform insiders about how different constitutional interpretive choices will affect or be viewed by external audiences, and to offer a more impartial perspective than insiders can in particularly sensitive, contested constitutional controversies. The downsides or risks of such interpretation, by contrast, are that it may be insufficiently informed or attentive to local contextual factors, create backlash against otherwise compelling constitutional arguments by insiders, or be in tension with existing constitutional interpretive norms, such as coherence, or commitments to "democratic" control of constitutional meaning.

How these various advantages and disadvantages should be evaluated will depend almost entirely on the particular constitutional context. In analyzing these various contexts, the article suggests that at least five questions are worth considering: *who*, *by what means*, *how*, *when* and *why* acts of outsider constitutional interpretation are contemplated or occurring.

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<sup>163</sup> See CRS Report for Congress, *supra* note 25, at 5

<sup>164</sup> See, e.g., "Pakistan's Ousted Chief Justice Accepts HLS Medal of Freedom", News, Harvard Law School, November 23, 2008.



Domestic courts and international NGO's, we have suggested, may be well placed to offer relatively impartial, helpful, and non-coercive, forms of outsider interpretation of foreign constitutions. Courts in particular are generally expected to act in a considered, deliberative way, which avoids the danger of overly hurried or poorly reasoned conclusions about foreign constitutional meaning; moreover, courts' discussion of foreign constitutional law will generally not be aimed, at least directly, at forcing a change in other states' conduct. Executive officials, by contrast, generally start from a quite different position as outside interpreters: they often lack any claim to or tradition of impartiality, yet have a clear capacity to exert coercive influence in the process of offering outside interpretations. For such officials, the mode, timing, and reasons for engaging in such interpretation will therefore be extremely important.

Answering these questions can also be guided, the article suggests, by decision-makers turning both inward and outward. In the U.S. federal system, doctrines of "abstention" provide importance guidance to federal courts in deciding *when* to intervene in state court proceedings; such doctrines, although developed in the distinctive context of a single federal system under a single national constitution, may nonetheless suggest factors to consider before other national decision-makers decide whether or when to engage in acts of "outsider" interpretation. Notions of consent, the adequacy of the local forum, the good faith and/or the "novel and bizarre" application of state law are also factors that have helped inform U.S. federal courts in the exercise of their jurisdiction. Such factors may also bear on the justifications for (or the *why* question behind) particular instances of outsider constitutional interpretation.

Regional and international legal systems are also increasingly developing norms that may offer useful guidance for national decision-makers, in evaluating this key question, of why intervene in particular domestic constitutional controversies. Consent, for example, remains a very significant aspect of international legal regimes (although there have been some inroads on this principle, especially in the development of the idea of *jus cogens*). Efforts to assess the distribution of jurisdictional authority as between national and supranational levels of governance have also increasingly placed weight on the idea of externalities – that is, the idea that if an action affects persons outside the jurisdiction, that counts as a reason to enable decisionmaking at a level of governance that includes those affected, as well as on the adequacy of national (or local) fora or mechanisms for decision-making. This idea can be seen, for example, in European notions of subsidiarity; and international criminal law principles of complementarity likewise focus on the adequacy of national institutions of criminal justice. Such factors, we suggest, may also bear on the interpretive interventions that have been the focus of this paper.

What we have called "outsider" or "extraterritorial" interpretation, in which an official or tribunal of one country expresses an interpretive view about constitutional events in another country, is a phenomenon that is in some sense driven by the increasing interaction among different constitutional systems and between national and transnational legal norms. Given increased interactions among peoples and states, across a very wide range of activities implicating national and international law, the opportunities for constitutional interpretation by outsiders are only likely to increase. As we have suggested, the coercive nature of some forms of outsider interpretation may be thought to call for especial caution, as such coercively motivated interpretive interventions bear risks and dangers that differ from those posed by the consideration of foreign law for purposes of better understanding the interpreters' own law. It



can be expected, however, that the interactive pressures of globalization will produce a multidirectional set of influences on and among national and international sources of public law that will reveal not only areas of contest and divergence but also areas of overlap, or convergence, between various norms of domestic and international public law that bear on questions of interpretive authority and pluralism. To the extent that overlapping normative principles emerge from these processes, we have suggested, they may also provide useful sources of guidance, for outsiders, in deciding whether, when and why to make interpretive interventions in domestic constitutional disputes.

