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Cover Page Footnote

Professor of Law, Washington University School of Law. I am indebted to my friend and mentor, Professor Peter Schuck of Yale Law School, who first introduced me to the term "militant moderate." See Peter H. Schuck, Meditations of a Militant Moderate: Cool Views on Hot Topics (2006).

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GETTING BEYOND THE CROSSFIRE PHENOMENON: A MILITANT MODERATE'S TAKE ON THE ROLE OF FOREIGN AUTHORITY IN CONSTITUTIONAL INTERPRETATION

*Melissa A. Waters**

INTRODUCTION

Just a few weeks ago, the U.S. Supreme Court revisited the issue that, in many respects, kicked off the twenty-first-century debate over the relationship between international law and the U.S. Constitution. In the aptly named *Kennedy v. Louisiana*,[1] Justice Anthony Kennedy, writing for a five-member majority, held that the use of the death penalty for child rape violated the Eighth Amendment's prohibition on cruel and unusual punishment.[2] For anti–death penalty advocates, *Kennedy* provides important evidence that key victories of the last decade (in *Roper v. Simmons*[3] and *Atkins v. Virginia*[4]) thus far have withstood the recent conservative turn of the Court. For advocates of the use of foreign and international law in constitutional interpretation, however, the decision offers a very different, and bleaker, picture.

For international lawyers, Justice Kennedy's opinion in *Kennedy* is a far cry from his groundbreaking majority opinion in *Roper* just three years earlier.[5] *Kennedy* is striking in the absence from the opinion of any discussion of foreign authority and the role that it should play in constitutional interpretation. Justice Kennedy passed on the opportunity to reiterate—and strengthen—*Roper*'s holding that "international opinion" can

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* Professor of Law, Washington University School of Law. I am indebted to my friend and mentor, Professor Peter Schuck of Yale Law School, who first introduced me to the term "militant moderate." *See* PETER H. SCHUCK, MEDITATIONS OF A MILITANT MODERATE: COOL VIEWS ON HOT TOPICS (2006).

1. 128 S. Ct. 2641 (2008).
2. *Id.* at 2646.
3. 543 U.S. 551 (2005).
4. 536 U.S. 304 (2002).
5. In *Roper v. Simmons*, Justice Anthony Kennedy delighted internationalists by asserting that foreign authority could play a "confirmatory role" in constitutional analysis. He commented, "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Roper*, 543 U.S. at 578.

play a "*confirmatory* role" in constitutional analysis.[6] Gone, too, are *Roper*'s references to the Convention on the Rights of the Child and other human rights treaties,[7] and its survey of foreign practices on the death penalty.[8] In short, in *Kennedy*, Justice Kennedy's powerful internationalist voice fell strangely silent.

The reasons behind Justice Kennedy's apparent (perhaps temporary) loss of enthusiasm for the internationalist enterprise must necessarily be left to speculation. But he may well have been influenced by the increasingly rancorous nature of the public debate over the role of foreign authority in constitutional interpretation. Since *Roper*, that debate—in the news media, in the blogosphere, and even before Congress—has fallen prey to what I call the "Crossfire phenomenon." Like the old CNN news commentary program, the Crossfire debate on foreign authority that has developed since *Roper* is great fun to watch, but often completely unedifying from the perspective of learning anything substantive about the complex issues involved. So-called "nationalists" saw in *Roper* an enormous threat to the very foundations of American democracy, and they have been fighting back hard ever since. In the immediate wake of *Roper,* members of *both* the House and the Senate introduced resolutions declaring that "judicial determinations regarding the meaning of the Constitution of the United States should not be based on . . . [foreign precedent] unless such . . . [foreign precedent] inform[s] an understanding of the original meaning of the Constitution."[9] At the confirmation hearings of both Chief Justice John Roberts and Justice Samuel Alito, conservative senators expressed the view that a judge's citation of foreign precedent constituted an impeachable offense.[10] One prominent conservative scholar has even called for a constitutional amendment banning the practice.[11] Many internationalists, for their part, simply cannot understand what all of the fuss is about: they

6. *Id.* at 604.

7. *See id.* at 576.

8. *See id.* at 576–77.

9. S. Res. 92, 109th Cong. (2005); H.R. Res. 97, 109th Cong. (2005).

10. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 293 (2005) (statement of Sen. Tom Coburn), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:23539.wais; *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471–72 (2006) (statement of Sen. Coburn), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_senate_hearings&docid=f:254 29.wais.

11. Professor Nicholas Quinn Rosenkranz of Georgetown University Law Center called for a constitutional amendment during remarks at a panel of the Federalist Society's annual conference. *See* Showcase Panel, Akhil Reed Amar, Frank H. Easterbrook, Vicki C. Jackson, Nicholas Quinn Rosenkranz & Janice Rogers Brown, *The Constitution and American Exceptionalism: Citation of Foreign Law* (Nov. 17, 2007), http://www.fed-soc.org/publications/pubID.454/ pubdetail.asp (providing audio and video recordings of the panel).

remain convinced that citation to foreign authority raises no serious legitimacy concerns whatsoever.[12]

Some international lawyers and scholars find themselves, like myself, in the uncomfortable middle of the Crossfire debate. As moderates—or "militant moderates," to borrow Professor Peter Schuck's delightful turn of phrase[13]—we recognize and take seriously the legitimacy concerns voiced by nationalists. At the same time, we agree with the internationalists that foreign authority, properly considered, can and should play an important role in constitutional interpretation. But with the increasing pressure to "choose up sides" in this increasingly divisive debate, what's a militant moderate to do?

The modest goal of this essay is to sketch out a militant moderate's take on the role of foreign and international law in constitutional interpretation—one that moves the debate beyond the Crossfire phenomenon depicted in the popular press. I begin by framing the question in terms of the broader (but often overlooked) issue that, in my view, is really driving current debate: American judges' growing participation in transnational judicial dialogue of various kinds.[14] I then briefly examine, and critique, key arguments and assumptions of both internationalists and nationalists. Finally, I sketch out a militant moderate take on the appropriate use of foreign authority in constitutional interpretation. Given the brevity of this essay, I of course do not seek to provide a definitive answer to complex questions that have been, and will continue to be, considered elsewhere in much greater depth.[15] Instead, drawing on previous scholarship, I suggest a possible analytical framework to consider some of these questions—one that may help to strike a balance between the legitimate concerns of nationalists and the equally legitimate aspirations of internationalists.

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12. My criticism of the "Crossfire phenomenon" is limited primarily to the way in which this debate has played out in the popular press and before Congress. With some exceptions, scholars on both sides of the issue have presented thoughtful, nuanced analyses of the complex issues involved. *See, e.g.*, Roger P. Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to* the Law of Other States, 59 STAN. L. REV. 1281 (2007); Comment, *The Debate over Foreign Law in* Roper v. Simmons, 119 HARV. L. REV. 103 (2005).

13. *See generally* PETER H. SCHUCK, MEDITATIONS OF A MILITANT MODERATE: COOL VIEWS ON HOT TOPICS (2006).

14. *See generally* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

15. See, for example, the superb collections of essays in recent issues of the *Harvard Law Review*, Vicki Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005), and the *Stanford Law Review*, Symposium, *Global Constitutionalism*, 59 STAN. L. REV. 1153 (2007). *See also* Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 658–59 & nn.128–38 (2007).

I. TRANSNATIONAL JUDICIAL DIALOGUE AS A FRAMING DEVICE

A militant moderate take on the debate over foreign authority in American constitutional interpretation begins by recognizing the broader phenomenon at the heart of the debate: the worldwide rise of what I have elsewhere termed "transnational judicial dialogue."[16] The subject of much scholarship and debate over the past several years, it is now a truism that "courts the world over . . . are talking to one another."[17] National, supranational, and international courts are increasingly citing and discussing at length foreign and international legal precedent on a wide range of issues. Over time, this cross-citation among the world's courts has developed into an informal kind of dialogue. Courts use judicial dialogue to engage in a sort of intellectual cross-fertilization of ideas—or as Dean Anne-Marie Slaughter has described it, a "process of collective judicial deliberation on [common legal] problems."[18]

Nor is transnational judicial dialogue limited to constitutional interpretation. We are increasingly seeing its emergence in areas as diverse as bankruptcy, antitrust, intellectual property, and defamation law.[19] The increasingly globalized nature of trade relations, the emergence of the Internet, and related phenomena are driving the world's legal systems into closer contact with one another. Judges, not surprisingly, are responding by participating in various forms of dialogue—sometimes out of necessity, sometimes out of a keen interest in learning from the experiences of their foreign counterparts.

Viewed through this broader lens, cases like *Roper*—and, to a lesser extent, *Lawrence v. Texas* and *Atkins*—seem to indicate an interest on the part of some Supreme Court Justices in the emerging transnational judicial dialogue. At a minimum, such cases reflect these Justices' desire to engage their foreign counterparts in a cross-border conversation on the relevance of international human rights standards in interpreting domestic constitutional rights. But in a broader sense, these cases may also reflect a nascent interest in transnational judicial dialogue more generally. Certainly, public comments by some members of the Court indicate a growing interest in American judges' participation in the emerging "world community" of courts.[20] They may also reflect a growing understanding of the changing

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16. *See* Waters, *supra* note 14.

17. Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 371 (1997).

18. Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 119 (1994).

19. *See, e.g.*, Waters, *supra* note 14, at 494–95, 538 (discussing transnational judicial dialogue in bankruptcy and defamation contexts).

20. *See, e.g.*, Ruth Bader Ginsburg, Assoc. Justice, U.S. Supreme Court, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Keynote Address at the Ninety-Ninth Annual Meeting of the American Society of International Law (Apr. 1, 2005), *in* 99 AM. SOC'Y INT'L L. PROC. 351, 355 (2005); Stephen Breyer, Assoc. Justice, U.S. Supreme Court, Keynote Address at the

nature of domestic courts in an increasingly globalized world—an understanding that the world's judges are emerging as key intermediaries between the domestic and international legal systems.[21]

A militant moderate takes the emergence of a globalizing judiciary, and the rise of the domestic judge as a key transnational intermediary, as givens. Moreover, the militant moderate tends to view the *Roper* debate through this broader lens, recognizing that it is not simply a debate over the relevance of foreign authority in American constitutional interpretation. In a larger sense, it is a debate over the role that U.S. courts will play in transnational judicial dialogue on a wide range of legal issues. And the outcome of the debate on constitutional interpretation will likely have spillover effects into other legal arenas (like intellectual property and defamation law), where transnational judicial dialogue is increasingly prominent.

Finally, a militant moderate recognizes that the outcome of this debate will have both internal and external implications. It will, of course, have an important impact on U.S. courts' jurisprudential approaches to constitutional interpretation and other issues of domestic law. Just as importantly, however, the outcome of the debate will play a key role in shaping the future development of U.S. courts' roles as intermediaries between domestic and international law. As I have argued elsewhere, transnational judicial dialogue is emerging as an important medium for the creation and development of international legal norms on a variety of issues.[22] To the extent that U.S. courts become active participants in transnational judicial dialogue, they can position themselves to play a powerful role in shaping and influencing the development of those norms. If they are less active in the emerging dialogue—or if they remain isolated from it—U.S. influence over the development of certain international legal norms will wane. The militant moderate thus recognizes that robust participation in transnational judicial dialogue offers both benefits and risks for U.S. courts. That recognition is coupled, however, with a firm conviction that American judges have both the capacity, and (within limits) the legal authority, to choose wisely—to shape their participation in judicial dialogue of various kinds in ways that maximize the benefits, while minimizing the risks.

II. A MILITANT MODERATE'S TAKE ON THE CURRENT CROSSFIRE DEBATE

The notion that U.S. courts can actively shape their roles as participants in transnational judicial dialogue has important implications for the current Crossfire debate on constitutional interpretation. First, it calls for a certain ratcheting down of the rhetoric, and a more nuanced presentation of

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Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003), *in* 97 AM. SOC'Y INT'L L. PROC. 265, 265–66 (2003).

21. *See* Waters, *supra* note 14, at 573–74.

22. *See, e.g.*, *id.*

arguments in the public arena by both nationalists and internationalists. For example, advocates of the robust use of foreign authority in constitutional interpretation defend *Roper* by contending that it is part of a venerable judicial tradition of respect for, and consideration of, international law in the U.S. legal system. They sometimes quote the Supreme Court's famous passage in the *Paquete Habana* case: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[23]

Nationalists, for their part, retort that reliance on foreign authority to interpret constitutional rights represents a dramatic departure from American tradition. Justice Antonin Scalia, for example, has expressed his conviction that the Founders would be "appalled" by the proposition that the Court might rely on foreign precedent and practice to strike down democratically adopted death penalty laws.[24]

For the militant moderate, the truth lies somewhere in between. While I am not at all convinced that the Founders would be appalled by the *Roper* Court's citation to international human rights standards, I am confident that they would be very, very surprised. And this is to be expected: after all, international human rights law as we know it today is largely a creature of the latter half of the twentieth century. While it is entirely possible that the Founders—and the early Supreme Court Justices—would applaud the Court's decision in *Roper*, it is also true that the *Paquete Habana* case and other historical precedents (to put it mildly) are not exactly on all fours with that decision.

In short, there is something new going on here—and that "something new" may raise all sorts of legitimacy concerns that prior courts simply have not addressed. To establish the legitimacy of the internationalist enterprise—particularly as it pertains to international human rights law—advocates of U.S. court participation in transnational judicial dialogue would do well to acknowledge that American judges (along with other courts around the world) are operating largely in uncharted waters.

Nationalists, for their part, would do well to recognize that at least in certain contexts other than human rights, U.S. courts have long been willing to consider both foreign and international law in their work. As Professor Sarah Cleveland has convincingly demonstrated, the Supreme Court—far from being a parochial isolationist court—has historically interpreted and

23. The Paquete Habana, 175 U.S. 677, 700 (1900).

24. *See, e.g.*, Antonin Scalia, Assoc. Justice, U.S. Supreme Court, U.S. Association of Constitutional Law Discussion: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005), http://www.freerepublic.com/focus/f-news/1352357/posts ("If you told the framers of the Constitution that [what the Supreme Court is] after is to . . . do something that will be just like Europe, they would have been appalled."); *cf.* Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring in part and concurring in the judgment) ("The Framers would, I am confident, be appalled by the proposition that . . . the American peoples' democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners.").

applied international law to a wide variety of legal issues.[25] Professor Steven Calabresi's research indicates similar Supreme Court practices with respect to the history of comparative law in constitutional interpretation.[26] Thus, while internationalists are occasionally guilty of overselling the historical pedigree of decisions like *Roper*, the historical precedent does suggest a longstanding judicial respect for, and willingness to take into account, foreign and international authority. Again, historical pedigree alone may not satisfy the legitimacy concerns raised by the very different, and much more robust, forms of transnational judicial dialogue emerging in the twenty-first century. But at a minimum, recent scholarship provides convincing evidence that participation in that dialogue is not quite the dramatic departure from the American democratic tradition that some nationalists might have us believe.

The notion that U.S. courts can actively shape their roles as participants in transnational judicial dialogue has a second key implication for the current Crossfire debate over constitutional interpretation. It suggests that participants in the debate should place more emphasis on the dialogic nature of these transnational judicial conversations. Instead, advocates on both sides often seem to characterize the role of foreign authority in constitutional interpretation as a sort of unidirectional monologue, in which U.S. courts are always on the receiving end. Internationalists trumpet the educational (or "persuasive") benefits of this one-way monologue, arguing that we have much to learn from foreign legal systems. Nationalists, for their part, insist that the monologue amounts to little more than the judicial imposition of "'foreign moods, fads, or fashions on Americans.'"[27]

The militant moderate, by contrast, emphasizes what I have elsewhere termed the *co-constitutive nature* of transnational judicial dialogue on constitutional interpretation.[28] The relationship between and among courts participating in dialogue is more properly conceived of as a co-constitutive, or synergistic, relationship in which domestic courts actively participate in the dynamic process of developing transnational and international legal norms. As Dean Harold Koh has noted, courts "help[] . . . to develop the norms that become part of the fabric of emerging international society,"[29] and, at the same time, help to ensure that these norms "seep into, are internalized, and become entrenched in domestic legal and political processes."[30] In other words, transnational judicial dialogue—whether on

25. *See* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 33–63 (2006).

26. *See* Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

27. Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring)).

28. *See* Waters, *supra* note 14, at 492; *supra* text accompanying notes 16–17.

29. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2655 (1997) (book review).

30. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 205 (1996).

constitutional interpretation or otherwise—serves as the engine by which domestic courts collectively engage in the co-constitutive process of international norm creation and internalization. And domestic courts participating in that dialogue can serve as active—and proactive—intermediaries between their own domestic legal systems, on the one hand, and foreign and international legal systems, on the other.

The co-constitutive nature of transnational judicial dialogue opens up the possibility that American judges might serve not only as *importers* of foreign and international legal norms, but also as transnational *champions* of American legal norms. Take the emerging transnational judicial dialogue on hate speech as one example.[31] The U.S. legal system diverges sharply from European legal systems in offering liberal protections for hate speech. U.S. courts might react to this divergence in two ways. First, a court adopting a "unidirectional monologue" perspective would take the view that because American and European speech norms are so fundamentally different, European legal precedent and practice on hate speech has no educational or persuasive value. The court would conclude that participation in judicial dialogue with European courts (through citation and discussion of European legal precedents) would likewise have no value, and it would choose nonparticipation.

A U.S. court adopting a "co-constitutive dialogue" approach, by contrast, would recognize that there might still be value to participation in transnational judicial dialogue on hate speech. By citing, discussing, and, where appropriate, *distinguishing* European authority on hate speech, the court could effectively champion American First Amendment norms on the transnational and international planes. This approach would offer at least two possible benefits. First, the U.S. court's opinion would have educational/persuasive value for judges in developing legal systems around the world whose laws on the issue are still in flux—and who may well choose to adopt the more liberal American model over the more restrictive European model. Second, and more importantly, active U.S. court participation in the dialogue would ensure a robust American voice in the international discourse on hate speech, encouraging emerging international human rights standards on speech to develop in ways that remain sensitive to American First Amendment concerns.

III. RECONCEPTUALIZING THE CROSSFIRE DEBATE: A MODEST PROPOSAL

One of the goals of this essay is, in a sense, to recharacterize the question at the heart of the Crossfire debate: Should U.S. courts—following the lead of courts throughout the common law world—participate in the emerging (and increasingly robust) transnational judicial dialogue on constitutional interpretation? For the militant moderate, the answer is, "It depends." In the militant moderate's view, the legitimacy of transnational judicial dialogue on constitutional interpretation depends entirely on how domestic

31. *See* Waters, *supra* note 14, at 531–38.

courts go about participating in and shaping that dialogue. The militant moderate thus focuses on *methodology*, believing that the entire enterprise is only as legitimate as the underlying methods used by the courts to build the dialogue.

In other words, the key questions that we should be asking are: *How* are courts taking into account foreign and international legal norms in their work? What interpretive techniques are they using? Which of those techniques have proven effective, and which can be considered "legitimate"? And how do we think about issues of methodological "legitimacy" in this context?

My previous work on the role of international treaties in constitutional interpretation offers one possible analytical framework for exploring these questions.[32] I examined all decisions over a seven-year period from the constitutional courts of Australia, Canada, New Zealand, the United States, and the Commonwealth Caribbean, in which the courts relied on the International Covenant on Civil and Political Rights (ICCPR) in interpreting domestic constitutional rights.[33] I found that the interpretive techniques relied on by the various courts tend to fall on a sort of spectrum—from the modest use of international treaties as a kind of value added, to a much more radical approach that would require harmonization of domestic constitutional law with international human rights norms.[34]

Current Supreme Court practice with respect to treaties has thus far been limited to the most conservative technique: the use of human rights treaties to gild the domestic lily.[35] In this technique, a court points to international treaty provisions as a kind of value added—that is, as additional support for its interpretation (based on domestic sources of law) of a constitutional provision. The internal logic of the court's opinion is rooted in domestic sources; for that reason, the integrity of the opinion would stand even if the discussion of treaties were excised entirely. Indeed, discussion of international law often seems to be tacked on as a sort of afterthought to a detailed discussion of domestic law.

Justice Kennedy's opinion in *Roper*, at first blush, is a quintessential example of the gilding the lily technique.[36] He first concluded that a domestic consensus existed supporting abolition of the juvenile death

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32. *See* Waters, *supra* note 15, at 694–704.

33. I also examined the role of treaties in shaping the common law, and in statutory interpretation. *Id.* at 652–91.

34. *See id.*

35. *See id.* at 654–60.

36. Roper v. Simmons, 543 U.S. 551 (2005). Another example is Justice Ruth Bader Ginsburg's concurring opinion in *Grutter v. Bollinger*, in which she used human rights treaties to buttress the proposition in the majority opinion that the use of race in law school admissions decisions "'must have a logical end point.'" 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (quoting the majority opinion). She noted that the majority's approach "accords with the international understanding of the office of affirmative action," and she quoted human rights treaty provisions as evidence of this "international understanding." *Id.*; *see also* Waters, *supra* note 15, at 655 (discussing Justice Ginsburg's approach).

penalty. He then cited the ICCPR and the Convention on the Rights of the Child as evidence of an international consensus supporting abolition. He contended that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions."[37] Taken at face value, the "confirmatory role" that Justice Kennedy ascribes to international opinion seems to be a fairly innocuous kind of international "window dressing" for an opinion otherwise firmly rooted in domestic law. (Of course, whether Justice Kennedy's opinion in *Roper* should be taken at face value is another matter altogether, one that is beyond the scope of this essay but that I and other scholars have explored in previous work.)[38]

Further along the spectrum is a somewhat more aggressive technique for utilizing international treaties in constitutional interpretation: a technique that I call "contextual interpretation." Rather than simply gilding the lily with international law sources, courts utilizing the contextual approach tightly interweave discussion of international treaties into their analysis of domestic legal sources. The courts do not consider the treaties to be binding; instead, they rely on them for their persuasive value, considering them useful in elucidating the meaning of domestic constitutional provisions.

The Canadian Supreme Court frequently utilizes the contextual interpretation technique in interpreting certain limitations provisions in the Canadian Charter of Rights and Freedoms. For example, Section 7 of the Charter guarantees "[e]veryone . . . the right to life, liberty and security . . . and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[39] The Canadian Supreme Court frequently utilizes the ICCPR and other treaties to interpret the scope of the "fundamental justice" limitation. International human rights law is used for its persuasive value, often tipping the balance in favor of a rights-conscious interpretation of the Charter.[40] As former Justice Claire L'Heureux-Dubé commented in describing the contextual approach,

> [I]n seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations [as] obligations [per se]; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.[41]

37. *Roper*, 543 U.S. at 578.

38. *See, e.g.*, Waters, *supra* note 15, at 658–60 & nn. 126–43; Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005).

39. Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 7 (U.K.).

40. For a thorough discussion of the Canadian approach, see Waters, *supra* note 15, at 673.

41. Suresh v. Canada, [2002] S.C.R. 3, 38 (Can.).

Finally, at the far end of the spectrum is a much more radical technique known as the constitutional *Charming Betsy*[42] canon. In this technique, a domestic constitutional provision is construed in conformity with the country's international human rights law obligations. Advocates of the canon argue that, "[w]here the [c]onstitution is ambiguous, [a] [c]ourt should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights."[43]

In most common law countries, the constitutional *Charming Betsy* canon has not yet made its way into the mainstream of judicial practice, instead remaining the object of human rights amicus briefs and the occasional dissenting opinion. One court, however, has utilized the technique in several opinions: the British Privy Council, which until recently served as the final court of appeal on constitutional matters for several countries in the Commonwealth Caribbean. The Privy Council has utilized international human rights treaties as more than mere persuasive evidence of the international community's normative commitments (unlike the Canadian Supreme Court). Instead, it has asserted that the treaties represent binding obligations on domestic courts in the region to interpret "ambiguous" constitutional provisions consistently with international law.[44]

My goal here is not to critically assess these interpretive techniques, nor to express views as to which techniques might be legitimate for use by U.S. courts (both questions which I have taken up at length elsewhere).[45] Instead, I have briefly described a range of available techniques simply to make a straightforward point—but one that is too often overlooked in the current Crossfire debate. Judicial participation in transnational judicial dialogue on constitutional interpretation is not a straightforward always/never, for/against proposition. Instead, dialogue takes a variety of forms, and courts worldwide have developed a range of techniques—some quite modest, others fairly radical—to participate in that dialogue. Similarly, American judges participating in dialogue can choose among the various techniques—and perhaps develop new approaches that are uniquely appropriate to American legal and democratic traditions.

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42. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

43. Kartinyeri v. Commonwealth (1998) 195 C.L.R. 337, 417 (Austl.) (Kirby, J., dissenting). Justice Harry Blackmun also urged such an approach, commenting, "it . . . is appropriate to remind ourselves that the United States is part of the global community . . . and that courts should construe our statutes, our treaties, and our Constitution, where possible, consistently with 'the customs and usages of civilized nations.'" Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 49 (1994) (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).

44. *See, e.g.*, Watson v. The Queen [2004] UKPC 34, [2005] 1 A.C. 472, 489 (P.C.) (appeal taken from Jam.) (using international law to interpret provisions of Jamaican Constitution with regard to law requiring mandatory death penalty); Lewis v. Attorney Gen. of Jam., [2001] 2 A.C. 50, 80–85 (P.C.) (appeal taken from Jam.) (U.K.) (requiring that Jamaica stay execution pending decision of international tribunal).

45. *See* Waters, *supra* note 15, at 652–99.

CONCLUSION

Since *Roper*, the Crossfire debate between nationalists and internationalists has both dominated and muddied public discourse over the role of foreign authority in constitutional interpretation. More importantly, that debate has prevented the development of a rich, nuanced discourse over the role of American judges in the emerging transnational judicial dialogue on a wide range of issues. This essay represents a modest effort to move beyond the Crossfire debate by reconceptualizing it, and by offering a more nuanced, "militant moderate" alternative to existing nationalist and internationalist conceptions. Unlike those conceptions, the militant moderate approach focuses on methodology: it recognizes the existence of a range of possible interpretive approaches that courts might use to participate in dialogue on constitutional interpretation. In so doing, it urges courts to view the enterprise as a true dialogue among the world's courts: as participants in the dialogue, American judges can serve not only as internalizers of foreign norms, but also as champions of American norms at the transnational level.

Of course, shifting the terms of the debate in this way does not obviate the legitimacy issues inherent in any discussion of U.S. courts' citation to foreign authority in constitutional interpretation. It can, however, shift the normative debate in the popular discourse onto more helpful ground. The militant moderate approach urges those involved in the public debate on these issues to abandon the always/never, for/against dichotomies of the Crossfire phenomenon. It urges them instead to adopt a more nuanced analysis of "when" and "where"—that is, in which specific contexts, and using which specific interpretive techniques—citation to foreign authority may be appropriate.