Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts

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I. INTRODUCTION

One of the great legacies of the New Haven School was its early recognition of the tremendous dynamism and complexity of the international lawmaking process. Its proponents wisely rejected both Austinian positivism and the traditional conception of “law” as a dichotomy of “national” and “international” legal rules. Instead, the policy-oriented jurisprudence of the New Haven School recognized and embraced the interactivity of a multiplicity of decisionmakers in shaping the international legal regime. Moreover, in defining law as an iterative process of authoritative decisionmaking, the New Haven School recognized that authoritative decisions need not necessarily come from official bodies such as courts, tribunals, or legislatures. Instead, its proponents argued, international law should be understood as a policymaking

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process in which the fundamental values of the international community help to define the content of, and to legitimate, international legal rules.2

These insights—groundbreaking at the time of the New Haven School’s founding—are today so well-entrenched in modern international legal theory that they are often taken for granted. Indeed, in many respects twenty-first century theory represents an elaboration upon the fundamental building blocks of the New Haven School.3 For example, as their names suggest, both the Transgovernmentalism and Transnational Legal Process Schools take as their starting point the New Haven School’s rejection of traditional dichotomies between “national” and “international.” These Schools emphasize instead the increasingly transnational nature of law and lawmaking.4 Moreover, the New Haven School observed that states are the primary—but certainly not the exclusive—actors in shaping international legal rules. As I discuss more fully below, scholars of both transgovernmentalism and transnational legal process take this insight a step further, explicitly recognizing the key influence of a wide variety of sub-state or non-state actors on the international lawmaking process. Thus, as a descriptive construct, the policy-oriented approach of the New Haven School has had an important and lasting influence on twenty-first century international law theory.5

From its inception, however, proponents of the New Haven School were interested not merely in providing a descriptive account but also in making strong normative claims.6 This is where the theory has been notably less successful. According to the New Haven School, the legitimacy of international legal rules depends on the extent to which they advance certain normative commitments, or fundamental values, of the international community.7 But its critics contend that by making consonance with a certain set of “fundamental goals” the yardstick by which legitimacy is measured, the New Haven School effectively subordinates “law” to “policy.”8 And in so doing, as one of its earliest proponents later acknowledged, the New Haven

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2. See id.

3. Modern theory also draws heavily on the New Haven School’s Harvard counterpart, the Transnational Legal Process School. For descriptions of the various schools of international legal theory, see generally Steven R. Ratner, Appraising the Methods of International Law: A Prospectus for Readers, 93 AM. J. INT’L L. 291 (1999). While the New Haven School’s policy-oriented jurisprudence focuses on “both what actors say and what they do,” the Transnational Legal Process School emphasizes the role of law itself “in constraining decision makers and affecting the course of international affairs.” Id. at 294.


6. See id.

7. See id.

8. The theory thus gives credence to the notion “that a clear and specific rule of law or treaty obligation may be disregarded if it is not in accord with” those values. Symposium, McDougall’s Jurisprudence: Utility, Influence, Controversy, 79 AM. SOC’Y INT’L L. PROC. 266, 271-72 (1985) (remarks by Oscar Schachter).
School’s normative construct “virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law.”

As the Transnational Legal Process and Transgovernmentalism Schools reach maturity a decade after their emergence, they offer the same promise, and face the same challenges, as the New Haven School did in its heyday. Both Schools have excelled in providing rich descriptive accounts of the modern process of international lawmaking. The founder of the Transnational Legal Process School, Dean Harold Hongju Koh, observes:

As sovereignty has declined in importance, global decisionmaking functions are now executed by a complex rugby scrum of nation-states, intergovernmental organizations, regional compacts, nongovernmental organizations, and informal regimes and networks. . . New forms of dispute resolution, executive action, administrative decisionmaking and enforcement, and legislation have emerged as part of a transnational legal process that influences national conduct, transforms national interests, and helps constitute and reconstitute national identities.

As descriptive constructs, both transnational legal process and transgovernmentalism (like the theories of their New Haven School predecessor) have made significant contributions to scholarly understanding of the formation of international legal rules, and of the transformation taking place in the process of domestic compliance with those rules.

To date, however, proponents of both Schools have concerned themselves primarily with providing thick descriptions of (and, in the case of the Transnational Legal Process School, “strategic plans of action” for) the “complex rugby scrum” of international lawmaking. They have shown less interest in mounting a fully articulated normative defense of the theories. Such a defense must address the various legitimacy questions that arise as the “rugby scrum” takes the place of traditional lawmaking processes: for example, as the key players become more diverse and the emerging legal rules become softer in form and more complicated to identify and apply.

In short, the jury is still out on the value of transgovernmentalism and transnational legal process as normative constructs, and much work remains to be done in exploring these questions. Should global decisionmaking be the result of a “complex rugby scrum”? Which subjects are appropriate for “legal transnationalization,” and which should be left exclusively in the hands of domestic lawmakers? Should the “soft law” rules emerging from the rugby

9. Id. at 267. Moreover, the values identified by proponents of the New Haven School—the maintenance and advancement of international public order, for example—seem too vague and subjective to serve as useful yardsticks. Indeed, in the decade following its emergence, the New Haven School’s understanding of the international community’s normative commitments or fundamental values closely tracked U.S. interests—thus further undermining the normative claims of the theory. See id.


11. The Transnational Legal Process School is particularly interested in the question of state compliance with international law. In Dean Koh’s conception, “transnational legal process presents both a theoretical explanation of why nations obey and a plan of strategic action for prodding nations to obey.” Id. at 2655.

scrum enjoy the same legitimacy and force as "hard law" rules emerging from treaty negotiations and other traditional international lawmaking processes?

The goal of this Article is to explore the potential of transnational legal process and transgovernmentalism as normative constructs, by bringing a narrow lens to an increasingly influential part of international law's rugby scrum: the role of transnational judicial dialogue among the world's domestic courts. Both transnational legal process and transgovernmentalism envision a key role for domestic courts in shaping international legal rules, and in ensuring state compliance with international law. Accordingly, proponents of the theories urge U.S. courts to participate in transnational judicial dialogue with foreign and international courts on a wide range of issues. But transnational judicial dialogue raises a host of questions surrounding the democratic legitimacy of this transformation of the judicial role. Proponents of transnational judicial dialogue claim that U.S. court participation in dialogue will improve judicial decisionmaking, promote uniformity in the development of transnational legal rules, and greatly enhance domestic enforcement of international law. But they give too little credence to concerns that transnational judicial dialogue can be deeply anti-democratic. In the view of transnational judicial dialogue's critics, dialogue (particularly in the realm of constitutional interpretation) can in fact create an "international countermajoritarian difficulty," in which domestic courts impose democratically illegitimate "foreign" norms on unwilling—and unsuspecting—domestic audiences.

In this Article, I explore the claims of both transnational legal process and transgovernmentalism with respect to transnational judicial dialogue. I first provide an account of the descriptive claims of both Schools with respect to the role of domestic courts and transnational judicial dialogue in the international legal regime. I explore to what extent those claims are based on a particular set of normative commitments or assumptions, what those normative commitments or assumptions might be, and whether their normative accounts provide a basis for the "legitimacy" of norms created through transnational judicial dialogue. I then consider how the theories might go about addressing the international countermajoritarian legitimacy concerns that some critics have voiced with respect to courts' emerging roles as transnational actors. In so doing, I return to first principles in the debate over the countermajoritarian role of courts: I explore whether one of the seminal works on the domestic countermajoritarian difficulty—John Hart Ely's


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Democracy and Distrust—might contribute important insights to the debate over transnational judicial dialogue’s legitimacy.

II. THE ROLE OF TRANSNATIONAL JUDICIAL DIALOGUE IN THE “NEW” SCHOOLS: TRANSGOVERNMENTALISM AND TRANSNATIONAL LEGAL PROCESS

Both the Transgovernmentalism and Transnational Legal Process Schools envision an important role for domestic courts and for transnational judicial dialogue in the emerging international legal regime. Transgovernmentalists, for example, view courts as key actors in developing a “global community of law.” Transgovernmentalism begins from the premise that the “unitary state” of an earlier international law era is breaking down into its component parts: It is adopting a “disaggregated sovereignty” model whose key building block is the transgovernmental network. While much of the transgovernmentalist scholarship to date has focused on networks among regulatory agencies, Anne-Marie Slaughter, a pioneering transgovernmentalism theorist, has devoted considerable attention to the emergence of transgovernmental judicial networks among the world’s domestic courts. She argues that domestic courts, like their regulatory counterparts, are developing robust worldwide networks on a wide range of legal issues. In her work, Slaughter has chronicled the growing phenomenon and importance of transnational judicial dialogue, which she refers to as “transjudicial communication.” Slaughter posits that by engaging in dialogue, the world’s domestic courts “are bound by multiple ties, both formal and informal, but ultimately by none so powerful as a common commitment to the rule of law. The meshing of that commitment, through increasingly

17. In applying Ely’s insights to transnational judicial dialogue, I am building on and further exploring the ideas presented by Anupam Chander in his essay, Globalization and Distrust, 114 Yale L.J. 1193 (2005), in which he explored the relevance of Ely’s theory to transnational legal process. This Article will also draw upon my previous scholarship on transnational judicial dialogue. See Melissa A. Waters, Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties, 107 Colum. L. Rev. 628 (2007) [hereinafter Waters, Creeping Monism]; Waters, Mediating Norms, supra note 13.
19. See Slaughter, The Real New World Order, supra note 18, at 184 (“The state is not disappearing, it is disaggregating into its separate, functionally distinct parts. These parts—courts, regulatory agencies, executives, and even legislatures—are networking with their counterparts abroad, creating a dense web of relations that constitutes a new, transgovernmental order.”). Slaughter has called transgovernmental networks “a blueprint for the international architecture of the 21st century.” Id. at 197; see also Anne-Marie Slaughter, Governing the Global Economy Through Government Networks, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 177, 204 (Michael Byers ed., 2000).
22. Id. at 102.
direct interaction, is more likely to establish an international rule of law than a single international court."

Thus, in Slaughter’s view, the emerging international governance of the new world order primarily will be based not on international institutions—including international courts—but rather on communication and coordination among domestic institutions—and in particular, on transjudicial communication among domestic courts. She argues, “International government requires common formal institutions; international governance is more likely to require communication and coordination among existing institutions. Courts are a fine place to start.”

Slaughter predicts, moreover, that domestic court participation in transnational judicial dialogue will produce a rich, diverse set of legal rules to govern the emerging international legal regime. She argues:

The global community of law emerging from judicial networks will more likely encompass many rules of law, each established in a specific state or region. No high court would hand down definitive global rules. National courts would interact with one another and with supranational tribunals in ways that would accommodate differences but acknowledge and reinforce common values.

Transnational judicial dialogue among domestic courts thus serves as a key component of the transgovernmentalists’ “new world order.” In the transgovernmentalists’ descriptive account, dialogue is an essential ingredient in the formation of both formal and informal judicial networks. Dialogue thus plays an important role in determining both how international legal rules are shaped and how they are internalized into domestic legal systems. Moreover, transgovernmentalists predict that the legal norms emanating from these networks will be “deeply pluralist and contextualized,” capable of accommodating national differences while reinforcing common values.

The Transnational Legal Process School, for its part, sees an equally robust role for judicial dialogue in an emerging “transnational” legal system. Developed principally by Harold Hongju Koh, transnational legal process posits that international legal rules are shaped through a three-phase process of interaction, interpretation, and internalization. In this view, “[o]ne or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global norm applicable to the situation.” Through repeated participation in this process, “international legal norms seep into, are internalized, and become entrenched in domestic legal and political processes.” Key to the interaction/interpretation/internalization process are so-called transnational “norm entrepreneurs” and “issue networks”—individuals and groups who, through advocacy on behalf of a particular issue, help both to shape emerging

23. Id. at 137.
24. Id.
25. Slaughter, The Real New World Order, supra note 18, at 189.
26. Slaughter, Judicial Globalization, supra note 18, at 1124 (explaining that judicial networks are “forging a deeply pluralist and contextualized understanding of human rights law”).
international legal norms and to operationalize those norms into domestic legal systems.  

Viewed through a transnational legal process lens, transnational judicial dialogue serves several important functions. First, courts participating in dialogue act as key “transmission belts” for the entrenchment of international legal norms into domestic statutory and constitutional regimes. For example, transnational norm entrepreneurs rely heavily on what Koh describes as “transnational public law litigation”—that is, on legal advocacy before domestic courts—to advance their strategic aims. For many norm entrepreneurs, those aims include the incorporation of international law (particularly international human rights law) into domestic law. Indeed, Koh and other Transnational Legal Process School adherents have appeared frequently as amici (or even as attorneys of record) before U.S. courts on a wide range of issues, from the Haiti litigation to the death penalty to same-sex marriage to the treatment of Guantanamo Bay detainees. In all of these cases, they have urged the courts to serve as “transmission belts”—that is, to utilize international human rights standards, as interpreted by foreign and international courts, in interpreting and applying U.S. law.  

Second, domestic courts participating in dialogue serve as important “law-declaring fora,” articulating and interpreting norms for use by other transnational actors in other fora. For example, norm entrepreneurs may seek a ruling from a court, involving both a judicial articulation of the relevant international norm, as well as a judicial declaration that the norm has been violated by one or more transnational actors. The norm entrepreneur can then use this judicial declaration as a “bargaining chip” to seek enunciation and further elaboration of the norm in other “law-declaring fora”—for example, legislatures, international organizations, or other domestic or international tribunals. Thus, Koh argues, domestic judicial decisions “no longer represent final stops, only way stations, in a transnational legal process of ‘complex enforcement,’ triggered . . . by transnational public-law litigation.”  

Finally, in the Transnational Legal Process School’s view, courts participating in transnational judicial dialogue create “interpretive

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34. See Harold Hongju Koh, Transnational Public Law Litigation, 100 YALE L.J. 2347, 2371 (1991) (noting that plaintiffs engaging in transnational public law litigation have “a prospective focus, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes,” as well as a “strategic awareness of the transportability of those norms to other domestic and international fora for use in judicial interpretation or political bargaining”).  
35. Koh, Transnational Legal Process, supra note 4, at 199.
communities” that engage in an iterative process of judicial interaction, interpretation, reinterpretation, and domestic internalization of a given international norm. The worldwide trend toward abolition of the death penalty serves as a case in point. Transnational judicial dialogue proved instrumental in creating a judicial “interpretive community” that eschewed the death penalty. Judicial opinions from powerful domestic and regional courts like the European Court of Human Rights interpreted human rights treaties and domestic constitutions to require abolition of the death penalty. Through dialogue, other domestic courts around the world considered those opinions in their own rulings, and adopted similar interpretations of the relevant human rights treaties and of their own domestic constitutions. Thus, through a Transnational Legal Process School lens, domestic courts—through transnational judicial dialogue—play a crucial role in shaping the emerging transnational legal system, and in ensuring internalization of the transnational legal system’s norms into domestic legal systems.

III. NORMATIVITY IN THE TRANSNATIONAL LEGAL PROCESS AND TRANSGOVERNMENTALISM SCHOOLS: DOES TRANSNATIONAL JUDICIAL DIALOGUE PRODUCE “LEGITIMATE” NORMS?

As descriptive constructs, both transnational legal process and transgovernmentalism provide rich accounts of the role of transnational judicial dialogue in shaping the emerging global legal regime. But do they make normative claims regarding transnational judicial dialogue, as well? For example, do the theories provide a response to critics who raise concerns regarding the legitimacy of transnational judicial dialogue? In this regard, there are at least two kinds of “legitimacy” claims that the theories might support: first, a claim that the international legal norms created by transnational judicial dialogue are “legitimate” on the international plane; and second, a claim that the norms internalized by domestic courts are “legitimate” on the domestic plane. I will first describe the normative commitments or assumptions of both theories, and then explore to what extent the theories might provide a normative defense of the legitimacy of norms created and entrenched through transnational judicial dialogue.

With respect to the Transnational Legal Process School, the normative commitments of its proponents are clear: They embrace normativity, arguing that transnational legal process itself “is normative, dynamic, constitutive.” For Transnational Legal Process School scholars, the goal is not simply a transnational actor’s compliance with international law, but rather, its obedience. Transnational actors provoking an interaction with another actor “seek[] not simply to coerce the other party, but to internalize the new interpretation of the international norm into the other party’s internal

38. See Waters, Mediating Norms, supra note 13, at 506.
normative system. The aim is to ‘bind’ that other party to obey the interpretation as part of its internal value set.”

Simply put, transnational legal process aims not simply to change behavior, but to change minds. Thus under the Transnational Legal Process School view, it is the dialogic process of transnational judicial dialogue itself—of interaction, interpretation, and internalization among the world’s judges—that ensures the generation and proliferation of norms that are “legitimate” on the international plane. Moreover, the norms internalized into domestic legal systems through transnational judicial dialogue are legitimate precisely because they are the product of this three-step process, which transforms “external sanction[s]” into domestic “internal imperative[s].”

The normative assumptions or claims of the Transgovernmentalism School with respect to transnational judicial dialogue are less clear. Slaughter, for example, suggests that her theory aims only to provide a descriptive account of the emerging international legal system. Slaughter’s conception of dialogue is grounded in the neo-realism of her liberal internationalist approach to international law, which by its own terms does not attempt to articulate a moral theory of international law. She draws a distinction between procedural rules and substantive law rules, and suggests that the former can be value-neutral. Under this view, transgovernmentalism simply provides a neutral, empirical account of transnational judicial dialogue and its influence on domestic courts’ emerging roles on the international plane. That empirical account emphasizes procedural consensus among like-minded courts, rather than assuming (much less requiring) moral consensus as to the content of the norms created through dialogue.

Some critics of the Transgovernmentalism School’s approach, however, contend that both the theory and its claims regarding transnational judicial dialogue are in fact grounded in an implicit set of normative commitments. Alex Mills and Tim Stephens, for example, have argued that underlying the transgovernmentalist conception of transnational judicial dialogue is a commitment to the concept of dialogue based on a “free market of ideas.” In Mills’s and Stephens’s account, transgovernmentalists assume that by

40. Id.
41. See Chander, supra note 12, at 1229.
42. See id.
43. See id. (quoting Harold Hongju Koh, How is International Human Rights Law Enforced?, 74 IND. L.J. 1397, 1402 (1999)).
44. Other scholars have criticized this aspect of Slaughter’s work. See, e.g., Christian Reus-Smit, The Strange Death of Liberal International Theory, 12 EUR. J. INT’L L. 573 (2001). Slaughter’s neutral approach can be contrasted to other scholars who have attempted to develop a normative construct for the emerging international legal regime. See, e.g., ALLEN BUCHANAN, JUSTICE, LEGITIMACY AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW (2004).
45. Slaughter and other transgovernmentalists argue that the emerging transnational judicial dialogue will “likely encompass many rules of law . . . . National courts would interact with one another and with supranational tribunals in ways that would accommodate differences but acknowledge and reinforce common values.” Slaughter, The Real New World Order, supra note 18, at 189.
46. See Alex Mills & Tim Stephens, Challenging the Role of Judges in Slaughter’s Liberal Theory of International Law, 18 LEIDEN J. INT’L L. 1, 27 (2005) (“Slaughter’s focus on ostensibly ‘neutral’ procedure masks a commitment to a normative agenda . . . .”).
47. Id. at 28.
participating in the market of ideas, the world's judges will, through transnational dialogue, develop an optimal set of international legal rules.\textsuperscript{48} In their view, transgovernmentalists have replaced international law's faith in international institutions with faith in free market mechanisms. They argue, "If Slaughter 'domesticates' international law, it is a domestication to the free-market model of domestic governance."\textsuperscript{49} Thus in the view of some of its critics, the Transgovernmentalism School's stated commitment to a value-neutral approach masks a deeper commitment to "the idea that moral questions are susceptible to a market system, to a sort of economic calculus"\textsuperscript{50}—one that is able to calculate moral values themselves.

Whether based on a normative commitment to a transnational "dialogic process" or a judicial "marketplace of ideas," both the Transnational Legal Process and Transgovernmentalism Schools share an optimistic faith in the ability of domestic courts—through dialogue—to help shape an efficient and just "new world order." What is less clear is whether either theory might provide an adequate response to the numerous critics of transnational judicial dialogue, who argue that dialogue produces international legal norms that are illegitimate on both the international and the domestic planes.\textsuperscript{51} I will consider both arguments in turn.

First, transnational judicial dialogue raises legitimacy questions on the international plane: For example, are the international legal norms created and shaped through the dialogic process representative of the consensus views of a truly "global community of law"? Even assuming that the descriptive accounts of transnational legal process and transgovernmentalism with respect to transnational judicial dialogue are accurate, the content of the norms created by such dialogue is normatively suspect. Transnational judicial dialogue, at least as it is currently constituted, is at best a partial dialogue. The "interpretive community" of domestic courts participating in the dialogue is limited primarily to courts in those countries with strong traditions of independent judiciaries and respect for the rule of law.\textsuperscript{52} Common-law courts, with their rich tradition of citing and discussing foreign legal precedent, are also more likely to be active participants in the dialogue than courts from the civil law tradition. The result of this partial dialogue is that a relative handful of courts in a handful of (mostly rich Western) countries have an outsized influence over the dialogue taking place—and over the content of the norms emerging from that dialogue. Indeed, I have argued elsewhere that a small number of domestic courts act as powerful "repeat players" in transnational judicial dialogue on human rights issues: As repeat players in the dialogue,

\begin{itemize}
  \item \textbf{48.} See id.
  \item \textbf{49.} Id.
  \item \textbf{50.} Id. at 29.
  \item \textbf{52.} Indeed, much of the scholarly research on transnational judicial dialogue focuses primarily on courts in wealthy Western democracies. See, for example, the sources cited in Waters, Mediating Norms, supra note 13, at 491-97 nn.19-40.
\end{itemize}
they actively export their own countries' norms to weaker courts, who then internalize those foreign norms into their own domestic legal systems.\footnote{53}{See Waters, Mediating Norms, supra note 13, at 524-26 (describing norm export in death penalty dialogue).}

The descriptive accounts of both transnational legal process and transgovernmentalism themselves suggest likely shortcomings in the legitimacy of international legal norms created through judicial dialogue. Transnational legal process, for example, emphasizes the key role of "transnational norm entrepreneurs" in articulating and shaping international legal norms, and in operationalizing those norms into domestic legal systems. But norm entrepreneurs are likely to be more active before some domestic courts than before others. In the Canadian and U.S. courts, for example, human rights law clinics and NGOs actively promote the application of international human rights standards in interpreting domestic law; in many other countries, however, such entities are much weaker or even non-existent, and the opportunities for advocacy before domestic courts are much more limited. In countries where transnational norm entrepreneurship before the courts is particularly well-developed, judges are more likely to participate in the global judicial conversation—thus increasing the likelihood that their voices will become influential in that conversation.

Transgovernmentalism, for its part, implicitly recognizes the partial nature of transnational judicial dialogue (though not necessarily its implications for the legitimacy of the norms emerging from that dialogue). The theory is based on the assumption that liberal democracies are more likely to engage each other at the transnational level; thus, its proponents recognize that "a true community of law is likely to be limited, at least in the short and medium term, to groups of countries or regions with a strong domestic tradition of the rule of law."\footnote{54}{Laurence R. Helfer & Anne-Marie Slaughter, Toward a Theory of Effective Supranational Adjudication, 107 YALE L.J. 273, 370 (1997).} In the Transgovernmentalism School's view, the interpretive community of judges participating in dialogue is likely to be similarly limited to like-minded courts hailing from liberal democracies. But this partial dialogue has serious implications for the legitimacy of both the dialogue itself, and the norms emerging from it. Just as "the attractiveness of the concept of a 'community of law' rather depends on whether one is inside or outside the community,"\footnote{55}{Mills & Stephens, supra note 46, at 27-28.} so too does the attractiveness of a transnational dialogue taking place solely among courts who are "inside" the community. Moreover, to the extent that "international" legal norms derive from such an "insider" judicial dialogue, the legitimacy of transnationalists' claims that those norms are products of a global \textit{moral} consensus will be undermined. In short, until all of the world's courts can participate in the global judicial conversation on an equal footing, one must continue to question claims that international legal rules emerging from that conversation have universal application or enjoy universal "legitimacy."

In addition to international legitimacy concerns, transnational judicial dialogue raises important concerns regarding legitimacy on the domestic plane. Critics have charged, for example, that judicial dialogue may create a
so-called "international counter-majoritarian difficulty" when courts internalize into domestic law norms created and shaped through dialogue. The domestic counter-majoritarian difficulty describes the problem of reconciling the need for democratic institutions to be responsive to the popular will with the concomitant need for a branch of government that can prevent the majority from infringing on the rights of the minority. In domestic legal systems, various kinds of checks ensure that courts do not overstep the proper boundaries of their roles as counter-majoritarian institutions. Roger Alford argues that an international counter-majoritarian difficulty exists when domestic courts attempt to mediate between conflicting domestic and international norms. When domestic courts rely on international norms in reviewing domestic law, there is a risk that the traditional counter-majoritarian difficulty will be exacerbated. For this reason, Alford contends that the international counter-majoritarian difficulty renders any judicial consideration of international norms normatively suspect.

Concerns about the international counter-majoritarian difficulty may undermine the normative claims of both the Transnational Legal Process and Transgovernmentalism Schools. The Transnational Legal Process School, for example, suggests that norms generated by transnational judicial dialogue are legitimate within the domestic context because they are part of a dialogic process in which courts and other domestic actors "interact, interpret, and internalize" a given norm, thus turning mere "compliance" into willing "obedience." In short, an internalized norm is legitimate because it is the product of "buy in" from a variety of domestic actors engaged in the transnational legal process. While this account may explain why domestic political actors can legitimately internalize norms generated by transnational legal process, it does not fully explain why courts may take on such a role. After all, as counter-majoritarian institutions, domestic courts may adopt a given norm into domestic law before there has been sufficient "internalization" or buy-in from other domestic actors—that is, before the interaction/interpretation/internalization process has run its course and produced a willing "obedience" to the norm in the domestic society as a whole. At a minimum, then, the international counter-majoritarian difficulty suggests that domestic courts should not serve as the primary actors in internalizing foreign norms—or that they should be cautious in internalizing a given norm without significant prior engagement of other domestic actors in the transnational legal process generating that norm.

The international counter-majoritarian difficulty poses significant questions for the transgovernmentalist account of transnational judicial dialogue as well. To the extent that its critics are correct that the theory is grounded in a normative commitment to a transnational judicial "free market of ideas," the international counter-majoritarian difficulty raises questions as to

57. Alford, supra note 15, at 58, 68 (citing conflicting international and U.S. norms in both the hate speech and death penalty contexts as examples where the international counter-majoritarian difficulty is present).
58. See id. (discussing the misuse of international norms in constitutional interpretation).
just how freely domestic courts may legitimately choose among the competing "ideas," or norms, presented to them. In many situations, a court will face a choice between "external" norms generated by transnational judicial dialogue, and conflicting "internal" norms that are generated, for example, by the executive or legislative branches. It is not entirely clear from the transgovernmentalist account where domestic courts derive their authority to choose external norms in the face of conflicting internal norms. Indeed, Alford contends that courts lack such authority. He argues that whenever international and domestic norms are in conflict, a proper understanding of courts' limited roles—as well as concern for both domestic sovereignty and federalism—should preclude courts from considering international norms when interpreting the Constitution.59 One need not go as far as Alford does to recognize that the international countermajoritarian difficulty suggests a circumscribed role for courts in choosing among the competing norms available to them in the "free market of ideas." Moreover, in some instances domestic courts may choose international norms that are primarily the product of judicial consensus among the world's courts, rather than popular consensus (as reflected in international treaties or foreign legislative or executive acts, for example). In so doing, courts will subject themselves to criticism that they are overstepping the proper boundaries of their limited roles as countermajoritarian institutions—thus undermining the democratic legitimacy of the foreign norms internalized by the courts.

In short, any attempt to develop either transnational legal process or transgovernmentalism into a normative defense of transnational judicial dialogue will require scholars to grapple with a set of obstacles surrounding the legitimacy of the norms generated through such dialogue. The problem is reminiscent of the obstacles that faced an earlier generation of scholars developing the normative aspects of the New Haven School's policy-oriented approach. The New Haven School's founders, Harold Lasswell and Myres McDougal, began from the premise that international legal rules could be founded upon a shared commitment to a "universal order of human dignity."60 They argued that the content of such rules could be discerned from a diverse set of "fundamental values" shared by all the peoples of the world. In determining these "fundamental values," they looked to a consensus among the world's major systems, which, they argued, shared common goals even if they differed in the "details of the institutionalized patterns of practice by which they seek to achieve such goals."61 Thus while decisionmakers might share the same fundamental values, the policy-oriented approach "does not

59. With regard to the Eighth Amendment's prohibition on cruel or unusual punishment, for example, Alford argues, "Reliance on global standards of decency undermines the sovereign limitations inherent in federal restraints, limitations born out of respect for the reserved powers of the states to assess which punishments are appropriate for which crimes." Id. at 61.


61. See id. at 19.
promise or guarantee one correct, single answer to the question(s) posed."\textsuperscript{62} Like the Transnational Legal Process and Transgovernmentalism Schools, then, the New Haven School provides an incomplete response to the question of the "legitimacy" of the world public order. As Anupam Chander has pointed out, the New Haven School's fundamental values are "articulated at a level of generality that leaves significant room for interpretation to the decisionmaker. Such latitude in the interpretation of a putatively superior law renders that law potentially undemocratic."\textsuperscript{63}

IV. TRANSNATIONAL JUDICIAL DIALOGUE AND THE PROBLEM OF COUNTERMAJORITARIANISM: DOES ELY PROVIDE A SOLUTION?

As currently constructed, neither transgovernmentalism nor transnational legal process provides a normative defense of the "complex rugby scrum" by which domestic courts—through transnational judicial dialogue—are developing international legal norms. Nor do their emphases on the "free market of ideas" or on the "dialogic process" provide an adequate justification for the legitimacy of the norms generated by transnational judicial dialogue. Both theories require further elaboration to ground a normative defense of dialogue. In this final Part, I elaborate on the theories' normative constructs by returning to first principles with respect to courts' roles in the democratic process. In essence, the final Part of this Article engages in a kind of thought experiment regarding the application of a classic scholarly account of the countermajoritarian difficulty to transnational judicial dialogue—John Hart Ely's *Democracy and Distrust*.\textsuperscript{64} If a significant problem with the legitimacy of transnational judicial dialogue is an international countermajoritarian difficulty, might Ely's classic defense of courts' *domestic* countermajoritarian roles provide a solution?

Anupam Chander was the first to recognize that Ely's work on the countermajoritarian difficulty might help to address the normative deficits of modern international law theory—specifically, of transnational legal process.\textsuperscript{65} In attempting to fashion a theory of domestic judicial review that was consistent with representative democracy, Ely argued that courts could play a "representation-reinforcing" role that would strengthen, rather than undermine, popular rule.\textsuperscript{66} Ely's representation-reinforcing approach was grounded in a two-part inquiry. First, does judicial review remove an issue from the political process? If not, courts in exercising such review do not threaten democracy, and there is no countermajoritarian problem present. If judicial review does remove the issue from the political process (for example, in the case of constitutional interpretation), a countermajoritarian difficulty is presented. However, constitutional judicial review may still be legitimate—


\textsuperscript{63} Chander, *supra* note 12, at 1231.

\textsuperscript{64} A full account of the application of the classic countermajoritarian difficulty literature to transnational judicial dialogue would require article-length or book-length treatment.

\textsuperscript{65} See Chander, *supra* note 12.

\textsuperscript{66} ELY, *supra* note 16.
and actually democracy enhancing—if it serves to protect “discrete and insular minorities.”

Chander argues that Ely’s “representation-reinforcing” theory might help to rebut critics’ complaints of a democratic deficit in international law, and to explain why transnational legal process is consistent with popular sovereignty. Applying Ely’s two-part inquiry, Chander argues first that, for the most part, the creation of international legal norms through transnational legal process does not remove issues from the majoritarian political process. He identifies one arena in which transnational legal process does remove issues from political processes: in the creation and internalization of jus cogens norms (for example, a prohibition on torture). In that arena, Chander argues, transnational legal process can still be justified as democracy enhancing because jus cogens norms protect certain minority groups “in a world where minorities are constantly at risk.”

How might Ely’s “representation-reinforcing” theory apply to transnational judicial dialogue? A translation of Ely’s work to judicial dialogue might begin with a two-part claim. First, on the international plane, courts can play a “representation-reinforcing” role that would strengthen, rather than undermine, the democratic legitimacy of international legal norms created through judicial dialogue. Second, on the domestic plane, courts can play a “representation-reinforcing” role that would help to legitimize their roles as internalizers of norms created through transnational judicial dialogue. To test these claims, I examine below two transnational judicial dialogues—one statutory, the other constitutional. In the first dialogue, U.S. and foreign courts develop a “rights-conscious” Charming Betsy canon to read immigration statutes consistently with international human rights law. In the second dialogue, the world’s courts together shape emerging international human rights legal norms surrounding the abolition of the death penalty. The two dialogues provide examples of both of Ely’s categories: judicial review

67. Id. See also Chander, supra note 12, at 1203.
68. Chander, supra note 12, at 1203.
69. Chander’s analysis suggests only a partial answer. In translating Ely’s theory to the international law context, Chander focuses primarily on the role of transnational legal process involving international institutions (such as the World Trade Organization and the International Monetary Fund). Only one of his examples considers the application of Ely’s theory to domestic courts—his exploration of its application to the U.S. Supreme Court’s decision in Sosa v. Alvarez-Machain, 524 U.S. 692 (2004). See Chander, supra note 12, at 1207. In Sosa, the Court held that the Alien Tort Claims Act, which authorizes federal courts to hear claims by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States, authorized a “modest number” of causes of action based on violations of customary international law. The Court directed lower courts, in discerning the content of customary international law, to examine the “current state of international law,” Sosa, 524 U.S. at 692, looking not only to “hard law” sources such as treaties, but also to “the customs and usages of civilized nations,” as developed and declared by the “works of jurists and commentators,” id. at 733-34. Chander argues that Sosa is an example of Ely’s first category: judicial review of an issue that does not remove that issue from majoritarian political processes. He points out, for example, that the Court made it clear that Congress could “‘shut the door to the law of nations entirely’ through legislative action or ‘modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.’” Chander, supra note 12, at 1207 (quoting Sosa, 542 U.S. at 731). In Chander’s view, the Court’s approach to the Alien Tort Claims Act is entirely consistent with Ely, who acknowledged that courts’ statutory interpretations can simply be altered or overruled by subsequent statute. See id.; see also Ely, supra note 16, at 4. The possibility of subsequent legislative reversal of the Court’s interpretation of the statute renders the decision—and its directive to lower courts to apply customary international law as federal common law—consistent with democracy. See Chander, supra note 12, at 1207.
that does not remove an issue from political processes, and is thus (in Ely’s account) unproblematic; and the much more difficult case where judicial review does remove an issue from majoritarian political processes, thus raising a countermajoritarian difficulty.

A. Dialogue over Statutory Interpretation: A “Rights-Conscious” Charming Betsy Canon

Courts are beginning to engage in transnational judicial dialogue regarding statutory interpretation, utilizing international human rights law to interpret “ambiguities” in domestic statutes and to define the content and reach of those statutes. The emerging dialogue is centered on well-settled canons of statutory construction. Courts in the United States and elsewhere have long employed a canon of statutory construction that assumes legislative intent to act in a manner not inconsistent with a country’s international law obligations. In the United States, for example, the so-called Charming Betsy canon holds that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” U.S. courts have applied the Charming Betsy canon to construe ambiguous statutes in such a manner that they would not violate either international treaties or customary international law. Other courts from the common law tradition have long had their own analogues to the Charming Betsy canon.

Over the past decade, common law courts have begun to transform the centuries-old Charming Betsy canon into a powerful judicial tool for entrenching international human rights obligations into domestic law. By developing a rights-conscious Charming Betsy canon, courts utilize treaties to interpret domestic statutes consistently with international human rights legal norms. A key emerging arena for the development of dialogue over the rights-conscious Charming Betsy canon is in statutory interpretation regarding administrative decisionmaking in the immigration context. In cases from Australia, Canada, New Zealand, and the United States, courts utilize Charming Betsy to incorporate international human rights obligations into their countries’ immigration law. They do so by requiring administrative officials to exercise their statutory discretion in accordance with the terms of human rights treaties—in particular, the Convention on the Rights of the Child (CRC)—whether or not those treaties have been legislatively incorporated into domestic law. The cases also reveal the significant role that transnational judicial dialogue is playing in the development of the rights-conscious Charming Betsy canon in the immigration context.

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70. I discuss the rights-conscious Charming Betsy canon in more detail in Waters, Creeping Monism, supra note 17.
73. See, e.g., Pul'u'uea v. Removal Review Auth., [1996] 3 N.Z.L.R. 538, 542 (C.A.) (“[T]he Court should strive to interpret legislation consistently with the treaty obligations of New Zealand.”).
The trend began in New Zealand. In *Tavita v. Minister of Immigration*, the New Zealand Court of Appeal expressed the view that immigration officials may have an obligation to take human rights treaties into consideration in exercising discretion under the New Zealand Immigration Act.\(^7\) The appellant in *Tavita* faced deportation, but he had a child who would remain in New Zealand. He argued that New Zealand’s obligations under the CRC required the immigration authority to make the best interests of the child a “primary consideration” in exercising its discretion under the statute. The immigration authority responded that it was not obligated to take the CRC’s provisions into account because the CRC had not been legislatively incorporated into domestic law.

The court sided with Tavita, suggesting that administrative decisionmakers may have an obligation to consider human rights treaty obligations regardless of the formal domestic legal status of the treaties in question. It emphasized the duty of the judiciary to interpret domestic law “in the light of the universality of human rights.”\(^75\) Accordingly, it discussed international human rights treaty law, along with decisions of the European Court of Human Rights regarding deportation proceedings.\(^76\) While it is unclear from the court’s decision what weight administrative decisionmakers are required to give to international human rights law, the decision was groundbreaking in that it read an immigration statute to require at least some administrative consideration of international human rights treaty obligations in exercising statutory discretion.\(^77\)

A striking feature of the emerging rights-conscious approach to statutory interpretation is that it is both a product of, and serves to further promote, transnational judicial dialogue on human rights. The New Zealand Court of Appeal’s landmark decision in *Tavita*, for example, greatly influenced the high courts of Australia and Canada in addressing similar statutory interpretation issues. Indeed, the Australian and Canadian courts not only have relied upon *Tavita* as precedent; they have developed and even expanded *Tavita*’s rights-conscious approach to statutory interpretation.

In *Baker v. Canada*,\(^78\) for example, the Canadian Supreme Court addressed in greater detail the weight that administrative decisionmakers must give to human rights treaties in exercising their statutory discretion under Canada’s immigration statute, which allowed exemption of individuals from deportation for “compassionate or humanitarian grounds.” Baker faced deportation and asked that she be allowed to stay in Canada to care for her Canadian-born children. She argued that Canada’s obligations under the CRC required the Canadian immigration authority to make the best interests of her

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75. *Id.* at 259.
76. *Id.* at 259.
77. See Claudia Geiringer, *Tavita and All That: Confronting the Confusion Surrounding Unincorporated Treaties and Administrative Law*, 21 N.Z.U. L. REV. 66 (2004) (discussing subsequent case law addressing the question of whether administrative decisionmakers must conform their decisions to the requirements of international human rights law, or if it is sufficient that they take into account human rights obligations in their decisionmaking).
78. [1999] 2 S.C.R. 817 (Can.).
children “a primary consideration” in exercising its statutory discretion. The Court agreed in part, holding that while the immigration authority need not make the best interests of her children a “primary consideration,” it did have an obligation to take their best interests into account. In interpreting the statutory “compassionate or humanitarian grounds” language, the Canadian Court adopted a presumption of legislative intent that was highly deferential to international human rights law: “[T]he legislature is presumed to respect the values and principles enshrined in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.”

As a result, the Court noted, “the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review.” It cited the New Zealand Court of Appeal’s decision in Tavita as support for this proposition. Moreover, it stated that the immigration authority had an obligation to exercise its statutory discretion “in accordance with . . . the fundamental values of Canadian society.” And in discerning “fundamental Canadian values,” the Court discussed at length the principles and norms articulated in the CRC. The Court concluded that while immigration authorities need not make the best interests of the child a “primary” consideration (as the CRC requires), they “should consider children’s best interests as an important factor.”

The Australian High Court has taken Tavita’s rights-conscious Charming Betsy approach even further. In a highly controversial decision, the Court relied on Tavita in holding that Australian ratification of the CRC may give rise to a “legitimate expectation” on the part of Australian residents that administrative decisionmakers will exercise their statutory discretion in conformity with the terms of the treaty. In Minister for Immigration and Ethnic Affairs v. Teoh, at issue was a statutory provision instructing immigration officials to take into account a petitioner’s family status and “strong compassionate or other humanitarian grounds” in ruling on deportation status. Teoh, a Malaysian citizen who faced deportation, petitioned the Australian immigration authority for permanent resident status, arguing that his deportation would cause severe financial and emotional hardship for his Australian-born children. The immigration authority denied his petition, and he appealed to the Australian courts, arguing that the

79. Article 3 of the CRC provides, “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Convention on the Rights of the Child art. 3, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3.
81. Id.
82. See id.
83. Id. at 855.
84. The Court pointed out that “[t]he values and principles of the [CRC] recognize the importance of being attentive to the rights and best interests of children when decisions are made that relate to and affect their future.” Id. at 861.
85. Id. at 864.
immigration authority was required under the terms of the CRC to make the best interests of Teoh's children "a primary consideration" in assessing his petition.

The Australian High Court agreed with Teoh's argument. Like the Canadian and New Zealand courts, it emphasized the importance of interpreting the legislative intent behind domestic statutes in accordance with Australia's international human rights obligations. In particular, the Court adopted a bold understanding of the meaning and consequences of Australia's ratification of the CRC. It asserted that ratification of a treaty "is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention."\(^7\) As such, ratification of the CRC alone served as "an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with" the treaty.\(^8\)

Thus, according to the *Teoh* Court, the Australian government's act of ratifying the CRC gave rise to legitimate expectations for individuals like Teoh that immigration officials would exercise their statutory discretion in conformity with the requirements of the treaty. Moreover, there was nothing in the statute itself suggesting a legislative intent to repudiate Australia's obligations under the CRC. Adopting such a rights-conscious approach, the Court held that the immigration authority had an obligation to treat the best interests of children as "a primary consideration" in exercising its statutory discretion, as the CRC required.\(^9\) Thus, in the *Teoh* Court's view, it was simply requiring immigration officials to fulfill the promise that the Australian government had already made to its citizens when it ratified the CRC: that statutes would be read in such a way as to conform Australia's conduct to its obligations under the treaty.

The influence of transnational judicial dialogue on the *Charming Betsy* canon is even being felt in the United States, as plaintiffs in U.S. courts begin to cite these foreign court decisions in advocating the adoption of a rights-conscious *Charming Betsy* approach to interpretation of U.S. immigration statutes. In *Cabrera-Alvarez v. Gonzales,*\(^9^0\) the immigration statute in question permitted cancellation of removal to aliens who could show "exceptional and extremely unusual hardship" to family members. Cabrera-Alvarez, a Mexican citizen, sought a cancellation of removal order to prevent economic and emotional hardship to his two children, both of whom were U.S. citizens. Like the petitioners in *Tavita, Baker,* and *Teoh,* Cabrera-Alvarez pointed to provisions in the CRC requiring administrative officials to make the best interests of the child "a primary consideration" in their decisionmaking. He argued that under *Charming Betsy,* immigration authorities had an obligation to interpret the statutory "exceptional hardship" language consistently with the

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87. *Id.* at 291.
88. *Id.*
89. *Id.* at 292. The Court held that the ratification of a treaty can give rise to "legitimate expectations" even in individuals who are unaware of the treaty's existence. *Id.* at 291.
90. 423 F.3d 1006 (9th Cir. 2005).
CRC. (Unlike Australia, Canada, and New Zealand, however, the United States is not a party to the CRC, having signed but not ratified the treaty.)

The Ninth Circuit Court of Appeals began its discussion by characterizing the Charming Betsy canon as a "presumption that Congress intends to legislate in a manner consistent with international law." It then acknowledged that because the United States has not ratified the CRC, it is not "the supreme Law of the Land" under the U.S. Constitution. Nevertheless, the court suggested that it could take into account whether the immigration statute complied with the terms of the CRC, "assuming that the unratified Convention has attained the status of customary international law." The court then assumed for purposes of Cabrera-Alvarez's appeal that the CRC had attained the status of customary international law, and that Congress intended to legislate in a manner consistent with customary international law (as reflected in the treaty's provisions).

Proceeding on these assumptions, the Ninth Circuit discussed at some length various provisions of the CRC, as well as the Australian and Canadian Courts' decisions in Baker and Teoh. It held that the immigration judge had in effect made the best interests of Cabrera-Alvarez's children "a primary consideration" in applying the statutory "exceptional and extremely unusual hardship" standard. Accordingly, it held that the immigration judge's decision was in fact consistent with the CRC. Although the Ninth Circuit ruled against Cabrera-Alvarez, its analysis suggests a willingness to engage in judicial dialogue over the development of a rights-conscious Charming Betsy canon—and to apply customary international law (even when based on unratified human rights treaties like the CRC) to interpret federal statutes in the appropriate case.

Courts utilizing a rights-conscious Charming Betsy canon have an expansive approach to judicial incorporation of international human rights treaty obligations into domestic law. They refuse, for example, to focus exclusively on the question whether a treaty has been legislatively incorporated into domestic law by statute (long the central issue for courts from the common law dualist tradition). Instead, in Tavita, Teoh, and Baker, ratification alone provides a justification for judicial use of the treaty in statutory interpretation; the courts held that the act of ratification itself gave administrative officials at least some obligation to take the treaty into account in exercising their statutory duties. Indeed, in Cabrera-Alvarez, the court suggested that even ratification was not necessary for a treaty to have relevance in statutory interpretation: So long as the treaty has attained the status of customary international law, the court suggested, administrative officials might have an obligation to take its provisions into account.

Courts engaging in the rights-conscious Charming Betsy dialogue seem to conceive of their own roles as mediators between domestic statutory

91. Id. at 1007.
92. Id. at 1010.
93. Id. at 1009.
94. See id. at 1010-11.
95. Id. at 1013.
96. Id.
regimes and international human rights treaty regimes. The rights-conscious *Charming Betsy* canon “places the courts . . . in a position of oversight to avoid the possibility of international liability for the country as a whole.”

Moreover, through participation in transnational judicial dialogue, these courts rely on foreign court decisions in shaping their roles as transnational mediators.

Ely’s representation-reinforcing theory seems to provide a defense of the democratic legitimacy of transnational judicial dialogue surrounding the rights-conscious *Charming Betsy* canon. The approaches adopted by the courts in these cases fall within Ely’s first category: judicial action that does not take an issue outside majoritarian political processes. Indeed, by its very terms the traditional *Charming Betsy* canon expresses deference to legislative intent: It presumes, where a statutory ambiguity exists, that the legislature intended to act in a manner not inconsistent with its nation’s international law obligations.

In keeping with this canon, the courts found ambiguity in the immigration statutes and accordingly read the statutes in light of their nations’ obligations under the CRC. They may well have gotten it wrong. They may have incorrectly assumed that the legislature intended to incorporate the CRC’s “best interests of the child” provision into domestic immigration law. Indeed, they may have improperly found a creative “ambiguity” in a statute where none exists. Thus while the courts’ decisions may be legitimately criticized as either judicial error or judicial overstepping, under Ely’s theory, these kinds of judicial failures in statutory interpretation do not necessarily render courts’ participation in dialogue on statutory construction democratically illegitimate. In all of the cases discussed above, domestic legislatures can correct the courts’ errors or oversteps by simply amending existing immigration laws or passing new statutes, making it clear that the legislature does not intend to incorporate the CRC into domestic statutory regimes.

Ely’s theory thus helps to explain why transnational judicial dialogue over statutory interpretation—and the norms that it generates—might be legitimate. Courts, through the use of the *Charming Betsy* canon, incorporate international human rights treaty obligations or (in Cabrera-Alvarez) customary international law rules into domestic law. They do so by assuming that domestic legislatures intended to legislate consistently with their nation’s

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98. Indeed, a political backlash in Australia against the Australian High Court’s decision in *Teoh* suggests that the political branches have numerous tools at their disposal to respond to judicial overstepping in employing the rights-conscious *Charming Betsy* canon. Shortly after the Court’s decision, the Australian Attorney General and the Minister for Foreign Affairs issued a Joint Ministerial Statement, taking the position that mere ratification of a treaty should not be interpreted by the courts to give rise to an expectation that government officials would act in accordance with the treaty. See Katherine L. Doherty et al., *Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation*, 5 U.C. Davis J. Int’l L. & Pol’y 147, 161 (1999). Moreover, members of the Australian Parliament have periodically introduced legislation that would overturn the court’s ruling in *Teoh*. See Susan Roberts, Case Note, Minister of State for Immigration and Ethnic Affairs v. Ah Hin Teoh: The High Court Decision and the Government’s Reaction to It, 2 Austl. J. Hum. Rts. 135 (1995), available at http://www.austlii.org/au/journals/AJHR/1995/10.html.
international law obligations (whether treaty or custom). Whether viewed through the transnational legal process scholar’s lens of “dialogic process” or through the transgovernmentalist’s notion that courts choose among a “free market of ideas,” courts’ participation in dialogue enjoys “legitimacy,” under Ely’s theory, precisely because the legislatures retain the option of overturning the results of the courts’ participation by subsequent statute. Thus, in transnational legal process terms, the dialogic process does not end with the domestic courts’ ruling; instead, the political branches retain the option of interceding in the dialogue and overruling the courts’ interpretation and internalization of a given norm. Thus in all of the cases discussed above, the courts’ decisions to apply international human rights law in interpreting administrators’ statutory discretion did not take the issue out of the majoritarian political process.\textsuperscript{99} It is thus consistent with a representation-reinforcing theory of transnational judicial dialogue.

B. Constitutional Interpretation

One of the most important arenas for transnational judicial dialogue is in the application of international human rights law to constitutional interpretation. An especially rich and—in the United States, at least—controversial form of constitutional dialogue has centered on judicial development and internalization of international human rights norms regarding the abolition of the death penalty. Courts participating in the death penalty dialogue run the gamut, from supranational tribunals like the European Court of Human Rights,\textsuperscript{100} to domestic courts in developed constitutional regimes such as those in the United States and the United Kingdom,\textsuperscript{101} to courts with nascent constitutional regimes in the former Soviet bloc\textsuperscript{102} or in sub-Saharan Africa.\textsuperscript{103} These courts have made a conscious effort to place their own decisions within the broader context of foreign and international law and, in so doing, have developed a rich transnational judicial dialogue on the status of the death penalty under both domestic and international law.\textsuperscript{104}

A particularly striking aspect of the death penalty dialogue is the extraordinarily powerful role the world’s courts have played in shaping emerging customary international law norms regarding the death penalty. The international prohibition on cruel or inhuman punishment has played a crucial

\textsuperscript{99} Cf. Chander, \textit{supra} note 12, at 1206-08 (citing Ely’s and Bickel’s understandings of the countermajoritarian difficulty as arising from the finality of judicial intervention).


\textsuperscript{101} See, e.g., Roper v. Simmons, 543 U.S. 551, 577 (2005).


\textsuperscript{103} See, e.g., Mbushu v. Republic, [1995] T.L.R. 97, 118 (Tanz.).

role, providing courts with a common reference point around which to shape a dialogue. At the same time, as a result of dialogue the international prohibition on cruel or inhuman punishment itself has evolved over time to encompass real limitations on the death penalty. Courts ruling on the constitutionality of domestic death penalty practices have cited foreign and international law on cruel or inhuman punishment to inform their own interpretations of their nations’ similar constitutional provisions. Through this dialogue, courts around the world have interpreted the norm to progressively limit or even to strike down as unconstitutional domestic statutes permitting use of the death penalty.

As I have discussed in a previous publication, the trend began with the European Court of Human Rights’ 1989 decision in Soering v. United Kingdom, in which the Court held that the death row phenomenon—the protracted delay typically involved in carrying out a sentence of death—might amount to cruel or inhuman punishment. Four years later, the Zimbabwe Supreme Court followed the Soering Court’s lead, holding that delays in execution of six years or more violated the Zimbabwe Constitution’s prohibition against cruel or inhuman punishment. Just a few months later, the Privy Council (the highest court of appeal for several countries in the Commonwealth Caribbean) cited Soering in reversing an earlier decision, this time holding unanimously that the death row phenomenon amounted to cruel or inhuman punishment under the Jamaican Constitution. Other courts have expanded upon the early death row phenomenon decisions, holding that the application of the death penalty itself violates the prohibition on cruel or inhuman punishment. The South African Constitutional Court, for example, declared that any use of the death penalty violated South Africa’s constitutional prohibition on cruel or inhuman punishment. In addition, relying on these earlier decisions, the Canadian Supreme Court has held that the death penalty violates constitutional guarantees of the right to life, citing what it described as “the international trend against the death penalty.” In all of these cases, the courts used foreign judicial decisions and international legal sources to inform, and to provide support for, their own interpretations.

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106. See SCHABAS, supra note 104, at 13-56.
107. Waters, Mediating Norms, supra note 13, at 510-16 (discussing the following cases in greater detail).
109. Id. para 92.
115. Id. para. 131.
of constitutional prohibitions on cruel or inhuman punishment. In essence, they used transnational judicial dialogue both to shape emerging customary international law norms prohibiting the death penalty, and to internalize those norms into domestic constitutional law.\footnote{116}

In recent years, the U.S. Supreme Court has joined the transnational judicial dialogue on the death penalty. In \textit{Knight v. Florida},\footnote{117} Justice Breyer discussed case law from several foreign constitutional courts in urging the Court to hear a claim that the death row phenomenon violated the Eighth Amendment’s prohibition on cruel and unusual punishment. In \textit{Atkins v. Virginia},\footnote{118} the Court held that a state statute permitting execution of the mentally retarded violated the prohibition on cruel and unusual punishment. In finding that the practice was no longer consistent with “evolving standards of decency,”\footnote{119} the Court cited (in a footnote) foreign authority prohibiting the practice, acknowledging that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”\footnote{120} More significantly, in \textit{Roper v. Simmons},\footnote{121} the Court struck down state laws permitting execution of juvenile offenders, holding that such executions amounted to cruel and unusual punishment.\footnote{122} In his opinion for the majority, Justice Kennedy cited the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child, and other human rights treaties as evidence of an “overwhelming”\footnote{123} international consensus prohibiting the juvenile death penalty. He asserted that such a consensus, “while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”\footnote{124} Justice O’Connor agreed, noting that “the existence of an international consensus . . . can serve to confirm the reasonableness of a consonant and genuine American consensus.”\footnote{125} Advocates of transnational judicial dialogue have hailed the Court’s decision in \textit{Roper} as a watershed event in U.S. courts’ approach to domestic incorporation of international law and in their willingness to participate in transnational judicial dialogue on human rights issues.\footnote{126}

Does Ely’s representation-reinforcing theory support the democratic legitimacy of transnational judicial dialogue on the death penalty? In the death penalty dialogue, courts are helping to shape a customary international law norm on cruel or inhuman punishment to include limitations on (or an outright prohibition of) the death penalty. Moreover, these courts are internalizing the international norms generated through dialogue into domestic constitutional provisions. Thus, transnational judicial dialogue on the death penalty implicates Ely’s second, and much more problematic, category. Constitutional

courts participating in this dialogue are removing the issue from majoritarian political processes—in effect, ending the “dialogic process” with respect to interpretation and internalization of norms regarding the death penalty—thus precluding the political branches or other domestic actors from further participation in the dialogic process.\textsuperscript{127}

Under a representation-reinforcing theory of transnational judicial dialogue, judicial participation in the death penalty dialogue may still be democratically legitimate if it serves to protect “discrete and insular minorities.”\textsuperscript{128} Applying Ely’s “discrete and insular minority” test in this context, however, poses both practical and conceptual difficulties. The first difficulty is definitional: Who, exactly, qualifies as a member of a “discrete and insular minority”? The phrase is, at best, vague and impressionistic, and its intended scope is unclear.\textsuperscript{129} Consider, first, the adoption of a narrow conception that roughly tracks the U.S. Supreme Court’s post-\textit{Carolene Products}\textsuperscript{130} test for heightened scrutiny. Under this test, Ely’s theory provides a normative defense of judicial dialogue in fairly limited circumstances, and it is not clear that it would authorize any participation in dialogue regarding the application of the death penalty. For example, under the Court’s jurisprudence, neither juveniles nor those with mental disabilities seem to enjoy “discrete and insular minority” status.\textsuperscript{131} Thus under a narrow conception of Ely’s theory, judicial generation and internalization of

\textsuperscript{127} Theoretically, of course, constitutional judicial review does not remove an issue from the majoritarian political process because there remains the possibility of constitutional amendment to overturn a judicial ruling disfavored by political majorities. However, this option is of little practical value as a majoritarian “override” of judicial review, given the extreme political difficulties presented in the modern era in amending the Constitution. Moreover, as its decision in \textit{City of Boerne v. Flores}, 521 U.S. 507 (1997), demonstrates, the Supreme Court has taken a dim view of Congress's attempts to invoke its own constitutional authority to override the Court's constitutional interpretations, even when those interpretations seem to be deeply countermajoritarian. Congress had enacted the Religious Freedom Restoration Act (RFRA) in an attempt to overturn a prior Supreme Court ruling interpreting the Free Exercise Clause as establishing a modest nondiscrimination right for religion. \textit{Id.} at 512 (responding to a Congressional attempt to overturn \textit{Employment Div. Dept. of Human Res. v. Smith}, 494 U.S. 872 (1990)). Relying on its power under Section 5 of the Fourteenth Amendment to enact “appropriate legislation” to “enforce” that Amendment, Congress interpreted the Free Exercise Clause as establishing a much broader substantive liberty for religious exercise. RFRA was enacted with overwhelming bipartisan support, unanimously in the House and 97-3 in the Senate. John P. LaVelle, \textit{Sanctioning a Tyranny: The Diminishment of Ex Parte Young, Expansion of Hans Immunity, and Denial of Indian Rights in Coeur d’Alene Tribe}, 31 \textit{Aiz. ST. L.J.} 787, 931-32 n.620 (1999). In \textit{Boerne}, the Court struck down RFRA, holding that it violated both separation of powers and federalism principles. 521 U.S. at 536. See generally Michael W. McConnell, \textit{Institutions and Interpretation: A Critique of City of Boerne v. Flores}, 111 \textit{Harv. L. Rev.} 153 (1997) (discussing \textit{Boerne}).

\textsuperscript{128} ELY, \textit{supra} note 16, at 76 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

\textsuperscript{129} See, e.g., Bruce Ackerman, \textit{Beyond Caroleine Products}, 98 \textit{Harv. L. Rev.} 713 (1985).

\textsuperscript{130} See \textit{Carolene Products}, 304 U.S. at 153 n.4 (noting that in reviewing statutes for constitutionality, “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry”).

\textsuperscript{131} See, e.g., City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (holding that legislation disfavoring mentally challenged individuals does not require heightened scrutiny); \textit{id} at 472 n.24 (Marshall, J., concurring in part and dissenting in part) (“Minors cannot vote and thus might be considered politically powerless to an extreme degree. Nonetheless, . . . I am not aware of any suggestion that legislation affecting them be viewed with the suspicion of heightened scrutiny.”). \textit{But see} Americans with Disabilities Act, 42 U.S.C. § 12101(a)(7) (2000) (declaring individuals with disabilities to be a “discrete and insular minority” deserving of heightened protection).
international norms protecting juveniles and the mentally challenged would not be justified as representation-reinforcing. Under this narrow view, Ely’s theory would not offer a normative defense of the Supreme Court’s participation in dialogue in *Roper* and *Atkins*.

The situation is more complicated with respect to judicial dialogue regarding the rights of death row inmates based on their status as prisoners (for example, Justice Breyer’s participation in dialogue regarding “death row phenomenon” claims). The Court’s jurisprudence with respect to the status of prisoners is unclear: At times, it has expressed special concern for prisoners, suggesting that they are in need of heightened judicial protection; but in other decisions it has apparently refused to recognize prisoners as a special class entitled to heightened protections. Some Supreme Court Justices have asserted that prisoners as a class constitute a discrete and insular minority, but the Court itself has never held that prisoners as a class are entitled to heightened scrutiny. Thus, under a narrow conception of Ely’s “discrete and insular minorities,” it is unclear that any form of judicial dialogue regarding the death penalty—even dialogue based on capital offenders’ status as prison inmates on death row—would be representation-reinforcing and thus democratically legitimate.

A broader conception of the phrase, however, would expand the universe of judicial dialogue considered representation-reinforcing. Ely himself suggested a broader conception of the phrase, asserting that “[t]he whole point of the [‘discrete and insular minorities’] approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending.” Chander echoes Ely in arguing that the phrase “discrete and insular minorities” should be modified to encompass “those [individuals] who need the channels of political change cleared for them.” Under this broader conception, death row inmates would surely qualify based on their status as prisoners. As Justice Stevens has commented, “[p]risoners are truly the outcasts of society. Disenfranchised, scorned and
feared, . . . shut away from public view, [they] are surely a 'discrete and insular minority.' Under this more expansive view, transnational judicial dialogue with respect to the death row phenomenon might be democratically legitimate. By generating and internalizing international norms prohibiting lengthy incarceration on death row, judges participating in the dialogue are helping to "clear the channels of political change" for a group of individuals whose interests tend to be ignored by domestic majoritarian political processes.

This more expansive reading of Ely's representation-reinforcing theory also suggests a response to one of the chief complaints of critics of transnational judicial dialogue. They question the legitimacy of international norms generated through transnational judicial dialogue because such norms are the result of a partial dialogue, consisting largely of courts in liberal democracies that enjoy a tradition of strong, independent judiciaries. But from the standpoint of Ely's conception of democratic legitimacy, the partial nature of the current dialogue may well be a net positive. To the extent that international human rights norms are the product of dialogue among courts from liberal democracies (as both transnational legal process and transgovernmentalism seem to suggest), they are more likely to be protective of minorities. Judicial internalization of such norms is thus consistent with courts' roles as countermajoritarian institutions: Dialogue is likely to be representation-reinforcing because it is protective of the rights of vulnerable groups who need the courts' help in "clearing the channels" of domestic political processes.

If proponents of transnational judicial dialogue seek to rely on this more expansive conception of courts' representation-reinforcing roles, however, they must be prepared for Ely's theory to lead dialogue in directions with which they may not be entirely comfortable. In short, an expansive conception of representation-reinforcing theory will serve to legitimize judicial internalization of certain international norms that stand in sharp conflict with well-entrenched constitutional rights. As an example, consider the rapidly emerging international norm prohibiting hate speech. Increasingly, the American constitutional regime stands alone in offering strong protections for hate speech. The emerging international norm, drawn from both foreign practice and international treaty law, espouses a very different conception of speech, one that privileges protection of vulnerable minorities over the right to freedom of expression. Under a representation-reinforcing theory, U.S. court participation in transnational judicial dialogue on hate speech—and judicial internalization of international anti-hate speech norms—would be democratically legitimate because they would serve to protect discrete and insular minorities from injury. And yet participation in such dialogue would fly in the face of deeply entrenched First Amendment rights—and, I would

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141. See id.
argue, in the face of norms "so rooted in the traditions and conscience of [the American] people as to be ranked as fundamental."\(^{142}\)

An expansive reading of Ely's representation-reinforcing theory thus provides a normative defense of various kinds of transnational judicial dialogue with respect to constitutional interpretation, but in the end it may prove too much. Its proponents emphasize that judicial dialogue is a dialogic process involving internalization of international norms rather than subordination of domestic norms. But to borrow a phrase from Peter Spiro, such arguments "may mask what is, in fact, a partial displacement of constitutional hegemony."\(^{143}\) By legitimizing the judicial internalization of international norms into domestic constitutions so long as those norms are minority-protecting, a broadly defined representation-reinforcing theory of dialogue may exacerbate a trend toward erosion of the supremacy of national constitutions as "discursive bulwark[s] against the encroachment of international law."\(^{144}\) It thus may serve to sharpen, rather than to allay, the fears of transnational judicial dialogue's critics, who predict that, "[i]n the long run, international norms may be played, not merely as persuasive agents, but as trumps."\(^{145}\)

Do such concerns render transnational judicial dialogue illegitimate, despite the normative justifications of representation-reinforcing theory? The answer, in my view, depends in large part on the extent to which we trust judges, in participating in dialogue, to "get it right." After all, like Ely's classic response to the domestic countermajoritarian difficulty, a representation-reinforcing theory of transnational judicial dialogue does not demand that judges engage in a "dumb proceduralism."\(^{146}\) It need not require that courts become mere passive recipients, or importers, of any international norm that is protective of minorities. Instead, by focusing on the extent to which the norms emerging from a particular dialogue are minority protecting, the theory simply helps to describe a universe of cases in which participation in transnational judicial dialogue may be appropriate, and in which domestic courts may wish to consider international norms in interpreting domestic constitutional provisions.

But with respect to transnational judicial dialogue, courts' roles as countermajoritarian institutions must be balanced with other, equally important considerations. In the final analysis, domestic courts draw their own legitimacy as countermajoritarian institutions not from a "global judicial community," but from domestic constitutional regimes—and indeed, from the domestic polity itself. In shaping their participation in dialogue on constitutional interpretation, then, it behooves courts to ensure, first and foremost, that domestic constitutional regimes capture and express the


\(^{144}\) Id.

\(^{145}\) Id.

\(^{146}\) Chander, supra note 12, at 1234.
“fundamental values” unique to their own societies. Beginning from a judicial orientation that is thus firmly rooted in the domestic plane, courts can then legitimately “reach out” to the international plane, drawing on judicial dialogue—and norms generated through such dialogue—to inform their own constitutional work.

V. CONCLUSION

Both transnational legal process and transgovernmentalism emphasize, above all, the dialogic quality of communications among the world’s courts. For transnational legal process scholars, courts participating in dialogue engage in a dialogic process of interaction, interpretation, and internalization. For transgovernmentalists, courts participating in dialogue choose among competing norms in the judicial marketplace of ideas. Both theories reject any conception of transnational judicial dialogue as a vertical process in which courts merely act as passive recipients of international legal norms. Instead, they emphasize the co-constitutive nature of dialogue: Courts “help[] . . . to develop the norms that become part of the fabric of emerging international society,” and, at the same time, help to ensure that these norms “seep into, are internalized, and become entrenched in domestic legal and political processes.” Thus domestic courts, through their participation in dialogue, serve as key mediators between the emerging international legal system and domestic legal regimes.

Ely’s representation-reinforcing theory, translated to the transnational context, provides at least a partial normative defense of courts’ emerging roles as mediators. It offers a normative justification for transnational judicial dialogue over statutory interpretation, explaining that such dialogue is legitimate because it does not remove legal issues from the majoritarian political process. With respect to dialogue involving constitutional interpretation, the story is more complicated. An overly expansive conception of representation-reinforcing theory may well lead courts to import into domestic legal regimes international norms that are inconsistent with the “fundamental values” of domestic society. Representative reinforcing theory can thus provide only a rough guideline for courts engaging in transnational judicial dialogue, suggesting a universe of possible cases in which

147. See Waters, Mediating Norms, supra note 13, at 559 (urging courts, in mediating between domestic and international norms, to consider the extent to which the international norm is consonant with fundamental American values “deeply rooted” in domestic constitutional tradition).

148. Roper arguably provides an example of a constitutional court firmly rooted in its orientation as a domestic actor. The Court first determined that there was a domestic consensus prohibiting the execution of juvenile offenders, and only after it had made this determination did it turn to international authority to provide confirmation” of its finding with respect to domestic consensus. Roper v. Simmons, 543 U.S. 551, 575 (2005). But see Waters, Creeping Monism, supra note 17 (discussing critics’ contention that the Roper Court was in fact using international authority to buttress a weak argument on domestic consensus against the juvenile death penalty).

149. See supra text accompanying notes 27-29.

150. See supra text accompanying notes 18-26.


153. See supra text accompanying note 67.
participation in dialogue may be democratically legitimate. To retain their own legitimacy as domestic actors, however, courts must balance consideration of minority-protecting international legal norms with domestic norms that articulate and promote different, sometimes conflicting societal values. Thus Ely's theory, properly understood, preserves for courts considerable latitude in choosing, among norms generated through transnational judicial dialogue, those norms uniquely appropriate to their own domestic context.