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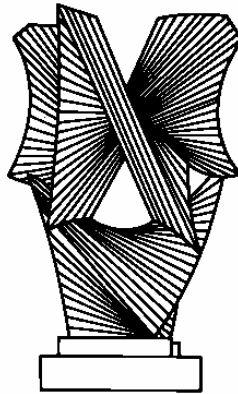
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DISREPECTING THE "OPINIONS OF MANKIND"

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Disrespecting the “Opinions of Mankind”

INTERNATIONAL LAW IN CONSTITUTIONAL INTERPRETATION

Eugene Kontorovich

IN *ROPER V. SIMMONS*, the Supreme Court, after rehearsing the international and foreign condemnation of the death penalty for 16 and 17 year olds, held that such punishment also violates the Eighth Amendment.¹ In recent years, international law has made brief appearances in *Atkins* and *Lawrence*, but only as part of the chorus. In *Roper*, it got star billing – an entire roman numeral of the Court’s opinion (roughly 20% of the total pages) is devoted to considering international instruments and practices. Thus *Roper* represents a significant victory for the view that American courts should look abroad when interpreting the U.S. Constitution (a position which will be referred to here to as “internationalist”). The significance of this victory is uncertain because *Roper* does not suggest that

international law is *binding* on U.S. courts in constitutional cases. Rather, the Court says “the opinion of the world community” can provide “*confirmation* for our own conclusions.”² This is an extraordinarily honest admission that the Court will only cite international opinion when it supports the result the justices wish to reach for other reasons; if “the opinion of the world community” contradicts that of the majority, it won’t find its way into the Opinion of the Court.³

Still, *Roper’s* extended discussion of “the opinion of the world community” in a constitutional case deserves closer attention. This Article will consider a particular argument that has often been advanced for the internationalist approach, one that is reflected in the *Roper* opinion itself. The

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1 544 U.S. ___, 125 S. Ct. 1183 (2005).

2 *Id.* at 1200 (emphasis added).

3 Justice Scalia notes that the Court ignores other countries’ laws when it comes to the establishment of religion or abortion rights. See *id.* at 1227 (Scalia, J., dissenting). But he has not caught the Court in a contradiction, because Justice Kennedy’s opinion admits that it uses international materials opportunistically.

phrase “opinion of the world community” is a politically-correct update of the “opinions of mankind” to which the Declaration of Independence said “decent respect” should be paid.⁴ The similarity in language is not fortuitous. Justice Ginsburg, speaking just one month after *Roper*, said the decision represents, “perhaps the fullest expression[] to date on the propriety and utility of looking to ‘the opinions of [human]kind.’”⁵ In recent years, the Declaration’s preamble has been frequently cited by champions of the internationalist approach as evidence that American law should look to and incorporate foreign values. Because Thomas Jefferson, the author of the Declaration, insisted on paying a “decent respect to the opinions of mankind,” the internationalists argue

that the use of foreign law is as American as apple pie, especially on such “opinionated” issues as the morality of capital punishment. In this view, *Roper* is not a departure, but rather a traditionalist return to the principles of the founding.

Indeed, the Declaration’s solicitude for the “opinions of mankind” has become a staple of the internationalist argument. The phrase has been invoked by the nation’s most respected and influential international law scholars.⁶ The importance the internationalist view places on the preambulatory passage can be inferred from the very titles of some articles.⁷ Moreover, the impact of the argument extends far beyond the academy. It has been embraced by several of the justices who favor using international mate-

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- 4 While the Declaration’s language may lack gender-inclusiveness, the Court’s phrase lacks a certain *exclusiveness*. If the world can constitute a community, it is hard to imagine what *is not* a community. The galaxy perhaps?
 - 5 Ruth Bader Ginsburg, “A Decent Respect to the Opinions of [Human]kind”: *The Value of a Comparative Perspective in Constitutional Adjudication*, Speech to the Annual Meeting of the American Society of International Law (April 1, 2005), available at www.asil.org/events/AM05/ginsburg050401.html.
 - 6 See, e.g., Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 43–44 (2004) (“[I]n an interdependent world, United States courts should not decide cases without paying ‘a decent respect to the opinions of mankind,’ in the memorable words of the Declaration of Independence. The framers and early Justices understood that the global legitimacy of a fledgling nation crucially depended upon the compatibility of its domestic law with the rules of the international system within which it sought acceptance.”); Vicki Jackson, *Yes Please, I’d Love to Talk With You*, LEG. AFFAIRS 43 (July/Aug. 2004) (“Far from being generally hostile to foreign countries’ views or laws, the founding generation had what the signers of the Declaration of Independence described as a ‘decent respect to the Opinions of Mankind.’”); David Golove, *Human Rights Treaties and the U.S. Constitution*, 52 DEPAUL L. REV. 579, 617 (2002) (referring to “the Jeffersonian ideal of paying decent respect to the opinions of mankind” as a legitimate reason for the U.S. to sign multilateral human rights treaties).
 - 7 See, e.g., Harold Hongju Koh, *Paying Decent Respect To International Tribunal Rulings*, 96 AM. SOC’Y INT’ L. PROC. 42, 46–48, nn. 19, 41 (2002) (“From the very beginning of the U.S. Republic, dating back to the Declaration of Independence, American courts have treated international law as part of our law and paid decent respect to the opinions of mankind. To reject that history and adopt a rule of ‘no deference’ to international precedents would be fundamentally antihistorical.”); Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1087–89 (2002) (“Obeying the law of nations was considered part and parcel of paying decent respect to the opinions of mankind.”); Louis Henkin, *A Decent Respect to the Opinions of Mankind*, 25 JOHN MARSHALL L. REV. 215, 227–28 (1992) (emphasis added) (“[T]he authors of the Declaration of Independence thought that it was important and necessary to accord decent respect to the opinions of mankind. . . . The conveners of this conference have apparently concluded that we accord decent respect to the opinions of mankind about our Bill of Rights, and attend to mankind’s criticisms of it.”).

rials in constitutional adjudication.⁸

Over a decade ago, Justice Blackmun in a much-cited article criticized the Court for failing in its juvenile death penalty rulings "to inform its decisions with a 'decent respect to the opinions of mankind.'"⁹ In *Roper* itself, when at oral argument the Missouri state solicitor pointed out that the Founders would object to the vast power international-style constitutional interpretation would give the Court, Justice Ginsburg retorted: "did [Jefferson in the Declaration] not also say that to ... lead the world, we would have to show a decent respect for the opinions of mankind?"¹⁰

The function of the "opinions of mankind" in the internationalist argument is to show that this approach has the most ancient and noble domestic pedigree, that the Founding generation would be sympathetic to what is now considered an innovative and controversial practice.¹¹ The internationalists do not wish to admit to possessing what Robert Frost, in writing of the creation of the post-war international institutions, called "the courage to be new."¹² They do not claim, or wish to be seen as advocating, a major departure from American legal traditions.¹³ The attempt to legalize and internationalize

8 See *Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting) ("Willingness to consider foreign judicial views in comparable cases is not surprising in a Nation that from its birth has given a decent respect to the opinions of mankind."); see also Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value Of A Comparative Perspective in Constitutional Adjudication*, 22 YALE L. S POL'Y REV. 329, 330 (2004):

In the value I place on comparative dialogue – on sharing with and learning from others – I count myself an originalist in this sense. The 1776 Declaration of Independence, you will recall, expressed concern about the opinions of other peoples; it placed before the world the reasons why the United States of America ... was impelled to separate from Great Britain. The Declaration did so out of "a decent Respect to the Opinions of Mankind."

9 See Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45, 48 (1994) ("Interpretation of the Eighth Amendment, no less than interpretations of treaties and statutes, should be informed by a decent respect for the global opinions of mankind.").

10 Transcript of Oral Argument at 17, available at www.supremecourtus.gov/oral_arguments/argument_transcripts/03-633.pdf. Missouri's counsel meekly accepted Justice Ginsburg's characterization of Jefferson's views. *Id.* at 18.

11 Looking to the Declaration to divine the acceptable sources of authority for Article III courts is an inherently problematic endeavor. The Declaration announced the existence of a nation not yet governed by the Constitution, or even the Articles of Confederation. Nor was it seen by the Founding generation as a font of constitutional values: it "played almost no part in the debates over the ratification of the Constitution." GARY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 324 (1978). Those who cite it in support of the internationalist argument seem to use it as evidence of the Founding generation's general attitude towards world opinion, rather than as shedding light on the meaning of any particular Constitutional provision or practice.

12 The phrase is obviously sarcastic. Frost saw the "new" U.N. as merely the latest incarnation of a series of failed attempts at world peace, such as the League of Nations. ROBERT FROST, "The Courage to Be New," in *THE POETRY OF ROBERT FROST* 387 (1969) (originally published in STEEPLE BRUSH (1947)):

Heartbroken and disabled	They will tell you more as soon as
In body and mind,	You tell them what to do
They renew talk of the fabled	With their everbreaking newness
Federation of Mankind. ...	And their courage to be new.

13 See *Roper*, 125 S. Ct. at 1200 ("It does not lessen our fidelity to our Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations ... simply underscores the centrality of those same rights within our own heritage of freedom.").

social contract theorists had laid the philosophical foundation for revolution, it could hardly be said that such notions had won the acceptance of the European states. The Declaration's invocation of "the opinions of mankind" in no way suggests that Congress would change its course if other nations insisted that it was violating international law. Quite the opposite: the Declaration closes by saying that nothing will stay the new nation from its chosen course. Later, the views articulated in the Declaration would find a receptive audience in France, and, eventually, much of the rest of the world. But this could only happen because the Founding generation believed in the superiority of their notion of government, and would not accede to the dominant monarchial conception.

II

To understand what "the opinions of mankind" meant to the Founding generation, one must consider why they appealed to them. The Declaration was solely intended to affect foreign opinion – but not in a way that supports the internationalist argument. For just as the internationalists take the "opinions of mankind" phrase out of its textual context, they entirely ignore its historical context. Looking at that context shows that the Founding generation was not concerned with international opinion about the *legality*

of its conduct, but solely with the opinions of a few powerful nations about the rebellious colonies' *creditworthiness* and perseverance.

The principal purpose of issuing the Declaration was to solicit financial and military aid from France,²⁰ and hopefully to draw her and Spain into the war against Britain.²¹ In the spring of 1776, many prominent patriots still hoped that reconciliation with the crown would be possible, and measures short of total independence might suffice. Congress understood that France and Spain would not mount operations to assist the colonists if they thought the wavering rebels would quickly reconcile themselves with Britain after taking a licking in the coming summer campaign.²² The colonists would need to borrow money, but this would hardly be forthcoming if France and Spain didn't expect Congress to be around to repay. Thus the ensuing list of grievances is meant not so much to convince the Europeans of the justice of the Americans' cause, as to convince them that *Americans* deeply believe in the justice of their own cause, and harbor a deep sense of injury that will prevent reconciliation.²³ This is the import of the Declaration's stirring final words: we are wholly committed – in "our lives, our fortunes, and our sacred honor" – to the fight.

To be sure, Congress also hoped the Declaration would yield what might be thought of as "international law" benefits, in particular,

20 See WILLS at 325 ("About the motive for declaring independence there can be no doubt ... it was a necessary step for securing foreign aid in the ongoing war effort.").

21 In Congress, the Declaration was raised as a "measure[] ... for procuring the assistance of foreign powers," see THOMAS JEFFERSON, THE AUTOBIOGRAPHY 13, in WRITINGS (1984), and the timing was partially motivated by the desire to have France's help in the difficult summer campaign.

22 See EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763–89 at 82 (3rd ed. 1992) ("The Declaration of Independence itself was issued mainly for the purpose of assuring potential allies that the Americans were playing for keeps and would not fly into the mother country's arms at the first sign of parental indulgence.").

23 See THOMAS PAINE, COMMON SENSE. See also JONATHAN R. DULL, A DIPLOMATIC HISTORY OF THE AMERICAN REVOLUTION (1985) ("The Declaration was largely a foreign policy statement; without it America could hardly appeal for foreign assistance against the great army gathering to attack New York.").

the advantages that accompany state recognition: the opening of foreign trade and the establishment of diplomatic relations, which would facilitate the making of defense and commercial treaties.²⁴ As Jefferson wrote, "a declaration of Independence would render it consistent with European delicacy for European powers to treat with us."²⁵ International lawyers often point to state recognition as an area where international law is particularly robust: without the international norms of recognition, "states" would not exist at all. However, the proponents of the Declaration saw its importance in practical, geopolitical, rather than legalistic, terms. As Thomas Paine argued in *Common Sense*, it would be "unreasonable to suppose that France or Spain would offer us any kind of assistance if we mean only to make use of that assistance" to remain in the Empire but on more favorable terms. And the Founders, keen as they were on opening trade with France, rejected the "constructivist" view of statehood. While nodding to "European delicacy," they did not believe that America's existence as a nation turned on the legalism of recognition. As the supporters of the Declaration put it in Congress, "the question was not whether, by a declaration of independence we should make ourselves what we are not; but whether we should declare a fact that already exists."²⁶

In today's international law, "the community of nations" means more or less that. The practice of South Africa or Russia is as relevant as that of El Salvador or Tuvalu. The appeal is truly to the general view of governments around the world. Yet the "Mankind" to which the Declaration speaks is hardly

this ecumenical. It is narrower than the set of civilized nations; narrower even than Europe. The Declaration's "Mankind" is: France, Spain, and perhaps Holland – likely and potential players in the nation's struggle to be born.²⁷ The opinions of, say, Russia, would hardly matter; not because the authors had a crabbed view of the international community or the legitimate participants in international law-making, but because the men to whose opinions the authors appealed were those who could act, through arms or money, to the fledgling nation's benefit or prejudice.

Nonetheless, one *can* learn from the Declaration about the Founders' views on the relevance of international opinion. International legal approval itself counts for nothing; all that counts is the opinions of a few states with the power and political inclination to help. To the extent the opinion of those states counts, it is only if their favorable impression would lead them to confer specific military and trade advantages on America. Foreign approval in the moral or sentimental sense counts for nothing, nor do their views of our purely internal arrangements: no one expected Spain to be enamored of the concepts of rebellion, popular sovereignty, and republicanism.

To apply this worldview to current debates, European opinions on the juvenile death penalty should only be considered if, say, France or Spain would send a division to Iraq if we satisfied their "European delicacy." Of course, France would never send such a division (if it had one to spare), and Spain has already withdrawn its troops, and is unlikely to send them back in consideration for

24 See SAMUEL FLAGG BEMIS, *THE DIPLOMACY OF THE AMERICAN REVOLUTION* 30–31 (1957).

25 See JEFFERSON at 16.

26 *Id.* at 15. See also Ware, 3 U.S. at 223.

27 In Jefferson's notes of the debates on the Declaration, France and Spain, the only nations poised to fight Britain, are the only countries mentioned. In the surrounding discussions, Holland is also mentioned as an attractive trading partner once independence is established.

Roper. In this light, Justice Ginsburg's use of the Declaration to support a reliance on "foreign judicial views" is particularly inappropriate; foreign judges may be able to invite American ones to deliver lectures, but they cannot bestow the more significant benefits of arms in wartime.

III

Most of those who invoke the Declaration in support of the internationalist approach would not go so far as to say that fidelity to the Founders' views *requires* adherence to foreign law. Why then quibble about their use of the phrase? Firstly, atextual and ahistoric quotation makes for bad legal arguments, and thus bad law. If there is an argument to be made for relying on foreign law in constitutional interpretation, it must be made on its own terms, not with those swiped from the Founders. Second, a decent respect for our founding documents requires that we

not lose sight of their meaning through repeated mischaracterization, however casual.

One might worry that scholars and judges who play fast-and-loose with our own revered founding documents will not fight fair with the massive arsenal of foreign law with which they seek to arm themselves. One of the biggest problems with using international and foreign legal materials is their malleability. There is much to choose from, so judges may point to those parts of foreign law that support their argument, while leaving out those that do not²⁸ – a selectivity akin to lifting a quote from its textual context. Actual foreign legal practices are often hard to identify; practice may differ dramatically from laws in the books and thus a sensitivity to context is crucial. The lack of decent respect for the Declaration, which lawyers and judges may be presumed to know well, makes one wonder how carefully an internationalist judge would parse international conventions, to say nothing of the laws of China. *gfb*

28 See *Roper*, 125 S. Ct. at 1223 (Scalia, J., dissenting) (“[A]ll the Court has done today ... is to look over the heads of the crowd and pick out its friends.”).

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