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TRANSNATIONAL LEGAL PROCESS AND THE SUPREME COURT'S 2003-2004 TERM: SOME SKEPTICAL OBSERVATIONS

Eric A. Posner[†]

I. INTRODUCTION

Dean Koh's keynote address last night provided you with an example of a popular approach to understanding international law these days.¹ He calls this approach "Transnational Legal Process" or TLP, and I will follow this nomenclature. This approach can be contrasted with what I will call, for lack of a better name, the "Standard View." Koh himself prefers to contrast TLP with what he calls "nationalism,"² but nationalism is something very different from the Standard View, which could be held by people who are not nationalists in the ordinary sense of that word. TLP and the Standard View make different

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1. In preparing these remarks, I have relied on several of Harold Koh's articles including: Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645-56 (1997); Harold Hongju Koh, The 1994 Roscoe Pound Lecture: Transnational Legal Process (Oct. 28, 1994), in 75 NEB. L. REV. 181 (1996) [hereinafter Koh, The Pound Lecture]; Harold Hongju Koh, Transnational Legal Process After September 11th, Jefferson Memorial Lecture (Oct. 1, 2003), in 22 BERKELEY J. INT'L L. 337 (2004) [hereinafter Koh, The Jefferson Lecture]; Harold Honju Koh, *The Ninth Annual John W. Hager Lecture, the 2004 Term: The Supreme Court Meets International Law*, 12 TULSA COMP. & INT'L L. J. 1 (2004) (remarks in this issue) [hereinafter Koh, The Hager Lecture].

2. Koh, The Hager Lecture, *supra* note 1.

assumptions about the world and have different implications for understanding the Supreme Court's cases last term.

In this talk, I will spend a few minutes contrasting TLP and the Standard View. Next, I will talk about their different implications for judicial enforcement. Then I will talk about the international law related cases decided by the Supreme Court during its 2003-2004 term. Finally, I will use these cases as a vehicle for criticizing the TLP view.

II. THE STANDARD VIEW

The Standard View can be caricatured as follows. The world consists of 190 or so states. Each state has its own "interest." A state's interest is fixed – the product of the domestic political process, reflecting the values and preferences of the public in a democracy, and those of a narrower elite in an authoritarian system. In short, the state's interest comes from within, and mainly concerns the security and prosperity of the state's citizens.

States pursue their interests in the international sphere in various ways. Sometimes, they cooperate with other states; sometimes, they prey on other states. When states cooperate, they make agreements and follow certain rules. They join the GATT/WTO in order to enhance trade; they enter military alliances such as NATO for security. These rules and agreements come to be called "international law." States comply with international law only as long as doing so advances their interests. International law itself has no normative authority, and no ability to influence states that are powerful enough to violate it.

What is distinctive about international law, compared with domestic law, is that there is no central world legislature, court, or enforcer. That is why states continue to comply with international law only when they choose to and think that doing so advances their interest.

The Standard View, as I have called it, should not be confused with old-fashioned realism: states are not necessarily trapped in a security competition. They do cooperate and they do create international law, but international law has a minimalist quality. One might think of the Standard View as the "billiard ball view" of international relations because the states, like billiard balls, do not change when they interact with each other.³

3. See JACK L. GOLDSMITH AND ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (discussing these assumptions further).

III. THE TLP VIEW

Under the TLP view, states are not billiard balls and they are not unitary agents. They are legal and social constructs.⁴ The borders of states are permeable in numerous ways. TLP emphasizes that people interact with each other across borders: they travel, they watch TV or films from other countries, they learn about foreign customs and norms, and they often have relatives who live in different countries.⁵ Since the end of the cold war, the world has become smaller; there is an immense amount of new trade and crossborder investment, new communications like the Internet and wireless phones, political integration in places like Europe, the spread of democracy, and on and on. Also of great importance is the rise of multinational corporations, NGOs like Amnesty International, and various transborder social and political movements such as (to pick one example) the campaign against landmines.⁶

The key difference between the TLP view and the Standard View is the assumption about state interests. For the Standard View, the world does not influence a state's interest. For the TLP view, the world does influence a state's interest. How? It's not clear. In various writings, Koh has argued that states "internalize norms" through the transnational legal process.⁷ By this, he appears to mean that various legal processes – both domestic and international – cause individuals within a state to change their views about what is morally or politically correct. States comply with international law – and do so more than the Standard View predicts – because officials who govern the state come to believe that causing the state to comply with international law is the right thing to do, or because their constituents come to have this belief and demand that elected officials act consistently with it.⁸

4. See generally Howard Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home (Apr. 8, 1998), in 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, The Frankel Lecture].

5. Koh, The Pound Lecture, *supra* note 1, at 205.

6. INTERNATIONAL CAMPAIGN TO BAN LANDMINES, *International Campaign to Ban Landmines, Annual Report 2003* (Nov. 3, 2004), available at http://www.icbl.org/campaign/annual_reports/2003 (last updated Nov. 3, 2004).

7. Koh, The Frankel Lecture, *supra* note 4, at 626-27.

8. See *id.* at 623; see also Koh, The Pound Lecture, *supra* note 1, at 205; Howard Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Koh, The Jefferson Lecture, *supra* note 1, at 343.

IV. THE ROLE OF COURTS

A. *Standard View*

Under the Standard View, the role of courts is dull. The political branches – and especially the president – determine foreign policy and decide whether to enter treaties, break treaties, and so forth. All that a court does is follow the instructions of the president or Congress. If the government wants to violate a treaty, a court will not stop it. But if the government wants its own citizens to comply with a treaty and creates domestic law that incorporates the treaty, then of course the court should enforce the treaty. A humble example is an old treaty that gave Spaniards certain property rights in Florida.⁹ If the political branches decide to incorporate this treaty into domestic law, then American courts should protect these rights; otherwise, they should not.

In sum, under the Standard View courts are deferential *agents* of the political branches. If political branches tell them to enforce international law (that is, if the political branches formally *incorporate* international law into domestic law) then courts will do so. However, courts will not try to force the political branches to comply with international law if the political branches prefer not to.¹⁰

B. *TLP View*

Under the TLP view, courts suddenly become powerful and glamorous. It is still the case that states enter treaties, and courts enforce them when they change domestic law. But courts now have a more significant role: introducing international norms into domestic legal processes. The key difference between the Standard View and the TLP view is that under the TLP view courts act not as agents but under their own authority to compel citizens and the government to comply with international law that has never been formally incorporated into domestic law by the government and to comply with the vaguer international norms, often called customary international law.

Courts are a key player in Koh's conception of TLP.¹¹ To the question I raised earlier – how exactly do states internalize international law – Koh's answer is, in part, through their courts.¹² Even if government officials don't

9. Adams-Onis Treaty, February 22, 1819, U.S.-Spain, art. 8, 8 Stat. 252.

10. One could take the billiard ball view of international relations but think that courts ought to enforce international law more aggressively. The two components of the Standard View, the assumption about fixed state interests and the assumption about the role of the courts, are not analytically connected; an adherent of the Standard View might favor a more aggressive role for the courts. But as a matter of intellectual history, the two seem to go together.

11. Koh, The Frankel Lecture, *supra* note 4, at 649-52.

12. *Id.* at 626-27.

want to comply with international law, their courts do, and the officials will find themselves forced by courts to comply with international law.

Then the question is, do courts really do this? And if so, why? We will get to these questions shortly. For now, you might think of the TLP view as a kind of cosmopolitan judicial activism; by contrast, the stodgy old Standard View envisions courts as exercising judicial restraint by submitting to the political branches. In international affairs, this usually, but not always, means the executive branch.

V. THE SUPREME COURT'S 2003-2004 TERM

Which view is held by the Supreme Court? Does the Supreme Court wed the Standard View and defer to the political branches, or does it hold the TLP view and force the political branches to comply with international law?

A. *Sosa v. Alvarez-Machain*¹³

The Alien Tort Statute (ATS) is an exceedingly old law that permits an alien to sue in an American federal court for injuries resulting from a tort that violated the law of nations.¹⁴ The law was rarely used, and lay dormant for nearly 200 years. Then, in 1980, a federal court famously held in *Filartiga v. Pena-Irala* that an alien may recover damages against a Paraguayan police official on account of torture and other grave human rights abuses.¹⁵

The striking thing about the *Filartiga* case was that although the U.S. government had ratified many human rights treaties, it had never allowed them to become domestic law; it has always resisted the idea that they could create private rights of action. This is true of nearly all states, and in order for the court to find that the acts of torture violated the "law of nations," or what we now call "international law," it had to argue that there is a customary international law norm against torture.¹⁶ Customary international law usually requires state practice and state consent; although most states claim that they reject torture, the vast majority of states practice torture at some level. The court ended up basing its judgment on, among other things, a General Assembly resolution, which, by common consent, has no formal power to create international law.¹⁷

The ATS presents a problem for our simple division between the Standard View and the TLP view. On the one hand, the ATS is legislation, and courts that rely on it to enforce human rights norms are acting consistently with the

13. 124 S. Ct. 2739 (2004).

14. 28 U.S.C. §1350 (2000).

15. 630 F.2d 876, 889 (2d Cir. 1980).

16. *Id.* at 880.

17. *Id.* at 882.

Standard View. On the other hand, thanks to *Filartiga*, the ATS had clearly evolved into something that was not foreseen by its drafters: an invitation to courts to implement human rights norms in a manner not permitted by formal human rights treaties – and against Americans as well as against foreigners. On balance, I think the latter is right: the ATS post-*Filartiga* reflects TLP.

We might think of the *Filartiga* court and other U.S. courts, especially the Ninth circuit, as seizing the ATS as an opportunity for incorporating international norms in domestic law. Other circuits, such as the D.C. circuit, resisted this trend. We can think of the circuit split as reflecting a conflict between a quasi-TLP view and the Standard View. And which side did the Supreme Court take in *Sosa*?

Unfortunately, the Supreme Court did not come down clearly on either side. On the one hand, it resisted the argument that the ATS was simply a jurisdictional statute that incorporated certain eighteenth century common law causes of action.¹⁸ This was a victory for TLP. On the other hand, the Court also raised the standards for determining whether a customary international law (CIL) norm exists. You can no longer rely on General Assembly resolutions; you need much more substantial evidence that a CIL norm exists.¹⁹

Thus, we won't know whether the TLP or the Standard View prevails until we see how lower courts interpret the *Sosa* case. If the evidentiary standards for finding human rights norms turn out to be high, then the ATS will be a dead letter. In *Sosa* itself, the question, whether a brief arbitrary detention violates international law, was answered in the negative.²⁰ The atmospherics of the opinion suggest that the courts, henceforth, will be more reluctant to award damages under the ATS. On balance, one might conclude that the Supreme Court reasserted the Standard View, albeit not with full rigor, against circuit courts influenced by TLP.

B. *Hamdi v. Rumsfeld*

Padilla v. Rumsfeld,²¹ *Rasul v. Bush*,²² and *Hamdi v. Rumsfeld*²³ dealt with different aspects of the U.S. government's handling of detainees, but only *Hamdi* has much on international law, so I will confine my discussion to that case.

The initial question before the Court was “whether the Executive has the authority to detain citizens who qualify as ‘enemy combatants.’”²⁴ The problem

18. *Sosa*, 124 S. Ct. at 2761.

19. *Id.* at 2761-62.

20. *Id.* at 2739.

21. 124 S. Ct. 2711 (2004).

22. 124 S. Ct. 2686 (2004).

23. 124 S. Ct. 2633 (2004).

24. *Id.* at 2639.

for the government was the “Non-Detention Act,” which forbids the Executive to detain American citizens except pursuant to an Act of Congress.²⁵ The government argued that the Executive has such authority under Article II of the Constitution,²⁶ and also under a statute enacted by Congress: the Authorization for Use of Military Force (issued in the wake of September 11th).²⁷ This Act of Congress said that the President may use “all necessary and appropriate force” against nations and individuals involved in the September 11th attack.²⁸ The plurality opinion written by Justice O’Connor agreed with the government, reasoning that the phrase “all necessary and appropriate force” in the Force Authorization included the power to detain for the duration of the conflict.²⁹

The next question was what process Hamdi was due under the U.S. constitution. Everyone agreed that Hamdi could bring a writ of habeas corpus. But the government argued that the court’s power to provide relief would be exceedingly narrow.³⁰ Under the so-called “some evidence” standard, the court would have to accept the government’s statement of facts, and determine only whether the “articulated basis [for the detention] was a legitimate one.”³¹ The plurality rejected this argument, holding that the “enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”³²

Hamdi gets sprung and many people cheer this result, but is it the result of the TLP view? Not at all. The main basis of decision was American statutory and constitutional law. International law made an appearance in two small places in the opinion, but its role was minor, and it clearly did not affect the result. The Standard View prevails.³³

Let’s turn now to Souter’s concurrence, where international law plays a more visible role. Souter argues that the Non-Detention Act³⁴ (which forbids the Executive to detain American citizens except pursuant to an Act of Congress) prevails unless a subsequent Act of Congress is explicit enough. For Souter, the Authorization for Use of Military Force was not sufficiently explicit because it made no mention of detentions of American citizens; the plurality had to find the

25. 18 U.S.C. § 4001 (2000).

26. U.S. CONST. art. II, § 2, cl. 1.

27. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sep. 18, 2001).

28. *Id.*

29. *Hamdi*, 124 S. Ct. at 2640.

30. *Id.* at 2644.

31. *Id.* at 2645.

32. *Id.* at 2648.

33. One might get the impression from Koh’s writings that the Standard View is synonymous with politically conservative outcomes. As the discussion in the text shows, the Standard View leads to liberal outcomes when domestic law leads to liberal outcomes.

34. 18 U.S.C. § 4001.

authorization implicit in the Act's "use of force" language. For Souter, this was not enough. Souter says that he can imagine the Force Resolution being sufficient to overcome the Non-Detention Act in the following circumstances. Here, he is recreating an argument of the governments:

Because the Force Resolution authorizes the use of military force in acts of war by the United States, . . . it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. . . . Accordingly, the United States may detain captured enemies. . . . Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the Force Resolution, Hamdi's detention is authorized for purposes of [the Non-Detention Act].³⁵

Souter then points out that the detention of Hamdi incommunicado "is apparently at odds with its [the government's] claim here to be acting in accordance with customary law of war," and rejects the government's argument.³⁶

What's going on here? One possibility is that Souter thinks that in authorizing the use of force, Congress could only have been authorizing the use of military force that is consistent with international law. As a matter of statutory interpretation, this seems wrong. Congress has frequently authorized uses of force; however, no one has ever thought that in doing so it conditioned the authorization on compliance with the laws of war, and certainly not to the extent of creating judicially enforceable private rights for individuals. No one thinks, for example, that when Congress declared war against Germany in 1941 it also implicitly forbade the American military to destroy German and Japanese cities, so that officials who authorized these bombing campaigns would be in violation of domestic as well as international law and subject to domestic judicial process, nor that German or Japanese POWs would have rights to American judicial process to evaluate their claims under international law. Traditionally, compliance with the laws of war has been at the discretion of the executive. Congress has attempted to take away this discretion in a handful of cases with explicit statutes (such as the War Crimes Statute),³⁷ but not otherwise. Souter is using statutory interpretation to disguise a novel argument that the laws of war may provide judicially enforceable rights; here, the right by an American citizen to be released from detention where the detention is (or might be) in violation of international law but not domestic law.

35. *Hamdi*, 124 S. Ct. at 2657.

36. *Id.*

37. 18 U.S.C. § 2441 (2000).

I don't want to overstate what Souter is doing here. Presumably, if Congress repealed the Non-Detention Act, Souter's international law argument would not get off the ground. But what does seem clear is that Souter is using statutory materials in an extremely aggressive fashion so as to incorporate international norms in domestic law. His opinion, therefore, provides some evidence for the TLP view. However, remember that his opinion received only one other vote.

By contrast, for O'Connor's plurality opinion, Hamdi goes free only if his detention violates American statutory or constitutional law.³⁸ The plurality – and the dissent, I should add – clearly reflected the Standard View; the Standard View wins, 7-2.

C. Revisiting LaGrand³⁹ and Breard:⁴⁰ the ICJ's Avena Case⁴¹

I want to mention briefly one other case, although not a Supreme Court case. Last March, the International Court of Justice (ICJ) ruled that the U.S. had violated the Vienna Convention on Consular Relations by failing to inform a Mexican national named Avena, who had been arrested for capital murder, that he had a right to obtain assistance from the Mexican consulate.⁴² Subsequently, Avena was sentenced to death for committing a capital crime. Mexico brought a proceeding against the U.S. in the ICJ, arguing that the U.S. should not execute Avena because of this violation of an international treaty.⁴³

It's one thing to lose an ICJ case; but the ICJ cannot stay an execution. To stay an execution, one must ask an American court to obey the ICJ's judgments. This, the Supreme Court has not been willing to do. In two earlier cases – in the *Breard* case (1998) and the *LaGrand* case (1999) – the Supreme Court refused to stay executions in light of an ICJ ruling in very similar circumstances.⁴⁴ According to the Court, the Vienna Convention does not provide “a foreign nation a private right of action in United States' courts to set aside a criminal conviction.”⁴⁵ The treaty has not been effectively incorporated into domestic law by the executive and Congress. This means that it can be enforced only

38. *Id.* at 2648.

39. *Federal Republic of Germany v. U.S.*, 526 U.S. 111, 114 (1999).

40. *Breard v. Greene*, 523 U.S. 371, 378-79 (1998).

41. *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. No. 128 (Mar. 31), available at http://www.icj-cij.org/icjwww/idocket/imus/imusjudgment/imus_imusjudgment_20040331.pdf (last visited Nov. 21, 2004).

42. *Id.*

43. *Application Instituting Proceedings (Mex. v. U.S.)*, 2003 I.C.J. No.128 (Jan. 9), available at http://www.icj-cij.org/icjwww/idocket/imus/imusorder/imus_iapplication_20030109.pdf (last visited Nov. 21, 2004).

44. 523 U.S. 371, 378-79 (1998); 526 U.S. 111, 114 (1999).

45. *Breard*, 523 U.S. at 377.

unilaterally, by the executive, e.g., by the state department begging a governor to grant clemency, which happens from time to time but rarely with effect. Here again we see the Standard View in action.⁴⁶

The failure of American courts to pay attention to the ICJ thus far, has been a problem for the TLP view. The ICJ is the most prominent and prestigious of the international courts: surely if TLP is right, domestic courts would pay attention to the ICJ. But this hasn't stopped some TLP proponents from claiming that the ICJ matters. Harold Koh, for example, argues as follows:

In the early 1980s, it came to light that the Reagan administration was supporting the Contras in their struggle against the Nicaraguan Sandinista Government, and that one of the chosen means was to mine the harbor of Corinto. In 1984 the Nicaraguan Government filed a suit against the U.S. Government in the International Court of Justice in The Hague.⁴⁷ Many people assumed that this was just a publicity stunt, one that could have no conceivable impact on the United States. They did not appreciate that Nicaragua was not so much seeking an international judgment as it was seeking to enforce transnational legal process against a more powerful adversary. By suing in this intergovernmental forum, and triggering an interaction, Nicaragua pursued the goal of obtaining a judicial interpretation that the United States was violating international law, an interpretation that it then hoped to internalize into U.S. domestic law. Nicaragua won a so-called "provisional measures" order from the ICJ, but instead of seeking enforcement, the Nicaraguans went to the U.S. Congress, where then-Senator Daniel Patrick Moynihan introduced a resolution that terminated future aid to the Contras for any actions that violated the ICJ ruling. In response, the Reagan administration stopped mining the harbors almost immediately. So, in my view, what happened here was a different kind of appeal, not an appeal to judicial process but to a transnational legal process, in which the Nicaraguans triggered an interaction, which led to an international legal interpretation, which was ultimately internalized into U.S. funding statutes, or domestic law. By invoking this process, a relatively powerless nation forced the most

46. Two qualifications here: first, there were some dissents; second, the procedural posture of the cases was such that the Supreme Court was not required to directly confront the TLP view. I thank Paul Berman for the latter point. I should also mention that at least one state court was influenced by the ICJ's judgment in the Avena case; see Janet Koven Levit, *A Tale of International Law in the Heartland: Transnational Legal Conversation Among State Courts, the Supreme Court and the International Court of Justice*, 12 *Tulsa Comp. & Int'l. L.* 157 (2004) (remarks in this issue).

47. *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1984 I.C.J. No. 70 (Nov. 26) available at

http://www.icj-ij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19841126.pdf (last visited Nov. 22, 2004).

powerful nation of the world, the United States, into obedience with international law.⁴⁸

The problem with this argument is that there is no evidence of a causal relationship between the ICJ's judgment and the Reagan administration's decision to stop mining the harbors. The CIA stopped mining the harbors before the ICJ judgment, because: (1) the operation was complete; (2) secrecy for further operations was lost; and (3) there was an intensely negative public reaction to that operation in particular, and to the president's Nicaragua policy in general. Congress reduced funds for numerous reasons, which included the Iran-Contra scandal, but also optimism about a diplomatic mission that would have been undermined by further military operations.

As for the ICJ opinion, it had no effect on the public opinion polls on the president's Nicaragua policy; it barely registered in the newspapers, and there were a few congressional hearings but not much else. The decisive point, a point that Koh never mentions, is that the U.S. reacted to the ICJ opinion by withdrawing from compulsory jurisdiction. Far from being influenced by the ICJ's opinion, the U.S. repudiated the opinion and virtually the institution itself. The ICJ, once a great hope for internationalists, had long been floundering, but its decision in the *Nicaragua* case may have mortally wounded it.

Even if Koh were correct in saying that the ICJ influenced Congress and the president, this would be the Standard View at work and not the TLP view. The U.S. has treaty obligations to comply with the judgments of the ICJ; if the president violates those treaty obligations, Congress has every right to try to get him to change his mind. The *Nicaragua* case would have supported the TLP view, as I understand it, only if it had influenced American courts and caused them to constrain the president or Congress. However, the U.S. courts played no role whatsoever in this political drama.

D. Basic problem

Our survey of the recent Supreme Court cases, plus the *Avena* case in the ICJ, suggests that the Standard View is alive and well. We have not looked at all of the Supreme Court cases; there were ten or so others, and in none of these cases did the Court do anything different from what it traditionally does: defer to the president, or the president and Congress speaking jointly through statutes. TLP-style rhetoric was rare and never commanded a majority.

The TLP view, therefore, is not a positive account of what the Supreme Court and the American judiciary does. It is not a terrible account, however. We saw its influence on Souter in the *Hamdi* case. We saw that it influenced some Circuits prior to the *Sosa* case, and it may possibly have influenced the court in that case as well, though I doubt it. One can find some TLP-style

48. Koh, The Jefferson Lecture, *supra* note 1, at 340-41.

language in concurring or dissenting opinions in a few other cases. A few people have suggested that cases like *Lawrence v. Texas* (the case from the 2002-2003 term, which struck down a Texas sodomy law on due process grounds) also reflects TLP.⁴⁹ In that case, Justice Kennedy mentioned that the European Court of Human Rights had also struck down a sodomy law as a violation of the European Charter of Human Rights.⁵⁰ This brief passage was, to my mind, trivial, and similar passages are few and far between (*Atkins v. Virginia* being another famous example).⁵¹ The dominant international law methodology on the Supreme Court is the Standard View, and there is no sign that this will change anytime soon.

Confronted with this type of evidence, Dean Koh makes two further arguments. First, he argues that TLP is, as its name suggests, a "process." If yesterday American courts ignored the ICJ, tomorrow they may obey it.⁵² Second, he argues that TLP is not just about courts, but about international norms influencing citizens and nonjudicial officials as well; therefore, a focus on the courts alone is misleading.⁵³ He may be right on both counts, but both propositions remove his theory from the realm of empirical testability, and into the realm of conjecture.

So much for the positive claims of the TLP view, but can it claim our adherence on normative grounds? Should we urge judges to take the TLP view seriously, and allow them to incorporate international and foreign norms into domestic law? I am skeptical for five reasons.

First, international law is not always good. Although current discussions center around human rights law, much of international law is a product of authoritarian as well as democratic countries agreeing on a lowest common denominator. Probably the strongest norm of international law is state sovereignty: we're not supposed to intervene when another country abuses its own citizens. If our political branches decide that intervention may be justified on humanitarian grounds (in Kosovo, Rwanda, the Sudan, wherever) then presumably, the enemy state ought to be able to get an injunction in federal court. Under the logic of TLP, courts ought to review American military interventions for their consistency with international law.

Second, judges are not always going to act the way we want them to. Koh's work assumes throughout that liberal judges will use liberal international human rights norms to constrain the American Congress and President. If you

49. 539 U.S. 558 (2003).

50. *Id.* at 2474.

51. 536 U.S. 304 (2002).

52. See generally Koh, The Hagar Lecture, *supra* note 1; see also Koh, The Jefferson Lecture, *supra* note 1, at 341.

53. Koh, The Hagar Lecture, *supra* note 1; see also Koh, The Jefferson Lecture, *supra* note 1.

are liberal, you might not mind this, but we have seen in other settings the dangers of judicial activism for liberal policy. Warren court era judicial activism for the sake of civil liberties easily transmutes into Rehnquist court era judicial activism for the sake of states' rights. TLP provides a new resource for judicial activists from both political parties.

Justice Kennedy mentioned Europe's view of sodomy laws in *Lawrence*, and the views of other countries as well; however, he did not undertake a systematic survey or acknowledge that the laws of many countries are exceedingly disagreeable.⁵⁴ Most countries in the world also have fewer protections for criminal defendants, laws against abortion on demand, and weaker protections for women and ethnic and racial minorities. It is not at all clear that we want our judges to take their cue from these states. Even if we do, it should be immediately clear that TLP does not necessarily mean more liberal American constitutional law. A principled approach would require American judges to take all foreign law seriously, and this means illiberal as well as liberal foreign law.⁵⁵

Third, judges just don't know much about foreign policy, foreign countries, and foreign law. Scholars who cheered when Justice Kennedy cited the ECHR must have felt at least a little dismay at the superficial way in which he treated the ECHR's decision. TLP produces a whole new range of opportunities for judicial error.

Fourth, courts are, by design, passive and reactive. They must wait for disputes to arise, and then for one party to bring the case to the courthouse. For 200 years, this institutional disability has made people think that courts are in a bad position to conduct foreign policy, which must change quickly and fluidly in reaction to unpredictable world events. TLP, if vigorously implemented, would tie the hands of the political branches, and especially the president, who is in the strongest position to conduct vigorous foreign policy. More likely, it would result in a reaction by the political branches, which are jealous of their power over foreign affairs, and have the means to frustrate efforts at judicial interference.

Consider the ATS. The U.S. government has a complicated relationship with foreign countries, and while it wants other countries to respect human rights, it cannot always get its way. During the cold war, this problem was acute. Many American allies against the Soviet Union violated the human rights of their citizens, but the American government always placed loyalty over

54. See *Lawrence*, 539 U.S. 558, 576.

55. See Justice Antonin Scalia, *Foreign Legal Authority in the Federal Courts*, Address before the Ninety-Eighth Annual Meeting of the American Society of International Law (Apr. 2, 2004), in 98 ASIL PROC. 305 (2004).

human rights performance. The usual reason was that if a place like Guatemala was bad, the Soviet Union was worse, as was a Soviet dominated world.

Now you might not agree with this logic, but it is one thing to say that it is wrong, and another to say that American courts should decide that it is wrong. Only the political branches can determine human rights policy in a way that does not conflict with its other values and priorities, such as containing the Soviet Union. The Carter administration could do this, for example, although it abandoned its efforts when the Soviet Union invaded Afghanistan.

Times haven't changed after the Cold War. Important countries with bad human rights records (Saudi Arabia, Turkey, Russia, China) cannot be repudiated; the U.S. needs them to accomplish its various goals, including self-defense. Pressure is put on them, but in a careful way. If the executive branch wants to do business with a country like China, tort suits in American courts by victims of Chinese human rights abuses, against Chinese officials, can only put the branches of government at cross purposes. There is no reason to think that courts should displace the executive and legislative branch's traditional function of conducting the nation's foreign policy.

Fifth, TLP is undemocratic. To some extent, all forms of judicial activism are undemocratic, but liberal academics were able to provide some attractive theories for Warren Court-era judicial activism – most notably, the idea that judges can correct democratic failure, such as the disenfranchisement of minorities. TLP, however, can be given no such rationalization. “Nationalist” American foreign policy – if you want to call it that – reflects the nationalist sentiments of the American people.

VI. CONCLUSION

For purposes of this talk I have simplified TLP, and my caricature can be stated in two propositions. The first proposition is a positive claim: American courts enforce international and foreign norms, often in the teeth of opposition by the President and Congress. The second proposition is a normative claim: American courts *should* enforce international and foreign norms in this way.

As for the positive claim, my argument has been that TLP has never been accurate as a descriptive matter and the Standard View is, more or less, correct. But TLP does contain an element of truth. American courts, from time to time, do seem to be tempted to enforce international law and norms in a way that is not sanctioned by the political branches. We have seen a few examples of this, albeit relatively minor examples, in the Supreme Court's 2003-2004 term.

As for the normative claim, I have sought to register some skepticism. We can think of a few cases, perhaps, where American courts may have enforced international or foreign law in a way that produced a good outcome. But I don't think anyone has provided good reasons for thinking that this is the proper institutional role of the courts. In the American system, courts work best when

they enforce positive law, and when they enforce constitutional norms in a way that is sensitive to domestic values and political realities. A cosmopolitan judicial activism may seem attractive in the abstract, but courts are in a poor position to enforce international norms against the will of the people and their elected representatives.

