Address

Transnational Spaces: Norms and Legitimacy

T. Alexander Aleinikoff†

I.

More than a decade ago, then Professor (now Dean) Harold Hongju Koh delivered the Roscoe Pound Lecture at the University of Nebraska College of Law. Entitled *Transnational Legal Process*, the lecture described a "theory and practice of how public and private actors . . . interact in a variety of public and private, domestic and international fora to make, interpret, and ultimately, internalize rules of transnational law."[1] Koh's primary purpose was to answer the question that has occupied many international law scholars: why do almost all nations obey almost all principles of international law almost all of the time?[2] He argued that the traditional answer—that nations obey based on interest and identity—is only partly right. Transnational legal process provides a more complete picture. According to Koh, "[a]s transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize."[3]

Dean Koh's paper has been appropriately influential. It provides a nuanced and insightful analysis of law in action, important both for theorists and activists. Today I want to push his analysis a bit further. First, because Koh's focus was on how the U.S. system incorporated international norms, he devoted little attention to how international norms themselves are developed. Second, though he provided an explanation of how international norms become incorporated into the U.S. legal system, he did not offer a theoretical justification for their incorporation. This question—one of *legitimacy*—is, I believe, generally undertheorized in the literature of transnational and international scholars. A theorist avoids this question at his or her peril: there are powerful premises underlying our legal system that delegitimize the role of non-domestic norms in the U.S. legal system, and there are strong, sometimes strident voices that argue against the easy assumptions of transnational scholars.

I will suggest today that these two issues—transnational lawmaking and the legitimacy of transnational norms—are in fact related, and that investigating new forms of lawmaking at the transnational level may also help

---

† Dean of the Georgetown University Law Center and Executive Vice President for Law Center Affairs of Georgetown University. These remarks were originally delivered as the keynote address of *The Yale Journal of International Law*'s Sixth Annual Young Scholars Conference, held on March 1, 2008 at The Yale Law School. I appreciate the thoughtful comments of Robert Ahdieh and Paul Berman on this essay.

1. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L REV. 181, 183-84 (1996).
2. The aphorism comes from LOUIS HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).
3. Koh, *supra* note 1, at 204.

provide an answer to the legitimacy question. My argument is that the United States increasingly participates in transnational, mutually responsive processes of legal argumentation and norm development, and that it does so because it sees utility in this participation. The legitimacy of these processes may be grounded in considerations that are quite distinct from the ways we think about the legitimacy of domestically generated norms. Finally, I will argue that the question of legitimacy is political and cultural, not legal—a conclusion that suggests that notions of legitimacy will evolve through practices and narratives.

II.

Let me start by looking at the Supreme Court case of *Sanchez-Llamas v. Oregon*[4] through Koh's lens. The case, decided in 2006, considered several questions regarding the applicability and interpretation of the Vienna Convention on Consular Relations. Under the Convention, which the United States ratified in 1969, member states are obligated to inform a detained foreign national that he or she has the right to have consular officials of the home state notified of his or her detention; if the detainee requests such notification, states must inform consular officials "without delay." The Convention provides no explicit remedy for its violation.[5]

In 1997, Mario Bustillo, a Honduran national, was charged with striking a man in the head with a baseball bat outside of a Springfield, Virginia restaurant.[6] He was convicted of first-degree murder and sentenced to thirty years in jail. After the conviction was affirmed on appeal and became final under state law, Bustillo filed a habeas petition in state court asserting that Virginia authorities had violated the Vienna Convention by failing to inform him of his right to notify the Honduran consulate. The state court found that the habeas petition was "procedurally barred" because the issue had not been raised at trial or on appeal, and the state supreme court affirmed. The U.S. Supreme Court then granted a writ of certiorari and the case was argued in early 2006.

As Chief Justice John Roberts noted for the majority, federal courts will normally deny review of a habeas claim that has been denied by a state court on the ground that the claim had not been raised at trial. But, Roberts recognized, the presence of the claim under the Vienna Convention made the issue more complicated—particularly because of a 2001 decision by the International Court of Justice (ICJ) that had held that the Vienna Convention bars the application of procedural default rules to defeat claims under the Convention, including violations of the consular notification guarantees.[7] The ICJ's decision relied upon language in Article 36 of the Convention, which mandates that state laws regulating the exercise of Convention rights "enable

4. Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006)

5. *See* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

6. Bustillo's case was joined with *Sanchez-Llamas* on appeal.

7. LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (June 27).

full effect" to be given to the intended purposes of the rights.[8] Where, as here, the procedural default was itself a result of a violation of the Convention—that is, the failure to inform the defendant of his consular notification right—permitting the default rule to bar consideration of the claim failed to give "full effect" as required by the Convention: it prevented courts from attaching any legal significance to the fact that the Convention's violation prevented the foreign government from assisting its national.

Bustillo asserted that the ICJ's judgment should be given substantial, if not controlling, weight in interpreting the Convention. The ICJ's role in interpreting the Convention is recognized in an Optional Protocol that provides for compulsory jurisdiction for the ICJ in disputes "arising out of the interpretation or application of the Convention."[9] The United States initially ratified both the Convention and the Optional Protocol, but has since withdrawn from the Protocol.

Here was an ideal moment for transnational legal process. But the Court missed the opportunity. It rejected the argument that the ICJ's interpretation of the Convention should be binding on the Court. The Court then went on to disagree with the ICJ's interpretation that state procedural default rules could not bar a claim based on the violation of the consular notification provision of the Convention. The reasoning of the international court, said the Chief Justice for the majority, "overlooks the importance of procedural default rules in an adversary system, which relies chiefly on the *parties* to raise significant issues and present them to the courts in the appropriate manner at the appropriate time for adjudication."[10] Thus, "[t]he ICJ's interpretation of Article 36 is inconsistent with the basic framework of an adversary system"[11]—a system which differs in material respects from the "magistrate-directed, inquisitorial legal system characteristic of many of the other countries that are signatories to the Vienna Convention."[12]

Roberts does not engage the decision of the World Court. Although he states that the Supreme Court owes "consideration" to the ICJ judgment,[13] the Chief Justice acts to the contrary. He lectures the ICJ on fundamentals of the U.S. adversary system and considers not the ICJ's reasoning but rather the ways in which the ICJ is an inappropriate body for rendering an opinion on the matter before the U.S. high court. The ICJ is less a *world* court—a repository of transnational knowledge based on global experience—than an *alien* court, one that knows not the traditions of the Anglo-American legal system.

---

8. Vienna Convention, *supra* note 5, art. 36.

9. Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S T. 325, 596 U.N.T.S. 487.

10. *Sanchez-Llamas*, 126 S. Ct. at 2685

11. *Id.*

12. *Id.* at 2686. Additional considerations play a role in the Chief Justice's opinion. He suggests that if the Convention bars application of the procedural default rules, then it would also call into question application of other rules such as statutes of limitations and prohibitions against successive filing of habeas petitions. Furthermore, he notes that it is generally accepted that procedural default rules can bar the consideration of claims of violation of fundamental constitutional protections, which are surely no less important than claims alleging violation of the consular notification provisions of the Convention.

13. *Id.* at 2697.

What might an opinion open to transnational legal process have looked like—one that is less authoritarian and more dialogic? Let's take a look at Justice Breyer's dissent.

Breyer begins by disagreeing with the majority's interpretation of the ICJ decisions on the Vienna Convention. The majority, according to Breyer, reads the ICJ judgments as concluding that a procedural default rule barring claims that the consular notification provision has been violated constitutes a per se violation of the Convention itself. Breyer interprets the ICJ cases to stand for a more limited proposition: that the state default rule cannot be applied where it was the failure of the state to inform detainees of their Convention rights that led to the detainees' failure to assert them (i.e., where the state brought about the procedural default).

Breyer assumed that the ICJ's decision did not bind the Supreme Court, but he went on to discuss what "respectful consideration" of the ICJ's ruling would entail. He thought that the majority's reading of the ICJ's jurisprudence—"as creating an extreme rule of law, as reflecting a lack of understanding of the 'adversary system'"—did not exhibit "respectful consideration."[14] Rather, he adopted the interpretation of the Convention that he found consistent with his reading of the ICJ's opinions:[15]

> I find strong reasons for interpreting the Convention as sometimes prohibiting a state court from applying its ordinar[y] procedural default rule to a Convention violation claim. The fact that the ICJ reached a similar conclusion . . . adds strength to these reasons. And I cannot agree with the majority's arguments to the contrary.[16]

Note what Breyer has done here. He has neither found the ICJ decision binding, nor as is sometimes done, invoked the international tribunal's ruling as a makeweight after reaching his decision on other grounds. Rather he has reasoned about the meaning of the Convention by engaging the rulings of the ICJ—moving from text to purposes to prior cases. It is possible that he would have reached the same judgment without having the ICJ cases before him, but I don't think that that is likely to have occurred. In a field of legal norms and arguments, the ICJ opinions exerted gravitational force—enough to influence the final resting point, but not enough to pull all matter its way.

Breyer's approach seems sensible: it is moderate, respectful, and accommodating. Why didn't it carry the day? Roberts suggests elsewhere in his opinion that there are deeper principles at stake in the Court's stance towards the ICJ. To give the ICJ ruling real weight in the Court's deliberations would be to undermine basic concepts of American sovereignty and the Supreme Court's place at the pinnacle of the U.S. constitutional system. This message is made clear by Roberts's invocation of *Marbury v. Madison*. Noting the argument of an amicus brief filed by "ICJ Experts" that "the

---

14. *Id.* at 2703 (Breyer, J., dissenting) (discussing *LaGrand* and another ICJ procedural default case).

15. Justice Breyer noted several reasons for "respectful consideration" of the ICJ's opinion: as an aid in achieiving uniformity of treaty interpretation, as "a natural point of reference for national courts seeking that uniformity," and as recognition of the ICJ's expertise in international law. *Id.* at 2700-01.

16. *Id.* at 2705.

United States is obligated to comply with the Convention, as interpreted by the ICJ,"[17] the Chief Justice aimed to set them straight:

> Under our Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and such inferior Courts as the Congress may from time to time ordain and establish." That "judicial Power . . . extend[s] to . . . Treaties." And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." *Marbury v. Madison*. If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by "one supreme Court" established by the Constitution. . . . It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ.[18]

The Chief Justice cites no authority for his argument that U.S. ratification of the Convention implicitly incorporated notions of Supreme Court supremacy over the ICJ in interpreting the Vienna Convention. I don't think he thought he needed to, because to find that the ICJ could issue rulings that bound the Supreme Court would, from his perspective, work such a fundamental shift in constitutional understandings that it was simply inadmissible.

Sanchez-Llamas is a snapshot of the U.S legal system, portraying late modern notions of sovereignty and law. Those conceptions, rooted in understandings of the nation-state now several centuries old, see law as an emanation of a sovereign who rules over a territory and a people. Law from outside the nation-state challenges the sovereignty of the state. In democratic states, where sovereignty is understood to reside in the people, legal rules that arise from outside the state are doubly troubling—undercutting both state and popular sovereignty. [19] To be sure, the United States will find itself participating in strategies of transnational governance—but it will do so in a way that maintains the integrity of U.S. sovereignty. Laws and rulings from afar, from organs and institutions neither elected by nor accountable to the American people, cannot bind us. And the Supreme Court stands ready to protect that sovereignty.[20]

This is a substantial challenge to transnational legal process, and one that internationalists rarely address directly: how can engagement with, or the incorporation of, foreign norms be justified in a system of popular sovereignty? Scholars have addressed these issues in a range of ways: by quoting *The Paquete Habana* ("[i]nternational law is part of our law"[21]), citing historical precedents of Supreme Court citation to foreign law,[22] arguing that customary international law is "federal common law" and thus

17. *Id.* at 2683 (majority opinion) (emphasis omitted).

18. *Id.* at 2672-73 (citations omitted).

19. Thus the people of the Commonwealth of Virginia might hypothetically find it remarkable that unelected judges sitting in the Netherlands could intervene on behalf of a Honduran national, in effect giving a foreign national more rights than a citizen of Virginia in the state criminal process. This intrusion may be seen as violating several levels of popular sovereignty.

20. Of course, ICJ decisions might be binding if the Court determined that the Convention was "self-executing" (an argument rejected by the Court in *Medellín v. Texas*, 128 S. Ct. 1346 (2008)), or if Congress enacted legislation declaring the Convention binding.

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

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

binding on the states,[23] and offering strong readings of the Supremacy Clause's reference to treaties.[24] But these arguments seem to skate on the surface of the deeper, foundational premises at work in Roberts's *Sanchez-Llamas* opinion.

III.

I will work my way back to this point about legitimacy, but first I want to examine the "space" of transnational law. When we take a look at what is "out there," we see a rich and complex set of relationships, overlapping competencies, and dialogues among states, state entities, international organizations, and nongovernmental organizations. Some of these spaces are occupied by institutions creating hard law (such as the World Trade Organization) that purport to bind member nations. Other spaces are sites where a number of national (and sometimes supranational norms) compete. Examples include competition laws that vary from state to state and judge transnational mergers and acquisitions under conflicting standards, or listing requirements of stock exchanges in different countries that impose differing obligations. In these spaces, states may come to establish norms and practices that mediate the differences—perhaps by adopting rules for resolving conflicts or by reaching accommodations through the development of hybrid norms.[25]

Robert Ahdieh describes action in these transnational spaces as:

> an active, iterative, and potentially even institutionalized, pattern of substantive regulatory engagement across jurisdictional lines, between simultaneously competing and coordinating regulators. Ultimately, such engagement might be expected to produce some pattern of co-regulation, in which collective regulatory norms can no longer be meaningfully parsed out as the product of one regulatory entity or the other.[26]

Norm articulation often proceeds in the absence of a higher law or formal adjudication. As Paul Schiff Berman has written in the pages of this journal, "[i]n a plural world, law is an ongoing process of articulation, adaptation, re-articulation, absorption, resistance, deployment, and on and on."[27]

Other transnational spaces display no overlapping competencies but rather create conversations among adjudicators and regulators faced with similar legal issues.[28] Refugee law provides a good example here. A transnational network of courts and administrative adjudicators has produced a rich discussion of the Refugee Convention even though the Convention

---

23. *See, e.g.*, Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997).

24. Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

25. For a description of a range of examples, see Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1197 (2007).

26. Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 870-71 (2006).

27. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 329 (2007).

28. *See generally* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004) (describing how transnational regulatory and judicial networks exchange expertise in areas including environment, trade, economic policy, and terrorism).

itself establishes no international body charged with issuing binding interpretations of the document. And, as has been well studied in recent years,[29] constitutional courts regularly read and refer to opinions of judges in other nations as they grapple with common interpretive questions.

We may have difficulty seeing these processes as establishing "law" or norms, but that may be because we are applying concepts that pertain to domestic systems. Berman writes:

> Some who study international law fail to find real "law" there because they are looking for hierarchically-based commands backed by coercive power. In contrast, a pluralist approach understands that interactions between various tribunals and regulatory authorities are more likely to take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity.[30]

This is a world in which the United States actively participates. U.S. courts increasingly consult decisions of foreign state and international adjudicators interpreting provisions in codes, conventions, and constitutions that are similar to those found in the U.S. Constitution and federal and state statutes. Lawyers negotiating transnational contracts or crafting mergers and acquisitions draft documents with an eye toward the laws of a number of states. These transnational spaces differ dramatically from the hierarchical structures of domestic legal systems. They are more open, more horizontal—more web than pyramid. Accommodation rather than authoritative determination is the *modus vivendi*.

IV.

In these spaces, states generally seek to be "good citizens." That is, they recognize (or others press them to recognize) a responsibility to the system as a whole. The idea is not that all actors will agree upon or conform to particular transnational norms, but rather that they are likely to act in a manner that supports the overall process of dialogue and accommodation—call it the desire to create international "street cred"—both because of the commitment that interconnectedness fosters and also because of states' perceived self-interests.[31]

Let me take an example from a somewhat surprising source: *Boumediene v. Bush*,[32] which considers challenges to the constitutionality of

---

29. *See, e.g.*, Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005).

30. Berman, *supra* note 25, at 1197. Berman also makes a normative claim about the benefits of hybridity. *See id.* at 1237 ("[B]y seeking to *manage* hybridity rather than *eliminate* it, we are more likely to preserve spaces for contestation, creative adaptation, and innovation, and to inculcate ideals of tolerance, dialogue, and mutual accommodation in our adjudicatory and regulatory institutions."). My aim here, however, is to be descriptive.

31. Compare Koh's description of conformity to international law at the national level: "In part, actors obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system. A state's violation of international law creates inevitable friction and contradictions that hinder its ongoing participation within the transnational legal process." Koh, *supra* note 1, at 203.

32. No. 06-1195 (U.S. argued Dec. 5, 2007).

the habeas-stripping provisions in the Military Commissions Act,[33] the statute that Congress adopted in the wake of *Hamdan v. Rumsfeld*.[34]

As has become the fashion in high-profile cases, dozens of amicus briefs have been filed. Law professors, retired military officers, former diplomats, and others have urged the Court to invalidate the jurisdiction-stripping provisions of the Act.[35] Among the briefs filed in the case is one by "Specialists in Israeli Military Law and Constitutional Law" (Israeli law professors, two of whom who had served as military judges).[36] The brief—part of the coordinated effort of the petitioners' counsel—sought to establish that providing independent judicial review for detainees in the war against terror was neither "impracticable" nor "anomalous"[37] by referring to Israeli practices in dealing with terror suspects.[38] In doing so, the brief follows a well-established tradition of informing the Supreme Court of foreign practices that might shed light on the reasonableness of U.S. practices.[39] But it also goes further. In describing their interests in participating in the case, the brief writers invoke reasons that take us to new ground:

> In an interdependent world threatened by transnational terrorism and linked by converging rule-of-law norms, all peoples are affected by the process the United States affords to foreign nationals who fall under its control. As much as any other nation, Israel has a vital stake in assuring that the United States pursues its struggle against terrorism successfully within the bounds of the law.[40]

The argument is not simply: "here are some data that may help a court understand how practices it is considering work in the world"—the kind of

---

33. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10 U.S.C.).

34. 548 U.S. 557 (2006).

35. The author also signed an amicus brief in the case on behalf of the petitioners

36. Brief of Amici Curiae Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners, Boumediene v. Bush., No. 06-1195 (U.S. Aug. 24, 2007), 2007 WL 2441592 [hereinafter Israeli Amicus Brief].

37. The terms come from Justice Anthony Kennedy's concurring opinion in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990), which quoted Justice John Marshall Harlan's concurrence in *Reid v. Covert*, 354 U.S. 1, 74 (1957). Justice Kennedy concluded, with the majority, that a person arrested in Mexico and brought to the United States for trial could not contest the lawfulness of his arrest because application of the Fourth Amendment's warrant clause would be impracticable and anomalous. The terms have been used by Justices to carve out a middle position on whether constitutional rights apply to actions taken by the U.S. government beyond its borders.

38. The brief writers cited to Israeli practice and Israeli constitutional law decisions that supported their position:

> Israel . . . has decades of experience that bears directly on the issues posed in these cases: Israel guarantees detainees—including suspected unlawful combatants—unimpeded, fully independent judicial review within fourteen days, access to counsel within thirty-four days, and periodic review of the basis for their detention, in a fully adversarial proceeding, at least once every six months.
>
> . . . .
>
> Over the course of many decades, Israel has been able to address its security concerns and meet its pressing need for timely intelligence while preserving independent judicial review and access to counsel. Consequently, Israeli experience makes clear that these safeguards are by no means impracticable.

Israeli Amicus Brief, *supra* note 36, at 1, 3.

39. For an early example, see the famous brief of future Justice Louis Brandeis in *Muller v. Oregon*. Brief of Defendant in Error, *Muller v. Oregon*, 208 U S. 412 (1908), 1908 WL 27605 (citing foreign legislation in arguing for the constitutionality of a maximum workday for women).

40. Israeli Amicus Brief, *supra* note 36, at 1, 3.

information that a disinterested expert might seek to provide. Rather, the Israeli scholars believe that the world beyond the United States has a direct and concrete interest in the resolution of the legal issues in *Boumediene* because decisions of the U.S. Supreme Court are likely to influence the development of international law—a body of law by which Israel considers itself bound.[41]

A similar argument was made in the brief filed by United Kingdom and European Parliamentarians, the signatories of which included several former judges of the highest court of the United Kingdom, the U.K. ambassador to the United Nations, the Vice President of the European Parliament, and a former Archbishop of Canterbury:

> Amici have come together to participate in this case because, despite their divergent political views, they share a common view that it is important to the international legal order that, even when faced with the threat of international terrorism, all States, including the United States, comply with the standards set by international humanitarian law and human rights law. . . .
>
> The outcome [for detainees] is . . . of enormous personal significance . . . .
>
> For the community of liberal democracies committed to the rule of law, which each member of the amicus group is or has been privileged to serve, the stakes are equally high. While this case presents a number of contested issues of U.S. law (which amici do not address), to the outside world it boils down to the simple, but crucial, question of whether the system of legal norms that purports to restrain the conduct of States vis-à-vis individuals within their power will survive the terrorist threat. . . .
>
> If the [Supreme Court holds that detainees do not have access to habeas], amici fear that the lesson that will be drawn by the wider world is that the evil of terrorism has proved more than a match for our principles and that accordingly other States will fail to abide by these principles in their own conduct.[42]

These briefs, in effect, attempt to move the Court's consideration of the case to a transnational space by arguing that the Court should internalize the externalities of its decision and reasoning. The argument from externalities takes several forms: (1) a "wrong" decision by the Supreme Court will harm the process of the development of transnational norms in which many nations play a role; (2) a Supreme Court decision that undermines international law will provide ammunition or possible justification to other states that would violate international law; and (3) failure to conform U.S. norms to international law is a breach of contract with other states in the international system—a system in which states commit themselves to abide by the international instruments they sign and customary international law. Each of these claims goes well beyond the "comparative law" reasons traditionally invoked for looking at foreign norms and practices.

The briefs in *Boumediene* paint a picture of a horizontal, interconnected, web-like transnational space, where actors see themselves not just as comparing the utility of results from elsewhere but also as engaged in a

---

41. *See also* Brief of Amici Curiae International Jurists in Support of Affirmance at 26, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (Nos. 03-339, 03-485), 2004 WL 398960 (stating that U.S. judicial decisions under the Alien Tort Statute have provided "a visible and influential model of United States human rights leadership" to other adjudicators).

42. Amicus Curiae Brief of 383 United Kingdom and European Parliamentarians in Support of Petitioner at 2-3, Boumediene v. Bush, No. 06-1195 (U.S. Aug. 24, 2007), 2007 WL 2441594. The brief goes on to argue, as a matter of substantive law, that the Military Commissions Act is inconsistent with international human rights norms.

common enterprise of working out norms. I don't want to draw too much from the briefs, but I find that their arguments are interesting examples of the kinds of transnational spaces in which U.S. adjudicators and regulators now participate. To the extent these spaces are elaborating norms, they are doing so in ways that are quite distinct from domestic norm creation.[43] There is no authoritative lawmaker, no institution with final say, no sovereign. Yet these processes are plainly exerting normative pressure on the U.S. domestic system.

V.

So here's where we are in the argument: I have suggested that the United States is a participant in a range of transnational processes that seek to resolve conflicts among norms and find solutions to common problems. The "law" that results is not the product of a sovereign lawmaker; rather, it is the product of a joint venture, of negotiation and borrowing.

What is the relationship of the norms developed in transnational spaces to our domestic legal system? My claim is not that transnational norms trump domestic norms, nor that they are directly incorporated into the domestic system. Rather, I see two sets of processes at work—domestic and transnational—which interact in complicated ways.

It is precisely the nature of that interaction that returns us to the Court's opinion in *Sanchez-Llamas*. From Chief Justice Roberts's perspective, there is a serious question about how the standards developed in nonhierarchical, nonstate processes can exert influence in our democratically accountable domestic system. But I think that that is the wrong question because it is based on a view of transnational law as exogenous to the U.S. system and as imposed upon "We the People" against our will. What I have been suggesting is that the United States participates in a range of normative systems, with different processes for the elaboration of norms. So the right question is, how do we mediate between and among normative systems?

That it is difficult to perceive this as the right question is the main point of this talk. Because legal development in transnational spaces looks quite different from the way we usually think about how law is made—legislatures, agencies, courts—and because we haven't yet developed a legitimacy story for transnational norms that can compete with the power of the narrative of popular sovereignty, it is hard to see why we have any duty to seek accommodation among our domestic norms and norms from afar. In order to demonstrate that this is in fact the right question, work needs to be done to explore in greater detail transnational normative processes and, most importantly, to develop a narrative of legitimacy for transnational norms.

---

43. On a horizontal web of norm-announcers and implementers, actors in one state (space) usually do not purport to establish binding norms for other network members. The decisions in one state affect the web—by sending ripples through it—but other states can adjust their positions or not. That is, horizontality provides for diversity and differentiation similar to that afforded states in a strong federal system like that in the United States. One might say that the transnational norms are refracted through the prism of a particular state's history and circumstances and then reflected back to an increasingly attentive world. *Cf.* SEYLA BENHABIB, THE RIGHTS OF OTHERS 178-79 (2004) (describing her concept of "democratic iterations").

There is an increasing amount of work being done on the former issue. But much more work needs to be done on the latter—the legitimacy question.

The answer lies not in the Constitution, which cannot establish its own legitimacy; nor will it be reached through legal argument based on reference to legal materials. What is at stake, as John Ruggie has suggested in a slightly different context, is an *epistemic* claim.[44] Legitimacy is a political and cultural concept, less the result of logical deduction and more the product of practice and narrative—that is, it is reflection upon experience.

This has important implications. It means that legitimacy is not deduced from first principles and declared; it is not prior to practice. Rather, legitimacy is *acquired*; it is *attributed* along the way or after the fact. That is to say, legitimacy lags practice. The transformation of constitutional understandings in the New Deal era provides an example—perceived need preceded practice, which in turn preceded the development of a robust justificatory apparatus and, ultimately, the legitimacy of the new lawmaking arrangements.[45]

From the kinds of transnational processes extant and emerging, we can begin to see the outlines of a new narrative of legitimacy. I would identify four elements that would ground such a narrative: (1) the perceived utility of transnational norms (whether they mediate legal pluralism or aid in interpretation of domestic legal norms); (2) the frequency of interactions (that is, familiarity breeds consent); (3) U.S. participation in the processes of developing norms (that is, to not resign ourselves to being simply "norm takers"); and (4) trust among the participants that are all working towards success of the common venture.

This, for the moment, is sloppy theoretical work. It is hard to break out of a two-hundred-year narrative based on elections and accountability. (It was, one might suspect, hard for monarchists to accept the new legitimacy story of popular sovereignty.) But the important point is this: what has been often viewed as a killer argument—that international norms fail because of a democratic deficit—is likely to lose traction in a globalizing world as a matter of practice and perceived necessity. A majority of the Supreme Court has already rejected the idea that it is beyond the pale to consult the decisions of foreign courts in interpreting the Constitution. Once we shift perspectives, once we begin to see these practices and others as embedded in normative systems in which we actively participate to our advantage,[46] we can find in these practices and processes the elements of a new theory of legitimacy.[47]

---

44. John Gerard Ruggie, *Territoriality and Beyond: Problematizing Modernity in International Relations*, 47 INT'L ORG. 139, 157 (1993) ("The demise of the medieval system of rule and the rise of the modern resulted in part from a transformation in social epistemology. Put simply, the mental equipment that people drew upon in imagining and symbolizing forms of political community itself underwent fundamental change.")

45. *Cf.* Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, 11 EUR. L.J. 262, 273 (2005) ("[U]nlike those participating in the practice of chess, those participating in the practice of law have the capacity to change even those features of the practice, which, from an external point of view, define the features of the practice . . . National Constitutional Supremacy as the ultimate legal rule governing legal practice is, therefore, a rule that can be challenged within national practice ") (emphasis omitted).

46. To be sure, there will be counter-narratives that contest any new narrative. For example, it might well be asked whether transnational spaces are dominated by particular states and particular

VI.

In July 2007, the *New York Times* ran a story that noted:

> Last month, a consortium of scientists published findings that challenge the traditional view of how genes function. The exhaustive four-year study was organized by the United States National Human Genome Research Institute and carried out by 35 groups from 80 organizations around the world. To their surprise, researchers found that the human genome might not be a "tidy collection of independent genes" after all, with each sequence of DNA linked to a single function, such as a predisposition to diabetes or heart disease.
>
> Instead, genes appear to operate in a complex network, and interact and overlap with one another and with other components in ways not yet fully understood. According to the institute, these findings will challenge scientists "to rethink some long-held views about what genes are and what they do."[48]

The article reported that the new science would challenge the "mechanistic, 'one gene, one protein' principle" upon which the recombinant DNA industry is built.[49] "Evidence of a networked genome shatters the scientific basis for virtually every official risk assessment of today's commercial biotech products, from genetically engineered crops to pharmaceuticals."[50]

So too our legal world is not "a tidy collection of independent [states]." Rather, "[states] operate in a complex network, and interact and overlap with one another and with other components in ways not yet fully understood." In this partially post-sovereignty, partially post-national world, we are witnessing a thickening network of relationships and novel governing arrangements. In spaces of legal pluralism, the vocabulary of sovereignty is increasingly at odds with the grammar of transnationalism. We've got the music and beat of a new legitimacy, but we are still working on the words.

---

private interests and whether norm creation in such spaces will undervalue the interests of marginalized groups.

47. It may also be necessary to explore novel modalities of practice for bringing transnational norms "softly" into the U.S. domestic system. *See, e.g.*, T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 101-08 (2004) (proposing federal legislation, patterned after the U.K. Human Rights Act, that would permit federal courts to declare federal law as "incompatible" with customary international law).

48. Denise Caruso, *A Challenge to Gene Theory, a Tougher Look at Biotech*, N.Y. TIMES, July 1, 2007, § 3, at 3.

49. *Id.*

50. *Id.*