Transnational Litigation in United States Courts. By Harold Hongju Koh. New York: Foundation Press, 2008. Pp. xvii, 276. Index. $31.

In his International Business Transactions course two decades ago, Harold Koh would speak of a famous football player who, when running the play, would "feel the color." As students we understood this phrase as that ineffable moment of revelation when the scattered pieces all fit, when we could recognize order in what seemed to be chaos. In *Transnational Litigation in United States Courts*, Koh feels the color.

The task he sets out is formidable: to identify the key themes that animate the doctrines that frame the transnational legal process in U.S. courts. The compass is broad, from international business transactions to human rights law, though the emphasis is on the former. The manuscript grows out of Koh's experience as a private and governmental lawyer, teacher, and scholar—and more proximately, out of his series of lectures at the Hague Academy of International Law.

In reading the book, I was reminded of Lawrence Tribe's monumental effort to find doctrinal coherence amid the jumble of constitutional jurisprudence. The landscape of transnational jurisprudence in United States courts is certainly far less vast than that of constitutional doctrine, but the identification of animating principles and elaboration of the doctrines require a similar mastery of the subject.

Koh finds the following five interrelated themes in transnational litigation in U.S. courts: party autonomy, national sovereignty, comity, uniformity, and the separation of powers. So stated, the principles seem elementary and obvious. But like Arrow's conditions for rational social choice, it turns out that these principles are often at odds with each other. The identification and juxtaposition of these rationales will put pressure on courts to assess the fundamental goals of the legal doctrines at stake and to rationalize the contours of doctrines.

Koh is the leading proponent of the view that the process of transnational norm creation and dissemination is a dialectical one. That serves him well here. Koh describes the meta-process through which both transnational legal procedure and substance are produced. Borrowing a metaphor from our networked age and supplementing it with a metaphor from an agricultural age, he talks of the "uploading" of domestic law to international law, the "downloading" of international law into domestic law, and the "horizontal transplantation" of law across jurisdictions. By allowing for these crosscutting dynamics, he can move easily between federal decisions and international conventions.

Notwithstanding this interplay between the international and domestic contexts, he focuses, as the book's title tells us, on U.S. courts, particularly the Supreme Court. He justifies this admittedly parochial focus—what he cheekily describes as the "United States as Middle Kingdom" (p. 14)—by observing that the United States "remains the world's leading commercial power" and also "the leading center of international commercial and financial litigation" (pp. 14–15). He recites the litany of factors making U.S. courts the preferred destination for plaintiffs, from contingency fees to products liability rules. Today, as the Texaco/Chevron litigation appears headed back from Ecuadorian courts to the United States, the centrality of U.S. litigation seems hard to deny. In that case, the Ecuadorian plaintiffs are expected to return to the United States not because of this country's plaintiff-friendly rules, but because Texaco, now merged into Chevron, apparently retains no assets in Equador on which the plaintiffs can execute a local judgment. As this case demonstrates, transnational civil litigation is of growing interest in other nations as well. Perhaps other scholars might usefully take up the challenge implicit in Koh's title—namely, to provide a comparative analysis of transnational legal process from the vantage point of various jurisdictions.

Koh is not mere dispassionate surveyor, but also seasoned critic. Take, for example, his discussion of the controversial and important issue of corporate liability for violations of human rights. He argues that corporations can, in some cases, be an appropriate subject of liability, liable either as agents of the state violating the law of nations or directly for certain "transnational offenses" (p. 46) that can be committed by private parties. Citing

federal laws, he notes that corporations can have specific intent to commit crimes and that the Nuremberg Tribunal held leading German industrialists criminally liable. But he argues that being complicit in a state crime requires more than merely choosing to "invest in a 'troublesome country'" (p. 50). Koh references international criminal law developments as offering helpful guidance in determining the extent of involvement required for liability.

The subject of transnational legal process has come of age. The American Law Institute and the International Institute for the Unification of Private Law (UNIDROIT) have together recently promulgated their *Principles of Transnational Civil Procedure*, and the U.S. Supreme Court's docket has been increasingly crowded with transnational law cases, as Koh has observed elsewhere. Globalization will undoubtedly continue to bring more cases with transnational characteristics to court. In this context, Koh's book offers a useful means to take stock of the postwar period's developments in this area. He covers, inter alia, extraterritoriality, act of state doctrine, foreign sovereign compulsion, foreign sovereign immunity, jurisdiction, venue, service of process, the taking of evidence, the recognition and enforcement of foreign judgments, and arbitral awards.

Because transnational legal process often requires courts to consider, and at times apply, customary international law, some have charged that the process is inherently undemocratic. Koh quickly dispatches this claim, noting first that "federal courts have applied customary international law since the beginning of the Republic" (p. 283). Moreover, "unelected judges apply[ing] law that was made elsewhere . . . is a *description* of the traditional process of common law judging" (*id.*). Most important, the transnational legal process retains a fundamental "democratic check": "supervision, revision, and endorsement by the federal political branches" (p. 284).[1]

With its lucid and economic explanations, its rational organization and exposition, and its sophistication as to the important issues, Koh's *Transnational Litigation in United States Courts* is a major contribution to the field. It is an ideal text for student, practitioner, judge, and scholar alike. It offers a sophisticated survey of the landscape of transnational civil procedure in the United States. It also shows how this landscape evolved over the last century of globalization, with the justifications for any particular doctrine often shifting over time. This historical narrative is not merely of academic interest. The practitioner will find this history useful as she seeks to predict the course of law in order to guide clients or plead before courts. Koh helpfully identifies the trends in the law (for example, the "declining deference to foreign sovereignty" through jurisdictional immunity (p. 122)). Neither hornbook nor casebook, the text is instead an ordering (and reordering) of the subject. This book will likely prove to be a highly thumbed-through volume on the shelves of many international lawyers.

That this book is the work product of someone recently confirmed as the legal adviser in the United States Department of State—the nation's top international lawyer—bodes well for U.S. engagement with the world through law.

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[1] *See* Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824, 1855 (1998); Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1227 (2005) (observing that polities retain the right to "review, revise, and reject" international law norms).