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2015 Jorde Symposium Capsule Summary

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INTRODUCTION

On September 24, 2015, Justice Stephen Breyer delivered the annual Jorde Symposium lecture at the First Congregational Church in Berkeley, California. In his lecture, "The Court and the World: The Supreme Court's New Transnational Role," Justice Breyer spoke about the many reasons why American judges must take ever-greater account of foreign events, law, and practices. An edited transcript of his Jorde Symposium remarks immediately precedes this summary. His remarks served to introduce and explain his recent book, *The Court and the World: American Law and the New Global Realities*.

Here, we provide a summary of the contents of Justice Breyer's book followed by two thoughtful pieces written in response to Justice Breyer's lecture, by Professors Curtis Bradley and Jenny Martinez.

I.
THE PAST IS PROLOGUE

The four parts of *The Court and the World* discuss various contexts in which the Supreme Court is increasingly called to act as a transnational Court, and the means that—in Justice Breyer's view—the Court can and should use to

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make sound decisions in these contexts. In part I, Justice Breyer is concerned with international security. He seeks to answer two critical questions. First, to what extent does the Constitution permit the President and Congress to limit our civil liberties for the sake of national security? And second, what role should the Court play in providing checks on liberty-limiting national security decisions made by the other coordinate branches?

In answering these questions, Justice Breyer first provides a historical overview of the Court's struggle to reconcile national security with personal liberty interests. He maps the evolution of the Court's liberty-security jurisprudence from the Civil War to the War on Terror—from its early tendency to suspend laws in wartime to its modern refusal to grant the coordinate branches a "blank check" in the national security sphere. This discussion frames Justice Breyer's overarching contention that the modern judiciary must engage with foreign events, law, and practices to decide international security cases.

Part I consists of four chapters. Chapter 1 discusses the Court's traditional unwillingness to review congressional or presidential action during wartime. It describes the Ciceronian view of crisis jurisprudence and the "political question" doctrine, which traditionally has been the Court's most oft-invoked justification for refusing to decide international security cases. Chapter 2 then describes the evolution from this "silent" jurisprudence to an intermediary approach, which took hold during World War II. Justice Breyer examines two World War II–era cases that showcased the development of this doctrine. *Korematsu v. United States* established that the President almost always has broad discretion during wartime, while *Ex parte Quirin* demonstrated that the President's authority is constrained by important limits.[1] In a broad view, these cases established that Congress and the President enjoyed nearly unfettered discretion during wartime. But they also signaled the beginning of the Court's transition away from allowing the President *completely* unlimited power over foreign affairs.

Chapter 3 next uses *United States v. Curtiss-Wright* to discuss how and why the Court began to impose limits on presidential wartime power during the Korean War.[2] Justice Breyer explains that in deciding that the President did not have the power to mandate private production of steel in the face of a strike, the Court further solidified its determination to review presidential wartime authority and to impose limits when the Court determined that the President had encroached too far upon liberty interests.

Then, in Chapter 4, Justice Breyer arrives at the modern era. He concludes the historical overview of national security jurisprudence by describing the "Guantanamo cases," where he discusses the modern Court's new willingness

1. *See* 323 U.S. 214 (1944); 317 U.S. 1 (1942).
2. 299 U.S. 304 (1936).

to review and check presidential authority during wartime. In contrast to earlier Courts, the modern Court has moved away from Ciceronian deference to presidential authority toward a more holistic evaluation of presidential decisions. The modern Court has weighed the gravity of suspensions of personal liberties against their necessity and efficacy, deciding the legal merits on a case-by-case basis.

In describing the evolution of the Court's liberty-security jurisprudence, Justice Breyer demonstrates the Court's increased willingness to review the other coordinate branches' foreign relations powers. Today—in the wake of the Guantanamo cases—it appears that the Court will no longer give the President or Congress a "blank check." But, of course, difficult cases will continue to arise. Justice Breyer argues that to best understand what power the coordinate branches should have in future cases, the Court must understand security threats both within and beyond our borders. Justice Breyer concludes part I stating that only by engaging pragmatically with international events can the Court ensure a robust and just balance between national security and personal civil liberties.

II.
AT HOME ABROAD

In part II, Justice Breyer considers the challenges of statutory interpretation and international commercial law in an increasingly globalized economy. He begins by noting that in crafting statutes, Congress rarely provides straightforward answers to questions of foreign applicability. Traditionally, this has been true even in statutes that have obvious international repercussions, such as antitrust and copyright laws. Justice Breyer then describes how the Court has responded to the international legal conflicts resulting from this ambiguity. Today, Justice Breyer writes, an evolving conception of "comity" guides the Court in these decisions. Whereas comity once referred narrowly to the need to ensure that domestic and foreign laws did not impose contradictory duties upon the same individual, today it refers to the necessity of furthering common objectives through differing legal regimes. In short, by allowing the evolving concept of comity to guide its decisions, the Court has recognized its role in fashioning and maintaining international legal harmony.

Justice Breyer notes that the pursuit of "legal harmony" is particularly important in commercial law and considers several recent cases that highlight the Court's pursuit of legal harmony in a globalized economy. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court grappled with the international applicability of the "first sale doctrine" to publications purchased abroad.[3] The first sale doctrine protects the resale of legally purchased copies and is codified in the

3. 133 S. Ct. 1351 (2013).

Copyright Act of 1976. In *Kirtsaeng*, the Court extended the doctrine to copies of copyrighted materials purchased in foreign countries and later resold in the United States. In doing so, the Court emphasized the need to avoid "untoward commercial consequences." It noted that the final versions of internationally sourced products are often amalgamations of various copyrighted components, and that inconsistent application of the first sale doctrine in domestic and foreign markets would force companies into an ever-expanding web of copyright negotiations and disputes.

But while *Kirtsaeng* stands for the proposition that the Court should seek harmony between domestic and foreign legal regimes, *F. Hoffman-La Roche Ltd. v. Empagran S.A.* underscores the continuing importance of limiting principles such as the presumption in favor of sovereignty.[4] Justice Breyer discusses how, in *Empagran*, the Court refused to extend the Sherman Antitrust Act to provide relief to foreign distributors harmed by an international vitamin cartel. There, the Court feared interfering with foreign nations' abilities to regulate their internal economic affairs, as well as with cooperative relationships between foreign antitrust authorities. Justice Breyer then notes that this fear—of disrupting foreign relationships and of interfering with the foreign affairs responsibilities of the legislative and executive branches—also played an important role in recent Alien Tort Statute (ATS) cases. In both *Sosa v. Alvarez-Machain* and *Kiobel v. Royal Dutch Petroleum Co.*, the Court shied away from broad applicability of the ATS and denied recovery to foreign citizens allegedly harmed by U.S. government activities.[5] The majorities in both Courts noted the need to avoid "adverse foreign policy consequences."

Taken together, these cases underscore that in a globalized economy, the Court's statutory interpretation often have international consequences. Justice Breyer contends that in these cases, the Court needs to understand the substantive and procedural laws of other foreign nations. He notes that the Court has relied significantly on briefs submitted by interested nations in relevant cases, and describes his hope that it will continue to do so. Justice Breyer also stresses that in allowing comity to guide its decisions, the Court must understand not only the domestic components of commercial law, but also the similarities and conflicts between U.S. commercial laws and their international counterparts.

III.
BEYOND OUR SHORES

In part III, Justice Breyer discusses the crucial role that treaties play in the Court's international jurisprudence. Throughout this part, he illustrates this role with a variety of examples, and eventually argues—as in other parts—that

4. 542 U.S. 155 (2004).
5. *See* 542 U.S. 692 (2004); 133 S. Ct. 1659 (2013).

increased international engagement will help the Court issue better decisions in treaty-related cases.

In Chapter 7, Justice Breyer argues that treaty interpretation will increasingly require federal judges to analyze the laws of foreign jurisdictions. Today, issues that were once predominantly local often involve multiple countries. To illustrate his point, Justice Breyer discusses *Abbott v. Abbott*, an international child custody dispute that recently reached the Supreme Court.[6] That case arose after an American woman and British man married in the United Kingdom and then separated in Chile, whereupon the woman brought the couple's son to Texas and filed for divorce. The father argued that his Chilean visitation rights were "rights of custody" under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), and that his son should therefore be returned to Chile. After examining Chilean family law, the Court ruled that the father had a custody interest under the Hague Convention and ordered the boy returned to Chile. Justice Breyer predicts that treaty interpretation will continue to bring family law questions into the federal courts, as the United States has entered into several child welfare treaties and the number of multinational families is increasing.

In Chapter 8, Justice Breyer argues that the Court will need to decide whether federal courts should maintain their current approach to reviewing international binding arbitration awards. He explains that the current arbitration review framework was developed in the context of domestic labor arbitration. As it stands today, that framework is very deferential to arbitrators' specific conclusions, but is *not* deferential on the question of whether binding arbitration was appropriate in the first instance. Noting that economic globalization has increased the amount of international investment carried out under investment treaties between sovereign nations, Justice Breyer predicts that federal courts will face an ever-larger spate of challenges to the appropriateness of binding international arbitration. He argues that the Court will ultimately need to decide whether federal courts should continue to apply the labor arbitration framework in the context of international arbitration, given that—at least arguably—this framework puts U.S. federal courts into conflict with courts in foreign countries.

In Chapter 9, Justice Breyer argues that constitutional treaty powers have become more relevant in a globalized world with ever more treaties, which increasingly govern sovereign nations and the daily lives of their citizens. Justice Breyer begins by explaining that the number of international governmental organizations (IGOs) has exploded since World War II—from about one hundred in 1951 to about two thousand today—and that these IGOs now make rules affecting an incredible range of issues, including environmental protection, trade and labor standards, food safety, and law

6. 560 U.S. 1 (2010).

enforcement. Justice Breyer notes that many of these IGOs were established by treaties to which the United States is a party, and that this raises important constitutional questions under the Supremacy Clause, which states that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."[7] Justice Breyer asks to what extent can the United States delegate legislative and adjudicative powers to international bodies created by treaties. Is it sufficient that a treaty was negotiated by the President and ratified by the Senate, or must Congress enact legislation codifying the treaty's provisions before they become enforceable in U.S. courts? And what are the constitutional limits upon the treaty power? Though discussing several cases that raise these and related questions, he ultimately concludes that the questions remain open and that the Court—and American society—has yet to work out America's legal relationship with the world's international rulemaking bodies.

In Chapter 10, Justice Breyer addresses the controversial practice of referring to the decisions of foreign courts in domestic judicial opinions. While acknowledging prominent arguments against such "cross-referencing"—including that foreign judges are totally removed from the U.S. electoral process and should therefore not have the power to impact U.S. law—Justice Breyer argues that cross-referencing is in fact a traditional aspect of American jurisprudence that has only recently become controversial. In his view, it is appropriate for judges to consider any and all relevant arguments and information at their disposal, and it is impossible for the Court to do its work without sometimes considering laws, circumstances, and judicial opinions from beyond U.S. shores.

Instead of withdrawing from the world, Justice Breyer calls on us to engage with it. Instead of fearing that the world will change the United States, Justice Breyer is confident that the United States can change the world. He warns that the United States must not withdraw from international efforts to address international problems, whether through international rulemaking bodies or other means, because "[i]f we cannot contribute to these bodies and participate in their work, others will do so nonetheless, and our voice in the effort and its outcomes will be diminished."

IV.
THE JUDGE AS DIPLOMAT

In the final part, Justice Breyer examines how conversations with judges, lawyers, and law students from foreign nations affect U.S. judges' thinking and decision-making processes. His concluding chapters are focused on two ways

7. U.S. CONST. art. III.

in which these conversations are useful to those who participate in them, and in turn, to their legal systems: these conversations promote the interchange of substantive legal ideas and the advancement of the rule of law across the globe.

In Chapter 11, Justice Breyer discusses how the exchange of ideas between judges from different nations can shape legal analysis, by cross-pollinating substantive solutions to pressing legal problems. He provides three examples of how conversations with foreign judges could impact the way judges approach legal problems within their own systems. First, the European concept of proportionality has affected his own conception of First Amendment analysis. Second, European courts struggling to balance the European Union's commercial regulations with the laws of sovereign nations could learn from U.S. Commerce Clause jurisprudence, which has long struggled to balance effective regulation of interstate commerce with state sovereignty. Finally, discussions between judges from different states can impact intrastate legal procedure. He illustrates this phenomenon by reference to successful interchanges between U.S. and Indian judges about their caseload management strategies.

In Chapter 12, Justice Breyer highlights how conversations between judges from different nations can advance the rule of law across the globe. For example, he recalls three of his own conversations. First, Justice Breyer discusses several conversations he has had with Chinese lawyers, law students, and legal scholars about how to create an independent judiciary, with a focus on specific procedural and technical safeguards that have worked well in the United States. Second, he discusses an exchange he had with a group of Tunisian lawyers and law students about American ideas concerning freedom of religion. Finally, he recounts a conversation with the President of Ghana, which focused on the importance of the citizenry in creating a culture conducive to the rule of law.

CONCLUSION

In the Epilogue, Justice Breyer observes that U.S. courts must meet the challenges of an increasingly international world not simply because they are unavoidable, but because Americans have an essential contribution to make in addressing the world's common problems. He argues that the American experiment has proven remarkably successful and durable, and that U.S. courts can and should lead by example. In Justice Breyer's view, this is not a theoretical point. If the United States fails to assume leadership in tackling the world's common problems, then other legal and political systems may well become dominant. More alarmingly, these legal and political systems may not always aspire to the United States's core values of the rule of law and equality. In the end, Justice Breyer concludes by reiterating the method he believes will ward off that outcome: governments and judges worldwide can, should, and must use the law to effect solutions to our common problems.