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Justice Breyer and the Rise of Globalization: An Analysis of the Jurisprudence of Justice Breyer as a Pragmatic Visionary

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JUSTICE BREYER AND THE RISE OF GLOBALIZATION

An Analysis of the Jurisprudence of Justice Breyer as a Pragmatic Visionary

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Introduction

"Can our American judicial system, by seeing itself as one part of a transnational or multinational judicial system enterprise, help to advance acceptance the rule of law itself?"[1] Justice Breyer asks this question in the introduction of his book, *The Court and The World.* Generally, visionary Supreme Court Justices are seen as advancing a particular ideology or lens that shapes their interpretation or jurisprudence. Can a Justice that focuses on harmonizing laws be a visionary? By examining Justice Breyer's opinions on recent court cases, one can see his visionary lens of looking abroad for ways to interpret cases in the United States. Additionally, the above question illustrates his long recognized pragmatic view of the role of the Court. Justice Breyer has advocated for the role of the Court in its decision to be "maintaining a constitutional system of government" (his italics).[2] This overarching goal makes Justice Breyer a pragmatic visionary and is evident in his jurisprudence as an Associate Justice on the United States Supreme Court.

The topic areas examined below span the legal spectrum. The reason for this is that no area is untouched by the rise of globalization and an increasingly connected world. The first area to explore is the concept of Rights, Liberty and National Security, framed by the 9/11 terrorist attacks, the new millennium's questions of what limits executive authority, and crime and punishment, including whether a chemical weapons treaty can be applied in a domestic dispute. Next, I will show how the Court addressed the advancement of the rule of law and human rights at home and abroad, and how Justice Breyer argues for the modernization of the current statutes. As the rise of globalization is generally thought of through the lens of economics and global business, section three examines how antirust, rules of discovery, financial regulations, and copyright laws face new questions in a connected world. Lastly, I will show how the Court and Justice Breyer handle the rise of international organizations and treaties that cover a range of topics from international investment agreements and arbitration, rights of alien

[1] Stephen G. Breyer, The Court and The World 6 (2016).
[2] Lincoln Caplan, *A Workable Democracy: the optimistic project of Justice Stephen Breyer*, Harvard Magazine, Feb 2017.

defendants, and child custody disputes. Across these topic areas, I will demonstrate that Justice Breyer's pragmatic goals are advanced by a visionary view of using international law and research to inform his opinions.

I. Rights, Liberty and National Security

In this new millennium, the United States Supreme Court's docket has had many new and difficult cases that required the court to examine past legal doctrines. Justice Breyer argues that the Court has shown a greater willingness than before to meet these challenges with a new approach to the Court's role in national security matters[3]. This readiness on his part and the Court illustrates a pragmatic realization that the Court is the institution uniquely positioned in our constitutional republic to provide checks on Congressional and Presidential power at the intersection of individual rights and liberties. Justice Breyer, by seeking to harmonize this new role for the Court, also shows his vision of a Court that is an active participant in confronting new asymmetric threats. By examining cases in which the Court confronted pressing issues that intersect individual rights, liberty and national security policy, this paper will illustrate Justice Breyer's new approach.

A. Political Question Doctrine

Justice Breyer argue the evolution from Cicero's view that "when the cannons roar, the laws fall silent," to the Court now placing limits on the other branches' conduct to ensure the rule of law prevails[4]. In the American context, since *Marbury v Madison*[5], the Court deferred to the Presidential authority that fell under the delegated political powers. The court did not assert itself in cases that arose during war or international relations incidents even into the Vietnam era. However, Justice Breyer now sees the Court as neither following the Cicero or "Political Doctrine" that would prevent it from deciding the merits of cases in which rights, liberties and national security are in question[6]. By examining Justice Breyer's

[3] *Id.* at 13.
[4] *Id.*at 15.
[5] *Id.*
[6] Id at 24.

jurisprudence within key cases during his time on the highest court in the land, the common thread is his pragmatism and visionary view of the law.

This trajectory of the Court no longer differing to the other political branches is illustrated by a recent case in which Justice Breyer was the lone dissenter. The case arose when a United State citizen wished to exercise his right under a statute passed by congress to list his birthplace as Israel rather than Jerusalem[7]. The State Department refused to issue the passport citing that listing Jerusalem as part of Israel would contradict the official policy. The eight-member majority found that there was a justiciable claim and the political question doctrine was a not a bar to the Courts deciding the merit of the statute[8]. Justice Breyer felt differently and in his dissenting opinion stated "But in the Middle East, administrative matters can have implications that extend far beyond the purely administrative. Political reactions in that region can prove uncertain. And in that context it may well turn out that resolution of the constitutional argument will require a court to decide how far the statute, in practice, reaches beyond the purely administrative, determining not only whether but also the extent to which enforcement will interfere with the President's ability to make significant recognition-related foreign policy decisions."[9] This case and the majority decision wade into the traditional matters that were left to the political branches, is one of the primary reasons that Justice Breyer believe the Court must know what is going on abroad.[10] When this case was reheard in 2015, the Court concluded that the statute by Congress, did infringe on the Executive Branch authority.[11] Justice Breyer in a concurring opinion, stated that "I continue to believe that this case presents a political question inappropriate for judicial resolution."[12] While birthplace location on passports is a serious matter for Middle East policy, the Court has also had to confront serious matters of life and liberty.

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[7] *Zivotofsky v. Clinton*, 566 U.S. 189, 191 (2012).
[8] *Id*. at 202.
[9] *Id*. at 216
[10] Daniel S. Severson, The Court and the World: An Interview with Associate Justice Stephen G. Breyer, 57 Harv. Int'l L.J. 253 (2016).
[11] *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2126 (2015).
[12] *Id*. at 2096.

B. National Security and Liberty

Justice Breyer often cites the historic phrase that "the Constitution is not a suicide pact," in the wake of the 9/11 terrorist attacks, as the 'War on Terror' brought central issues of rights and liberty to the docket of the highest Court in the land. A major question in the post-9/11 era is the extent to which a President can use his authority to imprison enemy combatants or infringe on civil liberties. Four cases in the mid-2000s during the early stages of the Global War on Terror illustrate how the Court is no longer giving the President a "blank check", but Justice Breyer correctly asks, 'then just what type of check is it?'.[13]

The Court in four seminal cases, *Rasul*, *Hamdi*, *Hamdan*, and *Bourmediene*, attempted to place limits on Executive Power. Justice Breyer views the implications of these decisions as the Court no longer using the "political question" doctrine to avoid weighing in on these decisions.[14]. He further argues that because the Court has chosen to weigh in and review the government's arguments related to national security matters, the Court must consider actions that take place abroad and understand in greater detail the evolving threats to our nation.[15] The Court now must develop an approach to address these complex questions. Justice Breyer, as a visionary, sees an opportunity to look to the United Kingdom and Spain as they may provide answers on how to deal with the need for the defendant's lawyer to obtain the appropriate security clearance to provide an effective defense.[16] Examining Justice Breyer's judicial opinions and thoughts on these cases will illustrate his pragmatic view on dealing with these critical issues of individual rights when the country is facing increasing asymmetrical threats.

In *Rasul*, the Court had to decide whether U.S. District Courts could exercise jurisdiction over enemy combatants that were captured in Afghanistan, as part of military force authorized by Congress and executed by the President following the terrorist attacks on September 11, 2001. The US military

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[13] Breyer, *supra* note 1, at 80.
[14] *Id.*
[15] *Id.* at 81.
[16] *Id.*

transported the combatants to the US Naval base in Guantanamo, Cuba, where they did not have access to counsel while in custody. They each filed a petition for writ of habeas corpus.[17] The six-member majority found that the District Court had jurisdiction to determine the legality of the detention and thus limited the authority of the President to detain non-citizen combatants. While Justice Breyer joined the majority and did not pen an opinion himself, he did express his thoughts on the opinion in *The Court and The World*. He noted that the Court did indicate that the federal courts should hear the habeas petition but not how the District Courts should rule.

In *Hamdi*, the Court faced a similar decision about how an enemy combatant shall assert rights in a court of law. Hamdi was a US Citizen captured in Afghanistan as an enemy combatant and held in a brig in South Carolina[18]. Here, the opinion authored by Justice O'Connor and joined by Justice Breyer, held that Hamdi had the right to present his case to a neutral arbiter if he was not an enemy combatant, but if he was an enemy combatant, then the President could detain him in the time of hostilities. Justice Breyer, writing in *The Court and The World*, expanded on the importance of the process rights that the Court affirmed in *Hamdi*,[19] including the constitutional rights to present their case before a neutral decision maker and present arguments. This illustrated how the political branches, namely the Executive branch, have some limits imposed by the Court.

In *Hamdan*, a Yemeni national was captured in Afghanistan following the 9/11 attacks. He was transferred to Guantanamo Bay, and President Bush approved him to be tried by military tribunal.[20] The government argued that it was appropriate to try this foreign national in the military justice system but the majority found that it raised separation of powers issues as the military courts were exclusively within the executive branch. The Court, when looking to international context, including the uniform code of military justice, Geneva convention and the US Constitution, found these tribunals were not illegal in and

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[17] *Rasul v. Bush*, 542 U.S. 466, 472 (2004).
[18] Hamdi -
[19] Id.
[20] *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006).

of themselves, however they were not lawful in the current context. Justice Breyer, in his concurrence, focused on the intersection of the Common Article 3 of the Geneva Conventions and Congressional authority.[21] Here, Justice Breyer in his classic pragmatic fashion, looked to harmonize the Congressional authority within our Constitution and the International law. He pointed out that under the Geneva convention that requires certain due process rights, Congress could authorize a special military tribunal should exigent circumstances exist. Since Congress has not exercised this power to create such a mechanism for the executive branch, the current tribunal structure was unlawful.[22]

In *Boumediene*, again the question of enemy combatants' rights to a habeas petition were raised; this time following a Congressional act in response to the *Rasul* case. Congress passed the Detainee Treatment Act that expressly removed United States Courts' jurisdiction for habeas petitions of those held at Guantanamo Bay.[23] The Court in *Boumediene* found that detainees at Guantanamo can assert their habeas rights under the United States Constitution. While Justice Breyer did not write an opinion, he did share his view of the case in *The Court and The World*, where he highlighted the fact that the petitioners were held for six years without hearing the charges.[24] He argues pragmatically that the Courts are the appropriate place for non-citizens after a reasonable amount of time.

Reviewing Justice Breyer's opinions and thoughts on these cases that challenged the rule of law when faced with an asymmetrical threat that is posed by terrorist groups, illustrate how he occupies the role of legal visionary and pragmatist. His pragmatic view of the law is evident by his view that the Courts must be the place for a neutral party to hear the facts against enemy combatants but recognizing the role of Congress and the Presidency. He sees the Court wading into these areas more and more, and thus proposes this innovative view of Judges looking abroad to know the world outside the United States.[25]

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[21] Id. at 645.
[22] Id. at 648-49.
[23] Boudmediene
[24] Breyer, *supra* note 1, at 77.
[25] Daniel S. Severson, The Court and the World: An Interview with Associate Justice Stephen G. Breyer, 57 Harv. Int'l L.J. 253 (2016).

For example, he looks to the United Kingdom where the defendant's counsel is from a select group of lawyers who have security clearance.[26] As there is no going back, Justice Breyer sees that the Court must serve its Constitutional role as a neutral arbiter between the Executive Branch and civil liberties of the defendant; yet must remain cognizant that the Court must keep its legitimacy with the public by producing sound judgements.[27]

C. Criminal Law and the Death Penalty

Criminal law and, in particular, the use of the death penalty illustrates another topic area in which looking abroad informs Justice Breyer's opinions. The Court has had to look beyond the traditional authority within the United States to assist with coming to a decision on pressing issues of applying statutes, international treaties and the application of the death penalty to specific populations and more generally.

i. The Death Penalty

Justice Breyer frequently looks abroad when it comes to cases that involve the imposition of the death penalty, expressing how the United States is increasingly alone compared to other western countries. In *Ring v. Arizona*, Justice Breyer concurred in the judgment that the eighth amendment required a jury to impose the death penalty, rather than the judge or panel of judges, for a felony murder conviction. He noted that while many countries have abolished the death penalty, "the United States rates fourth in number of executions, after China, Iran, and Saudi Arabia."[28] Justice Breyer continued to expound on aberration of the use of the death penalty in America when compared to the rest of the world. In his dissenting opinion, he took notice "that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice."[29] Additionally, when looking internationally, he noted that the United States varied by region of the world.

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[26]Breyer, *supra* note 1, at 82-83.
[27] *Id*. 87.
[28] *Ring v. Arizona*, 536 U.S. 584, 618 (2002).
[29] *Glossip v. Gross*, 135 S. Ct. 2726, 2775-76 (2015).

Compared to Europe, Central Asia and the rest of the Americas, the United States stands alone in executions as "Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen)."[30]

Cases that involve specific boundaries of the death penalty, such as executing minors or those with diminished mental capacity, drew Justice Breyer to again look abroad to inform his opinion or those he joined. Justice Breyer joined an opinion written by Justice Kennedy on whether the execution of a person who was under the age eighteen when they committed a crime violated the eighth and fourteenth amendments. In this opinion, the Court took notice that all countries around the world except the United States and Somalia approved of the United Nations convention on the rights of the child that barred the death penalty for children.[31] In a related case dealing with the imposition of the death penalty on those with mental retardation, the Court also looked abroad to inform its decision. While Justice Breyer did not pen an opinion, he joined the majority opinion that noted that international Anglo-American heritage and consensus did not support executing those who lacked the mental capacity to understand their action and thus be deterred from committing murder.[32] These cases highlight Breyer's view that the Court has and must continue to look to authority outside the United States to guide their decisions.

ii. Application of Criminal Statutes and Treaties

The new global realities require the Court to understand and interpret United States Statutes and International Treaties. The Court, and Justice Breyer specifically, have grappled with potential unintended consequences in an increasingly global world and legal context.

In *Small*, the Court was confronted with the issue of whether a statute stating that someone convicted in any court included foreign courts as well as domestic courts.[33] Here, the defendant was convicted in a Japanese court for smuggling guns and ammunition into Japan.[34] Upon returning to the United States after

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[30] Id.
[31] *Roper v. Simmons*, 543 U.S. 551, 576 (2005).
[32] *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).
[33] *Small v. United States*, 544 U.S. 385, 387 (2005).
[34] Id.

serving five years for the crime in Japan, federal authorities charged Small and he subsequently pled guilty for illegally purchasing a gun in Pennsylvania. Justice Breyer, writing for the majority, sought to address the circuit split as to the question of whether convictions in a foreign court apply in US jurisdictions. His pragmatism was illustrated through the review of the legislative history. He found that the intent was only to look at domestic convictions.[35] Furthermore, he found that there are many instances across the world where a person could be sentenced for crimes that are not illegal in America.[36] This case illustrates his visionary view of looking abroad to provide a pragmatic solution to the question at hand by not defending the use of extraterritorial criminal sentences.

Another recent case presented a similar issue dealing with international law and domestic crimes. Justice Breyer highlighted this case in *The Court and The World*, as it centered on applying an international treaty domestically. In *Bond*, the question presented dealt with applying a Chemical Weapons Convention that Congress adopted by statute and applied to the states.[37] Here, the defendant found out her husband was having an affair with one of her closest friends and fathered the friend's baby.[38] The defendant, a microbiologist by training, had access to chemicals via her employer. She stole chemicals from her employer and mixed them with other chemicals that she purchased from the online retailer, Amazon.com. She spread these chemicals throughout her friend's home over the course of more than two dozen visits. Justice Breyer joined the majority opinion written by Chief Justice Roberts. In the Chief Justice's opinion, the Court analyzed the Chemical Weapons Convention and the language in the treaty that formed the basis for the statute. The Court found that while the intent was to be a comprehensive ban on the use of chemical weapons, the conduct by Bond was not in a war-like situation.[39] Additionally, the extension of the federal statute to a local criminal case raised issues of federalism and the limited enumerated powers delegated to the federal government. Applying this statute

[35] Id. at 392-93.
[36] Id. at 389.
[37] *Bond v. United States*, 572 U.S. 844 (2014)
[38] Id. at 852.
[39] Id. at 855-56.

to a local offense would "dramatically intrude upon the traditional state criminal jurisdiction".[40] The treaty and subsequent statute did not intend to reach to the conduct of a local criminal targeting a single individual, but rather nation state and terrorist actors.

The common thread throughout all these cases advances the contention put forth by Justice Breyer: in an increasingly global world, the Court must look beyond the traditional sources of interpreting United States laws. To confront these new challenges, it takes a visionary approach to address threats both foreign and domestic. The other branches of the federal government may try to usurp power, such as in the Guantanamo cases, and the Court must be prepared to address the issues raised by these new threats. This pragmatic need to assert the rule of law in an increasingly changing world, such as the application of the death penalty, illustrate Justice Breyer's recognition that the advancement of law in the 21st Century requires a visionary view of the law to achieve a fair and just outcome.

II. Human Rights at Home and Abroad

How does an institution such as the Supreme Court help ensure human rights in a world faced with a rapidly changing reality? While Justice Breyer finds the answer through the Court's role in interpretation, the Court cannot modernize the statutes alone, as justices are not experts in the practices outside the US.[41] He argues that it is the role of Congress to address the need to modernize the Alien Tort Statute that has not been amended in over 200 years to protect victims in the contemporary context. In the cases that follow, one can see how Justice Breyer achieved pragmatic outcomes for parties through visionary uses of sources outside the American law context.

The Alien Tort Statute was passed in the early days of our republic in the year 1789. It states that "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[42]. Justice Breyer recounts

[40] Id. at 856-57.
[41] Breyer, *supra* note 1, at 163-64.
[42] *Id*. at 135.

the historical incidents prior to the ratification of the United States Constitution that informed the drafting of this statute in *The Court and The World*.[43] An altercation between a former French army officer and the French Consul general in Philadelphia in 1784 was an antecedent to the statute. This incident involved a physical attack of caning on the streets of the city by a former army officer of the French Consul.[44] France wanted to extradite the former army officer while Pennsylvania would not comply with request. The Continental Congress powers were severely limited under the Articles of Confederation and could not intervene with Pennsylvania on France's request. In another incident involving a foreigner in New York City, a police officer entered the Dutch ambassador's home to arrest a servant. The Dutch government complained about this violation of their sovereignty, termed the law of nations.[45] These incidents were the reason for the creation of Alien Tort Claims statute to allow non-citizens to bring a claim in United States Federal Courts.

In 2004, a case presented the Court with a difficult decision about whether the Alien Tort Statute applied. In *Sosa*, the plaintiff, Dr. Alvarez-Machain, was a doctor that assisted Mexican drug dealers in torturing a Drug Enforcement Agency agent.[46] He kept the agent alive during the torture by the drug dealers before being subsequently murdered. Years after the murder, Alvarez-Machain was indicted by a grand jury for the agent's murder.[47] While the Mexican government would not extradite him to the United States, the Drug Enforcement Agency ended up contracting with Mexican nationals to kidnap the doctor and transported him to United States for trial.[48] However, the district court dismissed the criminal charges and Alvarez returned to Mexico. Upon his return, he filed suit against one of his kidnappers, Jose Sosa.[49] At the district court level, Alvarez-Machain's claim under the Federal Tort Claims Act was dismissed

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[43] *Id*.
[44] Id.
[45] Id. at 136.
[46] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 697 (2004)
[47] Id.
[48] Id. at 698.
[49] Id.

while granting summary judgement under the Alien Tort Claims statute for $25,000 for violating the "law of nations."[50]

The Supreme Court reviewed the case after the appellate court affirmed the ruling of the district regarding the Alien Tort Claims Statute. Justice Souter, writing for the majority, found two inferences could be made about the intent of the Alien Tort Statute: (1) "there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners; (2) is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations."[51] These inferences led them to find that the plaintiff's claim could not proceed under jurisdiction by the statute.

Justice Breyer's concurrence focused on the role of comity and the meaning of law of nations. Justice Breyer focused on the international law and the majority's view that to qualify for recognition under the statute, there must be widespread acceptance of the standard.[52] Justice Breyer cited an International Law Association report in building his argument on procedural and substantive law. He also cited a supreme court case from Israel in the search for comity. If the law of nations is the criteria to be used, Justice Breyer looked to these sources because the implication is that other nations' courts do the same.[53] In his book, Justice Breyer highlighted the need for different nations to work together in harmony because of the increase in interdependence.[54] While in this case, the claim could not stand under the current Alien Tort Statute, there is a need for law to protect human rights around the world.

Following the Sosa case and the standard of widespread acceptance, lower courts allowed civil actions to proceed against corporate defendants that aided foreign governments that harmed their

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[50] Breyer, *supra* note 1, at 152.
[51] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004)
[52] *Id*. at 760.
[53] *Id*. at 761.
[54] Breyer, *supra* note 1, at 155

citizens.[55] Justice Breyer noted the examples of the law suit against ExxonMobil for aiding and abetting the Indonesian government's torture and murder of their citizens; a mining company was sued for the actions Papua New Guinea's war crimes; and even banks, oil companies and car manufacturers' were sued for supporting the apartheid regime in South Africa.

Another case, *Kiobel*, raised the issue as to whether a foreign company, Royal Dutch Shell, could be subject to jurisdiction under the Alien Tort Claims statute for actions that took place in Niger.[56] The majority found that the Alien Tort Claims statute did not permit this extraterritorial issue to be raised in the United States courts. Justice Breyer concurred in the judgment in an opinion that was joined by Justice Ginsburg, Justice Sotomayor, and Justice Kagan focused on the principles and practices of the foreign relations law.[57] Instead of denying the claim based on the presumption against extraterritoriality, Justice Breyer delineated the three areas that jurisdiction would arise under the Alien Tort Statute, "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest."[58] Justice Breyer expanded on the concept of national interest to include the interest in not allowing the United States to become a safe harbor for torturers - not unlike the pirates or slave traders that were in the scope of the statute when drafted. Since the defendant did not seek safe harbor in the United States, jurisdiction on the statute was not appropriate.

Justice Breyer in *The Court and The World* argues that the Court has found a middle group, one that limits but does not prohibit cases that advance human rights. The Court, according to Justice Breyer, will address these issues in the future by protecting victims who seek refuge in the rule of law for crimes that were committed abroad. However, the scope of the Alien Tort Claims statute will continue to be

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[55] *Id*.
[56] *Kiobel v. Royal Dutch Petro. Co.*, 569 U.S. 108 (2013)
[57] *Id*. at 127-128
[58] *Id.*

discussed and should be modernized by congress.[59] Furthermore, the area again highlights the need for the Court to look at international law, foreign law, and international affairs to guide their judgment.

III. The Court Faces Economic Realities of Globalization

Just as the Court had to confront the limits of the law in the criminal and human rights context, the increase in globalization brings new challenges to extending rule of law across the world. Justice Breyer's pragmatism is in full display in the context of global commerce. Looking back at history, Justice Breyer noted that when people lived most of their lives in the same place, "statutist" system of laws worked well.[60] This "statutist" system is one in which the physical location determined the legal status and rights. Furthermore, in the American context, our rules have favored interest balancing to interpret rules and doctrines, including the presumption against extraterritorial application of laws and the use of comity to balance other nations. Justice Breyer argues that these economic cases are complex with ambiguous jurisdiction and the Court now as a pragmatist, seeks to harmonize enforcement of domestic and foreign law, rather than just avoiding conflicts.[61] Furthermore, he argues that the Court must expand its knowledge of foreign legal practices, business practices, regulations and procedures to appropriately determine the application of domestic laws.[62]

A. Antitrust Laws

Justice Breyer notes that one area over which our domestic laws have always had some effect outside our borders is Antitrust enforcement.[63] Because conduct of firms, such as price fixing, can take place in-part abroad and yet affect American consumers, it has been a longstanding practice for authorities to analyze activity outside our boarders. Congress, in 1982, attempted to clarify the Sherman Act's application to conduct taking place outside the United States. The amendment sought to create by statute

[59] Breyer, *supra* note 1, at 163.
[60] Id. at 95.
[61] Id. at 96.
[62] Id. at 97.
[63] Id.

the two-part test created by Judge Hand in the Alcoa case – that Sherman Act does not apply to conduct involving commerce or trade with foreign nations unless the conduct had a direct, substantial and foreseeable effect on the domestic market.[64] This amendment set the stage for a case involving a global cartel of vitamin manufacturers.

In Empagran, the plaintiffs filed a class action lawsuit on behalf of foreign and domestic purchasers of vitamins.[65] The core question was whether the foreign conduct was anticompetitive, if it had an adverse effect domestically, and if an independent foreign effect could give rise to a claim in the United States courts.[66] The class action suit alleged that vitamin manufacturers and distributors conspired to fix world-wide prices.[67] The plaintiffs were distributers in foreign countries seeking to purchase vitamins from outside the United States.[68] Justice Breyer, writing for the majority, took notice of many other nations' enactment and enforcement of their own Antitrust law. In his pragmatic fashion, he asked the question as to whether it was "reasonable to apply those laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?"[69] Justice Breyer found that it was not reasonable to extend the Sherman and Clayton Acts to this conduct because the plaintiffs could not show adverse domestic effects in a purely foreign transaction.[70]

Furthermore, Justice Breyer discussed the doctrine of comity to understand the congressional intent of the 1982 amendment. This concept occurs when potential conflict of laws of nations are concerned with the intent of the legislature to be to reasonably avoid the conflicts where possible.[71] Justice Breyer noted that the United States Courts apply the rule of reasonableness when seeking to avoid a conflict of law in the court case at hand. Writing about the amicus briefs filed in this case, he was particularly persuaded by

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[64] Id. at 100.
[65] F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155, 159 (2004)
[66] Id. at 160
[67] Id.
[68] Id. at 159.
[69] Id. at 165.
[70] Because the plaintiffs could not show adverse domestic effects in a purely foreign transaction Id.
[71] Breyer, *supra* note 1, at 102-03.

the ones from other countries that highlighted how antitrust rules were applied within their jurisdiction.[72] Briefs from the United Kingdom and Netherlands warned the Court that ruling in favor of extending the Sherman Act into purely international transactions could have serious consequences for European Union antitrust enforcement. These arguments persuaded Justice Breyer about the concept of comity and issues of applying the Sherman Act extraterritorially.[73] The amnesty programs used by the Europeans as part of their antitrust enforcement regime would be severely harmed by the treble damages allowed under the Sherman Act.

The advancement of comity by the Justice Breyer opinion illustrates his brand of visionary pragmatism. By recognizing the broader international business regulatory system of foreign laws and bilateral agreements among nations to protect competitive markets Justice Breyer was visionary in considering the present and future consequences. Yet, the higher purpose was pragmatic, to provide a workable framework for commerce to occur in an increasingly connected global marketplace. Here, jurisdiction was not appropriate as these international transactions should be governed by the law of the nations that were substantially affected by the cartel.

B. Discovery

What happens when one multinational corporation alleges another multinational competitor engaged in behavior that violated European antitrust laws and the commission does not seek additional documents? Can the alleging party obtain the ability to proceed with discovery on their own by using United States laws? These questions were brought to the Court in 2004.

In *Intel Corp. v. Advanced Micro Devices, Inc.,* Advanced Micro Devices (AMD) filed a complaint with the Directorate-General for Competition of the Commission of the European Communities that Intel Corporation (Intel) was violating antitrust law.[74] In the complaint, AMD complained that Intel violated the European law by abusing its market position through the use of exclusive purchasing agreements,

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[72] Id. at 104.
[73] *Id*. at 105.
[74] *Intel Corp. v. Advanced Micro Devices, Inc*., 542 U.S. 241, 246 (2004)

loyalty rebates, price discrimination and standard-setting cartels.[75] AMD encouraged the Directorate-General for Competition to request access to the relevant evidence that was disclosed by Intel in prior litigation in the United States.[76] When the Directorate-General declined to seek access to the previously disclosed documents, AMD filed suit in the United States District Court for the Northern District of California to compel the discovery of the evidence from the earlier case.[77]

Intel argued that the statute AMD used for jurisdiction was only for active litigants, foreign sovereigns or their agents, and that AMD as an entity that lodged the complaint with the European Commission lacked standing. Justice Ginsburg, writing for the majority, rejected Intel's argument.[78] The Court found that AMD did qualify as an interested party and could proceed with their case. Additionally, the Court also rejected the Intel's arguments that the European Commission did qualify as a tribunal under the statute, and that discovery would be permitted even if it would not be allowed to proceed in a domestic litigation.[79]

Justice Breyer was the lone dissenter in this case. He found that the majority read the statute more broadly than congress intended.[80] In particular, Justice Breyer raised concerns that the majority opinion created a case by case framework for reviewing future issues under the statute. He instead argued for adoption of two categorical limits. First, when determining what qualifies as a tribunal, the district court should use the foreign country's definition of what is tribunal. This limitation would bring the application of the statute in line with the intent of congress. Second, discovery should only be permitted in situations where it would be authorized in the foreign system and permitted by our Federal Rules of Civil procedure.[81] Justice Breyer's solution illustrates his pragmatic nature to find a workable solution that keeps discovery costs down for litigants. His rationale was informed by his visionary approach to

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[75] *Id.* at 250.
[76] *Id.*
[77] *Id.* at 251.
[78] *Id.* at
[79] *Id.*
[80] *Id.* at 267.
[81] *Id.* at 269-270.

incorporating non-traditional sources to inform his opinion. For example, he reviewed research that examined the economic effects of litigation written by members of the European Commission that investigates antitrust.[82]

What does this ruling mean for the Court and cases going forward? Justice Breyer put forward his thoughts in *The Court and The World,* where he outlined four lessons. First, the Court had to learn about a foreign court system.[83] Second, this is a difficult task for the Court as it is not an expert in foreign legal systems.[84] Third, while the Court opted for the case-by-case approach rather than express rules, this approach could create difficulties with predicting future results.[85] Forth, the Court needs better ways to learn about foreign systems than just briefs and oral arguments. This information gap, as Justice Breyer calls it, will hopefully close through the work of participants in the legal profession: lawyers, judges and academics.[86]

C. Security Regulations

The changing global commerce realities have also brought new questions and challenges in the field of securities regulations. In the 1930s, the Securities and Exchange Commission issued an important rule (§10b-5) barring a person from making a false statement or engaging in fraud.[87] The question the Court faced is whether this rule applies to conduct that occurs abroad. Does it matter if some activity took place in United States and some abroad? Does it matter where the securities are traded, in the United States or abroad? The Court attempted to answer these questions in the case of *Morrison.*

In *Morrison,* Australian shareholders sued the Australian National Bank, the parent company of a Florida subsidiary, for fraud under Rule §10(b-5) of the Exchange Act.[88] The shareholders in their complaint alleged fraud by the Australian National Bank and the subsidiary Florida mortgage servicing

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[82] *Id.*
[83] Breyer, *supra* note 1, at 113.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 114.
[87] *Id.*
[88] *Morrison v. Nat'l Austl. Bank Ltd*., 561 U.S. 247, 250-53 (2010)

company, HomeSide Lending.[89] The fraud was related to the valuation of the outstanding mortgages HomeSide had on their books.[90] Australian National Bank, in public documents, listed the value of the HomeSide as assets based on the projections of the outstanding mortgages. In 2001, Australian National Bank wrote down the value of HomeSide by over $2 billion dollars over the course of three months.[91]

Justice Scalia, writing for the majority, found that the extraterritorial application Exchange Act in this instance was not supported by reading of the statute or legislative intent.[92] Justice Scalia was not convinced by the arguments advanced by the plaintiffs. First, that the act covered interstate commerce between the states and foreign nations and should apply in this case. Second, that the act's purpose was to cover "prices established and offered in such transactions are generally disseminated and quoted throughout the United States and foreign countries" would apply to the foreign stock exchange. Justice Scalia pointed out that the act does mention the extraterritorial application which placed limits on the application. Justice Scalia, in summary, found that "In short, there is no affirmative indication in the Exchange Act that § 10(b) applies extraterritorially, and we therefore conclude that it does not."[93]

Justice Breyer concurred in part and concurred in the judgment. He pragmatically sought to emphasize how the purpose of the statute was to protect American investors by finding that §10(b) applies to fraud in two categories: first, any security registered on the national securities exchange or purchase or sale of any security not registered.[94] Second, citing the presumption against extraterritoriality, he agreed the case could not procedure under the Securities and Exchange Act.[95] Furthermore, he highlighted his visionary view of looking at the application of this ruling in the international context as illustrated in the amicus briefs from other countries. Justice Breyer was persuaded by these briefs that issued warnings to

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[89] *Id.*
[90] *Id.*
[91] *Id.* at 251-52.
[92] *Id.* at 264-65.
[93] *Id.*
[94] Breyer, *supra* note 1, at 122.
[95] *Id.* at 273-274.

the Court, arguing that extending this regulation abroad would have serious consequences with the foreign securities regulations.

D. Copyright

The Court faced another question about the application of United States laws to actions that started abroad. How does copyright law apply in a global context? How do the doctrines that guided The Court's interpretation bend to the changing global realities of commerce? This next case involving a Thai student living in the United States and his attempt to save money on college textbooks provides some answers.

In *Kirtsaeng,* the question about the application of copyright laws to the private importation of college textbooks was answered by Justice Breyer and the Court.[96] Here, a Thai doctoral student was sued by the textbook publisher for violating copyright laws. The Thai student had his relatives in Thailand purchase the English version for a much lower price than offered in the United States. He would then sell them, using the proceeds to pay back his family and friends for their expenses and keeping any remaining profit.[97] The publisher brought the lawsuit against the student alleging this arrangement violated copyright laws based on his unauthorized importation of the books and subsequent resale.[98] While the District Court ruled the student could not assert the "first sale" doctrine defense, Justice Breyer disagreed. Writing for the majority, he stated that the "first sale" doctrine would apply non-geographically. The "first sale" doctrine states that the original holder of copyrighted material has the exclusive right of the first sale of the item. After the purchase, the transaction transfers ownership of that specific item to the purchaser. The purchaser is free to subsequently sell the item without violating the law.

Justice Breyer was not persuaded by the arguments advanced by the publisher. He looked at the historical precedent dating back to Benjamin Franklin and Thomas Jefferson who imported used books from foreign nations.[99] He also pragmatically looked at the economic impact of applying the first sale

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[96] *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 524 (2013)
[97] *Id.* at 527.
[98] *Id.*
[99] *Id.*

doctrine to specific geographic regions. He noted that $2.3 trillion of foreign goods were imported in 2011 alone. Justice Breyer also demonstrated his visionary orientation to the law and its affects abroad in this case by noting that any change in the laws would have a very disruptive effect to this global economic activity.[100]

E. Personal Jurisdiction

Another area we see the Court having to confront the changing global economy and current legal framework is with the doctrine of Personal Jurisdiction. Personal Jurisdiction is doctrine that allows a court to exercise authority over the parties. How far can jurisdiction extend to companies beyond our borders? What are the rules of fair play and substantial justice for companies? How does participation in the stream of global commerce expose a company to being hauled into court in countries far and wide?

The Court attempted to answer these questions in *J. McIntyre Mach., Ltd.*, which involved a tort claim with a foreign manufacturer of metal-shearing machine.[101] Justice Kennedy writing for the majority of The Court, found that the manufacturer did not purposefully avail itself of the laws of the United States. This finding was supported by the fact that the manufacturer did not directly market or sell its product to United States consumers, rather it used an independent distributer.[102]

Justice Breyer concurred in the judgment of the Court that jurisdiction should not be extended to this case. However, he did not agree with the majority's position on changing the existing legal framework and precedents.[103] Justice Breyer pragmatically focused on the importance of precedent guiding the disposition of the case. He was concerned by the majority's abandonment of the accepted practice of looking at the minimum contacts with the forum state. In his visionary fashion, Justice Breyer looked at the implications of the ruling on foreign manufacturers, especially small manufacturers. "It may be fundamentally unfair to require a small Egyptian shirt/maker, a Brazilian manufacturing cooperative, or a

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[100] *Id.* at 542-43.
[101] *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 878 (2011)
[102] *Id.*
[103] *Id.* at 887-88.

Kenyan coffee farmer, selling its products through international distributors, to respond to products-liability tort suits in virtually every State in the United States, even those in respect to which the foreign firm has no connection at all but the sale of a single (allegedly defective) good."[104] Justice Breyer, in his opinion, sought to keep the existing framework of fact-finding to determine where jurisdiction is appropriate.[105]

IV. The Court and Treaty Interpretation

This paper has examined the challenges and new questions that globalization raised for substantive and procedural law. But what about treaty interpretation? How do Article III courts apply treaties that have been agreed to by the other branches of government? Justice Breyer in *The Court and The World* takes notice of the rise of international agreements.[106] These agreements have, since the time of the nation's founding, increased in scope the traditional areas war and peace, control of over territory and trade. Now treaties cover topics such as individual social and political rights, technical aspects of commercial contracts and arbitration, and family law areas of marriage and child custody, and these areas now transcend national borders.

A. Arbitration

The trend of alternative dispute resolution from traditional expensive litigation has also been applied to the international context. How does the Court interpret an international investment treaty between foreign parties? What are the guiding principles and questions the Court should use in the application of treaty to specific situations?

In *BG Group,* Justice Breyer, writing for the majority, illustrated his visionary legal analysis by looking at the international context and pragmatic effects of the decision. First, he took notice of the importance of the use of arbitration to reduce cost and increase efficiencies in dispute resolution.[107] Citing

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[104] *Id.* at 892.
[105] *Id*. at 893.
[106] Breyer, *supra* note 1, at 167.
[107] *BG Grp. plc v. Republic of Arg.*, 572 U.S. 25, 32 (2014)

scholarly works that analyzed "dispute-resolution mechanisms allowing for arbitration are a "critical element" of modern-day bilateral investment treaties."[108] Justice Breyer saw that the foundational question was whether the treaty should be interpreted as an ordinary contract by the Court. Here, Justice Breyer found that analyzing the treaty as a contract did not make a critical difference in the outcome.[109] Justice Breyer found that the Article 8 of the treaty bound the parties to arbitration like a procedural clause in a contract.[110] In his opinion, he cites multiple international authorities that support this interpretation of the treaty as governing the procedure of the dispute. Justice Breyer determined that because the treaty functioned as a procedural precondition in a domestic contract, the local litigation requirement is also a procedural provision that arbitrators, not courts, primarily should interpret and apply.[111]

Again, we see Justice Breyer as pragmatic visionary, looking abroad for additional sources to guide his analysis of the issue. Yet, he focused on finding a pragmatic outcome for current and future litigants to have a framework to use going forward. His choice to treat an international treaty as a contract illustrates the appreciation of giving future parties a way to interpret these issues.

B. The Rise of Treaties

Justice Breyer in *The Court and The World* highlights the dramatic growth of international treaties and international organizations. The United States participates in nearly a quarter of international organizations.[112] These organizations set standards, procedures and conduct of nations and at times even their individual citizens. These international organizations may even have their own courts or other judicial mechanisms.[113] How does the Court balance these treaties with domestic law? Justice Breyer used two cases, *Sachchez-Llamas* and *Medellin*, to illustrate how the International Court of Justice can inform American criminal law.

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[108] *Id.*
[109] *Id.* at 33.
[110] *Id.*
[111] *Id.* at 36.
[112] Breyer, *supra* note 1, at 197.
[113] *Id.* at 198.

In *Sanchez-Llamas*, the Court had to answer three questions, First are there rights under the Vienna Convention that criminal defendants can assert; Second, does the Vienna Convention provide a suppression remedy for the statements made by the defendant; Third, can the State in postconviction proceeding raise a default defense as the defendant did not raise the claim at trial? Chief Justice Roberts, writing for the majority, found that even if the Convention created rights of the defendant to have contact with their home national consulate, suppression was not the appropriate remedy and the State can use the regular procedural default rule claims.[114] Justice Breyer, in his dissent highlighted his differences with the majority opinion. First, he analyzed the Vienna Convention and found that it did indeed create the obligation on the police to notify the home country. Second, he found that in certain circumstances the State default rules must yield to the Convention. Third, Suppression may be an appropriate remedy in certain circumstances.[115]

Justice Breyer as a visionary looked at how the International Court of Justice (ICJ) resolved two claims made by Germany and Mexico against the United States for violating the Convention. The ICJ rejected the United States' claims that consular notification did not extend to the individual and that it imposed these obligations on the domestic proceedings. Furthermore, the concept of review and consideration of these claims cannot be barred if the police authority failed to notify the foreign national of their rights and thus prevent them from raising the claim.[116] Again, we see Justice Breyer seek information from sources outside the United States to inform his decision. As a visionary, he looks to an international body's review of United States conduct to harmonize our laws. As a pragmatist, he states, "I would seek to minimize the Convention's intrusion and federal intrusion into the workings of state legal systems while simultaneously keeping faith with the Convention's basic objectives."[117] Therefore, he does find that if authorities did not advise a defendant of his rights, suppression may be appropriate under the treaty.

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[114] *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 397 (2006)
[115] *Id.* at 366.
[116] *Id.* at 369-70.
[117] *Id.* at 397.

In *Medellin*, a death row inmate appealed his capital conviction following the ICJ ruling on the Vienna Convention. Here, the defendant raised the claim that he was not informed of his rights to contact the Mexican consulate following his arrest for murder. The ICJ claim named Medellin as one of the Mexican nationals who was denied his rights under the Convention.[118] The Chief Justice, writing for the majority, found that the ICJ ruling was not binding as Congress did not pass a statute following the signing of the Vienna Convention.[119] Additionally, the Court did not accept the argument that the President, by signing the treaty, could pre-empt domestic law without congressional action.[120] Justice Breyer dissented from the Court's opinion. He found that under the circumstances, the United States did, through the treaty, consent to the jurisdiction of the ICJ and that our domestic courts should follow its decision.[121] Justice Breyer took notice that the United States has signed over 70 treaties under the ICJ and the "upshot is that treaty language says that an ICJ decision is legally binding, but it leaves the implementation of that binding legal obligation to the domestic law of each signatory nation."[122]

These two cases illustrate Justice Breyer as a pragmatic visionary. He seeks to harmonize the treaties and rulings from ICJ, with domestic law. Moreover, he recognized the pragmatic need of the courts to address this issue.[123] His dissent provided guidance for lower courts to use in determining how to apply the treaty that did not create a new claim and would avoid constitutional controversy. [124]

C. Child Custody

A final area of the law where the rise of globalization has been interjected into traditionally domestic issues is child custody. How does the Court decide transnational child custody disputes? How do treaties designed to protect child trafficking implicate parents in a custody case? The Court had to wade into this difficult legal territory in the past decade.

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[118] *Id.* at 499-99.
[119] *Id.*
[120] *Id.* at. 529-30.
[121] *Id.* at 539.
[122] *Id.* at 555.
[123] Breyer, *supra* note 1, at 215.
[124] *Id.*

In *Abbott*, The Court had to deal with transnational child custody. Here, the mother was a United States citizen married to a British citizen.[125] Their child was a natural born citizen of the United States. The Abbotts moved to Chile when the child was about seven years old and subsequently divorced.[126] The mother was given primary custody with the father given visitation rights. As part of the custody agreement, the child could not be taken out of the country by either parent without authorization by the Chilean court.[127] After the mother found out that the father had obtained a British passport for the child, she feared the father was planning on taking the child to the United Kingdom. The mother obtained a court order forbidding the father from taking the child to Britain. Still fearing that the father would take the child, the mother took the child to Texas without approval from the Chilean Court or the father. [128]

Justice Kennedy, writing for the majority, relied on the Hague Convention on the Civil Aspects of International Child Abduction (Convention).[129] The question in this case centered on the return remedy within the convention. If the parent was found to have abducted the child, they must be returned to the country of origin. The District Court had dismissed the claim by the father to have the child returned and the fifth circuit affirmed. Justice Kennedy's majority opinion remanded the case for further proceedings to determine if there were compelling reasons for the child to remain in the United States. Absent these reasons, the child should be returned as this remedy helps deter parental abductions, which is the intent of the treaty.

Justice Breyer joined the dissenting opinion written by Justice Stevens. Justice Stevens found the requirement of return in this case ran counter to the intent of the treaty as the mother had sole custody. Stevens found that the treaty's intent was to address joint-custody agreements, not those where one parent only had limited visitation.[130] Justice Breyer, in *The Court and The World*, expressed his views further by

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[125] *Abbott v. Abbott*, 560 U.S. 1, 5-6 (2010)
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] Id.
[130] *Id.* at 23-29.

questioning why the father's limited visitation could veto the mother's choice on where to raise the child.[131] He agreed that the treaty was focused on rights of custody and not just visitation.

V. Conclusion

Through the review of legal topics ranging from human rights, national security, child custody, discovery rules, criminal law and punishment, including the death penalty, I have shown that Justice Breyer is a pragmatic visionary. He advances his pragmatic goals through a visionary approach of incorporating international law research in his decisions. This non-traditional material provides a greater and more complete context for his opinions. Justice Breyer argues that the Court must become more aware of the changing world and how its rulings should harmonize with other nations and international law bodies. His own jurisprudence lays the groundwork for how the Court should increase its awareness as its docket will continue to face challenges of globalization.

[131] Breyer, *supra* note 1, at 174.