

**Yale Law School
2016 Brennan Center Jorde Symposium
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**U.S. Supreme Court Justice Stephen Breyer
“The Court and the World”**

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Robert C. Post: Good afternoon and welcome. As the Dean, I am often called upon, as has been observed many times, to offer introductions, and that is a duty that our lecturer for today once aptly termed the “blessing function.” And today, it is really my pleasure to bless this occasion when Justice Stephen Breyer comes back to the Yale Law School. And I want to especially thank you, Justice Breyer, for being with us on this difficult occasion, with the loss of your longtime colleague Justice Antonin Scalia. Justice Scalia was, as Justice Breyer so eloquently wrote a few days ago in a tribute to his friend, “a legal titan,” who “used his great energy, fine mind, and stylistic genius to further the rule of law as he saw it.” In spirited prose, Justice Scalia insisted upon the separation of law and politics. But, paradoxically, he was actually a genius at influencing popular attitudes toward constitutional law. He was in fact unmatched in giving jurisprudential voice to social movements, and he relished that role.

Though Justice Breyer is, alongside of Justice Scalia, one of the Court’s great scholars and intellects, he is not a Justice with whom one would casually associate the label “popular constitutionalism.” Yet, since the 2005 publication of his influential book *Active Liberty*, followed in 2010 by *Making Our Democracy Work*, Justice Breyer has engaged in a continuous effort to educate the public about the workings of the Court and the relationship between our constitutional law and our democracy. He has not sought, I should say, to arouse a social movement, but instead to sustain what my predecessor Eugene Rostow might have called a “vital national seminar,” albeit a seminar of an increasingly transnational character. Justice Breyer’s new book, *The Court and the World: American Law and the New Global Realities*, adds yet again to this invaluable educational project. The book seeks to demonstrate both that American law is not, and should not be, cut off from the global legal order. Justice Breyer has crafted this message to reach a broad audience – from classrooms in Tunis to courtrooms in Beijing. And, of course, he has made special efforts to educate the American public, including a recent appearance on the Late Show with Stephen Colbert. Before Justice Breyer came onstage, there was a raucous musical performance by The Dead Weather, and, when everyone’s ears had stopped ringing, Colbert began the interview by offering his own form of blessing. “Thank you for being here,

Justice Breyer,” he said, “you’re really classing up the joint.” So we are especially pleased to have Justice Breyer class up this joint on this topic, because he is a founding member of, and an indispensable participant in, our own Global Constitutionalism Seminar, which he has for two decades attended and which concerns many of the same questions that lie at the heart of *The Court and the World*, his book. And I say this humbly because I’m mindful of the fact that Justice Breyer’s has deep ties to our northern neighbor, the Harvard Law School, where some believe that “YALE” is an acronym for “Youth Against Law and Education.” Youthful as we are, here in New Haven, we will never stop searching for an occasion to learn from Justice Breyer, to honor his achievements as a giant of American law, and to delight in our special connection to him.

Before we hear from our speakers, I’d like to say a few words about today’s Symposium and the extraordinary man whom it honors. In September of 1996, Paul Gewirtz, who is the founding father of Yale’s own Global Constitutionalism Seminar, was welcoming Justices Breyer and Barak, and others from around the world to the Seminar’s very first session. And at precisely the same time, in the same month, Frank Michelman was delivering a lecture to inaugurate the Brennan Center Jorde Symposium, which is a Symposium designed to be a living memorial to Justice William J. Brennan, Jr. Over each of the past 20 years, the Brennan Center Jorde Symposium has provided support and an occasion for a distinguished lecturer to travel to two schools. The fall lecture is typically held, as it was this last September, at Berkeley School of Law, where Professor Tom Jorde, a graduate of this School, taught for many years. Professor Jorde’s intellectual, legal, and ethical commitments, were, like my own, profoundly shaped by the year he spent as a clerk for Justice William Brennan. And today, we thank Tom for his inspired creation and generous support, as we also thank John Kowal, the Brennan Center’s tireless Vice President for Programs, for keeping this important conversation alive.

The design of today’s Symposium is an especially fitting way to remember Justice Brennan. Justice Brennan believed deeply that we come to know ourselves as a free people through impassioned debate. Brennan loved to joust, always amicably and ever cheerfully, but never at the sacrifice of his own serious and searching views. Justice Breyer shares this quality of engagement. When asked what he would say to the fiercest critics of *The Court and the World*, he replied simply, I’m quoting him now, “I say I have written this book for you.” In this spirit of enlightened exchange, today at this Symposium, two celebrated commentators will respond to Justice Breyer’s lecture. The first, whom the *New York Times* describes as, and I’m quoting now, “John Marshall and Earl Warren wrapped into one,” served as the President of Israel’s Supreme Court and literally created the Israeli national constitution. Because of his deep commitment to judicial craft, his profound grasp of human values, and his inspired internationalism, Justice Aharon

Barak is among the world's most influential jurists. We are also delighted to welcome Professor Curtis Bradley of Duke University Law School, who has generated some of the most perceptive and, at times, provocative scholarship on essentially every aspect of the dynamic relationship between American law and international law. He is a renowned expert who has set the transnational agenda for scholarly debate in the field of foreign relations law. Today's Symposium aims to draw out the distinctive, and, at times, differing, voices of these three outstanding figures – Breyer, Barak, and Bradley. And its design expresses the hope that a little Brennan-like jousting might bring us closer to the truth.

I would like to close with the thought that *The Court and the World* would have delighted Justice William Brennan. He shared many of Justice Breyer's core philosophical commitments, including the radical belief, the radical belief, that law should make common sense and serve democratic values. For Justice Breyer, the lessons of his father, Irving Breyer, a lifelong advocate for San Francisco's public schools, are as indelible as the words engraved beneath his father's wristwatch, which the Justice now wears with pride every day. And likewise, Justice Brennan was inspired by the memory of his own father, a coal heaver from County Roscommon, Ireland, who became Newark's Commissioner of Public Safety. Brennan was inspired by his father to ask sensible questions of the law – questions like: “Why shouldn't the Constitution's demand for fair procedures apply to the needs of both rich and poor?” Brennan's efforts in *Goldberg v. Kelly* to answer that very question produced, and here I quote Justice Breyer quoting him: “something rare in the law— a symbol of the need for equality, dignity, and fairness.” As Nat Hentoff observed, Justice Brennan was engaged in a “continual battle for five votes to help the Constitution leap off the page and into people's lives.” Today, Justice Stephen Breyer carries forward this legacy. For, like Brennan, Breyer is at once boundlessly optimistic about the American experiment while deeply humble about the daunting challenges it faces. Justice Breyer is in equal measure a master diplomat and a master dissenter. His work is at once supple and capacious, both well-reasoned and passionate. Think, for example, of his recent painstakingly researched and morally profound call for the Court to reconsider the constitutionality of the death penalty. In an essay written in the final months of his life, Justice Brennan asked of us “continuous hard work” to protect our truest national treasure, the rule of law. And he left us with these words: “If I have drawn one lesson in my 90 years, it is this: To strike another blow for freedom allows a man to walk a little taller and raise his head a little higher. And while he can, he must.” So, please join me in that spirit in offering a warm welcome to Justice Stephen Breyer. So, before we start, two quick announcements: the first is there will be questions after the panel, and the second is when the time comes to adjourn, you're all invited to join us for a reception in the Alumni Reading Room, but please wait for the Justice and the panelist to leave the table and leave the auditorium before you exit. Thank you.

Justice Breyer.

Stephen Breyer: Thank you but before I begin I'd like to have maybe 15 seconds of silence for Justice Scalia, who was a good friend and really a life force at the Court, and it's going to be a grayer place without him, and a decent man who's made an enormous impression. We're all sad. We're all sad at this moment. So let's have about a few minutes, a minute, or half a minute of silence.

All right. Thank you. And I'd be, more than half a minute of thanks, my goodness. That was a very nice introduction. How am I going to live up to that? My father's most profound advice that he really meant—stay on the payroll. It was. I managed to do it. I'm delighted that Aharon is here. We participated in this seminar for years. He is—all they said about him is true. And we used to communicate by mental telepathy. It was great. And thank you very much for coming from Duke. And Yale, I mean Yale, I'd forgotten those nasty things that Paul Freund made up about Y-A-L-E or whatever it is. My experience here in Yale was Paul Gewirtz brought a visiting foreign delegation, and I was trying to explain to them that most law in the United States is actually made in the states. And I asked them what, I ask all the 10th graders who come to the Court. I love to talk to 10th graders. I say to them "In what city is the law made that really affects you the most?" If they're from California, they're supposed to say Sacramento. And here we are and I said "What city do you think they make the law that affects us the most right here at Yale?" And I could hear, "Hartford, Hartford." So I said to [former Yale President Richard] Levin, "What is it?" Hartford, yes, Hartford. So I said Hartford, of course. And then at the end of the two days, Paul says to them, "And do any of you have any further questions?" And the head of the delegation says, "Yes, I have one question." He says, "We were all wondering why do they make almost all the law in the United States at Harvard?" All right. Anyway, and Yale really helped me with this book. Aharon and I were trying to work out how many, he's written three books out of this seminar. But there are about four more that bear a considerable influence, and mine is just copied word for word. I mean that Yale was very helpful, research assistance and Paul's part and the rest of it and Judith Resnik and everyone, and the Dean has been terrifically helpful in finding the research for me, just great. Thank you.

All right. So you're the victims of this enterprise. And I'm going to talk about this book. And obviously, he said, I try to explain to people. I try to explain clearly. I have written other books. My first book, by the way, which is a regulation of energy by the Federal Power Commission written with Paul MacAvoy, is still available to you on Amazon. Hey, you know, it only costs a penny. It's fabulous. You can get books on Amazon for a penny. Okay, I mean, let's go down that road. But my second book, which was called *Regulation and Its Reform*, got into the hands of a reviewer in the *Los Angeles*

Times. Well, I mean, I know the subject, it's regulation, it's reform. All right. He wrote the following: "In Alice in Wonderland, Alice and the dormouse emerge from the pool of tears and the dormouse begins to read from Hume's History of England. 'Why are you reading that?' said Alice. 'Because,' says the dormouse 'we're wet. And this is the driest thing I know.' That's before Breyer wrote this book," he says. Anyway, stay away from that. I have written this book not really to reply to Justice Scalia's views or those of anybody else. It's serving a different purpose. I mean, the purpose that I really think of it is serving two. For a general audience, let me put it this way. Some of you, I hope, have read *The Charterhouse of Parma*. It's a great novel, great novel, one of the greatest. And it opens with Fabrice del Dongo, who's the hero, and he's wandering around in Waterloo. And the bullets are flying and the smoke is everywhere, and Napoleon is charging back and forth on his horse. And he thinks to himself, "Something really important is happening here. I wish I knew what it was." And that's how I feel when I hear words like interdependence, globalization, the world is shorter, I mean smaller, shrinking, whatever the normal cliché is that you hear. And I thought I would write to try to tell people rather concretely what those words, that interdependence, globalization, you can't even say it without thinking it's a cliché. But what does it mean concretely and absolutely specifically for one significant American institution, that's the Supreme Court. That's an institution on which I serve, so I see it. I know it. I know it on the daily basis for 20 years. And I've seen change. And the change that I think, one of the changes and perhaps the most remarkable change, is the change in the number of cases that require a judge to know something beyond our own shores in order to make a sensible decision in that case. And that's all I'm doing. I'm giving, in a sense, a report from the front. It's a report from the front about what I see happening, happening not because of anybody's philosophy or view of law or anything like that. It's something that's happening because of changes in the world. And in the next few minutes, I'll simply give you a few examples. And the book has quite a few organized in a way so people can take them in and see that they're in different fields and so forth.

Let's take one that is of great interest to a lot of people who aren't judges and lawyers, and that's the problem of security, security and civil liberties, and try to bring that up to date. If you go back to the history of the Alien and the Sedition Acts, and I recommend it because they were pretty bad news. They weren't exactly consistent with what we think of as the First Amendment. I mean, no, zero. But what did the judges say about that? I haven't found any history book that tells us, and I suspect that it doesn't tell us because they didn't say anything. It was left to the political system to work that out. That was at a time when there was war with France or maybe war with England or maybe both, or maybe both countries were seizing sailors. Anyway, you can look at your history books. Go to the Civil War and see what the Court said. Answer, not much. In the face of what? In the face of—hold it, of course, it was a terrible war, it was a terrible time—but in the face of President Lincoln

taking tens of thousands of Americans who were not soldiers and putting them in prison. Steward, who was the Secretary of State, called in the British Ambassador one day and he said, "You see that bell? I can push that bell once and I can have anyone I want in New York State thrown into prison. I can push it again and I can have anyone I want in Indiana thrown into prison." "Tell me," he said, "does the Queen of England have such power?" And what did the Court say? Nothing, until after the war, leaving the habeas corpus act. But nothing, nothing. Not until the war was over. And what was the legal theory? Well, maybe it was Cicero. Cicero said 2,000 years ago that, I used to translate it like this, following my Latin teacher in high school, Ms. [inaudible], she didn't translate it like this. I said, "When the cannons roar, the laws fall silent." That was a pretty good translation except somebody in an audience pointed out to me that the Romans didn't have cannons. So I had to change the translation but you get the point. In time of war, the laws fall silent. And that had a very powerful influence. Of course, that was what was going on. That was going on in the Civil War, and try World War I. And it's filled with those who were Learned Hand, the case of the masses, and others. There was lots of civil liberty. It's war time. What's the attitude of a president? Biddle the Secretary and the Attorney General under Roosevelt said, "I'll tell you the attitude in war time of President Roosevelt or any president. Their attitude is we'll worry about winning the war. We'll worry about the Constitution later." Probably is their attitude. And what did that lead to? Well, in World War II, which is in my lifetime, in World War II, I can remember my mother taking me down from San Francisco driving down the Peninsula, we'd pass Tanforan Racetrack, and she'd said that's where they ordered the Japanese to go during World War II, i.e., 70,000 American citizens of Japanese origin were taken from their homes at the West Coast and were brought to camps where they stayed during the war, against their will. For what reason? No good reason. I mean, history suggests that. History proves it. I mean, DeWitt who was the general at the time in the 6th Army in San Francisco in The Presidio, he had a list of things about why this should be done and 763 messages sent to Japanese submarines off shore, and people were worried in January 1942 about a Japanese invasion of California, five instances of sabotage, wait, Earl Warren was for it, a major force. He said later, "It's the worst thing I ever did." Who was against it? J. Edgar Hoover. "No need," he said, "I can handle the sabotage with the FBI." But they were sent and Fred Korematsu decides to bring a case in San Francisco. His lawyer is Ernie Besig.

Many years later, I met Fred Korematsu. I met him because next door in Cambridge, to our house, was his daughter, Ann Besig, who is the daughter of Ernie Besig who was the ACLU representative in San Francisco, who represented Korematsu. So she invited me over to meet him. I liked him very much. He was a very feisty guy, and he was great. And his parents had told him, "Don't bring the case. Don't rock the boat." And he wrote a little thing. It's good. He says, "This is America." He says, "They can't make me do this.

I'm an American citizen." And he got Ernie Besig to represent him but the ACLU, by the way, wouldn't underwrite that brief. But you see it was war time, and they're worried about an invasion. They did join the case later, the ACLU. They did but only when it got to the Supreme Court. Now, it did get to the Supreme Court. It got there in 1944. By that time, nobody is worried about a Japanese invasion of California, and Korematsu is pretty certain he's going to win. Moreover, two lawyers in the Justice Department, Burling and Ennis, they're charged with writing the brief for the government in the Supreme Court. And they got suspicious because of an article that had been written somewhere about the basis for holding the Japanese. So they called in reps of the FCC and the FBI, and they asked the FCC, "Go and look into the 763 instances of signaling the Japanese submarines. What was the fact there?" They came back a week later, documents like this, and they said there was no signaling. They said, "Why'd they say it?" He says, "These are all buck privates and so forth. They didn't know how to work the equipment." He said, "But how did you do this so quickly?" He said, "Oh, we didn't do it now. We did it at the time. We did it at the time." And General DeWitt knew it. You see, there was nothing. Nothing. The five instances of sabotage, three of them took place after they'd moved the Japanese, and the other two, J. Edgar Hoover said, "We had well under control." So Ennis and Burling say, no we're not signing the brief. Then, they hire, the Department got, to get them to sign that brief, the person who was running the War Section of the Justice Department, Herbert J. Wechsler. That's a name that means something to some of us. And he was very good at getting people to agree to things. So he wrote a footnote that was totally incomprehensible. Well, not quite, but if you read it seven times, you would see it says, "Don't follow DeWitt. He's wrong. There is no evidence here." But you had to read it pretty carefully. So I had always thought that maybe the judges didn't read the footnote. But then I did look at the transcript and Charles Horsky, who was representing the Japanese American Defense League, says to the judges, "Read the footnote." And if you look at Murphy's opinion, you'll see he read it. I mean, they knew. So, result, six to three for the government, for the government. So it was upheld, that movement of Japanese, the Japanese Americans, the Japanese American citizens taken for no reason from their homes and put in camps. And what's the reason? I mean, this was Black who wrote the opinion, Douglas, Frankfurter, liberals who were in favor of Board of Education, three dissenters, Roberts, Murphy, and Douglas. Why, why did they do this? Well I suspected the reason but somebody who got notes, which I didn't see, said this was the reason, said that Black walked into that conference and said in effect, "Someone has to run this war, either us or Roosevelt, and we can't. And, therefore, Roosevelt has to win." You see, Cicero, Cicero.

Well, things began to change. They began to change, really, I think, with the Steel Seizure Case, very interesting case, World War II, absolutely fascinating, and there the Court, Jackson, Frankfurter and the others say

President Truman went too far, behaved unconstitutionally when he seized the steel mills in order to assure a supply of steel for weapons to the army fighting in Korea. War time, good reasons for the government over here by the way. No, why did the Court strike it down? My own view, it was a reaction to Roosevelt. They were really fighting Roosevelt. And if you wanted to strike down what Roosevelt was doing, it's easier to strike it down when he isn't doing it and you have Truman because Truman is much less popular. I'm just saying. But in any case, they did hold it unconstitutional. They said the President has gone too far. And where are we now to bring us up to date? Well, I, this is where I think we are, Guantanamo, we've had four cases, two of them pretty significant. I mean, Guantanamo detainees, can we get into Court? Congress passes a law that says, "No, you cannot get into Court." No detainees can get into Court, and our Court says that that is unconstitutional. It violates habeas corpus. Bin Laden's chauffeur, he brought a case, not the most popular person in the United States. He won. He won. You have to have the elements of due process. Now what's more significant, the actual details of the cases, in my mind, is that we held the, we decided the cases, and we decided them for a person who is a detainee at a time of security threat, you see. So what are the key words from that perspective, words that I joined, Justice O'Connor wrote, "The Constitution does not write a blank check to the President, not even in time of war." Fine, no blank checks, no blank checks. But that long windup brings me to what's a very short pitch because as soon as I say that would ought to be in your mind, fine, no blank check. What kind of check? What kind of check does it write? And the cases have been criticized from every point of view. One group says, "But you shouldn't have gotten involved at all. What do you know about national security? Not much." And I admit and say, of course, the Constitution delegates the security powers to the other two branches, the President and Congress, not to us. But it does delegate to the judges a power to protect basic human rights.

And what happens when those two things conflict? Of course, we'll be involved. Solution, no blank check. "Wait a minute, that's much too vague. You should have been more specific. You should have given us a few details. You should have gone quite a lot farther in saying what they can't do." Really? We should have? Why didn't we? Because I don't know. If you want to be truthful about it, I don't know what the answer is. I can speak in generalities. I can say well, of course, Jackson and I just heard a French jurist, very great French jurist, quote Frankfurter on this but I think he might have been quoting Jackson that the rule of law does not mean, he said, "Rule by the weak. To have the rule of law doesn't mean you have to give in to terrorism for example." Of course not. But it does mean that the judges are there to protect basic values, basic human rights written into the document. But wait, we're still too high a level of generality. Well, let's go down a step and he'll say, "Look, before you depart," and this is Frankfurter or Jackson, whoever [inaudible] read, he says, "Before you depart from traditional liberties in the name of security necessity, you have to prove to us, the judges, that there is,

it's really necessary, not just a convenience, not a convenience for the police, not a convenience for the Army, not a convenience for you. It is a necessity."

Okay, we're a little bit, coming a little closer, a little closer, except they'll say it's a necessity. That's what the government's going to say. And they're going to have that in their brief. Why would they do it if they didn't think it was a necessity? Of course, and then, now this is a problem and how, what a pity I don't have answer, and so how do we know. We have the help of the lawyers. They will be there saying, "Why, why do you need this?" Or they'll ask a second question, and the second question will be, "Why not? Whatever that need was there, why can't you do it this way, which is a less restrictive way?" Those are traditional legal questions. But we are going to run into a bunch of questions. Suppose the answer is, why, the answer is "I can't tell you. It's classified." And how do we work with that in a way that protects legitimate reasons for classifying but still gets a judicial look at things. How do we find out whether something really is necessary or there are other ways to do it? Again, I say, it's been helpful for me to find out what other nations do, not that they have the answer but just to find out, so that we can better evaluate in terms of security, what the need is; in terms of ways of dealing with it, what the possibilities are.

When I heard Aharon describe in depth, and I wish you had an hour to listen to him on this, of how they've worked out a system in Israel where sometimes it is necessary but we want the judge to find that out even in ex parte, and then you come in next week and you better have a better reason, and next week you better, better, a continuance. You see, it continuously gets tougher for the government, week by week, to justify something that couldn't ordinarily be justified. That's something we should know about. We should know about how, what Britain is doing. We should know about what France is doing. And above all, we have to have some way of understanding a security problem that's likely to last and extend well beyond our shores.

And I end with the question, how do we find out? That's all, that's all what that long line that all I want to show you the nature of the problem that's in front of us and how it reaches out and demands that we know something beyond our shores. There are lots of other examples. You can take much less "glamorous" fields. What about, I love the case of the student from Thailand, studying in Cornell. And he's in Cornell and he says, he discovers that his textbooks, which are pretty expensive, same textbook in English sells in Bangkok at a much lower price. He writes to his parents, "send me a few." And they sent more than a few actually, and he began to sell them. And after a while, he made quite a lot of money and the publisher got a little bit annoyed and sued him. Now, could we, does he have the right to do that or not? And the answer lies in a few words, very incomprehensible, in a long statute. And it's not the answer so much that interests me though I had a great interest at the time, but I walk into my office and I discover a stack of briefs like this

from all over the world, Asian lawyers, European lawyers, governments from different countries. I said, what is going on? Why is there tremendous interest in, I mean, it's interesting but really, this many briefs? And in one of them, I find what I think is a pretty good answer. He says, you know, copyright today is just not a question of film or music or books. Try automobiles, the software in automobiles is often copyrighted. Try going into any store you want and look at any product and you'll see a label, and that label is copyrighted. And at the bottom, he says that we estimate that your decision in this case will affect \$3.2 trillion worth of commerce. That's a lot, even today. Right, yes.

All right. And look at the antitrust cases. We have a plaintiff in Ecuador suing a defendant in Holland. The Ecuadorian is a vitamin distributor, and the Dutch was a vitamin maker. And they were, he was in a cartel apparently with an American too, but they're suing the Dutch and they want to sue in New York. Can they do it? Well why'd they want to sue in New York? I mean, one reason might be if the price of vitamins is too high, the distributor can't get them and he's too weak, and he can't get to Europe. That's one possible reason. Another possible reason is called treble damages but, so he's in New York. But the question is, can he do it? And to answer that question, under the statute, we have to know and we did know. The very lengthy kinds of cooperation and the very lengthy nature of the kinds of enforcement activities that both our own Justice Department and the European cartel authority are engaged in. Read the opinions, and you'll see that that's a necessity.

The same is true of the securities law where a plaintiff from Australia sues for stock that he bought over the Australian exchange in an Australian company but sues in New York. Why, the fraud happened in Florida. Well, do we have jurisdiction or not? Lots of foreign countries file briefs and say "Stay out of this. You've going to affect our ability to enforce our own laws." And they won with that, they won with that. It happens all over the place to the point where I would say that this word, which you understand but not everybody does, the word comedy. It sounds terrific. I mean, what is comedy exactly? And I think, at least now, what it is more and more, is it is a question of trying to get laws from different countries to work together harmoniously, laws that aim at about the same thing. And that's a change. That's a change from what it was. I can go into a lot of other areas. I don't know how many you want me to go into but I mean even marriage. Marriage? What have we to do with marriage? I mean, if you want a tough job within the judicial system, try the family courts. I mean, that is tough. I have friends both in England and Cambridge, Mass who are involved in that. And what they say, Eddie Ginsburg told me this, he's a good family judge, he says, "I tell the couple that's feuding or they're fighting over children or something like that, you decided what to do, make an agreement, please. Because if you make me decide, I will decide something worse than you would've agreed to together."

I mean, that's a really hard job. And family judges know about it. State court judges know about it. Federal judges know very little about it, if anything, usually nothing. And we have three cases within two years, all involving the interpretation of a treaty against abduction of children. With, in those particular cases typically, a group on one side of people who are strongly against any abduction and groups on the side who are very strongly against spousal abuse, which can lead to abduction. You see? And they're asking us, who know less about that than we know about most things. And don't tell me what you think about, we won't go down that road. But the point is again this, why, why are we deciding these things? Because they're the subject of treaties. Why are they the subject of treaties? They are the subject of treaties because today marriage is more and more and more a matter that crosses national boundaries. It's all over. Treaties, treaties, we don't have just treaties. We have executive agreements. We have agreements of all kinds, and they go beyond national boundaries. And they affect us, those agreements.

My colleague, another member of our seminar, Sabino Cassese, had all his research students in Italy going and looking up this number, and he came up to the conclusion that if you ask the question how many organizations are there with little bureaucracies, which then make rules that affect, in practice determine how people have to act in more than one country, it isn't just the UN. It's also, well, he found the number was... How many think it's more than 50? Yeah, quite right. More than 500? Good. More than 1,000? More than 2,000? Well, it is more than 2,000. Anyway, that's a good quiz but nonetheless, how could there be so many? They're all over the place. The one that affects you the most, that affects you every single day of your life, you probably never even thought about, it's ICANN, which is a corporation in, that has its base in Los Angeles and it affects the rules of domain names and other rules of the Internet. That doesn't affect you? Of course it does, every hour. I'm amazed you're not looking at your tablets right now, you see. And it can be the UN. It can be the International Trade Organization. It can be, by the way, the international olive oil council, blue fin whale commission. I mean, they are all over the place.

And what is the status of those rules and at what point will we, in our court, begin to have the question they've already had several times in Europe, the question that's come up several times in Italy, in Germany, in Austria, the question is this, we've delegated tremendous power to the European Union. They make rules on everything. Do we have the right under our Constitution to delegate that power to the EU? All three of those countries have said, "In principle, no. We can't delegate every power. There are reserved things we can't delegate." But they have never found one actually they couldn't delegate. But nonetheless, that's what they say. Now, just imagine in our court, suppose that we can't delegate things, powers or there's narrow limit on what we can delegate, how will you in your generations solve the problems

that are plaguing the whole world really? And not just terrorism, environment, commerce, health, it's all over the lot.

And now have you thought about the same question this way. If the answer is "as much you want," what happens to Article I of the document that gives the power to congress to legislate? A question similar in some respects but not totally to a question that was asked at the time of the New Deal is how can things, how can powers be given to these administrative agencies which are not mentioned in the Constitution, resolved in *Crowell v. Benson* and other decisions. And how, how, how will we resolve them? I mean, all I'm trying to do is to get you orally or by reading to have a slightly different cast of mind in the way that you look at quite a few—10%, 15, I'd say, 20% maybe, of the problems that are now appearing in our court. And I want to go to the trouble of doing that because I think it's a pretty important thing to start looking at the problems. People do. I don't, they don't have to start but continue and more so looking at problems in this way, which means not a specialized course in international law but really these things come into lots of courses. It's an internationalization or a broadening of the frontiers of many courses that have traditionally have been pretty domestic in their focus.

Now, take the, it's limited, I'm not making some tremendously broad claim, but I want at least people to see what's going on and the questions that's likely to raise from a particular direction. Why? I was going to save this but I don't think I will. Why do I want that to happen? Why do they want - here's a broader reason. I want it to happen of course because when you said I wanted to persuade the people who are really against me, I think the people who are really against me in this argument if they are against me in the argument, I'm not sure, but they say "Don't refer to foreign things. Don't refer to foreign cases, etc." What is their reason? I persuade them so beautifully, and then they don't get persuaded at all. I make the most fabulous argument about how we should pay attention to what's going on elsewhere. He's a judge just like me. He has a document, which he sort of created, helped create, but just like I do. And he has problems sort of like mine, and so why don't I pay some attention to what he says. I can read it. I don't have to agree with it, and then the congressman, so and so, who is on the other side says, "Fine, read it. Just don't refer to it in your opinion."

Or, I say, but there was the case we had in that seminar, the Hungarian judge, the Hungarian whose own congress or parliament was just paying no attention to the courts, I say, "We refer to his cases. He refers to ours. If we refer to them occasionally, that will help build a rule of law, to help preserve democracy." He said, "Fine, write him a letter. Just don't put it in your opinion." What's he worried about? He's worried, he's worried about losing our, watering down our, seeing diminished our basic American values. And that's not just a code. He's worried about it. Well, I say, I want you to read this because I think that by the time that you finish reading and see what this

is like, you will say the best way to preserve our American values is to participate in matters, problem solving, efforts to write rules or regulations, efforts to talk to other people that go beyond our own shores. And Post pointed this out in a good phrase. He said, "You know, if they don't, if we don't, it'll go on anyway. People get together anyway, and we just won't be there. And when we're not there, we'll still be affected, so better to be there." And that's what I'm trying to do. I'm trying to show a picture of what's actually going on so that people will see that there are really a couple of ways that we can resolve these problems in front of us. And what I'm showing you are the efforts that are being made now to do so under law. And if we can't resolve these problems under law, people will find other ways. And those other ways are not nearly as attractive. So we all have an interest in this, of trying to get this legal system extended beyond our shores, as it is, to work. And that isn't a matter of individual judicial philosophy, in my opinion. It's not a matter of personality. It's not a matter of politics. It's a matter of fact, and it's the facts that are being presented in front of us, to us, by the nature of the world. All right. Now, you have a picture of the book and maybe it is not quite like Hume's History of England as read by the dormouse. Thank you.

Aharon Barak: So I must say that I listened to what Justice Breyer said and I read the book, and I'm really embarrassed. I'm embarrassed because I agree with everything he said. So why am I here? I am here to ask, if I agree to everything he said, why does he say so? Why does he say it? It's obvious. Of course, any legal system has a situation in which a judge in this legal system has to refer to foreign law. Anyone who has a class on conflict of laws knows very well that a local judge, a municipal judge as this is called, has to refer to another legal system and has to solve his own problem by looking what another legal system says. That's A-B-C. No one says that it's not so. No one claims that American, that an American judge can solve all his problems by only looking to American law. So what's the point? That was my embarrassment. I read the book and I asked myself, what's the point? And I couldn't find the point. So I started to think. Because in my country, I can't see that a judge, clearly not a judge of the Supreme Court of Israel, would sit and write such a book. For what?

Everything he says is right. Of course, I cannot solve a problem about oil and about copyright that takes place in another country only by my own legal system because my own legal system tells me go to another legal system and have a look. We have in Israel a beautiful law that says that everyone who, under German law, received reparations for the atrocities of the Germans may claim this amount from the state of Israel. This is part of the agreement of reparations with the Germans. So here I am sitting in an Israeli court and I have to decide if the guy will get, has the right under German law, so I read German law, and I have to decide what German law says about it. And then I read the German case, and I said no, the German case has misinterpreted the German law, and I do it. And I have no major problems with that. So what's

the problem? That's my problem. What's the problem? What's the point is my problem. So I said to myself, well, there is a point, an important point, which is not mentioned expressly in the book. The book has 360 pages. In 10 pages, Justice Breyer talks about the problem he mentioned here in passing, the question of to what extent should the American Supreme Court refer to a foreign law in interpreting the American Constitution. So that's the point. But one is not connected with the other. And he is right. He wrote 360 pages. Only 10 pages, he said about this problem and basically hasn't said anything about it because he just said, "Look, if you are interested in this question, go and read the article that Professor Waldron has written about it and that's all.

So what's the point? Clearly, the point is not that in order to convince people that American Supreme Court has to rely in interpreting the American Constitution on foreign law, this is the proposition and the proof of the proposition is the conflict of laws or other cases that Steve just explained to you because they are two different questions. I may think that the only way to construe the American Constitution is to understand what the American Constitution says and construe it in its own terms on the one hand and agree that in order to solve a problem about conflicts, problem about trademarks that have to do with another country, I have to refer to the laws of another country. One doesn't, it doesn't follow from the idea that 15% of my cases are cases in which I refer, I, American Supreme Court, refer to foreign law because our system tells me to go to foreign law. So there's no connection between this proposition and the proposition, and therefore, when we construe our Constitution, we have to take into account what other, the way that other legal systems construe their own constitution. It's a non sequitur. One doesn't follow from the other.

So, I again, ask my question, what's the point? And I told this Steve, no Israeli judge would write such a book, clearly not an Israeli Supreme Court Judge. In fact, the judges who are expert on this questions are trial court judges. He mentioned, himself, family court judges. They know, if he has a family case in which there is an external element, an abduction from outside or etc. you have to go to the other law and have a look what they say about it. That's A-B-C. So I ask myself again, I told you I was embarrassed, so what's the point in writing this book? You know, he writes a book, 360 pages, the word originalism is not there. The word originalism does not appear in the book at all. Well, I think that the whole book is an attempt to say originalism is wrong. No? Ten pages are there in which he talks about the view about originalism, does not mention originalism, and clearly, that's not his point because there are no attempts done to convince us that originalism is right or wrong. So I'm asking myself, what is the point? And I came to a conclusion that my, my way of reading the book is just wrong. That I'm trying to read the book in a very technical, analytical way of thinking, which is typical to me. This is the way I'm reading books. Justice Breyer didn't write this book for me. He wrote another book. So the question I asked myself is what is this

other book he wrote? What for? What's the point? And here I recalled, Steve, I've mentioned it to you. I don't know if you remember. You have to educate me about it. We met together in 2003, I think it was. There was a conference held at Columbia Law School, 10 years for the appointment of Justice Ruth Ginsburg Bader to the Supreme Court. And that was a very nice event, and half of the event was her contribution to American local law and another half was the question of comparative law. And we, both of us, were talking in the second part, and of course, we had the same views on this matter. And I remember Steve telling me, either to me or to everyone I don't remember, but that's not the point, and he said the following which is stuck in my mind, he said, "You ask why the Supreme Court of the United States does not refer to comparative law? I tell you why, because the lawyers don't argue it before us. And if you will ask me, so why are the lawyers not arguing before you? He answers because no one taught them about that in law school. And if you ask why hasn't anyone taught about it in law school, he will answer because the professors have not taught them about comparative law. And if you ask me why have the professors not taught anything about comparative law, I'll tell you because the Supreme Court doesn't cite comparative law." Here is the vicious circle that he told me and this stuck in my mind. He's right. There is here a vicious circle. So I said to myself, Steve decided to break the vicious circle.

But how to do it? So one way to do it is my way to do it, to take every little chain in it and say it's wrong, wrong, wrong, wrong. No, that's not his way. As I mentioned to you, originalism is not there. Comparative law is 10 pages. It's a book about how an American judge, most of the judges are not Supreme Court judges but trial court judges, how an American trial court judge including American Supreme Court judge disrespect matters that have an international component in them, that's the book about. So what has it to do with the vicious circle? And then I was thinking about it because Steve Breyer has a point. He has written a book not to educate us that legal matters having international character in it are coming before American courts. Of course, they're coming before American courts, so what's the point? And I came to the conclusion that he decided that the way to break this vicious circle is to create another circle altogether, not to go into the discussion about all the chains in this, all the little details in this chain but to have another theory. So what is this other theory? And I think his other theory is, "I will write a book not for lawyers." This book is not for you here, and it's not for law students. And it's not for judges. It is for laymen. It is for the American people. I think what Justice Breyer has tried to do is to write a book to, for the American people with the hope that they will read it, and now, I understand why he goes on TV and talks about it. He needs the American people to read the book because then a new chain will be created.

The American people will read the book and they will see that international law or comparative law, here you're making a mix up between international

and comparative law, everything is slightly mixed up, but they will understand that non-American law is coming to our courts on a regular basis. And it's, we are not threatened by it, and we keep our values and then, and they help us in keeping our values. And we are not alone in the world, etc., etc., etc. And if he will convince the American people that this is what happened, they may convince or their representative in the legislature may be convinced that that's the situation. The representative in the legislature may convince judges, who may convince lawyers, who may convince law professors, who will teach you about it. A new circle, outside the vicious circle I was telling you about, a new circle will be created. And if this new circle will be successful, this is a wonderful thing. We will get out of all this, according to my view, nonsense about comparative law business, and we will go into another era altogether. Well, there is a point in the book. And the point in the book is that my good friend Steve is an optimist. He believes that he can convince the American people to go this road. It's a long road to go but while my criticism of all this is very technical, narrow minded, his view about it is not technical and not narrow minded but he's thinking about it in a much, much more global, in a much, much more optimistic way. So my friend Steve, while I am a short-distance runner, you are a long-distance runner. You are an optimist, maybe Don Quixote, I don't know. But you do believe that by writing this book, you will convince the American people and a new circle will be created. Will it happen? I hope so. I don't know. But as we judges know, there is only one judge who will decide these matters. And this judge is history. Thank you.

Curtis Bradley: Even though this is, obviously, a more somber time to be talking about the Supreme Court than we had expected or anticipated, I'm absolutely delighted to talk with you about Justice Breyer's book and share with you my views about that. It's a very timely book for the reasons you've heard. It's a very engaging book. You can see how engaging the Justice is himself in person. The book is very much like that. One of the things that Justice Breyer mentions in his book, although not in his talk today but he says it repeatedly, is that he reminds us that the Supreme Court is not the world court. He says that several times. And against that backdrop, he suggests various functions the Supreme Court can perform when it is not the world court but it faces an increasingly international docket over the sort that he described. He talks about how it can promote harmonization, foster collaboration, even help to promote the rule of law.

And in this talk I want to emphasize a different role that I believe the court does perform and I will argue should perform and using some of the cases that Justice Breyer talks about in his book but not ones he emphasized today. And I will mention Justice Scalia at one point near the end of my remarks. The role that I have in mind is a role that the Supreme Court plays in serving as a filter between international law as it continues to develop and the American constitutional system. And I will begin by noting that this role is justified because international law is made through processes that often make it ill-

suited, it turns out, for direct application in the U.S. legal system and also is often designed to perform functions quite different from those demanded of domestic law. At least those of you in the room who've studied international law know there are two basic bodies of international law— treaties, which many of us are familiar with, and customary international law, which people are often less familiar with. The customary law arises out of the evolving practices and beliefs of nations. And the United States certainly contributes to it, sometimes very substantially, but it does not require any specific approval process in the United States legal system. In addition, because it's unwritten, its content and even the sources that make it up are often contested and uncertain. Treaties, again more familiar, certainly do engage with the U.S. legal system. They require, in particular, the agreement of the President of the United States and 2/3 of the Senate. Nevertheless, because they are often negotiated with representatives from different legal systems, different legal cultures, they have often wording and terminology that are distinct from ones that would be typical in the U.S. legal system. Often, the art of compromise and agreements require resorting to terms that are vague, unspecified, left for further resolution. In addition, the executive branch plays a particularly predominant role in the making of treaties much more so than in the legislative process and indeed has been the U.S. practice since almost the very beginning after George Washington decided that consulting with the Senate was not really worth the candle, that the Presidents negotiate treaties by and large without the Senate or the Congress and then present them to that body for approval after the fact. And here, by the way, I'm only talking about treaties that go to the Senate. Many agreements raise other issues and are called executive agreements but are beyond what I will talk about.

A third type of international law and a more modern sort is the output of international institutions themselves, either because they have the power to engage in their own adjudication of disputes or they have the power to issue, in essence, international regulations. Justice Breyer did mention some of that in his remarks, so to fill in the gaps of treaties, to update them often without having to go back to countries for additional approval. The growth of this international regulatory law in some ways resembles historically the rise of the administrative state in the United States but without the same level of domestic oversight. There is no administrative procedure act for international regulation. And even more than with the treaties, international institutional regulations are dominated to the extent the U.S. is involved at all, they're dominated by the executive branch. The only agents in international organizations on behalf of the United States are agents of the executive. So, let me use a few of the examples from Justice Breyer's book that he didn't mention to illustrate how the court is aware of these issues and indeed certainly allows international law to come into the U.S. legal system but also polices that boundary in order to protect American constitutional values. So, three scenarios in particular: the relationship between treaties and the unique American federal system of government; second, the issues, and Justice

Breyer adverted to them, posed by delegating authority away from domestic institutions to international bodies; and finally, the issues of domestic application of the evolving customary norms of international law, a particularly hot button issue when it comes to human rights law.

So, the first scenario, treaties and the federalism, a great case, a very interesting case that this Court decided recently was the *Bond vs. United States* case, and Justice Breyer talks about it in his book. The United States agreed to the Chemical Weapons Convention, a very important treaty in 1997, and one of the things the treaty calls for is to criminalize breaches of its provisions. And Congress did that the same year. It unfortunately, essentially, photocopied that Chemical Weapons Convention into the U.S. Code and that convention deliberately has extremely broad language about what a chemical weapon might be and what its use might constitute. In quoting chemical weapons, both the treaty and the statute say, 'are any chemical which through its chemical action on life processes can cause death, temporary incapacitation, or permanent harm to humans or animals.' There was a lively oral argument, some of you may recall, in the Supreme Court about things like giving chocolate to dogs, potatoes to horses, and other things because it includes anything that could have a chemical reaction that would harm even animals, a very broad provision. In *Bond*, the issue was whether the act could be applied to a woman in Pennsylvania who stole chemicals from her employer and tried to use them to harm another resident in Pennsylvania as part of a domestic dispute. Did she violate the Chemical Weapons Convention Implementation Act? Much churned on it as a matter of civil liberty because the other crimes that the government might go against her for had relatively low penalties. However, the statute for the Chemical Weapons Convention offers the maximum penalty of life imprisonment and that is what the federal prosecutor threatened. She was induced to plea bargain but she did have a right to appeal. In thinking about the statute, the Court acknowledged that a literal interpretation would in fact show that she violated it. She used a chemical in a way that could've caused harm to another human being without a peaceful purpose, that's the one exception in the statute, but the Court majority said this in fact would be inconsistent with the American federal system of government, which has the vast majority of its criminal law and enforcement at the state and local levels, not at the federal level, and that includes normally local poisoning cases of this sort. So the Court said that if Congress really wanted to do this, it needed to have a much clearer statement of its intent to take over such normally local and state matters of federal criminalization, and it didn't believe Congress intended to do this in the statute that it enacted. That was federalism.

Second type of scenario and a more complicated case although a very interesting one involving delegations of authority to international institutions. This case seems like an imaginative law professor's hypothetical. It had so many moving parts. It's going to make your head spin. I will not mention all

of these parts but it's a terrific and interesting case, and Breyer, Justice Breyer talks about it in the book, *Medellin against Texas*. I paused just because there's so much to say. It begins with the United Nation's Charter, perhaps the most important treaty in the world. All nations are parties to it. The United States, of course, is a party since 1945 when we set up the UN. It has many provisions. One in this case of particular interest, we have promised in Article 94 that in any case to which we're a party, we will abide by the decisions of the International Court of Justice, which is the judicial arm of the United Nations. All members of the UN have promised to do that including the U.S. Well, after, as the decades go on since the 1940s, the United States, very internationalist still by and large during that period, joins many treaties that allow for disputes under the treaties to be resolved by the International Court of Justice or the ICJ, to give you one, the subject of the *Medellin* case. The United States joined the Vienna convention on consular relations in the late 1960s, which protects consulates and their officials and also very interestingly has kind of an international Miranda clause in the treaty, which I'll talk about why that seemed to be buried for a while but became known sometime later, it requires any party country when they arrest a foreign national of another party country to give them notice that they can have their consulate notified of the arrest and to communicate with their consulate, sort of like the Miranda warnings do for other purposes. Well, the United States in the same year, 1969, and almost certainly would not do this today for reasons maybe we could talk about later, joined an optional protocol that said disputes under that consular convention, to the extent they arise, can also go to this International Court of Justice.

Many years go by. The United States does an extremely poor job of complying with this obligation of notifying arrested suspects of their consular rights. Why did that happen? One of the reasons it happened: most of the state and local police departments had no idea there was such a treaty to begin with. So the United States did a poor job of advising them and pushing them to carry out this treaty obligation. And for a variety of reasons, it didn't seem to get litigated for quite some time until people particularly focused on the death penalty of the United States saw that this treaty was routinely being violated at the state level and understandably thought that invoking these treaty rights might be beneficial to some of their clients on death row in various states in the United States, and they started litigating it. But they started losing repeatedly in U.S. courts. Why? These are all habeas cases and the habeas law, I won't go into that, that would take many lectures but is quite restrictive, your ability to raise after you've been convicted and even these treaty claims are being rejected because of the habeas limits. Well, that didn't end the litigation. I said many moving parts. A series of countries starts bringing cases against the United States in the ICJ based upon the violations of consular rights of their citizens. First, Paraguay, it was the first country, then Germany on behalf of a couple of brothers in Arizona who were both executed, and then finally Mexico, bringing kind of an international class

action suit against the United States on behalf of over 50 Mexican nationals on death row in various states. And the United States lost all of these cases despite able advocacy by the state department. And the ICJ finally made clear that the United States had an obligation to reopen at least the 51 cases involving these Mexican citizens named in the case called Avena and provide them with what the ICJ called review and reconsideration of their cases in light of the treaty violations. And then we had one of these Mexican nationals go to the U.S. Supreme Court arguing they wanted this new hearing that the International Court had said was required. But this posed a difficult question, which is, if the obligation of the United States is to abide by the ICJ's decisions, does that operate itself as domestic law within the United States legal system or is this something, for example, that Congress might need to implement or might need some agreement to implement. And it's particularly important because Texas law, in this particular case, was otherwise the governing law since the person was convicted in Texas, on death row in Texas, and Texas law said it's too late to bring any legal claims including, by the way, constitutional claims. And therefore, Texas law would normally say if you haven't raised your claim at trial or on appeal, you forfeited it under the rules of procedural default. So, if there's no domestic law to override, that Texas law will have the last word. And the Court, and it was divided, determined that in fact this treaty obligation to the ICJ did not operate as direct immediate domestic law in the United States and it's a long story, but the bottom line was that the majority was not convinced and I, I will say, in my own views for good reason, that the Senate and the President in 1945 intended when they made the commitment to the ICJ to allow its decision to have direct effect in criminal proceedings in the United States. I think, that would have been unfathomable to the Senate and the President in 1945. And the only enforcement they agreed to in 1945 for the ICJ decisions was so the UN Security Council arm of the UN—as probably most of you know, the United States and a few other countries is in a unique position in the security council, which is that it has a veto power deliberately put in in 1945 with United States and some other prevailing parties after World War II. And the idea that we had a veto over decisions of the Council, the only way to enforce the ICJ decisions and yet we're also somehow agreeing to let those decisions automatically override domestic law and judicial proceedings seems unlikely, and it was unlikely, said the majority. At any event, the Court was looking to try to figure out what these treaty obligations should or should not do and whether Congress needed to act. And they decided that Congress needed to take additional steps. I'm sad to report Congress has not done so. What a shock.

Final example concerns and this is one that gets into the human rights area which is customary international law, and the case, I'll mention one case, the Court has had a couple, the Sosa against Alvarez-Machain cases, all of these cases, by the way, nicely discussed in Justice Breyer's books. This case involves a very old statute called the Alien Tort Statute, which was written

first of the statutes in the United States in 1789, one provision in a big set of statutes that sets up all the federal court system, buried in one section called Section 9, and it just says in one sentence that the district courts will have jurisdiction over torts claims by aliens that are in violation of either the law of nations or treaties. It's a mysterious statute. There's no legislative history. It basically gets buried in the statute books for almost 200 years. There are almost no cases for 190 years ever successfully relying on that statute for jurisdiction until a second circuit court of appeals in a human rights case called *Filartiga* decides in 1980 that in fact when aliens are injured by human rights abuses, torture and summarily executed, etc., abroad, that is a tort. It's in violation of the law of nations, customary norms of human rights, and as long as they can find the defendant to serve them with process in the United States, they can use the statute to sue for damages. Many courts, by the way, were still confused by this area of law, and they were working on it in the lower courts. And some of them—by the way, this wasn't Justice Breyer's fault—but they begged the Supreme Court on various occasions, "Please tell us what's going on with this alien tort statute. It's one sentence. It doesn't say anything about remedies. We don't know anything about how it applies to modern human rights claims." It took the Supreme Court, it's the nature of the Supreme Court that it doesn't automatically take issues just because they're starting to percolate and eventually did weigh in in 2004 in the *Sosa* case, kind of a strange case involving a kidnapping of a Mexican doctor that wasn't, really didn't fit the pattern of the prior cases. But the bottom line of that case was the Court tried to allow this litigation to continue with what in that case Justice Souter called vigilant door keeping, explaining that if the Court was not cautious then there would be what Justice Souter described as risks of adverse foreign policy consequences to the nation because allowing claims about what other countries do in their own territories is inherently going to raise friction and protest, and it does. The state department hears many of those complaints, and the Court felt that it wasn't in a position to completely block that litigation but that it needed to allow it with great caution.

Now, this is where I was going to mention Justice Scalia, who concurred. His concurrence is as always lively and interesting to read. Sometimes, they became a little too lively to some people's taste. In the *Sosa* case, he begins by saying, "Everything the majority said is wonderful. I wish they would've just stopped about two-thirds of the way through and then we could all have gone home." But he complains about them letting the door to remain open, and he says that he's skeptical. That note of caution sent to our disaggregated, large federal court system will really slow down this litigation, and low and behold, Justice Scalia was right. And Justice Breyer, in fact, notes that in his book, quoting Justice Breyer's book, "Many lower courts seem to find in *Sosa* a green light, not a note of caution." And eventually, and I won't go into it now, the Supreme Court just a few years ago in the *Kiobel* case took a more categorical approach to this Alien Tort Statute in human

rights litigation. They said categorically, it does not apply to conduct purely that takes place overseas. This is a sharp territorial presumption that really does cut back on much of that human rights litigation and is a very controversial decision. This was strong medicine, and Justice Breyer in his concurrence in that case thought it was too strong, that the Court was pulling back too far. And whatever your views on that, I will just note that the decision still does not preclude Congress from authorizing broader human rights litigation if it so chooses. And it has from time to time, by the way, done that in statutes like the Torture Victim Protection Act. It simply leaves the tradeoff of foreign policy scrutiny and consequences to the legislative branch and the executive branch, which is a matter of separation of powers. It's probably better suited than the judiciary to make those sorts of fine tradeoffs in some.

The Supreme Court plays an important role in mediating between international law and the American constitutional system, a role that is needed, I believe, in light of the different processes used to generate international law and domestic law and the different functions they serve. Sometimes this means, and this is a complaint, that the international law applied within the United States looks different from the way it would look if it were applied in another country or most notably if it were applied in a tribunal like the International Court of Justice, a tribunal, by the way, that's often colloquially called the World Court. But as Justice Breyer usefully reminds us in his book, the U.S. Supreme Court is not and should not try to be the World Court. Thank you.

Breyer:

Thank you, both interveners. And I, it's rare that you give me an opportunity to respond to both with one example. But you see, he's, Aharon says, "Well, who is this book aimed at?" Of course, an author has to think who it's aimed at. And you'll see who it's aimed at in a second. And what I'd say about Professor Bradley is, yep, thank you. I want, he knows this stuff, much better than I do, to tell you the truth, that isn't false modesty, and better than a lot of people here in the Court, on the Court and in this audience. And what I'm saying is, pay attention to what he knows, okay, because it's more important than what you think. Perfect example, the last example. And a word you left out because it wasn't there, the word is how. Okay now, take that last example, it's Dolly Filartiga. Let's make this a little human. Dolly Filartiga comes to New York because she wants to find the man in New York who's from Paraguay, as is she, as was her brother, whom he tortured to death. And she finds this statute. I think, though I'm not certain, he knows it more, I agree, that this statute that really passes in 1790, aimed at pirates among others. It also was meant to help a couple of ambassadors who were assaulted in the street, etc., but probably pirates as well, okay? And the Court says, "Yes, you can recover." She never thought she would. She really didn't get money but she got the judgment. And she went back to Paraguay, and she said, "I came to the United States hoping to look that torturer in the eye, and I

came back with so much more.” Fabulous, fabulous. But that opens the door to all kinds of problems. Now, of course, we have the problem, who are today’s pirates? Who are they? That’s the Sosa problem. Who are today’s pirates? But every statute has difficulty. All of them do, that’s normal. But there are a few special ones here.

One, responding to Aaron, Aharon, sorry, why Israel’s a little different than America and so are these other countries. Think about the decision of the ICJ. Now, we’re going to get involved in international law and think about what Madison said when he said this document here, is a document, I don’t have the exact words, but the Constitution is a document of power delegated by liberty, not a document of liberty delegated by power. And what’s he thinking? He’s thinking in Europe and in other parts of the world, the powers at the center, the king or the equivalent, and he may delegate liberty to the people. And they’ll have the same liberty we do, but the delegation comes from there. That isn’t this one. This one, it’s the delegation up, the primal state is one of liberty, and it’s power they’re delegating. And the relevance of that is exactly what I talked about in Akhil’s undergraduate class today. To those undergraduates, I’m talking about my confirmation process, which was a little bit of a window of democracy entering into the confirmation of a judge who they’ll lose control over. At least, they have that power. Nominated by a president, elected, confirmed by a Senate, elected. We know who these judges are, you see. There is some control at least in the process, down to the people, but who are those judges in The Hague? What power do we have over them? And indeed, where is it, that delegated authority? Boy, it’s four times removed. And you have that basic reaction right today. And do I think that reaction is benighted? No, I don’t think it’s benighted. It is not benighted. Do I think it’s totally correct? No, don’t go too far with it. And so where does that leave me? That leaves me with a question and the question has three words: how, and turn Dolly Filartiga. That question of who are today’s pirates is the easiest one.

What about the question of legitimacy of the international law, i.e., law made by who? Law professors who aren’t even American. I just put it in a way that is really philistine and very, very bad but, but try to translate that into something more neutral and you’ll understand that a little better. And you’re not going to be able to deal with it unless you understand it. And that’s just the first one. I mean, there are cases which, after all, say this company treated those people so badly over there in Burma, Myanmar, Indochina, wherever you want, it’s slavery. And surely that’s like piracy. Well, it wasn’t quite that bad. That’s what they say. The company’s no, no, no. They’re blah, blah, blah. All right. These are matters very often in other countries for labor courts and specialized tribunals and here they’re thrown into the Article III judge. Try environmental cases. We have the EPA, you know. Not under the Alien Tort Statute, no EPA. And what do we do when we have a case of apartheid, and South Africa says in a brief, “Stay out of this, federal judges. We have

the Truth and Reconciliation Commission and don't get New York judges involved in our efforts to help the victims of apartheid. We're trying to hold our country together, and we want to do it our way." Okay, how is that brief supposed to be treated? And call it a problem of universality, but if we're going to have a rule about how to treat these victims of torture and don't forget Dolly Filartiga, and don't forget your reaction, which was great, which was mine. All right. And if we're going to do that, what about having a universal system so that other countries also do it, and they do it sometimes in different ways having a tort, a plaintiff participate in the criminal trial perhaps or maybe this international penal, you know, the penal court. There are many ways but the principle has to be universal and that's why I say, that's why I say, no supreme court of the world. It's not going to exist. So judge, you have to take it into a part, in part 3C of your brain, go ask that question of what happens with universality. And now I've just raised four questions and at the same time, we don't want to lose Dolly Filartiga, do we? And if we don't want to lose Dolly Filartiga, we better start thinking about the answers to those questions. And we're not going to get answers to those questions entirely by asking a specialist in international law. We're going to bring that in. And you go through each part of there and there will be how questions, how questions, which aren't raised in the how but are there implicitly and are there because I'm writing it in part for you.

I don't know if you'll read it but I want you to answer a few of the how questions. And that isn't a teaching device. It is because partly maybe with Dolly Filartiga, I don't want the principle to turn into some universal principle where every country in the world is starting to prosecute Henry Kissinger, that's how it always turns out to be, you see. That's not my object. And you talk with a very good point about what's going on over Basel. What's going on over there is that there's the Basel Commission. What's the Basel Commission or Basel, whatever you, too narrow, but the correct pronunciation of that city is where they have it. And what they have there is they have banks meeting, and they have regulators coming over from the SCC. And they sit around and they think at the committee what would be a correct rule, what would be a good rule. And the SCC people find out, and they participate, and they come back and then they promulgate it. They promulgate it and they say, "This is our rule. Let's have notice and comment." I'm waiting for somebody to say, "Uh-huh, that's the rule, all right. You're making it now, and you want our comment, all right. Hahaha. You made that rule in Basel, where we had no input whatsoever." And that's the question you raised, and that's another good one. How, how, and throughout, there are questions. Of course, we're in this. Of course, I want people to understand that there is no answer to the question that we're in it. Because the only other answer, there is no answer. We've got to solve these problems. But I also want them to see how a generalist judge, not a specialist, but a generalist and that's what American judges are for the most part, generalist. How they see the problems that are coming up. That's what I can talk about. I can't talk about the details because

I don't know them. And I think, it would be useful, indeed, it would be my dream if what would happen is what Aharon suggests. That would be fabulous, and we would be, both be, very happy. That's true. That's true. But there we are. Dreams don't—I'm not that unrealistic. And in the meantime, maybe we can get people to think about and get a few answers in a generalist way to what I think of as some fairly important questions.

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