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The Internationalism of Justice Harry Blackmun

Margaret E. McGuinness*

Throughout the symposium we have heard a host of adjectives to describe Justice Harry Blackmun and his jurisprudence, among them “willful,”¹ “liberal,”² “conservative,”³ and “humble.”⁴ Added to this list is what Professor Ruger calls “the ultimate compound taxonomy” for Justice Blackmun, a “White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs.”⁵ One adjective that is conspicuously missing is “internationalist,” a term that describes an important, though less discussed, dimension of Justice Blackmun and his jurisprudence. Internationalism is, in part, reflected in Justice Blackmun’s “preference change”⁶ or shift from “relatively conservative to relatively liberal.”⁷ At the same time, internationalism defies most traditional judicial typologies.

That Justice Blackmun as internationalist has been at best a minor theme in the academic literature⁸ is understandable given the small number of cases concerning international or transnational legal questions that reach the Court. A review of Justice Blackmun’s time on the Court, for example, reveals only

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1. Gregory C. Sisk, *The Willful Judging of Harry Blackmun*, 70 MO. L. REV. 1049, 1055-56 (2005) (describing the *Roe v. Wade* opinion).

2. Joseph F. Kobylka, *Tales from the Blackmun Papers*, 70 MO. L. REV. 1075, 1075-76 (2005) (describing mainstream portraits of Blackmun’s jurisprudence).

3. Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209, 1209 (2005) (noting that contemporary Court-watchers in 1970 viewed Blackmun as “consistently . . . on the conservative side of the issues”).

4. Larry Wrightsman, *Why Do Supreme Court Justices Succeed or Fail? Blackmun as an Example*, 70 MO. L. REV. 1261, 1277 (2005) (describing how scholars should assess Blackmun in relation to other justices).

5. Ruger, *supra* note 3, at 1209 (quoting Jon R. Waltz, N.Y. TIMES, Dec. 7, 1970, § 6 (Magazine), at 61).

6. *Id.* at 1210.

7. Wrightsman, *supra* note 4, at 1277.

8. One notable exception is Harold Hongju Koh’s discussion of Blackmun’s transnational jurisprudence in *Justice Blackmun and the World Out There*, 104 YALE L.J. 23, 30-31 (1994) (describing how, in his last decade on the Court, Blackmun challenged the Court’s vision of “a realist world in which Hobbesian obsession with national self-interest trumps human rights (of citizens, and especially of aliens), democratic decisions, and the settled expectations that flow from negotiated agreements and shared norms”).

nine cases in which foreign or international law sources are discussed in a Blackmun-authored majority, concurring, or dissenting opinion.⁹ Nonetheless, an examination of those opinions, as well as of Justice Blackmun's best known outside writing and speaking, uncovers his somewhat surprising and arguably influential internationalist turn.

This comment is intended to provide a roadmap for closer examination of the Blackmun Papers and to evaluate the sources of internationalism in Justice Blackmun's opinions.¹⁰ An understanding of those sources can in turn inform typologies of internationalism among other Justices, past, present, and future. It seems particularly salient to be discussing the internationalist aspects of Justice Blackmun's legacy today, at a time when the Court is deeply divided on questions of executive power over foreign affairs,¹¹ the relevance of foreign and international political practices and judicial opinions to constitutional interpretation,¹² and the extent to which decisions of international tribunals are binding on U.S. courts.¹³ Justice Blackmun's appeal to the broad

9. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (Blackmun, J., dissenting); *Itel Containers Int'l Corp. v. Huddleston*, 507 U.S. 60 (1993); *Société Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987) (Blackmun, J., dissenting); *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, (1986) (Blackmun, J., dissenting); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *North Dakota v. United States*, 460 U.S. 300 (1983); *Goldwater v. Carter*, 444 U.S. 996, 1006 (1979) (denial of certiorari) (plurality opinion) (Blackmun, J., dissenting); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979); *United States v. Alaska*, 422 U.S. 184 (1975).

10. Fortunately, Blackmun left behind a wealth of papers on the opinions discussed here as well as files about his teaching and travels, which can be explored more fully to reach a deeper understanding of his jurisprudence. Of particular interest in the Papers (which I have not reviewed for this comment) are the dozens of folders containing his speeches and notes from the Aspen Institute Seminars on Justice and Society between 1979 and 1995, as well as his notes from his 1994 address to the American Society of International Law. Harry A. Blackmun: A Register of His Papers in the Library of Congress (2003), <http://lcweb2.loc.gov/service/mss/eadxmlmss/eadpdfmss> (follow "2003" hyperlink, then follow "ms003030" hyperlink) (last visited Nov. 8, 2005) (Box 1363-1365; 1479).

11. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion); *Rasul v. Bush*, 542 U.S. 466 (2004).

12. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183 (2005) (5-4 decision); *Lawrence v. Texas*, 539 U.S. 558 (2003).

13. At issue in *Medellin v. Dretke* was whether U.S. federal courts are bound to provide a remedy ordered by the International Court of Justice ("I.C.J."). 125 S. Ct. 2088, 2089 (2005) (5-4 decision) (per curiam); see *Case Concerning Avena & Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 128, 2004 WL 2450913 (Mar. 31). The Supreme Court dismissed the case on the ground of certiorari improvidently granted, but the issue remains unsettled and may be raised again in future litigation. *Medellin*, 125 S. Ct. at 2089; see Posting of Lyle Denniston to SCOTUSBlog, *Analysis: Major test of presidential power*, http://www.scotusblog.com/movabletype/archives/2005/05/major_test_of_p.html

interests of the international community and to the universality of human rights echoes throughout these contemporary debates.

I. BLACKMUN'S INTERNATIONALIST LEGACY

What do I mean by internationalist jurisprudence? Justice Blackmun's internationalism is manifested in four separate but related jurisprudential approaches: (1) in federalism questions, applying deference to the federal political branches' ordering of international economic and political relationships on the basis of presidential authority over foreign affairs¹⁴ and congressional power to regulate commerce with foreign nations;¹⁵ (2) adopting a view of globalization of private economic and business relations that preferences international and/or foreign-based approaches to ordering legal relations;¹⁶ (3) interpreting treaty obligations by looking beyond interpretation espoused by the executive branch to globally accepted international law interpretation doctrines;¹⁷ and (4) respecting and acknowledging international and foreign judicial opinions in constitutional jurisprudence, while explicitly recognizing the value of international law and social and cultural developments in other democratic societies to the adjudication of individual rights.¹⁸

All four of these dimensions of Justice Blackmun's jurisprudence reflect a central theme of his international opinions: a recognition that the United States was founded within a system of interstate relations based on law and comity, and a view that those foundational principles of law and comity should continue to inform the Court's approach to questions affecting the United States' relationship with the rest of world.

(May 23, 2005); Linda Greenhouse, *The Supreme Court: The Death Penalty; Justices Drop Capital Case Ruled On by World Court*, N.Y. TIMES, May 24, 2005, at A17. For a detailed discussion of the ways in which the Supreme Court avoided the application of international or transnational law in the 2003-2004 term, see John K. Setear, *A Forest with No Trees: The Supreme Court and International Law in the 2003 Term*, 91 VA. L. REV. 579 (2005).

14. U.S. CONST. art. II, § 2, cl. 2.

15. U.S. CONST. art. I, § 8, cl. 3.

16. The best example of that view of globalization was his majority opinion in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), giving respect to international arbitration as a means of resolving transnational disputes that involve claims rooted in one or the other state's statutes. See discussion *infra* at Part I.B.

17. This is best exemplified in his sole dissent in the *Haitian Center's Council* case. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (Blackmun, J., dissenting).

18. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45 (1994) ("International law can and should inform the interpretation of various clauses of the Constitution, notably the Due Process Clause and the Eighth Amendment prohibition against cruel and unusual punishments.").

A. Federalism Cases: Limiting State Power to Interfere in Foreign Affairs

In two tax cases, Justice Blackmun demonstrated a strict view of federal prerogatives to order economic relations with foreign states. In *Wardair Canada Inc. v. Florida Department of Revenue*, the Court held that a state tax on airline fuel acquired by a foreign carrier only for international use was not preempted by the Federal Aviation Act on the ground that Congress had remained silent on the question.¹⁹ The Court concluded that the Florida tax did not hamper the federal government's ability to "speak with one voice" on foreign affairs because none of the multilateral or bilateral agreements governing air transportation explicitly prohibited state and local taxation of the fuel.²⁰ Justice Blackmun dissented, arguing that Congress' failure to expressly prohibit the tax should not be read as permission for the states to enact a tax.²¹ To the contrary, he concluded that "[t]he Government's efforts in the international sphere reveal an overarching and coherent policy directed at the creation of reciprocal tax exemptions in the area of foreign aviation."²² He reasoned that the Court's decision impermissibly trespassed on the powers of the federal political branches and would "hinder the United States in its efforts to attain reciprocal tax immunity with foreign governments."²³

The later case, *Itel Containers International Corp v. Huddleston*, concerned the ability of the State of Tennessee to levy direct tax on the proceeds from leases on containers used solely for international shipping.²⁴ The majority held Tennessee's policy was not precluded by the preemption doctrine as it did not conflict or interfere with Congress's ability to regulate foreign commerce, did not violate the Import-Export clause, and did not implicate U.S. obligations under the Customs Containers Convention.²⁵ Justice Blackmun dissented, noting that, as in *Wardair*, the failure of Congress to specifically prohibit Tennessee's tax was not dispositive.²⁶ He would have found the scheme a violation of both the Convention,²⁷ which encompassed a "national

19. 477 U.S. 1, 7 (1986). In 1979, in an opinion drafted by Blackmun, the Court had held that an ad valorem tax levied on containers that were owned, based, registered abroad and used exclusively in international commerce violated the Foreign Commerce Clause. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453-54 (1979).

20. *Wardair Canada*, 477 U.S. at 10-11.

21. *Id.* at 18-19 (Blackmun, J., dissenting).

22. *Id.* at 19.

23. *Id.* at 19-20.

24. 507 U.S. 60, 60 (1993).

25. *Id.* at 62.

26. *Id.* at 85-86 (Blackmun, J., dissenting).

27. *Id.* at 82-83 ("[A] treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it' at that '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which

policy to remove impediments to the use of containers as 'instruments of international traffic,'"²⁸ and the Foreign Commerce Clause, because it "prevent[ed] the United States from 'speaking with one voice' with respect to the taxation of containers used in international commerce."²⁹ Where the tax has "substantial ramifications beyond the Nation's borders," Justice Blackmun argued, the need for "[explicit,] affirmative [Congressional] approval is heightened."³⁰

B. Globalization of Economic Relations

Professor Deason has discussed at greater length the significance of Justice Blackmun's opinion in *Mitsubishi v. Soler* to the development of arbitration as an alternative means of dispute resolution – even where the underlying claims are statutory.³¹ But that case is also representative of Justice Blackmun's internationalism. With Justice Blackmun writing for the 6-3 majority, the Court in that case upheld an arbitration clause in a contract between a Japanese corporation, a Swiss subsidiary of a United States corporation and a Puerto Rico corporation.³² The contract required all claims to be arbitrated in Japan under the rules of the Japan Commercial Arbitration Association.³³ The question before the Court was whether a claim based on a violation of a U.S. antitrust statute was arbitrable in this foreign forum.³⁴ The Second Circuit had held in an earlier case that antitrust claims arising in the domestic context were non-arbitrable on the grounds that "the pervasive public interest in enforcement of the antitrust laws, and the nature of the claims that arise in such cases, combine to make . . . antitrust claims . . . inappropriate for arbitration."³⁵ Justice Blackmun chose not to extend the same reasoning in a cross-border context.

Justice Blackmun concluded that the parties should be held to their private agreement to arbitrate any claims arising out of the contract, even where those claims are statutory in nature.³⁶ The result does not appear radical and is

may be claimed under it, the more liberal interpretation is to be preferred." (citations omitted)).

28. *Id.* at 83 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979)).

29. *Id.* at 85 (citation omitted).

30. *Id.* at 86 (citation omitted).

31. Ellen Deason, *Arbitrability of Statutory Claims: Perspectives from the Blackmun Papers*, 70 MO. L. REV. 1133, 1156-62 (2005).

32. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 615 (1985).

33. *Id.* at 614.

34. *Id.*

35. *Am. Safety Equip. Corp., v. J.P. Maguire & Co.*, 391 F.2d 821 at 827-28 (2d Cir. 1968).

36. *Mitsubishi*, 473 U.S. at 614-15.

consistent with Justice Blackmun's pro-business opinions earlier in his tenure on the Court.³⁷ And there is plenty in the opinion to suggest that Justice Blackmun was as concerned with upholding the right of private litigants to opt out of a judicial forum (domestic or foreign) as he was with upholding notions of international comity.³⁸ However, when read together with his later opinions – particularly those involving public law questions – the internationalist elements of *Mitsubishi* become more striking.

Justice Blackmun's opinion in *Mitsubishi* rejected the principle that courts should adjudicate the important public rights at stake in antitrust claims,³⁹ in favor of broad principles of international comity.⁴⁰ He wrote for the Court:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.⁴¹

The result was compelled, according to Justice Blackmun, by the realities of the global economy:

37. Wrightsman, *supra* note 4.

38. *Mitsubishi*, 473 U.S. at 629-625; *see also*, Deason, *supra* note 31, at 1160-61.

39. Indeed, the decision below at the First Circuit rejecting the arbitrability of the claim noted that “[a] claim under the antitrust laws is not merely a private matter. The Sherman Act is designed to promote the national interest in a competitive economy; thus, the plaintiff asserting his rights under the Act has been likened to a private attorney-general who protects the public's interest.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 168 (1st Cir. 1983) (quoting *Am. Safety Equip.*, 391 F.2d at 826), *aff'd in part, rev'd in part*, 473 U.S. 614 (1985). Justice Marshall's dissent underscored the public rights and equities at issue:

Soler's claim not only implicates our fundamental antitrust policies, but also should be evaluated in . . . light of an explicit congressional finding concerning the disparity in bargaining power between automobile manufacturers and their franchised dealers. In 1956, when Congress enacted special legislation to protect dealers from bad-faith franchise terminations, it recited its intent “to balance the power now heavily weighted in favor of automobile manufacturers.” The special federal interest in protecting automobile dealers from overreaching by car manufacturers, as well as the policies underlying the Sherman Act, underscore the folly of the Court's decision today.

Mitsubishi, 473 U.S. at 664-65 (Marshall, J., dissenting) (citation omitted).

40. International comity generally refers to the principle that courts of one jurisdiction will not interfere in the prerogatives of a foreign state in exercising its own sovereignty. *See Am. Banana Co. v. United Fruit Co.* 213 U.S. 347, 356 (1909).

41. *Mitsubishi*, 473 U.S. at 629.

As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to “shake off the old judicial hostility to arbitration,” and *also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal*. To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration.⁴²

The passage is remarkable for a number of reasons. First, in noting that, “the potential [of international arbitration to resolve] legal disagreements arising from commercial relations has not yet been tested,”⁴³ Justice Blackmun appears to advocate a degree of experimentation in international dispute resolution.⁴⁴ Second, he admonishes U.S. courts to relax a little in ceding their own jurisdiction to private litigants and the international tribunals before which the litigants have agreed to arbitrate.⁴⁵ Finally, Justice Blackmun invokes “international policy,” implicitly rejecting, at least in the eyes of the dissenters, Justices Stevens, Brennan and Marshall, the primacy of domestic policy as a central consideration in the Court’s ADR jurisprudence.⁴⁶

C. Expansive View of Rights Created by Treaty

Justice Blackmun may have been successful in finding a majority in *Mitsubishi* precisely because it was a case upholding private contracting rights, even though those rights were to be enforced against a background of

42. *Id.* at 638-39 (emphasis added) (citation omitted). The phrase “shake off the old judicial hostility to arbitrations” is the language added by Chief Justice Burger. See Deason, *supra* note 31, at 1161.

43. *Mitsubishi*, 473 U.S. at 638.

44. As one commentator pointed out, it is difficult to determine the precise increase in the use of arbitration, but that a survey of the major arbitration clearing-houses shows the number of cases submitted to international arbitration nearly doubled between 1992 and 2000. Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 441 (2003).

45. *Mitsubishi*, 473 U.S. at 638.

46. In his dissent, Justice Stevens remarks it is “unwise to allow a vision of world unity to distort the importance of the selection of the proper forum.” *Id.* at 665 (Stevens, J., dissenting).

international treaty.⁴⁷ In *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, Justice Blackmun was not as successful, finding himself dissenting from what he viewed as a restrictive method of treaty interpretation, arguing instead in favor of the more broadly accepted international standards of treaty interpretation.⁴⁸ The case concerned a request made by United States plaintiffs to discover documents from defendants located in France.⁴⁹ Defendants argued that the discovery request should be governed exclusively by the Hague Convention on Taking Evidence Abroad (The “Hague Convention”),⁵⁰ to which the United States and France were both parties.⁵¹ The Court held that, while the Hague Convention applied to the request for discovery from a foreign national who was a party to the litigation, it did not provide an exclusive and mandatory procedure.⁵² Rather, the Court concluded that the federal district court retained full jurisdiction to order the foreign national who is party to the pending suit to produce evidence – even where that evidence (documentary or testamentary) is located within a foreign state.⁵³

In his dissent, Justice Blackmun dissented found that the Hague Convention procedure was intended to be the first resort for a court ordering cross-border discovery.⁵⁴ Justice Blackmun grounded his opinion in concerns about the ability of the executive branch to carry out foreign affairs and on principles of international comity, “the systemic value of reciprocal tolerance and goodwill.”⁵⁵ He noted that “[t]he principle of comity leads to more definite rules than the ad hoc approach endorsed by the majority.”⁵⁶

47. See generally *id.*; Recognition and Enforcement of Arbitral Awards, Jan. 29, 1970, 21 U.S.T. 2517.

48. 482 U.S. 522, 558-68 (1987) (Blackmun, J., dissenting).

49. *Id.* at 522 (majority opinion).

50. Taking of Evidence Abroad, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

51. *Aerospatiale*, 482 U.S. at 524 n.1. France submitted an amicus brief reaffirming its position that the “Hague Convention is the exclusive means of discovery in transnational litigation among the convention’s signatories.” *Id.* at 529 n.11 (citing Brief for Republic of France as Amicus Curiae, at 4, *Aerospatiale*, 482 U.S. 522 (No. 85-1695)).

52. *Id.* at 522-23.

53. *Id.* at 522. This ruling leads to the dilemma of a party prohibited by foreign law (for example, banking secrecy laws in Switzerland) from disclosure of certain documents, while at the same time compelled by a U.S. court to produce those very documents. See Gary B. Born, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 871 (Kluwer Int’l 1996). The defendants in *Aerospatiale* argued that because French penal law required that discovery be complete only in accordance with the Hague Convention, compliance under the Federal Rules of Civil Procedure was not possible. *Aerospatiale*, 482 U.S. at 526.

54. *Id.* at 548-49 (Blackmun J., concurring in part and dissenting in part).

55. *Id.* at 555. See generally *id.* at 554-67 (comity analysis).

56. *Id.* at 554.

In the 1993 case of *Sale v. Haitian Center's Council*,⁵⁷ when the issue was one of executive power over foreign affairs and executive interpretations of treaty obligations, Justice Blackmun found himself the sole dissenter. The issue in *Sale* was whether the United States was in compliance with its obligations under the United Nations Protocol Relating to the Status of Refugees⁵⁸ ("the Convention") and the Refugee Act of 1980 through which those treaty obligations were incorporated into the Immigration and Nationality Act⁵⁹ ("INA").⁶⁰ Haitians had been fleeing their home island in response to the brutal tactics of the military regime that toppled President Jean Bertrand Aristide.⁶¹ In response, the United States engaged in a large-scale maritime interdiction program, stopping Haitian refugees on the high seas and summarily returning them to Haiti without any inquiry into possible asylum claims.⁶² A group of Haitian refugees challenged the interdiction program as a violation of the United States' obligation of *non-refoulement*, or non-return, under Article 33 of the Convention, which requires that "No . . . State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened."⁶³ The United States government argued that only the INA created a cause of action for the plaintiffs, and that the INA did not apply to actions on the high seas as they were not within

57. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) (Blackmun, J., dissenting).

58. United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223 [hereinafter Refugee Convention].

59. 8 U.S.C. § 1252 (Supp. 1988) (amended 1996) (incorporating 1951 Convention for the Protection of Refugees' United Nations Protocol Relating to the Status of Refugees).

60. *Sale*, 509 U.S. at 155.

61. *Id.* at 162-63. The brutal conditions in Haiti were discussed in the uncontested findings of fact made by the District Court: "hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property because of their political beliefs. Thousands have been forced into hiding." *Id.* at 162 (citing Appeal to Petition for Certiorari, *Sale*, 509 U.S. 155 (No. 92-344))

62. *Id.* at 163-65. This policy was implemented by President Bush in 1992. *Id.* at 165. It was a departure from his and President Reagan's earlier policies – put in place in response to refugees fleeing the Baby Doc Duvalier regime of the 1980s – which called for screening out those Haitians with asylum claims from those to be returned. See generally *id.* at 163.

63. Refugee Convention, *supra* note 58, at art. 33.1. This provision is generally referred to as the *non-refoulement*, or non-return, obligation under the Convention. The *non-refoulement* obligation is codified as § 243(h)(1) of the INA: "[t]he Attorney General shall not deport [or return] any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1253(h)(1).

U.S. territory.⁶⁴ In other words, the government's argument was that the obligation of *non-refoulement* applied only to the expulsion of asylum seekers from United States territory.

The Court sided with the government, demonstrating maximum deference to the executive branch's interpretation of its obligations under the Convention.⁶⁵ Its reasoning began with the presumption that the INA, as a statute, does not apply extraterritorially absent express congressional intent.⁶⁶ Because the INA was held not to apply extraterritorially, the majority concluded that the *non-refoulement* provisions of the Convention applied to refugees who had already successfully entered United States territory.⁶⁷ In analyzing whether Congress intended to apply the INA provisions extraterritorially, the Court looked, *inter alia*, at the text and negotiating history of Article 33.⁶⁸ The plaintiffs argued that the "broad remedial goals" of the Convention required that "a nation be prevented from repatriating refugees to their potential oppressors whether or not the refugees are within that nation's borders."⁶⁹ The Court rejected that reading of the text and history, instead concluding that, like the domestic statute, the Convention could only have been intended to apply to asylum seekers within a state party's territory.⁷⁰ While the United States policy of rounding up refugees outside of U.S. territory might "violate the spirit of Article 33," the Court concluded that a treaty "cannot impose un contemplated extraterritorial obligations on those who ratify it through no more than its general humanitarian intent."⁷¹

64. *Sale*, 509 U.S. at 171.

65. *See generally id.* For a discussion of how the Court's conclusions in *Sale* were part of a pattern of "restrictive" treaty interpretation, see Martin Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 AM. U.J. INT'L L. & POLICY 559 (1996).

66. *See Sale*, 509 U.S. at 174. The Court of Appeals had found the extraterritoriality doctrines of "no relevance" to the case "because there was no risk that § 243(h), which can be enforced only in United States courts against the United States Attorney General, would conflict with the laws of other nations." *Id.* at 173-74 (citing *Haitian Ctrs. Council, Inc. v. McNary*, 969 F.2d 1350, 1358 (2d Cir. 1992), *rev'd by Sale*, 509 U.S. 155).

67. *Id.* at 156.

68. *Id.* at 178-79, 184-85.

69. *Id.* at 178.

70. *See id.* at 178-88. The Court spent a great deal of time analogizing the Convention's reference to "exp[ulsion] or return" with the Refugee Act's "deport[ation] or return" as well as with translations into English of the French term "*refouler*." *See id.* at 180-82 and nn.37-39. "To the extent that they are relevant, these translations imply that "'return'" means a defensive act of resistance or exclusion at a border rather than an act of transporting someone to a particular destination." *Id.* at 181-82.

71. *Id.* at 183.

Justice Blackmun's lengthy dissent clashed sharply with the majority.⁷² He looked first to the Convention – not the statute – to determine whether the United States was in violation of the *non-refoulement* obligation.⁷³ He concluded that the Refugee Convention was intended to apply globally and that a plain reading of the text of the Convention required simply that “[v]ulnerable refugees shall not be returned.”⁷⁴ Justice Blackmun applied the interpretative doctrines outlined in the Vienna Convention on Treaties⁷⁵ to conclude that the Majority's reliance on the *travaux préparatoires* (negotiating history) of the Convention was unnecessary where the plain meaning was clear and where the statements made during negotiation “were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body.”⁷⁶

Only after disposing of the treaty interpretation elements did Justice Blackmun turn to § 243(h) of the INA, finding: (1) it applied to the actions of the Coast Guard on the high seas;⁷⁷ (2) explicitly applied to returns made from places other than “within the United States;”⁷⁸ (3) imposed no explicitly

72. See generally *id.* at 188-208 (Blackmun, J., dissenting).

73. *Id.* at 189.

74. *Id.* at 190. Blackmun rejected the majority's interpretation which analogized the distinction between “expulsion” and “*refoulement*” under the Convention with “deportation” and “return” under American law, instead arguing that the terms of Article 33 are “unambiguous,” and that the United States had, historically, accepted its application to interdiction on the high seas. *Id.* at 190 & n.3 (discussing a memo by the Office of Legal Counsel and statements made before congressional committees indicating that the United States believed it had an “obligation[.]” under the Convention to protect asylum seekers on board interdicted vessels). Blackmun's dissent was also a bit tart, opening with this pointed rebuke to the majority that, despite the U.S. acceding to the Refugee Convention in 1967, in which it “pledged not to ‘return (‘*refouler*’) a refugee in any manner whatsoever’ to a place where he would face political persecution,” *id.* at 188:

Today's majority nevertheless decides that the forced repatriation of the Haitian refugees is perfectly legal, because the word “return” does not mean return, because the opposite of “within the United States” is not outside the United States, and because the official charged with controlling immigration has no role in enforcing an order to control immigration.”

Id. at 188-89 (citations omitted).

75. The United States is not and never has been a signatory to the Vienna Convention on Treaties, but took the position that the Vienna Convention represents settled international law on treaty interpretation. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1923 n.256 (2005).

76. *Sale*, 509 U.S. at 195 (Blackmun, J., dissenting) (quoting *Arizona v. California*, 292 U.S. 341, 360 (1934)).

77. *Id.* at 199.

78. Blackmun traces the history of the removal of the qualifying language “within the United States” and dismisses as “ridiculous” the majority's interpretation of the removal of the words from the text of the statute as indicating congressional

geographical limit in place of the language “within the United States;”⁷⁹ and, (4) that the canon of statutory construction against extraterritoriality had “no role here” as it applied “only where congressional intent is ‘unexpressed.’”⁸⁰ Justice Blackmun further argued that the extraterritoriality doctrine serves no purpose in a statute that is international in nature: “The presumption that Congress did not intend to legislate extraterritorially has *less* force – perhaps, indeed, no force at all – when a statute on its face relates to foreign affairs.”⁸¹

Justice Blackmun closed his opinion with an appeal to emotion, noting that the Convention was adopted in response to the experience of Jewish refugees during World War II, refugees the United States and the free nations of Europe had refused to admit and, in some instances, had forcibly returned to their certain deaths under the Nazi regime.⁸² While the *Sale* case was pending before the Court, Justice Blackmun was reading *The Comedians* by Graham Greene, a book detailing the horrors of Papa Doc Duvalier and his infamous paramilitary force, the Tonton Macoutes.⁸³ During oral argument, Justice Blackmun engaged in this colloquy with then-Deputy Solicitor General Maureen Mahoney, who argued the case for the government:

Blackmun: Have you ever been to Haiti?

Mahoney: No, your Honor, I have not.

Blackmun: Are you familiar with a book called *The Comedians* by Graham Greene?

Mahoney: No, your honor, I’m sorry, I’m not.

Blackmun: I recommend it to you.⁸⁴

The use of a novel as source material for the drafting of an opinion may be unusual, but Justice Blackmun’s questions at oral argument imply that the brutality of the Papa Doc regime depicted in that book (not dissimilar to the

intent to apply the statute only to those paroled into the United States from detention at the border. *Id.* at 203.

79. *Id.* at 202.

80. *Id.* at 205 (citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991), *superceded by statute*, 1991 Civil Rights Act § 109).

81. *Id.* at 206-07.

82. *Id.* at 207.

83. John Bowen, *The Doomed are Everywhere*, N.Y. TIMES, Jan. 23, 1966, available at <http://www.nytimes.com/books/00/02/20/specials/greene-comedians.html>.

84. Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 17-18 (1994) (citing Transcript of Oral Argument at 11, *Sale*, 509 U.S. 155 (No. 92-344)). Thanks also to Tony Mauro – and his steel trap memory – for confirming this anecdote in the discussion period for our panel at this symposium.

brutality of his son Baby Doc's regime) had some degree of influence over his view of the U.S. interdiction policy.⁸⁵

Justice Blackmun later linked his dissent in *Sale* with Justice White's dissent, which Justice Blackmun joined, in the 1992 case of *United States v. Alvarez-Machain*.⁸⁶ In *Alvarez-Machain*, the Court upheld the legality of the kidnapping of a Mexican national by agents of the Drug Enforcement Agency for rendition to the United States, notwithstanding the existence of a bilateral extradition treaty.⁸⁷ Justice Blackmun later stated that both cases "reflect a disturbing disregard on the part of the Supreme Court of its obligations when construing international law," noting that "[t]reaties are contracts among nations and thus must be interpreted with sensitivity toward the customs of the world community. In each of these cases, however, the Court ignored its first principles and construed the challenged treaty in a manner directly contrary to the opinions of mankind."⁸⁸

D. *Foreign and International Sources in Death Penalty Cases*

Much has already been said in this symposium about Justice Brennan's death penalty jurisprudence.⁸⁹ I will briefly supplement those discussions with an illustration of the influence of Justice Blackmun's internationalist perspective on his death penalty opinions and those post-Blackmun opinions which reflected his legacy. In an essay entitled *The US Supreme Court and the Law of Nations*,⁹⁰ Justice Blackmun argued that "[i]f the substance of the Eighth Amendment is to turn on the 'evolving standards of decency' of the civilized world, there can be no justification for limiting judicial inquiry to the opinions of the United States."⁹¹ Justice Blackmun supported looking abroad to determine what standards of punishment were demanded by the Constitution:

85. Karlan includes the *Sale* case as an example of Blackmun's "openness to a variety of sources of knowledge and experience" in approaching his decisions. *Id.* at 17.

86. 112 S. Ct. 2188 (1992)

87. *United States v. Alvarez-Machain*, 504 U.S. 655, 669-70 (1992).

88. Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 45 (1994).

89. See, e.g., Martha Dragich, *Revelations from the Blackmun Papers on the Development of Death Penalty Law*, 70 MO L. REV. 1183 (2005); Richard C. Reuben, *Justice Blackmun and the Spirit of Liberty*, 70 MO. L. REV. 1199, 1201 (2005); Sisk, *supra* note 1, at 1066-68; Wrightsman, *supra* note 4, at 1278-81.

90. Blackmun, *supra* note 88. The essay was adapted from the remarks Justice Blackmun gave in April 1994 to the American Society of International Law on the occasion of Louis Henkin's retirement as President of the Society.

91. Blackmun, *supra* note 88, at 48.

For nearly half a century, the Supreme Court has acknowledged that the Eighth Amendment's Cruel and Unusual Punishments Clause "must draw its meaning from evolving standards of decency that mark the progress of a maturing society." The drafters of the Amendment were concerned, at root, with "the dignity of man," and understood that "evolving standards of decency" should be measured, in part, against international norms. Thus, in cases striking down the death penalty as a punishment for rape or for unintentional killings, the Court has looked to both domestic custom and the "climate of international opinion" to determine what punishments are cruel and unusual.

Taking international law seriously where the death penalty is concerned, of course, draws into question the United States' entire capital punishment enterprise. According to Amnesty International, more than fifty countries (including almost all of Western Europe) have abolished the death penalty entirely, and thirty-seven others either have ceased imposing it or have limited its imposition to extraordinary crimes. Even those countries that continue to impose the death penalty almost universally condemn the execution of juvenile offenders. They do so in recognition of the fact that juveniles are too young, and too capable of growth and development, to act with the culpability necessary to justify society's ultimate punishment.⁹²

The Missouri Supreme Court adopted this view of international standards in the 2003 case of *Roper v. Simmons*.⁹³ In holding that the Eighth Amendment prohibits executing juveniles who committed their capital crimes under the age of 18, the Missouri Supreme Court included a section titled "National and International Consensus," under which it stated, "[w]e also find of note that the views of the international community have consistently grown in opposition to the death penalty for juveniles."⁹⁴ The court cited the United Nations Convention on the Rights of the Child and Amnesty International reports about the juvenile death penalty which placed the U.S. in the company of the Congo and Iran.⁹⁵

The Supreme Court upheld the Missouri Court's decision finding the juvenile death penalty unconstitutional,⁹⁶ and devoted several paragraphs of the opinion to a discussion of foreign state practices and the decisions of foreign

92. *Id.*

93. State *ex rel.* *Simmons v. Roper*, 112 S.W.3d 397 (Mo. 2003), *aff'd* 125 S. Ct. 1183 (2005).

94. *Id.* at 410-11.

95. *Id.* at 411.

96. *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (5-4 decision).

and international tribunals and international human rights treaties.⁹⁷ At least two amicus briefs filed with the Court cited the 1994 Justice Blackmun essay and those briefs, along with the international conventions discussed by the Missouri Supreme Court, were cited by Justice Kennedy in his majority opinion.⁹⁸ Writing for the Court, Kennedy found “the overwhelming weight of international opinion against the juvenile death penalty.”⁹⁹

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty... Respondent and his *amici* have submitted, and petitioner does not contest, that only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty. . .

The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.¹⁰⁰

With *Roper*, the internationalist approach to the death penalty has shifted from the minority to the majority view, a decade after Justice Blackmun's death.

97. *See id.* at 1198-1200.

98. Brief of Amici Curiae former U.S. Diplomats Morton Abramowitz et al. in Support of Respondent, *Roper*, 125 S. Ct. 1183 (No. 03-633); Brief for the Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae in Support of Respondent, *Roper*, 125 S. Ct. 1183 (No. 03-633) (cited in *Roper*, 125 S. Ct. at 1199, 1200).

At least one brief in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (5-4 decision) also cited the essay. Brief for Amici Curiae Law Professors in Support of Respondent, *Rumsfeld*, 542 U.S. 426 (No. 03-1027) (challenging the right of the government to hold U.S. citizens without charge as enemy combatants) (dismissed on procedural grounds).

99. *Roper*, 125 S. Ct. at 1200.

100. *Id.* (internal citation omitted).

II. MEASURING JUDICIAL INTERNATIONALISM

How did this “White Anglo-Saxon Protestant Republican Rotarian”¹⁰¹ from the Minnesota suburbs emerge as an internationalist? Harold Koh has noted “Blackmun became perhaps the first Justice to become less isolated from the real world by sitting on the Court”¹⁰² becoming more cosmopolitan – at least in judicial temperament¹⁰³ – than his Midwestern roots might suggest. While on the bench, Justice Blackmun traveled extensively. And, to paraphrase Eudora Welty,¹⁰⁴ it was through travel that Justice Blackmun became aware of the outside world and found his way into becoming a part of it. He traveled to England, Israel, Paris, Rome, Haiti and Salzburg.¹⁰⁵ He lectured on American law to foreign lawyers from Europe, Africa and the Middle East. His course materials for a Justice and Society seminar at the Aspen Institute – which he taught during eighteen summers – included Thucydides, *The Peloponnesian War*, Stanley Hoffman’s *Duties Beyond Borders*, and Louis Henkin’s *International Human Rights*.¹⁰⁶ This engagement with jurists and academics across borders had a profound influence on Justice Blackmun, who, predominantly through his leadership in the Aspen Institute program, became a central figure in transnational judicial education.¹⁰⁷

101. Ruger, *supra* note 3 at 1209.

102. Harold Hongju Koh, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 20, 21 (1994).

103. Blackmun remained modest in his day-to-day habits, eating breakfast at the Court cafeteria and driving himself in his VW beetle to chambers. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 43, 107 (2005).

104. Eudora Welty is credited with the quote, “Through travel I first became aware of the outside world; it was through travel that I found my own introspective way into becoming a part of it.” BrainyQuote.com, Eudora Welty Quotes, <http://www.brainyquote.com/quotes/authors> (follow “e” hyperlink; then follow “eudora_welty” hyperlink) (last visited Nov. 8, 2005).

105. Blackmun Papers. Among his foreign travel recorded in the Papers are trips to Paris, France in 1979 (for the Franco-American Colloquium on Human Rights), *id.* at 242 (Box 1506), and in 1995 (to teach the Louisiana State University Summer Course on American Constitutional Law), *id.* at 257 (Box 1517); Salzburg, Austria in 1977 (misidentified as “Salzburg, Germany”) (for the Salzburg Seminar in Summer 1977), *id.* at 248 (Box 1536); Rome, Italy in 1986 (to moderate an Aspen Institute Seminar), *id.* at 239 (Box 1492); Jerusalem, Israel, in 1986 (for the Fourth International Legal Conference), *id.* at 241 (Box 1505); *see also* Koh, *supra* note 8, at n.47 (citing David H. Souter, *A Tribute to Justice Harry A. Blackmun*, 104 YALE L.J. 5 (1994)).

106. Koh, *supra* note 8, at n.49 (citing The Aspen Institute Seminar Readings on Justice and Society 299, 300, 305, 375 (5th ed. 1992)).

107. *See* Norval Morris, HAB, 43 Am. U. L. Rev. 730 (1994). *See generally* J. Clifford Wallace, Globalization of Judicial Education, 28 Yale J. Int’l L. 355, 360 (2003).

A theory of judicial cosmopolitanism suggests that the kind of exposure a federal judge has to foreign judges and international ideas influences how the judge approaches the role of foreign and international sources in constitutional interpretation.¹⁰⁸ On the current Court, Justice Kennedy appears closest to undergoing this kind of cosmopolitan transformation on the bench. Since joining the bench as a “provincial” who had spent almost his entire life in Sacramento, California, Kennedy has become a cosmopolitan Justice, embracing the use of international and foreign sources in constitutional interpretation.¹⁰⁹ And, like Justice Blackmun, his time on the bench has been marked by active foreign travel and participation in international seminars and symposia with foreign judges.¹¹⁰ It is a shift in jurisprudential approach that cannot be predicted through a traditionally typologies of judicial orientation.

That is because typologies of judicial orientation tend to reflect attitudinal or ideological dimensions that have in mind domestic policy objectives – “liberal,” “moderate” or “conservative” – or modes of constitutional interpretation – “textualist,” “pragmatist,” “originalist.”¹¹¹ “Internationalist” does not fit neatly under any one of these labels. Some aspects of internationalism have traditionally been viewed as conservative, (e.g., protecting transnational businesses from extraterritorial application of statutes) and others more “liberal” (e.g., protecting individual rights created through treaty). Indeed, Justice Blackmun’s internationalist legacy reveals some apparent ideological contradictions in internationalism. His international jurisprudence is one that is favorable to both globalization of business (*Mitsubishi v. Soler*)¹¹² and the globalization of human rights (dissent in *Sale*).¹¹³ Internationalism is therefore perhaps better understood not though a framework of ideological or attitudinal preference, but as a way of qualifying modes of interpretation.

Justice Blackmun’s internationalism should be examined together with other areas of his jurisprudence, particularly those that reflect his shift toward expansion of individual rights. I agree with Professor Kobylka that *Lawrence v. Texas*,¹¹⁴ finding Texas’ homosexual sodomy statute unconstitutional, represents Justice Blackmun’s lingering influence on the expansion

108. See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, 42. (noting that Kennedy’s “passion for foreign cultures and ideas” has turned into a “principle of jurisprudence”); see also, Ruger, *supra* note 3, at 1212 (“I suspect that when one goes on the Supreme Court of the United States his constitutional philosophy is not fully developed . . . And if one didn’t grow and develop down there I would be disappointed in that person as a judge.”).

109. *Id.*

110. *Id.*

111. See Ruger, *supra* note 3, at 1209.

112. 473 U.S. 614 (1985).

113. 509 U.S. 155 (1993) (Blackmun, J., dissenting).

114. 539 U.S. 558 (2003).

of personal autonomy and privacy rights.¹¹⁵ But Justice Kennedy's acknowledgement in *Lawrence* that what the rest of the world says about these rights might matter, also reflects Justice Blackmun's lingering internationalist influence.¹¹⁶

Just as Justice Blackmun's internationalist jurisprudence is difficult to classify within traditional judicial preference typologies, his internationalist legacy is difficult to measure against traditional definitions of judicial "influence." Professor Wrightsman defines "influence" as influence on the Court (i.e., among other contemporary Justices) and on American society.¹¹⁷ Influence defined this way may be a useful dimension during a judge's lifetime, but it is temporally limited. The ultimate influence of an individual Justice on jurists, academicians and society at large may be more diffuse and may come long after that Justice's time on the bench. Justice Blackmun's "internationalism" appears to have a longer-term influence that cannot be measured solely by his success or failure in bringing other Justices to his point of view on particular cases at the time they were decided.¹¹⁸ For example, Justice Blackmun's opinions and writings have been influential in the current academic discussion about the role of international human rights in the U.S.¹¹⁹ Justice Blackmun's influence can also be observed among a generation of "internationalist" former clerks in the legal academy in practice. Prominent among them are Harold Koh, Dean of the Yale Law School and former Assistant Secretary of State for Democracy, Labor and Human Rights under President Bill Clinton and Donald Donovan, a preeminent public international lawyer who argued against the United States in the *LaGrand*¹²⁰ and *Avena*¹²¹

115. Kobyłka, *supra* note 2, at 1130-32.

116. *Lawrence*, 539 U.S. at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981) (a European Court of Human Rights case that determined that laws prohibiting consensual homosexual conduct violated the European Convention on Human Rights)).

117. Wrightsman, *supra* note 4, at 1265-66.

118. Justice Scalia may be one current example. Though he often finds himself in the dissent (demonstrating, under Wrightsman's analysis, failure to influence his co-Justices), few would doubt that he is enormously influential – among academics, lower court judges, and the political classes who influence the selection of future justices. See, e.g., Christopher E. Smith & Madhavi McCall, *Justice Scalia's Influence on Criminal Justice*, 34 U. TOL. L. REV. 535 (2003).

119. Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002). (100) A Westlaw search of his 1994 article in the Yale Law Journal entitled *The Supreme Court and the Law of Nations*, *supra* note 87, turns up 55 citations in other law review and journal articles. It has also been cited in briefs to the Court.

120. *LaGrand* (F.R.G. v. United States), 2001 I.C.J. 466 (June 21), 2001 WL 34607609.

121. *Case Concerning Avena & Other Mexican Nationals* (Mexico v. United States), 2004 I.C.J. 128, 2004 WL 2450913 (Mar. 31).

cases before the International Court of Justice,¹²² and who also argued the *Medellin*¹²³ case before the Court.

Today, the lines in the debate over the use of foreign and international law sources in constitutional jurisprudence is being played out in the Court's opinions,¹²⁴ in almost unprecedented public debates among the Justices themselves,¹²⁵ in proposed legislation limiting the ability of federal judges to cite to foreign law,¹²⁶ and in the academic literature.¹²⁷ Through-

122. ICJ ruled that the United States is in violation of its obligation to inform non-US citizens who have been arrested of their right under the Vienna Convention on Consular Relations to notify their consulates of their arrest. *LaGrand*, 2001 I.C.J. 466 at 515; *Avena*, 2004 WL 2450913 at ¶ 153(4).

123. *Medellin v. Dretke*, 125 S. Ct. 2088 (2005) (5-4 decision) (per curiam).

124. See *Roper v. Simmons* 125 S. Ct. 1183 (2005) (5-4 decision) (holding that the Eighth and Fourteenth Amendments prohibit execution for crimes committed before the age of eighteen); *id.* at 1206-17 (O'Connor, J., dissenting) (arguing that the Court's holding rests on a moral judgment that the execution is a disproportionate penalty for any crime committed by a person under the age of eighteen); *id.* at 1217-30 (Scalia, J., dissenting) (arguing that the majority improperly applied its personal views and those of foreign nations in interpreting what the Eighth Amendment requires); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002).

125. See, e.g., Justice Stephen Breyer, Keynote Address at the American Society of International Law Proceedings (Apr. 2-5, 2003) in 97 AM. SOC'Y INT'L L PROC. 265 (2003); Justice Ruth Bader Ginsburg, Keynote Address at the American Society of International Law Proceedings, in 99 AM. SOC'Y INT'L L. PROC., available at <http://www.asil.org/events/AM05/ginsburg050401.html>; Justice Antonin Scalia, Keynote Address at the American Society of International Law Proceedings: Foreign Legal Authority in the Federal Courts (Mar. 31-Apr. 3, 2004), in 98 AM. SOC'Y INT'L L. PROC. 305 (2004); Transcript of Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer at the American University Washington College of Law, *Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005), available at <http://domino.american.edu/AU/media/mediarel.nsf> (follow "AU Media Press Releases" hyperlink, then follow hyperlink to the transcript title); see also Posting of Peggy McGuinness to OPINIO JURIS, *Breyer v. Scalia: A "Messy Conversation" on Foreign Law*, <http://lawofnations.blogspot.com/2005/01/breyer-v-scalia-messy-conversation-on.html> (Jan. 16, 2005 13:17 CST).

126. See, e.g., Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004) ("In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.").

127. For an analysis of how such comparative constitutionalism might fit into constitutional theory, see Roger P. Alford, *In Search of a Theory for Comparative Constitutionalism*, 52 UCLA L. REV. 639 (2005). For arguments against use of foreign and international sources, see, for example, Eugene Kontorovich, *Disrespecting the "Opinions of Mankind," International Law in Constitutional Interpretation*, 8 GREEN BAG 2D 261 (2005) (arguing that invoking the phrase "Opinions of Mankind" from the Declaration of Independence in support of use of comparative and interna-

out this debate, Justice Blackmun's voice echoes in the arguments being marshaled by the internationalists of the Court, Justices Kennedy, Breyer and Ginsburg.¹²⁸

Because cases touching on international issues are a small data set and, therefore, may not be susceptible to producing empirical results with high predictive value, it is difficult to quantify – with any degree of certainty – the direct influence of Justice Blackmun.¹²⁹ Nonetheless, as the forces of globalization bring more transnational legal problems to the Court, and as the availability of those foreign and international sources increases, the number of cases in which Justices apply foreign and international sources is likely to grow, not diminish.¹³⁰ This suggests that Justice Blackmun's international legacy may not only linger, but that his path to internationalism may hold lessons for future systematic analysis of internationalist jurisprudence.

tional law sources to interpret U.S. Constitution misreads the text and the drafters intent). For arguments in favor of constitutional internationalism, see, for example, William N. Eskridge, Jr., *United States: Lawrence v. Texas and the Imperative of Comparative Constitutionalism*, 2 INT'L J. CONST. L. 555 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1116-17 (2000); Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999, 2026 (2003); Mark Tushnet, *Transnational/Domestic Constitutional Law*, 37 LOY. L.A. L. REV. 239 (2003).

128. Justice Blackmun's views are renounced by Rehnquist, Thomas, and, especially, Scalia, who decries the move toward internationalism as totally inappropriate. *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1988) (plurality opinion) (Scalia, J., dissenting) (“[T]he views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”); see also *Roper v. Simmons*, 125 S. Ct. 1183, 1229 (2005) (5-4 decision) (Scalia, J., dissenting) (“‘Acknowledgement’ of foreign approval has no place in the legal opinion of this Court”); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.”).

129. It has also been influenced by William O. Douglas, one of the Justices who is singled out as Blackmun's “fellow ‘internationalist.’” Koh, *supra* note 8, at 28.

130. See, e.g., Toobin, *supra* note 108, at 48 (noting that Justice Kennedy attributes the use of foreign law by judges to the “availability of global sources of information, in the same way that lawyers during the progressive era began using ‘Brandeis briefs’ in response to the advent of social-science research”).