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## GOING PUBLIC WITH TRANSNATIONAL LAW: THE 2002-2003 SUPREME COURT TERM

Janet Koven Levit\*

Court watchers and scholars hail the October 2002 Supreme Court Term as an international law watershed.<sup>1</sup> With prominent international and foreign law citations in this Term's highest profile decisions—most notably *Lawrence v. Texas*<sup>2</sup> and *Grutter v. Bollinger*<sup>3</sup>—international law purportedly arrived on “center stage” and, concomitantly, the appropriate role for international law in Supreme Court opinions quickly became a vogue topic of debate. As an international law professor, I am heartened at the attention that international law is now receiving. However, this recent publicity obscures the role that foreign and international law has played in Supreme Court jurisprudence and perhaps unfairly depicts the Court as more isolationist than its record merits. The Court's international and foreign law citations were not, in and of themselves, revolutionary or “breakthrough.” It was the Court's decision to use such citations in the highest profile, potentially most controversial cases—with no dearth of domestic law or empirical evidence for guidance—that inevitably catapults the Court into a rather public, potentially polarizing, discussion of the proper role of transnational law in constitutional jurisprudence.<sup>4</sup>

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1. Joan Biskupic, *Supreme Court Citing More Foreign Cases*, USA Today A-09 (July 8, 2003) (noting that the Supreme Court's reference to foreign law in *Lawrence v. Texas* “stood out as if it were in bold print and capital letters”); Linda Greenhouse, *In a Momentous Term, Justices Remake the Law, and the Court*, 152 N.Y. Times A1, A1 (July 1, 2003) (noting that the Court “displayed a new attentiveness to legal developments in the rest of the world and to the court's role in keeping the United States in step with them.”); Gina Holland, *Justices Use Guidance from Foreign Courts*, Chi. Sun Times 25 (Aug. 3, 2003); Charles Lane, *Thinking Outside the U.S.*, Wash. Post A13 (Aug. 4, 2003) (noting that the court's “decision-making is beginning to reflect the influence of international legal norms, as well as rulings by courts in foreign countries”); Tony Mauro, *Supreme Court Opening Up to World Opinion*, 26 Leg. Times 1, 1, 8 (July 7, 2003) (describing this Term's “significance” in terms of a “newfound interest in invoking the rulings and views of foreign courts and international authorities” and quoting Professor Harold Koh describing the Term as “breakthrough . . . . The veil has been lifted. The ostrich's head came out of the sand.”).

2. 123 S. Ct. 2472 (2003).

3. 123 S. Ct. 2325 (2003).

4. Traditionally, “international law” is law among states manifested in treaties or other international agreements, customs, or other general principles. Foreign law consists simply of the laws of foreign nations, and students have typically studied these types of laws in comparative law classes. But

## I. THE SUPREME COURT AND TRANSNATIONAL LAW

Contrary to some commentators' characterizations, the 2002 Term was not an absolute disjuncture from prior Supreme Court jurisprudence. While the Court has not been as hospitable to international law and "constitutional cross-fertilization" as its counterparts throughout the world,<sup>5</sup> the Court has not operated in an isolated, legal cocoon, oblivious to all transnational law. First and foremost, the Court cites and relies on international law, particularly ratified treaties and customs, because these treaties and customs are an integral, organic part of United States law. The U.S. Constitution endows treaties with the status of the "supreme Law of the Land,"<sup>6</sup> and ratified treaties have a legal status similar to that of a statute. United States courts have consistently treated customary international law—or the "law of nations"—as analogous to a rule of federal common law.<sup>7</sup> It should come as no surprise, therefore, that the Supreme Court has cited international law many times prior to the citations in two prominent cases this

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as internationally-oriented non-governmental organizations and multinational corporations make rules which effectively bind parties, and as international courts make decisions that affect the rights of individuals, as well as states, the meaning of international law is morphing beyond the traditional state-to-state definition. With increased regionalization comes the advent of regional law, most prominently European Union law. Is regional law international law? It certainly is law among states. However, in the case of the EU, for example, where EU law has virtually replaced domestic law in many areas and has forced the domestic law of many states to conform to EU minimum standards in other areas, the law has become a hybrid between foreign law that warrants comparative study and almost an emerging customary international norm as a result of converging state practice. The point is that the traditional distinctions between international and foreign law no longer make sense. All international law—all foreign law—all "informal" or "soft" international rules that non-state actors may develop—all law that has an extraterritorial impact—should be subsumed into a catch-all category of "transnational law." For the purposes of this essay, I will use the term transnational law to include international, foreign, informal "soft law," and domestic law with a transnational impact. For an excellent discussion of "transnational law," see Harold Hongju Koh, *The Globalization of Freedom*, 26 Yale J. Intl. L. 305, 306 (2001) (arguing that "transnational" law is the inevitable outgrowth of globalization and that international legal academics must "start treating transnational law as its own category"); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Intl. L.J. 191, 192 (2003) (arguing that there is an "underlying conceptual shift . . . from two systems—international and domestic—to one"). See Stephen Breyer, Keynote Address, *The Supreme Court and the New International Law* (Am. Socy. of Intl. L., Apr. 4, 2003), in U.S. S. Ct., *Speeches* <[http://www.supremecourtus.gov/publicinfo/speeches/sp\\_04-04-03.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html)> (accessed Oct. 6, 2003) (arguing that the distinctions between "comparative law" and "public international law" are now blurring and becoming less relevant).

5. Slaughter, *supra* n. 4, at 194-99 (arguing generally that cross-fertilization among constitutional courts and the evolution of a global jurisprudence is a trend that has taken part, in large part, despite the U.S. Supreme Court, but also citing instances in which the U.S. Supreme Court has participated in this endeavor).

6. U.S. Const. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land. . ."). In general, self-executing treaties have the status of a statute in U.S. courts while non-self-executing treaties require additional Congressional legislation prior to gaining the stature of a statute. See *Foster v. Neilson*, 27 U.S. 253 (1829).

7. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.").

Term.<sup>8</sup> In fact, in early United States history, the Court *frequently* looked toward international and foreign law, principally because U.S. law was in such a nascent, undeveloped state that international and foreign law became a necessary recourse to fill legal “holes.”<sup>9</sup> Second, the Court has looked in the past to foreign law as persuasive, or instructive, in deciding cases.<sup>10</sup> Third, the principle of “comity”—judicial deference to foreign courts and law in the name of harmonious foreign

8. See e.g. *Breard v. Greene*, 523 U.S. 371, 373 (1998) (per curiam) (citing and relying upon the Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. 6820, in denying petitioner’s claim for habeas relief based on alleged Vienna Convention violations); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187 (1993) (concluding that the government’s interdiction policy did not violate the U.N. Convention relating to the status of refugees); *U.S. v. Alvarez-Machain*, 504 U.S. 655, 658, 663-68 (1992) (citing and discussing an extradition treaty between the United States and Mexico, as well as customary international law as it pertains to abductions); *id.* at 670-88 (Stevens, J., dissenting) (arguing that the Court’s interpretation of the U.S.-Mexican extradition treaty, which is a part of U.S. law, is inconsistent with the spirit of the treaty); *Thompson v. Okla.*, 487 U.S. 815, 851 (1988) (O’Connor, J., concurring) (U.S. ratification of Article 68 of the Geneva Convention set eighteen as the minimum age for imposition of capital punishment); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (citing Warsaw Convention as to carrier’s liability limit binding within the U.S.); *Johnson v. Browne*, 205 U.S. 309, 321 (1907) (disallowing execution of sentence where the defendant was extradited to U.S. from Canada for a specified crime and thereafter convicted for a different crime for which extradition was not provided by the treaty); *U.S. v. Lee Yen Tai*, 185 U.S. 213, 222 (1902) (1894 treaty between China and the U.S. had the effect of domestic law but did not abrogate a prior domestic statute).

9. Koh, *supra* n. 4, at 308 (arguing that “[i]n the early years of the American republic, when the United States was a small nation with almost no indigenous law, America was fundamentally a law-taker and law-borrower”); Slaughter, *supra* n. 4, at 195-96 (noting that in the nineteenth century, there is “plenty of evidence of borrowing from English law”); Br. of Amici Curiae of Mary Robinson, et al. *Lawrence v. Tex.*, 123 S. Ct. 2472 (2003) (available in 2003 WL 164151).

For some examples of early decisions which borrowed from international and foreign law, see the following slavery decisions: *Ky. v. Dennison*, 65 U.S. 66 (1860) (discussing the implications of states entering into agreements with foreign countries); *U.S. v. Libellants & Claimants of the Schooner Amistad*, 40 U.S. 518 (1841) (citing Spanish law as to Spain’s prohibition of the African slave trade); *The Antelope*, 23 U.S. 66 (1825) (citing foreign law in case brought by Spain and Portugal for return of slaves); see the following decisions applying maritime law: *The Paquete Habana*, 175 U.S. 677 (stating that international law is part of domestic law); *The Santissima Trinidad*, 20 U.S. 283 (1822) (interpreting the U.S.-Spanish Treaty of 1795); *Croudson v. Leonard*, 8 U.S. 434, 437 (1808) (“It is a well established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose.” (emphasis omitted)).

10. See e.g. *Atkins v. Va.*, 536 U.S. 304, 316 n. 21 (2002) (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”); *Knight v. Fla.*, 528 U.S. 990, 996 (1999) (Breyer, J., dissenting from denial of certiorari) (looking to Supreme Courts of India, Zimbabwe, Canada, as well as the European Court of Human Rights to determine whether a lengthy delay in execution constitutes “cruel, inhuman [or] degrading . . . punishment”); *Printz v. U.S.*, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (arguing that foreign country practice provides empirical data of how other countries regulate handguns, in particular balancing federal regulation against local control); *Stanford*, 492 U.S. at 390 (Brennan, J., dissenting) (arguing that the imposition of capital punishment on those who were minors when committing a crime is “overwhelmingly disapproved” in the “world community”); *Thompson*, 487 U.S. at 830 (plurality) (arguing that imposition of death penalty for crimes committed by minors is inconsistent with many, if not most, Western countries); *Coker v. Ga.*, 433 U.S. 584, 596 n. 10 (1977) (citing *Trop v. Dulles*, 356 U.S. 86, 102 (1958) and noting that use of the death penalty to punish rape is contrary to the “climate of international opinion”); *Miranda v. Ariz.*, 384 U.S. 436, 486-90 (1966) (perusing the laws of England, Scotland, India, and Ceylon (Sri Lanka) for comparison); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421 n. 21 (1964) (citing foreign court decisions regarding the “act of state” doctrine).

relations—is a thread that connects many Supreme Court decisions.<sup>11</sup> Fourth, the Supreme Court has assumed a global posture when it decides cases under U.S. law that have a transnational impact.<sup>12</sup> While there is clearly room to criticize the Court for not being as active in transnational law as other high courts and for taking a “parochial” approach in some decisions, transnational law clearly did not make its debut in the 2002 Term.

## II. THE 2002-2003 TERM

The Court cited transnational law most prominently and most provocatively in *Lawrence*. As discussed in Professor Gary Allison’s contribution to this symposium,<sup>13</sup> the Court previously upheld the constitutionality of sodomy statutes in *Bowers v. Hardwick*.<sup>14</sup> In reaching the opposite conclusion in *Lawrence*, Justice Kennedy assaulted the foundations of *Bowers*, in part by undermining Chief Justice Burger’s claim that “homosexual conduct [has] been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.”<sup>15</sup> In *Lawrence*, Justice Kennedy argues that, contrary to Chief Justice Burger’s statement in *Bowers*, the laws of “Western civilization” do not universally condemn sodomy (and did not when *Bowers* was decided). In support, Justice Kennedy cites a 1967 British law<sup>16</sup> and a European Court of Human Rights decision holding that a Northern Ireland sodomy law violated Article 8 of the European Convention on Human Rights, which guarantees individuals “the right to respect” in “private and family life, . . . home[,] and . . . correspondence.”<sup>17</sup>

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11. See e.g. *Am. Ins. Assn. v. Garamendi*, 123 S. Ct. 2374 (2003) (deciding that federal law preempted California’s Holocaust Victim Insurance Relief Act, in part, because of concerns relating to friction with foreign governments and disruption of diplomatic efforts in certain fields); *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 818 (1993) (“[T]he practice of using international law [comity] to limit the extraterritorial reach of statutes is firmly established in our jurisprudence.”); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972) (upholding a forum selection clause because strict adherence to the “parochial concept that all disputes must be resolved under our laws and in our courts” is an affront to foreign commerce and international trade); *Banco Nacional de Cuba*, 376 U.S. at 408-09 (refraining from judging the legality of some Cuban expropriations, in part, in the name of “comity”); *Oetjen v. C. Leather Co.*, 246 U.S. 297, 303-04 (1918) (U.S. recognition that hides were validly confiscated by Mexico; therefore, jurisdiction was before the Mexican courts); *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895) (stating that “comity” is the “recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience . . . .”); *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (concluding that a statute must, whenever possible, be interpreted so as to avoid conflict with the “law of nations”); see generally Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* 3-5 (U.N.C. Press 1981); Joel R. Paul, *Comity in International Law*, 32 Harv. Intl. L.J. 1 (1991).

12. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991) (recognizing extraterritorial reach of employment (Title VII) law); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (recognizing extraterritorial impact of U.S. antitrust laws); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (transferring U.S. citizens’ claims against Iran to a U.S.-Iran claims tribunal).

13. See Gary D. Allison, *Sanctioning Sodomy: The Supreme Court Liberates Gay Sex and Limits State Power to Vindicate the Moral Sentiments of the People*, 39 Tulsa L. Rev. 95 (2003).

14. 478 U.S. 186 (1986).

15. *Id.* at 196 (Burger, C.J., concurring).

16. *Lawrence*, 123 S. Ct. at 2481 (citing Sexual Offences Act 1967, § 1).

17. *Convention for the Protection of Human Rights and Fundamental Freedoms*, § 1, art. 8(1) (Nov. 4, 1950), 213 U.N.T.S. 221.

With the latter, Justice Kennedy notes that although the European Court considered a Northern Ireland law, the European Court's legal conclusion is binding on the forty-five members of the Council of Europe.<sup>18</sup> Later in the opinion, Justice Kennedy reiterates that several other countries have affirmed "the protected right of homosexual adults to engage in intimate consensual conduct"<sup>19</sup> and further notes that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries."<sup>20</sup> For Justice Kennedy, the collection of foreign empirical data is notable, not only because it "uproots" Chief Justice Burger's "firmly rooted" condemnation of homosexual activity throughout Western, Judeo-Christian society but also because Texas did not offer a "governmental interest in circumscribing personal choice"<sup>21</sup> that was "more legitimate or urgent"<sup>22</sup> than these other countries. Justice Kennedy effectively "buys into" the notion that "transnational law" is comprised, in part, of a "global jurisprudence"<sup>23</sup>—an evolving consensus among states, particularly in areas related to privacy rights—and implies that the Court should regard transnational law as persuasive in reaching its decisions.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, recoils at the majority opinion's embrace of transnational law's global privacy jurisprudence. In addition to scolding the majority for eschewing *stare decisis*<sup>24</sup> and its sloppy substantive due process analysis,<sup>25</sup> Justice Scalia reserves comparatively harsh and sardonic language to attack the majority's use of transnational law. In the dissent, Justice Scalia fundamentally questions the majority's claim that *Bowers* rests on the empirical conclusion that anti-sodomy laws are "firmly rooted" in the "history of Western civilization" and "Judeo-Christian moral and ethical standards."<sup>26</sup> Consequently, Justice Scalia would label Justice Kennedy's discussion of transnational law as "meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"<sup>27</sup> Justice Scalia's words evince strident disdain

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18. *Lawrence*, 123 S. Ct. at 2481 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) ¶ 52, holding that a Northern Ireland law prohibiting sodomy is contrary to the European Convention on Human Rights, art. 8 (right to privacy)).

19. *Id.* at 2483 (citing Br. of Amici Curiae of Mary Robinson et al. at 11-12, *Lawrence v. Tex.*, 123 S. Ct. 2472 (2003)). The amicus brief discusses legislative and court decisions "striking down" sodomy laws in the following countries (in addition to those countries that are members of the European Union who are otherwise bound by the *Dudgeon* case): Canada, New Zealand, Israel, South Africa, and Colombia. See Br. of Amici Curiae of Mary Robinson, et al., *Lawrence v. Tex.*, 123 S. Ct. 2472 (2003) (available in 2003 WL 164151).

20. *Lawrence*, 123 S. Ct. at 2483.

21. *Id.*

22. *Id.*

23. See *Slaughter*, *supra* n. 4, at 193.

24. *Lawrence*, 123 S. Ct. at 2488 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

25. *Id.* at 2489-90.

26. *Id.* at 2493-94; see *Bowers*, 478 U.S. at 196 (Burger, C.J., concurring).

27. *Lawrence*, 123 S. Ct. at 2495 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting) (quoting *Foster v. Fla.*, 537 U.S. 990 n. (2002) (Thomas, J., concurring in denial of certiorari)).

for importing an emerging “global jurisprudence” into U.S. constitutional law and, even more fundamentally, looking abroad for empirical comparisons.<sup>28</sup>

In *Grutter*, Justice O’Connor, writing for the majority, upheld the University of Michigan Law School’s admission practices, which factored racial diversity into admissions decisions along with standardized test scores, college grades, a personal statement, recommendations, and “other information.”<sup>29</sup> The majority opinion is somewhat tentative, warning that affirmative action in higher education, particularly law schools, should not become a calcified mainstay of American public policy, but rather, by design, should recede as a policy tool when greater racial equality has been achieved.<sup>30</sup> In a separate concurrence, Justice Ginsburg, joined by Justice Breyer, notes that the Court’s admonition that “race-conscious programs ‘must have a logical end point’”<sup>31</sup> comports with the United States’ obligations under the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>32</sup> particularly those that permit “special and concrete measures to ensure the adequate development and protection of certain racial groups”<sup>33</sup> as long as such measures are not continued “after the objectives for which they were taken have been achieved.”<sup>34</sup> Justice Ginsburg also cites as instructive the Convention on the Elimination of All Forms of Discrimination

28. I will leave a detailed discussion of Justice Scalia’s substantive due process argument to my colleague. See Gary D. Allison, *supra* n. 13, at 151-53. Nonetheless, the discussion does bear on the transnational law discussion, so I will broach it here. Justice Scalia seems to argue that the majority implicitly endows the right to engage in sodomy with “fundamental right status” and chides the Court for its unwillingness to “own up” to this legal conclusion. In any case, Justice Scalia questions whether fundamental rights can “spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.” *Lawrence*, 123 S. Ct. at 2494 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting).

29. 123 S. Ct. at 2333. *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), is the companion case to *Grutter* and dealt with racial preferences in undergraduate admissions. For a discussion of these cases, see Martin H. Belsky, *Accentuate the Positive, Eliminate the Negative, Latch on to the Affirmative [Action], Do Mess with Mr. In-Between*, 39 Tulsa L. Rev. 27 (2003).

30. *Grutter*, 123 S. Ct. at 2346-47. The majority noted:

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

*Id.* (quoting Br. of Respts. Bollinger et al. at 34) (citations omitted).

31. *Id.* at 2347 (Ginsburg & Breyer, JJ., concurring) (quoting *id.* at 2345-46).

32. *Id.*

33. *Grutter*, 123 S. Ct. at 2347 (Ginsburg & Breyer, JJ., concurring) (quoting *International Convention on the Elimination of All Forms of Racial Discrimination* pt. I, art. 2(2) (Mar. 7, 1966), 660 U.N.T.S. 212 (ratified by the U.S. Oct. 21, 1994; entered into force for U.S. on Nov. 20, 1994, signed by U.S. in 1992)).

34. *Id.* (quoting *International Convention on the Elimination of All Forms of Racial Discrimination* pt. I, art. 2(2) (Mar. 7, 1966), 660 U.N.T.S. 212 (ratified by the U.S. Oct. 21, 1994; entered into force for U.S. on Nov. 20, 1994, signed by U.S. in 1992)); see *Gratz*, 123 S. Ct. at 2444-45 (Ginsburg & Souter, JJ., dissenting) (noting that the use of race-conscious policies to “prevent discrimination being perpetuated and to undo the effects of past discrimination” is consistent with “[c]ontemporary human rights documents” (in particular the Conventions on the Elimination of All Forms of Racial Discrimination and the Elimination of All Forms of Discrimination against Women) that “distinguish between policies of oppression and [policies] designed to accelerate *de facto* equality”).

against Women,<sup>35</sup> which similarly authorizes “temporary special measures” to promote gender equality but warns that such measures should be “discontinued when the objectives of equality of opportunity and treatment have been achieved.”<sup>36</sup>

What is so dramatic about Justice Ginsburg’s concurrence, particularly the transnational law citations, is how unnecessary and superfluous it was.<sup>37</sup> Justice Ginsburg was clearly anxious to import international treaties into equal protection jurisprudence. I imagine that Justice Ginsburg tried, but failed, to convince Justice O’Connor to include the international treaty citations in the majority opinion, presumably because Justices Thomas and Scalia may not have concurred in those portions of the opinion with international law citations. Whatever the story behind the scenes, it is clear that Justice Ginsburg chose a highly anticipated case to champion transnational law in a very public way.

### III. WHY THE HYPE?

If the Supreme Court has looked to transnational law in the past, why did this Term’s citations of international and foreign law receive so much attention? First and foremost, the Court cited transnational law prominently in support of *majority* positions in the most anticipated, most controversial, and highest profile cases of this Term. These citations were not buried in footnotes.<sup>38</sup> Nor were they relegated to a naysayer’s dissent<sup>39</sup> or hidden in a decision accompanying a denial of a writ of certiorari.<sup>40</sup> So, while the Court had used transnational law in the past, the transnational law citations in the 2002 Term were noticed (beyond a narrow group of international legal academics) because of the publicity that their host decisions received.

Yet, I would be over-diminishing the significance of this Term if I were to attribute the attention that transnational law received to mere publicity. The Justices *knew* that sodomy and affirmative action would receive the most widespread publicity, and it was *their deliberate choice* to implant transnational law in support of the majority position in these cases. *Lawrence*, with its potentially broad implications for gay rights and privacy rights, was perhaps the Term’s most anticipated case, and Justice Kennedy affirmatively *chose* to showcase transnational law as an important pillar of the majority opinion. Justice Ginsburg *knew* that many would be watching, scrutinizing the affirmative action

35. *Grutter*, 123 S. Ct. at 2347 (Ginsburg & Breyer, JJ., concurring).

36. *Id.* (quoting *Convention on the Elimination of All Forms of Discrimination against Women*, pt. I, art. 4(1) (Dec. 18, 1979), 1249 U.N.T.S. 13).

37. While the U.S. has ratified the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination against Women, they are not self-executing and thus may not be used in U.S. courts without implementing legislation. *See supra* n. 6.

38. *See e.g. Atkins*, 536 U.S. at 316 n. 21; *Thompson*, 487 U.S. at 831 n. 34.

39. *See e.g. Zadvydas v. Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J. & Rehnquist, C.J., dissenting).

40. *See e.g. Knight*, 528 U.S. at 990 (Thomas, J., concurring in denial of writ of certiorari); *id.* at 995-98 (Breyer, J., dissenting from denial of writ of certiorari).



cases—particularly her analysis, given the important role she played in the development of equal protection law as it pertains to women—and *chose* to seize the moment not only to display her alacrity and facility with international law but also to instruct her colleagues on how to integrate international law into constitutional jurisprudence.

Second, the Court's citations of transnational law were superfluous, and concomitantly, discretionary. The Court was not legally compelled to rely on transnational law in either *Lawrence* or *Grutter*; these were not cases that rested on an international treaty or international custom that had become an integral part of domestic law.<sup>41</sup> Nor did the Court have to turn to transnational law to fill a "gap" in domestic law, as it frequently did early in this country's history.<sup>42</sup> While transnational law certainly emboldened the Court's decisions both in *Lawrence* and the *Grutter* concurrence, the Court could have relied solely on domestic law in the domestic context. This makes the Court's resort to transnational law all the more dramatic and notable. In voluntarily embracing international law as persuasive authority in the highest profile cases,<sup>43</sup> the Court sent a poignant message to critics—who have seen the Supreme Court as insular—that the globalization trend does not end on the Supreme Court's steps.

Third, the Court's transnational law citations this Term, primarily the citations in *Lawrence*, have opened an active conversation among the Justices about the proper role of transnational law in the Court's jurisprudence. Admittedly, many Justices had "tipped their hat" at opportune moments in previous decisions<sup>44</sup> and in public speaking engagements.<sup>45</sup> In fact, Justices

41. See *supra* n. 8.

42. See *supra* n. 9.

43. For a discussion of the Court's use of transnational law as "persuasive" authority, see Slaughter, *supra* note 4, at 199-202.

44. Several Justices have revealed their attitude toward transnational law through opinions. The following have generally expressed support:

- Justice Stevens: *Atkins*, 536 U.S. at 316 n. 21 (noting that execution of the mentally retarded is "overwhelmingly disapproved" in the European Union);
- Justice O'Connor: *Thompson*, 487 U.S. at 851-53 (O'Connor, J., concurring) (noting that capital punishment for those under eighteen years is, in many circumstances, inconsistent with U.S. treaty obligations);
- Justice Kennedy: *Zadvydas*, 533 U.S. at 721 (Kennedy, J., Rehnquist, C.J., Scalia & Thomas, JJ., dissenting) (in habeas petition, citing international law pertaining to asylum seekers detained under INS regulations);
- Justice Breyer: *Foster*, 537 U.S. at 992 (Breyer, J., dissenting in denial of certiorari) ("Courts of other nations have found that delays of 15 years or less can render capital punishment degrading, shocking, or cruel."); *Knight*, 528 U.S. at 995-98 (Breyer, J., dissenting from denial of certiorari) (in arguing that the Court should consider the issue of whether a prolonged stay on death row implicates the Eighth Amendment, observing that "[a] growing number of courts outside the United States—courts that accept or assume the lawfulness of the death penalty—have held that lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading, or unusually cruel"); *Printz*, 521 U.S. at 976-77 (Breyer & Stevens, JJ., dissenting) (looking to federal systems in Germany, Switzerland, and the European Union to support position that "the United States is not the only nation that seeks to reconcile

O'Connor and Breyer were the respective keynote speakers at the previous two

the practical need for a central authority with the democratic virtues of more local control”).

The following have been more skeptical:

- Chief Justice Rehnquist: *Alvarez-Machain*, 504 U.S. at 664-66 (offering narrow view of applicability of extradition treaty between the U.S. and Mexico and thus diminishing (greatly) the role of international treaty law in deciding the legality of international abductions); *but see Wash. v. Glucksberg*, 521 U.S. 702, 718 n. 16 (1997) (looking to Canada, England, New Zealand, Australia, and Colombia for evidence among “western democracies” that physician-assisted suicide is a crime); *Planned Parenthood v. Casey*, 505 U.S. 833, 945 n. 1 (1992) (Rehnquist, C.J., White, Scalia & Thomas, JJ., concurring in part and dissenting in part);
- Justice Scalia: *Atkins*, 536 U.S. at 347-48 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting) (“Equally irrelevant are the practices of the ‘world community,’ whose notions of justice are (thankfully) not always those of our people.”); *Stanford*, 492 U.S. at 369 n. 1 (“We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant.”); *Thompson*, 487 U.S. at 868-69 n. 4 (Scalia, J., Rehnquist, C.J. & White, J., dissenting) (“[W]here there is not first a settled consensus among our own people, the view of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”); *but see McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 381-82 (1995) (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting) (“Australia, Canada, and England, for example, all have prohibitions upon anonymous campaigning. See, e.g., Commonwealth Electoral Act 1918, §.328 (Australia); Canada Elections Act, R.S.C., ch. E-2, § 261 (1985); Representation of the People Act, 1983, § 110 (England). How is it, one must wonder, that all of these elected legislators, from around the country and around the world, could not see what six Justices of this Court see so clearly that they are willing to require the entire Nation to act upon it: that requiring identification of the source of campaign literature does not improve the quality of the campaign?”);
- Justice Thomas: *Foster*, 537 U.S. at 990 n. (Thomas, J., concurring in denial of certiorari) (“While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court’s Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.”); *Knight*, 528 U.S. at 990 (Thomas, J., concurring in denial of writ of certiorari) (“I write only to point out that I am unaware of any support in the American constitutional tradition or in this Court’s precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed. Indeed, were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council.”).

45. See William H. Rehnquist, *Constitutional Courts—Comparative Remarks*, in *Germany and Its Basic Law: Past, Present and Future—A German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (“When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.”); Ruth Bader Ginsburg, *Remarks, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication* (Am. Const. Soc’y., Aug. 2, 2003) (“I nonetheless believe we will continue to accord ‘a decent respect to the Opinions of [Human]kind’ as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over. And humility because, in Justice O’Connor’s words: ‘Other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.’” (quoting Sandra Day O’Connor, *Broadening Our Horizons: Why American Judges and Lawyers Must Learn About Foreign Law*, Intl. Jud. Observer 2 (June 1997))).

annual meetings of the American Society of International Law.<sup>46</sup> Prior to this Term, however, the Justices were, for the most part, talking about transnational law *at* or *to* each other and not *with* each other, stating their views on transnational law in disjointed contexts.

In this Term, principally in *Lawrence*, the Justices engaged in an *interactive discussion* regarding the role of transnational law in delimiting the rights of consenting adults to engage in certain sexual conduct in the privacy of their homes and, more fundamentally, in developing an individual rights jurisprudence. And there is little ambiguity on where the Justices stand.<sup>47</sup> Justice Kennedy, writing on behalf of himself and Justices Ginsburg, Breyer, Souter, and Stevens, openly (and enthusiastically) embraced transnational law as a legitimate source of persuasive authority, even when domestic law or historical precedent would suffice. Justices Thomas and Scalia and Chief Justice Rehnquist are wary, calling the Court's resort to "foreign views" "[d]angerous dicta . . . since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'"<sup>48</sup> Whereas the Justices' individual attitudes toward transnational law had been dispersed in dissents, footnotes, concurrences, denials of certiorari, and a few majority opinions, prior to this Term, *Lawrence* importantly consolidates and solidifies this smattering of individual views, providing a focal point for an ongoing, iterative discussion.

In embracing transnational law in this Term's highest profile cases, a majority of Justices sent a potent message to foreign constitutional courts that they *will* engage their foreign colleagues in a court-to-court transnational dialogue and *will* participate in the evolution of a "global jurisprudence." In many ways, this message was a crescendo in a modest, yet mounting trend. Many Justices have been traveling abroad with increasing frequency; on these trips, Justices typically meet with prominent foreign jurists who illuminate foreign approaches to the same legal issues that the Court confronts today.<sup>49</sup> Through these discussions

46. Stephen Breyer, Keynote Address, *The Supreme Court and the New International Law* (Am. Socy. Intl. L., Apr. 4, 2003) (supporting the use of international and comparative law and noting that the "'comparativist' view that several of us have enunciated will carry the day—simply because of the enormous value in any discipline of trying to learn from the similar experience of others"); Sandra Day O'Connor, Keynote Address, *Globalization, International Law, and American Courts* (Am. Socy. Intl. L., Mar. 16, 2002) (available in WL, JLR, 96 ASILPROC 348) ("Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American Courts.").

47. Justice O'Connor concurred separately in *Lawrence* and thus did not join in the Court's discussion of transnational law in that decision. 123 S. Ct. at 2484 (O'Connor, J., concurring). However, given Justice O'Connor's public statements in other contexts, it is relatively clear that Justice O'Connor is an advocate for transnational law.

48. *Id.* at 2495 (Scalia, J., Rehnquist, C.J. & Thomas, J., dissenting) (quoting *Foster*, 537 U.S. at 990 n. (Thomas, J., concurring in denial of certiorari)).

49. For example, Justices O'Connor, Kennedy, Thomas, Ginsburg, and Breyer met with European justices to discuss the new European Constitution in July 2003. See Mauro, *supra* n. 1, at 1. Justice O'Connor is, as this essay is drafted, in Bahrain on "assignment from President Bush to lead a conference . . . on judicial reform in the Middle East." *Id.* at 8. Justices Ginsburg, O'Connor, and Breyer discussed the death penalty and terrorism with President Chirac this summer. Biskupic, *supra* n. 1 (noting that Justices O'Connor, Kennedy, Thomas, Ginsburg, and Breyer met with foreign judges in July to discuss a new European Constitution); Linda Greenhouse, *Heartfelt Words From the Rehnquist Court*, 152 N.Y. Times 3 (July 6, 2003) (noting that, in addition to the meeting with the

the Justices come to see foreign law less and less as a distant, disembodied pronouncement from the “black box” of a foreign institution but rather as the legal fruits, sometimes quite innovative, of their intelligent and charming foreign *colleagues and friends*.<sup>50</sup> Consequently, Justices have become more attuned and open to transnational law. While these “conversations” were clearly instrumental in the Justices’ increasingly transnational points of view, they nonetheless remained, for the most part, extracurricular side-bars, somewhat peripheral to the Court’s primary line of business—deciding cases. And while transnational law certainly has played a role in some Court decisions, the Court undoubtedly lagged behind other constitutional courts in its reliance on transnational law.<sup>51</sup> Yet in turning to transnational law in such a public way in this Term’s *decisions*, the Court broadened this global conversation to include not only an exchange of ideas in hallowed halls, but also active “constitutional cross-fertilization”<sup>52</sup> toward the building of a “global jurisprudence.”<sup>53</sup> In doing so, the Court becomes a participant—not an interested bystander—in a global constitutional conversation.

#### IV. CONCLUSION

This is an important transnational law moment for the Court. Yet, the news story is not: “The Court Discovers International Law.” The accurate news story is: “The Court Publicly Announces—Under Floodlights—that Transnational Law Provides Meaningful Assistance in Deciding Cases.” Transnational lawyers will undoubtedly celebrate this Term for opening a very public and potentially contentious dialogue—among the Justices and among courts—that will define the Court’s relationship to transnational law for decades to come.

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European justices, Justice Kennedy met with Chinese justices, and Justice O’Connor has been active in the ABA’s reform project for Central Europe); Gina Holland, *Ginsburg: Int’l Law Shaped Court Rulings*, AP Online (Aug. 2, 2003) (available in 2003 WL 60552100).

50. See Lane, *supra* n. 1 (noting that two legal scholars, one critical of the Court’s use of international law and one quite supportive, agree that “the justices’ interest in international law has probably been influenced by meetings with fellow jurists on their frequent visits abroad”); Mauro, *supra* n. 1, at 8 (“On their trips overseas, the justices learn much that helps explain their new internationalism, according to [Professor] Koh and others. For one thing, they find out that foreign courts and their judges are mature, sophisticated counterparts grappling with many of the same issues the justices face back at home.”).

51. See Slaughter, *supra* n. 4, at 196-202 (noting that the U.S. Supreme Court, while slowly changing, is not as active of a participant in the “constitutional cross-fertilization” that characterizes the activities of many constitutional courts); Anne-Marie Slaughter, *Judicial Globalization*, 40 Va. J. Intl. L. 1103, 1117-18 (2000) (noting that the U.S. Supreme Court is viewed as rather parochial).

52. Slaughter, *supra* n. 4, at 196.

53. See generally *id.* at 194-204.

