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Seminar on

"The Value of Precedents (national, foreign, international) for Constitutional Courts"

THE UNITED STATES SUPREME COURT: USE OF PRECEDENT, AND THE DEBATE OVER INVOCATION OF EXTERNAL JUDICIAL DECISIONS

Report

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I. **Introduction**

The Supreme Court of the United States recently has addressed important questions concerning the use of judicial decisions, including its own case law, in interpreting individual rights guarantees in the U.S. Constitution. Of particular note for this Seminar is the fact that these considerations have become linked to an intense debate among Justices of the Court, members of the legislative branch, and legal scholars, over the judiciary's use of international and foreign sources of law, including external court decisions. I will use the phrase "external court decisions" to include cases decided by international, regional, and foreign domestic courts.

The Court's case law demonstrates that the Court does not consider itself bound by judicial decisions: either its own or those of other courts. Legislation does not address this matter. Therefore, the questions concerning the use of judicial decisions center on the degree to which, if at all, the Court should choose as a matter of judicial policy to follow such decisions. In this paper, I first will address the Court's approach to the use of its own precedents, as discussed recently in the 2003 decision in Lawrence v. Texas.[1] Then, I will turn to the intense debate regarding what is called the "internalization" of external court decisions: the invocation of their reasoning or holdings as a guide to constitutional interpretation.

II. **The Court's Treatment of its own Precedents**

The principle of binding precedent is central to the Supreme Court's role as the highest judicial body in the U.S. legal system, with authority to review the decisions of both lower federal courts and the courts of the individual states. The binding nature of the Court's precedent for those other courts is particularly important, to advance the goals of uniformity and legal certainty, in a decentralized system such as in the United States, where all courts have the power to exercise judicial review (to hold an act unconstitutional) over legislation and other governmental acts.

However, as to its own decision-making, particularly in cases involving constitutional interpretation,[2] the Court's history is filled with examples of decisions in which it has set aside its own precedents. At the same time, the Court recognizes that it must act cautiously in doing so; therefore, those cases in which it has set aside its precedents are among the most well-known in its case law. For example, in one of its landmark decisions, the Court fifty years ago ruled that racial segregation in public schools was invalid under the Equal Protection clause of the Constitution.[3] This clearly reversed its position, set forth in an 1896 decision, that the maintenance of separate facilities was constitutional, so long as they were equal.

The most striking recent example in the Court's constitutional case law is its 2003 decision in Lawrence v. Texas, in the Court struck down a state statute that made it a criminal act to engage in homosexual sodomy. In so doing, it reversed the position it had adopted seventeen years earlier in the case of Bowers v. Hardwick, in which the Court upheld a state

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[1] Lawrence v. Texas, 539 U.S. 558; 123 S. Ct. 2472; 156 L. Ed. 2d 508 (decided June 26, 2003).

[2] Justice Antonin Scalia recently emphasized the existence of a distinction in the Court's treatment of its own precedents, depending upon whether the case in question involves constitutional or statutory interpretation. The Court, he said, should be much more vigilant in observing binding precedent in the latter. He stated that "Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war." Rasul v. Bush, 124 S. Ct. 2686, 2710 (2004) (J. Scalia, dissenting).

[3] Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

of Georgia statute that outlawed sodomy.[4] The Court's opinion in Lawrence addressed the matter of precedent directly, stating:

> Bowers was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. Bowers v. Hardwick should be and now is overruled.[5]

The Court's opinion also discussed the policy reasons for the use of binding precedent, or *stare decisis*, as well as certain factors to be taken into account when the Court is considering the reversal of an earlier decision. The Court noted that lower courts must observe the principle of binding precedent because it "is essential to the respect accorded to the judgments of the Court and to the stability of the law." As to its own deliberations, the Court recognized that it must act cautiously in reversing its precedents, because individuals or society as a whole may have relied upon them. However, the Court emphasized that for it the principle of binding precedent is not an "inexorable command"; instead, it is a "principle of policy" and not a "mechanical formula of adherence."[6]

The Court's Lawrence opinion identified three criteria to be taken into account in deciding whether to overrule its own precedent: (1) whether the earlier decision's foundations have been eroded by subsequent decisions; (2) whether it has been subject to substantial and continuing criticism; and (3) whether it has induced individual or societal reliance that counsels against such reversal.[7] The Court, in deciding whether to overrule the 1986 Bowers v. Hardwick decision, concluded that the first two of these were present, while the third was not.

III. **External Judicial Decisions in the U.S. Courts**

Let me now turn to the controversial topic of the "internalization" of external judicial decisions -- -- in other words, the question of whether U.S. courts should in any way pay attention to such decisions. First, I will identify certain situations in which the question might arise.

A U.S. court, whether state or federal, will confront the question of whether to look to external judicial decisions in at least three different circumstances:[8] first, when an international court has directed an order toward the United States; second, when interpreting an international agreement to which the United States is a party; and third, when interpreting the provisions of the U.S. constitution.[9]

In the first circumstance, the U.S. court must decide whether to implement the order of the international court, either because it might be considered binding or as a matter of international comity [respect]. For example, in three recent decisions, the International Court

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[4] Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

[5] Lawrence v. Texas, *supra* note 1, 123 S.Ct. at 2484.

[6] *Id.*, 123 S.Ct. at 2483. Here, the Court quoted from its earlier decision in Helvering v. Hallock, 309 U.S. 106, 119, 60 S. Ct. 444, 84 L. Ed. 604 (1940). Although three Justices dissented from the Court's substantive decision in Lawrence, the lead dissenting opinion did not voice disagreement with the basic proposition that the Court may overrule its precedents in constitutional cases. Justice Antonin Scalia, author of that opinion, stated: "I do not myself believe in rigid adherence to *stare decisis* in constitutional cases." 123 S.Ct. at 2488 (J. Scalia, dissenting). At the same time, Justice Scalia stated that the Court had not been consistent in identifying its criteria for overruling previous decisions, or in its application of them.

[7] 123 S.Ct. 2489 (summary by J. Scalia, dissenting).

[8] A fourth scenario would involve the Court's examination of the purported existence of a rule of customary international law, or of a general principle of law as evidence of an international norm. Since this inquiry by its nature would necessitate the identification of external judicial decisions, I will not discuss it here.

[9] For a far more detailed and nuanced discussion, see Roger P. Alford, "Federal Courts, International Tribunals, and the Continuum of Deference," 43 Virginia Journal of International Law 675 (2003).

of Justice, construing the Vienna Convention on Consular Relations (to which the U.S. is a party), has ordered the United States to take certain affirmative steps to postpone the execution of aliens who were not informed of their rights under the Convention. These ICJ decisions have given rise to a number of U.S. court decisions addressing the basic question of whether the ICJ orders should or must be observed. Because this Seminar is devoted to the treatment of precedent, and not the observance of direct orders, I will not describe these questions in this paper. However, I will note that you might find of interest a recent decision of the state of Oklahoma's Court of Criminal Appeals, in which the court, in a 3-2 vote, ordered the state of Oklahoma to suspend the execution of a Mexican citizen.[10] In so doing, the Oklahoma court took into account the ICJ's March, 2004 *Avena* decision, in which the ICJ found the U.S. in violation of the Vienna Convention and called upon the U.S. to review and reconsider the convictions and sentences in criminal proceedings involving approximately fifty Mexican citizens.[11]

The second circumstance -- -- the treatment of external court decisions as persuasive authority in interpretation of a treaty to which the United States is a party -- -- is not controversial. In these situations, Supreme Court Justices who oppose internalization as a guide in constitutional interpretation agree that attention to external judicial practice can be appropriate. For example, Justice Scalia recently wrote approvingly of the use of external judicial decisions construing the Warsaw Convention (The Convention for the Unification of Certain Rules Relating to International Transportation by Air).[12] Here, it should be noted that treaties in the U.S. legal system hold the status of federal legislative, not constitutional, provisions. Because use of external decisions in these circumstances is not controversial, and because it is not a matter of constitutional law, I will not discuss it further in this paper.

This leaves the third scenario as the focal point of my presentation. Here, the precise question is whether it is appropriate for a U.S. court to use external judicial decisions as a means of interpreting non-specific provisions in the constitutional text such "due process" or "cruel and unusual punishments."[13] Here, let me emphasize that the debate on this question concerns the use of external decisions as persuasive authority; no one, to my knowledge, argues that such decisions should be binding on the U.S. courts.

IV. **Citation of external decisions in *Lawrence v. Texas***

Lawrence v. Texas was the first decision in which the Supreme Court expressly cited external judicial decisions for support in defining individual rights guaranteed under the Constitution.[14] The Court's opinion cited decisions of the European Court of Human Rights, and alluded to those of other courts, as evidence to show that earlier decisions had been factually incorrect on an important point.[15] In its 1986 Bowers v. Hardwick decision, the

[10] Torres v. State of Oklahoma (unpublished decision: 13 May 2004).

[11] Mexico v. United States of America (International Court of Justice Judgment: 31 March 2004). In the Torres decision, a separate (concurring) opinion of one of the Justices of the Oklahoma Court of Criminal Appeals stated: "As this Court is bound by the treaty itself, we are bound to give full faith and credit to the Avena decision." One of the dissenting Justices wrote in his separate opinion that he disagreed with this conclusion.

[12] Olympic Airways v. Husain, 124 S. Ct. 1221, 1230 (2004) (J. Scalia, dissenting). In his dissenting opinion, Justice Scalia stated that "When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.' [*citation deleted*] True to that canon, our previous Warsaw Convention opinions have carefully considered foreign case law."

[13] These are found in the 4th and 8th Amendments to the U.S. Constitution, respectively. On this point, see Harold Hongju Koh, "International Law as Part of Our Law," 98 American Journal of International Law 43, 46 (2004).

[14] Roger P. Alford, "Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas," 44 Virginia Journal of International Law 913, 915 (2004).

[15] The Court's references to external decisions encompassed the following two sections:

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual

Court found that anti-sodomy laws have "ancient roots" as part of a centuries-old cultural tradition that the United States shared with other societies.[16] Adding to this, Chief Justice Warren Burger in a separate concurring opinion in Bowers wrote that homosexual conduct had been "subject to state intervention throughout the history of Western Civilization."[17] Similarly, the Texas Court of Appeals, upholding the constitutionality of the Texas statute that the Supreme Court was reviewing in Lawrence, stated in 2001 that "Western civilization has a long history of repressing homosexual behavior by state action."[18] Thus, for the Supreme Court in Lawrence, the Strasbourg Court decisions, and those of certain other courts, served as evidence to refute these factual assertions of a consensus in Western civilization favoring anti-sodomy laws.

Let me make two points concerning this. First, the Court turned to the external court decisions only after examining the evolution of laws and traditions in the United States over the past fifty years. Thus, foreign practice was not the starting point for the Court's analysis. Second, it is noteworthy that the Court relied upon and cited an *amicus curiae* (friend of the court) brief to make its points, thereby giving recognition to proponents of internalization who had been urging the Court to introduce this external dimension into its constitutional rights practice.[19]

V. **The Internalization Debate**

By explicitly citing external court decisions in Lawrence v. Texas, the Supreme Court added a new dimension to an on-going debate, going back at least to the late 1980's, about the use of external laws and practices in constitutional rights jurisprudence. Immediate criticism came from the dissenting Justices in Lawrence. For example, Justice Scalia wrote in his dissenting opinion (joined by Justice Clarence Thomas) that constitutional entitlements do not "spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct."[20] Quoting Justice Thomas's statement in another case, he added that the Court's citation of external sources was "dangerous" because the Court "should not impose foreign moods, fads, or fashions on Americans."[21] Later, amid criticism from public critics,[22] a

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who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon* v *United Kingdom*, 45 Eur. Ct. H. R. (1981) P 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization. 123 S.Ct. at 2481.

> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon* v *United Kingdom.* See *P. G. & J. H.* v *United Kingdom*, App. No. 00044787/98, P 56 (Eur. Ct. H. R., Sept. 25, 2001); *Modinos* v *Cyprus*, 259 Eur. Ct. H. R. (1993); *Norris* v *Ireland*, 142 Eur. Ct. H. R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct. See Brief for Mary Robinson et al. as *Amici Curiae* 11-12. The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent. 123 S.Ct. at 2483.

The international and foreign bodies cited in the Mary Robinson *amicus* brief included the Constitutional Courts of South Africa, Colombia, and Ecuador, and the Supreme Courts of Canada and Israel.

[16] Bowers v. Hardwick, *supra* note 4, 106 S.Ct. at 2844.

[17] Bowers v. Hardwick, *supra* note 4, 106 S.Ct. at 2847 (Burger, C.J., concurring).

[18] Lawrence v. State, 41 S.W.3d 349, 361 (Texas Court of Appeals, 2001).

[19] See discussion in Michael D. Ramsey, "International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*," 98 American Journal of International Law 69, 70 (2004).

[20] Lawrence v. Texas, *supra* note 1, 123 S.Ct. at 2491 [emphasis in the original].

[21] *Id.* (citing Foster v. Florida, 537 U.S. 990, 991, 123 S. Ct. 470, 154 L. Ed. 2d 359 (2002) (Thomas, J., concurring in denial of certiorari)).

subcommittee of the U.S. House of Representatives held a public hearing[23] and certain members of the House proposed enactment of resolutions opposing internalization, at least without strict limits as to its use.[24] Meanwhile, those who advocate the use of external sources as an aid in constitutional interpretation, including Supreme Court Justices Stephen Breyer, Ruth Bader Ginsburg, and Sandra Day O'Connor, continued to present their views in various public settings.[25]

In this section, I will seek briefly to describe the concerns voiced by this debate's participants and to identify their basic points of disagreement. Let me begin with proponents of internalization. Their arguments, and the use of external decisions in Lawrence v. Texas, suggest four rationales. First, the identification of external decisions can serve an evidentiary purpose. A second rationale -- -- that of empirical benefits -- -- is grounded in a functionalist perspective long familiar to scholars of comparative law: that many issues raised in constitutional rights adjudication are common to legal systems around the world or at least, as one proponent puts it, to systems with which the United States shares a "common constitutional genealogy".[26] Thus, the Supreme Court and external courts are engaged in what Justice Breyer has called a "global legal enterprise",[27] and the Court can benefit from examining the attempted solutions and experience of other legal systems in seeking to resolve these questions.[28] Third, careful examination of external courts' reasoning, methodologies, and substantive results can yield "normative insights" [29] that might lead to their adoption by U.S. courts. [30] A fourth consideration -- -- the maintenance of the Supreme Court's influential position in the global judicial dialogue -- -- lies outside the context of individual rights

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[22] For an example available online, see Terry Eastland, "Justice Takes a Holiday," The Daily Standard, July 16, 2003, available at http://www.weeklystandard.com/Content/Public/Articles/000/000/002/894rrxwn.asp ("It is odd to think that the interpretative task could include borrowing from the judgments of other courts to discern constitutional meaning."). This statement and others are cited in Alford, *supra* note 14, 44 Virginia Journal of International Law at 924 n. 72.

[23] "Appropriate Role of Foreign Judgments in the Interpretation of American Law": Hearing Before the House Judiciary Subcommittee on the Constitution (March 25, 2004). The full transcript of this hearing is available at [http://commdocs.house.gov/committees/judiciary/hju92673.000/hju92673_0f.htm].

[24] The Subcommittee on the Constitution of the Judiciary Committee of the U.S. House of Representatives on 13 May 2004 adopted House Resolution 568, entitled the "Reaffirmation of American Independence Resolution". The full Judiciary Committee has not acted on this non-binding Resolution, which supporters view as a communication to the judicial branch that "international law has no place in its decisions." Statement of Representative James Ryun, transcript of 25 March 2004 hearing, *supra* note 23, page 7. The proposed Resolution concludes with the statement:

"*Resolved,* That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States."

The full text of House Resolution 568 is available at [http://www.house.gov/feeney/reaffirmation.htm]. This Resolution was preceded by a shorter proposed Resolution (H.Res. 446), introduced in November, 2003. House Resolution 446 has not been adopted by any congressional body.

[25] See, for example, presentations by Justice Ginsburg on 2 August 2003 to the American Constitution Society [http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf] and Justice O'Connor on 28 October 2003 to the Southern Center for International Studies [http://www.southerncenter.org/OConnor_transcript.pdf]. Justice Breyer's keynote address to the American Society of International Law, some two months before the Lawrence v. Texas decision, was devoted to a defense of internalization. *See* 97 American Society of International Law Proceedings 265 (2003).

[26] Koh, *supra* note 13, 98 AJIL at 47.

[27] Justice Breyer, *supra* note 25.

[28] Koh, *supra* note 13, at 46 (citing Justice Breyer's dissenting opinion in Printz v. United States, 521 U.S. 898, 977, 117 S.Ct. 2365, 2405, 138 L.Ed. 2d 914 (1997): "Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own….But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem…").

[29] See use of this phrase in Gerald L. Neuman, "The Uses of International Law in Constitutional Interpretation," 98 AJIL 82, 87 (2002).

[30] Addressing the 2002 annual meeting of the American Society of International Law, Justice O'Connor stated that her experience on the Court had suggested that "there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here." 96 American Society of International Law Proceedings 348, 350 (2002) (cited in Koh, *supra* note 13, 98 AJIL at 48 n. 33).

adjudication. Here, proponents warn that if the Supreme Court does not as a matter of reciprocity recognize the potential value of external courts, it will undermine the foundations of its influence."[31]

Opponents of internalization, on the other hand, view the entire exercise as illegitimate, or at least ill-advised.[32] At the core of many opponents' concerns lies their commitment to judicial restraint in constitutional rights adjudication. For example, those who hold an originalist view of constitutional interpretation (in other words, one that views the Constitution as a document with a fixed meaning, which courts are to determine by reference to the intent of its authors and other circumstances present at the time of its adoption[33]) fear that the use of foreign sources will lead to an unprincipled process whereby judges will search the globe for evidence to support their own value judgments.[34] To prevent this, constitutional interpretation should be limited strictly to analysis of the historical record at the time of the Constitution's adoption. Thus, Justice Scalia told the annual meeting of the American Society of International Law last April that: "It is my view that modern foreign legal material can never be relevant to any interpretation of…the meaning of the U.S. Constitution."[35]

Another set of objections centers on the proper role of the judiciary under separation of powers principles. Thus, opponents of internalization view reference to foreign examples as an exercise in policy decision-making that is the prerogative of the legislative branch.[36]

Other objections, espoused by scholars whom I will call "skeptics", are less categorical. These skeptics acknowledge that comparative analysis sometimes can be appropriate, but only if conducted under strictly defined methodologies and standards.[37] For example, they charge that internalization proponents make selective use of external sources, choosing only those that support the enhancement of rights.[38] He finds it surprising that enthusiasts for comparativism assume that "it will enhance rather than diminish basic human rights" in the United States. Instead, he points to external judicial decisions that are less protective of rights, such as abortion and free speech, than those in the U.S.[39] Skeptics also argue that internalization could have a counter-majoritarian effect, imposing external values that conflict with democratic "community" standards in the United States. As a safeguard against this, they argue that: (1) internalization should occur only as a supplemental consideration after a national consensus has been identified; and (2) that the majoritarian

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[31] Neuman, *supra* note 29, 98 AJIL at 87 (adding that "Justices who declare the world irrelevant to our Constitution make our Constitution appear irrelevant to the world"). Speaking in October, 2003, Justice O'Connor stated that "When U.S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced." Speech to the Southern Center for International Studies, *supra* note 25.

[32] Ramsey, *supra* note 19, 98 AJIL at 69 n.3 (citing statements by Chief Justice William Rehnquist and Justices Scalia and Thomas).

[33] For a recent summary of Justice Scalia's originalist approach, see Robert C. Post, "Fashioning the Legal Constitution: Culture, Courts, and Law," 117 Harvard Law Review 4, 31-33 (2003).

[34] For example, see the recent book by former U.S. Court of Appeals Judge Robert Bork, in Robert H. Bork, Coercing Virtue: The Worldwide Rule of Judges, 22-24 (2003).

[35] Anne Gearan, "Foreign Rulings Not Relevant to High Court, Scalia Says," Washington Post, April 3, 2004. In its 1997 Printz decision, the Court's opinion, authored by Justice Scalia, stated that comparative analysis is "inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one." Printz v. United States, *supra* note 28, 117 S.Ct. at 2377 n.11 (1997). See also Judge Bork, *supra* note 34, at 23 (after surveying recent examples of judicial citation to external sources, writing that "The question in each of these cases should have been the understanding of the ratifiers of the Bill of Rights in 1791, not the current views of foreign nations").

[36] Justice Thomas, for example, prefaced his statement cited in footnote 21, *supra*, by stating that "Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes" [*emphasis in the original*]. See also Roger P. Alford, "Misusing International Sources to Interpret the Constitution," 98 American Journal of International Law 57, 58-59 (2004).

[37] For example, see the articles by Roger Alford, *supra* note 36, and Michael Ramsey, *supra* note 19.

[38] Alford, *supra* note 36, 98 AJIL at 67-69; Ramsey, *supra* note 19, 98 AJIL at 76-77.

[39] Alford, *supra* note 36, 98 AJIL at 67.

principle must be extended on a global scale, so that practices throughout the world are taken into account, not just those in selected legal systems.[40]

The implications of this debate are significant for the U.S. judicial system as a whole, due to the decentralized nature of judicial review in the United States in which all courts have the power to find governmental acts unconstitutional. Thus, if the Supreme Courts adopts internalization as a consistent practice, it will send a signal to all courts, and to lawyers practicing in those courts, that external judicial decisions are available for use in constitutional interpretation.

Meanwhile, the brief survey above provides a basis from which to identify key points at which the views of proponents, opponents, and skeptics intersect and conflict. I will do this in reference to three of the proponents' four arguments for internalization: the evidentiary, empirical, and "normative insight" rationales.

As to the arguments for internalization as an evidentiary matter, this arises out of the nature of the Court's jurisprudence in the areas of "substantive due process" and the Eighth Amendment to the U.S. Constitution. The doctrine of substantive due process, which is grounded in the Fifth and Fourteenth Amendments to the Constitution,[41] centers on the identification and protection against governmental interference of so-called "liberty interests" that do not receive other explicit recognition in the constitutional text.[42] Lawrence v. Texas is a substantive due process case. The Eighth Amendment, which has been the focal point of litigation over the death penalty, bars "cruel and unusual punishments".

In many of its cases in these areas, the Court has placed important emphasis on the ascertainment of community standards through examination of evidence. In a 1997 decision,[43] for example, the Court ruled that only liberty interests identified by the courts as "fundamental" would qualify for full substantive due process protection. The standard for this determination, the Court stated, would be based on objective facts: whether in fact the U.S. historical record demonstrates the existence of a tradition of social and legal protection for the liberty interest in question.[44]

In Eighth Amendment jurisprudence, the inquiry centers on whether evidence demonstrates there is a developing consensus that a particular punishment is cruel and unusual under "evolving standards of decency that mark the progress of a maturing society." In a 2002 decision,[45] the Court wrote that "to the maximum possible extent," objective factors should be used to determine the existence and nature of evolving standards.

This emphasis on examination of evidence of laws and practice gives rise to two points of disagreement among the participants in the internalization debate: the criteria of time and space. Both arise in the context of substantive due process: if indeed only the historical record in the United States is relevant, this automatically excludes consideration of external sources. Here lies the basis for the intense criticism directed at the Court's Lawrence

[40] Alford, *supra* note 36, 98 AJIL at 60, 67-68; Ramsey, *supra* note 19, 98 AJIL at 76-77.
[41] The Due Process Clause of the Fourteenth Amendment, which applies to the States, states: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." The Due Process Clause of the Fifth Amendment, which applies to the federal government, provides: "No person shall…be deprived of life, liberty, or property, without due process of law."
[42] Post, *supra* note 33, at 85-95, presents a survey of the evolution of the Supreme Court's substantive due process jurisprudence.
[43] Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997).
[44] *Id.*, 117 S.Ct. at 2267-2268.
[45] Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242, 2247, 153 L. Ed. 2d 335 (2002).

v. Texas decision: it departed from both of these constraints in citing modern decisions of external courts as evidence to invoke due process protections.

In the Eighth Amendment context, the question is spatial: how to define the geographical extent of the "community" in which consensus might be developing? In its 2002 Atkins v. Virginia decision, which construed the Eighth Amendment to invalidate capital punishment for mentally retarded persons, the Court stated that the "most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." However, in a step sharply criticized by internalization opponents,[46] the Court added that such punishment also is "overwhelmingly disapproved" by the "world community" (without identifying any specific external instruments or legal systems).[47] From the point of view of opponents and skeptics, this spatial expansion of community to encompass external sources poses the threat that judges will be engaged in making unconstrained, counter-majoritarian value judgments.[48]

One other aspect of the evidentiary approach is the challenge posed by the skeptics: if indeed external sources are to be viewed as relevant, what principles will be employed in deciding the geographic scope of such an inquiry? Putting the challenge more bluntly, Michael Ramsey states that narrowing of the category of relevant legal systems would appear to "revive the discredited nineteenth-century concept of 'civilized' and 'uncivilized' nations, and subconsciously to endorse a Eurocentrism that would be indefensible if argued overtly."[49] In response, one of the leading academic proponents, Dean Harold Hongju Koh, states that proponents of internalization are not mere "'international majoritarians'" who believe that "American constitutional liberties should be determined by a worldwide vote"; instead, they suggest that the practices of "other mature democracies" constitute the most relevant evidence of evolving standards.[50]

These considerations of time and space also lie at the core of disagreement over the use of internalization as an empirical exercise in comparative constitutional analysis. Because it also is grounded in evidentiary considerations, this approach also invites consideration of factors that opponents believe must be excluded from constitutional inquiry.

In my opinion, it is the proponents' "normative insight" rationale -- -- the argument that examination of external judicial practices will enhance substantive decision-making -- -- that carries the greatest potential for further intensification of the internalization debate. For one thing, its invocation would broaden the scope of the internalization debate to new areas of constitutional interpretation, beyond the evidentiary-based jurisprudence of substantive due process and the Eighth Amendment. Also, the normative approach can be focused more closely on judicial functions, rather than other acts and practices. The two evidentiary-based rationales can embrace citation of a broad range of external rules and practices, whereas the normative rationale suggests that it will entail close examination not only of judicial results, but also external courts' reasoning and methodologies. Or, from another perspective, the normative exercise poses what Gerald Neuman calls the "suprapositive" aspect of constitutional interpretation: the identification of a normative right "independent of its embodiment in positive law."[51] In other words, the normative approach poses the possibility

[46] *Id.*, 122 S.Ct. at 2252-2253, 2254 (Chief Justice Rehnquist, dissenting) and 122 S.Ct. at 2264 (Justice Scalia, dissenting).
[47] *Id.*, 122 S. Ct. at 2249 n. 21.
[48] For Roger Alford, for example, such internalization would be acceptable only if it is conditioned upon a prior finding of a national consensus. See *supra* note 36, at 60.
[49] Ramsey, *supra* note 19, 98 AJIL at 81.
[50] Koh, *supra* note 13, 98 AJIL at 56.
[51] Neuman, *supra* note 29, 98 AJIL at 84.

that judges will borrow external, suprapositive values to inform their constitutional interpretation -- -- a practice that advocates of judicial restraint certainly would oppose.

One might ask why this use of internalization need ever arise overtly. Why do courts ever cite persuasive authority at all? After all, courts often engage in borrowing without necessarily feeling compelled to make explicit reference in their published decisions to the fact that they are engaged in it. However, perhaps it is here that the proponents' fourth rationale -- -- the need to maintain the legitimacy and influence of the Supreme Court, and indeed the United States as a whole, in the global judicial dialogue -- -- might serve as an incentive for proponents on the Court to present explicit evidence of their recognition of the value of external judicial decisions.

VI. **Future Prospects**

It remains to be seen whether the Court's explicit use of external judicial decisions as an interpretive aid in Lawrence v. Texas was a highly unusual occurrence resulting from jurisprudential questions unique to that case, or whether it signals the beginning of a significant new trend in the Court's practice. Put another way, one cannot predict on the basis of one decision whether the Court will extend internalization beyond the context of substantive due process jurisprudence. If it does, the Court then will confront a broad range of policy and methodological considerations that were not addressed in the Lawrence case but have been illuminated in the subsequent internalization debate.

It is possible that some answers might soon be forthcoming in an Eighth Amendment case, Roper v. Simmons, that the Court will hear in its next term. In this case, the Court will be called upon to re-visit its precedent in the 1989 decision of Stanford v. Kentucky,[52] in which the Court upheld the constitutionality of capital punishment for offenders who committed their crimes while sixteen or seventeen years of age. In Stanford, the Court rejected invitations to place highest priority on external practices, stating that "it is *American* conceptions of decency that are dispositive." The oral argument hearing in Roper v. Simmons is scheduled for October, and a number of amicus briefs on file, citing Lawrence v. Texas, urge the Court to include external sources as evidence for the proposition that since 1989 the execution of juvenile offenders has become untenable under evolving standards of decency.

In my opinion, it is unlikely that the Court will make such a major departure, if indeed it decides to cite external evidence at all. Also, if the Court does decide to cite external sources, I believe it is likely that it will concentrate not on judicial decisions, but on international human rights instruments and foreign legislative acts, because more of them address juvenile capital punishment than the matter of homosexual sodomy. This direction is suggested by the content of those *amicus* briefs that I have read, although one of those briefs does cite the Strasbourg Court's 1989 decision in Soering v. United Kingdom to demonstrate that the USA's retention of the death penalty, particularly for sixteen and seventeen year old offenders, "is of great concern to European nations."[53]

VII. **Conclusion**

In conclusion, let me suggest that while the internalization debate is grounded in the particular jurisprudential context of the U.S. Supreme Court's practice, it also illuminates questions that are pertinent to all courts exercising constitutional control. Amid the on-going

[52] 492 U.S. 361; 109 S. Ct. 2969; 106 L. Ed. 2d 306 (1989).
[53] Roper v. Simmons, Brief of Amici Curiae James Earl Carter, *et al* (July 19, 2004), p. 14.

process that has been described as "judicial globalization,"[54] courts may be expected increasingly to confront challenging questions posed by the treatment of non-binding external judicial decisions, including the reasoning and methodologies of other courts. In particular, even for courts inclined to employ internalization on a consistent basis, many of the methodological issues in the U.S. debate, such as identification of principles or criteria for selection among multiple potential sources, will be relevant to their deliberations. In sum, it can be expected that these matters will become an even more frequent topic of conversation in the global judicial dialogue.

END

[54] See Anne-Marie Slaughter, "Judicial Globalization," 40 Virginia Journal of International Law 1103 (2000).