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Born in 1966

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PROJECT

The Structure of Authority

This comparative project examines the structure of public authority across a host of domains from federalism and separation of powers in domestic law to pluralism and fragmentation in global governance. The project seeks to explore several core claims. First, that conflict among multiple claims of authority is inherent in the idea of modern liberal governance - from domestic constitutional law to global governance. Second, that such conflict can spell order, insofar as it gives rise to a decentralized practice of contestation and accommodation among the various claims of authority. And third, that this pluralist practice of conflict and accommodation across these various domains takes place by reference to a common grammar of legitimacy, i. e., a common way of framing claims of authority and accommodation.

Recommended Reading

Halberstam, Daniel. "Of Power and Responsibility: The Political Morality of Federal Systems." Virginia Law Review 732 (2004).

available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=531562

__. "Comparative Federalism and the Role of the Judiciary." In The Oxford Handbook of Law and Politics, edited by Keith Whittington, Daniel Kelemen, and Gregory Caldeira. Oxford: Oxford University Press, 2008.

__. "Constitutional Heterarchy: The Centrality of Conflict in the United States and Europe." In Ruling the World? Constitutionalism, International Law, and Global Government, edited by Jeff Dunoff and Joel Trachtman. Cambridge: Cambridge University Press (forthcoming).

available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147769

COLLOQUIUM, 15.03.2010

Pluralism in Constitutional Law: National, Supranational, and Global Governance

The emergence of the European Union and the increasing density of global governance regimes raise questions about the nature of legal authority within and across these systems, as well as between any one of these systems and the traditional unit of modern governance: the state. A key debate concerns the

relevance of constitutional law as a paradigm for understanding how any one of these systems works or how these systems interact with one another and with the state. Simply put, these questions ask whether the EU, the UN, or the WTO are (or should become) "constitutional" in the sense of privileging central legal actors and norms over local law and politics, or whether these systems are (and should remain) loose regimes in which the relationship among the various legal actors and systems remains less ordered and in which law and politics stand on a more equal footing.

There have been two principal answers to this question: one local and one global. The local answer grounds all legal authority in the state. On this view, "law" beyond the state exists only because it serves the political interests of states and, to the extent it does not, such law either will be changed or will (need?) not be heeded. These arguments can be put forward rather simplistically by constitutional law scholars such as Eric Posner and Jack Goldsmith or in a more sophisticated way by those grounded in international relations theory such as Andrew Moravcsik. But the basic idea is the same: all constitutionalism is local. The other response has been to ground legal authority at the global level. Beginning from Kantian premises (e.g. Pogge, Tomuschat, Habermas), the idea (put crudely) is to understand states as operating within a globally ordered system to realize universal human rights as defined by the "international community." Others, such as British political theorist David Held, are more catholic in their philosophical foundations, but similarly envision a global hierarchy in which national, regional, and local "'sovereignties'" are "subordinate[ed] . . . to an overarching legal framework." In short, on this view, the only true constitutionalism is global.

As you will have guessed by now, I have set this up to make room for a third view, that of pluralism in constitutional law. And indeed, a small band of scholars (of which I am one) has begun to explore the possibilities of a pluralist approach to what otherwise appears as the dilemma of local versus global constitutionalism. This approach emphasizes the lack of hierarchy among the various actors and systems and does not argue for settling this situation in favor of either local or global authority.

The project I will discuss in my talk builds on these efforts by integrating the idea of pluralism into our core understanding of constitutional law - even into traditional state-based systems. The project examines elements of pluralism in, for example, the United States, and compares these elements of pluralism to those we find, say, within the EU, in the relationship among the UN and human rights regimes, or in the relationship between the UN, the EU, and a Member State. The idea is that more often than we generally appreciate, we lack a final arbiter of legal authority or, put differently, we find multiple conflicting claims to final legal authority and no overarching hierarchy for settling those claims. I will try to show that this multiplicity of claims has led not to chaos but to decentralized mutual accommodation that draws on the values of constitutionalism. This is, perhaps, as it should be. In its most radical form, I will float the claim that pluralism is inherent in the idea of constitutionalism itself.

PUBLICATIONS FROM THE FELLOW LIBRARY

Halberstam, Daniel (Cheltenham, UK [u.a.],2017)

The promise of comparative administrative law : a constitutional perspective on independent agencies

https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=1689237619

Halberstam, Daniel (2012)

Systems pluralism and institutional pluralism in constitutional Law : national, supranational, and global governance

https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=832538752

Halberstam, Daniel (2011)

Pluralism in constitutional law : national, supranational, and global governance

https://kxp.k10plus.de/DB=9.663/PPNSET?PPN=670721875

Halberstam, Daniel (2004)

Of power and responsibility : the political morality of federal systems