PLURALISM IN CONSTITUTIONAL LAW: NATIONAL, SUPRANATIONAL, AND GLOBAL GOVERNANCE

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I. Introduction

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 each other 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. In 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 will either be changed or not heeded. These arguments can be put forward rather plainly 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 on the global level. Beginning from Kantian premises

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(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, in this view, the only true constitutionalism is global.

As you may have guessed by now, I set this up to make room for a third view, that of pluralism in constitutional law. And indeed, a small band of scholars 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.

My own project 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 these claims. I will try to show that this multiplicity of claims takes on two principal forms – the first systemic and the second institutional – and that neither of these has led to chaos. Instead, both types of multiplicity of claims of authority have led 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.

II. A Comparative Analysis of Pluralism

Let us begin by comparing the European Union and the United States. If you start with the ordinary comparison, you might say the European Union and the United States are both federal-type systems. This comparison can be useful, as many comparative studies have illustrated, but it has its limits as far as pluralism is concerned. Here's why:

In the European Union, we have a primary conflict between the European level, which claims to be superior and foundational over the member state legal orders, and the rival claim of the member states, which insist that the member state legal orders are the true foundation of the European legal order. We find a profound *systems conflict* that leads to a standoff between the European Court of Justice and member state constitutional courts. This conflict among legal systems lies at the heart of the famous *Maastricht* and *Lisbon* decisions of the *Bundesverfassungsgericht*, as well as that court's earlier rulings in *Solange I* and *Solange II*. We shall discuss these decisions in greater detail later on. But for now all we need to note is that these are fundamental conflicts between the different legal systems operating on the various levels of governance.

In the United States, by contrast, we no longer witness this kind of systems conflict, at least not since the Civil War. Instead, the vertical relationship between the federal government and the states in the United States is, today, hierarchically ordered. No state today would suggest that a federal law that everyone agreed was valid under the United States Constitution could be invalid or inapplicable within a certain state simply because of a conflict with state constitutional law. To do so would, today, amount to a misunderstanding of the law, an act of legal or civil disobedience, or both.

Given that the modern comparison between the federalism of the European Union and that of the United States does not serve to analyze the issue of pluralism, where else might we look? Here I suggest we can look to the separation of powers at the federal level of governance, that is, between the President, the Congress, and the Supreme Court.

III. Institutional Pluralism and the Problem of Interpretation in the United States

A simple view of the United States might be that the Supreme Court interprets the Constitution and the laws, the Congress makes the laws, and the President applies them. And the simple view might be that Congress and the President accept the Supreme Court's interpretation of the law. But, as we shall see, things are a bit more complicated than that.

A. *Marbury*, *Stuart*, and the Birth of Interpretive Pluralism

As is well known, the US Supreme Court began its practice of "judicial review" in *Marbury vs. Madison*. What that concretely meant, as every first-year law student learns in the United States, is that the US Supreme Court reviewed a federal statute and refused to apply it because the statute violated the Constitution. In Chief Justice Marshall's famous words, the Court declared: "It is emphatically the province and duty of the judicial department to say what the law is." Now this seemed to put the Court in charge of telling us what the Constitution means. And so *Marbury* is often taken as establishing the claim on the part of the highest court to be the final arbiter of the meaning of the Constitution.

The simple version of the story ends here and ignores a second case from the founding era, a case called *Stuart vs. Laird*, which was decided only a week after *Marbury*. Like Sherlock Holmes' dog that didn't bark, this is a very important decision, even though it did not do very much and spans only two pages of written text.

For the non-lawyers in the room, I will give you some background. Both *Marbury* and *Stuart* grew out of a pitched battle between President John Adams' Federalists and the party of Thomas Jefferson. When Thomas Jefferson won the election of 1800 in a landslide, the outgoing Federalists – who were more enamored with central power than the Jeffersonians were – tried to entrench themselves in the judiciary. Before President Adams left office, the Federalists created a set of new judicial positions to which they appointed political allies right up until the day Thomas Jefferson took over. One such ally was William Marbury, a Georgetown businessman whose commission to be Justice of the Peace in the District of Columbia was signed and sealed in the final days of the outgoing Adams administration but, by mistake, never delivered. When the new administration of President Jefferson took over, it predictably refused to deliver Marbury's commission. And so William Marbury came to the Supreme Court to sue the new Secretary of State, James Madison, for delivery of Marbury's commission. The Court cleverly rejected the plea. The Chief Justice held that Marbury had a right to the commission but that the Court could not order delivery of the commission because the congressional statute providing the Court with jurisdiction over the case was unconstitutional. This was a shrewd way of telling the Jeffersonians that the Federalist judiciary would be there to watch over the Constitution while, in that particular case, not having to order anyone to do anything. It was, in short, a self-enforcing judgment that claimed to put the judiciary in charge of constitutional meaning.

Stuart vs. Laird grew out of the same pitched battle between these two factions. In addition to refusing delivery of Marbury's Commission, the incoming Jeffersonians also abolished a set of judicial offices that the Federalists had created and to which the Federalists had successfully appointed their political allies. *Stuart* raised the question whether the elimination of these positions was constitutional. There were two aspects to this question. The first was whether the Jeffersonians could remove judges simply by eliminating the underlying office instead of impeaching the judges in those offices. The second involved the consequences of that elimination. By eliminating the offices of circuit judges, the Supreme Court Justices had to take up the practice of "riding circuit," that is, to travel around the country in a horse drawn carriage to decide cases in courts of appeals. This might be seen as appointing existing judges to a new judicial office without following the proper appointment procedures. Even more important, it meant that the justices would now have far less time to do Supreme Court business. To insulate this assault on the judiciary, the Jeffersonians also abolished the June 1802 Term of the Supreme Court to delay the Court's ability to hear constitutional challenges to their actions until after the next election. All this was, in one form or another, before the Court in *Stuart vs. Laird*.

Now in *Marbury vs. Madison* Chief Justice John Marshall resists the Jeffersonian assault and writes a magisterial opinion. In *Stuart vs. Laird*, by contrast, Marshall tries in vain behind the scenes to assemble a majority to resist the Jeffersonians again. But after failing to get the votes to strike down the elimination of the circuit judges, Marshall gives in. But here again, he does so cleverly. He recuses himself from that case and thereby condemns the opinion to obscurity.

Marshall recused himself in *Stuart* because he was supposedly an interested party, that is, because the case was an appeal from a decision that Marshall had made when riding circuit. What is interesting, however, is that Marshall was also an interested party in *Marbury vs. Madison* and yet felt no reason to recuse himself in that case. As the well-known story goes, the person who failed to deliver William Marbury's commission was John Marshall's brother, James. And the person who sealed the commissions and was responsible for their delivery was none other than John Marshall himself, still acting in his capacity as Secretary of State during the final days of the Adams Administration (even though the outgoing President had already appointed Marshall Chief Justice of the Supreme Court). John Marshall was therefore as personally involved in *Marbury vs. Madison* as he was in *Stuart vs. Laird*, making his (non)recusal decisions seem rather strategically motivated. They allowed him to

announce the great principle of judicial review in *Marbury* while letting his Associate Justice write a small and quickly forgotten opinion in *Stuart* that gave in to the Jeffersonians.

Reading the two cases together, we see that in the very moment judicial review is founded in the United States, we witness a capitulation of the judiciary to the political branches. The assertion of judicial authority and the accommodation of political power come in the same breath. So it isn't just that the Court decides what the law is; there is, from the beginning, a political dimension to constitutional construction as well.

B. Interpretive Pluralism since the Founding

We can trace this practice of conflict and accommodation throughout American history. Some of these episodes are well known, like the interpretive changes that took place during the New Deal period. Going into the New Deal, the Supreme Court's interpretation of the Commerce Clause, which gives the central government the power to regulate "Commerce … among the several States", was very narrow. The Court had held that the Commerce Clause allowed Congress to regulate only things that moved across state lines, that the clause did not allow Congress to prohibit commerce, that it only allowed Congress to enhance commerce, and that it did not allow Congress to regulate matters that were internal to a state or states. After the Court had struck down several pieces of New Deal legislation, President Franklin D. Roosevelt threatened to "pack the Court", i.e., to create a new judicial position on the Supreme Court for every Supreme Court justice over the age of 70. That, of course, would have given him the power to control a new majority on the Supreme Court. In a famous "switch in time that saves nine", however, the Court subsequently changed its interpretation of the Commerce Clause, and took a position more in line with FDR's legislative program. (There is some question whether the Court was reacting to the court-packing plan but, in any event, the Court changed its reading of the Commerce Clause and the plan was dropped.)

American constitutional scholars have struggled with how to interpret this dynamic of political pressure and judicial interpretation. Was the President's pressure on the Court unconstitutional? Was the Court's change in interpretation a political cop-out? Or should we understand the change in interpretation and the political pressure as an informal constitutional amendment, as Bruce Ackerman has famously argued? In Ackerman's view, a very specific choreographed interaction between the Supreme Court, the political branches, and the American public can create a legitimate change in constitutional meaning – via a "con-

stitutional moment" – that does not undergo all the formal requirements of an amendment. FDR, in this view, took on the Court's narrow interpretation of the Commerce Clause and won repeated confirmation from the American people in elections that highlighted the disputed elements of constitutional understanding.

If we take a step back from the particular interpretation of the New Deal shift, we see that in the United States we have, in any event, a contest between multiple interpreters of the Constitution. Taking a look at the text of the Constitution alone already suggests this. Nowhere does it say that the Supreme Court's interpretation of the Constitution should bind all the other actors in the system. And according to Article 6 of the US Constitution, the President takes an oath of office (as does every legislative, executive, and judicial officer on the federal and state levels of governance) to uphold the Constitution – not an oath to follow what the Supreme Court says the Constitution is.

And so we in the United States may ask who the final arbiter of constitutional meaning is. This is an issue that has stayed with us since the Founding. President George W. Bush, for instance, was much criticized in the press for signing bills into law and including so-called "signing statements", in which he declared that he would not execute the parts of the law he deemed unconstitutional. To be sure, the frequency with which President Bush issued such statements was comparatively high and became the proper focus of concern. But in the view of many constitutional law scholars, regardless of political persuasion, the basic decision to sign a bill but not carry out aspects of the bill that are unconstitutional is an action a President can – and sometimes even should – take to live up to his oath to uphold the Constitution.

The principle that the President has the power to make up his own mind about what the Constitution means is not outlandish. The idea goes back to at least President Andrew Jackson, who famously refused to sign a bill because he thought the object of the bill was unconstitutional. The idea that the President has independent power to interpret the Constitution also animated President Lincoln's refusal to comply with Chief Justice Robert Taney's order to produce a prisoner in a *habeas corpus* proceeding during the Civil War. Lincoln refused, believing that he had done nothing unconstitutional and that the Court was improperly trying to infringe on the President's powers. This, then, is the kind of *institutional pluralism* or multiplicity of institutions claiming final authority to interpret the Constitution that we have in the United States.

Let me give you one more just point of comparison before we proceed. Consider the case of a Kelsenian constitutional court as you have in Germany and Austria. Here, the basic

idea was to create an institution that determines the meaning of the constitution for everyone else within the system. We can imagine them as special tribunals sitting almost outside and above the system, watching over everybody within the system. Although Hans Kelsen suggested that such tribunals would just interpret and apply the law as any other judge would, he nonetheless recognized the special role of these judges and proposed that they be chosen in a special way. For example, some of the judges were to be former politicians, others judges, etc. Once chosen, however, Kelsen proposed to give the constitutional court the final (and exclusive) power to determine the meaning of the constitution for everybody within the system. The US Supreme Court, in short, is in a very different position from this kind of classic constitutional court.

IV. Systems Pluralism, Institutional Pluralism, and the Grammar of Legitimacy

My project, then, is to work through the lack of settlement of final legal authority in the United States and compare it with the lack of settlement of final legal authority in the European Union and elsewhere. Put another way, the comparison is between the vertical competition among systems in the European Union and the horizontal competition among interpretive institutions within a single system in the United States. We can call one kind of competition *systems pluralism* and the other *institutional pluralism* (or, more precisely, *interpretive pluralism*). And the question is, can we learn anything from the comparison beyond the fact that there is pluralism in both of these situations, despite the analytical difference between the two phenomena? I suggest: yes.

First, even though legal hierarchy in the European Union is unsettled and legal hierarchy among the institutions in the United States is unsettled, neither situation creates chaos. Both the European Union and the United States are functioning legal systems. So, the lack of settlement does not produce disorder. Second, the lack of settlement in both situations is an essential characteristic of the legal system. In neither system is the lack of settlement a mistake that we must fix or overcome. In both systems it is a central feature of the system that is here to stay.

Third, and most important, I investigate how this lack of settlement is managed. What I find is that the lack of settlement is not managed by resort to any normative hierarchy that lies beyond the actors. It is managed, instead, in a decentralized way by the actors them-

selves, each appealing to the values of the system(s) of which they form a part. The battles between these different organs are carried out from what you might call an internal perspective. Nobody is trying to turn this into a revolution. On the contrary, every interpreter claims to be the best interpreter of the system we currently have. This was true for Franklin D. Roosevelt, who did not want a new constitution, but a "proper" interpretation of the one we had. Similarly, in the Maastricht decision, the *Bundesverfassungsgericht* did not seek to engineer a revolution. The German judges, too, were trying to make the best of the system – or combination of systems – that they inhabit.

The values that provide the foundation for this competition among multiple actors are those of constitutionalism, by which I mean the idea of *limited collective self-governance*. Put another way, to win accommodation on the part of their rivals, the various actors in this pluralist constellation must present their claim of legal authority as vindicating the idea of limited collective self-governance.

I propose that we can further break this idea down into three constitutive values, which I have called *voice*, *rights*, *and expertise*. In brief, voice is the idea of the relevant political will; rights the idea of individual (or, better, counter-majoritarian) rights; and expertise the idea of knowledge-based governance and instrumental capacity. The first two are rather plausible ingredients of constitutional legitimacy, so let me say a brief word about the third. The idea of expertise captures two things. First, that governance must respond to the world as we understand it. That is, modern liberal governance is the idea of governance based on what you might call "proper knowledge" of the world (as opposed to some fanciful mystical construct of the world). Second, the idea of expertise is that self-governance is not simply about expressing our will or protecting rights but also about getting something done. For example, Fritz Scharpf has talked about this in terms of "output legitimacy"; Ralf Dahrendorf has talked about this when noting that a government that doesn't deliver a certain form of a social stability and economic safety will wind up de-legitimized; and Seymour Lipset suggested a similar focus on satisfying the population's needs long ago as well. The idea of "expertise" in the trilogy of constitutional values seeks to capture these ideas.

These three values – voice, rights, and expertise – constitute what I call a kind of *grammar of legitimacy*. The various institutions locked in battles of pluralism must appeal to a combination of these three values whenever making their claim to authority within a system of modern liberal governance.

This means that the various actors do not simply appeal to power. To be sure, power considerations may not be entirely absent. And sometimes actors are unprincipled. But to

the extent that this is a legal practice – and certainly to the extent that this is presented as a principled contest – the various actors resort to this grammar of legitimacy as a way to make their claims. Perhaps there is an element of hypocrisy in this, but, as Jon Elster said, it is hypocrisy with a "civilizing effect." So if you are a constitutional court, you have to make an argument about why your position is the correct position and why it realizes the values of constitutionalism better than the alternatives you want to reject. Your claim is that your legal position – and your claim to legal authority – somehow vindicates voice, rights, and expertise better than the alternatives proposed by others. Either you represent the more relevant political will or are better at representing the political will that others seek to represent, or you are protecting rights better than the others, or you actually know something about this problem that others do not. And that is why they should listen to you.

Without getting into the taxonomy too much, let me note just briefly that the centrality of these three ideas to the legitimacy of authority is suggested also by the fact that these three values are mutually constitutive. Put another way, you cannot have a functioning claim of rights without some understanding of voice; you cannot have a functioning understanding of voice without drawing on an implicit understanding of expertise and rights; and you cannot make a respectable claim of expertise without having some implicit understanding of rights and voice. One way or another, you need all three to make a legitimate claim to public power.

V. The Practice of Pluralism: Contest and Accommodation

As an empirical matter, I suggest that in looking at systems conflicts and institutional conflicts within systems we see appeals to voice, rights, and expertise. I will give you some examples, although I will limit these to cases in which a voice claim is pitted against a voice claim, an expertise claim is pitted against an expertise claim, and a rights claim is pitted against a rights claim. To be sure, any combination of these three may be pitted against any other combination, but the following should be sufficient to illustrate the basic idea I want to get across. The important point to see is that no single institution of government – in the United States, for example, neither the President nor the Congress nor the Supreme Court – has an exclusive claim to any one of these.

In this sense, the idea of voice, expertise, and rights differs from Montesquieu's functional separation of powers, which assigns each of these claims to a distinct branch of gov-

ernment. Following Montesquieu, then, one might think that the courts protect rights, the Congress vindicates voice, and the President administers based on expertise. Pluralism rejects this idea of neat functional separation of powers. Instead, the idea is that, in principle, each of these institutions can lay claim to vindicating any one of these values. To be sure, one institution might frequently be better at laying claim to one or another of these values, but no institution has an exclusive claim to any one of them. Moreover, a claim of authority can – and often is – based on more than one of these values.

A. Conflict and Accommodation Based in Voice

1. Institutional Pluralism in the United States

Let me give you just a taste of voice-based conflict and accommodation in the United States. You might think that in the United States the Congress always has a superior claim to voice. In a rather simple way, the Congress represents the national political will. The President does too, since he is indirectly elected by the people. But do the federal courts or the Supreme Court? The judiciary has only a remote connection to the electorate and so would not be thought of as representing the political will. (Indeed, that, in a nutshell, is the core of Alexander Bickel's well-worn "counter-majoritarian" difficulty, i.e., the problem that an unelected Court has the power to strike down decisions reached through the majoritarian process in Congress.) But think again. As scholars from Hans Kelsen to Bruce Ackerman have argued, the Supreme Court often – if not indeed always – grounds its claim to authority in voice. The argument is simple. The Court claims to vindicate the more considered will of the people as against the less considered transitory will of the currently constituted political branches. The counter-majoritarian difficulty, then, is really an inter-temporal difficulty with democracy on both sides of the ledger.

You can often see this kind of reasoning at work in the judiciary. For example, a court may narrow down a statute because it may violate, say, international law or limit executive action by reading a statute broadly to incorporate international law. The question is not whether Congress could violate international law if it so chose, but whether Congress's decision to violate international law represents the considered choice of the American people in light of the more general commitment not to be an international outlaw. A court may suggest that Congress in such cases must speak clearly before the Court will read Congress as having intended to violate international law.

Now, of course, sometimes a voice-based claim to authority can actually work against the Court, as it may have done when President Roosevelt threatened to pack the Court. The President claimed to have a mandate from the American people by virtue of having been elected three times and in landslide elections. The President threatened to appoint one new Justice for every Justice over the age of 70, which would have allowed the President to control the political makeup of a majority on the Court. In addition to claiming a popular mandate – i.e., the political backing of the people – for his vision of the Constitution, the President also invoked the idea of "expertise" to support his vision of federal power. The court-packing plan was justified not only by electoral politics, but also by the idea that modern experience and a modern understanding of the needs of governance were lacking on the Court. The Court, so FDR, was in need of younger Justices who were more familiar with the demands of modern governance. His claim, then, was based in voice and expertise. Whether the court-packing plan itself led to the famous "switch in time that saved nine," that is, to the change in Supreme Court interpretation that allowed FDR's New Deal to go forward, is in doubt. Less in doubt, however, is that the Court did change its interpretation at a time when a highly popular President who was invoking the necessities of the day was pushing hard for the Court to change its views.

2. Systems Pluralism in the European Union

Turning to the European Union, you might think that the superior voice-based claim of legitimacy inevitably lies with the member states. After all, they are the ones who have functioning democracies, whereas the European Union still labors under the notorious democratic deficit. And indeed, there is some truth to this description of the state of affairs. When the question concerns voice-based claim of legitimacy, the Union does face a real struggle.

But the idea of voice-based legitimacy need not always cut against the authority of Union. Sometimes, the European Union has a superior claim because it actually represents interests that are left out of the member-state political process. Certain interests, such as those of consumers (as opposed to producers) may be better represented on the EU level than on the Member State level. This is a point that may have general force in the sense that the EU level of politics can at times counteract a certain kind of political capture of the state political process.

Moreover, the EU can also trace a voice-based claim to legitimacy back to the foundational treaties among the Member States. This means that a calculus of voice – i.e., determining whether a particular EU measure or a conflicting Member State measure has the better claim of representing the relevant political will – may sometimes cut in favor of the EU, based on the prior commitment of the Member State to join the EU.

Think, for example, of the European Communities Act of 1972 in the United Kingdom, which basically provides that EU law will be given effect within the United Kingdom. Properly understood, this creates a presumption that the political will to join the European Union in 1972 was formed on a deeper level than any decision in the course of ordinary legislation that winds up creating a conflict with EU law after that. As a result, the strong presumption is that current law is not to be taken as a considered rejection of European Union law. Nonetheless, the British Parliament could tomorrow abolish the European Communities Act of 1972. What is more, the UK Parliament might even enact a particular substantive law (say, about selling goods only in imperial measurements) that directly conflicts with EU law and potentially prevail in a British court, as long as the law explicitly sought to contradict EU law. To be sure, such a law would be difficult to maintain alongside continued UK membership, but the considerations that would govern the applicability of such a law in a UK court would, at least in part, depend on an account of the proper domestic voice. To oversimplify, the Parliament is deemed to have accepted EU law unless it raises a rather specific and express objection and that objection is either compatible with continued membership in the European Union or itself amounts to a considered rejection of European Union law altogether.

An interesting example in this regard is the European Arrest Warrant. It was passed hastily in the wake of 9/11 after years of general resistance to the idea. Soon after being passed, it ran into difficulties with Member States resisting the implementation of the EAW. Poland's Constitutional Court held that certain aspects of the European Arrest Warrant – especially those pertaining to the arrest of Polish citizens – were unconstitutional under Poland's constitution as then written. The constitutional court gave Parliament 18 months to amend the constitution. The Polish parliament did so, but did not entirely eliminate all barriers to the implementation of the EAW. Incompatibilities between Polish constitutional law and the EAW remain. But now, the implementation of the EAW faces a considered choice on the part of the Polish constitutional legislature to resist the mandates of EU law. This now presents a real problem for the European Union. And it would be surprising if the European Commission, which recently was given the power to bring enforcement ac-

tions in this area, would pursue Poland's infringement. At this point in time, the conflict between the EAW and Poland's Constitution is not accidental, but has the force of a considered political decision on the part of Poland's parliament. In such a case, the European Union has a very thin basis in voice to support European law as against national law. To be sure, from the perspective of Union law taken in isolation, the EAW is as valid as it ever was. But the time may be ripe for inter-systemic accommodation.

B. Conflict and Accommodation Based in Expertise

Expertise-based conflict and accommodation are more frequently hidden than the conflict and accommodation in the other domains are. And I shall only sketch the idea out briefly here. Fleshing this out more will be one of the tasks ahead in carrying this project further to its conclusion. But let me nonetheless give you an idea of what I mean.

1. Systems Pluralism in the European Union

In Europe the basic argument from expertise is an old one that indeed demands little elaboration. The original vision of European authority was almost entirely based in expertise. Jean Monnet's idea was that of an expert bureaucracy in charge of technocratic decisions that would enhance the welfare of all Europeans. To be sure, there was some idea that the "output" of European integration would be appreciated (and one might even say, ratified) *ex post* by the public. But the legitimacy of the action as conceived of, and presented, for example, in the Schumann declaration, was independently legitimate because of the actual output it would deliver. There was little voice-based input into the plan or its initial execution. Jean Monnet's dirigiste vision, remember, originally left out any sort of parliament. Monnet was not a supporter of the Assembly, which only much later turned into the European Parliament and today is a co-equal legislative body. Although it has become increasingly problematic as time goes on, it was an expertise-based claim to legitimacy that originally supported much of the European claim to authority.

2. Institutional Pluralism in the United States

In the United States, we also see expertise-based claims to constitutional authority in the standoff between the various institutions and branches. Presidential claims of authority in

matters of foreign defense and security have often been based in expertise. This does not mean that the executive branch always wins on these issues, as some of the recent Supreme Court decisions surrounding the detention and trial of enemy combatants have shown. Sometimes the Judiciary (and Congress) will defer to the President and sometimes they will not. But the terms of the deferral, where it occurs, is often that in foreign affairs the courts lack the expertise of the President and the political branches – even in questions that have constitutional implications.

Even in more mundane areas, such as commercial regulation, the Court will often defer to the political branches in part because it does not believe that it, the Court, has the tools to answer the constitutional question with any precision. In this vein, the Court will hold, for example, that as long as a particular piece of economic legislation is within the ballpark of acceptability, judges will not closely examine the degree of the law's necessity for the regulation of interstate commerce. The Court will leave this more precise judgment up to the political branches. This means the political branches may well conclude that a given Act is not within the federal government's constitutional power (as President Jackson did in the case of the Bank), even though the Court would uphold the Act if it were passed, signed, and enforced.

Regardless whether the President, the Congress, or the Court wins the battle of authority based in expertise, it is important to see that nobody directs these institutions from above in what to do. They reach these accommodations on their own. And they base these accommodations not on sheer power considerations, but on considerations of constitutional governance. That is, they base these accommodations – or at least they justify them publicly as having been reached – on a relative assessment of voice and, in this case, expertise as well.

C. Conflict and Accommodation Based in Rights

Courts are traditionally conceived of as playing a special role in the protection of rights. This means that any type of accommodation of competing claims to rights protection seems to strike at the very heart of the judicial enterprise. And yet, we witness interesting elements of rights accommodation in both the United States and the European Union.

1. Institutional Pluralism in the United States

In the United States and in many other systems you might think that rights mean courts. You might think that courts enforce rights against the expression of an overbearing majority in parliament. Think again. The Supreme Court of the United States gave us the *Dred Scott* decision that said a freed slave could never be a citizen of the United States. The Supreme Court of the United States upheld racial segregation during the Reconstruction era. And the Supreme Court of the United States – in an opinion written by the great Justice Oliver Wendell Holmes – told black citizens of Alabama long after the end of the Civil War that even though the state prohibited African-Americans from voting, there was nothing the judiciary could do about it.

When did the Court begin enforcing rights? Judicial enforcement of equal protection rights of minorities was but a trickle in the early 20th century. When the judiciary stepped up in earnest to protect racial minorities, the executive branch had already desegregated the armed forces, and Congress was not long behind. This is not to suggest that the Court did not push ahead of the political branches when it struck down segregation in public schools in *Brown vs. Board of Education* in 1954. But the Court's leadership in racial equality had been sorely lacking for nearly 75 years.

Congress knew better than to rely on the Courts alone. The Civil War Amendments ending slavery and providing guarantees of citizenship, equal protection, due process, and voting rights granted specific enforcement powers to Congress – not the Courts. The final clause in each of the 13th, 14th, and 15th Amendments says, "The Congress shall have power to enforce this article by appropriate legislation." This was, in part, a reaction to the *Dred Scott* decision, which the 14th Amendment was, among other things, designed to overturn. And, indeed, the distrust of the Supreme Court implicit in these amendments was initially born out. When Congress passed civil rights legislation shortly after the Civil War, the Court struck down most of it, arguing that Congress had overstepped its powers.

It was only after Congress again passed historic measures in 1964 (the Civil Rights Act) and 1965 (the Voting Rights Act) in the wake of the national civil rights movement that the Court let the measures stand. And here, the Court indeed began to grant to Congress a wide berth. In a series of cases beginning in the mid-1960s, the Supreme Court expressly recognized the power of Congress to protect rights more expansively than the Supreme Court itself did. For example, the Supreme Court upheld provisions of the Voting Rights Act of 1965 that prohibited the use of literacy tests for voters. Even though the Court had previ-

ously said that literacy tests did not themselves violate the Constitution, the Court said that Congress could, in its judgment, prohibit literacy tests in an effort to protect constitutional rights.

More recently – in the past 15 years – the Court has sought to cut down Congress' discretion. In more recent cases, said it has ruled that the Congress' enforcement power under the Civil Rights Amendments only allows Congress to protect those rights that the Court itself has found to exist. More specifically, the Court has said it will examine whether Congress' legislation is congruent and proportional to protecting or remedying a constitutional violation as determined by the Court. In short, Congress today – at least according to the Court – has the power only to protect those rights that the Court says are rights. No more and no less.

There is a highly relevant twist to this latest doctrinal development. The Court has not (yet) touched the Voting Rights Act of 1965 or the Civil Rights Act of 1964, even though both of these laws have provisions that may be questionable under the Court's current doctrine. It seems that the Court has been exceptionally cautious in approaching the constitutionality of these two statutes, in part, because these statutes express deep national commitments to civil rights. Indeed, last year, when the question of the continued constitutionality of a particular section of the Voting Rights Act came before the Court, the judges expressed their concern about the law but made the case go away by interpreting the statute in an unusually inventive manner.

What we see here, then, is a dialogue between the judiciary and the Congress. In this most recent episode, the Court has hesitated to strike down a law protecting rights in part because the law seems to have the full backing of Congress. And yet, the Court has not simply given in. It has put Congress on the spot by signaling that the law better be fixed (or, perhaps, reaffirmed in a more considered judgment than has happened in the past) or else it will be struck down next time around. This, then, is not judicial supremacy but hard, inter-institutional dialogue as voice- and rights-based claims come together in a conflict over constitutional interpretation.

2. Systems Pluralism in the European Union

Let us turn to rights in the European Union. The authority of the European Union has been challenged by the Member States not only based on voice, not only based on expertise, but also based on rights. Indeed, rights have figured most prominently in the battle of authority

between the European Union and the Member States. As many of you know, in the 1974 *Solange I* decision, the German *Bundesverfassungsgericht* told the ECJ that the German court would protect German constitutional rights against European infringement as long as there was no rights protection on the European level of governance. In response, the European Court of Justice "found" rights guarantees in the European legal order itself and began enforcing these rights against European law. Twelve years later, the *Bundesverfassungsgericht* acknowledged this development in *Solange II* and stepped back, allowing the European Court of Justice to enforce rights as long as the general level of rights protection on the European level remained acceptable.

Notice, however, that in a rights-based clash of authority between legal systems, both sides can invoke rights. This means that at some future point in time, the European Court of Justice might say that the Member States are insufficiently rights-protective. Given that the scope of European Union law is rather broad today, the supervisory reach of the European Court of Justice can be vast. And perhaps the European Court of Justice will announce that it, too, will hold back on exploiting its full reach only "as long as" the Member States do an adequate job of rights protection generally. This kind of "reverse-Solange" move can be seen in some of the decisions of Advocate General Miguel Maduro, for example. So here, too, we come across rights as the last element of this grammar of legitimacy within which these various actors argue about their various claims to authority.

VI. Caveat and Conclusion

Before closing, let me add one other point about the comparison I have drawn here today. I have juxtaposed two situations. On the one hand, I have provided an idealized description of the US federal system in which there is no pluralism vertically. And I have provided an idealized description of the German situation of separation of powers in which there seems to be no pluralism horizontally. I then contrasted each of these with a situation in which there is vertical *systems pluralism* (the relationship between the European Union and its Member States) and horizontal *institutional pluralism* (the relationship between the President, the Congress, and the Supreme Court in the United States). Before closing let me just acknowledge that hierarchy between central and component state legal systems might not always be (or have been) as settled as I made it out to be today. And, perhaps more interesting, I would like to suggest that the constitutional monopoly of the German *Bundesverfas-*

sungsgericht over constitutional interpretation in Germany might also be less well established than is generally taken to be the case. On the latter point, consider only the authority of the *BVG* to bind all other actors within the system to its vision of the *Grundgesetz*. Where do we find this provision? As most of you will know, that provision is not in the *Grundgesetz* itself, but in an ordinary law, the *Bundesverfassungsgerichtsgesetz* paragraph 31. So it is ultimately the German parliament that elevates the *Bundesverfassungsgericht* to the position of binding all other actors within the system. The parliament could, as a formal matter, revoke this provision, and indeed during the Adenauer era the government and its parliamentary majority threatened to make serious inroads into the German high court's jurisdiction because the government was displeased with that court's legal interpretation. My point in this closing qualification is simply to say that things are perhaps even more complicated than I suggested with my background assumption that in the United States we have a complete vertical hierarchy and that in Germany there is a complete hierarchy among the various branches of government when it comes to constitutional interpretation. In short, there may be more pluralism to constitutional law than initially meets the eye, here as well. Indeed, some form of pluralism might even be essential to all constitutional systems. But that is a much broader claim than even I am willing to defend right here right now.

So let me summarize. If we compare the European Union to the United States, we learn something about pluralism. We learn that pluralism is an essential feature of these various systems. We learn that it does not lead to chaos but represents a system of order. We learn that the system of order is managed in a decentralized manner. And that it is managed by appeal to the fundamental values of constitutionalism. If we want to return to talking about global governance in the register of constitutionalism, we might imagine this not in a rigidly hierarchical way. Instead, we might begin by imagining here, too, a plural decentralized construct in which multiple actors make competing claims to legal authority and that these competing claims will be managed by contest and accommodation among the various actors claiming to vindicate the values of voice, expertise, and rights.

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This lecture presented ideas that are discussed in a more formal manner and with appropriate references in the following publications:

Halberstam, Daniel. "Local, Global, and Plural Constitutionalism: Europe Meets the World." In *The Worlds of European Constitutionalism*, edited by Grainne de Burca and Joseph Weiler. Cambridge Univ. Press, forthcoming 2010, available at: http://ssrn.com/abstract=1521016

– "The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order." (with Eric Stein). *Common Market Law Review* 46 (2009), available at: http://ssrn.com/abstract=1312082

– "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 Univ. Press, 2009, available at: http://ssrn.com/abstract=1147769