

WALTER HALLSTEIN-INSTITUT FÜR EUROPÄISCHES VERFASSUNGSRECHT



FORUM CONSTITUTIONIS EUROPAE

FCE 12/09

**CONSTITUTIONAL CONFLICT.
THE STRUCTURE OF AUTHORITY IN EUROPE
AND THE UNITED STATES**

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**Vortrag an der Humboldt-Universität zu Berlin
am 09. Dezember 2010**

- ES GILT DAS GESPROCHENE WORT -

*Das Forum Constitutionis Europae ist eine gemeinsame Veranstaltung des
Walter Hallstein-Instituts und der Robert Bosch Stiftung.*

Constitutional Conflict: The Structure of Authority in Europe and America*

Thank you for inviting me to speak in the *Forum Constitutionis Europae*, a lecture series that has earned a reputation throughout Europe and beyond, and thank you for this kind and generous introduction.

I. Introduction

I shall begin with the motivation for my talk, which is that we are trying to understand global governance. As a general matter, we feel a need for some kind of legal organization beyond the state. At the same time, however, this legal organization challenges the power of the state without replacing the state with much of an organization of its own. Global governance is fragmented along a variety of dimensions. Perhaps most important we have a fundamental conflict between what you might call the primacy of international law versus that of domestic constitutional law. The international legal order considers itself foundationally constitutive of all legal order, which means that the state is an entity validated by the international legal order and not the other way around. At the same time, however, domestic legal orders at times see international law as a kind of product of domestic law or a product of collective state action. This is sometimes captured in the idea of international law being based on state consent. Without getting into the details of these conflicting views, we can say that we have a fundamental conflict between the international and domestic grounding of law. Let us call this a *systems conflict*.

In addition to the systems conflict between domestic and international legal orders, we also have a conflict among different “systems” at the international level. Sure, we have Article 103 of the UN treaty, which tells us that UN law is supreme over other treaty obligations. But that provision does not comprehensively solve conflicts, such as those between the WTO, the UN, and the EU.

A second kind of fragmentation appears within each system and relates to the problem of interpretation. By this I mean the following: very few systems have a rationally organized set of interpreters supervised by a final interpretive authority. In most of international law, the interpretation and application of law – not to speak of the enforcement of law – is fragmented and dispersed. And this leads to a pervasive *interpretive conflict* among different *institutions* within even a single system of law.

* What follows was not originally composed as a written text. It is a lightly edited transcript of a public lecture given at the Humboldt University in the *Forum Constitutionis Europae*, on December 9, 2009.

We all come to this, and the host of this lecture series, Ingolf Pernice, also comes to this, with the basic question: how should we understand this global legal order? So far, there have been two principal responses. One has been to insist that local constitutionalism is all there is. Our local constitution, on this view, grounds all law. The other response is to turn it all around and say with the early Hans Kelsen, that the global legal order grounds all law. Now Ingolf Pernice's work is part of a movement towards a third way, that is, toward the conclusion that neither the local nor the global answer is correct. What we have instead is a system, in which we have multiple claims of authority that coexist alongside one another. Ingolf Pernice has developed the idea of a "Verfassungsverbund" whereas others, including myself, have tried to talk about constitutional coexistence in terms of *pluralism*.

This, then, is the motivation for my comparison between the EU and the US. I want to attend to the US / EU comparison to understand pluralism better. My basic point is that pluralism is not just an aspect of the international legal order. It is also an aspect of the European Union legal order. Perhaps more interesting, pluralism is also an aspect of an ordinary domestic constitutional legal order such as the United States. So, in short, what I want to show you today and what I hope can serve as a point of departure for the debate about global governance, is that pluralism is essential to many constitutional systems – perhaps more than first meets the eye.

In particular, I will make three points. First, that pluralism in constitutional law as I will describe it is not a mistake. It is not a defect. It is not a problem. Instead, it is an essential characteristic of each of these systems. Second, pluralism does not lead to chaos or disorder. Pluralism constitutes a system of order. And third, this order is managed by the various actors in a decentralized practice of contestation and accommodation by reference to constitutional values. This means that in some ways pluralism brings out the values of constitutionalism. Put another way, by examining the interactions of the various institutions or levels in a pluralist system we can see what constitutionalism itself is all about.

II. A Comparative Analysis of Pluralism

Let us, then, compare the European Union and the United States. If you start with the ordinary comparison, which many have made, you might say the European Union is a federation, a federal-type system and the United States is a federation, a federal-type system. Franz Mayer (who is the audience today), for example, has written about that and others including myself have written on that comparison. And for purposes of those studies the comparison was valid. But if you want to consider pluralism, that comparison does not work as well. At least it doesn't quite work today anymore.

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 member states insisting that the member state legal orders are the true foundation of the European legal order. You have a profound systems conflict that leads to a stand off between the European court of justice and member state constitutional courts. We see this in the *Maastricht* opinion and the *Lisbon* decision, as well as in *Solange 1* and *Solange 2*. We'll talk about these decisions in greater detail later on. But for now all we need to note is that these are stand offs between the different legal systems operating at the various levels of governance. In the US we no longer have this kind of system conflict; at least not since the Civil War. We can talk about that in greater detail later on, if you like, as well. But let's just say that the vertical relationship between the federal government and the states in the United States is hierarchically ordered today. No State today would suggest that a federal law that everyone agreed was valid under the United States constitution could be invalid or nonapplicable within a certain state simply because of a conflict with state constitutional law.

If that comparison with the United States does not work in terms 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.

A. 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 things are a bit more complicate than that.

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

As is well known, the US Supreme Court began the 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: "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 constitution meaning.

The simple 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*. This is a very important decision, even though it is only 2 pages long.

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 land slide, they called it the Revolution of 1800 and the outgoing administration did not like it one bit. The Federalists – who were more enamored with central power than the Jeffersonians – 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 business man 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 never delivered. They simply forgot to deliver Marbury's commission. When the new administration of President Jefferson took over, they predictably refused to deliver Marbury's commission. And so 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 basically said "Yes, Marbury has a right to the commission but we can't order the delivery of the commission, because the congressional statute that gives us jurisdiction over this case is unconstitutional." This was a very clever 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 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. Not only did the Jeffersonians not deliver the commission to William Marbury, they also abolished a set of judicial offices that the Federalists had created and to which the Federalists had appointed their political allies. And so the question was whether the elimination of these positions was constitutional. One question was whether the Jeffersonians could remove judges by eliminating the underlying office instead of impeaching the judges in those offices. The answer to this question was (and is) probably that the underlying office can indeed be eliminated consistently with the Constitution (at least if you don't simply recreate the office the next day in an effort to allow for the appointment of new judges to what is essentially the same office). So that was probably not a violation of the judicial tenure provisions of the Constitution. But there was another problem with the elimination of judicial offices. By eliminating the offices of circuit judges, the Supreme Court justice 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. To hear ordinary appeals cases meant, of course, that they would

have less time to do Supreme Court business. Now this was a real assault on the Supreme Court of the United States. And the question was again, “Is this constitutional?” These questions, in one form or another, were before the Court in *Stuart v. Laird*.

Now in *Marbury vs. Madison* Chief Justice John Marshall has the votes to resist 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, what does Marshall do? He recuses himself from that case and thereby condemns the opinion to obscurity.

Marshall recused himself in *Stuart* because he was 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. Why was Marshall an interested party in *Marbury*? Because 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 strategic. 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* giving in to the Jeffersonians.

So in the very moment that judicial review is founded in the United States, we find a capitulation by the judiciary to the political branch. We find, as it were, both the assertion of judicial authority and the accommodation of political power in the same breath. It isn’t just that the Court decides what the law. There is a political dimension to constitutional construction as well.

2. Interpretive Pluralism since the Founding

We can trace this practice of conflict and accommodation throughout American history. Some of these episodes are well known, as in the interpretive change during the New Deal period. Here, the Supreme Court of the United States had said that the Commerce Clause, which gives the central government the power to regulate commerce among the several states, was a very narrow clause only allowing Congress to regulate 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 state. This view was incompatible with President Roosevelt's New Deal response to the Depression. So what does Franklin D. Roosevelt do? He threatens to create a new judicial position on the Supreme Court (allowing him to appoint a new Supreme Court justice) 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 and one that would agree with him on what the Constitution means. In a famous "switch in time that saves nine," however, the Court subsequently changes its interpretation of the Commerce Clause, and takes a position that is more in line with FDR's legislative program. There is some question as to whether the Court was specifically reacting to the court packing plan, but, in any event, the plan is dropped.

American constitutional scholars have struggled with how to interpret this dynamic. 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 certain choreographed interaction between the Supreme Court, the political branches, and the American public can create a legitimate change in constitutional meaning – via a "constitutional moment" – that does not undergo all the formal requirements of an amendment. FDR, on this view, took on the Court's narrow interpretation of the Commerce Clause and won repeated confirmation from the American people for his view.

If we take a step back, we see that in the United States we have a contest between multiple interpreters of the Constitution. Just taking a look at the text of the Constitution 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 U.S. Constitution, the President takes an oath of office (as does every legislative, executive, and judicial officer at the federal and state level of governance) to uphold the Constitution – not an oath to follow what the Supreme Court tells you the Constitution is.

And so we may ask in the United States: who is the final arbiter of constitutional meaning? Now George Bush got into much trouble for signing bills into law and including so-called "signing statements," in which he declared that he would not execute those parts of the law that he deemed unconstitutional. He basically said: "I am signing this congressional law but I am making an exception and I am warning you that I am going to take exception to some parts and that I might not execute the statute in the way Congress wants." Now the frequency with which the President issued such statements was rather high and became the proper focus of concern. But in my view (and in the view of many constitutional law scholars regardless of political persuasion) he was doing something that, in principal, was consistent – even required – by 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 of the President's independent power to interpret the Constitution also animated President Lincoln's refusal to show up in court when Chief Justice Robert Taney ordered the President to produce a prisoner in a *habeas corpus* proceeding. President 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 they 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.

B. 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. 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 their clear analytical difference? I suggest, yes.

First, even though we have unsettled legal hierarchy in the European Union and we have unsettled legal hierarchy among the institutions in the United States, neither situation creates chaos. The European Union works just fine as it is, at least in terms of the preservation of the

rule of law and reasonable certainty about the law. So, too, in the United States. Putting criticism about Guantanamo aside, the United States is a functioning legal order despite the lack of settlement regarding the final interpretive authority. 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.

How is this lack of settlement managed? This brings me to my third point: the lack of settlement is managed not by resort to any normative hierarchy that lies beyond the actors. It is managed, instead, in a decentralized way by the actors themselves, 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. To 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.

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, in order to win the 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 is 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. Fritz Scharpf has talked about this in terms of “output legitimacy.” Ralf Dahrendorf has talked about this as well by noting that a government that doesn’t deliver a certain form of a social stability and economic safety will wind up de-legitimized. Seymour Lipset suggested something similar 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 appeal 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 a kind of 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, why it realizes the values of constitutionalism better than the alternatives you want to reject. Your claim is that your interpretation – or your claim to legal authority – somehow vindicates voice, rights, and expertise better than the alternatives proposed by the others. Either you represent the more relevant political will or you 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. What I mean is briefly this: you cannot have a functioning claim of rights without some understanding of voice; you cannot have an 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 in order to make out a legitimate claim of public power.

III. The Practice of Pluralism: Contest and Accommodation

As an empirical matter, I suggest that in looking at systems conflicts and interpretive conflicts we see appeals to voice, rights and expertise. I will give you some examples, although I will limit them 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. Of course you can have any combination of these three 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 anyone of these. In this sense the idea of voice, expertise, and rights differs from

Montesquieu's functional separation of powers, which assigns each on one of these claims to a distinct branch of government. 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 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 famous 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 Bruce Ackerman (and others too) 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 American people as against the less considered transitory will of the currently constituted political branches. (Hans Kelsen, by the way, made a very similar argument.) 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, the Court will frequently narrow down a statute because it may violate, say, international law. The question is not whether Congress could violate international law if it wanted, 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. The Court will 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 essentially claimed that he had a mandate from the American people to vindicate his interpretation of the Constitution as against the Court's. 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 indeed some truth to this description of the state of affairs. So when the question concerns a voice-based claim of legitimacy, the Union faces a struggle.

But the idea of voice-based legitimacy does 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 at the EU level than at the Member State level. More generally, 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 taken at a deeper level than any decision in the course of ordinary legislation to create a conflict with EU law after that. Thus, as a general matter, no current law should be taken as a considered rejection of European Union law. Nonetheless, the British Parliament could tomorrow abolish the European Communities Act of 1972. Also, the UK Parliament could also tomorrow enact a substantive law (say, about selling goods only in imperial measurements) that conflicts with EU law while appending a clause that states: “This law shall be in effect notwithstanding the European Communities Act of 1972 or anything in EU law to the contrary.”

So, you see here that the European Communities Act as well as the general practice of the UK in dealing with the European Union is based on a certain calculus of voice. That is, as a general matter, the Parliament is deemed to have accepted EU law unless it raises a rather specific and express objection.

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 the Polish 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 actions in this area, would now 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

1. Systems Pluralism in the European Union

In Europe the argument from expertise is an old one that demands little elaboration. Indeed, the original vision of European authority was 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. Jean Monnet's dirigiste vision, remember, originally left out any sort of parliament. Monnet originally opposed even 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 stand-off between the various institutions and branches. President George Bush's claim in foreign defense and security has been based in expertise. This does not mean that the executive branch always wins on these issues, as recent cases 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. And so the Court will say, as long as the regulation is within the ballpark of acceptability (as long as we can imagine some rational basis on which this regulation makes sense) we will not ask whether the regulation is in fact necessary. The more precise judgment is up to the political branches. It is a kind of political question, which 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 the accommodation 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, expertise and rights.

C. Conflict and Accommodation Based in Rights

1. Institutional Pluralism in the United States

Let us, then, finally turn to rights. Again, in the United States and in many other systems you might think that rights means courts. You might think that courts enforce rights against the expression of the majority will in parliament. Think again. Who failed year after year, decade after decade in the United States in enforcing rights? The Supreme Court of the United States. Who 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. Who upheld segregation during the Reconstruction era in the United States? The Supreme Court of the United States. And it was the judges of that Court - in an opinion written by the great Justice Oliver Wendell Holmes – who told black citizens of Alabama long after the Civil War that even though the state prohibited them from voting because of their race, 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 sort of a trickle in the early 20th century. The judiciary began to step in seriously to protect civil rights in earnest after the executive branch had already disaggregated the armed forces and not too long before the federal political branches themselves were moving toward protecting civil rights as well. 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 v. Board of Education* in 1954. But the Court's leadership in rights had been sorely lacking for just about 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 the 13th, 14th, and 15th Amendments each says that “The Congress shall have power to enforce this article by appropriate legislation.” After the *Dred Scott* decision which predated – and likely contributed to – the Civil War, the Congress had reason to distrust the Supreme Court as a guarantor of civil rights. And so the Amendments ensure that Congress has specific enforcement powers regarding rights.

When Congress did pass civil rights legislation pursuant to these Amendments shortly after the Civil War, the Court nevertheless struck down most of it, arguing that Congress had overstepped its powers.

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 and, this time, the Court let the measures stand. Indeed, in a series of cases beginning in the mid-1960s, the Supreme Court expressly recognized the power of Congress to interpret those provisions 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 previously 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 – say in the past 15 years – the Court has cut down on Congress’s discretion. More recent cases have said that the Congress’s enforcement power under the Civil Rights Amendments only allows Congress to protect those rights that the Court itself has found to exist. Moreover, the Court has said it will examine whether Congress’s legislation is congruent and proportional to protecting or remedying a constitutional violation as determined by the Court. In short, Congress today – according to the Court – has the power only to protect those rights that we say are rights. No more and no less.

Notice, however, one thing in this latest doctrinal twist. The Court has not (yet) touched the Voting Rights 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. The Court has not touched these two statutes, in part, it seems, because – for the most part – they express a deep national commitment to a certain vision of 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 deep concern about the law but made the case go away by interpreting the statute in an inventive way.

What we see here, then, is a dialogue between the judiciary and the Congress. The Court has hesitated to strike down a law protecting rights that has the full backing of Congress, but is putting Congress on the spot to fix or reaffirm (in a considered judgment as opposed to in routine manner) the Congress’s continued support of the statutory regime. It is, then, a hard dialogue about rights protection under the Constitution. We have, then, voice and rights based claims coming together in the conflict between the Congress and the Supreme Court over the interpretation of the Bill of Rights.

2. Systems Pluralism in the European Union

Let us turn to rights in the European Union? The authority of the European Union was challenged by the Member States not only based on voice, not only based on expertise, but also based on rights. Rights figured 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 at 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 as 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 at the European level remained acceptable.

Notice, however, that in a rights-based clash of authority between legal systems, both sides might invoke rights. This means that the European Court of Justice might say, at some future point in time, 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 again we come across rights as the last element of this grammar of legitimacy to which these various actors appeal in managing, in a decentralized way, their various claims to authority.

IV. 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 United States). Before closing let me just acknowledge that hierarchy between central and component state legal systems might not always 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 *Bundesverfassungsgericht* over constitutional interpretation in Germany might be less well established as 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 revoke this provision, and indeed during the Adenauer era the government (and parliament) threatened to make serious inroads on the Court’s jurisdiction because the government was displeased with the court legal interpretation. My point in this closing qualification is simply to say that things are perhaps even more complicated than I

suggested at first by saying that in the US 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 first meets the eye. 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 recap. 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 claims to legal authority and to vindicating the values of voice, expertise and rights.

Thank you for your attention.

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

Daniel Halberstam, *Local, Global, and Plural Constitutionalism: Europe Meets the World*, in Grainne de Burca and Joseph Weiler, eds., *The Worlds of European Constitutionalism* (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*, 46 *Common Market Law Review* 13 (2009) (with Eric Stein), available at: <http://ssrn.com/abstract=1312082>

_____, *Constitutional Heterarchy: The Centrality of Conflict in the United States and Europe*, in Jeff Dunoff and Joel Trachtman, eds., *Ruling the World? Constitutionalism, International Law, and Global Government* (Cambridge Univ. Press, 2009), available at: <http://ssrn.com/abstract=1147769>