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11. Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States

DANIEL HALBERSTAM

I. Introduction

In the debates about whether to take constitutionalism beyond the state, the European Union invariably looms large. One element, in particular, that invites scholars to grapple with the analogy between the European Union and global governance is the idea of legal pluralism. Just as the European legal order is based on competing claims of ultimate legal authority among the European Union and its member states, so, too, the global legal order, to the extent that we can speak of one, lacks a singular, uncontested hierarchy among its various parts. To be sure, some have argued that the UN Charter provides for a basic ordering of the international legal system akin to a constitutional charter.[1] Others urge us to view the World Trade Organization as the foundation for global constitutional order.[2] And yet legal and institutional fragmentation among the various regimes in the international arena broadly persists, as in the unsettled relationship among, say, trade, environmental, and human rights regimes.[3] Moreover, with regard to the basic normative hierarchy as between domestic and international legal orders, the old debate

[1] *E.g.*, Bardo Fassbender, *The United Nations Charter as Constitution of International Community*, 36 COLUM. J. TRANSNAT'L L. 529 (1998).

[2] *E.g.*, Ernst-Ulrich Petersmann, *The WTO Constitution and Human Rights*, 3 J. INT'L ECON. L. 19 (2000); Ernst-Ulrich Petersmann, *How to Reform the UN System? Constitutionalism, International Law and International Organizations*, 10 LEIDEN J. INT'L L. 421 (1997).

[3] *E.g.*, Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th Sess., Int'l Law Comm'n (2006).

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between monism and dualism has run its course and the practical result is a tie. The international legal order claims autonomy from, and authority over, the state, whereas the state, in turn, claims primacy in the creation, direction, and implementation of international law.

With regard to the European Union itself, some take the lack of conclusive ordering as a sign of the absence of constitutionalism. Constitutionalism, for such scholars, depends on the existence of either a new *Grundnorm* or a fully fledged demos, or both.[4] Constitutional skeptics believe that, even in the European Union, talk of constitutionalism (whether invoked innocently or deployed strategically) is a solecism that taps into an understanding of political community that does not (yet) exist; ignores the quintessentially intergovernmental character of the political enterprise; or is incompatible with the general lack of hierarchy, order, and grand settlement that currently mark the Union.[5] Many scholars are skeptical about global constitutionalism for similar reasons.[6]

Those who pursue a constitutional understanding of the Union, however, have done so despite persistent discontinuities between traditional state-based constitutional systems and the project of European integration. A growing number of European constitutionalists have embraced the idea of constitutional pluralism, that is, the idea of competing claims of constitutional authority within a single system of governance.[7] Broadening their inquiry further, scholars have begun to consider pluralism within the European Union as a model from which to glean more general principles applicable to pluralism and constitutionalism elsewhere.[8] If we can find constitutionalism within the pluralist system of the European Union, so the argument goes, perhaps we can find constitutionalism within the international legal system as well.

This chapter takes a fresh look at constitutionalism and pluralism by bringing heterarchy home. In so doing, it explores a comparison that has been uniformly overlooked in the scholarly literature. This chapter examines the similarities between the pluralism that lies at the core of European constitutionalism and aspects of pluralism in U.S. constitutional practice. The

4 *E.g.*, Trevor C. Hartley, *International Law and the Law of the European Union – A Reassessment.* 72 Brit. Yb. Int'l L. 1 (2001) (J. Crawford and V. Lowe eds., 2002).

5 *See* Dieter Grimm, *Integration by Constitution*, 3 Int'l J. Const. L. 193, 208 (2005); Andrew Moravcsik, *In Defense of the "Democratic Deficit": Reassessing Legitimacy in the European Union*, 4 J. Common Mkt. Stud. 603 (2002).

6 *See, e.g.*, Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17 Eur. J. Int'l L. 647 (2006).

7 The classic exposition of the idea is in Neil MacCormick, Questioning Sovereignty (1999); Neil Walker, *The Idea of Constitutional Pluralism*, 65 Mod. L. Rev. 317 (2002).

8 *See, e.g.*, Mathias Kumm, Miguel Maduro, and Neil Walker, in this volume.

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conflicts that are the focus of this chapter are not the pervasive background of social and cultural contestation that scholars such as James Tully have highlighted.[9] Nor are they the conflict of ordinary politics in Max Weber's felicitous turn of phrase.[10] Instead, this chapter focuses on concrete institutional and intergovernmental contestation in times of deep disagreement about final legal authority within constitutional systems.

By investigating the parallels of constitutional conflict in the United States and the European Union, this chapter exposes and explores the centrality of conflict in the constitutional operation of each system. With regard to these two systems, the chapter makes the following three claims. First, in both systems, important questions of final legal authority remain unsettled. This lack of settlement is neither a defect nor a temporary inconvenience but, instead, forms an essential characteristic of each system. Second, in both systems, this absence of hierarchy of legal authority does not lead to chaos but constitutes a system of order. This nonhierarchical order – call it heterarchy – reflects the spontaneous and decentralized mutual accommodation among the various constitutional actors. Third, the management of constitutional conflict and the resulting accommodation turn on what I claim are the three primary values of constitutionalism: voice, expertise, and rights.

Reaching beyond these two systems, the comparative inquiry pursued here helps answer what may be the most pressing question for those who seek to understand global governance in the language of constitutionalism. The question has repeatedly been asked: what can the idea of constitutionalism add to governance beyond the state, other than perhaps a mistake in translation?[11] What emerges from the proposed comparative analysis is a glimpse of the answer. By examining constitutionalism in the crucible of contestation in these two very different systems, we see what constitutionalism means. The comparison reveals that constitutionalism does not depend on traditional hierarchy among systems or interpretive institutions. Instead, constitutionalism can be realized within a system of heterarchy. Constitutionalism stands for a project of governance in which actors endeavor to realize the primary values of voice, expertise, and rights. And it is these three values that the idea

[9] James Tully, Strange Multiplicity: Constitutionalism in an Age of Diversity (1995).

[10] Max Weber, Parliament and Government in Germany under a New Political Order, *reprinted in* Weber, Political Writings 130, 173 (Peter Lassman & Ronald Speirs eds., 1994) ("the essence of all politics . . . is conflict").

[11] *See, e.g.*, J.H.H. Weiler, The Constitution of Europe: "Do the New Clothes Have an Emperor?" and Other Essays on European Integration 270 (1999); Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, *in* European Constitutionalism beyond the State 27 (J.H.H. Weiler and Marlene Wind eds., 2003).

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of constitutionalism, if taken seriously, aims to vindicate at the global level of governance as well.

II. Constitutionalism and Pluralism: The European Union and the United States Compared

Comparative scholarship examining the relationship between the European Union and its member states has traditionally compared and contrasted that vertical relationship with the one between the United States and its several states. The parallel is both obvious and fruitful. On the basis of this comparison, scholars have examined a host of general questions about federalism.[12] Indeed, this comparison of principles of federalism in the European Union and the United States has been of interest not only to committed comparatists but also to others as a means of better illuminating important questions that scholars of one or the other system had previously examined only in isolation.[13]

In one important sense, however, the relationship between the European Union and its member states is, of course, different from that between the United States and the several states. In the United States, the relationship between federal and state law, and, in particular, between the federal Supreme Court and the state judiciary, is fully ordered. There is no real practical or theoretical doubt about federal legal supremacy in the United States – at least there has not been since the Civil War, which dispelled any remaining confederate conceptions (or illusions) about the nature of the U.S. Constitution.[14] Since the Civil War and Reconstruction, there has been no reasonable doubt that the U.S. Constitution establishes a single (federal) legal order that

[12] *See, e.g.*, Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, *in* The Oxford Handbook of Law and Politics (Keith Whittington et al. eds, 2008); The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union (Kalypso Nicolaïdes and Robert Howse eds., 2001); Integration through Law: Europe and the American Federal Experience (Mauro Cappelletti, Monica Seccombe & Joseph Weiler eds., 1986). This tradition was begun by Terrance Sandalow & Eric Stein, Courts and Free Markets: Perspectives from the United States and Europe (1982).

[13] *See, e.g.*, Daniel J. Meltzer, *Member State Liability in Europe and the United States*, 4 Int'l J. Const. L. 39 (2006); James Pfander, *Member State Liability and Constitutional Change in the United States and Europe*, 51 Am. J. Comp. L. 237 (2003).

[14] *See, e.g.*, Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States*, 47 Am. L. Rev. 1, 1, 161 (1913). In the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), the old doctrines of interposition and nullification briefly reared their head, provoking the Supreme Court's unprecedented assertion of interpretive supremacy in *Cooper v. Aaron*, 358 U.S. 1 (1958).

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comprises both state and federal law.[15] The U.S. Constitution expressly makes the Constitution, federal law, and U.S. treaties directly effective within, and supreme over, the constitutions and laws of the several states. To the extent that there is a multiplicity of legal systems in the United States, then, it is a strictly ordered multiplicity, in that the legal systems of the several states are nested within the overarching system of law created by the U.S. Constitution.

In the European Union, by contrast, the relationship between the central and component state legal orders is fundamentally unsettled. On the one hand, the European Community claims normative superiority of Community law over the law of the member states. According to the European Court of Justice (ECJ), for instance, the Community is an autonomous legal order, directly effective within, and supreme over, the legal orders of the member states, and grounded in a constitutional charter of its own.[16] On the other hand, there is an equally persistent (and conceptually coherent) claim on the part of the member states regarding the ultimate primacy of their own legal orders. In the view of the German and Polish constitutional courts, as well as the Danish Supreme Court, for example, the European legal order is a treaty-based member state creation, and continued membership and participation in European integration on the part of the member states is subject to the control and limitations of the member state's own constitutional orders.[17]

In contrast to the historical state resistance to federal power in the United States, the unsettled relationship between the European and member state legal orders and their respective judiciaries is an enduring and essential part of the European legal order. First, as a matter of fact, the unsettled nature

[15] Indeed, strictly speaking, even interposition and nullification did not necessarily depend on challenging the idea of a unified legal system but focused instead on challenging the federal government's (and, in particular, the Supreme Court's) claim of final authority regarding the interpretation of the Constitution. *See, e.g.*, Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333 (1998).

[16] *See* Case 294/83, Les Verts–Parti Ecologiste v. European Parliament, 1986 E.C.R. 1339, para. 23; Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629; Case 6/64, Flaminio Costa v. E.N.E.L., 1964 E.C.R. 585; Case 26/62 NV Algemene Transport–en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, 1963 E.C.R. 1. *Cf.* Koen Lenaerts & Damien Gerard, *The Structure of the Union According to the Constitution for Europe: The Emperor Is Getting Dressed*, 29 Eur. L. Rev. 289, 299–300 (2004).

[17] *See* K 18/04 of May 11, 2005 (Poland's Membership in the European Union – The Accession Treaty), *English summary available at* http://www.trybunal.gov.pl/eng/summaries/documents/K_18_04_GB.pdf; Carlsen v. Rasmussen, [1999] 3 C.M.L.R. 854 (Danish Supreme Court) (English extract only); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 155 (F.R.G.) (hereinafter "Brunner").

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of the hierarchy among legal systems in the European Union will continue for the foreseeable future. There is no sign that member states have any intention of giving up their claim of ultimate primacy within the foreseeable future. Not even the ambitious constitutional treaty sought to change this in any radical way.[18] Indeed, the very nature of that instrument – a treaty establishing a constitution for Europe – was designed to preserve the fundamentally unsettled nature of the relationship between the European Union and its member states. Second, as a matter of theoretical conceptualization of the European Union, the unsettled nature of hierarchy in Europe is not a troubling disturbance of the rule of law, as state defiance of federal rule was in nineteenth-century America. The uneasy relationship between European and member state legal orders is not a matter of constituent state recalcitrance to be overcome, as it was in the United States.[19] Instead, the unsettled nature of hierarchy within the Union, which Neil MacCormick and Neil Walker have dubbed "constitutional pluralism," is an essential characteristic of the European legal order.[20]

On this view, the federalism parallel with the United States becomes suspect, and we must look elsewhere for comparative insights for understanding the relationship between the competing constitutional authorities in the European Union. To be sure, we can still consider specific doctrines of federalism or structures of federalism theory and practice that span these two variations on shared rule. But if we are interested specifically in insights about the unsettled nature of hierarchy in the European Union, and, by extension, if we are interested in understanding the unsettled nature of hierarchy in the global arena, the domestic legal order of the United States seems irrelevant.

Not so fast. To be sure, if we search the United States for an analogue to Europe's essential characteristic of unsettled legality and finality, we cannot find it in the relationship between the federal government and the states. But we can find something similar elsewhere – in the separation of powers at the federal level of governance. Here, a similar terrain of contestation and lack of finality operates in the United States among the various branches of the federal government, that is, among the president, the Congress, and the Supreme Court of the United States. According to some, it even extends to

[18] For a careful analysis, see Mattias Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11 Eur. L. J. 262 (2005).

[19] For an examination that juxtaposes the history of component state resistance in the two systems, see Franz C. Mayer, Kompetenzueberschreitung und Letztentscheidung (2000).

[20] *See* MacCormick, *supra* note 7; Neil Walker, *supra* note 7.

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"the people themselves."[21] Each of these actors has a plausible claim to being the final arbiter of legality within the American constitutional system.

This is not the place for an extended defense of this assertion, which remains controversial. Suffice it to say that the departmental or coordinate view of authority to interpret the constitution has significant support despite the insistence by some on the idea of judicial supremacy. Revived perhaps most controversially by President Reagan's attorney general, Edwin Meese,[22] some version of coordinated, as opposed to exclusively judicial, power to interpret the Constitution is now accepted by a broad range of scholars from a variety of political and methodological backgrounds. For present purposes, let us put to one side the most highly charged question whether the president and Congress have the constitutional authority to defy a Supreme Court judgment and order in a given case in which the federal government is a party before the Court (although there is even some precedent for that within the history of the American republic).[23] With regard to the more general question as to whether, as a matter of constitutional law, the Supreme Court's interpretation of the Constitution formally binds other actors within the system, there seems to be a growing consensus that the answer is no.[24]

A brief contrast with Continental systems illustrates the point. The standard European model of judicial review formally privileges a specialized tribunal with final authority over constitutional interpretation. As originally conceived of by Hans Kelsen, these constitutional courts would operate outside and, indeed, above the remainder of the legal system, rendering decisions that bind the constitutional judgment of all other actors throughout the system.[25] Although several features of Kelsen's model have been modified, the formal recognition of the legitimacy of judicial review by a specialized constitutional court remains. As Alec Stone Sweet has summed it up: "New

[21] Larry D. Kramer, The People Themselves: Popular Constitutionalism and Judicial Review (2004); Mark Tushnet, *Popular Constitutionalism as Popular Law*, 81 Chi.-Kent L. Rev. 991, 991 (2006).

[22] Edwin Meese III, Attorney General, Separation of Powers: Legislative-Executive Relations (April 30, 1986). *See* Meese, *The Law of the Constitution*, 61 Tul. L. Rev. 979 (1987); Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. Rev. 341 (2008).

[23] *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. 217 (1994) (defending the president's independent power to interpret the Constitution even in defiance of a direct Supreme Court order).

[24] For a quick sense of the depth of general acceptance of some form of departmentalism, see, e.g., the disclaimers in Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 Const. Comment. 455 (2000).

[25] *See* Hans Kelsen, *Wesen und Entwicklung der Staatsgerichtsbarkeit*, 5 Verhandlungen d. Deutschen Staatsrechtslehrer 30 (1929).

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European constitutions expressly provide for the supremacy of constitutional courts with respect to constitutional interpretation. European academics and constitutional judges will state as much in one breath, and then move on to more interesting issues."[26]

In the United States, by contrast, the unsettled nature of the relationship among the president, the Congress, and the Supreme Court is considered very interesting indeed. To be sure, Alexander Bickel's "countermajoritarian difficulty" of judicial review is, by now, stale, banal, and overwritten.[27] But the unsettled nature of the relationship among the president, the Congress, and the Supreme Court (and even the people themselves) in matters of constitutional interpretation is ever fresh and challenging.[28] Indeed, one scholar has dubbed this problem the "central obsession of constitutional theory" in the United States.[29] This aspect of U.S. constitutional practice – the lack of settlement of final interpretive authority – is not simply a glitch in the rule of law but, instead, an essential characteristic of the U.S. legal system. Let us call this feature of the U.S. system interpretive pluralism, in the sense that multiple institutions compete as authoritative interpreters of the U.S. Constitution.

To be sure, in ordinary times, a general practice of deference to the Supreme Court's interpretation of the Constitution prevails.[30] And that is as it should be. After all, a basic function of a legal system is to enable individuals to realize their projects, plans, and goals within a reasonably predictable framework for social order. And a basic function of a constitution is to create reliable enabling rules for the daily political conflict of ordinary politics. Absent a habit of accommodation resulting in a basic level of stability, then, our constitutional system would be a failure.

Nevertheless, throughout the history of the American republic, U.S. constitutional theory and practice have allowed multiple competing institutions to lay claim to being authoritative interpreters of the Constitution. Such

[26] Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 Mich. L. Rev. 2744, 2779 (2003).

[27] Alexander M. Bickel, The Least Dangerous Branch (1962).

[28] So, for example, Robert Post and Reva Siegel recently developed this idea with regard to section 5 of the Fourteenth Amendment in *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 Yale L.J. 1943 (2003).

[29] Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 Yale L. J. 153 (2002).

[30] *See*, *e.g.*, Walter E. Dellinger, Assistant Attorney General, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994) (Memorandum for the Honorable Abner J. Mikva Counsel to the President), *available at* http://www.usdoj.gov/olc/nonexcut.htm.

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constitutional conflict differs from the conflict of daily politics in that the framework for governance becomes the subject of dispute. At the same time, such constitutional conflict differs from revolutionary conflict, in that the dispute is not about whether the framework should be altered or discarded but about how the framework should be understood best. Constitutional conflict in the United States, then, is premised on competing claims of fidelity to the overall system and its underlying values. The object is victory within the system, not victory over the system. And the goal is to find a proper form of conflict resolution and thus, ultimately, a point of mutual accommodation within what remains a common project of governance.

The unsettled nature of the relative authority of the president, the Congress, and the Supreme Court in matters of constitutional interpretation, that is, the centrality of both conflict and accommodation within our system, is as old as judicial review itself. Only six days after *Marbury v. Madison*[31] proclaimed the great principle that the Supreme Court would review the constitutionality of legislative and executive action, *Stuart v. Laird*[32] upheld a constitutionally questionable attack on the Court by the political branches. *Stuart* and *Marbury* were part of the same pitched battle between the Federalists, who had lost control over the presidency and Congress in the election of 1800, and the new administration of Thomas Jefferson.[33] Although *Marbury* is usually celebrated and *Stuart* largely forgotten, the immediate practical importance of *Stuart* was, in many ways, greater than that of its famous twin. *Marbury* involved the idiosyncratic case of a single signed, sealed, but undelivered judicial commission. *Stuart*, by contrast, involved the imposition on the individual justices of an onerous duty to ride circuit and decide cases in courts of appeal, which left the justices less time to tend to the Supreme Court's own work. But lacking the votes to deal a second blow to the Jeffersonians after *Marbury*, the great chief justice simply recused himself in *Stuart* and allowed Associate Justice William Paterson to pen a perfunctory opinion upholding the objectionable law.[34]

Marbury and *Stuart* thus inaugurated a pragmatic American tradition of constitutional accommodation lasting to this very day. Over the course of U.S. constitutional history, the political branches have frequently squared off against the Supreme Court in seeking to vindicate their own vision of

[31] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[32] Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).
[33] *See* George Lee Haskins & Herbert A. Johnson, Foundations of Power: John Marshall, 1801–15 (1981).
[34] *See* Bruce Ackerman, The Failure of the Founding Fathers 163–198 (2005).

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constitutional meaning.[35] From Andrew Jackson's constitutionally based veto of the Bank Bill and Lincoln's emancipation address to Franklin D. Roosevelt's court-packing plan and George W. Bush's frequent signing statements, presidents have asserted a right – indeed, an obligation – of independent executive branch constitutional interpretation.[36] Congress, too, has asserted its own understanding of the Constitution, whether in supporting the president's political initiatives, as in Jefferson's and FDR's attacks on the judiciary, or in historical or contemporary efforts to strip the judiciary of jurisdiction, or by pushing for its vision of the constitutional right to equality.[37] Important in all this is that the president, the Congress, and the Court each has won these battles on some occasions and lost on others. Or, perhaps more to the point, in each case, the various branches ultimately reached states of pragmatic accommodation to solve the constitutional standoff.

Europe shares this lack of settlement and practice of accommodation with the United States, although there are certainly differences between the two. In Europe, what has been dubbed "constitutional pluralism" pertains to a plurality of constitutional systems with legal norms and sources that stand in a complex relation of mutual recognition and conflict with one another. The American brand of pluralism is also constitutional in nature but involves, by contrast, a single constitutional system within which a plurality of interpretive institutions stand in a complex relationship of mutual recognition and conflict with one another.

We might be tempted to conclude that the European Union is beset by interpretive pluralism as well. After all, within the European Union, member state courts – especially constitutional and supreme courts – appear to assert an independent power to serve as final arbiters of the meaning of the European treaties within their own territories. On closer inspection, however, it becomes clear that member state courts are not threatening to interpret the meaning of Community law as such in opposition to the ECJ but only trying to prevent Community law, under certain interpretations, from taking effect within their territory. To be precise, then, when Germany's Bundesverfassungsgericht, for instance, threatens to interpret the Maastricht Treaty at variance with the interpretation given by the ECJ, it is telling Germans not what the treaty means for Europe, but what the treaty can legitimately mean in Germany to

[35] *See generally* G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 Va. L. Rev. 1463 (2003); Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 Geo. L.J. 347 (1994).

[36] See Paulsen, *supra* note 23.

[37] *See, e.g.*, Post & Siegel, *supra* note 28 (on the dialogue between the Court and Congress on constitutional sex equality).

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accord with the limitations that Germany's constitution places on Germany's continued membership in the project of European integration.[38] Accordingly, this clash of interpretive institutions within the European Union is at its core a manifestation of the plurality of systems.

Finally, with regard to the interpretation of European Union law itself, the ECJ indeed stands in a privileged position, much as its Kelsenian constitutional court counterparts do. As a matter of treaty law, the ECJ is the only institution formally charged with "ensur[ing] that in the interpretation and application of this treaty, the law is observed."[39] In its horizontal relations with the political branches of the European Union, the ECJ can well draw on a special mandate that provides it with superior authority in the interpretation of the treaty. Similarly, with respect to member state institutions, the ECJ can, strictly as a matter of EU law, equally draw on this formal delegation of superior interpretive authority. In Europe, then, it is, properly speaking, not the plurality of interpretive institutions that is the source of constitutional conflict but ultimately the plurality of constitutional systems.

Despite these differences among the American and European brands of constitutional pluralism, one basic fact remains: the unsettled nature of final legal authority is an enduring and essential characteristic of each system. As we shall see in the next section, the two systems also share deep similarities in the way in which they manage this lack of settlement by finding order within pluralism.

III. Managing Pluralism in the European Union and the United States

The United States and the European Union are both functioning legal systems. Neither the lack of settlement regarding the hierarchy of legal systems in Europe nor the lack of settlement regarding the hierarchy of institutions in the United States leads to anarchy or chaos. Instead, each system is a system of order. By definition, however, order within pluralism cannot be the product of central command and control. Order in the face of pluralism must, if at all, arise spontaneously within the decentralized interactions among the various actors involved. And that is what we find in both systems. The U.S. president does not routinely threaten to pack the Court whenever he disagrees with the

[38] *See* Brunner, *supra* note 17.

[39] Treaty Establishing the European Community, art. 220, 1992, 1997 O.J. (C340) 145. *Cf.* Treaty on European Union, art. 19, 2008 O.J. (C115) 13 (as modified by the Treaty of Lisbon) (not in force) (expanding "this Treaty" to "Treaties").

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Court's interpretation of the Constitution, nor does the Bundesverfassungsgericht routinely threaten to interpose German constitutional values to block the effectiveness of EU law within Germany. Instead, we find in both systems a habit of deference and accommodation that enables each system to function as a stable and predictable system of constitutional governance. Let us call this kind of constitutional order in the absence of hierarchy constitutional heterarchy.

Constitutional heterarchy is a system of spontaneous, decentralized ordering among the various actors within the system. But it is more than that. Constitutional heterarchy is not merely conflict and accommodation based on raw power differentials or random fortuity of positions of relative advantage. Instead, constitutional heterarchy reflects the idea that the coordination among the various actors is based on constitutional considerations, that is, in the values of constitutionalism itself. Because conflict and accommodation are ordered in this way, constitutional heterarchy helps crystallize what these values are. Actors will base their respective claims of superior authority on their relative ability to vindicate the values of constitutionalism. And even when actors make what appears to be a naked bid for power, they will phrase their claims in terms of constitutional principle.[40] Put another way, those normative and interpretive conflicts are carried out in what Neil Walker has called a "constitutional register."[41]

Examining constitutional conflict in the two systems reveals that the intersystemic engagement in Europe and interinstitutional engagement in the United States surround three primary values – call them voice, expertise, and rights. In the pitched battles of confrontation, as well as in the mundane practice of coexistence, the three values emerge as central to the pragmatic accommodation that sustains constitutionally based pluralism in both systems. Put crudely, I want to define the first as asking which actor has the better claim of representing the relevant political will; the second as asking which actor has the better claim of knowledge or instrumental capacity; and the third as asking which actor has the better claim of protecting individual rights.

In the European Union and the United States, we observe that none of these values is exclusively or even reliably associated with one or another of

[40] Let us put to one side for the moment the debate about whether this rhetorical frame is mere window dressing or whether it reflects or affects the actual substantive claims that are made. *Cf.* Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. Pa. J. Const. L. 345, 371–419 (2000).

[41] Neil Walker, *Legal Theory and the European Union: A 25th Anniversary Essay*, 25 Oxford J. Legal Stud. 581, 599 (2005).

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the contending actors. At different times, different actors can lay claim to be vindicating any one or more of these values. If an actor can maximize all three values in any given case, that actor's claim to authority within the system becomes paramount. If, as is more frequently the case, different actors can lay only partial claim to one or the other of these values, the stage is set for constitutional confrontation. Such confrontation can, of course, pit claims to different combinations of the three values against one another. The remainder of this section, however, will highlight constitutional confrontation that surrounds only one or another of these values to demonstrate that each actor can lay claim to vindicating each of the three primary values of constitutionalism.

A. Voice

One might be tempted to think that, in a reasonably well-functioning democracy such as the United States, the political branches invariably do better than courts in representing the relevant political will on any given matter. Indeed, this is the assumption that underlies the traditional understanding of the countermajoritarian difficulty and the usual justification for only limited judicial review.[42] On this view, the political branches create and represent the political will of the polity, whereas courts look out for rights. This suggests that courts should interfere with the political branches' expression of will, if at all, only to vindicate the autonomy rights of individuals against invasion by the majority. That view, however, is mistaken.

There are numerous ways of understanding the judiciary as, at times, vindicating the relevant political will better than the political branches do. As an initial matter, we may understand many aspects of constitutional law as enabling the creation of a collective political will, as opposed to guarding the autonomy rights of individuals against incursion on the part of the collectivity. There would be no coherent will of the community absent the procedures and institutions that allow for its creation.[43] Moreover, even many rights provisions – from provisions regarding jury trials to those protecting speech, debate, and even religion – can be understood as revealing a strong constitutional commitment to vindicating political majorities.[44] On this view, constitutional adjudication can be central to the reliable creation of majority

[42] *See, e.g.*, Bickel, *supra* note 27; James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 Harv. L. Rev. 129 (1893).

[43] *Cf.* Stephen Holmes, *Precommitment and the Paradox of Democracy*, *in* Constitionalism and Democracy (Jon Elster & Rune Slagstad eds., 1988).

[44] *See* Akhil Reed Amar, The Bill of Rights (1998).

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will and to vindicating that will against the capture of government by a small detached and self-interested political elite.

More broadly, as Bruce Ackerman has most prominently argued, judicial review can be understood not as a countermajoritarian difficulty, but as an intertemporal difficulty, with democratic claims on both sides of the ledger.[45] To the extent that the Constitution itself is grounded in the expression of a considered, legitimate political will, constitutional adjudication vindicates the constitutional politics of the past against incursion by a simple parliamentary majority of the present. Coupled with the idea of a relatively high degree of citizen mobilization in times of constitutional norm creation as compared with general citizen apathy in everyday politics, Ackerman lays out a basic democratic argument in favor of judicial review. Indeed, Ackerman's theory of constitutional moments brings the grand battles over shifts in constitutional meaning entirely back to the single value of voice, that is, the question of which actor has the better claim of representing the will of the people.

Even beyond the great interinstitutional conflicts of constitutional review, we may often see the judiciary as vindicating the value of voice against the potentially unrepresentative actions of the presently constituted political institutions. Some of the Court's clear statement rules serve this function. For example, courts have protected federalism or the adherence to international treaty obligations by requiring that Congress and the president speak clearly before committing the nation to actions contrary to these more particular constitutional values.[46] The underlying substantive judgment can run the other way, of course, as in the recent Supreme Court majority's insistence that Congress and the president indicate rather clearly when an international treaty is to be self-executing.[47] In these cases, courts are ostensibly not engaging in judicial review; that is, they are not formally challenging the political branches' constitutional interpretation. Instead, they are engaged in interpreting Congress's (or the president's) intent. And yet as we all know, ever so often, the project of statutory interpretation turns into a judicial challenge

[45] Bruce Ackerman, We the People (1993).

[46] *See, e.g.*, Gregory v. Ashcroft, 501 U.S. 452 (1991) (refusing to extend federal Age Discrimination in Employment Act to state judges absent clear statement); U.S. v. Palestine Liberation Organization, 695 F. Supp. 1456 (S.D.N.Y.1988) (holding that federal Antiterrorism Act did not supersede UN Headquarters Agreement). To be sure, some clear statement rules may serve values other than voice, as in the requirement to state clearly the elements of a crime in order to provide notice to defendants. But even here the Supreme Court has used, for example, the rule of lenity as an indirect means to ensure democratic deliberation about extensions of federal power. *See, e.g.*, Jones v. United States, 529 U.S. 848 (2000) (holding that federal arson statute does not cover arson to owner-occupied dwelling).

[47] *See* Medellin v. Texas, 552 U.S. _, 128 S.Ct. 1346 (2008).

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that the political branches have failed to consider properly the protection of particular constitutional values.[48] The result of these decisions is, however, not to strike down the measure absolutely but to demand more transparent, deliberate, or inclusive politics on the particular constitutional value at hand. In short, it is a demand for voice.

Turning to constitutional pluralism in the European Union, one might similarly be tempted to think that the value of voice invariably favors the member states, not Europe. After all, traditional democratic processes, such as parliamentary elections, the formation of governments, and the creation and maintenance of a participatory public sphere, are reasonably well established at the nation-state level in most member states. At the European level of governance, by contrast, the analogues to these processes – to the extent they exist at all – are still in their infancy. But this jaundiced view of voice at the European level, or overly romantic view of voice at the level of the member states, would be mistaken as well.

As an initial matter, the European Union contains a plurality of collective wills (which Kalypso Nicolaïdis has aptly termed a "demoi-cracy") that requires an assessment of the relative legitimacy of each.[49] In addition, others have pointed out the frequent failure within the European Union and elsewhere of state-based structures of democratic governance to serve adequately the goals of self-governance, especially in light of the fact that decisions of one polity increasingly have significant effects on the members of another.[50] The value of voice, then, understood as the value of self-governance or as participation in the policy decisions that affect one's life, may not always be vindicated best at the level of the state.

Accordingly, arguments based on the voice of those affected by political choices need not favor the member states but may, at times, favor Europe instead.[51] Borrowing from federalism theory, for example, there are several

[48] *See* William M. Kelley, *Avoiding Constitutional Questions as a Three Branch Problem*, 86 Cornell L. Rev. 831 (2001). For a critical review, see William N. Eskridge Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

[49] Kalpyso Nicolaïdis, "*We, The Peoples of Europe* ... " 83 Foreign Affairs 97–110 (2004); Samantha Besson, *Europe as a Demoi-cratic Polity*, 1/116 Retfaerd – Nordisk Juridisk Tidsskrift 3 (2007).

[50] *See, e.g.*, Jo Shaw, The Transformation of Citizenship in the European Union (2007); Gráinne de Búrca, *Developing Democracy beyond the State*, 46 Colum. J. Transnat'l L. 221 (2008); Miguel Poiares Maduro, *Europe and the Constitution: What If This Is as Good as It Gets? in* European Constitutionalism beyond the State 74, 81–86 (J.H.H. Weiler & Marlene Wind eds., 2003).

[51] *See* Daniel Halberstam, *The Bride of Messina: Constitutionalism and Democracy in Europe*, 30 Eur. L. Rev. 775, 797 (2005).

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systematic reasons for preferring a central (or more comprehensive) representation of voice over its more local counterparts. In particular, central processes of decision may better reflect the interests of the relevant affected parties in the face of what we may call interjurisdictional difficulties, such as overcoming externalities and other collective action problems that bedevil processes of decentralized decision making. Conversely, by virtue of the greater diversity of participating actors at the central level, central institutions may counteract the problem of intrajurisdictional difficulties, that is, the neglect or oppression of politically disempowered groups within decentralized jurisdictions.[52]

Moreover, in the case of Europe, this recognition of the legitimacy of a collective voice beyond the state is not a foreign imposition but can be traced instead to the deliberate openness of member states' own constitutional systems to supranational integration. Put another way, European constitutional pluralism – and the recognition of the legitimate claim of a supranational voice – is itself the product of specific member state commitments to accommodate a collective political will beyond the state. As a result, the decision to resolve even a simple conflict between the European and national legal orders may, at least in part, almost always be brought back to a calculus of voice.

We can see a calculus of voice – especially in this latter sense – being played out in several important doctrines regarding the conflict between the supranational and national legal orders. Take, for example, the European Communities Act of 1972, which implements British accession to the European Community.[53] By this act, the U.K. Parliament gives precedence to Community law in general while reserving the possibility of national supremacy in cases in which the national legislator specifically expresses the intention to deviate from European norms. By imposing a heavy presumption against interpreting current legislation as abrogating European obligations, the act reflects an accommodation of constitutional pluralism based on voice.

As with the intertemporal difficulty in the United States, voice here figures on both sides of the ledger. The European Communities Act discounts the current voice of ordinary politics as compared to an earlier, presumably deeper, more considered, more transparent, and more participatory decision to join the European Union. It thus privileges one voice over another on the the assumption that the two are not of equal weight in representing the relevant political will. The act (and adherence to the act on the part of subsequent parliaments and courts) reflects the view that, all things being

[52] For a discussion of inter- and intrajurisdictional difficulties, see Halberstam, *Comparative Federalism*, *supra* note 12.

[53] European Communities Act of 1972, 1972, chap. 68.

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equal, the expression of preference of any given Parliament with regard to a particular sectoral policy subsequent to the passage of the act is more likely the product of interest-group capture than was the broad-based preference for accession to the European Union. In the United Kingdom, this calculus of voice takes on added constitutional significance, given that it taps into the very same calculus of voice that underpins the national constitutional system itself. Put another way, without a formal documentary constitution spelling out national constitutional norms, the United Kingdom's national constitution depends, at least in part, on a similar calculus of voice that discounts present politics against the politics that led to, for example, the Magna Carta and the Bill of Rights.

We can see a similar calculus of voice at work in the Italian and German accommodation of Community primacy. In *Granital*,[54] for example, the Italian constitutional court allowed lower courts to disapply Italian law in favor of Community law with two exceptions. One of these exceptions is where the national law seems to threaten the very essence of the Community legal regime, in which case the question must be submitted to the constitutional court. I submit that we can see in this exception the very same reservation based on voice that we just saw in the United Kingdom's Act of Accession. The Italian Constitutional Court accommodates constitutional pluralism by presuming, as a general matter, that the Italian legislator did not intend to violate Community law. In cases where the Italian law challenges the very essence of Community law, however, we can no longer apply this presumption. In those cases, the question of the continued participation in the Community in the face of the purported violation of Community law must come before the highest constitutional tribunal itself.

The German *Maastricht* opinion,[55] for all its faults, can also be understood as coming to an accommodation of the two legal orders on the basis of voice. The decision upholds Germany's accession to the Maastricht Treaty against the challenge that the treaty undermines the individual's constitutionally protected participation in the control of the political process. It holds that the Community's powers remain sufficiently circumscribed as to leave member state parliaments with sufficient tasks and member state citizens with a sufficient voice in the process of policy making. More specifically, the opinion explains its imposition of constraints on European integration by linking the legitimacy of supranational law to the need for a European public sphere that is commensurate with the scope of European decision making.

[54] Corte costituzionale, June 8, 1984, No. 170, 21 C.M.L. Rev. 756 (Granital).
[55] *See* Brunner, *supra* note 17.

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Although the opinion is wooden in its conception of possible futures, and remarkable for its failure to see any current democratic deficit in the European Union, the calculus of accommodation here, too, is ultimately based on voice.

Finally, the recent row over the European Arrest Warrant (EAW) seems also to be managed at least in part based on voice (i.e., the depth of commitment of the Community and the member states to their respective positions on the matter). The EAW came about in the frenzy immediately after September 11, 2001. The idea for such an instrument had been previously raised and rejected but was hastily resurrected and quickly passed in the immediate aftermath of the terrorist attacks.

When the matter came before the Polish Constitutional Tribunal,[56] that court was confronted with a clear constitutional provision to the contrary (i.e., specifically prohibiting the extradition of its nationals). Although the Polish court could not ignore this clear expression of the national will, it nonetheless muted the national voice by delaying the effectiveness of its opinion for eighteen months to allow Parliament to change the constitution. Subsequently, Parliament changed the constitution to allow the extradition of Polish nationals in general, but the constitutional amendment did not accommodate the EAW in its entirety. As a result, differences between what Poland permits and what the EAW appears to require remain.

Similarly, Germany's highest constitutional court struck at the EAW, assailing not the act itself but only Germany's particular method of implementation.[57] Here, too, the constitutional court tempered its ruling in the face of Germany's background choice for participation in Europe.[58] The Community, for its part, has failed to challenge this resistance politically. Even after becoming empowered under the treaty of Lisbon to bring enforcement actions against Poland and other member states for failure to transpose the EAW, the Commission may well hold back because of the realization that its hasty decision to embrace the EAW in the fall of 2001 now confronts a highly deliberate decision on the part of member states to resist certain aspects of that mandate.

[56] Polish Constitutional Tribunal, P 1/05, April 27, 2005, a*vailable at* http://www.trybunal.gov.pl/eng/summaries/summaries_assets/documents/P_1_05_full_GB.pdf (Polish European Arrest Warrant Decision).

[57] BVerfG, July 18, 2005, *available at* http://www.bverfg.de/entscheidungen/rs20050718_2bvr223604en.html (German European Arrest Warrant Act Decision).

[58] For an excellent comparative analysis of the German, Czech, and Polish responses to the EAW, see Zdeněk Kühn, *The European Arrest Warrant, Third Pillar Law and National Constitutional Resistance-Acceptance*, 3 Croatian Yb. Eur. L. & Policy 99 (2007).

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B. Expertise

The second realm of contestation is that of expertise. I use this term broadly here to encompass knowledge-based capacity as well as bureaucratic capacity and instrumental rationality. In short, expertise here stands for expert judgment as well as effective administration and the capacity to deliver otherwise defined results. Expertise, understood in this sense, is an important aspect of modern liberal governance that brings us beyond the usual dichotomy of negative and positive liberty. To be sure, liberal constitutionalism must give citizens a voice in governance and protect individuals from abuses of power.[59] But liberal constitutionalism must do more. It must get certain things right and get the job of governance done. As we shall see, this value of expertise figures prominently in the constitutional conflict in both systems.

In the United States, relative institutional capacity is frequently the subject of dispute in asking whether judicial review of a given matter is appropriate or whether judging the constitutionality of any given course of action is better left to the Congress, the president, or even the people themselves. The basic argument in favor of judicial review in the United States has traditionally been one of expertise, that is, an argument based on the bureaucratic, professional, apolitical, and scholarly virtues of the judiciary.[60]

This claimed position of privilege is, however, frequently under attack. The first of the challenges denies the relevance of expertise entirely and insists on bringing us back to voice. Such critics assert that the judiciary, far from being removed from politics, is deeply enmeshed in the business of conducting politics by indirection.[61] The fundamentally realist challenge denies the claim of judicial expertise (and, in the extreme, the relevance of expertise in the crafting of public policy more generally) and recasts the interinstitutional battle simply in terms of voice. A second argument, more specific to the adjudication of rights, is that the judiciary should refrain from balancing values or interests in the adjudication of rights and should focus, instead, on smoking out government's illegitimate motives or purposes.[62] In contrast to the first critique, this argument distinguishes between a legitimate

[59] *Cf.* Stephen Holmes, Benjamin Constant and the Making of Modern Liberalism (1984).

[60] Bickel, *supra* note 27.

[61] *See, e.g.,* Karen Alter, Establishing the Supremacy of European Law 45–52 (2001); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 Duke L.J. 477, 480–487 (2001).

[62] *See* Joseph Raz, Practical Reason And Norms 178–199 (1990); Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 Hastings L.J. 711 (1994).

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realm of judicial involvement based on expertise (i.e., eliminating government actions based on unconstitutional considerations) and an illegitimate realm of judicial involvement in which the voice of the political branches should control (i.e., balancing various competing interests).

For present purposes, let us put aside these arguments that pit voice against presumed expertise, and let us focus briefly on a third critique. Here, the idea is that expertise may well matter pervasively to constitutional judgment but that judicial expertise in several areas, such as federalism, foreign affairs, or national security judgments, is lacking. This critique does not juxtapose the court's expertise with the voice of the political branches but argues, entirely on expertise-based grounds, that the court simply lacks the institutional capacity to judge the constitutionality of government policies any more reliably than the political branches can do themselves.[63] This critique, then, acknowledges the role of expertise generally in constitutional judgment while suggesting that the Court should either abstain from judgment or take an extremely deferential stance to the political branches, in areas where the president or the Congress have the more reliable institutional expertise. What is interesting, then, is that, once again, each institution of government can lay claim to furthering the value of expertise.

The management of interpretive pluralism in the United States often reflects the expertise-based claims of the various branches. Invoking his expert judgment, for example, Andrew Jackson vetoed the Bank Bill on constitutional grounds, claiming superior knowledge that the law, which seemed necessary to Congress and would have passed Supreme Court review was, in fact, not necessary but harmful.[64] Even apart from vetoes, which more recently have been based on mere policy disagreements, presidents may, under certain circumstances, declare that they will not enforce certain laws as written by drawing on their special position of institutional expertise on a given subject.[65] The Supreme Court, for its part, has, on occasion, deferred to the

[63] *See* Mark Tushnet, Taking the Constitution Away from the Courts, 123 (1999). Larry D. Kramer, *Marbury and the Retreat from Judicial Supremacy*, 20 Const. Comment. 205 (2003).

[64] *See, e.g.*, Trevor W. Morrison, *Suspension and the Extrajudicial Constitution*, 107 Colum. L. Rev. 1533, at n. 235 (2007).

[65] For different variations, see, e.g., David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 Law & Contemp. Probs. 61 (2000); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 Law & Contemp. Probs. 7 (2000). *See also* Johnsen, *supra* at note 12–13 ("Presidential non-enforcement policy should respect judicial precedent and Congress's considered judgments about the meaning of the Constitution, but afford greater weight to the President's views when the President possesses special institutional expertise of relevance.").

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president, as, for example, in matters of foreign affairs, given its relative lack of institutional capacity to assess the consequences of the actions in question. Similarly, built into the Court's basic doctrines checking the enumeration of powers is an interinstitutional accommodation based in part on a calculus of expertise, as in the numerous doctrines of deference to Congress's assessment of constitutional facts, such as the need for a particular piece of legislation under the commerce clause and the necessary and proper clause.[66]

Turning to Europe again, we see that here, too, claims of expertise have featured prominently in managing pluralism, that is, in managing the unsettled nature of hierarchy within the European enterprise of governance. Arguments of relative expertise featured strongly in the justification of the European Union from the very beginnings of the Community in Jean Monnet's dirigiste vision of an expert body of supranational administration operating far above politics. Indeed, traces of this expertise-based understanding of the legitimacy of the European Union can still be found in the language currently used to describe the powers of the European Union. The French constitution, for example, denotes the Community's powers by using the technical sounding word *compétences* (which is how the French constitution also terms the powers of adjudication as well as those of local governments) while reserving the more broadly political-sounding term *pouvoirs* to denote the powers of the French president and parliament.[67] Indeed, the pervasive European usage of the word *competence* to describe what Americans would term the *powers* of the European Union may well reflect a latent, expertise-based understanding of European integration even today. This language of expertise serves not only to lay out a vision for what the European bureaucracy might do well but also to overcome the obvious weakness of the Community's argument for legitimacy based on voice.

Despite the European Union's progression from bureaucracy to body politic, the idea of expertise and the instrumental values of bureaucracy and efficiency have retained a significant place in the institutional accommodation of conflicts of hierarchy within the system. Because the conflict of hierarchy in the European Union is a conflict among competing levels of governance, the expertise-based argument taps into principles of federalism and subsidiarity much as the voice-based argument did. Indeed, expertise and instrumental rationality figure prominently in the treaty itself in the

[66] More generally, Jeff Powell speaks of the Court examining constitutional meaning through "screens of deference." H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. Chi. L. Rev. 365 (1998).

[67] *Compare*, *e.g.*, Constitution du 4 octobre 1958, arts. 88–1 & 2 *with* arts. 7 & 25.

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formulation of subsidiarity as a crosscutting principle to moderate European involvement in the governance of the system. According to Article 5 EC, the Community may exercise its concurrent powers only to the extent that a given goal cannot be properly achieved by member state action alone. The question at issue in Article 5 EC, then, is not one of voice but one of instrumental rationality, that is, the relative institutional capacities for achieving a particular desired result.[68]

At the political level, the expertise-based accommodation of constitutional pluralism can be found, for example, in the subsidiarity protocol, a procedure that institutionalizes contestation of the instrumental rationality of Community action.[69] Notice that this contest is not simply one of voice, that is, of voting down a community proposal – although it is that, too. Moving away from voice, the protocol expressly demands engagement among the various levels of governance on the issue of expertise. Member state parliaments may challenge the necessity for Community action and force a reevaluation of the instrumental justification for Community action at the Community level. Although the procedure, from the perspective of Community law, does not formally unsettle the European Commission's prerogative of decision in these matters, it reflects a pragmatic accommodation of the problematic nature of the Community's ultimate claim of primacy within the system. Even apart from the specific protocol, the Community has already responded to member state contestation of the need for Community action by creating a mechanism of review within the European Commission of the necessity of Community action according to the principle of subsidiarity.[70]

The ECJ, too, has tapped into instrumental ideas of subsidiarity in yielding to member state concerns about a runaway European Community. In the judgment regarding the Tobacco Advertising Directive in 2000,[71] the ECJ can be seen as responding to an earlier threat of member state high courts to defect in the event that the Community did not curb its enterprise.[72] The ECJ arguably accommodated this concern when it decided for the first time ever to declare that a Community policy had exceeded the sum total

[68] Cf. Halberstam, *Comparative Federalism*, *supra* note 12, for a discussion of the instrumental nature of subsidiarity in Article 5 EC.

[69] Treaty of Lisbon, Protocol on the Application of the Principles of Subsidiarity and Proportionality, Dec. 17, 2007, 2007 O.J. (C 306) 150.

[70] George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 Colum. L. Rev. 331 (1994).

[71] Case C-376/98, Federal Republic of Germany v. European Parliament and Council of the European Union, 2000 E.C.R. I-08419.

[72] Bruno Simma, J.H.H. Weiler & Markus Zöckler, Kompetenzen und Grundrechte 68–83, 161 (1999).

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of the Community's powers. Asserting the instrumental capacity to reign in Community powers, the court based its substantive decision on a calculus of expertise as well, holding that certain parts of the original directive were simply unnecessary to the functioning of the common market.

C. Rights

In the United States, as elsewhere, rights tend to mean courts. The thought of individual rights usually conjures up the image of a court declaring that a law, executive act, or official action has invaded a protected liberty. As a result, one might think that in the case of protecting rights, the judiciary invariably has a stronger claim to interpretive primacy with regard to rights.[73] And yet here, too, the pluralism we find in the United States complicates matters quite a bit.

Just as the U.S. Constitution does not definitively settle the institutional hierarchy among the various branches on matters of constitutional interpretation generally, it does not clearly settle who is to protect individual rights. To be sure, the usual practice of deference to judicial interpretation obtains, but this practice is subject to disruption here as well. The disruption of the usual deference to the judiciary can, of course, be based on familiar arguments of voice and expertise. For example, the argument may be made that the judiciary has no business enforcing what are often vague rights provisions against the specifically declared will of the majority or that the judiciary is no better than the political branches at balancing relevant interests or at ascertaining constitutionally relevant facts.

Interesting for present purposes, however, is not that a court's jurisprudence of rights can be questioned on the basis of countervailing concerns of voice and expertise but that the usual practice of deference to the judiciary on individual rights protection may be called into question on the basis of rights protection itself. Put another way, the interinstitutional accommodation of pluralism in the United States with regard to the protection of rights at times hinges not on a general argument about voice or expertise or on an argument about the trade-off between individual rights and other values but on arguments about which institution will better protect rights.[74]

In the United States, there is good reason to distrust the judiciary's claim of monopoly – or even preeminence – in the realm of rights protection. As a textual matter, each of the Civil War amendments, which revolutionized

[73] *See, e.g.*, Ronald Dworkin, A Matter of Principle (1985).
[74] *Compare, e.g.*, Joseph Raz, *Disagreement in Politics*, 43 Am. J. Juris. 25 (1998), *with* Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 Yale L.J. 1346 (2006).

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the protection of rights in the United States, ends by granting the Congress the specific power "to enforce" the general rights provisions of each amendment.[75] This textual hook for Congress's claim as authoritative guardian of rights is itself grounded in the historical realization that the antebellum Court, especially in its *Dred Scott* decision, had miserably failed to protect individual rights properly. As if to confirm this suspicion, a backward-looking Reconstruction Court similarly declined to provide much meaningful rights protection when it came to interpreting the Civil War amendments. Instead of putting its weight behind the new rights regime, the Reconstruction Court eviscerated core provisions of the Fourteenth Amendment[76] and declared that the amendments did not support Congress's civil rights agenda.[77] Even when the specific question of protecting African American equality and the African American franchise came before the Court, the judiciary proved useless for decades.[78]

Although the U.S. Supreme Court gradually came to protect individual rights more aggressively, especially after World War II, the federal Congress and the president were frequently by its side. With a series of civil rights acts, most prominently the Civil Rights Act of 1964[79] and the Voting Rights Act of 1965,[80] Congress enlisted the executive branch to become a forceful protector of rights. The rights guaranteed by congressional legislation often exceeded those pronounced by the Court and retained their vitality even after the Supreme Court's own rights activism receded in the late 1970s.

For many years, the Supreme Court expressly recognized the authority of Congress to vindicate a broader vision of constitutionally based rights than that embodied in the Court's own interpretation of the Constitution. For example, even though the Court had found that the Constitution did not automatically prohibit states from requiring voters to pass a literacy test as a condition of voting, Congress could nonetheless protect an individual's constitutional right to vote by prohibiting states from using such literacy tests.[81] In short, for many years the Court's own jurisprudence of rights accommodated the multiplicity of authoritative interpreters of constitutional rights.

[75] *See* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747 (1999).
[76] *See* Slaughter-House Cases, 83 U.S. 36 (1872).
[77] *See* Civil Rights Cases, 109 U.S. 3 (1883).
[78] *See* Giles v. Teasley, 193 U.S. 146 (1904); Plessy v. Ferguson, 163 U.S. 537 (1896).
[79] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.).
[80] Voting Rights Act of 1964, Pub. L. No. 89-110, 79 Stat. 437 (codified in scattered sections of 42 U.S.C.).
[81] Katzenbach v. Morgan, 384 U.S. 641 (1966).

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In recent years, however, the Supreme Court has asserted its monopoly over the interpretation of constitutional rights. In a series of cases, beginning with *City of Boerne v. Flores*,[82] the Court has denied Congress the power to deviate from the precise scope of constitutional rights as declared by the judiciary. For example, given that the Court held that the First Amendment's religion clauses do not protect individuals from neutral government regulation that happens to burden the free exercise of religion, Congress can no longer pass federal legislation insisting that states justify such burdens by a compelling state interest.[83] Put simply, the Court has now arrogated to itself the conclusive power to determine the precise scope of constitutional rights and has severely limited Congress's discretion to vindicate a more expansive vision of rights.

Interesting in this recent development is not that the Court seems to have lost its understanding of pluralism in the interpretation of rights. Instead, the remarkable fact is that even in the midst of the Court's recent arrogation of power, the justices nonetheless seem aware of their own limitations in the American constitutional constellation. The Court has, for instance, not ventured forth to apply its new jurisprudence either to the Voting Rights Act or to the core of the Civil Rights Act of 1964 – Title VII. Indeed, *City of Boerne* specifically noted that the Voting Rights Act would remain untouched under the new approach despite the fact that it strains the Court's new reasoning to do so.[84] And in a recent case that would have had disastrous implications for Title VII, the Court treaded lightly, paying only lip service to its new jurisprudence while allowing the federal Family Medical Leave Act to stand.[85] Thus, even in the midst of the Court's general assault on interpretive pluralism, we see signs of pragmatic accommodation based on a calculus of rights.

If we turn to the European Union, we see that fundamental rights still tend to mean domestic constitutional rights or, perhaps by now, domestic constitutional rights plus the European Convention on Human Rights. In short, the classic locus of fundamental rights protection lies not at the level of the European Union but elsewhere. The traditional story about fundamental rights in the European Union was, indeed, that the Union's own ambitions

[82] City of Boerne v. Flores, 521 U.S. 527 (1997).
[83] *Id.* at 535–536.
[84] *See id.* at 518, 530–32. *See* Ellen D. Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 Hous. L. Rev. 33, 40 (2007) (discussing application of *Boerne* standard to the Voting Rights Act).
[85] *See* Hibbs v. Department of Human Resources, 538 U.S. 721 (2003). *Cf.* Post and Siegel, *supra* note 28.

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had to be tempered to accord with fundamental rights as they were recognized and protected at the member state level.[86]

One element of the constitutional standoff between the Community and member state legal orders famously turned on member state resistance regarding rights protection.[87] Here, the ECJ garnered the deference of member state courts to the ECJ's (and the Community's) claim of superior authority by incorporating central aspects of member state constitutional rights into Community law itself. To take the best-known example, Germany's Constitutional Court declared that it would defer to the ECJ on case-by-case fundamental rights protection while keeping a watchful eye on the ECJ's track record on rights generally.[88] The ECJ, in turn, not only has incorporated general rights protection into its own jurisprudence but also has begun to defer to specific domestic claims of legislative rights protection that exceed a Europe-wide standard, even when those protections run up against free movement claims.[89]

Most interesting for the present discussion is the possible shift in accommodating the respective boundaries of European and member state jurisdiction over rights. According to cases like *Mary Carpenter*,[90] for example, the ECJ could investigate virtually any member state legislative, administrative, or adjudicative act that might negatively affect the exercise of an individual's rights to free movement under the European Community Treaty. As the *Carpenter* case illustrated, jurisdiction under this rubric is potentially vast. It led to ECJ fundamental rights review of Mary Carpenter's residency rights on the reasoning that her residency in the United Kingdom provided (non-pecuniary) support to her husband, who exercised free movement rights by working throughout the European Union. Moreover, with the *Chen* case,[91] the already vast potential of the ECJ's fundamental rights review may have expanded even further, as the ECJ might now intervene to protect all fundamental rights of all EU citizens.[92]

[86] N. Lockhart & J.H.H. Weiler, *"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence* (pts. 1 & 2), 32 Common Mkt. L. Rev. 51, 32 Common Mkt. L. Rev. 579 (1995).

[87] *See* 37 BVerfGE 271 (1974) (Solange I); Case 11–70, Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, 1970 E.C.R. 1125.

[88] 73 BVerfGE 339 (1986) (Solange II).

[89] *E.g.*, Case C-36/02, Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn, 2004 E.C.R. I-9609.

[90] *E.g.*, Case C-60/00, Mary Carpenter v. Secretary of State for the Home Department, 2002 E.C.R. I-6279.

[91] *See* Case C-200/02, Chen v. Secretary of State for the Home Department, 2004 ECR I-9923 (finding right of residency for mother of EU citizen).

[92] *But cf.* Case C-212/06, Government of French Community and Walloon Government v. Flemish Government, judgment of 1 April 2008 (not yet reported), at paras. 38–41 (refusing

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Whatever the precise limits of the ECJ's jurisdiction over rights, one thing is certain: to date, the ECJ has clearly not exhausted its vast power over fundamental rights protection, almost certainly for reasons of mutual accommodation. An aggressive use of the ECJ's jurisdiction over fundamental rights would invite the member state courts to retaliate in kind, engaging the logic of mutually assured destruction that Joseph Weiler pointed out long ago.[93] More important, though, for present purposes is the nature of the accommodation and the values that lie at the heart of this accommodation – in particular the value of rights protection itself.

As a general matter, member states' fundamental rights records have been passable, at least when coupled with protection through the European Court of Human Rights in Strasbourg. There has been little need for the ECJ to intervene, except to preserve the sphere of Community law where the fundamental right did indeed have a particular connection to free movement.

With the accession of member states with possibly more questionable fundamental rights records, however, the current state of mutual accommodation might be shifting. As an initial matter, the Community's political branches have been placing greater burdens on new member states to demonstrate their bona fides on the protection of fundamental rights.[94] Similarly, the ECJ might begin to review fundamental rights claims – especially those coming from the new member states – more aggressively. The ECJ may be viewed as laying the foundation for such intervention in cases like *Pupino*,[95] in which the court broadly read a European framework directive under the third pillar to protect basic rights of criminal procedure. In that case, the ECJ specifically made reference to the European Court of Human Rights, as if to lend its own institutional support to what is becoming an important (but increasingly overworked) ally in this venture.[96]

The new accommodation on rights, then, may play out something like this: First, the member states will continue to refrain from reviewing fundamental rights violations involving European law as long as the ECJ generally provides an acceptable level of rights protection. Put simply, the *Solange*

to review for fundamental rights violation the application of Belgian law to Belgian nationals that have not exercised their freedom of movement).

93 Robert Stith & J.H.H. Weiler, *Can Treaty Law Be Supreme, Directly Effective, and Autonomous – All at the Same Time? (An Epistolary Exchange)*, 34 N.Y.U. J. Int'l L. & Pol. 729 (2002).

94 Indeed, here the Union often imposes obligations on new member states that exceed what the Union demands of existing members of the club. *See* Christophe Hillion, *Enlargement of the European Union – The Discrepancy between Membership Obligations and Accession Conditions as regards the Protection of Minorities*, 27 Fordham Int'l L.J. 715 (2004).

95 *E.g.*, Case C-105/03 Criminal Proceedings against Maria Pupino 2005 E.C.R. I-5285.

96 *Id.* at paras. 48–50.

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compromise that the German Bundesverfassungsgericht reached with the ECJ will continue unless there is a change in the European Union's track record on rights protection. Although unlikely, such a change is conceivable. For example, if, following the Court of First Instance's suggestion, the ECJ had abdicated responsibility for fundamental rights review in considering the European Union's implementation of UN Security Council sanctions, the member states might well have suspended their current restraint under *Solange II*.[97]

Second, and even more intriguing, the ECJ will refrain from aggressively reviewing all fundamental rights claims within its jurisdiction but only on the analogous terms. That is, the ECJ will not tap into the full potential of its jurisdiction over fundamental rights under *Carpenter* and *Chen*, but it will restrain itself only so long as member states generally maintain a satisfactory level of fundamental rights protection throughout their system. Thus, the ECJ may shoot a warning shot across the bow of potentially rights-infringing member states, just as the member states have done with regard to the ECJ. Such a "reverse-*Solange*" compromise may indeed already be brewing at the court.[98] Just as the member state courts have generally heeded their compromise over the past two decades, the ECJ is also unlikely to become very active in enforcing fundamental rights beyond the traditional scope of core free movement issues.[99] And yet, in the case of new member states with sketchy human rights records, the ECJ might nonetheless reach more broadly than it traditionally has done with regard to the old member states.

IV. Conclusion

The European Union and the United States are both systems marked by what this chapter has called constitutional heterarchy. In both, important issues of final legal authority within the system are fundamentally unsettled. In both, the unsettled nature of authority is not a defect but an essential feature of the system. And in both, the lack of settlement does not result in anarchy within the system or destruction of the system but in productive

[97] For an analysis of pluralism with regard to the ECJ's decision in the *Kadi* decision, see Daniel Halberstam and Eric Stein, *The United Nations, The European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 Comm. Market L. Rev. 13 (2009). *Cf.* C-402/05 P, Kadi v. Council (Grand Chamber), Judgment of 3 September 2008, nyr.

[98] *See* Case C-380/05, Centro Europa 7 Srl v. Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni, 2008 E.C.R., paras. 14–20 (Opinion of AG Maduro).

[99] *See* Case C-212/06, *supra* note 92.

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conflict. Constitutional heterarchy is therefore not a principle of disorder but a principle of organization. In the United States and in the European Union the institutions and levels of governance ground their conflicting appeals to authority in the values of constitutionalism and reach multiple points of spontaneous mutual accommodation to maintain the productive functioning of the system as a whole.

An examination of this process of constitutional contestation reveals that the conflict in each system surrounds three primary values of constitutionalism. I have called them here the values of voice, expertise, and rights. These values roughly combine the two basic insights from traditional liberal theory – the liberty of the ancients, as participation in governance, and the liberty of the moderns, as the freedom from coercion by the community – with the basic insight from the development of the modern administrative state that (social) legitimacy also depends on bureaucratic capacity, professionalism, and knowledge-based governance.

Constitutional heterarchy means that none of these values is predictably associated with any particular level, unit, or institution of governance. In the United States, for instance, the judiciary may challenge the authority of the political branches by invoking arguments based on voice, just at the political branches may challenge the authority of the judiciary by invoking arguments based on rights. Similarly, each branch of government can draw on arguments of expertise. And, of course, each branch can combine several of these primary values in search of a more persuasive hew of legitimacy. In Europe, the European Union as well as the member states can and do base their competing claims of authority on any combination of these three values.

Constitutional heterarchy means that the organization of this conflict is not grounded in any hierarchy outside the system. It would therefore be mistaken to suggest, as some scholars have,[100] that the pluralism of systems in the European Union is organized under the umbrella of international law. Similarly, one may search in vain for a hierarchical organization of the pluralism of interpretive institutions in the United States within or beyond the U.S. Constitution. Instead, the organization of contestation in each system is the result of concrete actions and interactions of the competing institutions, each drawing on the primary values of constitutionalism to support their stance of authority or deference. In short, as a form of organization, constitutional heterarchy is spontaneous, decentralized, and immanent.

The comparison of constitutional pluralism across these two very different settings – the pluralism of systems, sources, and norms in Europe as

[100] *See, e.g.*, Neil MacCormick, Questioning Sovereignty, *supra* note 7, at 121.

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compared to interpretive pluralism in the United States – leads to important insights into the role of constitutionalism in global governance. The examination of these two rather different settings of constitutional conflict reveals the values that lie at the heart of constitutionalism itself. Having identified these values, it seems plain that the traditional state-based setting of constitutional governance is becoming increasingly challenged in promoting them successfully. Whether a result of shifting realities or shifting perceptions, the quest to vindicate the voice of those affected by policy determinations, to develop the instrumental capacity to govern effectively, and to protect the rights of individuals has gained global dimensions in the modern world. At the same time, the institutions and systems of global governance do not fit neatly into a new hierarchy of norms and institutions but are, instead, fragmented along both systemic and interpretive dimensions. Put another way, global governance embodies both a pluralism of systems, sources, and norms, as well as a pluralism of interpretive institutions. As the comparison between the United States and Europe demonstrates, understanding the problem of fragmentation in the register of constitutionalism need not entail a search for an overarching hierarchy of systems or of interpretive authorities. Instead, we can find constitutional order in spontaneous, mutual accommodation that seeks to vindicate the values of voice, expertise, and rights at the level of global governance as well.

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