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Pluralism in *Marbury* and *Van Gend*

DANIEL HALBERSTAM

'Great cases, like hard cases, make bad law', Oliver Wendell Holmes, Jr, famously remarked in his first Supreme Court dissent.[68] For Holmes, 'great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment'.[69] On this account neither *Marbury v Madison*[70] nor *Van Gend en Loos*[71] would qualify. *Van Gend* was a case of great principle without greatly interesting facts. And *Marbury* was a great political battle that nevertheless produced a case of great principle.

But by any measure other than Holmes's, *Marbury* and *Van Gend* are great cases—often called the greatest within their respective systems. Both have foundational significance for the legal systems they helped establish. Both confront the deepest challenge to any legal order: competing claims of ultimate authority. But these cases do not definitively resolve the great problem of pluralism. Instead, both decisions brilliantly capture the devilish subtlety of the pluralist problem and inaugurate regimes of accommodation that, as we shall see, have followed surprisingly similar lines.

Fighting Congress and the President in *Marbury*

Marbury came out of a pitched battle between the incoming Democratic-Republican administration of President Thomas Jefferson and the outgoing Federalist administration of President John Adams.[72] This was political drama at its best. The Federalists, still in control of Congress after having lost the autumn elections, passed a series of judicial reform acts in February 1801.[73] In an effort to mute the force of Jefferson's political 'Revolution of 1800', the lame duck Congress expanded the ranks of the federal judiciary to enable lame duck President John Adams to lodge dozens of Federalists on the bench in

[68] *Northern Securities Co v United States*, 193 US 197, 364 (1904).
[69] *Ibid.*
[70] 1 Cranch (5 US) 137 (1803).
[71] Case 26/62 [1963] ECR 1.
[72] See Bruce A Ackerman, *The Failure of the Founding Fathers* (Cambridge, Mass: Belknap, 2005); George Lee Haskins and Herbert A Johnson, *Foundations of Power: John Marshall, 1801–15* (New York, Macmillan, 1981) (History of the Supreme Court of the United States vol II).
[73] Act of 13 February 1801, 2 Stat 89 (1801); Act of 27 February 1801, 2 Stat 103 (1801).

the waning days of his administration.[74] One such 'midnight judge' was ardent Federalist supporter William Marbury, whose judicial commission had been approved and sealed but not delivered by the outgoing Secretary of State (and freshly appointed Chief Justice) John Marshall.

As soon as Thomas Jefferson took office and his party assumed the majority in Congress, the Jeffersonians worked furiously to undo the handiwork of the outgoing Federalists. In the spring of 1802, the new Congress repealed the year-old Federalist law that had created the 16 federal appellate circuit courts (albeit not the law that created Marbury's office of justice of the peace).[75] By eliminating the offices of the freshly appointed circuit courts, the Jeffersonians effectively ousted many of the newly appointed Federalist judges without the formal impeachment proceedings that would have demanded a showing of bad behaviour. The new judiciary act also directly attacked the Supreme Court. The law reinstated the onerous requirement that the Justices 'ride circuit' to decide appellate cases all across the country. Finally, to insulate itself from immediate legal challenge, the Jeffersonians altered the frequency of Supreme Court sessions, precluding the Court from hearing any cases before 1803.

Less than two weeks after finally hearing Marbury's petition on 11 February 1803, the Supreme Court struck back with a shrewd opinion for a unanimous Court. The Court's lengthy declaration that Secretary of State James Madison (who had refused to appear in court) was legally obligated to deliver Marbury's commission as well as the holding that the judiciary could lawfully review the constitutionality of congressional action would require no co-operation by the Executive Branch or Congress for its execution. A creative reading of the Constitution and Section 13 of the Judiciary Act of 1789 meant that Congress had improperly conferred jurisdiction on the court in this case. The Court accordingly dismissed the case, fully executing its own judgment and establishing the principle of judicial review for the future.

There is an important coda to this story. On 2 March 1803, six days after *Marbury v Madison* was handed down, the Supreme Court decided *Stuart v Laird*.[76] At issue was the Jeffersonian law dismantling the circuit courts and imposing the duty to 'ride circuit' on the Justices. The constitutionality of the 1802 law, in particular the requirement to ride circuit, was highly questionable. John Marshall worked behind the scenes to gauge his colleagues' willingness to resist this encroachment as well, but did not find the unified front needed to counter the assault. The Chief Justice proceeded to recuse himself, allowing Associate Justice William Paterson to pen a perfunctory opinion upholding the new law. At least this way, the Chief Justice was spared the embarrassment of having to turn his back on *Marbury*. The Supreme Court could retain the principle of judicial review announced in *Marbury* while quietly accommodating the *force majeure* of Jeffersonian politics in *Stuart*.[77]

[74] To prevent Thomas Jefferson from appointing a Supreme Court justice in the event of retirement, the law also reduced the number of judges on the Supreme Court from six to five effective upon the next retirement. Act of 13 February 1801, 2 Stat 89.

[75] Act of 29 April 1802, 2 Stat 156.

[76] *Stuart v Laird*, 1 Cranch (5 US) 299 (1803).

[77] Cf Akhil R Amar, *America's Constitution: A Biography* (Random House, New York, 2005).

Disaggregating the State in *Van Gend*

Van Gend followed a similar path of opportunity and cunning. Adjudication under the old European Coal and Steel Treaty had been trickling along without much distinction for the better part of a decade. Not a single watershed case challenging conventional wisdom about the relationship between national and international legal orders is to be found in the over 70 reported judgments on the ECSC from 1954 to 1961. Then, in *de Geus v Bosch and van Rijn*,[78] the first question for an interpretation of the 1958 Treaty on European Economic Community came to the Court under the then-novel preliminary reference procedure of Article 177 EEC (now 234 EC). The stage was set for change.

Advocate General Lagrange immediately recognised the importance of a procedure that was 'designed to play a central part in the application of the Treaty':

> The progressive integration of the Treaty into the legal, social and economic life of the Member States must involve more and more frequently the application and . . . interpretation of the Treaty in municipal litigation . . . and not only the provisions of the Treaty itself but also those of the Regulations adopted for its implementation will give rise to questions of interpretation and indeed of legality. Applied judiciously—one is temped to say loyally—the provisions of Article 177 must lead to a real and fruitful collaboration between the municipal courts and the Court of Justice of the Communities with mutual regard for their respective jurisdictions.[79]

De Geus held that the Treaty *cum* regulation creates immediately applicable law within the domestic legal orders of the Member States. Presaging *Van Gend*, Advocate General Lagrange went one step further: 'Since the Treaty, by virtue of its ratification, is incorporated into the national law, *it is the function of national courts to apply its provisions*, except when powers are expressly conferred on Community organs.'[80]

In the very next reference action, *Van Gend en Loos*, the Court issued its constitutional juggernaut on direct effect, holding that the Treaty of Rome creates rights for individuals that Member State courts must protect. To be sure, international law had long known so-called 'self-executing' treaties, which can confer justiciable rights on individuals. Also, the Permanent Court of International Justice had long confirmed that international law may provide individuals with rights that states must recognise within their domestic legal orders,[81] and that states are not excused from their international legal obligations by virtue of domestic rules of law (whether they be rules of ordinary legislation or of a domestic constitution).[82]

But *Van Gend* was different. By directly ordering Member State courts to apply Community law, the European Court of Justice drafted these state institutions into the immediate service of the Community. This stands in marked contrast to traditional international law, in which the corporate structure of the state remains intact. State

[78] Case 13/61 [1962] ECR 45.

[79] *Ibid.* at 56.

[80] *Ibid.* at 65 (emphasis added).

[81] Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, PCIJ, Series B, No 15, 17, 18: '. . . it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adaptation by the parties of some definite rules creating individual rights and obligations and enforceable by national courts.'

[82] Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, PCIJ, Series A/B, No 44, 24.

violations of international law generally only create disputes among states. And even where individuals are allowed to sue states directly, as under Chapter 11 of the NAFTA[83] or the ECHR,[84] the outcome of the litigation is a judgment against the state in its corporate capacity.

To be sure, on one view, the NAFTA and ECHR dispute provisions might seem more dramatic than the pallid request for a preliminary reference on a question of Treaty law from a Member State court. After all, under NAFTA and the ECHR the international tribunal is completely seized with the legal dispute between an individual and a state, completely resolves the case, and orders a remedy. The Rome Treaty's reference procedure, in contrast, merely provides for Member State courts to pose questions of interpretation to the European Court of Justice.

And yet, the seemingly mild indirection of the reference procedure radically disaggregates the state. *Van Gend* holds that Member State courts owe the Community a duty of obedience that is not mediated by the national political branches, national laws, or even the national constitution. The ECJ does not simply pour the answer to a question of Treaty interpretation into the black box of the domestic legal order with whatever consequences for non-compliance this may have under international law. Instead, the ECJ communicates directly with the national court insisting that 'national courts must protect' the 'individual rights' the ECJ finds.

The constitutional disaggregation of the state gives the practical institutional punch to the normative assertion of integrating national and supranational legal systems. The drama of supremacy, for instance, which soon unfolded in *Costa v ENEL*,[85] was not the assertion that national law must yield to Community law. This would have been true with regard to international law as well. The drama lies in the fact that, as an institutional matter, 'superior' Community law is directly infused into the national process of adjudication. All this flows naturally from *Van Gend*.

Van Gend couples the constitutional disaggregation of the state with a normative recalibration of the Community system, that is, the normative turn to the individual.[86] *Van Gend* reads the Treaty as recognising the individual, along with the Member States, as the immediate subject of rights and responsibilities. The transfer of 'sovereign rights' from the Member States to the Community is matched by the idea that 'the nationals of the states [are] brought together in the Community [and] called upon to cooperate in the functioning of the Community'.[87] Here, too, the Court disaggregates the 'peoples' of each state, which are referred to in the preamble's 'ever closer union among the peoples of Europe' only in their corporate capacity. The individual is both legally freed from the

[83] North American Free Trade Agreement, US–Can–Mex, 17 December 1992, 32 ILM 605, 639 (1993) (Chapter 11). For a review of cases, see Jack J Coe, Jr, 'Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods' (2003) 36 *Vanderbilt Journal of Transnational Law* 1381.

[84] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5, 213 UNTS 221. For a synopsis of the introduction of individual suits, see, eg, Dinah Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe' (2003) 13 *Duke Journal of Comparative and International Law* 95.

[85] Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585 (holding that Community law trumps subsequent national law). See also Case 106/77, *Simmenthal* [1978] ECR 629 (holding that Community law trumps national constitutional rule on jurisdiction).

[86] See Daniel Halberstam, *The Bride of Messina: Constitutionalism and Democracy in Europe*, 30 Eur L Rev 30[6] (2005), 775.

[87] [1963] ECR 12.

constitutional confines of her Member State and endowed with what Robert Cover would have called an immediate 'jurisgenerative' capacity at the supranational level of governance.[88]

As in the case of *Marbury*, non-compliance with the judgment in *Van Gend* would have been devastating. Fortunately, however, the Court at the time laboured, in Eric Stein's famous words, '[t]ucked away in the fairland Duchy of Luxembourg and blessed . . . with benign neglect by the powers that be and the mass media'.[89] Moreover, the reference came from the Netherlands, which already had adopted monism as the guiding principle of its own legal system. The judges therefore knew that the Dutch court would carry out their judgment. And so, on a creative reading of Articles 12 and 177 of the EEC Treaty, the ECJ in *Van Gend*, too, could establish a great principle at little cost.

There is a coda to *Van Gend* as well. One year later, the French government boycotted European Council meetings, returning only after the 'Luxembourg compromise' preserved the rule of unanimity for taking any Community decisions and for passing secondary legislation.[90] This way, whatever the European Court of Justice would import into the Member States' legal orders would at least have the formal approval of all the Member States. The ECJ never adjudicated the Luxembourg compromise, which surely violated the spirit, if not the letter, of the Treaties as much as the dismantling of the circuit courts did with regard to the constitution of the United States. As in the United States, this would not be the last compromise to mitigate the clash of pluralism. Instead, it was only the beginning of a continuing process of mutual accommodation.

Confronting Pluralism: Interpretive Pluralism, Systems Pluralism, and Mutual Accommodation in the United States and Europe

In both the United States and Europe the mutual accommodation of pluralism remains with us to this very day. In the United States, the extent of the Supreme Court's power of judicial review is still hotly debated, as are the limits of Congress's and the President's powers to implement their own vision of the Constitution and retaliate against a recalcitrant Court. In the European Union, the scope of supremacy of Community law over national law and the scope of rights that European law and national constitutions afford individuals within the Member States remain unsettled.

In the United States, this institutional stalemate is due to the fact that multiple institutions can lay immediate claim to interpreting the constitution. Although Article III strongly supports the hierarchical superiority of the Supreme Court vis-à-vis lower federal courts and state courts, there is no similarly clear suggestion regarding the Congress, the President, or even the people themselves. Call this *interpretive* pluralism.

A quick contrast with continental systems illustrates the point. The standard European model of judicial review formally privileges a specialised tribunal with a monopoly over

[88] Cf Robert Cover, 'Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4.

[89] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1.

[90] Cf JHH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403, 2423–31.

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 opinions and judgments that completely bind the constitutional judgment of all other actors throughout the system. Although many features of Kelsen's model have been modified, the formal recognition of the legitimacy of judicial constitutional review by a specialised constitutional court remains. As Alec Stone Sweet sums it up: 'New 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 . . .'[91]

Although portions of *Marbury* might be read as making the analogous claim of supreme authority on behalf of the Supreme Court in the United States, *Marbury* itself did not definitively resolve this question. To be sure, in ordinary times a justified practice of deference to the Supreme Court prevails. But throughout the Court's history, US constitutional theory and practice have nonetheless allowed multiple competing institutions to lay claim to being authoritative interpreters of the Constitution. In keeping with the pragmatic tradition of the common law, the question in the United States has therefore always been one of finding the proper form of mutual accommodation. *Marbury*—especially when coupled with *Stuart v Laird*—provides a masterful initiation into this continuing conundrum. *That* is why the case is truly great.

The European Union is also a pragmatic legal order, as opposed to a formally ordered one. To be sure, as a matter of Treaty law, the European Court of Justice is the only institution charged with 'ensur[ing]' that the law be observed.[92] And yet, meshing this Treaty system with the existing constitutional structures of the Member States, as *Van Gend* did, yields a situation of *systems* pluralism that shares some of the theoretical and practical features of the *interpretive* pluralism that *Marbury* inaugurated so dramatically in the United States.

Comparative scholarship on *Van Gend*, however, has tended to juxtapose supremacy and direct effect in the Member States with US federal supremacy in the several States. This comparison certainly has its virtues.[93] And the apparent parallelism is obvious. But ultimately, the relationship between federal and state law, as well as that between the federal Supreme Court and the state judiciary, are fully ordered in the United States. Put another way, there is no real practical or theoretical doubt about federal legal (and judicial) supremacy in the United States—at least not since the Civil War, which dispelled any remaining confederate illusions about the nature of the United States Constitution.[94]

Unlike state resistance to federal power in the United States, however, the unsettled relation between the European and Member State legal orders (and their respective judiciaries) will continue for the foreseeable future. In Europe, this is not a troubling disturbance of the rule of law as state defiance of federal rule was in the United States. The

[91] Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 *Michigan Law Review* 2744, 2779.

[92] Art 220 EC.

[93] For an excellent analysis in this regard, see Franz C Mayer, *Kompetenzüberschreitung und Letztendscheidung* (2000).

[94] See, eg, Charles Warren, 'Legislative and Judicial Attacks on the Supreme Court of the United States' (1913) 47 *American Law Review* 1 and 161. I should mention the brief episode during the Civil Rights era, in which the Southern Manifesto reawakened the old idea of confederation and interposition, which provoked the Supreme Court's counterpunch in *Cooper v Aaron*.

uneasy relationship between European and Member State legal orders is not a matter of unlawful constituent state recalcitrance that must be overcome. Not even the constitutional treaty sought to change this in any radical way.[95] In short, like interpretive pluralism in the United States, systems pluralism in Europe is an essential feature of the legal order.[96]

How, then, does each system manage its own brand of pluralism? This is the neglected yet highly relevant comparison between *Van Gend*, *Marbury*, and their respective progenies. The answer is that each system seems to manage its pluralism with three interrelated principles in mind: voice, expertise, and rights. The first asks which institution has the better claim of representing the relevant political will; the second asks which institution has the superior institutional structure, capacity, or knowledge to address the substantive issue at hand; and the third asks which institution will better protect basic rights. These three questions overlap, of course, and they can only be sketched out in their crudest form in the pages that remain. But a quick glance nonetheless suggests the potential fruitfulness of this comparison.

Voice

One might think that in the case of interpretive pluralism claims of democratic voice invariably cut in favour of the political branches. That would be mistaken. As Bruce Ackerman, for one, has argued, the judicial counter-majoritarian difficulty may be reconceived as an inter-temporal difficulty with democratic claims on both sides of the ledger.[97] Viewed thus, judicial review involves the relative democratic credentials of a current parliamentary majority confronting the constitutional politics of the past. Ackerman aside, the relative democratic pedigree of the two sides can be subject to many forms of analysis, including analysing the deliberateness or the deliberative nature of the purported democratic choices on both sides, or examining the citizenry's working assumptions regarding institutional functions (such as judicial review), constitutional substance, or interpretive method.

Depending on the circumstances and the issue, a voice-based argument can cut in favour of the Judiciary, the President, Congress, or, as Larry Kramer has argued,[98] the people themselves. Suffice it to say that the pragmatic accommodation of interpretive pluralism in the United States since *Marbury* has repeatedly reflected the relative democratic pedigree of the competing claims of constitutional substance, method, and authority.

In the case of systems pluralism, one might similarly be tempted to think that claims of voice invariably favour the nation state, not Europe. This, however, would be mistaken as well. As an initial matter, there is, of course, a plurality of democratic wills in the European Union, which Kalypso Nicolaidis has aptly termed a 'demoicracy,' and which requires some

[95] See Mattias Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262.

[96] Cf, eg, Neil Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *MLR* 317; Neil MacCormick, *Questioning Sovereignty* (Oxford, Oxford University Press, 1999).

[97] See Ackerman, above n 72; Bruce Ackerman, *We The People: Foundations* (Cambridge, Mass: Belknap, 1991).

[98] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York, Oxford University Press, 2004).

assessment of the relative legitimacy of each will's claim within the system.[99] Second, systems pluralism itself is the product of the deliberate openness of Member State constitutional systems to supranational integration, which entails a specific national democratic commitment to accommodating a collective political will beyond the state. Third, even in terms of the strictly national political will, as Don Regan argues in his contribution to this volume, yielding to certain supranational norms may augment the quality of national democracy itself.

Here, too, then, the practice of accommodation may depend—and has depended—on analysing the relative democratic pedigree of competing norms, actors, and decisions. Consider in this regard, for example, the European Communities Act of 1972, which essentially precludes an *inadvertent* violation of Community law on the part of the UK while suggesting a less accommodating position in cases of specific and deep disagreement backed by a deliberate expression of the domestic democratic will.[100] One might read one prong of the Italian accommodation in *Granital* along these lines as well.[101] The German Maastricht opinion,[102] for all its faults, may be similarly understood as coming to an accommodation between the two legal orders based on an assessment of the relative democratic claims that may be made on behalf of each. And the brewing problems with the European Arrest Warrant may be similarly affected by the deliberateness with which the two sides have chosen their competing positions.[103]

Expertise

In the United States, the relative institutional capacity of the Congress, the President, the Court, or even the people themselves figures prominently in the daily paradigm of assessing the strength of judicial review. For example, on the one hand, many argue that the scholarly attributes of the Supreme Court place this institution in a superior position to ascertain the meaning of the Constitution.[104] On the other hand, the daily judicial deference to Congress is based on the assumption that the legion of facts necessary to answer constitutional questions are better ascertained and evaluated elsewhere.

Debates over adjusting the nature and severity of judicial review in the United States frequently focus on relative institutional capacity. Scholars debate, for instance, whether the Supreme Court has (or courts, more generally, have) the capacity to balance meaningfully competing interests or whether they should limit themselves to ensuring the absence

[99] Kalypso Nicolaidis, 'We, the Peoples of Europe . . .' (November/December 2004) *Foreign Affairs* 97.

[100] European Communities Act 1972, c 68 (England); *R v Secretary of State for Transport, ex parte Factortame Ltd* (1991) 1 All ER 70.

[101] Here, the Italian Constitutional Court generally allows lower courts to disapply national law in face of conflicting European law. One exception to this rule, however, is when the national law appears to violate fundamental principles of community law. This can be understood to mean that unless the national legislator deliberately takes on a core aspect of the Community legal order, the national legislator will not be deemed to have made a sufficiently salient democratic decision to oppose European law. If, on the other hand, the national legislator does invoke its full powers, then the matter will go to the Constitutional Court itself. See *Granital SpA v Amministrazione finanziaria*, Corte Cost, 8 June 1984, n 170, 66 Racc uff corte cost 367 (1984), 1984 Giur Cost 1988.

[102] 89 BVerfGE 155 (1993).

[103] Anneli Albi, 'Supremacy of EC Law in the New Member States: Bringing Parliaments into the Equation of "Cooperative Constitutionalism"' (2007) 3 *European Constitutional Law Review* 25.

[104] The classic argument is Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, Bobbs-Merrill, 1962).

of discrete, constitutionally obnoxious reasons for action.[105] Conversely, certain institutions might claim specific subject-matter expertise, as the Presidency has most recently in matters of national security in order to escape the watchful eye of the judiciary and the controlling hand of Congress. The specific accommodation on that issue is still out. In the meantime, it is certain, that accommodation in the face of interpretive pluralism in the United States will continue to depend on arguments from relative expertise.

In Europe, too, arguments from expertise have been a staple ingredient of legitimacy claims and the process of mutual accommodation. Indeed, the original idea of the Community grew out of Jean Monnet's dirigiste vision of an expert bureaucratic administration operating far above politics. One even detects a hint of this old idea in the language used in the French constitution to record the accommodation of Community powers: the Community's powers are notably referred to as narrow expertise-based '*compétences*' in contrast to the more broadly political '*pouvoirs*' of either the president or the French parliament.[106]

Insofar as the Community has progressed beyond this simple idea of apolitical knowledge and expertise, arguments about relative strength in structure and capacity nevertheless remain central to evaluating competing claims of authority. The principle of subsidiarity, for example, centrally addresses this very question and has figured prominently in legal as well as political efforts to accommodate the clash of legal orders.[107] One form of pragmatic constitutional accommodation on this score can be found in the Subsidiarity Protocol, which brings about a direct exchange of views on the matter among the national and European legislators.[108]

Rights

In the United States, rights tend to mean courts. And yet, interpretive pluralism has historically left room for multiple institutions to argue for their superior authority in protecting rights. For many years Congress, for example, successfully claimed the position of a co-ordinate expositor of rights under Section 5 of the 14th Amendment. Only recently has the Supreme Court struck down this claim, asserting the Court's monopoly on defining the content of rights even under the 14th Amendment.[109] So far, Congress has not mounted any serious resistance to this consolidating move on the part of the Supreme Court. But this complacence may ultimately be due to the Court's own pragmatic restraint: so far the Court seems to have spared central Congressional civil rights initiatives, such as Title VII of the Civil Rights Act and the Voting Rights Act, from its searching standard of review.

[105] See, eg, Richard H Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1994) 45 *Hastings Law Journal* 711, 715; T Alexander Aleinikoff, 'Constitutional Law In the Age of Balancing' (1987) 96 *Yale Law Journal* 943, 949, 951; Jeremy Waldron, *Rights in Conflict, in Liberal Rights: Collected Papers 1981–1991*, 203 (Cambridge, Cambridge University Press, 1993).

[106] Cf, eg, Constitution du 4 Octobre 1958, Arts 88.1 and 2 with 7 and 25.

[107] Kumm, above n 95, too, proposes using this principle in solving the stand-off between the constitutional systems.

[108] Stephen Weatherill, 'Using national parliaments to improve scrutiny of the limits of EU action' (2003) 28 *EL Rev* 909.

[109] For a critical assessment, see, eg, Robert C Post and Reva B Siegel, 'Legislative Constitutionalism and Section Five Power: Polycentric Interpretation of the Family and Medical Leave Act' (2003) 112 *Yale Law Journal* 1943.

In the European Union, fundamental rights still tend to mean domestic constitutional rights, or, perhaps by now, domestic constitutional rights as supervised by the European Convention on Human Rights. Accordingly, one element of the constitutional standoff between the Community and Member State legal orders famously turned on Member State resistance regarding rights protection. Here, the European Court of Justice only 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 will now defer to the European Court of Justice on case-by-case rights protection while keeping a watchful eye on the ECJ's overall track record on rights generally.[110] The European Court of Justice, in turn, has not only incorporated general rights protection into its own jurisprudence, but also begun to defer to specific domestic claims of legislative rights protection that exceed a European-wide standard, even when those protections run up against free movement claims.[111]

Most interesting is the possible shift in accommodating the respective boundaries of European and Member State jurisdiction over rights. According to cases like Mary Carpenter, for example, the European Court of Justice could investigate virtually any Member State's legislative, administrative, or adjudicative act that might negatively affect the exercise of an individual's rights to free movement under the EC Treaty. As the Carpenter case illustrated,[112] jurisdiction under this rubric was potentially vast. It led to ECJ fundamental rights review of Mary Carpenter's residency rights on the reasoning that her residency in the UK provided emotional support to her husband, who exercised free movement rights by working throughout the EU. With the recent *Chen* case,[113] the already vast potential of ECJ fundamental rights review has expanded even further, as the ECJ might now intervene to protect all fundamental rights of all EU citizens.

To date, the European Court of Justice has not regularly exhausted its vast power over fundamental rights protection, most likely for reasons of mutual accommodation. As a general matter, Member States' fundamental rights records have been fair, at least when coupled with protection through the European Court of Human Rights in Strasbourg. There has been little need for the European Court of Justice to intervene, except where the fundamental right did indeed have a particular connection to free movement.

With the accession of Member States with more questionable fundamental rights records, however, the current state of mutual accommodation might be shifting. The European Court of Justice might begin to review fundamental rights claims—especially those coming from the new Member States—more aggressively. Indeed, the ECJ may have laid the foundation for such intervention in the recent *Pupino* case,[114] in which the Court read a European framework directive under the third pillar to protect basic rights of criminal procedure. The ECJ specifically made reference to the ECHR in this decision, as if to lend its own institutional support to what has become an important (but increasingly overworked) ally in this venture.

[110] 73 BVerfGE 339 (1986) (Solange II).

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

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

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

[114] Case C-105/03, *Criminal Proceedings against Maria Pupino* [2005] ECR I-5285.

The new accommodation on rights in Europe may be just this: (1) the Member States (and the European Court of Human Rights) 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; (2) conversely, however, the European Court of Justice will only continue to refrain from aggressively reviewing all fundamental rights claims within its jurisdiction as long as Member States (with the help of a functioning European Court of Human Rights) maintain a general satisfactory level of fundamental rights protection.[115] In the case of new Member States with sketchy human rights records that may slip by an increasingly overburdened European Court of Human Rights, the ECJ may begin to reach more broadly than it traditionally has done with regard to the old Member States. In sum, each level will focus on reviewing only those rights violations that strike at the core of their respective legal systems but only as long as the other level generally protects rights adequately within its own primary sphere of operation.

Conclusion

Van Gend is often casually compared to *Marbury* simply because in each case the high court declares itself to be the final arbiter of central government law. But there is a good deal more to the comparison than that. Both cases serve up what is perhaps the most profound and complex issue of their systems: multiple competing claims of ultimate legal authority. Both decisions make important claims for central judicial authority. And yet, in so doing, each inaugurates a regime of mutual accommodation among the competing actors lasting to this very day.

To be sure, the nature of the competition in the two cases is rather different. In the United States, the competition is mostly horizontal and institutional, that is between the Court, the President, and Congress, as well as the people themselves. And the object is interpreting a single object: the Constitution. In Europe, the competition is mostly vertical and systemic, that is between the legal orders of the European Union and its Member States. To be sure, in Europe there is also competition among different institutions to interpret the Union's foundational charter. But this institutional competition is ultimately based on a deeper, systemic competition, that is, a battle about which legal system trumps the other(s) in cases of conflict.

And yet, despite these differences, the practice of accommodating *interpretive* pluralism in the United States shares important features with the practice of accommodating *systems* pluralism in Europe. By juxtaposing accommodation in the two systems, we may understand these practices far better than if we limit ourselves to only one or the other legal order. In particular, we recognise that actors in both systems seem to rely on considerations of voice, expertise, and rights to manage the pluralist stand-off.

[115] See, eg, Case 380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le Garanzie nelle Comunicazioni et al*, nyr (12 September 2007) (Opinion of Advocate General Maduro).