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## ***Marbury v. Madison* and European Union "Constitutional" Review**

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# MARBURY v. MADISON AND EUROPEAN UNION “CONSTITUTIONAL” REVIEW

GEORGE A. BERMAN\*

## I. INTRODUCTION

The U.S. Supreme Court's decision in *Marbury v. Madison*<sup>1</sup> specifically raises the question of the legitimacy of a “horizontal” species of judicial review, that is, review by courts of the exercise of powers by the coordinate branches of government. The same question could be asked with respect to judicial review in the European Union. More particularly, how problematic or contestable has “horizontal” judicial review been within the European Union as a matter of principle? And, irrespective of its contestability, how have the courts of the European Union exercised “horizontal” review? We will find, however, that it is not the “horizontal” dimension of judicial review, with which *Marbury* is associated, but rather its “vertical” dimension, that has generated larger questions of principle within the E.U. constitutional system, giving rise to serious doubts as to its exercise.

## II. “VERTICAL” REVIEW IN THE EUROPEAN UNION

Controversy over the principle of vertical judicial review within the United States has become relatively muted. The U.S. Constitution's Supremacy Clause<sup>2</sup> has gone a long way toward securing acceptance of the legitimacy in principle of *federal* court review of the *federal* constitutionality of *state* legislation. This is not to say that the principle has not been contested. Names such as John C. Calhoun<sup>3</sup> and milestones such as the Kentucky<sup>4</sup> and Virginia Resolutions<sup>5</sup> demonstrate as much. But the day has long since passed

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1. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

2. U.S. CONST. art. VI cl. 2.

3. See generally IRVING H. BARTLETT, JOHN C. CALHOUN: A BIOGRAPHY (1993).

4. JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 58-59 (2002).

5. *Id.* at 59-60.

when the principle of federal court review of the federal constitutionality of state legislation is challenged as a matter of constitutional principle. Such dispute as there is—and it is at times hot—tends to be over the workings and intensity of that review, and over the specific constitutional reasoning on the basis of which state legislation is on occasion found to run afoul of the federal Constitution.

By comparison, judicial review's vertical, or federalist, dimension reveals truly serious "fault lines" within the European Union. This should not surprise us. If the European Union's core purpose is the pervasively programmatic one of market integration—the free movement of the factors of production: goods, persons, services and capital<sup>6</sup>—then infringing State measures simply cannot be allowed to stand, but neither can State courts realistically be relied upon to invalidate them. To appreciate this point, we in the United States would have to imagine the "dormant commerce clause" lying at the core of American constitutionalism, and ask whether state courts could be counted on to vindicate it. Only if that were the case, would we find ourselves in a situation broadly comparable to the E.U. situation with regard to vertical federalism.

When we examine the substance of the Treaty Establishing the European Community,<sup>7</sup> we cannot help but observe that much of the *stuff* of that treaty consists of limitations on Member State law and policy vis-à-vis the principles of European market integration. The treaty also establishes fairly precise formulas for determining if and when Member State-imposed obstacles to intra-Community trade are tolerable.<sup>8</sup> Market integration is so central to the European enterprise that the European Court of Justice (ECJ) read into the Treaty of Rome a full-scale supremacy clause at its first opportunity.<sup>9</sup>

As a vertical integration project, the European Union is of course far the better model than the United States for the emerging regime of the World Trade Organization (WTO). The jurisprudence of the WTO panels and Appellate Body is very much a matter of determining the extent to which the scope of policymak-

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6. GEORGE A. BERMAN ET AL., CASES AND MATERIALS ON EUROPEAN UNION LAW 451 (2d ed. 2002).

7. CONSOLIDATED VERSION OF THE TREATY ESTABLISHING THE EUROPEAN COMMUNITY, Dec. 24, 2002, O.J. (C 325) 33 (2002) [hereinafter EC TREATY].

8. See *id.* arts. 28-30 (goods), 39 (workers), 43-46, 49-54 (services and establishment), 56-60 (capital).

9. See Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585.

ing freedom that previously sovereign states once enjoyed is now to be curtailed in pursuance of the free trade and market integration policies central to the WTO regime.<sup>10</sup>

This brings me to the question of the exercise of vertical judicial review within the European Union. An examination of the jurisprudence of the ECJ shows that, while there have been, as in most federal systems, various “swings of the pendulum,” allegedly discriminatory or protectionist state measures have been subject not only to constitutional scrutiny, but to *serious* constitutional scrutiny. Even after the ECJ finds that a Member State has invoked a legitimate state interest in defense of trade-inhibiting legislation, the State may have to justify that measure by reference to a broad and potentially demanding proportionality analysis.<sup>11</sup> This proportionality analysis may require, at the extreme, a showing that the disputed measure satisfies a least drastic means test<sup>12</sup> long associated in the United States with vindication of only the most precious of individual constitutional rights. The proportionality principle permits close judicial scrutiny even of measures adopted by Member States in the name of “overriding” or “paramount” requirements of a “mandatory” nature.<sup>13</sup>

This is not to say that strict scrutiny in E.U. law knows no limitations. The ECJ’s *Keck* jurisprudence, for example, carves out an exception according to which the ECJ will not examine the proportionality of State measures that only potentially and indirectly affect intra-Community trade.<sup>14</sup> The ECJ’s manifestly deferential case law includes another exception applicable when Member States seek to justify state measures by reference to national interests of a public morality character.<sup>15</sup> Furthermore, established case law shows that, once Member States have legislatively harmonized certain policies at the Community level, the possibility of justifying national measures on the basis of those policies diminishes.<sup>16</sup>

The pattern that I have described is in an important sense paradoxical. That which is most essential to the achievement of the

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10. MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 126-28 (2003).

11. Case 124/81, *Commission v. United Kingdom*, 1983 E.C.R. 203, 236 (UHT Milk Case).

12. *Id.*

13. Case 178/84, *Commission v. Germany*, 1987 E.C.R. 1227 (German Beer Case).

14. Joined Cases C-267/91 and C-268/91, *Keck v. Mithouard*, 1993 E.C.R. I-6097, I-6131.

15. Case 34/79, *Regina v. Henn*, 1979 E.C.R. 3795, 3813.

16. *See, e.g.*, Case 5/77, *Tedeschi v. Denkavit*, 1977 E.C.R. 1555, 1576-77.

paramount Community mission—*viz.* assuring the conformity of national law with overriding market integration values—by its nature requires a potentially objectionable erosion of State sovereignty. It is for this reason that, while the basic principle of supremacy of European over national law has largely gone uncontested, the more precise notions of direct applicability and direct effect, which are essential to realizing that supremacy, have proven, historically at least, to be somewhat more contested.<sup>17</sup>

The E.U. law system mitigates this contestability in various ways. By and large, the ECJ never invalidates a Member State measure as such; rather, at most, the ECJ declares the measure's incompatibility with E.U. law, and leaves to Member State administrations, and ultimately Member State courts, the obligation to draw the appropriate substantive and remedial inferences.<sup>18</sup> The ECJ's review is most often mediated by the reference of "preliminary questions"<sup>19</sup> by Member State courts before which questions of E.U. law may arise. The right of national courts to make and formulate preliminary references to the ECJ, and their right to determine how the resulting preliminary rulings will be given effect in the national court proceedings out of which they arose, strongly empowers those courts in the E.U. adjudicatory process.

On the other hand, the ECJ has understandably refused to give national courts the "last word" on the adequacy of the national law remedies that Member State courts use to vindicate E.U. law-based claims. Understandably, a formidable body of case law has arisen in which the ECJ requires national courts to use non-discriminatory and minimally adequate remedies in adjudicating E.U. law-based claims. Non-discriminatory remedies are those which are available under other Member States' laws for comparable violations, and at the same time at least "minimally adequate" for purposes of protecting the E.U. legal rights being asserted.<sup>20</sup> The remedial pressures on Member States and their courts have operated as an important counterweight in the system.

This corrective produces its own paradox. Precisely because Member State courts are the linchpin of the system, the ECJ has taken an exceptional, and some might say *unhealthy*, interest in

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17. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 163-212 (2d ed. 1998).

18. BERMAN ET AL., *supra* note 6, at 441.

19. EC TREATY, *supra* note 7, art. 234.

20. Case 33/76, *Rewe-Zentralfinanz eG v. Landwirtschaftskammer für das Saarland*, 1976 E.C.R. 1989.

scrutinizing the adequacy of Member State administrative and judicial remedies. In contrast to domestic law-based claims, the ECJ will scrutinize the adequacy of a Member State remedy for a Community law-based claim even when the national courts apply the remedy in a non-discriminatory fashion. This *remedial adequacy* case law has addressed such matters as the availability of certain remedies (such as constitutional review of national legislation contrary to E.U. law,<sup>21</sup> provisional relief in connection with E.U.-based challenges to national law,<sup>22</sup> and a damages remedy for national violations of Community law<sup>23</sup>) and the acceptability of limits on the exercise of E.U. law-based claims (such as standing rules,<sup>24</sup> statutes of limitations,<sup>25</sup> damages ceilings,<sup>26</sup> and defenses such as waiver<sup>27</sup> and abuse of rights<sup>28</sup>).

### III. "HORIZONTAL" REVIEW IN THE EUROPEAN UNION

While the vertical dimension of judicial review is thus highly problematic within the European Union, its horizontal dimension—the dimension largely represented by *Marbury*—is considerably less problematic. We observe this distinction from the very face of the Community Treaties. Unlike the U.S. Constitution, E.C. Treaty articles expressly vest the ECJ with authority to review the legality of acts of E.U. institutions.<sup>29</sup> They also identify which categories of plaintiffs have standing to seek review, and on which grounds and within what time period.<sup>30</sup> Originally, the institutional plaintiffs included the Commission and the Council, with the European Parliament initially having nothing more than a

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21. See, e.g., Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.*, 1978 E.C.R. 629.

22. See, e.g., Case C-213/89, *The Queen v. Sec'y of State for Transp. ex parte Factortame Ltd.*, 1990 E.C.R. I-2433, I-2465.

23. See, e.g., Joined Cases C-6 & 9/90, *Francovich v. Italy*, 1991 E.C.R. I-5357, I-5414.

24. See, e.g., *id.* at I-5407-13.

25. See, e.g., *Rewe-Zentralfinanz eG*, 1976 E.C.R. at 1999.

26. See, e.g., Case C-271/91, *Marshall v. Southampton & S.W. Hampshire Area Health Auth.*, 1993 E.C.R. I-4367, I-4412.

27. See, e.g., Case C-126/97, *Eco Swiss China Time Ltd. v. Benetton Int'l NV*, 1999 E.C.R. I-3055, I-3094-95.

28. See, e.g., Case C-441/93, *Pafitis v. Trapeza Kentrikis Ellados A.E.*, 1996 E.C.R. I-1347, I-1359.

29. EC TREATY, *supra* note 7, art. 230. The original article also gave standing, under certain circumstances, to private parties. Under the current version of Article 230, standing is also enjoyed by the European Parliament and, within certain limits, the Court of Auditors, and the European Central Bank.

30. *Id.*

purely consultative role in the legislative process.<sup>31</sup> Interestingly, neither of these institutional plaintiffs offers any kind of presumptive *majoritarian* or *popular* advantage, much less a *democratic surplus*. The Commission, after all, is bureaucratic in form and executive in function<sup>32</sup>; the Council consists by definition of national government ministers<sup>33</sup> entirely capable of acting in a way antithetical to the preferences of the E.U.'s popular majority, not to mention to the Community interest.

The E.C. Treaties' embrace of horizontal judicial review is nevertheless entirely understandable, and arguably indispensable, from a constitutional point of view. Precisely because the Commission and Council enjoyed such broad and democratically uncontrolled authority under the Treaties, the rule of law requires some form of check on their exercise of power.<sup>34</sup> Viewed in this light, judicial review of the legality of E.U. law measures—though by no means itself a directly democratic instrument—contributes significantly to the control of supranational institutions which, for all their power, are not themselves essentially democratic.

The only real alternatives to inviting the ECJ to perform this role would have been to permit the legality of Community legislation to pass unreviewed or to subject it to review by national supreme and constitutional courts, insofar as its applicability in the various member states is concerned. The first solution, circumventing any judicial review of Community legislation, would have been unacceptable. The Member States had not perfected their own internal systems of administrative and constitutional review of national law over the years—constructing and deploying powerful notions such as the German *Grundrechte* and the French *principes généraux du droit*—only to permit supranational law to operate, unreviewed and unreviewable, within their territory.<sup>35</sup> A number of national supreme and constitutional courts—starting with the

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31. *Id.* art. 251 (parliamentary co-decision procedure).

32. *Id.* arts. 211-19.

33. *Id.* arts. 202-10.

34. Case 294/83, Parti écologiste 'Les Verts' v. Parliament, 1986 E.C.R. 1339, 1365.

35. BERMANN ET AL., *supra* note 6, at 203.

German<sup>36</sup> and, more recently, the Irish,<sup>37</sup> Italian,<sup>38</sup> Danish,<sup>39</sup> and Greek<sup>40</sup>—have sent a clear message that, unless the ECJ conducts serious constitutional review of E.U. legislative and regulatory measures, national courts will have to review them on the occasion of implementation. This approach presents evident risks to the uniformity and supremacy of E.U. law, which explains, at least in part, the ECJ's readiness to police E.U. legislative and regulatory measures, again on both fundamental rights and E.U. competence grounds, when it otherwise might not have done so.<sup>41</sup> The historical record confirms the very real possibility that national courts might contest E.U. law on one of two grounds: incompatibility with fundamental rights norms or exceeding the scope of authority "delegated" to E.U. institutions in the constitutive treaties.<sup>42</sup>

We may ask how the Court's authority to conduct horizontal judicial review within the EU has been exercised. It is, once again, largely clear and unsurprising that the ECJ has borrowed, by analogy, practices from the administrative and constitutional jurisprudence of some Member States' national constitutional and/or supreme courts, including notably the German Constitutional Court and the French Conseil d'Etat. The ECJ has woven a doctrinally rich fabric drawn from national jurisprudential concepts such as *exces de pouvoir* (notably, lack of jurisdiction,<sup>43</sup> procedural due process,<sup>44</sup> violation of substantive law,<sup>45</sup> and *detournement de pouvoir*<sup>46</sup>), and general principles of proportionality,<sup>47</sup> equality,<sup>48</sup>

36. *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, Case 2 BvL 52/71, BverfGE [Federal Constitutional Court] 37, 271, [1974] 2 C.M.L.R. 540 (1974). The second solution—national judicial review—is likewise problematic.

37. *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan*, [1989] I.R. 753, [1990] 1 C.M.L.R. 689 (1989) (Ire.).

38. *S.p.a. Fragn v. Amministrazione delle Finanze*, Corte cost., 21 Apr. 1989, n.232, 34 Giur. Cost. 1001, 1990 Foro It. I 1855 (1989).

39. *Case I 361/1997, Carlsen v. Rasmussen*, [1998] UfR [Supreme Court] 800, ¶ 9.6, [1999] 3 C.M.L.R. 854, 861-62 (1999) (Den.).

40. *Katsarou v. DI.KATSA*, 3458/1998 (Greece).

41. *Id.*

42. CRAIG & DE BÚRCA, *supra* note 17, at 299-308.

43. *See, e.g.*, Case C-327/91, *France v. Commission*, 1994 E.C.R. I-3641 (application to declare the antitrust agreement between the Commission and the United States void).

44. *See, e.g.*, Case 17/74, *Transocean Marine Paint Ass'n v. Commission*, 1974 E.C.R. 1063.

45. BERMANN ET AL., *supra* note 6, at 170-71.

46. *See, e.g.*, Case 105/75, *Giuffrida v. Council*, 1976 E.C.R. 1395.

47. *See, e.g.*, Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125.

48. *See, e.g.*, Case 114/76, *Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH & Co. KG*, 1977 E.C.R. 1211.



protection of legitimate expectations and legal certainty,<sup>49</sup> and fundamental public liberties.<sup>50</sup> As among these sources, the ECJ's intensity of review varies greatly. The ECJ is quite exacting when it comes to the E.U. institutions' respect for procedural norms and for specific limits on their scope of authority, but less so in considering whether the competent institutions respected the substantive law imposed on them by the Treaties or general principles such as proportionality and subsidiarity. Indeed, scholars have long noted that the ECJ tends to exercise measurably greater scrutiny when examining the proportionality of national measures challenged within the context of the free movement of goods, persons, services, or capital than it exercises when weighing the legality of E.U. measures against the general principle of proportionality at the E.U. level.<sup>51</sup>

Up to a certain point, ECJ review does operate as a reasonable surrogate mechanism for national court review. To the extent that both national and E.U. *higher* laws protect individual rights and general principles like proportionality, the tasks that they perform and the values that they champion in performing those tasks are broadly congruent. But the congruence is far from perfect. There remains always the possibility that national and E.U. constitutional systems will reconcile fundamental rights differently and appear to clash. For example, the two systems have already created a potential conflict with respect to freedom of expression and the right to privacy.<sup>52</sup>

No less important or inescapable, of course, is the possibility that the ECJ and national courts will take contrasting views and reach conflicting conclusions about the proper scope of E.U. competences.<sup>53</sup> Perhaps in recognition of that fact, and of its possible impact on national courts' willingness to trust in the surrogacy of

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49. See, e.g., Case 120/86, *Mulder v. Minister van Landbouw en Visserij*, 1988 E.C.R. 2321.

50. See, e.g., Case 29/69, *Stauder v. City of Ulm, Sozialamt*, 1969 E.C.R. 419.

51. George A. Bermann, *Proportionality and Subsidiarity*, in *THE LAW OF THE SINGLE EUROPEAN MARKET: UNPACKING THE PREMISES* 75, 75-76 (Catherine Barnard & Joanne Scott eds., 2002).

52. See Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice's Authority: Economic Freedom Versus Human Dignity*, *COLUM. J. EUR. L.* (forthcoming 2004) (discussing the preliminary reference to the Court of Justice by the German Federal Administrative Court in the Case C-36/02, *OMEGA Spielhallen- und Automatenaufstellung-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2002/C 109/40, 2002 O.J. (C 109) 25, 25 (*Laserdrome* case)).

53. Case C-376/98, *Germany v. Parliament and Council*, 2000 E.C.R. I-8419 (*Tobacco Advertising*).

ECJ review on the competences question, the ECJ did finally address this issue. After some forty years of not once finding a Community law measure to fall *ultra vires* the Treaties, the ECJ ruled in the *Tobacco Advertising* case that a particular directive had, at least in part, been enacted in excess of the Union's legislative authority under the EC Treaty.<sup>54</sup> Interestingly, the ruling, while in itself an exercise of horizontal judicial review (in that the Court partially struck down an E.U. legislative measure), achieved the objectives of vertical judicial review. To the extent that the directive was struck down, Member States' "constitutional" authority over the matter was vindicated and preserved. In effect, while the practice of *horizontal* review was in play because the legality of a coordinate branch's action was in dispute, the ECJ was in effect resolving the federalism tensions typical of *vertical* judicial review.

#### IV. CONCLUSION

Clearly, federalism concerns cast a long shadow over judicial review in the European Union. This is the case not only in the ECJ's vertical market integration case law, but also in the case law involving horizontal review, where the real value at stake is protection of the proper sphere of Member State authority within the E.U. constitutional scheme.

This is not to suggest that E.U. constitutionalism is unique, or even distinct from U.S. constitutionalism, in this regard. The U.S. Supreme Court's recent federalism rulings under the Tenth,<sup>55</sup> Eleventh,<sup>56</sup> and Fourteenth<sup>57</sup> Amendments, as well as the Interstate Commerce Clause,<sup>58</sup> all entail federal judicial challenges to the constitutionality of legislation adopted by Congress, a coordinate branch at the federal level. A moment's reflection demonstrates that the real stakes in those cases involved the balance of constitutional authority between the federal government and the states.

The fact remains that there is still largely missing in the European Union any consensus, such as the consensus which has long prevailed in the United States, that Member State constitutional values must, as a matter of *substantive* principle, yield to national constitutional values to the extent of conflict between them. Additionally, there is not even any E.U. consensus over the *institutional*

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54. *Id.*

55. *New York v. United States*, 505 U.S. 144 (1992).

56. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

57. *United States v. Morrison*, 529 U.S. 598 (2000).

58. *United States v. Lopez*, 514 U.S. 549 (1995).

question as to which court—the supreme or constitutional court of the participating Member State or the European Union’s own supreme court—is the final arbiter on any such substantive questions of law. This is but a sign of the larger unresolved question of the European Union’s identity: is it more in the nature of federal polity or a federation of polities? Were that question to be clearly resolved one way or the other, a resolution of the substantive and institutional tensions to which I refer would more easily emerge.