

Constitutive Cases: *Marbury v. Madison* meets *Van Gend & Loos*

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What rights if any do individuals have against their governments? Can ordinary legislation be controlled by constitutional documents? These two questions lie at the center of the two most important constitutional decisions in history, *Marbury v. Madison*¹ and *Van Gend & Loos*.² *Marbury* is as well known to U.S. jurists as *Van Gend* is to European jurists. However few people are familiar with both decisions. This article presents a comparison of the two decisions to see what can be discovered by the comparison. It concludes that the two decisions take different routes to the same goal but that *Van Gend* is both bolder and more defensible. Thus the comparison may provide some creative insights to jurists on both sides of the Atlantic.

I. *Marbury v. Madison*

A. The Facts in *Marbury v. Madison*

The facts of *Marbury* are well known to American lawyers but likely unfamiliar to foreign lawyers and contextualize the legal issue. Briefly, the departing president had signed and sealed but not yet delivered commissions to new judges vesting them in office. The new president wished not to deliver these commissions.³ One of the new judges, *Marbury*, sued in *mandamus* (lat.; etymologically 'give me') to obtain his commission.⁴ The Supreme Court concluded that in fact the law giving the power to the court to issue writs of *mandamus* to public officers was contrary to the constitution and thus unenforceable.⁵

B. *Marbury v. Madison*'s Interest

Marbury is interesting not because it determined that the Supreme Court can adjudicate the constitutionality of an act of congress.⁶ That was already obvious.⁷ The Federalist Papers make plain that the power of the Supreme Court to review laws against the constitution was

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¹ 1 Cranch 137, 5 U.S. 137, 1803 WL 893, 2 L.Ed. 60, U.S. Dist. Col., Feb 1803.

² Case 26/62 *Van Gend & Loos* (1963) ECR I

³ *Marbury*, 155.

⁴ *Marbury*, 154-155.

⁵ *Marbury*, 176-180.

⁶ *Marbury*, 178.

⁷ "Before the ratification of the Fourteenth Amendment, substantive constitutional review resting on a theory of unenumerated rights occurred largely in the state courts applying state constitutions that commonly contained either due process clauses like that of the Fifth Amendment (and later the Fourteenth) or the textual antecedents of such clauses, repeating *Magna carta*'s guarantee of "the law of the land." [FN5] On the basis of such clauses, or of general principles untethered to specific constitutional language, state courts evaluated the constitutionality of a wide range of statutes." *Washington v. Glucksberg*, 521 U.S. 702, 756-757 117 S.Ct. 2258 (1997).

intended as an integral part of the U.S. constitution *ab initio*⁸ and it is also clear that judicial review was intended by the framers of the constitution.⁹

Though judicial review was already obvious¹⁰ and is in all events accepted practice *Marbury* is nevertheless interesting because of the analytical structure the court uses to reach the obvious result. Chief Justice Marshall claims the structure of analysis he used inevitably compelled the result.¹¹ In fact however that is not the case. It is not that the analytical structure is wrong, rather that the analytical structure does not compel the result claimed. Other arguments however would have reached the same result. Marshall claims the arguments he uses to reach his result to be incontestable but they are in fact contestable.

C. The Analytical Structure of *Marbury v. Madison*

1. Written and unwritten constitutions

One of the key distinctions *Marbury v. Madison* makes is between written and unwritten constitutions.¹² This distinction is not so controversial, it may seem at first: After all, French law likewise distinguishes between its written sources of law and unwritten sources of law. Written sources of French law are hierarchized as: first the Constitution (France has a written constitution with limited judicial review),¹³ second international treaties¹⁴ (which

⁸ "If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption, where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents." Hamilton, *Federalist* 78.

⁹ *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 258 (1998); John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 Tex. L. Rev. 1459, 1462 (2001). As on most points contrary scholarship can be found, e.g., Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215, 235-237 (2000); but the practice of judicial review both in the colonies and in the states as well as the writings of the federalist confirm Yoo's position.

¹⁰ See, *Whittington v. Polk*, 1 H. & J. 236 (Md.Gen. 1802) (Samuel Chase, J.); *State v. Parkhurst*, 9 N.J.L. 427 (N.J. 1802); *Respublica v. Duquet Shippen*, 2 Yeates 493 (Pa. 1799); *Williams Lindsay v. East Bay Street Com'rs*, 2 Bay (S.C.L.) 38 S.C.Const.App. 1796 (Thomas Waties, J.); *Ware v. Hylton*, 3 Dallas (3 U.S.) 199 (1796); *Calder v. Bull*, 3 Dallas (3 U.S.) 386 (1798); *Cooper v. Telfair*, 4 Dallas (4 U.S.) 14 (1800); *Vanhorne's Lessee v. Dorrance*, 28 F. Cas. 1012, 2 Dallas (2 U.S.) 304; 1 L. Ed. 391; C. Pa. 1795).

¹¹ "The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable." *Marbury*, 177.

¹² *Marbury*, 176 et seq.

¹³ Constitution Francaise Titre XVII Art. 89.

¹⁴ Constitution Francaise, Art. 55.

outrank legislation),¹⁵ and third ordinary legislation.¹⁶ Unwritten sources of law in France are general principals of law¹⁷ case law and customary law.¹⁸ Courts are not obliged to follow precedent and their decisions do not constitute binding precedent.¹⁹ French case law incorporates and expresses the general principles of law.²⁰ Indeed, Marshall himself in *Marbury* looks to general principles of law to determine whether *mandamus* should have issued.²¹ General principles of law (specifically the principle of proportionality) have been invoked by the Supreme Court to decide domestic questions of law.²² Such principles are unwritten law. Yet Justice Marshall thinks that the unique quality of a written constitution is that all²³ written constitutions,²⁴ and only written constitutions, allow judges to review ordinary legislation for its constitutionality. Marshall also implies that only governments

¹⁵ Unsurprisingly the case law of the *conseil d'état* and *conseil constitutionnel* confirms the constitutional hierarchization of treaties as superior to laws. CE 1952 *Dame Kirkwood*; CC 1975 *IVG*; CCass 1975 *Jacques Vabres*; CE 1989 *Nicolo*.

¹⁶ Constitution Française, Art. 55 " Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie." (Treaties or accords regularly ratified or approved have, from the time of their publication, a superior authority to that of the laws with the reservation that for each accord or treaty be applied by the other party [thereto]) (Author's translation).

¹⁷ For a discussion of the place of general principles of law in the French constitutional order see: CC Decision 69-55 of June 26, 1969, GD 228.

¹⁸ See, e.g., Cons. const., 16 Juillet 1971.

¹⁹ See Jonathan I. Charney, *Third Party Dispute Settlement in International Law*, 37 Colum. J. Transnat'l L. 65, 83 (1997):

[T]he French system under the *Cour de Cassation* ... institutionalizes the values of percolation. The Court's position on the French law at issue will only be binding on a third lower court after the Court has previously quashed the decisions of two lower courts in the same case. Furthermore, in French law the doctrine of stare decisis does not exist as a formal matter. Thus, decisions of higher courts have no binding effect on lower courts in regard to cases other than the one decided by the reviewing court. A single decision on a matter of law by a higher court is not binding, but it may be persuasive for the lower courts when the same legal issues are present. It is understood, however, that after a sufficient number of similar higher court decisions on the same legal question, the lower courts consider themselves to be bound by la jurisprudence constante. Other civil law jurisdictions follow similar practices."

²⁰ The general principles include the principle of freedom (principe de liberté, see, e.g., CE, Ass., 22 juin 1951, *Daudignac* ; CE Sect., 13 mai 1994, Président de l'Assemblée) the general principle of equality (see, e.g., CE, Sect., 9 mars 1951, *Société des concerts du conservatoire*, Leb. p. 151, GAJA n° 70 ; CE, Ass., 25 juin 1948, *Société du Journal l'Aurore*, Leb. p. 289, GAJA n° 64; CE, 1974, *Denoyez et Chorques*; CE, Ass, 28 mai 1954, *Barrel et autres*, Rec. p. 308 concl. *Letourneur*, GAJA n° 77 ; CE, 9 novembre 1966, *Commune de Clohars-Carnoët*) the principle of non retroactivity of laws (C.E., Ass, 25 juin 1948, *Société du Journal l'Aurore*, Leb. p. 289, GAJA n° 64) (i.e. no *ex post facto* laws) the right of self defense (CE, Sect., 5 mai 1944, *Dame Veuve Trompier Gravier*, Leb. p. 133, GAJA n° 58 ; Ass., 26 octobre 1945, *Aramu*, Leb. p. 213 ; *en matière pénale* : CE, Ass., 19 octobre 1962, *Canal, Robin et Godot*, Leb. p. 552, GAJA n° 88. CC, dec. n° 76-70 DC du 2 décembre 1976, Rec. p. 39 ; CC, déc. n° 77-83 DC du 20 juillet 1977, Rec. p. 39). These principles and the decisions in cases derived from them are by no means exhaustive.

²¹ *Marbury*, 152, 170.

²² *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 3009 (1983).

²³ "the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Marbury*, 180.

²⁴ "This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on." *Marbury*, 177.

with written constitutions are limited governments.²⁵ That is not in fact the case. Britain has no written constitution²⁶ (though Europe might²⁷) yet the British government is limited and not at all arbitrary.

a. Written Constitutions do not Compel Judicial Review

A written constitution is in fact no guarantee of the possibility and necessity of judicial review. An examination of the Soviet constitution²⁸ and various international human rights treaties show that written constitutions do not compel judicial review. Both the Soviet Constitution²⁹ and international instruments contain hortatory clauses.³⁰ A hortatory clause presents not a binding norm but rather sets out goals and objectives of the law. Marshall denies that hortatory clauses could even exist in the U.S. Constitution.³¹ One might think that hortatory laws are useless, mere eyewash and of no legal value whatsoever. That view is wrong. Hortatory clauses are in fact useful as the guide the interpretation of operative laws, i.e. those laws which themselves are in fact binding.³² Simply because a constitution is written in no way means that it creates directly enforceable rights by individuals.

b. Unwritten Constitutions do not Preclude Judicial Review

Likewise, unwritten constitutions do not preclude judicial review. The sources of unwritten law³³ are customary law,³⁴ works of scholars,³⁵ general principles of law³⁶ (fundamental rights), equity,³⁷ and case law are unwritten sources of law.³⁸ These are also the source

²⁵ "The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act." *Marbury*, 176-177.

²⁶ *In re House Bill No. 1,230*, 28 L.R.A. 344, 163 Mass. 589, 595, 40 N.E. 713, (Mass., 1895).

²⁷ "the Danish referendum of June 2 may well help the Spanish government to bring home to the country the fact that it is not the complete master of its own destiny.

The vote rejected the changes to the European community's 'constitution' the Treaty of Rome, decided last December in Maestricht" *Duperier v. Texas State Bank*, 28 S.W.3d 740, 750, (Tex.App.-Corpus Christi,2000).

²⁸ Constitution of the Soviet Union (1977) available at:

<http://www.departments.bucknell.edu/russian/const/1977toc.html>.

²⁹ Peter Krug, *Civil Defamation Law and the Press in Russia: Private and Public Interests, the 1995 Civil Code, and the Constitution* Part Two 14 Cardozo Arts & Ent. L.J. 297 (1996); Osofsky, Hari M. *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 Yale Law Journal 191-226 (1997).

³⁰ Thomas Chantal, *Should the World Trade Organization Incorporate Labor and Environmental Standards?* Washington and Lee Law Review, Winter 2004.

³¹ "It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it." *Marbury*, 174.

³² LaGrande, *Memorial of the Federal Republic of Germany* 3 44 16 Sept. 1999.

³³ *John P. King Mfg. Co. v. City Council of Augusta*, 277 U.S. 100, 103 48 S.Ct. 489, 490 (1928).

³⁴ " Having reviewed the written law of the case, we must next examine what was the unwritten law of the place, which can appear only from the evidence in the record, as to the usage, custom or fuero, and is most manifest. " *Strother v. Lucas*, 37 U.S. 410, 449 (1838).

³⁵ "unwritten law' refers to law that, although observed and administered by the courts, is collected from or based on reports of judicial decisions and treatises or commentaries by legal scholars." C.C. Bjorklund, *Law of Foreign Jurisdiction*, 21 Am. Jur. Proof of Facts 2d 1.

³⁶ Eric Engle, *Alvarez-Machain v. United States and Alvarez-Machain v. Sosa: The Brooding Omnipresence of Natural Law*, 13 Willamette J. Int'l L. & Disp. Resol. 149, n. 15 (2005).

³⁷ Aristotle, *Rhetoric*, in *The Basic Works of Aristotle* (R. McKeon ed. 1941) 1359.

"unwritten" sources of constitutional law in U.S. law. The Supreme Court regards the Federalist Papers as having constitutional value³⁹ because they describe the teleology of the constitution and guide its interpretation; Chief Justice Marshall himself used the Federalist papers in *Marbury* as evidence of the meaning of the constitution.⁴⁰ Similarly, the anti-federalist papers are also relevant evidence of constitutional law not as a source of law but in the negative sense of being the vision that was not adopted.⁴¹ Other sources of unwritten constitutional law include the declaration of independence,⁴² the English bill of rights,⁴³ and *magna carta*.⁴⁴ These documents are of constitutional value not in the positivist sense of being the text *sine qua non* to interpret but rather in the complementary and confirmatory senses as texts which explain and guide our interpretation of the main text, which is the constitution itself. Additionally, constitutive customary practices such as the prohibition of prior restraints on publications have constitutional value.⁴⁵ Just as ordinary legislation can displace customary law so can constitutional amendments displace customary constitutional law.

Is judicial review against a wholly unwritten constitution possible? Indeed it is. Lord Justice Coke recognized that some customary laws are not "ordinary" but rather constitutional.⁴⁶ Blackstone too recognized the constitutional value of the principle of the writ of habeas corpus.⁴⁷ Hamilton sees as incorporated into the written constitution and protecting the

³⁸ "The common, customary, or unwritten law, may be proved by witnesses acquainted with the law." *Wilcocks v. Phillips* 1 Wall.Jr.C.C. 47 (C.C.Pa. 1843); 1 W. Blackstone, Commentaries 91, 92. Most exactly, equity is not law per se but rather the corrector of the laws.

³⁹ See, e.g., *Alden v. Maine*, 527 U.S. 706, 713, 714-715; 119 S.Ct. 2240, 2246-47; *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 70 n. 13, 116 S.Ct. 1114, 1131 n. 13, 134 L.Ed.2d 252 (1996).

⁴⁰ *Marbury*, 147.

⁴¹ "Table One reflects that the majority cited Anti-Federalist hopes as evidence of meaning twelve times, whereas it cited Anti-Federalist fears as evidence of meaning only three times; the dissent, on the other hand, never cited Anti-Federalist hopes as evidence of meaning (that is, never concluded that the Constitution was originally understood to accommodate Anti-Federalist views), but cited Anti-Federalist fears as evidence of meaning (that is, concluded that the Constitution meant precisely what the Anti-Federalists feared it would mean) twenty-seven times." Peter J. Smith, *Sources of Federalism: An Empirical Analysis of the Court's Quest for Original Meaning* 52 UCLA L. Rev. 217, 257 (2004).

⁴² The declaration was a *legal* instrument: It operated to make the United Colonies *independent*. As a legal instrument it is not merely hortatory, and even if it were it would still be valid as a guide to interpreting the constitution. And this is the position of the supreme court: "it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." *Cotting v. Godard*, 183 U.S. 79, 108; 22 S.Ct. 30 U.S. 1901 (1901).

⁴³ The English Bill of Rights is cited by the U.S. Supreme Court as evidence of the meaning of the VIIIth Amendment: "The Eighth Amendment was based directly on Art. I, § 9 of the Virginia Declaration of Rights (1776), authored by George Mason. He, in turn, had adopted verbatim the language of the English Bill of Rights. There can be no doubt that the Declaration of Rights guaranteed at least the liberties and privileges of Englishmen." *Solem v. Helm*, 463 U.S. 277, 103 S.Ct. 3001, 3007 n. 10 (1983); *Ford v. Wainwright* 477 U.S. 399, 106 S.Ct. 2595, 2600 (1986).

⁴⁴ "It is well recognized that the Due Process Clauses of the United States Constitution grew out of the 'law of the land' provision of *Magna carta* and its later manifestations in English statutory law."

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 792, n. 2; 100 S.Ct. 2467 (1980).

⁴⁵ The Senate's power to condition assent to treaties on reservations thereto is an example of constitutional customary law. SENATE COMM. ON FOREIGN RELATIONS, REPORT ON EXEC. N. S. REP. NO. 12, 95th Cong., 1st Sess. 11 (1978); On constitutional customary law in Norway see: Jaakko Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective*, 48 Am. J. Comp. L. 345, 365 (2000).

⁴⁶ *Dr. Bonham's Case*, 8 Co. Rep. 107a.

⁴⁷ "To bereave a man of life (says he) or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole

citizens of the United States.⁴⁸ However, Hamilton regards the constitutional authority of the unwritten constitution as equal to that of ordinary legislation.⁴⁹ But that view is wrong because the constitution refers to "law of the land" the term found in magna charta. And if the great charter is, like habeas corpus and trial by jury, incorporated by reference then its unwritten provisions are of constitutional value and as such superior to ordinary legislation. Hamilton's argument seems ill put. Could a constitutional amendment legalize indefinite detention without trial legal? Yes. Could an ordinary law? No. Could an ordinary law remove the right to trial by jury of crimes? No. Could a constitutional amendment? Yes. Other examples of customary constitutional principles can be found. Just because Coke's arguments were not later followed in Britain does not mean they were wrong. In fact, review of legislation of Member States of the European Union for conformity with the general principles of law which too are unwritten laws⁵⁰ happens all the time. The European Union confirms the views of Coke as to the constitutional character of certain fundamental rights centuries later.

In sum, the structure Marshall outlines simply does not compel the conclusions he asserts.

1) A written constitution does not entail either judicial review or vacuity; 2) Judicial review against unwritten constitutional sources is possible and indeed the practice of the several states prior to and after the revolution.

2. Marshall's Inquiry

a. Does the claimant have a right?⁵¹

Marshall's first question is whether the claimant has a right. In fact, this is the question of whether the U.S. Constitution gives individual persons a right to enforce the constitution which is known in European Union law as the question of the direct effect of the treaty on citizens in the Member States. This is one of the reasons why I think *Marbury* and *Van Gend*⁵² are interesting to compare. They both answer the question whether a law which binds sovereign states together can be invoked by individuals against the action either of the federal government or of a Member State. Both cases address similar issues but do so in

nation; but confinement of the person by secretly hurrying him to goal, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government.' And as a remedy for this fatal evil, he is every where peculiarly emphatical in his encomiums on the habeas corpus act, which in one place he calls 'the BULWARK of the British constitution.'"

Alexander Hamilton, *Federalist*, no. 84, 575--81, 28 May 1788.

⁴⁸ See, Alexander Hamilton, *Federalist*, no. 84, 575--81 28, May 1788.

⁴⁹ "To the second, that is, to the pretended establishment of the common and statute law by the constitution, I answer, that they are expressly made subject 'to such alterations and provisions as the legislature shall from time to time make concerning the same.' They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction."

The only use of the declaration was to recognize the ancient law, and to remove doubts which might have been occasioned by the revolution. This consequently can be considered as no part of a declaration of rights, which under our constitutions must be intended as limitations of the power of the government itself."

Alexander Hamilton, *Federalist*, no. 84, 575--81 28, May 1788.

⁵⁰ See, e.g. *Centros Ltd v Erhvervs-og Selskabsstyrelsen* (Case C 212/97 [1999] ECR I 1459; *EMU Tabac* [1998] ECR I 1605; *Emsland-Stärke v Hauptzollamt Hamburg Jonas*, (Case C-110/99) [2000] ECR I-11569. (TAC SASES); *P v. S and Cornwall County Council* Case C-13/94 (Gender discrimination).

⁵¹ *Marbury*, 154.

⁵² Case 26/62 *Van Gend & Loos* (1963) ECR 1.

different ways. Marshall concludes that in fact *Marbury* has a right which he can enforce. He reaches this conclusion by distinguishing between a) Political acts and b) Legal acts.⁵³

i. Political vs. Legal Acts

Marshall regards some acts of the state as political and unreviewable. Marshall implies that the acts of the executive are usually, if not always, political and as such unreviewable. There is some logic to this view. The president's foreign policy powers, particularly the power to make war are essentially despotic. Should congress wish to oppose the president's war power it can only refuse to fund appropriations pursuant thereto.

ii. Legal Acts

Marshall contrasts unreviewable political acts (of the executive) with reviewable legislative acts (of the legislature).

Marshall regards legal acts as reviewable and implies that the acts of the legislature are legal acts. A legal right becomes judicially enforceable when it is vested (here, signature under seal sufficed).⁵⁴ Just as Marshall implies that the executive's actions are political and unreviewable he also implies that the acts of the legislature are legal acts and as such reviewable.

It is clear from the writings of Montesquieu which are one of the constitutive sources of the American Constitution⁵⁵ (and thus persuasive evidence when interpreting the U.S. Constitution)⁵⁶ that the executive shall enforce the laws enacted by the legislature. Despite this principle of separation of powers, Marshall states that an executive appointee can be subjected to duties imposed by the legislature and that such imposed duties can be enforced by individuals.⁵⁷

The structure of Marshall's thinking, not the results he reaches, is what is important: The question whether one has a right, and if so whether that right is enforceable by an individual is a common question in both *Marbury* and *Van Gend*; The distinction between political and legal acts likewise parallels the distinction between application of the laws of the Member States (over which the ECJ had no jurisdiction) and interpretation of the EC Treaty⁵⁸ (over which the ECJ has jurisdiction).

Though the structure of *Marbury* is more important than the answers it is still worth looking at the answers as they will tell us to what extent the structure that generates those answers is inaccurate. *Marbury's* commission was not delivered, but only signed and sealed. It is true a promise under seal is enforceable⁵⁹ but must also be delivered⁶⁰ - mere intent to deliver is not sufficient.⁶¹ And *Marbury's* commission was not in fact delivered to

⁵³ *Marbury*, 165-166.

⁵⁴ "Delivery is not necessary to the validity of letters patent." *Marbury*, 193.

⁵⁵ *Ex parte Jenkins* 723 So.2d 649, 655 esp. n. 4, n. 5. (Ala., 1998).

⁵⁶ "Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher v. Synar*, 478 U.S. 714, 722, 106 S.Ct. 3181 (1986); *Buckley v. Valeo*, 424 U.S. 1, 96, 120, S.Ct. 612 (U.S. Dist. Col. 1976); *Cramer v. U.S.*, 325 U.S. 1, 65 S.Ct. 918, 921 n. 21 (1945).

⁵⁷ *Marbury*, 165-166.

⁵⁸ *Van Gend*, p. 21.

⁵⁹ *Zirk v. Nohr*, 2 Abbots 217, 217, 21 A.2d 766 (N.J. Err. & App. 1941).

⁶⁰ It is well established that to render an instrument under seal valid and binding, it must be delivered. Simpson, *Contracts*, s 63 (2d ed. 1965). *In re Ingram's Estate*, 302 So.2d 204, 205 (Fla. App. 1974).

⁶¹ "A promise under seal is delivered unconditionally when the promisor puts it out of his possession with the apparent intent to create immediately a contract under seal, unless the promisee then knows that the promisor has

Marshall⁶² but was delivered to the secretary of state.⁶³ Donative acts⁶⁴ require delivery⁶⁵ either actual (delivery of the object) or constructive (delivery of a symbolic representation of the object) to be effective. Likewise, communication of acceptance is necessary to the formation of a contract.⁶⁶ If one intends to make a present of a house, and does not deliver the title deed or keys to the house there is also no donation.⁶⁷ Marshall does not focus on the transfer of a legal right, which he regards as vested⁶⁸ as soon as the document is signed and sealed. Rather Marshall focusses on the powers and duties of ministerial officers of the United States. That is an interesting question but only arises after the determination whether delivery of a commission is required for the commission to be effective and if so whether delivery to the secretary of state or to the commissioned person is necessary. And clearly for a promise under seal mere communication of the intent to promise is insufficient and actual delivery is required. The answer Marshall presents as obvious again seems less than obvious.

*b. Does the claimant have a remedy?*⁶⁹

The next question Chief Justice Marshall had to answer was whether claimant *Marbury* had a remedy. This question itself entailed the question whether such a remedy could be obtained before the court.⁷⁰ Justice Marshall, following Blackstone, wrought the answer that where there is a right, there is a remedy.⁷¹ This seems perhaps logical, after all what sense can a right have without a remedy?⁷²

In fact however the position that Chief Justice Marshall takes that seems obvious in fact isn't. For example, we should remember that most international law does not create rights which individuals can themselves enforce. Rather, the individual must, for most remedies, invoke the aid of the state of their citizenship.⁷³ For example, if an illegal abduction is not

not such actual intent. So, if A signs and seals a written promise to B and deposits the document in the drawer of his own desk, saying to B and to a third person as he does so, that he intends the promise to be immediately binding, there has been no delivery and there is no contract. Restatement of the Law, 'Contracts', sec. 102, 'What Amounts to Unconditional Delivery.' *Bussey v. Trinity Universal Ins. Co.* 344 S.W.2d 220, 224 (Tex.Civ.App. 1961).

⁶² *Marbury*, 138.

⁶³ *Marbury*, 138.

⁶⁴ The essential elements of a gift inter vivos are: (1) The gift must be of personal property; (2) possession of the property must be delivered at the time of the gift to the donee, or someone for him, and the gift be accepted by the donee; (3) the title to the property must vest in the donee at the time of the gift; and the donor must be divested of and the donee invested with the right of property in the subject of the gift; it must be absolute, irrevocable and without any reference to its taking effect at some future period.

In re Estate of Walker, --- A.2d ---, 2006 WL 59509 *10 (D.C.,2006).

⁶⁵ Generally, to make a valid gift transfer, "the donor must intend to make a gift, the property must be delivered and the donor must absolutely dispose of the property." (citations omitted) *Erickson v. Erickson*, Not Reported in N.W.2d, 2005 WL 2277291 *3 (Minn.App.,2005).

⁶⁶ See, e.g., *Kendel v. Pontious*, 261 So.2d 167 (Fla.1972).

⁶⁷ "A deed to be operative as a transfer of real estate must be delivered. 23 Am.Jur.2d Deeds § 102, at 141 (2002)." *McNertney v. Kahler* --- N.W.2d ---, 2006 WL 358237 *3 (Iowa,2006).

⁶⁸ *Marbury*, 162.

⁶⁹ *Marbury*, 154.

⁷⁰ *Marbury*, 168; 173-175.

⁷¹ *Marbury*, 147.

⁷² 3 Bl. com. 109.

⁷³ See *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) ("[I]t is traditionally held that any rights arising out of such provisions are, under international law, those of the states and... individual rights are only

torture it can only be remedied by the state which the citizen is a national of.⁷⁴ The individual has a right, but they do not necessarily have a remedy.⁷⁵ Their state must seek to enforce their right and the individual can only compel their state to enforce such rights within their national legal system.⁷⁶ Even if the citizen's state chooses to intervene on behalf of their citizen, right of the individual may go unenforced: Other states can and do ignore protests of states invoking their right of diplomatic protection of their national.⁷⁷ At that point the state may escalate to retorsions⁷⁸ and even ultimately reprisals.⁷⁹ But such remedies are in the hands of the state, not of the individual.⁸⁰

And what about the hortatory provisions of laws? Those create no binding remedy. Do they create a right? The citizen may of course always invoke a non-binding hortatory objective in a law as a guide to interpreting other laws. Again, it seems you can have a right without a remedy.

I think these two examples make clear that one can separate a right and a remedy such that an individual can have a right, but not be able to enforce it. Yet if that proposition is still unclear we can consider other propositions of international law. Do treaties create directly enforceable rights on behalf of their citizens? In European law this is known as the problem of the direct effect of the EC Treaty to the Member States and their citizens, nationals, and residents. The potential claimants are the EC, Member States, residents of Member States and Citizens of Member States. So there are 16 possible plaintiff-defendant combinations which explains why the issue of direct effect of the EC Treaty may be confused and why I think terms such as "horizontal" and "vertical" direct effect are less than helpful. In all 16 cases however the underlying question is the same. When does the EC Treaty create an enforceable right? This is somewhat akin to the problem of the third party beneficiary⁸¹ in domestic contract law. Does the third party beneficiary have a remedy under the contract⁸²/treaty in question? In fact, the answer in both cases is also similar. If the parties to the treaty intended to confer a directly enforceable right to the individual/s in question

derivative through the states." (quoting Restatement (Second) of the Foreign Relations Law of the United States § 115, cmt. e (1965)).

⁷⁴ *Sosa v. Alvarez-Machain*, 124 S.Ct. 2739 (2004).

⁷⁵ See, e.g., *In re Argoud*, 45 I.L.R. 90 (Cour de Cassation 1964) (Fr.).

⁷⁶ See *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir. 1975) ("[I]t is traditionally held that any rights arising out of such provisions are, under international law, those of the states and... individual rights are only derivative through the states." (quoting Restatement (Second) of the Foreign Relations Law of the United States § 115, cmt. e (1965))).

⁷⁷ *Attorney General of Israel v. Eichmann*, 36 I.L.R. 18 (Dist. Ct. 1961) (Isr.).

⁷⁸ *Marks v. U.S.*, 28 Ct. Cl. 147 (1893) (stating that retorsions are retaliatory acts short of war). See also George K. Walker, *The Lawfulness of Operation Enduring Freedom's Self-Defense Responses*, 37 Val. U. L. Rev. 489, 534 (2003) (stating that "[r]etorsions are unfriendly but lawful acts," such as mobilizing reserves or recalling ambassadors).

⁷⁹ The power of reprisal is explicitly recognized in the U.S. Constitution. "[Congress shall have the power] to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." U.S. Const. art I, § 3, cl. 11. See also Michael J. Kelly, *Time Warp To 1945--Resurrection Of The Reprisal And Anticipatory Self-Defense Doctrines In International Law*, 13 J. Transnat'l L. & Pol'y 1, 7 (2003) ("While acts that constitute reprisals would normally be illegal, they become legal because of the aggressor's previous illegal act. Moreover, reprisals contain a distinctly punitive purpose and are frequently viewed as justified sanctions.").

⁸⁰ "It is well established that individuals have no standing to challenge violations of international treaties in the absence of a protest by the sovereigns involved." *Matta-Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.1990); *United States ex. rel. Lujan v. Gengler*, 510 F.2d 62, 67 (2d Cir.1975).

⁸¹ *Orta Rivera v. Congress of U.S. of America*, 338 F.Supp.2d 272, 277 D.Puerto Rico, 2004. Sep 28, 2004.

⁸² As to third party beneficiaries to a contract see, e.g., *Broadway Maintenance Corp. v. Rutgers*, 90 N.J. 253 (1982); *Brooklawn v. Brooklawn Housing Corp.*, 124 N.J.L. 73, 77 (E. & A.1940).

then yes, the provisions of the treaty are directly enforceable by individuals as an exception to the general rule that the rights of individuals do not have rights under international law which they themselves can enforce.⁸³ Otherwise the individuals rights under international law are enforceable only by their state.⁸⁴ If the parties to a treaty did not intend to confer directly enforceable rights to individuals, and especially if the treaty contains reservations to the implementation (transposition) of the treaty in domestic law then the treaty will not create individually enforceable rights. Individuals can have rights with no corresponding remedy.

II. *Van Gend and Loos*

Van Gend reaches a result similar to *Marbury*: The individual citizen in Europe can bring a cause of action against a Member State of the European Union when that Member State violates its treaty obligations.⁸⁵ Both cases acknowledge the right of the individual to seek review of legislation against a constitutive text.

However, the two decisions reach the similar result in different ways. In *Van Gend* the result is reached essentially through a teleological analysis⁸⁶ that looks to the nature and purpose of the European Treaty. However, though teleological, *Van Gend* does not invoke the writings of Schumann or Aristotle. In *Marbury* in contrast the Chief Justice does not talk about the grand aim of a continental union of peaceful commerce. He does however cite Blackstone extensively. This is why I think these two great decisions are worthy of comparison. They reach remarkably similar results in surprisingly different ways. When compared, we see that their methods could be complementary. This understanding of the complementary nature of textual and teleological analysis might improve the state of constitutional thinking. Who's afraid of political scientists? Why aren't we looking to the objectives of civic society? We can and should do both whether as advocate, judge or teacher.

The facts in *Van Gend* were not particularly complicated. The EC had prohibited any increase in customs duties pursuant to the creation of the single market. A certain Member State did not increase the customs duty on a given good; rather, it reclassified the good, and that reclassification placed the good into a higher tariff category.

The question presented was whether this reclassification was in contravention of the EC Treaty (then the Treaty of Rome, now the Treaty of Amsterdam). The defense of the Member State was that the law in question was a domestic law and as such not subject to the jurisdiction of the ECJ. The first issue was whether it was a matter of interpreting the

⁸³ "it is a settled principle of both public international law and American constitutional law that unless a treaty or intergovernmental agreement is 'self-executing' that is, unless it expressly creates privately enforceable rights, an individual citizen does not have standing to protest when one nation does not follow the terms of such agreement." *United States v. Bent-Santana*, 774 F.2d 1545, 1550 (11th Cir.1985).

⁸⁴ *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir.1988) ("Treaties are contracts between or among independent nations. The treaty provisions in question were designed to protect the sovereign interests of nations, and it is up to the offended nations to determine whether a violation of sovereign interests occurred and requires redress.").

⁸⁵ Case 26/62 *Van Gend & Loos* (1963) ECR I.

⁸⁶ *Van Gend*, p. 21, 25.

ECT -- in which case the ECJ would be perfectly right to adjudicate -- or of applying domestic law of a Member State -- in which case the ECJ would have had no jurisdiction.⁸⁷ The ECJ determined that the issue was not the application of the Member State's law but rather an interpretation of whether that law was in contravention of the EC Treaty.⁸⁸ It reached this conclusion by looking not at the act of the Member State -- the reclassification of a good in domestic law -- but rather by looking at the effect of the act.⁸⁹ And the effect of reclassifying a good into a higher tax bracket is the same as introducing a higher customs duty, an act which the EC Treaty made illegal. Thus the ECJ had jurisdiction to decide whether the Member State did in fact breach its treaty obligations.⁹⁰

A. Similarities between *Van Gend* and *Marbury*

1. Jurisdiction

Just as in *Marbury* a preliminary question in *Van Gend* was whether the court even had jurisdiction.⁹¹ Both courts concluded that they could hear the case.⁹² In both cases the then controverted issue of jurisdiction has since become clear and thus is not analyzed here except to note the existence of another interesting parallel between the cases.

2. Implied rights

Both cases also took risky positions to imply rights where no express right in the constitutive document existed. In *Marbury* for example, we see Marshall literally turn affirmative words into negations:

"Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."⁹³ Which seems to me a flim flam. More honestly, but also controversially, the court in *Van Gend* also rejected the argument that the express remedies granted to states in former Articles 169 and 170 implied the exclusion of any other remedies and especially of individual remedies.⁹⁴ The only way to justify this countertextual argument is to point to the teleological arguments of the ends sought by the treaty. But that justification is sufficient.

⁸⁷ *Van Gend*, p. 21.

⁸⁸ *Van Gend*, p. 26.

⁸⁹ "It is of little importance how the increase in customs duties occurred when, after the Treaty entered into force, the same product in the same Member State was subjected to a higher rate of duty." *Van Gend*, p. 26.

⁹⁰ *Van Gend*, p. 26.

⁹¹ *Van Gend*, p. 22.

⁹² *Van Gend*, p. 22.

⁹³ *Marbury*, 174.

⁹⁴ *Van Gend*, p. 25.

3. Reasoning by *Reductio*

Marbury and *Van Gend* also resort to plausible *reductios* to prove their point. A *reductio ad absurdum* argument proves a proposition by demonstrating that a contradictory proposition would lead to an absurd result. A is true because not A would lead to B and B is clearly untrue is the simplest logically correct representation of the *reductio* argument. An easier but inexact and potentially erroneous way to get the idea of reductive thinking is to think of a *reductio* argument as essentially saying "that can't be true -- look what it would lead to!" However in life sometimes we are compelled to shocking but true conclusions and this shortcut is in fact inaccurate but an easy way to remember the essence of reductive inferencing. Both *Van Gend*, and *Marbury* argue from *reductio ad absurdum* and point out how any other interpretation than the one the court offers would lead to an absurd result."⁹⁵ But, *Van Gend* does so much more convincingly.

4. Results Oriented Thinking

A common theme in contemporary U.S. constitutional interpretation and in the interpretation of the European Union's laws is a certain realism; Realism not in the sense of a radical break from formal legal methods in the service of a political agenda of social reform but in a limited sense of results oriented consideration of outcomes and processes marks other areas of the law as well.

Contemporary courts regularly make decisions based not on *à priori* formalist classifications. Rather, they look to the practical effects of legislation. For example, in *Van Gend* the court decided that the reclassification of the good was the functional equivalent to the introduction of new tax legislation.⁹⁶ In the United States the most extreme example of such (sur)realism is *Wickard v. Filburn*⁹⁷ considering grain, grown on a farm, for consumption on the farm, as "effecting" interstate commerce and thus subject to federal regulation, even though there was no buying and selling (commerce) of a good across state lines (interstate).

Is a principled realism possible, one that seeks not to impose the agenda of a given social class but rather which seeks to evaluate the world honestly and in materialist (empirical) terms to reach common sense results possible? In all events the realist decisions made both by U.S. and European courts do not claim to be "realist" or even acknowledge the influence of realist legal theory on their decisions. Such "neo-realist" decisions can be found perhaps most readily in the field of economic laws. This is because machinations of taxpayers, for example, often inspire the creation of legal artifices. Such structures are readily recognized and rejected by courts on both sides of the Atlantic. What would the realist reformers of the

⁹⁵ "A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national Decision taken contrary to the provisions of the Treaty." *Van Gend* p. 25.

⁹⁶ "with regard to the prohibition in article 12 of the treaty, such an illegal increase may arise from a rearrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an actual increase in the rate of customs duty.

It is of little importance how the increase in customs duties occurred when, after the treaty entered into force, the same product in the same member state was subjected to a higher rate of duty." *Van Gend*, p. 26.

⁹⁷ *Wickard v. Filburn*, 317 U.S. 111 (1942) 317 U.S. 111.

1930s think of the fact that their method has been turned not to prosecution of class war but to the service of the ruling class? One can only imagine.

B. Differences in *Marbury* and *Van Gend*

1. The *sua sponte* motions of the ECJ

One noteworthy difference in EU law and US law is the fact that the ECJ can on its own initiative make inquiries and present issues for resolution.⁹⁸ This is very much unlike common law procedure where the court demonstrates its neutrality by allowing the parties to litigate the case. The adversarial method does of course preserve the idea of neutrality, but does it best serve the interests of justice? Why should courts not be allowed to make inquiries or present issues to litigants for resolution in the interests of justice? In any event this possibility was not used in *Van Gend*.⁹⁹

2. Teleological Reasoning

Of the two decisions *Van Gend & Loos* is far more innovative than *Marbury*. *Marbury* essentially only confirmed what had already been long standing practice at the state level and what was clearly intended by the framers of the constitution. In contrast, in *Van Gend* the right of individuals to enforce their claims against the Member State was born, like Athena, fully formed from the brain of Zeus, clad in armor and shrieking a cry of victory. The court in *Van Gend* at once declared a) that individuals have rights under the treaty¹⁰⁰ b) that those rights are enforceable against the Member States c)¹⁰¹ that those rights may be express or implied¹⁰² d) that Member States created a new international legal person,¹⁰³ unique in international law¹⁰⁴ e) that the Member States had transferred their sovereignty in limited fields to the new international legal person¹⁰⁵ f) that the addressees of this new legal person are not merely the member states or even the individuals¹⁰⁶ but also the people of the Member States.¹⁰⁷

⁹⁸ *Van Gend*, p. 21.

⁹⁹ *Van Gend*, p. 21.

¹⁰⁰ "Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage." *Van Gend*, p. 23.

¹⁰¹ "It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect." *Van Gend*, p. 25.

¹⁰² "These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community." *Van Gend*, p. 23.

¹⁰³ "the Community constitutes a new legal order of international law" *Van Gend*, p. 23.

¹⁰⁴ "the Community constitutes a new legal order of international law" *Van Gend*, p. 23.

¹⁰⁵ "for the benefit of which the states have limited their sovereign rights, albeit within limited fields," *Van Gend*, p. 23.

¹⁰⁶ "the subjects of which comprise not only Member States but also their nationals" *Van Gend*, p. 23.

¹⁰⁷ "this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. ... Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee." *Van Gend* p. 23.

Moreover unlike *Marbury*, where it is obvious that Marshall is reacting to political pressures and forcing issues the decision in *Van Gend* is not forced, rather its logic is as compelling as it is beautiful. This may be because the thinking in *Van Gend* is not motivated by a tortured reading or framed in a rigid universe of false dichotomies. Rather *Van Gend* reaches its conclusion holistically, following the teleology of the Union to reach its logical and breathtaking conclusion.

Conclusion

The comparison of *Marbury* and *Van Gend* leads to some interesting observations of parallels in issues and method and highlights some divergences, notably the absence of teleological interpretation in *Marbury* and the absence of non-legislative sources in *Van Gend*. Paradoxically, one hears complaints about democratic deficit in the EU all the time, and one also hears paens to the virtues of America's Constitution. Yet these two key decisions which really were the root of all that follows show that the American decision was not so well founded and the European decision is much more logical. One would think the legitimacy issue would be reversed but it isn't, at least not yet. Are these the final words? Each decision is lacking in that the EU decision did not look beyond the text of the treaty even though it did a teleological analysis and the US decision did not even do a teleological analysis at all. What will become of *Van Gend* and *Marbury*? The only answer is that which Mao Zedong gave when asked what he thought about the French revolution. His answer? "It is too soon to tell."¹⁰⁸

¹⁰⁸ By Bill Brazell, *Born to Rebel?* Wired Magazine, Issue 5.02 (Feb 1997).