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Nicolo and the Push to 1992-The Evolution of Judicial Review in France

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I. INTRODUCTION

Every day, all across the world, people struggle to preserve basic human rights from infringement by governments and government agents. Two hundred years ago this same struggle resulted in the French and American Revolutions. Both revolutions were founded on individual rights but took divergent paths to protect these rights.

From the American Revolution emerged a unique brand of constitutionalism—characterized by the rule of law as determined by a supreme document proclaiming the rule of governance and the rights established.[1] This new constitutionalism contained two necessary elements. First, the constitution was a social contract, and second, the constitution had to be the supreme law—supreme even to legislatures, the people's representatives.[2] Following Locke as modified by Jefferson, Americans boldly announced that "Congress shall make no law" which would infringe on individual freedoms outlined in the Bill of Rights, thus founding constitutionalism.[3]

However, constitutionalism and constitutional supremacy are meaningless without adequate protection.[4] Judicial review—the power of courts to decide on the constitutionality of legislation and governmental acts in order to preserve basic rights and separation of powers—is another American legal innovation[5] fundamental to the preservation of constitutionalism and the rule of law.[6] Although judicial review has been a distinctive feature of U.S. jurisprudence, judicial review in various forms is now found worldwide.[7]

France's Revolution was also based on rights, but, following Rousseau and Montesquieu more than Locke, France created

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1. Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1029, 1035 (1989).
2. *Id.* at 1029.
3. *Id.* at 1030.
4. A. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 112 (1989).
5. *Id.* at 1, 3; *see also* Henkin, *supra* note 1, at 1042.
6. A. BREWER-CARÍAS, *supra* note 4, at 77-79.
7. *Id.* at 1.

parliamentarism.[8] In parliamentarism, Parliament and not the law was supreme. The theory was that Parliament represented the will of the people and there could be no "supreme" rights upheld against the will of the people. In France, people could obtain rights only by law; Parliament or the general will was seen as the infallible protector of individual rights.[9] The people retained no rights protected from legislation, no right to challenge legislation—the Parliament was omnipotent.[10]

France's supreme Parliament was an outgrowth of its hatred for judges. While America was cultivating the power of judges, France was blocking it.[11] However, French faith in the omnipotent Parliament was shaken by the events of World War II,[12] and with the 1958 Constitution, Parliament's monopoly of power was broken.[13]

With the dissipation of Parliament's power, the divergent paths of the U.S. and French Revolutions began to converge, and the 1958 Constitution introduced constitutionalism into France.[14] The 1958 Constitution created a constitutional court of sorts and unveiled a form of a priori judicial review (review of legislation after passage by Parliament, but before promulgation by the President).[15]

This progress toward a U.S. model notwithstanding, France's limited judicial review is not sufficiently comprehensive to enforce the supremacy of the constitution over all legislation and governmental acts and preserve constitutionalism.[16] The lack of post-promulgation review is accompanied by diverse jurisdictional problems, emergency rights of the President, and other roadblocks to comprehensive judicial review.[17] French anti-judicial tradition still blocks the complete acceptance of judicial review and constitutionalism. However, other factors may push France beyond French tradition and modern roadblocks and down the path to American constitutionalism. The Euro-

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8. Henkin, *supra* note 1, at 1035.

9. *Id.*

10. *Id.*

11. M. CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 3 (1971).

12. *See infra* notes 37-42 and accompanying text.

13. Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 384, 387 (1982).

14. Henkin, *supra* note 1, at 1035.

15. Neuborne, *supra* note 13, at 379-82.

16. *See* Henkin, *supra* note 1, at 1030.

17. *See infra* notes 61-65 and accompanying text.

pean Community (EC) may contain the necessary ingredients to create comprehensive judicial review in France. The EC, with its push to European unity by 1992, requires French courts to enforce another supreme law and resolve conflicts of national and transnational law. As the recent landmark decision *Nicolo* points out, these factors may well push France into a more comprehensive system of judicial review and allow it to fully protect its fledgling constitutionalism and the rule of law.

II. FRANCE'S HISTORY WAS INCONSISTENT WITH JUDICIAL REVIEW

A. France Has Historically Blocked Judicial Protection of Rights

Through several Republics and several constitutions the French judicial system remained essentially the same. The most notable aspect is that from the French Revolution to the early post-World War II era the French judiciary was essentially powerless.[18]

The powerlessness of the judges in the French legal system can be attributed to the continued abuse of judicial review by the judges of the monarchy or *ancien regime*. In pre-Revolution France, the high courts used a form of substantive judicial review to protect their power base and control the more progressive legislation. They used unwritten, fundamental laws and principles to preserve an extremely conservative power structure and way of thinking.[19] Cappelletti points out: "In the name of [these] vague unwritten 'principles,' those judges hampered and paralyzed even very moderate reforms that the king and his court were willing to concede, and which might have prevented the violent explosion of the 'bourgeois' Revolution."[20]

In supporting the monarchy against the will of the people, the court both delayed and fueled the Revolution. Therefore, one of the Revolution's rallying cries founded in Montesquieu's writings was that the judges were to be stripped of power and the people themselves should rule in their place. Thereafter, the judges were to be mindless, blind machines of the law.[21] They

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18. M. CAPPELLETTI, *supra* note 11, at 3.

19. Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 412-13 (1980).

20. *Id.* at 413.

21. Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of*

were not to interpret the law, but to apply it automatically and uncreatively.[22]

B. The Incompatibility of Judicial Review and the Supreme Parliament

Following this rallying cry to the letter, post-Revolution France stripped judges of any real power and rigidly held to its anti-judicial review tenet.[23] In fact, the general intent of the French legal system was to preserve the unchecked power of the Parliament (parliamentarism).

> Steps toward larger parliamentary power met fierce, powerful resistance from the monarchy, nobility, and the church, institutions that were supported by the courts. Political, social and economic tensions and the clash of competing forces led to the Reign of Terror, to civil war, to the Directorate, and then to Napoleon. In these struggles, individual rights hardly mattered.[24]

The enemy of the new Republic was a monarch who put his will before the will of the people.[25] As a result, the French followed Rousseau and Montesquieu and created parliamentarism.[26] Since it represented the absolute will of the people, the Parliament was considered absolutely sovereign.[27] To the French, the general will of the people and not individual rights was the main concern.[28] There could be no rights against the general will.[29] The French left the protection of rights to the political process.[30]

Montesquieu's representation of judges as no more than the mouths that pronounce the law was codified by the statute of 16-24 August 1790. Article 10 forbade judges from interfering or taking part in legislative power or suspending the execution of the legislative acts. Article 12 obligated the courts to ask the National Assembly to interpret the laws where there was a question

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"Constitutional Justice", 35 CATH. U.L. REV. 1, 11-12 (1985).

22. Neuborne, *supra* note 13, at 374-79; Cappelletti, *supra* note 19, at 413.
23. Cappelletti, *supra* note 21, at 13-14.
24. Henkin, *supra* note 1, at 1031.
25. A. BREWER-CARÍAS, *supra* note 4, at 113.
26. Henkin, *supra* note 1, at 1032.
27. Cappelletti, *supra* note 19, at 413; Henkin, *supra* note 1, at 1031, 1044.
28. Henkin, *supra* note 1, at 1032.
29. *Id.*
30. *Id.* at 1031.

of interpretation.[31] Judicial power was seen as a mere extension of the execution of the laws.[32]

Parliamentarism is incongruous with constitutionalism.[33] The logical consequence of Parliament's supremacy is that it excludes the possibility of giving constitutional control to any other government organ.[34] No outside protection was seen as necessary because parliamentary error was inconceivable.[35] Indeed, in this traditional Parliamentarism, judicial review of the constitutionality of legislation was a violation of Parliamentary sovereignty. The system was completely incompatible with judicial review.[36]

The rethinking of Parliamentarism in France came about in the aftermath of World War II.[37] The rapid defeat, the German occupation, and the deplorable Vichy government quickly weakened French resolve to maintain an unchecked legislature.[38] The crises and tragedies of that time period exposed as myth the notion that Parliament represented the will of the people. France watched despotic regimes and tyrannical majorities use parliaments and legislatures as instruments of oppression.[39]

Fear of oppressive Parliamentary majorities pressured all of Europe to look at constitutionalism.[40] The political reality that Parliament represented the will of political parties and not the will of the people pushed France to adopt a form of constitutionalism.[41] The supremacy of the constitution over Parliament marked the end of French parliamentary absolutism and led the way to constitutional review through the *Conseil constitutionnel*.[42]

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31. A. BREWER-CARÍAS, *supra* note 4, at 113.

32. *Id.*

33. *Id.* at 114.

34. *Id.* at 113.

35. *Id.*

36. *Id.* at 114.

37. *Id.* at 114-15.

38. Henkin, *supra* note 1, at 1045.

39. A. BREWER-CARÍAS, *supra* note 4, at 114-15.

40. *Id.* at 115.

41. *Id.*

42. *Id.* at 115-16. The *Conseil constitutionnel* is a type of legislative council that reviews the constitutionality of nonpromulgated laws.

III. The Foundation of Constitutionalism in France

A. The 1958 Constitution

Although both the American and French revolutions led to written constitutions, the French have had five Constitutions while the Americans have had only one.[43] Many of the French Constitutions have been constitutions in name only. The current Constitution, adopted in 1958, brings many changes to the French political system. It finally imports constitutionalism (a binding social contract embracing key elements of the rule of law). The 1958 Constitution also offers two unique aspects to the government of the Fifth Republic: executive and judicial power. An accompanying dimension is a separation of powers and a new system of checks and balances to protect it.[44]

From the outset of the Revolution, power in France had always been given to a highly-centralized national government composed of one omnipotent legislative branch.[45] However, a distinct innovation of the 1958 Constitution was to separate and balance the powers between two mutually exclusive bodies, the executive and the legislative, each supremely autonomous in its own sphere.[46] This separation of powers between the legislature and a renewed executive branch finally broke Parliament's political monopoly.[47]

The Constitution of 1958 also established an agency called the *Conseil constitutionnel*; its main purpose was to control the constitutionality of legislation after passage but before ratification by the President of the Republic.[48] The *Conseil constitutionnel* was originally designed not as a constitutional court to enforce the dominance of the constitution vis-à-vis ordinary parliamentary legislation, but rather as a referee between the newly established branches and as a protector of the administrative law against usurpation by Parliament.[49]

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43. Henkin, *supra* note 1, at 1035.

44. Neuborne, *supra* note 13, at 384, 387.

45. *Id.* at 384.

46. *Id.* at 384, 387.

47. *Id.* at 384; Davis, *The Law/Politics Distinction, the French* Conseil constitutionnel, *and the U.S. Supreme Court*, 34 Am. J. Comp. L. 45, 90-92 (1986).

48. Cappelletti, *supra* note 19, at 416.

49. Henkin, *supra* note 1, at 1047; Cappelletti, *supra* note 19, at 417; Neuborne, *supra* note 13, at 386-88.

B. The Conseil Constitutionnel*'s A Priori Judicial Review*

Because French political philosophy had so categorically rejected the idea of judges overruling the voice of the people, no degree of judicial review of legislative activity was possible until the Fifth Republic broke parliament's legislative monopoly.[50] Therefore, judicial review was a significant departure from post-revolution philosophy.[51]

On October 5, 1958, the *Conseil constitutionnel* was given power to judge legislation's conformity with the Constitution before it is signed by the President.[52] There are about sixty politicians who have standing to challenge the constitutionality of ordinary laws and international treaties.[53] As soon as the *Conseil constitutionnel* hears a request for constitutional review, the process of promulgation is stayed for one month.[54]

If the *Conseil constitutionnel* finds that the text does not conflict with the constitution, the stay of promulgation is lifted.[55] If it declares the text unconstitutional, the text can neither be promulgated nor enforced.[56] However, if the *Conseil constitutionnel* finds that the provisions can be severed from the text, the President can either enact the incomplete statute or send it back to the legislature for more discussion.[57] Whatever the case, the decision of the *Conseil constitutionnel* is not reviewable and has a binding effect on all public powers.[58]

Although the *Conseil constitutionnel* initially possessed very limited power, it subsequently assumed broader-based power than had previously been recognized. Over the past three decades, the members of the *Conseil constitutionnel* have drawn from the text of the 1958 Constitution, the Declaration of the Rights of Man, the preamble to the 1958 Constitution, the preamble to the 1946 Constitution, and other documents in attempting to create judicially-defined limits on political behavior.[59]

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50. Neuborne, *supra* note 13, at 384; Davis, *supra* note 47, at 90-92; A. Brewer-Carías, *supra* note 4, at 251.

51. Henkin, *supra* note 1, at 1046-47; Davis, *supra* note 47, at 90-92.

52. A. Brewer-Carías, *supra* note 4, at 251.

53. *Id.* at 256.

54. *Id.* at 257.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Neuborne, *supra* note 13, at 379-82.

C. *Prior Review Alone is Not Enough to Protect Constitutionalism*

Even though progress has been made, there is still much to do to obviate extant barriers to complete judicial review in France.[60] A more comprehensive judicial review is essential to the protection of fundamental rights.[61] One scholar wrote:

> A Constitution in which unconstitutional acts and particularly, unconstitutional laws, remains valid because its unconstitutionality cannot lead to its annulment, is, more or less, equivalent from a juridical point of view, to a desire without obligatory force.[62]

Scholars point to several fundamental problems limiting the effectiveness of French judicial review.[63] Among the most frequently cited are the lack of jurisdiction, the lack of standing for common citizens, the lack of real independence of the judiciary, and the inability to control executive acts.[64]

IV. The European Community Push to Federalism by 1992 May Lead to Comprehensive Judicial Review in French Courts

A. *The Push to 1992 Is a Push to Federalism*

Even though France now has only piecemeal judicial review, the European Community's push for unity by 1992 might be the ingredient necessary to formulate a more comprehensive system of judicial review.[65] Whereas now one court is allowed a priori review of legislation, the push to a unified European Community by 1992 might impel posterior judicial review into French courts by forcing them to apply superior "federal" law.

The concept of unification involved in the creation of the EC necessitates fundamental structural changes in member na-

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60. Henkin, *supra* note 1, at 1047-48.

61. A. Brewer-Carías, *supra* note 4, at 123-24.

62. *Id.* at 124 (quoting Kelsen, *La Garantie juridictionelle de la Constitiution (la justice constitutionnelle)*, Rev. du Droit Public et de la Science Politique en France et à l'Etranger 250 (Paris 1928)).

63. *See, e.g.*, Henkin, *supra* note 1, at 1045-48, 1051.

64. *Id.*

65. Mertens de Wilmars & Steenbergen, *The Court of Justice of the European Communities and Governance in an Economic Crisis*, 82 Mich. L. Rev. 1377, 1378-80 (1984).

tions' systems of government.[66] This movement binds each country to bring about a transnational economy with free movement of capital and labor.[67]

> Article 2 of [the Treaty of Rome] establishes as the Community's primary task the promotion of harmonious development of economic activities by establishing a common market and progressively approximating the economic policies of Member States. The. . .Treaty thus seeks to dismantle the barriers between the economies of the Member States . . . .[68]

The countries of Europe are continuously pressured by the EC to follow its guidelines, and there is added pressure to meet the goal of uniformity of laws by 1992.[69]

B. The EC Federalism Pushes Supreme Law on French Courts

1. It uses national courts for unification

EC law cuts into the autonomy of the Member States, thus limiting the applicability of national laws.[70] This reduction in autonomy flows from the imperatives of the EC. The European Court of Justice has consistently held that the necessary tenets for effective uniformity are supremacy, immediacy, and direct applicability of EC law.[71]

Instead of setting up a system of separate community courts, the Treaties provide for the application of EC law in the national courts of the Member States.[72] This is one of the fundamental aspects of the relationship between the EC and the Member States. EC law and national law are complementary, but preeminence is given to EC law.[73] The European Court of Justice has said that adherence to EC principles mandates an irrevocable commitment on the part of the Member States to abide by the law of integration and ensure its effective applica-

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66. Barav, *The Judicial Power of the European Economic Community*, 53 S. CAL. L. REV. 461, 462 (1980).

67. A. DALTROP, POLITICAL REALITIES: POLITICS AND THE EUROPEAN COMMUNITY 15 (1982).

68. Mertens de Wilmars & Steenbergen, *supra* note 65, at 1378.

69. *Id.* at 1378-80.

70. Barav, *supra* note 66, at 521.

71. *Id.*

72. *Id.* at 462-65.

73. *Id.* at 499.

tion.[74] One scholar wrote: "The joint exercise of the Community judicial power has. . .proved to be the most significant vehicle of integration and the most effective device for the gradual and progressive unification of Europe."[75] National courts must appeal directly to the European Court of Justice for binding precedents in certain matters and have not yet formed a cohesive system of their own.[76] Because the national courts are charged with enforcing uniformity, the EC's push toward 1992 will pressure the courts to create such uniformity.[77]

2. EC law is supreme

To provide for freer movement, the EC has introduced supranational law to France. The Treaty of Rome, its amendments, and all the EC's legislation supersede French national law.[78] There are still many areas where France is allowed to legislate, just as states in the United States' system are reserved powers and rights. However, the EC's powers are broad as interpreted by the European Court of Justice.

One of the most famous decisions of the European Court of Justice is *Costa v. Enel.*[79] Here the Court held that EC law, both primary and secondary, is preeminent to both prior and subsequent national law.[80] This precedent was a bold move by the Court to usurp power not specifically delineated to it. However, this precedent has never really been challenged by any of the individual States or their courts.

The Court of Justice has also introduced into the French system its own system of judicial review as against higher laws including the Treaty of Rome and progeny, the International Declaration of Human Rights, and the collective constitutions of the Member States.[81] Because the decrees of the Court are binding on French courts, French courts must begin to consider these higher laws in determining the outcome of legal disputes in their country or be overruled.[82] They must learn to deal with the fed-

74. *Id.* at 486-87.
75. *Id.* at 524-25.
76. Cappelletti, *supra* note 19, at 424-25.
77. The Economic Community decrees are generally enforced by the national courts. *See supra* notes 71-74 and accompanying text.
78. Barav, *supra* note 66, at 462-63.
79. 1964 E. COMM. CT. J. REP. 585, 3 COMM. MKT. L.R. 425.
80. Cappelletti, *supra* note 19, at 424.
81. *Id.* at 424-25.
82. *Id.*

eral system of supremacy and the binding precedents of the judiciary over the legislature on a supranational level.

The most efficient way found by the EC to push uniformity and dismantle barriers has been to create uniform guidelines which conflict with national laws and then enforce them as supreme.[83] Therefore, French courts will have an even stronger, more active judiciary given the pressure on the French courts to interpret and follow EC law. In the name of expediency and supremacy, the courts of France must adopt a system of comprehensive judicial review so that non-conforming but previously promulgated legislation can be struck down.[84]

3. *Judicial review follows federalism*

As federalism moves into French politics it is likely that a more comprehensive judicial review will follow. Judicial review is intrinsically tied to federalism. One of the leading factors which has led to the establishment of and justification for judicial review is the federal form of government.[85] Federal governments are historically the first to adopt judicial review because federalism requires a governmental body able to settle conflicts of power between national and regional government bodies.[86] Decentralization of the political process itself encourages judicial powers to guarantee a balance between central and regional bodies.[87] Moreover, judicial review is the only way to guard against undue interference in regional and national spheres as well as constitutional rights.[88]

C. Nicolo *Shows the EC Push Helps French Courts to Progress Toward Comprehensive Judicial Review*

Nicolo,[89] the October 20, 1989 decision of the *Conseil d'Etat*,[90] is perhaps the most important decision of French

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83. The European Court of Justice has held that the free movement of goods remains one of the cornerstones of the EC and must be protected against all protectionist, national laws. Mertens de Wilmars & Steenbergen, *supra* note 65, at 1395-97.

84. The Economic Community decrees are generally enforced by the national courts. *See supra* notes 71-74 and accompanying text.

85. A. BREWER-CARÍAS, *supra* note 4, at 117-18.

86. *Id.*

87. *Id.* at 118.

88. Id. at 120-21.

89. Raoul Georges Nicolo and Another, 1990 CMLR 173.

90. The *Conseil d'Etat* or State Council is the highest administrative court and reviews only executive actions.

courts in years.[91] In one sense France has three supreme courts. The *Conseil constitutionnel* consists of ex-politicians who function like judges in enacting a priori review of un promulgated legislation. The *Conceil d'Etat* is like the supreme court for administrative matters and the *Cour de Cassation* is like the supreme court for other non-legislative, non-administrativ matters. By 1975, the *Conseil constitutionnel* and the *Cour de Cassation* had accepted the view that Community law supreceded national law, but until *Nicolo* the *Conseil d'Etat* held the opposite view. *Nicolo* put an end to the confusion about conflicts of law between international treaties and national laws.

1. *Before* Nicolo

The *Conseil d'Etat* was the last supreme court of the twelve EC Member States to recognize the preeminence of EC law.[92] The French position was first set out in 1931, holding that if there were a conflict between a treaty and a prior law, the law was abridged by the ratification of the treaty by Parliament.[93] However, if it were a law which followed the treaty, the judge needed to try to resolve the conflict or, in deference to the legislature, apply the law. Generally, judges are bound to follow the basic premise of French jurisprudence—that the judge can recognize no other will than the law.[94]

In the 1958 Constitution, article 55 states that ratified Treaties have an authority superior to that of conflicting national laws. This text established a hierarchy with the treaty above the law.[95] The text of the Constitution notwithstanding, the 1931 position was reestablished by the *Conseil d'Etat* in *Syndicat des Semoules*[96] in 1968. It held that to prefer the treaty to the law because of article 55 would be to review the constitutionality of the law, and the Constitution exclusively gave that power to the *Conseil constitutionnel* and not to the other judges whose function stayed subordinate to the law.[97] Therefore, the court re-

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91. Isaac, *Traite et Loi Posterieure: Le Revirement du Conseil D'Etat*, 25 REV. TRIM. DR. EUR. 787 (1989).

92. *Id.* at 788.

93. *Id.* This is known as the "Matter Doctrine." It is named after the *Procureur General* Matter and his opinions in the *chambre civile* in the *Cour de cassation. Id.*

94. *Id.*

95. *Id.*

96. Syndicat General de Fabricants de Semoules de France, 1970 CMLR 395.

97. Isaac, *supra* note 91, at 789.

fused to apply an EC rule over a successive ordinance which contradicted it. This holding not only ignored article 55, but deliberately bypassed *Costa v. Enel*[98] in which the European Court of Justice held that EC law superseded the laws and constitutions of the Member States.[99]

In 1975 in the *Jacques Vabre*[100] decision, the *Cour de cassation*[101] adopted the position opposite that of the *Conseil d'Etat*. It joined the *Conseil constitutionnel* in accepting article 55, *Costa v. Enel*, and the proposition that judges had the power to apply Community law in place of national law, even successive national law.[102] However, the *Conseil d'Etat* reaffirmed the 1968 holding in 1979, 1980, 1985, and again in 1988. It continued to hold that it was not competent to effectuate the process and that it was bound by article 10 of the laws of 1790 forbidding courts from suspending the application of the law.[103]

2. Nicolo's *facts*

The facts of *Nicolo* are fairly unimportant as is generally the case when the principle, more than the facts, is at stake.[104] Nevertheless, the facts in this case surround the June 1989 elections to the European Parliament.

The European elections were organized in France based on law 77-729 of July 7, 1977. The *Conseil d'Etat* has sole jurisdiction in election matters. Twice before, the 1977 Act was challenged on the ground that it conflicted with the Treaty of Rome. *Nicolo* was another such challenge. The law was challenged based on a conflict of law regarding the applicability to the French territories of voting and candidate sponsorship.[105] The issue was which law to apply when the conflict is between an anterior treaty and a posterior French law.

The *Conseil d'Etat* upheld the territorial division as it had twice before, but whereas before it had held that it could not invalidate the law as conflicting with the Treaty of Rome, this

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98. *See supra* note 80 and accompanying text.

99. *Id.*

100. La Societe des Cafes Jacques Vabre SA v. Directeur General des Douanes et des Droits Indirects, 1976 CMLR 43 (1971).

101. The *Cour de cassation* is the supreme court for general matters (non-administrative and non-legislative).

102. Issac, *supra* note 91, at 789.

103. *Id.* at 790.

104. *Id.* at 790.

105. *Id.*

time it reconciled the two by fundamentally examining the law against the background of the treaty.[106]

3. Progress made

French courts do not generally publish public opinions as American courts do. However, the *Procureur General*[107] who argues before the court publishes the arguments, which are looked upon as the opinion of the court. In this case the arguments are all the more influential because the court followed the *Procureur General*'s every suggestion.

Mr. Frydman was the *Procureur General* for *Nicolo*. He argued that the court needed to bridge the jurisdictional gap left by the *Semoule* decision.[108] In *Semoule*, the *Conseil d'Etat* held that only the *Conseil constitutionnel* had jurisdiction to decide the constitutionality of the law, yet the *Conseil constitutionnel* would never have jurisdiction over a conflict of law as would the *Conseil d'Etat*. Therefore, no court would really be competent to decide the issue. This was the argument that got the *Cour de cassation* to overlook the precedent in *Jacques Vabre*.[109]

Mr. Frydman also argued that it was necessary to finally end the French contradiction of simultaneously increasing its international engagements while maintaining the supremacy of its own laws.[110] Perhaps most poignantly, Mr. Frydman argued that after thirty years of the Fifth Republic and fifteen years since the *Jacques Vabre* decision, French courts were on the eve of instituting constitutional control by way of exception and it would not be wise to retreat once again behind the trancendental nature of the law.[111]

Up to 1989, the *Conseil d'Etat* refused to see more in article 55 than an invitation to legislators to respect international treaties. However, in *Nicolo* the court accepted jurisdiction by article 55 and modified the law of 1790 authorizing judges to limit the application of the national laws.[112] Now the French courts,

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106. The court effectively followed the suggestion argued before it that it should abandon the holding of *Syndicat des Semoules* of 1968. *Id.*

107. The *Procureur General* is the only advocate before the French courts. He is a type of solicitor general.

108. Isaac, *supra* note 91, at 792.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 793.

indeed all the European courts, seem to agree on the supremecy of EC law.[113] As one scholor wrote: "Even if the *Nicolo* decision does not yet guarantee the supremacy of Community law in France, it represents a courageous and significant progress pronouncing full approval."[114]

D. 1992 and the Evolution of Judicial Review

Just as the United States Supreme Court has built its power, so will the French courts until they have a comprehensive system of judicial review.

> The explosion of rights in the United States might not have been possible without the coming of age of judicial review. John Marshall had asserted that power early but it was not confirmed and established and judicial supremacy and finality were not secured until this century. Once, its principal constitutional function was to assure the proper division of authority between the central and state governments and the allocation of powers among the branches of the United States government. Now, the principal use of judicial review is for monitoring respect for rights, by the states and by the United States government, by the executive as by the legislatures.[115]

Just as the United States Supreme Court has built its power, so will the French courts until they have a comprehensive system of judicial review. The door is clearly open. Although Allan Brewer-Carías wrote before the *Nicolo* decision, his words are more appropriate now that the *Conseil d'Etat* has decided that case:

> The Court of Cassation, in *Administration de Douanes v. Société Cafés Jacques Vabre S.A.* (1975), led the way to the exercise of a diffuse system of judicial review in France by establishing the power of courts to refuse to apply statutes which were contrary to the Treaties of the European Economic Community. This possibility of a diffuse system of judicial review could lead to a general examination of statutes to test their conformity with fundamental rights. . . . Of course, to that end, the reluctance of the courts to control the constitutional-

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113. *Id.* at 790-91.

114. This represents the author's liberal translation of Guy Isaac from French to English. *Id.* at 797.

115. Henkin, *supra* note 1, at 1042.

> ity of statutes so traditional in France must be overcome. That is a fundamental task they have in the future.[116]

The comprehensive system of judicial review is at the doorstep of the French courts and the decisions have already been made to open the doors. The push to 1992 might be the impetus to push French courts out the door and down the path to comprehensive judicial review. Before the United Kingdom joined the European Community, Lord Denning prophetically wrote:

> If the national courts are ready to acknowledge that the Community Law is superior to the national law—and if they are prepared to hold their own national laws invalid insofar as they conflict with Community Law, then the Community Law will be of the highest significance. The member countries will be in a fair way to becoming a Federation of States governed by Community Law—much as the several States of the United States of America are governed by the Constitution of the United States.[117]

Another leading scholar wrote: "Judicial review of parliamentary legislation, banished from the main door of the *national* Constitution, has in fact entered through the large window of a *transnational* bill of rights. Rather than banished, judicial review is thus, in a sense, magnified, because it becomes *transnational judicial review*."[118]

V. Conclusion

Even though most of post-war Western Europe was adopting judicial review, few scholars would have been bold enough at that time to foretell the forthcoming of judicial review in France. However, few would have been able to foresee the future of the European Economic Community or all the political changes in Eastern Europe. Nevertheless, throughout this period of time France has subtly laid the foundation for its own system of judicial review of legislation.

The Constitution of 1958 broke the monopoly of power previously held by the Parliament. The distribution of power between the executive and legislative branches necessitated a sepa-

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116. A. Brewer-Carías, *supra* note 4, at 260.

117. Cappelletti, *supra* note 19, at 431 (quoting Denning, *Forward to* A. Campbell, Common Market Law at xi (1969)).

118. *Id.* at 421 (footnotes omitted)(emphasis in original); *see also* Henkin, *supra* note 1, at 1055-56.

ration of powers and a priori judicial review to protect the precarious balance. However, for all its progress, several barriers lay in the way of a cohesive system of substantive judicial review in France.

Because the push to 1992 goes through the national courts it forces them to reconcile conflicts of law between national law and Community law. As these conflicts must be resolved in favor of the Community in order to meet the 1992 deadline for uniformity, French courts must be allowed to strike down any national legislation which does not conform to European law. This power, in conjunction with the constitutionalism already accepted in France, should bring about a more comprehensive system of judicial review.

Federalism is intrinsically tied to judicial review. The fruits of federalism can be seen in the *Nicolo* decision. One important argument accepted by the court was that on the eve of constitutional review by all French courts (by excepting past rules), the *Conseil d'Etat* could not retreat. It did not. Judicial review in France has stepped higher in the evolutionary chain to comprehensive judicial review.[119]

Mike Bothwell

119. While this note was in the final stages of publication, the *Conseil d'Etat* affirmed and extended the *Nicolo* decision to the EC directives and regulations as well as the Treaty of Rome. This supremacy concept was applied to a law which was amended after an EC cultural regulation, and although currently unavailable in print, the decision was handed down on September 24, 1990. On that same day the reply came in the National Assembly that now only the French Constitution ranks higher than EC law. *Supremacy of EC Regulations*, Business Law Brief, Oct. 1990, at 1.