

ANTI-ASHWANDER: CONSTITUTIONAL LITIGATION
AS A FIRST RESORT IN FRANCE

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In 2010, France joins the mainstream of Western constitutionalism by permitting individuals to challenge statutes in force that violate their constitutional rights. The Republic has abandoned its prior model of limited review and seeks to reinvigorate a constitutional culture to which citizens have had insufficient access. The pendulum has swung surprisingly far: the new procedures require the *Conseil Constitutionnel* to decide upon the constitutionality of a statute even if the case could easily have been resolved on treaty grounds, such as European human rights law. The unnecessary adjudication of constitutional questions was found necessary to restore the importance of the national constitution in a system generously infused with transnational human rights.

The widely held perception that treaty law has crowded out constitutional law makes the recent developments in France a useful example for exploring the relationship between constitutional rights and human rights regimes. This essay explains the new reform, which creates a system for

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referral of constitutional claims and gives them absolute priority over treaty claims. It contrasts this priority with the principle followed in the United States (and elsewhere) of constitutional litigation as a last resort, and considers whether the United States would respond similarly to a more thorough implementation of international human rights in domestic law. Ultimately, the essay concludes that distinctive features of the French constitutional system account for the perceived need to expedite constitutional adjudication.

I. CREATING CONSTITUTIONAL QUESTIONS

The basic model of constitutional review of statutes in France since 1958 has presented a polar contrast with the U.S. system of decentralized judicial review. In the United States, judicial review proceeds as an incident of ordinary litigation in the state and federal courts. The French Constitution of 1958 adopted an extreme version of the continental European "constitutional court" model of specialized review of statutes.¹ At the risk of slight oversimplification, the French system can be described as follows. A limited set of political actors are empowered to refer statutes newly passed by the legislature to the Constitutional Council (*Conseil Constitutionnel*) during a brief window before they enter into force.² If referral takes place, the *Conseil Constitutionnel* conducts an objective examination to determine whether the statute is consistent with the Constitution (including principles that the Constitution is understood as incorporating by reference), and it can invalidate the statute in whole or in part. Otherwise, the statute is promulgated

1. See generally JOHN BELL, FRENCH CONSTITUTIONAL LAW 29-56 (1992).

2. The 1958 Constitution empowered only four principal government officers (the President, the Prime Minister, the President of the Senate, and the President of the National Assembly) to refer statutes to the *Conseil Constitutionnel* for review. A constitutional amendment in 1974 extended the power of referral to groups of sixty senators or sixty members of the National Assembly, thus opening the path to the *Conseil Constitutionnel* to the parliamentary opposition and dissident factions within the majority coalition. 1958 CONST. art. 61 (amended 1974); BELL, *supra* note 1, at 32.

The referral to the *Conseil Constitutionnel* must occur after the legislature's final vote on the law and before the President promulgates it. The Constitution does not specify a period of time that the President must wait before promulgating the law, but the practice has been to delay promulgation when the executive has been notified that a referral will occur. See GUILAUME DRAGO, CONTENTIEUX CONSTITUTIONNEL FRANÇAIS 288 (1998).

and cannot be challenged thereafter.³ The *Conseil Constitutionnel* has held a monopoly on the power to review the constitutionality of statutes; the civil/criminal courts and the administrative courts have not been authorized to question the constitutionality of statutes that they apply in litigation. The basic model has thus consisted of *a priori* abstract review of the constitutionality of statutes, concentrated in a specialized constitutional tribunal.

It should be emphasized, however, that this model applies to review of the *constitutionality* of *statutes*. The civil/criminal and administrative courts have had the authority to resolve constitutional disputes regarding governmental actions of lesser status within their respective jurisdictions.⁴ (The French judicial system includes two separate hierarchies, each with its own supreme court: the *Cour de Cassation* for civil/criminal courts, and the *Conseil d'Etat* for administrative courts.)

More importantly for present purposes, the civil/criminal and administrative courts exercise the power to disregard a statute in a situation where applying the statute would be inconsistent with obligations under an international treaty. Article 55 of the Constitution affords treaties higher normative force than statutes. The *Conseil Constitutionnel* has explained that inconsistency with a treaty does not ordinarily create the kind of constitutional violation that falls within its task of *a priori* review, and that instead the courts should give effect to article 55 on a case-by-case basis.⁵ Thus, the courts cannot set statutes aside for unconstitutionality, but they can set statutes aside for “unconventionality” (*inconventionnalité*). The two most important types of review for inconsistency with treaty obligations involve European Union law⁶ and the European Con-

3. There is an important exception by which the *Conseil Constitutionnel* permits itself to review a provision of a previously promulgated statute in the course of its review of a later statute that amends the earlier provision. *Conseil constitutionnel* [CC] [Constitutional Court] decision No. 85-187 DC, Jan. 25, 1985, Rec. 43; BELL, *supra* note 1, at 33.

4. See, e.g., L'APPLICATION DE LA CONSTITUTION PAR LES COURS SUPRÊMES: CONSEIL CONSTITUTIONNEL, CONSEIL D'ÉTAT, COUR DE CASSATION (Guillaume Drago ed., 2007) (describing the use of constitutional principles in litigation, as well as the limited possibility of concluding that a subsequent constitutional provision has superseded an earlier statute).

5. BELL, *supra* note 1, at 75-76.

6. The constitutional basis for enforcing EU law obligations has been reinforced by a later interpretation of article 88-1, which was added in 1992,

vention on Human Rights (“the Convention” or “the European Convention”).⁷

The limited reach of constitutional review in France has long engendered debate. The restriction to *a priori* abstract review is not essential to the Continental model of a specialized constitutional court. Other countries have permitted abstract review of statutes already in force, or have authorized the regular courts to refer questions regarding the validity of statutes to the constitutional court when they arise concretely in litigation. To some extent, the exceptional features of constitutional review in France reflect the reality that the system was originally designed for the enforcement of separation of powers under the 1958 Constitution rather than for the protection of individual rights. Constitutional review expanded to individual rights only later by interpretation, after the *Conseil Constitutionnel* concluded that language about rights in the Constitution’s preamble was legally enforceable.⁸ The exercise of this jurisdiction was facilitated by a constitutional amendment that enabled the parliamentary opposition, as well as those in power, to refer cases for abstract review. Nonetheless, not all statutes of dubious constitutionality are referred, and sometimes constitutional difficulties emerge too late for *a priori* review, after the operation of the statute has been better understood or because of subsequent developments in constitutional jurisprudence.

Some have considered the absence of post-promulgation review for constitutionality particularly incongruous given the availability of review for inconsistency with treaties. If statutes that violate European human rights obligations are not immune from being set aside at the behest of individuals in ordinary litigation, why should individuals have no recourse at all against statutes that violate their constitutional rights?

Critics of the status quo have repeatedly proposed amendments that would permit individuals to raise constitutional challenges to statutes before the regular courts, for referral to

see DOMINIQUE ROUSSEAU, *DROIT DU CONTENTIEUX CONSTITUTIONNEL* 119-22 (8th ed. 2008), but that distinction has little bearing on the present essay.

7. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1949, E.T.S. 5, 213 U.N.T.S. 221.

8. CC decision No. 71-44 DC, Jul. 16, 1971, Rec. 173; BELL, *supra* note 1, at 66.

the *Conseil Constitutionnel*.⁹ I will call this a “preliminary reference” procedure, as in European Union law. In 1990, under the Mitterrand presidency, a constitutional amendment to create a preliminary reference system was approved by the National Assembly but did not achieve final passage; a second proposal in 1993 also failed.¹⁰

The reform was finally adopted in 2008, as part of a complex package of constitutional amendments supported by President Nicolas Sarkozy for the “modernization” of the institutions of the Fifth Republic.¹¹ New article 61-1 of the Constitution defines some elements of the preliminary reference procedure, while leaving the rest to be specified by an implementing statute (*loi organique*, or “institutional act”¹²). In an official English translation:

If, during proceedings in progress before a court of law, it is claimed that a statutory provision infringes the rights and freedoms, guaranteed by the Constitution, the matter may be referred by the *Conseil d'État* or by the *Cour de Cassation* to the Constitutional Council, within a determined period.

An Institutional Act shall determine the conditions for the application of the present article.¹³

This amendment contemplates a filtering process. Rather than directly referring questions of constitutional rights to the *Conseil Constitutionnel*, lower courts must refer them up the judicial hierarchy to the supreme civil/criminal or administrative court, which then decides whether a question has sufficient merit to require an answer by the *Conseil Constitutionnel*. The filtering system spares the relatively understaffed *Conseil*

9. DRAGO, *supra* note 2, at 444-61.

10. *See id.* at 455-56.

11. Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la V^e République [Constitutional amendment of July 23, 2008 on the modernization of the institutions of the Fifth Republic], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jul. 24, 2008, p.11890.

12. Enactment of a *loi organique* involves a more cumbersome legislative procedure than ordinary legislation, including a slightly higher majority requirement. A *loi organique* cannot be amended by ordinary legislation and is also subject to mandatory referral to the *Conseil Constitutionnel*, unlike ordinary legislation. *See* 1958 CONST. art. 46; BELL, *supra* note 1, at 63, 113.

13. 1958 CONST. art. 61-1.

Constitutionnel both the burden of resolving insubstantial questions and the burden of screening them out. It also creates the risk that the two supreme courts will impose their own views in deciding which questions merit referral.

The implementing legislation was finally adopted in November 2009, and took effect in March 2010.¹⁴ Among other features, it specifies that claims that a statutory provision violates a constitutional right must be raised in writing by a party to the case, and not by the court *sua sponte*.¹⁵ The court then confirms whether (1) the statutory provision applies to the case, (2) the statutory provision has not already been upheld by the *Conseil Constitutionnel*, or circumstances have changed in a manner that requires a new evaluation, and (3) the constitutional question is serious in character.¹⁶ If these conditions are met, then the initial court transmits the question to the *Conseil d'Etat* or the *Cour de Cassation* respectively,¹⁷ and ordinarily suspends its own proceedings to await a response.¹⁸ The higher court then has three months to give a reasoned decision on whether the listed conditions apply;¹⁹ if the time passes without decision, the question is transmitted by default. Once the *Conseil Constitutionnel* receives a question, it has three months in which to hold a public hearing and decide the question. Settlement or other disposition of the original litigation

14. Loi organique 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution [Organic Law 2009-1523 of December 10, 2009 relative to the application of article 61-1 of the Constitution], J.O., Dec. 11, 2009, p. 21379.

15. *Id.* art. 23-1.

16. *Id.* art. 23-2. Technically, at this stage the issue is whether the constitutional question is not devoid of serious character, and then at the filtering stage the higher courts apply a slightly higher standard of whether the question is new or serious. *Id.* art. 23-4. These details are not important for the present essay.

17. *Id.* art. 23-2. Questions of constitutionality may also be raised for the first time to the *Conseil d'Etat* or the *Cour de Cassation* in cases proceeding before them.

18. *Id.* art. 23-3. Proceedings are not suspended, however, if the consequence of suspension would be to extend the detention of an individual, or in other urgent circumstances. The *Conseil Constitutionnel* upheld this exception subject to the understanding that an otherwise final decision made pending the *Conseil's* review could not preclude the claimant from seeking a remedy if the *Conseil* then found the statute unconstitutional. CC decision No. 2009-595 DC, Dec. 3, 2009, J.O., Dec. 11, 2009, p. 21381, cons. 18, 23.

19. Loi organique 2009-1523, art. 23-4.

does not affect the responsibility of the *Conseil Constitutionnel* to decide the question.²⁰

The implementing statute assigns this procedure the name *question prioritaire de constitutionnalité*, which did not appear in the constitutional amendment itself.²¹ One of the principal characteristics that justify the adjective *prioritaire* is the express requirement to address constitutionality before addressing compliance with treaties. If a party contests both the consistency of a statutory provision with constitutional rights and its consistency with international commitments (*engagements internationaux*), the courts must first decide whether to transmit the constitutional question to the *Conseil Constitutionnel*.²²

The preliminary reference procedure probably does not permit individuals to raise all the questions of constitutionality that the *Conseil Constitutionnel* could have reviewed in an *a priori* abstract proceeding.²³ Both the constitutional amendment and the implementing legislation mention statutes that infringe constitutionally guaranteed rights and freedoms. The legislative history makes clear the intention not to include procedural defects in the statutory enactment procedure, although the *Conseil Constitutionnel* does censure these in *a priori* review. Exactly which substantive defects will count as infringements of rights and freedoms, as opposed to non-rights-oriented substantive norms also mandated by the Constitution, remains to be resolved by the *Conseil Constitutionnel* in the future.

As a *loi organique*, the implementing legislation creating the preliminary reference procedure was itself subject to mandatory referral to the *Conseil Constitutionnel*. The *Conseil*

20. *Id.* art. 23-9.

21. Earlier proposals had often used the phrase “objection of unconstitutionality” (*exception d'inconstitutionnalité*), but some experts thought that the new term more accurately described the mechanism enacted by the implementing legislation. The name change was first adopted by a committee of the National Assembly in September 2009. ASSEMBLÉE NATIONALE, COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE, COMPTE RENDU NO. 73, at 13 (2009).

22. Loi organique 2009-1523, art. 23-2 (for the lower court), 23-5 (for the *Conseil d'Etat* or the *Cour de Cassation*).

23. See ROUSSEAU, *supra* note 6, at 76-77 (discussing limitations imposed by the preliminary reference procedure).

described its understanding of the legislation and upheld it as interpreted in December 2009.²⁴

II. MOTIVATING THE REFORM

The constitutional amendment creating a preliminary reference regime has been explained as serving a number of purposes. Within the 2008 package of constitutional amendments, it ranked among the provisions that granted “new rights” to the citizens.²⁵ Granting new rights was desirable in its own terms, and was also meant to increase the attractiveness of the package of primarily structural amendments. The right to raise questions of constitutionality directly involved the citi-

24. CC decision No. 2009-595 DC, Dec. 3, 2009, J.O., Dec. 11, 2009, p. 21381. The decision both paraphrased the statute and identified two respects in which the constitutionality of the statute depended on its being interpreted in a particular way: the ability of the claimant to reopen otherwise final decisions in order to benefit from a favorable decision of the *Conseil*, see *supra* note 18, and the implied obligation of the *Conseil d'Etat* and the *Cour de Cassation* to respect the right to fair hearing in making their filtering decisions, CC decision No. 2009-595 DC, cons. 18, 23, 28.

The decision did not clarify an important ambiguity in both the constitutional amendment and the implementing statute, namely whether litigants now have the right to challenge the constitutionality of a statute consenting to the ratification of a treaty that has since entered into force. Remarkably little was written on this subject while the amendment and the statute were under consideration. *But see* Pascal Mbongo, *Droit au juge et prééminence du droit: Bréviaire processualiste de l'exception d'inconstitutionnalité*, 2008 RECUEIL DALLOZ 2089, 2091-92 (posing the question). Nonetheless, a handbook published in early 2010 asserts categorically that such statutes cannot be referred. *See* Jérôme Roux, *Contre quels textes soulever la question prioritaire de constitutionnalité?*, in *LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITÉ* 28, 36 (Dominique Rousseau ed., 2010). The *Conseil d'Etat* apparently adopted this position in a filtering decision, *Rujovic*, CE, May 14, 2010, JurisData 2010-006167.

25. *See* ASSEMBLÉE NATIONALE, PROJET DE LOI CONSTITUTIONNELLE DE MODERNISATION DES INSTITUTIONS DE LA V^e RÉPUBLIQUE, EXPOSÉ DES MOTIFS 3 (2008) (the government's explanation of its draft constitutional amendment as submitted to the legislature). The proposal to create a preliminary reference procedure had been revived by an expert committee on constitutional reform headed by former Prime Minister Edouard Balladur. The Balladur Committee's report grouped its proposals into three categories, “a better-controlled executive power,” “a reinforced parliament,” and “new rights for the citizens.” COMITÉ DE RÉFLEXION ET DE PROPOSITION SUR LA MODERNISATION ET LE RÉÉQUILIBRAGE DES INSTITUTIONS DE LA V^e RÉPUBLIQUE, UNE V^e RÉPUBLIQUE PLUS DÉMOCRATIQUE (2007) [hereinafter BALLADUR COMMITTEE REPORT].

zens in a process of constitutional review from which they had previously been excluded. Second, the opportunity for post-promulgation review would permit the removal from the legal system of unconstitutional statutory provisions that had gone unchallenged,²⁶ or whose unconstitutionality had not been evident at the time of their *a priori* review. Third, the reform would reaffirm the place of the Constitution at the apex of the French legal order. It would end the paradoxical situation in which statutes in force could not be challenged on constitutional grounds, but could be challenged on treaty grounds.

Not all French jurists supported the creation of the referral procedure. Some maintained the traditional reverence for parliamentary enactments, and opposed the right to challenge statutes in force.²⁷ Others considered the reform too late and superfluous, because judicial enforcement of compliance with treaty norms had satisfied the need for protection of individual rights.²⁸ Which brings us to the sore point.

The implementing legislation goes further than the constitutional amendment literally required by giving the question of constitutionality priority over international questions. Indeed, the Senate report on the proposed constitutional amendment had expressed the assumption that the courts would decide treaty questions *before* making referrals, and that therefore the *Conseil Constitutionnel* would not be burdened by an excessive number of referred constitutional questions.²⁹ Once the constitutional amendment had been adopted, however, a different argument prevailed. Too often, European human rights claims would offer a parallel basis for challenging a statute, and parties would raise both national and international claims. The reform would fail in effect if the judges

26. This includes statutes enacted before the adoption of the 1958 Constitution, statutes enacted between 1958 and 1974 (when the legislative minority received the power to initiate *a priori* review) and statutes that escaped *a priori* review for other reasons after 1974.

27. See, e.g., BALLADUR COMMITTEE REPORT, *supra* note 25, at 99-100 (dissenting view of M. Pierre Mazeaud, former President of the *Conseil Constitutionnel*) (identifying disadvantages of permitting constitutional challenges to statutes already in force).

28. See, e.g., Marthe Fatim-Rouge Stéfanini, *La question préjudicielle de constitutionnalité: étude du projet français au regard du droit comparé*, 23 ANNUAIRE INTERNATIONAL DE JUSTICE CONSTITUTIONNELLE 13 (2008).

29. SÉNAT RAPPORT NO. 387, at 178-79 (2008).

could avoid referral of constitutional questions by resolving the case on treaty grounds.³⁰ Among other reasons, judges might be motivated to avoid referral because they were more familiar with the treaty issues, which they were already in the habit of deciding themselves, or because referral would impose delay.³¹ As a result, the Constitution would not be restored to its proper place at the apex of the legal order, in practice or in the minds of the litigants.³² Therefore constitutional questions must be made priority questions.

The debate over the implementing legislation, both in the legislature and in the journals, shows some hesitation over the degree of priority that could validly be given. The concern arose from European Union jurisprudence, which has insisted that national legal systems cannot obstruct national judges from making a preliminary reference to the European Court of Justice (ECJ) for guidance on an issue of European Union law arising before them. Some drafts of the implementing legislation sought to reserve whatever exception this supranational jurisprudence required. Ultimately, the legislature left this problem to inference from general language. The priority afforded to constitutional questions apparently does not prevent a judge faced with multiple challenges to a statute from first transmitting the constitutional issue to the *Cour de Cassa-*

30. See, e.g., COMPTE RENDU NO. 73, *supra* note 21, at 3-4 (remarks of Mme. Michèle Alliot-Marie, the Minister of Justice) (explaining that if left to choose, judges may choose to apply international law rather than the constitution, which “seems entirely abnormal to the jurist and Gaullist that I am.”).

31. See, e.g., ASSEMBLÉE NATIONALE, COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L’ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE, COMPTE RENDU NO. 58, at 24 (2009) (testimony of M. Jean-Claude Colliard, former member of the *Conseil Constitutionnel*) (arguing that judges would tend to resolve questions on familiar treaty grounds rather than refer them as questions of constitutionality).

32. See, e.g., ASSEMBLÉE NATIONALE, COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L’ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE, COMPTE RENDU NO. 63, at 22 (2009) (testimony of M. Marc Guillaume, Secretary General of the *Conseil Constitutionnel*) (stating that the purpose of article 61-1 is to reestablish the primacy of the Constitution); CC decision No. 2009-595 DC, Dec. 3, 2009, J.O., Dec. 11, 2009, p. 21381, cons. 14 (stating that “in imposing the examination by priority of claims of [un-]constitutionality before claims based on lack of conformity of a legislative disposition to international commitments of France, the organic legislature intended to guarantee respect for the Constitution and to recall its place at the apex of the internal juridical order . . .”).

tion or the *Conseil d'Etat*, and then immediately referring the European issue to Luxembourg without waiting for a response from Paris, if European law so requires.³³

Proponents also contended that priority was justified by comparison of the different remedial consequences of determinations of invalidity of statutes on constitutional grounds and treaty grounds. When a French court concludes that a statute violates an individual's treaty rights, that conclusion results in nonapplication of the statute but formally has no broader effect on nonparties to the litigation. When the *Conseil Constitutionnel* finds a statutory provision unconstitutional in an abstract proceeding, that finding voids the provision and has *erga omnes* effect.³⁴ The recent constitutional amendment

33. Pierre Bon, *La question prioritaire de constitutionnalité après la loi organique du 10 décembre 2009*, 2009 REVUE FRANÇAISE DE DROIT ADMINISTRATIF [RFDA] 1107, 1120-21; see also CC decision No 2009-595 DC, cons. 14 (observing that the implementing legislation does not prevent the court from assuring respect for the superiority of treaties and EU norms after it has referred the priority question of constitutionality). Ordinarily, the answer from Paris is likely to arrive before the answer from Luxembourg. The ECJ reported the average duration of its proceedings on nonexpedited preliminary references as 16.8 months in 2008. ANNUAL REPORT OF THE EUROPEAN COURT OF JUSTICE 94 (2008), available at http://curia.europa.eu/jcms/jcms/Jo2_11035/?hlText=report. The French implementing legislation, in contrast, places strict time limits on the procedure for deciding referred constitutional questions. Once a court has initiated a reference, the *Conseil d'Etat* and the *Cour de Cassation* must perform their filtering function within three months or the question is automatically referred; once the *Conseil Constitutionnel* has received the question, it must decide within a maximum of three months. Loi organique 2009-1523, art. 23-4, 23-7, 23-9.

Disputes over the relative priority of constitutional questions and EU law questions continued after the new procedure came into effect in 2010. The *Cour de Cassation* sought an expedited ruling from the ECJ on the compatibility of the procedure with EU law, and the ECJ ruled in June 2010 that priority for national questions would be permissible only if it did not prevent the national courts from giving full effect to EU law; the courts must be free to refer EU law challenges to the ECJ at any time, to afford provisional protection to EU rights while the constitutionality of a statute was being resolved, and to disapply the statute on EU law grounds even after its constitutionality had been upheld. *Melki and Abdeli*, C-188/10 & C-189/10 (ECJ June 22, 2010); see Henri Labayle, *Question prioritaire de constitutionnalité et question préjudicielle: ordonner le dialogue des juges?*, 2010 RFDA 659 (providing a nuanced overview of the continuing controversy).

34. See, e.g., COMPTE RENDU No. 58, *supra* note 31, at 4-5 (testimony of M. Jean-Marc Sauvé, Vice President of the *Conseil d'Etat*) (arguing that the *erga omnes* effect of a finding of unconstitutionality justifies priority over ques-

assigns similarly broad effect on nonparties to the *Conseil Constitutionnel's* rulings on referred questions of constitutionality.³⁵ Proponents of priority maintained that the claim with the broader remedial effect should logically be decided before the claim with the narrower remedial effect.

III. COMPARING PRIORITIES

The priority of constitutional questions may be surprising to U.S. lawyers, and not only to them. It appears to contradict a major maxim of U.S. constitutional adjudication, that open constitutional questions should generally be decided only as a last resort. In the words of Justice Louis Brandeis in his famous *Ashwander* concurrence, "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of."³⁶ To the extent that treaties are judicially enforceable in the United States, they also provide a nonconstitutional basis for deciding cases, which should ordinarily be addressed before reaching a constitutional question.³⁷

tions of inconsistency with a treaty). Nonetheless, others have stated that the practical effect of the two types of decisions is ultimately the same. *See, e.g.*, Olivier Duthéillet de Lamothe, *Contrôle de conventionnalité et contrôle de constitutionnalité en France* (Apr. 2, 2009) (transcript available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/madrid_odutheillet_avril_2009.pdf) (address to the Spanish Constitutional Court by member of the *Conseil Constitutionnel*).

35. 1958 CONST. art. 62. The new provision does, however, authorize the *Conseil Constitutionnel* to delay the effective date of abrogation and to limit its retrospective consequences. *Id.*

36. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

37. *See, e.g.*, *O'Connor v. United States*, 479 U.S. 27, 30 n.1 (1986) (resolving tax case by interpretation of the Panama Canal Treaty, and thereby avoiding constitutional question involving retroactive taxation); *Bacardi Corp. of America v. Domench*, 311 U.S. 150, 166-67 (1940) (finding that Puerto Rican legislation violated U.S. obligations under trademark treaty and therefore not reaching constitutional claims under Fifth Amendment and Commerce Clause); *Asakura v. City of Seattle*, 265 U.S. 332, 343-44 (1924) (finding that the city's denial of a pawnbroker's license to noncitizens violated commercial treaty between U.S. and Japan, and therefore not reaching due process and equal protection claims under the Fourteenth Amendment). *But see* *Hamdi v. Rumsfeld*, 542 U.S. 507, 534 n.2 (2004) (plurality opinion) (deciding that a citizen was constitutionally entitled to hear-

German constitutional law employs similar considerations in its concrete review procedure. A judge may refer a case to the Federal Constitutional Court only if the outcome turns on the constitutionality of the statute (the requirement of *Entscheidungserheblichkeit*).³⁸ For example, if a statute clearly conflicts with European Union law, then a decision on its constitutionality is not necessary and the judge cannot refer it for concrete review.³⁹ This criterion does involve some flexibility, however: if the validity of the statute is unclear under European Union law, then the Federal Constitutional Court affords the judge discretion to decide whether to refer for concrete review of its constitutionality or to refer it to the European Court of Justice for a preliminary ruling on its validity.⁴⁰ (This flexibility prevents a jurisdictional void in which both referrals would be inadmissible because neither is absolutely necessary.⁴¹)

The idea of including similar flexibility in the new French implementing legislation was raised, but rejected.⁴² Even if a statute clearly violates a treaty, and the question of its constitutionality is novel, that question must be referred to the *Conseil Constitutionnel*.

Moreover, the implementing legislation does not make the outcome-determinative character of the constitutional issue a necessary condition for referral. The government's draft bill had required that the statute whose constitutionality was challenged must control the outcome of the case (*commande l'issue du litige*), but the legislature substituted the looser condition that the statute be applicable to the case, in order to expand the opportunity for litigants to have questions referred. The legislature also specified that, once the *Conseil Constitution-*

ing on the legality of military detention, bypassing broader issue of whether any treaty guaranteed such a right).

38. See HANS LECHNER & RÜDIGER ZUCK, *BUNDESVERFASSUNGSGERICHTSGESETZ KOMMENTAR* 438-41 (5th ed. 2006).

39. See, e.g., Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 28, 1992, 85 BVerfGE 191, 203-05 (Ger.).

40. See, e.g., BVerfG, Dec. 17, 2002, 106 BVerfGE 275, 294-96.

41. *Id.*

42. See, e.g., Laurence Burgorgue-Larsen, *Question préjudicielle de constitutionnalité et contrôle de conventionnalité*, 2009 RFDA 787, 796 & n.93 (citing arguments presented in favor of a flexible approach); COMPTE RENDU NO. 63, *supra* note 32, at 41 (testimony of M. Vincent Lamanda, First President of the *Cour de Cassation*) (urging a flexible approach).

nel had received the question, mootness of the original case would not affect the *Conseil's* power and obligation to answer.⁴³

A partial precedent for the priority rule may be seen in a contemporaneous development in Belgium, although that change served a different purpose. Belgium already had a procedure for referral of constitutional questions from the normal courts to its Constitutional Court, and it amended that framework in 2009 in order to regulate the referral of challenges that implicate fundamental rights both under the Belgian Constitution and under European or international law.⁴⁴ The key provision requires the supreme civil/criminal court (the *Cour de Cassation*) and the highest administrative court to refer cases presenting substantial open questions of fundamental rights to the Constitutional Court before deciding the

43. Loi organique 2009-1523, art. 23-9. Again, the opposite rule applies in Germany: a reference ceases to be admissible if later developments in the original case render it no longer relevant to the outcome. See LECHNER & ZUCK, *supra* note 38, at 446. The Belgian system described *infra* similarly provides that withdrawal of the original case results in termination of the proceedings of the constitutional court on a referred constitutional question. See Loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle, art. 99, available at http://www.const-court.be/fr/textes_base/textes_base_lois_01.html (as modified). I owe thanks to Bruno De Witte and Philippe Reyniers for clarifying this latter issue.

44. See JAN THEUNIS, EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW, THE INTERRELATIONS BETWEEN THE CONSTITUTIONAL COURT AND ORDINARY COURTS (2006) (describing the evolution of the Belgian constitutional court and its competition with the ordinary courts). The new provision begins as follows, before stating exceptions:

Where it is invoked before a court of law that a statute, decree or rule referred to in Article 134 of the Constitution infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, said court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling.

Loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle, art. 26(4). A prominent Belgian constitutional scholar testified on the pending legislation at one of the hearings before a French parliamentary committee concerning the drafting of the French implementing legislation. See COMPTE RENDU NO. 58, *supra* note 31, at 8-13 (testimony of M. Francis Delpérée, vice president of the Belgian Senate and professor of law). Despite the differences emphasized here, it has been said that the Belgian reform inspired the French priority rule. See, e.g., Bon, *supra* note 33, at 1120.

international claim. The purpose of the reform, however, was to reduce an institutional conflict between the recently created Constitutional Court and the long-established *Cour de Cassation*.⁴⁵ This supreme court had been resolving cases on European human rights grounds and refusing to refer them to the Constitutional Court, *even when the European human rights claims failed*. The instances of refusal included the highly salient conviction of the political party Vlaams Blok for violating antiracism laws.⁴⁶ The highest courts convened a conference in 2005 at which they worked out a compromise that supplied the basis for the new legislation.⁴⁷ In enacting the reform, the legislature accepted the convergence between constitutional interpretation and European human rights interpretation, but insisted on protecting the authority of the politically balanced Constitutional Court to resolve open questions.⁴⁸

45. See THEUNIS, *supra* note 44, at 3 (describing the conflict). The *Cour Constitutionnelle* was created in 1983 (under the name *Cour d'Arbitrage*), while the *Cour de Cassation* dates back to the independence of Belgium in 1830. The jurisdiction of the *Cour d'Arbitrage* originally extended only to a limited set of constitutional issues concerning the federal structure of Belgium but was later expanded, first to equality rights, and then since 2003 to include all the constitutional rights listed in Title II of the Belgian Constitution. The *Cour de Cassation* lacks the power to invalidate statutes on constitutional grounds, but can set them aside when they conflict with European or international treaty obligations. The rise of the *Cour Constitutionnelle* comes at the expense of the *Cour de Cassation*, and each court has used debatable interpretations of its powers to assert final authority over issues that arguably belong to the other.

46. See Eva Brems, *Belgium: The Vlaams Blok Political Party Convicted Indirectly of Racism*, 4 INT'L J. CONST. L. 702 (2006) (describing the affirmance of the conviction by the *Cour de Cassation* and its refusal to refer a constitutional challenge to the conviction); Benoit Gors, *Une cause de refus de renvoi préjudiciel: la primauté de la Convention européenne sur la Constitution*, 38 REVUE BELGE DE DROIT CONSTITUTIONNEL [RBDC] 507 (2005).

47. Christine Horevoets, *L'article 26 de la loi spéciale sur la Cour d'arbitrage est-il voué à une perpétuelle mutation?*, in EN HOMMAGE À FRANCIS DELPÉRÉE: ITINÉRAIRES D'UN CONSTITUTIONNALISTE 631, 632 & n.4 (Robert Andersen et al. eds., 2007); see also LES RAPPORTS ENTRE LA COUR D'ARBITRAGE, LE POUVOIR JUDICIAIRE ET LE CONSEIL D'ÉTAT (Alex Arts et al. eds., 2006) (publishing the reports of the symposium).

48. See, e.g., THEUNIS, *supra* note 44, at 6 (describing the international and national interpretations of fundamental rights in Belgium as "inextricably linked"). See also SÉNAT DE BELGIQUE COMMISSION DES AFFAIRES INSTITUTIONNELLES, PROPOSITION DE LOI SPÉCIALE MODIFIANT L'ARTICLE 26 DE LA LOI SPÉCIALE DU 6 JANVIER 1989 SUR LA COUR D'ARBITRAGE, RAPPORT NO. 4-12/4-2007/2008, at 32, 38 (2008) (remarks of Sen. Vandenberghe) (maintaining

Priority under the new Belgian legislation is both narrower and broader than priority under the French reform. If the European or international equivalent of the Belgian constitutional right is clearly violated by the statute (*manifestement violée*), then the regular courts can decide it on that basis without referring the constitutional issue.⁴⁹ On the other hand, the Belgian rule requires referral to the Constitutional Court even if the individual litigant raises only a European or international law claim, so long as that claim overlaps in substance with a constitutional rights claim that the litigant could have raised.⁵⁰ The French priority rule, in contrast, permits a litigant to avoid referral by failing to plead the claim in constitutional terms.

IV. UNPACKING PRIORITY

The priority of constitutional questions over European human rights questions has repeatedly been justified as a measure needed to restore the place of the French constitution at the apex of the national legal order. Although other purposes were mentioned,⁵¹ or can be imagined,⁵² this prominent claim

that the political character of the *Cour Constitutionnelle* gives it a greater claim to resolve fundamental rights challenges to statutes).

49. Loi spéciale du 6 janvier 1989 sur la Cour constitutionnelle, art. 26(4)(3). The courts can also decline to refer if they conclude that the statute clearly does not violate the constitutional right. *Id.* art. 26(4).

The Belgian priority rule is also narrower to the extent that it applies only to treaty claims that are similar to constitutional rights claims. The French rule gives referral of the constitutional question priority over all treaty claims. Language in the government's original draft limiting priority to situations where a party challenges a statute on constitutional and treaty grounds "in an analogous fashion" was dropped as too ambiguous. See COMPTE RENDU NO. 73, *supra* note 21, at 5 (remarks of M. Didier Quentin); COMPTE RENDU NO. 63, *supra* note 42, at 25 (testimony of M. Marc Guillaume).

50. SÉNAT RAPPORT NO. 4-12/4-2007/2008, at 41; SÉNAT DE BELGIQUE COMMISSION DES AFFAIRES INSTITUTIONNELLES, PROPOSITION DE LOI SPÉCIALE MODIFIANT L'ARTICLE 26 DE LA LOI SPÉCIALE DU 6 JANVIER 1989 SUR LA COUR D'ARBITRAGE, RAPPORT NO 4-12/8-2008/2009, at 4 (2009).

51. Technical arguments were also pressed in favor of the priority rule. First, priority would compensate for the delay inherent in the referral procedure, in contrast to raising treaty questions that judges can decide for themselves. See, e.g., COMPTE RENDU NO. 58, *supra* note 31, at 24 (testimony of M. Colliard). But that argument is persuasive only when coupled with reasons why individual rights holders should be required to accept the delay.

deserves investigation. Why might the French constitution be so threatened by European human rights law that constitutional questions should be given priority, indeed absolute priority, over treaty questions? Why does reserving constitutional adjudication until after exhaustion of subconstitutional claims not express reverence for the higher norm?

The legislative history of the reform, and some of the juristic literature supporting it, suggest considerable belief by lawyers and politicians in France that the adjudication of rights claims as a matter of transnational law impairs the respect properly owing to the national constitution. The current President of the *Conseil Constitutionnel* has stated, "It is not healthy for the control of treaty-conformity, and thus treaties, to occupy more space in the internal legal order than the control of constitutionality, and thus than our Constitution."⁵³ In

Second, priority could be used to overcome the inertia of the regular courts, especially the lower court judges, who have become accustomed to resolving claims of conflict between statute and treaty but not to addressing constitutional challenges to statutes. See, e.g., Bertrand Mathieu, *Question préjudicielle de constitutionnalité – À propos du projet de loi organique*, SEMAINE JURIDIQUE EDITION GÉNÉRALE, Apr. 29, 2009, No. 18-214. This argument concerns transition to the new regime, and would not justify permanent maintenance of the priority rule once the judges have become habituated to referring constitutional questions. From that perspective, it is worth recalling that the priority rule forms part of the implementing legislation, not part of the constitutional amendment. Once the practice of referring constitutional questions takes root, and particularly if the volume of referrals is higher than anticipated, the priority rule could be made less absolute by amending the implementing legislation.

52. For example, the priority rule might be seen as intervening in institutional competition between the two supreme courts and the *Conseil Constitutionnel*, by analogy to the situation in Belgium. (It may be observed that the Secretary General of the *Conseil Constitutionnel* testified in favor of the priority rule, while the First President of the *Cour de Cassation* criticized it; on the other hand the Vice President of the *Conseil d'Etat* also testified in support of priority, with an exception for EU law questions, based on concern that EU law may require it). See COMPTE RENDU No. 63, *supra* note 32, at 22-24, 40-41; COMPTE RENDU No. 58, *supra* note 31, at 4-5.

Alternatively, the priority rule might serve the economic interest of constitutional lawyers in generating a demand for their expertise. But if so, they have rallied many allies to their cause.

53. Jean-Louis Debré, *Contrôle de Constitutionnalité et Contrôle de Conventi-onnalité* (June 6, 2008), at 9 (transcript available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_inter-ventions/2008/pdt_debre_afdc_06062008.pdf) (address by the president of

another well-known stricture, “one should not go looking in Strasbourg for what can be found in Paris.”⁵⁴

Such arguments deem it preferable for statutory provisions to be invalidated on the basis of French constitutional rights rather than European human rights, even when the content of the decision would be otherwise identical. If a citizen asserts, say, a right to freedom of expression and prevails, the victory should be attributable to the French constitution and not to the European Convention. Then the victory reinforces the importance of the French constitution, and the loyalty and attachment of citizens toward it. An expert observer might inquire whether the current interpretation of the French constitutional norm contributed independently to the victory, or whether the victory results precisely from the influence of European human rights thinking on French constitutional law. But in either alternative, deciding the case under the rubric of French constitutional right strengthens the link between citizens and their Constitution.

These arguments may suggest an emphasis on appearance in contrast to the underlying reality. French constitutional law is less independent of European law than the advocates of priority may want the citizens to believe. For example, a recent summary by a current member of the *Conseil Constitutionnel* identifies a series of respects in which the European Convention and its interpretation by the European Court of Human Rights has implicitly influenced the interpretation of French constitutional rights.⁵⁵ These include the supplementation of the express constitutional rights in the 1789 Declaration and the 1946 Preamble by a right to respect for private life, freedom of marriage, the right to live a normal family life, and the principle of human dignity; the infusion of the European Court’s conception of media pluralism into the *Conseil*’s understanding of freedom of expression; and the elaboration of

the *Conseil Constitutionnel* to a colloquium organized by the French Association of Constitutional Law).

54. Cour de cassation [Cass.] [Supreme court for judicial matters] ass. plén., June 30, 1995, JCP 1995, II, 22478 (conclusions of *avocat général*).

55. Olivier Dutheillet de Lamothe, L’Influence de la Cour Européenne des Droits de l’Homme sur le Conseil Constitutionnel (Feb. 13, 2009) (transcript available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/cedh_130209_odutheillet.pdf) (address to the *Conseil Constitutionnel*).

rights of criminal defense that incorporate elements identified in the European Convention and in the European Court's case law. The *Conseil* also developed stricter standards for evaluating legislation that retrospectively validates administrative actions, after the European Court found its prior criteria too lax to satisfy the European Convention.⁵⁶

These decisions and much of the literature exhibit a strong belief that French constitutional standards should not fall below the European minimum, even if other mechanisms are available to ensure compliance with the Convention. Often such divergence between European and French interpretations is taken as a reproach to French law,⁵⁷ rather than as the inevitable consequence of maintaining parallel positive rights systems with different authoritative adjudicators.⁵⁸ Harmonization of constitutional and treaty interpretations is also justified on more pragmatic grounds, such as enhancing legal security by preventing conflicting signals to individuals about the content of their rights.⁵⁹

To be sure, the French constitution does contain rights additional to those protected by the European Convention, and some rights such as equality and religious freedom are interpreted differently in France. Prior adjudication of Euro-

56. *Id.*

57. See, e.g., BERTRAND MATHIEU & MICHEL VERPEAUX, DROIT CONSTITUTIONNEL 756 (2004) (describing the condemnation in Strasbourg of a statute previously upheld against a parallel constitutional challenge as a *camouflet* (snub) to the *Conseil Constitutionnel*); Denys de Béchillon, *De quelques incidences du contrôle de la conventionnalité internationale des lois par le juge ordinaire (Malaise dans la Constitution)*, 1998 RFDA 225, 232 (characterizing as *hyperformaliste* the view that divergent applications of a European human right and a parallel French constitutional right would be acceptable because the norms are not identical).

Not always, however. For example, the Strasbourg Court's criticism of the structure of adjudication in the *Conseil d'Etat*, as inconsistent with European norms regarding the appearance of partiality and inequality of arms, was condemned for years as a failure to understand the French system, until the procedures of the *Conseil d'Etat* were brought into compliance. See Mitchel Lasser, *The European Pasteurization of French Law*, 90 CORNELL L. REV. 995 (2005); Bernard Pacteau, *La justice administrative française désormais en règle avec la Cour européenne des droits de l'homme?*, 2009 RFDA 885.

58. See generally Gerald Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 STAN. L. REV. 1863 (2003) (discussing the consequences of dual positivation of fundamental rights norms).

59. Dutheillet de Lamothe, *supra* note 55, at 10.

pean human rights challenges would not always obviate the need to reach French constitutional challenges. But it often would.

Invalidating statutes on grounds of constitutional right rather than treaty grounds also reinforces French national identity as the “fatherland of human rights” (*la patrie des droits de l’homme*). The continental and global influence of the 1789 Declaration of the Rights of Man and the Citizen has been a source of national pride, and that Declaration itself—transformed by modern interpretations of its provisions—literally forms part of the constitutional norms that are legally enforceable in France.⁶⁰ Employing the Declaration, rather than the European Convention, as the operative source of decisions invalidating statutes has potential consequences for the national self-image.

The insistence that public attention needs to be refocused on the national constitution may reflect a reaction against the most ambitious forms of European governance. Several years ago, a movement to put the European Union on a more expressly “constitutional” basis failed, in substantial part due to a negative referendum outcome in France.⁶¹ In anticipation of the European Constitution Treaty, the *Conseil Constitutionnel* had articulated an interpretation that allowed the primacy of EU law to operate only within limits defined by the French constitution.⁶² The scaled-back Treaty of Lisbon incorporates

60. Since the early 1970s, the *Conseil Constitutionnel* has interpreted the references in the preamble of the 1958 Constitution to the 1789 Declaration and to the additional rights enumerated in the preamble to the 1946 Constitution as incorporating those rights into the body of constitutional norms (the *bloc de constitutionnalité*) that the *Conseil* enforces. See BELL, *supra* note 1, at 66-68.

61. The alignments around the treaty were complex, and the negative result was not a simple expression of patriotic opposition to European constitutionalism as such. See, e.g., Matt Qvortrup, *The Three Referendums on the European Constitution Treaty in 2005*, 77 POL. Q. 89 (2006); Allan Ramsay, *The French Referendum*, 287 CONTEMP. REV. 11 (2005).

62. CC decision No. 2004-505 DC, Nov. 19, 2004, Rec. 173, cons. 9-13. Earlier that same year, however, the *Conseil Constitutionnel* largely renounced its power to review the compatibility of EU directives implemented in France with French constitutional rights. More precisely, it held that it will not review the compatibility of a French statutory provision that merely transposes an EU directive into the domestic legal order for conformity with individual rights that are protected both by European law and by the French constitution. It has reserved the power to review such provisions for conformity to

many elements of the abandoned treaty, including provisions that strengthen the operation of fundamental rights at the EU level.⁶³ To the extent, then, that the French constitution suffers from European competition, its rival is gaining in attraction.

Prior adjudication of French constitutional claims may also serve more subtle purposes. Giving the *Conseil Constitutionnel* the opportunity to evaluate the balance between individual and national interests within its own modes of analysis may produce conclusions that will receive greater deference in context from the European courts. It also provides the *Conseil Constitutionnel* with more occasions to participate as a formally independent voice in the normative dialogue that influences future European judicial interpretations. These may be modest improvements of degree, compared with the prior regime in which the *Cour de Cassation* and the *Conseil d'Etat* already evaluated treaty claims, and those courts had authority to adjudicate the constitutionality of substatutory acts, and the *Conseil Constitutionnel* expounded the constitution in *a priori* abstract review proceedings.

V. TRANSLATING THE QUESTION

A thought experiment: how would a more conscientious implementation of international human rights law in the United States affect U.S. constitutionalism? Formally speaking, the United States differs from France in three important relevant respects: its federal structure, the place of treaties in the hierarchy of norms, and the form of its participation in the international human rights regime. The United States is federal whereas France is unitary; the United States places treaties at the same level as federal statutes whereas France gives them

uniquely French constitutional principles. See, e.g., CC decision No. 2004-498 DC, Jul. 29, 2004, Rec. 122. It also reviews statutory provisions that implement an EU directive to the extent that they go beyond the minimum that the EU directive requires.

63. For example, the Lisbon Treaty gives binding legal character to the European Charter of Fundamental Rights, and it also authorizes the EU to negotiate its accession to the European Convention on Human Rights. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities, art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 13. France ratified the Lisbon Treaty in February 2008, and it finally entered into force in December 2009. *Id.*

greater force than parliamentary acts; and the United States does not participate in a regional system of binding human rights adjudication,⁶⁴ whereas France has submitted to both the European Court of Human Rights and the European Court of Justice.

Focusing on the principal obligations of the United States in the field of traditional “civil” rights, Congress might enact a statute incorporating as judicially enforceable federal law all the rights contained in the Covenant on Civil and Political Rights (CCPR), as modified by some or all of the U.S. reservations to that treaty.⁶⁵ Under the Supremacy Clause, the statute would make CCPR obligations prevail in court over inconsistent state law.⁶⁶ Under the last-in-time rule (*lex posterior derogat priori*), the statute would also supersede previous conflicting federal legislation, but it would not preclude Congress from enacting later inconsistent legislation. Ambiguous later statutes would be construed to avoid inconsistency with the CCPR, and clearly conflicting later statutes would normally prevail.⁶⁷

64. This assertion may be mildly controversial in that the Inter-American Commission on Human Rights purports to engage in binding adjudication of the obligations of the United States under the Charter of the Organization of American States; the U.S. government regards the Commission’s conclusions as nonbinding recommendations. See LOUIS HENKIN ET AL., *HUMAN RIGHTS* 617-20 (2d ed. 2009). The United States does have the option of joining human rights regimes with binding adjudication, such as the American Convention on Human Rights, but that prospect is even more hypothetical than the thought experiment discussed here.

65. See generally International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. An alternative (hypothetical) approach would be for the United States to withdraw its declaration that the Covenant is not self-executing.

66. I leave aside here the question whether implementation of the CCPR against the states would exceed the treaty power, as argued by some revisionist commentators. *Missouri v. Holland*, 252 U.S. 416, 432 (1920) (holding that the treaty power is a separate delegated power not limited to the scope of the federal government’s other powers by the Tenth Amendment) suggests not, and is in my view correct.

67. I say “normally,” because the later statute might raise constitutional problems, either independently or through its interaction with the earlier statute.

A stricter approach might include a provision in the implementing statute instructing that future federal statutes should be applied only to the extent that they are consistent with CCPR obligations absent express statement to the contrary. Cf. 42 U.S.C. § 2000bb-3(b) (2006) (providing that RFRA

First resort to CCPR rights would reduce the need for constitutional adjudication with regard to a majority of the individual rights protected by the federal and state constitutions. Rights with comparable or overlapping content include free exercise of religion, freedom of speech, freedom of association and assembly, rights to bodily integrity and familial privacy, rights to fair hearing and habeas corpus; voting rights; limitations on searches and seizures; freedom from involuntary servitude; and criminal procedure rights regarding double jeopardy, self-incrimination, speedy and public trial, notice of charges, confrontation of witnesses, compulsory process, assistance of counsel, bail, and ex post facto laws. In some instances, such as freedom of speech, U.S. constitutional law is conspicuously stricter. The CCPR does not address establishment of religion, the right to bear arms, grand juries, abortion, takings of property, or jury trial in civil and criminal cases.⁶⁸ It does address equality rights, but the U.S. has substantially diluted its obligations in that respect by means of a reservation.⁶⁹

Thus, many challenges to federal executive action could be, and therefore should ordinarily be, addressed as a matter of CCPR compliance before reaching constitutional objections, at least if the individual asserts the treaty claim. Given that the CCPR is sometimes more protective and sometimes less protective of individuals than the Bill of Rights, certain constitutional claims would still require adjudication after a finding that a laxer treaty right had not been violated. Simi-

exemptions for religious exercise apply to all subsequent federal statutory law “unless such law explicitly excludes such application”).

68. Moreover, complex issues arise under the CCPR when the human rights of an individual are implicated by government action directed against a legal entity such as a corporation. *See* MANFRED NOWAK, CCPR COMMENTARY 41-42, 829-32 (2d ed. 2005). Congress might bypass these issues in the implementing legislation by authorizing corporations to raise claims on behalf of their owners and employees.

69. The reservation, labeled an understanding, asserts that “distinctions [are] permitted when such distinctions are, at minimum, rationally related to a legitimate governmental objective.” 138 CONG. REC. S4783 (daily ed. April 2, 1992). The United States also took a reservation to the prohibition against cruel, inhuman or degrading treatment that equates it with treatment forbidden by the Fifth, Eighth, and Fourteenth Amendments. *Id.* Thus, implementation of the latter reservation would not decrease the need for constitutional adjudication.

larly, challenges to older federal statutes would proceed first as treaty-based claims. Later federal statutes could be construed to avoid treaty violations, but once their meaning was determined they could be challenged only on constitutional grounds. Actions of the states, whether executive, legislative, or judicial, could always be challenged as violating CCPR rights, and courts would ordinarily reach the treaty-based claims before addressing either federal or state constitutional objections.⁷⁰

The “last resort” maxim is not an absolute rule, however, and sometimes it yields to other rules or policies.⁷¹ It might be found desirable, for example, for courts to apply a well-settled rule of constitutional law rather than resolve a difficult issue of treaty interpretation.⁷² Disputes over the interpretation of CCPR provisions would be resolved by the state and federal courts, with final authority in the U.S. Supreme Court. They would take into account the persuasive but nonbinding interpretations adopted at the international level,⁷³ and presumably also the views expressed by the federal executive.

If litigants and courts took full advantage of this regime, it could substantially decrease the number of federal constitutional decisions, as rights claimants would more frequently prevail on subconstitutional grounds. The center of gravity in

70. Thus far, state courts that give “primacy” to state constitutional claims over federal constitutional claims have still adhered to the principle that nonconstitutional claims should be reached first. *See, e.g.*, *State v. Kincaid*, 960 A.2d 711, 713, 715 (N.H. 2008); *State v. Johanesen*, 873 P.2d 1065, 1069 & n.4 (Or. 1994); *West v. Thomson Newspapers*, 872 P.2d 999, 1007 (Utah 1994).

71. *See, e.g.*, Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1025-35 (1994) (discussing varying application of the last resort rule); *Lambrix v. Singletary*, 520 U.S. 518, 525 (1997) (analyzing constitutional issue despite possible state procedural bar in order not to “prolong this litigation by a remand”); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (invalidating congressional grant of standing to plaintiff rather than rejecting plaintiff’s claim on grounds of statutory interpretation).

72. *Cf. Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 588 (1999) (reaching “straightforward” constitutional issue of personal jurisdiction rather than “difficult and novel” statutory question of subject-matter jurisdiction).

73. The primary international expositor of the CCPR is the U.N. Human Rights Committee. *See* NOWAK, *supra* note 68, at 894-95. How the evolving interpretation of the CCPR by the Committee would interact with precedent-based decisionmaking by the U.S. Supreme Court presents an interesting question, but it is not the subject of this essay.

constitutional rights adjudication would shift from the rights that were generously covered by the CCPR toward the omitted or less covered rights, and toward recent federal legislation instead of state violations, federal executive action, and older acts of Congress. In some fields, judicial discourse could change from the U.S. vocabulary of balancing and scrutiny to the international vocabulary of proportionality and necessity in a democratic society. On the other hand, U.S. courts would have substantial room to exercise their own judgment in elaborating the CCPR in terms that make sense in U.S. legal culture, given that the United States would not regard the Human Rights Committee's interpretations as strictly binding, and that U.S. courts would not face the prospect of "reversal" of their CCPR-based decisions by an international court.⁷⁴ The background question, whether action consistent with the CCPR nonetheless violated a constitutional right, would always remain potential. Constitutional adjudication would continue as before with regard to most separation of powers issues,⁷⁵ and questions of horizontal and vertical federalism.

The displacement of constitutional litigation would follow on a broader scale the effects produced by other statutory regimes, such as the Voting Rights Act and the Civil Rights Acts, which also enact statutory standards that obviate the need for direct constitutional adjudication. These regimes have not threatened the prestige of the federal Constitution, understood to apply as a last resort.

The effect on the state constitutional systems, however, could be greater. Actually, the French discussion significantly resembles U.S. debates over the reinvigoration of state constitutional rights. In the twentieth century, the application of

74. By "reversal," I mean a binding adjudication that the decision violates the obligations of the United States under the treaty and that the United States owes a remedy to the victim. Such adjudication would not literally reverse the prior decision. In fact, the CCPR does not confer jurisdiction on an international court, and the United States has not agreed to the quasi-judicial procedures of the Human Rights Committee, which the United States would not regard as binding. See generally *Optional Protocol to the International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 302 (establishing a procedure by which individuals may bring alleged violations of the CCPR to the attention of the Human Rights Committee).

75. Some separation of powers questions, however, could be reframed as CCPR issues, particularly with regard to the right to an impartial tribunal.

state constitutional provisions that are similar to federal constitutional provisions was often neglected altogether, or dominated by U.S. Supreme Court interpretations of the corresponding federal rights. Some judges and scholars in the 1970s and 1980s began calling for more independent interpretation of state bills of rights.⁷⁶ In practice, even this “New Judicial Federalism” has often involved borrowing analyses from dissenting federal justices in lieu of the Supreme Court majority, and some commentators have decried the failure of most state supreme courts to develop their own autonomous constitutional discourse.⁷⁷ A few state supreme courts have implemented a “primacy” approach advocated by Hans Linde: state constitutional challenges should be addressed and resolved before considering any federal constitutional challenge.⁷⁸ The primacy approach seeks to ensure proper attention to the state’s own constitution.⁷⁹ It manages the order of consideration of claims in a two-level system of rights, in hope of reestablishing the separate significance that the “lower” level had lost.

Statutory implementation of the CCPR would add another federal layer to this debate. CCPR rights, as federal rights, would prevail in case of conflict over all past and future state legislation and over the state constitutions themselves.

76. E.g. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); see also Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 224 (2007) (discussing origins and methodologies of the “New Judicial Federalism”).

77. E.g. Lawrence Friedman, *Reactive and Incompletely Theorized State Constitutional Decision-Making*, 77 MISS. L.J. 265 (2007); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015 (1997); see also James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing that autonomous state discourse is absent and impossible).

78. Linde, *supra* note 76; Williams, *supra* note 77, at 239-43 (discussing primacy and alternative approaches to sequencing federal and state analyses). Professor Linde served as a justice of the Oregon Supreme Court from 1977 to 1990.

79. Of course, in U.S. federalism, the state’s own constitution does *not* stand at the apex of the hierarchy of norms, but rather is subject to the constraints of federal law under the Supremacy Clause of the U.S. Constitution. In this context, “primacy” does not mean supremacy. Linde, *supra* note 76, at 383-84.

State constitutional law addresses numerous issues of structure and policy beyond the state bills of rights, and most of its content would be unaffected by implementing the CCPR. And, as with the federal Constitution, state constitutions include some rights that the CCPR protects less strictly or omits. But the fragile state constitutional rights culture, already overshadowed by the U.S. Supreme Court, might be seriously undermined if CCPR implementation made redundant most of its opportunities for independent development.

Some states might respond to this dilemma in a manner analogous to the new French legislation. States that already use the primacy approach to postpone consideration of federal constitutional issues could extend it to decide state constitutional claims before considering CCPR rights. States that have not favored primacy as between state and federal constitutional rights might find the approach more persuasive as between the state constitution and the treaty. Federal supremacy would not preclude the states from varying the order of consideration of claims, so long as the state courts did reach the CCPR issue if the claimant had not prevailed on other grounds.

VI. ANOTHER FRENCH EXCEPTION?

Do the recent French reforms offer any broader lesson about the relationship between constitutionalism and transnational human rights regimes? Do they indicate a propensity of transnational rights to crowd out national constitutional culture? The dilemma that motivated the priority rule is suggestive, but it reflects the confluence of several factors, which may be too numerous to support a broader generalization.

The late arrival of constitutional review in France, the limited output⁸⁰ of the *Conseil Constitutionnel* and its inaccessibility to citizens, and the “monist” supremacy of treaties over statutes in France, all contributed to the vulnerability of French law to

80. The *Conseil Constitutionnel* has issued on average only a dozen decisions per year on the constitutionality of statutes since its creation (eighteen per year in the past decade), and many of those decisions focus on details of legislative procedure or executive-legislative relations. Admittedly, a dozen cases could provide the occasion for more than a dozen holdings of unconstitutionality, because the *Conseil* may invalidate more than one subprovision of a statute during its one opportunity to review.

external competition. The unique progress of regional integration in Europe, including the strong penetration of national legal orders by EU law and the associated success of binding adjudication under the European Convention, created an effective rival—the priority rule was not motivated by global human rights treaties.

These circumstances provided an opportunity for frequent reliance on transnational norms in litigation, to the point that the *Conseil d'Etat* had reportedly considered treaty claims in one-third of its decided cases.⁸¹ Other factors ensured that this prevalence would be unwelcome. France is not a fledgling democracy, looking to international law for guidance on how to put its house in order. To the contrary, France has a long tradition of constitutional thought, takes pride in its legal tradition, and has ambitions to influence transnational institutions. Reduction to the role that state constitutions play in the United States would be resisted, even if the solution French law has now adopted resembles the technique employed by some state supreme courts.

The recent developments illustrate how under certain conditions a certain kind of conscientious domestic enforcement of transnational human rights may intensely compete with a certain kind of national constitutional review. The French reforms also illustrate that a national system can adopt measures to counteract such rivalry, if the effects appear detrimental. The new implementing legislation retains some degree of competition between national and international rights norms, because it allows individuals to avoid referral to the *Conseil Constitutionnel* by taking the risk of framing their pleadings exclusively as international claims. Experience will reveal how well the new procedure succeeds in attracting litigants.⁸²

81. See, e.g., ASSEMBLÉE NATIONALE RAPPORT NO. 892, at 439 (2008).

82. For initial views of the system in operation, see CONSEIL CONSTITUTIONNEL, *Septembre 2010: Question prioritaire de constitutionnalité: Premiers chiffres*, www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/a-la-une/septembre-2010-question-prioritaire-de-constitutionnalite-premiers-chiffres.49188.html (reporting *inter alia* that in the first six months the *Conseil* had issued twenty-two decisions on priority questions of constitutionality, seven of which found constitutional defects); Pierre Bon, *Premières questions, premières précisions*, 2010 RFDA 679; Valeriya Kirsey & Hugues Portelli, *Droits fondamentaux: du bon usage de la guerre des juges par le justiciable*, SEMAINE JURIDIQUE EDITION GÉNÉRALE, July 12, 2010, No. 28-799.