Hommage à Louis Favoreu

Burt Neuborne*

Professor Neuborne mourns the passing of Louis Favoreu as the “First Citizen” of the emerging “république du droit constitutionnel mondial.” Professor Neuborne recounts how Professor Favoreu initiated him into the workings of the French Conseil Constitutionnel, enabling him to compare the French and U.S. methods of constitutional adjudication. He observes that Doyen Favoreu’s tireless efforts to explain and defend the work of the Conseil Constitutionnel played a major role in expanding the practice of constitutional judicial review throughout the world.

In September 1979, I began a year’s sabbatical in Paris. Anxious to make friends in a new environment, I gratefully accepted an invitation to use the excellent library facilities at Coudert Frères on the Champs-Élysées. One afternoon in October, emboldened by the Beaujolais Nouveau at lunch, I struck up a conversation in my halting French with a chic young woman doing legal research in the library. I explained that I was an American law professor doing research in Paris. She answered that she was just beginning to practice law. I smiled. She smiled. She asked my field. I played my trump card, a line that had never failed in the United States. “Je suis un professeur du droit constitutionnel,” I answered and waited for the inevitable “How very interesting.” Instead, her eyes glazed over, and she murmured: “Triste, triste. How sad for you,” as she disappeared into her dossier.

Little did I know that, in 1979, the interesting human rights action in France was in droit administratif, and that French constitutional law was still viewed by many as the dreary province of well-meaning pedants who get excited over comparative governmental structure. Louis Favoreu changed all that. His remarkable academic career as a “missionary” on behalf of a “new constitutional law” succeeded in moving the human rights jurisprudence of the Conseil Constitutionnel to center stage, not only in France but in the emerging worldwide constellation of constitutional courts that Doyen Favoreu so

* Inez Milholland Professor of Civil Liberties, New York University School of Law. Email: burt.neuborne@nyu.edu

brilliantly chronicled, critiqued, and championed in more than 275 articles and innumerable colloquia. It is a shame that I am now too old to benefit from Professor Favoreu’s resuscitation of my best pickup line.

Rebuffed socially in 1979, I retreated into my books. I was quickly introduced to Professor Favoreu, unfortunately not in person but through his magisterial *Grandes décisions du Conseil constitutionnel*, a unique combination of constitutional law casebook, treatise on French law, and running law review comment. *Grandes décisions* made it possible for a novice like me to penetrate at least a few of the mysteries of the Palais-Royal, and to attempt an analysis of the relationship between judicial enforcement of the separation of powers and substantive human rights jurisprudence in France and the United States. My recollection is that I started with a used copy of the 1975 first edition. I quickly invested in a copy of the second edition. One of my cherished possessions is an inscribed copy of the seventh edition graciously signed by Professors Favoreu and Loïc Philip. Over the years, each new edition of *Grandes décisions* has formed a staple of my summer reading. It will seem very strange—and very sad—to study the thirteenth edition of *Grandes décisions* and not hear Professor Favoreu’s voice guiding me through the new opinions.

Although we corresponded, I did not meet Professor Favoreu in person until 1992, when Justice Sandra Day O’Connor and I were invited to deliver brief remarks to the French National Assembly celebrating the one hundred and fiftieth birthday of Justice Oliver Wendell Holmes, Jr. Professor Favoreu was the consummate host, wryly presiding over a memorable dinner at Le Procope, one of his favorite Parisian restaurants (perhaps known more for its venerable age than for its food).
turning the dinner into an unforgettable seminar on worldwide constitutional jurisprudence.

I met Professor Favoreu for the last time at Cardozo Law School in New York City in 2003, shortly after he ended his five years of pioneering work on the Constitutional Court for Bosnia-Herzegovina, a remarkable experiment in combining national and international jurists on a single constitutional tribunal. It was clear to us all how physically demanding the work in Sarajevo had been. But the élan and rigor of Professor Favoreu’s description of the work and his penetrating assessment of the role of courts in preserving fundamental human rights overshadowed the toll that Sarajevo had so clearly taken on his health.

It is fitting that one of Professor Favoreu’s last public appearances was in January 2004, as president of a plenary session of the Sixth World Congress of the International Association of Constitutional Law in Santiago, Chile, because no one has done more than Louis Favoreu to turn judicial protection of constitutional rights into a worldwide phenomenon. We mourn his passing as one of the first citizens of the emerging “république du droit constitutionnel mondial.”

How does one calculate the debt owed to a scholar like Louis Favoreu who has devoted a lifetime to the study and defense of judicial enforcement of constitutional rights, first in France, and then throughout the world? For me, the debt is twofold. Louis Favoreu introduced me to French constitutional law, enabling me to enrich my understanding of my own country’s system of constitutional enforcement by comparing it with its European cousin. Additionally, he dramatically enlarged my professional world by playing a major role in igniting the explosion of judicial energy that transformed judicial enforcement of constitutional rights from an isolated idea centered in the United States into a staple of worldwide democratic theory.

Professor Favoreu’s painstaking, analytically precise, and consistently accessible work on the French Conseil Constitutionnel was the bridge that enabled me to cross a chasm of culture and language, and to confront a model of French judicial constitutional enforcement that differs significantly from my own experience and intuitions. Although one could point to numerous celebrated examples of Professor Favoreu’s role as bard-in-chief of the Conseil

Constitutionnel.\textsuperscript{8} I have chosen a modest 1998 essay in honor of the fortieth anniversary of the Constitution of the Fifth Republic chronicling the evolution of the Conseil Constitutionnel from 1958 to 1998 because the essay is so indicative of much of his work.\textsuperscript{9} The essay is a model of concise description, wise assessment, and analytical rigor. It explains how French legal thought had, since 1789, rejected the idea of judicial review of legislative acts, and how the Conseil Constitutionnel, as initially conceived in 1958, was consistent with the idea of parliamentary sovereignty, as long as parliament was acting within the legislative sphere. In fact, suggests Professor Favoreu, the principal role originally conceived for the Conseil Constitutionnel was to prevent the legislature from trenching on turf set aside—for the first time by the Constitution of the Fifth Republic—as the sole province of the executive.

Professor Favoreu then spins the tale of the Conseil’s unexpected evolution, noting the early instances of institutional energy.\textsuperscript{10} He focuses, first, on the July 16, 1971, decision (freedom of association) as the turning point in the evolution of French judicial review\textsuperscript{11} and, second, on the crucial 1974 decision by parliament to amend article 61(2) of the French  


\textsuperscript{9} Available at http://www.conseil-constitutionnel.fr/dossier/quarante/q18.htm.

\textsuperscript{10} I believe that the first exercise of judicial review in modern French history took place in 1959 when the Conseil Constitutionnel, exercising its mandatory article 61(1) authority to review the internal rules of the National Assembly, invalidated a rule permitting the National Assembly to bar membership to political parties that it determined failed to respect the principles of national sovereignty and democracy. See CC decision no. 59-2DC, June 17, 18, and 24, 1959. I have sought to explain the 1959 decision as an effort to enforce principles of separation of powers by preventing the National Assembly from both promulgating the rule and acting to implement it in particular cases. See Neuborne, supra note 4, at 390–391.

\textsuperscript{11} The 1971 decision striking down prior restraints on free association was the result of a challenge lodged by the president of the Senate under the pre-1974 rules that limited access to the Constitutional Council to the president, and the leaders of the National Assembly and Senate. See CC decision no. 71-44DC, July 16, 1971. During the Gaullist years, only the president of the Senate was likely to challenge a law enacted by the parliamentary majority. The 1971 decision is discussed in Neuborne, supra note 4, at 391–392.
Constitution. This ruling vests standing in sixty members of the political minority in either the Senate or the National Assembly to challenge the constitutionality of an act of parliament in the Conseil Constitutionnel prior to its promulgation by the president. He points out that prior to the 1974 grant of standing to the political minority, only nine challenges had been filed with the Conseil Constitutionnel questioning the constitutionality of an ordinary law from 1958 to 1973, but that between 1974 and 1998 the number of constitutional challenges skyrocketed to 328, resulting in opinions invalidating 135 laws during the first forty years of the Conseil Constitutionnel’s existence.

Professor Favoreu also notes the curious evolution of the Conseil from an institution designed to protect the executive against parliamentary overreaching to a body that enforces a rigorous version of the delegation doctrine, forbidding parliament from delegating excessive discretion to executive officials, especially in settings where constitutional values are at stake.

There are, of course, significant theoretical and practical differences between the model of French constitutional judicial review sketched by Professor Favoreu in his 1998 essay and the model in use in the United States. In the French model described in article 61(2) of the Constitution of the Fifth Republic judicial review formally unrolls as an integral part of the law-making function; (b) must take place prior to the promulgation of a statute as law; and (c) may take place only in a specialized tribunal—the Conseil Constitutionnel—specifically established for that purpose. Professor Favoreu notes that, pursuant to article 56, the Conseil Constitutionnel consists of nine members serving nine-year nonrenewable terms, three of whom are appointed by the president of the Republic, three by the president of the National Assembly, and three by the president of the Senate.

During its first forty years, Professor Favoreu reports that fifty-six persons, including two women, served on the Constitutional Council. Although past presidents of the Republic are also nominal members, none has sat since 1962. Through 1998, Professor Favoreu notes that membership included fifteen practicing lawyers, five members of the Conseil d’État, three members of

12 The French Senate is an indirectly elected body with a suspensive veto.

13 See 1958 Const. art. 61(2).


15 It has been reported that former president Valéry Giscard D’Estaing has recently begun to sit with the Conseil Constitutionnel.
the Cour de Cassation, one member of the Cour des Comptes, a past president of each of the European Court of Human Rights and the Court of the European Community, and a dozen law professors, including the two dominant post–World War II administrative law theorists, professors Marcel Waline and Georges Vedel.

Thus, as a matter of theory, constitutional judicial review in France has a sound positivist foundation under article 61(2); it does not purport to challenge the supremacy of a completed parliamentary act but merely prevents the president from promulgating a statute that fails to comport with the Constitution. Indeed, once a statute is formally promulgated after being signed by the president, it is immune from constitutional review in the Conseil and may not be challenged in a lower court. Given the restrictive timing of constitutional judicial review in France, it follows that all constitutional review by the Conseil Constitutionnel must be facial and must take place within a narrow window of time after the passage of a statute but before its signing by the president. There is, therefore, no room for “as applied” constitutional review of a legislative act in the French model.

16 French law operates a separate judicial system for the review of administrative actions, culminating in the Conseil d’État. Ordinary legal questions proceed through a judicial system that culminates in the Cour de Cassation. The Conseil Constitutionnel stands apart from the two principal judicial systems. The Cour des Comptes considers specialized financial issues. Professor Favoreu wrote perceptively on the problem of integrating the jurisprudence of the Conseil Constitutionnel into the day-to-day activities of the Conseil d’État and the Cour de Cassation. See Louis Favoreu, Duality or Unity in the Juridical Order—Do the Conseil Constitutionnel and Conseil d’Etat Belong to Two Different Legal Systems?, in CONSEIL CONSTITUTIONNEL ET CONSEIL D’ETAT 145–190 (Librairie générale de droit et jurisprudence, 1988); Louis Favoreu, La Cour de Cassation, le Conseil constitutionnel et l’article 66 de la Constitution [The Court of Cassation, the Constitutional Council and Article 66 of the Constitution], 23 RECUEIL LE DALLOZ 169 (1986); Louis Favoreu, L’application des décisions du Conseil constitutionnel par le juge administratif (nouveaux développements) [The Application of Constitutional Council Decisions by the Administrative Judge (New Developments)], 6 R.F.D.A. 142 (1989); Favoreu, L’application directe et l’effet indirect, supra note 8.

17 There is some room in the Conseil d’État for postpromulgation review of executive efforts to enforce a controversial statute, but only under the rubric that the executive’s acts are not authorized by the statute. See Amicale des Annamites de Paris, CE Ass., July 11, 1956, Rec 317. While constitutional values play a role in the Conseil d’État’s reading of the scope of a parliamentary grant of power to the executive, the Conseil d’État has not yet crossed the Rubicon by holding that a statute cannot authorize the executive to engage in an unconstitutional act. See Favoreu, Dualité ou unite, supra note 16; Louis Favoreu, L’application des décisions du Conseil constitutionnel par le Conseil d’État et le Tribunal des conflits (bilan provisoire) [The Application of Constitutional Council Decisions by the Council of State and the Conflicts Tribunal (Provisional Report)], 4 R.F.D.A. 264 (1987).

18 Since a challenge automatically suspends the promulgation of a law enacted by parliament, ordinarily, decisions must be rendered within thirty days of an article 61(2) challenge.
The United States model of constitutional judicial review established by *Marbury v. Madison* is different. In the first place, it is available to every judge. But it may not be deployed during the lawmaking stage. An attempt to seek judicial guidance about the constitutionality of a pending congressional statute prior to its signature by the president would be dismissed promptly as an effort to obtain a forbidden advisory opinion. Thus, unlike France, in the United States constitutional judicial review may take place in any court but must await the formal promulgation of the statute by the president and the emergence of a “case or controversy,” usually involving the executive’s effort to enforce it. Accordingly, in the United States, most judicial review is “as applied,” although a significant move toward elements of facial review exists, especially in First Amendment settings.

Matters might have been different in France, which came within a whisker of adopting the United States’ model in 1974. The common program of the left in 1972 endorsed a Supreme Court with power to exercise appellate review over all lower courts in cases raising constitutional questions. Moderate conservatives had long endorsed the idea. A majority appeared to support the proposal in parliament. If the program had been adopted, the French and United States’ models would be virtually identical. Political wrangling involving a reluctance by Giscard d’Estaing to allow François Mitterrand to take credit for the reform prevented adoption of the plan, resulting in the adoption of the more limited amendment to article 61(2) permitting the political minority to invoke constitutional review in the Conseil Constitutionnel prior to the promulgation of the law by the president. In retrospect, the failure to adopt the United States’ model in 1974 may have been an important step in the ultimate acceptance of the Conseil Constitutionnel’s aggressive review of the constitutionality of acts of the National Assembly by permitting French theoreticians to continue to assert that the legislative provisions under review had not yet become real laws.

19 5 U.S. 137 (1803).

20 *See Felix Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924).*


22 *David Gans, Strategic Facial Challenges, 85 B.U.L. Rev. 1333 (2005).*


and were, therefore, not entitled to claim Raymond Carré de Malberg’s mantle of parliamentary supremacy.  

As Professor Favoreu’s writings about the Conseil Constitutionnel have made clear, the differences in theory between the French and United States’ models of constitutional review generate significant practical consequences. For example, the French process traces its existence in an impeccably positivist manner to the text of article 61(2) of the Constitution itself. Thus, when the Conseil Constitutionnel strikes down an act of parliament, it need not apologize for acting in an undemocratic manner. I believe that such a secure positivist base has encouraged the Conseil Constitutionnel to adopt broad readings of the relevant constitutional norms that go beyond the text of the Fifth Republic’s Constitution. For example, borrowing from the practice of the Conseil d’État in reviewing executive actions, the Conseil Constitutionnel, in an extraordinary exercise in institutional expansion, has recognized a judicially enforceable bloc of constitutional norms that go beyond the text of the current French Constitution. In addition to the text of the current Constitution, the Conseil Constitutionnel asserts the right to test the validity of legislative action against a body of constitutional norms that includes the 1791 Declaration of the Rights of Man, the preamble to the 1946 constitution, and two nontextual sources of guidance: “fundamental principles recognized by the law of the Republic,” and “general principles of French law.” The nontextual norms were originally developed by the Conseil d’État to limit executive action in the absence of legislative authorization. The Conseil Constitutionnel borrowed the techniques, especially that of “fundamental principles recognized by the laws of the Republic” to limit parliament’s authority to enact legislation. In sum, I believe that the Constitutional Council’s indisputable positivist patrimony enabled it to adopt an extremely broad conception of institutional role, although the process is narrowly confined in time, and available only to the Conseil Constitutionnel.

The United States’ practice of widespread postenactment judicial review of legislative acts lacks a similarly firm positivist patrimony. It cannot be traced to the text of the United States Constitution. The intellectual slight-of-hand that


26. The Declaration of the Rights of Man and the preamble to the 1946 constitution are incorporated by reference into the Constitution of the Fifth Republic, rendering the Conseil Constitutionnel’s use of those texts to invalidate legislation somewhat less dramatic.

27. The process is described by Professor Favoreu in Le bloc de constitutionnalité [The Bloc of Constitutionality] (Colloque de Séville 1989).
enabled John Marshall in *Marbury* to derive a theory of judicial review from the very existence of a written constitution—given the absence of any explicit textual support—hardly qualifies as a persuasive exercise in positivist jurisprudence. Rather, it is a contestable argument from necessity, painting the constitutional judge as an involuntary player who, obliged to decide a “case or controversy” within her jurisdiction, has no choice but to decide whether the statutory or constitutional text is to be given precedence when the two appear to collide.  

The lack of a clear positivist constitutional text authorizing judicial review in the United States continues to roil the intellectual waters to this day, enabling generations of legal academics to gain tenure by positing grand theories of constitutional review and giving rise to numerous theories of constitutional interpretation, some of which are profoundly foolish in seeking a formally positivist fig-leaf for the judicial enterprise. In the end, I believe that the nonpositivist justification for judicial review successfully put forth in *Marbury* has shaped the process into one that is widely available to any judge called upon to resolve a “case or controversy,” but at a price—namely, the prevalence of restrictive theories of constitutional interpretation designed to provide a positivist cloak for judicial review.

In addition to introducing me to French constitutional practice, Professor Favoreu’s work vastly expanded my professional horizons. In 1967, when his classic article *Le Conseil constitutionnel, régulateur de l’activité normative des Pouvoirs publics*, appeared, I was beginning my career as a civil liberties lawyer in the United States’ judicial system. While the idea of asking courts to mediate between the majority and the individual in the guise of enforcing the Constitution was firmly implanted in the United States, my sense in those days was that asking a judge to protect individual rights against

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30 Favoreu, supra note 6.
Rousseau’s volonté générale had no significant intellectual purchase anywhere else in the democratic world, with the possible exception of the German Federal Constitutional Court, the Supreme Court of India,31 and the acrobatics of the Supreme Court of Israel, operating without a written constitution. Practicing as a young constitutional lawyer in the United States, I had absolutely no sense of shared purpose with lawyers and judges elsewhere in the democratic world. Louis Favoreu played a major role in eliminating that sense of professional isolation. He fostered, championed, and chronicled a remarkable explosion of judicial energy that has propelled judicial review of the constitutionality of legislation to the center of virtually every functioning democracy.

Professor Favoreu began by concentrating on the rise of the European model of a specialized constitutional court, sharing many of the attributes of the Conseil Constitutionnel.32 He extended his analysis to the constitutional courts of South America33 and ended by seeking a general theory of the role of constitutional judges worldwide.34 As a result of his pursuits, Professor Favoreu’s work has helped to enlarge the very idea of democracy from the simple expression of the volonté générale to the more complex interplay between majority


33 Louis Favoreu, Los tribunales constitucionales [The Constitutional Courts], in LA JURISDICCION CONSTITUCIONAL EN IBEROAMERICANA [CONSTITUTIONAL JURISDICTION IN LATIN AMERICA] (Francisco Fernandez Segado & Domingo Garcia Belaunde eds., Dykinson 1997).

rule and individual right that is, today, the province of constitutional judges throughout the world. Thanks in part to the lifelong work of Louis Favoreu, when I practice as a civil liberties lawyer in the United States today, I no longer work in national isolation. The United States Supreme Court has begun to consult the decisions and scholarship of colleagues abroad. I practice constitutional law today as a member of an emerging worldwide community of lawyers, judges, and scholars committed to constitutional adjudication as the technique for charting the boundary between the individual and the group; it is an activity on which the future of democracy depends.

Indeed, in a fascinating paradox, Professor Favoreu’s careful defense of the positivist roots of judicial review in Europe and Latin America has helped to foster the existence of textually authorized constitutional courts in virtually every democracy, each engaged in a common process of protecting fundamental individual rights through judicial enforcement of constitutional norms. From such impeccable positivist roots may emerge a worldwide constitutional common law of individual freedom that can provide minimum standards for measuring national behavior. I wish that Professor Favoreu had been granted a little more time to help us build that worldwide community. We will sorely miss his wisdom, intellect, and energy.


16 See generally Norman Dorsen, Michee Rosenfeld, András Sajó & Susanne Baer, Comparative Constitutionalism (Thomson West 2003).