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FIFTY YEARS OF CONSTITUTIONAL  
EVOLUTION IN FRANCE:  
THE 2008 AMENDMENTS AND BEYOND

I. Introduction

**I**n October 2008, France celebrated the fiftieth anniversary of the Constitution of its Fifth Republic, which became effective on October 4, 1958.<sup>1</sup> The Constitution, inspired by and largely drafted for General Charles de

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1. See generally Bernard Mathieu (ed.), *Cinquantième anniversaire de la constitution française: 1958-2008* (2008) (a collection of short essays by seventy-three leading constitutional scholars dealing with all aspects of the Constitution of 1958) [hereinafter *Cinquantième anniversaire de la constitution française: 1958-2008*]; François Luchaire, Gérard Conac & Xavier Prétot (eds.), *La Constitution de la République française: Analyses et commentaires* (3<sup>rd</sup> ed. 2009) (an article-by-article analysis of the Constitution of 1958) [hereinafter *La Constitution de la République française: Analyses et commentaires*]; Pascal Jan (ed.), *La Constitution de la V<sup>e</sup> République: Réflexions pour un cinquantenaire* (La Documentation française, 2008); *Les Cahiers du Conseil constitutionnel, Cinquantenaire du Conseil constitutionnel, Actes des colloques du 3 novembre 2008 et du 30 janvier 2009* (hors série, 2009). For an overview and general evaluation of constitutional developments since 1958, see Bertrand Mathieu, *Propos introductifs: La constitution à cinquante ans: continuités et ruptures*, *Cinquantième anniversaire de la constitution française: 1958-2008*, *op. cit. supra*, at 1. Principal treatises on the Constitution of 1958, updated to include consideration of the 2008 amendments, are: Jean Gicquel & Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques* (23<sup>rd</sup> ed. 2009); Louis Favoreu *et al.*, *Droit constitutionnel* (11<sup>th</sup> ed. 2008); Olivier Duhamel, *Droit constitutionnel et institutions politiques* (2009) [hereinafter *Duhamel*]. The indispensable source for leading Constitutional Council decisions with commentary is L. Favoreu & L. Philip, *Les grandes décisions du Conseil constitutionnel* (14<sup>th</sup> ed. 2007). See also Sophie Boyron, *The Constitution of France: A Contextual Analysis* (2011); Martin A. Rogoff, *French Constitutional Law: Cases and Materials* (2010); Dominique Schnapper, *Une sociologue au Conseil constitutionnel* (2010) [hereinafter *Schnapper*]; Sylvain Brouard, Andrew M. Appleton & Amy Mazur (eds.), *The French Republic at Fifty: Beyond Stereotypes* (2009); Jean Garrigues, Sylvie Guillaume & Jean-François Sirinelli (eds.), *Comprendre la V<sup>e</sup> République* (2010); *Une nouvelle V<sup>e</sup> République?*, *Revue française de Droit constitutionnel* (no. 82, Apr. 2010) (symposium issue on the constitutional amendments of July 2008); Andrew Knapp & Vincent Wright, *The*

Gaule<sup>2</sup> following his call to power during a political crisis occasioned by a revolt of French military forces in Algeria, was not expected to outlast the general or his resolution of the Algerian matter.<sup>3</sup> Given France's constitutional history, expectations of impermanence were eminently justified. During the period between the French Revolution of 1789 and the adoption of the Constitution of 1958, France had fifteen different constitutions,<sup>4</sup> fluctuating from parlia-

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Government and Politics of France (5<sup>th</sup> ed. 2006). Older but still very useful English language books are John Bell, *French Constitutional Law* (1992); and Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (1992).

2. General de Gaulle presented the broad outline of his ideas for a constitution in two important speeches in 1946. See Charles de Gaulle, *Speech Delivered at Bayeux (June 16, 1946)*, in Charles de Gaulle, *Mémoires d'Espoir, suivi d'un choix d'allocutions et messages sur la IV<sup>e</sup> et la V<sup>e</sup> Républiques: 1946-1969*, at 309 (1970) [hereinafter Charles de Gaulle, *Mémoires d'Espoir*]; Charles de Gaulle, *Speech Delivered at Épinal (September 29, 1946)*, in *id.*, at 317. See also Michel Debré, *Speech before the Council of State of August 27, 1958*, in Didier Maus (ed.), *Les grands textes de la pratique constitutionnelle de la V<sup>e</sup> République 2-8 (La Documentation française, 1998)* [hereinafter *Les grands textes de la pratique constitutionnelle de la V<sup>e</sup> République*].

3. See Dominique Rousseau, *La V<sup>e</sup> République se meurt, vive la démocratie* 116 (2007); see also *id.* at 21-91 (describing the events surrounding de Gaulle's call to power, the drafting and ratification of the Constitution of 1958, and the Constitution during de Gaulle's years in power (1958-1969)); Pierre Avril, *Changeante et immuable?*, in *Cinquantième anniversaire de la constitution française: 1958-2008*, *supra* note 1, at 13. In 1964, future President François Mitterrand, a political opponent of de Gaulle, characterized the Constitution of 1958 as a *coup d'état permanent*. François Mitterrand, *Le coup d'état permanent* (1964); but when he was elected President in 1981, he said: "The institutions weren't made for me, but they are well suited for me." Cited by Dmitri Georges Lavroff, *Feue la V<sup>e</sup> République*, in *Cinquantième anniversaire de la Constitution française: 1958-2008*, *supra* note 1, at 37 (2008).

4. Jacques Godechot, *Les constitutions de la France depuis 1789* (1979) (containing the texts, with commentary, of all French constitutions since the French Revolution of 1789). It is interesting to note that the same code of private law, the *Code civil*, which was adopted in 1804, is (as amended) still in force today. In fact, the *Code civil* has, until recently, been regarded as the fundamental legal document in France, rather than any of the more or less ephemeral constitutions. See Jean Carbonnier, *Le Code Civil*, in Pierre Nora (ed.), *2 Les Lieux de mémoire: La Nation* 293 (1986); Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. Ill. L. Rev. 597 (1984). But see Antonio Gambaro, *Codes and Constitutions in Civil Law*, in Alfredo Mordechai Rabello (ed.), *European Legal Traditions and Israel* 157 (1994). For concise, comprehensive descriptions of the *Code civil*, see Jean-Louis Halpérin, *Le Code civil* (1996); Jean-Michel Poughon, *Le Code civil* (1992). On the pre-history of the *Code civil*, see Jean-Louis Halpérin, *L'Impossible Code civil* (1992); André-Jean Arnaud, *Les origines doctrinales du Code civil Français* (1969). For a collection of essays on various aspects of the *Code civil*, see Bernard Schwartz (ed.), *The Code Napoleon and the Common-Law World* (1956). For a collection of important texts related to the drafting and promulgation of the *Code civil*, see François Ewald (ed.), *Naissance du Code civil* (1989). For a study of codification in

mentary democracy to authoritarian rule.<sup>5</sup> The longest lasting regime during this period was the Third Republic, which endured from 1870 to 1940, but the regime fought for its life during much of that time and ultimately proved unable to provide an effective framework for government.<sup>6</sup> Nevertheless, in hindsight, there was reason for optimism in 1958. The Constitution did not represent the imposition of one view of government or one set of values, as past constitutions had, but was in effect the product of long historical experience, combining as it did, elements of parliamentary government<sup>7</sup> with a strong executive and the incorporation in its preamble of Enlightenment values (the Declaration of the Rights of Man and the Citizen of 1789),<sup>8</sup> the republican principles of the Third Republic (“the fundamental principles recognized by the laws of the Republic”),<sup>9</sup> and the social and humanitarian values of the post-World War II

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France from the Middle Ages through the Revolution, see J. Van Kan, *Les efforts de codification en France: Étude historique et psychologique* (1929).

5. In a *régime bonapartiste*, power is concentrated in a single person. The *régime bonapartiste* has the capacity to act firmly and decisively but is not necessarily representative of differing views or interests. In a *régime d'assemblée*, power resides in the popularly elected legislative chamber to which the Government (i.e., the prime minister and other ministers) is responsible. The *régime d'assemblée* has often been characterized by factiousness, indecisiveness, and instability.

6. See generally H.S. Jones, *The French State in Question: Public law and political argument in the Third Republic* (1993).

7. General de Gaulle was named prime minister on June 1, 1958, following a political crisis occasioned by the insurrection of French military forces in Algeria. His Government received a vote of confidence of 329 to 224 in the National Assembly. The law of June 3, 1958, accorded power to that Government alone (“the Government which took office on June 1, 1958”) to draft a new constitution (although some parliamentarians did participate in the process). The legislative authorization to the Government, however, contained certain guarantees to safeguard the essential interests of Parliament. Constitutional Law of June 3, 1958, *Providing for Temporary Derogation from the Provisions of Article 90 of the Constitution* (“Sole Article. By derogation from the provisions of Article 90 [of the 1946 Constitution, providing for its revision], the Constitution shall be revised by the Government which took office on June 1, 1958, with the following formalities: The Government of the Republic shall prepare the draft of a constitutional law implementing the following principles: 1. Universal suffrage shall be the sole source of power; Legislative and executive power shall emanate from universal suffrage or from bodies elected thereby; 2. The executive power and the legislative power must be separated effectively in such a manner that the Government and the Parliament shall each, for itself and on its own responsibility, exercise fully the powers attributed to it; 3. The Government must be responsible to the Parliament; ...”).

8. Stéphane Rials, *La déclaration des droits de l’homme et du citoyen* (1988) (containing the Declaration, related documents, and extensive notes and commentaries).

9. The “fundamental principles recognized by the laws of the Republic” are principles that provide the basis for laws of the Republic that predate the Constitution of 1946 and that are recognized as having constitutional status (*valeur constitutionnelle*) by the Constitutional Council. For criteria

period (the preamble of the 1946 Constitution).<sup>10</sup> Also, importantly, the 1958 Constitution was sufficiently flexible to allow for development and adaptation through amendment, interpretation, and practice.<sup>11</sup>

Other modern constitutions have attracted attention as progressive and enlightened charters for government, particularly the post-war German Consti-

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for determining whether a particular principle falls within this category, see *Loi portant amnistie* [Amnesty Law], CC, decision no. 88-244 DC, July 20, 1988, Rec. 119; *Loi d'orientation et de programmation pour la justice* [Juvenile Justice], CC, decision no. 2002-461 DC, Aug. 29, 2002, Rec. 204.

10. The preamble to the 1946 Constitution provides that “the people of France proclaim anew that each human being, without distinction of race, religion or creed, possesses sacred and inalienable rights. They solemnly reaffirm the rights and freedoms of man and the citizen enshrined in the Declaration of Rights of 1789 and the fundamental principles acknowledged in the laws of the Republic.” The 1946 preamble “further proclaim[s], as being especially necessary to our times, the [16] political, economic and social principles enumerated below.” These principles focus on economic and social rights, like the right to employment (Section 5), the right to union action and to join a union of choice (Section 6), the right to strike (Section 7), the right of workers to participate in the collective determination of their working conditions and the management of the workplace (Section 8), the principle that “all property and all enterprises that have or that may acquire the character of a public service or de facto monopoly shall become the property of society” (Section 9), the obligation of the nation “to provide the individual and the family with the conditions necessary to their development” (Section 10), etc. While General de Gaulle was certainly a leader in the authoritarian mold, he did embrace certain similar social and economic values. “To summarize the principles that France intends to place at the foundation of its national activity, we will say that, while assuring to all the maximum liberty possible and while furthering the spirit of enterprise in all matters, she should see to it that the particular interest is always obliged to give way to the general interest, that the principal sources of our common wealth are exploited and managed not for the profit of some, but for the benefit of all, that combinations of interests which have weighed so heavily on the condition of men and even on the policies of State be abolished once and for all, and finally, that each of her sons and daughters can live, work, and raise their children in security and dignity.” General Charles de Gaulle, Speech at the Palais de Chaillot (September 12, 1944), available at <http://www.charles-de-gaulle.org/pages/l-homme/accueil/discours/pendant-la-guerre-1940-1946/discours-du-palais-de-chaillot-12-septembre-1944.php>.

11. “The Fifth Republic owes its strength and longevity to the malleability (*plasticité*) of its arrangements (*dispositions*) and to the efficacy of the executive.” Jean-Jacques Hyst, Rapport fait au nom de la commission des Lois constitutionnelles, de législation, du suffrage universel, de règlement et d’administration générale sur le projet de loi constitutionnelle adopté par l’Assemblée nationale, de modernisation des institutions de la V<sup>e</sup> République, Sénat, no. 387, 11 juin 2008, at 38 (page citation to pdf version, available at <http://www.senat.fr/rap/107-387/107-387.html>) [hereinafter *Hyst Report*].

tution (the *Grundgesetz*)<sup>12</sup> and the more recent South African Constitution.<sup>13</sup> These constitutions articulate and provide for judicial enforcement of a wide range of rights, establish institutions for effective democratic government, and confront and successfully resolve historic social and political fissures in their respective societies.<sup>14</sup> Another recent development that has attracted substantial interest is the emergence of constitutional-type documents and institutions at the regional and international levels.<sup>15</sup> The European Union<sup>16</sup> and the Council of Europe's human rights regime<sup>17</sup> are the best examples of this phenomenon; but other regional and international agreements and institutions also attest to the recognition of the need for "constitutional" principles and institutions at supranational levels.<sup>18</sup>

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12. For an overview of the German Constitution, see David P. Currie, *The Constitution of the Federal Republic of Germany* (1994); Donald Kommers & Paul Kirchhof (eds.), *Germany and the Basic Law* (1993); Donald Kommers, *The Government of Germany*, in Michael Curtis (ed.), *Introduction to Comparative Government* 159 (4<sup>th</sup> ed. 1997); Donald Kommers et al. (eds.), *Politics and Government in the Federal Republic of Germany: Basic Documents* (1995). For an overview of how the German Constitution has been interpreted and applied by the Federal Constitutional Court [*Bundesverfassungsgericht*], see Donald Kommers & Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3<sup>rd</sup> ed. 2011).

13. S. Afr. Const. 1996, in Rüdiger Wolfrum & Rainer Grote (eds.), *XVI Constitutions of the Countries of the World* (2008). See also Francois Venter, *The Republic of South Africa: Introductory Note and Select Bibliography*, in *id.*; Heinz Klug, *The Constitution of South Africa: A Contextual Analysis* (2010).

14. Although this benign outcome may have been in doubt for a while, it is now commonly accepted. See Ronald Tiersky, *Mitterrand's Legacies*, 74 *Foreign Aff.* 112, 115 (No. 1, Jan.-Feb. 1995). ("[Mitterrand's] new realism made possible a historic left-right accommodation, expanding the heretofore contested nature of the Fifth Republic's political institutions and liberal economy. The willingness of both right and left to abandon France's two-century-old 'silent civil war' inspired historians in the mid-1980s to declare that 'the French Revolution is finally over.'") See also Steven Laurence Kaplan, *Farewell, Revolution: Disputed Legacies, France, 1789-1989* (1995).

15. See generally Bruce Ackerman, *The Rise of World Constitutionalism*, 83 *Va. L. Rev.* 771 (1997).

16. For the latest versions of the principal European Union treaties, see consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Official Journal of the European Union, 2010/C 83/01 (Mar. 30, 2010); Charter of Fundamental Rights of the European Union, Official Journal of the European Union 2010/C 83/02 (Mar. 30, 2010).

17. See European Convention for the Protection of Human Rights and Fundamental Freedoms (1950, as amended by Protocol 11), E.T.S. 5, as amended by E.T.S. No. 155; 213 U.N.T.S. 221.

18. See, e.g., Rome Statute of the International Criminal Court, U.N. Doc. 32/A/CONF. 183/9, reprinted at 37 *I.L.M.* 999 (1998); World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Annex 2 (1994), reprinted at 33 *I.L.M.* 1125, 1226 (1994).

The French experience with the Constitution of 1958, however, allows us to focus on an aspect of constitutionalism that is equally, if not more, important in the long run: the entrenchment of constitutionalism in a nation that lacked that tradition, and was even hostile to it,<sup>19</sup> through the peaceful evolution of institutional structures and the expansion and judicial enforcement of protected values. The dynamics of this constitutional evolution, occurring as it did through a combination of constitutional amendment, constitutional jurisprudence, and the practice of established institutions allows us to observe the process of legal adaptation to new political, economic, and social perspectives and realities that is often so troublesome for political societies.

The establishment of a particular constitutional order does not mark the end of history, politics (both within the established order and challenges to it), or economic, social, demographic, ideological, or cultural change.<sup>20</sup> A crucial inquiry regarding all constitutional systems, therefore, is how well a particular system is able to accommodate such changes within established structures. This is so important because the replacement of one constitutional regime with another usually occurs after a period of instability, often accompanied

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19. See Édouard Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis: L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois* (1921) [hereinafter Lambert, *Le gouvernement des juges*]. The book appeared in France in 1921 and struck a formidable blow against judicial review. Reacting to indications that courts in France might be amenable to considering social and economic matters in arriving at their decisions, rather than following the strict letter of the law, Lambert delivered a comprehensive critique of the American practice of judicial review, which he regarded as providing an opportunity for the judiciary to impose its conservative social and economic views on the country, while overriding the more progressive views expressed in state and federal legislation. Lambert, of course, was writing during the so-called “Lochner era,” which in the United States had produced Charles Beard’s famous critique, *An Economic Interpretation of the Constitution*, which appeared in 1913. Beard’s book, like Lambert’s, was written in response to the Supreme Court’s striking down such progressive measures as the graduated income tax, regulations to protect workers from long hours, and dangerous working conditions, etc.

20. While change does occur over time, the “formative era” of a particular political regime is of great significance for future political and legal developments. As Jean-Jacques Rousseau remarked: “Montesquieu says that at the birth of political societies, it is the leaders of the republic who shape the institutions, but that afterwards it is the institutions that shape the leaders of the republic...” *The Social Contract* 84 (1762) (Maurice Cranston, trans., 1968). According to Alexis de Tocqueville, in a chapter entitled “On the Point of Departure and Its Importance for the Future of the Anglo-Americans”: “Every people bears the mark of its origins. The circumstances that surround its birth and aid its development also influence the subsequent course of its existence.” *Democracy in America* 31 (1835) (Arthur Goldhammer, trans., 2004). See also Carl J. Friedrich, *Man and His Government: An Empirical Theory of Politics*, chap. 22, *Founding the Political Order* (1963).

by violence, during which the established order is unable to adapt to or to accommodate change.

Following General de Gaulle's withdrawal from the political scene with his resignation in 1969 (after French voters had rejected by referendum a proposal he had supported for modification of the Senate), and with new political, legal, economic, demographic, and social realities confronting the nation, the institutional arrangements established by the Constitution of 1958 appeared more and more unsuitable.<sup>21</sup> Particularly significant developments were the growth of European law and institutions, several *alternances*<sup>22</sup> and three "cohabitations,"<sup>23</sup> the desire to decentralize the highly centralized decision-making and administrative structures and processes of the French state, the rise of liberal economic theories, the increasing ethnic and religious diversity of French society, and the prominence of new values (like increased emphasis on democracy, pluralism, and the equality of men and women, increased concern for the protection of individual rights, and increased concern for the protection of the environment). In response to these changes and the perceived inability of existing political structures to accommodate them, many people called for the adoption of a new Constitution and the establishment of a Sixth Republic.<sup>24</sup> Between 1958 and February 2008, the Constitution was amended twenty-three times, sixteen of those amendments since 1996. In July 2008, the Constitution was substantially amended to take account of these new developments, needs, ideas, and values. The principal thrusts of the July 2008 amendments were to better define and control the power of the executive, to increase the powers of Parliament, and to better assure the protection of fundamental rights.<sup>25</sup>

The American and French experiences provide excellent examples of how different constitutional systems react to change. For the most part, the American

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21. Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V<sup>e</sup> République, présidé par Édouard Balladur, *Une V<sup>e</sup> République plus démocratique* (2008) ("Today, society's needs have evolved." at 7) [hereinafter *Balladur Report*]. See also Pierre Rosanvallon, *La légitimité démocratique: Impartialité, réflexivité, proximité* (2008) (arguing that new ideas regarding the legitimate exercise of authority require new institutional arrangements).

22. *Alternance* refers to the phenomenon of political parties with different political tendencies succeeding each other in power. See generally Jean Massot, *Alternances et cohabitation sous la V<sup>e</sup> République* (La Documentation française, 1997).

23. "Cohabitation" occurs when the president is from a different political party than the majority of the members of the Chamber of Deputies. In this situation, the president is obliged to name a prime minister who will be acceptable to the majority party within the National Assembly. See generally Jean Massot, *id.*

24. Martin A. Rogoff, *One, Two, Three, Four, Five, and Counting: A Sixth French Republic?*, 10 Colum. J. Eur. L. 157 (2003) [hereinafter Rogoff, *A Sixth French Republic?*].

25. *Balladur Report*, *supra* note 21, at 15-25.

system has been successful in containing change within established structures. Contending forces contest their interests and views within the legislative and judicial chambers of government, rather than in the streets or on the barricades. This is so largely because of the role played by the United States Supreme Court in interpreting the Constitution. As Alexis de Tocqueville remarked, “There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question.”<sup>26</sup> In resolving many of those questions, the Supreme Court has interpreted the Constitution flexibly so as to allow constitutional law to accommodate new political, economic, and social situations. Good examples are the Court’s legitimization of federal power when needed to deal with truly national matters, like civil rights,<sup>27</sup> economic regulation,<sup>28</sup> national defense,<sup>29</sup> or international relations;<sup>30</sup> but the limitation of federal power when the political, social, and ideological climate in the country regards problems as better handled at the state and local levels.<sup>31</sup> Eschewing, over time, a univocal interpretation of the powers delegated to the federal government by the Constitution, the Court has in effect adapted the Constitution incrementally to changing political configurations and different challenges facing American society. The most notable failure of the American constitutional system to accommodate contending forces within established structures was the crisis which ultimately led to the Civil War.<sup>32</sup> Following that failure, the integrity of the nation was preserved only by the force of arms rather than by the peaceful operation of the institutions of government. The constitutional system that emerged from the crucible of the Civil War, with the addition of the Thirteenth, Fourteenth, and Fifteenth Amendments, and the enactment of numerous Reconstruction laws, fundamentally altered the American social contract and in fact might—if the United States shared the French propensity for rupture and numeration (rather than seeking to preserve

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26. Alexis de Tocqueville, *Democracy in America* 310 (1835) (Arthur Goldhammer, trans., 2004). The role of the courts in the United States in adapting the Constitution to contemporary needs, perspectives, and changing configurations of power is due in large part to the almost total impossibility of amending the Constitution itself through the political process. The Constitution is “inflexible,” as the requirements of U.S. Const. art. VII are extremely difficult to satisfy. Since the ratification of the constitution in 1788, it has been amended only 27 times, and the first ten amendments are, in effect, better considered as part of the original Constitution.

27. *Brown v. Board of Education*, 347 U.S. 483 (1954).

28. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

29. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

30. *Missouri v. Holland*, 252 U.S. 416 (1920).

31. *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997).

32. *Scott v. Sandford*, 60 U.S. 393 (1856).

the appearance of continuity)—very well be called the Second Republic.<sup>33</sup>

Until the establishment of the Fifth Republic in 1958, and really not until the famous *Freedom of Association* decision of the Constitutional Council in 1971<sup>34</sup> and the equally crucial 1974 constitutional amendment that allowed opposition legislators to refer a parliamentary enactment to the Council,<sup>35</sup> France did not have an effective system for the judicial application and modification of its Constitution through interpretation. Throughout its post-revolutionary history prior to the adoption of the Constitution of 1958, constitutional change was effected either by legislative amendment or by the adoption of a new constitution. It is hard to speak of a true constitutional order if the constitution can be altered by ordinary law; in such case, the constitution is continually subject to the vicissitudes of the political process. Moreover, if the constitution cannot be interpreted to accommodate change, it ceases to be a useful framework for political life. It is thus no accident that since the Revolution, France has had so many different constitutions. In almost all cases, the adoption of a new constitution was accompanied by significant political and social disorder, and often by violence. In effect, the winners impose a constitutional order on the losers. Since constitution-making is not regarded as a one-time enterprise, the losers can look forward to other chances in the future. Why, then, give one's allegiance

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33. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L. J. 453 (1989) (describing three "great constitutional transformations": the Founding, the Reconstruction, and the New Deal). For a broader and more detailed analysis, see Bruce Ackerman, *We the People: Foundations* (1991) and Bruce Ackerman, *We the People: Transformations* (1998). *But see* Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We the People*, 108 Yale L. J. 2237 (1999). The French experience, even the traumatic Revolution of 1789, may be more continuous than is generally thought:

No nation had ever before embarked on so resolute an attempt as that of the French in 1789 to break with the past, to make, as it were, a scission in their life line and to create an unbridgeable gulf between all they had hitherto been and all they now aspired to be... I have always felt that they were far less successful in this curious attempt than is generally supposed in other countries and then they themselves at first believed. For I am convinced that though they had no inkling of this, they took over from the old régime not only most of its customs, conventions, and modes of thought, but even those very ideas which prompted our revolutionaries to destroy it; that, in fact, though nothing was further from their intentions, they used the debris of the old order for building up the new.

Alexis de Tocqueville, *The Old Régime and the French Revolution* (1856) (Stuart Gilbert, trans. 1995), at vii.

34. *Liberté d'association* [Freedom of Association], CC decision no. 71-44 DC, July 16, 1971, Rec. 29.

35. *Parliamentary referral to Constitutional Council*, Law No. 74-904 of Oct. 29, 1974, J.O., Oct. 30, 1974, at 11035.

to the particular constitution that has been adopted? After all, it represents the triumph of the political opposition. Rather than being the symbol of the nation, as is the Constitution in the United States, in France the Constitution has historically been a “contested document.”<sup>36</sup>

The European Union (EU) provides an example of a constitutional system that has responded to change by a combination of judicial and political means. The European Court of Justice (ECJ) has, since the 1960s, “constitutionalized” the Treaty of Rome in a series of important decisions,<sup>37</sup> and had, for nearly three decades, interpreted expansively EU power under the Treaty.<sup>38</sup> Responding, more recently, to concerns that EU legislation was too intrusive in areas of primary concern to member states, the ECJ has been more reluctant to approve EU legislation.<sup>39</sup> The ECJ has also been sensitive to the responsibilities of national constitutional courts, and has taken their views into account as it developed EU law.<sup>40</sup> On the political side, the Treaty of Rome has been revised several times by the agreement of member states.<sup>41</sup> In fact, the process of amendment, which has occurred through periodic conferences since the mid

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36. Martin A. Rogoff, *Constitutionalism in the United States and France*, 49 *Maine L. Rev.* 21, 60-64 (1997).

37. *See, e.g.*, Case 26/62, *Van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1; Case 6/44, *Costa v. ENEL*, 1964 E.C.R. I-585.

38. *See, e.g.*, *Van Gend & Loos, id.*; *Costa v. ENEL, id.*; Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. 1337; Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA* [*Simmenthal II*], 1978 E.C.R. 629; Case C-106/89, *Marleasing SA v. La Comercial Internacional de Alimentacion SA*, 1990 E.C.R. I-4135; Case C-213-89, *The Queen v. Secretary of State for Transport, ex parte Factortame Ltd.* [*Factortame I*], 1990 E.C.R. I-2433.

39. *See, e.g.*, Cases 267/91 & 268/91, *Keck and Mithouard*, 1993 E.C.R. I-6097; Case 69/93, *Punta Casa SpA v. Sindaco del Comune di Capena*, 1994 E.C.R. I-2355; Joined Cases 401/92 and 402/92, *Criminal proceedings against Tankstation t’Heukske vof and J.B.E. Boermans*, 1994 E.C.R. I-2199.

40. *See* Anne-Marie Slaughter, *A New World Order* 82-85 (2004). *See also* the decisions, articles, and books *cited in id.*, notes 80-96, at 285-87.

41. Single European Act, Feb. 28, 1987, 1987 O.J. (L 169) 1; Maastricht Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1; Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1; Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1. The introduction of the principle of subsidiarity (analogous to the Tenth Amendment to the U.S. Constitution) in the Maastricht Treaty of 1992 is a good example of amendment to the constitutive document through the political process to reflect changing perspectives and needs. That principle is now contained in article 5(3) of the Treaty on European Union (consolidated version following the Treaty of Lisbon, which entered into force on December 1, 2009), *supra* note 16.

1980s, may be described as an ongoing process of revision to allow the Treaty to accommodate new needs, initiatives, and political imperatives as they arise. Constitutional developments in France since 1958 have taken a somewhat analogous course, with constitutional change and accommodation occurring through a combination of legal (constitutional jurisprudence) and political (constitutional revision) mechanisms. Another important modality of adaptation has been institutional practice.

## II. Mechanisms for Constitutional Development

### A. Amendment<sup>42</sup>

The French Constitution of 1958 strikes a good balance between rigidity and flexibility.<sup>43</sup> Thus, while not as easy to amend as the Constitutions of the Third and Fourth Republics, amendment (which the French call *révision*), especially when undertaken by the Government,<sup>44</sup> although difficult, is not impossible.<sup>45</sup>

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42. For a description of amendments to the Constitution from 1958 to 2008, see Gérard Conac, *Les révisions constitutionnelles (1958-1986)*, in La Constitution de la République française: Analyses et commentaires, *supra* note 1, at 15; and Xavier Prétot, *Les révisions constitutionnelles (1987-2008)*, in *id.* at 55. For a list of all constitutional amendments to date, see Duhamel, *supra* note 1, at 458. For a discussion of pre-2008 amendments organized by category (the popular vote, the rule of law, Europe, and decentralization), see Jean-Luc Warsmann, Rapport fait au nom de la Commission des lois constitutionnelles, de la législation et de l'administration générale de la République sur le projet de loi constitutionnelle de modernisation des institutions de la V<sup>e</sup> République, Assemblée nationale, no. 892, 15 mai 2008, at 15-20 (page citation to pdf version, available at <http://www.assemblee-nationale.fr/13/rapports/r0892.asp>) [hereinafter *Warsmann Report*].

43. See *Warsmann Report*, *id.* at 11. See also Thomas C. Grey, *Constitutionalism: An Analytic Framework*, in J. Roland Pennock & John W. Chapman (eds.), *Constitutionalism: Nomos XX* (1979), at 41 (for a useful set of classifications for characterizing and analyzing constitutional systems).

44. "Government," when capitalized, refers specifically to the institution described in Title III of the 1958 Const. (arts. 20-23). It is comprised of the Council of Ministers and its action is directed by the prime minister (art. 21).

45. "Too little rigidity empties the notion of the Constitution of its substance; too much rigidity risks ruining the edifice." Duhamel, *supra* note 1, at 25. According to Dean Vedel, "if a constitution, the fundamental pact, must be more difficult to modify than ordinary legislation, its rigidity must not go to the extreme of permitting the indefinite freezing of institutions..." Moreover, if revision of the constitution is impossible, judicial review risks becoming illegitimate, since judicial power would not then be subordinate to the constituent power. Comité consultatif pour la révision de la Constitution, présidé par Georges Vedel, *Propositions pour une révision de la Constitution*, 15 février 1993, Rapport au président de la République (1993), Journal Officiel de

If the Government proposes an amendment and it is approved in identical terms by the National Assembly and the Senate, it can then be adopted by a three-fifths vote of the two houses of Parliament sitting together in Congress.<sup>46</sup> The president of the Republic may also elect to submit a proposed amendment, either an amendment proposed by the Government or by a Member of Parliament, to referendum (after approval by both houses of Parliament).<sup>47</sup> Since 1958, there have been twenty-four constitutional laws amending the Constitution.<sup>48</sup> Some brought about important changes in the operation of institutions,<sup>49</sup> others constitutionalized new values,<sup>50</sup> and others were in response to European integration or international cooperation.<sup>51</sup> A few amendments were made to overcome decisions of unconstitutionality by the Constitutional Council.<sup>52</sup>

Three constitutional amendments prior to the major revisions of July 2008 brought about significant changes in the structure and operation of French political institutions. The original Constitution provided for the indirect elec-

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la République Française [Official Gazette of France] [hereinafter J.O.], Feb. 16, 1993, at 2537, 2551 [hereinafter *Vedel Report*].

46. 1958 Const. art. 89.

47. *Id.*

48. For an enumeration in tabular form of all the revisions to the constitution of 1958, see Duhamel, *supra* note 1, at 458.

49. *Direct election of the President by universal suffrage*, Law No. 62-1292 of Nov. 6 1962, J.O., Nov. 7 1962, at 10775; *Parliamentary referral to Constitutional Council*, Law No. 74-904 of Oct. 29, 1974, J.O., Oct. 30, 1974, at 11035; *Changes in High Council of the Judiciary*, Law No. 93-952 of July 27, 1993, J.O., July 28, 1993, at 10600; *Reduction of presidential term to five years*, Law No. 2000-964 of Oct. 2, 2000, J.O., Oct. 3, 2000, at 15582. For other amendments that modified the operation of the legislative process, see *Date of parliamentary sessions*, Law No. 63-1327 of Dec. 30, 1963, J.O., Dec. 31, 1963, at 11892; *Single session of Parliament*, Law No. 95-880 of Aug. 4, 1995, J.O., Aug. 5, 1995, at 11744; *Annual vote on social security financing law*, Law No. 96-138 of February 22, 1996, J.O., Feb. 23, 1996, at 2911.

50. *Charter for the Environment*, Law No. 2005-205 of Mar. 1, 2005, J.O., Mar. 2, 2005, at 3697; *Abolition of the death penalty*, Law No. 2007-239 of February 23, 2007, J.O., Feb. 24, 2007, at 3355.

51. *Revisions required for ratification of Treaty of Maastricht*, Law No. 92-554 of June 25, 1992, J.O., June 26, 1992, at 8406; *Revisions required for ratification of Treaty of Amsterdam*, Law No. 99-49 of Jan. 25, 1999, J.O., Jan. 26, 1999, at 1343; *International Criminal Court*, Law No. 99-568 of July 8, 1999, J.O., July 9, 1999, at 10175; *European arrest warrant*, Law No. 2003-267 of Mar. 25, 2003, J.O., Mar. 26, 2003, at 5344; *European Constitution*, Law No. 2005-204 of Mar. 1, 2005, J.O., Mar. 2, 2005, at 3696.

52. *Equal access of men and women to elective office*, Law No. 99-569 of July 8, 1999, J.O., July 9, 1999, at 10175; *Decentralization*, Law No. 2003-276 of Mar. 28, 2003, J.O., Mar. 29, 2003, at 5568.

tion of the president by an electoral college composed of about 80,000 elected officials—deputies and senators, members of departmental and municipal councils, and mayors. In 1962 the Constitution was amended to provide for the direct election of the president by universal suffrage.<sup>53</sup> This amendment marked a decisive turning point in the functioning of French political institutions,<sup>54</sup> according significantly more power to the president, as now his status was confirmed and legitimated by the people as a whole. The president owed his office to the people alone and could fulfill General de Gaulle’s desire that the Chief of State be the representative of the nation, independent of and superior to the political parties. The constitutional amendment of 1962 was approved by a presidentially initiated referendum, in apparent violation of article 89 of the Constitution.<sup>55</sup> However, the Constitutional Council, in its decision of November 6, 1962, decided that it did not have competence to review a law adopted by way of referendum. The Council opined that “it follows from the spirit of the Constitution, which has established the Constitutional Council as an organ to regulate the actions of public authorities, that the laws that the Constitution envisaged in its article 61 [as subject to review by the Council] are only laws voted by Parliament and not those which, adopted by the people pursuant to a referendum, constitute a direct expression of national sovereignty.”<sup>56</sup>

In 1974 the Constitution was amended to allow sixty deputies or sixty senators to refer a recently enacted law to the Constitutional Council for review of

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53. This amendment was enacted by referendum.

54. *Balladur Report*, *supra* note 21, at 27.

55. President de Gaulle relied on article 11 of the Constitution, which deals with referenda on “Government Bills,” rather than article 89, which deals specifically with referenda on constitutional amendments. The article 89 procedure requires parliamentary involvement in the amendment process, whereas parliamentary participation is not required under the article 11 procedure. By relying on article 11, President de Gaulle was able to avoid parliamentary participation.

56. *Loi référendaire* [Referendum Law], CC decision no. 62-20 DC, Nov. 6, 1962, Rec. 27. *But see* the comments of former Constitutional Council member Dominique Schnapper on this decision, Schnapper, *supra* note 1, at 62-66 (indicating that the majority of the members of the Council, as well as the General Assembly of the Council of State and most jurists, thought that use of the article 11 referendum procedure to amend the Constitution was unconstitutional, but that the Council refused to examine the constitutionality of the law on the basis of “the higher interest of the country.”). *See also* Conseil constitutionnel, *Séance du 2 octobre 1952, Avis sur le référendum relatif à l’élection du président de la République au suffrage universel direct*, in B. Mathieu et al., *Les grandes délibérations du Conseil constitutionnel: 1958-1983* (2009), at 99 [hereinafter *Les grandes délibérations du Conseil constitutionnel*]; Conseil constitutionnel, *Séance du 6 novembre 1962, Décision No. 62-20 DC, Loi référendaire relative à l’élection du président de la République au suffrage universel direct*, in *id.* at 113.

its constitutionality prior to its promulgation by the president of the Republic.<sup>57</sup> Previously, only the president of the Republic, the prime minister, and the presidents of the Senate and the National Assembly had this power. This amendment accorded considerably more influence to the minority (opposition) party in the legislature, as it could now challenge the constitutionality of laws before their promulgation. It also greatly enhanced the role of the Constitutional Council, since now it was able to review almost all important parliamentary enactments for their constitutionality.<sup>58</sup> After the enactment of the 1974 amendment, referrals to the Council increased greatly in number.<sup>59</sup>

In 2000 the Constitution was amended to reduce the term of the president from seven years to five years.<sup>60</sup> This amendment, together with an institutional act of May 15, 2001,<sup>61</sup> requiring presidential elections to take place before legislative elections, has had the effect of necessitating that presidential and parliamentary elections take place in close proximity to each other. This near simultaneity of presidential and legislative elections greatly reduces the chance that different political parties would control the presidency and the National Assembly, and hence the possibility of cohabitation. The power of the president has thus been significantly enhanced at the expense of Parliament. Another consequence of the temporal proximity of presidential and legislative elections is to tie the campaign and election of the president of the Republic more closely to the struggle of the political parties for control of the legislature,

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57. In 1974, article 61 of the Constitution was amended to allow sixty senators or sixty deputies to refer legislation to the Constitutional Council for review. For this reason, article 61 now virtually assures that all legislation can be brought before that body for review.

58. See generally Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (1992); F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 *Am. J. Comp. L.* 89 (1988).

59. Dominique Rousseau refers to the 1974 amendment as “a veritable constitutional revolution.” Dominique Rousseau, *Droit du contentieux constitutionnel* 71 (8<sup>th</sup> ed. 2008). For a discussion of the politics leading to the enactment of the amendment, see *id.* at 70-73.

60. *Reduction of presidential term to five years*, Law No. 2000-964 of Oct. 2, 2000, *J.O.*, Oct. 3, 2000, at 15582. See generally Jean-Éric Gicquel, *Article 6*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 298, 306-10. See also Olivier Duhamel, *Le quinquennat* (2000).

61. *Loi organique no. 2001-419 du 15 mai 2001 modifiant la date d'expiration des pouvoirs de l'Assemblée nationale*, May 15, 2001. See Jean-Éric Gicquel, *id.* at 307-08. 1958 Const. art. 12 provides: “The President of the Republic may, after consulting the Prime Minister and the Presidents of the Houses of Parliament, declare the National Assembly dissolved. – A general election shall take place no fewer than twenty days and no more than forty days after the dissolution.” See also Pierre Avril, *Article 12*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 472, 485.

thereby increasing the politicization of the presidency and moving the constitutional design away from General de Gaulle's conception that the president stood over and above party politics as the representative of the interests of the nation as a whole.<sup>62</sup>

Other important amendments related to France's membership in the European Union and other international engagements. According to the Constitution, if the Constitutional Council decides that an international engagement would violate the Constitution, France cannot undertake that international engagement without a prior modification of the Constitution.<sup>63</sup>

In July 2008 the Constitution underwent major revisions, the purpose of which was to better define the relationship between the institutions of government, to enhance democracy by according more power to the Parliament, and to facilitate the vindication of rights by citizens through the judicial process. The July 2008 amendments are considered in detail in Part III of this article.

## *B. Jurisprudence*

One of the principal vices of the Fourth Republic in the eyes of General de Gaulle and his allies was the power of Parliament to interfere with the proper functioning of the executive branch, leading to incoherence in governmental policy and sapping the French state of the ability to effectively confront domestic and foreign challenges. To remedy this defect, the Constitution of 1958 did several things. First, it accorded to the Government an autonomous regulatory sphere in which it had legislative-type power to enact rules and

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62. The overt politicization of the presidency may be traced to a 1978 speech of President Valéry Giscard d'Estaing in which he sought to influence the outcome of the legislative elections of that year for the benefit of his political party and its parliamentary allies. Valéry Giscard d'Estaing, Speech at Verdun-sur-le-Doubs of January 27, 1978, in *Les grands textes de la pratique constitutionnelle de la V<sup>e</sup> République*, *supra* note 2, at 44-45.

63. 1958 Const. art. 54 ("If the Constitutional Council... has declared that an international commitment contains a clause contrary to the Constitution, the authorization to ratify or approve it may be exercised only after amendment of the Constitution."). For example, in a 1975 decision, the Council held that it lacked the competence to evaluate the legality of a law according to the terms of an international agreement. *Interruption volontaire de grossesse I* [Abortion I], CC decision no. 74-54 DC, Jan. 15, 1975; *see also Interruption volontaire de grossesse II* [Abortion II], CC decision no. 2001-446 DC, June 27, 2001. Moreover, under article 61 of the Constitution, the Council may review an ordinary law enacted by Parliament *only* prior to its promulgation and *only* if it is referred to the Council by the president of the Republic, the prime minister, the president of the Senate or of the National Assembly, or by sixty deputies or sixty senators.

also the power to implement the rules established by Parliament.<sup>64</sup> Parliament may not enact law in the executive's sphere of competence if the Government objects,<sup>65</sup> nor may it prescribe detailed rules for the implementation of the laws which it may constitutionally enact.<sup>66</sup> Second, the Constitution accorded to the Government the dominant role in the legislative process,<sup>67</sup> by allowing the Government to control the setting of the parliamentary agenda,<sup>68</sup> permitting the Government to introduce legislation,<sup>69</sup> and according Government bills (*projets de loi*) priority treatment over Members' bills (*propositions de loi*) in a number of ways.<sup>70</sup> Third, the Constitution allowed Parliament to delegate to the Government, for a limited period of time, the power to exercise legislative

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64. 1958 Const. art. 37. The article provides that “[m]atters other than those within the domain of the law have an executive character (*caractère réglementaire*).” It thus recognizes an extensive autonomous normative power residing in the executive, which enables the executive to establish rules in many areas without parliamentary authorization. See generally Marcel Prélôt & Jean Boulouis, *Institutions politiques et droit constitutionnel* 615-19 (11<sup>th</sup> ed. 1990); James E. Beardsley, *Constitutional Review in France*, 1975 Sup. Ct. Rev. 189, 213-19; *Blocage des prix et des revenus* [Freezing of Wages and Prices], CC decision no. 82-143 DC, July 30, 1982, Rec. 57.

65. *Blocage des prix et des revenus* [Freezing of Wages and Prices], CC decision no. 82-143 DC, July 30, 1982, Rec. 57.

66. *R.A.T.P. [Régie autonome des transports parisiens]*, CC decision no. 59-1 L, Nov. 27, 1959, Rec. 67. See also Constitutional Council, *Séance du 27 novembre 1959, Décisions No. 59-1 L, RATP et No. 59-FNR, Baux à ferme*, in *Les grandes délibérations du Conseil constitutionnel*, *supra* note 56, at 53-55 (providing insight into the role of political factors and legal factors in the Council's decision in this matter).

67. See generally Pierre Avril & Jean Gicquel, *Droit parlementaire* (4<sup>th</sup> ed. 2010); Pascal Jan, *Les assemblées parlementaires françaises* (2005).

68. 1958 Const. art. 48(1) (before 2008 amendment) (agenda of both parliamentary assemblies must accord priority to Government bills and to Members' bills accepted by the Government in the order fixed by the Government).

69. 1958 Const. art. 39(1).

70. 1958 Const. art. 40 (“Private Members' Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure.”); 1958 Const. art. 42(1) (before 2008 amendment) (discussion of a Government bill before the first assembly in which it is introduced begins with Government text); 1958 Const. art. 44(3) (“If the Government so requests, the House before which the Bill is tabled shall proceed to a single vote on all or part of the text under debate, on the sole basis of the amendments proposed or accepted by the Government.”); 1958 Const. art. 45(2) (before 2008 amendment) (allows the Government to utilize an emergency procedure (*procédure d'urgence*) to expedite legislation (and shortcut parliamentary debate) under certain circumstances). Moreover, even though Parliament could enact laws pursuant to 1958 Const. art. 34, it lacked the constitutional capacity to adopt advisory resolutions.

power by ordinance.<sup>71</sup> Fourth, the number of standing committees in each house of Parliament was limited by the Constitution to six,<sup>72</sup> thus making parliamentary consideration of legislation rather cumbersome. Finally, the Government possessed a powerful device to have its legislation enacted, by, in effect, challenging the National Assembly to either accept a Government bill or to overturn its own Government by a vote of no-confidence.<sup>73</sup>

To enforce the constitutional scheme, the Constitution established a Constitutional Council, whose principal function was thought at the time to be the review of just-enacted legislation to assure that it fell within Parliament's legislative sphere ("the domain of the law") and did not encroach on the Government's autonomous regulatory domain.<sup>74</sup> Also, institutional acts<sup>75</sup> and changes in the procedural rules of the parliamentary chambers were subject to the mandatory review of the Constitutional Council.<sup>76</sup> Again, this was to assure that Parliament did not interfere with the Government's constitutionally given prerogatives in the legislative process.

In spite of the original purposes for which the Constitutional Council was established, and which it fulfilled from 1958 on,<sup>77</sup> the Council soon undertook the more significant and controversial function of reviewing just-enacted legislation (but before its promulgation by the president of the Republic) for its conformity to the substantive provisions of the Constitution. In its most important decision to date, the *Freedom of Association* decision of July 16,

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71. 1958 Const. art. 38. An ordinance is a rule-making act of the Government, done with the authorization of Parliament, with respect to matters that fall within the domain of the law. The power to adopt ordinances is limited in duration and object. Before ratification by Parliament, an ordinance is considered to be a regulatory (executive) act; after ratification it has the status of law.

72. 1958 Const. art. 43(2) (before 2008 amendment) (limits each parliamentary assembly to six permanent committees).

73. 1958 Const. art. 49(3). See *infra* notes 150-151 and accompanying text.

74. See generally Dominique Rousseau, *Droit du contentieux constitutionnel* (8<sup>th</sup> ed. 2008); Pascal Jan, *Le procès constitutionnel* (2<sup>nd</sup> ed. 2010). For other functions of the Constitutional Council, see notes 191-196 and accompanying text.

75. An institutional act (*loi organique*) is a law enacted by Parliament to define, supplement, and/or implement a provision of the Constitution. Institutional acts "create organs of the State and establish their structure." Henri Capitant, *Le vocabulaire juridique* (1930), quoted in Xavier Prétot, *Article 46*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1116, 1117. The 1958 Const. art. 46 provides a special procedure for the adoption of institutional acts, including their mandatory referral to the Constitutional Council.

76. 1958 Const. art. 61(1).

77. See, e.g., *Règlement de l'Assemblée nationale* [National Assembly Rules], CC decision no. 59-2 DC, June 17, 18 & 24, 1959, Rec. 58; *R.A.T.P. [Régie autonome des transports parisiens]*, CC decision no. 59-1 L, Nov. 27, 1959, Rec. 67.

1971,<sup>78</sup> the Council struck down a parliamentary enactment on the ground that it violated a substantive principle of constitutional status. It found that principle not in the text of the Constitution itself, but in the “fundamental principles recognized by the laws of the Republic,” a source referred to in the preamble to the Constitution of 1946, which the Council held had been incorporated by reference into the Constitution of 1958 by its own preamble, which refers to “the preamble of the Constitution of 1946.” The effect of the 1971 decision was to create what the French call “the constitutional bloc” (*bloc de constitutionnalité*), consisting of the Constitution itself, and other sources of law mentioned in its preamble, including the Declaration of Rights of Man and the Citizen of 1789 and the preamble to the Constitution of 1946, which in turn refers to “the fundamental principles recognized by the laws of the Republic” and to “the political, economic, and social principles particularly necessary in our time.” Later, in 2005, the Constitution was amended to incorporate the Charter for the Environment of 2004.<sup>79</sup>

Since 1971, the Constitutional Council has played a major role in the legislative process,<sup>80</sup> interpreting and applying the Constitution and other principles with constitutional status (*valeur constitutionnelle*) to just-enacted legislation. Now that minority deputies and senators can refer laws to the Council, almost all important legislative enactments receive its scrutiny for their constitutionality. In conducting this review, the Council, of necessity, interprets and develops the Constitution—both in its decisions that have separation of powers implications and those affecting matters of substantive law. Here are some examples.

Although originally established to assure that Parliament did not interfere with the executive power, the Council has often interpreted the Constitution to enlarge parliamentary competence. For example, in its *R.A.T.P.* decision of 1959, it recognized a broad parliamentary competence to legislate with respect to autonomous administrative authorities, although it also set certain limits to parliamentary competence (the law enacted by Parliament could not descend into the details of implementation).<sup>81</sup> In its *Site Protection Law* decision

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78. See Peter L. Lindseth, *Law, History, and Memory: “Republican Moments” and the Legitimacy of Constitutional Review*, 3 Colum. J. Eur. L. 49 (1997); George D. Haimbaugh, Jr., *Was It France’s Marbury v. Madison?*, 35 Ohio St. L.J. 910 (1974).

79. *Charter for the Environment*, Law No. 2005-205 of Mar. 1, 2005, J.O., Mar. 2, 2005, at 3697.

80. Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (1992) (analyzing the political role of the Constitutional Council and analogizing the Council to a third house of Parliament).

81. *R.A.T.P. [Régie autonome des transports parisiens]*, CC decision no. 59-1 L, Nov. 27, 1959, Rec. 67.

of 1969, the Council included within the domain of the law any situation involving the modification of or derogation from a general principle of law.<sup>82</sup> In its important *Freezing of Wages and Prices* decision of 1982, the Council had before it a law enacted by Parliament providing for the freezing of wages and prices. As part of that law, Parliament provided for fines of between 20 and 50 francs (approximately \$4-10) for certain violations of the law. According to the Constitution, however, fines for misdemeanors (*contraventions*) fall clearly within the domain of the regulatory power of the Government. In deciding whether Parliament nevertheless had the competence to adopt this provision, the Constitutional Counsel had to settle a long-standing controversy: whether Parliament lacked the power, under all circumstances, to enact laws whose subject matter fell within the regulatory domain (General de Gaulle's view), or whether, on the contrary, Parliament could legislate with respect to matters within the regulatory domain unless challenged by the Government under article 37(2) or article 41 of the Constitution.<sup>83</sup> The Council decided that Parliament could deal with a matter by law, even if it fell within the regulatory domain, if the Government did not object.

When the Council regarded legislative power as overreaching or inappropriately exercised, it interpreted the Constitution to impose significant limitations. In its *Future of the School* decision of 2005, for instance, concerned about the declining quality of the law, including, importantly, the tendency of enacted law to be diffuse and wordy (*la loi bavarde*), the Constitutional Council forcefully reiterated its requirement that "the law" must possess a certain nature: the law must be normative, that is to say, it must establish rules; it must be clear, accessible, and intelligible; and it must not be concerned with details of implementation.<sup>84</sup>

Also, the Council has not been hesitant to construe its jurisdiction broadly in order to preserve the constitutional separation of powers scheme. For example, in a 1987 decision, the Council held that it could review an ordinance for its constitutionality even though Parliament had not enacted a law to approve the ordinance.<sup>85</sup> Ordinances that have not been ratified by Parliament are considered to be administrative acts. As such they are not subject to review by the Constitutional Council, but may be reviewed by the Council of State.

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82. *Protection des sites* [Site Protection Law], CC decision no. 69-55 L, June 26, 1969, Rec. 27.

83. *Blocage des prix et des revenus* [Freezing of Wages and Prices], CC decision no. 82-143 DC, July 30, 1982, Rec. 57.

84. *Avenir de l'école* [Future of the School], CC decision no. 2005-512 DC, Apr. 21, 2005, Rec. 72.

85. *Conseil de la concurrence* [Council on Competition], CC decision no. 86-224 DC, Jan. 23, 1987, Rec. 8. See also *Privatisations* [Privatizations], CC decision no. 86-207 DC, June 25-26, 1986, Rec. 61.

Ordinances which have been ratified by Parliament may be reviewed by the Constitutional Council for their constitutionality if the ratifying statute is referred to the Council. In its 1987 decision, the Constitutional Council extended its jurisdiction to review ordinances that had not been ratified by Parliament if a subsequent statute presupposing the validity of the ordinance is referred to the Council.<sup>86</sup> The Council has also adopted an expansive interpretation of individual rights and the principle of equality in a series of landmark cases (*Freedom of Association*,<sup>87</sup> *Vehicle Searches*,<sup>88</sup> *Bioethics*,<sup>89</sup> *Ex Officio Taxation*<sup>90</sup>) and has approved certain affirmative action (*discrimination positive*) measures, although such measures would seem to be contrary to the French notion of equality.<sup>91</sup>

But expansive, facilitative interpretation has its limits. Where the Constitution is clear, in spite of political consensus and contemporary needs and values to the contrary, the Council enforces the constitutional scheme. For instance, in its *Decentralization* decision of 1982,<sup>92</sup> the Council held that the constitutional principle of the indivisibility of the Republic prohibited depriving, even temporarily, the national Government's representative in the departments (*préfet*) of

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86. *Conseil de la concurrence* [Council on Competition], *id.* In 2008 article 38 was amended to require that ordinances be ratified by express parliamentary action ("They may only be ratified in explicit terms"), rather than by implication from the enactment of subsequent laws.

87. *Liberté d'association* [Freedom of Association], CC decision no. 71-44 DC, July 16, 1971, Rec. 29.

88. *Fouille des véhicules* [Vehicle Searches], CC decision no. 76-75 DC, Jan. 12, 1977, Rec. 33. *See also* *Sécurité et liberté* [Security and Liberty], CC decision no. 80-127 DC, Jan. 20, 1981, Rec. 15; *Maîtrise de l'immigration* [Immigration Control], CC decision no. 93-325 DC, Aug. 12-13, 1993, Rec. 224.

89. *Bioéthique* [Bioethics], CC decision no. 94-343/344 DC, July 27, 1994, Rec. 100. *See also* an important decision of the Council of State on the protection of human dignity. *Commune de Morsang-sur-Orge* CE Ass., Oct. 27, 1995, Rec. Lebon 372.

90. *Taxation d'office* [Ex Officio Taxation], CC decision no. 51 DC, Dec. 27, 1973, Rec. 25. *See also* *Lois de nationalisation* [Nationalization Laws], CC decision no. 82-139 DC, Jan. 16, 1982, Rec. 18.

91. *See, e.g., Loi relative au statut général des fonctionnaires* [Third Admission Track to the *École nationale d'administration*], CC decision no. 82-153, Jan. 14, 1983, Rec. 35; *Loi portant diverses dispositions d'ordre social, éducatif et culturel* [Admission to the *Institut d'études politiques*], CC decision no. 2001-450 DC, July 11, 2001, Rec. 82; *Loi relative à l'égalité salariale entre les femmes et les hommes* [Equal Pay for Men and Women], CC decision no. 2006-533 DC, Mar. 16, 2006, Rec. 39.

92. *Lois de décentralisation* [Decentralization Laws], CC decision no. 82-137 DC & 82-138 DC, Feb. 25, 1982, Rec. *See also* *Loi relative à la Corse* [Law on Corsica], CC decision no. 2001-454 DC, Jan. 17, 2002, Rec. 70.

power to assure compliance of local legislative and regulatory measures with national law. In its *Gender Quotas I* decision of 1982 and *Gender Quotas II* decision of 1999, the Council also found laws to advance gender equality to violate the constitutional principle of equality.<sup>93</sup>

The jurisprudence of the Council demonstrates that the Constitution can be adapted to changing needs and values, but only up to a point. Then, constitutional change must occur through the political process, i.e., amendment to the Constitution itself. Thus, in 1999, then-article 3, now the second paragraph of article 1, of the Constitution was amended to add the words: “Statutes shall promote equal access by women and men to electoral mandates and elective offices.”<sup>94</sup> In a 2006 decision, the Constitutional Council refused to validate a legislative enactment imposing the requirement of predetermined proportions of women and men on the boards of directors and supervisory councils of private companies and public-sector enterprises, on joint consultative production committees, among employee representatives, on candidate lists for labor tribunals, and in joint public bodies, on the ground that the constitutional amendment of 1999 applied only to “elective political positions.”<sup>95</sup> In July 2008 the second paragraph of article 1 of the Constitution was amended by adding the italicized words: “Statutes shall promote equal access by women and men to elective offices and posts *as well as to professional and social positions*,” (emphasis supplied). This amendment overruled the Council’s 2006 decision.

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93. *Quotas par sexe I* [Gender Quotas I], CC decision no. 82-146 DC, Nov. 18, 1982, Rec. 66; *Quotas par sexe II* [Gender Quotas II], CC decision no. 98-407 DC, Jan. 14, 1999, Rec. 21. See generally Cynthia A. Vroom, *Equal Protection versus the Principle of Equality: American and French Views on Equality in the Law*, 21 Capital U. L. Rev. 199 (1992).

94. *Equal access of men and women to elective office*, Law No. 99-569 of July 8, 1999, J.O., July 9, 1999, at 10175; *Decentralization*, Law No. 2003-276 of Mar. 28, 2003, J.O., Mar. 29, 2003, at 5568. See also *Quotas par sexe III* [Gender Quotas III], CC decision no. 2000-429 DC, May 30, 2000, Rec. 84 (upholding amendments to the Electoral Code establishing gender quotas for candidate slates in proportional elections at the local, departmental, regional, national, and European levels after the 1999 amendment to article 3 of the Constitution that provided that “Statutes shall promote equal access by women and men to electoral mandates and elective offices”).

95. *Loi relative à l'égalité salariale entre les femmes et les hommes* [Equal Pay for Men and Women], CC decision no. 2006-533 DC, Mar. 16, 2006, Rec. 39.

### *C. Practice*

In a press conference in January 1964, President de Gaulle said that “a Constitution is a spirit, institutions, and practice...”<sup>96</sup> Practice has played a major role defining the relationship of governmental institutions, particularly the awkward and peculiar relationship between the president of the Republic and the prime minister during periods of cohabitation.<sup>97</sup> There have been three periods of cohabitation so far, each occurring in a different political context, and each having its own characteristics. Perhaps it is the vagueness of the Constitution regarding the relationship between president and prime minister that has allowed successive presidents and prime ministers to tailor their relationship to suit the political environment of the time. The Constitution as applied by the Constitutional Council has had little relevance in defining the relationship between president and prime minister during periods of cohabitation.<sup>98</sup>

The Constitution of 1958 created a “bicephalous”<sup>99</sup> executive branch: a president, originally indirectly elected, but since 1962 elected by direct universal suffrage, and a prime minister responsible to the National Assembly. The president is elected by the people and is responsible to them. Article 5 of the Constitution expresses General de Gaulle’s conception of the presidency, as articulated in his Bayeux and Épinal addresses of 1946.<sup>100</sup> Although article 5

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96. President Charles de Gaulle, Press Conference of January 31, 1964, in Charles de Gaulle, *Mémoires d’Espoir*, *supra* note 2, at 858. See Jean-Jacques Chevaller, Guy Carcassonne & Olivier Duhamel, *La V<sup>e</sup> République, 1958-2001* (9<sup>th</sup> ed. 2001), at 105-10 (calling President de Gaulle’s press conference of January 31, 1964, “extraordinary.” “[T]he Head of State ‘is presenting the tables of the law, describing the Constitution as a *spirit, institutions, a practice...*’ the poor document of 1958 caught in a sandwich between a spirit—which is naturally that of the arbiter [the 1958 Const. art. 5 provides that the president “shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State”]—and practice, which he had personally instituted, imposed, and modified.” *quoting* Jean Lacouture, *De Gaulle*, at 105). See also Avril, *supra* note 3 (stressing the importance of practice in giving content to the terms of the Constitution); *Vedel Report*, *supra* note 45, at 2537 (“The political institutions of a country are not defined solely by the written Constitution and laws which effectuate it, but also by political practice.”).

97. See generally Martin A. Rogoff, *A Sixth French Republic?*, *supra* note 24.

98. See *infra* notes 102-106 and accompanying text.

99. *Balladur Report*, *supra* note 21, at 27.

100. 1958 Const. art. 5 provides: “The President of the Republic shall ensure due respect for the Constitution. He shall ensure, by his arbitration, the proper functioning of the public authorities and the continuity of the State. – He shall be the guarantor of national independence, territorial integrity and due respect for Treaties.” See also General de Gaulle’s Bayeux and Épinal addresses, in Charles de Gaulle, *Mémoires d’Espoir* *supra* note 2, at 309 and 317.

may be viewed as largely symbolic, with its legal significance uncertain, as it refers primarily to the general purposes of the presidential function, a broad reading has been the basis for the assertion of vast presidential power. One thing is certain, however: article 5 clearly rejects a ceremonial or passive conception of the presidency and instead expresses a dynamic, active conception of the presidential office. Because of the vagueness of article 5 and article 20 (which provides that “The Government shall determine and conduct the policy of the Nation”), the relationship between the president and the Government (under the leadership of the prime minister) has evolved flexibly, responsive to the contemporary political environment and to the practicalities of governing. This has certainly been the case during periods of cohabitation and also during those periods when the president’s party was a minority in the governing parliamentary coalition (from 1958 to 1962 and again during the presidency of Valéry Giscard d’Estaing, from 1974 to 1981).<sup>101</sup>

The legislative elections of March 1986 resulted in a small majority for the parties of the Right in the National Assembly. President Mitterrand (*Parti socialiste*) named Jacques Chirac (*Rassemblement pour la République*) as prime minister. This was the first time since the inception of the Fifth Republic in 1958 that the president and the prime minister were from opposing parties. This cohabitation was particularly tense and difficult for two principal reasons: first, the incoming Government of the Right wanted to make significant changes in some of the policies of the preceding Governments of the Left (most importantly, to privatize large sectors of the economy that had recently been nationalized); and second, President Mitterrand intended to seek reelection in 1988, and Prime Minister Chirac was almost certainly going to be the opposing candidate.

A potential constitutional crisis arose early in the Mitterrand-Chirac cohabitation. On March 20, 1986, Prime Minister Chirac announced that he intended to submit two laws to Parliament authorizing the Government to legislate by ordinances.<sup>102</sup> He stated that article 20 of the Constitution provides that the Government, directed by the prime minister, determines and conducts the policy of the nation, and made clear that in his opinion “the Government possesses all the powers to act which are recognized by the Constitution, whether it involves regulatory measures of any kind, individual or general, which appear necessary to implement its policies. In particular, in order to accomplish with the least

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101. See generally Pierre Bréchon, *La France aux urnes: Soixante ans d’histoire électorale* (2009). See also Laurent Touvet & Yves-Marie Doublet, *Droit des élections* (2007); Jean-Pierre Camby, *Le Conseil constitutionnel, juge électoral* (5<sup>th</sup> ed. 2009).

102. Jacques Chirac, Statement of March 20, 1986, in *Les grands textes de la pratique constitutionnelle de la V<sup>e</sup> République*, *supra* note 2, at 140-141 (1998).

delay the recovery of the country and to make our institutions more effective, two authorization laws will be submitted to Parliament authorizing the Government to legislate by ordinances...”<sup>103</sup> President Mitterrand responded by stating his view that “the major reforms of the preceding legislature, like decentralization, workers’ rights, new freedoms, and reform of work time, took the normal legislative route. So I think that ordinances, which... cannot reconsider vested social rights, will have to be used sparingly and that authorization must be sufficiently precise to enable the Constitutional Council to make a decision with full knowledge of what is involved...”<sup>104</sup> Two authorization laws, allowing the government to act by ordinance, were enacted to reverse policies of the previous Socialist-dominated legislature: one allowing the Government to privatize enterprises previously nationalized and the other allowing the Government to undertake a new delimitation of electoral districts. The Constitutional Council approved both laws, subject to certain interpretive reservations.<sup>105</sup> President Mitterrand, however, refused to sign the ordinances subsequently adopted by the Government. According to article 13(1) of the Constitution, “The president of the Republic shall sign Ordinances and Decrees deliberated upon in the Council of Ministers.” Does this mean that the president is required to sign ordinances adopted by the Council or Ministers? Or may he exercise his discretion in deciding whether to sign the ordinance or not? The Chirac Government decided not to raise a constitutional challenge to President Mitterrand’s refusal to sign the privatization and electoral apportionment ordinances,

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103. *Id.* On the use of ordinances by the Government to bypass Parliament, thus avoiding possible fractious debate and the need to compromise, see Dominique Rousseau, *La V<sup>e</sup> République se meurt, Vive la démocratie* 103-104 (2007) (“To govern by ordinances is in effect to govern without Parliament.”).

104. François Mitterrand, Message to Parliament of April 8, 1986, in *Constitution française du 4 octobre 1958 après la révision de juillet 2008* (La Documentation française, 2008), at 46-47.

105. *Privatisations* [Privatizations], CC decision no. 86-207 DC, June 25-26, 1986, Rec. 61; *Découpage électoral* [Electoral Apportionment I], CC decision no. 86-208 DC, July 1-2, 1986, Rec. 78. According to 1958 Const. art. 62, “a provision declared unconstitutional on the basis of article 61 shall be neither promulgated nor implemented.” Article 62 further provides that decisions of the Constitutional Council “shall be binding on public authorities and on all administrative authorities and all courts.” In about a third of its recent decisions involving the constitutionality of laws, rather than find a legislative provision contrary to the Constitution, the Constitutional Council declared that the provision conforms to the Constitution on the condition that the provision in question is interpreted or applied in the manner indicated by the Council. Such conditions are called interpretive reservations (*réserves d’interprétation*). Since 2002, the Council has systematically included in its holdings reference to the specific *considérant* or *considéran*ts in which its interpretive reservations are expressed, thus assuring that these reservations are binding.

and subsequently introduced the text of both ordinances as Government bills which were then enacted by the Parliament.<sup>106</sup>

President Mitterrand was reelected in 1988, and his party emerged with a few more seats in the National Assembly than the parties of the center Right, but not enough for a majority. Nevertheless, President Mitterrand was able to select a prime minister from his own party and to control the legislative agenda. The legislative elections of March 1993, however, resulted in a substantial majority for the parties of the center Right (486-91) in the National Assembly. President Mitterrand (*Parti socialiste*) named Édouard Balladur (*Rassemblement pour la République*) as prime minister. The political context of this cohabitation was very different from that of the first cohabitation, as President Mitterrand, old and ill, and Prime Minister Balladur, who disclaimed presidential ambitions, were not competitors for the presidency in the upcoming election of 1995. Effective power passed to the prime minister.

In 1997 President Jacques Chirac dissolved the National Assembly and called for legislative elections, which he had the power to do pursuant to article 12 of the Constitution. He did so because he thought that the electoral position of his party, although deteriorating, was still strong, and he wanted to assure a continuing parliamentary majority for the last five years of his seven year term of office. To his great chagrin, however, the parties of the Left won 320 seats in the National Assembly and the parties supporting President Chirac won only 251 seats. President Chirac (*Rassemblement pour la République*) named Lionel Jospin (*Parti socialiste*), whom he had defeated in the presidential election two years before, as prime minister. Because of the radically altered political environment, Prime Minister Jospin was able to exercise considerably more power than the prime ministers during the first two cohabitations.

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106. See, e.g., statements of President Mitterrand and Prime Minister Chirac on the electoral apportionment ordinance. Communiqué from the President of the Republic of October 2, 1986, in Dmitri Georges Lavroff, *le droit constitutionnel de la V<sup>e</sup> République* 603 (1996) (“After review of the proposed ordinances on the delimitation of legislative districts submitted to him on September 23, the President of the Republic deems it desirable to adhere to the republican tradition which requires that the National Assembly itself determines the methods of the election of deputies.”); Communiqué from the Prime Minister of October 2, 1986, in *id.* at 604 (“Without entering into a constitutional controversy, the government has decided to submit immediately to the Council of Ministers a bill (*project de loi*) for the delimitation of electoral districts for legislative elections, which shall be considered promptly by the Parliament.”). See generally Charles Reiplinger, *Article 13*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 492-94.

### III. Constitutional Revisions of 2008

#### *A. The Balladur Commission Report*

Although comprehensive constitutional reform had been considered during the 1990s, and a report had been prepared in 1993 recommending numerous revisions,<sup>107</sup> reform did not occur at that time. A decade and a half later, in July 2007, President Nicolas Sarkozy established a commission of thirteen members, chaired by former Prime Minister Édouard Balladur, to make proposals for the modernization and restructuring of the institutions of the Fifth Republic.<sup>108</sup> Vice-chairs of the Commission were Jack Lang (former Minister of Education and a leading Socialist politician) and Pierre Mazeaud (former president of the Constitutional Council).

In a letter to Chairman Balladur,<sup>109</sup> the president charged the Commission with several tasks: to make recommendations to better define the relation-

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107. *Vedel Report*, *supra* note 45. The *Balladur Report* followed the broad outline of the *Vedel Report*, whose three principal divisions were *un exécutif mieux défini, un parlement plus actif, and un citoyen plus présent*. It also adopted many of the proposals contained in the *Vedel Report*.

108. Décret no. 2007-1108 du 18 juillet 2007 portant sur la création d'un comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V<sup>e</sup> République, *reprinted in Balladur Report*, *supra* note 21, at 203. *See also* paragraph 1 of the Lettre de mission du président de la République, July 18, 2007, *reprinted in Balladur Report*, *id.* at 206:

The Constitution, which fixes the present organization of our institutions, was established nearly fifty years ago. Inspired by the ideas of General de Gaulle and his determination to give our country strong and stable institutions, it presents qualities that no longer have to be justified. Incontestably, however, due to the effect of numerous changes which have occurred in our country and abroad since 1958, our democracy today needs to see its institutions modernized and rebalanced (*modernisées et rééquilibrées*). Our citizens expect from the State a renewed authority and more efficiency in government, but they also want more transparency, more debate, and more simplicity. They want political action to be in the service of the general interest, not of special interests. They profoundly aspire to an exemplary democracy, to an irreproachable Republic.

*Id.* at 206. *See also* President Nicolas Sarkozy, Speech at Épinal of July 12, 2007, in *Constitution française du 4 octobre 1958 après la révision de juillet 2008* (La Documentation française, 2008), at 52. For a discussion of the political forces leading to the comprehensive amendments of July 2008, see Xavier Prétot, *supra* note 42, at 77-82 ("Although the constitutional law of July 23, 2008, bears the imprint of the President of the Republic elected in May 2007, in the way in which it was adopted as well as in its content, it did not spring fully armed from the head of some demiurge and is in fact responsive to the thinking engaged in during preceding years about the evolution of institutions pursuant to the Constitution of October 4, 1958." *Id.* at 77).

109. Lettre de mission du président de la République, July 18, 2007, *reprinted in Balladur Report*, *supra* note 21, at 206.

ship between the president of the Republic and the prime minister, to suggest ways to “rebalance” the relations between the executive and Parliament, and to strengthen the “judicial authority.” More specifically, President Sarkozy directed the Commission’s attention to the following matters: a more precise definition of the powers of the president of the Republic and the prime minister; more transparency in the exercise of the presidential function; limitations on presidential power (like according Parliament a role in important appointments); enhancing the powers of Parliament in the legislative process (like giving the houses of Parliament more control over their own agendas, increasing the number of standing committees, enlarging the role of Parliament in overseeing administrative action and budgetary matters and in the determination of European, international, and defense policy, and allowing Parliament to adopt resolutions susceptible of influencing the work of the Government); strengthening the role of the parliamentary opposition (like assuring that the opposition has access to information and financial resources to function effectively and allowing the opposition to establish investigatory committees); better insuring the independence of the judiciary (by reforms to the High Council of the Judiciary) and the protection of individual rights (like allowing individuals to refer laws to the Constitutional Council and allowing the Constitutional Council to examine laws already in force for their constitutionality). President Sarkozy also asked the Commission to advise him on the desirability of introducing some degree of proportionality into parliamentary elections.

The *Balladur Report* is divided into three sections: “a better controlled executive power” (*un pouvoir exécutif mieux contrôlé*), “a strengthened Parliament” (*un Parlement renforcé*), and “new rights for citizens” (*des droits nouveaux pour les citoyens*). Each section contains detailed recommendations which deal with most of the matters raised by President Sarkozy in his charge to the Commission. The constitutional law, based in large part on the Commission’s recommendations, was approved by majorities in both houses (National Assembly, 344-230-2; Senate 195-127-7) and just barely approved by the required three-fifths vote in Congress (539-357) (538 votes were needed). Parliament and later Parliament in Congress approved most of the recommendations of the Balladur Commission, but did reject four significant proposals: to clarify the relationship of the president of the Republic and Government by better defining their respective roles,<sup>110</sup> to introduce some proportionality into the election of the National Assembly,<sup>111</sup> to rein in the regime of *cumul des mandats* by

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110. See *infra* note 119 and accompanying text.

111. *Balladur Report*, *supra* note 21, at 136-38 (the institution of a system of “compensatory” proportional representation (*représentation proportionnelle “compensatrice”*) for the election of 20 to 30 members of the Chamber of Deputies to allow minority points of view to be represented).

ministers and members of Parliament,<sup>112</sup> and to reform representation in the Senate.<sup>113</sup> Parliament also added one significant change not recommended by the Commission—to limit the president of the Republic to two terms.<sup>114</sup>

### *B. Executive Power (un pouvoir exécutif mieux contrôlé)*

According to the Balladur Commission, under the 1958 Constitution the division of functions and responsibilities between the president and the prime minister was “ambiguous,” with “the prime minister occup[ying] an ill-defined position.”<sup>115</sup> Particularly problematic for the Commission was the practice which allowed the president at his discretion to terminate the appointment of the prime minister outside of periods of cohabitation, in apparent violation of article 8 of the Constitution.<sup>116</sup> Nevertheless, the Commission decided not to recommend a modification of article 8 to explicitly allow the president to dismiss the prime minister. It regarded article 8’s application in practice as a reasonable adaptation rendered desirable in some circumstances because of the dual source of executive authority: according to republican tradition, the Government, since it is responsible to the National Assembly, derives its authority from the people; and the president also derives his authority from the people, based on his popular election pursuant to the constitutional amendment of 1962.<sup>117</sup> To clearly define presidential power in this area would “deprive our institutions of the flexibility necessary in the case of cohabitation.”<sup>118</sup>

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112. *Balladur Report*, *supra* note 21, at 64–65 (to prohibit ministers from holding elective office), 127–28 (to prohibit members of Parliament from exercising a local executive function). The term *cumul des mandats* refers to the practice of holding several political offices at multiple levels of government. While officials cannot hold multiple offices at the same level, they can hold offices in any combination of communal, departmental, regional, national, and European levels. For a discussion of the political effects of the practice and of the 1985 law limiting it, see Vivien A. Schmidt, *Democratizing France: The Political and Administrative History of Decentralization* 144–49 (1990).

113. *Balladur Report*, *supra* note 21, at 138–40 (to provide for more demographic equality in the election of senators).

114. 1958 Const. art. 6.

115. *Balladur Report*, *supra* note 21, at 27.

116. 1958 Const. art. 8: “The President shall appoint the Prime Minister. He shall terminate the appointment of the Prime Minister when the latter tenders the resignation of the Government.”

117. *Balladur Report*, *supra* note 21, at 28–33.

118. *Id.* at 28. To allow the president to dismiss the prime minister during periods of cohabitation would very seriously impair the functioning of the parliamentary aspect of the French governmental scheme by in effect giving the president a veto power over Parliament’s confidence in the prime

The Commission did recommend, however, that the functions of president and prime minister be better defined and divided. Thus, it proposed that article 5 be amended to include the words: “He [the president] determines the policy of the Nation.” It also recommended that article 20 be amended to read: “It [the Government] conducts the policy of the nation” (a change from the existing language, which reads: “The Government shall determine and conduct the policy of the nation.”).<sup>119</sup> Parliament did not adopt these recommendations; so articles 5, 20, and 21 (along with article 8) remain unchanged. This major initiative to better define the role of president and prime minister and Government, to make clear that the president sets policy and the prime minister and his Government implement it, was in the final analysis simply too far removed from the republican tradition to be acceptable to Parliament. This should have come as no surprise to the Commission, which recognized that the responsibility of the Government to Parliament is the “cornerstone” (*pierre angulaire*) of the French conception of government.<sup>120</sup> For this concept to have meaning, the Government must play a role not only implementing policy, but also in determining it.

The Commission had more success with its recommendations to better define the prerogatives of the president. An amendment to article 18 now provides the opportunity for the president to address a joint session of Parliament “convened in Congress.”<sup>121</sup> The personal appearance of the president before Parliament has a long and controversial history in France. It became part of the French notion of separation of powers that the president could not appear in the parliamentary chambers (*l’interdiction d’entrée dans les hémicycles parlementaires*). While the president was not allowed to address Parliament in person, he could “communicate with the two houses of Parliament by messages

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minister and his Government.

119. *Id.* at 33-34. Additional modifications to articles 20 and 21 would clarify the Government’s role in national defense and in administering the armed forces. It would implement policies and decisions in these areas determined by the president, rather than determine them itself.

120. *Id.* at 36. Jean-Claude Colliard has characterized the Fifth Republic as a “parliamentarism with a presidential corrective.” Quoted in *Warsmann Report*, *supra* note 42, at 41. See also Constitutional Law of June 3, 1958, *Providing for Temporary Derogation from the Provisions of Article 90 of the Constitution*, *supra* note 7 (requiring that the Constitution drafted by the Government adhere to certain principles, including: “2. The executive power and the legislative power must be separated effectively in such a manner that the Government and the Parliament shall each, for itself and on its own responsibility, exercise fully the powers attributed to it; 3. The Government must be responsible to the Parliament;...”).

121. The Constitution was not amended to allow the president, at his request, to appear before a parliamentary commission of enquiry (*commission parlementaire d’enquête*). For a presentation of this proposal, see *Balladur Report*, *supra* note 21, at 38-39.

which may be read, but may not be the occasion for debate.”<sup>122</sup> This practice dates back to laws of 1873 and 1875, which prohibited the president from appearing before Parliament.<sup>123</sup> The concerns that motivated these enactments were that the president would use his personal appearance before Parliament to bully and dominate the legislative body and also that his such appearance would symbolize the replacement of the prime minister by the president as the principal executive authority.

An amendment to article 13 limits the nominating powers of the president.<sup>124</sup> Previously the president could name persons to certain positions, without any parliamentary participation or oversight. Giving this unencumbered power to the president, in conjunction with adoption of an ordinance containing an extensive list of positions subject to the presidential appointment power,<sup>125</sup> accorded with the spirit of the 1958 Constitution, which was to enlarge the powers of the president and to diminish those of Parliament.<sup>126</sup> Now, after the amendment to article 13, certain nominations must be considered by “the relevant standing committee in each assembly. The President of the Republic may not make an appointment when the sum of the negative votes in each committee represents at least three-fifths of the votes cast by the two

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122. 1958 Const. art. 18(1).

123. See generally Véronique Champeil-Desplats, *Article 18*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 567. On June 22, 2009, President Sarkozy addressed the Parliament assembled in Congress at Versailles. He began his remarks with these words: “In addressing you today, I am aware of inaugurating a profound change in our republican tradition. Since 1875, the Head of State did not have the right to come before the houses of Parliament. He could communicate with them only by written messages which would be read for him. This rule had been established in a climate of mistrust in which the Republic felt fragile and threatened. This time has long since passed. The Republic is solidly anchored in our country. So the time has come for the legislative power and the executive power to establish between them relations more in accord with the spirit of a tranquil democracy. A tranquil democracy isn’t a democracy where everyone agrees, but where everyone listens to each other and respects each other.” Déclaration de M. le président de la République devant le Parlement réuni en Congrès (June 22, 2009), available at <http://www.scribd.com/doc/16660460/Discours-de-Nicolas-Sarkozy-devant-le-Congres>.

124. 1958 Const. art. 13.

125. Ordinance organique no. 58-1136, Nov. 28, 1958. For a discussion of this ordinance, see *Warsmann Report*, *supra* note 42, at 136-37 (“The somewhat byzantine division of the power of appointment between the prime minister and the president of the Republic is the result of the desire of the adopters of the 1958 Constitution who wanted to increase the list of high officials appointed by the president, without at the same time making a detailed enumeration in the Constitution.”).

126. Charles Reiplinger, *Article 13*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 494-95.

committees.”<sup>127</sup> The amendment also provides that an institutional act shall determine the posts with respect to which the president possesses the power of appointment and are therefore subject to parliamentary participation. The purpose of this provision is to prevent confusion as to which positions fall within the president’s power of appointment rather than that of the Government and thus to limit the scope and discretion of the president’s power to appoint to high offices.<sup>128</sup>

The Commission grouped a number of proposals under the heading “Making more democratic the exercise of powers by the head of state.”<sup>129</sup> Article 17, as amended pursuant to the Commission’s recommendation, now allows the president to grant pardons only to individuals. He no longer possesses the power to grant collective (or group) pardons.<sup>130</sup> Article 16, dealing with the emergency powers of the president, again following the Commission’s recommendation,<sup>131</sup> now concludes with a paragraph allowing referral, by the president of the National Assembly, the president of the Senate, or by sixty deputies or sixty senators, to the Constitutional Council after emergency powers have been in effect for thirty days for a decision as to whether the conditions for invoking emergency powers still apply. Sixty days after the exercise of emergency powers or at any moment thereafter, the Council “shall, as of right, carry out such an examination and shall make its decision in the same manner...”<sup>132</sup> Emergency

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127. 1958 Const. art. 13. Other provisions of the Constitution were also amended to subject nominations to certain positions to the article 13(5) procedure: members of the Constitutional Council (1958 Const. art. 56), members of the High Council of the Judiciary (1958 Const. art 65), and the Defender of Rights (1958 Const. art. 71-1). The Constitutional Council held that the institutional act to implement article 13(5) conformed to the Constitution. *Loi organique relative à l'application du cinquième alinéa de l'article 13 de la Constitution* [Institutional Act on the Application of the Fifth Paragraph of Article 13 of the Constitution], CC decision no. 2010-609 DC, July 12, 2010, Rec. —, J.O. , July 24, 2010, at 13669 (no. 18). The Council also held that the law enacted to implement the institutional act conformed to the Constitution. *Loi relative à l'application du cinquième alinéa de l'article 13 de la Constitution*, [Law on the Application of the Fifth Paragraph of Article of the Constitution], CC decision 2010-610 DC, July 12, 2010, Rec. —, J.O. , July 24 2010, at 13670 (no. 19).

128. *Balladur Report*, *supra* note 21, at 40-43.

129. *Id.* at 45-59. Some of these recommendations involved changes in existing laws, rather than amendments to the Constitution: reforming the allocation of media time with respect to presidential statements in electoral campaigns; reforming accounting procedures for the budget of the presidential office; and reforming the nomination process for presidential elections.

130. *See generally* Xavier Prétot, *Article 17*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 545.

131. *Balladur Report*, *supra* note 21, at 47-50.

132. 1958 Const. art. 16. Jack Lang, Vice Chairman of the Balladur Commission, appended

powers scare many Frenchmen, conjuring up visions of the assumption of authoritarian power by Napoleon Bonaparte in 1799 (who subsequently abolished the First Republic and established the French Empire), by then-President Louis Napoleon Bonaparte in 1851 (who abolished the Second Republic and established the Second Empire, taking the name Napoleon III), and by Marshal Pétain in 1940 (bringing the Third Republic to its end). The memory of Hitler's legal assumption of dictatorial power in Germany in 1933, pursuant to the emergency powers provision of the Weimar Constitution, evokes even darker fears. The *Vedel Report* of 1993 recommended that the emergency powers provision be retained, but that additional safeguards be added to prevent its abuse.<sup>133</sup>

### *C. Legislative Power (un Parlement renforcé)*

The primary goal of the 1958 Constitution was to empower the president and Government to act promptly, efficiently, and firmly to determine and effectuate the national interest. This necessarily involved the expansion of the sphere of executive responsibility and the facilitation of executive action, as well as the curtailment of parliamentary power, all of which the 1958 Constitution duly accomplished.<sup>134</sup> The *régime d'assemblée* of the Fourth Republic was replaced by the *parlementarisme rationalisé* (rationalized parliamentarianism) of the Fifth. But, as the National Assembly's Committee on Constitutional Law's *Warsmann Report* puts it: "*Parlementarisme rationalisé* is an idea that has succeeded too well."<sup>135</sup> Since the entry into force of the 1958 Constitution, the presidency has gained even more power, often at the expense of Parliament. The critical inflexion points were the constitutional amendment of 1962 on the direct election of the president and the presidential election of 1969, the

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his "personal observations" to the *Report* in which he called for the complete repeal of article 16. *Balladur Report*, *supra* note 21, at 187 ("Je souhaite que l'article 16 soit purement et simplement abrogé."). Article 16 has been invoked only once, in April 1961, by President de Gaulle following an attempted putsch by French military officers in Algeria. The Constitutional Council upheld President de Gaulle's application of article 16. *Avis du 23 avril 1961 (réunion des conditions exigées par la Constitution pour l'application de son article 16)* [Application of Article 16 of the Constitution], CC opinion, Apr. 23, 1961, Rec. 69. President de Gaulle maintained the state of emergency for five months, well beyond the period of threat to the Republic, raising serious concerns about the desirability and operation of the emergency powers provision of the Constitution. See Schnapper, *supra* note 1, at 58-60. See also Constitutional Council, *Séance du 23 avril 1961, Avis sur la mise en œuvre de l'article 16 de la Constitution*, in *Les grandes délibérations du Conseil constitutionnel*, *supra* note 56, at 82.

133. *Vedel Report*, *supra* note 45, at 2540.

134. See *supra* note 77.

135. *Warsmann Report*, *supra* note 42, at 22.

first presidential election after the resignation of General de Gaulle and his withdrawal from political life. In his famous press conference of January 31, 1964, President de Gaulle clearly expressed his view that the president was the supreme power in the nation.<sup>136</sup> The direct election of the president personalized the office, accorded its occupant legitimacy based on popular national endorsement, and allowed the successful candidate to dominate the media, which has continually acquired more importance in French political life.<sup>137</sup> The election of 1969 offered French voters the choice between two competing views of the presidency: that of Georges Pompidou, who had expressed his commitment to carrying forward General de Gaulle's vision, and that of Alain Poher, a longtime parliamentarian.<sup>138</sup> With Pompidou's victory, the Gaullist vision triumphed and carried forward. Over time, the president has become more and more involved (and dominant) in party politics.<sup>139</sup> When the presidency and the Parliament are controlled by the same party, Parliament plays only a subordinate role. Even during periods of cohabitation, Parliament has little real freedom vis-à-vis the Government under the leadership of the prime minister.<sup>140</sup> After the constitutional amendment of 2000 limiting the term of

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136. Charles de Gaulle, Press Conference of January 31, 1964, in *Les grands textes de la pratique constitutionnelle de la V<sup>e</sup> République*, *supra* note 2, at 42-44. See also *supra* note 96.

137. See Olivier Duhamel, *Vive la VI<sup>e</sup> République!* 38-66 (2002) (discussing the effect of the media and "pollingism" ("*sondagisme*") on politics in France).

138. One of the most important and immediate consequences [of General de Gaulle's resignation] was to make the presidential election [of 1969] a veritable test of our institutions...

I draw two conclusions [from the absolute calm of the electoral campaign]: the first is that it is desirable, and even essential, that all political parties, except those which pursue revolution purely and simply, from now on to situate their actions and their hopes within the framework of our institutions...

The second conclusion is that I believe that the choice made by the French people demonstrates its adherence to General de Gaulle's conception of the role of the President of the Republic: both supreme head of the executive branch, as well as guardian and guarantor of the Constitution. He is, in this dual role, responsible for setting fundamental policies, defining essential directions, and assuring and overseeing the proper functioning of public powers, both as national arbiter and as principal responsible party.

Georges Pompidou, Press Conference of July 10, 1969, in *Les grands textes de la pratique constitutionnelle de la V<sup>e</sup> République*, *supra* note 2, at 44.

139. See generally Stéphane Baumont, *Un président pour une VI<sup>e</sup> République?* (2002).

140. 1958 Const. art. 39 provides: "Both the Prime Minister and Members of Parliament shall have the right to initiate legislation." But, "[f]or the facial equality described by the text of the Constitution of October 4, 1958, institutional practice has substituted an inequality in fact, revealing the dominant place of the Government with respect to the initiation of legislation under presidential leadership. Government bills and Members' bill are not considered in the same way; from this inequality in legislative procedure there results in effect the displacement

the president to five years, the same length of time as a session of Parliament, presidential and legislative elections will most likely occur in close proximity, greatly reducing the chance of different outcomes and thus of cohabitation.<sup>141</sup>

As the *Balladur Report* concludes, the presidency has greatly increased its “capacity for action.”<sup>142</sup> “The functioning of Parliament,” on the other hand, “is not adapted for the necessities of our time: the aspirations of citizens very often find only a faint echo in the houses of Parliament; the Parliament barely oversees the actions of the Government and does not engage in a real assessment of governmental policies; the legislature enacts too many laws, in conditions which do not allow it to assure their quality.”<sup>143</sup> Parliament must be reinvigorated to give French citizens confidence in the functioning of their democracy.<sup>144</sup> The 2008 amendments make significant changes in four areas: (1) giving the houses of Parliament more control over their own work; (2) improving the legislative process; (3) giving Parliament a real power of oversight and assessment of governmental action; (4) strengthening the position of the opposition. Although many of the amendments enacted would appear to deal with rather minor procedural matters, collectively they place Parliament in a considerably stronger position vis-à-vis the executive branch than formerly and enhance its ability to be a political (rather than a mere technical) participant in the policy-making process if it has the will to act as such.<sup>145</sup>

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of the legislative power of the [parliamentary] assemblies.” Clémence Zacharie, *Article 39, in La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 975, 982.

141. On the political effect of the five-year presidential term (*le quinquennat*) on the relations of the president, the Government, and Parliament, see *Vedel Report*, *supra* note 45, at 2539.

142. *Balladur Report*, *supra* note 21, at 67.

143. *Id.* at 67-68. “The weakening of parliament written into key provisions at the heart of the 1958 constitution now appears irrevocable... Yet there has been a reaction against the corseting of parliament under the early Fifth Republic; and polls show a continuing demand, among Deputies and voters, for parliament to be more active in holding the government to account.” Andrew Knapp & Vincent Wright, *The Government and Politics of France* 155 (5<sup>th</sup> ed. 2006). Perhaps the principal problem for Parliament’s asserting itself politically against the president and/or Government is the French tradition of party discipline. It appears, however, that party discipline may be loosening somewhat, as deputies with strong local support are able to withstand party pressures, and that National Assembly presidents are not always “compliant links in the disciplinary chain stretching from government to individual Deputies...” *Id.* at 162.

144. *Id.* at 68. See also Pierre Rosanvallon, *La légitimité démocratique: Impartialité, réflexivité, proximité* (2008); Olivier Duhamel, *Vive la VI<sup>e</sup> République!* (2002); Paul Allies, *Pourquoi et Comment une VI<sup>e</sup> République* (2002).

145. The political role of Parliament has also been enhanced by amendments concerning the powers of the president and the Government, such as allowing the president to appear before the two houses of Parliament in Congress (1958 Const. art. 18), requiring parliamentary participation

## 1. Parliament's Control Over Its Work

Strange as it may seem to the American observer, the 1958 Constitution as originally adopted accords to the Government the dominant position in organizing the work of the houses of Parliament. Thus, article 48 provided that the agenda (*ordre du jour*) of the two houses “is composed of, by priority and in the order fixed by the Government, the discussion of Government bills (*projets de loi*) and Members' bills (*propositions de loi*) accepted by it.”<sup>146</sup> Article 48 was perhaps the most significant constitutional provision in giving the Government control over the work of Parliament. The Government insisted on a strict interpretation and application of its requirements<sup>147</sup> and the Constitutional Council “gave article 48 an interpretation inspired by the spirit in which it was conceived, by committing itself firmly to upholding the governmental prerogative which it establishes.”<sup>148</sup> The 2008 amendment to article 48 has been described as “a major component in the rebalancing of institutions.”<sup>149</sup> Article 48 now provides:

... [T]he agenda shall be determined by each House.

During two weeks of sittings out of four, priority shall be given, in the order determined by the Government, to the consideration of texts and to debates which it requests to be included on the agenda.

In addition, the consideration of Finance Bills, Social Security Financing Bills and, subject to the provisions of the following paragraph, texts transmitted by the other House at least six weeks previously, as well as bills concerning a state of emergency and requests for authorization referred to in article 35, shall, upon Government request, be included on the agenda with priority.

During one week of sittings out of four, priority shall be given, in the order determined by each House, to the monitoring of Government action and

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in certain presidential appointments (1958 Const. art. 13), and giving Parliament a role in the Government's decision to commit armed forces abroad (1958 Const. art. 35).

146. 1958 Const. art. 48 (before 2008 amendment). Article 48 (before amendment) also provided that one session per week is reserved for questions by members of Parliament and responses from the Government; and that one session per month is reserved for the agenda fixed by each house.

147. Jean-Louis Pezant, *Article 48*, in *La Constitution de la République française: Analyses et commentaires*, at 1204, 1208-09. See also Pierre Avril & Jean Gicquel, *Le droit parlementaire* 125-32 (4<sup>th</sup> ed. 2010).

148. Pezant, *supra* note 147, at 1209. For citation to Constitutional Council decisions, see *id.* at 1209-10.

149. *Id.* at 1217.

to the assessment of public policies.

One day of sitting per month shall be given to an agenda determined by each House upon the initiative of the opposition groups in the relevant House, as well as upon that of the minority groups.

During at least one sitting per week, including during the extraordinary sittings provided for in article 29, priority shall be given to questions from Members of Parliament and to answers from the Government.

Another significant amendment enhancing the power of Parliament is the change made to article 49(3). As adopted in 1958, article 49(3) allowed the Government to enact legislation by the devious route of turning the vote on its bill into a vote of confidence. According to that article (before its amendment in 2008):

The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph.

Of particular concern was the Government's use of article 49(3) to enact laws authorizing it to legislate on important matters by ordinance.<sup>150</sup> Recourse to article 49(3) has been severely limited by the 2008 amendment of that article, which now reads:<sup>151</sup>

The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly. In that event, the Bill shall be considered passed unless a resolution of no-confidence, tabled within the subsequent twenty-four hours, is carried as provided for in the foregoing paragraph.

In addition, the Prime Minister may use the said procedure for one other Government or Private Members' Bill per session.

The article 49(3) procedure can now be used only for finance bills and social security financing bills and one other bill per session.

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150. See Dominique Rousseau, *La V<sup>e</sup> République se meurt, vive la démocratie* 103-05 (2007).

151. 1958 Const. art. 49(3). Vice Chairman Jack Lang dissented. He recommended the abrogation of article 49(3) *in toto*. *Balladur Report*, *supra* note 21, at 187.

After due consideration, the *Balladur Report* decided not to recommend an amendment to article 44, which allows for the so-called “single vote” (often characterized by the pejorative term *vote bloqué*),<sup>152</sup> regarding it as “an effective instrument for assuring the coherence of the Government bill in the face of inappropriate amendments.”<sup>153</sup> According to that article: “If the Government so requests, the House before which the Bill is tabled shall proceed to a single vote on all or part of the text under debate, on the sole basis of the amendments proposed or accepted by the Government.”<sup>154</sup> Parliamentarians had objected to this procedure as allowing the Government to effectively eliminate consideration of amendments proposed by them.

The *Balladur Report* did recommend amending article 45(2) to limit the power of the Government to utilize the so-called “accelerated procedure” (previously called the “emergency procedure,” *procédure d’urgence*) to shortcut parliamentary debate under certain circumstances.<sup>155</sup> The *Report* proposed that the Government’s use of this procedure be subject to the disapproval of Parliament.<sup>156</sup> Before the 2008 amendment, the Government could simply declare an emergency (“*déclar[e] l’urgence*”) to send a bill to a joint committee of Parliament after one reading in each house, instead of the ordinary two readings. Article 45(2) now reads:

If, as a result of a failure to agree by the two Houses, it has proved impossible to pass a Government or Private Member’s Bill after two readings by each House or, if the Government has decided to apply the accelerated procedure *without the two Conferences of Presidents*<sup>157</sup> *being jointly opposed*, after a single reading of such Bill by each House, the Prime Minister, or in the case of a Private Members’ Bill, the Presidents of the two Houses acting

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152. Jean-Louis Hérin, *Article 44*, in *La Constitution de la République française: Analyses et commentaires*, at 1064, 1077. See also Pierre Avril & Jean Gicquel, *Le droit parlementaire* 195-96 (4<sup>th</sup> ed. 2010).

153. *Balladur Report*, *supra* note 21, at 77. Vice Chairman Jack Lang dissented. He recommended the abrogation of the single vote procedure of article 44(3). *Id.* at 187.

154. 1958 Const. art. 44(3).

155. See generally Georges Bergougnous, *Article 45*, in *La Constitution de la République française: Analyses et commentaires*, at 1087, 1094-98. See also Pierre Avril & Jean Gicquel, *Le droit parlementaire* 217-18 (4<sup>th</sup> ed. 2010).

156. *Balladur Report*, *supra* note 21, at 77-79. The amendment as subsequently adopted differed in certain respects from the *Report’s* proposal.

157. The Conference of Presidents of each respective house is composed of its president, vice presidents, presidents of standing committees, the *Rapporteur général* of its Finance Committee, the president of each party group, and the president of its European Affairs committee.

jointly, may convene a joint committee, composed of an equal number of members from each House, to propose a text on the provisions still under debate. (emphasis supplied)

## 2. Improvement of the Legislative Process

The Balladur Commission made a number of proposals for constitutional amendments to improve the legislative process: (i) better preparation of the law (requiring impact studies, opinions of the Council of State, pre-enactment involvement of the Constitutional Council, and the expanded use of programming acts); (ii) the “modernization” of the right of amendment; (iii) improving parliamentary consideration of proposed legislation; and (iv) enhancing the role of parliamentary committees.<sup>158</sup> Following up on some of these recommendations, but not all, the 2008 amendments expanded Parliament’s competence to enact programming acts,<sup>159</sup> increased the number of permanent committees in each house from six to eight,<sup>160</sup> and stipulated that debate on bills in plenary session is, with certain stated exceptions, to begin with the committee text (rather than the Government’s text, as had been the case before).<sup>161</sup>

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158. *Balladur Report*, *supra* note 21, at 80-85.

159. The only proposal in this category that was adopted was to expand Parliament’s authority to enact programming acts (*lois de programmation*) which previously had been restrictively construed by the Constitutional Council. See, e.g., *Avenir de l’École* [Future of the School], CC decision no. 2005-512 DC, Apr. 21, 2005, Rec. 72. Programming acts are statutes which establish qualitative or quantitative objectives for governmental action, although they do not necessarily have normative effect. Article 34 now reads: “Programming Acts shall determine the objectives of the action of the State.” Before the 2008 amendment, article 34 authorized programming acts only with respect to “economic and social actions of the State.” The following sentence was also added to article 34: “The multiannual guidelines for public finances shall be established by Programming Acts. They shall be part of the objective of balanced accounts for public administrations.” See Juliette Gaté & Marie-Laure Gély, *Article 34*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 879, 887 (indicating that the amendment to article 34 now provides a constitutional basis for program laws). But such legislation must, in most cases, be submitted to the Economic, Social, and Environmental Council before enactment. (“Any plan or Programming Bill of an economic, social or environmental nature shall be submitted to it for its opinion.” 1958 Const. art. 70). See also *Avenir de l’École* [Future of the School], *id. considérant* 14.

160. 1958 Const. art. 43.

161. 1958 Const. art. 42.

### 3. Parliamentary Power of Oversight and Assessment of Governmental Action

One of the principal thrusts of the 2008 amendments was to improve Parliament's capacity to oversee, to evaluate, and to express its views with respect to Government action. To this end, the 2008 amendments add language to article 24 to constitutionalize Parliament's supervisory role: "It [Parliament] shall monitor the action of the Government. It shall assess public policies."<sup>162</sup> Other 2008 additions to the Constitution provide Parliament with the means to better carry out this function. New article 47-2 provides for the assistance of the *Cour des comptes* to Parliament:

The *Cour des Comptes* shall assist Parliament in monitoring Government action. It shall assist Parliament and the Government in monitoring the implementation of Finance Acts and Social Security Financing Acts, as well in assessing public policies. By means of its public reports, it shall contribute to informing citizens.

The accounts of public administrations shall be lawful and faithful. They shall provide a true and fair view of the result of the management, assets and financial situation of the said public administrations.<sup>163</sup>

New article 51-1 allows Parliament to constitute committees of inquiry:

In order to implement the monitoring and assessment missions laid down in the first paragraph of article 24, committees of inquiry may be set up within each House to gather information, according to the conditions provided for by statute.

Thanks to new article 34-1, Parliament may now adopt resolutions. Its ability to do so had previously been limited by a decision of the Constitutional

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162. 1958 Const. art 24. See also François Colly, *Article 24*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 677-85.

163. 1958 Const. art. 47-2. See also *Loi organique relative aux lois de finances* [Institutional Act on Finance Laws], CC decision no. 2001-448 DC, July 25, 2001, Rec. 99 (which had previously limited Parliament's ability to rely on assistance from the *Cour des comptes*). The *Cour des comptes* is an administrative court, which exercises supervision over public expenditures, from the annual budget enacted by Parliament to the expenditures of public authorities and local administrative units. It also reviews decision of the twenty-four *Chambres régionales des comptes* and the six *Chambres territoriales des comptes*. Its decisions may be appealed to the Council of State. Before the 2008 addition of article 47-2, the *Cour des comptes* was limited to advising Parliament only with respect to finance laws. See generally Rémi Pellet, *Article 47-2*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1191.

Council holding that the responsibility of the Government could only be raised pursuant to the conditions and procedures of articles 49 and 50, and that resolutions calling for the implementation or disapproval of certain policies were in effect challenges to the government.<sup>164</sup> New article 34-1 reads:

The Houses of Parliament may adopt resolutions according to the conditions determined by the Institutional Act.

Any draft resolution, whose adoption or rejection would be considered by the Government as an issue of confidence, or which contained an injunction to the Government, shall be inadmissible and may not be included on the agenda.<sup>165</sup>

The 2008 amendments also significantly increase the involvement of Parliament in European policy and in foreign and defense policy. Article 88-4, as amended, provides for the creation of a European Affairs Committee in each house and allows Parliament to enact resolutions pertaining to European policy (by deleting language limiting parliamentary competence only to European measures of a “legislative nature”). Article 88-4, as amended, now provides:

The Government shall lay before the National Assembly and the Senate drafts of European legislative Acts as well as other drafts of or proposals for Acts of the European Union as soon as they have been transmitted to the Council of the European Union.

In the manner laid down by the rules of procedure of each House, European resolutions may be passed, even if Parliament is not in session, on the drafts or proposals referred to in the preceding paragraph, as well as on any document issuing from a European Union Institution.

A committee in charge of European affairs shall be set up in each parliamentary assembly.

The following language was added to article 35, whose first paragraph provides that “A declaration of war shall be authorized by Parliament”:

The Government shall inform Parliament of its decision to have the armed forces intervene abroad, at the latest three days after the beginning of said

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164. *Règlement de l'Assemblée nationale* [National Assembly Rules], CC decision no. 59-2 DC, June 17, 18 and 24, 1959, Rec. 58.

165. 1958 Const. art. 34-1. *Loi organique relatif à l'application des articles 34-1, 39 et 44 de la Constitution* [Institutional Act on the Application of Articles 34-1, 39, and 44 of the Constitution], CC decision no. 2009-579 DC, Apr. 9, 2009, Rec. —, J.O., Apr. 16, 2009, at 6530 (no. 2).

intervention. It shall detail the objectives of the said intervention. This information may give rise to a debate, which shall not be followed by a vote. Where the said intervention shall exceed four months, the Government shall submit the extension to Parliament for authorization. It may ask the National Assembly to make the final decision.

If Parliament is not sitting at the end of the four-month period, it shall express its decision at the opening of the following session.

#### 4. The Opposition

Since the Government and the National Assembly are controlled by the same political party or a coalition of parties with the same basic political orientation, the opposition party in Parliament must be able to play a significant role in the work of the Parliament if Parliament itself is to be much more than a mere rubberstamp for the Government and to play a significant political role, especially in overseeing the operation of the Government. According to the *Balladur Report*:

All of the preceding proposals pursue the same objective: the emancipation of the Parliament. That will be attained only if the prerogatives accorded to it benefit all parliamentarians, and not solely those who support the action of the Government.

The thinking of the Commission on this question has been guided by one constant concern: to recognize a more important role for the opposition, allowing it also to play a more responsible role, removed from the sterility of general criticisms which cast discredit on political discourse.<sup>166</sup>

The 2008 amendments add a paragraph to article 4 of the Constitution which deals with political parties: “Statutes guarantee the pluralistic expression of opinions and the equitable participation of political parties and groups in the democratic life of the Nation.” This provision, implementing the principle

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166. *Balladur Report*, *supra* note 21, at 128. The *Warsmann Report*, *supra* note 42, is equally emphatic about the importance of recognizing and empowering the parliamentary opposition. “The real separation of powers [today] is not to be sought between the Parliament and the Government, but between the majority and the opposition.” *Id.* at 55. “The opposition has to accept that the majority was put in place to enact its policies into law. On the other hand, the majority has to admit that monitoring is the function of the opposition. The minority must be allowed to participate equally in the responsibility for the activities of supervision. To recognize to the opposition its rightful place implies a sort of ‘affirmative action’ (*discrimination positive*) on its behalf, which is difficult to formalize.” *Id.* at 57.

of pluralism recognized in several decisions of the Constitutional Council,<sup>167</sup> besides recognizing the constitutional status of minority political parties, is intended to reinforce their rights to public financing and to equitable access to the media.<sup>168</sup>

The 2008 amendments also add a new article, 51-1: “The Rules of Procedure of each House shall determine the rights of the parliamentary groups set up within it. They shall recognize that opposition groups in the House concerned, as well as minority groups, have specific rights.” This provision, which constitutionalizes the rights of the opposition, was necessary because of a 2006 decision of the Constitutional Council, based on the principle of equality, which disapproved of any distinction in parliamentary rules between members of majority and opposition parties.<sup>169</sup>

#### *D. New Rights for Citizens (des droits nouveaux pour les citoyens)*

The *Balladur Report* proposed amendments to the Constitution to recognize, define, and constitutionalize three categories of “new rights for citizens”: political rights—the right of citizens to be represented in the diversity of their opinions, consulted by reason of their situation and their interests, and listened to when they express themselves; legal rights—the right to a system of justice more accessible to the people and more protective of their freedoms; and fundamental rights—the right of the people to have access to the Constitutional Council to protect their fundamental rights.<sup>170</sup>

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167. *Entreprises de presse* [Press Law], CC decision no. 84-181 DC, Oct. 10-11, 1984, Rec. 73; *Loi relative à la liberté de communication audiovisuelle* [Freedom of Audiovisual Communication], CC decision no. 86-217 DC, Sept. 18, 1986, Rec. 141.

168. Jean-Jacques Israël, *Article 4*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 218, 224.

169. *Résolution modifiant le règlement de l'Assemblée nationale* [National Assembly Rules], CC decision no. 2006-537, June 22, 2006, Rec. 67. See also Charles Reiplinger, *Article 51-1*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1280, 1284. See also Pierre Avril & Jean Gicquel, *Le droit parlementaire* 97-98 (4<sup>th</sup> ed. 2010).

170. *Balladur Report*, *supra* note 21, at 135-36.

## 1. Political Rights

Parliament should better reflect the views of the people. To this end, the *Balladur Report* proposed adding an element of proportionality (about 20-30 seats) to elections for the National Assembly. This proposal, along with a proposal to better balance the size of Senate districts, was not accepted. The 2008 amendments did include, however, an addition to article 25, which requires an independent commission to publicly evaluate legislation to delimit electoral districts and the distribution of seats for the National Assembly. Article 25(3) reads:

An independent commission, whose composition and rules of organization and operation shall be set down by statute, shall express an opinion, by public announcement, on the Government and Private Members' Bills defining the constituencies for the election of members of the National Assembly, or modifying the distribution of the seats of members of the National Assembly or of Senators.

The *Balladur Report* also proposed enhancing the role and representativeness of the Economic and Social Council. The Economic and Social Council, now called the Economic, Social and Environmental Council (ESEC) after the 2008 amendments, was conceived as a consultative body composed of representatives of the economic and social activities of French society.<sup>171</sup> The 2008 amendments recognize the equal status of environmental considerations. The ESEC can now be seized by Parliament as well as by petition (before the 2008 amendments, it could be seized only by the Government).<sup>172</sup> The institutional act on the ESEC enumerates the economic and social sectors from which ESEC members are selected.<sup>173</sup>

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171. See generally Alexandre Gohier del Re, *Titre XI (Le Conseil économique, social et environnemental)*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1631. See also J. Frayssinet, *Le Conseil économique et social* (La Documentation française, 1996); P. Rosanvallon, *Le modèle politique français: la société civile contre le jacobinisme de 1789 À nos jours* (2004).

172. "This profoundly innovative development [seizure of the CSEC by petition], after it will have been implemented, will lead to the introduction of a dose of direct, participatory democracy in the modes of seizing the council." Alexandre Gohier de Re, *id.* at 1648.

173. *Ordonnance no. 58-1360 du 29 décembre 1958 portant loi organique relative au Conseil économique et social* (as last modified by article 17 of institutional act no. 2000-294 of April 5, 2000, J.O., Apr. 6, 2000. Article 7 of the *Ordonnance* enumerates 10 categories of members: 69 employee representatives, 69 representatives from enterprises (27 from private sector enterprises, 10 from trades enterprises, 10 from public sector enterprises, 25 from agricultural enterprises),

To increase direct democracy, the Constitution was amended to allow a referendum to be held on the initiative of citizens. In order to not undercut parliamentary authority, however, the support of one-fifth of parliamentarians was made necessary.<sup>174</sup>

A referendum concerning a subject mentioned in the first paragraph [the organization of the public authorities, or with reforms relating to the economic or social policy of the Nation, and to the public services contributing thereto, or which provides for authorization to ratify a treaty which, although not contrary to the Constitution, would affect the functioning of the institutions] may be held upon the initiative of one fifth of the members of Parliament, supported by one tenth of the voters enrolled on the electoral lists. This initiative shall take the form of a Private Members' Bill and may not be applied to the repeal of a legislative provision promulgated for less than one year.<sup>175</sup>

## 2. Legal Rights: The Justice System

Concern for the independence of the judiciary from the influence of the executive authority,<sup>176</sup> and also for its competence,<sup>177</sup> led to the amendment of

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3 from the liberal professions, 10 from agricultural insurance and credit cooperatives, 5 from non-agricultural cooperatives, 4 from non-agricultural insurance cooperatives, 17 from social activities (including 10 from family associations, one from the housing sector, one from the savings sector, and five from other associations), 9 from the economic and social activities of the departments, territories, and overseas territories, 2 from Frenchmen living outside of France, and 4 experts in the social, economic, scientific, or cultural domains. *Balladur Report, supra* note 1, at 144-45, recommended revising ESEC membership to better reflect the contemporary economic, social, and environmental interests, activities, and groups in the country.

174. *Balladur Report, supra* note 21, at 146-47.

175. 1958 Const. art. 11(3). See Gérard Conac & Jacques Le Gall, *Article 11, in* La Constitution de la République française: Analyses et commentaires, *supra* note 1, at 402, 410-12.

176. For example, the question of the independence of the judicial authorities from political influence was dramatically at issue during the so-called Clearstream affair, which captivated the French media from 2004 and is still ongoing. Former Prime Minister and Minister of the Interior Dominique de Villepin was accused of complicity in falsely accusing his political rival Nicolas Sarkozy of involvement in financial wrongdoing. When Villepin was acquitted in January 2010, the public prosecutor appealed the verdict, giving rise to the suspicion that he did so on orders from President Sarkozy. *Affaire Clearstream: le gouvernement face au soupçon*, *Le Monde*, Jan. 31, 2010.

177. Concern and outrage with respect to judicial competence resulted from the so-called Outreau affair, a high-profile investigation and prosecution, that went on from 2001 through 2005, of 18

article 65 of the Constitution dealing with the High Council of the Judiciary.<sup>178</sup> Article 64, however, which makes the president responsible for guaranteeing the independence of the judiciary and provides that the High Council assists him in this task, was not amended; but article 65 was amended to delete the provision that the president presides over the High Council. That article, as amended, now divides the High Council into two bodies, one with authority over judges (*magistrats du siège*) and the other with authority over public prosecutors (*magistrats du parquet*). The Chief President of the Court of Cassation presides over the first body, and the Chief Public Prosecutor at the Court of Cassation over the second. Each section of the High Council is responsible for making recommendations on appointments (judicial or prosecutorial) and for handling disciplinary matters.<sup>179</sup> In addition to freeing the High Council from political influence, the Balladur Commission also wanted to do away with the “corporatism” of which the Council was often accused.<sup>180</sup> To that end article 65 now provides that each section of the High Council is to include six prominent qualified persons who are not members of Parliament or of the judicial or administrative orders.<sup>181</sup> Two of these persons are to be appointed by the

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people for pedophilia and incest based on the testimony of one adult witness (who later admitted when the case was on appeal that she had lied), the unreliable testimony of young children, and questionable psychiatric evidence. The accused were kept in custody from one to three years awaiting trial, and one accused person committed suicide while being held. The cause of the problem was apparently the inexperience and poor judgment of the investigating magistrate (*juge d'instruction*), a recent graduate of the *École de la Magistrature*. President Jacques Chirac called the proceedings a judicial disaster (*catastrophe judiciaire*) and Yves Bot, Chief Prosecutor in Paris, presented his apologies to the defendants on behalf of the legal system at the time of their acquittal at their second trial before the *Cour d'Assises* of Paris. The Institutional Act on the Recruitment, Training, and Responsibility of Magistrates was enacted to subject magistrates to more rigorous supervision and disciplinary rules and procedures. That act was considered by the Constitutional Council, which held that certain provisions were contrary to the Constitution on the ground that they compromised the independence of judges. *Loi organique relative au recrutement, à la formation et à la responsabilité des magistrats* [Institutional Act on the Recruitment, Training, and Responsibility of Magistrates], CC decision no. 2007-551 DC, Mar. 1, 2007, Rec. 86.

178. 1958 Const. art. 64 provides: “The President of the Republic shall be the guarantor of the independence of the Judicial Authority. – He shall be assisted by the High Council of the Judiciary.” The *Balladur Report* recommended that the second sentence of article 64 be deleted in recognition of the principle that the High Council was an independent body and was not an instrument of the president in supervising the judiciary. *Balladur Report*, *supra* note 21, at 160. Article 64, however, was not so amended.

179. See Gilbert Mangin, *Article 65*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1522, 1544-51.

180. *Balladur Report*, *supra* note 21, at 156.

181. Each section has fifteen members. The judges section is composed of the Chief President of

president of the Republic, two by the president of the National Assembly, and two by the president of the Senate. These appointments are specifically made subject to the article 13(5) appointment procedure. An important addition to article 65 is the provision allowing a litigant to refer a complaint to the High Council.<sup>182</sup> The conditions for the application of this provision are to be determined by an institutional act.<sup>183</sup> The institutional act to implement article 65 was promulgated by the president of the Republic in July 2010, after it had been found by the Constitutional Council to conform to the Constitution.<sup>184</sup>

### 3. Fundamental Rights<sup>185</sup>

Perhaps the 2008 amendment that will ultimately have the most long term significance is new article 61-1, which provides:

If, during proceedings in progress before a court of law, it is claimed that a legislative provision infringes the rights and freedoms guaranteed by the

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the Court of Cassation, five judges, one public prosecutor, one member of the Council of State, one lawyer, and six prominent qualified persons. The public prosecutors section is composed of the Chief Public Prosecutor of the Court of Cassation, five public prosecutors, one judge, one member of the Council of State, one lawyer, and six prominent qualified persons.

182. See Gilbert Mangin, *supra* note 171, at 1551-52.

183. 1958 Const. art. 65(11).

184. *Loi organique relative à l'application de l'article 65 of the Constitution* [Institutional Act on the Application of Article 65 of the Constitution], CC decision no. 2010-611 DC, July 19, 2010, Rec. —, J.O., July 23, 2010, at 13583 (no. 4).

185. The Balladur Commission considered whether or not to recommend amending the preamble to resolve conflicts between the principles contained by reference therein (the Declaration of Rights of Man and the Citizen and the preamble to the Constitution of 1946) and also whether to specifically recognize new principles and rights (like human dignity). It decided not to do so. *Balladur Report*, *supra* note 21, at 165-67. Subsequently, President Sarkozy appointed a commission to study the question of amending the preamble. Décret no. 2008-328 du 9 avril 2008 portant création d'un comité de réflexion sur le Préambule de la Constitution, J.O., Apr. 10, 2008 (no. 1). The Commission concluded that modification of the preamble was not necessary, as existing law, interpreted by the Constitutional Council and the judicial and administrative courts, adequately protected fundamental rights. The Commission did suggest, however, that it may be desirable to add a reference to the principle of human dignity to the preamble (“*un principe d'égalité de dignité de chacun*”) “to bring the text of the Constitution more into line with the spirit of the values to which the nation is most fundamentally committed since the end of the Second World War...” Comité de réflexion sur le Préambule de la Constitution, présidé par Simone Veil, *Rapport au Président de la République, Redécouvrir le Préambule de la Constitution* 97 (La Documentation française, 2009).

Constitution, the matter may be referred by the *Conseil d'Etat* or by the *Cour de Cassation* to the Constitutional Council which shall rule within a determined period. An Institutional Act shall determine the conditions for the application of the present article.<sup>186</sup>

Parliament enacted the institutional act to implement article 61-1 in November 2009,<sup>187</sup> and the Constitutional Council held that the act conformed to the Constitution in early December.<sup>188</sup> The institutional act to implement article 61-1 was promulgated on December 10, 2009, and entered into force on March 1, 2010.

Article 61-1 represents a radical change in French constitutional law, as it allows for a judicial authority to find an act of Parliament unconstitutional even though that act has already entered into force. One of the fundamental political principles that emerged during the revolutionary era, became a core element of the “Republican tradition” during the nineteenth century, and later

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186. 1958 Const. art. 61-1. *See generally* Dominique Rousseau (ed.), *La question prioritaire de constitutionnalité* (2010); Valérie Bernaud, *Article 61-1*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1280.

[T]he QPC entered into application on March 1, 2010. Incontestably a new era is opening. For at least three reasons. First, with *a priori* review constitutional adjudication is restricted by the procedure for the elaboration of the law; with *a posteriori* review it becomes integrated into general adjudication. It is an integral part of the judicial or administrative trial and a determinative part since the outcome of the trial depends on it. This change of position will necessarily have the effect of submitting constitutional adjudication to the requirements of the rules of due process and of completing the transformation of the Constitutional Council into a true court. Also, the responsibility of judicial and administrative judges to assure the “filtration” of constitutional questions is not only going to oblige them to undertake a preliminary constitutional analysis in order to determine whether the question raised is serious or not, but also will establish an organic link between the supreme courts of the two judicial orders [the Council of State and Court of Cassation] and the Constitutional Council. Eventually, the French legal landscape may find itself profoundly changed. Finally, the Constitution will become, as the Constitutional Council said in its decision of December 3, 2009, a “means.” For a long time, the Constitution was a neglected text; during the 1980s and still more during the 1990s, it became an object of study, of academic theses, of conferences; today, the Constitution is becoming a means for the litigant to defend his rights against the law. *The Constitution is leaving the University to capture (gagner) the courts.*

187. Dominique Rousseau, *id.* at 3 (emphasis in original).

*Loi organique no. 2009-1523 du 10 décembre 2009 relative à l'application de l'article 61-1 de la Constitution* [Institutional Act on the Application of Article 61-1 of the Constitution], J.O. Dec. 11, 2009.

188. *Loi organique relative à l'application de l'article 61-1 de la Constitution* [Institutional Act on the Application of Article 61-1 of the Constitution, CC decision no. 2009-595, Dec. 3, 2009, Rec. —, J.O., Dec. 11, 2009, at 21381 (no. 2)].

became the dominant principle of legal/political thinking with the definitive triumph of republicanism in the last quarter of that century and the years that followed, was the sanctity of the law (*la loi*), which had come to mean the statutes enacted by Parliament. Adopting the concept from Jean-Jacques Rousseau's *The Social Contract* of 1762, article 6 of the Declaration of the Rights of Man and the Citizen of 1789 states: "The Law is the expression of the general will." According to Rousseau, the general will, and hence the law which expresses it, is the authentic expression of national sovereignty. As such, it is, according to Rousseau, "indivisible," "inalienable," "illimitable," and "infallible." While Rousseau maintained that the general will could not be represented (e.g., by representatives elected to a legislative body), later theorists maintained that the general will could be represented, and in fact resided in Parliament.<sup>189</sup> To allow non-elected judges to invalidate or not apply an act of Parliament was totally incompatible with this view that the sovereign will of the people is in effect expressed by laws enacted by Parliament.<sup>190</sup>

The Constitutional Council as originally conceived in 1958 had a limited number of tasks: principally overseeing the regularity of referenda<sup>191</sup> and presidential elections,<sup>192</sup> deciding National Assembly and Senate election disputes,<sup>193</sup> deciding whether an international agreement contains anything contrary to the Constitution (in which case the agreement could not be ratified or approved until the Constitution was amended),<sup>194</sup> passing on the constitutionality of institutional acts and the standing rules of the houses of Parliament,<sup>195</sup> and passing on the constitutionality of any act of Parliament if referred to the Council by certain designated officials (the president of the Republic, the prime minister, the president of the National Assembly or Senate), or (after a 1974 amendment) sixty senators or sixty deputies.<sup>196</sup> With respect to the review of

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189. Sieyès, *Qu'est-ce que le Tiers État?* (1789); Raymond Carré de Malberg, *La loi, expression de la volonté générale* (1931).

190. This theoretical view of the law expresses French hostility to what is pejoratively called "the government of judges" (*le gouvernement des juges*). This hostility has its roots in the conservative role played by French judges during the old regime, when for the benefit of the aristocracy they opposed royal attempts at reform, John P. Dawson, *Oracles of the Law* (1968), and the later perception that judicial review exercised by a conservative judiciary was a means of nullifying progressive social and economic legislation. Édouard Lambert, *Le gouvernement des juges*, *supra* note 19.

191. 1958 Const. art. 60.

192. 1958 Const. art. 58.

193. 1958 Const. art. 59.

194. 1958 Const. art. 54.

195. 1958 Const. art. 61(1).

196. 1958 Const. art. 61(2). The Constitutional Council also has the competence to decide

institutional acts, ordinary laws, and parliamentary rules, the clear intent of the framers of the Constitution was to devise a procedure to assure that the constitutional division of authority between the executive power (the Government) and the legislative power (the Parliament) was rigorously enforced. The enforcement of this division of authority was crucial to the success of the *parlementarisme rationalisé* that lay at the foundation of the political organization of the Fifth Republic.

In 1971, however, the Constitutional Council, in a decision that is often compared with the United States Supreme Court's decision in *Marbury v. Madison*,<sup>197</sup> decided that it could review parliamentary enactments for their conformity to substantive provisions of the Constitution (not just provisions dealing with allocation of competence between the executive and legislative branches or those dealing with matters of legislative procedure). In that decision, the Council also held that the preamble to the 1958 Constitution was positive law, containing provisions of constitutional status (*valeur constitutionnelle*) that it could apply in assessing the constitutionality of legislation. That decision significantly augmented the substantive content of the Constitution, as the 1958 preamble makes specific reference to the Declaration of Rights of Man and the Citizen of 1789 (which contains seventeen articles enumerating a variety of political and civil rights) and the preamble to the 1946 Constitution (which proclaims, "as being especially necessary to our times" sixteen "political, economic and social principles"). In addition, the 1946 preamble contains a reference to "fundamental principles recognized by the laws of the Republic," which the Council held in its 1971 decision to be another source of law with constitutional status.

In recognition of the original intent underlying review of laws by the Constitutional Council, which was to assure that Parliament did not encroach on the sphere of executive rule-making competence or its procedural prerogatives in the legislative process, the 1958 Constitution as originally adopted provided that ordinary laws could be referred to the Council by only four officials: the president of the Republic, the prime minister, the president of the Senate, and the president of the National Assembly. In 1974 the Constitution was amended

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whether a matter proposed to be enacted as a law is "regulatory" in nature and therefore could not be enacted by Parliament. 1958 Const. art. 41. The purpose of this provision is to prevent Parliament from encroaching on the executive's autonomous regulatory authority, as defined in 1958 Const. art. 37. Also, 1958 Const. art. 37(2) allows the Government to petition the Constitutional Council to "delegalize" legislation in force that is regulatory in nature, so that these matters can be dealt with by executive decree.

197. See, e.g., George D. Haimbaugh, Jr., *Was It France's Marbury v. Madison?*, 35 Ohio St. L.J. 910 (1974).

to allow sixty deputies or sixty senators to refer enacted laws (but before their promulgation and entry into force) to the Council. But, and it is important to stress, Council review took place, and was constitutionally required to take place, before the law entered into force. So in determining that a referred law did not conform to the Constitution, and therefore could not be promulgated or applied,<sup>198</sup> the Council was not invalidating an act of Parliament, and could in fact be regarded as advising or “counseling” Parliament that the law, or part(s) of it, had to be amended before it could enter into force.<sup>199</sup>

The addition of article 61-1 to the Constitution in 2008 is revolutionary in two respects: first, it allows an individual litigant to raise a question of constitutionality before the Constitutional Council (albeit indirectly); and second, it allows the Constitutional Council to rule on the constitutionality of a law already in force and to invalidate it. Article 62(2) prescribes the legal effect of a declaration of unconstitutionality pursuant to article 61-1:

A provision declared unconstitutional on the basis of article 61-1 shall be repealed as of the publication of the said decision of the Constitutional Council or as of a subsequent date determined by said decision. The Constitutional Council shall determine the conditions and the limits according to which the effects produced by the provision shall be liable to challenge.

The institutional act to implement article 61-1<sup>200</sup> provides that a litigant

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198. 1958 Const. art. 62(1).

199. See generally Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (1992).

200. The Constitutional Council held that the institutional act conformed to the Constitution (with three minor interpretative reservations). *Loi organique relative à l'application de l'article 61-1 de la Constitution* [Institutional Act on the Application of Article 61-1 of the Constitution], CC decision 2009-595 DC, Dec. 10, 2009, Rec. —, J.O., December 11, 2009, at 21381 (no. 2). The act entered into force on March 1, 2010. The act reads, in relevant part:

Chapter II *bis* – Priority Question of Constitutionality

Section 1 – Provisions applicable before tribunals coming within the jurisdiction of the Council of State or the Court of Cassation

*Article 23-1.* Before tribunals coming within the jurisdiction of the Council of State or Court of Cassation, the objection that a legislative provision infringes on rights and freedoms guaranteed by the Constitution shall be admissible only if presented by a written petition with reasons stated. Such objection may be raised for the first time on appeal. It cannot be raised *ex officio*.

(...)

Such ground may not be raised before an Assize Court (*Cour d'assises*). In case of an appeal from the decision of an Assize Court of first instance, it may be raised in a written statement accompanying the petition of appeal. This petition shall be transmitted immediately to the Court of Cassation.

*Article 23-2.* The tribunal shall decide promptly by a reasoned decision on the transmission of

the priority question of constitutionality to the Council of State or to the Court of Cassation. It shall make such transmission if the following conditions are satisfied:

1. The challenged provision is applicable to the litigation or to its procedure, or constitutes the basis of the prosecution;

2. It has not been declared to conform to the Constitution by the reasoning or the disposition of a decision of the Constitutional Council, unless there is a change of circumstances;

3. The question presented is not devoid of a serious character.

In any case, the tribunal shall, when seized with a petition challenging the conformity of a legislative provision to the rights and freedoms guaranteed by the Constitution or to the international obligations of France, decide with priority on the transmission of the question of constitutionality to the Council of State or to the Court of Cassation...

The decision to transmit the question is addressed to the Council of State or the Court of Cassation within eight days of its pronouncement, along with the *mémoires* or the *conclusions* of the parties. It is not subject to appeal. The refusal to transmit the question may only be challenged on the appeal of the decision of all or part of the case.

*Article 23-3.* When the question is transmitted, the tribunal shall stay its decision until it receives the decision of the Council of State or of the Court of Cassation, or, if it is seized, of the Constitutional Council...

*Section 2 – Provisions applicable before the Council of State or the Court of Cassation*

*Article 23-4.* The Council of State or the Court of Cassation shall render a decision on the referral of the priority question of constitutionality within three months from the receipt of the transmission... It shall consider the referral if the conditions stipulated in 1, 2, and 3 of article 23-2 are fulfilled and if the question is new or presents a serious character.

*Article 23-5.* The objection that a legislative provision violates the rights and freedoms guaranteed by the Constitution may be raised, even for the first time on appeal, in a proceeding before the Council of State or the Court of Cassation. The objection shall be admissible only if presented by a separate petition with reasons stated. It cannot be raised *ex officio*.

In any case, the Council of State or the Court of Cassation shall, when seized with a petition challenging the conformity of a legislative provision to the rights and freedoms guaranteed by the Constitution or to the international obligations of France, decide with priority on the transmission of the question of constitutionality to the Constitutional Council.

The Council of State or the Court of Cassation shall render its decision within three months from the time of the presentation of the objection. The Constitutional Council may be seized of the priority question of constitutionality if the conditions stipulated in 1 and 2 of article 23-2 are fulfilled and if the question is new or presents a serious character.

(...)

*Section 3 – Provisions applicable before the Constitutional Council*

*Article 23-8.* The Constitutional Council shall, when seized in application of the provisions of this chapter, immediately inform the President of the Republic, the Prime Minister, and the Presidents of the National Assembly and the Senate. These persons may present their observations to the Constitutional Council on the priority question of constitutionality which has been submitted to it.

*Article 23-9.* When the Constitutional Council has been seized with a priority question of constitutionality, the termination, for whatever reason, of the proceeding which was the occasion for raising the question shall not affect the examination of the question.

in the ordinary court system or in the administrative court system may request the court to refer a question of the constitutionality of a law in force to the Constitutional Council. Such referral can be made only by the highest court in each system: the Council of State for the administrative court system or the Court of Cassation for the ordinary judicial system. This procedure is called the “priority question of constitutionality” (*question prioritaire de constitutionnalité*, or QPC).<sup>201</sup> The institutional act contains certain conditions that must be satisfied for a referral by the Court of Cassation or the Council of State: as summarized by the Council of State in one of its first referrals, “the Constitutional Council may be seized of the priority question of constitutionality on the triple condition that the contested provision is applicable in the litigation or to the procedure, that it has not already been declared to conform to the Constitution by the reasoning or the disposition of a decision of the Constitutional Council, unless there is a change of circumstances, and that it is a question of first impression or is not devoid of a serious character.”<sup>202</sup> The Council rendered its first QPC decision on May 28, 2010.<sup>203</sup> In that decision it held that certain provisions of a few finance laws dealing with military retirement pensions did not conform to the Constitution because they contravened the principle of equality contained in article 6 of the Declaration of 1789.<sup>204</sup> Article 23-10 of the institutional act on the QPC provides that “[t]he parties may present their opposing observations [before the Constitutional Council]. The hearing shall be open to the public...” Allowing formal presentations by attorneys for the parties and requiring that these sessions be open to the public are innovations in the Council’s procedure intended to increase the access and participation of private parties and to enhance transparency.<sup>205</sup>

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*Article 23-10.* The Constitutional Council shall render its decision within three months after being seized. The parties may present their opposing observations. The hearing shall be open to the public, except in exceptional cases, as determined by the internal rules of the Constitutional Council.

Institutional Act 2009-1523 of December 10, 2009 on the Application of Article 61-1 of the Constitution, J.O., Dec. 11, 2009.

201. On the QPC, see Dominique Rousseau (ed.), *La question prioritaire de constitutionnalité* (2010).

202. *Mme L.* [Mrs. L.], Council of State, decision no. 329290, Apr. 14, 2010, Rec. Lebon —.

203. *Consorts L.* [Mr. and Mrs. L.], CC decision no. 2020-1 QPC, May 28, 2010, Rec. —, J.O., May 29, at 9728 (no. 67).

204. *Id.*

205. Attorneys’ presentations before the Constitutional Council in QPC proceedings can be viewed on the website of the Constitutional Council. To view videos of QPC proceedings, see <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/videos/toutes-les-videos.48281>.

The Balladur Commission proposed that article 56, dealing with the composition of the Constitutional Council, be amended to eliminate former presidents of the Republic as *ex officio* members of the Council in order “to reinforce the judicial mission assigned to the Constitutional Council.”<sup>206</sup> The Commission’s *Report* pointed out that former presidents usually remain active in political life and that such activity was incompatible with service on a judicial body. Parliament, however, did not accept the Commission’s recommendation, and former presidents continue to serve on the Council.<sup>207</sup>

Another significant 2008 amendment intended to protect fundamental rights is the addition of new article 71-1, which established the constitutional office of the Defender of Rights (*le Défenseur des droits*).<sup>208</sup> The principal function of the Defender of Rights is to assure that constitutional rights and protections of individuals are recognized and implemented by administrative authorities. The Defender of Rights replaces the Mediator of the Republic, an office which did not have constitutional status. Article 71-1 provides:

The Defender of Rights shall ensure the due respect of rights and freedoms by state administrations, territorial communities, public legal entities, as well as by all bodies carrying out a public service mission or by those that the Institutional Act decides fall within his remit.

Referral may be made to the Defender of Rights, in the manner determined by an Institutional Act, by every person who considers his rights to have been infringed by the operation of a public service or of a body mentioned in the first paragraph. He may act without referral.

The Defender of Rights is appointed for a non-renewable six-year term by the president of the Republic, subject to the article 13(5) appointment procedure. The *Balladur Report* recommended that the Defender of Rights be able to refer a law not yet promulgated to the Constitutional Council for *a priori* review,<sup>209</sup> but this recommendation was not included in the 2008 amendments.

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html#ancrePresentationQPC. English translations of QPC decisions are also available on the Council’s website. See <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/priority-preliminary-rulings-on-the-issue-of-constitutionality/decisions-of-the-constitutional-council-qpc.48658.html>.

206. *Balladur Report*, *supra* note 21, at 174.

207. See the critical comments of Dominique Schnapper regarding the membership on the Constitutional Council of former presidents of the Republic. Schnapper, *supra* note 1, at 124-25.

208. 1958 Const. art. 71-1. See generally Nathalie Marcon, *Le Défenseur des droits (Article 71-1)*, in *La Constitution de la République française: Analyses et commentaires*, *supra* note 1, at 1682.

209. *Balladur Report*, *supra* note 21, at 179. See also Nathalie Marcon, *id.* at 1684.

New article 71-1 leaves considerable leeway to Parliament to define the position of Defender of Rights and its powers by institutional act.

Besides structural and procedural changes, the 2008 amendments also constitutionalized certain substantive rights. Article 34, among other things, now provides that “Statutes shall determine the rules concerning: civic rights and the fundamental guarantees granted to citizens for the exercise of their civil liberties; *freedom, pluralism and the independence of the media*; the obligations imposed for the purposes of national defense upon the person and property of citizens...” The italicized language was added to assure constitutional status (*valeur constitutionnelle*) to the rights there indicated. An addition to article 1 (indicated in italics), which now reads: “Statutes shall promote equal access by women and men to elective offices and posts *as well as to professional and social positions*,” was made necessary by decisions of the Constitutional Council invalidating certain gender equality law.<sup>210</sup> New article 75-1 recognizes that “Regional languages are part of France’s heritage.”<sup>211</sup> The legal import of this provision is uncertain, as it is imprecise, not contained in the title on sovereignty, and relegated to the back of the Constitution.

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210. *Loi organique relative au statut de la magistrature et au Conseil supérieur de la magistrature* [Institutional Act on the Status of the Judiciary and the High Council of the Judiciary], CC decision no. 2001-445 DC, June 19, 2001, Rec. 63; *Loi relative à l'égalité salariale entre les femmes et les hommes* [Law on Equal Pay for Women and Men], CC decision no. 2006-533, Mar. 16, 2006, Rec. 39.

211. There was a long tradition in France that refused to recognize regional or minority languages. In 1982, however, President Mitterrand declared: “The time has come for a status of the languages and cultures of France which recognizes in them a true existence. The time has come to open the doors of schools, of radio and television in order to allow their diffusion and to give them the place they deserve.” *Quoted in* Dominique Breillat, *The European Charter for Regional or Minority Languages: The French Case*, Paper for the Coimbra-Group Conference “Migration, Minorities, Compensation” in Siena, Italy, March 2001. In 1999, the president of the Republic, pursuant to article 54 of the Constitution, referred to the Constitutional Council the question of whether the ratification of the European Charter for Regional or Minority Languages required amendment of the Constitution. In its decision, the Council indicated that ratification would require amendment. *Charte européenne des langues régionales ou minoritaires* [European Charter for Regional or Minority Languages], CC decision no. 99-412 DC, June 15, 1999, Rec. 71. In July 2008, article 75-1 was added to the Constitution. As of August 1, 2010, France had not ratified the Charter.]

## IV. Conclusion: An Assessment of the 2008 Amendments

The constitutional amendments of 2008 were a major step forward in adapting the French political and legal systems to the twenty-first century. They are not perfect or even complete, but they do represent movement in the right direction. Most importantly, the Balladur Commission as well as Parliament rejected calls for fundamental alterations, either in the direction of a restored parliamentary regime or toward a more pronounced presidentialism.<sup>212</sup> The French tradition, as it has emerged and solidified over the past fifty years, now calls for a mix of the two, or as Jean-Claude Colliard has put it: “a parliamentary regime with a presidential corrective.”<sup>213</sup> Stability and continuity have become overriding considerations. To quote the National Assembly’s Committee on Constitutional Law’s *Warsmann Report*:

To revise, without overturning; to modernize without denying; to adapt, without destroying; these are the principles which must govern our chamber in its constituent work... The present revision is not an end in itself or a sufficient result. It must be seen not only in the general context of a profound reform of the State, but especially as a point of departure for modifications

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212. *Balladur Report*, *supra* note 21, at 10-11; *Warsmann Report*, *supra* note 42, at 37-42. *But see* the point of view of the Socialist Party, as expressed by deputy Arnaud Montebourg, who believes that “in the face of the profound crisis of democracy which the country is experiencing... a thoroughgoing reform of the national political system [is necessary]... The Fifth Republic has a tendency toward authoritarianism or toward personalized power, and has shown itself to be powerless to make durable political compromises permitting the country to resolve its problems.” *Id.* at 74-75. More specifically, the Socialist Party wanted to consider amending the preamble, as suggested in the *Veil Report*, *supra* note 185; it found “unacceptable” the nomination process provided for by 1958 Const. art. 13(5) (concerned with the creation of a “*comité Théodule*” [a term coined by President de Gaulle, that has come to mean a rubberstamp committee]); the changes to the High Council of the Judiciary now in 1958 Const. art. 65 (fearing a “repoliticization” of the Council); allowing the president to appear before the Parliament in person (it is the prime minister who directs the work of Parliament); and the retention of the article 49(3) procedure for enacting legislation. *Id.* at 74-76. “More generally, the proposals of the Socialists seek to combat anything that augments the powers of the executive and to encourage anything that improves the separation and the equilibrium of powers.” *Id.* at 75. Finally, “The opposition wants to reach a compromise which will shake up (*ébranler*) the constitutional history of France by giving a new direction to the Fifth Republic.” *Id.* at 89. In short, the Socialists wanted to make major changes to move France away from the president-dominated regime of the 1958 Constitution toward a parliamentary democracy. Although they found many, if not most, of the proposed amendments unobjectionable, they feared that nothing of substance would really change, or, as the French would say, *plus ça change, plus c’est la même chose*.

213. *Quoted in Warsmann Report*, *supra* note 42, at 41.

which will necessitate adaptation, sometimes substantial, of institutional acts, ordinary law, and the rules of the parliamentary assemblies, and which will allow us to take the exact measure of what the proposed constitutional changes imply... This also implies changes in practices. To quote the aphorism of Royer-Collard, “*Constitutions aren’t tents made for sleeping.*” This also implies changes in practices.<sup>214</sup>

Mainstream thinking has coalesced around a number of evolutionary modifications, as is evinced by the essential similarity of the *Vedel Report* of 1993 and the *Balladur Report* of 2008. The *Warsmann Report* states: “France has exhausted itself in the past in the pursuit of constitutional chimeras”<sup>215</sup> and that it is important to avoid “constitutional adventurism.”<sup>216</sup> The Senate’s Committee on Constitutional Law’s *Hiest Report* echoes this sentiment, opining that the accomplishments of the Fifth Republic must be preserved.<sup>217</sup> Now that France finally has a Constitution that satisfies the broad center of the political spectrum, both structurally and substantively, the task ahead is to build on and deepen the accomplishments since 1958.

Take, for example, *a posteriori* constitutional review of laws at the behest of litigants in judicial or administrative courts. What was once unthinkable for fear of “the government of judges” is now a reality. But the QPC established by the 2008 amendments did not spring full blown from the constituent’s mind at that time. There was slow but steady movement in that direction since the establishment of the Constitutional Council in 1958. The mandatory review of institutional acts and parliamentary rules in the original Constitution of 1958, the *Freedom of Association* decision of 1971 greatly enlarging the judicially cognizable substantive content of the 1958 Constitution, the 1974 amendment allowing opposition parliamentarians to refer a law to the Constitutional Council (and the 1992 amendment allowing parliamentarians to refer a treaty to the Council), review of French laws in force for compliance with the Treaty on the European Union European by the Court of Cassation (as of 1975)<sup>218</sup> and Council of State (as of 1989)<sup>219</sup> and the European Convention for the

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214. *Warsmann Report*, *supra* note 42, at 10.

215. *Id.* at 37.

216. *Id.*

217. *Hiest Report*, *supra* note 11, at 38.

218. *Administration des Douanes v. Sociétés Cafés Jacques Vabre*, Cass. Ch. Mixte, May 24, 1975, D. 1975, 497.

219. *Nicolo*, CE Ass., Oct. 20, 1989, Rec. Lebon 190.

Protection of Human Rights and Fundamental Freedoms<sup>220</sup> all set the stage for the QPC. The QPC, however, does not allow litigants to raise constitutional questions directly in the Constitutional Council, as for example, the German Constitution (*Grundgesetz*) does.<sup>221</sup> Instead, objections to a law in force must be raised by litigants in pending proceedings in judicial or administrative courts, and the question of the constitutionality of the law will then be referred to the Council by the Court of Cassation or Council of State if it meets certain conditions. The Council of State and the Court of Cassation perform, in effect, a door-keeper, or *filtrage*, function.

One might perhaps point to the failure of Parliament to accept the Balladur Commission's proposals to modify articles 5 and 20 to reflect the reality of presidential dominance and the subordinate role played by the prime minister as an example of the failure of the 2008 amendments to better clarify the relationship between the two sources of executive power. But the system now in place has proven its worth in practice; it allows great flexibility for institutional arrangements to adapt or reflect different configurations of political power as they evolve.

The "rebalanced" (*rééquilibrée*) relationship between Parliament and the Government is more problematic. While Parliament has certainly gained powers, prerogatives, and resources to better prepare, enact, supervise, and evaluate legislation, and is less subject to Government domination and control, it still remains to be seen whether these new capabilities will actually translate into Parliament's playing a more active role in the political process. But that said, at least Parliament (including, importantly, the opposition) now has the possibility and the tools to be more assertive in the political arena, if it is willing and able to seize the opportunities available to it.

Since the Revolution of 1789, France has been plagued by the problem of the precariousness of legitimacy of political authority. This has been a destabilizing force and significantly weakens existing institutions. In 1958,<sup>222</sup> and again in 1961,<sup>223</sup> it was eminently conceivable that the republican form of government itself was threatened. And the specter of revolution or radical regime change

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220. Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 Maine L. Rev. 405, 433-69 (2006).

221. Art. 93(1)(4a) GG: "(1) The Federal Constitutional Court shall rule: 4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights... has been infringed by public authority..."

222. See Jean-Jacques Chevallier, Guy Carcassonne & Olivier Duhamel, *La V<sup>e</sup> République, 1958-2001* (9<sup>th</sup> ed. 2001), at 1-8; Duhamel, *supra* note 1, at 385-98.

223. See Jean-Jacques Chevallier, Guy Carcassonne & Olivier Duhamel, *id.* at 65-68.

hung over the events of 1968.<sup>224</sup> Radical regime change is not unthinkable in France, as it would be, say, in the United States. That is perhaps why the presidential election of 2002, when the extreme right-wing candidate Jean-Marie Le Pen was one of the two candidates in the second (final) round of the election, was such a shock to the French political psyche.<sup>225</sup> But radical discontinuity is becoming less and less thinkable today, as French society coalesces more and more around an institutional and values consensus. That consensus has found embodiment in a Constitution that has become an important referent in political life, and with the QPC, will become even more important in the thinking of the entire legal and administrative system as well as that of the average person. As Dominique Rousseau has written, with the QPC “the Constitution is moving out of the universities and into the courts,”<sup>226</sup> and, we may add, into the lives of the French people more generally.<sup>227</sup> It is now poised to embody and symbolize the values of the nation, and as such to act as a powerful unifying force.<sup>228</sup> The slow, organic growth of the institutions and values of the Fifth Republic over time, through political, legal, and customary practice, and the recognition and implementation of that growth by constitutional amendment and interpretation has gradually transformed the Constitution of 1958, from “General de Gaulle’s Constitution” to the Constitution of the French people.<sup>229</sup>

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224. On the events of 1968 and their political significance, see *id.* at 141-56.

225. See Rogoff, *A Sixth French Republic*, *supra* note 24, at 158-59.

226. Dominique Rousseau (ed.), *La question prioritaire de constitutionnalité* 3 (2010).

227. There is virtually no political question in the United States that does not sooner or later resolve itself into a judicial question. Hence the parties in their daily polemics find themselves obliged to borrow the ideas and language of the courts... In a sense the language of the judiciary becomes the vulgar tongue. Thus the legal spirit, born in law schools and courtrooms, gradually spreads beyond their walls. It infiltrates all of society, as it were, filtering down to the lowest ranks, with the result that in the end all the people acquire some of the habits and tastes of the magistrate. Alexis de Tocqueville, *Democracy in America* 310-11 (1835) (Arthur Goldhammer, trans., 2004). See also Jean Carbonnier, *Droit et passion du droit sous la V<sup>e</sup> République* (1996); Martin A. Rogoff, *The French (R)evolution of 1958-1998*, *Colum. J. Eur. L.* 453 (1997/98) (reviewing Jean Carbonnier, *Droit et passion du droit sous la V<sup>e</sup> République*).

228. Martin A. Rogoff, *A Comparison of Constitutionalism in France and the United States*, 49 *Maine L. Rev.* 21, 60-64. available at <http://www.juspoliticum.com/L-histoire-du-concept-de.html>.

229. See generally Olivier Beaud, *L'histoire du concept de constitution en France. De la constitution politique à la constitution comme statut juridique de l'État*, 3 *Jus Politicum* (No. 3, Dec. 2009), available at <http://www.juspoliticum.com/L-histoire-du-concept-de.html>.