

# The Brakes that Failed: Constitutional Restriction of International Agreements in France

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*Can constitutions successfully constrain the exercise of the treaty power? This article examines the French Constitution of 1958 as a case study. The founders of the Fifth Republic drafted provisions intended to protect national sovereignty, as the Gaullists understood that concept, against inroads resulting from international agreements. Looking back fifty years later, it is clear that those protective efforts did not succeed. The sequence of events by which the constraints were loosened or evaded may represent one nation's particular history, but they illustrate the limited capacity of constitutional restrictions to control international commitments in the long term.*

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In 2008, the French Fifth Republic celebrated the fiftieth anniversary of its origin in the Constitution of 1958. That same year, the Republic also adopted a far-ranging set of constitutional amendments that included a significant alteration in its methods of constitutional review. In particular, the distinctive French system in which statutes are subject to review for constitutionality at the moment of their enactment, but cannot later be challenged as unconstitutional once the brief window for review has closed, has been replaced by procedures permitting both *a priori* and post-enactment constitutional review. The short-term and long-term consequences of the 2008 amendments are uncertain, but a new era in French constitutional law has definitely begun. This watershed provides an appropriate occasion for looking back over the past half-century of legal development.

This Article focuses on a particular aspect of that recent history: the relationship between the Constitution and transnational cooperation, especially the making of international agreements. Regarding this relationship, Oliver Wendell Holmes famously wrote, “When we are dealing with words that also are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.”<sup>1</sup> The experience of the Fifth Republic may provide a potent illustration of the inability of parchment barriers to restrain a political will to engage in transnational institution-building.

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1. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

## I. The Constitution of the Fifth Republic

The Fifth Republic was born out of crisis, but its Constitution created a stable political system that has undergone peaceful evolution for more than half a century. That record contrasts strongly with the Fourth Republic, established by the Constitution of 1946 after the liberation of France. In that parliament-dominated regime with a fractured Assembly, cabinets fell roughly twice a year.<sup>2</sup> General Charles de Gaulle found the system incapable of providing France with the strong leadership he believed it needed, and he withdrew from political life.<sup>3</sup>

His opportunity to return on favorable terms arose when the Republic was threatened by its own army, rebelling against the prospect of decolonization in Algeria.<sup>4</sup> De Gaulle accepted the post of prime minister and took on the dual assignment of governing and proposing a new constitution.<sup>5</sup> He chose as his Minister of Justice Michel Debré, a close associate who had been working with the General on constitutional reform proposals since the 1940s. Debré led the drafting project and became “the principal author of the Constitution of the Fifth Republic.”<sup>6</sup> The draft had to be negotiated with de Gaulle’s coalition partners in the cabinet, taking into account the views of a consultative committee appointed largely by the parliament and the advice of the *Conseil d’État*, before the final draft was submitted to referendum.<sup>7</sup> The entire process, from authorization to popular approval, was accomplished within four months.<sup>8</sup>

The leading innovations of the 1958 Constitution concerned the structure of the executive and legislative branches and the relations between those branches. The Fifth Republic enshrined a “semi-presidential” system, with a powerful head of state independent of the legislature and a prime minister as head of the Government, responsible to the majority in the National Assembly.<sup>9</sup> At first, the President was indirectly elected, but de Gaulle obtained a constitutional amendment in 1962 substituting direct election, in the hope of giving his successors a mandate analogous to his own personal authority.<sup>10</sup> The Constitution also restrictively defines the powers and procedures of both chambers of the legislature (the National Assembly and the Senate). In Debré’s model of “rationalized” parliamen-

2. See ROBERT ELGIE, *POLITICAL INSTITUTIONS IN CONTEMPORARY FRANCE* 12 (2003).

3. See *id.* at 10-11.

4. See *id.* at 12-13.

5. See *id.* at 12-13.

6. ANNE STEVENS, *GOVERNMENT AND POLITICS OF FRANCE* 48 (3d ed. 2003). For an English account of the drafting process by a scholar who received privileged access at the outset of his distinguished career, see Nicholas Wahl, *The French Constitution of 1958: II. The Initial Draft and Its Origins*, 53 AM. POL. SCI. REV. 358 (1959).

7. See François Luchaire, *Introduction*, in *LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE* 1, 3-4 (François Luchaire et al. eds., 3d ed. 2009).

8. See ELGIE, *supra* note 2, at 13.

9. See ELGIE, *supra* note 2, at 95. Where appropriate, I will use the capital letter to distinguish the “Government,” as that portion of the executive led by the Prime Minister, from the government more generally.

10. See STEVENS, *supra* note 6, at 52-53; *cf. infra* note 69 (discussing the means by which President de Gaulle obtained this amendment).

tary procedure, the Government exercises substantial control over the legislative agenda, and can employ techniques for streamlining the passage of legislation.<sup>11</sup> The Constitution provides that some international agreements do not require legislative approval at all, while others must be authorized by statute.<sup>12</sup>

A secondary innovation, which later transformed the character of French constitutionalism, involved the creation of a *Conseil constitutionnel* (“*Conseil*”<sup>13</sup>) as an independent body authorized to decide upon the constitutionality of legislation. The original main purpose of the *Conseil* was to enforce the reduction of legislative power by preventing the legislature from invading the sphere assigned to the executive and by keeping legislative procedures within the framework dictated by the Constitution.<sup>14</sup>

The *Conseil* is not technically a court, but rather an independent tribunal. It has nine members, appointed for staggered nine-year terms.<sup>15</sup> The President of France, the President of the Senate, and the President of the National Assembly each appoint three of the members. They need not be lawyers, and are often senior politicians; other members have been professors, or have come from the civil or administrative courts.<sup>16</sup> The main functions of the *Conseil* today are constitutional review of legislation and supervision of national elections.

Independent constitutional review departed from a long republican tradition in France. Previously, legislation had been seen as embodying the Rousseauian “general will,” and the legislature had served as the expositor and implementer of the Constitution. The *laissez-faire* period of U.S. constitutionalism had only strengthened the criticism in France of a “government of judges.” The legislature’s judgments of constitutionality,

11. See JOHN BELL, FRENCH CONSTITUTIONAL LAW 17-19 (1992).

12. See 1958 CONST. art. 53 (“Peace treaties, trade agreements, treaties or agreements relating to international organization, those committing the finances of the State, those modifying provisions which are the preserve of statute law, those relating to the status of persons, and those involving the ceding, exchanging or acquiring of territory . . .”); Pierre Michel Eisenmann & Raphaële Rivier, *National Treaty Law and Practice: France*, in NATIONAL TREATY LAW AND PRACTICE 253, 259-60 (Duncan B. Hollis et al. eds., 2005). In some cases, a referendum may substitute for legislative approval. *Id.* at 261-62; see *infra* note 65.

13. For brevity, I will often refer to the *Conseil constitutionnel* as the “*Conseil*.” For clarity, I will never refer to any other body as simply “the *Conseil*” (e.g., the *Conseil d’État*). Also for clarity, I will use the French term “*Conseil*,” rather than “Council,” in order to distinguish it from various European “Councils” to be mentioned later. See *infra* note 114.

14. BELL, *supra* note 11, at 27-29.

15. 1958 CONST. art. 56. In addition, former presidents of the Republic are eligible to sit on the *Conseil* as ex officio members if they are not otherwise serving in government. *Id.* This practice fell into disuse after 1962, but was revived by former President Valéry Giscard d’Estaing in 2004. Subsequently both he and former President Jacques Chirac have participated from time to time. The inclusion of former presidents has long been criticized as in tension with the increasing judicialization of the *Conseil*, but a proposal to abolish presidential participation failed in 2008. See Michel Verpeaux, *La révision constitutionnelle à l’arraché*, LA SEMAINE JURIDIQUE—ÉDITION GÉNÉRALE, No. 31-35, July 30, 2008, ¶ 18.

16. BELL, *supra* note 11, at 34-36.

implicit in the enactment of a statute, were authoritative, and the statute operated as a “screen” (the *loi-écran*) that judges were not authorized to look behind.<sup>17</sup>

The Fifth Republic’s less reverent attitude toward Parliament allowed for the creation and gradual expansion of constitutional review. Unlike both the U.S. style of judicial review in the ordinary courts and the Austrian style of a specialized constitutional court, the *Conseil*’s procedure of constitutional review was limited to *a priori* examination of statutes during the brief period between their enactment by the legislature and their official promulgation.<sup>18</sup> Initially, Article 61 of the Constitution empowered only four principal political officers (the President, the Prime Minister, the President of the Senate, and the President of the National Assembly) to refer statutes to the *Conseil constitutionnel* for review.<sup>19</sup> A very important constitutional amendment in 1974 extended this power of referral to groups of sixty senators or sixty members of the National Assembly, thus opening the path to the *Conseil constitutionnel* to the parliamentary opposition and greatly increasing its caseload. But neither individuals nor judges could refer cases before the 2008 amendments, and laws once promulgated were immune from direct challenge.<sup>20</sup>

In 1971, the *Conseil constitutionnel* held that it could evaluate statutes for their conformity to principles referenced in the Preamble to the 1958 Constitution, and not just to the numbered articles of the Constitution itself.<sup>21</sup> This recasting of the *Conseil*’s role inaugurated a jurisprudence of constitutionally protected rights, derived from such sources as the 1789 Declaration of the Rights of Man and the Citizen, the Preamble to the 1946 Constitution, and even the legislation of the earlier Republics, all indicated directly or indirectly by the 1958 Preamble.

These changes in the function of the *Conseil* illustrate the evolution of de Gaulle’s Constitution after de Gaulle himself passed from the scene. Some features of the regime as initially designed have proved resilient, while others have been modified, with or without express amendment.

A similar observation could be made about the term “Gaullist,” which once denoted loyalty to the General and some subset of his political ideas, but in later years has been harder to define. As a party label, it covers a sequence of reorganized and redesignated political parties—UNR, UDR,

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17. See Martin A. Rogoff, *Application of Treaties and the Decisions of International Tribunals in the United States and France: Reflections on Recent Practice*, 58 ME. L. REV. 406, 466 (2006).

18. BELL, *supra* note 11, at 32–33.

19. BELL, *supra* note 11, at 29. A restricted set of “organic statutes” (*lois organiques*), are subject to mandatory referral, as are rules of procedure (*règlements*) of the National Assembly and the Senate. *Id.* at 31.

20. As will be discussed later, the *Conseil constitutionnel* later adopted a doctrine that partly circumvents this immunity, allowing provisions of previously enacted laws to be challenged indirectly when laws amending those provisions are before the *Conseil* for a priori review.

21. *Conseil constitutionnel* [CC] [Constitutional Council] decision No. 71-44 DC, July 16, 1971; see ELGIE, *supra* note 2, at 187.

RPR, UMP<sup>22</sup>—none of which included the General's name in their official title. As a current of political thought, characteristic themes of "Gaullism" have included the independence and greatness of the French nation, the strength and stability of the state, and a degree of social solidarity.<sup>23</sup> However, positions on these issues have varied within the party and across decades, and, occasionally, it may be useful to distinguish "traditional Gaullists" from the "neo-Gaullists" who eventually outnumbered them.<sup>24</sup>

Debré shared de Gaulle's emphasis on the status of France as an independent power that should not be subservient to other great powers or shackled by overly constraining treaties and alliances. In the European regional context, de Gaulle and Debré's preferred vision was a loose inter-governmental cooperation among sovereign states, and not a federal or supranational Europe.<sup>25</sup>

The early 1950s proposal of a European Defence Community (EDC) cast a long shadow over future debates. The EDC originated in a French initiative for a common European defense force that would protect West Germany, instead of permitting the Germans to rearm and join NATO. Under U.S. influence, the initiative evolved into a proposed merger of six nations' armed forces, including German forces, into a single European army controlled by an explicitly "supranational" commissariat.<sup>26</sup> The EDC Treaty would not have totally abolished separate national armed forces, but would have limited their size and functions; its effect would have gone far beyond the loaning of contingents to a supplemental European army. The Treaty received legislative approval in West Germany and the Benelux states, but provoked heated debate in France. The Gaullists, among others, condemned the treaty as inimical to French national sovereignty and unconstitutional. The National Assembly rejected the EDC by a substantial majority in August 1954.<sup>27</sup>

Although de Gaulle opposed the structural arrangements of the treaty establishing the European Economic Community (EEC), he welcomed some of the economic policies it embodied, and he did not attempt to repudiate it once the Fifth Republic began. Instead, he exerted pressure within the institutions to make the EEC operate more by consensus than by the majoritarian process that the treaty established on certain issues.<sup>28</sup> This

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22. These initials stand for, in chronological succession, *Union pour la nouvelle République*, *Union des Démocrates pour la République*, *Rassemblement pour la République*, and both *Union pour une Majorité Présidentielle* and *Union pour un Mouvement Populaire*. These continual changes make the initials unsuitable for narrative purposes in this article.

23. See ANDREW KNAPP, GAULLISM SINCE DE GAULLE 454-55 (1994).

24. *Id.* at 395.

25. See ALAIN GUYOMARCH ET AL., FRANCE IN THE EUROPEAN UNION 21 (1998).

26. See Treaty Constituting the European Defense Community art. 20, May 26, 1952, reprinted in S. EXEC. Q & R, 82d Cong., 2d Sess., at 173 (1952) (unofficial translation); see generally Gerhard Bebr, *European Defence Community and the North Atlantic Alliance*, 22 GEO. WASH. L. REV. 637 (1954).

27. Gerhard Bebr, *The European Defence Community and the Western European Union: An Agonizing Dilemma*, 7 STAN. L. REV. 169, 173 (1955).

28. GUYOMARCH ET AL., *supra* note 25, at 24-25.

strategy resulted in the “empty chair crisis” of 1965, when France boycotted meetings of the EEC Council of Ministers, and the Luxembourg Compromise of 1966, an informal side agreement enabling states to block action on measures that adversely affected what they considered vital national interests.<sup>29</sup>

Debré had condemned the EEC Treaty as a member of the upper chamber in 1957,<sup>30</sup> and resistance to supranationality became a hallmark of his career. Understandably, he fought to include provisions that would inhibit the sacrifice of national sovereignty in the 1958 Constitution. The frustration of his purpose over time will be the major theme of this Article.

## II. Constitutional Restrictions—In Theory

Michel Debré described in his memoirs his struggle with his “supranational adversaries” in the drafting of the provisions on international relations in the Constitution of the Fifth Republic.<sup>31</sup> Three points of comparison between the 1958 and 1946 Constitutions call for attention here: first, the revised treatment of the place of treaties in the hierarchy of norms; second, the continuing effects of provisions on international law and organizations in the 1946 Preamble; and third, the creation of a new mechanism for resolving doubts about the constitutionality of an international agreement.

### A. Article 55 and Treaty Enforcement

Debré sought to weaken the effect of treaties in the domestic legal system, but he achieved only a partial retreat from the provisions of the 1946 Constitution. Prior to 1946, France had followed a “dualist” approach to treaties, distinguishing their international legal force from their domestic legal force and requiring a separate decree of presidential promulgation to give a ratified treaty domestic effect.<sup>32</sup> The drafters in 1946 pursued a more “monist” approach: Article 26 of the 1946 Constitution gave ratified treaties domestic legal force from the moment of their publication.<sup>33</sup> Furthermore, Article 28 directed that duly ratified and published treaties had

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29. Desmond Dinan, *Fifty Years of European Integration: A Remarkable Achievement*, 31 *FORDHAM INT'L L. J.* 1118, 1129 (2008).

30. The upper chamber of the Fourth Republic was called the *Conseil de la République*. It regained the traditional name of *Sénat* in the Fifth Republic.

31. MICHEL DEBRÉ, *TROIS RÉPUBLIQUES POUR UNE FRANCE: MÉMOIRES 1946-1958*, at 383 (Tome 2, 1988) (“Mes adversaires supranationaux, c’est-à-dire les juristes col-laborateurs ou disciples de Jean Monnet . . .”).

32. NGUYEN QUOC DINH, PATRICK DAILLIER & ALAIN PELLET, *DROIT INTERNATIONAL PUBLIC* 231 (7th ed. 2002).

33. *Id.* at 231-32. The requirement of publication has usually been met by publication in the *Journal Officiel*. For secondary norms issued by certain international organizations, French practice also treats publication in the official journal of the organization as sufficient. See *CONSEIL D'ÉTAT, LA NORME INTERNATIONALE EN DROIT FRANÇAIS* 53 (2000). Admittedly, the difference between executive publication and the prior practice of presidential promulgation is subtle. See NGUYEN ET AL., *supra* note 32, at 239. Allowing publication by the international organization to give an international obligation domestic force is more clearly “monist.”

authority superior to statutes.<sup>34</sup> It did not, however, specify the mechanism for enforcing that superiority.

Debré omitted both these provisions from his initial draft of articles on international relations for the 1958 Constitution, and he strongly criticized the proposal by others to reinstitute the superiority of treaties over statutes.<sup>35</sup> The drafting history reveals a continuing struggle among those who opposed the superiority of treaties, those who adhered to the monist legacy of the Fourth Republic, and those who regarded some priority for treaties as necessary for constructing the European communities.<sup>36</sup> Debré accepted a compromise that conditioned the superiority of treaties on actual compliance by treaty partners, and he resisted attempts to make this test of reciprocity easier to satisfy. The resulting text of Article 55 provides:

Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, in regard to each agreement or treaty, to its application by the other party.<sup>37</sup>

The Government overrode warnings that this reciprocity condition would create uncertainties and obstruct compliance, particularly with regard to multilateral treaties.<sup>38</sup> One example prominently mentioned to illustrate the value of the reciprocity requirement involved noncompliance by the United States with NATO obligations regarding exemption from conscription.<sup>39</sup>

34. 1946 CONST. art. 28.

35. See Louis Favoreu, *Le droit international*, in *L'ÉCRITURE DE LA CONSTITUTION DE 1958*, at 577, 585 (1992) [hereinafter *ÉCRITURE*]; *L'Avant-projet de Constitution préparé à la mi-juin 1958*, in 1 COMITÉ NATIONAL CHARGÉ DE LA PUBLICATION DES TRAVAUX PRÉPARATOIRES DES INSTITUTIONS DE LA V<sup>E</sup> RÉPUBLIQUE: DOCUMENTS POUR SERVIR À L'HISTOIRE DE L'ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 251, 256 (1987) [hereinafter *DPS I*]; *Compte rendu de la réunion du groupe de travail du 8 juillet 1958*, in *DPS I*, at 381-82. In citing documents from the drafting history, I should mention that most of the documents were originally confidential, and were not revealed to the public until years later.

36. See Favoreu, *supra* note 35, at 591-92; Débat, in *ÉCRITURE*, *supra* note 35, at 597-99 (remarks of Raymond Janot and François Luchaire).

37. 1958 CONST. art. 55; see Favoreu, *supra* note 35, at 586-88, 591.

38. See, e.g., 2 COMITÉ NATIONAL CHARGÉ DE LA PUBLICATION DES TRAVAUX PRÉPARATOIRES DES INSTITUTIONS DE LA V<sup>E</sup> RÉPUBLIQUE: DOCUMENTS POUR SERVIR À L'HISTOIRE DE L'ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 133 (1987) [hereinafter *DPS II*] (remarks of Pierre-Henri Teitgen); 3 COMITÉ NATIONAL CHARGÉ DE LA PUBLICATION DES TRAVAUX PRÉPARATOIRES DES INSTITUTIONS DE LA V<sup>E</sup> RÉPUBLIQUE: DOCUMENTS POUR SERVIR À L'HISTOIRE DE L'ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 370-371 (1987) [hereinafter *DPS III*] (remarks of François Luchaire).

39. See *DPS II*, *supra* note 38, at 529-30; 4 COMITÉ NATIONAL CHARGÉ DE LA PUBLICATION DES TRAVAUX PRÉPARATOIRES DES INSTITUTIONS DE LA V<sup>E</sup> RÉPUBLIQUE: DOCUMENTS POUR SERVIR À L'HISTOIRE DE L'ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 187 (1987) [hereinafter *DPS IV*]. The discussions referred to a dispute between France and the United States in the early 1950s over conscription of French nationals residing in the United States who had already performed military service in France, which was characterized as U.S. failure to implement a treaty obligation. Whether that description accurately summarized the earlier dispute may be less important than the fact that the drafters of the 1958 Constitution thought it did.



The 1958 Constitution also did not specify how the superior authority of treaties would be enforced. The *Cour de Cassation* (the supreme French court in civil and criminal matters) had long applied subsequent treaties as prevailing over earlier statutes, on a theory of implicit legislative authorization.<sup>40</sup> But neither the *Cour de Cassation* nor the *Conseil d'État* (the supreme administrative court) had regarded themselves as permitted to enforce the priority of earlier treaties over subsequent statutes under the 1946 Constitution. The high respect for laws enacted by the representatives of the people had led the administrative courts to treat later statutes as a "screen," blocking resort to earlier treaties, just as respect for statutes precluded the courts from judging their conformity to the Constitution (the doctrine of the *loi-écran*). This jurisprudence carried over, at least initially, into the first decades of the Fifth Republic.<sup>41</sup> Some commentators hypothesized that the new *Conseil constitutionnel* would enforce the superiority of treaties by preventing inconsistent statutes from coming into effect because they would be unconstitutional under Article 55.<sup>42</sup> This mechanism would operate, however, only if the statute were referred to the *Conseil constitutionnel* by an authorized official immediately after its passage. (As it turned out, the *Conseil constitutionnel* disclaimed jurisdiction to enforce Article 55 in this manner.) Thus, at the outset of the Fifth Republic, it appeared that respect for earlier treaties would depend primarily on the self-restraint of the legislature. In reality, changes in interpretation over time resulted in routine enforcement of treaties by the courts and the hollowing out of the reciprocity proviso.

## B. The Uncertain Legacy of the 1946 Preamble

Another legacy of the 1946 Constitution passed into the 1958 Constitution in a more indirect and precarious manner. The Preamble to the 1946 Constitution had begun by proclaiming that human beings had inalienable rights, solemnly reaffirming the 1789 Declaration of the Rights of Man and the Citizen as well as "the fundamental principles recognized by the laws of the Republic."<sup>43</sup> It then proclaimed a set of "political, economic, and social principles particularly necessary for our times," which supplemented the 1789 Declaration with economic and social rights.<sup>44</sup> That set also included two provisions signaling the good citizenship of France in the post-war international order:

[¶ 14] Faithful to its traditions, the French Republic shall comply with public international law. It shall never undertake any war of conquest, and never deploy its forces against the freedom of any people.

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40. See Philippe Manin, *The Nicolo case of the Conseil d'État: French Constitutional Law and the Supreme Administrative Court's Acceptance of the Primacy of Community Law over Subsequent National Statute Law*, 28 COMMON MKT. L. REV. 499, 501-02 (1991).

41. *Id.* at 502-03.

42. See MAURICE DUVERGER, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL 651-52 (5th ed. 1960).

43. 1946 CONST. pmbl., ¶ 1.

44. *Id.*

[¶ 15] Subject to reciprocity, France shall consent to those limitations on sovereignty necessary for the organization and defense of peace.<sup>45</sup>

A series of contingent events would later give Paragraph 15 great importance in the constitutional law of the Fifth Republic.

The text of the 1958 Constitution contains no specific “bill of rights.” Instead, the text includes a few rights-related provisions and, like the 1946 Preamble, the 1958 Preamble makes reference to earlier constitutional documents:

The French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946 . . .<sup>46</sup>

The drafters of the 1958 Constitution chose to adopt what one participant called a “preamble of references”<sup>47</sup> for several reasons. In part, the choice was practical: time was short, and drafting a new declaration of rights and principles would lead to divisive debates and delay. Moreover, it was said to be contrary to French tradition to have a bill of rights drafted by a ruling Government (as the new Constitution would be) rather than an elected constituent assembly. Third, most of the drafters regarded the Preamble as motivational rather than legally binding. Under these circumstances, incorporation by reference could reassure voters in the upcoming referendum, without compromising the institutional reforms that de Gaulle and Debré were pursuing. Some also considered the mention of prior bills of rights as a means of complying with a mandate in the statute that had authorized the drafting of a new Constitution.<sup>48</sup>

Whether the reference to the 1946 Preamble included Paragraph 15, or indeed whether it included all the social rights, was not clear to everyone. At a few points in the drafting history, questions of this kind were raised,<sup>49</sup> and somewhat vague assurances were given.<sup>50</sup> The president of the consultative committee expressly linked Paragraph 15 to the project of European integration.<sup>51</sup> The notion that sovereignty could be limited by voluntary adhesion to an international organization might have been one

45. *Id.* ¶¶ 14, 15.

46. 1958 CONST. pmbl. In 2005, the Preamble was modified to add to this sentence a reference to another bloc of norms, “the Charter of the Environment of 2004,” which was adopted as part of the same amendment, but not incorporated into the text of the Constitution. See Loi constitutionnelle 2005-205 du 1er mars 2005, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 2, 2005, p. 3697.

47. DPS II, *supra* note 38, at 448 (remarks of Paul Coste-Floret on “préambule de références”); see Bruno Genevois, *Le préambule et les droits fondamentaux*, in *ÉCRITURE*, *supra* note 35, at 483, 485.

48. Genevois, *supra* note 47, at 484. The legislation had set forth a few parameters for the future Constitution, including a mandate that the judiciary should remain independent to assure the observance of essential liberties as defined by the preamble of the 1946 Constitution and by the Declaration of the Rights of Man, to which it referred.

49. See DPS II, *supra* note 38, at 77, 255; DPS III, *supra* note 38, at 288; Genevois, *supra* note 47, at 489.

50. DPS II, *supra* note 38, at 95; DPS III, *supra* note 38, at 289.

51. DPS II, *supra* note 38, at 77.

of the “principles of national sovereignty” indicated by the 1958 Preamble, particularly after an unexplained change in the text from “principle” to “principles.”<sup>52</sup>

The original purpose of Paragraph 15 in 1946 had been to authorize French participation in the United Nations, in conformity with the obligations of the U.N. Charter.<sup>53</sup> The possible relevance of that paragraph’s acceptance of “limitations on sovereignty” to arrangements for regional cooperation in Europe had been raised in 1954 in connection with the debate on the European Defense Community.<sup>54</sup> When the referendum on the new Constitution was held in September 1958, Jean Monnet pointed to the preservation of Paragraph 15 and its implications for European integration as one of the reasons for voting in favor.<sup>55</sup> But these interpretations were debatable, and prevailed only later when the *Conseil constitutionnel* had attributed legal force to the 1958 Preamble and the texts it referenced.<sup>56</sup>

It should be emphasized here, as it will be again later, that, prior to 1992, the French Constitution contained no provision specifically addressing European regional cooperation in general, or European Community law in particular. Articles expressly dealing with Europe were added only in the wake of the Maastricht Treaty, when the *Conseil constitutionnel* held for the first time that ratifying a treaty would require a constitutional amendment.<sup>57</sup> Prior to that time, constitutional analysis concerning Europe proceeded on the basis of broader provisions concerning international law, treaties, and international cooperation.

### C. Article 54 and Treaty Ratification

The 1958 Constitution included an important mechanism for assuring the supremacy of the Constitution—and thereby national sovereignty—over treaties. (For simplicity, I will refer to treaties here, although the procedure covers a potentially broader category of “international commitments” (*engagements internationaux*)).<sup>58</sup> Article 54 allows the submission

52. Cf. Genevois, *supra* note 47, at 489 n.2 (noting the change).

53. See Thibaut de Berranger, *L’alinéa 15 du Préambule de 1946*, in *LE PRÉAMBULE DE LA CONSTITUTION DE 1946: HISTOIRE, ANALYSE ET COMMENTAIRES* 357, 359 (Gérard Conac et al. eds., 2001).

54. See *id.* at 366; Georges Vedel, Letter to the Editor, *LE MONDE*, June 15, 1954, at 6, reprinted in *La querelle constitutionnelle sur la Communauté Européenne de Défense*, 16 *DROITS* 101, 112 (1992). Vedel was a professor of constitutional law and later an important member of the *Conseil constitutionnel*.

55. See Jean Monnet, *M. Jean Monnet explique dans une déclaration au “Monde” pourquoi il votera finalement “oui”*, *LE MONDE*, Sept. 11, 1958, at 1, 3; Berranger, *supra* note 53, at 357, 359–60.

56. See *infra* note 183 and accompanying text.

57. See *infra* Parts III.A.2.d, III.A.2.f.

58. Moreover, in the semi-presidential system of France, a technical distinction exists between “treaties” (*traités*), which are “ratified” by the President, and “accords” (*accords*), which are “approved” by the Government (usually the Minister of Foreign Affairs). The terms are not always used precisely, and they do not track the distinction between agreements that do and do not require legislative authorization. See Pierre Michel Eisenmann & Catherine Kessedjian, *National Treaty Law and Practice: France*, in

of treaties to the *Conseil constitutionnel* for a ruling on their compatibility with the Constitution before their ratification, and provides that if the *Conseil constitutionnel* finds a clause in conflict with the Constitution, then the treaty cannot be ratified without a prior constitutional amendment.<sup>59</sup> The current text reads:

If the Constitutional Council, on a reference from the President of the Republic, from the Prime Minister, from the President of one or the other assembly, or from sixty deputies or sixty senators, has declared that an international commitment contains a clause contrary to the Constitution, authorization to ratify or approve the international commitment in question may be given only after amendment of the Constitution.<sup>60</sup>

(The phrase authorizing deputies or senators to initiate a reference under Article 54 was added in 1992.)<sup>61</sup>

Article 54 originated in a suggestion by the Legal Adviser of the Foreign Ministry, André Gros, that prior debates on the constitutionality of certain treaties might motivate the inclusion of a provision similar to one in the Netherlands constitution.<sup>62</sup> Michel Debré implemented this suggestion in his mid-July drafts, specifying that the authorization to ratify a treaty with a clause contrary to the Constitution could result only from a constitutional amendment.<sup>63</sup> The express mention of referral to the *Conseil constitutionnel* was accepted as a friendly amendment clarifying the intent of the provision.<sup>64</sup>

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NATIONAL TREATY LAW AND PRACTICE: FRANCE, GERMANY, INDIA, SWITZERLAND, UNITED KINGDOM 1-2 (Monroe Leigh & Merritt R. Blakeslee eds., 1995). I will generally use the term "treaty" in the broad sense of international law, embracing all international agreements, whether they are *traités* or *accords*. Nonetheless, the distinction between *traités* and *accords* will become relevant in one passage. See *infra* note 294 and accompanying text.

59. Technically, there may be three available courses of action: to refrain from ratifying the treaty, to amend the Constitution and then ratify the treaty, or to ratify the treaty subject to reservations excluding the constitutionally unacceptable obligations, assuming the particular treaty permits such reservations.

60. 1958 CONST. art. 54.

61. See *infra* note 284 and accompanying text.

62. See *Projet de lettre relatif aux relations internationales du 26 juin 1958*, in DPS I, *supra* note 35, at 287, 289. A provision had been added in 1953 to the Netherlands constitution, enabling treaties that conflicted with the constitution to be ratified with the approval of a two-thirds vote in both chambers of the legislature (the same supermajority required for a constitutional amendment). See Jonkheer H.F. van Panhuys, *The Netherlands Constitution and International Law*, 47 AM. J. INT'L L. 537, 550 (1953). André Gros was the Legal Adviser (*Jurisconsulte*) of the Ministry of Foreign Affairs from 1947 until 1963, when he was elected to the International Court of Justice. Debré praised him in his memoirs as a patriot, a Gaullist, and an ally in the struggle with the disciples of Jean Monnet in the drafting process. See DEBRÉ, *supra* note 31, at 383-84.

63. See *Avant-projet de Constitution du 15 juillet 1958*, art. 46, in DPS I, *supra* note 35, at 429, 437. At several stages of the drafting, the rule also applied to treaties that contradicted organic statutes (which could then be ratified only after amendment of the organic statute), but this parallel restriction was ultimately dropped. See DPS III, *supra* note 38, at 369.

64. See DPS II, *supra* note 38, at 125, 134-35. The modification was proposed by the MRP deputy Paul Coste-Floret, subsequently a member of the *Conseil constitutionnel*.

The operative significance of Article 54 may be judged in part by the contrast between the procedures required for ratifying a treaty and the procedures required for amending the Constitution. Briefly put, both treaty ratification and constitutional amendment are easier in France than in the United States. Legislative authorization to ratify a treaty usually involves an ordinary statute; if the Senate demurs, the National Assembly can still enact the statute by a simple majority in the National Assembly.<sup>65</sup> Moreover, Article 49(3) permits the Government to take the extraordinary step of making the adoption of a bill an issue of its responsibility before the National Assembly, in which case the bill becomes law unless the National Assembly denies the Government its confidence.<sup>66</sup> Amending the Constitution is more difficult, because it requires the concurrence of simple majorities in the National Assembly and the Senate, and then a final adoption in a joint session or “Congress” (*Congrès*) by the moderate supermajority of three-fifths.<sup>67</sup> Given that the voters in the Congress are the same people who voted in the chambers, the amendment process can move relatively quickly.<sup>68</sup> The President also has a different option:

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65. See 1958 CONST. art. 45(4); ELGIE, *supra* note 2, at 157-58; Jean Dhommeaux, *Le rôle du parlement dans l'élaboration des engagements internationaux: Continuité et changements*, 103 REVUE DU DROIT PUBLIC 1448, 1475-78 (1987) (describing the use of this procedure for treaties).

Some international agreements can be adopted by the executive without any role for either branch of the legislature (thus, even more easily), but the extent to which Article 54 applies to such agreements is unsettled. See *infra* Part III.A.1. In some cases, a referendum may substitute for legislative approval. Eisenmann & Rivier, *supra* note 12 at 261-62; see 1958 CONST. art. 11 (permitting the President to submit to referendum the approval of a treaty that “although not contrary to the Constitution, would affect the functioning of the institutions”). As of 2008, only three such referenda have been held: in 1972 and 1992 (successfully, on the admission of the UK, Ireland and Denmark to the EEC, and on the Maastricht Treaty, respectively), and in 2005 (unsuccessfully, on the European Constitution Treaty). France ratified the Lisbon Treaty, which replaced the European Constitution Treaty, in 2008, without a referendum. See Laurence Burgogues-Larsen, *Article 53*, in LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1308, 1310 n.14 (Lucaire et al. eds., 3d ed. 2009). The 1992 and 2005 referenda were held after constitutional amendments had eliminated any contrariety between the treaties and the constitution. A special rule was added in 2005 (and amended in 2008) contemplating a referendum on the future admission of member states to the EU (e.g., Turkey). See *infra* note 521.

66. See BELL, *supra* note 11, at 116-18. This provision was amended in 2008 to limit the frequency with which the Government can employ this tactic. See 1958 CONST. art. 49(3).

67. 1958 CONST. art. 89. Until 2008, the Constitution did not address the absolute or relative sizes of the Senate and the National Assembly, but there have always been fewer senators than deputies altogether, and, therefore, the senators have been numerically inferior in the Congress. The July 2008 amendment set maximum numbers for the two chambers: 577 for the National Assembly and 348 for the Senate. 1958 CONST. art. 24.

68. The Congress method of amendment has traditionally involved a joint meeting of the two chambers at Versailles rather than Paris (although the Constitution does not expressly demand this relocation). As examples of the swiftness that will be discussed later, the highly contentious amendment authorizing ratification of the Maastricht Treaty was adopted less than three months after the *Conseil constitutionnel* declared it necessary; an August 1993 decision protecting the right to asylum was overturned in less than four months; and the 2008 amendment authorizing the ratification of the Lis-

instead of convening the Congress, the President can choose to submit the amendment to popular referendum, where a majority of votes will suffice.<sup>69</sup> The Congress method has been employed most frequently—for all but two of the twenty-four amendments adopted through 2008.<sup>70</sup>

Thus, Article 54—when it is invoked—can substantially raise the hurdles to the ratification of a treaty but does not pose an insuperable barrier. The amending process has not been inhibited by a culture of reverence for the text *per se*: the Constitution of the Fifth Republic has been amended more frequently since 1958 than the U.S. Constitution has since 1792.<sup>71</sup> And, unlike the German Basic Law, the French Constitution places few limits on the amending power. Substantively, it forbids only amendments that would undo “the republican form of government”; and, as will be discussed later, the *Conseil constitutionnel* eventually denied that it had jurisdiction to enforce even that limitation on the constituent power.<sup>72</sup>

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bon Treaty on the European Union followed less than two months after the Conseil confirmed that an amendment was necessary.

69. 1958 CONST. art. 89. A third procedure, by which the President bypasses the legislature and submits a desired constitutional amendment directly to popular referendum under Article 11 of the Constitution, has been used only twice, by President de Gaulle: in 1962 (for direct election of the President) and in 1969 (unsuccessfully, for decentralization and for restructuring of the Senate). De Gaulle made each referendum a vote on confidence in himself, and resigned when the 1969 referendum failed. See Gérard Conac & Jacques Le Gall, *Article 11*, in LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 402, 453–57 (Luchaire et al. eds., 3d ed. 2009).

Whether the Constitution really authorizes this method is traditionally disputed. The *Conseil constitutionnel* confidentially advised de Gaulle that it did not, and after he proceeded anyway, the *Conseil* dismissed a referral of the resulting law on the ground that it lacked jurisdiction to review provisions adopted by referendum. CC decision No. 62-20 DC, Nov. 6, 1962. See LES GRANDES DÉLIBÉRATIONS DU CONSEIL CONSTITUTIONNEL 1958–1983, at 99, 113 (B. Mathieu et al. eds., 2009) [hereinafter GRANDES DÉLIBÉRATIONS] (publishing the *Conseil*'s deliberations on this affair).

70. In fact, the Article 89 referendum has been used only once: for the amendment in 2002 that shortened the term of the President from seven years to five years in order to decrease the likelihood of cohabitation. De Gaulle submitted amendments directly to a non-Article 89 referendum in 1962 (successfully) and in 1969 (unsuccessfully). See *supra* note 69.

Counting amendments is a bit tricky, because sometimes a single amending law (*loi constitutionnelle*) contains unrelated provisions, and sometimes more than one amending law is approved at the same Congress. Amendments are normally incorporated into the text of the Constitution rather than listed separately at the end as in the United States. The figure twenty-four results from treating each adopted amending law as a unit, as is conventional in France. The constitutional amendment adopted in July 2008 consisted of forty-seven sections, modifying or adding more than forty articles of the Constitution.

The text of Article 89 appears to make the referendum rather than the Congress the normal method, but practice has been otherwise. Moreover, the President has discretion over whether to proceed after the two chambers have voted, and some proposed amendments have been abandoned at that stage.

71. In contrast to the twenty-four times the 1958 Constitution has been amended, the U.S. Constitution has only been amended seventeen times since 1792.

72. See CC decision No. 2003-469 DC, Mar. 26, 2003, discussed *infra* text accompanying notes 391–392. Procedurally, amendments are not permitted during a vacancy of the Presidency or a state of emergency. See 1958 CONST. arts. 7, 16, 89(4); CC decision No. 92-312 DC, Sept. 2, 1992; Pascal Jan, *Article 89*, in LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1991, 1993 (Luchaire et al. eds., 3d ed. 2009).

### III. Constitutional Restrictions— In Practice

The operation of the constitutional constraints in practice has reflected the interplay of domestic politics and external pressures with the institutional structure. After the death of Georges Pompidou in 1974, the Presidency passed into non-Gaullist hands—first, the more Euro-friendly Valéry Giscard d’Estaing and then the Socialist François Mitterrand—before returning to the neo-Gaullists Jacques Chirac and Nicolas Sarkozy. France’s options in diplomacy and law were affected by external factors such as decolonization, the oil price shock of 1974, the collapse of the post-war monetary system, international economic competition, the rise of the human rights regime, the activism of the European Court of Justice, and the demise of the Soviet bloc.

This part of the Article examines the evolution of constitutional practice between 1958 and 2008 by dividing that half-century into two periods: up to and after 1992. The episode justifying this division involved the Maastricht Treaty on European Union. In 1992, the *Conseil constitutionnel* found for the first time that an international commitment could not be ratified without a constitutional amendment, and, as a result, provisions specifically addressing European integration were added to the 1958 Constitution.<sup>73</sup> The basic theme for the first period is how deeply France was able to commit itself internationally *without* a constitutional amendment. The basic theme for the second period is how the permissive legacy of the first period received further development after the *Conseil constitutionnel* had begun to require constitutional amendments for certain treaties; it will appear that the *Conseil* and the courts continued prior accommodations to international agreements, and found new ones, while also creating some moderate impediments.

Before commencing the first period, a few additional comments about political institutions may be helpful. It turned out that the Fifth Republic would experience several forms of divided government. Sometimes the President’s party (or coalition) has enjoyed solid support in both the National Assembly and the Senate. At other times, a party or coalition opposed to the President holds the majority in the National Assembly and, therefore, supplies the Prime Minister and the Government. This “cohabitation” of adverse executives occurred three times before a constitutional amendment rendered it less probable.<sup>74</sup>

Additionally, a President and Prime Minister from the same party or coalition may lack the support of the Senate, which was created as a deliberative counterweight to the National Assembly. The Senate is indirectly

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73. See *infra* Parts III.A.2.d, III.A.2.f.

74. A constitutional amendment adopted in 2000 reduced the President’s term of office from seven years to five years, facilitating coordination of elections for the President and the National Assembly and thereby decreasing the likelihood that cohabitation will recur. See ELGIE, *supra* note 2, at 126. The three cohabitations in the Fifth Republic were Mitterrand/Chirac (1986–1988), Mitterrand/Balladur (1993–1995), and Chirac/Jospin (1997–2002).

elected by “colleges” composed mainly of local and regional officials.<sup>75</sup> Throughout the period from 1958 to 2008, overrepresentation of rural areas in the electoral scheme resulted in a structural right-wing majority, though often not a specifically *Gaullist* majority.<sup>76</sup> The Senate developed an unexpected oppositional role in the years of de Gaulle’s presidency, and the three Presidents of the Senate prior to 1998 were all from small center or center-right parties. The rightward slant of the Senate made it harder for parties of the left to achieve constitutional amendments than for parties of the right, and in fact, no constitutional amendments were adopted during François Mitterrand’s first decade as President.<sup>77</sup>

The centrist character of the Senate President over four decades has other implications for this article, because the 1958 Constitution vested that office with the power to appoint three of the nine members of the *Conseil constitutionnel*.<sup>78</sup> Gaston Monnerville, who served as Senate President from the beginning until 1968,<sup>79</sup> and Alain Poher, who served from 1968 until 1992,<sup>80</sup> ensured that members more favorable to European integration than the Gaullists of their period participated in the *Conseil*’s decisions. This contingency had consequences that were probably not foreseen by Michel Debré when he designed the institution.

A united President and Prime Minister may also face resistance from their own supporters. Party discipline is not rigid in France, and individual parties—let alone coalitions—have been internally divided on important issues, including the accommodation of national sovereignty and international cooperation. Nonetheless, it was noted in 2003 that the Governments of the Fifth Republic had ultimately succeeded in receiving legislative authorization for a treaty whenever they requested it.<sup>81</sup> On seven occasions between 1992 and 2008, the *Conseil constitutionnel* held that rati-

75. See STEVENS, *supra* note 6, at 168.

76. See, e.g., ELGIE, *supra* note 2, at 153–55. When the package of constitutional amendments adopted in July 2008 was being drafted, an initial proposal to link representation in the Senate more closely to population was first diluted by the Government and the National Assembly, and then rejected altogether by the Senate. See Pierre de Montalivet, *Les cadres nouveaux de la démocratie représentative*, LA SEMAINE JURIDIQUE—ÉDITION GÉNÉRALE, No. 31–35, July 30, 2008, ¶ 28 & n.27.

77. After a minor amendment on electoral procedure in 1976, the next successful amendment was the authorization of the Maastricht Treaty on European Union in 1992. See *infra* Part III.A.2.d. (Mitterrand was elected President of the Republic in 1981 and in 1988.)

78. 1958 CONST. art. 56.

79. Monnerville had served as head of the second chamber for most of the Fourth Republic, and continued that role in the Fifth, where his criticisms of de Gaulle’s use of power aroused the General’s personal hostility. Poher appointed Monnerville to the *Conseil constitutionnel* in 1974.

80. Poher had served as President of the European Parliament in the era when that body was drawn from national legislatures, before assuming the presidency of the Senate. As Senate President, he twice acted as interim President of France, after the resignation of de Gaulle in 1969 and after the death of Pompidou in 1974.

81. See Eisenmann & Rivier, *supra* note 12, at 261 n.30 (noting that the last treaty to be defeated in parliament was the European Defence Community, which preceded the Fifth Republic). This success rate may, however, reflect care not to request authorization for a treaty that lacks majority support. President Chirac subsequently miscalcu-



fication of a treaty would require a constitutional amendment, and the amendment duly followed in six of the seven cases.<sup>82</sup>

#### A. Prior to the 1992 Maastricht Amendment

The first three decades of the Fifth Republic demonstrated the limited ability of the constitutional constraints to protect the supremacy of the Constitution and to resist the lure of supranationality. International commitments were rarely referred to the *Conseil constitutionnel* under Article 54, and the *Conseil's* standards for reviewing the treaties that were referred grew increasingly accommodating. Meanwhile, Article 55 became a powerful tool by which the civil/criminal courts, and subsequently the administrative courts, enforced the expanding body of European Community and European human rights law.

The discussion of the first period (A) begins with procedural features of the Article 54 mechanism (1), then turns to the substantive standards applied in the sequence of referrals culminating in the first *Maastricht* decision (2). It next considers the increasing power given to treaties under Article 55, including their prevalence over subsequent statutes, their independent interpretation by the administrative courts, and the narrowing of Debré's reciprocity proviso (3). Interim conclusions are drawn (4) before passing to the years following the Maastricht amendment (B).

##### 1. Article 54: Procedure

Procedural features of the Article 54 referral mechanism, as it was drafted and as it was interpreted, undermined its potential to protect the 1958 Constitution against inconsistent international commitments. The opportunity to make referrals was restricted, and few referrals occurred; the *Conseil constitutionnel* defined the scope of its review in a manner that further diminished the opportunity; and the *a priori* nature of the inquiry made the mechanism ineffective against unforeseen interpretations of the treaties.

First, Article 54 authorized but did not require submission of treaties to the *Conseil constitutionnel* when constitutional doubts arise. The 1958 Constitution did provide for mandatory submission of two categories of norms to the *Conseil constitutionnel*, the "organic statutes" (*lois organi-*

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lated in submitting the European Constitution Treaty to a referendum in 2005, which failed.

82. See CC decision No. 92-308 DC, Apr. 9, 1992 (Maastricht Treaty on European Union); CC decision No. 97-394 DC, Dec. 31, 1997 (Amsterdam Treaty on the European Union); CC decision No. 98-408 DC, Jan. 22, 1999 (Statute of the International Criminal Court); CC decision No. 99-412 DC, June 15, 1999 (Charter of Regional or Minority Languages); CC decision No. 2004-505 DC, Nov. 19, 2004 (European Constitution Treaty); CC decision No. 2005-524/525 DC, Oct. 13, 2005 (optional protocol to ICCPR abolishing the death penalty); CC decision No. 2007-560 DC, Dec. 20, 2007 (Lisbon Treaty). The one exception was the regional language charter; the Socialist Prime Minister Lionel Jospin favored it, but the Gaullist President Jacques Chirac declined to seek an amendment. See *infra* Part III.B.3.a.

ques)<sup>83</sup> specified for fleshing out certain constitutional structures, and the rules of procedure (*règlements*) of the National Assembly and the Senate. But international commitments, like ordinary statutes, were subject to optional referral.<sup>84</sup> That was a blessing for the *Conseil constitutionnel*, given the large number of instruments covered, and no narrower category of obligatory treaty referrals was identified.

Second, the range of “international commitments” subject to referral under Article 54 was, and remains, unclear. Some contend that Article 54 applies only to those international agreements for which Article 53 requires legislative authorization, while others contend that it also applies to the larger category of treaties that the executive may conclude on its own, or other forms of international commitment.<sup>85</sup> The practice of the *Conseil constitutionnel* in some of the first Article 54 referrals lends support to both interpretations.<sup>86</sup> So far, the *Conseil* has never rejected an Article 54 referral on the ground that the text referred was not an “international commitment.”

Third, a very limited set of public actors were authorized to make the referral. Originally, the Constitution gave only the President, the Prime Minister, and the Presidents of the Senate and the National Assembly the power to refer either laws or treaties to the *Conseil constitutionnel*.<sup>87</sup> When Article 61 of the Constitution was amended in 1974 to empower sixty deputies or sixty senators to refer statutes to the *Conseil constitutionnel*, no change was made to Article 54. Nonetheless, the *Conseil constitutionnel* circumvented this limitation, at least in part, by permitting deputies and senators to refer statutes that authorized the ratification of a treaty, and by allowing challenge to the authorizing statute to include a challenge to the content of the treaty.<sup>88</sup> (Later, in 1992, an amendment to Article 54 expressly empowered sixty deputies or sixty senators to refer.<sup>89</sup>) Thus, the opposition, or dissenting factions within the majority, could also secure review of the constitutionality of a proposed treaty, so long as they were

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83. See, e.g., 1958 CONST. art. 25 (organic statute to specify the term, number, compensation, and qualifications of the legislative assemblies); 1958 CONST. art. 47 (organic statute to specify procedures for enacting government finance laws); 1958 CONST. art. 63 (organic statute to specify the organization and procedure of the *Conseil constitutionnel*). The official translation on the *Conseil constitutionnel*'s website refers to these as “institutional acts,” but I will use the term “organic statutes” in the belief that it is less likely to confuse the reader.

84. 1958 CONST. arts. 54, 61; see Elgie, *supra* note 2, at 184.

85. See, e.g., ÉLISABETH ZOLLER, DROIT DES RELATIONS EXTERIEURES 269-70 (1992) (broader than Article 53); DOMINIQUE ROUSSEAU, DROIT DU CONTENTIEUX CONSTITUTIONNEL 206 (8th ed. 2008) (broader than Article 53); François Luchaire, *Article 54*, in LA CONSTITUTION DE LA RÉPUBLIQUE FRANÇAISE 1060-61 (Luchaire et al. eds. 1987) (limited to Article 53); Christine Maugüé, *Le Conseil constitutionnel et le droit supranational*, 105 POUVOIRS 53, 54-55 (2003) (limited to Article 53); cf. *supra* note 12 (listing the categories of treaties subject to legislative approval under Article 53).

86. See *infra* Part III.A.2.a.

87. 1958 CONST. art. 61; STEVENS, *supra* note 6, at 59.

88. See CC decision No. 76-71 DC, Dec. 29-30, 1976 (announcing this possibility); CC decision No. 80-116 DC, July 17, 1980 (applying it).

89. 1958 CONST. art. 54; see *infra* text accompanying note 271.

sufficient in number. In practice, the Article 61 route enabled opponents to raise the same type of claims that the *Conseil* would have decided under Article 54.<sup>90</sup>

Such referrals have in fact been quite rare. In the period from 1958 to 1992, there were only eleven referrals of treaties and treaty-ratification statutes under Article 54 and Article 61 combined.<sup>91</sup> Important treaties with apparent constitutional consequences for France were not referred. For example, the European Convention on Human Rights escaped referral, as did seven of its Protocols;<sup>92</sup> only one Protocol, concerning the death penalty, was referred. Major global human rights treaties ratified by France during this period, including the Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Discrimination against Women, the Convention Against Torture, and the Convention on the Rights of the Child,<sup>93</sup> similarly escaped referral. On the European Community front, the Single European Act of 1986, which increased the powers of EC institutions in order to facilitate completion of the internal market by 1992, was also ratified without referral.<sup>94</sup> This situation is in some respects comparable to the referral of statutes: although referrals have been more frequent, certain statutes raising visible constitutional questions passed without review because politicians did not wish to take a position against them.<sup>95</sup>

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90. Rousseau observes, however, that in Article 61 proceedings the *Conseil* has felt empowered to limit its review to the objections raised in the referral, whereas in Article 54 proceedings the *Conseil* has felt obliged to identify and resolve possible objections *sua sponte*. ROUSSEAU, *supra* note 85, at 203.

91. There were three Article 54 referrals by the President, one by the Prime Minister, six Article 61 referrals by groups of legislators, and one Article 54 referral by a group of legislators after they acquired that authority in 1992. Even this estimate is high, since it includes three referrals relating to the Maastricht Treaty of 1992, and one attempted referral of a statute approving a non-international convention between the French Government and its overseas territory of New Caledonia. See CC decision No. 83-160 DC, July 19, 1983, cons. 1.

92. Admittedly, most of these Protocols were procedural rather than substantive. The European Social Charter and the European Convention for the Prevention of Torture also escaped referral.

93. See Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 (ratified by France in 1990); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (ratified by France in 1986); International Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1977, 1249 U.N.T.S. 13 (ratified by France in 1983); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by France in 1980); International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (ratified by France in 1980); International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (ratified by France in 1971).

94. See *infra* text accompanying notes 206-215.

95. Two examples commonly mentioned in the literature are the 1990 law prohibiting Holocaust revisionism (the *Loi Gayssot*) and the 1993 overhaul of the Criminal Code. See GUILLAUME DRAGO, *CONTENTIEUX CONSTITUTIONNEL FRANÇAIS* 435-36 (1st ed. 1998).

A few statistics may put this issue in perspective. A 1985 report by the *Conseil d'État* estimated that between 300 and 400 international agreements entered into force each year, mostly unpublished, with thirty to forty submitted to the legislature for authorization, including five to ten major multilateral conventions.<sup>96</sup> In the same period, roughly eighty-five agreements were published each year.<sup>97</sup> The seventh legislative term (1981-1986) resulted in the enactment of 524 statutes, 174 of which authorized international agreements.<sup>98</sup> In 1993 (just after this first period), fifty-three international agreements were published, eighteen of which had received legislative authorization.<sup>99</sup> Meanwhile, only five referrals to the *Conseil constitutionnel* under Article 54 had occurred from 1958 to 1992, plus a similar number of referrals of statutes authorizing ratification (or approval).<sup>100</sup> By contrast, in the 1980s, the *Conseil constitutionnel* was reviewing on average more than ten statutes per year on the basis of optional referrals, not including the mandatory referrals of organic statutes.<sup>101</sup> Not until 1992 did the *Conseil constitutionnel* hold for the first time that entering into the international commitment before it would require a constitutional amendment.<sup>102</sup>

Fourth, the window for challenge under Article 54 was deliberately restricted. Treaties could be questioned before ratification, but, once ratified, the treaties could no longer be referred to the *Conseil constitutionnel*. The restricted opportunity for challenge resembled the system of *a priori* review established for statutes under Article 61, although the window for treaties was larger. Treaties could be referred under Article 54 before or during their consideration by the legislature, whereas statutes (including statutes authorizing treaties) could be referred under Article 61 only during the brief period between parliamentary adoption and promulgation.<sup>103</sup>

Fifth, the *Conseil constitutionnel* restricted the potential of the Article 54 procedure to protect the constitutional system against international impingements by strictly concentrating its review on the incremental effects of new treaties. The *Conseil* does not fully measure the substance of a new treaty provision against constitutional standards. Rather, it evaluates only the additional content of the new provision given existing treaty

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96. *Conseil d'État*, DROIT INTERNATIONAL ET DROIT FRANÇAIS: ÉTUDE DU CONSEIL D'ÉTAT 9 (1986).

97. Dhommeaux, *supra* note 65, at 1452-53.

98. These figures are drawn from the website of the Assemblée Nationale. *Histoire de l'Assemblée nationale: 8. La Cinquième République (depuis 1958)*, ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/histoire/histoire-1958.asp> (last visited Mar. 31, 2012) (scroll down for table).

99. See Eisenmann & Kessedjian, *supra* note 58, at 1, 5 (noting that the 53 published agreements included 10 multilateral agreements, 40 bilateral agreements, and 3 agreements with international organizations).

100. Again, this includes multiple referrals of the Maastricht Treaty, and one referral of a statute approving a "convention" with an overseas territory.

101. See LE CONSEIL CONSTITUTIONNEL 163 (Michel Verpeaux & Maryvonne Bonnard eds., 2007) (table).

102. See CC decision No. 92-308 DC, Apr. 9, 1992 (discussed *infra* Part III.A.2.d).

103. See 1958 CONST. arts. 54, 61; DRAGO, *supra* note 95, at 396.

obligations. Prior treaties, whether or not they had been reviewed by the *Conseil* before ratification—and very few of them had been—had already acquired force and could not be challenged. This principle was asserted in the *Conseil*'s first Article 54 proceeding, regarding the financing of the European Communities, where the *Conseil* observed somewhat opaquely that the treaties of 1951 and 1957 establishing the European Communities had been regularly ratified and published, and since that moment had “entered into the field of application of Article 55 of the Constitution.”<sup>104</sup> This language has been understood as observing that the treaties had taken effect as internal law, indeed as internal law superior to statute, and could no longer be reviewed by the *Conseil constitutionnel*.<sup>105</sup>

The *Conseil* reaffirmed this incremental approach to the review of treaties even after it had adopted a different practice in reviewing ordinary statutes.<sup>106</sup> Although the Constitution created only a narrow window for pre-promulgation review of statutes, the *Conseil constitutionnel* devised a method for expanding that window by using later amending statutes as a vehicle for examining the statutes that they amend. More specifically, in a decision involving emergency legislation for New Caledonia in 1985, the *Conseil* announced that, when new legislation modified, completed, or changed the area of applicability of a statutory provision already in force, the *Conseil*'s review of the new legislation could include evaluating the constitutionality of the prior provision.<sup>107</sup> The *Conseil* subsequently refused, however, to apply this technique to the review of treaties modifying earlier treaties. In a 1992 decision concerning the Maastricht Treaty, the *Conseil* asserted that the principle of compliance with treaties in force, *pacta sunt servanda*, was one of the rules of international law to which France had pledged conformity in Paragraph 14 of the 1946 Preamble, referenced by the 1958 Preamble, and that Article 55 of the 1958 Constitution gave ratified treaties domestic authority superior to law. As a result, the *Conseil* limited its examination under the Article 54 procedure to the new content added by the later treaty.<sup>108</sup>

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104. See CC decision No. 70-39 DC, June 19, 1970, cons. 5 (discussed *infra* Part II.A.2.a). The reader may have noticed that these treaties even entered into force before the adoption of the 1958 Constitution and its Article 55.

105. See, e.g., PATRICK GAÏA, *LE CONSEIL CONSTITUTIONNEL ET L'INSERTION DES ENGAGEMENTS INTERNATIONAUX DANS L'ORDRE JURIDIQUE INTERNE* 75 (1991).

106. I say “reaffirmed” because some of its earlier decisions, by commenting on the validity of treaties already in force while reviewing statutes implementing them, had caused observers to hope or fear that the *Conseil* would be willing to declare a provision of a ratified treaty inconsistent with the Constitution. See, e.g., Joël Rideau, *Constitution et droit international dans les Etats membres des Communautés européennes: Réflexions générales et situation française*, 2 *REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL* 259, 272-78 (1990).

107. See CC No. 85-187 DC, Jan. 25, 1985, cons. 7-10. The first time that this doctrine actually led to the invalidation of a statutory provision was in 1999. See *infra* Part III.B.2.

108. See CC decision No. 92-308 DC, Apr. 9, 1992. The *Conseil* has expressed this principle of limited review in subsequent (post-1992) decisions by means of the formula that “[t]hose provisions of the Treaty which merely reiterate undertakings already entered into by France are however excluded from any such examination as to their

Sixth, as a rare exception to the underutilized procedure, the *Conseil constitutionnel* will not review the constitutionality of a treaty that has been approved by a referendum.<sup>109</sup> That restraint reflects its longstanding practice with regard to statutory referenda. It rests partly on a theory of textually limited jurisdiction, and partly on the theory that referenda are direct expressions of national sovereignty.<sup>110</sup>

Finally, it should be observed that, even when it is employed, the efficacy of the *a priori* review procedure in forestalling conflicts between treaties and the Constitution depends upon the ability of the *Conseil constitutionnel* and its informants to predict future developments. Unanticipated contradictions could arise from later interpretations of the treaty, from changes in circumstances affecting the treaty's practical meaning, or, indeed, from later interpretations of the Constitution. The *a priori* review of the constitutionality of statutes poses similar disadvantages, but they are intensified in the case of treaties, where the *Conseil constitutionnel* has less ability to control or influence the course of future interpretation.<sup>111</sup>

## 2. Article 54: Substance

The *Conseil constitutionnel* received its first Article 54 referral in 1970, while the Gaullists still governed. The resulting decision stated a theme that would echo through the *Conseil's* jurisprudence: that, to be consistent with the 1958 Constitution, treaties must not infringe upon the "essential conditions for the exercise of national sovereignty."<sup>112</sup> Six years later, as a non-Gaullist President charted a new course for European policy, the *Conseil* struggled with the decision whether to find an agreement invalid, or to uphold it while articulating standards that could protect national sovereignty against threats that would materialize in the future. It chose the latter option. In the years that followed, as Gaullist power ebbed, the *Conseil* continued to uphold treaties, sometimes by refashioning the standards that demonstrated their consistency with the Constitution. Momentum built up sufficiently during this period that, by the time the *Conseil* finally found a treaty that did violate the Constitution, the majorities necessary for adopting the corresponding amendment were available.

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conformity with the Constitution." CC decision No. 2007-560 DC, Dec. 20, 2007, cons. 10.

109. See *supra* note 65 (on authorization by referendum).

110. See CC decision No. 92-313 DC, Sept. 23, 1992, cons. 2. The doctrine of nonreview of referenda originated as the explanation for lack of jurisdiction over challenges to the arguably unconstitutional referendum on direct election of the President in 1962. See CC decision No. 62-20 DC, Nov. 6, 1962, cons. 5.

111. In the statutory context, the *Conseil constitutionnel* often employs a technique of upholding a statute subject to a reserve of interpretation. In other words, it holds that the statute would not conflict with the Constitution so long as it receives a particular interpretation. See BELL, *supra* note 11, at 53-54. A single national court or tribunal, however, cannot dictate the international interpretation of a treaty.

112. CC decision No. 70-39 DC, June 19, 1970, cons. 9.

## a. Step One

The first decision under Article 54 involved a pair of linked engagements negotiated within the context of the European Communities. The EEC Treaty had contemplated that activities of the EEC, including agricultural subsidies that greatly benefitted France, would initially be financed by contributions of the member states, but that this system would later be replaced by assignment of forms of tax revenue to the Community as its own resources.<sup>113</sup> In April 1970, the Council of the EEC<sup>114</sup> adopted a Decision laying out the framework for transition to the Community's own resources, most prominently a value-added tax to be defined at the Community level.<sup>115</sup> The French government understood this Council Decision as an agreement subject to legislative approval. The deal also involved the Treaty of Luxembourg, which increased the role of the Parliamentary Assembly in the Community budget process.<sup>116</sup> These agreements provoked arguments by some Gaullists in the National Assembly, led by former Justice Minister Jean Foyer, that the enhancement of EEC power usurped legislative power and impaired national sovereignty, and therefore required a constitutional amendment.<sup>117</sup> To quell objections within his own party, Prime Minister Jacques Chaban-Delmas referred the Council Decision and the Luxembourg Treaty to the *Conseil constitutionnel* under Article 54.<sup>118</sup>

The *Conseil* found nothing in the Council Decision or the Treaty that would necessitate a constitutional amendment, but it made several important points on the way to this conclusion. First, the *Conseil* regarded the Council Decision as a "measure of application" giving practical effect to a

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113. Treaty Establishing the European Economic Community arts. 200, 201, Mar. 25, 1957, 298 U.N.T.S. 11.

114. It will be regrettably necessary to distinguish among several similarly named bodies: the Council of Ministers of the EEC (subsequently the Council of Ministers of the European Union, referred to here as "EEC Council" or "EU Council"), an institution of the EEC (subsequently EU); the European Council, an intergovernmental conclave of the heads of member state governments of the EEC (subsequently EU); and the Council of Europe, a separate regional organization whose membership is wider than that of the EEC or EU, and under whose auspices the European regional human rights system operates.

115. See *Conseil Décision du 21 avril 1970 relative au remplacement des contributions financières des États membres par des ressources propres aux Communautés*, 70/243/CECA, CEE, Euroatom, JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES, Apr. 28, 1970, No. L 94/19. The Council Decision and the Luxembourg Treaty also involved the financing of the European Atomic Energy Community, but I omit it from the text in order to simplify the discussion.

116. See *Traité portant modification de certaines dispositions budgétaires*, JOURNAL OFFICIEL DES COMMUNAUTÉS EUROPÉENNES, Jan. 2, 1971, No. L 2.

117. See Charles Rousseau, *Jurisprudence française en matière de droit international public*, 75 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 239, 241-44 (1971) (discussing the politics of the decision). The French Communist Party, which was always hostile to Western European integration, also opposed the agreements. See *id.*; GUYOMARCH ET AL., *supra* note 25, at 94.

118. See Rousseau, *supra* note 117.

policy decision inherent in the EEC Treaty.<sup>119</sup> To the extent that critics objected per se to the assignment of taxing power within France to the EEC, that impairment of national sovereignty had already been accepted in the EEC Treaty and could no longer be challenged. As the *Conseil* put it, the EEC treaty had already been lawfully ratified and published and had entered into the field of application of Article 55 of the Constitution.<sup>120</sup>

Second, an agreement conferring specific taxing authority on the EEC dealt with a matter within the range of legislative powers under the Constitution, and, therefore, required legislative approval of the agreement under Article 53. However, delegation of authority by an approved agreement would not contravene the Constitution's vesting of legislative powers in the parliament. At the same time, the *Conseil* did not broadly approve the delegation of legislative powers. It stated in a conclusory fashion that the particular agreement at issue did not by its nature or magnitude "infringe upon the essential conditions for the exercise of national sovereignty" (*porter atteinte . . . aux conditions essentielles d'exercice de la souveraineté nationale*).<sup>121</sup> This phrase, obscure in scope, would play a large role in later decisions, but, at the moment, it reserved for the future the *Conseil's* power to decide when international commitments went too far in impairing national sovereignty.

Similarly, the *Conseil* upheld the Luxembourg Treaty, observing that the treaty reallocated powers internally within the EEC (an issue not addressed by the French Constitution), but also adding that the treaty did not affect the balance of power between the EEC and the member states.<sup>122</sup> It thus reserved judgment on institutional changes that would significantly affect that balance of power.

Third, the *Conseil* cited the Preamble of the 1958 Constitution among the legal sources that it had considered in reaching its decision (the "visas"). That citation endorsed the legal character of the Preamble, although the decision was rather ambiguous about what content in the Preamble it deemed relevant. Perhaps it might have reinforced the principle of national sovereignty discussed in the decision, or conveyed the permissibility of limiting national sovereignty by means of reciprocal treaties, as contemplated by Paragraph 15 of the 1946 Preamble, incorporated through the 1958 Preamble. The recent publication of the *Conseil's* 1970 deliberations shows that one non-Gaullist member, François Luchaire, expressly made the latter argument,<sup>123</sup> but the extent to which his colleagues agreed remains unclear. Some commentators regarded the question as unresolved before later decisions of the *Conseil* more explicitly identified Paragraph 15

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119. It is now known that this conclusion was not unanimous. One member of the *Conseil*, Marcel Waline, interpreted the EEC Treaty as not firmly committing France to provide the Community with its own resources, and therefore viewed the approval of the Council Decision as the determinative step that would necessitate a constitutional amendment. See GRANDES DÉLIBÉRATIONS, *supra* note 69, at 203-04.

120. See CC decision No. 70-39 DC, June 19, 1970, cons. 5.

121. *Id.* cons. 9.

122. See *id.* cons. 2.

123. See GRANDES DÉLIBÉRATIONS, *supra* note 69, at 202.



as authorizing treaties that limit national sovereignty.<sup>124</sup>

The decision upholding the two commitments enjoyed overwhelming support within the *Conseil*. One member disagreed on the merits, and Luchaire abstained on the final vote because he thought that the Council Decision was not an international commitment within the *Conseil's* jurisdiction under Article 54.<sup>125</sup>

#### b. The Crossroads of 1976

A key opportunity to apply Article 54 arose from the debate over direct election of the “European Parliament.” The *Conseil constitutionnel* came within a single vote of blocking an engagement to implement the EEC Treaty, on the grounds that creating a form of democratic legitimation for the EEC would be inconsistent with the principles of national sovereignty embodied in the 1958 Constitution.<sup>126</sup> This section will discuss the episode in some detail, both because of its importance and because unpublished documentation of the *Conseil's* decision has recently become available.<sup>127</sup> The documentation reveals how a divided *Conseil* sought to accommodate moderate initiatives toward European integration without losing its ability to restrict them in the name of national sovereignty. In retrospect, the Gaullists’ concession may have been more effective as a short-term tactic than as a long-term strategy.

The treaty establishing the EEC had created an Assembly of parliamentarians, designated by national parliaments from among their own members, and had contemplated a later shift to direct election of the Assembly by popular vote.<sup>128</sup> (The Assembly named itself the “European Parliament” in 1962, although the member states did not officially approve that name until 1986.)<sup>129</sup> Article 138(3) of the EEC Treaty provided:

The Assembly shall draw up proposals for elections by direct universal suffrage in accordance with a uniform procedure in all Member States. The

124. See CC decision No. 76-71 DC, Dec. 29-30, 1976, cons. 2 (invoking Paragraph 15); CC decision No. 92-308 DC, Apr. 9, 1992, cons. 13 (same); LOUIS FAVOREU & LOIC PHILIP, *LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL* 264-65 (1st ed. 1975) (regarding the question as unsettled as of 1975).

125. See *GRANDES DÉLIBÉRATIONS*, *supra* note 69, at 206. The dissident member, Professor Marcel Waline, did not view the relevant clause of the EEC Treaty as a firm commitment to provide a revenue source to the EEC, and therefore viewed its implementation as a new commitment that could (and did) require a constitutional amendment. *Id.* at 203.

126. See *infra* text accompanying notes 166-172.

127. An organic statute enacted in 2008 made the internal documentation of the *Conseil constitutionnel* publicly accessible after a period of twenty-five years. A selection of the *comptes rendus* of major cases from 1958 to 1983 was published in 2009. See *GRANDES DÉLIBÉRATIONS*, *supra* note 69. That volume mentions the 1976 decision, e.g., *id.* at 253-54, but does not include its *compte rendu*, probably because of its length. The case files from those years are available in the *Archives Nationales*.

128. A later treaty merged the Assemblies of the three European Communities (EEC, Coal and Steel, and Euratom) in 1967, but for simplicity I will refer only to the EEC in the text. The *Conseil* framed the legal issues in its decision in terms of the EEC Treaty.

129. See JEAN-CLAUDE PIRIS, *THE LISBON TREATY: A LEGAL AND POLITICAL ANALYSIS* 115 (2010).

Council, acting by means of a unanimous vote, shall determine the provisions which it shall recommend to Member States for adoption in accordance with their respective constitutional rules.<sup>130</sup>

President de Gaulle and his successor Georges Pompidou, however, were hostile to direct election of the Assembly, and they stalled approval by the Council, at times invoking the technical objection that agreement on a genuinely uniform procedure had not yet been reached.<sup>131</sup> The obstacles to uniformity included disputes over majority rule or proportional representation, national or regional constituencies, election dates, and eligibility rules. But the deeper issues were France's preference for an inter-governmental model of EEC policymaking and France's opposition to an Assembly with pretensions to popular sovereignty.

The situation changed with the election of President Valéry Giscard d'Estaing. Although he was constrained by his party's coalition with the Gaullists, Giscard favored a more cooperative European policy.<sup>132</sup> In December 1974, a Paris summit of EEC heads of state agreed to move forward on direct election of the Assembly. The details were negotiated over the ensuing months, but disagreements about issues such as proportional representation and subnational constituencies persisted. In September 1976, the Council decided to begin direct elections in 1978, but to allow national procedures to govern the conduct of the first election.<sup>133</sup>

The efforts to institute direct elections excited opposition in France, especially from traditional Gaullists and Communists. Some critics, including Michel Debré, insisted that direct election of the European Assembly would contravene the Constitution.<sup>134</sup> The mix of arguments ranged from political theory concerning the nature of sovereignty to predictions of long-term consequences and technical analyses of clauses of the treaties and the Constitution.

For Debré, democratic legitimacy was possible only within a national framework; universal suffrage and national sovereignty were intimately linked.<sup>135</sup> Once popularly elected, the Assembly—which had already usurped the title “European Parliament”—would assert or demand additional powers that a majority coalition at a supranational level could not

130. Treaty Establishing the European Economic Community, *supra* note 113, art. 138(3).

131. See Valentine Herman, *Direct Elections: The Historical Background*, in *THE LEGISLATION OF DIRECT ELECTIONS TO THE EUROPEAN PARLIAMENT* 14 (Valentine Herman & Mark Hagger eds., 1980); Dominique Remy & Karl Hermann Buck, *France: The Impossible Compromise or the End of Majority Parliamentarism?*, in *THE LEGISLATION OF DIRECT ELECTIONS TO THE EUROPEAN PARLIAMENT* 103 (Valentine Herman & Mark Hagger eds., 1980).

132. The presidential election came in the midst of the legislative term, and the Giscardians had fewer seats in the National Assembly than the Gaullists. Giscard named Jacques Chirac as his first prime minister and Chirac became the leader of the Gaullists. Relations between them were tense, and Chirac eventually resigned as Prime Minister in August 1976.

133. See Herman, *supra* note 131, at 14. The election was subsequently postponed to 1979. *Id.* at 27.

134. Michel Debré, *Souveraineté et légitimité*, *LE MONDE*, Dec. 9, 1976, at 1.

135. See *id.*

legitimately exercise.<sup>136</sup> The distinctive interests of France would be submerged and the ability of Europe to resist Atlanticist influence (or U.S. domination) would be reduced.<sup>137</sup> Moreover, if direct elections were to be implemented through regional constituencies, the indivisibility of the Nation would be threatened and separatism would be fostered.<sup>138</sup> In legal terms, the 1958 Constitution guaranteed national sovereignty and defined the conditions of its exercise. Under Article 3, only the French people and their representatives could exercise sovereignty. Furthermore, the Constitution strictly determined the occasions in which direct election of representatives could occur.<sup>139</sup>

Other legal arguments turned on the specific terms of the proposal adopted by the Council of the EEC in September 1976. The proposal was not reciprocal, because some new member states would not be held to identical obligations. The proposal also left too much discretion to member states in implementation and, therefore, did not supply the “uniform procedure” contemplated by Article 138 of the EEC Treaty. For some analysts, this divergence from the Treaty meant that the proposal represented a new international engagement subject to constitutional review rather than a “measure of application” of a treaty already in force that would be immunized from review under the *Conseil’s* 1970 decision.<sup>140</sup> To others, even measures of application remained subject to review if they infringed upon the essential conditions of the exercise of national sovereignty.<sup>141</sup> For some, permitting non-uniformity entailed a lack of reciprocity, so that the new engagement could not be justified as a reciprocal limitation of sovereignty authorized by Paragraph 15 of the 1946 Preamble.<sup>142</sup>

Defenders of the proposal dismissed these arguments as either political rather than legal, or legally erroneous.<sup>143</sup> In their view, the principle of direct election had been accepted in the EEC Treaty before the 1958 Constitution was drafted, and could no longer be challenged.<sup>144</sup> Neither the principle nor the details of the proposal violated a proper understanding of sovereignty as recognized in the 1958 Constitution and the 1946 Preamble.<sup>145</sup>

President Giscard d’Estaing sought to defuse the legal aspect of the debate by referring the new EEC instruments to the *Conseil constitutionnel*

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136. See *id.* at 11.

137. Michel Debré, *L’aventure Recommence*. . . , LE MONDE, Dec. 18, 1975, at 1, 10.

138. *Id.* at 10.

139. Debré, *supra* note 134, at 11.

140. Jacques Robert, *L’Europe et le droit*, LE MONDE, Nov. 21–22, 1976, at 17.

141. Jacques Boitreaud, *L’élection de l’Assemblée européenne et la Constitution française*, LE MONDE, Nov. 24, 1976, at 13. Boitreaud had served as the first Secretary General of the *Conseil constitutionnel*.

142. Robert, *supra* note 140, at 17.

143. See, e.g., François Luchaire, *Faut-il réviser la Constitution?*, LE MONDE, Nov. 6, 1976, at 10. Luchaire had served as a member of the *Conseil constitutionnel* at the time of the 1970 decision on the Community’s own resources.

144. *Id.*; Georges Vedel, *Bilan d’une controverse*, LE MONDE, Dec. 25, 1976, at 5.

145. François Luchaire, *Faut-il modifier la Constitution? (suite)*, LE MONDE, Dec. 11, 1976, at 8; Vedel, *supra* note 144, at 5 (regarding the details).

under Article 54 and asking it to determine whether the Constitution needed to be amended before the commitments could be approved.<sup>146</sup> At this period, the *Conseil* consisted of six members appointed by Gaullists and three centrists appointed by presidents of the Senate; Giscard had not yet had the opportunity to add any members.<sup>147</sup> In accordance with the usual practice, the *Conseil* President, Roger Frey, chose one member as *rapporteur* to study the question and present an analysis of the legal issues along with a draft decision. The *rapporteur* on this occasion was François Goguel, a distinguished political scientist and former Senate official, who was appointed to the *Conseil* by Pompidou.<sup>148</sup>

When the *Conseil* met to deliberate, Goguel delivered a lengthy report favoring a conclusion of unconstitutionality.<sup>149</sup> He expressed several, though not all, of the criticisms previously articulated by Debré, and a few of his own. The *Conseil's* scope of review, he argued, extended both to the principle of direct elections for the Assembly and to the details of implementation.<sup>150</sup> Goguel explained that the prior ratification of the EEC Treaty did not prevent *Conseil* review, because Article 138 left open whether proposals for direct elections would be adopted by ordinary legislation or by constitutional amendment; it merely said that plans for direct election would be recommended to Member States "for adoption in accordance with their respective constitutional rules."<sup>151</sup> The September 1976 Act purported to make members of the European Assembly representatives of the peoples of their respective states, and, thereby, conflicted with Article 3(1) of the Constitution, which identified the representatives of the people as a means for the exercise of national sovereignty. European Assembly members could not be recognized as exercising French national sovereignty.<sup>152</sup> Furthermore, Article 3(3) decreed that the Constitution would delineate the occasions for the exercise of direct and indirect suffrage; the Constitution made no provision for European elections. Universal suffrage was the exercise of national sovereignty, and was inherently a matter of constitutional dimension.<sup>153</sup>

In addition to these textual conflicts, Goguel argued that the Act contradicted the "silence" of Article 34, which enumerated legislative powers but did not specify the authority to regulate European elections.<sup>154</sup> He did not believe, however, that the European incompatibility rules for candi-

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146. Technically, the instruments referred consisted of a Council Decision of September 20, 1976, and the annexed "Act" setting forth the details of the proposal.

147. See GRANDES DÉLIBÉRATIONS, *supra* note 69, at 456 (showing the composition of the *Conseil* at the time of the decision).

148. CC, Compte rendu, decision No. 76-71 DC, at 1 (copy on file with the author) [hereinafter *Compte rendu*]. This account is based on the summary record (*compte rendu*) of the deliberations, unpublished but available in the *Archives Nationales*. The record is not a literal transcript of everything said by the participants.

149. *Id.* at 2-34.

150. *Id.* at 10-12.

151. *Id.* at 11.

152. *Id.* at 19-20.

153. *Id.* at 20-21.

154. *Id.* at 23-24.

dates conflicted with the national incompatibility clause contained in Article 23, because the two norms really addressed two different subjects.<sup>155</sup> Nor did he believe that the absence of full reciprocity afforded a valid objection to the permissibility of the commitment.<sup>156</sup>

For these reasons, Goguel concluded that a constitutional amendment should be necessary before France could accept the proposal for direct elections. Beyond that, he thought that the *Conseil's* decision should include reminders that treaties could not be superior to the Constitution and that the European institutions possessed only limited competences.<sup>157</sup> The decision should also point out the specific ways in which the Constitution would need to be amended if the President chose to go forward. Otherwise, there would be a danger that France would adopt a broad constitutional amendment, as other countries had, prospectively permitting transfers of power by ordinary law or treaty, in anticipation of future European developments.<sup>158</sup>

Goguel's report met with an unusual reception. Paul Coste-Floret, a centrist member of the *Conseil* who had been involved in the drafting of both the 1946 and 1958 constitutions, presented a counter-report that he had written, responding to the arguments of the public debate and denying the necessity of a constitutional amendment.<sup>159</sup> For Coste-Floret, the shift to direct election of the European Assembly would neither threaten the principle of national sovereignty nor infringe particular articles of the Constitution. The new commitments concerned only the method of selection of the Assembly and did not increase its powers.<sup>160</sup> The member states remained free to resist any requests by the Assembly for additional powers.<sup>161</sup> Furthermore, he argued that the 1958 Constitution was drafted against the background of the EEC Treaty and was not intended to override it.<sup>162</sup> Article 3 of the Constitution described how national sovereignty was exercised within the Republic, and did not deal with questions concerning the European Assembly, which does not exercise sovereignty.<sup>163</sup> Similarly, other articles of the Constitution addressing national elections did not implicate the structure of European elections.<sup>164</sup> Moreover, Coste-Floret argued that even if relevant, reciprocity did not require uniformity of obligations.<sup>165</sup>

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155. *Id.* at 22.

156. *Id.* at 27.

157. *Id.* at 28.

158. *Id.* at 30-31. Goguel had devoted several pages of his report to a description of relevant provisions of other member state constitutions, some of which he interpreted as broadly authorizing transfers of power to international institutions in derogation of the national constitution. *Id.* at 12-18.

159. *Id.* at 35-44.

160. *Id.* at 37-38.

161. *Id.* at 38.

162. *Id.*

163. *Id.* at 40-41.

164. *Id.* at 43-44.

165. *Id.* at 42-43.

An intense discussion followed, with both proposals receiving support from other members. Frey insisted that the *Conseil's* authority extended only to declaring the need for a constitutional amendment, not to suggesting what its content should be.<sup>166</sup> Several members worried that a constitutional amendment would indeed be adopted, either by the parliamentary route or by referendum.<sup>167</sup> Coste-Floret argued that the *Conseil* could better assure the protection of national sovereignty by a well-reasoned decision explaining the consistency of the commitment with the Constitution than by declaring it inconsistent.<sup>168</sup> When the *Conseil* took a vote on Goguel's conclusion of unconstitutionality, the outcome was a tie: four in favor, four opposed, and one abstaining.<sup>169</sup> The abstainer was Pierre Chatenet, a Gaullist whose experience as President of Euratom had left him distrustful of the European Assembly, but who described himself as genuinely uncertain as to which solution presented greater dangers.<sup>170</sup> Under the *Conseil's* procedures, the vote of President Frey broke the tie,<sup>171</sup> and he had joined with the three centrists in finding no conflict. He then agreed to redraft a proposed decision explaining the new conclusion.<sup>172</sup>

The deliberations resumed the next day, and made significant revisions to Frey's draft.<sup>173</sup> Goguel was not able to reopen the questions decided the previous day, and the modified version was approved by a five-to-four vote, with Chatenet's active participation.<sup>174</sup>

The resulting decision expressed its principles in seven numbered paragraphs (*considérants*).<sup>175</sup> The first emphasized the limited purpose of the referred commitments, to make provisions for direct election of the

166. *Id.* at 49, 54.

167. *Id.* at 49, 55-56 (remarks of Brouillet, Chatenet, Coste-Floret, and Goguel).

168. *Id.* at 55.

169. *Id.* at 57. The same passage indicates that the *Conseil* had reached consensus that both instruments were international engagements subject to its authority under Article 54 and that its review extended to all aspects of the engagements. *Id.* These two conclusions were left implicit in the decision.

170. *Id.* at 47, 57-58. It is unclear whether Chatenet's abstention might have been influenced by an earlier incident in the public debate, when he had signed a manifesto of the Movement for the Independence of Europe (i.e., independence from the United States and the Soviet Union). One paragraph of the manifesto argued that direct election of the European Assembly should be implemented only in strict compliance with the terms of Article 138. The Socialist caucus in the National Assembly then wrote to the *Conseil*, arguing that Chatenet had violated his duty of restraint by commenting on an issue likely to come before it. See Pierre Avril & Jean Gicquel, *Chronique constitutionnelle française*, 1 POUVOIRS 205, 215 (stating that Chatenet should have recused himself); *Le groupe socialiste reproche à M. Chatenet d'avoir enfreint son "obligation de réserve"*, LE MONDE, Feb. 7, 1976, at 5; *Nouveau manifeste pour l'indépendance de l'Europe*, LE MONDE, Jan. 21, 1976, at 6. However, he did participate in the discussion preceding the vote on December 29, and took part in the vote on December 30, and the *compte rendu* does not reflect any attention to this issue.

171. Article 56(3) of the Constitution gives the vote of the president determinative effect in case of a tie. 1958 CONST. art. 56(3).

172. *Compte rendu*, *supra* note 148, at 58.

173. *Id.* at 60-70. The *compte rendu* includes both Goguel's draft decision and Frey's new draft.

174. *Id.* at 69-70.

175. CC decision No. 76-71 DC, Dec. 29-30, 1976.

Assembly by universal suffrage.<sup>176</sup> The second, taken from Goguel's draft, asserted that, although Paragraph 15 of the 1946 Preamble, confirmed by the 1958 Preamble, authorized reciprocal *limitations* of sovereignty, no constitutional provision authorized *transfers* of all or part of the national sovereignty to any international organization whatsoever.<sup>177</sup> The third emphasized that nothing in the referred commitments enlarged the enumerated powers of the European Communities or the Assembly, or modified the nature of the Assembly, which remained composed of representatives of each of the peoples of the member states.<sup>178</sup> The fourth asserted that direct election of the Assembly neither created a sovereignty nor created institutions inconsistent with respect for national sovereignty; nor did it infringe upon the powers of the Republic and its legislature; that any change could result only from a new amendment of the treaties, which would be subject to Articles 52 through 55 and 61 of the Constitution (and thus referral to the *Conseil* for a new ruling).<sup>179</sup> The fifth found that nothing in the referred commitments required or permitted election procedures that would put at issue the indivisibility of the Republic, but rather these procedures must respect all constitutional principles.<sup>180</sup> The sixth observed that the sovereignty defined in Article 3 of the Constitution could only be national, both in its foundation and in its exercise, and only the representatives elected within the framework of the Republic could be regarded as exercising it.<sup>181</sup> The seventh observed that the Assembly was an international institution external to the framework of the Republic, not exercising national sovereignty, and, therefore, outside the scope of provisions of Articles 23 and 34 relevant to national elections.<sup>182</sup> Consequently, no clause of the referred commitments was contrary to the Constitution.

The decision thus dismissed the threat to national sovereignty by minimizing the effect of the commitments and attempted to deny any transformative character to the directly elected Assembly. It confirmed the continuing force of Paragraph 15 of the 1946 Preamble, but drew a distinction between permitted limitations of sovereignty and forbidden transfers of sovereignty. It avoided provoking an overbroad constitutional amendment, and tried to preserve or even expand the potential role of the *Conseil* in evaluating further European developments.<sup>183</sup> Meanwhile, it accepted

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176. *Id.* cons. 1.

177. *Id.* cons. 2.

178. *Id.* cons. 3.

179. *Id.* cons. 4.

180. *Id.* cons. 5.

181. *Id.* cons. 6.

182. *Id.* cons. 7.

183. The decision expanded the *Conseil's* role, because it signaled that the parliamentary minorities could refer laws authorizing the treaties under Article 61.

The first attempt, in 1978, involved the procedural objection that the Government had sought authorization for one modification of France's responsibilities to the IMF without also submitting a related earlier agreement; the *Conseil* upheld the separate submission of the later engagement, while also observing that the earlier one did not infringe national sovereignty. CC decision No. 78-93 DC, April 29, 1978. Another procedural

the argument that certain constitutional norms applied only to the operation of the French government, and not to the operation of international institutions created in part by France.

The *Conseil's* compromise ruling paved the way for legislative approval of direct elections, but it did not satisfy all of the critics, and the path was not smooth. The fact that the vote was five-to-four leaked immediately, despite the formal secrecy of the deliberations.<sup>184</sup> Michel Debré continued to warn of dangers to French sovereignty, and he pointed out that even if the *Conseil's* exposition bound the various branches of the French state, it did not bind the European institutions.<sup>185</sup> Concerned by dissension within his own party, the Gaullist leader Jacques Chirac sought to postpone legislative consideration of the agreement. Giscard's Government had to resort to the exceptional procedure of making the authorization bill an issue of its responsibility under Article 49(3) of the Constitution; the Gaullists then faced the choice between joining in a motion of censure of the Government, which would force immediate elections, or letting the bill automatically become law.<sup>186</sup> The bill thus passed the National Assembly by default, and received the explicit approval of the Senate, where the Gaullist bloc was smaller and withheld its vote.<sup>187</sup> Whether Giscard could ever have mustered the supermajority necessary for a constitutional amendment, if the *Conseil* had found one necessary, is uncertain. At the time, some authors assumed that he could not have,<sup>188</sup> although the members of the *Conseil* apparently believed that an amendment would have been likely to succeed.

Debré was surely right that direct election would bolster the Assembly's claims to legitimacy, and would make more likely the conferral of additional powers that would undermine French national sovereignty in the long term. The *Conseil* majority was apparently unwilling to resist beginnings, to let the potential of future threats to sovereignty dictate current conclusions about constitutionality. Instead, it tried to define broad principles, trusting the executive and legislative branches to protect national interests, and waiting to adjudicate imminent threats to national sovereignty when later agreements were referred. Arguably, that approach

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challenge, which will not be discussed in text, concerned the failure to consult the territorial assembly of New Caledonia before seeking legislative approval of an ILO Convention applicable there; the *Conseil* held that the constitutional requirement of consultation did not apply to the treaty. See CC decision No. 88-247 DC, Jan. 17, 1989.

184. See Andre Laurens, *L'avenir du Parlement européen*, LE MONDE, Jan. 1, 1977, at 1, 4. (This article misallocated the votes, however, placing Chatenet among the dissenters and Henry Rey in the majority.)

185. See, e.g., Michel Debré, *La Tricherie*, LE MONDE, May 2, 1977, at 1, 3.

186. See JOHN FITZMAURICE, THE EUROPEAN PARLIAMENT 69-70 (1978); Remy & Buck, *supra* note 131, at 114.

187. Remy & Buck, *supra* note 131, at 115-16.

188. See Louis Favoreu & Loïc Philip, *Élection au suffrage universel direct des Membres de l'assemblée européenne*, 93 REVUE DU DROIT PUBLIC 129, 130-31 & n.1 (1977) (also doubting the viability of a referendum).



embodied the proper interpretation of Article 54.<sup>189</sup> The risks attendant on that interpretation materialized in 1986, when a political compromise prevented referral of the Single European Act, as will be discussed in the next section.

### c. The Road to Maastricht

The *Conseil* attempted to clarify some of the essential content of national sovereignty in a few decisions of the fifteen years that followed, thus far, always concluding that impermissible infringements had not occurred. In 1980, a group of Communist deputies challenged a fairly minor treaty between France and Germany on mutual judicial assistance.<sup>190</sup> As the *Conseil* had suggested in 1976, the deputies used the passage of a law authorizing ratification of the treaty as a vehicle for referral of the treaty issues under Article 61. The challenge might best be seen as another attempt to resist beginnings, against the background of negotiations exploring a “common European area of justice.”<sup>191</sup> The *Conseil* examined claims that the treaty violated judicial independence and national sovereignty, and threatened the right to asylum, by giving effect to orders of German courts in France;<sup>192</sup> it had been argued in the earlier debates that the treaty would lead to German police conducting searches in France.<sup>193</sup> The *Conseil* responded that these claims overstated the content of the treaty, which actually preserved opportunities for French courts to withhold compliance with foreign requests. But it made explicit that the treaty did not infringe “the rule, which derives from the principle of national sovereignty,” that requested acts of judicial assistance in penal matters can be performed in France only by the French judicial authorities, as defined by French law, acting in the forms prescribed by French law.<sup>194</sup> Thus, both national sovereignty and judicial independence were secured.

In 1981, a major turning point in French politics occurred. First, François Mitterrand was elected President; then, the Socialists won an absolute majority in the National Assembly, returning them to Government for the first time since the 1950s.<sup>195</sup> This reversal of polarity led to many developments in French constitutional law. One consequence of immediate interest here was the statutory abolition of the death penalty in 1981, followed by the negotiation of a new Protocol to the European human rights convention outlawing capital punishment. Ratification of the Proto-

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189. Indeed, Paul Coste-Floret himself had proposed the language in Article 54 that created the referral procedure.

190. CC decision No. 80-116 DC, July 17, 1980.

191. See Charles Vallée, *À propos de la décision du Conseil constitutionnel du 17 juillet 1980*, 85 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 202, 205 (1980); COUNCIL OF THE EUROPEAN UNION, *LIVING IN AN AREA OF FREEDOM, SECURITY AND JUSTICE* 6-8 (2005) (describing emergence of EC intergovernmental cooperation in law enforcement).

192. Judicial independence is guaranteed under Article 64 of the Constitution; the right to asylum was declared in Paragraph 4 of the 1946 Preamble.

193. ASSEMBLÉE NATIONALE, *COMPTE RENDU INTÉGRAL*, May 21, 1980, 2d sitting, at 1166 (remarks of M. Robert Montdargent).

194. CC decision No. 80-116 DC, July 17, 1980, cons. 4.

195. GORDON WRIGHT, *FRANCE IN MODERN TIMES* 426-27 (1995).

col would preclude future legislative majorities from reinstating the death penalty in peacetime;<sup>196</sup> authorization to ratify could be (and ultimately was) granted over the objection of the Senate.<sup>197</sup> The opposition, prominently including Michel Debré,<sup>198</sup> insisted that the power to impose capital punishment was too important an element of national sovereignty to renounce, and that definitive abolition would infringe the President's emergency powers under Article 16 of the Constitution.

In response, President Mitterrand referred the Protocol to the *Conseil constitutionnel* under Article 54.<sup>199</sup> The *Conseil constitutionnel* succinctly declared the treaty consistent with the Constitution.<sup>200</sup> It observed that France could legally withdraw from the treaty in the future by applying the denunciation clause of the European Convention. (Depending on the circumstances, this might involve some delay, and might require denunciation of the European Convention itself.) The *Conseil* asserted that the commitment to abolish the death penalty in peacetime was not incompatible with "the duty of the state to ensure respect of the institutions of the Republic, the continuity of the life of the nation, and the guarantee of the rights and liberties of citizens."<sup>201</sup> For these reasons, it concluded that the Protocol did not infringe upon the essential conditions of the exercise of national sovereignty, or otherwise violate the Constitution.<sup>202</sup>

This opaque decision raised a series of questions. Was a denunciation clause necessary and/or sufficient to reconcile some or all treaties with national sovereignty? (Later decisions suggest that denunciation clauses are sometimes necessary and not always sufficient.)<sup>203</sup> Did the decision, which did not expressly mention the President's emergency powers under Article 16, mean to imply that the Protocol did not restrict the

196. Article 2 of the Protocol permits states to provide for the death penalty "in respect of acts committed in time of war or of imminent threat of war."

197. See Louis Favoreu, *La décision du Conseil constitutionnel du 22 mai 1985 relative au protocole No. 6 additionnel à la Convention européenne des Droits de l'homme*, 31 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 868, 869 (1986). As previously mentioned, Article 45(4) of the Constitution enables the National Assembly, at the Government's request, to pass a bill into law after unresolvable disagreement with the Senate. This procedure applies to ordinary legislation, including authorization to ratify a treaty, but not to certain "organic statutes" and not to constitutional amendments.

198. See Favoreu, *supra* note 197, at 871. Debré not only objected to the Protocol when it was first introduced, but moved in the National Assembly to reject it on constitutional grounds even after the *Conseil constitutionnel* had upheld it. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, June 21, 1985, 2d sitting, at 1874-75. Nearly all the Gaullist and Giscardian deputies (but not Giscard) voted in favor of his motion. *Id.* at 1888.

199. This was only the third time that Article 54 had been used, not counting the few indirect referrals by means of Article 61.

200. CC decision No. 85-188 DC, May 22, 1985. (The *Conseil* returned to the death penalty issue twenty years later, as will be discussed.)

201. *Id.*

202. *Id.*

203. See CC decision No. 91-294 DC, July 25, 1991 (denunciation clause not necessary in Schengen implementation agreement); CC decision No. 98-408 DC, Jan. 22, 1999 (denunciation clause not sufficient for ICC Statute); CC decision No. 524-525 DC, Oct. 13, 2005 (denunciation clause necessary for Second Optional Protocol to ICCPR).

President's emergency powers, or that it did not impermissibly restrict them?<sup>204</sup> Did the tripartite standard of duty regarding institutions, the nation, and rights spell out the essential conditions of national sovereignty?<sup>205</sup>

The *Conseil* missed an opportunity to further clarify the essential conditions of national sovereignty when a political accommodation prevented referral of the next major step in European integration. The Single European Act of 1986 combined a series of modifications of the EEC Treaty, primarily designed to facilitate the accomplishment of a unified internal market by the end of 1992.<sup>206</sup> It replaced requirements of unanimity by qualified majority voting in several relevant fields, increased the role of the European Parliament in Community legislation,<sup>207</sup> and broadened the Community's authority to legislate by means of regulations with direct effect rather than by means of directives dependent on national implementation.<sup>208</sup> These changes intensified the supranational character of the EEC, and the expansion of qualified majority voting exposed France to the risk of being subjected to rules that it expressly opposed. Traditional Gaullists, including Michel Debré, considered the Single European Act incompatible with the French constitution, and prepared to fight against its ratification.<sup>209</sup>

The ratification process, however, occurred during an unusual period in French politics. The Single European Act had been negotiated by a Socialist government, but shortly after the text was finalized and signed, legislative elections in France led to a right-wing majority in the National Assembly and the first "cohabitation" between a President (Mitterrand) and Prime Minister (Chirac) of opposing parties.<sup>210</sup> Chirac pursued a strategy of alliance rather than competition with Giscard's party, and now favored progress on European integration and economic liberalization.<sup>211</sup>

As the time for parliamentary approval neared, Chirac put pressure on his party not to obstruct the treaty. Debré agreed to withdraw his motion in the National Assembly to reject the treaty as unconstitutional.<sup>212</sup> The Communist deputies maintained their own equivalent motion, but only

204. See Favoreu, *supra* note 197, at 874; RONNY ABRAHAM, *DROIT INTERNATIONAL, DROIT COMMUNAUTAIRE ET DROIT FRANÇAIS* 62-63(1989).

205. Favoreu, *supra* note 197, at 874, ABRAHAM, *supra* note 204, at 62-63.

206. Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1 [hereinafter Single European Act].

207. It also made official the change in title from "Assembly" to "European Parliament." *Id.*, art. 3, § 1 ("The institutions of the European Communities, henceforth designated as referred to hereafter . . .").

208. See generally George A. Bermann, *The Single European Act: A New Constitution for the Community?*, 27 *COLUM. J. TRANSNAT'L L.* 529 (1988-1989); C.D. Ehlermann, *The Internal Market Following the Single European Act*, 24 *COMMON MKT. L. REV.* 361 (1987).

209. See *infra* text accompanying notes 212-214.

210. KNAPP, *supra* note 23, at 344-45, 357.

211. See GUYOMARCH ET AL., *supra* note 25; KNAPP, *supra* note 23, at 357-58.

212. See M. Chirac *met fin à quelques manifestations antieuropéennes au RPR*, *LE MONDE*, Nov. 20, 1986, at 13; ASSEMBLÉE NATIONALE, *COMPTE RENDU INTÉGRAL*, Nov. 20, 1986, 1st sitting, at 6615.

they voted for it; Debré and his allies voted against.<sup>213</sup> Later that day, in the final debate on the bill authorizing ratification, Debré and Jean Foyer spoke at length against the constitutionality of the treaty, and then declined to vote.<sup>214</sup> Thus, due to Gaullist acquiescence, the “most comprehensive revision to date of the [EEC] Treaty”<sup>215</sup> came into force without an examination by the *Conseil constitutionnel*. Whether the *Conseil* as then composed would have vindicated Debré’s objections or denied them, possibly by inflecting its jurisprudence, can only be guessed.

Sovereignty challenges to a treaty returned to the *Conseil* in 1991, with the Schengen implementation agreement.<sup>216</sup> In the original Schengen accords, a subset of the European Community members had set the goal of gradually eliminating routine controls at the borders between them;<sup>217</sup> the later implementation agreement adopted concrete commitments toward achieving this goal, including enhancement of law enforcement to compensate for the suppression of border checks, and the adoption of common visa policies regarding non-EC visitors.<sup>218</sup> Although the Gaullist caucus supported ratification of the implementation agreement, a dissident faction led by Pierre Mazeaud referred the authorizing statute to the *Conseil*,<sup>219</sup> objecting both to the agreement’s weakening of France’s borders and to several of the compensatory measures. The *Conseil* rejected a long series of challenges to specific provisions, as well as to the general regime of the agreement.<sup>220</sup>

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213. COMPTE RENDU INTÉGRAL, *supra* note 212, at 6615-17 (remarks of M. Robert Montdargent); *id.* at 6630-31 (analysis of vote).

214. ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, Nov. 20, 1986, 2d sitting, at 6641-43 (remarks of M. Michel Debré); *id.* at 6648-50 (remarks of Jean Foyer, with approving interjections from Debré); *id.* at 6669 (listing eight members of the Gaullist party (RPR), aside from the presiding officer, who were present but not voting).

215. Bermann, *supra* note 208, at 529.

216. CC decision No. 91-294 DC, July 25, 1991.

217. Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 14, 1985, 2000 O.J. (L 239) 1, 13-18. The 1985 accord was never submitted to the French parliament for its approval; authorization was sought only for the later implementation convention.

218. Convention implementing the Schengen Agreement of June 14, 1985, between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, June 19, 1990, 2000 O.J. (L 239) 1, 19-62 [hereinafter Convention implementing the Schengen Agreement]. At this stage, the Schengen regime rested on a multilateral international agreement among certain European states; several years later, the regime was incorporated into European Community law.

219. Mazeaud had introduced a motion in the Assembly to reject the treaty as an unconstitutional infringement of national sovereignty, but the motion received few votes. However, with the support of deputies outside the Gaullist party, Mazeaud reached the threshold of sixty deputies needed for a referral to the *Conseil*. By 1991, Michel Debré was nearly eighty and no longer sat in the Assembly. After Jacques Chirac became President, he appointed Mazeaud to the *Conseil constitutionnel*, and, later, to its presidency.

220. Not without irony, the deputies also challenged the implementation agreement as violating the right to asylum under Paragraph 4 of the 1946 Preamble. The *Conseil* held that the treaty did not impair, but rather preserved the right of asylum. Only a few years later, the *Conseil*’s efforts to protect the right to asylum against similar measures

In finding the new border regime consistent with national sovereignty, the *Conseil* elaborated upon on the tripartite standard that it had employed in the 1985 death penalty case. The essential conditions of the exercise of national sovereignty included “the duty of the state to ensure respect of the institutions of the Republic, the continuity of the life of the nation, and the guarantee of the rights and liberties of citizens.”<sup>221</sup> However, the *Conseil* found that relaxing border controls was not equivalent to suppressing the borders of the state or ceding territory, and so did not threaten the “institutions of the Republic”; nor was the state thereby abdicating its duty to guarantee the rights of its citizens to security.<sup>222</sup> The *Conseil* was more receptive to the claim that an agreement could threaten the “life of the nation” by removing national control over migratory flows, and ultimately control over access to French nationality, but the *Conseil* denied that this agreement had that effect. In sharing control of short-term visa policies with the Schengen partners, France retained sufficient power over the movement of non-EC visitors, and did not relinquish any power over French nationality law.<sup>223</sup> Thus, the implementation agreement did not violate the tripartite standard.

The *Conseil* rejected all arguments that the implementation agreement accomplished a (forbidden) transfer of sovereignty rather than a (permissible) limitation of sovereignty.<sup>224</sup> The agreement gave other Schengen states effective power to authorize the entry of non-EC nationals into France, but only within certain temporal limits and subject to potential veto by French authorities. The *Conseil* also rejected the argument that the agreement abandoned national sovereignty because it lacked a denunciation clause; the *Conseil* found that the absence of a denunciation clause was not objectionable per se, particularly because the rules of the treaty could not be modified without the consent of France.<sup>225</sup> The *Conseil*’s phrasing did not make clear whether it was distinguishing or discarding the reasoning it had used in the 1985 death penalty case, which had emphasized the option of denunciation as a safety valve for national sovereignty, even though a well-defined prohibition was involved.

A softening of attitude also appeared in the *Conseil*’s acceptance of provisions concerning foreign police action on French soil. Among its other compensating measures, the implementation agreement allowed foreign police to engage in surveillance and pursuit of a criminal who crossed the open border into France, though they could accomplish arrests and searches only by requesting the French police for assistance.<sup>226</sup> Mazeaud

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resulted in severe criticism from the right and a constitutional amendment. See *infra* text accompanying notes 360-364.

221. CC decision No. 91-294 DC, July 25, 1991, cons. 9.

222. *Id.* cons. 11, 17. Note the characteristic claim that a treaty threatens the rights of citizens by limiting the power of the state to protect them.

223. *Id.* cons. 13-15.

224. *Id.* cons. 19-23, 25-26, 38-39.

225. *Id.* cons. 56-58.

226. Convention implementing the Schengen Agreement, *supra* note 218, at arts. 39-43.

had strongly objected to the intrusion of foreign police as violating the principles of the *Conseil's* 1980 decision on the Franco-German judicial assistance treaty.<sup>227</sup> Nonetheless, the *Conseil* found that the restricted authority to continue law enforcement action into France did not disrespect national sovereignty or transfer sovereignty to foreign officers, and that the treaty itself required foreign police to comply with individual liberties applicable in France.<sup>228</sup>

One aspect of the implementation agreement troubled the *Conseil* enough to raise the issue *sua sponte*. The agreement created an intergovernmental Executive Committee to oversee the accurate implementation of its terms, acting by unanimous vote of the parties.<sup>229</sup> Decisions of the Executive Committee were subject to no judicial control. The *Conseil* formally reconciled this structure with constitutional principles by observing that the decisions of this Committee had no direct effect in France, and that measures taken by French authorities in response to those decisions would themselves be reviewable in court.<sup>230</sup> Once more, then, the *Conseil* neutralized a potential constitutional issue by characterizing an institution as external to the Republic and outside the scope of the applicable constitutional provision.

Thus, by 1991, the *Conseil constitutionnel* had upheld every international commitment referred to it, including regional innovations undertaken both within and outside the regime of European Community law. Its sparse case law had partly sketched, not always consistently, the essential boundary of national sovereignty that could not be infringed without a constitutional amendment.

#### d. The First Maastricht Decision

The Maastricht Treaty of 1992 both amended the prior Community treaties and added a new Treaty on European Union. Responding to post-Cold War changes in Europe, the agreement accelerated integration in order to anchor reunified Germany more firmly in the EC, and to reform legislative processes in anticipation of new accessions.<sup>231</sup> Major innovations included provisions on political union, creating a European citizenship and increasing Community powers over migration of third-country nationals, and provisions on economic and monetary union, progressing

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227. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, June 3, 1991, 1st sitting, at 2668 (remarks of M. Pierre Mazeaud), available at <http://archives.assemblee-nationale.fr/9/cri/1990-1991-ordinaire2/070.pdf>.

228. CC decision No. 91-294 DC, July 25, 1991, cons. 38-40.

229. Convention implementing the Schengen Agreement, *supra* note 218, at arts. 131-32.

230. CC decision No. 91-294 DC, July 25, 1991, cons. 62; see also Xavier Prétot, *La conformité à la Constitution de la loi autorisant l'approbation de la Convention d'application de l'Accord de Schengen*, 28 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 194, 209-211 (describing this holding as ambiguous concerning which actions needed to be reviewable and why).

231. See GUYOMARCH ET AL., *supra* note 25, at 39.

in stages to the adoption of a common currency.<sup>232</sup> The treaty also expanded the powers of the European Parliament and adopted a co-decision procedure that gave that body a full veto over the enactment of certain measures.<sup>233</sup> Additional powers over labor policy, implemented in part by qualified majority voting, resulted from a Social Protocol that omitted the United Kingdom.<sup>234</sup> The European Union umbrella also covered a “second pillar” of intergovernmental cooperation on common foreign and security policy, and a “third pillar” of cooperation in justice and home affairs.<sup>235</sup>

The Maastricht treaty prompted controversy and constitutional soul-searching in other European countries, and produced three decisions of the *Conseil Constitutionnel*, including the first-ever finding that ratification of a treaty would require a constitutional amendment. Nonetheless, the *Conseil*'s initial Maastricht decision is as remarkable for what the *Conseil* deemed constitutional as for what it deemed unconstitutional.

The drafting of the Maastricht Treaty extended over several years, and its referral to the *Conseil* was long anticipated. That expectation gave the *Conseil* the opportunity to prepare for deliberations on a large and complex set of instruments within the one-month deadline set by the *Conseil*'s organizing statute.<sup>236</sup> The decision confirmed that the *Conseil* would restrict its evaluation to the new commitments entailed by the treaty, and would not address the constitutionality of commitments already in force under prior treaties (such as the Single European Act, which had never been submitted to its review). The *Conseil* justified this restriction by reference to the norm of respect for treaty obligations, *pacta sunt servanda*, which the *Conseil* treated as having constitutional significance, as an aspect of France's conformity to public international law contemplated by Paragraph 14 of the 1946 Preamble, and by reference to the status given to treaties by Article 55 of the 1958 Constitution.<sup>237</sup> It thus declined to extend to treaties the practice it had adopted for statutes in 1985, of examining the constitutionality of an earlier statute while reviewing a new statute that amended it.<sup>238</sup>

The *Conseil* invoked Paragraph 15 of the 1946 Preamble, which it now interpreted as permitting “transfers of competences” to international organizations on the basis of reciprocity, instead of permitting only “limita-

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232. See Roger J. Goebel, *The European Community and Eastern Europe: “Deepening” and “Widening” the Community Brand of Economic Federalism*, 1 *NEW EUR. L. REV.* 163, 202-04, 207 (1993).

233. *Id.* at 209-11.

234. *Id.* at 210.

235. *Id.* at 205-06; Koen Lenaerts, *The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism*, 17 *FORDHAM INT'L L.J.* 846, 848 (1994).

236. See Bruno Genevois, *Le Traité sur l'Union européenne et la Constitution: A propos de la décision du Conseil constitutionnel no. 92-308 DC du 9 avril 1992*, 8 *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 373, 377 (1992) (explanation of the decision by the secretary general of the *Conseil*).

237. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 7-8.

238. See *supra* text accompanying notes 106-107.

tions of sovereignty” as in previous decisions.<sup>239</sup> The *Conseil* did not literally say that it was approving “transfers of sovereignty,” but it no longer relied on the distinction between limitations and transfers of sovereignty that it had articulated in 1976 and had purported to apply in subsequent cases.<sup>240</sup> Instead, it evaluated the effects of the power transferred in order to determine whether that transfer infringed upon the essential conditions of the exercise of national sovereignty, taking into account the nature of the subject matter and also the modality by which the transferred power would be exercised.<sup>241</sup>

Applying its new criteria, the *Conseil* found two aspects of the treaty incompatible with national sovereignty. First, the *Conseil* addressed monetary policy. The monetary union created by the treaty would progress in three stages to the adoption of a common currency (i.e., the euro). The initial two stages involved coordination of monetary policy, limits on inflation and reduction of deficits. At the third stage, once the conditions of convergence had been met, individual national currencies would be replaced by a common currency, monetary policy would be supervised by an independent European Central Bank, and exchange rates with third-states would be regulated at the EU level (partly by unanimity and partly by qualified majority voting). The *Conseil* found that, at this third stage, the modalities of decision-making would deprive France of its own powers over monetary and exchange policy, a domain implicating the essential conditions of the exercise of national sovereignty.<sup>242</sup>

Second, the *Conseil* addressed visa and immigration policy. New provisions regarding entry and movement of non-EU citizens gave the EU authority to determine as common policy which third countries’ nationals would be required to obtain visas before crossing the EU’s external borders. Until 1996, the EU Council would make such determinations by unanimity, with an exception allowing qualified majority voting on urgent restrictions lasting six months in response to a mass influx; from 1996 onward, the EU Council would adopt common visa policies by qualified majority. The *Conseil* concluded that qualified majority voting on emergency measures was acceptable, but that the shift from unanimity to qualified majority as the general rule would pose too great a risk to national

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239. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 13. In addition, the *Conseil* treated the requirement of reciprocity in Paragraph 15 as purely formal; the fact that the treaty would not come into force until all the member states had ratified it, irrespective of the variations in their obligations, satisfied this requirement. *Id.* cons. 16.

240. Commentators had criticized this distinction, and it became increasingly untenable as a description of the authority that France was granting to the European Community.

241. See Genevois, *supra* note 236, at 386; see also Noëlle Lenoir, *Les rapports entre le droit constitutionnel français et le droit international à travers le filtre de l'article 54 de la Constitution de 1958*, in *DROIT INTERNATIONAL ET DROIT INTERNE DANS LA JURISPRUDENCE COMPARÉE DU CONSEIL CONSTITUTIONNEL ET DU CONSEIL D'ÉTAT* 11, 21 (Pierre-Marie Dupuy ed., 2001) (characterizing the *Conseil*'s approach since 1992 as “essentiellement pragmatique”) (Lenoir was a member of the *Conseil constitutionnel* from March 1992 to March 2001).

242. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 43.



sovereignty.<sup>243</sup>

The *Conseil* also departed somewhat from the approach of the 1985 death penalty decision by treating the protection of rights and liberties of citizens as a separate factor in evaluating a treaty, rather than as a component of the essential conditions of national sovereignty.<sup>244</sup> Taking note of the express recognition of individual rights in the Maastricht Treaty<sup>245</sup> and the combined availability of supranational and national courts to enforce individual rights, the *Conseil* concluded that the Treaty would not infringe constitutionally guaranteed rights.<sup>246</sup> The basis of this optimistic prediction is unclear, as the decision does not address possible divergences between rights recognized at the European level and rights guaranteed by the French constitution, and the *Conseil* had not yet elucidated the extent of French courts' power (or the *Conseil's* own power) to enforce French constitutional rights against the implementation of European norms.<sup>247</sup>

Examining the provisions of the Maastricht Treaty regarding EU citizenship, the *Conseil* found one specific conflict regarding the eligibility of non-nationals to vote and to stand for office in municipal elections. Because municipal officials formed part of the colleges that chose members of the national Senate, municipal elections implicated national sovereignty, which must be exercised by citizen suffrage under Article 3.<sup>248</sup> On the other hand, the participation of EU citizens in electing France's representatives to the European Parliament raised no constitutional problem, because the *Conseil* continued to externalize the European Parliament as a body that did not exercise national sovereignty and whose electoral regime was not specified by the French constitution.<sup>249</sup>

This limited critique of European citizenship fell far short of the objections raised by opponents of the treaty, including former *Conseil* member François Goguel.<sup>250</sup> He saw the very concept of European citizenship as

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243. *Id.* cons. 49. In the official translation, "the abandonment of the unanimity rule from 1 January 1996 as provided by Article 100C(3) could, in spite of Article 100C(4) and (5), generate a situation in which the exercise of national sovereignty was jeopardised."

244. *Id.* cons. 17-18.

245. The Maastricht Treaty committed the European Union to "respect fundamental rights, as guaranteed by the European Convention . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Treaty on European Union tit. 1, art. F(2), Feb. 7, 1992, 1992 O.J. (C 191), 31 I.L.M. 253 [hereinafter Maastricht Treaty].

246. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 17-18.

247. The Secretary General's explanation of the decision suggested that the *Conseil* was consciously influenced by the approaches of the German and Italian Constitutional Courts to the approximation of national rights standards by European rights. See Genevois, *supra* note 236, at 384. A decade would pass before *Conseil* decisions openly addressed this question. See *infra* text accompanying notes 510-515.

248. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 24-26. The problem thus arose from the interaction of Articles 3, 24, and 72, and not from the theory that Article 3 prohibited the participation of non-nationals in municipal elections per se, as critics of the treaty had argued.

249. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 31-35.

250. See François Goguel, *La souveraineté nationale menacée*, LE FIGARO, Apr. 9, 1992, at 2F. As noted above, Prof. Goguel was the author of the initial, unsuccessful report for

erecting a supranational sovereignty dangerous to French national sovereignty.<sup>251</sup> He also argued that inclusion of non-nationals in the European Parliament electorate violated the *Conseil's* 1976 explication of the European Parliament as separately representing each of the peoples of the member states, rather than representing a (nonexistent) European people.<sup>252</sup> Moreover, the enhancement of the democratic credentials of the European Parliament, through the adoption of the rhetoric of European citizenship and the Parliament's increased legislative role in the co-decision procedure, escaped the *Conseil's* censure.

It should be emphasized that, although the *Conseil's* decision did not explicitly analyze every provision of the treaty, it offered a comprehensive statement of the constitutional conflicts that it perceived, and declared the rest of the treaty consistent with the Constitution.<sup>253</sup> The *Conseil* could not anticipate what form a constitutional amendment eliminating the conflicts would take, and it was obliged to identify all the problems that needed to be addressed.<sup>254</sup> The *Conseil* later confirmed that this declaration of the validity of the remainder of the treaty amounted to a binding conclusion with the effect of *res judicata* (*la chose jugée*).<sup>255</sup>

Thus, the *Conseil's* first Maastricht decision involved both the first occasion on which it had found a conflict between a treaty and the Constitution, and a further loosening of the standards by which potential conflicts were to be evaluated. Transfers of policymaking power to international organizations would be permitted, depending on the extent and manner of their impact on national sovereignty (especially core components of national sovereignty). Political union at the EU level, including the symbolic recognition of a European citizenship, efforts to mobilize a European politics, and greater partnership of the European Parliament in legislation, did not require a prior constitutional amendment. But replacement of the franc by a common currency, majority voting on visa policy, and local alien suffrage, did require an amendment.

Many critics of the Maastricht Treaty were not satisfied with the *Conseil's* decision, and the struggle over the treaty continued in the debate on the constitutional amendment, the subsequent referendum on ratification, and two further appeals to the *Conseil constitutionnel*.<sup>256</sup> The *Conseil's* second and third Maastricht decisions will be discussed in subsection f. For now, it should be observed that the 1992 amendment cleared the way to ratification by adding a new set of Europe-specific articles to the Constitu-

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the decision on direct election of the European Assembly in 1976. See *supra* Part III.A.2.b.

251. Goguel, *supra* note 250.

252. *Id.*; accord, Louis Favoreu & Patrick Gaïa, *Les décisions du Conseil constitutionnel relatives au traité sur l'Union européenne*, 11 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 389, 396-97 (1992) (this portion of the article is by Favoreu).

253. CC decision No. 92-308 DC, Apr. 9, 1992, cons. 51.

254. See Genevois, *supra* note 236, at 358.

255. CC decision No. 92-312 DC, Sept. 2, 1992, cons. 36, 41, 43; see *infra* Part III.A.2.f.

256. See *infra* Part III.A.2.f.

tion, and not by rewriting the articles of the 1958 Constitution that caused the conflict.<sup>257</sup> For the first time, the consent of the popular sovereign to a form of European integration became explicit in the French Constitution.

e. The Distance Traveled

Thus, by April 1992, with no relevant constitutional amendment, the *Conseil constitutionnel* had:

- given treaties even greater immunity from post-hoc review than statutes, elevating *pacta sunt servanda* to a constitutional principle capable of competing with or overriding other constitutional principles;
- abandoned its earlier distinction between limitations of sovereign powers and transfers of sovereign powers as a touchstone of constitutionality;
- allowed in incremental stages the evolution of the European Parliament as a majoritarian democratic component of the EC legislative process;
- accepted the concept of European citizenship;
- accepted the use of majority voting for temporary adoption of policy in some areas that it identified as central to national sovereignty;
- avoided application of some constitutional rules to European elections in France by treating the European Parliament as an external institution;
- begun relying on European courts as guarantors of constitutional rights;
- approved the elimination of routine border controls, in a treaty lacking a denunciation clause;
- permitted foreign police to pursue suspects into French territory; and
- accepted the use of a human rights treaty to preclude reintroduction of the death penalty.

Moreover, the *Conseil* had reached all of these conclusions by relying on general provisions of the Constitution concerning international cooperation, not Europe-specific provisions, which did not yet exist. On occasion, the *Conseil* had accepted proposed treaties as consistent with national sovereignty on a “this far, but no farther” basis, and then subsequently relaxed its strictures. The *Conseil* had produced all these holdings in Article 54 proceedings and in equivalent challenges to authorization statutes under Article 61, with the awareness that other important treaties were avoiding referral altogether.

The *Conseil* at last found in Maastricht some treaty provisions that it could not reconcile with the Constitution, partly with regard to local suffrage, but primarily because of excessive sacrifices of sovereignty in the fields of monetary and migration policy. Ratification would require invocation of the amending process, and would revive the long-postponed question of how an amendment that did compromise the “essential conditions of the exercise of national sovereignty” could be adopted.

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257. See Loi constitutionnelle 92-554 du 25 juin 1992 ajoutant à la Constitution un titre “Des Communautés européennes et de l’Union européenne”, J.O., June 26, 1992, p. 8406. The amendment also added some unrelated provisions, adopted as compromises in the ratification process, see *infra* Part III.A.2.f.

f. Postscript: *Maastricht II* and *III*

The constitutional debate over the Maastricht Treaty did not end with the *Conseil's* decision, or even with the adoption of the constitutional amendment designed to authorize ratification of the treaty. Opponents of the treaty offered a mix of political, substantive, and procedural arguments aimed at preventing ratification. Ultimately, these arguments failed, but not until the *Conseil constitutionnel* had issued two more decisions and a referendum had narrowly approved the treaty.

Now that the Article 54 procedure had finally resulted in the demand for a constitutional amendment, questions arose about the form that the amendment would take. The government favored the least intervention necessary to permit ratification, and proposed two short, separate articles authorizing the transfer of competences in accordance with the treaty and the modification of electoral rules for European citizens in local elections.<sup>258</sup> The amendment would be adopted through the usual parliamentary process, passage of identical texts by majorities in the National Assembly and the Senate, followed by a three-fifths vote in a joint session at Versailles.<sup>259</sup>

But critics argued that this process should not, or even could not, be employed, and that the amendment should be submitted to a popular referendum.<sup>260</sup> Some claimed merely that the effects of the treaty were too important for the decision to be made by political elites, and that the people should be involved in the process. Others argued that the effect on fundamental constitutional principles was so great that only the sovereign people had the power to adopt the amendment.<sup>261</sup> This latter argument, sometimes characterized as positing the existence of "supraconstitutional" norms that would invalidate the proposed amendment, rested on constitutional theory rather than on constitutional text or precedent.<sup>262</sup>

Critics also objected to the addition of separate authorizing articles, as contrasted with systematic revision of the provisions of the Constitution that conflicted with the treaty. Professor Louis Favoreu argued that amendment by addition would improperly create a bifurcated or self-contradictory constitution.<sup>263</sup> Some opponents apparently hoped that obliging the government to tamper directly with provisions of the Preamble or the Declaration of the Rights of Man and the Citizen would excite public

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258. See Alec Stone, *Ratifying Maastricht: France Debates European Union*, 11 FRENCH POL. & SOC'Y 70, 75 (1993).

259. See *supra* text accompanying notes 65-70.

260. In technical terms, some arguments called for the use of the referendum alternative rather than the joint session alternative to approve a parliamentary proposal under Article 89, while others called for an Article 11 referendum, bypassing the parliament altogether. Arguably, the Article 11 route, employed by de Gaulle in 1962, was, itself, unconstitutional. See *supra* note 69.

261. See Constance Grewe, *La révision constitutionnelle en vue de la ratification du traité de Maastricht*, 11 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 413, 416 (1992).

262. See *id.* at 426; Stone, *supra* note 258, at 76.

263. See Louis Favoreu, *Constitution révisée ou Constitution Bis?*, LE FIGARO, Apr. 21, 1992, at 8.

opposition to the treaty<sup>264</sup> (or to the Government).<sup>265</sup> In the National Assembly, Gaullist traditionalist Philippe Séguin moved to reject the proposed constitutional amendment as itself unconstitutional for a combination of these reasons.<sup>266</sup> Defenders of the treaty rebutted the theory of supraconstitutionality, and reproached Séguin for inconsistency with the position taken by the Chirac Government, of which he had been a member, on the Single European Act of 1986.<sup>267</sup> Séguin's motion failed, but received substantial support.<sup>268</sup> Chirac himself, it appears, reluctantly supported the Maastricht treaty, which was badly dividing his party, and he was concerned not to alienate pro-European voters.<sup>269</sup>

As the legislative debate continued, the proposed amendment grew more complex.<sup>270</sup> Both chambers insisted on compensating enhancements to their powers, and the Socialists as usual lacked a majority in the Senate. One such compromise was the modification of Article 54 to permit sixty deputies or sixty senators to refer an international commitment to the *Conseil constitutionnel*.<sup>271</sup> Another gave both chambers the authority (which they otherwise lacked under the 1958 Constitution) to adopt nonbinding resolutions addressing the merit of proposed European legislation.<sup>272</sup> The

264. See, e.g., ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, May 5, 1992, 2d sitting, at 864 (remarks of M. Philippe Séguin).

265. It should be kept in mind that some members of the parliamentary minority did not actually oppose ratification, but used the process to impose political costs on the Socialist majority.

266. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, May 5, 1992, 2d sitting, at 864 (remarks of M. Philippe Séguin).

267. See *id.* at 878-79 (remarks of M. Michel Pezet); *id.* at 881 (remarks of M. Charles Millon). In 1986, Séguin had been Minister for Social Affairs in the Chirac Government.

268. See Stone, *supra* note 258, at 76-77; *L'examen de projet de révision constitutionnelle: L'effet Séguin*, LE MONDE, May 8, 1992 (describing the diverse motives of those who voted in favor of the motion).

269. See, e.g., GUYOMARCH ET AL., *supra* note 25, at 86-87; KNAPP, *supra* note 23, at 132-33.

270. See Stone, *supra* note 258, at 78-81; Grewe, *supra* note 261, at 431-38.

271. See Loi constitutionnelle 92-554 du 25 juin 1992 ajoutant à la Constitution un titre "Des Communautés européennes et de l'Union européenne" art. 2, J.O., June 26, 1992, p. 8406 (amending Article 54). Although the *Conseil constitutionnel* had already permitted groups of deputies or senators to challenge treaties by challenging authorizing legislation, adding them to Article 54 gave further procedural advantages, including access to the *Conseil* at an earlier stage of the political debate.

The constitutional amendment also required that laws structuring overseas territories be enacted as organic statutes (*lois organiques*). *Id.* art. 3 (amending Article 74). The provision of the amendment concerning participation of EU citizens in local elections was modified to specify that the operative rules must be adopted by an organic statute passed in identical terms by the two chambers. See 1958 CONST. art. 88-3.

272. More specifically, Article 88-4 required the Government to provide the chambers with the texts of proposed European community acts "of a statutory nature" (i.e., addressing matters within parliamentary authority under the 1958 Constitution), and authorized the chambers to adopt resolutions addressing such texts. See François Luchaire, *L'Union européenne et la Constitution (Deuxième partie)*, REVUE DU DROIT PUBLIC 933, 965-67 (1992). In one of its earliest decisions, the *Conseil constitutionnel* had held that, where not specifically authorized by the Constitution, adoption of nonbinding resolutions on issues of policy by the National Assembly amounted to improper interference with the province of the executive. See CC decision No. 59-2 DC, June 17, 18, 24, 1959; BELL, *supra* note 11, at 300-01. The scope of the chambers' authority to adopt

National Assembly also added a provision declaring French as the national language, reacting primarily against the prevalence of English in business, science, and European institutions.<sup>273</sup> Meanwhile, a referendum in Denmark had rejected the Maastricht Treaty, and the amendment was reworded to finesse the possibility that a substitute treaty without Denmark would be needed. Two key provisions of the resulting amendment read as follows:

Article 88-1

The Republic shall participate in the European Communities and in the European Union, composed of states which have chosen to exercise certain of their competences in common in accordance with the treaties which created them.

Article 88-2

Subject to reciprocity and according to the terms laid down by the treaty on European union signed on 7 February 1992, France consents to the transfer of competences necessary for the creation of European economic and monetary union as well as for the determination of the rules relating to the crossing of the external frontiers of member states of the European Community.<sup>274</sup>

Evidently, Article 88-2 avoided giving open-ended permission to make future transfers of power in later treaties, but did not fully specify what powers it did transfer, operating by reference instead.<sup>275</sup> Article 88-1, added in the National Assembly, was intended to declare and define the relationship between France and the European Union;<sup>276</sup> its practical significance has changed over time.<sup>277</sup>

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resolutions was significantly expanded in 2008, but still has limits. See 1958 CONST. art. 34-1.

273. See, e.g., ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, May 12, 1992, 1st sitting, at 1019 (remarks of M. Edmond Alphandéry); Roland Debbasch, *La reconnaissance constitutionnelle de la langue française*, 11 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 457 (1992); Lynne Wilcox, *Coup de Langue: The Amendment to Article 2 of the Constitution: An Equivocal Interpretation of Linguistic Pluralism?*, 2(3) MODERN & CONTEMP. FR. 269 (1994). Despite support expressed in the debate for regional languages within France (such as Breton, Alsatian, Provençal, and Basque), the amendment quickly became a possible limit on linguistic regionalism. See Debbasch, *supra* at 466-68; Wilcox, *supra* at 276-77; see also *infra* Part III.B.3.a.

274. 1958 CONST. art. 88-2, translation in BELL, *supra* note 11, at 260 (1992 version, subsequently amended).

275. 1958 CONST. art. 88-3, translation in BELL, *supra* note 11, at 260 (1992 version, subsequently amended), addressing local suffrage for European citizens, also operated by reference:

Subject to reciprocity and according to the terms laid down by the treaty on European union signed on 7 February 1992, the right to vote and to be elected in municipal elections may be granted only to citizens of the Union resident in France. These citizens may not hold the office of mayor or deputy mayor, nor participate in the nomination of senatorial electors or in the election of senators. An organic law voted in the same terms by the two chambers shall determine the provisions for implementing this article.

276. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, May 12, 1992, 3d sitting, at 1074 (remarks of M. Alain Lemassoure); *id.* at 1076 (remarks of Mme Elisabeth Guigou, minister for European affairs).

277. See *infra* text accompanying notes 480-482, 556-560.

Although President Mitterrand obtained final passage of the constitutional amendment from a joint congress of the two chambers (with the Gaullist party abstaining), he decided to seek popular approval of the ratification of the Maastricht Treaty by referendum. Séguin and Charles Pasqua led a vigorous opposition campaign, joined by Michel Debré.<sup>278</sup> Before the vote could take place, a group of Gaullist senators led by Pasqua used their new access rights under Article 54 to bring the treaty back before the *Conseil constitutionnel*. They presented a variety of claims that the constitutional amendment was invalid, and that, even if it were valid, it did not cure all conflicts between the treaty and the Constitution.<sup>279</sup>

The *Maastricht II* decision rejected all arguments against the treaty. As for the validity of the constitutional amendment, the *Conseil* replied that the constituent power was sovereign and could choose how to frame its constitutional amendments, whether as modifications of prior provisions or as the addition of specific provisions explicitly or implicitly derogating from them.<sup>280</sup> Although the Constitution provided some procedural limitations on the amending power, and required that the republican form of government be preserved, it otherwise left the amending power free to abrogate or modify constitutional values.<sup>281</sup> Regarding the underlying question of how far constitutional amendments could go in approving successive infringements of national sovereignty, the *Conseil* treated the inquiry as hypothetical in the present posture, and declined to address it.<sup>282</sup>

Objections merely repeating points that the *Conseil* had decided, expressly or silently, in the first *Maastricht* decision were rejected as *res judicata*. New claims concerning alleged gaps between the constitutional amendment and the treaty failed on the merits.<sup>283</sup>

The referendum was accordingly held on September 20, 1992, and the treaty was very narrowly approved by a vote of 51 to 49 percent.<sup>284</sup> Anti-Maastricht deputies immediately challenged the constitutionality of the popularly-enacted law, referring it to the *Conseil constitutionnel* under Arti-

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278. See GUYOMARCH ET AL., *supra* note 25, at 86–87; KNAPP, *supra* note 23, at 133.

279. See *Saisine par 60 sénateurs - 92-312 DC*, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1992/92-312-dc/saisine-par-60-senateurs.103100.html> (last visited Apr. 2, 2012). Professor Stone Sweet notes that Professor Favoreu drafted the second and third referrals. See Stone, *supra* note 258, at 88 n.35. The discussion in text highlights key arguments, and is not comprehensive.

280. CC decision No. 92-312 DC, Sept. 2, 1992, cons. 19.

281. *Id.*

282. *Id.* cons. 44–45.

283. The *Conseil* denied that the optional form in which new Article 88-3 granted legislative power to enfranchise European citizens in local elections created an additional conflict between the Constitution and the treaty. *Id.* cons. 26–29. And it rejected the argument that Denmark's current unwillingness to ratify the treaty raised a constitutional obstacle to ratification. *Id.* cons. 12–13. (Denmark ultimately ratified the Maastricht Treaty after extracting additional concessions and holding a second referendum in May 1993.)

284. See Stone, *supra* note 258, at 83; CC, *Proclamation des résultats du référendum du 20 septembre 1992*, Rec. 91 (13,162,992 in favor; 12,623,582 opposed).

cle 61. The *Conseil* dismissed the referral on September 23, 1992, reaffirming its much-criticized 1962 decision that it had no power to rule on the constitutionality of laws enacted by referendum.<sup>285</sup>

### 3. *The Reconstruction of Article 55*

As previously described, the superiority in principle of treaties over statutes under the 1958 Constitution was weakened in practice at the outset of the Fifth Republic by the unwillingness of the courts to enforce a treaty that contradicted a subsequent statute, and was expressly qualified in Article 55 by the requirement of reciprocal compliance. Shifts in jurisprudence, however, revolutionized the practice. The civil/criminal courts first took on the role of ensuring that treaties prevailed over subsequent statutes, followed by the administrative courts; the administrative courts accepted their independent responsibility to interpret treaties rather than leaving their meaning to the executive; and the courts began creating exceptions to the reciprocity proviso that have vitiated the purpose that Michel Debré had designed it to achieve.

#### a. Article 55 and Subsequent Statutes

As we have seen, Article 55 did not specify how the theoretical primacy of treaties over statutes in the hierarchy of norms would be given effect. Within the framework of the 1958 Constitution, the obligation of a later statute to respect an earlier treaty might have been left to the self-restraint of the legislature, addressed by Article 61 referral of an offending statute to the *Conseil constitutionnel*, or adjudicated as occasions arose through litigation in civil and administrative courts.

Initially, however, these courts did not feel empowered to give treaties priority over subsequent statutes. Judicially enforcing later treaties over earlier statutes could be justified on the ground that the later treaty reflected a superseding expression of the sovereign will, just as a later statute would have.<sup>286</sup> But judicially enforcing an earlier treaty over a subsequent statute placed the judges in the position of controlling legislative power, analogous to enforcement of constitutional norms against the legislature, and contradicted traditional French attitudes toward the role of the judiciary in the separation of powers.<sup>287</sup> As the *commissaire du gouvernement* argued in a leading case of the *Conseil d'État*, "if the legislator has manifested a precise will, if the national statute insinuates itself as a necessary intermediary between the Treaty and the application required of it, no provision of the Constitution, Article 55 in particular, excuses the judge from respecting that will."<sup>288</sup> In its administrative capacity, advising on

285. See CC decision No. 92-313 DC, Sept. 23, 1992; see *supra* note 69.

286. See NGUYEN ET AL., *supra* note 32, at 237.

287. See Patrick Wachsmann, *L'article 55 de la Constitution de 1958 et les conventions internationales relatives aux Droits de l'Homme*, 114 REVUE DU DROIT PUBLIC 1671, 1675-76 (1998).

288. *Syndicat général de fabricants de semoules de France*, 1970 COMMON MKT. L. REP. 395, 404-05 (1970) (decided 1968) (conclusions of Commissaire du gouvernement



draft bills, the *Conseil d'État* could call attention to contradictions between a proposed statute and an earlier treaty, but once the statute was enacted, the administrative judges must follow the statute in deciding a case.<sup>289</sup>

The creation of the *Conseil constitutionnel* provided a new (not strictly “judicial”) forum in which failures to respect Article 55 might be addressed after the legislature had voted on a subsequent statute but before its promulgation. When groups of sixty legislators received the power to refer statutes for constitutional review, the first such referral occurred in the highly sensitive context of a challenge to a statute liberalizing the regulation of abortion. The dissenting deputies alleged infringement of constitutional rights and violation of the right to life as protected by the European Convention on Human Rights, and, therefore, of Article 55.<sup>290</sup> In response, the *Conseil constitutionnel* held that its own jurisdiction extended to issues of constitutionality, not of conformity to treaties, which had a different normative character.<sup>291</sup> The decision arguably implied that such claims should be raised instead before the civil/criminal and administrative courts.<sup>292</sup>

The *Conseil's* refusal to review statutes for their conformity to particular treaties has been defended on practical grounds: given the vast number of potentially conflicting treaties and the short time frame within which the *Conseil constitutionnel* must rule (one month at most), assigning the *Conseil* the task of reviewing *a priori* the conformity of newly-enacted statutes with treaties would overload its capacity.<sup>293</sup> Retail enforcement of Article 55 was better performed on a case-by-case basis in the civil/crimi-

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Questiaux). The term *commissaire du gouvernement* refers to a member of the *Conseil d'Etat* assigned the role of presenting an objective analysis of the case and a proposed result, corresponding to the *avocat-général* in the *Cour de Cassation*. The title *commissaire du gouvernement* was recently replaced by *rapporteur public* in order to stress the impartiality of the role, after criticism of the institution by the European Court of Human Rights. See *infra* note 579.

289. See *Syndicat général de fabricants de semoules de France*, *supra* note 288, at 406.

290. Jacques Robert, *La décision du Conseil constitutionnel du 15 janvier 1975 sur l'interruption volontaire de grossesse*, 1975 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 873, 874-75.

291. CC decision No. 74-54 DC, Jan. 15, 1975. The dissenting legislators were actually members of the majority center-right coalition. The law had been enacted with the support of the opposition. The *Conseil constitutionnel* rejected the other constitutional objections on the merits.

292. See, e.g., FAVOREU & PHILIP, *supra* note 124, at 371. It is now known that François Goguel, the *rapporteur* on this case, stated this view in his report. See *GRANDES DÉLIBÉRATIONS*, *supra* note 69, at 268-70. The relevant portion of his draft decision, which was not explicit on this point, was adopted without modification. *Id.* at 278. This documentation may cast some doubt on Karen Alter's account aligning the *Conseil constitutionnel* with the *Conseil d'Etat* in resistance to the supremacy of European law in the 1970s. See KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE* 145-58 (2001).

293. See, e.g., Bruno Genevois, *Faut-il maintenir la jurisprudence issue de la décision no. 74-54 DC du 15 janvier 1975?*, 7 *CAHIERS DU CONSEIL CONSTITUTIONNEL* 95 (1999). Goguel mentioned the magnitude of the task in his report, and so did the *Conseil's* President Roger Frey in the discussion, as Genevois surely knew, having had access to the records as Secretary General of the *Conseil*. See *GRANDES DÉLIBÉRATIONS*, *supra* note 69, at 269, 275.

nal and administrative courts, where individual litigants had the opportunity to point out inconsistencies.

The *Conseil* eventually distinguished between such case-by-case enforcement and direct or wholesale violation of Article 55 by means of a statute openly challenging the principle of the primacy of treaties, which would lie within the *Conseil*'s jurisdiction. In 1986, Michel Debré, protesting the Government's failure to submit a border control accord between France and Germany to the legislature for authorization, inserted language in an immigration statute making the statute's procedures subject only to "duly ratified and not denounced" international conventions.<sup>294</sup> The *Conseil constitutionnel* invalidated this statutory language as improperly attempting to narrow the scope of Article 55.<sup>295</sup>

Meanwhile, the *Cour de Cassation*, the highest of the civil/criminal courts, had responded quickly to the *Conseil constitutionnel*'s decision in the abortion case by accepting its own authority to apply earlier treaties in preference to later conflicting statutes.<sup>296</sup> The *Conseil d'État*, however, as the highest administrative court, resisted this conclusion for over a decade, continuing until 1989 to rely on the theory that an administrative court could not look past a later statute to a treaty that it allegedly violated.<sup>297</sup>

In the watershed case *Nicolo*, the *commissaire du gouvernement* gave several reasons for revising the *Conseil d'État*'s concept of its role under the 1958 Constitution.<sup>298</sup> The *Conseil constitutionnel*'s definition of its own powers under Article 55 assuaged concern that the *Conseil d'État* would be effectively judging the constitutionality of statutes if it gave preference to

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294. See Dhommeaux, *supra* note 65, at 1460-61. Technically, this language could be understood as limiting the primacy of conventions to those "ratified" by the President, and not those "approved" by a minister. See *supra* note 58. Dhommeaux explains that the phrase was poorly drafted and was really intended to deny primacy to conventions not duly "authorized" (by the legislature). Dhommeaux, *supra* note 65, at 1461. The accord that provoked the amendment was a bilateral agreement between France and Germany, predecessor to the Schengen agreements discussed above. See Accord entre le gouvernement de la République française et le gouvernement de la République fédérale d'Allemagne relatif à la suppression graduelle des contrôles à la frontière Franco Allemande, July 13, 1984, Fr.-Ger., J.O. Aug. 3, 1984, p. 2565.

295. CC decision No. 86-216 DC, Sept. 3, 1986, cons. 5.

296. See *Cour de cassation, Administration des Douanes v. Société Cafés Jacques Vabre*, [1975] 2 COMMON MKT. L. REP. 336, 368-69 (1975). The arguments of the *procureur général* emphasized the recent decision of the *Conseil constitutionnel*, *id.* at 358-60, and also referred to the internationalist intentions of the proponents of Article 55 and its predecessors in the 1946 Constitution, *id.* at 361-62, while urging the court to base its decision directly on the principle of the preeminence of European Community law, *id.* at 363-64. The court's decision placed greater reliance on Article 55 than the *procureur général* suggested. *Id.* at 368-69.

297. In the interim, the *Conseil constitutionnel* gave renewed encouragement to the administrative courts to apply treaties in preference to subsequent legislation, first by language included in its 1986 decision on Debré's amendment, see CC decision No. 86-216 DC, Sept. 3, 1986, cons. 5-6; and then by example, examining the compatibility of a subsequent statute with the European Convention on Human Rights in the course of deciding an election challenge in its non-constitutional capacity. See CC decision No. 88-1082/1117, Oct. 21, 1988, cons. 3-5; ALTER, *supra* note 292, at 159.

298. *Conseil d'État, Nicolo*, [1990] 1 COMMON MKT. L. REP. 173 (1990) (conclusions of Frydman, *commissaire du gouvernement*) (decided 1989).

earlier treaties, and revealed a gap in treaty enforcement that the administrative courts needed to fill.<sup>299</sup> The discrepancy between the approach of the civil /criminal courts and that of the administrative courts made the gap in public law cases more anomalous,<sup>300</sup> and illustrated the “profound questioning of the supremacy of statute under the Fifth Republic.”<sup>301</sup> More generally, “[i]t cannot be repeated often enough that the era of the unconditional supremacy of internal law is now over,” particularly, but not only, with regard to European Community law.<sup>302</sup> Thus, both developments in France’s international (and European) relations and the diminished status of Parliament justified an increased role for the administrative courts in treaty enforcement.

The *Nicolo* decision has been explained as resulting from both political realignment and the changed institutional context of the *Conseil d’État*.<sup>303</sup> By the mid-1980s, President Mitterrand had renounced socialist experimentation and turned to European integration as a strategy for improving France’s economic situation.<sup>304</sup> Jacques Chirac, the Prime Minister from 1986 to 1988, also abandoned the traditional Gaullist anti-European stance and economic protectionism.<sup>305</sup> The Government encouraged a more cooperative attitude toward Europe in the *Conseil d’État*, through policy initiatives and arguably through personnel changes.<sup>306</sup> The councilors themselves came to recognize that the expansion of European Community activity meant that they could achieve more impact by influencing European policy than by reacting against it.

#### b. Article 55 and Treaty Interpretation

The civil/criminal and administrative judges’ review of the consistency of legislation with prior treaties has had particular impact in the area of individual rights, including questions of government structure that can be framed in human rights terms. France belatedly ratified the European Convention on Human Rights in 1974,<sup>307</sup> and accepted the right of individuals to bring cases against it before the Commission and the European

299. *Id.* at 181–82.

300. *Id.* at 182–83.

301. *Id.* at 184.

302. *Id.* at 183.

303. See, e.g., ALTER, *supra* note 292, at 158–66; Michel Mangent, *The Conseil d’État and Europe: Adapting the French Administrative State*, in FRENCH RELATIONS WITH THE EUROPEAN UNION 88, 90 (Helen Drake ed., 2005).

304. See STEVENS, *supra* note 6, at 262.

305. See KNAPP, *supra* note 23, at 419–20.

306. See ALTER, *supra* note 292, at 162; Mangent, *supra* note 303, at 91.

307. See Alain Pellet, *La ratification par la France de la convention européenne des droits de l’Homme*, 90 REVUE DU DROIT PUBLIC 1319, 1320–21 (1974). President Georges Pompidou laid the groundwork for ratification of the European Convention on Human Rights before his death. Subsequently, Alain Poher, as interim President, completed the ratification of the Convention. France also ratified the first, fourth, sixth, and seventh protocols during this period. These protocols add substantive rights to the Convention. As discussed earlier, the sixth protocol on the death penalty led to an Article 54 decision of the *Conseil constitutionnel*, which held that no constitutional obstacle to ratification existed.

Court of Human Rights in 1981.<sup>308</sup> While the civil/criminal and administrative courts already had the authority to apply both constitutional rights and international human rights provisions in evaluating executive and judicial action, the modern interpretation of Article 55 enables judges to measure current legislation against the standards set by the European Convention.

The willingness of both the *Cour de Cassation* and the *Conseil d'État* to enforce treaties at the expense of later legislation gave increased importance to the question of how the treaties were to be interpreted. Traditional French approaches to the separation of the judicial and executive functions had identified treaty interpretation as largely an executive function relating to the conduct of foreign affairs.<sup>309</sup> In practice, the courts varied in their application of this conception. For the administrative courts, ambiguous treaty provisions should be referred to the ministry of foreign affairs for a definitive interpretation that would bind the court, while provisions deemed unambiguous could be applied without seeking such guidance under the doctrine of the "*acte clair*."<sup>310</sup> Chambers of the *Cour de Cassation* applied a similar doctrine, but some had developed an additional rule that the courts could interpret treaty provisions implicating only private interests, rather than public concerns, without reference to the ministry.<sup>311</sup>

These regimes of executive interpretation did not apply, however, to questions of European Community law. There, the courts accepted that the treaty mechanism of preliminary reference of interpretative questions to the European Court of Justice displaced the system of reference to the executive.<sup>312</sup> Moreover, the *Conseil d'État* may have followed an implicit rule against referring questions under the European Human Rights Convention to the Ministry of Foreign Affairs - unlike the *Cour de Cassation*, the *Conseil d'État* never made such a referral.<sup>313</sup>

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308. See Elisabeth Lambert Abdelgawad & Anne Weber, *The Reception Process in France and Germany*, in A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS 107, 109 (Helen Keller & Alec Stone Sweet eds., 2008). The acceptance of the jurisdiction of the court occurred early in François Mitterrand's first term.

309. G.R. Delaume, *De l'application et de l'interprétation des Traités par les Tribunaux interne dans les relations franco-américaines*, 80 JOURNAL DU DROIT INTERNATIONAL, 584, 591 (1953).

310. See *Conseil d'État*, *supra* note 96, at 29-30. Clarity, not surprisingly, was in the eye of the beholder. The report also observed that the "*acte clair*" doctrine lent itself to literalist and restrictive interpretations of treaties. *Id.*

311. See Denis Alland, *Jamais, parfois, toujours: Réflexions sur la compétence de la Cour de Cassation en matière d'interprétation des conventions internationales*, 100 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 599, 603 (1996); see also Delaume, *supra* note 309, at 615 (discussing interpretive practice in the Fourth Republic).

312. See *Conseil d'État*, *supra* note 96, at 30. Both the *Cour de Cassation* and the *Conseil d'État*, however, made broad use of the "*acte clair*" exception in European Community law, and the *Conseil d'État* did not refer a question to the European Court of Justice until 1970. See ALTER, *supra* note 292, at 144; O. Audeoud et al., *The Application of Community Law in France: Review of French Court Decisions from 1974 to 1981*, 19 COMMON MKT. L. REV. 289, 291 (1982).

313. See ABRAHAM, *supra* note 204, at 96-97 (suggesting that the *Conseil d'État* already assumed full authority to construe lawmaking treaties such as the European Convention); Jean-Paul Costa, *L'application par le Conseil d'État français de la convention*

The *Conseil d'État* repudiated its traditional understanding of the distribution of interpretive authority in the *GISTI* decision of 1990.<sup>314</sup> Henceforth, the interpretation of treaties would be regarded as a judicial function of the administrative courts, paying due respect to the information supplied by the executive. The analysis of the *commissaire du gouvernement* emphasized several factors favoring this reversal. The French practice of binding ministerial interpretation in contested cases was unique in Europe, arguably inconsistent with the requirement of an impartial and independent court under the European Human Rights Convention, and in tension with principles of judicial independence otherwise applicable in France.<sup>315</sup> Moreover, now that the *Conseil d'État* enforced the supremacy of treaties over statutes, to allow the executive to dictate the meaning of treaties would enable the ministry to trump subsequent legislation.<sup>316</sup> Although the *GISTI* decision involved bilateral treaties between France and Algeria, the *commissaire du gouvernement* urged the *Conseil d'État* to adopt the approach for treaties in general.<sup>317</sup> The *Conseil d'État* should not prohibit the administrative courts from seeking the ministry's views, but rather should eliminate the binding effect of the response.<sup>318</sup>

The arguments in the *GISTI* decision foreshadowed the response of the European Court of Human Rights, which would indeed hold in 1994 that the *Conseil d'État's* prior practice of absolute deference to ministerial interpretations violated Article 6(1) of the European Convention.<sup>319</sup> In the wake of that decision, the chambers of the *Cour de Cassation* also modified their own approach, but these developments occurred in the second period discussed later.

The acceptance of independent authority to interpret treaties further strengthened the effect of "supranational" institutions in France. It redrew the boundaries between judicial and executive power with regard to international obligations in general, and led to stricter enforcement of obligations under the European Human Rights Convention, in particular.<sup>320</sup> (It is important to recall that European human rights law represented a distinct body of law from European Community law from the perspective of 1958 or 1990, although their interrelations have deepened over the

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*européenne des droits de l'Homme*, 8 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 395, 397 (noting that the *Conseil d'État* had never referred a European Convention question to the ministry); Alland, *supra* note 311, at 634 (discussing *Cour de cassation's* deferral to the ministry of foreign affairs on the scope of the prohibition against retroactive criminal legislation under article 7 of the European Convention).

314. CE Ass., June 29, 1990, *reprinted in* 94 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 879, 879 (1990) [hereinafter *GISTI*] (conclusions of Abraham, *commissaire du gouvernement*). The *commissaire du gouvernement* on this occasion was Ronny Abraham, the author of the treatise cited in the preceding footnote, and subsequently a judge of the International Court of Justice.

315. *Id.* at 901-03.

316. *Id.* at 899-900.

317. *Id.* at 904.

318. *Id.* at 905.

319. *Beaumartin v. France*, 296-B Eur. Ct. H.R. (ser. A) (1994).

320. See Abdelgawad & Weber, *supra* note 308, at 139-40.

decades that followed.) Over time, the French courts have become increasingly accepting of the legal interpretations—sometimes surprising and unwelcome—of the European Court of Human Rights, while still retaining some space for dialogue and occasional resistance.<sup>321</sup>

The consequences with regard to other treaties have been mixed. Specifically, the global human rights treaties ratified by France have played a smaller role. Thus far, at least, litigants raise them less frequently, and courts sometimes find that treaty provisions, or entire treaties, lack direct effect (i.e., in U.S. terms, are not self-executing).<sup>322</sup> Courts also feel freer to adopt narrower interpretations of treaty language than those favored by global human rights bodies, which have less power, both *de jure* and *de facto*, than the European regional courts.<sup>323</sup>

Before leaving the topic of treaty interpretation, it should be observed that a different process of interaction between the European human rights system and the French constitutional system also arose in the course of the 1980s, namely, the influence of European human rights jurisprudence on the interpretation of constitutional rights by the *Conseil constitutionnel*. This influence is not obvious on the face of the *Conseil's* decisions, which rarely cite the *Conseil's* own prior decisions, let alone external sources.<sup>324</sup> Nonetheless, a report submitted on behalf of the *Conseil* to a 1993 conference identified three areas in which the European Court of Human Rights had influenced its case law:<sup>325</sup> first, the pluralist character of freedom of expression within a democracy; second, the extension of fundamental principles of criminal procedure to other proceedings imposing punitive sanctions; and third, an interpretation of the rights of criminal defense to

321. See *id.* at 138-39.

322. See, e.g., Roger Errera, *L'application de la Convention de l'ONU relative aux droits de l'enfant (CDE) et l'incidence de la Convention européenne des droits de l'homme (CEDH) sur les droits de l'enfant dans la jurisprudence du Conseil d'État*, 17 REVUE UNIVERSELLE DES DROITS DE L'HOMME 329, 333 (2005) (discussing the practice of deciding provision by provision whether obligations under the UN Convention on the Rights of the Child have direct effect, and giving examples of other human rights treaties denied direct effect).

323. See, e.g., Wachsmann, *supra* note 287, at 1679-89 (discussing the *Conseil d'État's* narrower interpretation of Article 26 of the International Covenant on Civil and Political Rights).

324. See BELL, *supra* note 11, at 51 (noting that the *Conseil constitutionnel* tends to repeat language from prior cases rather than cite them, except for reasons such as demonstrating *res judicata* effect). The first time that the *Conseil constitutionnel* expressly cited a judgment of the European Court of Human Rights in one of its decisions was in 2004; but the *Conseil constitutionnel* had special reasons for citing the judgment. See CC decision No. 2004-505 DC, Nov. 19, 2004; see also *infra* note 509 and accompanying text.

325. Rapport de la délégation française, *Protection constitutionnelle et protection internationale des droits de l'homme: Concurrence ou complémentarité?*, in IXE CONFÉRENCE DES COURS CONSTITUTIONNELLES EUROPÉENNES (Paris, 10-13 mai 1993), at 319, 343 (citing decisions of the *Conseil constitutionnel* from 1982 to 1990). Professor Favoreu observed that the report was presumably written by the Secretary General of the *Conseil constitutionnel*, Bruno Genevois. Louis Favoreu, *La prise en compte du droit international et communautaire dans la jurisprudence du Conseil constitutionnel*, in L'INTERNATIONALITÉ DANS LES INSTITUTIONS ET LE DROIT: CONVERGENCES ET DÉFIS: ÉTUDES OFFERTES À ALAIN PLANTÉY 33, 37 (1995).

include a fair procedure guaranteeing the equality of rights of the opposing parties (in Strasbourg parlance, the principle of “equality of arms”).<sup>326</sup> Although the borrowing of European human rights concepts may have been limited and implicit during this first period, it became more common and more openly acknowledged in the years after 1992.<sup>327</sup>

c. The Decline of the Article 55 Reciprocity Proviso

Judicial interpretation severely undermined the requirement of reciprocity, which Michel Debré had designed to limit the enforcement of treaties by making their authority depend on compliance by treaty partners. In 1975, at the same time that the *Cour de Cassation* held that it could enforce the superiority of treaties over subsequent statutes under Article 55, it also concluded that the exception for lack of reciprocity had no application to enforcement of European Community law.<sup>328</sup> Rather, “in the Community legal order the failings of a member-State of the European Economic Community to comply with the obligations falling on it by virtue of the Treaty of 25 March 1957 are subject to the procedure laid down by Article 170 of that Treaty and so the plea of lack of reciprocity cannot be made before the national courts.”<sup>329</sup> Even as to bilateral treaties, the civil chamber of the *Cour de cassation* sharply limited the impact of the reciprocity proviso by holding that courts were not authorized to address such objections unless the executive had taken the initiative to denounce the treaty or suspend its application.<sup>330</sup> The *Conseil d’État*, meanwhile, adopted the approach of resolving doubts about the reciprocal application of a treaty by referring it to the ministry of foreign affairs for a determination that the court would then treat as binding.<sup>331</sup> Such referrals, however, never involved European Community law or human rights treaties, and a 1985 study published by the *Conseil d’État* expressed the idea that “[c]ertain multilateral conventions exclude by their very nature any idea of reciprocity: the conventions concluded under the auspices of the International Labour Organisation, the European human rights convention, and more generally, often those conventions that may be regarded as law-making treaties.”<sup>332</sup> Thus, the

326. Christos Rozakis, *The Right to a Fair Trial in Civil Cases*, 4 JUD. STUD. INST. J. 96, 101-02 (2004).

327. See *infra* Part III.B.6.

328. Cour de cassation, *Administration des Douanes v. Société Cafés Jacques Vabre*, [1975] 2 COMMON MKT. L. REP. 336, 369 (1975).

329. *Id.*

330. Cour de cassation civ., Mar. 6, 1984, 111 JOURNAL DU DROIT INTERNATIONAL 859, 864 (Kryla). For a case in which the executive had taken such an initiative, see Cour de cassation 1e civ., Mar. 23, 1994, Bull. Civ. I, No. 105 (*N’Guyen Duy Thong*).

331. CE Ass., May 29, 1981, Rec. Lebon 220 (*Rekhou*) (referring to a bilateral treaty between France and Algeria). The *Conseil d’État* continued to regard ministerial determinations of reciprocity as binding, even after it had recognized independent judicial authority to interpret ambiguous treaty provisions in the 1990 GISTI decision. See *supra* text accompanying note 314. Later, the European Court of Human Rights held that the binding character of the executive determination violated principles of judicial independence; the *Conseil d’État* finally overruled its prior decision in 2010. See *infra* Part III.B.7.

332. *Conseil d’État*, *supra* note 96, at 17.

treaties that presented the greatest potential to penetrate the national legal order were being excused from the sanction of the reciprocity proviso.

During this first period, the *Conseil constitutionnel* did not rule on possible exceptions to the reciprocity proviso. That would come later. The one important clarification concerned the consequences of the proviso. In 1980, a group of opposition deputies challenged an amendment to an excise tax on alcoholic beverages, which had been adopted to ensure compliance with a judgment of the European Court of Justice condemning protectionist discrimination.<sup>333</sup> The deputies argued that other European states still imposed comparable discriminations and that, therefore, the reciprocity that would require compliance was absent, and the statute was unconstitutional. The *Conseil constitutionnel* rejected this claim, explaining that Article 55 dealt only with the choice of applicable law between a treaty and a conflicting statute, and that any possible lack of reciprocity did not restrict the authority of the legislature to enact a compliant statute.<sup>334</sup> In deciding on these grounds, the *Conseil constitutionnel* left open the possibility that the reciprocity proviso might apply to European Community law, but did not address it.

#### 4. Interim Conclusion

By 1992, the effort in the 1958 Constitution to entrench Gaullist conceptions of national sovereignty against future inroads by a more internationally inclined legislative majority had failed on numerous fronts. The Article 54 procedure as written contained loopholes, and the *Conseil constitutionnel* had narrowed one loophole by authorizing the parliamentary opposition to refer treaties, but opened another by constitutionalizing the principle of *pacta sunt servanda*. The substantive standards applied under Article 54 suffered from ambiguity and were susceptible to drift over time. The compromise between monism and dualism that underlay Article 55 proved unstable, and the pressures of participation in the EEC led to the ascendancy of the monist elements, with consequences that extended beyond European Community law. European human rights rules affected both the structure and the outcome of litigation, and had started to influence the interpretation of constitutional rights.

The five-to-four decision on direct election of the European Assembly suggests the contingency of the course of events. In 1976, the Gaullist majority on the *Conseil constitutionnel* could have played the role of guardians of tradition against the innovations of a newly elected regime, by requiring a constitutional amendment. The result might have been to block the democratization process at the European level, or to write more specific hedges against Europe into the Constitution itself; alternatively, it might have been a constitutional green light. Partly to avoid the latter risk,

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333. CC decision No. 80-126 DC, Dec. 30, 1980, cons. 3; see Case 168/78, *Comm'n v. France*, 1980 E.C.R. 347, 351. This was not the only provision of the statute that the group of opposition deputies challenged, nor the only ground on which they challenged this provision.

334. CC decision No. 80-126 DC, Dec. 30, 1980, cons. 5-6.



the *Conseil* upheld the conformity of the treaty, and wrote principles into its decision instead, including the prohibition on transfers of sovereignty.

While the *Conseil constitutionnel* continued to approve incremental innovations over the following decade, the momentum toward Europe kept growing. The Gaullists also suffered electoral defeat, and their representation on the *Conseil* dwindled. With Mitterrand as the adversary and the Giscardians more as potential allies than as rivals, Chirac promoted a version of Gaullism less hostile to European integration. The *Conseil d'État* was converted into an enforcer of European norms. As Debré had predicted, and now protested, the intergovernmental vision of European authority yielded ground to the claims of the European Parliament and the efficiency of qualified majority voting.

Michel Debré evaluated the *Conseil constitutionnel's* performance in his memoirs: the institution was good, but people with the wrong understanding of national sovereignty were serving on it.<sup>335</sup> Another observer, Professor Élisabeth Zoller, suggested that Article 54 could not serve the purpose for which it was originally designed, because defining the substance of national sovereignty was a political and not a legal task.<sup>336</sup> The unexpected end of the Cold War, the reunification of Germany, and the opening to the East provoked the quantum jump to political and monetary union. By the time that the *Conseil constitutionnel*—with no Gaullist appointees—finally found a treaty that required a constitutional amendment, the necessary three-fifths majority was available among the political elites.

Looking forward from 1992, the Maastricht amendment might be viewed in two different ways, legally and politically. From the political perspective, it provided express constituent consent to European integration for the first time. It Europeanized the 1958 Constitution. Indeed, the Maastricht ratification process gave a double legitimation, first through a constitutional amendment by the people's representatives, and then through a narrow referendum victory (far less than three-fifths) endorsing political and monetary union and all that had gone before it. An external observer might say that the fundamental decision was taken to sacrifice the Gaullist conception of sovereignty for the benefits of European integration. Further adjustments to the EU would be technicalities; they might or might not legally require a supermajority vote, but they would not raise issues of political legitimacy. In spirit, the amendment would have accomplished the type of open-ended authorization for the European sphere that the *Con-*

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335. DEBRÉ, *supra* note 31, at 414 (1988) (“Il m’est arrivé de regretter l’orientation du Conseil notamment à propos du principe fondamental de la souveraineté nationale car il est des principes qui ne souffrent aucun compromis. Je l’ai dit et le redirai, mais je dois reconnaître dans l’ensemble la valeur de la jurisprudence. D’où l’importance accrue du choix des hommes qui composent le Conseil. La règle est générale: il n’est d’institution qui vaille qu’à cette condition.”).

336. ZOLLER, *supra* note 85, at 291–92 (“Au terme de l’évolution, il est douteux que le contrôle de constitutionnalité des engagements internationaux prévu par l’article 54 de la Constitution puisse effectivement servir les fins pour lesquelles il fut initialement institué . . . . Le fond du problème est que la définition de la souveraineté appartient au souverain.”).

*seil constitutionnel* had been concerned to prevent in its 1976 decision on direct elections.

That interpretation contrasts strongly with the legal perspective, which is closer to the way the internal political debate was phrased. Legally, the Maastricht amendment provided a limited constitutional authorization for Europe, accompanied by compensating protections for the national legislature and for the national culture. The amendment did go beyond Mitterrand's initial minimalist proposal, but the abstract statement in Article 88-1 was designed to rationalize and restrict the effect of the authorization, not to provide open-ended consent. From this perspective, future transfers of power to Europe would continue to raise issues of principle regarding the boundaries of national sovereignty.

Unfortunately, from the legal perspective, the Maastricht amendment provided little new guidance as to how the future issues should be resolved. The text of the amendment could be interpreted as approving the *Conseil constitutionnel's* analysis in *Maastricht I*. If so, that approval could be understood as encouragement to muddle through, applying an opaque standard to identify permissible "transfers of competences" and perhaps to make further innovations as needed.

The Maastricht amendment also conferred a degree of retrospective constitutional legitimation on the European human rights regime. Politically, the express commitment in the Maastricht Treaty to respect for fundamental rights as guaranteed by the European Convention could be understood as transmitting constituent approval to the Convention and its substantive protocols,<sup>337</sup> not merely within the limited sphere of Community law (as then defined) but in general. From the legal perspective, however, the consent was narrower, and could not account for the pervasive effects of Convention rights in such fields as criminal law enforcement and judicial administration.

The explicit recognition of European union provided a textual basis as well as a political basis for distinguishing constitutional doctrines about Europe from constitutional doctrines about international law in general. In the period that followed, the *Conseil constitutionnel* would be slow to give effect to that distinction. The legacy of the earlier interpretations would persist.

## B. Since the Maastricht Amendment

The convergence of political elites that made the passage of the Maastricht amendment possible continued to support further steps toward European integration and international cooperation in the period following 1992. Traditional Gaullists became a dwindling minority, accompanied by other bands of Euroskeptics on the left and on the right.<sup>338</sup> Now that con-

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337. The Maastricht Treaty committed the European Union to "respect fundamental rights, as guaranteed by the European Convention . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law." Maastricht Treaty, *supra* note 245, art. F.2.

338. See KNAPP, *supra* note 23, at 134-37.

stitutional amendments were more feasible, Article 54 referrals served more often as a means of defining the amendments that would follow than as a serious threat to treaty ratification.<sup>339</sup> Meanwhile, the body of European human rights law expanded in the post-Cold War environment, and its influence in French law intensified.<sup>340</sup>

The primacy claims of supranational law provoked some resistance in this second period, and a few secondary doctrines were developed on behalf of France's constitutional identity. The general outcome, however, is that the treaties govern, by France's constitutional consent.

The discussion of this second period examines the infrequency of Article 54 proceedings (1), and the extent of protection for already-ratified treaties (2), before looking substantively at the *Conseil's* Article 54 decisions (3). Because the *Conseil's* decisions produced several findings of conflict between treaties and the Constitution, the discussion then considers the constituent power's use of its freedom to choose the form of the amendments that resulted (4). Next, the discussion turns to the limited effect of introducing Europe-specific articles into the Constitution (5), and the stronger influence of European human rights law on constitutional interpretation (6). After describing the further consolidation of the Article 55 doctrines (7), the discussion ends with a concluding summary (8).

### 1. Infrequent Use of Article 54

After 1992, referrals of international engagements to the *Conseil constitutionnel* continued to be rare. From 1993 to 2008, there were eight referrals under Article 54, and two referrals of laws authorizing treaties under Article 61.<sup>341</sup> While this is about twice the rate as in the earlier period, it is still less than one per year and only a tiny fraction of the engagements made. Dissenting legislators have used the new authority granted by the Maastricht amendment only once to refer international commitments under Article 54.<sup>342</sup> In 2003, 103 international agreements were published, including twenty-nine multilateral conventions, two agreements with international organizations, and seventy-two bilateral treaties; forty-four of the 103 received legislative authorization.<sup>343</sup> The *Conseil d'État* reported in 2000 that each year France entered into about 200 bilateral agreements, and that legislative authorization was obtained for approxi-

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339. See *infra* Part III.B.1.

340. ELGIE, *supra* note 2, at 206-08.

341. In 2010, after the second period, there was another Article 61 referral of a law authorizing a treaty. The *Conseil constitutionnel* held that a bilateral treaty between France and Romania for the return of unaccompanied children included an alternative procedure that violated the right to an effective judicial remedy. CC decision No. 2010-614 DC, Nov. 4, 2010.

342. See *infra* text accompanying notes 432-438. This does not mean, however, that legislators would not have referred more treaties if referrals had not already been made by the President or the Prime Minister. The two Article 61 referrals by legislators concerned issues of legislative authorization procedure rather than the content of the treaties. See *infra* note 346-349.

343. Eisenmann & Rivier, *supra* note 12, at 253, 260.

mately forty to sixty treaties.<sup>344</sup> Statistics of the National Assembly indicate that laws authorizing treaties amounted to almost half its legislative output.<sup>345</sup>

The few referrals that did occur, however, had greater impact than in the earlier period, producing six findings of unconstitutionality and resulting in five constitutional amendments. To summarize, the period began with two unsuccessful procedural challenges to the authorization of treaties affecting overseas territories.<sup>346</sup> The *Conseil constitutionnel* confirmed the need for further constitutional change before three major proposed revisions of the European Union treaties (the Amsterdam Treaty in 1997, the ill-fated European Constitution Treaty in 2004, and the substitute Lisbon Treaty in 2007).<sup>347</sup> Ratification of the Statute of the International Criminal Court also required an amendment.<sup>348</sup> The *Conseil* found constitutional defects in the European Charter of Regional or Minority Languages,<sup>349</sup> but not in the linguistic aspects of an accord on European patents.<sup>350</sup> The simultaneous referral of two treaties further entrenching the abolition of the death penalty yielded disparate conclusions, on the grounds that one of them could never be denounced.<sup>351</sup>

While the *Conseil* found constitutional amendments necessary because of infringements upon national sovereignty, it also objected to the conferral of new powers on the national parliament, and found conflicts with specific constitutional norms regarding the official character of the French language,<sup>352</sup> the equality of citizens,<sup>353</sup> the indivisibility of the Republic,<sup>354</sup> and official immunity from prosecution.<sup>355</sup>

344. See, e.g., CONSEIL D'ÉTAT, *supra* note 33, at 19–21. The report gives no separate annual figure for multilateral treaties.

345. See *Histoire de l'Assemblée nationale*, *supra* note 98.

346. See CC decision No. 93-318 DC, June 30, 1993 (challenging the authorization of a Franco-Mongolian investment treaty); CC decision No. 93-319 DC, June 30, 1993 (challenging the authorization of ILO Convention 139). In these two companion cases, the *Conseil* rejected the argument that, as a result of a constitutional provision adopted in the compromise permitting ratification of the Maastricht treaty, treaties applicable in overseas territories could be authorized only by organic statutes rather than by ordinary statutes. See *supra* note 271.

347. CC decision No. 97-394 DC, Dec. 31, 1997; CC decision No. 2004-505 DC, Nov. 19, 2004; CC decision No. 2007-560 DC, Dec. 20, 2007. See also *infra* Part III.B.3.b.

348. CC decision No. 98-408 DC, Jan. 22, 1999; see also *infra* Part III.B.3.a.

349. CC decision No. 99-412 DC, June 15, 1999; see also *infra* Part III.B.3.a. This decision provided the only occasion in the period between 1958 and 2008 in which the *Conseil's* evaluation of a treaty led to the abandonment of the ratification process.

350. CC decision No. 2006-541 DC, Sept. 28, 2006 (reviewing the London Agreement on European patents); see also *infra* Part III.B.3.a. Aside from the procedural challenges discussed *supra* notes 346–349 and accompanying text, this decision involved the only occasion in this period on which legislators referred a treaty to the *Conseil*. In fact, the London Accord was referred to the *Conseil* by the Prime Minister, as well as by sixty deputies.

351. CC decision No. 2005-524/525 DC, Oct. 13, 2005 (reviewing Protocol No. 13 to the European human rights convention and the Second Optional Protocol to the International Covenant on Civil and Political Rights); see also *infra* Part III.B.3.a.

352. CC decision No. 99-412 DC, June 15, 1999; see also *infra* Part III.B.3.a.

353. *Id.*

354. *Id.*

Another significant EU treaty, the Treaty of Nice, was ratified without referral to the *Conseil constitutionnel* in 2001. Negotiated under time pressure during the French presidency of the European Council, the Treaty of Nice made a series of changes to the institutions of the European Union aimed at increasing the EU's flexibility before numerous new member states were admitted from the former Eastern Bloc.<sup>356</sup> The treaty reallocated voting proportions in both the European Parliament and the Council, and further extended the use of qualified majority voting where unanimity had previously been required. The shift to majority voting raised serious questions under the *Conseil constitutionnel's* jurisprudence, and a small group of left Euroskeptics associated with Jean-Pierre Chevènement moved to reject the treaty on constitutional grounds in both the National Assembly and the Senate.<sup>357</sup> Nonetheless, the Gaullists and the Socialists united in support of a treaty sponsored by their leaders (President Jacques Chirac and Prime Minister Lionel Jospin, in the third cohabitation).<sup>358</sup> Ultimately, the constitutional critics lacked the numbers to meet the threshold for a referral.

Two other treaty-related amendments should be mentioned here to round out the description of the second period: the 1993 asylum amendment, and the 2003 amendment regarding the European Arrest Warrant. The asylum amendment did not arise from a new treaty, but rather from a constitutional dispute about the effects of a treaty that the *Conseil constitutionnel* had already upheld. The *Conseil* determined in 1991 that the Schengen implementation convention was consistent with the constitutional guarantee of asylum because the convention permitted, but did not require, France to leave the protection of an asylum seeker to another state party designated as responsible under its rules.<sup>359</sup> In July 1993, the new center-right Government enacted legislation authorizing immigration offi-

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355. CC decision No. 98-408 DC, Jan. 22, 1999; see also *infra* Part III.B.3.a.

356. See Roger J. Goebel, *The European Union in Transition: The Treaty of Nice in Effect; Enlargement in Sight; A Constitution in Doubt*, 27 *FORDHAM INT'L L.J.* 455 (2004).

357. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, June 5, 2001, 2d sitting, at 3844-45 (remarks of M. Jean-Pierre Chevènement); SÉNAT, COMPTE RENDU INTÉGRAL, June 28, 2001, 1st sitting, at 16 (remarks of M. Jean-Yves Autexier).

358. See Sophie Roquelle, *Les députés s'apprêtent à ratifier sans enthousiasme le traité de Nice*, LE FIGARO (June 6, 2001), available at <http://www.lefigaro.fr> (search for the article's title to find it in the archives). Former President Giscard d'Estaing led his party to abstain on the Treaty of Nice, but he criticized it as inadequate rather than unconstitutional. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, June 12, 2001, 2d sitting, at 4084-85 (remarks of M. Valéry Giscard d'Estaing); *id.* at 4088-89 (reporting the votes of various parliamentary groups on ratification).

359. CC decision No. 91-294 DC, July 25, 1991. Paragraph 4 of the 1946 Preamble provided: "Any person persecuted for his activities on behalf of freedom has the right of asylum in the territories of the Republic." 1946 CONST. pmb., translated in BELL, *supra* note 11, at 263. The Schengen implementation convention addressed the protection of refugees within the meaning of the 1951 Geneva Convention on the Status of Refugees for a potentially broader category of persons having well-founded fear of persecution on the grounds of race, religion, nationality, political opinion, or membership of a particular social group. The Schengen provisions were partly designed to assign responsibility for a claim for refugee protection to the state that had allowed the third-country national to cross the external borders of the Schengen group.

cials to exercise the Schengen option and to deny refugee processing to claimants for whom another state was responsible.<sup>360</sup> After opposition senators and deputies referred the statute to the *Conseil constitutionnel*, the *Conseil* held that exclusion from refugee processing on such grounds violated the constitutional asylum guarantee, and that the statute must be interpreted as making refugee processing obligatory for the subcategory of claimants covered by the constitutional guarantee.<sup>361</sup> This holding largely vitiated the benefit of the change, and several leading Gaullists responded with strong criticism, some of which called into question the legitimacy of the *Conseil's* methods of review.<sup>362</sup> Mitterrand acquiesced in the demand for a constitutional amendment overturning the *Conseil's* decision. The November 1993 amendment added a new article 53-1 to the series of constitutional provisions dealing with treaties. It generically authorized Schengen-style agreements to allocate responsibility for asylum adjudication with suitable European partners.<sup>363</sup> The amendment was understood as replacing the *individual right* to asylum by a discretionary *power* to grant asylum for persons within its scope. In December 1993, legislation giving effect to the amendment was enacted without referral to the *Conseil constitutionnel*.<sup>364</sup>

The 2003 amendment regarding the European Arrest Warrant did not involve the *Conseil constitutionnel* at all. The European Arrest Warrant is a streamlined mechanism for transferring accused criminals from one EU state to another without the limitations of a traditional extradition process;<sup>365</sup> one might compare it to interstate rendition within the U.S. federal system. After the terrorist attacks of September 11, 2001, earlier slow pro-

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360. In the parliamentary elections of March 1993, the Gaullists and Giscard's UDF won an overwhelming majority in the National Assembly; in fact, the Gaullists fell only slightly short of an absolute majority by themselves. The result was the second cohabitation, between Mitterrand (who was nearing the end of his second presidential term) and the Gaullist prime minister Édouard Balladur.

361. CC decision No. 93-325 DC, Aug. 13, 1993, cons. 86, 88, 95. The *Conseil* also found several other provisions of the statute concerning immigration control and procedure unconstitutional; however, only the asylum holding led to a constitutional amendment.

362. See, e.g., JOHN BELL, FRENCH LEGAL CULTURES 228-30 (2001); DRAGO, *supra* note 95, at 435-36. The leader of the challenge to the Schengen implementation convention, however, defended the *Conseil's* later decision as following properly from the earlier one. *Le débat sur le droit d'asile Pierre Mazeaud (RPR) est "hostile" à une révision constitutionnelle*, LE MONDE, Sept. 17, 1993, at 24.

363. 1958 CONST. art. 53-1 ("The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum submitted to them. However, even if the request does not fall within their jurisdiction under the terms of such agreements, the authorities of the Republic shall remain empowered to grant asylum to any Foreigner who is persecuted for his action in pursuit of freedom or who seeks the protection of France on other grounds.").

364. See Olivier Schrameck, *La décision du 13 août 1993: Impressions et leçons d'un tonnerre estival*, 25 CAHIERS DU CONSEIL CONSTITUTIONNEL 44, 45 (2008).

365. See Nicola Vennemann, *The European Arrest Warrant and Its Human Rights Implications*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 103 (2003); Jan Wouters & Frederik Naert, *Of Arrest Warrants, Terrorist Offences and Extra-*

gress culminated in the rapid adoption of an EU Council Framework Decision. The French Government then sought the advice of the *Conseil d'État* on implementing legislation for the Framework Decision, and the *Conseil d'État* opined that the new procedure had only one constitutional flaw.<sup>366</sup> The Framework Decision eliminated the principle that extradition would be refused for political offenses, which the *Conseil d'État* viewed as a “fundamental principle recognized by the laws of the Republic” within the meaning of the 1946 Preamble.<sup>367</sup> The *Conseil d'État* advised that a constitutional amendment would be necessary before implementing legislation could be enacted. The Framework Decision was already in force as EU secondary legislation, not requiring any national ratification, and for that reason it was considered impossible to seek the *Conseil constitutionnel*'s opinion under Article 54.<sup>368</sup> The Government followed the *Conseil d'État*'s recommendation and easily obtained a constitutional amendment, adding a paragraph to Article 88-2 authorizing legislative implementation of a European arrest warrant in accordance with acts taken on the basis of the Treaty on European Union.<sup>369</sup>

## 2. *Protection of Treaties in Force*

In the post-Maastricht period, the *Conseil constitutionnel* continued to hold that treaties already in force were immune from its review, and that review of new international commitments had to be limited to the provisions that were new. The *Conseil* stated this principle more clearly than ever in its decision on the European Constitution Treaty, insisting that “[t]hose provisions of the Treaty which merely reiterate undertakings already entered into by France are however excluded from any such examination as to their conformity with the Constitution.”<sup>370</sup> Meanwhile, the *Conseil* continued to apply a different principle in statutory cases by examining the constitutionality of older statutory provisions when reviewing newer statutory provisions that modified or extended them.<sup>371</sup> Although

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*dition Deals: An Appraisal of the EU's Main Criminal Law Measures against Terrorism After "11 September"*, 41 COMMON MKT. L. REV. 909 (2004).

366. Avis of CE Ass., Sept. 26, 2002, No. 368282, reprinted in ASSEMBLÉE NATIONALE, RAPPORT NO. 463, 12th legislature, at 33 (2002).

367. While the *Conseil d'État* placed the right not to be extradited for a political offense on the list of fundamental principles recognized by the laws of the Republic, the *Conseil constitutionnel* has never expressed a view on its inclusion. See also CE Ass., July 3, 1996, Rec. Lebon 255 (*Koné*) (identifying the obligation to deny extradition when it is sought for a political purpose as another fundamental principle recognized by the laws of the Republic).

368. See ASSEMBLÉE NATIONALE, REPORT NO. 463, 12th legislature, at 19 (2002); cf. *supra* text accompanying notes 85-86 (discussing uncertainty about the scope of Article 54).

369. The amendment encountered little opposition, coming primarily from the legislature's Communist group. In the 2008 constitutional amendment authorizing ratification of the Lisbon Treaty, the provision regarding the European Arrest Warrant was slightly reworded, and it became the sole remaining sentence in Article 88-2.

370. CC decision No. 2004-404 DC, Nov. 19, 2004, cons. 8; see also CC decision No. 2007-560 DC, Dec. 20, 2007, cons. 10 (regarding the Lisbon Treaty).

371. See *supra* text accompanying note 107.

the result of this examination was usually a conclusion that the older provisions were valid, the *Conseil* did declare an older provision unconstitutional in 1999.<sup>372</sup>

The administrative courts and the civil/criminal courts, in contrast, developed exceptional doctrines that sometimes call into question the legal validity of treaties. The first exception concerned the enforceability under Article 55 of a treaty provision alleged to conflict with both a constitutional requirement and an administrative decree subsequent to the treaty implementing the relevant constitutional requirement. The issue arose before the *Conseil d'État* in 1998 through a case involving the qualifications for referendums regarding the status of the overseas dependency of New Caledonia.<sup>373</sup> In accordance with Article 76 of the Constitution, the decree imposed lengthy residence requirements that excluded many residents who had arrived more recently from metropolitan France.<sup>374</sup> Excluded citizens challenged the qualifications as violations of the European human rights convention and the International Covenant on Civil and Political Rights. The *Conseil d'État* responded that, within the domestic legal order, Article 55 made treaties superior to legislation but inferior to other provisions of the Constitution; therefore it would not invalidate the qualifications under Article 55.<sup>375</sup> The *Cour de Cassation* ruled similarly in an analogous case involving legislative elections in New Caledonia in 2000.<sup>376</sup>

Thus far, these holdings represent a narrow exception protecting a subsequent legal norm from earlier treaties if the statute embodies a constitutional requirement.<sup>377</sup> The *Conseil d'État* does not generally have authority to review the constitutionality of statutes. When a duly ratified treaty does not conflict with a later norm, the *Conseil d'État* has continued to deny its authority to review the substantive constitutionality of the treaty.<sup>378</sup>

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372. CC decision No. 99-410 DC, Mar. 15, 1999. In reviewing an organic statute concerning New Caledonia, which extended to that territory provisions of a 1985 bankruptcy law that made individuals adjudged bankrupt automatically ineligible for public office, the *Conseil* concluded that the 1985 provisions violated the constitutional requirement of proportional penalties.

373. CE Ass., Oct. 30, 1998, No. 200286 (*Sarran*), available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000008008495&fastReqId=493438676&fastPos=1>.

374. Articles 76 and 77, added in 1998, incorporated into the Constitution terms of an agreement negotiated between the French Government and leaders of political movements in New Caledonia in the wake of separatist violence.

375. The qualifications, however, probably did not violate either treaty. See Human Rights Committee, *Gillot v. France*, Comm. No. 932/2000, UN Doc. CCPR/C/75/D/932/2000 (2002) (upholding the referendum qualifications); *Py v. France*, 2005-I Eur. Ct. H.R. (upholding the qualifications for legislative elections in New Caledonia).

376. Cass. ass. plén., June 2, 2000, Bull. A.P., No. 4, 7 (*Fraisse*).

377. See Christine Maugué, *L'arrêt Sarran, entre apparence et réalité*, 7 CAHIERS DU CONSEIL CONSTITUTIONNEL (2000) (characterizing the *Sarran* decision as using the Constitution as a screen between the subsequent norm and the treaty, and denying a broader power of the *Conseil d'État* to review the constitutionality of treaties more generally). Mme Maugué was the *commissaire du gouvernement* in the *Sarran* case.

378. See, e.g., CE Sect., July 8, 2002, No. 239366 (*Commune de Porta*), available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=>



With regard to *procedural* constitutionality, however, the *Conseil d'État* has gone further, holding since 1998 that it can review whether the executive, acting alone, has ratified a treaty that ought to have been submitted to the legislature under Article 53 for its authorization.<sup>379</sup> The consequence of such a finding is not the permanent invalidation of the treaty, but rather the denial of its domestic legal force until legislative approval has been obtained. The *Conseil d'État* explains its authority to review this issue as deriving from a strict interpretation of Article 55, which attributes superior rank only to treaties that are “duly ratified or approved” (*régulièrement ratifiés ou approuvés*).<sup>380</sup> Protecting the prerogatives of the legislature against the irregular action of the executive in this manner is more consistent with the traditional role of the *Conseil d'État* as an administrative court than reviewing the substantive constitutionality of a treaty. The *Cour de Cassation* adopted the same approach in 2001, overruling its prior case law and refusing to apply a bilateral treaty on judicial cooperation in civil matters between France and Senegal on the ground that the executive had not obtained legislative authorization, and it was therefore not “duly ratified or approved.”<sup>381</sup>

These doctrines do impose some limits on the extent to which the principle *pacta sunt servanda* immunizes improperly ratified treaties from later constitutional review. The defects that they control would rarely be so manifest as to excuse France from complying *vis-à-vis* a treaty partner.<sup>382</sup>

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CETATEXT000008042657&fastReqId=1873718129&fastPos=1; CE Ass., July 9, 2010, No. 327663, 26 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 980 (2010) (conclusions of Keller, *rapporteur public*) (*Fédération nationale de la libre pensée*), available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022487030&fastReqId=1399975832&fastPos=1>. In the latter case, which is technically outside of the second period, the Assembly of the *Conseil d'État* rejected the proposal of its *rapporteur public* to extend its authority.

379. CE Sect., Dec. 18, 1998, Rec. Lebon 483 (*SARL de parc d'activités de Blotzheim*); see also CE Ass., Mar. 5, 2003, Rec. Lebon 77 (*Aggoun*); CE Ass., July 9, 2010, No. 327663, 26 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 980 (2010) (conclusions of Keller, *rapporteur public*) (*Fédération nationale de la libre pensée*), available at <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000022487030&fastReqId=1399975832&fastPos=1>.

380. CE Sect., Feb. 23, 2000, Rec. Lebon 72 (*Bamba Dieng*).

381. Cass. 1e civ., May 29, 2001, Bull. civ. I, No. 149, 97 (*Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar*). The *Conseil d'État* had also declared the same treaty improperly ratified the year before. CE, Feb. 23, 2000, Rec. Lebon 72 (*Bamba Dieng*); see also Rogoff, *supra* note 17, at 446-49.

382. See Vienna Convention on the Law of Treaties art. 46, May 23, 1969, 1155 U.N.T.S. 331 (explaining when a state can assert the invalidity of its consent to a treaty as a result of a manifest violation of a fundamentally important rule of its internal law). France is not a party to the Vienna Convention on the Law of Treaties, but recognizes that provision as codifying customary international law. See CONSEIL D'ÉTAT, *supra* note 33, at 10; Gilles Bachelier, *Le contrôle des conditions d'introduction en droit interne d'une convention internationale*, in 15 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 315, 321 (1999) (conclusions of the *commissaire du gouvernement* on *SARL du parc d'activité de Blotzheim*).

### 3. Article 54: Substance (bis)

The *Maastricht* decisions of 1992 articulated the basic framework for Article 54 review. They also set the precedent that, when the *Conseil constitutionnel* concluded that a treaty would infringe upon the essential conditions of national sovereignty, a constitutional amendment authorizing the infringement could follow. This section will examine the further evolution of the *Conseil's* substantive standards; first, with regard to the constitutionality of general multilateral treaties; then, in relation specifically to the European Union.

One jurisdictional question left open by the *Maastricht II* decision finally received an answer in 2003, in a non-treaty decision of the *Conseil*. Opposition senators attempted to challenge a constitutional amendment, newly adopted in Congress, decentralizing legislative powers to political subdivisions. They argued that it violated the principle of (internal) national sovereignty by empowering localities at the expense of the national legislature, and that it exceeded the limits of the amending power under Article 89, which prohibits amendments to “the republican form of government.”<sup>383</sup> The *Conseil* succinctly dismissed the proceeding, concluding that it had no competence, under Article 89 or Article 61 or otherwise, to pass on the validity of a constitutional amendment.<sup>384</sup> That dismissal put the *Conseil* firmly on record, *a fortiori*, against any notion of enforceable supraconstitutional norms.

#### a. General Multilateral Treaties

As previously noted, there are five decisions to consider here: one involving the International Criminal Court, two involving language issues, and two conjoined decisions involving treaties on the abolition of the death penalty. These cases produced three findings of conflict between a treaty and the constitution, including the one occasion on which such a finding led to the abandonment of a proposed ratification.

##### *The ICC Statute*

The *Conseil's* 1999 decision on the Statute of the International Criminal Court (ICC)<sup>385</sup> was politically controversial, but not because of attitudes towards international criminal law. The issues raised by the ICC Statute included the exposure of heads of state to criminal punishment, and thereby gave the *Conseil* the opportunity to address the immunity of the President of the Republic from prosecution at a time when President Jacques Chirac was being investigated for links to official corruption during his service as Mayor of Paris.<sup>386</sup> Official immunity turned out to be

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383. See *Saisine par 60 sénateurs - 2003-469 DC*, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2003/2003-469-dc/saisine-par-60-senateurs.101124.html> (last visited Apr. 3, 2011).

384. CC decision No. 2003-469 DC, Mar. 26, 2003, cons. 2.

385. CC decision No. 98-408 DC, Jan. 22, 1999.

386. See, e.g., Thierry Brehier, *Le Conseil constitutionnel attribue à M. Chirac une immunité pénale*, LE MONDE, Jan. 26, 1999, at 5.

one of several grounds on which the *Conseil* concluded that a constitutional amendment would be needed before ratification of the Statute.

Framing the analysis, the *Conseil* observed that Paragraphs 14 and 15 of the 1946 Preamble, together with its Paragraph 1,<sup>387</sup> enabled France to enter into international commitments, including the establishment of a permanent international court to punish grave crimes against fundamental human rights affecting the international community.<sup>388</sup> The *Conseil* added that, given this purpose, the obligations should be independent of compliance by other states, and thus the reciprocity proviso of Article 55 would not be applicable.<sup>389</sup> Still, if the engagement contained a clause contrary to the Constitution, endangered constitutionally protected rights, or infringed upon the essential conditions of the exercise of national sovereignty, a constitutional amendment would be required before ratification.<sup>390</sup>

Turning first to the problem of immunities, the *Conseil* perceived a conflict between the rejection of official immunities for heads of state, members of governments, and members of parliament in the ICC Statute, and the express immunities conferred on the President of the Republic, members of the Government, and members of Parliament in Articles 68, 68-1, and 26 of the Constitution. For example, Article 68 provided that the President could not be held liable for acts performed in the exercise of his duties except in the case of high treason, and also that he could be indicted only by a special procedure in the “High Court of Justice.”<sup>391</sup> The *Conseil* interpreted this provision as making the jurisdiction of the High Court of Justice exclusive of *any* other court, domestic or international.<sup>392</sup> It similarly interpreted the immunities of members of the Government and the Parliament as not applying solely to domestic prosecutions.<sup>393</sup> Accord-

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387. The first paragraph of the 1946 Preamble begins: “On the morrow of the victory won by free peoples over regimes that tried to enslave and degrade the human person, the French people proclaims anew that any human being possesses inalienable and sacred rights.” 1946 CONST. pmb., translated in BELL, *supra* note 11, at 263. The *Conseil constitutionnel* has derived from this paragraph a constitutional principle of the protection of the dignity of the human person against any form of servitude or degradation. See CC decision No. 343-344 DC, July 27, 1994, cons. 2 (adopting this human dignity principle); CC decision No. 98-408 DC, Jan. 22, 1999, cons. 8 (restating this principle).

388. CC decision No. 98-408 DC, Jan. 22, 1999, cons. 12.

389. *Id.*

390. *Id.* cons. 13.

391. *Id.* cons. 16. The “High Court of Justice” was defined in Article 67 as a special “court” composed of members of the two chambers of Parliament. The *Conseil* interpreted the sentence in Article 68 on the High Court of Justice as indicating that the President could not be prosecuted before any other court during his term of office, even for acts not performed in the exercise of his duties (e.g., when he was Mayor of Paris). Whether or not this interpretation was correct, it excited considerable controversy at the time.

Articles 67 and 68 were thoroughly rewritten in 2007. The current versions make explicit that the President cannot be prosecuted or even required to testify during his term of office (except before the ICC), and establish a procedure for his removal by a form of impeachment.

392. *Id.* cons. 16-17.

393. *Id.*

ingly, ratification of the ICC Statute would require a constitutional amendment.

The *Conseil* next verified that the criminal proceedings under the ICC Statute were consistent with a long list of constitutional principles applicable to criminal defendants in France. These included, inter alia, the presumption of innocence, the principle that crimes and penalties must be defined by law, the principle of non-retroactivity, the rights of defense, the right to a fair procedure guaranteeing balance as between the rights of the parties, the prohibition on excessive punishment, and the right to an independent and impartial court.<sup>394</sup> While this discussion was reassuring, the *Conseil* did not always make clear which features were required and by precisely what constitutional principles.<sup>395</sup> Nor did the decision shed light on why the French Constitution should be understood as making these principles obligatory for an international criminal tribunal.<sup>396</sup>

In contrast to this endorsement of the treaty, the *Conseil* found that the ICC treaty imperiled the essential conditions of the exercise of national sovereignty in two respects. First, the *Conseil* considered the regime of complementarity. Exercise of ICC jurisdiction in circumstances where the state evaded its obligations, or where the national judicial system was unable to function, would not infringe national sovereignty.<sup>397</sup> But the *Conseil* was troubled by the possibility of an ICC prosecution where the national prosecution was barred by amnesty or by prescription. Although making such grave crimes imprescriptible would not violate any constitutional right of the accused,<sup>398</sup> the state's power to adopt a limitations period or to

394. *Id.* cons. 21, 22, 23, 25, 26.

395. *See, e.g., id.* cons. 24, 28 (concluding opaquely that various provisions of the Statute did not violate any constitutional rule). It has been suggested that some of the *Conseil's* discussion of rights reflected European human rights jurisprudence, and that some of the elements mentioned there were being recognized as French constitutional requirements for the first time. *See* Bruno Genevois, *Le Conseil constitutionnel et le droit pénal international*, 15 *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 285, 305-07 (1999); Olivier Dutheillet de Lamothe, *Le Conseil constitutionnel et la Cour européenne des droits de l'homme: Un dialogue sans paroles*, in *LE DIALOGUE DES JUGES: MÉLANGES EN L'HONNEUR DU PRÉSIDENT BRUNO GENEVOIS* 403, 410 (2009). Moreover, the principal drafter of the decision has explained that discussion of rights went beyond the usual practice in Article 54 cases of concentrating on the provisions that conflict with the Constitution in order to highlight France's success in making ICC procedures more protective of individuals. *See* Lenoir, *supra* note 241, at 11, 17; *cf.* Jean-François Dobelle, *La convention de Rome portant statut de la Cour pénale internationale*, 44 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 356, 362-65 (1999) (discussing France's negotiating positions and their results).

396. By analogy, European human rights law prohibits extradition to a country where the accused faces serious danger of inhuman and degrading treatment, but does not currently prohibit extradition to a country whose criminal justice system does not fully comply with European standards of fair trial.

397. CC decision No. 98-408 DC, Jan. 22, 1999, cons. 32.

398. *Id.* cons. 20. The *Conseil d'État*, in preparations for the negotiation of the ICC Statute, had identified the principle of prescription for less grave offenses as a fundamental principle recognized by the laws of the Republic, given constitutional force by the Preambles to the 1958 and 1946 Constitutions. *See* Antoine Buchet, *L'intégration en France de la convention portant statut de la Cour pénale internationale: Histoire brève et inachevée d'une mutation attendue*, in 1 *THE ROME STATUTE AND DOMESTIC LEGAL ORDERS*, 65, 68-69 (Claus Krefß & Flavia Lattanzi eds., 2000). The *Conseil constitutionnel* did not

grant amnesty if it chose was too important a sovereign function; in order to impose on France the obligation to arrest and surrender an accused who was covered domestically by amnesty or prescription, a constitutional amendment would be necessary.<sup>399</sup> The provisions on investigative cooperation and judicial assistance sufficiently protected the state's power to reject requests where transmitting the information would raise national security issues. In contrast, the Prosecutor's authority to perform certain investigative acts on French territory without the presence of French authorities, including taking evidence from voluntary witnesses and examining public places, was liable to violate the essential conditions for the exercise of national sovereignty, and required a prior constitutional amendment.<sup>400</sup> Finally, the *Conseil* construed the ICC Statute as permitting a state that had been asked to carry out an ICC sentence of imprisonment to place conditions on its consent, which could include reserving the power of the executive to exercise clemency toward the prisoner.<sup>401</sup> The *Conseil* thereby avoided what it considered another possible infringement of the sovereignty principle and of the express constitutional grant of the pardon power to the President.<sup>402</sup>

The direct consequence of the decision was the adoption, by nearly unanimous vote,<sup>403</sup> of an opaque constitutional amendment authorizing the ratification of the ICC Statute. Article 53-2 provides, "The Republic may recognize the jurisdiction of the International Criminal Court as provided by the treaty signed on 18 July 1998."<sup>404</sup> France, accordingly, ratified the treaty in 2000.

Thus, the *Conseil's* ICC decision found conflicts between the treaty and three specific provisions of the Constitution regarding official immu-

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confirm or deny the constitutional status of such a principle, but held that it would not cover the crimes involved in the ICC statute.

399. CC decision No. 98-408 DC, Jan. 22, 1999, cons. 34. It is interesting to note, though outside the usual temporal scope of this article, that the implementing legislation enacted in 2010 makes genocide and crimes against humanity imprescriptible, but imposes a thirty-year prescription period on prosecution for war crimes. The *Conseil constitutionnel* rejected a challenge to this limitation, replying that any inconsistency between the statute and the treaty was a matter for the civil/criminal courts to deal with, and that the differential treatment did not violate the constitutional principle of equality. CC decision No. 2010-612 DC, Aug. 5, 2010, cons. 5. (It might also be noted that the ICC Statute does not require the absence of a prescription period for war crimes in the national courts, but rather makes them imprescriptible before the ICC itself, and treats the prescription period as a possible reason for exercising international jurisdiction under the complementarity regime.)

400. CC decision No. 98-408 DC, Jan. 22, 1999, cons. 38; see Rome Statute of the International Criminal Court art. 99(4), July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

401. CC decision No. 98-408 DC, Jan. 22, 1999, cons. 39-40.

402. *Id.* cons. 40; see 1958 CONST. art. 17 (amended 2008).

403. See *La Cour pénale internationale et la parité entrent dans la Constitution*, LE FIGARO, June 29, 1999 (reporting 856 votes in favor, 6 against).

404. A subsequent constitutional amendment in 2007, changing the national procedures for responding to misconduct by the President, also incorporated a cross-reference to Article 53-2 as an exception to the President's official immunity. See 1958 CONST. art. 67(1).

nity, as well as infringements of national sovereignty based on the ICC's power to circumvent a French amnesty or prescription, and the Prosecutor's authority to conduct non-coercive investigation unaccompanied on French soil. The *Conseil* accommodated the weighty purpose of the treaty by creating an exception to the reciprocity proviso in Article 55; the *Conseil* failed to accommodate the treaty's purpose by ruling the immunities inapplicable or by characterizing the intrusions on national sovereignty as minor. The most significant consequence of the decision, however, was probably its clarification of the *domestic* law of presidential immunity. The decision was doubtless welcome to the President, and since the Constitution would have to be amended anyway—the ICC Statute permits no reservations<sup>405</sup>—the other holdings created no additional impediment to the government.

France was hardly the only country to conclude that ratifying the ICC Statute would require a constitutional amendment. Numerous countries have considered possible constitutional hurdles to ratification, including official immunity, prohibition of the extradition of nationals, prohibition of life imprisonment, and exclusivity of criminal jurisdiction within the national territory.<sup>406</sup> Sometimes such problems disappear as a result of interpretation, reading a constitutional provision as applying only to domestic prosecution, or distinguishing between extradition to a foreign state and surrender to an international tribunal. In other instances, constitutional amendments have solved the problem. Nevertheless, to this author as an outside observer, the *Conseil's* constitutional analysis of the ICC Statute appears less than fully convincing. The main problem arises from the *Conseil's* inconsistent treatment of when the ICC should be treated as external to the French constitutional system and when French constitutional constraints should be projected onto it. For example, the ICC Prosecutor is too external to be permitted to investigate in France without a chaperone, but the ICC is not too external to be required to respect French official immunities and pardons. The ICC criminal process must also respect some or all of the rights of French constitutional criminal procedure. Perhaps there are reasons that would justify and reconcile these interpretations, but they are not obvious and the *Conseil* did not even hint at them.

#### *The Language Charter and the Patent Agreement*

Another 1999 decision provides the one example in the fifty-year period in which the *Conseil constitutionnel's* finding of conflict between the Constitution and a treaty actually deterred France from ratifying the treaty.<sup>407</sup> The *Conseil* found that the European Charter of Regional or

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405. Rome Statute, *supra* note 400, art. 120.

406. See, e.g., Roy S. Lee, *States' Responses: Issues and Solutions, in STATES' RESPONSES TO ISSUES ARISING FROM THE ICC STATUTE: CONSTITUTIONAL, SOVEREIGNTY, JUDICIAL COOPERATION AND CRIMINAL LAW 1, 9-21* (Roy S. Lee ed., 2005); Venice Commission, Second Report on Constitutional Issues Raised by the Ratification of the Rome Statute of the International Court, Doc. CDL-AD(2008)031 (Nov. 4, 2008).

407. *But see supra* note 341.

Minority Languages (the “Language Charter”)<sup>408</sup> violated specific clauses of the Constitution rather than the general criterion of national sovereignty. The Language Charter was one of two principal treaties promoted by the Council of Europe<sup>409</sup> in the 1990s to encourage greater tolerance by post-Communist states toward their linguistic minority communities.<sup>410</sup>

The 1990s approach to regional and minority languages was, however, seriously in tension with French language policy. Looking outward, France engages in the international promotion of *Francophonie*, competing with other globally influential languages (particularly English), and resisting their incursions within France.<sup>411</sup> Looking inward, the French language serves as an important unifying factor for a country whose territory was assembled over several centuries by absorbing other linguistic communities.<sup>412</sup> This practical consideration accompanies an ideological basis for language policy, the “Jacobin” strain in French Republican thought, which emphasizes the unity of the Nation and delegitimizes groups or communities whose particular interest competes with the national interest.<sup>413</sup> Defense of the French language is a traditional Gaullist priority, but Republican concern for linguistic unity transcends the political spectrum. Nonetheless, the Fifth Republic has always engaged in some promotion of regional languages, subject to the primacy of French.<sup>414</sup>

When the Council of Europe first adopted the Language Charter in 1992, France abstained on the vote and declined to sign the treaty, citing constitutional obstacles.<sup>415</sup> Even before the Maastricht amendment enshrined the official character of the French language, the *Conseil constitutionnel* had invalidated a statute that purported to recognize a “Corsican people” as a component of the French people.<sup>416</sup> The Constitution

408. European Charter for Regional or Minority Languages, *opened for signature* Nov. 5, 1992, E.T.S. No. 148 (entered into force Mar. 1, 1998) [hereinafter Language Charter].

409. The Council of Europe, not to be confused with the European Union, is the larger organization for regional cooperation. The Council originated in Western Europe, but currently has over forty members including Russia. The European Convention on Human Rights operates under its auspices.

410. See, e.g., David Wippman, *The Evolution and Implementation of Minority Rights*, 66 *FORDHAM L. REV.* 597, 612–15 (1997). The second is the more widely ratified Framework Convention for the Protection of National Minorities, *opened for signature* Feb. 1, 1995, E.T.S. No. 157 (entered into force Feb. 1, 1998). As of January 1, 2011, the Framework Convention had thirty-nine parties, and the Language Charter had twenty-five parties.

411. See Debbasch, *supra* note 273, at 459–460; Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 *WASH. L. REV.* 285, 313–17 (1996).

412. See Wexler, *supra* note 411, at 296–304.

413. See Florence Benoit-Rohmer, *Les langues officielles de la France*, 45 *REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL* 3, 6–8 (2001).

414. See *id.*, at 17–22.

415. See Wilcox, *supra* note 273, at 276.

416. CC decision No. 91-290 DC, May 9, 1991. The statute afforded special powers and organization to the island of Corsica (i.e., *La Corse*). Many of the provisions were upheld, but the *Conseil constitutionnel* invalidated the programmatic statement discussed in the text, as well as several substantive and procedural provisions.

“recognises only the French people, made up of all French citizens regardless of origin, race or religion.”<sup>417</sup> The *Conseil* upheld the offering of instruction in Corsican language and culture in the public schools as consistent with the principle of equality, but only so long as it was optional for the students.<sup>418</sup> Later decisions applying the 1992 French language amendment to the regulation of language in public and commercial activities,<sup>419</sup> and to public administration and education in French Polynesia,<sup>420</sup> further strengthened the inhibition.

After the 1997 elections, in a renewed period of cohabitation, the Socialist Government of Lionel Jospin reexamined the question. Because the Language Charter incorporates a lengthy menu of options, and affords states considerable leeway to designate their own set of obligations,<sup>421</sup> the Government hoped it could identify a package of language rights that would exceed the minimum threshold of compliance without transgressing constitutional norms. President Jacques Chirac had the Language Charter signed in May 1999, depositing a declaration that set forth some interpretations of the Language Charter and then specified the clauses France intended to implement after ratification. Shortly thereafter, faced with opposition from within his own party, Chirac referred the treaty to the *Conseil constitutionnel* for an Article 54 ruling on its compatibility with the Constitution.<sup>422</sup>

The Jospin-Chirac strategy had some degree of success: in considering Part III of the Language Charter, the *Conseil constitutionnel* limited itself to the undertakings that France had designated in its declaration upon sign-

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417. *Id.* cons. 13. The *Conseil constitutionnel* distinguished between the island of Corsica, considered as part of the metropolitan territory of France, and overseas possessions (remaining from the former colonial empire), within which the Constitution does contemplate the existence of distinct peoples with rights of self-determination. The latter subject deserves fuller discussion, but will not be pursued here because it is not directly relevant to the decision on the European Charter of Regional or Minority Languages.

418. *Id.* cons. 37.

419. CC decision No. 94-345 DC, July 29, 1994. The *Conseil* was particularly deferential to legislative control of the form of expression by public agencies and persons engaged in public service.

420. CC decision No. 96-373 DC, April 9, 1996. The *Conseil* held that even in the overseas territory of French Polynesia, the French language must be employed in the public service and also by ordinary citizens in their interaction with the administration. Nor did the constitutional guarantee of equality permit obligatory teaching of Tahitian or other Polynesian languages in public schools there. These holdings took the form of mandated interpretations of challenged provisions, rather than invalidations. *See also* CC decision No. 2004-490 DC, Feb. 12, 2004, cons. 70 (holding again that teaching of Tahitian and other Polynesian languages must be optional).

421. The Language Charter requires parties to apply the provisions of Part II to each regional or minority language, and to apply for each such language “a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Language Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11, and 13.” Language Charter, *supra* note 408, art. 2.

422. *See* Benoit-Rohmer, *supra* note 413, at 13 n.27.



ing, and found that none of them violated the Constitution.<sup>423</sup> However, the *Conseil* found unavoidable conflict between the Constitution and non-optional clauses of Part II.<sup>424</sup> It found that the Language Charter conferred group rights on speakers of regional languages, which applied within “territories” particular to such languages, and thereby infringed the constitutional principles of the indivisibility of the Republic, equality before the law, and the unity of the French people.<sup>425</sup> The *Conseil* also found that the Language Charter entailed a right to practice a language other than French not only in private life, but also “in public life,”<sup>426</sup> including before courts, administrative agencies, and public services, which violated the status conferred on the French language by Article 2 of the Constitution.

On this occasion, the *Conseil constitutionnel*’s decision ended the matter. Jospin was willing to adopt a narrow constitutional amendment authorizing ratification of the Language Charter, but Chirac was not. He issued a statement refusing to undertake an amendment that would violate “fundamental principles of the Republic.”<sup>427</sup>

France has kept its distance from both the Language Charter and the Framework Convention. As will appear *infra*, the *Conseil* later identified the prohibition of collective rights for linguistic groups as an important French constitutional principle that EU treaties should not infringe.<sup>428</sup>

423. CC decision No. 99-412 DC, June 15, 1999, cons. 3, 13. The *Conseil constitutionnel* also noted that most of the designated clauses involved practices that France already engaged in for the benefit of minority languages. The *Conseil constitutionnel* apparently concluded that France had successfully finessed some of the constitutional problems by designating clauses that required publication of certain official documents in minority languages as well as in the national language.

424. *Id.* cons. 10. The *Conseil constitutionnel* declined to limit its review to those provisions as interpreted in the declaration that France had deposited because the unilateral declaration was not internationally binding. *Id.* cons. 4.

425. Article 2 of the Constitution included language stating that, “France is an indivisible, lay, democratic, and social Republic. It ensures equality before the law for all citizens, without distinction as to origin, race, or religion.” In 1995, this language was moved to Article 1. Article 3 provides, in relevant part, that “National sovereignty belongs to the people,” and that “No section of the people, nor any individual, may arrogate its exercise to itself.” See *id.* cons. 5.

426. *Id.* cons. 11; see Language Charter, *supra* note 408, art. 7(1)(d) (a provision not subject to reservation).

427. See *M. Chirac refuse à M. Jospin la révision constitutionnelle pour la protection des langues régionales*, LE MONDE, June 25, 1999. Ironically, at the very moment when Chirac refused to modify these principles on behalf of speakers of regional languages, he and Jospin were engaged in amending Article 3 to authorize the legislature to improve the access of women to elective office. The gender parity amendment, adopted in Congress on July 8, 1999, overturned decisions of the *Conseil constitutionnel* that had prohibited laws requiring parties to nominate a minimum percentage of women, on the grounds that they violated the principle of equality and improperly divided the citizenry into categories for election purposes. See CC decision No. 82-146 DC, Nov. 18, 1982 (Gender Quotas I); CC decision No. 98-407 DC, Jan. 14, 1999 (Gender Quotas II). The 2008 amendments further expanded the parity provision and moved it to Article 1 of the Constitution.

428. See *infra* notes 503–513 and accompanying text (discussing CC decision No. 2004-505 DC, Nov. 19, 2004).

During the massive constitutional reform of 2008, an attempt was made to add a sentence recognizing regional languages as part of the national patrimony in Article 1 of the Constitution.<sup>429</sup> Ultimately, a similar provision was placed in Title XII of the Constitution on territorial communities as a compromise.<sup>430</sup> Neither form of the amendment was intended to impair the primacy of the French language, or to permit the ratification of the Language Charter.<sup>431</sup>

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The interaction between official French and international obligations returned to the *Conseil* in 2006, this time involving the threat posed by English. Dissenting deputies on the right, as well as the Prime Minister, referred under Article 54 a minor treaty modifying an earlier multilateral treaty that had established a European (not EU) patent process.<sup>432</sup> The London Agreement of 2000 sought to lower the costs of European patents by permitting applicants to file their applications in one of the three official languages (French, German and English) with only a partial translation into the other two languages.<sup>433</sup> (The patent claims needed to be fully translated, but the description of the invention need not be.) The deputies argued that requiring third parties to avoid infringing a patent that had not been fully translated into French violated the official status of the French language under Article 2 of the Constitution, as well as constitutional principles of equality, the accessibility and intelligibility of the law, and the rule of law in the penal context.<sup>434</sup> The *Conseil* concluded, however, that the Agreement permitted the use of foreign languages in the private law interactions between patent-holders and interested third parties, and in the operations of the European Patent Organisation, which was not part of the domestic legal order and so was not subject to Article 2.<sup>435</sup> Whenever patent litigation took place in the French courts, the Agreement preserved the power of France to insist on a full translation, and therefore respected the obligatory status of French in communication with domestic public

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429. The attempt was successful in the National Assembly, but rejected by the Senate. See ASSEMBLÉE NATIONALE, RAPPORT NO. 1009, 13th Legislature, at 53 (2008).

430. 1958 CONST. art. 75-1 (“Les langues régionales appartiennent au patrimoine de la France.”).

431. See ASSEMBLÉE NATIONALE, RAPPORT NO. 1009, 13th Legislature, at 53-54, 57, 186-88 (2008); Christian Lavielle, *Du nominalisme juridique: Le nouvel article 75-1 de la Constitution du 4 octobre 1958*, 24 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1110 (2008). Subsequently, the *Conseil constitutionnel* held that the new Article 75-1 does not create a right or liberty that would enable individuals to challenge legislation under the “priority question of constitutionality” procedure. CC decision No. 2011-130 QPC, May 20, 2011; see also *infra* Part V (discussing QPC procedure).

432. CC decision No. 2006-541 DC, Sept. 28, 2006.

433. Agreement on the Application of Article 65 of the Convention on the Grant of European Patents, Oct. 17, 2000, OFFICIAL JOURNAL OF THE EUROPEAN PATENT ORGANISATION 550 (2001) [hereinafter London Agreement].

434. CC decision No. 2006-541 DC, Sept. 28, 2006.

435. *Id.* cons. 6-7.

authorities.<sup>436</sup> The holding that Article 2 did not apply to the European Patent Organisation, an external entity, seems reasonable but it deserves juxtaposition with the *Conseil's* assumptions in the ICC decision concerning constitutional principles that do apply to an external entity.

After the *Conseil's* decision, the effect of the Agreement on the status of the French language in international business remained a divisive issue across the political spectrum,<sup>437</sup> but the Government secured majority approval for the Agreement a year later.<sup>438</sup> France ratified the treaty in January 2008.

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Thus, the official French language amendment added at the time of the Maastricht Treaty, combined with Republican principles of indivisibility and the opposition to collective rights, successfully blocked adherence to an important human rights treaty of the Council of Europe. The *Conseil constitutionnel* confidently drew a line between existing accommodations to regional languages and more robust language rights. It appears to have shifted the balance of political forces and preserved the status quo, thereby fulfilling one of the purposes that Article 54 was intended to serve.

#### *Death penalty treaties redux*

The *Conseil constitutionnel* revisited the subject of human rights treaties abolishing the death penalty, twenty years after its earlier decision of 1985.<sup>439</sup> President Chirac referred two treaties that would further expand France's international obligations not to impose capital punishment (in the hypothetical future). The Thirteenth Protocol to the European Human Rights Convention requires abolition of the death penalty in all circumstances, not merely in peacetime.<sup>440</sup> The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR) abolishes the death penalty generally, but permits ratifying states to preserve the power to apply the death penalty in time of war for a "most serious crime of a

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436. *Id.* cons. 13. The *Conseil* also easily dismissed the notion that private property instruments, like patents, were subject to the same requirements of accessibility and intelligibility as statutes, or that criminal law notice requirements applied, or that the effect of the London Agreement improperly discriminated against interested third parties with lesser linguistic capabilities. *Id.* cons. 9-11.

437. See Annie Kahn & Patrick Roger, *La loi sur la traduction des brevets européens divise les députés français*, LE MONDE, Sept. 26, 2007.

438. Loi constitutionnelle 2007-1477 du 17 octobre 2007 autorisant la ratification de l'accord sur l'application de l'article 65 de la convention sur la délivrance de brevets européens, J.O., Oct. 18, 2007, p. 17170.

439. CC decision No. 2005-524/525 DC, Oct. 13, 2005. For the earlier decision, on the sixth Protocol to the European human rights convention, see *supra* text accompanying notes 199-202.

440. See Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning the Abolition of the Death Penalty in all Circumstances, *opened for signature* May 3, 2002, E.T.S. No. 187 (entered into force July 1, 2003). The Protocol also prohibits derogation from this obligation, and does not permit reservations by ratifying states. *Id.* arts. 2-3.

military nature.”<sup>441</sup>

The *Conseil constitutionnel* saw no conflict between the treaties and express provisions of the Constitution or constitutionally protected rights.<sup>442</sup> Nonetheless, the treaties potentially infringed upon essential conditions of national sovereignty by preventing the reintroduction of the death penalty even in an emergency situation that threatens the life of the nation.<sup>443</sup> (It is interesting that a European constitutional tribunal in 2005 would ascribe such importance to the availability of capital punishment in emergency situations.) As in its 1985 decision on the European Sixth Protocol, the *Conseil* observed that the European Thirteenth Protocol did not fully obstruct reintroduction because France had the (formal) option of withdrawing from it prospectively under the denunciation clause of the European Convention.<sup>444</sup> However, the ICCPR and its Second Optional Protocol contain no denunciation clauses, and the *Conseil* accepted the international view that they are not subject to denunciation.<sup>445</sup> Accordingly, ratification of the Second Optional Protocol would violate the Constitution, on the principle that “adherence to an irrevocable international commitment touching upon a domain inherent to national sovereignty” infringes upon the essential conditions of its exercise.<sup>446</sup>

On this occasion, President Chirac, who had been among the minority of Gaullists voting for the statutory abolition of capital punishment in 1981,<sup>447</sup> responded to the *Conseil*’s Article 54 decision by seeking a substantive amendment to the Constitution. It eliminated the inconsistency by making the abolition of the death penalty a constitutional norm, rather than by authorizing ratification of a treaty. The amendment, overwhelmingly adopted toward the end of Chirac’s presidency in February 2007, provides simply that “No one shall be sentenced to death.”<sup>448</sup> France then adhered to both treaties in October 2007.

441. Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty art. 2(1), *opened for signature* Dec. 15, 1989, (entered into force July 11, 1991), *available at* <http://www2.ohchr.org/english/law/ccpr-death.htm>.

442. CC decision No. 2005-524/525 DC, Oct. 13, 2005, cons. 4.

443. *Id.* cons. 7. The *Conseil* drew its phrasing here from the derogation clause of the Covenant itself, which was inapplicable to the Protocol.

444. *Id.* cons. 6. Some subtleties lie behind this statement, including uncertainty about whether the Protocol could be denounced without denouncing the entire European Human Rights Convention, and the fact that any future denunciation would become internationally effective only after a six-month delay. See Jean-François Flauss, *Le Conseil constitutionnel et les engagements internationaux relatifs à l’abolition définitive de la peine de mort*, 110 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 117, 121-124 (2006).

445. CC decision No. 2005-524/525 DC, Oct. 13, 2005, cons 7; see also Human Rights Committee, General Comment No. 26: Continuity of Obligations, U.N. Doc. CCPR/C/21/Rev.1/Add.8/Rev.1 (Dec. 8, 1997); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY, xxxvi-xxxvii (2d ed. 2005).

446. CC decision No. 2005-524/525 DC, Oct. 13, 2005, cons. 5.

447. See ASSEMBLÉE NATIONALE, COMPTE RENDU INTÉGRAL, Sept. 18, 1891, 2d sitting, at 1228.

448. 1958 CONST art. 66-1. The vote in the joint Congress was 828 in favor, 16 opposed.

The *Conseil's* general statement of the principle that irrevocable international commitments touching on a domain inherent to national sovereignty require a constitutional amendment raises serious questions about other constitutional problems France may have overlooked when it ratified the Covenant on Civil and Political Rights in 1980.<sup>449</sup> At that time, the *Conseil* had not yet emphasized the need for an option to withdraw from a treaty, and the Covenant did not expressly prohibit denunciation. The Covenant on Economic, Social and Cultural Rights, also ratified by France in 1980, equally lacks a denunciation clause, as does the Convention on the Elimination of All Forms of Discrimination Against Women, ratified in 1983. Conceivably, these treaties contain some provisions that pose similar problems.

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Thus, the five decisions on purely international treaties in the post-1992 period resulted in two rulings of conformity (on the denunciable protocol and the patent treaty), two rulings of nonconformity that prompted constitutional amendments (the ICC Statute and the non-denunciabile protocol), and one ruling of nonconformity that halted ratification. The *Conseil* found violations of specific constitutional provisions relating to the French language, territorial indivisibility, the absence of collective rights for minorities, and penal immunity for public officials. The *Conseil* developed its prior jurisprudence concerning infringement of sovereignty by foreign law enforcement,<sup>450</sup> and by absolute prohibition of capital punishment. It broke new ground on the essential sovereign powers of amnesty and prescription.

One could also say that the *Conseil* continued its tradition of unpredictability concerning the externalization of international organizations, that is, when it would hold that a constitutional provision applies only to restrict the domestic legal actors and when it would bring international or foreign actors within the restrictive scope of a constitutional provision.

#### b. The European Union

The Maastricht amendment had apparently endorsed the *Conseil constitutionnel's* view that principles of national sovereignty permitted some "transfers of competence" to the European Union but not others. The express authorizations of transfers in Article 88-2 did not provide advance consent to future transfers, which would have to be judged on their own merits. Evaluation of such transfers became the major theme of the *Conseil's* jurisprudence, common to its Article 54 decisions on the Amsterdam, European Constitution, and Lisbon treaties. Minor themes included the

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449. See Flauss, *supra* note 444, at 132.

450. Compare the discussions of the Franco-German judicial assistance treaty and the Schengen implementation convention, *supra* text accompanying notes 192-194, 226-228, with the decision on the ICC, *supra* text accompanying notes 385-406.

scrutiny of powers contemplated for the French parliament, and the foundational question of European “constitutionalism.”

*The Amsterdam Treaty*

The Amsterdam Treaty made modest advances on the Maastricht Treaty. It transferred most of the EU’s powers over migration from the intergovernmental “third pillar” on justice and home affairs to the EC “first pillar,” where these powers would be progressively subjected to qualified majority voting.<sup>451</sup> It integrated the Schengen regime into the EU framework (with opt-outs for the UK and Ireland, and some for Denmark).<sup>452</sup> It expanded the scope of the “co-decision” procedure; thus, increasing the power of the European Parliament.<sup>453</sup> It created a procedure for suspending a member state that seriously and persistently violates fundamental rights.<sup>454</sup> It accomplished other minor reforms, although not the original goal of redesigning representation in the Commission and the EU Council, in anticipation of future enlargements.<sup>455</sup>

The *Conseil’s* 1997 decision on the Amsterdam Treaty placed itself directly within the framework of analysis provided in *Maastricht I*. In the first seven paragraphs, the *Conseil* reproduced verbatim paragraphs 9-14 of *Maastricht I*, explaining the sources and limits of France’s ability to transfer competences to an international organization. The *Conseil* inserted an additional paragraph, taking note of Article 88-1 added after *Maastricht I*,<sup>456</sup> but it did not include this article as one of the sources of power to transfer, continuing to rely instead on paragraphs 14 and 15 of the 1946 Preamble.<sup>457</sup>

Turning to the content of the Amsterdam Treaty, the *Conseil* noted that Article 88-2 limited its consent to the terms of transfer provided for in the Maastricht Treaty.<sup>458</sup> Therefore, transfers of competence in other fields of activity or changes in the manner of exercising competences already conferred needed to be scrutinized for their effect on national sovereignty. The second Maastricht decision had upheld provisions on common visa policy, and the *res judicata* effect of the *Conseil’s* decisions precluded a renewed challenge to similar provisions of the Amsterdam Treaty.<sup>459</sup> However, the new treaty decreed that, after five years, the procedure for exercising these powers would change from one that could be initiated by any member state and that required the unanimous consent of all member states for adoption

451. See Philippe Manin, *The Treaty of Amsterdam*, 4 COLUM. J. EUR. L. 1 (1998).

452. *Id.* at 7, 19-20.

453. *Id.* at 6, 13.

454. *Id.* at 11-12, 24.

455. *Id.* at 8-9.

456. CC decision No. 97-394 DC, Dec. 31, 1997, cons. 5.

457. *Id.* cons. 6; see also Bruno Genevois, *Le Conseil constitutionnel et le droit communautaire dérivé*, 20 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 651, 653 (2004) (describing the citation of Article 88-1 as “*juridiquement neutre*” [legally neutral]). Recall that these provisions of the 1946 Preamble addressed international law and international organizations generally.

458. CC decision No. 97-394 DC, Dec. 31, 1997, cons. 9.

459. *Id.* cons. 27.

of a measure to a co-decision procedure. Under co-decision, only the EU Commission could initiate the process, a qualified majority of the member states could adopt a measure in the Council, and the European Parliament's assent was required.<sup>460</sup> The *Conseil* concluded that France's resulting loss of power within the visa policymaking process required a new constitutional amendment.<sup>461</sup>

New authorities regarding asylum, immigration, and the crossing of internal borders also raised issues of sovereignty. The *Conseil* found that the initial arrangement, which required unanimity and provided each state with the power of initiation, did not sufficiently trench upon on national sovereignty to require a constitutional amendment.<sup>462</sup> However, after five years, the co-decision procedure governed some of these matters, and others were subject to a "*passerelle*" clause (or "bridging clause") by which they could be made subject to the co-decision procedure through a unanimous vote within the EU Council.<sup>463</sup> These bridging clauses would be given effect by actions internal to the EU institutions that would not provide an occasion for constitutional review by the *Conseil*; therefore, although the intrusion on national sovereignty was contingent, the *Conseil* needed to evaluate it immediately. For these reasons, the transfers of new competences in the migration area (after the five-year period) required a constitutional amendment.

The *Conseil* did not object to other features of the Amsterdam Treaty, including the enhancement of the European Parliament's role by making its assent necessary in the co-decision procedure across a wide range of regulatory subjects.

In response, a constitutional amendment modified Article 88-2, replacing the enumerated transfer of competence over border control under the Maastricht Treaty by the broader competence resulting from the Amsterdam Treaty, which it specifically cited.<sup>464</sup> At the legislature's request, the amendment also modified Article 88-4, expanding the information that the Government should convey to both chambers about proposed European measures and the power of each chamber to adopt resolutions addressing those measures.<sup>465</sup> This expansion represented a compensatory increase in legislative power, not a requirement of the treaty. In this period of cohabitation, the amendment received broad support and the opposition of a vocal minority, with more than 85% of the legislators voting in its favor in the Congress.<sup>466</sup>

#### *Toward a European Constitution, or Not*

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460. *Id.* cons. 28; Manin, *supra* note 451, at 6.

461. CC decision No. 97-394 DC, Dec. 31, 1997, cons. 28-29.

462. *Id.* cons. 23.

463. *Id.* cons. 24-25.

464. Loi constitutionnelle 99-49 du 25 janvier 1999 modifiant les articles 88-2 et 88-4 de la Constitution, J.O., Jan. 26, 1999, p. 1343.

465. *Id.*

466. See *Le Congrès a adopté sans passion la révision constitutionnelle*, LE MONDE, Jan. 20, 1999; *Cent onze parlementaires ont voté contre*, LE MONDE, Jan. 20, 1999.

The next major step occurred in the summer of 2004.<sup>467</sup> At that time, the multi-year project of drafting what would later be known as the Treaty establishing a Constitution for Europe (TCE or European Constitution Treaty) was coming to fruition. The ill-fated TCE was intended as a quantum leap in reform of the EU institutions, comparable to the Maastricht Treaty, responding to the challenges of the EU's expanding activities and increasing membership.<sup>468</sup> The first stage of the drafting process involved a "Convention" combining representatives of governments, members of national parliaments, members of the European Parliament, and representatives of the EU Commission; Valéry Giscard d'Estaing served as President of the Convention.<sup>469</sup> The Convention decided to unify the separate EU treaties into a single instrument, simpler in form (though still quite voluminous) and constitutional in nature. It would strengthen the EU institutions and make their procedures less rigid, and it would upgrade the European Parliament as a partner in a more democratized legislative process.<sup>470</sup> The Charter of Fundamental Rights, adopted as a non-binding instrument at the time of the Nice Treaty, would be written into the Constitution Treaty as its bill of rights.<sup>471</sup> The Convention draft was further modified by inter-governmental conferences, which struggled with difficult issues of distribution of power such as the definition of weighted votes to be used in structuring qualified majority voting.<sup>472</sup> The governments reached agreement on the final text in June 2004.<sup>473</sup>

Also in June 2004, the *Conseil constitutionnel* began reviewing a series of statutes that implemented EU directives.<sup>474</sup> (A directive is a binding norm enacted by the EU that obligates states to adopt legal norms of their own design that achieve the specified result, as opposed to an EU "regulation," which is a binding norm enacted by the EU that is directly applicable in the member states' courts.)<sup>475</sup> The decisions in these statutory referral cases reconceptualized the relationship between EU law and the French Constitution, as well as the relationship between the *Conseil constitutionnel* and the European Court of Justice.

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467. Recall that the Treaty of Nice was ratified without any evaluation by the *Conseil constitutionnel*. See *supra* Part III.B.1.

468. See PIRIS, *supra* note 129, at 9-14.

469. *Id.* at 15.

470. *Id.* at 20-23, 325-26.

471. *Id.* at 148-49.

472. *Id.* at 17-19, 221-22.

473. *Id.* at 19.

474. CC decision No. 2004-496 DC, June 10, 2004; CC decision No. 2004-497 DC, July 1, 2004; CC decision No. 2004-498 DC, July 29, 2004; CC decision No. 2004-499 DC, July 29, 2004. For a discussion in English, see Jacqueline Dutheil de la Rochère, *Conseil constitutionnel (French Constitutional Court), Decision No. 2004-496 of 10 June 2004, Loi pour la confiance dans l'économie numérique (e-commerce)*, 42 COMMON MKT. L. REV. 860-61 (2005). Unlike other decisions discussed in this section, these decisions involved the referral of domestic statutes with European roots, not referral of treaties or of statutes authorizing the ratification of treaties.

475. See PIRIS, *supra* note 129, at 192-94.



The new approach comprised three main elements. First, the *Conseil* identified a different constitutional basis for EU law and its primacy. For the first time, the *Conseil* attributed substantive normative content to Article 88-1 of the Constitution, a provision added in 1992 by the Maastricht amendment.<sup>476</sup> That article then provided that “The Republic shall participate in the European Communities and in the European Union, composed of states which have chosen freely to exercise certain of their competences in common in accordance with the treaties which created them.”<sup>477</sup> Although the *Conseil* had previously explained the supralegislative force of Community law as resulting from Article 55, which deals with international commitments generally,<sup>478</sup> the *Conseil* now interpreted Article 88-1 as entailing a specific constitutional mandate that required the implementation (or “transposition”) of EU directives by domestic law. Consequently, there was constitutional weight on the side of implementing directives, which would have to be reconciled with countervailing constitutional values.<sup>479</sup>

Second, the *Conseil constitutionnel* announced that it was ordinarily the exclusive responsibility of the EU judges to ensure that European directives remained within the boundaries of EU competence and respected the fundamental rights guaranteed under EU law.<sup>480</sup> To the extent that a French statute limited itself to drawing the necessary consequences from unconditional and precise provisions of a directive, the *Conseil constitutionnel* would not review the statute for compliance with fundamental rights under the French Constitution, but would leave the task of protecting fundamental rights with the ECJ.<sup>481</sup> To the extent, however, that the French statute imposed additional restrictions that were not mandated by the directive, the *Conseil* would review those additional aspects of the statute for compliance with fundamental rights.<sup>482</sup> Again, this division of responsibility was expressed as resulting from the provisions of the French Constitution regarding European integration, and not as imposed involuntarily from above by EU law.

Third, the preceding limitation on the *Conseil constitutionnel*'s role would be subject to an exception where a directive conflicted with what the

476. CC decision No. 2004-496 DC, June 10, 2004, cons. 7.

477. 1958 CONST. art. 88-1 (1992 version, subsequently amended).

478. See, e.g., CC decision No. 77-90 DC, Dec. 30, 1977; Anne Levade, *Le Conseil constitutionnel aux prises avec le droit communautaire dérivé*, 120 REVUE DU DROIT PUBLIC 889, 891 (2004).

479. CC decision No. 2004-496 DC, June 10, 2004, cons. 7. The *Conseil* later derived another conclusion from this constitutional mandate, namely, its authority to review whether a statute intended to transpose a directive into domestic law was manifestly incompatible with the directive. See CC decision No. 2006-540 DC, July 27, 2006; CC decision No. 2006-543 DC, Nov. 30, 2006; see *infra* text accompanying notes 557-560.

480. CC decision No. 2004-496 DC, June 10, 2004, cons. 7.

481. CC decision No. 2004-496 DC, June 10, 2004, cons. 9.

482. CC decision No. 2004-497 DC, July 1, 2004 (finding that a provision of the law before it, which was not required by the directive, violated the constitutional right to equality and was invalid); see CC decision No. 2004-496 DC, June 10, 2004, cons. 9, 14 (foreshadowing this result).

*Conseil* described as “an express contrary disposition of the Constitution.”<sup>483</sup> This phrase was soon glossed by the *Conseil*’s Secretary General as referring to an express disposition particular to (*propre à*) the French Constitution, as opposed to those rules common to French and EU law.<sup>484</sup> That amplification was then confirmed by the third of the decisions, upholding a statute implementing an EU directive on the legal protection of biotechnological inventions. The *Conseil* indicated that the provisions in question, which did no more than implement the directive, could not be challenged as violating the freedom of expression protected by Article 11 of the Declaration of 1789 because that freedom was also protected in EU law as a general principle based on Article 10 of the European Human Rights Convention.<sup>485</sup> Thus, it appeared that the *Conseil constitutionnel* would not independently enforce rights that enjoyed parallel protection under French and EU law in a manner that threatened the supremacy of an EU directive, but it reserved the right to block implementation of a directive that infringed distinctive French constitutional principles. Further clarification of this division of labor emerged in later decisions. Employing language derived from the European Constitution Treaty, the *Conseil* rephrased the exceptional category as a “rule or principle inherent to the constitutional identity of France.”<sup>486</sup> Examples probably include the particular French version of secularism, *laïcité*, and the strong formal equality principle that opposes recognition of collective rights for groups defined by common origin, culture, language, or religion.<sup>487</sup>

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483. CC decision No. 2004-496 DC, June 10, 2004, cons. 7.

484. Jean-Éric Schoettl, *Le nouveau régime juridique de la communication en ligne devant le Conseil constitutionnel*, LES PETITES AFFICHES, June 18, 2004, at 10, 18.

485. CC decision No. 2004-498 DC, July 29, 2004, cons. 6-7; see also Jean-Éric Schoettl, *La brevetabilité des gènes, la droit communautaire et la Constitution*, LES PETITES AFFICHES, Aug. 17, 2004, at 3, 6 (giving this interpretation of the decision). In the fourth of these decisions, decided the same day as the third, the *Conseil* more tersely declined to review a provision of a statute that implemented a directive for its compliance with the judicially derived right to respect for private life. CC decision No. 2004-499 DC, July 29, 2004, cons. 8. That right is not only common to the French and European systems, but was read into the general protection of liberty under Article 2 of the 1789 Declaration by the *Conseil*.

486. CC decision No. 2006-540 DC, July 27, 2006, cons. 19; see also CC decision No. 2006-543 DC, Nov. 30, 2006, cons. 6; CC decision No. 2008-564 DC, June 19, 2008, cons. 44; CC decision No. 2010-605 DC, May 12, 2010, cons. 18; cf. Pierre Mazeaud, *Voeux du président du Conseil constitutionnel*, M. Pierre Mazeaud, *au Président de la République*, CONSEIL CONSTITUTIONNEL, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/documentation-publications/cahiers-du-conseil/cahier-n-18/voeux-du-president-du-conseil-constitutionnel-m-pierre-mazeaud-au-president-de-la-republique.51930.html> (last visited Apr. 5, 2012) (“Mais non, le droit européen, si loin qu’aillent sa primauté et son immédiateté, ne peut remettre en cause ce qui est expressément inscrit dans nos textes constitutionnels et qui nous est propre. Je veux parler ici de tout ce qui est inhérent à notre identité constitutionnelle, au double sens du terme ‘inhérent’: crucial et distinctif. Autrement dit: l’essentiel de la République.”).

487. See Bertrand Mathieu, “Les règles et les principes inhérent à l’identité constitutionnelle de la France”: Une catégorie juridique fonctionnelle à définir, in EN HOMMAGE À FRANCIS DELPÉRIÈ: ITINÉRAIRES D’UN CONSTITUTIONNALISTE 977, 985-86 (Robert Andersen et al. eds., 2007); cf. Jean-Eric Schoettl, *Primauté du droit communautaire: l’approche du Conseil*

The *Conseil's* analysis represented a compromise position between two poles: the total subjection of constitutional norms to EU lawmaking, and unilateral insistence that EU regulation must comply with all French constitutional norms. One might say that the compromise lay much closer to total acceptance of EU supremacy than to total insistence on the supremacy of the French Constitution. Indeed, the *Conseil's* new approach initially prompted press reports that EU law now trumped the Constitution.<sup>488</sup> The *Conseil's* renunciation of review with respect to most constitutional rights might be seen as a further evolution of the optimistic presumption it had indulged concerning EC protection of fundamental rights in the *Maastricht I* decision.<sup>489</sup> Yet, the *Conseil's* stance in 2004 amounted to a limited resistance to the conception of European primacy that had long served as orthodox doctrine in EU law. The new approach provided a variant on strategies employed by several other constitutional courts in Europe, seeking to carve out some checking role for their national constitutions in the ever-expanding EU regime. The greatest resemblance may be to the Italian Constitutional Court, whose influence on the *Conseil's* solution has been noted.<sup>490</sup> As the reader will have observed, the text of Article 88-1 provided no guidance whatsoever on where to draw the line.<sup>491</sup>

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The European Constitution Treaty was signed at a formal ceremony in Rome on October 29, 2004, and President Chirac referred it to the *Conseil constitutionnel* under Article 54 the same day.<sup>492</sup> In response, the *Conseil* held that a constitutional amendment would be necessary before the treaty

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*constitutionnel*, in *RAPPORT PUBLIC 2007, JURISPRUDENCE ET AVIS DE 2006* (Conseil d'État ed., 2007) (suggesting *laïcité* and equal access to public office as examples).

488. See *Les Sages acceptent la primauté de Bruxelles*, *LE FIGARO*, June 17, 2004, at 9; Hervé Gattegno & Christophe Jakubyszyn, *Le droit européen prime désormais sur la Constitution française*, *LE MONDE*, June 17, 2004, at 8. The *Conseil* took the unusual step of delaying announcement of the decision it had reached on June 10, in order to prevent misunderstandings of its approach from influencing the elections for the European Parliament on June 12. Dutheil de la Rochère, *supra* note 474, at 859.

489. See *supra* text accompanying notes 244-247.

490. See, e.g., Genevois, *supra* note 457, at 654; Bertrand Mathieu, *Rapports normatifs entre le droit communautaire et le droit national*, 72 *REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL* 675, 679 (2007); Schoettl, *supra* note 487, at 17 (describing the approaches of other constitutional courts, in exposition by Secretary General of the *Conseil constitutionnel*).

491. A few years later, the *Conseil d'État* adopted an analogous, though differently worded, version of the *Conseil constitutionnel's* rule to guide its own practice in reviewing the constitutionality of administrative regulations implementing EU directives. CE Sect., Feb. 8, 2007, Rec. Lebon 55 (*Société ARCELOR Atlantique et Lorraine*) (holding that, in view of Article 88-1, administrative courts can review the constitutionality of a regulation transposing the precise and unconditional dispositions of a directive only if there is no rule or general principle of Community law that, as currently interpreted by the EU judges, effectively guarantees respect for the constitutional provision invoked); see, e.g., Bruno Genevois, *L'application du droit communautaire par le Conseil d'État*, 25 *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 201 (2009).

492. CC decision No. 2004-505 DC, Nov. 19, 2004.

could be ratified and also interpreted the treaty in a manner that would decrease the conflicts between the treaty and its own current jurisprudence.<sup>493</sup> The decision is remarkable in two respects. The first is the extent to which the *Conseil's* reasoning relied on unilateral interpretations of the treaty, which it could not guarantee that external actors would accept. Second, the *Conseil* gave an illustrative, rather than a comprehensive, list of the contradictions between the treaty and the Constitution, taking for granted that the likely amendment would consent in generalized terms to the transfers of competences that the treaty would produce.<sup>494</sup>

The framework stated in the opening paragraphs of the decision deviated from the wording of the *Maastricht I* and *Amsterdam* decisions in subtle, but significant, ways. First, the *Conseil* now included Article 88-1 among the texts enabling France to transfer competences to the European Union.<sup>495</sup> Second, the *Conseil* designated the EU in that sentence as a “permanent European organization” rather than as a “permanent international organization,” signaling its shift from an analysis in terms generally applicable to international treaties to a Europe-specific analysis.<sup>496</sup> The *Conseil* subsequently described Article 88-1 as establishing the existence of a community legal order integrated with the domestic legal order and distinct from the international legal order.<sup>497</sup>

Nonetheless, the *Conseil* emphasized that the TCE remained an international treaty, subject to unilateral denunciation.<sup>498</sup> This observation was one of a series of deflationary assertions concerning the magnitude of change that the Treaty would bring, relying in part on the wording of the Treaty and official European interpretations, and in part on the *Conseil's* own construction. The label “Constitution for Europe” did not change the relationship between the EU and the constitutions of the member states, and the French Constitution remained at the apex of the domestic legal order.<sup>499</sup> Moreover, TCE Article I-5 required the EU to respect the national identity of the member states, inherent in their fundamental political and constitutional structures.<sup>500</sup> The express statement of the rule of the primacy of EU law in TCE Article I-6 did not change the content of the rule as previously applied,<sup>501</sup> and as the *Conseil* had articulated it in the decisions

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493. *See id.*

494. *See id.*

495. *Id.* cons. 6.

496. *Id.*

497. *Id.* cons. 11.

498. *Id.* cons. 9. In fact, the TCE included an explicit withdrawal clause, unlike the EEC Treaty or the Treaty on European Union. *See* Treaty Establishing a Constitution for Europe art. I-60, Oct. 29, 2004, 2004 O.J. (C 310) 40 [hereinafter TCE]; Raymond J. Friel, *Providing a Constitutional Framework for Withdrawal from the EU: Article 59 of the Draft European Constitution*, 53 INT'L & COMP. L.Q. 407, 407 (2004).

499. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 10.

500. *Id.* cons. 12 (quoting from Article I-5 of the TCE, *supra* note 498, which provided that “[t]he union shall respect the equality of the Member States before the constitution as well as their national identities, inherent in their fundamental structures, political and constitutional . . .”).

501. *Id.*

of summer 2004.<sup>502</sup> Therefore, these features of the TCE did not require a constitutional amendment.

The *Conseil* turned next to the European Charter of Fundamental Rights, which would finally be given binding legal force within the sphere of EU law by the TCE.<sup>503</sup> *This was the first time that the Conseil had openly confronted the divergence between European and French conceptions of fundamental rights.* The *Conseil* examined whether the provisions of the Charter would violate important principles contained in Articles 1 to 3 of the French Constitution, and whether they would infringe upon essential conditions of the exercise of national sovereignty. Only five issues received specific mention, and the *Conseil* found favorable solutions to all of them. First, the *Conseil* maintained that, because TCE Article II-112 encouraged interpretation of certain rights in harmony with the traditions of the national constitutions, the Charter would not impair the prohibition against recognizing collective rights for groups defined by commonality of origin, culture, language, or belief.<sup>504</sup> Second, the *Conseil* maintained that the Charter would not impair the particular French version of secularism, *laïcité*, citing as evidence a recent Chamber decision of the European Court of Human Rights regarding the prohibition of headscarves in a university in Turkey.<sup>505</sup> The *Conseil* also identified reasons for believing that rules in the Charter concerning the public character of judicial hearings,<sup>506</sup> cross-border limits on double jeopardy,<sup>507</sup> and countervailing considerations of

502. *Id.* cons. 13. It is relatively rare for the *Conseil* to make explicit citations to its prior decisions, but it did so on this occasion.

503. TCE, *supra* note 498, art. I-9, at 13; TCE, *supra* note 498, pt. II pmb., at 41.

504. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 16; *cf. supra* text accompanying notes 415-431 (discussing constitutional objections to group rights in connection with the European Charter of Regional or Minority Languages).

505. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 18 (citing Leyla Şahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R., (Chamber Judgment (Fourth Section), June 29, 2004), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=699739&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>). This was the first time that the *Conseil* had ever cited a European Court of Human Rights judgment among the legal sources of its decisions. In fact, the judgment was a non-final Chamber judgment that was being referred to the Grand Chamber of the Court. Although that fact may have made the judgment an insecure basis for reliance, it still possessed utility in the conversation that the *Conseil* was conducting. The Grand Chamber affirmed the Chamber's decision in 2005. See Leyla Şahin v. Turkey, 2005-XI Eur. Ct. H.R. 173.

506. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 19 (using nonbinding interpretations of the Charter by the *praesidium* of the convention that initially drafted it to construe the public hearing provision as incorporating public order exceptions).

507. *Id.* cons. 20 (using nonbinding interpretations of the Charter by the *praesidium* of the convention that initially drafted it to construe the double jeopardy provision as permitting France to try an individual for treason or espionage offenses under Title IV, book I of the Penal Code despite a prior foreign prosecution). The prohibition of cross-border double jeopardy traced back to the Schengen implementation convention of 1990, and disputes over the exceptions had recently resurfaced in connection with the European Arrest Warrant. See Jérôme Roux, *Le traité établissant une Constitution pour l'Europe à l'épreuve de la Constitution française*, 121 REVUE DU DROIT PUBLIC 59, 81-82 & n.144 (2005).

public interest<sup>508</sup> would be construed in a manner protective of French national sovereignty. The *Conseil* concluded from its interpretive exercise that nothing in the Charter required a constitutional amendment.<sup>509</sup> Whether its predictions regarding the operative meaning of the Charter will prove accurate remains to be seen, but its analysis may have served to put European institutions on notice of a core of interpretive demands.

The *Conseil* then took up the areas where a constitutional amendment would prove necessary. As in the *Maastricht I* and *Amsterdam* decisions, these areas involved new transfers of competence that implicated national sovereignty, changed modes of EU decision regarding competences already transferred, and new authorities to be exercised by the national parliament. New transfers infringing upon national sovereignty would occur, for example (*notamment*), in TCE Article III-265 concerning border controls, and in TCE Articles III-269 to 271 concerning judicial cooperation in civil and criminal matters, to the extent that these exceeded the authorities already transferred to the EU under prior treaties.<sup>510</sup> The authorization to establish a European Public Prosecutor's Office, empowered to prosecute criminal offenses affecting the financial interests of the EU before the national courts, also raised sovereignty issues serious enough to require a constitutional amendment.<sup>511</sup> Generally speaking, these conclusions involved areas previously identified in the *Schengen*, *Maastricht*, and *ICC* decisions, but one can only speak generally because of the summary treatment the *Conseil* afforded in the TCE decision.

The *Conseil* also gave examples of provisions that necessitated a constitutional amendment because those provisions changed the modalities for exercise of previously transferred competences implicating national sovereignty, whether by substituting qualified majority voting for unanimity in the EU Council, by requiring the assent of the European Parliament, or by taking the power to initiate legislative proposals away from the individual member states.<sup>512</sup> As in the *Amsterdam* decision, the *Conseil* found that "bridging clauses" that empowered a future shift from unanimity to qualified majority voting on matters inherent to the exercise of national sovereignty, without the opportunity for review by the *Conseil*, required a constitutional amendment.<sup>513</sup> Another innovation of the treaty, the "simplified revision procedure" of TCE Article IV-444, permitted the European Council (i.e. the heads of governments acting by unanimity), with the express consent of the European Parliament, to replace a unanimity voting procedure in the EU Council with qualified majority voting, absent objec-

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508. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 21 (using nonbinding interpretations of the Charter by the *praesidium* of the convention that initially drafted it to construe the general limitations clause of the Charter as including the interest of a single member state in its territorial integrity, public order, or national security as among the general interests recognized by the Union justifying restrictions on fundamental rights).

509. *Id.* cons. 22.

510. *Id.* cons. 27.

511. *Id.* cons. 28.

512. *Id.* cons. 30-32.

513. *Id.* cons. 33-34.

tion by the national legislatures.<sup>514</sup> For the same reason as the bridging clauses, this provision required a constitutional amendment.<sup>515</sup>

Finally, the *Conseil* identified three provisions contemplating that national parliaments would exercise new prerogatives regarding EU law-making that exceeded the restricted role of the legislature in the 1958 Constitution.<sup>516</sup> National parliaments had the power to block a simplified revision under TCE Article IV-444;<sup>517</sup> each chamber had the power to compel a reexamination of a proposed legislative act by issuing a reasoned opinion explaining why the act would violate the principle of subsidiarity; and each chamber was authorized to initiate proceedings before the ECJ to vindicate the principle of subsidiarity.<sup>518</sup> A constitutional amendment would be necessary to confer these powers on the French parliament.

The decision did not address many of the important institutional changes embodied in the TCE. That silence most likely reflected the assumption, dating back to the *Conseil's* first European decision in 1970, that certain reallocations of authority within the European institutions were not of constitutional concern to France.<sup>519</sup> The *Conseil* has also focused its attention on *qualitative* changes, such as the shift from unanimity voting to qualified majority voting, rather than *quantitative* changes, such as distributions of voting weight, despite the obvious significance that the latter have for France's ability to affect EU policy.

After the *Conseil's* decision, one might predict that the result would be a constitutional amendment consenting in general terms to whatever transfers of competence were entailed by the European Constitution Treaty (since the precise list could not be confidently enumerated), and that three specific new authorities would be added to the legislature's powers. The amendment would implicitly adopt the *Conseil's* analysis, and would change the status quo to the extent necessary for ratification of the treaty. Perhaps some extraneous provisions would be added as the price of consent, but the theory of national sovereignty and the relations between the constitutional order and the European legal order would be left in the hands of the *Conseil*. And that is largely what happened. The drafters of the amendment took the opportunity to clean up the constitutional text,

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514. TCE, *supra* note 498, art. IV-444(1). Another variant, Article IV-444(2), allowed the European Council to substitute the "ordinary legislative procedure" (formerly known as co-decision) for various "special legislative procedures" that diminished the role of the European Parliament. I omit this branch from the text for the ease of the reader; it was unconstitutional for the same reason.

515. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 35. The broader provision of TCE Article IV-445 for simplified revision, which streamlined the treaty revision process but still required national ratification, did not require a constitutional amendment, because France's consent to the revision would involve legislative approval and would therefore be subject to challenge before the *Conseil constitutionnel*. *Id.*, cons. 36.

516. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 37-41.

517. TCE Article IV-444 therefore required a constitutional amendment for two independent reasons.

518. CC decision No. 2004-505 DC, Nov. 19, 2004, cons. 39, 41.

519. See CC decision No. 70-39 DC, June 19, 1970; see also *supra* text accompanying note 122.

removing some material that would become redundant; they made that rewording contingent on the entry into force of the treaty (which, as it turned out, never occurred).<sup>520</sup> They also introduced a new provision requiring a referendum before France would consent to the admission of future member states—a provision directed against Turkey.<sup>521</sup> But the main force of the amendment was an authorization for France to participate in the European Union according to the terms of the European Constitution Treaty signed on October 29, 2004.<sup>522</sup>

Even before the TCE had been signed, President Chirac had yielded to pressure within his own Gaullist party to submit it to a referendum (as had been done with the Maastricht Treaty, but not with the lesser Amsterdam and Nice Treaties).<sup>523</sup> The constitutional amendment authorizing ratification passed easily, as a mere preliminary to the popular vote.<sup>524</sup> The Socialist Party had split on the treaty, with the party leadership favoring ratification but a dissident faction led by Laurent Fabius arguing that the current version was too neo-liberal and that it should be renegotiated to

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520. As a result, Article 1 of the amendment added a new, transitional sentence to Article 88-1 authorizing ratification of the TCE. Once the treaty entered into force, it would disappear, and Article 3 of the amendment provided that the Europe articles in Title XV of the Constitution would be replaced. Article 88-1 would state the principle of French participation in the EU with sole reference to the TCE; the enumeration of transferred competences in Article 88-2 would be dropped, and only the sentence regarding the European Arrest Warrant would remain; Article 88-3 would be almost unchanged, but the references to reciprocity and to the Maastricht Treaty would be dropped as obsolete; Article 88-4 would be slightly reworded; Article 88-5 would authorize the new parliamentary powers concerning subsidiarity as contemplated by the TCE; Article 88-6 would authorize the new parliamentary powers concerning simplified revision; and Article 88-7 would address the referendum on new admissions, discussed in the next footnote. See *Loi constitutionnelle 2005-204 du 1er mars 2005 modifiant le titre XV de la Constitution*, J.O., Mar. 2, 2005, p. 2005.

521. In October 2004, President Jacques Chirac had promised that France would not agree to the admission of Turkey to the EU (which he favored) without holding a referendum on the issue; it was hoped that guaranteeing the referendum would separate the question of eventual membership of Turkey from the question of approving the TCE. See Henri de Bresson & Béatrice Gurrey, *M. Chirac promet un référendum sur l'adhésion de la Turquie*, LE MONDE, Oct. 4, 2004.

As a result of the contingent amendment strategy, Article 2 of the amendment added a new, transitional Article 88-5, providing that statutes authorizing the ratification of a treaty admitting a new member state to the EU would be submitted to referendum, and it added a cross-reference to this procedure in Article 60 (on the *Conseil constitutionnel's* oversight of referenda). Once the TCE entered into force, transitional Article 88-5 would be replaced by an equivalent Article 88-7. Article 4 of the amendment was a grandfather clause, specifying that referenda would not be required for certain admissions already planned (i.e., Romania, Bulgaria, and Croatia).

After the European Constitution Treaty failed, the transitional amendment regarding referenda remained in force. It was softened somewhat in 2008 by the addition of a method for bypassing the referendum by parliamentary supermajority. See *infra* note 541.

522. See *supra* note 520.

523. See Matt Qvortup, *The Three Referendums on the European Constitution Treaty in 2005*, 77(1) POL. Q. 89, 90 (2006).

524. The vote in the joint Congress was 450 in favor and 34 against; the dissenting Socialists abstained.



provide greater protections for French social policy.<sup>525</sup> This dissent apparently provided the margin of nearly ten points that defeated the treaty, added to the sovereigntists and voters registering their general discontent with the incumbent government.<sup>526</sup> It is striking how little the *Conseil constitutionnel*'s concerns about the treaty had to do with the concerns of the decisive segment of voters.

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After another negative referendum result a few days later in the Netherlands, and with bleak prospects in several other states, the TCE was abandoned and two years later the member states negotiated a less ambitious substitute.<sup>527</sup> The Lisbon Treaty jettisoned the constitutional dress of the TCE and presented itself as a set of complicated amendments to earlier European treaties. Much of the content of the TCE was recycled, sometimes with restrictions intended to reassure member states and sometimes with cosmetic changes in expression. The Charter of Fundamental Rights was given legal force by reference rather than by textual incorporation into the treaty.<sup>528</sup> The express provision on primacy of EU law was dropped.<sup>529</sup> Some additional enhancements were made to the role of national parliaments in the EU legislative process.<sup>530</sup>

Chirac's successor President Nicolas Sarkozy referred the Lisbon Treaty for a ruling on the need for a constitutional amendment, and the similarities between the treaties enabled the *Conseil* to answer swiftly.<sup>531</sup> Because the European Constitution Treaty had not been ratified, neither respect for treaties in force nor the highly specific authorization for the abandoned treaty provided cover for the Lisbon Treaty. (In a sense, then, the technique of amending the French Constitution by incorporating sweeping approval of a named treaty had backfired, and a new amendment was necessary even for a less invasive substitute.) The authority of the *Conseil*'s previous decision, however, supplied direct answers to many of the relevant questions. Other questions, posed in slightly different terms by differently worded treaty clauses, received analogous answers. As in the prior decision, the *Conseil* left many important institutional reforms within the EU unaddressed.

The *Conseil* repeated its framing of the analysis in terms of a European

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525. See Renaud Dehousse, *The Unmaking of a Constitution: Lessons from the European Referendum*, 13(2) CONSTELLATIONS 151, 153-55 (2006); Isabelle Mandraud, M. Fabius: "Pour une Europe plus forte, on commence par dire non", LE MONDE, May 10, 2005.

526. Qvortup, *supra* note 523, at 94-95; Gilles Ivaldi, *Beyond France's 2005 Referendum on the European Constitutional Treaty: Second-Order Model, Anti-Establishment Attitudes and the End of the Alternative European Utopia*, 29(1) W. EUR. POL. 47 (2006); Allan Ramsay, *The French Referendum*, 287 CONTEMP. REV. 11, 14 (2005).

527. See PAUL CRAIG, *THE LISBON TREATY: LAW, POLITICS, AND TREATY REFORM* 20-25 (2010).

528. See PIRIS, *supra* note 129, at 150.

529. See *id.* at 81.

530. See *id.* at 124-25.

531. CC decision No. 2007-560 DC, Dec. 20, 2007.

organization, and not in terms of international organizations generally.<sup>532</sup> It added an assertion that the relevant constitutional provisions confirmed the place of the Constitution at the apex of the domestic legal order.<sup>533</sup> Giving legal effect to the Charter of Fundamental Rights would not infringe national sovereignty or other constitutional principles, for the reasons already stated.<sup>534</sup> The *Conseil* did attempt to list exhaustively the articles of the treaty that would transfer new competences infringing upon the essential conditions of the exercise of national sovereignty,<sup>535</sup> and articles that would subject existing transfers implicating national sovereignty to decision procedures that reduced France's control,<sup>536</sup> or to bridging clauses that might do so in the future.<sup>537</sup> The *Conseil* reiterated its prior conclusions about simplified revision procedures.<sup>538</sup> Authorities conferred on the French parliament, as in the previous decision, required a constitutional amendment, including new provisions increasing the opportunity for national parliaments to resist violations of the subsidiarity principle, and a provision permitting parliamentary objection to the use of a bridging clause regarding family law.<sup>539</sup> Thus, to no one's surprise, a constitutional amendment would have to precede ratification of the Lisbon Treaty.

The necessary amendment was adopted in February 2008, over substantial opposition and heavy abstentions from the Socialists.<sup>540</sup> The amendment, like its predecessor, authorized French participation in the European Union in accordance with the Lisbon Treaty, and provided a contingent rewriting of Title XV for when that treaty entered into force. The form it gave Title XV was essentially equivalent, *mutatis mutandis*, to the form contemplated by the TCE amendment.<sup>541</sup> Strong objections were

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532. *Id.* cons. 3-9.

533. *Id.* cons. 8.

534. *Id.* cons. 12. Apparently the future accession of the European Union to the European human rights convention did not necessitate a constitutional amendment, at least at this time. *Id.* cons. 13.

535. *Id.* cons. 18-19 (listing articles involving counterterrorism, border control, human trafficking, judicial cooperation in civil and criminal matters, and the European public prosecutor's office).

536. *Id.* cons. 21-22.

537. *Id.* cons. 24-25.

538. *Id.* cons. 26-27.

539. *Id.* cons. 32.

540. See Assemblée Nationale, *Scrutin public sur le projet de loi constitutionnelle modifiant le titre XV de la Constitution*, Feb. 4, 2008, available at [www.assemblee-nationale.fr/13/scrutins/jo9000.asp](http://www.assemblee-nationale.fr/13/scrutins/jo9000.asp) (listing 560 votes in favor, 181 against, and 152 legislators abstaining or not voting).

541. See Loi constitutionnelle 2008-103 du 4 février 2008 modifiant le titre XV de la Constitution, J.O., Feb. 4, 2008, p. 2202. There were slight differences in wording, and the 2008 amendment left Article 88-3 unmodified, and therefore left in the reference to reciprocity. Also, the numbering of the articles was different.

A subsequent amendment in July 2008, part of the large package of institutional reforms, changed the procedures in Article 88-6 for challenging the compliance of EU legislation with the principle of subsidiarity. It also created an option in Article 88-5 to bypass the referendum on admission of a new member state (e.g., Turkey) by a supermajority procedure similar to the adoption of a constitutional amendment. Loi

raised to effectively overruling a referendum by substituting a similar treaty without a new referendum, but parliament enacted the authorizing statute, and France deposited its instrument of ratification the same month. After some suspense and delay, the treaty entered into force in December 2009.<sup>542</sup>

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Thus, the *Amsterdam*, *TCE*, and *Lisbon* decisions further developed the framework of the *Maastricht* decision within the context of the successive Europe-specific amendments. The *Conseil* focused on particular subject matters that it had previously recognized as essential to national sovereignty and added a few more examples. It focused on modes of exercising transferred competences that unduly impaired France's control over these subject matters, including bridging clauses that set up contingent future actions that the *Conseil* would be unable to review. It also guarded against enhancements of the French parliament's authority to check EU action, despite their benefit to national sovereignty, if the enhancements would transgress the Fifth Republic's design of separated powers.

Meanwhile, the *Conseil* sought a compromise between submission and resistance to EU supremacy. It attributed the status of EU law to the consent expressed in the constitutional amendments, and tried to construct an interpretation of that consent that included limits preserving key elements of France's constitutional identity.

#### 4. *The Form of Amendments*

The *Conseil constitutionnel* has consistently adhered to its pronouncement in the *Maastricht II* decision that the constituent power is free to design constitutional amendments in whatever form it chooses, whether as revisions of existing provisions or through addition of contradictory provisions, by general statements of principle or by explicit reference to a particular external instrument (such as the Treaty on European Union). The constituent power has exercised that prerogative, both in the treaty context and in the domestic context,<sup>543</sup> despite the uncertainties and asymmetries that critics had warned against.

The amendments authorizing international commitments have taken a variety of forms. The 1999 amendment that followed the decision of the *Conseil* on the International Criminal Court treaty was simple and uninformative. It authorized ratification of the specific treaty, without any indi-

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constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, art. 47, J.O., July 24, 2008, p. 11890.

542. Hesitancy by voters in Ireland and by the Czech President led to the negotiation of concessions in side agreements that enabled all member states to ratify in 2009. See PIRIS, *supra* note 129, at 51-63.

543. For a domestic example, see Loi constitutionnelle 98-610 du 20 juillet 1998, relative à la Nouvelle-Calédonie, J.O., July 20, 1998, p. 11143 (adding articles 76 and 77, making specific reference to laws and agreements relating to the overseas territory of New Caledonia).

cation or limitation of the constitutional provisions that it was overriding.<sup>544</sup> Presumably, the *Conseil's* decision illuminates the content of the amendment.<sup>545</sup>

The 2003 amendment that approved the European Arrest Warrant more generically authorized the implementation of European Arrest Warrant regimes adopted pursuant to the Treaty on European Union, again without any indication or limitation of the constitutional principles being sacrificed.<sup>546</sup> That amendment may be even less informative than the ICC amendment, given that the *Conseil d'État* cannot provide definitive guidance on what the Constitution does and does not require, and given that the *Conseil constitutionnel* has never clarified which principles of extradition law may rise to the level of "fundamental principles recognized by the laws of the Republic" and thus be guaranteed by the Preamble.<sup>547</sup>

At the other extreme, the response to the *Conseil's* second decision on death penalty treaties was entirely substantive; the 2007 amendment mooted the conflict with national sovereignty by enshrining the abolition of the death penalty as a constitutional principle, without any reference to treaties.<sup>548</sup>

The 1993 asylum amendment authorized both current and future treaties with comparable European states for the purpose of allocating jurisdiction over asylum claims, and made rather clear that it was carving out an exception to the individual right of asylum under the 1946 Preamble.<sup>549</sup>

The portions of the 1992 Maastricht amendment dealing with the Maastricht Treaty included a mix of approaches. Articles 88-2 made specific reference to the terms of the Maastricht Treaty, while also identifying the subject matter of the competences being transferred. Similarly, Article 88-3 made specific reference to the terms of the treaty while authorizing inclusion of EU citizens in the municipal electorate. Article 88-1 referred generically to past and current European treaties as the basis for France's participation, but did not give advance authorization to future treaties.<sup>550</sup>

The 1999 amendment enabling the Amsterdam Treaty modified the enumeration of transferred competences in Article 88-2. Like its predecessor, it referred both to the subject matter of the competences and to the specific treaty defining the terms of the transfer.<sup>551</sup>

544. Loi constitutionnelle 99-568 du 8 juillet 1999, insérant, au titre VI de la Constitution, un article 53-2 et relative à la Cour pénale internationale, J.O., July 9, 1999, p. 10175.

545. A partial confirmation of the amendment's substance was added later, when new Article 67 on presidential responsibility incorporated a cross-reference to Article 53-2 on the ICC.

546. Loi constitutionnelle 2003-267 du 25 mars 2003, modifiant le titre XV de la Constitution, J.O., Mar. 25, 2003, p. 5344.

547. See Rousseau, *supra* note 117, at 109.

548. Loi constitutionnelle 2007-239 du 23 février 2007 modifiant le titre XV de la Constitution, J.O., Feb. 23, 2007, p. 3355.

549. Loi constitutionnelle 93-1256 du 25 novembre 1993, J.O., Nov. 25, 1993, p. 16296.

550. Loi constitutionnelle 92-554 du 25 juin 1992, J.O., June 25, 1992, p. 8406.

551. Loi constitutionnelle 99-49 du 25 janvier 1999, J.O., Jan. 25, 1999, p. 1346.

By the time of the decision on the European Constitution Treaty, the *Conseil constitutionnel* had apparently become habituated to amendments that referenced treaties rather than the constitutional provisions that they were implicitly modifying. The *Conseil* felt comfortable giving an illustrative, rather than a comprehensive, exposition of the conflicts between the Constitution and the treaty, confident that the conflicts would be lifted en masse if ratification proceeded. As it turned out, that approach produced a minor inconvenience when a referendum rejecting the treaty followed the 2005 amendment. The government had to repeat the amendment process in 2008 in order to authorize ratification of the weaker Lisbon Treaty.<sup>552</sup> Both the TCE and Lisbon amendments suppressed the enumeration of transferred competences in Article 88-2, and relied instead on the generalized reference to transfers of competence by virtue of specifically mentioned treaties in Article 88-1.<sup>553</sup>

The practice of opaquely authorizing the ratification of treaties creates uncertainty about the reach and content of other constitutional principles with which the treaties were once thought to conflict. Moreover, the *Conseil constitutionnel*'s announcement of exceptions to the supremacy of EU law in 2004 raises the possibility that consent may not be unqualified, but rather the scope of the consent expressed in a constitutional amendment may also become a matter of constitutional interpretation. The failure of the constituent power to delineate the implications of its choice effectively delegates the task to others—the legislators may be agreeing to more, or less, than they realized. The *Conseil constitutionnel*'s answers to such questions have particular authority, although its limited jurisdiction may decrease its opportunities to provide them.

### 5. *Employment of Europe-Specific Articles*

As this article has repeatedly emphasized, prior to 1992, the French Constitution made no mention of the European Communities. Decisions concerning European integration relied instead on generic categories of international law and international agreements, or on the slightly more specific Paragraph 15 of the 1946 Preamble concerning international organizations. The Maastricht amendment added a new Title XV to the Constitution, addressing the European Communities and the European Union. The text now provided a basis for Europe-specific doctrines, which slowly emerged.

A first example arose in 1998, when the *Conseil constitutionnel* reviewed the organic statute implementing the right of European citizens to

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552. See Loi constitutionnelle 2008-103 du 4 février 2008 modifiant le titre XV de la Constitution, J.O., Feb. 5, 2008, p. 2202.

553. The amendments also made specific reference to the treaties with regard to the authorization of legislative participation in the simplified revision process. See 1958 CONST. art. 88-7 (current version added by the Lisbon amendment); Loi constitutionnelle 2005-204 du 1er mars 2005 modifiant le titre XV de la Constitution, J.O., Mar. 2, 2005, p. 2005 (adding a new article 88-6 that was contingent on the entry into force of the TCE).

vote in municipal elections in accordance with the Maastricht Treaty. The *Conseil* explained that the phrasing of Article 88-3 made clear that the constituent power intended the *Conseil* to review the consistency of the organic statute with European law as part of its mandatory review of constitutionality, contrary to its usual practice of not reviewing whether statutes comply with treaties.<sup>554</sup> Accordingly, the *Conseil* compared the organic statute with the relevant treaty provision and with the EU directive implementing it before approving the statute as constitutional.<sup>555</sup>

It was not until 2004, however, that the *Conseil constitutionnel* gave substance to Article 88-1 as the basis for French participation in the European Union. As mentioned earlier, the *Conseil* interpreted Article 88-1 as imposing a constitutional mandate that EU directives be implemented in France, and it employed that constitutional mandate as a justification for allocating jurisdiction to protect individual rights as between itself and the ECJ.<sup>556</sup> Subsequently, the *Conseil* derived from this constitutional mandate a responsibility for it to examine whether a statutory provision intended by the legislature to implement a directive actually complied with that directive.<sup>557</sup> Nonetheless, it said, the brief period of time within which the *Conseil* must decide made it impossible to refer unclear issues to the European Court of Justice. Accordingly, the *Conseil* could invalidate a statutory provision only if it was manifestly incompatible with the particular directive that it was intended to implement.<sup>558</sup> At the same time, the *Conseil* emphasized that it would limit its review of compliance with the directive to those portions of the statute intended to implement the directive.<sup>559</sup> Thus, the limited exception derived from Article 88-1 did not extend to the compliance of statutes with directives or EU law generally, which remained the province of the French civil/criminal and administrative courts and the ECJ.<sup>560</sup>

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554. See CC decision No. 98-400 DC, May 20, 1998, cons. 4. The relevant sentence reads, "Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France." 1958 CONST., art. 88-3. Recall that organic statutes are subject to mandatory referral to the *Conseil constitutionnel* before promulgation.

555. See CC decision No. 98-400 DC, May 20, 1998, cons. 4.

556. See CC decision No. 2004-496 DC, June 10, 2004.

557. See CC decision No. 2006-540 DC, July 27, 2006 (requiring that the statute be construed in a manner consistent with the directive it transposed); CC decision No. 2006-543 DC, Nov. 30, 2006 (finding a manifest conflict between the statute and the directive it transposed); see also CC decision No. 2008-564 DC, June 19, 2008 (finding no manifest conflict between the statute and the directive it transposed).

558. See CC decision No. 2006-540 DC, July 27, 2006, cons. 20.

559. See *id.* cons. 72.

560. See CC decision No. 2008-564 DC, June 19, 2008; CC decision No. 2006-540 DC, July 27, 2006, cons. 20; CC decision No. 2006-535 DC, Mar. 30, 2006. In 2007-2008, the drafters of the package of constitutional amendments deliberately chose not to confer on the *Conseil constitutionnel* the responsibility of evaluating the consistency of statutes with prior treaties. See *infra* note 632.

## 6. *The ECHR and Constitutional Interpretation*

The influence of European human rights jurisprudence on the *Conseil constitutionnel's* interpretation of French constitutional rights has increased and has become more openly avowed in the second period. It remains true that the *Conseil* almost never cites Strasbourg judgments in its own decisions. However, the *Conseil* has expanded the information that it provides to the public about its procedures and working methods,<sup>561</sup> and public statements by members of the *Conseil* confirm this attention to foreign and international precedents. Thus, for example, the legal staff of the *Conseil constitutionnel* prepares a dossier of relevant legal texts for each case, which may contain domestic, foreign, and international decisions, including judgments of the European Court of Justice, the European Court of Human Rights, and foreign constitutional courts.<sup>562</sup>

An essay by a member of the *Conseil* provides a convenient list of doctrines inspired by European human rights law since 1992.<sup>563</sup> These include the right to respect for private life,<sup>564</sup> freedom of marriage,<sup>565</sup> the right to lead a "normal family life,"<sup>566</sup> the principle of the dignity of the human person,<sup>567</sup> the requirement of reasonable suspicion of crime for arrest without prior judicial authorization,<sup>568</sup> the right to an effective judi-

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561. Prior to 2010, the procedures of the *Conseil constitutionnel* in deciding on the constitutionality of statutes and treaties were always informal and nonpublic, reflecting both the limited time frame within which it must decide, and the absence of parties to its abstract adjudication. In order to increase public understanding of its work, the *Conseil* has published some of the inputs into its decisions, including the written submissions on the merits (if any) of the legislators who invoke the procedure and of the Government. In the digital era, these materials are available on the *Conseil's* website. The *Conseil* maintains the secrecy of the internal memoranda preceding contemporary decisions, and its procedures do not include an advocate general or *commissaire du gouvernement* whose submissions are made public. As a partial substitute, the *Conseil constitutionnel* has had its legal staff issue a semi-official, post-decisional interpretation of its rulings, and commentaries on the rulings by the head of its legal staff (the *Secrétaire Générale*) are often published in a legal journal. In 2010, for its new jurisdiction to hear individuals' challenges to legislation in force, the *Conseil* has developed more court-like formalized procedures and even webcasts the oral hearings.

562. See OLIVIER DUTHEILLET DE LAMOTHE, *LES MODES DE DÉCISION DU JUGE CONSTITUTIONNEL* (2001), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/pdf/Conseil/modes.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/pdf/Conseil/modes.pdf); Olivier Schrameck, *Les aspects procéduraux des saisines*, in *VINGT ANS DE SAISINE PARLEMENTAIRE* 81, 84 (Association Française des Constitutionnalistes ed., 1994).

563. See Dutheillet de Lamothe, *supra* note 395, at 408–10.

564. See CC decision No. 99-416 DC, July 23, 1999 (attributing the right to respect for private life to liberty under Article 2 of the Declaration of the Rights of Man and of the Citizen); CC decision No. 94-352 DC, Jan. 18, 1995.

565. See CC decision No. 2003-484 DC, Nov. 20, 2003 (attributing freedom of marriage to liberty under Articles 2 and 4 of the Declaration of the Rights of Man and of the Citizen); CC decision No. 97-389 DC, Apr. 22, 1997.

566. See CC decision No. 93-325 DC, Aug. 13, 1993 (attributing the right to lead a normal family life to protection of the family under Paragraph 10 of the 1946 Preamble).

567. See CC decision No. 94-343/344 DC, July 27, 1994 (attributing the principle of the dignity of the human person to the opening paragraph of the 1946 Preamble).

568. See CC decision No. 2003-467 DC, Mar. 13, 2003 (deriving this principle from liberty under Articles 2 and 4 of the Declaration of the Rights of Man and of the Citizen, along with judicial guardianship of liberty under Article 66 of the Constitution); *cf.*

cial remedy,<sup>569</sup> the right to a public hearing in a criminal case,<sup>570</sup> the requirement of impartiality and independence of courts,<sup>571</sup> the obligation for a court to give reasons in a criminal case,<sup>572</sup> and the requirement of non-retroactivity of preventive detention.<sup>573</sup>

Another example arose from a rare direct confrontation between the *Conseil constitutionnel* and European Court of Human Rights, in which the former upheld a statute as constitutional, and then the latter found the statute inconsistent with the European Convention.<sup>574</sup> The case turned on the practice of retroactive legislative validation of challenged administrative acts; the Strasbourg Court has expansively interpreted the right to fair hearing before an independent and impartial tribunal for the determination of civil rights and obligations as restricting the power of the legislature to intervene in litigation against the state.<sup>575</sup> After this adverse judgment, the *Conseil constitutionnel* revised its jurisprudence, raising the standard for justifying a legislative validation so as to bring it closer to the European human rights norm.<sup>576</sup>

Several factors have contributed to the increased influence of European human rights law on French constitutional interpretation. One is the explosion of Strasbourg jurisprudence since the end of the Cold War. The European Court of Human Rights has not only decided vastly more indi-

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[European] Convention for the Protection of Human Rights and Fundamental Freedoms art. 5(1)(c), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights] (recognizing as permissible grounds for deprivation of liberty the "lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so").

569. See CC decision No. 99-416 DC, July 23, 1999; CC decision No. 96-373 DC, Apr. 9, 1996 (deriving this principle from the guarantee of rights and separation of powers under Article 16 of the Declaration of the Rights of Man and of the Citizen).

570. See CC decision No. 2004-492 DC, Mar. 2, 2004 (deriving this principle from Articles 6, 8, 9, and 16 of the Declaration of the Rights of Man and of the Citizen); CC decision No. 98-408 DC, Jan. 22, 1999.

571. See CC decision No. 2006-545 DC, Dec. 31, 2006 (attributing this principle to Article 16 of the Declaration of the Rights of Man and of the Citizen); CC decision No. 98-408 DC, Jan. 22, 1999.

572. See CC decision No. 98-408 DC, Jan. 22, 1999 (deriving this requirement from the principle that crimes and punishments should be defined by law under Articles 7 and 8 of the Declaration of the Rights of Man and of the Citizen).

573. See CC decision No. 2008-562 DC, Feb. 21, 2008.

574. See DUTHELLET DE LAMOTHE, *supra* note 562, at 410-12; see also Bertrand Mathieu, *Les validations législatives devant le juge de Strasbourg: Une réaction rapide du Conseil constitutionnel mais une décision lourde de menaces pour l'avenir de la juridiction constitutionnelle*, 16 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 289 (2000) (describing the events and interpreting them as demonstrating a loss of autonomy and significance for constitutional review). Compare CC decision No. 93-332 DC, Jan. 13, 1994, with *Zielinski v. France*, 1999-VII Eur. Ct. H.R. 95 (Grand Chamber of the European Court of Human Rights).

575. See *Zielinski v. France*, 1999-VII Eur. Ct. H.R. 95 (Grand Chamber of the European Court of Human Rights).

576. See CC decision No. 99-422 DC, Dec. 21, 1999; DUTHELLET DE LAMOTHE, *supra* note 562, at 411 (noting the different verbal formula used by *Conseil constitutionnel*, and adding "everyone has his dignity").



vidual cases, but has generated ever more detailed interpretations of the European Convention.<sup>577</sup> Meanwhile, the European Union has drawn closer links between the multilateral European Convention and the EU's own fundamental rights commitments.<sup>578</sup> These developments place both practical and ideological pressure on the interpretive choices of the *Conseil constitutionnel*. The *Conseil* may uphold a French statute based on a narrow interpretation of a constitutional right, and then see the statute set aside for violating a European right. Alternatively, the *Conseil* may give one constitutional right a broad interpretation, and then see the European interpretations strike a different balance between that right and another right. These practical problems are complicated in France by a common tendency to conflate French constitutional rights with universal rights. Inconsistency between the *Conseil* and Strasbourg is perceived as criticism or disrespect, rather than as the understandable consequence of embodying individual rights in multiple legal orders.<sup>579</sup> As a practical matter, accepting the influence of Strasbourg interpretations also gives the *Conseil constitutionnel* the opportunity to participate in a dialogue that helps shape future interpretations.

In addition to pressure from “above” from the European Court of Human Rights and the European Court of Justice, the *Conseil constitutionnel* faces competition from “below,” from the *Cour de Cassation* and the

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577. See Alec Stone Sweet & Helen Keller, *The Reception of the ECHR in National Legal Orders*, in *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* 3, 6-7, 12-13 (Helen Keller & Alec Stone Sweet eds., 2008).

578. The Maastricht Treaty, *supra* note 241, committed the European Union to “respect fundamental rights, as guaranteed by the European Convention . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law.” The Charter of Fundamental Rights of the European Union of 2000, originally nonbinding, contains a provision requiring that Charter rights corresponding to European Convention rights should be given the same meaning as the European Convention rights (Article 52(3)). The nonratified European Constitution Treaty and the substitute Lisbon Treaty of 2009 both made the Charter legally binding and required the European Union to accede to the European Convention.

579. Professor Mathieu wrote of the decision on legislative validations as a “snub” (*camouflet*) to the *Conseil constitutionnel*. Mathieu, *supra* note 574, at 296.

On the “dual positivization” of individual rights as national constitutional rights and international human rights, see Gerald L. Neuman, *Human Rights and Constitutional Rights: Harmony and Dissonance*, 55 *STAN. L. REV.* 1863, 1864-79 (2002-2003). For an explicit dismissal of such positivist attitudes as “hyperformaliste,” see Denys de Béchillon, *De quelques incidences du contrôle de la conventionnalité internationale des lois par le juge ordinaire (Malaise dans la Constitution)*, 14 *REVUE FRANÇAISE DE DROIT ADMINISTRATIF* 225, 232 (1998).

The most painful confrontation between courts in Strasbourg and Paris thus far has not concerned the *Conseil constitutionnel*, but rather the *Conseil d'État* and the *Cour de Cassation*. Specifically, the European Court of Human Rights has forced the French courts to redesign their structures of decision-making, which had been found to violate fair procedure norms under Article 6 of the European Convention. The criticisms have involved both “equality of arms” and, most controversially, the appearance of partiality, due to the roles of the *avocat général* and the *commissaire du gouvernement* (now renamed *rapporteur public*). For an illuminating account in English, see MITCHEL DE S.-O.-L'É. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* (2009).

*Conseil d'État*. Under the division of labor that the *Conseil constitutionnel* created in 1975, the *Conseil* exercised constitutional review of statutes before promulgation, while leaving the two supreme courts to adjudicate treaty-based challenges under Article 55 to statutes that are already in force.<sup>580</sup> The result was a proliferation of individual rights litigation in the courts that was based on European human rights law because individuals had no forum in which they could bring constitutional rights challenges to statutes.<sup>581</sup> The perceived subordination of national constitutional rights motivated the 2008 reform that created a vehicle for individuals to challenge statutes in force before the *Conseil constitutionnel*.<sup>582</sup>

The extent of the constraints that European human rights law now places on both constitutional rights and state power in France were not foreseen when France ratified the European Convention (without referral to the *Conseil constitutionnel*) in 1974.<sup>583</sup> Nor did the *Conseil* grapple with these constraints in its first decision on the Maastricht Treaty.<sup>584</sup> By the time of the European Constitution Treaty, the *Conseil* was more alert to the dynamic and did address some of the implications of the Charter of Fundamental Rights for national sovereignty and other constitutional principles.<sup>585</sup> Ratification of such treaties entails consent to a multilevel elaboration of rights, a process that the *Conseil* can attempt to mediate but cannot predict or control.

### 7. Article 55, Reciprocity, and Treaty Interpretation

Returning to the question of reciprocity as a limit on the supremacy of treaties over statutes under Article 55, several further developments occurred in the post-Maastricht period. First, the *Conseil constitutionnel*, which had not found occasion to address this question earlier, added its voice. In 1998, while reviewing the organic statute implementing the right of EU citizens to vote in municipal elections, the *Conseil* construed the specific requirement of reciprocity for electoral rights set forth in the new Article 88-3.<sup>586</sup> It asserted that the ratification of the treaty by all EU member states sufficed to satisfy the requirement of reciprocity; if another member

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580. See *supra* Part III.A.3.

581. For example, it was estimated in 2008 that treaty-based challenges to statutes were included in one-third of the cases decided by the *Conseil d'État*. See ASSEMBLÉE NATIONALE, RAPPORT NO. 892, 13th Legislature, at 439 (2008) (testimony of M. Jean-Marc Sauvé, Vice President of the *Conseil d'État*).

582. 1958 CONST. art. 61-1; see also *infra* Part V.

583. It was clear, however, that the European Convention on its face would require some changes in French law and more effective enforcement of existing French law. See Alain Pellet, *La ratification par la France de la Convention européenne des Droits de l'Homme*, 90 REVUE DU DROIT PUBLIC 1319, 1373-77 (1974).

584. See *supra* Part III.A.2.d.

585. See *supra* text accompanying notes 503-509.

586. The relevant sentence reads, "Subject to reciprocity and in accordance with the terms of the Treaty on European Union signed on 7 February 1992, the right to vote and stand as a candidate in municipal elections shall be granted only to citizens of the Union residing in France." 1958 CONST. art. 88-3 (added by the 1992 amendment authorizing ratification of the Maastricht treaty).

state violated its obligations, France's remedy would be litigation before the European Court of Justice.<sup>587</sup> This reasoning has been understood as endorsing the view of the *Cour de Cassation* and the *Conseil d'État* that reciprocity exceptions do not apply to EU law, which substitutes the ECJ remedy for noncompliance.<sup>588</sup> Then, in 1999, the *Conseil constitutionnel* addressed reciprocity more broadly in its Article 54 decision concerning the treaty establishing the International Criminal Court. While the *Conseil* found several conflicts necessitating a constitutional amendment, it went out of its way to insist that the humanitarian purpose of the treaty made it exempt from any requirement of reciprocity under Article 55.<sup>589</sup>

A 2001 study by the *Conseil d'État* characterized the current regime as denying the applicability of the reciprocity proviso to either EU law obligations or treaties of a humanitarian character, including the European Convention on Human Rights.<sup>590</sup> For the remaining treaties to which the requirement of reciprocity does apply, the study continued to assert the *Conseil d'État's* position that when reciprocity is questioned, the court must seek a binding evaluation of the other state's compliance from the ministry of foreign affairs.<sup>591</sup> That practice, however, would soon be criticized by Strasbourg as incompatible with judicial independence.

This story about conflicting conceptions of judicial role really begins in 1994, with the *Beaumartin* judgment of the European Court of Human Rights.<sup>592</sup> In 1989, the *Conseil d'État* had accepted as definitive the interpretation of a bilateral treaty by the Ministry of Foreign Affairs in accordance with the traditional practice that it subsequently overturned in *GISTI*.<sup>593</sup> In *Beaumartin*, the unsuccessful claimants challenged the fairness of the decision under Article 6(1) of the European Convention, and a chamber of the European Court of Human Rights concluded unanimously that France had not afforded the claimants an "independent" tribunal to determine their rights.<sup>594</sup> The ministry, not independent of the executive, had resolved the interpretive question without any input from the claimants, and the *Conseil d'État* had not exercised any jurisdiction over the question. This practice was unique among the parties to the Convention and had since been abandoned for the future by the *Conseil d'État*. Accord-

587. See CC decision No. 98-400 DC, May 20, 1998, cons. 5.

588. See, e.g., CONSEIL D'ÉTAT, *supra* note 33, at 54.

589. CC decision No. 98-408 DC, Jan. 22, 1999, cons. 12; see also *supra* text accompanying notes 387-389.

590. See CONSEIL D'ÉTAT, *supra* note 33, at 54-55. With regard to the European Convention, the report cited a 1989 case of the *Cour de Cassation* and a 1992 case of the *Conseil d'État*.

591. See *id.* at 55.

592. See *Beaumartin v. France*, 296-B Eur. Ct. H.R. (ser. A) (1994).

593. See *supra* Part III.A.3.b.

594. Article 6(1) provides in relevant part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." European Convention on Human Rights, *supra* note 568, art. 6(1).

ingly, France had violated Article 6(1).<sup>595</sup> The consequences of the *Beaumartin* judgment spread through the French courts over time. The *Conseil d'État* was already in compliance with its approach, and the chambers of the *Cour de Cassation* began to expand the range of cases in which they denied binding authority to ministerial interpretations of treaties.<sup>596</sup>

The reasoning in *Beaumartin* also called into question the *Conseil d'État's* practice of absolute deference to the foreign ministry's ad hoc determinations of lack of reciprocity.<sup>597</sup> The *Conseil d'État* regarded the issues of treaty interpretation and reciprocity as distinct, however, and continued to hold that the ministry's determinations on reciprocity were binding. In the 2003 *Chevrol* case, a litigant challenged in Strasbourg the *Conseil d'État's* deference to a ministry determination that Algeria was not complying with a provision of a bilateral treaty.<sup>598</sup> France defended this deference, arguing that determinations of reciprocity involved difficult evaluations of the conduct of a foreign government and implicated foreign policy, making them inappropriate tasks for courts under the separation of powers.<sup>599</sup> A majority of the chamber rejected this defense and insisted that an independent tribunal must review the ministry's evidence of lack of reciprocity, along with contrary evidence submitted by the individual.<sup>600</sup>

Several years later, the *Conseil d'État* had occasion to return to the issue. In 2010, it finally accepted the obligation to independently review reciprocity issues.<sup>601</sup> The decision involved precisely the same issue of reciprocity that had been involved in *Chevrol*, mutual recognition of medical degrees between Algeria and France. On this occasion, the *Conseil d'État* rejected the ministry's conclusion that Algeria was not complying with its obligations. Apparently, the *Conseil d'État's* delay did not result from reluctance, but rather from the infrequency with which the defense of lack of reciprocity is asserted.<sup>602</sup>

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595. *Beaumartin v. France*, 296-B Eur. Ct. H.R. (ser. A), ¶¶ 38-39 (1994). As previously mentioned, the *commissaire du gouvernement* in GISTI had predicted this evaluation of the practice. See *supra* Part III.A.3.b.

596. See Alland, *supra* note 311, at 603-04 (1966); Cass. 1e civ., Dec. 19, 1995, Bull. civ. I, No. 470, 376 (*Banque africaine de développement*); Cass. crim., Feb. 11, 2004, Bull. crim., No. 37, 150 (*Lacour*) (decision of criminal chamber accepting responsibility of judge to interpret treaty).

597. The *Beaumartin* court's criticism probably does not apply to the modern practice of the *Cour de Cassation*. The *Cour de Cassation* does not refer questions of reciprocity to the ministry on a case-by-case basis; it applies the reciprocity proviso of Article 55 only when the executive has already responded to the other country's noncompliance by denouncing or suspending the application of the treaty in general. See Sophie Lemaire, *Le juge judiciaire et le contrôle de la réciprocité dans l'application des traités internationaux*, 2007 RECUEIL DALLOZ 2322, 2323-24.

598. *Chevrol v. France*, App. No. 49636/99, 2003-III Eur. Ct. H.R. ¶ 2.

599. *Id.* ¶¶ 69-70.

600. *Id.* ¶¶ 81-84. One judge found France's arguments persuasive and dissented.

601. CE Ass., July 9, 2010, 26 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 1133 (2010) (conclusions of Dumortier, *rapporteur public*) (*Chériet-Benseghir*).

602. See *id.* at 1133 & n.1 (conclusions of the *rapporteur public*) (indicating that the present case was the first to come before the *Conseil d'État* since *Chevrol*).

It is unclear whether the new practice will dilute or strengthen what little remains of the reciprocity proviso of Article 55. Independent judicial evaluation potentially reduces both the ministry's discretion to exaggerate the level of noncompliance by the other state and the ministry's discretion to overlook noncompliance. Given that lack of reciprocity can already be waived by not asserting it,<sup>603</sup> the balance may be in favor of further dilution. However that may be, restrictive interpretations have already neutralized the requirement of reciprocity in the areas where the potential for "supranationality" has been the greatest.

#### 8. *Conclusion on the Second Period*

The momentum toward compromise of national sovereignty that began in the pre-Maastricht period thus continued in the following decades. Article 54 proceedings occurred somewhat more frequently and with greater success, but almost always resulted in constitutional amendments. The Article 55 reciprocity proviso continued its long decline.

The period from 1992 to 2008 witnessed a "Gaullist" resurgence. Jacques Chirac's long quest for the presidency finally succeeded in 1995. The right won three of the four parliamentary elections, although Chirac had to cohabit with Jospin from 1997 to 2002.<sup>604</sup> Even the Senate presidency fell to the Gaullists in 1998,<sup>605</sup> and they were therefore in a position to appoint all the new members of the *Conseil constitutionnel* from 2002 to 2008.<sup>606</sup> The past three presidents of the *Conseil* have been Gaullists (Yves Guéna, Pierre Mazeaud, and Jean-Louis Debré, a son of Michel Debré).<sup>607</sup>

By the late 1990s, however, most Gaullists—not all—had made their peace with the European Union. The political elite has consented to further "transfers of competences" and to strengthening (qualified) majoritarian institutions in order to make an expanded EU governable.<sup>608</sup> The *Maastricht* decisions of 1992 continue to supply the basic orientation for constitutional review of treaty revisions, and, although the *Conseil constitutionnel* has required some constitutional amendments, the amendments have followed as technocratic updates rather than as changes of principle. Ironically, some portions of the amendments have been necessari-

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603. Under administrative law practice, lack of reciprocity is an objection that must be raised by a party, and not one that the court raises *sua sponte*. See CONSEIL D'ÉTAT, *supra* note 33, at 55; CE Ass., May 19, 1981, Rec. Lebon 220 (*Costa*).

604. See *Les élections législatives et la composition de l'Assemblée Nationale sous la V<sup>e</sup> République (1958-2002)*, ASSEMBLÉE NATIONALE, <http://www.assemblee-nationale.fr/elections/historique-2.asp> (last visited Apr. 6, 2012).

605. UMP members Christian Poncelet and Gérard Larcher served as President of the Senate from 1998 to 2008 and from 2008 to 2011 respectively. In October 2011, Jean-Pierre Bel became the first Socialist President of the Senate of the Fifth Republic. See Guillaume Perrault, *Bel permet au PS de prendre la tête du Sénat*, LE FIGARO, Oct. 3, 2011.

606. Recall that the President of the Republic, the President of the Senate, and the President of the National Assembly each appoint one-third of the members of the *Conseil constitutionnel*, not counting the former Presidents of the Republic who can sit *ex officio*.

607. Guéna became President of the *Conseil* in 2000, Mazeaud in 2004, and Jean-Louis Debré in 2007.

608. See *supra* Part III.B.3.b.

tated by treaty provisions empowering the French parliament to intervene in EU affairs;<sup>609</sup> these protections for national sovereignty modified the Gaullist design for restricted parliamentary power. The *Maastricht I* interpretation of *pacta sunt servanda* as a constitutional principle continued to immunize older international commitments from constitutional review, even when they had escaped review initially and were restated in a new treaty. As in the first period, the *Conseil* has done little to resist the continuing incremental rise in the power of the European Parliament, except in specific fields that the *Conseil* has characterized as particularly relevant to national sovereignty.

The form of these constitutional amendments, as the *Conseil* held in *Maastricht II*, has been left to the discretion of the legislature. The *Conseil* has also answered the question, left slightly open in *Maastricht II*, as to whether it could review the substance of a constitutional amendment to ensure the preservation of a republican form of government: it cannot.<sup>610</sup>

The *Conseil* has continued to maintain that EU supremacy operates by the consent of the French Constitution, not by its own autonomous force, and that there are some limits to the consent that has been given (to date). The *Conseil* also deflated the rhetoric of the European Constitution movement in a manner calculated to reduce the significance of ratifying the TCE. Simultaneously, the *Conseil* has largely relinquished to the ECJ the task of determining whether EU directives endanger constitutional rights.<sup>611</sup> This combination of firm theoretical disagreement and general factual acquiescence resembles the stance that other constitutional courts have taken in their dialogues with EU institutions. The space for such dialogues is narrow because it is obvious that the functioning of a regulatory system with over twenty formally equal members depends upon self-restraint. Meanwhile, French constitutional law has been increasingly open to influence from Europe in the broader sense (the Council of Europe) in the interpretation of constitutional rights. Article 54 decisions have rarely turned on the protection of individual rights, rather than the protection of national sovereignty.<sup>612</sup>

The addition of Article 88-1 in 1992 eventually prompted the *Conseil* to develop some Europe-specific doctrines that do not extend to classical international treaties. Nonetheless, interpretations of more general provisions that the *Conseil* had used earlier in relation to Europe continued to benefit international treaties. Paragraph 15 of the 1946 Preamble supported the creation of an international criminal court empowered to prosecute French defendants with the mandatory cooperation of France if

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609. See *supra* text accompanying notes 516-518.

610. See *supra* text accompanying notes 383-384.

611. See *supra* text accompanying notes 476-491.

612. The one formal counterexample in this period, the violation of "equality" found in the *Language Charter* case, was arguably more about an abstract republican principle than about a threat to any individual's right. A more straightforward example of a treaty provision that violated an individual right appeared in the 2010 decision about the return of Romanian minors, which is technically outside the temporal period of this article. See CC decision No. 2010-614 DC, Nov. 4, 2010, discussed *supra* note 341.

French authorities failed in good faith to do so in a particular case. (But overcoming official immunities, amnesties, and rules of prescription did necessitate a constitutional amendment.) The *Conseil* also accorded the ICC Statute, and a broader category of humanitarian treaties, an implied exemption from the operation of the reciprocity proviso of Article 55. If the *Conseil* has been unpredictable in its conclusions regarding when an international organization or actor should be deemed external to the French constitutional system and therefore outside the scope of a constitutional rule, and when a French constitutional rule should be projected onto an international organization or actor, the same can be said of the *Conseil's* application of this technique to European institutions.

The routine enforcement of Article 55 by the administrative and civil/criminal courts, privileging treaties over statutes, has transformed the French legal landscape. The ability of individuals to challenge statutes in force on ECHR grounds has unsettled the prestige of both national legislation and the national constitution. In 2008, the Gaullist majority found it necessary to grant private parties access to the *Conseil constitutionnel* in order to “re-nationalize” litigation over individual rights.<sup>613</sup> That redefinition of the *Conseil's* role represents both the culmination of an evolution initiated in 1958 and a profound change in the constitutional regime.

#### IV. What Went Wrong?

If we ask what went wrong in the application of the 1958 Constitution to international agreements, then two answers suggest themselves. From one perspective, nothing went wrong. The 1958 Constitution was a compromise; de Gaulle and Debré did not get everything they wanted, and the text carried forward legacies of the 1946 constitution that facilitated the process of European integration until Maastricht, when an amendment became necessary to go further. Once that amendment had passed, additional diminutions in national sovereignty became legitimate and routine. But that is not the whole story, and probably not even half.

As we have seen, by 1992 the protective mechanisms of the 1958 Constitution had failed to prevent the spread of qualified majority voting in the EEC, the rise of the European Parliament, the suppression and blurring of borders in the Schengen system, and the penetration of the French legal system by European human rights law. First the *Cour de Cassation* and then the *Conseil d'État* were co-opted as enforcers of both EC law and European human rights law, overriding subsequent statutes and discarding the reciprocity proviso of Article 55. After 2000, the *Conseil constitutionnel* renounced its authority to safeguard most constitutional rights against infringement by EU directives.<sup>614</sup> European human rights became such potent competitors with French constitutional rights that France aban-

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613. See Nicolas Sarkozy, *Entrée en vigueur de l'article 61-1 de la Constitution* (Mar. 1, 2010), available at [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/discours\\_interventions/2010/1ermars2010\\_pdr.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/discours_interventions/2010/1ermars2010_pdr.pdf).

614. See *supra* text accompanying notes 476-491.

doned its distinctive model of judicial review in the hope of restoring the prestige of the national constitution.

How did it happen? Several legal and non-legal causes contributed to this evolution. Some were contingent events of history and politics. Others were structural flaws in the mechanisms themselves. The key flaw, however, may have been the expectation that a quasi-judicial body would resist the majority's preference for international cooperation, particularly by employing a standard as vague and contestable as the principle of national sovereignty.

Political contingencies, including the long inability of the Gaullists to secure the Senate presidency, the victory of Giscard d'Estaing in 1974, and the Socialist sweep of the early 1980s helped propel legal change. Such events, however, were not unforeseeable, and constitutions are meant to channel political forces. The main purpose of Article 54 was to encumber a future majority that was pursuing supranational goals. The mere emergence of that majority would provide a test of the safeguard, not the explanation for its failure.

In retrospect, the design of Article 54 had two principal disadvantages. It made review of the constitutionality of international commitments too discretionary, and *a priori*. The parliament could authorize ratification of major treaties without referring them to the *Conseil*. Even when review did occur, the *Conseil* might not anticipate the future effects of the treaty. Given the dynamic nature of modern treaty interpretation, *a priori* review afforded a very limited defense.

The inherent weaknesses of Article 54 were compounded by the *Conseil's* interpretive choices. The *Conseil* chose to evaluate treaties based on their content rather than on their tendencies. It chose to limit its examination to the incremental advances of treaties rather than their total content. The international law principle of *pacta sunt servanda* did not literally forbid the *Conseil* to hold that a constitutional amendment would be required before ratification of a new treaty because of a combination of factors relating to old and new obligations. The *Conseil* also chose to let its own standards evolve over time, rather than freeze the conclusions of its earliest (mostly Gaullist) members.<sup>615</sup> These choices abetted the progress of European integration in the period when constitutional amendments would have been hard to obtain.

Another structural factor, the absence of Europe-specific provisions in the 1958 Constitution, may actually have increased the long-term sacrifice of sovereignty. The interpretations given to Article 55 by the *Cour de Cassation*, and later by the *Conseil d'État*, were consciously pro-European.<sup>616</sup> The constitutional text did not inexorably require that these interpretations apply to international treaties more generally, but it made the extension of these interpretations easier. The consequence has been the near total evis-

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615. See *supra* Part III.A.4.

616. See *supra* Part III.A.3.a.



ceration of the reciprocity proviso that Michel Debré fought so hard to include.

In 1976, the Gaullist majority of the *Conseil constitutionnel* had the opportunity to demand a constitutional amendment before the implementation of direct suffrage for the European Assembly. The Gaullist votes divided, however, and the *Conseil* accommodated Giscard's initiative, while attempting instead to control the future through dicta.<sup>617</sup> They could not draft the constitutional amendment themselves, and they expressed concern about the form that a responsive amendment might take.<sup>618</sup> Their dilemma highlights the difficulty of expressing in words, especially in succinct phrases, a formula that could control transnational action across the wide range of situations where events might make it desired.

The long slide from the 1958 Constitution to the Lisbon Treaty followed a specific route that could not have been predicted in advance. Still, the experience of France suggests that the probability of long-term success of purely legal barriers against international projects is low. Failure was not inevitable, but likely. Each unhappy family may be unhappy in its own way, but their malfunctions have something in common after all.

## V. Epilogue: Plus ça change . . .

This Article has generally tried to limit its analysis to the years 1958 to 2008, in order to avoid dealing prematurely with matters unsettled by the massive constitutional amendment of July 2008. In closing, however, it may be useful to make some preliminary observations about the major change in the structure of constitutional review brought about by that amendment and its relationship to the themes of this article.

The constitutional amendment of July 2008 on "the modernization of the institutions of the Fifth Republic" resulted from a complex deliberative process initiated by President Nicolas Sarkozy in July 2007.<sup>619</sup> A Committee of Reflection, chaired by former Prime Minister Édouard Balladur, issued a lengthy report in late October 2007, proposing a series of revisions to the powers of the executive, the procedures of the legislature, and the means of protecting the rights of the citizens.<sup>620</sup> The Government presented its preferred version of the package in April 2008, and the two chambers made significant modifications before adopting the final version in Congress.<sup>621</sup> The overall focus of the reform, as its name suggests, was structural. Key provisions included reduction in the President's emergency

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617. See *supra* Part III.A.2.b.

618. *Id.*

619. Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République, J.O., July 24, 2008, p. 11890.

620. COMITÉ DE RÉFLEXION ET DE PROPOSITION SUR LA MODERNISATION ET LE RÉÉQUILIBRAGE DES INSTITUTIONS DE LA VE RÉPUBLIQUE, *UNE VE RÉPUBLIQUE PLUS DÉMOCRATIQUE* (2007) [hereinafter Balladur Committee Report].

621. The amendment achieved the necessary supermajority in Congress by a single vote. This outcome probably resulted from discontent that the reform had not gone further and reluctance to hand President Sarkozy a political victory.

powers, authorizing the President to address the legislature in person, and relaxation of some of the constraints imposed on parliament in 1958. For present purposes, the most interesting reform was a sweetener to the deal, a provision giving individuals access to the *Conseil constitutionnel* to challenge legislation already in force.

The Balladur Committee had revived the project, pursued without success in the Mitterrand years, of creating an *exception d'inconstitutionnalité*, allowing litigants to raise constitutional objections to statutes before the civil/criminal and administrative courts and to have the objections referred to the *Conseil constitutionnel* for resolution.<sup>622</sup> Opposition from the right had blocked the project in the early 1990s, but by 2008, new reasons had emerged to broaden its appeal.<sup>623</sup> The frequency with which individuals challenged legislation in court on grounds of EU law and European human rights had hollowed out the traditional sanctity of promulgated statutes, and politicians had come to perceive the anomaly of simultaneously denying citizens the opportunity to challenge legislation on the basis of their own national constitution. The prestige of the national constitution as the apex of the domestic constitutional order, so recently besieged by EU ambitions, was felt to be at stake.

New Article 61-1 authorizes the *Conseil constitutionnel* to hear claims that “a statutory provision infringes the rights and freedoms guaranteed by the Constitution” when they arise in litigation and are referred by the *Conseil d'État* or the *Cour de Cassation*.<sup>624</sup> The article remits the procedural details to an organic statute. The implementing legislation was enacted in December 2009 and took effect in March 2010.<sup>625</sup> The legislation establishes a filtering procedure in which the two supreme courts weed out insubstantial claims and transmit serious constitutional questions to the *Conseil constitutionnel* for resolution.<sup>626</sup>

In its new head of jurisdiction, the *Conseil constitutionnel* operates more like a conventional constitutional court adjudicating an individual complaint, and the legislators understood that European human rights law would require more judicialized procedures than the *Conseil* has employed in the past for its abstract *a priori* review of statutes. The *Conseil* has introduced adversary briefing and public oral hearings, which even include webcasting.<sup>627</sup>

The organic statute goes beyond the constitutional amendment by requiring that courts refer constitutional questions to the *Conseil* before

622. See Balladur Committee Report, *supra* note 620, at 87–90.

623. See *id.*; DRAGO, *supra* note 95, at 440.

624. 1958 CONST. art. 61-1 (“qu’une disposition législative porte atteinte aux droits et libertés que la Constitution garantit”).

625. See Loi organique 2009-1523 du 10 décembre 2009 relative à l’application de l’article 61-1 de la Constitution, J.O., Dec. 11, 2009, p. 21379.

626. See *id.* art. 23-4.

627. See Règlement intérieur du 4 février 2010 sur la procédure suivie devant le Conseil constitutionnel pour les questions prioritaires de constitutionnalité, Feb. 4, 2010, arts. 1, 8–10, reprinted in 29 CAHIERS DU CONSEIL CONSTITUTIONNEL (2010).

resolving challenges based on incompatibility with treaties.<sup>628</sup> It accordingly re-labels the process as the “priority question of constitutionality” (*question prioritaire de constitutionnalité*, or QPC).<sup>629</sup> When the organic statute was referred to the *Conseil constitutionnel* for its mandatory review before promulgation, the *Conseil* observed that:

when requiring that arguments of unconstitutionality be examined in priority to those based on the failure of a statutory provision to comply with international commitments entered into by France, Parliament . . . intended to ensure compliance with the Constitution and reiterate the place of the latter at the apex of the national legal system. This priority merely results in specifying the order in which the arguments raised before the court to which the matter is referred be examined. It does not restrict the jurisdiction of said court, once the provisions pertaining to the priority preliminary ruling on the issue of constitutionality have been complied with, to ensure the superiority over national laws of legally ratified or approved treaties or agreements and norms of the European Union. It thus does not fail to comply with either Article 55 of the Constitution or Article 88-1 . . .<sup>630</sup>

Shortly after the new regime took effect, the *Conseil* issued a decision on *a priori* review of a statute that reaffirmed several of its earlier doctrines.<sup>631</sup> The *Conseil* does not review whether statutes are consistent with an international treaty or European law under Article 55; such review remains within the province of the civil/criminal and administrative courts, as the organic statute for the QPC makes clear.<sup>632</sup> Compliance with the Treaty of Lisbon is not a constitutional issue for the *Conseil* to decide, despite the fact that Article 88-1 of the Constitution refers to France’s participation in the EU in accordance with the Treaty of Lis-

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628. This is the subject of another article, Gerald L. Neuman, *Anti-Ashwander: Constitutional Litigation as a First Resort in France*, 43 N.Y.U. J. INT’L L. & POL. 15 (2010). The problem of coordinating referrals to the *Conseil constitutionnel* and referrals to the European Court of Justice raises delicate questions of EU law that have not yet been fully settled as of this writing. See Denys Simon, *Conventionnalité et Constitutionnalité*, 137 POUVOIRS 19, 27-30 (2011-2012).

629. See Loi organique 2009-1523 du 10 décembre 2009 relative à l’application de l’article 61-1 de la Constitution, J.O., Dec. 11, 2009, p. 21379.

630. CC decision No. 2009-595 DC, Dec. 3, 2009, cons. 14. The *Conseil* upheld the organic statute, subject to a few points of interpretation.

631. CC decision No. 2010-605 DC, May 12, 2010. (As the notation DC indicates, this was an abstract review of a statute not yet promulgated; it was not a concrete review of a question arising from the application of a statute in litigation (QPC)). The decision also took the occasion to provide initial guidance concerning the procedure to be followed when a litigant raises both a QPC and a challenge based on EU law. See *supra* note 628.

632. CC decision No. 2010-605 DC, May 12, 2010, cons. 11, 16; see also CC decision No. 2010-4/17 QPC, July 22, 2010, cons. 11 (holding that violation of a treaty cannot be raised in a QPC proceeding). It is also quite clear from the legislative history of Article 61-1 that the drafters did not intend to involve the *Conseil constitutionnel* in reviewing compliance with treaties. See Ballardur Committee Report, *supra* note 620, at 88-89; ASSEMBLÉE NATIONALE, RAPPORT NO. 892, 13th Legislature, at 441-42 (2008); SÉNAT, RAPPORT NO. 387, 13th Legislature, at 177 (2008).

bon.<sup>633</sup> Article 88-1 does entail a constitutional mandate to implement directives, and the *Conseil* reaffirmed its prior statements concerning its scope of review of statutes implementing directives: the *Conseil* would examine whether a statutory provision was manifestly incompatible with a directive that it was intended to transpose, and the *Conseil* would examine whether the transposition of a directive violated a rule or principle inherent to the constitutional identity of France.<sup>634</sup> The mandate to implement directives, however, was not a “right [or] freedom guaranteed by the Constitution” that could give rise to a priority question of constitutionality.<sup>635</sup>

Two days later, the *Conseil d'État* published a filtering decision stating its position on an important interpretive question concerning Article 61-1 and the organic statute. By authorizing litigants to challenge a “statutory provision” (*disposition législative*) that infringes a constitutional right, did the reform open up challenges to treaties in force, either directly or by means of challenges to the statute that had authorized the ratification of the treaty?<sup>636</sup> As the *rapporteur public* explained, absolutely not. A treaty was not a statute and could not be directly challenged.<sup>637</sup> To invalidate the treaty would violate the principle of *pacta sunt servanda*. The *Conseil constitutionnel* had always limited itself to reviewing treaties before their ratification and would not review the constitutionality of provisions that merely repeated the content of prior treaties.<sup>638</sup> The authorizing statute could in theory be referred, but referral would be inappropriate because the statute was not itself applicable to the case and did not itself violate any constitutional right. The *Conseil d'État* followed the recommendation of the *rap-*

633. CC decision No. 2010-605 DC, May 12, 2010, cons. 16. The *Conseil* thus distinguished its earlier decision concerning Article 88-3, discussed *supra* in text accompanying notes 554-555.

634. *Id.* cons. 18. The *Conseil* has since had occasion to apply this rule in a QPC case, declining to review the constitutionality of a statute transposing the EU directive on qualifications for refugee status and subsidiary protection. CC decision No. 2010-79 QPC, Dec. 17, 2010.

635. CC decision No. 2010-605 DC, May 12, 2010, cons. 19.

636. Remarkably little was written on the subject while the constitutional amendment and the organic statute were under consideration. The question was posed in Pascal Mbongo, *Droit au juge et prééminence du droit: Bréviare processualiste de l'exception d'inconstitutionnalité*, 2008 RECUEIL DALLOZ 2089, 2091-92. A handbook published shortly before the QPC procedure took effect asserted categorically that such statutes cannot be referred. See Jérôme Roux, *Contre quels textes soulever la question prioritaire de constitutionnalité?*, in LA QUESTION PRIORITAIRE DE CONSTITUTIONNALITÉ 28, 36 (Dominique Rousseau ed., 2010).

637. CE, May 14, 2010, 26 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 709 (2010) (conclusions of Burguburu, *rapporteur public*) (*Rujovic*). A year later, the Cour de cassation similarly held that the QPC procedure does not permit litigants to challenge a treaty by challenging the constitutionality of a statute authorizing its ratification. Cass. crim., May 17, 2011, No. 10-82938 (*Commune de Mesquer*), available at <http://www.legifrance.gouv.fr/affichJurijudi.do?oldAction=rechJurijudi&idTexte=JURITEXT000024567461&fastReqId=440154515&fastPos=1>; see Jean-Baptiste Perrier, *Le non-renvoi des questions prioritaires de constitutionnalité par la Cour de cassation*, 27 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 910, 911-12 (2011).

638. See CE, May 14, 2010, 26 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 709, 710 (2010) (conclusions of Burguburu, *rapporteur public*) (*Rujovic*).

*porteur public* and avoided referral on that basis.<sup>639</sup> On that interpretation, respect for treaties in force keeps them beyond the reach of the *Conseil constitutionnel*, just as before 2008, even if they violate the Constitution.

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639. See *id.* at 712.

