three decades have counseled public policy on reapportionment, affirmative action, and abortion.

A two-thirds vote would not eliminate qualified candidates. Since the emergence of the modern Supreme Court (a date scholars fix at around 1897), only one successful nominee to be an associate justice might have failed to gain 67 Senate votes—Mr. Thomas. William Rehnquist might still have attained confirmation as an associate justice (he had 68 votes in 1971), but he might not have been able to ascend to the chief justiceship (he received only 63 votes in 1986).

I stress the word "might," because a change in the rules would significantly alter the calculus of both the president and the Senate. With a two-thirds requirement, Ronald Reagan might not have sought to elevate Mr. Rehnquist (or pursued the confirmation of Robert Bork), nor might President Bush have nominated Thomas. Alternatively, Rehnquist might have received more votes from the Senate if it was operating under the constraints of a two-thirds rule.

My point is not to second-guess past votes; it is to suggest that a two-thirds requirement would not restrict the pool of serious candidates. It may, though, reduce it just enough to eliminate those who have no business sitting on the most important judicial body in our nation.

QUESTIONS AND COMMENTS

1. For an argument that the political dynamics of the appointments process in the U.S. mirror the political dynamics of other issues, so that, for example, when interest group politics shape social security policy such politics likewise dominate judicial nomination politics, see Mark Silverstein, JUDICIAL CHOICES (1994). Silverstein suggested that the increasingly public and interest-group dominated nature of the confirmation process will drive nominations to the center, with a focus on the nominee's technical skills, since these are the nominees who can get through the political minefields, a result he finds unacceptable: "That a politicized system of selecting and confirming our judges may mean that people of stature, a Brandeis or a Holmes, a Marshall and a Warren, do not find their way to the Court is a consequence that must be measured against a paramount commitment to self-rule."

2. Has the political process, as described by Silverstein, come to approximate the effects of Epstein's proposed two-thirds rule? If it has, how stable is this political practice? If not, why not?

3. In tension with Silverstein's claim, other scholarship suggests that the U.S. nomination process can produce judges who are not so moderate and are too ready to address themselves to external audiences through separate opinions. In part because the judges of European constitutional courts are generally "appointed by supermajorities, or by other processes that lead to justices who are acceptable to all major parties." European constitutional courts are populated not "by justices from any ideological or jurisprudential extremes, but . . . by judicial moderates," according to John F. Pincione & Pasquale Pasquino, Constitutional Adjudication: Lessons from Europe, 82 Tex. L. Rev. 1671, 1702 (2004). By contrast, they argue, in the United States, "a president whose party enjoys a majority in the Senate need not seek support from any members of the other party," leading to the possibility of more heterogeneous and sharply divided judges. Noting the tension of European courts—even those in which dissents are permitted— to speak with one voice, they suggest that the U.S. Court has "gone too far in encouraging members . . . to engage in public conflict," and suggest that modification of a supermajority voting requirement (as Epstein suggested years earlier) might lead to more self-restraint in publishing separate opinions.

4. What is the relationship between appointment methods and judge's behavior on the bench? How would one distinguish the effects of appointment methods from the effects of life tenure (as compared to the single nonrenewable terms typical in Europe)? Near the end of an eleven year period without a new appointment on the U.S. Supreme Court, proposals were made to adopt a simple 18-year term for Supreme Court justices, with appointments staggered to come every two years. See, e.g., Steven G. Calhoun & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 39 Harv. J. L. & Pub. Pol'y 709 (2006). Proponents argued it would provide a more secure democratic basis for the Court's exercise of power, lower the stakes in the confirmation process and thus improve its functioning, prevent deceptitude on the bench, and improve decisionmaking. What might be the effects of such a change on judicial culture?

5. In some constitutional courts, as in France, dissents are not permitted, and judgments issue in the name of the court. How might such practices—of anonymity or of separate opinions—affect the judges' or courts' roles? Cf. Donald P. Kommers & Russell A. Miller, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 26 (3d ed. 2012) (noting that the "rapporteur" of a case in the German Constitutional Court will typically write the Court's opinion, even if he/she is in disagreement, and that the Court rarely publishes dissenting opinions).

3. FRANCE AND THE CONSEIL CONSTITUTIONNEL.

Because current French constitutional jurisprudence incorporates to some degree the Declaration of the Rights of Man and Citizen of 1789, this introduction begins with France in 1789. From then until at least 1858, sovereignty and government power were located in elected assemblies, and/or strong rulers, with courts playing a decidedly subordinate role.

In the 1780s, France had accumulated substantial debts, and the reform and taxation efforts of its King, Louis XVI, were obstructed by clergy and nobility who controlled the local "parlements" or lawcourts; the "parlements" did not have power to legislate but their agreement was required to register laws or edicts promulgated by the King. In order to obtain assent to raise taxes, the King convened the "estates general," which had not met for 150 years and whose voting rules permitted the clergy and nobility to outvote all others. Soon, however, representatives of the so-called "third estate"—consisting of everyone other than the clergy or nobility—broke off and established the first
government if it gave up Algeria. In order to avert this crisis, De Gaulle returned as prime minister, with emergency powers and authority to propose a new constitution. Under his government the present Constitution of the Fifth Republic—a very substantial departure from prior constitutions—was prepared and was approved by the voters in 1958.

Under the Constitution of 1958, parliament’s powers were curtailed and the scope of the executive substantially expanded to include the power to issue “règlements” (rules) in areas of “executive legislative competence.” Article 34 sets forth the areas in which parliament makes laws (législative powers), while article 37 in essence confers legislative power on the executive to make “règlements” (decree-laws or rules). Laws generally require rules, made by the government, to be implemented. The president, moreover, can direct the order of proceeding on matters in Parliament. Thus the executive’s authority in legislation is quite strong. Under this constitution, finally, Parliament’s power to dismiss a government was substantially curtailed, and among the expanded powers of the President is the power to appoint the Prime Minister.

In the readings that follow, Bell and Stone give complementary accounts of the creation and development of the Conseil Constitutionnel. Initially designed to enforce the powers of the president against parliamentary encroachments, the Conseil has proven to be an even more substantial innovation in French constitutional law. Whether to view it as a constitutional court or an arm of the legislature has been a matter of some disagreement, though with France’s abandonment in 2008 of its prohibition on post-enactment review of the constitutionality of laws and its authorization of referrals, by the Conseil d’Etat and Cour de Cassation, of cases to the Conseil Constitutionnel for its examination of the constitutionality of a law, the Conseil Constitutionnel’s role has expanded into a realm typically occupied by constitutional courts.

1 For an overview of French history during the revolution, on which this summary is in part based, see Donald Kagan, Steven Ozment & Frank M. Turner, THE WESTERN HERITAGE 690-725 (6th ed. 1993); see also L. Naville, Boots & John H. BELL, FRENCH ADMINISTRATIVE LAW 8-47 (4th ed. 1989). The contribution of Jacob L. Taylor to this section is gratefully acknowledged.

2 France is reported to have had a total of fifteen constitutional instruments in the two hundred years since the Revolution of 1789. John Bell, FRENCH CONSTITUTIONAL LAW 1 (1993).

3 Bell reports that France had 23 governments in twelve years. Bell at 11.
1.3 CONSTITUTIONAL REVIEW

The creation of the Conseil constitutionnel was originally intended as an additional mechanism to ensure a strong executive by keeping Parliament within its constitutional role. As will be seen later, this original intention has been departed from to a significant degree in subsequent years to create what is effectively a constitutional court.

Constitutional Review in French History

In presenting the Conseil constitutionnel to the Conseil d’État in 1958, Debré stated that “It is neither in the spirit of a parliamentary regime, nor in the French tradition, to give to the courts, that is to say, to each litigant, the right to examine the validity of a loi...” Although the rule of law quite quickly involved the subordination of the executive to the law and to bodies that could be called courts, Parliament, as the lawmaker and representative of the nation, was in a different position. This is reflected both in the history of institutions and in currents of ideas.

Institutions. In the ancien régime there was nothing quite like a modern national Parliament. The Estates General, composed of representatives of the three orders of society (nobility, clergy, and commons), was the nearest equivalent to one, but it did not meet from 1614 until 1789. The regional parlements were low courts, membership of which was an office of profit to be bought and sold, and representatives were drawn from the nobility and the clergy. In order to be valid, a law made by the King had to be registered with the local parlement, from which grew up the view that it had the power to refuse to register laws made by the King. Although the King could impose his will by holding a fait accompli, remonstrances made by the parlement against a particular measure could ensure that it was altered. This power had been used in the years leading up to the Revolution of 1789 in order to block reforms introduced by Louis XVI. The clergy and nobility were thus able to resist change, and the parlements gained the reputation of being reactionary.

The separation of powers introduced by the revolutionary Constitutions sought to protect the judiciary being able to obstruct Parliament. Hence the loi of 14-24 August 1790 insisted in article 10 that the judiciary was not “to take part directly or indirectly in the exercise of legislative power”, or to “obstruct or suspend the execution of the decrees of the legislative body”. Article 127 of the Criminal Code backed this up by making it an offence for a judge to interfere with the legislative power. The Tribunal de cassation (as the highest ordinary court was known) decided as early as 1797 that “the absolute power in which the prohibition on the courts to stop or suspend the implementation of the loi is drafted can admit of no exception or excuse”.

Apart from two possibly aberrant decisions of the Cour de cassation (or the Tribunal de cassation had then become) in 1851, the ordinary judiciary has consistently refused to challenge the validity of lois.

This reaction to the parlements did not mean that the French were not aware of the need to keep Government and Parliament within the limits of the Constitution. The excesses of the Terror brought home the necessity for such control. In the debates on the Directoire Constitution of 1795 Sieyès suggested that there should be a jury constitutionnaire that would ensure that the Constitution was obeyed by annulling acts of the legislature and the executive that were contrary to it. Rejected then, the idea was taken up at the adoption of the next Constitution in 1799. The Constitution of year VIII established a Sénat conservateur that had the function of considering the constitutionality of provisions, and even annulling decisions referred to it by the Tribune (Assembly) or by the Government (article 21); this included annulling lois, though only before their promulgation (article 37). In fact, this body was totally ineffective. Composed of persons appointed by the consuls, who were irremovable, it did nothing to prevent the excesses of the Napoleonic period. It only decided to quash legislative acts two days before the capitulation of Paris in 1814. The institution was revived under Louis Napoleon (soon to become Napoleon III) in the Constitution of 14 January, 1852. Again composed of persons appointed with security of tenure, it was intended as the guardian of liberties and other basic values. It could pronounce on the constitutionality of lois before promulgation, but it could also pronounce on any decision referred to it by the Government or on a petition of citizens. This was thought to open the way to review of laws even after they had been promulgated. But the provision was never put to the test, and the Sénat of the Second Empire was as ineffective as that of the First.

The contrary, and typically republican, tradition exhibited in other Constitutions before 1946 was that Parliament itself was the guardian of constitutionality. In the very first Constitution of 1791 the National Assembly was enjoined to refuse all proposals that infringed the Constitution. Self-limitation was the preferred institutional device for ensuring that the Constitution was respected, with an ultimate control exercised by the electorate.

It was the collapse of the Third Republic, and the actions of the Vichy regime that encouraged further consideration of institutional safeguards. The First Constituent Assembly of 1945–6 adhered to the positivist republican tradition, and did not even have a second chamber as a check on the National Assembly. Following the Second Constituent Assembly, the Constitution of 1946 established a Comité constitutionnel composed of the Presidents of the Republic, the National Assembly, and the Council of the Republic (as the Senate was called), and then seven persons nominated by the National Assembly and three by the Council of the Republic. The nominees appointed by the two Assemblies were to come from outside their membership. This body was designed to make prompt decisions on a limited range of matters concerning exclusively with the institutional provisions of the Constitution, and deliberately excluding the declarations of rights. It could examine lois before they were promulgated to see if a constitutional amendment was necessary. Since the procedures for such amendments were cumbersome, this was, in theory, a serious obstacle to unconstitutional legislation. It was concerned merely to resolve conflicts between the two chambers, and was designed to redress the power of the National Assembly to override the Council of the Republic.

It was called upon to make only one decision: in 1948, on the question of the time-limit within which the Council to the Republic had to vote on a bill when the National Assembly had classified it a matter of urgency.
Other attempts to have matters referred were not successful. Notably, in 1907 the Gauflista tried to have the bill ratifying the Treaty of Rome referred to the Comité on the ground that it was incompatible with national sovereignty. Since there was no conflict between the two Assemblies on the issue, the Comité had no jurisdiction to consider the matter.

The self-limitation of Parliament was not very effective, in that blatantly abusive lois were passed both in terms of procedure—for example, the delegation of blanket legislative powers to the executive—and substance—the ant clerical legislation of the turn of the century. Even the Fourth Republic offered no check where both chambers were agreed on a measure.

The Doctrinal Debate. In the realm of ideas, constitutional review did not loom large as an issue in the public imagination.

The main arguments used against constitutional review focused on the status of loi and the separation of powers.

Article 6 of the Declaration of 1789 stated that loi is the supreme expression of the volonté générale. This was interpreted as meaning that Parliament was the representative of the general will of the nation, and that its enactments thus enjoyed the status appropriate to the expression of the will of the sovereign. On this view, the State was the voice of the nation, and its authority was a pre-condition for liberty. In no sense was it argued that constitutional review was incompatible with the idea of sovereignty. The people could easily agree to restrict that authority, and Carré de Malberg considered that such limitations were very much expressions of sovereignty. All the same, the introduction of constitutional review would be a change in the way in which it was to be exercised.

The argument from the separation of powers has two elements. On the one hand there is the statement of the appropriate function of each organ; on the other, there is the appropriate deference that must be paid by other organs of government.

The function of the legislature was, according to Carré de Malberg, to be the controlling representative of the will of the nation, and, as such, to complete the task of making the Constitution. The French situation under the Third Republic was different from that in other countries, since Parliament had the power to alter the Constitution, and was not subordinate in this task to a prior or external institution or mechanism. In addition, the legislature was to be the interpreter of the Constitution; this was appropriate, since it was representative of the people who made it. Parliament was to interpret the Constitution when it came to passing legislation, and if it decided that its interpretation was consistent with the Constitution, this could not be gainsaid by any other organ.

Nothing is more natural than to make interpretation an act of the very person who made the text... In other words, it is for the legislature, at the very moment of making laws, to examine if the loi being considered is consistent with the Constitution, and to resolve the problems that may arise on this point. The legislature interprets in this way by virtue of its popular representation.

The appropriate role of the judiciary here was to defer to the decision of the legislature. The denunciation of powers was to be understood not as a separation of functions, as in the United States, but as a separation of organs of government. In making constitutional amendments, Parliament had to meet in a different way from when it passed ordinary legislation, but it was still Parliament that “was acting”. For both ordinary and constitutional lois, the separation of powers required the judiciary to respect the actions of Parliament. To try to impose the will of Parliament constituted as constitutional legislator over Parliament constituted as ordinary legislator did not make sense. The revolutionary texts, attacked as outdated by the proponents of constitutional review, were seen as merely expressive of the appropriate separation of powers in a democracy, since judges could not stand in the way of the will of the people.

A significant concern of the writers was the conservative effect of providing constitutional review based on any declarations of rights. The authors like Duguit and Hauriou who proposed some form of substantive review envisaged that this would strike down measures such as the anticlerical laws of 1905, the provisions on secrecy of tax returns (which enabled private settlements between the revenue and the taxpayer), the granting of judicial powers to parliamentary committees, and attacks on property. To Jèze, this would simply make the judiciary a block to social progress. “Against a democratic Parliament, product of universal suffrage, and against its possible will for reform, it is desired in reality to set up bourgeois judges for the defence and irreducible preservation of the possessing classes considered as elites.” This concern seemed to be supported by the highly influential study of the US Supreme Court published by Édouard Lambert in 1921. He described it as “doubtless the most perfected tool of social inertia to which one can currently resort to restrain workers’ agitations and to hold back the legislator from the slippery slope of economic interventionism”. Time and again the opponents of constitutional review would point to the experience of the United States in the 1910s as an illustration of what could happen in France.

Other arguments centred on the effect that this would have on the judiciary. Currently, this career civil service was strongly influenced in its appointments by the Government, and there was no strong, fearless independence equivalent to the Supreme Court of the United States. In any case, judges would inevitably be drawn into the political forum by constitutional review, and this would lead to attacks on their political views that would further reduce the reputation of the French judiciary.

In any case, if Jèze and Eisenmann were right about the nature of the Constitution of 1875, reduced to mere rules of procedure without any declarations of rights, an institution of constitutional review would have very little impact and importance, and would thus not be worth while.

The Intensions of the Drafters of the Constitution. As originally conceived, the Conseil constitutionnel was not to be a radical departure from what had gone before in terms of its institutional competence. The essential difference was the new view of parliamentary sovereignty as limited by the role accorded to the executive. The Conseil was merely...
one institutional mechanism to ensure that this new function of Parliament was adhered to. The Comité consultatif constitutionnel soon made the Council as a Council, "an essential element for the harmonious operation of public authorities", a body to keep Parliament and the executive within their proper limits. It was not to be some form of supreme court in constitutional matters, along the lines of the German Constitutional Court, a specialist body to which references can be made from all courts during litigation. As the commissaire du gouvernement (the civil servant representing the Government), Janot, stated:

Such a system would be tempting intellectually, but it seemed to us that constitutional review through an action in the courts would conflict too much with the traditions of French public life. To give the members of the Council constitutional the power to oppose the promulgation of unconstitutional texts appeared sufficient to us. To go further would risk leading us into a kind of government by judges, would reduce the legislative role of Parliament, and would hamper governmental action in a harmful way.

The longest debate in the Comité was on the question of who should be able to refer matters to the Council. The draft—so, indeed, the final text put to the people—only enabled the President of the Republic, and the Presidents of the Senate and the National Assembly, and the Prime Minister to do so, added Raymond Trichot. moved an amendment... to allow one-third of the members of either assembly to refer a law to the Council. The argument was one of protecting the position of minorities within the Parliament. Since the Presidents of the National Assembly and Senate were, in past experience, likely to belong to the majority, the opposition had no way of having a matter raised before the Council. This was argued in the Council's opinion, but that it would be incompatible with parliamentary government. Similarly, Teitgen argued, "Every time that a loi has given rise to an impassioned debate, the opposition will... refer it to the Council constitutionnel, and in the end effective government will be in the hands of the pensioners who will sit on the Council..."

The role of the Council constitutionnel has increased significantly since 1974, when members of Parliament were permitted to make references to it.

The Functions of the Council constitutionnel. The Council has five broad heads of jurisdiction, which are not necessarily related.

First, the Council is an election court, and returning officer. It determines the existence of a presidential vacancy or incapacity, it oversees the election process, and announces the results. It has a similar supervisory function in relation to referendums. With regard to parliamentary elections, it rules on disputed elections. It also rules on the eligibility of members of Parliament. The case-load is quite considerable. As a result of the parliamentary elections of June 1988, some eighty-five decisions on electoral matters are reported in the annual Recueil des décisions of the Council constitutionnel.

In the case of parliamentary elections, the Council will judge after the event, though it has recognized that it may be appropriate to rule on an issue before elections taken place, where this affects a large number of constituencies. Thus in Delmas it ruled on whether the duration of the election campaign was not too short, in breach of the Electoral Code. This affected all elections. In this area, the Council is like any judge, where it follows the provisions of the Electoral Code have been obeyed. As an election court, it does not have jurisdiction to change the validity of the law that set out the rules for elections.

Secondly, the Council also advises the President both when he seeks to use emergency powers under article 16 and on the rules made thereunder. Such advice is not binding, but it is of considerable authority all the same. The practice of 1961 would suggest that the Council's formal advice is preceded by informal advice. This may, however, be due to the particular personalities involved in the 1961 crisis, and might not be so easily repeated.

Thirdly, the Council may also be asked to rule on the constitutionality of treaties. Treaties are signed by the President, but require parliamentary legislation in most cases before they can be ratified. Once ratified, they have a status superior to loi (article 30). Although the Council constitutionnel will not strike down a loi for incompatibility with a treaty, other courts may refuse to apply it in such a case. Prior examination of the compatibility of a treaty and the Constitution is thus desirable.

The Presidents of the Republic, the National Assembly, and the Senate, or the Prime Minister or 60 deputies or senators may refer a treaty for consideration by the Council to determine whether it is contrary to the Constitution. If it is, then it can only be ratified after a constitutional amendment has been passed (article 54). This procedure is the only way to obtain the competence of the Comité constitutionnel, established under the Fourth Republic, about which there was controversy when the EEC Treaty was ratified. The President of the Republic has been the only one to make use of it in relation to EEC taxation (1979), European elections (1976), the additional Protocol to the European Declaration on Human Rights on the death penalty (1986) and the Maastricht Treaty (1992).

Fourthly, the Council also examines the constitutionality of organic laws and parliamentary standing orders. Both are subject to compulsory review by the Council before they are promulgated (article 61 § 1).

Organic laws are required in a number of areas, such as on the judiciary, on the composition of Parliament, on finance laws, and on the procedure of the Council constitutionnel. The process for passing them is stricter than for ordinary loi, requiring the agreement of the Senate or an absolute majority of members of the National Assembly (article 46). Since these organic laws may be used subsequently as a basis for judging the constitutionality of loi, and may extend the body of constitutional rules, it is appropriate that the Council should review them before enactment.

The scrutiny of parliamentary standing orders is justified by the desire to ensure that Parliament does not overstep the boundaries set out for it in the Constitution. If Parliament were to adopt procedures that blocked the dominance of the executive, this could clearly upset the
new arrangements of 1958. It may be that all right to leave such matters to the sole judgment of Parliament in an era of parliamentary sovereignty, but this could no longer be the case in the 1958 regime. . . .

Fifthly, the Conseil had, as its primary original function, to police the boundaries of the legislative competences of Parliament and of the executive. It is performed in any of the three ways.

1. Under article 37, the Government can amend or repeal provisions in loi passed after 1958 by way of règlement if the Conseil constitutional has first declassified them. In other words, if it has ruled that the provision does fall within the domain of executive legislative competence. In this way, it ensures that the Government does not overstep its competences. The Government must take the initiative, and refer provisions of loi to the Conseil if it wishes to have them declassified.

2. When private members' bills or amendments are proposed in Parliament that stray into the area of the executive's legislative competence, the Government may seek to have the proposed provisions ruled out of order. Where the President of the relevant chamber of Parliament disputes the claim of the Government, either he or the Prime Minister may refer the dispute to the Conseil, which has to give a ruling within eight days (article 41). Since 1979, this procedure has rarely been used.

3. Once a loi has been passed by Parliament, the Conseil has jurisdiction to rule on its constitutionality if a reference is made to it by the President of the Republic, the President of either the National Assembly or the Senate, the Prime Minister, or (since 1970) any member of either Assembly (article 61 § 2). The reform of 1974 effectively gave the opposition a chance to challenge legislation, and it has become almost the only challenger to loi.

Although originally designed to keep Parliament within the competence set out in article 34, the reference of enacted loi to the Conseil became a procedure for challenging them on wider, substantive grounds, particularly for breach of fundamental rights. The importance of this procedure can be seen from Table 1.1.

### TABLE 1.1. References to the Conseil constitutional under article 61 § 2 of the Constitution

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<td>April 1986–January 1989</td>
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<td>19</td>
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### SECTION B STRUCTURE, COMPOSITION, APPOINTMENT, AND JURISDICTION


From Watchdog to Policy Maker: Structure, Function, Mandate

[Some describes the transition from the Fourth to the Fifth Republic]

... The new constitution, drafted principally by conseillers d'État under the watchful eyes of de Gaulle, Michel Debré, and their associates, shifted effective power over the legislative process and over the form and content of legislation from parliament to the executive. In a word, the parliamentary system was rationalized, that is, placed under the management of a government detached from parliament (if left responsible). A special body, the Constitutional Council, was created to guarantee the viability of this new distribution of powers, and—not wholly unlike the Bonapartist Senate—the institution was expressly denied a judicial role, and its competence was limited entirely to parliamentary space. This chapter, first, examines the creation of the Council—with special attention paid to the intention of the founders—along with attributes of the body's jurisdiction, composition and recruitment.

The Council and Original Intent

After a nearly century-long period of unrivalled supremacy, parliament was mastered by the political settlement that gave birth to the Fifth Republic. The central objective of the founders was to "alter the status of parliament so that it would no longer be at the center of political life... and... permanently be incapable of obstructing government action. From this point of view, their success was complete." The settlement, as everyone knows, resulted in a "servile" legislature, in the famous words of François Mitterrand, in a "permanent coup d'État." The central features of the rationalized legislative process are worth recalling. First, and most important, the constitution distinguishes between statute—la loi—and a certain class of executive acts—le règlement. Whereas parliament was free to legislate on any subject during the Third and Fourth Republics, article 34 of the new constitution lists inclusively those legislative subject matters which together constitute what the constitution calls the "domain" of la loi. These subject matters include among others the 'fixing of rules concerning' civil and fundamental rights of citizens; nationality, marriage, and inheritance; changes in the penal code and the code on penal procedure, amnesties, and the creation of new courts and the status of judges; electoral laws; the rights of the civil and military service; the creation of "public enterprises," the nationalization of industry, and the expropriation of private property; local administration and education; and labor laws and social security. It later, in article 40, fords any number or group of parliament from proposing bills or amendments which would have the effect of either raising public expenditures or reducing public funds. All subject matters not listed in article 34 are expressly reserved to the executive by article 37. In sum, la loi was no longer to be defined by its form, an act of parliament, but by its content, the matter to be regulated. Second, the process itself was "streamlined" in favor of the government. The constitution grants to the executive alone control over the legislative