close the Declaration and announce the forthcoming Constitution. At the time, the article was a reminder of a long-established experience since Montesquieu: the reunion of the three powers in one single hand is the very definition of despotism.[8] In linking the protection of rights to the separation of powers, the article suggested, in line with a widely held opinion, that a good constitution with separated and wisely distributed powers is the guarantee of political liberty.[9]

The specificity of the French republican model is that it has never been able to function with the ''auxiliary precautions''[10] added to it by American constitutional and political practice. In particular, the famous ''barriers'' between the different powers on which Jefferson insisted to guarantee the effectiveness of the theory—that is, the checks and balances—either have never been applied, or, if applied, have precipitated the country into crisis. The absence of checks and balances between the powers underlines a fundamental difference between the French and the American models. The reason is that, if checks and balances may well be opposed to the power of the people, the same counterpowers may not be opposed to the power of the nation because the concept of nation, with its inclusiveness, rules out not only the idea, but even the need for counterpowers (Section A.1). As a result, the separation of powers is not at all understood in France as it is in the United States; it does not cut power into pieces given to different organs, as one cuts a cake into slices to distribute them, and it does not guarantee maintenance of the separation by interplay between forces and counter forces. Power is one; it is that of the nation, and it cannot be divided. However, if this is the case, what remedy does the French republican model provide against abuse of power? How does it prevent the arbitrariness that the Montesquieu's theory specially aimed to avoid? The answer is quite simple—by a separation of functions. Power, or sovereignty, implies functions (all kinds of functions such as to defend the country, to legislate, to enforce the law, to adjudicate disputes, to raise and collect taxes, to spend, all inherited from the ancient prerogative rights), and the remedy against the risk of their being abusively exercised is found in their distribution among several organs instead of their concentration into one single hand (Section A.2).

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[8] See Chapter 6, Section A.1.

[9] See S. Rials, *La Déclaration des droits de l'homme et du citoyen*, Hachette, Collection Pluriel, 1988, p. 373.

[10] A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, C. Rossiter Edition, Mentor Book, N.Y, 1961, Letter no. 51, p. 322, available at http://www.yale.edu/lawweb/avalon/federal/fed.htm [hereinafter *The Federalist*].

1. Absence of Checks and Balances

Relations between the executive and the legislative powers. By contrast with the American model, which has turned the presidential veto over congressional bills into a key element of the separation of powers, the French system rebels at any conflict between the legislature and the executive power. The examples are manifold; they mark French constitutional history, consistently repeating the same teaching: the nation is one and longs to be governed by one and one power only. Any antagonism, any conflict between the legislative and the executive is generative of political crises that end with the victory of one power over the other. The system is unable to remain in this balanced equilibrium of divided government that, from an historical standpoint, is the common lot of the relations between powers in the United States. Depending on the circumstances, it is one or the other power that prevails, but they do not remain opposed during long periods of stasis.

Sometimes, it is the legislative power that prevails. Such is the lesson that may be drawn from the sad experience of the royal veto exercised by Louis XVI, in full compliance with the Constitution of 1791, against two decrees of the legislative body. The effect of his veto was, in short order (within a few weeks), to precipitate the downfall of the monarchy, immediately followed by a toppling of the Revolution into extremes. ''If the Constitution empowers the King with a right of veto, the Declaration of Rights gives the people a right of resistance to oppression'' wrote a journalist in a widely read newspaper.[11] The second example took place during the crisis of May 16, 1877, triggered by the dismissal of the moderate republican Jules Simon, head of the government, by MacMahon, president of the republic, and his replacement by a hard-line conservative. The Chamber refused to accord its trust to the new government, thus forcing the president to dissolve Parliament. Léon Gambetta, the opposition leader, famously said: ''When France will have let its sovereign voice heard, then one will have to submit or resign.'' Indeed, when the nation sent back to Parliament a republican majority, the executive had to submit. Yielding to the ballot box, the president had no other choice but to appoint a moderate republican, Jules Dufaure, as president of the Council of Ministers (equivalent to prime minister). Disavowed by the nation, he subsequently resigned and was replaced by the republican Jules Grévy. The crisis bore witness to the preference of the nation for a parliamentary system, sealed the victory of the legislative over the executive power and paved the way to a system of ''Parliamentary

[11] See M. Morabito & D. Bourmaud, *Histoire constitutionnelle et politique de la France (1789-1958)*, 5th ed., Montchrestien, 1998, p. 77.

Sovereignty,'' French-style, with an omnipotent Parliament, which lasted for more than seventy years, until 1940.

Sometimes, it is the executive that prevails. Such was the rule in the late eighteenth and nineteenth centuries when France experienced Constitutions with a strict separation of powers, American-style (*i.e.*, with checks and balances), the functioning of which eventually led to a paralysis of the government, resolved in every case by a *coup d'état*. Such sad experiences occurred under the Directoire (1795-1799) and the II Republic (1851-1852).

The so-called ''cohabitation''—equivalent of a divided government in the United States—inaugurated by President François Mitterrand in 1986, indirectly confirmed once more the radical incompatibility of a system of checks and balances with the national temper. The three cohabitations experienced by the country between 1986 and 2002 duplicated in every respect the American system of divided government that illustrates so well the interplay of checks and balances between powers. The system had not been experienced twice before it was clear that the French would not rest until it was changed. Their impatience in the circumstance was a splendid confirmation of the veracity of De Gaulle's remarks on the expectations of the nation regarding its government: ''One could not accept a diarchy at the top.''[12] The constitutional reform of 2000, which reduced the length of the presidential term to five years, followed by a public law setting the date for the legislative elections no later than two weeks after the presidential election, in the avowed hope of giving a parliamentary majority to the president so that he may govern, runs contrary to the spirit of the American separation of powers with its checks and balances.

Relations between the judicial and legislative powers. In the French republican model, the judiciary is not a ''power,'' but rather an ''authority.'' This status is expressly provided for in Title VIII of the Constitution of 1958, ''On Judicial Authority,'' and it must be regarded as implied by the principle of national sovereignty. The nation is the source of all powers, and the judiciary does not proceed from it because it is not elected by it.[13] Like the administration, the judiciary is not anointed by popular suffrage; like the former, the latter is an ''authority.'' This does not mean that the judiciary is bestowed with an inferior

[12] Ch. De Gaulle, Press Conference of January 31, 1964, reproduced in D. Maus, *Les grands textes de la pratique constitutionnelle de la Ve République*, La documentation française, 1998, p. 43.

[13] True, some judges in the French system are elected, such as the professional judges who compose commercial or labor courts. But these elections are limited to the interested professions; as a rule, no judge is elected by the nation. This is the decisive reason in French law why the judiciary cannot be a power.

status. On the contrary, the judiciary holds great authority; it is even ''sovereign'' in its jurisdiction (the *Cour de Cassation*, for instance, is sovereign regarding the interpretation of the statutes that come under its competence). What this means is this: the judiciary in the French legal system cannot play the role of the judicial power in the American system; it cannot hold the legislative power in check and thwart the will of the nation.

Due to the prestige enjoyed by the American constitutional system in Europe and, in France particularly, the impossibility of the judicial power acting as a check on the legislature is often presented as outdated. It is argued that, when reviewing a statute against a treaty, courts do exercise a power of judicial review that is, as a matter of fact, identical to that exercised by United States courts when they review statutory laws against the Constitution. Such a view is mistaken; judicial review of statutes against the European Convention on Human Rights or against EU law does not fall within the logics of separation of powers. As noted above,[14] the superiority of treaties over statutes is not identical to the supremacy of the Constitution over the laws; it does not square with the checks and balances of the separation of powers. The point in such a review is less to hold the legislature in check than to defend and promote the superiority of universal and humanist values over nationalistic preferences. In addition, the interplay of forces in the American system between the judicial and the legislative powers is supported by a legal reality that is missing in the French legal system. That legal reality is the common law.

The reason why American courts may stand fast against legislators and, occasionally, venture to set aside their laws can be explained by their being able to implicitly rely on a rich legacy of rights and liberties, dating from time immemorial and standing behind them, so to speak. These ancient rights and liberties have never been abrogated; on the contrary, all of them were received by the legislatures in the states, and they are still in force when courts decide on their cases. This wealth of rights and liberties is the common law, and this common law is the fulcrum, so to speak, that allows the lever of judicial review to rise so high. As in England,[15] the common law means that there exists in the legal system a thick and large bundle of rights and freedoms, coming from the depths of history, still in force, which have not been put in the Social Contract, but rather which have been ''reserved,'' that is, protected, from legislative encroachments. And the role of courts is to dig into this endless wealth of rights, as needed, and recall their existence to the legislator.

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[14] See Chapter 7, Section B.1.

[15] See Chapter 4, Section B.

In the civil law system, which originates in the principles laid down by the French Revolution, courts do not have these resources. There are no ''reserved rights'' in this model; there are just natural rights, which have all been put into the Social Contract. The genuine characteristic of the political association created by the nation is that everyone gives himself entirely to it, so that the conditions are equal for all. For, as Rousseau put it: ''If the individuals retained certain rights, as there would be no common superior to decide between them and the public, each, being on one point his own judge, would ask to be so on all; the state of nature would thus continue, and the association would necessarily become inoperative or tyrannical.''[16] Under such circumstances, only a statute may regulate rights, to the exclusion of a court's opinion. This is actually what the Declaration of the Rights of Man and the Citizen of 1789 precisely provides for, in article 4: ''The exercise of the natural rights of any man has no other limits than those which guarantee to the other members of society the enjoyment of these same rights. These limits may be defined *only* by statutory law.'' The idea of a judiciary—counterforce in the Republic, which would regulate (in lieu of the legislature) the boundaries and the content of the rights and liberties among citizens and between the citizens and the Republic—is not a complement, but rather a distortion of the French republican model.

2. The French Conception of the Separation of Powers

The separation of powers understood as separation of functions. The French conception of separation of powers is not identical to the American approach. On the one hand, it takes into account not three, but just two powers, the legislative and the executive. On the other hand, it does not balance these two powers against each other through an interplay of checks and balances. The two powers are separated as in the United States; they are not in a state of fusion as in England. What is the exact relation between them?

One thing is certain: the ''two'' powers in question actually exercise ''one'' power only—the power of the nation. They are not true ''powers,'' strictly speaking, but rather ''organs'' of the nation, and the term ''separation of powers'' does not have the same meaning in French and American law. Thus, the problem is to explain how a system of government that does not rest on the traditional tripartite interpretation of the separation of powers, as envisioned by Montesquieu, may nevertheless be regarded as protecting political liberty (*i.e.*, this ''tranquility of mind arising from the opinion each person has of his

[16] J.-J. Rousseau, *The Social Contract* [Translated by G. D. H. Cole], Book, I, chap. 6, available at http://www.constitution.org/jjr/socon.htm.

safety''). The answer may be as follows: if Montesquieu is still relevant to explain the French republican model, it is because the one and indivisible power of the nation is not concentrated in the hands of a single organ, but rather because the functions it implies are distributed and exercised by different and separate organs—the president of the republic, the government, and the Parliament. The French republican model divides the power of government only insofar as it distributes its implied functions to distinct organs.

The functions of power. Montesquieu distinguished in every government three sorts of functions, which he called ''powers'':

(1) the legislative, by virtue of which ''the prince or magistrate enacts temporary or permanent laws, and amends or abrogates those that have been already enacted'';

(2) the ''executive in respect to things dependent on the law of nations,'' that is, the executive in respect to international affairs, by which the prince ''makes peace or war, sends or receives embassies, establishes public security, and provides against invasions,'' and which he proposed to call simply the executive power of the State;

(3) the executive ''in regard to matters that depend on the civil law,'' in other words, judicial power, by which ''he punishes criminals, or decides the disputes that arise between individuals.''[17]

His exposition of the three powers in every government is the origin of the tripartite classification of the State functions widely in use today.

Although well established in all contemporary legal systems, the tripartite classification of the functions of the State is very much of its epoch. Tailored for the power of the monarchical age, it refers to a government ruling over a static society, frozen in an order established from time immemorial. It refers to a period where the State legislates, certainly, but sparingly, because the peculiarity of the law at that time is to be ''already here,'' rooted for most of its rules in customary usages coming from the past. It calls to mind a time when the State defended the kingdom in aggrandizing the realm whenever possible to the detriment of its neighbors. It evokes a time when the State limited itself internally to securing public peace and ensuring proper justice in civil and criminal matters. These three functions still exist today, in the republican age, but their content has experienced profound changes with the codification of the

[17] Montesquieu, *The Spirit of Laws* [Translated by Th. Nugent, 1752, revised by J. V. Prichard], 1748, Book XI, chap. 6, available at http://www.constitution.org/cm/sol.htm.

law (which revolutionized legislative and judicial functions) and the evolution of international law, which deeply affected the conduct of foreign relations. Additionally and more importantly, the traditional tripartite functions of the State have been supplemented by two other functions that barely existed in the eighteenth century of Montesquieu, but that have since undergone tremendous development. These two functions are those of government and administration.

The governmental function consists in leading the society towards a common goal that, in the republican age, cannot be anything else than ''common happiness.''[18] During the monarchical age, this function had grown in continental Europe in the form of the Police-State. The complete destruction of the society of the monarchical age caused by the French Revolution, and the subsequent necessity to build a new society based on the new principles of the republican age, has elevated the governmental function. The revolutionary experience demonstrated that, in order to build a society all over again and to put into place the ''masses of granite'' that hold it together such as legislation, justice, an administration and a police, there was a need for an ''intelligent authority'' (Cicero) or, as De Gaulle said, ''a level-headed man at the helm'' (*une tête à l'État*). This transformation in the traditional methods of government was initiated by Bonaparte, who, as early as 1799, in the Constitution of Year VIII, introduced a new State power, the governmental power. An essential means of efficiency in the modern State, the governmental function has greatly modified the executive power insofar as it has attributed to it part of the legislative power: not just any part, but the most important, that which sets the whole governmental machine into motion, the power to initiate laws. Article 44 of the Constitution of Year VIII simply stated: ''The Government proposes the laws.'' Once vested with the governmental function, the executive power has ceased to be a faithful executor of the laws, a clerk-in-chief, so to speak, as was commonly held at the beginning of the Revolution. At the political level, the governmental function turned the executive into a ''real'' power, endowed with a will of its own, a force on the move, in charge of conceiving and carrying out a governmental program. The task of the executive nowadays no longer consists only in ''tak[ing] care that the laws be faithfully executed'';[19] it consists in

[18] Article 1 of the Declaration of Rights in the Constitution of Year I (1793), which established in French public law the first republic: ''The aim of society is the common happiness.''

[19] The formula is, of course, borrowed from Article II, Section 2 of the Constitution of the United States: ''He [the President] shall take Care that the Laws be faithfully executed.'' Interestingly enough, the governmental function in the United States has found its place in American constitutional law, and it is nowadays well illustrated by the presidential address on the state of the Union.

governing, in steering society to ''common happiness,'' in ''solving crises that call into question the national unity and taking care of major national interests'';[20] in other words, in ''foreseeing,'' as Pierre Mendès-France put it.

The administrative function consists in executing the laws; it is however only one side of the executive function, the other being the judicial function. At the time of Montesquieu, the administrative execution of the laws was still modest, particularly in England—the country he used as a point of reference for his theoretical model of separation of powers—but also, if less so, in France. The greatest change to the executive function in the late nineteenth century was a shift in the nature of law enforcement methods in the modern State, which changed from a system of judicial enforcement to a system of administrative enforcement of the laws.

In the monarchical age, the execution of the laws was mostly judicial in nature. The problem of the application of the laws was within the hands of lawyers, and it arose occasionally, on a case-by-case basis. As modern societies advanced further into new technologies and became increasingly complex, they came closer to ''societies of a higher type'' as Emile Durkheim put it; judicial enforcement of the law—so simple in its principle—tends to become increasingly differentiated.[21] Concretely speaking, the problem of executing the laws no

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[20] Such is the definition of the governmental function given by Maurice Hauriou in *Précis de droit administratif et de droit public*, Paris, Sirey, 1933, reprint Dalloz 2002, p. 15.

[21] One must refer here to the analysis made by Emile Durkheim in his criticism of Spencer who, in the second half of the nineteenth century, became the champion of the market against the State. By contrast with the British economist, who was convinced that the exchange between people, that is, the contract, would diminish the need for a regulatory apparatus and reduce the functions of the State solely to the organization and functioning of courts of law, the French sociologist objects that regulation, hence administrative law, is all the more developed in societies that are technically and industrially advanced and that the more we go back in history, the more modest regulation is. For Durkheim, as new technologies come into being, regulation can no longer be rudimentary. In his opinion:

> The state's attributions become ever more numerous and diverse as one approaches the higher types of society. The organ of justice itself, which in the beginning is very simple, begins increasingly to become differentiated. Different law-courts are instituted as well as distinctive magistratures, and the respective roles of both are determined, as well as the relationship between them. A host of functions that were diffuse become more concentrated. The task of watching over the education of the youth, protecting health generally, presiding over the functioning of the public assistance system or managing the transport and communications systems gradually falls within the province of the central body. As a result that body develops. At the same time it extends progressively over

longer arose occasionally, but permanently. It no longer concerned particular cases only, but rather a large number of cases identical in their nature and calling for common solutions. Occasional judicial resolution of disputes limited to specific cases no longer sufficed. It became necessary to anticipate possible future conflicts, to prevent them by prior, precise definition of the conditions of the application of the laws—no longer on a case-by-case basis only, but rather at a higher level, presupposing a large number of identical legal situations. In other words, it became necessary to regulate—or to administrate. This point is subtly underlined by Laferrière when he says: ''To administrate means to secure a *daily* application of the laws''[22] —as opposed to ''adjudicate,'' which, as is exemplified by the existence of judicial terms, consists in securing the application of the laws during certain periods delimited in the course of the year. As a result of these developments, in most industrial countries, the end of the nineteenth century witnessed a formidable development of administrative bodies and institutions that, for obvious reasons of fairness (equal application of the laws to all citizens) progressively evolved toward acquiring a status close to that of the courts (*i.e.*, independence).[23]

Guarantees of separation of functions. The French concept of separation of powers consists of separating the functions of government, distributing them among distinct organs, and making sure that each of them stays within the limits of the function entrusted to it. The major difference from the American approach is this: the encroachment of one organ over another is not remedied by the counterforces represented by ''the necessary constitutional means and personal motives [given to those who administer each department] to resist encroachments of the others,''[24] but rather by independent organs. Three organs play a crucial role in separating legislative, governmental, judicial, and administrative

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> the whole area of its territory an even more densely packed, complex network, with branches that are substituted for existing local bodies or that assimilate them. Statistical services keep it up to date with all that is happening in the innermost parts of the organism. The mechanism of international relations—by this is meant diplomacy—itself assumes still greater proportions. As institutions are formed, which like the great establishments providing financial credit are of general public interest by their size and the multiplicity of functions linked to them, the state exercises over them a moderating influence.

E. Durkheim, *The Division of Labor in Society*, [Translated by W. D. Halls], The Free Press, 1984, pp. 167-168.

[22] E. Laferrière, *Traité de la juridiction administrative et des recours contentieux*, vol. II, 1896, Paris, LGDJ, reprint 1989, p. 33 (emphasis added).

[23] This was achieved with the development of a civil service recruited through a merit system instead of a spoils system.

[24] Letter no. 51, *The Federalist*, *supra* note 10, pp. 321-322.

functions: the Constitutional Council (*Conseil Constitutionnel*), the Council of State (*Conseil d'Ėtat*) and the *Tribunal des Conflits*. Their in-depth analysis pertains to the field of constitutional law. Suffice it to say that the Constitutional Council is in charge of monitoring Parliament,[25] the Council of State oversees organs in charge of executive functions, whether governmental or administrative (president of the republic and government),[26] and the *Tribunal des Conflits* watches over the judicial authority.[27]

The technique of separation of functions as a guarantee against the abuse of power has been used extensively in French public law; it is not limited to the constitutional distribution of powers between State departments. It is also applied within the administrative functions as a means of preventing abuse of authority. For instance, the separation of functions pertain to the following techniques: in matters of public accounting, the separation between the officials who spend and those who pay; in police matters, the separation between the judicial police that assists the judicial department and, thus, is in charge of individual liberty, which is under the protection of ordinary courts as a matter of constitutional rule,[28] and the administrative police in charge of regulation and

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[25] The Constitutional Council makes sure that Parliament limits itself exclusively to the legislative function and does not encroach upon judicial functions (for instance, in retroactively giving effect to State actions invalidated by the courts; CC, Dec. 80-119 DC, July 22, 1980, *Validations d'actes administratifs*, Rec. 46) or abandon its legislative function, but rather exercise it in its plenitude (legislative delegations are subject to strict conditions). It also makes sure that Parliament does not displace the limits between judicial and administrative functions; the judicial authority has reserved powers, it is in charge of individual liberty, and Parliament may not delegate to the police the determinations to be made on confinements; conversely, Parliament may not attribute to the judicial authority review of State actions that call into question the exercise of prerogatives of public authority (CC, Dec. 87-224 DC, January 23, 1987, *Conseil de la concurrence*, Rec. 8).

[26] The Council of State exercises its power of review over executive action either as an advisory body when it vets the bills drafted by the government before they are sent before Parliament, or as a court of law, when it adjudicates between individuals and the State. In both cases, the Council of State makes sure that the executive does not encroach upon legislative or judicial functions.

[27] The *Tribunal des Conflits* is in charge of keeping the judicial authority from adjudicating disputes involving the exercise of functions reserved to the administrative authority and to remain within the limits of its function.

[28] Article 66(2) of the Constitution of October 4, 1958, constitutionnalized a general principle of law in recalling that ''the judicial authority'' (*i.e.*, the ordinary courts) is ''guardian of individual liberty,'' a wording that means (1) that no one can be imprisoned except by a regular sentence handed down by a ordinary court of law, and (2) that criminal law is necessarily part of private law since it is adjudicated by ordinary courts. It is worth noting that article 66(2) addresses individual ''liberty,'' not ''property,''

public services; in matters of justice, the separation between two kinds of judges, the seated magistrates (also called *magistrats du siège*, because they remain seated at trial) who are in charge of adjudicating the case, and the standing magistrates (also called *magistrats du parquet*) who stand up when speaking and who are in charge of suing the accused. All these techniques are applications, in various degrees, of the precepts enunciated by Montesquieu, originally developed for the monarchical age, and subsequently reinvented to fit the needs of the republican age yet without fragmenting the power of the nation, such that the nation remains free to govern in a republican State.

B. THE REPUBLICAN STATE

The entrepreneurial State. The republican State is an enterprise,[29] ''a sort of agency enterprise'' said Maurice Hauriou,[30] at the service of one client, the nation, and in charge of one business, the realization of a social contract. Hauriou is the French scholar who best underlined this quintessential characteristic of the French republican model. The idea of the State conceived as enterprise helps to highlight the key difference separating it from the American model. It illustrates the two completely opposite views of the relationship between the State and the civil society—views so different that the idea of the State as an enterprise is totally foreign to the American model, which regards the enterprise, if any, as the province of society, not the State.

The French republican model as an enterprise entrusted to the State has been built since the Revolution. It is the Revolution that imprinted on the State this characteristic—one that it did not previously possess and that was not in accord with its spirit, at least until the middle of the eighteenth century. Under the old regime, the State had neither the will nor the means to be an enterprise. The will of the monarchical age was ''to maintain everything in its existing order.'' When—due to economic growth, social developments, and the evolution of public opinion—the French monarchy realized the amplitude of reforms to be accomplished, it discovered that it had neither the legal means (the statutes of the king had to respect the law) nor the financial means (the revenue did not defray the costs) to carry out such projects. The royal State was certainly a paternalistic State, as Pierre Legendre accurately noted, and the myth of the father more than that of the policeman is indeed ''the integral myth'' of French

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meaning that, when the public interest is involved and pursued with public authority (as in fiscal matters), property rights may be adjudicated by administrative courts.

[29] I use the term not in the capitalist sense of a business, but to mean any undertaking that is accomplished efficiently by collective action.

[30] See Hauriou, *supra* note 20, at p. 17.

society.[31] But it remained a myth and did not find a concrete expression before the Revolution. Under the old regime, no matter how paternalistic governmental intentions may have been, the truth of the matter is the State did not have the means to put them into practice. Here was the crucial difference between the French monarchy and all the monarchies of Central Europe that had built the well-ordered Police-State. In France, this evolution had barely taken place, because the State was constantly bumping into society and its law of privileges and immunities, each more unequal than the next. In destroying these institutions and tearing apart the feudal structures that enabled them to grow, the Revolution could write on a clean slate. But it was unable to design the State model that would best fit the new civil society it established. It is with the Empire established by Napoleon that the State built itself, or rather, that it rebuilt itself and eventually became—due to the destruction and reconstruction imposed by the Revolution—the enterprise it has never since ceased to be. Since the Revolution, the idea of the State as an enterprise has never been absent from French public law. However, since it came into being, the enterprise has profoundly changed in its objectives, and it is currently undergoing great changes in its methods.

1. Objectives

Original objectives. The French republican model was based on theories of social contract, drawn from different sources, although clearly favoring the theory developed by Rousseau. Rousseau prevailed in the circumstance over Locke because of the absence, in Rousseau's social contract, of reserved rights for the associates—a fact that marks a sharp difference with the English author who inspired the American model. The first form taken by the French republican model in the nineteenth century was that of the liberal republic, which in its own way was also an enterprise, although at the service of limited objectives such as public peace and order and ensuring basic public utilities.

Even when liberal, the republican State has always been characterized by a touch of authoritarianism inherited from the Napoleonic experience. It owes this to the means chosen for rebuilding French society destroyed by the Revolution. Everything happened as if the ends of the enterprise overdetermined the means selected to achieve them. The first objective of the State built after the Revolution was public peace, and even, as Mona Ozouf noted, ''an obsession

[31] P. Legendre, *Histoire de l'administration de 1750 à nos jours*, PUF, Thémis, 1968, p. 204.

with public peace.''[32] This cannot be understood without taking into account the terrible legacy of the Terror, ''that lawless regime, [. . . . .] that anarchy in the strictest sense of the term, which was the dictatorship of Year II,''[33] a national tragedy that ''has poisoned the entire political life in the nineteenth century,''[34] until the consolidation of the republican regime in 1875. These tragic events, the memory of which severely hampered the development of labor unions in France, originally left no choice to the French republican model but to be authoritarian. They stood for the backdrop against which Napoleon established a powerful, coherent, and rational administration, the backbone of French centralization.[35]

Modern objectives. The French republican model is today fully emancipated from its initial authoritarian characteristics, which became less and less necessary as the republican regime was more and more accepted. Satisfaction of the public interest always starts with ensuring public peace; however, it progressively extended to other objectives, particularly at the end of the nineteenth century, and today it embraces great ambitions. The public interest that two centuries ago confused itself with public necessity (what the State decided to carry out had to be necessary and even absolutely necessary) has turned into a much broader concept, social utility.[36] The twentieth century witnessed a prodigious development of public utilities and the coming into being of a so-called public sector so large that its limits became indistinct. It became customary to refer to the ''general interest''[37] instead of the ''public interest.'' This shift in the meaning of ''public interest'' had the effect of downgrading the satisfaction of ''private interest'' in public opinion—private interest being henceforth suspect on account of both public or general interests. As the dividing line between public and private activities became blurred, and the sphere of private autonomy was invaded by public laws, new values emerged, such as real (as opposed to formal) equality,[38] or dignity;[39] others were

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[32] M. Ozouf, ''Esprit public,'' *DCRF* (Idées), p. 179.

[33] P. Nora, ''République,'' *DCRF* (Idées), p. 404.

[34] F. Furet, ''Terreur,'' *DCRF* (Evénements), p. 307.

[35] See J. Ellul, *Histoire des institutions—Le XIXe siècle* (1962), PUF, Quadrige, reprint 1999, p. 164.

[36] See the foreboding analysis of Hauriou, *supra* note 20, at p. 58-59.

[37] See D. Truchet, *Les fonctions de la notion d'intérêt général dans la jurisprudence du Conseil d'État*, Paris, LGDJ, 1977; Conseil d'État, *Rapport public 1999, supra* note 1, at p. 237.

[38] G. Calvès, *Les politiques de discriminations positives*, PPS no. 822 (1999).

[39] D. Roman, *Le droit public face à la pauvreté*, Paris, LGDJ, 2002.

awakened from deep sleep.[40]

The apex in this evolution occurred in 1946, with the unsuccessful attempt to substitute a new Declaration of Rights for the Declaration of the Rights of Man and the Citizen 1789. Instead of a new Declaration, the French people decided to adopt a new text—the Preamble to the Constitution of 1946—which incorporated by reference the Declaration of 1789, and ''further proclaim[ed] as particularly necessary to our times, [some sixteen] political, economic and social principles'' that modified the original conditions of the republican compact in depth (gender equality, right of asylum, duty to work and right to employment, union rights, right to strike, right to collective bargaining, right to education, etc.). Unlike the American model, which is still a liberal model, the Preamble of 1946 changed the French republican model into a social model. Such is precisely what the current Constitution of 1958 provides in article 1 when it defines France as ''an indivisible, secular, democratic and social Republic.'' Being a ''social'' republic, the French model necessarily implies a certain kind of State, the republican State endowed with the means, in particular the means of public authority, necessary to attain the objectives outlined in the social contract.

2. Means

The public authority. The French republican model is that of a strong State, a State asserting itself as a State power and thus ''very naturally'' (as Hauriou noted) called a public authority (*puissance publique*). It is customary in France to designate the State as ''the public authority'' without any other qualification. The term has no equivalent in English. In French, it evokes a vital energy, an irresistible force aimed at one single objective, the common good. The idea of ''public authority'' derives from a broader concept—power. Both terms are obviously very close but need to be distinguished inasmuch as they do not operate within the same fields in public law.

''Power'' is a notion of constitutional law, usually associated with the State. To refer to the power of the State is the same as referring to sovereignty, ''the principle of principles,'' as Olivier Beaud underlines.[41] Insofar as sovereignty implies the power to lay down positive law as an initial lawgiver or, to use a more ancient vocabulary, ''to make law binding on all his subjects in general and on each in particular,'' it is not severable from the power of the State; sovereignty is indeed the signature of State power. And, as there is neither State

[40] M. Borgetto, *La notion de fraternité en droit public français*, Paris, LGDJ, 1993.
[41] O. Beaud, *La puissance de l'État*, PUF, Collection Léviathan, 1994, p. 11.

without sovereignty nor sovereignty without a State, power is inherently possessed by each State. In French law, the power of the State to enact law as an initial lawgiver is exemplified by the legislative power (article 34 of the Constitution) supplemented, when needed, by the power to enact ordinances (article 38).

''Public authority'' is a notion of administrative law that comes into play with enforcement not enactment of the laws. ''Public authority'' is the term usually used in French law to refer to the administration whose function is to ensure the application of laws to all. Why is it referred to as a ''public authority''? The answer lies in this simple fact: the French administration is completely independent from the other authority in charge of the application the laws (*i.e.*, the judicial authority). In France, administration is a public authority because its action is free from any preliminary judicial review by courts of law. By contrast with the common law tradition, in which the individual whose rights are affected may usually invoke equitable remedies in the courts of law to stop the State in its course, the civil law tradition requires individual obedience to the administration (*i.e.*, the decisions of the public official). The ability to command immediate compliance is the true mark of the public authority. Of course, there are remedies—chief among these, judicial review of administrative action—but, as a rule, such remedies always follow after compliance (except in case of emergency procedures)[42] and are never actionable before ordinary courts.

The coming into being of the ''public authority.'' Under the old regime, administrative power was no public authority at all; it was indeed so far from being one that the French kings were fighting endless battles to have it recognized as one. In the provinces, king's representatives (*intendants*) were under the surveillance of the *Parlements* and reviewed with a zeal that put a halt to any administrative action and a check on any attempt to reform the legal system. Every time a right was abridged or a privilege ignored, the victim could sue to be redressed in his rights. As the *Parlements* claimed to be the guardians of the rights and freedoms of the subjects of His Majesty, the laws of the king stumbled everywhere and on everything.

The Revolution was barely one year old when the National Assembly, anxious not to permit its projected reforms to be absorbed and lost in the maze of the judicial procedures, hurried to adopt a law that put an end to the

[42] The most important reform in the principles governing French administrative contentious procedures over the past half century has been a drastic change in the emergency procedures and the possibility for the administrative courts to grant stay orders against administrative determinations whenever it appears that the individual liberty is likely to be seriously and permanently affected.

prerogatives of the judicial power and replaced them with those of the administrative power—henceforth called upon to become the new ''public authority.'' This was the object of article 13 of the *Loi* of August 16-24, 1790, on judicial organization which provides: ''The judicial functions are distinct and shall always remain separated from the administrative functions. The judges, under penalty of forfeitures, shall not disturb in any manner whatsoever the operations of the administrative bodies, nor cite before them the administrators on account of their functions.''[43] The provision was so new, so revolutionary in the French legal system that the judges, ignoring its spirit, did not yield to it, particularly in the fields of national domains, emigration, and especially, taxation.[44] A second attempt was called for. Such was the object of the Decree adopted in 1795 (16 Fructidor of Year III), which prohibited courts from acknowledging any case involving an administrative function under any circumstances. Three years later, Bonaparte locked the system all the way up. Courts and tribunals were forbidden to acknowledge any case involving functions or acts by administrative authorities but also any case involving a public officer. Article 75 of the Constitution of Year VIII (1799) provided: ''The agents of the Government, other than the ministers, can be prosecuted for acts relating to their duties only in virtue of a decision by the Council of State; in that case, the prosecution takes place before the ordinary tribunals.''[45] For three quarters of a century, this provision gave public officers what amounted to blanket immunity from legal suits as a complement to the principle of separation of judicial and administrative functions. The so-called system of ''guarantee of public agents'' was abolished by a legislative Decree of September 19, 1870—unlike the two other texts, which have never formally been repealed from French law.

Separation of administrative and judicial functions: Genealogy of a principle. Since the Revolution, the principle of separation of administrative and judicial functions has been part of French law, notwithstanding all the changes of regimes—including the temporary return of the monarchy after 1815. In 1987, the Constitutional Council made it a constitutional rule by turning it into a fundamental principle recognized by the laws of the republic.[46] The principle of

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[43] F. Maloy Anderson (Ed.), *The Constitutions and Other Selected Documents Illustrative of the History of France (1789-1901)*, Minneapolis, Wilson Co., 1904, p. 35.

[44] See G. Bigot, *Introduction historique au droit administratif depuis 1789*, PUF, Coll. Droit fondamental, 2002, pp. 36 and 39.

[45] Anderson, *supra* note 43, at p. 280.

[46] CC, Dec. 87-224 DC, January 23, 1987, *Conseil de la concurrence*, Rec. 8.

separation of administrative and judicial functions is a founding and foundational principle of the French republican model. How did this come about?

In order to justify the principle that was about to be enshrined in article 13, on March 24, 1790, Thouret (the rapporteur of the bill for reorganizing the judicial system) said,: ''Let's say that, now that this Nation elects its public officers, the ministers in charge of distributive justice must not interfere with the administration of the functions which are not entrusted to them.''[47] Popular election, thus, was apparently the decisive factor for withdrawing cognizance of administrative cases from ordinary judges, in the same manner that it then justified and still today justifies the prohibition on them to review the constitutionality of the laws. Public officers are no longer elected (actually, they have almost never been elected, except for brief periods of time, when election was the norm at the local level), but they have kept the judicial immunities, which, protect them against the judiciary whenever they are exercising prerogatives of public authority. If this means anything, it is that the principle of separation was indeed justified by something other than election.

At the end of the eighteenth century, the principle of separation of administrative and judicial authorities had been known for a long time. It was a pillar of the ''strong State,'' the backbone of enlightened despotism, which was carrying reforms out at a gallop. Maria Theresa of Austria (1740-1780) had made separation of justice from the administration (*die Trennung der Justiz von der Verwaltung*) her pet idea. Put into effect as early as 1749, with a complete reorganization of the administrative machinery of the Habsburg Empire, the idea had nothing to do with the theory of separation of powers advanced by Montesquieu. Its design was not to slow power down, but rather to speed it up. As Werner Ogris explains it,

> Maria Theresa would not have ever dreamt of creating a system of checks and balances that could impose restrictions or limitations on her absolute power. In separating the judiciary from the general administration, she tried to accomplish two things: first, to simply improve efficiency and promptness of jurisdiction, which at that time presented a picture of misery; and secondly (and most importantly) to secure herself more freedom in exercising governmental power outside the judiciary. Why was this? Jurisdiction was thought to be very conservative and excessively reliant on custom.[48]

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[47] *AP*, vol. XII, p. 344.

[48] W. Ogris, ''The Habsburg Monarchy in the Eighteenth Century: The Birth of the Modern Centralized State,'' in A. Padoa-Schioffa (Ed.), *Legislation and Justice*, European Science Foundation, Clarendon Press, 1997, p. 313 s., especially p. 325.

Both in Austria and in France, separation of the judiciary from the administration has been the key, the necessary prerequisite for the entry of old feudal societies into modernity.

Separation of administrative and judicial authorities: A condition of the entrepreneurial State. In removing all the obstacles that the application of the laws used to run into everyday, in freeing the execution of the laws from all the exacting checks aimed at protecting privileges and immunities—all those private rights, in particular property rights, usually held to be vested and often sources of abuses—the principle of separation of administrative and judicial authorities made it possible to carry out the Revolution that overwhelmed French society. It is indeed the Revolution that, on account of both the magnitude of the reforms and the coercion necessary to implement the principles deriving from them, obliged the administration to turn into a ''public authority.'' In order to so, it had to be freed from the judges and endowed with the power necessary to enforce the needed reforms. This latter condition was realized when the Jacobins won over the Girondins, a victory that gave the administration, after its emancipation from judicial oversight, the second springboard of State power—that is, centralization.[49]

The building of State power was pursued by Napoleon Bonaparte and achieved once he was Emperor, with the establishment of a two-tiered administration at the national and local levels—still the backbone of the republican State, although today it is more flexible and less rigid and authoritarian, particularly following the broad reforms carried out in the second half of the twentieth and beginning of the twenty-first centuries (laws of decentralization of 1982 and the constitutional amendment of 2003, which proclaimed the decentralized organization of the republic).[50] It is under the Napoleonic era and with the reforms then implemented that the administration—henceforth a real ''public authority''—turned the State, as Maurice Hauriou has noted it, into an ''enterprise,''[51] a term that conveys the idea of both a design (securing public order, being at the service of the public interest by

[49] On the necessity of centralization to implement the reforms of the Revolution in the best manner, uniformly and all over the territory, together with the prestige gained by this technique all over Europe at the end of the eighteenth century, see J. Godechot, *La grande Nation, l'expansion de la France révolutionnaire dans le monde de 1789 à 1799*, 2nd ed. enlarged., Paris, Aubier-Montaigne, 1983.

[50] Article 1 of the Constitution of 1958, which defines France as ''an indivisible, secular, democratic and social Republic'' now provides at its very end as follows: ''Its organization is decentralized.'' The formula was added by Article 1 of Constitutional Law No. 2003-276 of March 28, 2003.

[51] Hauriou, *supra* note 20, at p. 57.

relying on the police and public services), and the means necessary to carry it out (a powerful administration, free in its course and uniform in its action).

Insofar as the concept of ''enterprise'' as applied to the State at both the national and the local level paves the way to a ''public authority'' in charge of exercising a sort of ''protectorate over civil society,''[52] that concept may be considered in some ways (although for different reasons) a reminder of the well-ordered Police-State that was the cradle of German public law. This is the reason why, in public law, French and German lawyers speak the same language and think the same way. A notable illustration of this common thought is to be found in the European Community treaties that, from the beginning, in the Paris Treaty (1950),[53] then in the Rome Treaty (1957),[54] and eventually in the Maastricht Treaty (1992),[55] made of ''the general interest'' of the Community a lodestar for every initiative and every decision of the members of the European Commission.

The separation of administrative and judicial authorities: Implementation and follow-ups. In removing all obstacles that the application of the laws ran into under the old regime, and in ensuring immediate enforcement of the laws of the republic, the principle of separation of administrative and judicial authorities has securely established the power of ''public authority,'' but it has less happily rendered the individual powerless before the State. The citizen found himself without remedies against the public authority, which inevitably was made its own judge in cases against individuals. ''Nobody can be a judge in his own cause'' being the very first principle of the Western legal tradition; a solution had to be found.

It was eventually found in the Council of State, an institution originally created to exercise legislative functions, and subsequently directed towards adjudicatory functions; the ministers decided that a body principally made of lawyers was the most appropriate place to hear disputes arising between their respective departments and citizens. Thus, the administrative judge was born. Initially, the solutions suggested to the ministers were merely advisory opinions, and the ministers had the final say. Then, on the return of the republicans to power in 1872, the opinions were made mandatory, and they became true decisions, binding on the ministers, in line with the so-called principle of

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[52] *Id*., p. 57.
[53] Article 9(2) of the ECSC Treaty.
[54] Article 157(2) of the EEC Treaty.
[55] Article G(48) of the Maastricht Treaty.

''delegated justice'' (justice was delegated to the Council of State by the law of May 24, 1872).[56]

The administrative judge naturally applied to the administrative enterprise a law tailored to its objectives. This is how the great adventure of French administrative law began, growing with its own body of principles derogatory from the ''common law'' (*droit commun*), a notion that, in the French legal system, means civil law (*droit civil*) as codified in the Civil Code. The administration called for a law fitted to its ends; conversely, the existence of a jurisdiction separated from the judiciary called for a special law. In the end of the nineteenth century, thanks to the return of the republicans to power, the pervasive influence of the notion of solidarity in French national history, and a notable influence of socialist thought in a country nurtured by Catholicism,[57] scholars came to teach that public authority no longer explained the law and, particularly, public law. True, said some scholars, the administration has the privilege not to be subject to the Civil Code and to be subject instead to a special law, outside the common law, for the particular purpose of empowering it to carry out its enterprise. However, the rationale for its exorbitant privileges, the criterion that triggers the application of a status exempt from the common law, applicable as a rule to all other social activities, is not to be found in the concept of power or public authority, but rather in that of the ''public service'' the administration renders to the nation. For scholars, such as Léon Duguit,[58] the concept of ''public service'' had replaced that of ''power'' or ''public authority'' as the criterion of administrative law.

From the standpoint of political and moral philosophy, they were on very solid ground. For it is only too obvious that, in the republican age, the power of the State is meaningful only in relation to its ends, which cannot be anything other than the common interest or the general interest. From the standpoint of legal analysis, however, the problem is that identifying administrative law by the criterion of public service became unmanageable with the growing involvement of the administration in the economic, social, and cultural life of the country. If the criterion was to be applied as a rule to distinguish between judicial and administrative cases (*i.e.*, between the cases to be adjudicated by ordinary courts and those to be decided by administrative courts), it would have meant that a large part of the national economy was henceforth within the jurisdiction of the

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[56] See J. Chevallier, *L'élaboration historique du principe de séparation de la juridiction administrative et de l'administration active*, Paris, LGDJ, 1970, p. 17.

[57] See Ph. Jourdan, ''La formation du concept de service public,'' *RDP*, 1987, p. 89.

[58] See L. Duguit, ''The Law and the State,'' 31 *Harv. L. Rev.* 1, 184-185 (1917); L. Duguit, ''The Concept of Public Service,'' 32 *Yale L. J.* 425, 431-435 (1923).

administrative courts. This situation would have been ridiculous, for the administration need not be always armed with a law outside the common law, even if it is clear that, whatever it does, the administration must always work for the benefit of the nation and, thus, always deliver services that are by nature public. The whole administration, in one sense, is nothing but a bundle of public services; but it need not always be subject to special rules derogatory from the common law (*i.e.*, administrative law). The real question is to identify the situations when this must be the case. After much scholarly debate, agreement was eventually reached that these situations were those where the administration needed to be endowed with prerogatives of ''public authority.'' Thus, public authority became the criterion of administrative law.

The prerogatives of public authority. The concept of the prerogatives of public authority plays a central role in French public law; however its importance must not be overstated. The prerogative of public authority is not a definition of public law, but rather a criterion triggering the jurisdiction of administrative courts. These courts are called upon to adjudicate only the cases that call into question a prerogative of public authority; all other cases fall under the jurisdiction of ordinary courts. Prerogatives of public law are attached to the legal personhood of public law; these are two sides of the same coin; their unity in the concept of ''legal person of public law'' draws a line between the groups that possess that personhood (such as the state, the regions, the cities, or public establishments such as universities or public foundations) and those that do not and have only the simple, ordinary legal personhood (*i.e.*, the legal personality of private law).

The expression ''prerogatives of public authority'' is not crystal clear. It suggests the image of a nebulous sphere inside which common agreement identifies a ''hard core,'' such as tax power.[59] However, no one is able to draw the exact circumference of the circle. For instance, does it include disciplinary

[59] The European Court of Human Rights qualified the fiscal procedures deriving from tax power as the exercise of public authority, involving public law, and, thus, according to the Court, excluding the right to a fair trial in *Ferrazzini v. Italy*, no. 44759/98, in particular § 28. It also applied the same reasoning on the concept of public authority to controversies over the right to stand for election to the National Assembly (*Pierre-Bloch* v. *France*, October 21, 1997, *Reports of Judgments and Decisions* 1997-VI, p. 2223, §§ 50-51) and to disputes between administrative authorities and those of their employees who occupy posts involving participation in the exercise of powers conferred by public law (see *Pellegrin* v. *France* [GC], no. 28541/95, §§ 66-67, ECHR 1999-VIII). In all these cases, the Court decided, in a very controversial manner, that the victim could not invoke the right to a fair trial as laid down in article 6 of the European Convention on Human Rights.

power? One thing is certain: the prerogatives of public authority have the particular characteristics of affecting the rights of private persons (or public persons, such as local collectivities) without their consent, unilaterally and immediately, without a prior hearing before a court. Whenever prerogatives of public authority come into play, the citizen does not lose his right to a day in court, but he cannot expect to have it before the decision is implemented. As a matter of redress, the judicial remedy of course exists (before the administrative courts), but it comes after execution of the laws. Prerogatives of public authority are not the monopoly of public persons; they may occasionally be granted to private persons, under certain conditions.[60] Insofar as they enable their possessors, whether public or private persons, to affect the liberty or property of citizens, they are unanimously regarded as exemplifications of ''the power of domination of the State,'' as the French scholar Carré de Malberg wrote, drawing on the analysis by the great German jurist Jellinek.[61]

According to Jellinek (1850-1911), the true, genuine and exclusive, attribute of the State is not sovereignty, but rather the power of the State (*Herrschaftsgewalt*), the essence of which is domination. To dominate, Jellinek said, is to command in the most absolute manner, with an irresistible power of coercion. It means to coerce, possibly by force, the execution of the given orders without any other limit than self-limitation on the part of he who possesses the power of the State. Jellinek's ideas had a tremendous influence on German public law thinking at the end of the nineteenth century.[62] They crossed the

[60] Whenever private persons are granted prerogatives of public authority, they may enjoy the whole gamut of these prerogatives. The Constitutional Council has decided that the State may not invest private persons with a ''mission of sovereignty'' (CC Dec. 2003-473 DC, June 26, 2003, *Loi habilitant le gouvernement à simplifier le droit*, cons. 19, Rec. 386), a terminology that rules out delegation to the private sector of prerogatives of public authority such as the tax power, the judicial power (prisons cannot be privatized under French law), and probably the power of eminent domain.

[61] R. Carré de Malberg, *Contribution à la théorie générale de l'État*, *op. cit*., vol. II, p. 25.

[62] In particular, they have influenced German administrative law, noticeably the theory of special relationship of public authority (*besonderes Gewaltverhältnis*), which applied to the specific relations between the State and the citizen and which was grounded in the voluntary or coerced integration (*Einordnung*) of the latter in certain services of the former (schools, prisons, army, etc.). The special relationship of public authority was regarded as exclusively pertaining to the internal structure of the administration and, thus, not subject to law, even less to judicial review. The dismantling of the special relationship of public authority became inevitable with the new constitutional foundations of German legal order after World War II. The fundamental rights (*Grundrechten*) that now form the ideological basis of the German legal order necessarily give priority to the individual over the State and, thus, have rendered this old theory obsolete. See 33 BVerfGE 1 on

border and were introduced into France by authors such as Louis Le Fur, Raymond Carré de Malberg, and Hauriou who, despite their criticisms of the ideas' foundations, relied heavily on them in their own disciplines. In particular, the concept of State power was reinvented by Hauriou through the theory of the institution—which was nothing, in his opinion, but a theory of objective self-limitation.[63] It has developed in French law inasmuch as it served as a matrix from which a proper criterion of administrative law was eventually elaborated, administrative law being nowadays defined as the special law that is applied to those administrative activities that are carried out by means of public authority. However, it would be wrong to infer from these developments that the concept of authority subsumes the totality of the means by which the republican State is carrying out its enterprise (*i.e.*, securing the public good).

Res publica*, public law and public authority*. If public law must still be defined as it has been since its Roman foundations (*i.e.*, as the law of the *res publica*), it is too simplistic to define it as the law of public authority. True, in line with Hauriou's theory, it is possible to say that in the republican age, the *res publica* has become an enterprise, provided that it is also concurrently said that the enterprise need not to be as large as it was envisioned after World War II. At that time, the republic created a huge public sector due to the nationalization of all property or enterprises having the character of a national public service or a monopoly in fact. Recent developments in the laws and regulations of the European Union—in particular, the obligation to open the public services to competition—run along these lines. The public sector need not cover almost half of the national economy, as was at one time the case, in pursuance of the ideas of Léon Duguit (leading French advocate of public service) and those of Hauriou (leading advocate of the prerogatives of public authority), but their idea remains sound.

In French public law, the State, the *res publica*, remains an enterprise, the design of a nation, always with great projects to be accomplished, great designs to be fulfilled. What is currently undergoing transformation is the means by which the enterprise is carried out. On the one hand, the system of natural liberty calls for recognition of the fact that private initiative may contribute to the *res publica* and that, consequently, public authority need not be as extensive as was once thought. On the other hand, the State need not be an entrepreneur and may

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execution of criminal penalties; H. Maurer, *Droit administratif allemand* [Translated by M. Fromont), Paris, LGDJ, 1992, p. 173.

[63] Hauriou, *supra* note 20, particularly the foreward written by the author to the eleventh edition of his work and published in 1926, ''La puissance publique et le service public,'' pp. xv-xvi.

either delegate part of the enterprise to the private sector, for the delivery of merchant goods, for example, or enter into partnership with the latter in development plans to revitalize economically distressed areas, for example. These evolutions prove that the concept of public authority is now quite dated as an explanation for the totality of public law. Let us repeat it once more, the concept of public authority explains one side of public law only, that is, the jurisdiction of administrative courts over contentious cases involving the prerogatives of public authority. Law cannot be reduced to cases only, but it is also true that legal cases, because of their particular nature, are still privileged means for discovering the basic trends of a legal discipline insofar as, when properly analyzed, they always allow the principles and main themes that form the fabric of the discipline to emerge. So far as French public law is concerned, there is a main theme that runs like a red thread through the whole fabric. This red thread is the exemplary persistence of the French nation in refusing to let ordinary courts adjudicate public law cases or decide cases involving the *res publica*, even through judicial review.[64]

The cause of this constant refusal has to do with the manner in which the French people think of themselves as sovereign; as explained above, they are sovereign together, not separately. The duality of courts has no justification other than the deep belief that the cases dealing with the *res publica* are not of the same nature as those concerning the multitude of private interests. It exists only because of the belief in a public interest distinct from an aggregation of private interests, a national interest distinct from the numerous private interests of the people. This means that there is something beyond the technicalities of the cases adjudicated by administrative courts. There is the idea that the French people form a nation; and this idea is not without merit, even for an American.[65]

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[64] See the following articles by French leading scholars, D. Truchet, ''Mauvaises et bonnes raisons de mettre fin au dualisme juridictionnel,'' *Justices* no. 3 (1996), p. 53; R. Drago & M.-F. Frison-Roche, ''Mystères et mirages des dualités des ordres de juridictions et de la justice administrative,'' *APD*, 1997, p. 135; Y. Gaudemet, ''Le juge administratif, une solution d'avenir ?'' *Clefs pour le siècle*, Dalloz, 2000, p. 1213.

[65] Commenting upon the duality of ordinary and administrative courts in the French legal system and comparing it to the unitary approach of the American system (the duality, if any, in the United States is between federal and state courts), Robert H. Jackson, far from disapproving of the existence of courts separated from ordinary courts to adjudicate on cases involving the public interest, surprisingly enough expressed the following views:

> The painfully logical French went about the controlling of official action where it affected the rights of the citizen in exactly the opposite manner. They recognized from the beginning that controversies between the citizen and an official, in the performance of his duty as he saw it, involved some different

From any perspective, one is always sent back to the principle that forms the irreducible basis of the French republican model, the principle of national sovereignty. A public law justice distinct from a private law justice cannot be understood as anything other than a direct consequence of this principle, which must henceforth be regarded as the defining characteristic of the French republican model.

> elements and considerations than the contest between two private citizens over private matters. They invested the Conseil d'État with jurisdiction over regulatory bodies and recognized that *droit administratif* was a different matter than private law, as to which the Cour de Cassation was the high court.

R. H. Jackson, *The Supreme Court in the American System of Government*, Harvard University Press, 1955, p. 46.

Conclusion

The irresistible rise of statutory law. For a long time, statutes remained at the margin of the law. No matter how numerous, most statutes did not interfere or interfered very little with the law. In civil law as well as in common law countries, statutes were concerned only with the relations between private persons and public authorities by way, for example, of taxation, health regulations, or police powers. In accordance with a well-established practice, the core of law—that is, the ordinary law that applies between private individuals—was made by the judges held to be ''the oracles of law.''[1]

Contrary to appearances, the Napoleonic codification did not alter this tradition. In casting the foundational rules of private law—particularly in matters of property and contracts, in the mold of statutory law—the codification changed the status of some basic rules (*e.g.,* in family law) from *jus dispositivum* to *jus cogens* (imperative law)[2] thereby unifying the basis of private law made henceforth mandatory for all French citizens. However, at the beginning of the nineteenth century, that statutory framework supported a host of provisions that were optional or additional, not mandatory, especially in the domain of contracts and wills insofar as they applied only failing contrary provisions decided by the parties.[3] In other words, notwithstanding its legislative base, civil law was governed by the so-called principle of the autonomy of will. It was pervaded with a spirit of liberty that was applicable to the whole spectrum of relations between private individuals. Concretely speaking, provided that he did not cause any tort to any one—the notion of ''tort'' was then narrowly construed—the individual was free to do as he chose.

[1] John P. Dawson, *The Oracles of Law*, University of Michigan, 1968.

[2] Public law means in the first place mandatory law, or rules that may not be discarded at will; see L. Ehrlich, ''Comparative Public Law and the Fundamentals of its Study,'' 21 *Columbia L. Rev.* 623, 632 (1921).

[3] On the distinction between mandatory and optional or additional provisions in the Civil Code, see René David, *Le droit français*, vol. I (*Les données fondamentales du droit français*), Paris, LGDJ, 1960, p. 73.

Beginning in the late nineteenth century, statutes and regulations multiplied outside their traditional domain, that is, the police powers of the State (economic and administrative matters). They entered the domain of relations between private individuals. In every legal system of industrialized States, regardless of whether the law was codified, the ''autonomy of the will'' shrank to an increasingly narrow field. Freedom of contract dwindled (the work contract and the insurance contract were most affected). The movement accelerated in the United States with the Great Depression, and it assumed even greater proportions in France after World War II, with the implementation of ''the political, economic and social principles [. . .] particularly necessary to our times,'' as stated in the Preamble to the Constitution of 1946.

It did not take long before private law lawyers sounded the alarm and denounced the invasion of private law by public law.[4] Public law and legislation appeared to them as an incoming tide making its way up the estuaries and into the remotest riverbeds of the private law landmass.[5] They calmed down when they understood that while the flood of public law may well enter the smallest of streams, the private law landmass is not submerged as a result. Even if public law irrigates it as a whole, private law does not disappear, but remains firm and solid as a legal domain, distinct and separate from public law. Neither in the United States nor in France have the numerous public laws (or *lois*) that deal with labor law, consumer law, or banking law turned these legal fields into branches of public law. The same can be said of the public laws that legislate on matters of property, leases, or mortgages, or those that apply to relations between debtors and creditors: none of them has made property or contracts migrate to public law. How does this come about?

The explanation lies in this one fact: the commonly received definition of the distinction between private law and public law is mistaken. It is an error with high stakes to define public law as the law that applies to the relations between the State and the citizens when public laws regulate the everyday relations

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[4] See, for the United States, Roscoe Pound, ''Public Law and Private Law,'' 24 *Cornell L. Q.* 469 (1939), and more recently, Grant Gilmore, *The Ages of American Law*, Yale University Press, 1977 p. 95, also G. Calabresi, *A Common Law for the Age of Statutes*, Harvard University Press, 1982, p. 5; for France, where the debate focused on the relation between the statute and the case-law in the sources of law, see Henri Mazeaud, ''Défense du droit privé,'' D. 1946, chronique, p. 17; more recently, *La création du droit par le juge*, A.P.D., no. 50 (2007).

[5] In the same way, so to speak, that Lord Denning was to describe much later the effect in England of European law, which he compared to an ''incoming tide making its way up the estuaries and into the remotest riverbeds of the British isles,'' in *H.P. Bulmer Ltd.* v. *J. Bollinger SA* [1974] 1 All E.R. 1226, 1231.

between citizens. The distinction between public law and private law must necessarily have another meaning than one that is purely formal, or organic, that is, based upon the quality of the persons or organs involved. A return to the origins of the distinction in Roman law may shed some light and unfold the contradiction.

The original meaning of the distinction between private law and public law. As enunciated in the Digest, the distinction between public law and private law was never intended to divide law into two domains, public law and private law, opposed to each other in practice, if not enemies by nature. When Ulpianus reminded the freshly made Roman citizens that there was, on the one hand, public law, and on the other, private law, he was referring not to rules, but rather to positions, stances, or viewpoints, in the study of law. ''Of this subject [*i.e.*, the study of law] there are two positions, public and private law,'' he said (''*Hujus studii duae sunt positiones, publicum et privatum*.'') In other terms, the distinction between public law and private law was originally meaningful only for the purpose of studying the law. In order to understand the true meaning of the distinction, it is necessary to go back to the Roman concept of law.

Law, for the Romans, was not a matter of rules but of art. Law was the art of goodness and fairness (*ars aequi et boni*); in other words, law was justice. The word justice (*justitia*) came from *jus*, and *jus* for the Romans was not the rule, but the fair share attributable to every one, the *id quod justum est*. Attribution to everyone of his fair share—said Ulpianus in substance above—requires that the student of law always take into account two positions, or view points, the public and the private. The distinction recalled Aristotle's classification of the kinds of justice: (1) general justice and (2) justice as a particular or specific virtue. The first is a complex of rules formulated by the city-state as legally mandatory for the members of the community; the second is the set of rules that govern relations between the members of the community.[6] The distinction made by Ulpianus sounds quite natural if one keeps in mind its historical context. The problem for him was to justify a tax, that is, in legal, not financial terms, the fair share that had to be given to the *res publica* of imperial Rome: religious affairs, the priesthood, and the affairs of state.

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[6] P. Vinogradoff, *Outlines of Historical Jurisprudence*, 1920, p. 45. Vinogradoff adds: ''Justice as a particular or specific virtue [. . .] falls into two classes (a) Distributive justice and (b) Corrective justice or legal redress: (a) covers all cases in which an answer is given to the question as to what one person can claim on the ground of just distribution as against others; (b) covers all function of justice directed towards redressing wrongs as between members of the State.''

Loss of meaning of the distinction between public and private law. Everything in Ulpianus's memorable words that founded the distinction between public law and private law can be reduced to this: real justice will never be reached if the two positions, public law and private law, are not considered in studying the law. True justice requires the taking into account of the distinction between that which belongs to everyone, as a matter of public interest, and that which belongs to each one in particular, as a matter of private concern. The necessity of taking into account the two points of view when studying the law bears witness to the importance of religion in Roman society. Like all ancient societies, Roman society made no distinction between public and religious affairs. Christianity, with its separation between religious and political affairs, and the much later-Reformation, accompanied by individualism and the secularization of societies, radically changed the meaning of the distinction. One can take a measure of the transformation by the simple fact that where the Romans used to consider public and private law as complementary terms, moderns tend to view them, rather, as radically antagonistic.

The idea of natural complementarities between public and private law, of a natural harmony between the community and the self, collapsed in the monarchical age, for reasons that form the backbone of the first book of this work. Logic would have called for their reunification in the republican age, but this did not happen, or happened only partially, as the second book of this work indicates in counterpoint. One of the two terms is always under suspicion: either it is public law or it is private law. The American model is inclined to take the statute as usurping individual freedom, whereas the French model tends to regard private rights as obstacles to the full realization of public rights. Resolving the inevitable tension between the two, as Beccaria said, is the task of the public law lawyer.[7]

The separation between public and private goes back, as previously said, to the Renaissance, when, due to the revolution of Protestantism, a new mode of thinking carried the day. The autonomy of the self asserted itself through the right to freedom of conscience, the individual emerged as a ''thinking self'' out of the undifferentiated medieval community, and the right to a private sphere, distinct and separate from the public sphere, marked the entry into modernity. The unity of the common good was replaced by a duality between the public good and the private good (or rather, the multitude of private goods). Common

[7] ''It is for the student of law and the state to establish the relationship between political justice and injustice, that is, between what is socially useful and what is harmful.'' Beccaria, *On Crimes and Punishments and Other Writing,* ''To the Reader,'' Cambridge University Press, 1995, p. 5.

interests were on the wane; instead, private interests, distinct and separate from the public interest, asserted themselves and demanded to be detached from it, due to individualism, the modern form of liberty.

The separation between the private and the public was a landmark in the evolution of Western philosophy. As a prerequisite to freedom, that separation represents the distinctive criterion of modern society. It is, therefore, particularly unrealistic to advocate a return to the former medieval ''community'' that preceded it (*Gemeinschaft* as opposed to *Gesellschaft*).[8] In the modern age, men are bound to form a *societas*, not a *universitas*. Otherwise, men would no longer form a ''modern'' society, so to speak. Separation between public and private marks a point of no return. This is set forth in simple, albeit illuminating, terms in article 5 of the Declaration of the Rights of Man and the Citizen: ''The *loi* (statute) may prohibit only those actions which are harmful to society.'' In other words, what has no harmful effect on society, what is purely internal to the self, the ''secret garden'' of the individual, is not an object of legitimate concern for the public or the State. The difficulty is that what was originally (and should have remained) a principle of sound separation between private and public law has turned into opposition, if not a principle of antagonism. The upshot is that public law and its quintessential expression, the statute, are regarded as enemies of private law. The paths toward this complete denaturation of the meaning of the separation between private and public law started in the nineteenth century, but they followed quite different courses in Europe and in United States.

The European path. In Europe, the conquest of parliamentary assemblies by the popular classes gave formidable impetus to the statute. In the nineteenth century, public law was turned into a great offensive because the statute was considered as an instrument of social change, a tool for achieving the public good in line with the traditions of the monarchical age. At the same time, the defense of private law took the form of a counteroffensive against this movement with, on the continent, the theory of subjective rights born out of the work of Savigny as a reaction against objective law (the statute), and, in England, the judicial canonization of the precedent (*stare decisis*), which the House of Lords opposed to legislative invasions of the common law by a sovereign Parliament. Although carrying out different legal techniques, the two defensive reactions shared the same spirit. Both were the veiled but resolute expression of the resistance of private rights to the statute (*loi*), the instrument of

[8] The celebrated opposition between community (*Gemeinschaft*) and society (*Gesellschaft*) made by the German sociologist F. Tönnies [*Gemeinschaft und Gesellschaft* (1887)] was intended to serve as a scientific criterion in the study of order in societies over the ages, not to be used as a political manifesto.

public law. To use more political terms, both expressed, in the domain of law, the conservative ideas of the counterrevolution launched in Germany and England against the ideas of the French Revolution.

Today, the resistance has come to an end; the fight of the subjective right against the objective law has only an historical interest.[9] The key factor in the pacification of relations between private rights and public law seems to have been the development of judicial protection for subjective rights by way of judicial review of statutes against a ''higher law.'' Sometimes, this higher law is of a constitutional nature—judicial review of statutes against the constitution is not, however, very developed in Europe (at least, in comparison with the United States) insofar as, when it is effective, parliament often has the last word. Sometimes, this higher law is treaty law—European States are more open to international treaties than the United States (they more readily accept an effect on domestic law, as all European States are parties to the European Convention on Human Rights, and subject to the jurisdiction of the Court). The crux of the matter is that, in Europe, the statute is no longer regarded as the enemy of the public good because it is ''sovereign'' only in the respect of universal values. Insofar as this element allows reconciliation between the private and the public sphere, it enables the idea of *res publica*—the idea that certain things must be held in common and be subject to a law special to it, that may imply sacrifices—to take shape and, thus, to be legitimate.

The American path. In the United States, the statute never enjoyed the privileged status of its European counterpart because, by contrast with the European tradition, it was never considered as an instrument of public good. From the outset, Americans chose to trust private rather than public initiative to bring about the public good.[10] To exploit the resources of their immense country, they bet on the individual not the State; they sanctified the contract not the statute.[11] The choice was made early, at the end of the eighteenth century, when they rejected taxation as a means to promote national wealth. Public good in the United States was realized through private, not public, law.

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[9] The terms of the struggle between subjective rights and objective law are clearly reported by J. Ghestin, G. Goubeaux & M. Fabre-Magnan, *Droit civil, Introduction générale*, LGDJ, 1994, pp. 126-155.

[10] This is the running theme of the great classic by Morton J. Horwitz, *The Transformation of American Law: 1780-1860*, Harvard University Press, 1977.

[11] The landmark case on the sanctity of the contract is *Trustees of Darmouth College* v. *Woodward*, 17 US (4 Wheat.) 518 (1819), by which the Supreme Court, in refusing to allow a legislature to modify a contract in force in the slightest manner, operated a sharp distinction between the private and the public, forbidding the latter to interfere with the former.

In turning private law into an instrument of public good, Americans put it on a pedestal where it remains. Still today, recourse to private law—especially, the principles of property law—to promote economic growth is regarded as key to success.[12] What must be clearly understood at this point is this: private law in the United States is the common law, that is, the unwritten law deriving from the principles of reason and enunciated by judges in the cases brought before them. In the face of this private law—largely freed from the English common law to better serve the economic interests of the country—public law makes a poor showing, not only because it comes from a politics that is never above suspicion of corruption, but also because it is considered as inherently unable to do as well as private law. The latter is actually entirely subordinated to the former by means of judicial review, which amounts to an evaluation of the public good not with universal values, but rather with what Marshall termed ''the general principle of *our* political institutions.''[13] Here, the possessive pronominal adjective is a key element insofar as, among the general principles of American political institutions, there survives the medieval idea of a ''higher law,'' a law originating ultimately in God, securing everyone's right, reigning above the power, enunciated by the judges in the cases submitted to them. That higher law has nowadays found a secular replacement with the Constitution.[14] Like the common law, the Constitution originates in a higher power (The People); it secures everyone's rights, it reigns over the government, and it is ''what the judges say it is.''[15]

The judge and the public good. Immersed in a ''legal consciousness''[16] nurtured with idealism, the statute in the United States never triumphed over the old medieval mysticism of an eternal law, unsullied by the act of man. By

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[12] See World Bank *Doing Business 2004: Understanding Regulation*, in particular p. 93 ''Focus on Enhancing Property Rights,'' available at http://www.doingbusiness.org/Main/DoingBusiness2004.aspx.

[13] *Fletcher* v. *Peck*, 10 US (6 Cranch) 87, 139 (1810).

[14] On the tradition of higher law in United States Law, see Edward S. Corwin, ''The 'Higher Law' Background of American Constitutional Law,'' Part I and II, 42 *Harv. L. Rev.* 149-185, 365-409 (1928-29).

[15] In the Middle Ages, Englishmen could have said of the common law exactly what Charles Evans Hughes said once of the Constitution in a much famous quote: ''We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and of our property under the Constitution,'' in *Addresses and Papers of Charles Evans Hughes*, New York and London, 1908, pp. 139-140; 1916, pp. 185-186.

[16] On the concept of ''legal consciousness,'' see Duncan Kennedy, ''Toward an Historical Understanding of Legal Consciousness: The Case of Classical legal Thought in America, 1850-1940,'' 3 *Research in Law and Sociology* 3-24 (1980)

contrast to the unity achieved in Europe between law and statute, due to the concept of sovereignty, the statute in the United States remained separated from the law. The reason is that the somber and disillusioned attitude Americans entertain *vis-à-vis* power—assimilated to sin and the fall—makes it inevitable that the only ''true'' law is not, cannot, and will never be human law, but rather the higher law, that law formerly given by God (in the colonial age, the Bible was an extraordinarily fecund source of inspiration for New Englanders in the drafting of their laws)[17] and today ordained by the people (''*We The People*''). In the legal culture of the United States, religion never completely separated from the law.[18] The upshot is that the public good, if it exists, can come only from that higher law close to God, which, just like the common law in the Middle Ages, can only be enunciated by a court of law.

The question is obviously whether the judge can enunciate the public good. Clearly, there are two positions on this question as exemplified by the crucial fault between the French and the American models on the role of judges in ''extensive and unmixed,'' or modern, republics. In proclaiming that ''limits [to liberty] may be defined *only* by the statute (*Loi*)'' (article 4 of the Declaration of the Rights of Man and the Citizen, 1789), the French abandoned the old medieval tradition of the judges as sovereign expounders of the law.[19] By contrast, the Americans—as early as the Philadelphia Convention, and without paying the slightest attention to the fact that the British had abandoned that tradition at the glorious revolution[20] —kept in line with the ancestral tradition of the common law, based on the idea of a law ''higher'' than positive law and pronounced by the judges. Mesmerized by the blindfold over Themis's eyes, which they apparently construed as living evidence of impartiality, they chose ''to entrust the keeping of the equilibrium of the Federal Union to a court rather than to the Congress.''[21] The result is that the United States has ''the most legalistic system of government in the world with the judicial power penetrating

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[17] A. de Tocqueville, *Democracy in America* [Translated by H. C. Mansfield & D. Winthrop], University of Chicago Press, 2000, p. 38, Tocqueville refers to ''the strange idea of drawing from sacred texts'' to compose penal laws.

[18] See C. Greenhouse, *Praying for Justice*, Cornell University Press, 1986; C. Greenhouse, B. Yngvesson, & D. Engel, *Law and Community in Three American Towns*, Cornell University Press, 1986.

[19] See J. H. Merryman, ''The French Deviation,'' 44 *AJCL* 109 (1996).

[20] See Chapter 4, Section A.

[21] R. H. Jackson, *The Struggle for Judicial Supremacy, A Study of a Crisis in American Power Politics*, New York, A. Knopf, 1941, p. 9.

and legal philosophy governing [the] whole national life.''[22] In choosing the courts to define the public good in the last resort, Americans have fated themselves to an indefatigable legal idealism about the capacity of the judicial branch to bring about common happiness—an idealism that has caused them many disappointments in the course of their history.

In the beginning of the twentieth century, the school of legal realism initiated by Oliver W. Holmes put American legal idealism to rest, at least for some time. Starting with the Great Depression and the New Deal crisis, American judges acquiesced in the common sense idea that forms the backbone of positivist legal thought, namely, that, in the republican age, law is not—and cannot be—as Holmes forcefully said, ''a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign.''[23] In other words, for Holmes, law is the voice of the sovereign people and their representatives. By the end of the 1930s, the statute thus overthrew the judicial opinion in the enunciation of the public good, becoming recognized as the best instrument to bring it about. Better, judges consented to put themselves at the service of lawmakers, so to speak, passing along the entire legal system the consequences of the will of the sovereign people. In short, American judges converted themselves to positivism. But this period did not last.

As early as the 1950s, believers in the traditional methods of adjudication charged that legal realism empowered the courts to carry out the achievement of political ends by judicial means—effectively legislating from the bench. A search for ''neutral principles,'' buttressed by the deep conviction that they were discoverable—in a nutshell, the spirit of idealism—came back at full gallop.[24] Disguised under various schools of thought emanating from diverse inspirations and methods,[25] legal idealism can be encapsulated by a single idea: ''true'' or ''fair'' law is not, and cannot be made by man. The upshot is that the statute, which is ''human'' law, fallible by nature, has been gradually sent back to its

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[22] *Id*., p. 10.

[23] *Southern Pacific Co.* v. *Jensen*, 244 US 205, 222 (1917).

[24] The leading article that started the movement of dissatisfaction with legal realism—which culminated in the leading case *Brown* v. *Board of Education of Topeka*, 347 US 483 (1954) in which the Court for the first time decided a case entirely upon a principle of reality (''Separate educational facilities are inherently unequal,'' p. 495)—is by H. Wechsler, ''Towards Neutral Principles of Constitutional Law,'' 73 *Harv. L. Rev.* 1 (1959).

[25] To name a few, such is the case with the following movements in legal interpretation: critical legal studies of Marxist inspiration, law and economics driven by ultra liberalist economists, if not libertarians, and originalism inspired by conservative philosophy.

traditional inferior and subaltern position in American legal culture, and the United States still ignores public law as the law of the *res publica*. Hegel was right when he said that the United States formed a ''constantly evolving State.''[26]

The American peculiarity with the res publica. The logic of transition from the monarchical age to the republican age was to transform the basis of public law. Concretely speaking, it was to lead legislatures to legislate only for the public interest and to incite courts to adjudicate disputes always by taking into account both dimensions of public and private law. This did not happen or happened only partially. A divide between two legal systems has nowadays taken place. It does not run, as explained by those who advocate recourse to private law as the test for good governance, between civil law and common law systems,[27] but rather between, on the one hand, the United States and, on the other, Europe, if not the rest of the world. In Europe, public law, that is, the law of public interest that comes under the form of statutory law—the law of the *res publica*—has now found its place in the legal system. Its enforcement is organized more or less strongly depending on the States. Courts make it their duty to apply it, as far as possible, in a manner agreeable to both public and private interests. Its existence is not called into question on a daily basis.

In the United States, public law is still struggling for legitimacy. Statutory law is regularly put into question; public action stumbles every day. In other terms, belief and confidence in the public interest comes and goes. The *res publica* is neither stable, nor permanent. There are times in history where it glows as a shining sun, that is, periods when the Constitution is not construed as limited to the protection of certain basic liberties and, instead, is interpreted as having created ''a representative form of government capable of translating the people's will into effective public action.''[28] The New Deal or the Civil Rights eras are cases in point. In many ways, Reconstruction, too, may be an example of a very strong *res publica*, but not in its representative form. During these periods, the federal government passed important legislation dealing with emancipation, poverty, civil rights, the environment, health and safety, etc. But

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[26] Georg W. F. Hegel, *La raison dans l'histoire*, Bibliothèques 10/18, Plon 1965, p. 240.

[27] As argued in the famous article by R. La Porta, F. Lopez-de-Silanes, A. Schleifer & R. Vishny, ''The Quality of Government,'' 15 *Journal of Law, Economics and Organization* 222 (1999).

[28] *Federal Maritime Commission* v. *South Carolina State Port Authority*, 535 US 743, 787 (2002) [dissenting opinion of Breyer, J., with whom Stevens, Souter, and Ginsburg, JJ., joined]

these periods do not last. Sooner or later, they come to a close and turn into mere parentheses in American history. Private interests then win the day and the idea of the public interest fades away. In other words, the *res publica* in the United States is cyclical. What is it that sustains these cycles?

The common explanation—the most widely held—is to link the intermittent nature of the *res publica* in the United States to the uniqueness of its governmental structure conducive to a conception of public interest as being a constant work in progress. In the United States, the *res publica* is not a thing but a process, so to speak; the public interest is not the result, but rather the political process made possible by the ever whirling wheels of federalism and the nuts and bolts of the separation of powers. The problem with this systemic approach is that it begs the question, for it fails to explain why governmental structures were purposively built like this, that is, with a view toward turning the *res publica* into ''the American uncompleted quest.''[29] The answer, I believe, has to do with the nature of the sacred. There is no such thing as a *res publica* in a society where the sacred remains a matter of purely private concern. In the modern republican age, freedom of conscience and religion compels us to recognize that the sacred is of such a nature; but the crux of the matter is that it cannot be only that. Rousseau captured this well: ''No State has ever been found without a religious basis.''[30] The French republican model reconstituted this religious basis—what Rousseau called the ''civil religion''—with the concept of ''*laïcité*,'' an untranslatable concept that is the cement of the French *res publica*. What *laïcité* means in the first place is a sharp division between the private and the public: the Sovereign—''We, The People'' or the Nation—has no authority beyond the limits of public expediency, nor does the citizen have authority beyond the limits of private conscience. In the United States, where this separation is unstable,[31] the public interest compels the citizens to eternal debate about the nature of the sacred.

The future of public law. At the beginning of the twenty-first century, public law is on the wane. The global age is driven by private law and private interests,

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[29] R. N. Bellah, R. Madsen, W. M. Sullivan, A. Swindler & S. M. Tipton, *Habits of the Heart, Individualism and Commitment in American Life*, University of California Press, 1985, p. 252.

[30] J.-J. Rousseau, *The Social Contract* [Translated by G. D. H. Cole], Book, IV, chap. 8, available at http://www.constitution.org/jjr/socon.htm. For an application of Rousseau's idea to the United States, see Robert N. Bellah, ''Civil Religion in America,'' 96 *Daedalus* 1 (1967).

[31] See C. Greenhouse, ''Separation of Church and State in the United States: Lost in Translation,'' 13 *IJGLS* 493 (2006).

as exemplified by the extraordinary success of the jurisprudence of law and economics, that is, the calculation of the cost of everything to the exclusion of more unquantifiable values. In the United States, the *res publica*—alive and well only a few decades ago—has become an increasingly abstract concept, first, with deregulation the effect of which was to transfer to the private sector large pieces of the *res publica* patiently put together since the New Deal, and, second, with the ongoing debate over federal powers against which member States claim the ''umbrage'' of private law to protect themselves (sovereign immunity, and core governmental functions). In France, public law is likely to undergo transformations as the new government elected in 2007 engages in globalization to a much greater degree than before.

The decline of public law at the domestic level coincides with the rise of globalization. The latter is indeed as much a cause as it is an effect of the former inasmuch as the more global the world goes, the more private it goes. This does not mean that no good will ever come from a globalized world. Rather, with so many common dangers, especially in environmental matters, it is unrealistic (if not irresponsible) to expect that ''international peace and security''—the very basic substance of the *res publica* at the world level, as actually enunciated in the first article of the Charter of the United Nations—will arise as by magic from private law principles (*i.e.*, the market). No society can endure without ''some'' public law, even—and, perhaps, even more—if it is not a State.

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