The enduring difficulty of abuse of power. Whether it be within the hands of one individual, or of thousands of them, or of some chosen among the thousands, sovereignty remains identical and does not change. In its purest form, sovereignty is always the ''supreme, irresistible, absolute, uncontrolled authority'' referred to by Blackstone.[13]

In the monarchical age, only England succeeded, as we saw it, in fending off the danger and limiting sovereignty by establishing the parliamentary institution of the ''King in Parliament,'' but it could manage to achieve that result only by using the estates of the society of the monarchical age, that is, the orders that organized themselves around the central figure of the king to form with him the mixed government.[14]

The republican age did not make sovereignty inoffensive. Whether it found an expression in the triumph of individual egoisms in the young American republic after the Declaration of Independence, in the populist laws then enacted and in the demagogic measures adopted, or whether it made its terrible force be known by the massive executions, the confiscatory laws, and the expedited judgments that marked the Terror, sovereignty proved to be as dangerous, if not more so, in the republican age as it was in the monarchical age. How do we stay away from such excesses; how do we limit sovereignty and make sure that it will always work for the public good when the resources of the monarchical age (*i.e.*, the social structures), no longer exist? This is the first question to be solved in the republican age.

The res publica *in the republican age*. As in the monarchical age, public law in the republican age has built itself upon the concept of sovereignty, and its object is still the public good. Sovereignty has not disappeared; but the sovereign has changed. It is no longer a monarch who is sovereign, but the

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[13] W. Blackstone, *Commentaries on the Laws of England, A Facsimile of the First Edition of 1765-1769*, 4 volumes, Chicago & London, University of Chicago Press, 1979, p. 49, available at http://www.constitution.org/tb/tb-0000.htm (edited by St. George Tucker).

[14] The mixed government that constituted the excellence of the British system of government entered into periods of great turmoil when its moderating element, the House of Lords, lost its influence in the interplay of balance of powers, due to the increasing democratization of society and the growing obsolescence of aristocratic forms of government. The reforms of 1911 (loss of the power to reject the budget) and of 1949 (loss of the power to durably oppose bills from the Commons) together with a new constitutional convention, the so-called Salisbury convention, by which the House of Lords in 1945 agreed that it would be constitutionally wrong for it to prevent the manifesto commitments of the elected Government from being enacted into law, marked a gradual, evolutionary, but ineluctable decline of the mixed government.

society, and the entire question under consideration is what to do to ensure that this new sovereign always acts for the public good. The question arises under a much more complicated context than before, for at least two reasons.

The first difficulty is that a modern republic, made of citizens with lots of divergent interests, all of them thrown in the race for a rapid maximization of profits in a highly competitive capitalistic economy, can no longer take refuge in the resources of the small republic of the city-state, which lived under an agrarian economy and which, because of its size, formed a community of men closely united by similar interests and values, in particular the search for virtue and the public good. The second difficulty is that, insofar as it is grounded in the equality of conditions between men, the modern republic can no longer make use of the estates of monarchical society, the moderating factors of the mixed government.

As James Madison, a founding father of the American republic, so well understood, the dilemma of the republican age is to find ways of ensuring the public good in societies that are ''unmixed and extensive republics''[15] : ''unmixed,'' because they are no longer socially mixed, they no longer embody the estates that could be mixed and balanced against each other in the mixed government; ''extensive,'' because these republics occupy large territories, making the direct democracy of the city-state inaccessible to them for practical reasons. The core dilemma of modern public law is that, because of their social fabric and their size, these new republics in their quest to attain the public good have the help of neither the estates that formed monarchical society and the basis of the mixed government nor the virtue that was the soul of the small republic.

Two republican models. Two answers were given to the dilemma; each of them stands for a republican model. The first answer is that of the United States. Quickly found, as early as 1787, only ten years after the war against England, the answer has remained the same for two centuries; the American republican

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[15] The expression is embodied in Letter no. 14 of *The Federalist*. *The Federalist* (short name for *The Federalist Papers*) is a collection of eighty-five letters (editorials in modern parlance) written by three authors, Alexander Hamilton, James Madison, and John Jay, and published in various newspapers of the State of New York in 1787-1788. The point of these writings was to convince the people of New York of the excellence of the Constitution adopted the year before in Philadelphia and to incite them to ratify the text. A positive vote by that State was regarded as crucial for the future of the Constitution. We are using the following edition: A. Hamilton, J. Madison & J. Jay, *The Federalist Papers*, C. Rossiter Edition, Mentor Book, N.Y, 1961, p. 101, available at http://www.yale.edu/lawweb/avalon/federal/fed.htm.

model today exercises an exceptional influence throughout the world. The second model is that of France. Invented just two year later, in 1789, it has developed on very different foundations, in particular in the answer it gives to the problem of representation—the opposite extreme of the American model. Of course, in both cases, we are dealing with models only—generalizations that are, of necessity, painted with a broad brush—that is, ideal types, which in the long run have evolved and adapted to various crises in human affairs. However, as models, they still influence how we think about the public good, how to conceive, protect, and maintain the *res publica* that unites men. Both models stand for the benchmarks that help us to understand where contemporary public law comes from and where it is going.

Part C
The American Model

The State and society. In the United States, the State is not ''a power in a way external to the body social.'' The country wanted to break away from the tradition of the monarchical age characterized by a sharp distinction between the State and civil society. The first to have understood it was Tocqueville, when, in *Democracy in America*, he contrasted the United States and these European countries ''where a power in a way external to the social body acts on it and forces it to march on a certain track.'' He added:

> Nothing like this is seen in the United States; there society acts by itself and on itself. Power exists only within its bosom; almost no one is encountered who dares to conceive and above all to express the idea of seeking it elsewhere. [. . .] The people reign over the American political world as does God over the universe. They are the cause and the end of all things; everything comes out of them and everything is absorbed into them.[1]

Because it rejects any distancing between the State and civil society, the American model is characterized by an absence of any formal distinction between public law and private law, and public law does not receive any particular fate. To be sure, in republics with extensive territory, a perfect match between the State and civil society is more an ideal than a reality. That said, there actually is in the United States a distinction between the State and civil society, between the governed and the government, and thus a difference between a public and a private interest. However, the distance between them is small, or at least tends to be minimal. One consequence of this situation is that it is impossible to apply to the United States the theoretical analysis of the French legal scholars in the beginning of the twentieth century who claimed that sovereignty was born in the State and then, subsequently, communicated to the

[1] A. de Tocqueville, *Democracy in America*, [Translated by H. C. Mansfield & D. Winthrop], University of Chicago Press, 2000, I, I, chap. 4, p. 55.

citizens.[2] In the United States, sovereignty was born first in the people and was then communicated to the State, or, to put it differently, in the United States, the people are the State; they make it, so to speak.[3]

The immediate proximity between the people and their government is the bedrock principle of American public law; it derives from the American conception of representation, based on popular sovereignty (Chapter 5). The rather negative consequences of this system of representation for the public good are alleviated by a particular conception of separation of powers, which forms, after popular representation, the second principle of the American system of government and is the backbone of the idea of limited power (Chapter 6).

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[2] See, for instance, R. Carré de Malberg, *Contribution à la théorie générale de l'État*, 2 vols, 1920, reprint CNRS 1962, vol. II, p. 166.

[3] The United States is, par excellence, the model of the ''popular State'' described by Sir Henry Summer Maine in his work of the same name: H. S. Maine, *Popular Government: Four Essays*, London, J. Murray, 1890.

Chapter 5
Popular Sovereignty

The American conception of the sovereign. In the United States, the sovereign is the people, the actual people: the people in their everyday reality made of hundreds of millions of men and women living in fifty states; the people made of immigrants coming from all five continents; the people made of all races, all religions, all beliefs, all origins; in short, the people in their entire diversity. As it is conceived in the United States, the sovereign could not be other than these real people. This means, as Justice Jackson put it in *West Virginia State Board of Education* v. *Barnette* (1943), that: ''There is no mysticism in the American concept of the State.''[1]

As it is conceived in the United States, the State is not the idealized form of the *res publica*, as in the French tradition. The State, at the federal as well as the state level, is first and foremost a government—that is, a group of men who have power and who are thus potentially dangerous for the freedoms of the people. To keep these powerful men from trampling on the liberties and rights of the people, society must be as close to them as possible so that they are carefully watched over.[2] The absence of any mysticism in the American concept of the State explains the very practical and realistic way of thinking about, setting up, and organizing a system of representation in the United States. Representation American-style is popular representation, centered on the real people in every sense of the term (Section A). Its implications must be well understood because the system of representation always determines the status of statutory law within the State (Section B).

[1] *West Virginia State Board of Education* v. *Barnette*, 319 US 624, 641 (1943)

[2] The idea, a direct legacy of the British tradition, was the keystone in the building of the institution of king in Parliament. The king remained king only because he consented to reign ''in Parliament,'' that is, with society represented alongside, and sharing the power with him, until society and its representatives eventually absorbed his power completely.

A. POPULAR REPRESENTATION

Representation of all interests. Popular representation aims at giving an image as faithful as possible of the whole body social in all its diversity—that which presents itself as a picture of society at a certain time, as it is composed of a multitude of interests and communities. It purports to represent individuals in their social reality, as they may define themselves by their affiliation with the numerous groups that make society, whatever their racial, ethnic, economic, religious nature, the objective being in the end that all interests, whatever their nature, may be represented in the government.

1. Historical Formation (1776-1786)

Initial doubts about representation. From the very beginning, Americans were doubtful about the virtues of representation for at least two reasons. On the one hand, they were not used to it; on the other, they did not know much about it. The few things they knew about it, they had learned from the English, and these did not inspire much confidence in this device of government, which they viewed as being potentially subject to all kinds of easy manipulations.[3]

The system of representative government did not thrive in the first colonies; it was never regarded as the usual system of government. From the beginning, the colonies practiced self-government, particularly in New England, where direct democracy was widely used. Several factors can explain this phenomenon. In the first place, the absence of any aristocracy greatly facilitated first the transplant, then the extraordinary development of the English system of self-government that represented (and still represents today in certain domains such as local education) a true system of direct democracy. In the second place, the Protestant colonies of New England were peopled, particularly in Massachusetts, by those who were the fundamentalists of Protestantism, the Puritans. Tocqueville appreciated the power of this doctrine: ‘‘Puritanism was not only a religious doctrine; it also blended at several points with the most absolute democratic and republican theories.’’[4]

The first American communities, the townships of New England, governed themselves like the Swiss cantons: the citizens themselves, all gathered in a town meeting, discussed the affairs of the community, elected the magistrates of

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[3] Particularly objectionable to them was the practice of designating courtiers and political friends to sit in the House of Lords so that the balance of power would tilt in the direction wished by the government.

[4] Tocqueville, *Democracy in America*, [Translated by H. C. Mansfield & D. Winthrop], University of Chicago Press, 2000, I, I, chap. 2, p. 32.

the county each year, and assigning them their commissions. It is in these townships, where representative government had not been adopted, that American people learned the basics of democracy.[5] Still today, at the local level, if the majority works through representatives and magistrates when it is dealing with the general affairs of the community, direct participation of the citizens in the deliberation and management of certain public matters, particularly education, remains the rule. The citizens are not only consulted; they decide, themselves, by their votes on the projects and orientations of their community.

These elements of self-government did not prepare the Americans for a representative system of government. However, the reason they became hostile to the representative system of government is closely linked to their dispute with the English about their taxation by the Parliament in London, without them being actually represented in this compound body. This dispute, which triggered the American Revolution, is a turning point in American history that determined many of the political choices made later, after independence.

The fiscal debate with England. In the beginning of the 1760s, England decided to raise taxes on the colonies; the idea was to oblige the colonies to share the burden of providing a military defense for the new possessions won from the French territories in America after the Seven Years War. The new customs duties on the trade of goods caused some irritation, but the true revolt against England began in March 1765, when Parliament by an overwhelming majority passed the Stamp Act, levying a tax on legal documents, almanacs, newspapers, and nearly every form of paper used in the colonies. The amount of the parliamentary tax was modest; what caused alarm in the colonies was its significance for the future of their relations with England. Until then, it was commonly accepted that the colonies in theory were immune from taxation. The customs duties raised by London on their trade were regarded as measures aimed at regulating foreign trade, not at raising revenue. The Stamp Act had nothing to do with foreign trade; it directly touched Americans' everyday affairs; it affected purely internal affairs. The Stamp Act, therefore, was seen as an attempt to raise revenue from the colonies without the consent of their legislatures. The Americans invoked the ancestral right of the Englishmen: ''No taxation without representation.''

The refusal of virtual representation. In the eyes of the Englishmen, the colonies were subject to the laws adopted by Parliament because they had consented to them; and they consented to them, the English said in essence, because they were virtually represented therein, like any possession of the

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[5] *Id.* I, I, chap. 5, p. 61.

British empire, even if they had not elected representatives. The idea that Parliament represented the whole society grew out of the correspondence between the political organization of the kingdom and its social organization; the government, that is, the body politic made by the King in Parliament was a perfect mirror of the entire society. Moreover, at the political level, the representative character of Parliament was the keystone of parliamentary sovereignty. The whole society was bound to obey the laws adopted by Parliament because it was presumed that the whole society was virtually represented in this precinct and, thus, had consented to the laws that were debated and voted on.

Virtual representation had important consequences for both the status and the mandate of the representatives. In a speech to the electors of Bristol in 1774, the Conservative Edmund Burke developed these consequences when he insisted on the representative rather than imperative nature of the mandate, meaning that the representative may never be bound by authoritative instructions from his electors. Burke explained to his electors:

> Parliament is not a *congress* of ambassadors from different and hostile interests; which interests each must maintain, as an agent and advocate, against other agents and advocates; but parliament is a *deliberative* assembly of *one* nation, with *one* interest, that of the whole; where, not local purposes, not local prejudices, ought to guide, but the general good, resulting from the general reason of the whole. You choose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of *parliament*. If the local constituent should have an interest, or should form an hasty opinion, evidently opposite to the real good of the rest of the community, the member for that place ought to be as far, as any other, from any endeavor to give it effect. I beg pardon for saying so much on this subject. I have been unwillingly drawn into it; but I shall ever use a respectful frankness of communication with you. Your faithful friend, your devoted servant, I shall be to the end of my life: a flatterer you do not wish for.[6]

The theory of virtual representation did not impress the Americans, who answered the English that, as far as they were concerned, their alleged virtual representation in the Parliament was pure fiction. An attempt was made to

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[6] E. Burke, Speech to the Electors of Bristol (November 3, 1774), in P. B. Kurland & R. Lerner (Eds.), *The Founders' Constitution*, University of Chicago Press, 1987, vol. 1, pp. 391-392 (emphasis in original), available at http://press-pubs.uchicago.edu/founders/tocs/toc.html.

designate representatives of the colonies who could sit in the Parliament in London, but it did not succeed. The English, then, moved the debate onto a different plane, that of sovereignty, arguing that, even if the Americans were not represented in Parliament, they nevertheless were bound by what Parliament might decide because, being sovereign, Parliament had the power to tax the colonies as it saw fit. The argument backfired; the Americans claimed sovereignty for themselves (*i.e.*, independence). They proclaimed it unilaterally on July 4, 1776.

The triumph of actual representation. Once they proclaimed themselves ''free and independent states'' according to the terms of the Declaration of Independence, the thirteen colonies had to organize themselves. Many of them did not change their existing legislatures, particularly because of the ongoing war against England, but all felt the repercussions of the dispute with England over representation.[7]

The new States adopted constitutions that provided for assemblies popularly elected on conditions very close to universal (white and masculine) suffrage. Very soon, however, a great gulf lay between those who were inside and those who were outside the assembly. Few Americans believed that their representatives could be a faithful image of the electorate as so many expected them to be. The citizens and their representatives were forming two separate worlds. Some radical elements in the North Carolina convention informed their representatives that they were their delegates only and that political power ''is of two kinds, one principal and superior, the other derived and inferior . . . The principal supreme power is possessed by the people at large, the derived and inferior power by the servants which they employ.'' In the minds of Americans, the people were radically distinct from their representatives. The former natural correspondence between representatives and represented that was the hallmark of representation in the European societies divided into estates, each of them being represented in the State, broke apart in the egalitarian society that prevailed across the Atlantic.

Representative institutions fell under suspicion. The people out-of-doors (the electors), as they called themselves, wanted to legislate with the people indoors (the elected). Among the people, many thought that there was no reason to give away sovereignty to representatives who represented nothing but themselves. Their criticisms became all the more acute in that an elitist, almost aristocratic, party had taken shape among the elected. A few of them resurrected

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[7] On the crisis over representation in America in the aftermath of independence, see G. S. Wood, *The Creation of the American Republic (1776-1787)*, [hereinafter *The Creation*], 1969, reprint New York, W.W. Norton & Co., 1987, p. 363.

the privileges of the British MP's, and others, although in small number, even succeeded in having a too vocal critic, William Thompson, a tavern keeper, threatened with banishment and reprimanded by the House of Representatives of South Carolina for allegedly insulting one of its wealthy members, John Rutledge.[8] The trust between the representative and the represented no longer existed. The people were convinced that their representatives had become the straw men of political parties and factions; legislatures were regarded as places of political conspiracies between private interests against the public good. The representatives, prone to like power and the honors it bestows, made their differences of rank and status felt by laymen and became execrated. Some were called the ''Nabob members of the legislature.'' The implicit trust they requested from their electors was of course denied to them. Americans could not accept that a few appropriated the right to decide for all.

The people wanted either to keep or to take into their own hands the power they had delegated. Popular assemblies were spontaneously created in the counties to reexamine the laws adopted by the representatives. People were proud to say that ''yes, they legislate at home!'' Some demagogues presented themselves as true spokesmen for the will of the people, who exhausted themselves trying to find all possible means by which they could keep their representatives under control. The electors addressed authoritative instructions to their representatives; elections were held at very close dates. The representatives were supposed to be the mere agents and instruments of the will of the people. Samuel Chase went so far as to declare that the people's power ''is like the light of the sun, native, original, inherent, and unlimited by human authority. Powers in the rulers or governors of the people is like the reflected light of the moon, and is only borrowed, delegated and limited by the grant of the people.''[9] The people entertained a mechanical conception of representation.

Distrust of the representatives. The widespread distrust of elected bodies entailed unexpected consequences. American distrust of the virtues of representation had tremendous fallout for the American approach to the public good and public law in general. If the law made by the legislative assemblies was not in truth a reflection of the will of the people, if it was not an image of the general will, but rather the mere product of the will of corrupt and suspect elected representatives, all kinds of devices then would be necessary to limit the scope of their laws and, in some case, to keep their laws from taking effect.

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[8] *Id.*, p. 367.
[9] *Id.*, p. 371.

The first remedy sought was the simplest; the people resorted to authoritative instructions addressed to their representatives so that they would be bound in all their words and votes; from there, the electors wondered whether general oversight by the people of all the organs of State was not to be provided for. Everything that seemed to limit, to circumscribe, to restrain the power of the representatives was received with favor by the people. People were obsessed, haunted by the power their representatives might enjoy and the ways they might abuse it. The idea emerged that, if the people could not be truly and honestly represented by their delegates, who would necessarily turn into spokesmen for particular interests, then the representatives of the people deserved to represent the people for certain objects only, not for all conceivable objects of legislation. The powers of the legislature therefore had to be limited. These ideas eventually led to a radical redistribution of powers in society and a shattering of all the set notions that dominated European political thought.

The end of classical politics. The less people trusted their representatives, the more they looked for remedies that would guarantee a representation as faithful as possible of all their interests. Distrust of representation led them to ensure that all interests of the electors were represented in the assemblies. The politics of interest groups made its first appearance in American politics.[10] The electoral mandate was conceived as a means to promote all interests in politics, including private interests.

In a profound article on the origins of this foundational and deciding factor in the American republican model, Gordon S. Wood recalls an event that he regards very rightly as ''one of the crucial moments in the history of American politics—maybe the crucial moment.'' It is the debate that occurred in 1786 in the Pennsylvania assembly over the rechartering of the Bank of North America. Two principals confronted each other in this debate. On one side was William Findley, the defender of the debtor-paper money interests in the State, who had been a schoolmaster, farmer, and militia captain before ending up as a political officeholder. On the other was Robert Morris, the wealthiest merchant in the state, with aristocratic aspirations, who was a major stockholder in the bank and a strong supporter of its rechartering. Findley charged that supporters of rechartering of the bank were themselves interested men; they were directors or stockholders of the bank and thus were acting as judges in their own cause. As Wood says, there was nothing new in these charges. To accuse one's opponent of being self-interested was conventional rhetoric in eighteenth-century debates.

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[10] C. R. Sunstein, ''Interests Groups in American Public Law,'' 38 *Stanford L. Rev.* 29 (1985).

What was new—startlingly new—was the following by Findley himself: ''Any others in their situation would do as they did.'' Morris and the other investors in the bank, he pursued, had every ''right to advocate their own cause, on the floor of this house.'' But they had no right to protest when others realize ''that it is their own cause they are advocating, and to give credit to their opinions, and to think of their votes accordingly.'' As Wood says, this debate was indeed ''crucial.'' It meant that ''the promotion of interests in politics was quite legitimate, as long as it was open and above board and not disguised by specious claims of genteel disinterestedness. The promotion of private interests was in fact what American politics ought to be about.''[11] This novel approach to politics completely changed the science of government.[12]

In accepting that the government shall mirror all the interests of society, Americans turned personal interest into the driving force of modern politics. A most unfortunate application of this deleterious principle was the additional representation granted to the particular interests of slave owners in the southern States, in the form of a number of representatives in the House of Representatives, apportioned among the several States according to their respective numbers, with ''all other Persons'' counted as ''three fifths'' of a person each.[13] Although the Civil War and the three constitutional amendments adopted in its aftermath have made these provisions obsolete, the idea that triggered their initial inclusion in the Constitution is still alive. This idea runs as follows: it is commonly agreed that what is made in the legislatures does not necessarily promote the public good, but vindicates in the first place the defense of private interests.[14] A whole chapter of classical politics came to an end; the idea of virtue and disinterestedness in the management of public affairs broke into pieces. The republic moved into an era of jealousy and suspicion.

The coming into being of modern constitutionalism. In accepting the representation of all interests into the legislatures, Americans paved the way to a radically new approach to the notion of Constitution. They had already taken a

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[11] G. S. Wood, ''The Origins of American Democracy, or How the People Became Judge in Their Own Cause,'' 47 *Cleveland State L. Rev.* 309, 320-21 (1999).

[12] As Gordon S. Wood explained it in Chapter XV ''The American Science of Politics'' of his masterful book: *The Creation, supra* note 7, at p. 593.

[13] Article I, sec. 2(3) of the Constitution [changed by section 2 of the Fourteenth Amendment].

[14] On the coming into being of private interests in public affaires, see G. S. Wood, *The Radicalism of the American Revolution*, Vintage Books, 1993, pp. 241-270. As Wood makes understood as an understatement, promotion of private interests in politics is a mere fact that Americans very early resigned themselves to; this does not mean that a majority of them finds it acceptable, still less desirable.

similar path with the reinvention of federalism. In deeming a ''Constitution'' a document that most contemporaries regarded as a ''compact'' between sovereign people—in other words, a treaty—they already had written a new chapter in the complicated history of the law of mixed or composed State structures, which legal scholars at that time analyzed as pertaining to the law of nations rather than to domestic law.[15] However, the disastrous consequences of the promotion of private interests through popular representation reinforced this particular constitutional feature.

From the day it became clear that nothing good could be expected from representatives driven by the defense of particular interests, trust in their actions vanished. Distrust and suspicion took its place, and a remedy to alleviate them soon became necessary. It was the Constitution that, as early as the end of the eighteenth century, acquired in the United States a radically different meaning than on the European continent where it was understood as an ''assemblage of laws, institutions and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community hath agreed to be governed.''[16] The Constitution in the United States turned into a single written piece, contained within the four corners of the document, which soon became the disciplinary charter of the government. In the draft resolution he prepared for the legislature of Kentucky in 1799, Jefferson offered the new meaning for the document as follows:

> It would be a dangerous delusion were a confidence in the men of our choice to silence our fears for the safety of our rights: [. . .] confidence is everywhere the parent of despotism—free government is founded in jealousy, and not in confidence; it is jealousy and not confidence which prescribes limited constitutions, to bind down those whom we are obliged to trust with power: [. . .] our Constitution has accordingly fixed the limits to which, and no further, our confidence may go. [. . .]

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[15] The idea that the Constitution was a ''compact'' between sovereign States survived for a very long time in the United States, notwithstanding the strong denial by John Marshall as early as 1803; it was definitively crushed only with the Civil War, although, even today, it still keeps feeding certain aspects of the southern confederate thought. On the passage from the treaty to the Constitution, see E. Zoller, ''Aspects internationaux du droit constitutionnel, Contribution à la théorie de la fédération d'États,'' 294 *RCADI* 39 (2002).

[16] Bolingbroke (Henry St John), *A Dissertation upon Parties* (1733-1734), Letter X, reproduced in A. W. Bradley & K. D. Ewing, *Constitutional and Administrative Law*, 13th ed., Harlow, Pearson Education, 2003, p. 4.

> In questions of power, then, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution.[17]

The American conception of the Constitution. The new approach to the Constitution that Americans have spread throughout the world has always been an object of national pride. They regard it as the safest guarantee of liberty that has ever been found. As early as 1803, John Marshall drew a sharp distinction between two models of constitutions—the constitutions that ''organize the government, and assigns, to different departments, their respective powers [and that] stop here'' (an excellent description of what European constitutions and particularly the English Constitution used to do at that time) and the constitutions that (too) ''organize the government, and assigns, to different departments, their respective powers, [but that also] establish certain limits not to be transcended by those departments.'' And John Marshall proudly adds: ''The government of the United States is of the latter description.''[18] After John Marshall, James Madison too underlined the specificity of the American Constitution when, commenting upon one ''vital characteristic of the political system of the United States,'' that is, that ''the Government hold its powers by a charter granted to it by the people,'' he added: ''Hitherto charters have been written grants of privileges by Governments to the people. Here they are written grants of power by the people to their Governments.''[19] The new approach to the Constitution entails the following consequence: ''Without a steady eye to the landmarks between these departments, the danger is always to be apprehended, either of mutual encroachments and alternate ascendencies incompatible with the tranquil enjoyment of private rights, or of a concentration of all the departments of power into a single one, universally acknowledged to be fatal to public liberty.''[20]

2. The Theory of Popular Representation

Popular representation and public interest. The representation in the government of all interests of the society is one thing; the consequences that derive thereof are quite another. From a public law standpoint, the major and

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[17] Th. Jefferson, Original Draft of the Resolutions 8 and 9, which he supplied to the Kentucky legislature: October 1798, reprinted in Kurland & Lerner, *supra* note 6, at vol. 5, p. 134.

[18] *Marbury* v. *Madison*, 5 US (1 Cranch) 137, 176 (1803).

[19] J. Madison, Supplement to the letter of November 27, 1830, to Andrew Stevenson, on the phrase ''common defense and general welfare.''—on the power of indefinite appropriation of money by Congress in Kurland & Lerner, *supra* note 6, at vol. 2, p. 459.

[20] *Id.*, p. 458.

most difficult question to solve is this: how do all these interests work for the public good, and how can it be enunciated?

Ten years of popular representation in the states brought an obvious fact to light: modern politics were plagued with a disease against which no remedy seemed to be available, the triumph of individual egoisms and a complete lack of interest in the public good.

Having become closed precincts of bitter struggle between private interests, the states lost all interest in the confederate Union that they created in 1777 to wage war against England and that enabled them to free themselves from British rule. Once peace was established, each state turned inward and became focused on its own interests only; discord was sown in the Union. Within the States, each interest group struggled to conquer power and to put forward its own interests. In a difficult economic climate, fraught with the consequences of the War of Independence, the individual egoisms of all triumphed over the interests common to all. The States, henceforth deprived of access to the traditional commercial markets of the British empire, struggled to survive by relying on their own means; trade war between the States loomed in the near future. Financial difficulties caused popular dissatisfaction, and even populist unrest, particularly among the farmers whose smallholders, driven to the brink of bankruptcy, voted en masse for the demagogues who promised them debtor relief laws. In order to choke off the financial crisis that threatened to bring the Union to ruin, the Congress of the Confederation passed a Resolution on February 21, 1787, ''for the sole and express purpose of revising the Articles of Confederation [to] render the Federal Constitution adequate to the exigencies of Government and the preservation of the Union.'' After four months of work by the fifty State delegates gathered in Philadelphia, a Constitution for the United States was eventually signed on September 17, 1787. This most important document, which stands as the charter of the American republican model, endeavored to find potent medicine against the sickness of the newborn modern republic, the promotion of private interests in politics. The subtle composition, the proper balance between the ingredients and the beneficial effects of the new medicine have been laid out by James Madison, a most important founding father of the American Constitution, in Letter no. 10 of *The Federalist Papers*.[21]

Factions in the modern republic. Letter no. 10 of *The Federalist* is a decisive text to understand the ins and outs that may explain why and how

[21] A. Hamilton, J. Madison & J. Jay, *The Federalist Papers* [hereinafter *The Federalist*], C. Rossiter Edition, Mentor Book, N.Y, 1961, p. 77, available at http://www.yale.edu/lawweb/avalon/federal/fed.htm.

Americans very early lost all their illusions about what politics and the alleged search for the public good may be in a modern republic. In this letter, Madison draws lessons from ten years' experience of republican government in the new free and independent States of America. He explains the proclivity of popularly elected assemblies to legislate for the sole profit of a few, not for the common profit of all. He sets out the partiality and unfairness of these laws, pointing to the fact that ''measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.''[22] In other words, power is within the hands of factions that work against the public good, what Madison calls ''the permanent and aggregate interests of the community.'' And he raised the question: can we do away with factions? He implicitly admits that this would be the best solution, but he thinks that such an undertaking is unrealistic and that the cure is worse than the disease.

The impossible suppression of factions. Curing the mischiefs of faction may be done by two methods: by removing its causes or by controlling its effects. Removing the causes of faction may in turn be done by two methods, either by destroying the liberty which is essential to its existence, or by giving to every citizen the same opinions, the same passions, and the same interests. In both cases, Madison believes that these drastic measures would amount to killing liberty. He expounds: giving to every citizen the same opinions amounts to destroying freedom of expression and freedom of religion; giving to every citizen the same passions is tantamount to imposing the civil religion of Hobbes haunted by the search for consubstantiality between the Christian State and the Church,[23] or that of Rousseau, obsessed by the will to reunite ''the two heads of the eagle, and the restoration throughout of political unity, without which no State or government will ever be rightly constituted''[24]; giving to every citizen the same interests is equivalent to suppressing property, and this, Madison rejects with all his might, because he is convinced, like Locke, that property is the fountainhead of modern liberty. He also makes the point that there exists ''an insuperable obstacle to a uniformity of interests,'' which is ''the diversity in

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[22] *Id*.

[23] In *De Cive,* Hobbes writes: ''In Christian Cities the judgement both of *spirituall* and *temporall matters* belongs unto the civill authority. And that man, or councell who hath the Supreme power, is head both of *the City*, and of *the Church*; for a *Church*, and a *Christian City* is but one thing.'' T. Hobbes, *On the Citizen (De Cive)* [Edited and translated by Richard Tuck & Michael Silverthorne], Cambridge University Press, 1998, chap. XVII, § 28, available at http://www.constitution.org/th/decive.htm.

[24] J.-J. Rousseau, *The Social Contract*, Book IV, chap. 8 [Translated G. D. H. Cole], available at http://www.constitution.org/jjr/socon.htm.

the faculties of men.'' Madison's conclusion is irrevocably final: factions are inevitable in society; they are ''sown in the nature of man.'' The only way to cope with them is to put up with them.

Remedies to factions. Failing a possible eradication of factions, attention must be focused on the means that may neutralize their effects. Two possibilities are conceivable. If the faction is a minority, nothing is to be feared; relief is in the ballot box, supplied by the republican principle, which enables the majority to defeat its views by regular vote. If the faction is a majority in a position to rally a majority, this is the real danger for individual rights and the public good. Madison believes that there are only two methods to prevent such factions from carrying out their grievous projects. If the majority is not yet formed, one must intervene to prevent its formation by breaking power into several organs so that each of them has only a portion of the power—and accordingly particular motives to resist the encroachments of the others (this is the remedy of the separation of powers). If the majority is already formed, the men who make it are already united in their disastrous identity of passions contrary to the public interest. In that case, Madison wrote, one must make use of their number and local situation to keep them from carrying out their plans of oppression (this is the remedy of federalism).

The objection of the antifederalists. The adversaries of Madison in particular, and to the federalists in general, who were called the antifederalists, did not see the problem in the same light. They, too, regarded factions as the worst threat to the republic, but, unlike Madison, they did not regard factions as inevitable; indeed, they were convinced to the contrary. For them, factions diminished and even disappeared in small communities, and it was possible, in their view, to develop a civic spirit through education and self-government.

The antifederalists thought that unity could be achieved through decentralization. They subscribed to Montesquieu's views that a republic may support itself without any internal factions only if it is small. When there are too many interests, they are too diverse, and it is impossible to reach a common good beneficial to all—a situation in which every citizen may take advantage of political association, where there are no winners and no losers. ''Brutus,'' one of their leaders (Roman first names were fashionable, in remembrance of Ancient Rome), dreamed of a society where no one would lose. In order to achieve this, everybody had to be the same, so that everybody would meet the conditions of winning. In a large unit, representation of all the interests is never perfect, if only because there are groups that lose by dint of being in the minority. Brutus believed in small homogenous republics in which both wealth and power are equally distributed, in which every citizen knows every other, in which every

citizen may force his neighbor to be virtuous, and where it is possible to attain a common good that may benefit everyone. According to him, there was no need for the big machinery that was the federal government as provided for in the Constitution; the solution was to bank on the States and to trust governments that would be close to the people.[25] Brutus was a supporter of decentralization.

To these arguments, Madison answered that, in a small republic, the probability of factions is even greater than in a large republic, because the majority will always share common interests and common passions, due to the fact that the form of government will necessarily enable it to unite and work in agreement. Madison very cleverly convinced all those who feared for the protection of their rights against the power of the majority that a great republic provides better protection against factions than the small republic can. The diversity and the multiplicity of the interests that form the great republic minimize the risk that a common desire or passion may be felt by enough people at the same time to oppress a minority.

The Madisonian theory of the public good. Madison provided remedies against faction in the republic, but he was far from thinking that, once all private egoisms were under control, the public good would spring by itself, as if by magic, from a clash between all these private interests then neutralized. He knew that something more was needed. Concretely, he knew that the public good called for honest and upright statesmen who would be in charge of public affairs and work hard to enhance the public interests. To put such virtuous statesmen at the helm, he relied on the same mechanisms that brought about a solution to the religious conflicts. The multiplicity of religious sects in America prevented any one of them from becoming predominant in one State, a result that, in turn, enabled enlightened statesmen such as Jefferson and himself to ensure that the public interest would prevail at the federal level (in the separation between Church and State embodied in the First Amendment).

In Madison's view, the great advantage of the republic over democracy was that it made it possible for talented men, caring for the public good, to come to the fore. By republic, he meant a government in which the idea of representation exists, thus allowing governmental affairs to be delegated to a small number of citizens chosen by the people while avoiding the pitfall of democracy—degeneration into factions, no matter how small the democracy may be. The republic, he insisted, avoids the dangers of democracy precisely because of

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[25] Brutus, Essay I (October 17, 1787), in *The Anti-Federalist Papers and the Constitutional Convention Debates* (R. Ketcham (Ed.)), New York, Mentor Book, 1986, p. 270.

representation, which makes it possible ''to refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.''[26]

Representation, buttressed by the conviction that elections deriving thereof necessarily send enlightened and responsible statesmen to the helm, is at the heart of the American conception of the public good. This theory operates on the premise enunciated by Madison himself as follows: ''I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom.''[27] There is little doubt that the Madisonian approach to the public good is premised on an elitist conception of politics. The Federalists—Madison chief among them as one of their brightest supporters—were not so much adversaries of power as fierce opponents of the State governments headed by uneducated people of petty low condition. Their fear for the future of the Union lay in the mediocre quality, the short-sighted views, and the narrow-minded projects of those who held power in the States and who seemed to be interested only in parochial disputes. Their dream was less to replace them than to subject them to the liberal, enlightened, cosmopolitan views of the natural aristocracy of society, as they saw themselves.

The virtues of the great republic. In order to do so, they suggested enlarging the field of politics and shifting the most important decisions to a higher level, the federal or national level, with a broadening of the electorate and a diminution of the elected as a result. The combination of a larger electoral basis and a reduced government concentrated on the problems common to all would work as a filter for selecting the best minds to take on national responsibilities. The great republic is bound to be propitious to the public interest, they said, because it will produce more good leaders; the breeding ground for virtuous men is larger by necessity, and, insofar as they would confront a larger number of electors and a wider range of interests, candidates would be more likely to be held to account by a larger public. This calculation was the winning bet of the great republic that the federalists created in Philadelphia. Madison outlined the inner mechanism of the scheme as follows: ''In the extended republic of the United States, and among the great variety of interests, parties, and sects which it embraces, a coalition of a majority of the whole society could seldom take

[26] Letter no. 10, *The Federalist*, *supra* note 21, at p. 82.

[27] J. Madison, Virginia Ratifying Convention, June 20, 1788, in Kurland & Lerner *supra* note 6, at vol. 1, p. 409.

place on any other principles than those of justice and the general good.''[28] For carrying out his design, Madison relied heavily on the Senate. In his mind, this chamber of States—which was not originally popularly elected, but rather designated by the State legislatures—would work ''as a defense to the people against their own temporary errors and delusions'' and form ''some temperate and respectable body of citizens, in order to check the misguided career, and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind.''[29]

Democracy and republic. The antifederalists objected that a system of filtering the electorate was aristocratic, contrary to the republican principle, and undemocratic. The federalists were clever enough to counter the charge by circumventing it and attacking their opponents on their own field. Against the relentless charges of elitism, the Federalists replied that the new system, in complete contrast with the former confederation, would derive its powers entirely and exclusively from the people. The source of power will always derive from the popular will, they kept repeating, an assertion that was perfectly correct since the people not only elected the political organs of the government, but also had to approve the Constitution through constitutional conventions in their states. Their propaganda worked so well that, as early as 1787-1788, the word ''democracy'' in the United States was equated with ''election'' and put on a par with the term ''republic.'' Eventually, representation was identified with election, pure and simple. Once that identification was reached, the old categories of democracy and mixed government that went back to Aristotle became obsolete, failing to describe the new American system of government.[30]

The contemporary variation of the pluralist State. In the twentieth century, Letter no. 10 of *The Federalist* has been understood as having laid down the foundations of the pluralist State. It is true, in one sense, that Madison's genius was to invent a theory of representation free from any need for virtue. Contrary to classical authors, who listed the spirit of sacrifice, devotion to the *res publica*,

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[28] Letter no. 51, *The Federalist*, *supra* note 21, at p. 325.

[29] Letter no. 63, *The Federalist*, *supra* note 21, at p. 384. The Seventeenth Amendment to the Constitution, which imposed popular election of senators by universal direct suffrage in the states eviscerated Madison's hopes of a great part of their substance. See I. Kramnick, ''The 'Great National Discussion': The Discourse of Politics in 1787,'' 45 *Wm. & Mary Q.* 3, 13 (1988) and, in French, R. Dehoussse, ''Le paradoxe de Madison: Réflexions sur le rôle des chambres hautes dans les systèmes fédéraux,'' *RDP*, 1990, p. 643, in particular pp. 646-647.

[30] See G. S. Wood, ''Democracy and the Constitution,'' in R. A. Goldwin & W. A. Schambra (Eds.), *How Democratic is the Constitution?* Washington / London, American Enterprise Institute for Public Policy Research, 1980, pp. 1-17.

renunciation of self-enrichment, and frugality as being the prerequisites for the proper functioning of a republican government, Madison fathered a new system that did away with the need for virtue in that it deprives the personal and egoistic interests of individuals of success in their undertakings. To keep these particular interests from working against the public good and the common interests, they should be allowed to grow and multiply as freely as possible, so that, as Philippe Raynaud writes, ''an individual is prevented from defining himself solely by his belonging to *one* group of opinions or interests only.''[31] In order to reach such a result, Madison advocated organizing government so as to prevent its organs from uniting into an oppressive majority and, in fact, to instead contrive for them to work for the public good while looking out for their own interests. The Madisonian theory of the State made it possible for all the interests of society to be represented in the government without adverse consequences for the public good; it paved the way for a polity that would later be called the pluralist State.

Although Madison's ideas laid down the foundations of a theory of popular representation that relies on the plurality of interests to better protect individual rights, it would be misleading to say that they directly gave birth to the theory of the pluralist State; at best, they prepared the way for it. Madison is a forerunner of Robert Dahl; but he does not advocate a pluralist vision of politics. In his view, the government is not a public space in which all sorts of interests clash in the hope that mutual concessions by all parties will give rise to a public arrangement satisfying everybody. For Madison, the government was rather a neutral and disinterested umpire, made up of impartial and enlightened men who were called to decide and take sides among the various interests without being co-opted by the most powerful among them. Madison does not defend the pluralist State; he is not a modern political scientist.[32]

Representation of interest and governance. In turning the State into a mirror reflecting all the interests of society, the American conception of representation has made a distinction between the State and the government pointless. In truth, the distinction is no longer necessary, except in external relations, where the concept of the State, as in England, stands through the international legal personhood for the enduring interests of the American nation, as opposed to the transitory character of the various administrations at the helm. By contrast, in

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[31] Ph. Raynaud, ''Préface,'' in J. M. McPherson, *La guerre de Sécession (1861-1865)*, Robert Laffont, 1991, p. xxiii (emphasis in original).

[32] See R. J. Morgan, ''Madison's Theory of Representation in the Tenth federalist,'' 36 *Journal of Politics* 852 (1974); P. F. Borke, ''The Pluralist Reading of James Madison's Tenth Federalist,'' 9 *Perspectives in American History* 271 (1975).

internal relations, the people being represented in the government or, better, the people being the State itself, the government and the State are two sides of the same coin. The State is completely absorbed in the government, and the government stands for the State; both of them are places of conciliation between all the particular interests therein represented; they stand for a meeting point of all these interests without ever claiming to be in a position to ''govern'' in the true meaning of the term, that is, to ''direct'' all these interests toward a goal of common good that would represent a public interest distinct from the aggregation of individual interests.

The principal consequence of the fusion between the State and the government is that the quality of government is no longer measured as before by the ends it pursues (or, at least, is supposed to pursue, that is, the public good). Rather, it is assessed by its aptitude in fulfilling the function of conciliation between all the interests therein represented and its capacity to keep any especially powerful interest from taking over the governmental mechanisms and imposing its own preferences on the other interests.[33] Scholars focus their attention less on the legitimacy of a particular policy than on its effectiveness in satisfying, as far as possible, all the interests represented in the public space. Concern for the ends is secondary; the primary concern is with the means used to reach an agreement that will satisfy all these interests. A good government is judged by the quality of the means it employs to deliver to the citizens what they expect, not by the ends it assigns itself—hence, the importance given to the procedures and mechanisms of dispute settlement in modern politics. The conflict among interests may not be resolved by public authority (the concept of public authority in the United States is hard to grasp), but by negotiation and mutual adjustment among everyone's claims.[34] To make a long story short, government is replaced by governance. Instead of a search for the public good, good governance puts the emphasis on the modalities by which power is exercised, and it downplays the importance of its ends.

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[33] See F. H. Easterbrook, ''The State of Madison's Vision of the State: A Public Choice Perspective,'' 107 *Harv. L. Rev.* 1328, 1337 (1994).

[34] For a criticism of this ''popular State'' whose political philosophy is summarized by the expression ''interest-group liberalism'' and in which the priority of politics is to make the government accessible to all the interests of society without ever allowing it to exercise an independent judgement on the value of their various claims, so that the public interest is nothing more than an amalgam of all these interests, see T. S. Lowi, *The End of Liberalism*, 2nd ed., New York, W.W. Norton & Co., 1979.

B. THE STATUS OF STATUTORY LAW IN THE STATE

Representation and legislation. To a great extent, popular representation determines the status of statutory law in the State. A statute is appreciated less in consideration of a distant and hypothetical public interest that nobody believes in, than in consideration of the tangible and real interests of the individuals represented in the legislatures. The first yardstick of a fair and good law is its aptitude to satisfy the individual interests of the electors. The public interest is envisioned only in reference to the individual preferences of the electors, as they are expressed at the ballot box. In *Brown* v. *Hartlage* (1982), the question was what kinds of promises a candidate may make to his constituency and, in particular, whether he may pledge himself to reduce his salary if elected. The Supreme Court with equanimity decided that there was nothing reprehensible in ‘‘the fact that some voters may find their self-interest reflected in a candidate's commitment.'' The Court added:

> We have never insisted that the franchise be exercised without taint of individual benefit; indeed, our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare. So long as the hoped-for personal benefit is to be achieved through the normal processes of government, and not through some private arrangement, it has always been, and remains, a reputable basis upon which to cast one's ballot.[35]

The presence, always perfectly legitimate, accepted and even desired, of all the private interests in the government, and in particular in the legislatures, has had a heavy cost on the law-making process. It explains the reserved and suspicious approach of public opinion towards statutory law.

Representation of all interests. A legislature that would represent all the different interests and views of the various classes of the community is obviously an ideal beyond reach. During the debate on the ratification of the Constitution, it was said ‘‘to be necessary, that all classes of citizens should have some of their own number in the representative body, in order that their feelings and interests may be the better understood and attended to.'' In that vein, it was argued that landholders, mechanics, manufacturers, farmers, and men of the learned professions should be represented by members of each class in order to be fairly represented. Hamilton answered these visionary arguments:

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[35] *Brown* v. *Hartlage,* 456 US 45, 56 (1984).

''This will never happen under any arrangement that leaves the votes of the people free.''[36]

The basic idea of popular representation—the implicit expectation that all interest groups and classes in society have a legislative presence, so that the legislature may be regarded as a mirror of society—does not mean that each citizen has a right to have all his own personal interests taken into consideration in the debate, but this is how this sense of entitlement is operative in practice—even though not established in theory as an actual right. The causes of this phenomenon are diverse. Two of them seem crucial: the extreme brevity of electoral mandates in the lower chambers (no more than two years), which strongly induces the elected to always think about satisfying the preferences of his electors, and, at the same time, the distrust of the voters for the representatives. Scholars, including the Supreme Court, justify the system by recalling Madison's aphorism, ''that the private interest of every individual may be a sentinel over the public rights.''[37]

The result of all these considerations is that the statute, and more generally all legal rules, may be made only in taking scrupulous account of all classes of interests, private and public, general and individual, likely to be affected. This entrenched idea is the reason for the prodigious development of lobbies and interest groups that besiege the legislatures at the federal as well as at the State level. The right of all classes of interests to participate in the making of rules likely to affect them is of general scope nowadays. Since World War II, this right has been extended to include the rule making functions of executive and administrative agencies. A 1946 statute, the Administrative Procedure Act, provides for a mandatory consultation of all classes of affected interests. It forms the very substance of what ''Administrative Law'' stands for in the United States. For example, it compels administrative agencies to publish in the *Federal Register* a general notice of proposed rulemaking and, more particularly, ''[to] give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.'' It must be noted that federal courts have construed the statute as requiring the agency, whenever its rule does not take into account the various representations made during the rulemaking, to give reasons, although ''comments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or

[36] Letter no. 35, *The Federalist*, *supra* note 21, at p. 215.
[37] Letter no. 51, *The Federalist*, *supra* note 21, at p. 322.

consideration becomes of concern.''[38] In the second half of the twentieth century, these techniques have spread all over the world; they penetrated European law and inspired the procedures applicable to the making of directives and regulations in the European Union. Today, these techniques make the substance of what is called ''participatory democracy.'' They developed and coexist next to the ''deliberative'' or ''elective democracy,'' which used to regard both statutes and regulations as the final result of deliberations between unbiased and honest representatives—moved only by the pursuit of the public good, such as was the heart of the republican model envisioned by the Founding Fathers in 1787.

Free communication of ideas and free trade of interests. The system of popular representation has the advantage of allowing representation of all classes of interests that may exist in society, giving each of them a chance to participate in the making of the legal rules that will affect society. All interests expect to be heard and to be represented by the candidates they may have won over to their cause. All these interests compete against each other in the same manner that ideas compete in public debate. From the free trade of interests on the market, the same benefits are expected as from the free trade of ideas.

The free trade of ideas that, due to conservative and puritan prejudices, did not exist in the American society at the beginning of the nineteenth century, was forcefully defended by Justice Holmes as the best means to reach ''the ultimate good desired'' because, in his views, ''the best test of truth is the power of the thought to get itself accepted in the competition of the market.''[39] When it is free, open, and untrammeled, the free competition between ideas is supposed to be the best means to reach truth and to make it prevail. The problem is that, ideas being often shields for interests, the transition from competition between ideas to competition between interests is easy to make, and today, what is true of ideas is held to be true of interests, too.

The free market of ideas and interests is entirely based upon absolute liberty of the will and unlimited trust in the individual judgment. It can work effectively and properly only if it is accompanied and supported by complete freedom of speech. There is therefore little surprise if that freedom is a ''preferred

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[38] *Portland Cement Ass'n* v. *Ruckelhaus*, 486 F.2d 375, 394 (D.C. Cir. 1973), cert. denied, 417 US 921 (1974). See also A. C. Aman, Jr. & W. T. Mayton, *Administrative Law*, 2nd ed., West Group, 2001, p. 55.

[39] Holmes (dissenting) in *Abrams* v. *United States*, 250 US 616, 630 (1919). ''When men have realized that time has upset many fighting faiths,'' Holmes added: ''that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.''

freedom'' in American public law, for it is the prerequisite to the smooth functioning of popular representation. There are no limits to the peaceful resources, whether financial or otherwise, that a general or particular interest may mobilize to make itself heard in the market and to win the votes of the electors. True, some laws exist to regulate the role played by money in political campaigns, but their aim is mostly to ensure the transparency of private funding and contributions to candidates.[40] Expenditures are not capped, and there are no limits to the number of interests—whether political, economic, or social, or causes, whether national or local, public, or private—that may enter into the public debate. The goal is to give all interests, whatever they may be, a chance to be represented in the legislature (whether at the State or national level) and to be in a position to be heard—hence, the numerous pressure groups, or lobbies, that revolve around the representatives.[41]

From the theory of domination to the socialization of authority. The system of popular representation, as it evolved in the United States toward the pluralist State, radically transformed both the conception of the public good and the relation of the individual to the latter. It would be wrong to assume that because all interests are represented in one way or another in the government, this means that they all must be satisfied, but the close proximity of all these interests to the centers of power creates a situation that tends toward such a result. The pluralism that characterizes the American republican model has created a State system that cannot be properly explained with the analytical tools given by the so-called ''general theory of the State,'' elaborated in the nineteenth century by German scholarship and introduced in France in the beginning of the twentieth century by Carré de Malberg.

The theory of ''*Staatsgewalt*'' (State power), which analyzes the State as an instrument of domination over the society, never thrived in the United States. As early as the end of the nineteenth century, American political scholars broke away from the German ''general theory of the State.''[42] They steered academic scholarship toward another and completely different theory of political authority

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[40] See *Buckley* v. *Valeo*, 424 US 1 (1976).

[41] Leaving aside the prohibition of corruption, there are no limits to the means used to be heard. Electoral campaign regulation is not as strict as it may be in Europe, notwithstanding the recent efforts by the Senate to reinforce it; see *Congress and Pressure Groups*, Senate, 99th Congress, 2nd session, S-Prt 99-161 (1986) and *Lobbying Reform, Background and Legislative Proposals, 109th Congress*, CRS Report for Congress (updated March 26, 2006).

[42] See S. D. Fries, ''*Staatstheorie* and the New American Science of Politics,'' 34 *Journal of the History of Ideas* 391 (1973).

inspired by the philosophy of Pragmatism, which has exercised a tremendously important influence not only in the United States, but also overseas. This shift triggered a paradigmatic change in the analysis of social domination. Born in the Progressive Era (1880-1920), this theory, which may be called the theory of social control, endeavored to consider in depth the foundations of a new rationale justifying obedience to law and political power.[43]

According to the theory of social control, the rationale for obedience to law and power does not derive from a transcendental source (such as natural law, in which the social contract is rooted), but from the experience acquired in the intersubjectivity and interdependence of human relations. The reflexiveness of human reality is crucial in this theory; both human ethics and human knowledge are not innate or revealed, but based on intersubjective agreements and forged in social relationships, hence interdependent. Man in the state of nature is a pure fiction (with the implication that the social contract is legal fiction). Rejecting Max Weber's analysis of legal-rational domination, the theory of social control teaches that man obeys authority, not for formal reasons, but because he has acquired through exchanges with his peers a feeling of social responsibility. The social link originates in the reciprocity and responsibility of human relations. Obedience is grounded not in domination, but in the mechanisms of human interdependencies and in the social codes that the individual acquires in his community and social environment. Power is not external to society; it does not take the form of a State external to the social body; it is society itself; or, in other words, authority is socialized.[44]

Social control is therefore a decisive element of the insertion of the individual into the group. It grows out of natural mechanisms such as, for instance, the market, whose rules and discipline are a natural mechanism of socialization. It is also possible to enhance better socialization of the individual through a thorough knowledge of the sciences of organization. It must be said that these last scientific disciplines, which derive from the American approach to power, underwent considerable development in the twentieth century, in particular with management, which is a scientific application of the new theory of obedience based upon social control (where leadership is a modern version of command). The aim of social control theory was originally to build the theory of obedience upon bases other than domination and to demonstrate that the mystery of obedience is not a top-down, but a bottom-up mechanism insofar as it comes

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[43] See G. G. Hamilton & J. R. Sutton, ''The Problem of Control in the Weak State, Domination in the United States, 1880-1920,'' 18 *Theory and Society* 1 (1989).

[44] See J. P. Diggins, ''The Socialization of Authority and the Dilemmas of American Liberalism,'' 46 *Social Research* 454 (1979).

from the subject himself. The theory was initially born as a revolt against the rigid and dogmatic European formalism that Americans have always regarded as inadequate to explain the specificity of their republican model.

Rejection of majoritarian logic. Unlike the European model, the American governmental model builds itself against majoritarian logic. In the spirit of the Founding Fathers, the criterion of a free government is to be found in its aptitude to put a check on the ambitions of ‘‘an interested and overbearing majority.’’[45] That government was achieved by favoring the multiplicity and multiplication of interests. The Founders, however, never take sides as to how to settle between these interests, leaving to the deliberative process the responsibility for reaching conciliation among them.

Formally, the American model adheres to what Hamilton termed the ‘‘fundamental maxim of republican government, which requires that the sense of the majority should prevail,’’ on the condition that this is the sense ‘‘of a respectable majority.’’[46] What is a respectable majority? There is no clear answer to that question, and it would be foolhardy to try to give one. One may, however, suggest this: a majority is respectable if it has taken shape in striving to take into account all opinions, hence all interests, on the question under discussion. This is the reason why, beyond formal appearances, the system actually works in accordance with a different principle than the majoritarian principle: it works in accordance with the principle of compromise.

The principle of compromise. The principle of compromise is a matter of legitimacy, not legality. It would be erroneous to say that it amounts to a veto power for the minority over the decisions by the majority, for this is not the case. But the organizing principle of American politics is this: every major interest in the country—whether regional, economic, or religious—has a right to be heard before any political decision affecting it is to be taken, even to the point of being entitled to request that the decision will not be taken without its consent.

The principle of compromise is a reminder of the principle that John C. Calhoun called ‘‘the rule of concurrent majority.’’ Calhoun, a former vice-president of the United States and a senator from South Carolina, fought for the minority interests of the southern states in the 1830s. He developed an ingenious theory arguing that in a truly constitutional government, every political decision must be made with the agreement of at least a portion of the minority with the majority. He thought that a decision could be fair only if it

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[45] Madison, Letter no. 10, *The Federalist*, *supra* note 21, at p. 77.
[46] Hamilton, Letter no. 22, *The Federalist*, *supra* note 21, at pp. 146, 148.

combines the majority of the majority and the majority of the minority, that is, a majority of consensus. Although Calhoun's theory may be said to have been defeated by the Civil War, it would wrong to conclude that its spirit has not survived.[47] Europeans, who usually look at history with a sense of fatality, are prone to invoke the irreducibility principle of politics or, in the words of Carl Schmitt's famous aphorism, the view that ''sovereign is he who decides on the exception.''[48] There is no doubt that, in great historical moments, he who decides is sovereign, although it is rare that the sovereign in such exceptional moments decides without the people and their various interests gathered behind, and supporting him. History is not made of exceptional moments only. In the day-to-day life of the American republic, it is true that the majority may carry the day, but it is rare that it does so without having first tried to govern, whenever this is possible, with the consent of the minority.

Consequences. The rejection of majoritarian logic seems to be sown in the fabric of American politics. This can be verified in the numerous usages that bend the techniques and mechanics of the decision-making process toward respect for minority interests. These methods or usages are not made official; but they are regularly followed and tend to make the law-making process into one of mutual concessions that are regarded as necessary for the public good. Among these usages, the following ought to be noted:

(1) The working methods of the Congress—Congress works essentially in committees and subcommittees, in front of limited audiences where a conciliation of all interests present may take place; all interests to be heard are admitted in the course of public hearings; when the bill leaves these committees, the plenary session takes place for appearances' sake.[49]

(2) The absence of any structured political parties—the two major American political parties do not represent ideas, but interests; they have no ideology. Pragmatism is their dominant discourse. They may adjust themselves to circumstances, and their program is very general; they have no other goal than to set up winning strategies that will

[47] See P. F. Drucker, ''A Key to American Politics: Calhoun's Pluralism,'' 10 *Review of Politics* 412 (1948).

[48] Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1934) [Translated by George Schwab], MIT Press 1985, p. 5.

[49] This was already well noted as early as the beginning of the twentieth century by the future president of the United States, Woodrow Wilson, in *Congressional Government, A Study in American Politics*, Boston, Houghton Mifflin, 1885.

> enable them to gain power, thus giving to the multitude of interests that compose them a chance to win the elections.

Popular representation, private interests, and the public interest. Popular representation holds that the representation of interests in the republic is the necessary condition for the public good. According to its supporters, it necessarily works for the good of everyone because it allows all the interests of society to be represented and because, if the public interest exists, it cannot be anything other than an aggregation of all individual preferences. The American conception of the public good is a legacy of the British monarchical age; it holds the public interest to be in nothing more than the protection of every individual's private rights. The whole law-making process is organized to satisfy the private interests of society. Popular representation leads to a system that puts a strong value on a pluralist and interactive approach to collective action.[50] In the American republican model, the laws—and, along with them, the idea of the public good—are the result of a competition and a negotiation between numerous interest groups, whether private (such as those involved in the business world) or public (as those dedicated to the public interest) without either of them being in a position to win over its rival in a lasting and permanent manner. The problem with this approach is that some groups are more powerful than others, and they tend to win over the others more often than the theory predicts. Without a regulation of the role played by money in politics, the system gives a decisive advantage to financially powerful groups. That said, its major and most appealing advantage is to present the protection of individual rights as the *raison d'être* of the State;[51] private interests are not severed and radically distinct from that of the public interest.

On such premises, the distinction between public law and private law has no *raison d'être*. There is one law only, which constantly mixes the State and the society, the public and the private.[52] Its purpose is to defend and promote the

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[50] See J. Chevallier, ''La gouvernance et le droit,'' *Mélanges Amselek*, Bruylant, 2005, p. 189, especially p. 191.

[51] On that score, American and French philosophers shared the same philosophy. The affirmation of the 1776 Declaration of Independence [''To secure these (unalienable) rights (Life, Liberty, and the Pursuit of Happiness), Governments are instituted among Men''] is echoed by article 2 of the 1789 Declaration of Rights [''The purpose of every political association is the preservation of the natural and indefeasible rights of man (liberty, property, security, and resistance to oppression)''].

[52] See W. J. Novak, ''The Pluralist State, The Convergence of Public and Private Power in America,'' in W. Gamber, M. Grossberg & H. Hartog (Eds.), *American Public Life and Historical Imagination*, University of Notre Dame Press, 2003, p. 27 s., in particular pp. 36-37.

interest of the individuals who compose society. In the United States, when scholars refer to public law values, what they have in mind are values that serve the individual members of the society; they are individual not collective values. Legal scholars interested in them cite one after another: fairness, publicity, transparency, accountability, due process, legality, rationality, participation, and even efficiency. Since these values have in common the fact that they all work to the benefit of the private interests of individuals, they tend to merge with the rights of men, which, as far as Americans are concerned, are the values of the Bill of Rights. Public law in the United States is not the law *of* power but the law *against* power—public power (the State) as well as private power (monopolies).

Chapter 6
Limited Power

Initial distrust of power. No idea is more important to understanding the American republican model than that of limited power. Few people have taken more seriously the admonitions of Montesquieu about the aptitude of every man to abuse power.[1] Extending his observations much further than he envisioned, Americans have invented a republican model that gives all power to the individual, but denies it to the State. Although their theory of popular representation has spread throughout the world, their theory of power and the model of government that emerged from it have remained distinct to them. No other people are governed as Americans are. The constitutional theory of federalism, which they invented ''to form a more perfect Union,'' already, ex hypothesis, implies a limited power because of the distribution of power between the federal government and the states. In addition, their general political theory inherited from the British is that political power must be limited because it is inherently dangerous. The combination of both theories in the Constitution has resurrected the medieval approach to power, where power is treated like a bundle of sticks, so to speak, made of jurisdictions parsimoniously granted and meticulously counted.

The American deep-rooted distrust for power has many origins. Historically speaking, the rejection of State power originates in the hatred for any domination of one man over another, which was regarded as incompatible with liberty. Bernard Baylin related in minute detail the distaste that the colonists had for power; they preferred to call power ''dominion,'' recalling its feudal origins, which they loathed. Power, it was said over and over, has ''an encroaching nature''; power is ''grasping'' and ''tenacious''; ''what it seizes, it will retain.''

[1] In *The Spirit of Laws* [Translated by Th. Nugent, 1752, revised by J. V. Pritchard], 1748, Book XI, chap. 4 available at http://www.constitution.org/cm/sol.htm, Montesquieu wrote: ''Constant experience shows us that every power invested with power is apt to abuse it, and to carry his authority as far as it will go. Is it not strange, though true, to say that virtue itself has need of limits?''

Sometimes, power was ''like the ocean, not easily admitting limits to be fixed in it.'' Sometimes, it was ''like a cancer, it eats faster and faster every hour.'' Sometimes, it was like ''jaws . . . always open to devour.'' From the power and sovereignty, which they abhorred, Americans have retained their irrepressible tendency to be restless, aspiring, and insatiable, and to invade all that they could subdue. The word most often used in relation to them is trespass, a common law tort that refers to the invasion of something private, privately owned, and hence, sacred. In their view, power was inherently aggressive and always prone to fall on its natural prey—liberty, law, and right.[2]

The effect of popular representation on the legislative process. Practical implementation of the principles of popular representation did not make things better. It even worsened the situation insofar as, once all the interests of the society, from the noblest to the basest, were present in the legislatures, the distrust formerly directed against the laws of the king was extended to the laws of the people. As soon as it became clear, as Jefferson put it, that ''173 despots [can] surely be as oppressive as one,''[3] the statutes of popular legislatures were not more gently treated than the statutes of the tyrants. Statutory law was regarded as the result of makeshift coalitions of private interests that eventually succeed only because they have numbers behind them, in particular, the required number of votes. True, the idea that the law must always aim to promote the public good—common to all, not the private good of a few—was never far from sight. However, in the absence of any will (or power) to curtail in any way the right of the people to be actually represented in all their tangible interests within the legislatures, the public interest, or the public good, appears to be in the eyes of many citizens a chimera—a sort of wishful thinking, so to speak. The common opinion is that it is possible that statutes may pursue the public good, but that nothing could be more uncertain, and that this is most likely not the case. On such premises, public opinion tends to hold that the fewer laws, the better. The first requirement of public law in the United States is that it limits power.

Divided sovereignty. In order to limit power, Americans have undertaken, as Justice Kennedy put it so well in *U.S. Term Limits Inc.* v. *Thornton* (1995), ''to split the atom of sovereignty.''[4] They broke power into pieces; they exploded it; they enervated the State of its power. How? By dividing

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[2] B. Bailyn, *The Ideological Origins of the American Revolution*, Cambridge, The Belknap Press of Harvard University Press, 1967, enlarged edition 1992, p. 56.

[3] T. Jefferson, ''Notes on the State of Virginia,'' in *Writings*, New York, Literary Classics of the United States, 1984, p. 245.

[4] *U.S. Term Limits Inc.,* v. *Thornton*, 514 US 779, 838 (1995).

sovereignty under an original application of the theory of separation of powers that has remained unique to them (Section A) and leads the American republican model to fit under the paradigm of the liberal State (Section B).

A. THE SEPARATION OF POWERS

The American contribution to the theory of the separation of powers. It would be an overstatement to say that the separation of powers was invented by Americans, but it is true that the theory experienced in the United States is an implementation not experienced elsewhere. In less than two decades, it was elevated to the rank of ''first principle of free governments,'' as Madison said in 1792.[5] That promotion did not take place at once; nobody could imagine in 1776, when the theory was first put into practice, that it would turn into the elaborate doctrine it had become by 1792. It has not ceased to develop since, year after year. Americans came to the building of the theory progressively.

1. Historical Formation

Origins. No other principle of American public law has drawn more scholarly interest than the separation of powers. It is usually presented as a founding principle of the American political system, and this is the correct approach if one construes the principle as implying the splitting of power and division of sovereignty. The principle originates in the classification of functions of the government first undertaken by Aristotle. But the sources that Americans used to establish their theory of separation of powers do not go back further than the seventeenth century in England. During the Revolution and the Interregnum, several English radicals had developed a theory of separation of powers as a means of isolating the legislative function of Parliament from the executive function of the monarch. Locke had pursued this idea, and built a loose theory of separation of powers among the legislative, the executive, and the federative powers (by which he meant foreign affairs). In the beginning of the seventeenth century, the separation of powers was at the center of scholarly disputes between

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[5] *National Gazette*, February 6, 1792:

> Power being found by universal experience liable to abuses, a distribution of it into separate departments has become a first principle of free governments. By this contrivance, the portion entrusted to the same hands being less, there is less room to abuse what is granted; and the different hands being interested, each in maintaining its own, there is less opportunity to usurp what is not granted. Hence the merited praise of governments modelled on a partition of their powers into legislative, executive, and judiciary, and a repartition of the legislative into different houses.

political theorists. It was often blended with other political theories, in particular that of the mixed government, which represented and balanced against each other the different estates of the society, namely the nobility, the clergy, and the commons. In the 1730s, the separation between the legislative and the executive powers was often assimilated to the mixed government and often absorbed by it.

The contribution of Montesquieu. The genius of Montesquieu was to sort out all these theories and to bring about there complete reorganization through an analysis that has since become immortal. When his work was published in 1748, there was nothing new in his affirmation: ''When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.'' This had been believed for a long time. A little more novel was his remark: ''There is no liberty, if the judiciary power be not separated from the legislative and executive.'' Although Montesquieu also spoke about the mixed constitution, and kept the confusion between separation and balance of powers alive and well, he is the first author who clearly identified a tripartite classification of governmental functions into the legislative, the executive, and the judiciary. The gist of his famous Chapter 6 of Book XI of *The Spirit of Laws*[6] was simply this: political liberty is at risk when these three functions are within the same hands. It is more desirable to distribute the various functions of the State into several hands than to put them all within a single hand.[7] Thus, for Montesquieu, the secret of moderate government is in the sharing of power. In order to understand this and to persuade oneself of the wisdom of this arrangement, it suffices, as Montesquieu reiterated in substance, to take a close look at England, where the King shares power with the Lords and the Commons, and where, as a result, he is firmly kept from abusing power—thus allowing political liberty to ''appear in its highest perfection.''[8]

a. The Years of Formation (1776-1779)

The separation of powers in 1776. In 1776, Americans agreed that there were three functions of government; but few of them attached great importance to a real and effective division of governmental functions because no one saw clearly how this could be concretely applied in an unmixed republic. Once elected by the sovereign people, legislative assemblies naturally became the

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[6] Montesquieu, *supra* note 1, Book XI, chap. 6.

[7] For more details, see the classical analysis by Michel Troper, *La séparation des pouvoirs dans l'histoire constitutionnelle française*, Paris, LGDJ, 1973, new edition, 1989; Michel Troper, ''The Development of the Notion of Separation of Powers,'' 26 *Israel Law Review* 1 (1992).

[8] Montesquieu, *supra* note 1, Book XI, chap. 5.

dominant organs in the new governments; they added other executive and judicial powers to the executive powers already taken from the governors during the colonial period. It should be recalled that all through the eighteenth century, the legislative assemblies in the colonies encroached upon the powers of the governors designated by the king. They cut back on the prerogative powers of the governors, managing to win power in the administration of public finances and even a power of review over monetary appropriations—since they could decide on the use of public money to wage war against the Indians and on the nomination of most public officers. They fought the patronage power of governors in the designation of candidates for executive and judicial functions. Beyond appointment power, they also assumed the right to exercise judicial power, and they occasionally decided cases of a public or private nature. The distinction between the political and judicial functions was blurred. If the colonial assemblies had encroached upon judicial functions, it was because of the extreme politicization of the British judicial system, the fear of judgments handed down by courts under the control of the king, the distrust for the equity decisions made by governors designated by the king, and the lack of professional judges. The legislative assemblies often agreed to hear and decide private cases, and they strove to adjudicate them in a manner agreeable to right and justice.

The Revolution did not change these developments; on the contrary, it reinforced them. The new Constitutions gave to the legislative assemblies not only the powers they had already gained over the governors in the years before the independence, but they also provided some powers that, in British constitutional tradition, could not be labeled other than executive—such as the power to wage war and make peace, to make treaties, to have diplomatic relations, to summon and dissolve the assemblies, or to grant pardons. In the 1780s, the assemblies interfered even more in judicial functions by winning the power to designate judges. What could the separation of powers mean in such a context? The answer is deceptively simple: separation of powers at that time meant a prohibition against a single person occupying multiple public positions, no more, no less. The Constitution of Virginia paid its tribute to the separation of powers in providing that ''nor shall any person exercise the powers of more than one of them, at the same time.'' The separation of powers was understood in the first place as ruling out conflicts of interests.

The first step: Using the separation of powers against executive power. Besides the prohibition against holding more than one office at the same time, the separation of powers meant something more for the colonists. Only the context of eighteenth-century politics makes it comprehensible. What had particularly shocked and disturbed the colonists under British rule was the

manner in which governors used to exercise their extensive powers to pressure, to influence, even to bribe the other governmental organs and, in particular, the representatives of the people in the legislatures, in their promises to give them favors that their positions of power put at their disposal. This is how they managed, for instance, to redraw electoral maps or to reapportion electoral districts; they manipulated representatives by luring them into public positions or judicial functions in exchange for their support of the government. Patronage was of general application. Governors cajoled, enticed, and bribed the representatives of the people; they did this so well that they led Americans to believe that they were indeed killing their liberties.

When Americans started to talk about separation of powers in the 1770s, they had in mind these corrupt practices. They sought in the first place to isolate the courts and, especially, the legislature from these manipulative governors and shield them from evil influence. Their priority was to isolate the popular assemblies from any sort of executive influence or impingement. All the revolutionary constitutions drafted in 1776 were emphatic in excluding from the assemblies ‘‘all persons possessed of any post or profit under the Government,’’ so that the legislative department might be preserved from its corrupting influence. The absolute prohibition of any executive presence in the assemblies was the consequence of historical experiments in the colonies. As Gordon S. Wood demonstrates, this choice represented one of the greatest American contributions to the science of politics, a great achievement in the building of truly free governments. The principle of isolating legislatures from executive influence, with its assumption of a sharp separation between ruler and people, also represented a clear victory of the traditional Whig conception of the nature of politics.[9] It put into practice the particular conviction of the Whig party that the secret of liberty was to be found in a complete separation between the people and their rulers, so that the latter would no longer be regarded as the depositories and best guardians of the interests common to the former.

The second step: Using separation of powers against legislative power. In the 1780s, the great expectations of the Revolution were on the wane. Americans came to realize that their new rulers were just as intoxicated by power as their former governors and that no matter who is exercising it, power has an encroaching nature The great hopes raised by the republican form of government in 1776 collapsed when it became clear that the republic was no shelter against tyranny. Tyranny actually just changed names; it became the

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[9] G. S. Wood, *The Creation of the American Republic (1776-1787)*, 1969, reprint New York, W.W. Norton & Co., 1987, pp. 157-159.

modern tyranny, that form of tyranny that Tocqueville would later immortalize as ''the tyranny of the majority.''[10] When this situation was fully understood, public opinion changed. If separation of powers had been successfully used to protect against the executive, why could it not be used against the legislative? As elections on account of popular representation became the normal means of selecting the members of all the organs in the State, they were regarded as representative of the people, and, thus, because of their common source of authority, put on the same level. No particular prerogative, special right, or derogatory status could be granted to one of them, lest the seeds of political war be sown between them.

Once all organs of the State were unified and homogenized, important consequences could ensue. The truth of the matter is that, if all organs of the government must be considered as equal, because all of them emanate from the people and are supposed to work for the people, there is no longer a reason to regard the legislative power as fundamentally different from the other powers and, in particular, from the executive power. And, if it is true that the government must work for the good of the people, then its different organs, whether they be legislative, executive or judicial, must be equally separated and put under scrutiny, so that the powers granted to one are not absorbed by another. If the powers are properly separated, the officers at service in one of them will stand sentinel against any usurping attempt on the part of another. From the moment it was written down in the States' Constitutions and successfully used, the technique of separation of powers could be used against any department, no matter its representative nature. These ideas came to life in New England in response to the difficulties caused by legislative supremacy and the unexpected excesses of the revolutionary constitutions.

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[10] The expression was coined by Tocqueville, who writes under the paragraph titled ''Tyranny of the majority'' the following: ''I regard as impious and detestable the maxim that in matters of government the majority of a people has the right to do everything [. . .] I shall never grant to several the power of doing everything that I refuse to a single one of those like me,'' in A. de Tocqueville, *Democracy in America* [Translated by H. C. Mansfield & D. Winthrop], University of Chicago Press, 2000. The idea that the majority has all the rights comes straight from Hobbes. The English philosopher justified the rule by the original contract supposed to have been concluded between all the members of society to create Leviathan: ''[B]ecause the major part hath by consenting voices declared a Soveraigne; he that dissented must now consent with the rest; that is, be contented to avow all the actions he shall do, or else justly be destroyed by the rest.'' T. Hobbes, *Leviathan*, Penguin Classics, 1985, Part II, chap. 18, p. 231 available at http://www.constitution.org/th/leviatha.htm.

By the end of the 1780s, the principle of separation of powers had already traveled a long way in America since Montesquieu. In 1778, the report of the Essex County Convention declared: ''If the three powers are united, the government will be absolute, whether these powers are in the hands of one or a large number.''[11] It is, however, Jefferson who explained better than anybody else, in his *Notes on the State of Virginia* (1781),[12] the secret springs of the new theory of separation of powers. That theory was, as Gordon S. Wood rightly noted, a minor doctrine in the constitutional theory of the eighteenth century that, once exploited to its maximum by the founders of the great republic, became a basic tenet of the American system of government.

b. The Years of Consolidation (1780-1787)

The ideas of Jefferson. In his *Notes on the State of Virginia* (1781), Jefferson denounced the concentration of all the powers of government—legislative, executive, and judicial—in the legislative body as the radical vice of the Constitution of Virginia. The judicial and executive members are left dependent on the legislative for their subsistence and, sometimes, even for their continuance in office. Jefferson remarked: ''If the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual.''[13] He also noted that the legislature had in many instances decided rights that should have been left to judicial controversy and that it had often assumed the direction of the executive during the whole period of the legislative session.

His assessment of the situation is harsh, but not radically new: ''The concentrating these in the same hands is precisely the definition of despotic government.'' By contrast, what follows is radically new: ''It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one.'' This is the decisive turning point, for, in saying this, Jefferson forgoes the English remedy, which he believes in that case particularly ineffective. The solution he recommends is truly revolutionary; it goes much further than the remedy of Montesquieu. Montesquieu relied on ''the very nature of things'' for power to check power. In other words, he relied on society (the estates) and the natural inclinations of its members—the wisdom of the aristocracy, the frugality of the people—to moderate power. Jefferson's solution goes much further. He sets up a model, a theory, which does not derive from the

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[11] *supra* note 9, at p. 451

[12] T. Jefferson, ''Notes on the State of Virginia,'' in *Writings*, New York, Literary Classics of the United States, 1984.

[13] *Id*., pp. 245-246.

social status of the classes, but from sheer human will. He enunciates his theory as follows:

> An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

Thus Jefferson definitively holds to a system of government in which the powers are distinct and separated, so that none may transcend their legal limits, but he says—and here is the novelty in the analysis—this is not enough, for ''no barrier was provided between these several powers.'' Here lies, in his eyes, the weakest point of the Virginia Constitution. Convinced of the folly of claiming that representatives will not abuse their powers because of their disinclination to do so currently, he adds on a pessimistic note:

> Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.[14]

The discovery of the barriers to legislative power. Progressively, the barriers to the legislative power, which later will become the famous checks and balances, were discovered by digging into the governmental practices and usages that were familiar to the colonists—the British institutions. Two of them, the first one in the hands of the executive, the second one in the hands of the judges, gave the American conception of separation of powers its distinctive form.

The veto power. The first barrier was the discovery and reinvention of the governor's voice in legislation. The king's signature on the bills adopted by the two houses of Parliament under the form of the royal assent took a very different shape once in the hands of the governor. A limited right of veto by the governor was described as a way of maintaining the necessary separation of powers. The governors were granted a share in lawmaking not because, as in England, the magistracy was a social entity that must consent and thus bind itself and its administration to all laws, but rather because a due balance had to be preserved in the three powers of government. The veto power became a means for the executive to control the legislative power. First, it was conceived as a defense of

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[14] *Id.*, p. 246.

the executive against hegemonic undertakings by a legislature that might seek to encroach on and strip it of its powers. Then it was understood that the technique could have a further use; it could be a check against the adoption of bad laws, an additional security against the enactment of improper legislation. As Hamilton later said: ''It not only serves as a shield to the Executive. [. . .] It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.''[15] The limited rather than definite right of veto—it may be overthrown by a two-thirds majority vote in both houses of the Congress—is premised ''upon the supposition that the legislature will not be infallible.'' It represents one of the most important powers of the president.

Judicial review of statutes: The origins. The second barrier was the theory of judicial review of statutes that the Americans did not so much invent as rejuvenate. It must be recalled that in the monarchical age, enforcement of statutes was subject to compliance with existing law. The law and the statutes were two separate and distinct notions; they were not merged as is the case nowadays—particularly in the civil law system, and less so in the common law system because of the survival of the common law. The statutes enacted by the king were supposed to respect the rights and freedoms (privileges and immunities, benefices, franchises) possessed by his subjects and protected by the judges, their natural guardians. The idea that the subjects of the king were legitimately entitled to expect their sovereign to respect their rights was accepted in all European monarchies but applied differently depending on the country. Judicial review over statutes was practiced under different forms. In France, it had a preventive character. Upon registration of royal legislation in the provinces, the *Parlements* had the right to address remonstrances to the king on the ground that they had a right to review the legislation against the fundamental laws of the realm and to draw the monarch's attention to any legislation, whatever its form (edicts, ordinances, *lettres patentes*), which might hurt the customs or the rights of his subjects.[16] In England, by contrast, the review was, in theory, corrective. It was supposed to intervene *a posteriori* after enactment of the statute by way of judicial review. In 1610, Sir Edward Coke, in the famous *Dr Bonham's case*, defined the power of judicial review as being

[15] A. Hamilton, J. Madison & J. Jay, *The Federalist Papers* [hereinafter *The Federalist*], C. Rossiter Edition, Mentor Book, N.Y, 1961, Letter no. 73, p. 443, available at http://www.yale.edu/lawweb/avalon/federal/fed.htm.

[16] See Chapter 1, Section B.2.b; Vernon V. Palmer, ''From Embrace to Banishment: A Study of Judicial Equity in France,'' 47 *AJCL* 277 (1999).

implied by the common law in very broad terms: ''And it appears in our books, that in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void.''[17] At the end of the eighteenth century in England, the proud assertion of the Chief Justice had long become obsolete because of the coming into being of parliamentary sovereignty at the time of the glorious revolution and the necessity for English judges to recognize the power of Parliament to modify the common law.[18] But the idea embodied in *Dr Bonham's case* had survived in the American colonies, all the more so that it had been enunciated by Sir Edward Coke himself in another landmark case that also outlived the English Revolution in America, the celebrated *Calvin's case* (1608), which asserted: ''The law of nature is immutable and cannot be changed.''[19] These principles of a paramount, superior, inalterable law had been upheld with fervor in the American colonies, in all likelihood because they corresponded to the most cherished and entrenched religious beliefs of the colonists.

At the end of the eighteenth century, confronted by statutes inspired by egoistic and partial interests, some state judges resurrected the old doctrine of judicial review that had originated in medieval law. Summoned by the ''sovereign'' (*i.e.*, the people represented in the legislatures by ''an interested and overbearing majority'') to give effect to its will, these judges issued a reminder, in substance, that the law is above the statute (just as God was above the king in the Middle Ages), that rights exist above power. Also, since no one can be a judge in his own cause, they were entitled, as the oracles of law, to exhort the new sovereign to respect these old, ancient, and venerable principles that came from time immemorial.[20] In short, state judges had recourse to the

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[17] *Dr. Bonham's case* (1610), 77 Eng. Rep. 646, 8 Co. Rep. 114 a; see also M. R. Redish & L. C. Marshall, ''Adjudicatory Independence and the Values of Procedural Due Process,'' 95 *Yale L. J.* 455, 479-480 (1986).

[18] See Chapter 4, Section A.

[19] *Calvin's case* (1608), 77 Eng. Rep. 377, 8 Co. Rep. 1a.

[20] They were all the more inclined to adopt such a course of action in that the laws in question affected property, and that property at that time was not a political object, but rather a judicial object. Insofar as the laws voted by the popular legislatures dealt with the right of property, Madison was well received in the context of the time when he insinuated that these laws were indeed very similar to ''judicial determinations, not indeed concerning the rights of single persons, but concerning the rights of large bodies of citizens.'' This analysis undertaken in Letter no. 10 of *The Federalist*, *supra* note 15, enabled Madison to assimilate statutes to judgments and to subject the former to compliance with the same principles that apply to the latter. Concretely speaking,

secular rhetoric of the common law, and they began to assert a power of judicial review over statutes as their own.[21] By the end of the eighteenth century, the idea of judicial review was well received. Hamilton struck a sympathetic chord in public opinion when, in Letter no. 78 of *The Federalist*, he turned the courts of justice into ''bulwarks of a limited Constitution against legislative encroachments'' and insisted that the lifelong tenure of federal judges would encourage them to display ''inflexible and uniform adherence to the rights of the Constitution, and of individuals.''[22] Soon after the federal Constitution went into effect, the Supreme Court followed suit and alluded to its power to make statutes conform to the prescriptions of the Constitution.[23] The decisive turning point was taken in the landmark case *Marbury* v. *Madison* (1803).[24] The importance of the case comes from the fact that the Court gave a constitutional status to the power of judicial review so that the legislature can no longer evade it, in the same manner that it cannot evade the veto power of the president. Congress, the house of the American people, is henceforth squeezed between two checks.

Judicial review of statutes: The evolution. With the passing years, the judge has become the decisive figure in the American republican tradition of the check on the sinister designs of an ''interested and overbearing majority,'' with his power to invalidate almost the totality of decisions made by the political organs. The power of judicial review is of general scope; it may be used against executive as well as legislative decisions. It is, however, when the judge uses it against the legislative power that its nature as a countermajoritarian (a euphemism in the United States for undemocratic) institution is the most palpable. True, the judiciary no longer ventures to oppose the legislatures all

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operating on the premise that statutes could be assimilated to judicial determinations, Madison raised the crucial question: how can this situation be justified in light of a venerable principle from time immemorial such as ''no man is allowed to be a judge in his own cause'' (*nemo judex in re sua*), which is the basis of the rule of law? The underlying assumption to the question is this: if this principle was successfully invoked the monarchical sovereign, why couldn't it be invoked against the popular sovereign too? The principle *Nemo judex* was, and still is, so fundamental in the common law that it is indeed this very principle that was at stake in the illustrious *Dr Bonham's case* (1610) in which Chief Justice Coke confidently affirmed that, should Parliament ignore it, the common law would hold it in check and stop it.

[21] See W. E. Neilson, ''Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860,'' 120 *U. Penn. L. Rev.* 1166 (1971-1972).

[22] Letter no. 78, *The Federalist*, *supra* note 15, at pp. 469, 470-471.

[23] *Hylton* v. *United States*, 3 US (Dall.) 171 (1796); *Calder* v. *Bull*, 3 US (3 Dall.) 386 (1798); for a general overview, see J. Goebel, *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, 1971, pp. 554-568 and 580-584.

[24] *Marbury* v. *Madison*, 5 US (1 Cranch) 137 (1803).

across the board, as it used to do before the New Deal. After the crisis of the court-packing plan initiated by President Roosevelt, judicial review in economic and financial matters exists only for appearance's sake. In other words, the court no longer protects the right of property and the freedom of contract with the same vigilant scrutiny as before. Judicial review of laws infringing on individual rights and, in particular, on the rights of ''discrete and insular minorities,'' is, however, more extensive and intrusive.

Because it developed in a common law system where it is commonly held that there exists positive rights before the statutes (''retained'' rights, also called ''reserved'' rights,[25] that are not put into the social contract), the power of judicial review not only allows the judge to review the statutes against ''the words of the Constitution'' strictly speaking, it also enables him to review the statute against ''the general principles of our political institutions'' as John Marshall put it in 1810,[26] that is, the principles of equality, freedom and justice of the American civilization. In other words, judicial review empowers the judge to substitute his judgment to that of the legislature and to govern in its place. True, there are a few decisions that are left to legislative discretion; they are known under the label of ''political questions,'' but they are in limited number. Brought by the judge himself over the past few years within narrow limits,[27] these questions are mostly related either to the internal functioning or procedures of Congress, or to foreign affairs. With the sole exception of these questions, the majority does not have the right to make its will prevail or, to speak in the metaphoric language of Cass Sunstein, to order its ''naked preferences,''[28] that is, what it wants, when it wants, and how it wants, simply because it is the majority. Such behavior is always regarded as leading to arbitrary and capricious decisions. The majority does not systematically have its right of way; it has it only when, and because, a judge says it does.

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[25] The retained or reserved rights represent an odd survival in the republican age of the immemorial rights of the monarchical age, the Rights of Englishmen, that for some of them preceded the Conquest and that had been quite effective in the struggle against the pretensions to absolutism of the Stuarts. These rights that are rooted in the common law are expressly provided for, in the Ninth Amendment to the federal Constitution.

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

[27] *Baker* v. *Carr*, 369 US 186 (1962).

[28] C. Sunstein, ''Naked Preferences and the Constitution,'' 84 *Columbia L. Rev.* 1689 (1984).

2. The Theory of the Separation of Powers

Theoretical underpinnings. Originally, the American theory of the separation of powers, with its checks and balances, is nothing more than a practical device, a technique, to remedy a very practical need, the need to contain the consequences of a system of popular representation regarded as limitless in its absolute respect for the liberty of the individual. The question may be raised why Madison never envisioned taking action on the composition of the legislature. The answer is obvious. Taking action on the composition of the legislature probably meant—in Madison's mind—reintroducing the corruption of the British monarchy, which had become a master in the art of manipulating the composition of the chambers in order to find allies. In addition, such a course of action was impossible without resurrecting the feudal traditions as the estates and orders, the guilds and corporations, the honors and titles of ennobled families—all kinds of institutions doomed to obsolescence in the republican age.

Behind the reluctance to tamper with actual representation, there is, however, more than pure opportunism. There is the principled belief that taking action on representation amounts to interfering with the freedom of conscience, the liberty of the individual to think of himself in the State as he sees fit. The American conception of the republic regards as eminently desirable that the individual think of himself with respect to the republic as a virtuous citizen caring for the public good and the public interest. It highly values the citizens who choose to sacrifice for the community (*e.g.,* to serve in the armed forces or to bequeath property for the public rather than private heirs, even if they are in need). But it values as well its commitment not to take action on citizens who refuse to follow suit and choose to give priority to their own interests before those of the community. Nobody can ''be forced to be free''[29] in the great republic. The individual has the right ''to isolate himself from the mass of those like him and to withdraw to one side with his family and his friends, so that after having thus created a little society for his own use, he willingly abandons society at large to itself.''[30] Nobody can be forced ''to think well.'' The call for a responsible citizenship is not absent in the United States; it even may occasionally come from the State.[31] But it runs against the bedrock principle of

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[29] J.-J. Rousseau, *The Social Contract* [Translated by G. D. H. Cole], Book I, chap. 7, available at http://www.constitution.org/jjr/socon.htm. Rousseau uses the formula to convey the idea that the citizen must subordinate his own preferences to the common good, his own will to the general will, so that he may be free with the community, and the community may be free with him.

[30] Tocqueville, *supra* note 10, at II, 2, 2, p. 482.

[31] Such is the case, nowadays, with the debates over welfare and other social support, resting precisely on such State prescriptions.

American philosophical approach so clearly expounded by Justice Jackson in *West Virginia State Board of Education* v. *Barnette*: ''If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.''[32] In other words, the individual is absolutely free to think what he wants; no public authority may indicate a way to follow.[33] Virtue is a free choice as well as disinterestedness, individualism, and selfishness. On such premises, power must be organized in such a way as to counter the consequences of the most hard-hearted egoisms. And this is precisely what the separation of powers is good for; it is a technique that makes up for an absence of high and uplifting ideas among men by putting into place instead a perpetual competition between their opposed and antagonistic interests.

Madison's theory. First experienced in the States, then codified in the Constitution, the principles of the separation of powers were theorized by Madison in Letter no. 51 of *The Federalist*. These principles boil down to one single idea: ''[C]ontriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.''[34] Two prerequisites must be met.

First, each branch must have a will of its own, independent from the will of another. Their members should therefore be elected at different times and by distinct bodies of electors and means of selection. Madison acknowledges that this condition is bound to be fulfilled with difficulty as far as the judicial power is concerned because that department, to be staffed by competent members, must be designated rather than elected. But he does not rule out a participation of the judicial power in the scheme of separation of powers as a result.

Second, each branch must keep a will of its own, which means that each must be kept from falling under the domination of another. In this respect, the greatest difficulty for Madison is the financial question. In a republican government, legislative authority necessarily predominates and usually has the final say in financial matters. If it may tamper with the emoluments annexed to the offices of other branches, the independence of the latter will be merely

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[32] *West Virginia State Board of Education* v. *Barnette*, 319 US 624, 642 (1943)

[33] It is worth noting that the prohibition is addressed to the ''public'' authority only. It does not affect in the slightest manner the ''private'' authorities whose power of influence over the individual may be considerable, due in particular to the efficacy of the various means used (more generally, the media) and the unlimited scope of the domains concerned (from religion to morals, including economics and politics).

[34] Letter no. 51, *The Federalist*, *supra* note 15, at p. 320.

nominal. The Constitution wards off the danger by forbidding Congress to diminish the emoluments of judicial offices while the incumbent judges are in office.[35] But this is not enough; there are also all the means of the departments, whether they concern the personnel or the buildings and, more generally, all the financial appropriations that are necessary for the laws to be enforced and justice to be done. All these means are under the control of popular representation. Nothing would be easier than for the popular assemblies to take control of them and annex all the means necessary for enforcing the laws. Against this danger, Madison follows Jefferson's lead from the *Notes on the State of Virginia*.[36] Like him, he wards off the danger by resorting to ''barriers'' between departments, elaborating as follows: ''The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.''[37] These constitutional means are the veto power of the executive and the power of judicial review. He waxes at length on the veto, probably because it runs contrary to the logic of the republican government (his major defense is that the veto is relative only, not absolute or final). He does not refer explicitly to the power of judicial review, but he implies it underlines the need to distribute the checks to ''each'' department, a language that includes the judiciary.

The federal component and the reinvention of the separation of powers. The theory of the separation of powers could have stopped with the internal structure of the central government. However, in the second part of Letter 51, Madison gave a new dimension to the theory by extending it to the external (*i.e.*, territorial organization of the State). A rather unexpected analysis, since it had never been raised in the debates at Philadelphia, the question is closely tied to the theory of federalism. Having concluded in favor of the separation of powers as an organizing principle of the internal structure of the government, Madison caps his argument by pointing to ''two considerations particularly applicable to the federal system of America, which place that system in a very interesting point of view.''[38]

According to Madison, the federal system of America, the fact that it is a compound republic made of several units, gives it two advantages over a single republic. First, insofar as power is divided between two distinct and separate

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[35] The Constitution provides the same prohibition as far as the emoluments of the executive function are concerned [article II, sec. 1 (7)].

[36] See *supra* note 12.

[37] Letter no. 51, *The Federalist, supra* note 15, at pp. 321-322.

[38] *Id*., p. 323.

governments, the rights of the people are doubly protected. Not only will the different governments control each other, but each at the same time will control itself, giving society better protection against the oppression of its rulers. Second, the federal system of America gives the individual a better protection against the oppression of society and, in particular, against the tyranny of the majority. Insofar as, on the one hand, all authority in the republic is derived from society and, on the other, society is, due to the federal structure of the republic, broken into so many parts, interests and classes of citizens, the rights of the individuals, or of the minority will be in little danger from interested combinations of the majority. A compound republic is therefore the safest possible shield against the tyranny of the majority. Madison elaborates further: ''The security for civil rights must be the same as that for religious rights.'' In the same manner that the multiplicity of sects kept one from gaining predominance over the others, the multiplicity of interests will keep one part of society from becoming a majority and oppressing the minority.

These analyses have acquired great celebrity. They complete the initial theorization of the separation of powers by splitting it in two. The theory of separation of powers is now dual, inasmuch as power may be divided horizontally (contriving the internal structure of government) and vertically (dividing the society into a multiplicity of interests and sects). The so-called ''horizontal'' and ''vertical'' separation of powers became part of the common constitutional discourse in the twentieth century.

Adaptation of the theory. From its origins, the separation of powers has always ranked in the first place among the constitutional principles of the American republic. However, its content has not been immutable. Initially, when Madison developed his theory in *The Federalist Papers*, his aim was to explain to his readers its exact import in the new Constitution. His particular concern was to convince them that, by contrast with most States' Constitutions adopted thus far,[39] the republican model established in Philadelphia would effectively guarantee a real separation between powers in the republic in that each department had been given ''the necessary constitutional means and personal motives to resist encroachments of the others.'' He did not, however, envision that the theory would prevent the slightest participation of one department in the functions of another, for in his words: ''[T]he political apothegm there examined does require that the legislative, executive, and judiciary departments should be

[39] Letter no. 47, *The Federalist*, *supra* note 15, at p. 300. For the criticism of the States' Constitutions, see pp. 304-308.