wholly unconnected with each other.''[40] A most famous application of this connection is the participation of the executive department in the legislative function as exemplified by the ''information'' that the president is requested by article II, section 3, of the Constitution to give ''from time to time'' to the Congress on ''the State of the Union,'' including the ''Measures as he shall judge necessary and expedient [to] recommend to their Consideration.''

This coordination between departments has never gone very far, if only because the president is actually allowed to enter Congress and to give ''information'' to its members only once a year, for the so-called annual presidential message on the State on the Union. If contacts have developed between the executive and legislative branches, their nature is of confrontation, rather than of coordination, except during these rare periods when the same party holds the White House and the Capitol. But, even so, the spirit of the separation of powers means that the most frequent connection between the two branches is to be found in the constant oversight function of the Congress over the executive branch through the committees process. The possible connections between the departments as Madison envisioned them have never resulted in the affirmation of a governmental power, a real power able to spur the government toward definite goals and to impart a direction to political action. A turning point occurred at the beginning of the twentieth century in the *Myers* case, when the Court for the first time faced the question whether the president had the power to dismiss officers of the United States without the advice and consent of the Senate. The answer was in the affirmative. However, a dissenting opinion by Justice Brandeis read: ''The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.''[41] If this phrase deserves to be highlighted, it is for the word ''efficiency,'' a clear reminder, albeit in a disavowing tone, of the intrinsic quality of the parliamentary regime as expounded by Walter Bagehot, the Englishman who portrayed it as inherently superior to the American presidential regime. It is actually in the 1930s that Brandeis's ideas triumphed, probably in reaction to the growing presidential powers under the New Deal, and a fundamentalist approach to the theory of separation of powers ultimately carried the constitutional day for the future. The Supreme Court has been extremely reluctant to endorse delegations by Congress of legislative powers to the executive, and it has subjected them to stringent prerequisites.[42] With the sole exception of foreign affairs, which it considered ''in origin and essential

[40] Letter no. 48, *The Federalist, supra* note 15, at p. 308.
[41] *Myers* v. *United States*, 272 US 52, 293 (1926).
[42] *Schechter Poultry Corp. et al.* v. *United States*, 295 US 495 (1935).

character different from that over internal affairs''[43] and that it viewed as requiring to ''often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved,''[44] the Court relentlessly fought any aggrandizement of presidential powers outside statutory authority.[45]

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[43] *United States* v. *Curtiss Wright Export Corp*., 299 US 304, 319 (1936).

[44] *Id*., p. 320.

[45] This does not mean that the president is powerless; the executive is certainly a very powerful organ, all the more so after the war on terror launched by President George W. Bush. A decade ago, Martin S. Flaherty went as far as to argue that the executive had turned into the most dangerous branch in the American government; see M. S. Flaherty, ''The Most Dangerous Branch,'' 105 *Yale L. J.* 1725 (1995-1996). However, presidential powers in domestic affairs are first and foremost hortatory as illustrated by the metaphor of the ''bully pulpit,'' from which the president may exhort the American people to follow a certain course of conduct. As Robert H. Jackson, J., wrote in a famous concurring opinion, the ''own'' constitutional powers of the President of the United States endow him with an authority that is bound to remain ''at its lowest ebb,'' failing an ''expressed or implied will of Congress,'' in *Youngstown Steel & Tube Co.* v. *Sawyer*, 343 US 579, 637 (1952). Justice Jackson gave the following rationale: ''Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress,'' *id*. at 635. *Mutatis mutandis*, in England, the realization of the public good—this common good that was formerly contained in the prerogative, the fountain-head of executive powers in common law tradition—is subject to parliamentary approval (see Chapter 3, Section B.3).

In the beginning of the twenty-first century, due to the legal arguments put forward by the Bush administration to launch a war on terror with sweeping consequences on liberties and civil rights, the question was debated among constitutional scholars whether the president—by sole virtue of his position at the head of the executive branch—is endowed with extraconstitutional, inherent, powers. See M. D. Ramsey, ''The Myth of Extraconstitutional Foreign Affairs Power,'' 42 *Wm. & Mary L. Rev*. 379 (2000-2001). Such ''inherent'' powers—which originate in Justice Sutherland's opinion in *U.S.* v. *Curtiss-Wright Export Corp*., 299 US 304 (1936), as clearly expounded by D. M. Levitan, ''The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory,'' 55 *Yale L. J.* 467 (1946)—would enable the president in emergency situations to act on his own motion (*i.e.*, outside statutory authority). This theory amounts to considering the president as the Crown in England, that is, as endowed with inherent powers—a legacy of the prerogative—that may be exercised, particularly in foreign affairs, outside parliamentary approval. This is not the place to dwell on this constitutional debate—much influenced by Carl Schmitt's ideas about sovereignty—that eventually goes to decide where sovereignty ultimately resides. Suffice it to say that in the republican age—as opposed to the monarchical age—the government (no matter whether the legislative or the executive branch is concerned) cannot be granted ''inherent'' power, thus ''inherent'' sovereignty, inasmuch as such theory would negate the principle of the sovereignty of the people, the first meaning of which is that, in a republic, the principle of all sovereignty resides essentially in the people (or the nation).

*Construction of the theory opposing executive power*. In the eighteenth century, Hamilton predicted that only the president could be a guardian of the public interest, ''the permanent and aggregate interests of the community'' dear to Madison. This is why he advocated for a strong executive, reminding the electors of New York that, if

> it is a just observation that the people commonly intend the public good [. . .], this often applies to their very errors [and that] when occasions present themselves, in which the interests of the people are at variance with their inclinations, it is the duty of the persons whom they have appointed to be the guardians of those interests, to withstand the temporary delusion, in order to give them time and opportunity for more cool and sedate reflection.[46]

These ideas never prevailed.

Except for a few prominent exceptions (Lincoln, Roosevelt, Kennedy), arising at times of national crisis, if not national tragedy (the Civil War in 1860, the Great Depression in the 1930s, the Civil Rights Movement in the 1960s), the president of the United States is not a guardian of the public good; Americans are too vigilant about the risk of tyranny to entrust a single man with responsibility for deciding on a day-to-day basis what the public good requires, and the executive function has never been conceived of in the United States as it has been in Europe. The shadow of George III has always loomed large over American political institutions. Fear of the abuse of power and obsession with the constant possibility of tyranny still weighs heavily on the executive power. The sole domain in which the American political system is a true presidential regime is that of war and diplomacy, foreign affairs—those matters that require the use of armed force. The president is first and foremost a ''commander-in-chief.'' Such is, indeed, his very first function, according to article II, section 2(1) of the Constitution.[47]

In internal affairs, his powers do not have the same legitimacy. True, he is often presented as a ''leader,'' but the checks and balances of a government with divided and separated powers put a brake everyday on his actions. In the twentieth century, Justice Jackson recommended a less rigid interpretation of the principle of separation of powers that would integrate all these dispersed powers into ''a workable government'' on the ground that the constitutional theory

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[46] Letter no. 71, *The Federalist*, *supra* note 15, at p. 432.

[47] George W. Bush and his administration relied on the presidential constitutional stature in foreign affairs to obtain from Congress in the war against terror delegations of powers that would have been inconceivable in purely internal matters.

''enjoins upon its branches separateness but interdependence, autonomy but reciprocity.''[48] His appeal has never been heard, nor his construction of the Constitution ever accepted, except in foreign affairs.[49] Still, the problem remains the same. In the beginning of the twenty-first century, Justice Breyer recalls that the whole constitutional history of the United States has been ''a quest for workable government.''[50]

*Rejection of all presidential dominance.* Fear of arbitrariness always prevails over concern for efficiency. The Court stuck to rigid, almost dogmatic, construction of the separation of powers. It jealously made sure that the president would remain tightly boxed-in by the initial limits of the constitutional framework. It checked any initiative, any construction, or any reform that would have augmented presidential power. It refused to vest the president with a leadership power over the numerous administrative agencies, divesting him of the power to nominate and to revoke their chief executive officers and creating the concept of the ''independent'' administrative agency.[51] It refused to grant him with line item veto over the budget that would have enabled him to cancel budgetary provisions aimed at providing financial advantages to private interests only, and it authorized Congress, with multiple interests represented therein, to make its own budgetary choices prevail over his priorities for the nation.[52]

However it is perhaps in *INS* v. *Chadha* (1983) that the Court best revealed its extreme separation of powers approach in constitutional jurisprudence. Turning its back to realist approaches that recommended interpreting separation of powers in the context of a modern government—either as a separation of functions not hampering governmental action or as the technique of checks and balances itself—the Court stuck to an idealist approach of the first principle of American government. With a comfortable majority of 7 to 2, it held:

> The Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility. The hydraulic pressure inherent within each of the separate Branches to

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[48] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 635 (1952).

[49] See *Dames & Moore* v. *Reagan*, 453 US 654, 669 (1981); *Hamdi* v. *Rumsfeld*, 542 US 507, 531, 536 (2004); *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2774, n.23 (2006).

[50] S. Breyer, *Active Liberty, Interpreting Our Democratic Constitution*, New York, A. Knopf, 2005, p. 34.

[51] *Humphrey's Executor* v. *United States*, 295 US 602 (1935).

[52] *Clinton* v. *City of New York*, 547 US 417 (1998).

> exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.[53]

It could not have said more clearly that even the public good does not authorize stepping beyond constitutional limits. The president and Congress, therefore, have only the powers delegated to them by the people and, if these powers do not suffice to secure the conditions of public good, this may be a shame, but it is also in some way proof of the excellent work done in Philadelphia: the people are forced to be and remain free.

## B. THE LIBERAL STATE

*The contingency of power.* The American concept of the separation of powers explains why there is no ''State'' in America, comparable to the sense of the word in continental Europe and, in particular, in France: an ideal carried by a political will, a public power in charge of leading society toward a common end defined in a manifesto, a program of government. The American concept of the separation of powers rules out the existence of a strong government that enables each department to exercise its powers ''for its part and under its responsibility to their fullest extent'' such as enunciated in the constitutional law of June 3, 1958, that empowered General de Gaulle to elaborate a new Constitution for France. How did this come about?

A first explanation is that no governmental organ in the United States, whatever the level of state or federal responsibilities, possesses the totality of governmental functions since the United States is a federation, a Union of States. Under such conditions, the ''State,'' at any level, is always exercising only part of its powers. In theory, the vertical separation of powers (federalism) works to limit governmental authority by keeping it from overstepping the ''enumerated powers'' entrusted to it. The principle of ''enumerated powers'' embodied in article I, section 8, of the federal Constitution has not been, however, the check on power initially envisioned. As of 1787, the option was taken to prevent the interpretation of the powers of the Union from being in line with that of international compacts or treaties. By contrast with the Articles of Confederation, which entrusted the Union only with the powers ''expressly'' delegated by the States, the Constitution did not contain the same adverb. As a result, the powers of the federal government have been able to be generously and extensively interpreted, in particular due to clause 18, which closes the above-mentioned provision and considerably increases the scope of the so-called ''enumerated powers'' in giving Congress the power ''to make all Laws which

[53] *INS* v. *Chadha*, 462 US 919, 951 (1983).

shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.''[54] The true reason for the weakness of power in the United States is therefore not to be found in federalism and the ''vertical'' separation of powers[55] but in the ''horizontal'' separation of powers as construed and put into effect in the United States. This calls for closer examination.

*Divided sovereignty.* In order to understand the innate contingency of power in the United States and the fact that, except in external affairs, where emergency requires unity of action in the hands of the president, the government in internal affairs is constantly hampered, one must start by looking at the horizontal separation of powers.

Haunted by the fear of a republic tipping over into monarchy or dictatorship and wary about a government of men replacing the government of laws emblematic of the new republic, first the Founding Fathers, then the Supreme Court have plunged into a dogmatic construction of the prudential principle articulated by the political theorists of the eighteenth century. As of the convention of Philadelphia, it became common wisdom that the sovereign, that is, the people, may choose to be represented in any manner, as legislator, as executive, or as judge (at least, where judges are popularly elected, as is often the case in the States), and any level (federal, or state, or local). To each organ and at each level, the people delegate the portion of power that they deem fit. These powers that all, each in its own way, represent the people may be opposed

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[54] Article I, section 8, clause 18 (the necessary and proper clause) was at the heart of the case *McCulloch* v. *Maryland*, 17 US (4 Wheat.) 316 (1819). To those who argued that if the clause did increase the powers of Congress, it did not actually leave it the free choice of means, John Marshall answered: ''Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'' The *McCulloch* case, which invites the Court to exercise a light review over congressional statutes, reached an apex after the New Deal, with the Court's interpretation of the Commerce Clause [article I, section 8(3)]. The generous and expansive construction of the Commerce Clause enabled Congress to increase the powers of the federal government dramatically. If the case *Lopez* v. *United States*, 514 US 549 (1995), does turn back the tide of this jurisprudence and affirms the Court's willingness to come back to a more restrictive interpretation of the Commerce Clause, there is a common agreement among constitutional scholars that the flow is bound to be relatively limited.

[55] This is so true that there are many state Constitutions that provide for a vertical separation of powers and that are not weak States. Such is the case of the federal States with parliamentary regimes (Australia, the Federal Republic of Germany).

to one another, just as they were in the monarchical age. As in the past, they can be used as forces and counterforces in the interplay of the balance of powers that gave birth to the mixed government, that excellent form of government, which had successfully tamed the monarchy. The work accomplished (and Madison was very proud of it) was all the more remarkable in that the social conditions that had made it possible (*i.e.*, the estates) had disappeared.[56]

The difficulty with this elaborate scheme is that in breaking the representation of the people into several organs, the Founding Fathers broke the popular will into pieces. The sovereign no longer has one will, as under the monarchy, but several; the will of the people is split, distributed among at least six organs (both at the federal and state level, there are three powers in the government). In other words, sovereignty is divided. In the case law of the Supreme Court, the terms ''separation'' and ''division'' have become interchangeable, as if the founding principle of American federalism that is, indeed, based on the idea of divided sovereignty,[57] had been drawn into, then eventually encompassed by the principle of separation of powers.[58]

*The disembodiment of government.* The result of this arrangement of divided and separated powers is that the sovereign people are never represented as a whole, as forming a nation, but always at several levels and in different organs balanced against each other, among which none may lastingly prevail over the others. Even the president of the United States does not represent the American people in all their enduring common interests, only those interests that have been federalized. He therefore speaks in the people's name, in one voice, only on federal matters, where centralization of powers is common law and practice, as in foreign affairs.[59] For the rest, legally speaking, the president represents the sovereign people indirectly and for certain objects only.[60] The

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[56] On all these points, see the remarkable demonstration by Wood, *supra* note 9, at pp. 561-562.

[57] See *McCulloch* v. *Maryland*, 17 US (4 Wheat.) 316, 410: ''In America, the powers of sovereignty are divided between the government of the Union, and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign, with respect to the objects committed to the other.''

[58] See *Seminole Tribe of Florida* v. *Florida*, 517 US 44, 151 (dissenting opinion Souter) (1996); *Bowsher* v. *Synar*, 478 US 714, 721 (1986); *INS* v. *Chadha*, 462 US 919, 951 (1983); *Goldberg* v. *Kelly*, 397 US 254, 273 (opinion Black) (1970).

[59] See *United States* v. *Curtiss Wright Export Corp*., 299 US 304 (1936)

[60] There is little surprise if, notwithstanding numerous proposals of constitutional amendments, a revision of the electoral process to choose the president has never succeeded. The president and vice president are not elected on direct universal suffrage; they are elected by an electoral college, an assembly that is elected by the voters in the States. However, today, both of them are regarded by the Supreme Court as ''the only

result of all this is that the sovereign is composed not of one body, but rather ''of several connected pieces'': it is a ''man of several bodies.''[61] Being represented never as one body politic, but rather as a composite body made of several pieces, the sovereign is weak; it can never be seen, so to speak. Harvey C. Mansfield said this well: ''The essential character of the American Constitution is that while all its parts are *derived* from the people, none of them *is* the people.''[62] The State as a personification of the sovereign cannot therefore be an instrument of domination over the society; it is much too contingent, disabled from exercising lasting and permanent efforts, except, as already mentioned, in those centralized matters such war and diplomacy. In internal affairs, society dominates the State in peopling its organs by way of electing representatives of all its interests, who in turn transform the State into a public forum for conciliating these antagonistic interests.

Perhaps the most important consequence of these developments has been to divest the people out of the government, achieving what Gordon S. Wood has called ''the disembodiment of the government.''[63] The alleged congruence of interests between the representatives and the people, which had made the British representative system in the eighteenth century so successful, was broken into pieces and replaced by an incommensurable divide between the government and the governed. A climate of suspicion and jealousy took hold between them. From the day when election became the only criterion for representation, it was extended to all political organs, and democracy got a better foothold; but it never again brought about that unity of views and interests between the people and their representatives that had been the key to the success of the British system. The logic of the growing distrust between the people and their representatives took the people out of the government and put them outside, and above, the government, in a position where they would watch over it and evaluate its

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elected officials who represent all the voters in the Nation,'' *Anderson* v. *Celebrezze*, 460 US 780, 795 (1983); *Bush* v. *Gore*, 531 US 98, 112 (2000). The phrase seems to indicate that they transcend the diversity of interests in the country. But it may also have been used just to indicate that, under such conditions, the Court has jurisdiction in the case, despite the fact that the matter is entirely governed by State law. Whatever the exact meaning of the phrase is, there is no doubt that the actual concept of separation of powers would become obsolete were the president and the vice president to be elected by universal direct suffrage.

[61] Rousseau, *supra* note 29, at Book II, chap. 2.

[62] H. C. Mansfield, Jr., ''Constitutional Government: The Soul of Modern Democracy,'' *The Public Interest*, no. 86 (Winter 1987), p. 53 s., in particular p. 55 (emphasis in original).

[63] Wood, *supra* note 9, at p. 383.

conduct in relation to the Constitution. Disembodied from the government, the sovereign people in America exist as a constitutional entity rather than as a nation. The upshot is that ''the people'' are actually ''represented'' in their totality by the Supreme Court, the only organ where they ''speak'' as a constitutional entity by the mouth of the justices. Paradoxically, only the nonrepresentative branch can claim to speak to, and for, the totality of the constitutional entity that is ''the people.''

*The realization of the public good.* In the United States, the principle of the separation of powers took on a meaning very different from that commonly understood in Europe. French constitutional scholars usually draw a line between ''rigid'' and ''soft'' separation of powers. As opposed to the rigid separation of powers, which allows no collaboration between legislative and executive powers, the soft separation authorizes, even favors, such collaboration, by entrusting an executive cabinet, originating in the Parliament, with the responsibility of acting on a manifesto—an expression of the public good chosen by the electors when electing Parliament. On such premises, a distinction is made between the parliamentary regime, which ultimately entrusts the Parliament with the responsibility of bringing about the public good (cabinet members are all MPs and accountable before Parliament) and the presidential regime, which vests the same responsibility with the president. This theoretical framework is only partly true. For there is no comparison between the energetic power of a head of government in Europe and the limited powers, sparely distributed and meticulously enumerated, of the president of the United States. Whereas the separation of powers in Europe does not weaken the government, because it is meant as a separation of functions, the same doctrine in the United States has been meant precisely to do this (*i.e.*, to weaken power by turning all questions of public good into questions of power structures). The government—''the State'' in the U.S. sense—is a constant, polymorphous object of contention.

In the United States, powers are separated, not, as in Europe, by a mere separation of functions that does not divide the unity of State power; instead, the powers are separated and broken into pieces by a division of governmental power that runs into the very core of governmental action, as if it were aimed at splitting the common will of the people into pieces and keeping it from ever forming a unity. Separation of powers means constant debate over powers. The result of all this is that no political organ in the United States, whether at the federal or at the state level, can claim to be responsible for the public good; the separation of powers forbids it. Consequently, the public good, or the public interest, is taken care of not by the State, but rather by society, and society takes care of the public good with its own rules (*i.e.*, the rules of the market).

Economic theory inevitably prevails over political theory to define the public good.

*Prevalence of economic analysis of the law*. Two reasons may be put forward to explain the extraordinary success of economic analysis of the law in defining the public good. They confirm and reinforce each other in a reciprocal interplay.

(1) *The disrepute of politics*. From the outset, the presence of individual interests in the government casts into question anything it may decide, for it is impossible to say with certainty if decisions were made for the real benefit of the public good or, as is more likely, for the sole benefit of some private powerful interest. Public opinion holds as common wisdom that public choices are always impure, because politics is by nature impure. The economic theory of legislation assumes that statutory as well regulatory enactments are generally the product of special interest groups.[64] It holds that it is always highly desirable, whenever possible, to trade public for private choices because the individual, taken as *homo economicus*, is a rational human being who always makes decisions for objective and scientifically quantifiable reasons (*i.e.*, the satisfaction of his individual preferences).

(2) *The prestige of economics*. The second reason that seems to explain the scholarly preference of some legal academics for measuring the public good by the yardstick of economic analysis of the law may be enunciated as follows: Since society does not have any other choice but to take charge of the public good by itself, it does so using rules that are familiar to it (*i.e.*, the rules of the market). But, it has been scientifically proved—here is the crucial point in the reasoning—that the rules of the market can in theory do as well, if not better, than the rules of the legislature. Such is indeed the core message of the Coase theorem.[65] The great economist demonstrated in substance that, in a world with no transaction costs, that is, a world in which individuals can meet and talk with each other, rational individuals always choose the most efficient solution for their common problems and always succeed by the

[64] See D. A. Farber & Ph. P. Frickey, ''The Jurisprudence of Public Choice,'' 65 *Texas L. Rev.* 873, 890 (1986-1987).

[65] R. Coase, ''The Problem of Social Cost,'' 3 *Journal of Law & Economics* 1 (1960). See, however, the misgivings of the Nobel prize winner over the extensive application of his theory to noneconomic disciplines such as law in R. Coase, ''Economics and Contiguous Disciplines,'' 7 *Journal of Legal Studies* 201 (1978).

> exchange in bringing about the optimal solution, in economic terms, to their problems. From the day the celebrated theorem became common wisdom among the elites—this happened in the early 1980s—the important legislation of the welfare state, based upon a political approach of the common good (dealing with poverty, civil rights, environment, health and safety), was swept away. Deregulation carried the day, and the public good reversed to the market.

Because it favors the maximization of individual preferences for the participants, the market is allegedly the clearest demonstration that it always provides for the public good. Pragmatic, society knows by experience (this is one of the greatest lessons of liberalism) that the free exchange between people satisfies the individual, at least in most cases.[66] It thus concludes that, in order to bring about the public good, nothing more is necessary than to supply remedies for market failures—in other words, corrective substitutes for everything that free exchange cannot satisfy. Everything that can be claimed as a property right is subject to trade, including body parts, even human tissues, cells, and genome; the concept of inalienable right having no real content in the law currently into force,[67] the concept of property is virtually without limits. In addition to means of redress against market failures, two other problems must be solved: on the one hand, the free rider problem that arises from the impossibility of making everybody pay individually for collective goods (such as security granted by the army and the police), and that justifies taxation and, on the other, the no-seller problem that arises from the impossibility of forcing people to sell, and that justifies appropriation by eminent domain.

The contingency of power in the United States explains the absence of any idea of a public good that could be free from market rules. Indeed, nobody sees interest in such a concept. Priority is given to individual interest because it is commonly accepted that the only legitimate goal of public interest is the satisfaction of private rights and that the public good can be nothing more than the satisfaction of private rights. Economic analysis of the law that derives from the liberal economic theory is influential and pervasive.[68] The jealous suspicion

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[66] There is, however, a great deal of social science to show that individual negotiations are likely to be encumbered by nonrational factors such as unequal status due to age, race, gender, knowledge, etc. The Coase theorem ''works'' in part because it assumes that participants are already equal. But society pays little attention to these warnings, for it is too convinced that ''all men are created equal.''

[67] This is the direction of modern law in the United States, but earlier law was more reserved.

[68] One of its most distinguished scholar is Richard Posner, whose major work is *Economic Analysis of Law*, 6th ed., New York, Aspen, 2003; for an application of his

that looms over all political decisions, constantly wrapping them in the dark cloth of egoistic self-interest, makes it relatively easy to convince public opinion that economic analysis is in most cases superior to political analysis of the law and can always advantageously replace it.

*Conclusion.* The American republican model has no public law because it does not believe that private law resides outside the *res publica*. In the United States, the *res publica* is utterly abstract and dreamlike. The government being held to be a mirror of the society, the *res publica* is actually in the mechanisms by which the society controls itself. In other words, the *res publica* is in the separation of powers itself, that is, in a process (and therefore, history), not in a structure. The public interest in the United States is a constant work in progress—a political process, so to speak, not a thing—mixing democracy, participation, and information flows. It cannot be grasped by a single organ elected by the nation as a whole, such that only the nonrepresentative branch (the federal judiciary) can claim to speak for the totality of the constitutional entity that is ''the people.'' And so the battle is constantly pitched between the forces of law and the forces of the market (*i.e.*, heirs to federalism and antifederalism). In the United States, the *res publica* is a distant future—hence the propensity of the country to think of itself as forever young, capable of reinventing itself as the times demands.

As to the real, tangible public good, it is acted on at the local not at the national level; it is to be seen in the community to which everyone voluntarily belongs not in the State. It is, for instance, in the county, in local associations, in churches, in small communities that citizens work for the public interest, always with dedication, often with enthusiasm. True, there are some national institutions expressly in charge of defending tangible public interests. Such is the case with the administrative tribunals that can be found in all administrative agencies; such is also the case with the federal courts without limited territorial jurisdiction, such as the U.S. Court of Federal Claims, in charge of adjudicating private claims against the Union, or the U.S. Tax Court, with jurisdiction over the finances of the Union. However, all these institutions in charge of defending the interests of the Union, that is, the public interest in its strongest expression, are always subject to judicial review of their decisions by the Supreme Court of the United States, the highest authority for the protection of individual rights (hence private interests) and a symbol of this judicial power that, in all common law countries, even a republic, never yields before a statute of the sovereign.

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analysis to political decisions, see, in particular, chapter 19 on ''The Market, The Adversary System, and The Legislative Process as Methods of Resource Allocation,'' p. 529.

# Part D
# The French Model

*The State and society*. In France, the State is radically distinct from society. It forms, as Tocqueville would have put it, ‘‘a power in a way external to the body social,’’ which it dominates, influences, and forces to progress in a certain direction. That said, of course, the government broadly understood as including all the organs of the State emanates from society, since ‘‘universal suffrage is the sole source of power’’[1] in the Republic, and, as a result, election is directly or indirectly the fountainhead of the organs vested with legislative and executive powers. But the government is not, as in the United States, a mirror for the interests of the society. Society has its interests, and the State has others. The first are regulated by private law, the second are governed by public law, and the latter always prevail over the former. In short, the distinction between the State and society, between the government and the governed, is much more underlined and rigid than in the American model. In French law, it would be inconceivable that a private interest could hold the State in check, still more that it could capture it. The *res publica* in France is subject to special treatment. How did this come about?

The reason lies in this single fact: the sovereign is not conceived in the same manner. In their distrust of power, Americans reduced sovereignty to ashes and dispersed it throughout society, so that each member would own a little fragment of it. France never operated on the same premises. Of course, the French people are sovereign; but they are sovereign as a nation. In other words, *vis-à-vis* sovereignty, the United States is a people, while France is nation. This means that the millions of French people residing in the French territory are

[1] The principle that originates in the French Declaration of the Rights of Man and the Citizen of 1789 was recalled in the constitutional law of June 3, 1958, that laid down the terms of reference within which the drafters of the new Constitution were to work. See J. Godechot, *Les constitutions de la France depuis 1789*, GF-Flammarion, no. 228, 1978, p. 423; A. T. von Mehren & J. R. Gordley, *The Civil Law System*, Boston, Little Brown, 1977, p. 228.

sovereign together, not separately, that is, they are sovereign in the interests that unite them, not in those that divide them. The French republican model is based on national sovereignty (Chapter 7). The major, and most important, consequence is that the public interest is not an uncompleted quest, but rather a day-to-day task for the republic. Far from being the limited power of the American model, power in the French model is a complete power, a State power (Chapter 8).

## Chapter 7

# National Sovereignty

*The French concept of the sovereign.* In France, the sovereign is the nation, the nation in all its historical depth, its revolutionary past, its emotional component. It may be said, as the Constitution of October 4, 1958, puts it in article 3, that ''sovereignty belongs to the people,'' but the sovereignty in question is still qualified as ''national sovereignty.''[1] By contrast with the American model, sovereignty in France belongs to the people as forming a nation; it is not popular, but national. This entails significant implications that must be clearly understood.

The nation is not the people in all their diversity, but rather the people conceived in their unity. The nation knows nothing of races, of religions, of beliefs, of ethnicities; it knows nothing but men, free and equal in rights, who are citizens of the republic. It defines itself by liberty, equality, and fraternity; it upholds an ideal, and it takes shape only by the values that bind its members. Ernest Renan was quite right when he said that the nation was ''a soul, a spiritual principle.''[2] In complete contrast to the American republican model, the French model is embedded in mysticism.

In French public law, the State is not the government (except in the vernacular language that is not that of lawyers). In law, the State is completely detached from the persons of those who are office holders. When article 5(1) of the 1958 Constitution proclaims that ''the President of the Republic shall ensure [. . .] the continuance of the State,'' this does not mean that he is responsible for watching over the functions of the prime minister and the government, but

[1] Article 3 (1) provides: ''National sovereignty belongs to the people, which shall exercise this sovereignty through its representatives and by means of referendums.''

[2] E. Renan, *Qu'est-ce qu'une Nation ?*, Discours en Sorbonne (March 11, 1882), available at http://ourworld.compuserve.com/homepages/bib_lisieux/nation01.htm. Renan added: ''This soul is made of two components [. . .], a common possession of a rich legacy of memories [. . .], a willingness to keep fructifying the bequest to be held in common.''

rather that the president is in charge of a legacy, the *res publica*, which he is accountable for maintaining in the present and bequeathing unaltered to his successors in the future. The president of the republic exercises today the same functions as the king under the old regime, except for this crucial difference: since there is no longer an ecclesiastical foundation for the State, its head holds his powers no longer from God, but rather from the nation, which is the sole source of sovereignty.[3] National sovereignty is the most important principle of French public law.

Legally speaking, it is the nation that is sovereign, not the people. In other words, the French people as a sovereign are always represented as forming a nation. Representation therefore is not popular, but rather national (Section A); and it is from the concept of national representation that the completely different status of statutory law in the French model, as opposed to the American model, is derived (Section B).

## A. NATIONAL REPRESENTATION

Raison d'être. National representation is the keystone of the French republican model. Even before the Revolution, it had been advocated by Emmanuel Sieyès, in two works written as a follow-up to the summation of the General Estates for 1789 and both published in 1788: ''*Views of the Executive Means Available to the Representatives of France in 1789*,'' followed a few months later by the famous ''*What is the Third Estate?*.''

National representation is poles apart from popular sovereignty. The latter came into being as a reaction to virtual representation. However, it should not be concluded that national representation is the same as virtual representation. National representation has nothing in common with virtual representation; the people are not represented without even having elected their representatives. But the people are represented as forming a nation, not merely as a people. The difference lies in this fact: whereas popular representation aims at being a perfect copy of the social reality, at mirroring society, national representation is an intellectual construction of society that justifies itself only by its goal—to attain a representation entirely committed to promoting the public good. The *raison d'être* of national representation according to Sieyès is this:

> It would be a grave misjudgment of human nature to entrust the destiny of societies to the endeavors of virtue. What is needed instead is for the

[3] Article 3 of the Declaration of the Rights of Man and the Citizen of 1789 provides: ''The principle of all sovereignty remains in essence in the Nation. No public body, no individual can exercise authority that does not expressly derive from the Nation.''

> nation's assembly to be constituted in such a way as to ensure that individual interests remain isolated and the will of the majority cleaves constantly to the public good even during these long periods when public manners are in a state of decadence and egoism seems to be the universal rule.[4]

True, there is a common point between Sieyès and Madison: both of them are convinced that relying on ''the endeavors of virtue'' to ensure the public good is unrealistic in the modern age. But the crucial difference between them is this: Madison lets society be represented as it is, with its vices and it virtues, relying only on good fortune to get to the right result (''I go on this great republican principle, that the people will have virtue and intelligence to select men of virtue and wisdom''[5]). Sieyès thinks in a mandatory mode; in his view, action is ''needed'' to get an assembly that will cleave to the public good, action is called for to reach such a good result. That action is this: one must ensure that ''individual interests remain isolated.''

*Representation of common interests.* For ''the individual interests [to] remain isolated,'' one must take into account common interests only; people are therefore represented in what brings them together, not in what separates them. The whole theory of national representation is based on this principle. There are, according to Sieyès, three types of interests to be found in the human heart: first, the common interest, the interest by which citizens resemble one another; second, the factional interest, the one by which an individual allies himself with some number of others; third, the individual interest, by which each individual separates himself from the rest, thinking solely of himself. Whereas the common interests are the general interests, factional and individual interests form the particular interests that keep the representatives from expressing a true general will (*i.e.*, the legal expression of the common good). In order for the representatives to espouse only the public good, only the common interest—that is, only the one by which members of an association decide how to deal with matters of common concern—must lead the will of the legislative body. Therefore, it is necessary to exclude from national representation everything that is relevant to an individual or separate interest. Particular interests have no vocation and no right to be represented nationally; excluding them is the

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[4] E. Sieyès, *What Is the Third Estate?* in E. J. Sieyès, *Political Writings* [Translated by Michael Sonenscher], Hackett Publishing Co, Inc., Indianapolis / Cambridge, 2003, p. 154.

[5] J. Madison, Virginia Ratifying Convention, June 20, 1788 [Papers 11: 163] in P. B. Kurland & R. Lerner (Eds.), *The Founders' Constitution*, University of Chicago Press, 1987, vol. 1, p. 409, available at http:press-pubs.uchicago.edu/founders/tocs/toc.html.

prerequisite for ensuring that ''the will of the majority cleaves constantly to the public good.''

Not only does national representation not reflect a faithful image of the entire people's interests—it does not aspire to do so. It reflects common interests only. These interests are limited, for only few interests are common (*i.e.*, those interests that make the *res publica*).[6] The political association to be created is a re-public, not a re-total.[7] ''Only what is needed to fulfill the purpose of the political association ought to be put in common.''[8] The common interest comprises not the totality of private interests, but rather an aggregation of only those interests that men decide by an act of free will (*i.e.*, a social contract) to put in common. This common interest is the public interest; it represents the ''general good'' that Sieyès regards as the fixed star of the representatives. This general good is the *res publica*, no more, no less. It is the ''public thing''—it is ''the State.''

The French theory of representation is intimately connected to belief in the public interest as a concept distinct from a mere aggregation of private interests, made of those interests regarded as common to all the participants in a social contract. Such an approach to the public interest may be found in Sieyès' *Third Estate* (''It is impossible to conceive of a legitimate association whose objects are not common security, common liberty, in short, the public thing [*res publica*]''[9] ) as well as in Rousseau's *Social Contract* (''The common element in these different interests is what forms the social tie; and, were there no point of agreement between them all, no society could exist.''[10] ) In French public law theory, the public interest is not to be confused with the aggregation of private interests; it a political choice, voluntary, made of all the interests held in common in the social contract. The French republican model is based on a political theory of the public interest.

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[6] See P. Bastid, *Sieyès et sa pensée*, Hachette 1938, New enlarged edition, 1970, p. 381.

[7] See P. Pasquino, *Sieyès et l'invention de la constitution en France*, Paris, Odile Jacob, 1998, p. 73.

[8] The phrase is from Sieyès in a manuscript of 1792, titled *Contre la ré-totale* and quoted by P. Pasquino, *id*., p. 79.

[9] E. Sieyès, *Qu'est-ce que le Tiers État*? (1788), PUF, Collection Quadrige, 1989, p. 85.

[10] J.-J. Rousseau, *The Social Contract*, [Translated by G. D. H. Cole], Book II, chap. 1 available at http://www.constitution.org/jjr/socon.htm.

## 1. Historical Formation

*Social constitution and political constitution*. When the French Estates General convened in Versailles on May 5, 1789, the social constitution of the French realm was very similar to that of England. French society was divided into three estates, or orders: the nobility, the clergy, and the Third Estate. The king having authorized double representation for the Third Estate, the composition of the Estates General was as follows: both the nobility and the clergy had 300 deputies who represented some 200,000 people, while the Third Estate had 600 deputies representing about 26 million souls. The three orders gathered in one single united assembly for the opening session, which was presided over by the king. Then, contrary to the wishes of the Third Estate, the three orders separated to verify the powers of their members; the verification of powers of each deputy was made in separate chambers. On May 12, the nobility declared the powers of its members had been duly verified and instituted itself as a separate chamber, expecting the Third Estate and the clergy to do the same.

On June 15, the Third Estate made it known that, the powers of its members having been duly verified, it was ready to begin working with the other two orders on the great reform project, the regeneration of the realm. Although ambivalent, the clergy was not opposed to working with the popular party. The nobility, however, was strongly opposed to it, in line with a tradition that could be traced far back in time.[11] It was, in its opinion, out of the question to work in

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[11] In his *Essay on the Privileges* (1788) (annexed as an introduction to his *Qu'est-ce que le Tiers-État*? *supra* note 9), Sieyès explained how the privileges of the nobility had led members of this order to believe that they formed an order ''set apart'' from the two others and to regard the ''others,'' that is, the people, as ''an assemblage of nobodies, a class of men created especially for the service of others whereas they had been themselves created expressly for command and pleasure,'' *id*., p. 9. To better illustrate his argument, he complements it with the following extract from the minutes of the meeting of the Estates General in 1614. Shocked by the suggestion of the Third Estate, which, then, would have liked to be able to present the French realm as ''a family made of three brethren,'' the President of the nobility, Baron de Senecey, objected to this proposal on the ground that the Third Estate held the last rank in the assembly. And he added in graphic language:

> They [the Third Estate] are those who dare to compare themselves to us. . . They claim the clergy to be the eldest, we to be the younger, and themselves to be the youngest. . . . What a miserable condition did we fall into should these words be true! How could so many services rendered from time immemorial, so many honors and dignities, inherited by the nobility and highly deserved by reason of its labor and fidelity have it served so well that, instead of raising the order, they degrade it to the vulgar in the closest union to be envisioned between men, which is fraternity?

*Id*., pp. 25-26.

common with the other two orders. In its view, the political constitution of the kingdom could not differ from its social one. In the same manner that the three estates in England were represented in two chambers, there should be in France the same representation of the orders in separate chambers. According to the nobility, because it and the clergy were not united, there should continue to be three chambers, each having veto power over the decisions of the two others. The obstinate determination of the nobility and part of the clergy not to work together in a single chamber with the Third Estate left the latter no other option but to constitute itself, too, in an assembly.

*Representatives of the people or representatives of the nation*. The deputies of the Third Estate were hesitant about the title they should give themselves to be rightly constituted as a deliberative assembly. What name could they choose? In reference to his famous pamphlet ''*What is the Third Estate?*'' Sieyès suggested ''representatives, known and verified, of the French Nation.''

Mirabeau objected on the ground that this could jeopardize a smooth sequence of events in the near future. Anxious about the need to obtain royal assent, he explained to the assembly that it could not do without this substantial formality, were its resolution to come into force. If assent were lacking, the assembly would run the risk, Mirabeau warned, of being dissolved or prorogated, and would eventually be exposed to ''an outburst of vengeance, a coalition of all aristocracies, and the hideous anarchy that always paves the way to despotism.''[12] The concern of the deputy from Aix was understandable. According to the law of French monarchy, it was commonly understood that the nation in France was not an independent body politic, but rather was entirely subsumed within the king's body. There was little doubt, from that standpoint, that Sieyès's proposal was a provocation. Advocating for a more conciliatory

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The French Revolution was less against the monarchy, the political constitution of the realm, than against its social constitution, namely, the division of the society into orders, each endowed with separate rights. If the concept of nation is so fundamental to French public law, it is because that concept has been the political and legal means by which France left the monarchical age by putting an end to the society of the old regime and its division into orders. The vocation of the nation is to welcome under the same roof a people of free men, equal in rights, and living under a common law. In the French constitutional tradition, the French nation is not an aggregate of people endowed with diverse status and various privileges or immunities; the people are sovereign as forming a nation. There is little doubt that the genealogy of the nation is religious; the nation realizes a unit very similar to the Christian community: ''There are no longer Jews, or Greeks, or slaves, or freemen, or men, or women; in Jesus Christ, you are whole in one,'' *Galatians*, 3: 28.

[12] *AP*, vol. VIII (June 15, 1789), p. 111.

stance, Mirabeau offered the following formula: ''representatives of the French people.'' Drawing on English laws and customs adopted by the Americans, he declared to the Assembly that the word ''people'' was usually understood as encompassing the greatest part of the nation and that this formula had the advantage of not being a ''frightening title.''

Between ''representatives of the nation'' and ''representatives of the people,'' there was no small difference. Choosing Mirabeau's formula would not have political consequences only. The deputy from Aix was, in all likelihood, using the formula in the hope of bringing about a change in French constitutional tradition similar to what had taken place in England. It is probable that, in his view, the representatives of the French people were called sooner rather than later to constitute a counterpart to the low chamber (Commons), while the nobility would turn into a high chamber (Lords), with the clergy (whose members were extremely unequal in wealth) dividing between the two, depending on their fortune. In choosing the title ''people,'' the Assembly would have accepted a sharing of sovereignty between the king, the privileged orders (nobility and clergy), and the people (Third Estate). Had this solution been adopted, history would have taken another course; but it was not. The reason has to do with the fact that in England, as Sieyès had explained it in his pamphlet on ''*What is the Third Estate?,*'' the nobility had privileges only insofar as part of its members participated in the legislative process.[13] In other words, the nobility (although, not the whole nobility, but only that part which had seats in the House of Lords) was distinct and separate from the rest of the English people because of political not civil rights. Englishmen were lucky to be subject to the same law, the common law, and to have their disputes adjudicated by the same courts, the king's courts. Whether criminal or civil, the common law was theoretically the same for all in England; the laws were equally protective. Such was not the case in France where the individual, as such, had no legal existence[14] ; everyone was defined in society by his estate, or social class (*corps*).[15] Each estate, or

[13] Sieyès, *supra* note 9, at p. 60.

[14] Under the old regime, the human being has a legal existence only insofar as he lives in society and is linked and attached to other men; he is defined from social, economic, or legal standpoints by his belonging to communities such as towns, provinces, countries, guilds, religious orders, lordships, universities. The society in the old regime is a society of estates (corporations), and the corporations define themselves by their privileges.

[15] The estate (corporation), under the old regime, is a group of Frenchmen united for the common good. The corporations enjoy legal personality; they may sue, elaborate their own rules, provide for their recruitments; they may also exercise juridical functions and adjudicate cases, tax their members, and provide for a common budget; they are recognized, and reformed when necessary, by the king who exercises general oversight

social class, had its own laws, the privilege being in essence ''dispensation from the common law'' (Loyseau).

*The constitution of the Third Estate into a ''National Assembly.''* Accepting Mirabeau's formula amounted to dooming the task of national restoration that the Third Estate had put at the top of its agenda. How could it be realistic to imagine that this agenda could ever be put into practice, if it was subject to the consent of the privileged orders and the assent of the king? To accept Mirabeau's formula meant, as Sieyès had predicted in his pamphlet on the Third Estate, that the will of 26 million souls could be held in check by the will of 200,000 privileged (the nobility and the clergy) and even by that of one individual (the king). Mirabeau's formula did not carry the day. The obsessive will of changing, first, the social constitution of the kingdom before improving its political constitution won over all oppositions.

By a decree of June 17, 1789, the Assembly of the Third Estate, recognizing that it was ''already composed of the representatives sent directly by at least ninety-six percent of the nation,'' that ''the members who compose it are the only representatives lawfully and publicly known and verified,'' and that ''they are sent directly by almost the totality of the nation,'' and recalling that ''the representation is one and indivisible'' declared: ''The denomination of National Assembly is the only one which is suitable for the Assembly in the present conditions of things.''[16] This revolutionary move was the act that gave birth to modern France.

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over them. The individual is socially respected only insofar as he belongs to an estate (corporation), for he then may enjoy the privileges of the corporation. Corporations have indeed their privileges, each of them different between estates; these privileges may be social (position in the official ceremonies; apparel, for instance, only nobles may wear silk), fiscal (tax exemptions and immunities, the nobility is tax exempted for the ''*taille,*'' a kind of income tax, and the ''*gabelle,*'' a salt tax), or legal (special courts, university members have their own jurisdictions). All Frenchmen, in one way or another, are ''privileged.'' Privileges may apply to the economic sector (corporations enjoy a *de facto* monopoly over making and selling part of the production); the royal manufactures enjoy their own privileges (in particular, monopolies) all of them granted by the king. The nobility has its own privileges: tax exemptions, right to bear the sword, right to wear precious fabrics, right to enter and make a military career (soldiering is exclusively reserved to the nobility as of 1781), special colleges for the education of their children dedicated by their parents to soldiering (four generations of nobility to enter the royal college of La Flèche, but sixteen to enter that of Lure and Saint Claude). Last but not least, privileges regulate the right to access and be presented to the court. See Yves Durand, ''Privilèges, privilégiés,'' in *DAR*, p. 1024.

[16] Frank Maloy Anderson (Ed.), *The Constitutions and Other Selected Documents Illustrative of the History of France (1789-1901)*, Minneapolis, Wilson Co., 1904, p. 2.

*The meaning of national sovereignty.* Article 3 of the Declaration of the Rights of Man and the Citizen adopted two months later implemented the consequences of the decisions made by the Third Estate. It provides: ''The principle of all sovereignty remains in essence in the Nation. No public body, no individual can exercise authority that does not expressly derive from the Nation.'' The meaning of this text is at least twofold.

First, it puts an end to the fusion that traditionally existed between the king and the nation. The king is no longer the nation; he is separate from it. The law of the French monarchy held that *the Nation is no body politic per se, in France* and that *it remains entirely in the body politic of the King.* To the *Parlement* of Paris, which had dared to speak in the name of the nation and to defend on its behalf the fundamental laws of the kingdom, Louis XV contemptuously replied in the so-called audience of Flagellation of 1766: ''The rights and the interests of the Nation, which some dare to envision as a body politic separated from the monarch, are necessarily united to mine, and remain in my hands only.''[17] There was not, on the one hand, the nation, and on the other, the king; they were joined in one single body politic. ''Without the King, no Nation''[18] affirmed the jurist Jacob Nicolas Moreau, who was also an historiographer of the king. The concept of national sovereignty discards that approach, without, however, imposing the republic. The nation could elect to give itself a king, but the latter, in theory, would no longer rule by the grace of God, but rather by the grace of the nation. One may underline that the terminology ''in essence'' (''The principle of all Sovereignty remains in essence in the Nation'') seems to bear witness to the difficulty the people of this era had in imagining a king who would be ''King of Frenchmen,'' as it would be said later in the middle of the nineteenth century of Louis-Philippe, and no longer ''King of France.''

The second implication of the article calls for a more complex analysis. No doubt, it withdrew all legitimacy from the pretensions of the *Parlements* that, starting in the 1760s, had claimed to be the ''representatives of the Nation'' and, as such, to be entitled to defend the fundamental laws of the kingdom, of which they were, incidentally, unable to give a proper definition.[19] But the article also ruled out an evolution English-style, so to speak (*i.e.*, the establishment of a sovereign body politic such as the institution of ''King in Parliament'' used to be, and still was). This exclusion of a sovereign body politic signaled the end of the monarchical age. National sovereignty calls for one center of power, the one

[17] P. Brunet, *Vouloir pour la nation, Le concept de représentation dans la théorie de l'État*, Bruylant / LGDJ, 2004, p. 73. See also Chapter 1, Section A.2.

[18] The formula is quoted by Pasquino, *supra* note 7, at p. 59.

[19] *Id*., p. 58.

where the nation is represented. Moreover, in ruling out the possibility of an institutional body politic being inherently sovereign, it also rules out a sharing of sovereignty between separate organs, as is the case in England. The principle of national sovereignty belongs to the republican age; it implies the sovereignty of the people, a people forming a nation.

*The revolutionary nation*. The French Revolution did not invent the concept of nation, which had been in existence since the sixteenth century and was synonymous with ''human group'' or ''community,'' but it radically transformed it.[20] In the eighteenth century, the term nation tends to be equated with that of State. In 1748, Montesquieu referred to ''nations'' in relation to the law of nations[21] and, ten years later, Vattel spoke indifferently of nations or States, defined as ''bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.''[22] What is the new nation made of? The answer is given in article 1 of the Declaration of the Rights of Man and the Citizen. The nation is made of ''men [who] are born free and remain equal in rights.'' The new nation has nothing in common with the old one, which united not individuals, but rather groups of individuals—estates, corporations, and guilds, all of which were bound to each other by sentiments (honor, loyalty, faith, or love).

What does bind these men ''born free and remaining equal in rights'' together? What is the social link? Sieyès gives the following answer: men are linked to each other by labor, which supplies each nation—as Adam Smith had put it—with ''all the necessaries and conveniences of life'' and is ''the fund'' of any wealth.[23] The brilliant idea of the English liberal that economic exchange, in particular trade, is indeed what makes the social link is the cornerstone of Sieyès's essay.[24] The reason why the Third Estate is a self-sufficient ''complete nation'' is that it undertakes all the activities that support society, that is, all kinds of private employment (work on the land, human industry, occupations of merchants and dealers, most liberal and scientific professions, as well as the

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[20] See Yves Durand, ''Nation, nations,'' in *DAR,* p. 882; P. Nora, ''Nation,'' *DCRF* (Idées), p. 339

[21] Montesquieu, *The Spirit of Laws* [Translated by Th. Nugent, 1752, revised by J. V. Prichard], 1748, Book I, chap. 3, available at http://www.constitution.org/cm/sol.htm.

[22] E. de Vattel, *The Law of Nations, or Principles of The Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* [Translated by J. Chitty], Philadelphia, 1832, Preliminaries, § 1.

[23] A. Smith*, An Inquiry Into the Nature and Causes of the Wealth of Nations*, Liberty Classics, Indianapolis, 1976, vol. I, Introduction and Plan of the Work, p. 10.

[24] It has been proved that Sieyès carefully read Smith's *Wealth of Nations* and embraced Smith's ideas with enthusiasm; see Pasquino, *supra* note 7, at p. 118.

least esteemed domestic services) and most public services (the army, the law, the Church, and the administration), nineteen out of twenty employed in the public services are members of the Third Estate, the chief difference from the other orders being that its members ''are required to bear the whole burden of all the genuinely hard work, namely, all the things that the privileged orders simply refuse to do.'' The Third Estate does indeed contain, within itself, everything needed to form a complete nation. It works like an industrious beehive. The Third Estate is, according to Sieyès, ''a strong and robust man with one arm still in chains.'' He elaborates: ''If the privileged order were removed, the nation would not be something less but something more [. . . .] The nobility is not part of our society at all: it may be a burden for the nation, but it cannot be part of it [. . . .] Such a class is, surely, foreign to the nation, because of its idleness.'' Thus, idleness, formerly a privilege of aristocracy, becomes a dividing line in society. The French nation defines itself as including all those who participate in the making of the nation's wealth. Labor is the criterion that includes or excludes from the nation.[25] If labor is the cement that forms the new nation, there is no doubt that the social link has become, like in America, voluntary, objective, based upon interests.

*The modern nation*. The nation of the twenty-first century is no longer that of 1789. True, its foundations are still the same. ''What does a nation require to prosper and survive?'' asked Sieyès. ''Private activities and public services,'' he answered. This is certainly still the case. It is indeed labor that brings men together and makes the foundations of a nation so that the social link is principally interest. But it has never been only that, and it is still less today. From the origins, because it had to assert itself against the monarchical nation, the modern nation has always lived with an obsessive yearning for unity, unity (limited here to public law only) of representation, of power, of legislation, of citizenship, of its secular people enriched today with the children of its former colonies, ''the sons and the daughters of the Republic.''[26] Haunted by a fear of dislocation that has always loomed large, since it was built on the people united by these abstract concepts of liberty and equality, derided by Burke as ''stubble and quicksand,''[27] the revolutionary nation could survive as a collective project

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[25] *Id*., p. 61. See also C. Clavreul, ''Sieyès et la genèse de la représentation moderne,'' *Droits*, no. 6 (1987), p. 45, particularly, p. 49.

[26] Jacques Chirac, Speech of December 17, 2003, available at http://www.elysee.fr/elysee/elysee.fr/francais/interventions/discours_et_declarations/2003/decembre/discours_prononce_par_m_jacques_chirac_president_de_la_republique_relatif_au_respect_du_principe_de_laicite_dans_la_republique-palais_de_l_elysee.2829.html.

[27] E. Burke, *Thoughts on the Cause of the Present Discontents*, continued, 1. 1. 139, in *Select Works of Edmund Burke, and Miscellaneous Writings*, Indianapolis, Liberty Fund,

only. This was, and has remained, ''the happiness of all''[28] announced as early as 1789 in the Declaration of the Rights of Man and the Citizen *in fine* and later in the Declaration of Rights of Year I (1793) as ''common happiness.''[29]

This ambitious project bears witness to the most important and significant difference between the American people and the French nation. There is no doubt that both republican models aim at ensuring happiness (happiness is the lodestar of political thought in the eighteenth century). But, unlike the American model that, from the very beginning, has construed ''the Pursuit of Happiness,'' mentioned in the Declaration of Independence of 1776, as an individual project that eventually turned into the ''American Dream,'' the French model from the beginning interpreted happiness as a collective project. ''The libretto was written when the curtain raised, but history set it to music,'' writes Pierre Nora.[30] The happiness of all was bound to come into being by and in unity only. Carried forward by this perpetual search for unity, the nation excluded from itself all its causes of division (the religion chief among these, with the law of 1905 on the separation of Church and State) and included within itself all the values that could bring it back to what had made the success of the monarchical nation, the ''whole-in-one'' France. These values are found in the socialist doctrines and the principle of fraternity affirmed in 1848, the hardships of the two Worlds Wars, and affirmation in 1946, reiterated in 1958, that the republic was henceforth ''indivisible, secular, democratic and social.''[31]

## 2. The Theory of National Representation

*The search for a good legislature.* Unlike Madison who, because of his skepticism about human nature, does not think it realistic to expect to elect a legislative assembly of virtuous representatives motivated only by the public

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1999, available at http://www.econlib.org/LIBRARY/LFBooks/Burke/brkSWv1c1a.html. In E. Burke, *Reflections on the Revolution in France*, Penguin Classics, 1968, p. 122, Burke blamed the revolutionaries for ''despising everything that belonged to [them],'' and ''set up [a] trade without a capital.''

[28] The Preamble to the Declaration of 1789 reads in part as follows: ''The representatives of the French people [. . .] have resolved to set out, in a solemn declaration, the natural rights, inalienable and sacred, of man so that [. . .] the complaints of the of citizens [. . .] will always resolve around the maintenance of the Constitution and the happiness of all.''

[29] Article 1 of the Declaration of the Rights of Man and the Citizen of Year I (June 24, 1793) provided: ''The aim of society is the common happiness.''

[30] P. Nora, ''Nation,'' *DCRF* (Idées), p. 345.

[31] The phrase is contained in article 1 of the Constitution of October 4, 1958 (it was already mentioned in article 1 of the Constitution of October 27, 1946).

good, Sieyès operates on the premise that ‘‘a good representation is essential for a good legislature.’’ To make good laws, one needs a good legislature, motivated by the public good only. The conformity of laws to the public interest depends on the composition of the assemblies. It is thus necessary to require two prerequisites, which may be described as the flying buttresses of the theory of national representation: the deputy is the representative of the nation, and the deputy represents the national interest.

*The deputy is the representative of the nation*. The first proposition, indeed a basic tenet, insofar as it determines all the rest, is in complete opposition to that accepted by the American theory of popular representation. It is as follows: the French deputy is the representative of the nation; he represents the whole nation, not his electors, not his constituency. The reason for this proposition is to be found in the consequences of the opposite proposition. If a deputy represented his electors only, it would seem, says Sieyès, that each constituency, electing its own representatives separately and having no say in the selection of the others, would be entitled not to recognize as valid law a bill that is not the work of the whole body of representatives and to claim the right to recognize as good law only the work of the majority of its own representatives. Each constituency would therefore have a *liberum veto* on every other, that is, it would have the right to claim not to be bound by any law that had not been adopted by its own representative. A right of this nature, says Sieyès, would sooner or later paralyze the law-making process and make it impossible for the legislature to perform its functions.[32] The French deputy is thus regarded as elected by the whole nation; he represents general, never individual interests; he represents not those who voted for him, not even his constituency, but rather the whole nation.

*The deputy represents the national interest.* The second proposition that flows from the first is as follows: as each deputy is a representative of the nation, he always represents a national, hence general interest, not particular interests. His will, therefore, is necessarily led by the national interest, hence the public interest, so the law is always the expression of general, not particular will. This result is the logical, quasi-mathematical consequence of the theory of representation envisioned by Sieyès, whose only concern was to set up a system that would enable the assembly of a nation to be composed in such a way that

[32] See E. J. Sieyès, *Views of the Executive Means Available to the Representatives of France in 1789*, in E. J. Sieyès, *Political Writings* Including the Debate between Sieyès and Tom Paine in 1791 [Edited, with an Introduction and Translation of *What Is the Third Estate* by Michael Sonenscher], Hackett Publishing Co., Inc., Indianapolis / Cambridge, 2003, p. 12.

''the will of the plurality cleaves constantly to the public good.''[33] Sieyès's theory is the opposite extreme of Madison's.[34] In contrast to the latter, who is convinced that the public good is achieved through a multiplication of particular interests, the former believes that the public good is premised on total exclusion of particular interests from national representation. The goal is less to forget these particular interests than to represent them elsewhere than in the national assembly.

*Representation of particular interests.* It is greatly to the credit of the French system of national representation that its ultimate goal is to extract a general interest rising out of the multiplicity of factional interests in the social fabric. It suffers, however, the drawbacks of its qualities in that it stifles diversity in rolling back everything that could unravel the unity of national representation. The theory is obviously incompatible with the communitarian approach to representation, today so popular, which emphasizes groups' rights in the name of multiculturalism, just as it was at odds at the beginning of the twentieth century with the corporatist doctrine that advocated specific representation for economic and social interests. It is within these contradictions that one may find the exact meaning of the principle of indivisibility of the republic set forth in article 1 of the Constitution.

What the principle of the ''indivisible Republic'' enunciated in article 1(1) of the Constitution in effect means exactly, seems to be this: the sovereign (*i.e.*, the French people) shall not be represented other than in the national form. It does not mean that the numerous groups, communities, and interests that compose French society may not be represented as such, but that they may not be represented in the national representation, for that would imply that they have a right to take part and have a say in the exercise of sovereignty. The theory of national representation does not rule out any representation for particular interests; rather, it keeps them from being represented in sovereign powers. These interests can be represented outside sovereign powers, as is the case with economic and social interests today represented in the Economic and Social Council, an advisory body in the legislative process.

The national representation may reflect national interests only; particular or individual interests are not part of it. To change this, the Constitution would have to be amended, as was done for the ratification of the Maastricht Treaty in 1992. Since senators were elected by the organs of territorial subdivisions and

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[33] Sieyès, *supra* note 9, at p. 86.

[34] See B. Manin, *Principes du gouvernement représentatif*, 1995, Flammarion, Champs, no. 349, p. 12.

local towns, and EU foreigners were admitted to be represented in these organs, some foreign, and thus, particular, interests were henceforth represented in the Senate. A constitutional revision took place to authorize this derogation made inevitable by the ratification of the Maastricht Treaty. For the same reasons, article 3 of the Constitution was amended to enable the legislature, if it chooses to do so, ''to promote equal access by women and men to elective offices and positions.'' It may be noted that the formula rules out any discriminatory quotas in favor of women, insofar as access must always be provided equally (*i.e.*, for ''women and men'').

## B. THE STATUS OF STATUTORY LAW IN THE STATE

*Representation and legislation.* National representation is conducive to approaching statutory law in a spirit completely different from the Americans. Insofar as it leads to a legislature representing not a multitude of diverse and antagonistic interests, but rather a united nation, charged with attending common interests only, the statute is necessarily the expression of a general will, never that of a (or some) particular will(s); it is therefore not inclined to create injustices. To the extent that the legislature is composed in such a way that, according to Sieyès's wishes, ''the will of the plurality cleaves constantly to the public good,''[35] the statute may fairly be described as a true ''expression of the general will,'' not the expression of ''an interested and overbearing majority,''[36] prone to impose its ''naked preferences.''[37] It is the theory of national representation, that is, the idea that general interests only may be represented in the legislatures, that explains why the obsessive fear of the tyranny of the majority was in France never as vivid, almost palpable, as in America.

National representation leads to the public good with great probability but not certitude. In reality, it has not always brought about the expected results. This is not to say that its premises are flawed; they are not. Close observation of American political practices and the role of interest groups and lobbies is convincing enough in this respect. But the theory, a pure product of the powerful reason of the Enlightenment, can produce its beneficial results only upon fulfillment of certain conditions that, in reality, are difficult to meet. The whole theory boils down to the concept of generality. In order for the lawmakers to

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[35] Sieyès, *supra* note 9, at p. 86.

[36] A. Hamilton, J. Madison, & J. Jay, *The Federalist Papers*, Letter no. 10, p. 77, C. Rossiter Edition, Mentor Book, N.Y, 1961, available at http://www.yale.edu/lawweb/avalon/federal/fed.htm.

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

always legislate for the public good, they must pay attention to, and represent, only general interests. This can be done only by acting on the law-making process as well as the object of legislation. The principles of French public law were built on these premises, but they have had to be adapted from their revolutionary beginnings.

## 1. The Law-Making Process and the Representation of Interests

*''Good representation'' and ''good legislature.''* Sieyès's basic idea is to compose a legislature that would be well and truly national, that is, composed in such a way that ''the will of the plurality cleaves constantly to the public good.'' In practice, this can be done only if the deputy is forbidden to represent anything but the nation. Such ambition supposes, as Sieyès himself acknowledges, getting over ''the major difficulty that springs from the interest by which a citizen allies himself with just a few others.'' For as Sieyès explains: ''It is this interest that leads to conspiracy and collusion; through it anti-social schemes are plotted; through it the most formidable public enemies are created.''[38] These interests that are a danger to the republic are, of course, akin to the factions of Madison. However, where Madison thinks that there is nothing to be done but to accommodate them and minimize their harm to the republic, the Frenchman proposes a much more radical solution. Haunted by the estates, guilds, and corporations that divided French society of his time, Sieyès is certain that they must be kept, in the first place, from forming. He offers the following remedy: ''It should not be surprising therefore that the social order should require that no citizens be allowed to organize themselves in corporate bodies.''[39] Sieyès follows in the footsteps of Rousseau, who wrote: ''It is essential, if the general will is able to express itself, that there should be no partial society within the State, and that each citizen should think only his own thoughts.''[40]

*Plurality and majority.* The great design of Sieyès is to extract from representation, or elections, an assembly composed so that its members always cleave to the public good. Let us ensure, he says in substance, a ''good legislature'' through ''good representation,'' and its members will naturally promote the public good. They would be inclined to do so, because of both their characters and their working methods. Having no ties to particular interests, their will shall be free; the deputy will think only his own thoughts.

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[38] Sieyès, *supra* note 4, at p. 87.

[39] *Id*.

[40] Rousseau, *supra* note 10, at Book II, chap. 3.

True, decisions cannot be required to be unanimous as this would be impracticable, even under such favorable circumstances as an assembly determined by individual wills only. In that respect, Sieyès considers: ''[T]o require for the future that the common will should always be the exact sum of every individual will would amount to giving up the possibility of being able to will in common and would mean the dissolution of the social union.''[41] However, it will not be simple majority rule either, for Sieyès adds: ''It is therefore absolutely necessary to resolve to attribute all the characteristics of the common will to an agreed plurality.''[42] ''Plurality,'' not ''majority,'' says Sieyès. The difference is no trifling matter.

What Sieyès has in mind is not the numerical majority of Hobbes, the mathematical majority that derives from the criterion for decision agreed upon in the initial pact.[43] The plurality Sieyès is referring to is the ''*major et sanior pars,*'' the majority of the Church and the canons, that is, not the strict majority of more than half, but the opinion of the most important part of the deliberative body, the majority that takes shape by exchange and discussion, and that eventually appears to be a reinforced majority. The legislature of the republican age cannot be identical to that of the monarchical age, for as Sieyès put it in terms that should be agreeable to Thomas Paine: ''Everything between men is exchange, and in every act of exchange, there is necessarily on both sides a free act of will; but no man has a right to dominate another; the opposite maxim would open the door to all crimes, all horrors, and to the annihilation of all rights.''[44]

*The role of deliberation.* In order to reach a plurality of voices, and to get away from the hard-line majority logic—that mechanical majority that is incompatible with liberty—Sieyès relies on the role of deliberation and recommends the test of argumentation and discussion. He is convinced that from a free deliberation, a ''*major sanior pars*'' should necessarily spring, because consensus always comes out of a healthy and robust discussion between free men, free from any allegiance to a particular interest, and motivated solely by their reason and intelligence. A free deliberation in his opinion always leads to a ''single view,'' as he explains in the following excerpt:

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[41] Sieyès, *supra* note 32, at p. 11.

[42] Sieyès, V*ues sur les moyens d'exécution dont les Représentans [sic] de la France pourront disposer en 1789*, pp. 17-18, Paris, 1789, available at http://gallica.bnf.fr/ark:/12148/bpt6k41688x.

[43] See Chapter 6, Section A.1.a.

[44] Sieyès, *supra* note 42, at pp. 16-17.

> In every deliberation there is a kind of problem to be solved. This is to know, in any given case, what the general interest would prescribe. When the discussion begins, it is not possible to identify the direction it will take to reach that discovery with certainty. Doubtless, the general interest would be nothing if it were not someone's interest. It has to be the one interest among the various individual interests that is common to the largest number of voters, hence the need for a clash and coincidence of opinions. What you take to be a mixture and confusion that serves to obscure everything is an indispensable preliminary towards enlightenment. All these individual interests have to be allowed to jostle and press against one another, to take hold of the question from one point of view, then another, each trying to push it according to his strength towards some projected goal. In this trial, views that are useful and those that are harmful will be separated from one another. Some will fall, while others will maintain their momentum and will balance one another until, modified and purified by their reciprocal interaction, they will end up by becoming reconciled with one another and will be combined together in a single view, just as in the physical universe a single, more powerful movement can be seen to be made up of a multitude of opposing forces.[45]

As Bernard Manin underlines, the discussion does not form in itself a principle of decision; what gives a proposal a decisional value is not its being debated, but rather its ability to obtain consent.[46] True, this is not universal assent; it is the consent of a majority, but a large majority.

*The theory of good representation in the face of political parties.* As a matter of pure logic, the theory of Sieyès is faultless. Madison followed the same line of reasoning with respect to the Senate, which he envisioned composed of virtuous and wise men who would be able to refine the popular will and lead the people to the public good. The difficulty with that theory is that, in order for the deliberation to be the product of an exchange between authentically free wills, private citizens must not be ''allowed to become members of corporate bodies.''[47] Concretely speaking, this amounts to restricting the freedom of association. Unsurprisingly, freedom of association was recognized in French law only in 1901 and, still today, French law does not equally protect associations, insofar as full and complete legal capacity is

[45] Sieyès, *supra* note 32, at pp. 39-40.
[46] Manin, *supra* note 34, at p. 241.
[47] Sieyès, *supra* note 9, p. 87.

granted solely to those associations recognized as contributing to public utility (*associations reconnues d'utilité publique*). More importantly, the status of political parties is still today uncertain in French law.[48]

In practice, the expected adjustment between ''good representation'' and ''good legislature,'' which in turn results in ''good legislation,'' has not always been realized. Factional interests, or political parties, in modern language, have defeated elaborated constitutional schemes more often than not. And the statute, instead of being what the Constitution commands it should be, ''the expression of the general will,'' has been sometimes transformed into an expression of particular wills, occasionally aligned against the general interest. Sieyès realized the danger and, without giving up on the necessity of keeping factions from investing legislative assemblies, he eventually decided—five years after his initial writings—to abide by Madison's recommendations. He, too, came to believe that, failing the suppression of factions, controlling their effects was the best option. In 1795, he suggested setting up an assembly of 108 members in charge of reviewing the conformity to the constitution of voted statutes, the so-called ''*jurie constitutionnaire.*'' His proposal for a legislative, not judicial, review marks the first attempt to establish a system for reviewing the constitutionality of statutes in French law; it did not succeed and was soon forgotten. Although a cause within academic circles, particularly at the end of the nineteenth and beginning of the twentieth centuries, the different idea of a judicial review for statutes never prevailed during the third republic (1875-1940). The fear was that a judicial remedy of this type would introduce into France the same ''government by judiciary'' criticized by the French scholar Édouard Lambert in a memorable and influential book, a faithful account of the *Lochner* era reigning supreme in the United States at that time.[49] However, after World War II, Sieyès's idea was resuscitated under the form of the Constitutional Committee of thirteen members, a sort of legislative joint committee, since all members came from the legislative assemblies, that was in charge of reviewing actions legislative in form in the Constitution of October 27, 1946.[50] Its activity was nonexistent. In 1958, the French system for reviewing the constitutionality of statutes was brought to a successful conclusion

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[48] See J.-C. Colliard, ''La liberté des partis politiques,'' *Mélanges J. Robert*, Montchrestien, 1998, p. 81.

[49] É. Lambert, *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine de contrôle judiciaire de la constitutionnalité des lois*, Paris, Edition Giard, 1921, reprint Dalloz, 2005.

[50] See the debates on the creation of the Committee in the casebook by A. T. von Mehren & J. R. Gordley, *The Civil Law System*, Little Brown, 1977, p. 264.

by the creation of the Constitutional Council, a legislative organ composed of individuals from different fields, charged with exercising a check on the abuse of power by the legislature.[51]

*The French model for reviewing the constitutionality of statutes*. This developed much more slowly than the American system. By contrast with the American system of judicial review, which modeled itself on the English system as theorized by Sir Edward Coke in the beginning of the seventeenth century, the French system departed from the monarchical system of judicial review as early as the beginning of the Revolution. No principle is more firmly established in French law than the prohibition on the courts to take any part in the legislative function. The prohibition was stated in article 10 of the *Loi* of August 16-24, 1790, as follows: ''The judicial tribunals shall not take part, either directly or indirectly, in the exercise of legislative power, nor impede or suspend the execution of the enactments of the legislative body.'' It is regarded as deriving directly from the principle of national sovereignty. A rapporteur to the law of 1790, the deputy Thouret gave the core justification of the principle when he declared that ''a nation which exercises the legislative power through a permanent body of representatives cannot leave to the tribunals, enforcers of its laws and subject to its authority, permission to revise its laws.''[52] To this reason of principle, another one may be added, which is more one of common sense and opportunity: conformity between statutory law and the public interest cannot be sought by those who are in charge of protecting private interests. This solution is compelling not only to avoid conflicts of interests, but also to protect the independence and impartiality of the judges.

The French model for reviewing the constitutionality of statutes is an original creation that, unlike the American model, owes nothing to the powers of judicial review the courts enjoyed in the monarchical age. Definitely anchored in the republican age, it is usually regarded as a successful institution because of the broad consensus it enjoys in public opinion, a status far from the apparently endless controversy that exists in America on the existence as well as the exercise of the power of judicial review. The success of the French model comes from the fact that it is not exercised by a judicial body, but rather by an organ, the Constitutional Council, which, on the one hand, is not composed of judges, and which, on the other hand, does not adjudicate cases. It does not address itself to the actual material interests of private persons, and it is not interested in

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[51] See G. Vedel, ''Excès de pouvoir administratif et excès de pouvoir législatif [I et II],'' *Cahiers CC*, no. 1 (1996), p. 57 and no. 2, 1997, p. 77.

[52] *AP*, vol. XII (March 24, 1790), p. 344.

their sufferings or their losses; in other words, it does not dispense justice. The Constitutional Council addresses abstract questions only.

The Constitutional Council is an advisory body that, in those activities relevant to our present demonstration,[53] belongs to the law-making process, as does the Council of State (*Conseil d'État*) when giving an advisory legal opinion on bills before their being put forward before Parliament. The most important differences between the former and the latter are two: First, unlike the Council of State, which intervenes before a bill goes to Parliament, the Constitutional Council comes into play after the bill has been debated but before its promulgation by the president, which is followed by enactment. As a result, the Constitutional Council does not review statutes, strictly speaking, but rather actions that are legislative in form.[54] Second, unlike the Council of State, whose opinion is always advisory, so that the government is free to abide by it or not, the Constitutional Council's opinion is binding, and a bill's provision that has been declared contrary to the Constitution may not be promulgated. Beyond these characteristics, which by themselves distinguish the Constitutional Council from a Supreme Court, the spirit in which it performs its functions is not the same as in the United States. The Council is not a piece of the mechanism of the separation of powers as that theory is understood in the United States; it is not conceived as a counterweight to the legislative power. Its role is not to put a check on the will of the legislature and to oppose its ambition to the latter's, but rather to make sure that the text to be promulgated will conform as far as possible to the general interest. In that respect, the Council has the power to raise *ex officio* arguments that have not been invoked by critics of the bill, if it thinks that the public good so requires, a prerogative that would be inconceivable if it were a true judge or court. Last but not least, the role of the Council is not even to protect the rights of ''discrete and insular minorities'' insofar as the organs that may refer bills to it (*i.e.*, the president of the republic, or each president of both chambers, or sixty deputies, or sixty senators) are not the spokespersons or representatives of minority groups, but rather are all representatives elected at the national level and thus, necessarily, representatives of the nation.

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[53] Besides reviewing the constitutionality of actions legislative in form, the Constitutional Council exercises an oversight function over the presidential and legislative elections; it also reviews the compatibility of treaties with the constitution before ratification.

[54] This is the rightful terminology, in our opinion, adopted by von Mehren & Gordley, *supra* note 50, at p. 264.

*Reviewability of statutes against treaties*. The absence of judicial power to review statutes against the Constitution in the French legal system does not mean that courts may never go beyond a mechanical application of the legislative enactment to the case at hand. After World War II, an important novelty was introduced into the French constitutional tradition, due to the influence of the monist doctrine of international law, represented by Georges Scelle. Operating on the inherent superiority of international law to domestic laws, the constituent power in 1946 imposed an important limitation on the ''exaggerations'' (the word is from Talleyrand) of the legislature. Article 26 of the Constitution of October 27, 1946, laid forth the principle of an automatic superiority of treaties duly ratified or approved over laws, without, however, formally giving the courts the power to enforce the provision (*i.e.*, to make the treaty prevail over the conflicting statute by effectively setting aside the statute and applying the treaty instead). The same provision reappeared in Article 55 of the Constitution of October 4, 1958. Treaties, when duly ratified or approved, were declared to have ''an authority superior to that of laws,'' save for the slight difference *vis-à-vis* the 1946 text that their superiority is no longer automatic, but rather ''subject, for each agreement or treaty, to its application by the other party.'' It took almost thirty years in the case of the judicial courts[55] and more than forty years in the case of the administrative courts[56] to resolve that they were empowered to enforce the constitutional provision. Nowadays, French courts review statutes against international treaties binding on France, chief among these the European Convention on Human Rights, on a regular basis.

The fact that today courts are reviewing the compatibility of statutes with international treaties is often invoked to argue that the distance traditionally separating French and American legal systems has narrowed and that the former has come very close to the latter. It is said that review of ''constitutionality,'' which is the core of judicial review American style, is not very different from review of ''conventionality'' (by reference to the European Convention on Human Rights), which is the substance of judicial review, French style. The assimilation of the two systems of judicial reviews seems ill-conceived. The superiority of treaties over statutes as set forth in Article 55 of the French Constitution does not fit within the logic of checks and balances that accompanies the principle of the separation of powers, but rather derives from a quasi-federal logic that defends and promotes the superiority of universal and humanist values over nationalistic preferences. The superiority of universal

[55] Cour de Cassation, *Société des Cafés Jacques Vabre* v. *Administration générale des douanes*, [1975] 2 CMLR 336.

[56] Conseil d'État, *Nicolo*, [1990] 1 CMLR 173.

values, as enshrined especially in the Declaration of the Rights of Man and the Citizen of 1789, has been a permanent feature of French legal tradition since the Revolution of 1789, which never adhered to the dualist theory erecting a wall of separation between international law and domestic law.[57]

Originally, article 26 of the 1946 Constitution, then article 55 in the 1958 Constitution, was introduced to protect the foreigners lawfully settled and engaged in business in the French territory against the xenophobic laws adopted during the period of economic hardship that followed the Great Depression of the 1930s. In particular, the French National Assembly had adopted discriminatory laws that withdrew the rights of establishment of the foreigners (mostly Italians and Spaniards) in violation of the bilateral treaties that protected them. With the conclusion of large universal and regional treaties on human rights, the provision ended up applicable to nationals, too. But, no matter how broad the protection of the constitutional provision may be, its aim is solely to protect the individual in his rights. It has never been, like judicial review in the American legal system, a technique that enables the judicial power to oppose its ambition to that of Congress and impede the government in its policies.

When a judge makes a treaty prevail over a statute, he no longer acts exclusively as an organ of enforcement of national laws. Rather, upon express constitutional authorization, he acts as an agent of international law enforcement, following a technique of ''functional dual enforcement authority'' that empowers the judge to enforce both international and domestic law. That technique, which was theorized in the interwar period by Georges Scelle,[58] has today become a means commonly used for enforcing international law. International treaties, particularly in the field of human rights, often give a cause of action to the individual to have his rights duly enforced and protected by national courts. The technique, today, plays a crucial role in European law, not only in ensuring the primacy of EU law over national laws, but also in

[57] This permanent and enduring feature of French legal thought is recalled in the Preamble to the Constitution of 1946 by the incise ''faithful to its traditions'' in the phrase: ''The French Republic, faithful to its traditions, abides by the rules of international law.'' That phrase has important consequences on the principles governing relations between international law and domestic law.

[58] The technique is known in French as ''*dédoublement fonctionnel.*'' G. Scelle, who coined the expression, explains it as follows: ''When a national judge delivers a judgment in a case between nationals and foreigners or between foreigners, he ceases to be a national judge and becomes an international judge,'' in *Précis de droit des gens, Principes et systématique*, Sirey, 1932, vol. I, p. 56; see also, vol. II, p. 317.

guaranteeing the effective application of the European Convention on Human Rights.[59]

## 2. Object of Statutory Law

*The generality of the statute*. No concept is more important than generality in understanding the privileged position of statutory law in French law. If the statute enjoys in French law a highly respected position in public opinion beyond all comparison with its usually inferior status in the American model, it is principally because its object must be always general. A *loi* (*i.e.*, a statute in French law) cannot address a particular situation or individual as its object. Under the old regime by contrast, the sovereign could address any object and legislate on anything; his will had no limits; the essence of sovereignty in the monarchical age was, indeed, to be unlimited. In the republican age, when liberty comes before sovereignty, the statute has a supplementary character. It may regulate all rights without exception (from this standpoint, there can be no ''reserved rights'' in a republic, all citizens having the same rights); however, to regulate does not mean to forbid. The statute may not forbid all rights insofar as ''the *loi* has the right only to prohibit actions harmful to society'' (article 5 of the Declaration of the Rights of Man and of the Citizen of August 26, 1789).

The principle of the necessary generality of the statute was developed by Rousseau in the *Social Contract*. Rousseau gave a crucial role to the principle of generality, insisting on the fact that ''there can be no general will directed to a particular object.''[60] In his view, the *loi* is ''the expression of the general will'' if, and only if, it pursues a general object. Only when this prerequisite is met, may a statute be regarded fair, nondiscriminatory, and to have been adopted for the public good. In the theory of the *loi* as the ''expression of the general will,''

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[59] For those familiar with the evolution of American federalism after the Civil War, the ''functional dual enforcement authority'' theory seems to have been inspired by American techniques. Its core meaning, which is to rely on the individual to have his own rights protected by the judge, is exactly the same as that found to protect civil rights after the Civil War. Curiously enough, the United States has reserved the technique for domestic law enforcement purposes and has not extended its benefit to the enforcement of international law, most human rights treaties binding on the country being expressly declared non-self-executing in domestic law.

[60] Rousseau, *supra* note 10, at Book II, chap. 6. For a profound scholarly exposition of the principle of generality of the *loi*, see R. Capitant, ''Principes du droit public,'' Paris, Cours de droit 1951-1952, reprinted in *Écrits constitutionnels*, Paris, Éditions du CNRS, 1982, pp. 98-99.

*all* classifications between people, not only those ''which curtail the civil rights of a single racial group,'' are ''immediately suspect.''[61]

The principle of the necessary generality of statutory law entails important consequences, which were developed by Portalis in his famous Preliminary Address on the First Draft of the Civil Code (1799). The fundamental principle is enunciated as follows:

> The office of the statute (*loi*) is to lay down, with high views, the general maxims of the law: to establish principles fertile in consequences, not to dwell on the details of the questions that may arise on every subject. [. . .] The statute (*loi*) rules everyone: it considers men as a mass, never as individuals. It must not involve itself either in individual events, or in the disputes that divide citizens.[62]

Therefore, a *loi* cannot be the work of a jurisconsult (*i.e.*, a jurist, an expert in law), but that of a legislator, who must not be driven into details; drafting a *loi* is not like writing a bill of particulars. Portalis explains:

> There is a science for the legislators, just as there is one for the jurists; and the one does not resemble the other. The legislator's science consists in finding on every subject the principles most favorable to the common good. The jurist's science consists in applying those principles, ramifying them, extending them, through wise and reasoned application, to private hypotheses.[63]

These ideas fostered in French law an approach to statutory law very different from that prevailing in the United States, both in the states and even in Congress.[64] In French law, a statute, in principle, may not have a particular

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[61] *Korematsu* v. *United States*, 323 US 214, 216 (1944).

[62] Portalis, *Discours préliminaire au premier projet de Code civil*, reprint, Paris, Collection ''Voix de la cité,'' Éditions Confluences, 1999, pp. 19 and 23. There is an English translation of the Preliminary Address to the First Draft of the Civil Code prepared by The International Cooperation Group, Department of Justice of Canada, available at http://www.justice.gc.ca/en/ps/inter/code/index.html#note1.

[63] *Id*. pp. 23-24.

[64] Private bills, which exist in the United States as well as in all common law systems, are inconceivable in French law; see, ''Private Bills in Congress,'' 79 *Harv. L. Rev.* 1684 (1966). They stand for a legacy of the monarchical age, when the sovereign could pay attention to everybody and everything. When a law in the French legal system pays attention to a private situation or a private person, this is always for a reason of public interest (such is the case of a statute that orders national mourning for a deceased person or that orders the transfer of the ashes of a great man). True, private laws in the United States are today extremely rare. However, their mere existence bears witness to the concept of representation, which is very different from the French approach. They are

object or be addressed to a particular situation. For, should this be the case, Portalis warns: ''The legislator, bogged down in the particulars, would soon be no more than a jurisconsult. The legislative power would be besieged by private interests, distracting it, at every turn, from the general interest of society.''[65]

As Portalis explains, the necessary generality of the statute makes it that ''rare and exceptional cases cannot fit within the framework of a reasonable legislation.'' The legislator must not occupy himself with ''the too-volatile and too-contentious particulars, nor with all the subjects it would be futile to try and foresee, or whose hasty prediction could not be free of risk.''[66] A subject that does not come within the framework of a *loi* is a matter for regulation or a matter for judgment. Both of them are the responsibility of the executive power, since they call into question administrative or judicial functions.

*The birth of regulatory power.* An important consequence of the principle of the generality of the statute in French law is a sharp distinction between the statute (*loi*) and the regulation (*règlements*). The distinction was already in force before the Revolution, but it did not have the same scope or the same meaning.[67] Under the old regime, the king made the laws, then called ordinances or edicts, and the ''*Parlements*'' (courts of law) were in charge of making regulations within their respective territorial jurisdiction. The judges were then considered the traditional organs for enforcing the laws; besides enforcing the law by adjudicating private disputes, the courts were also in charge of functions that today are regarded as administrative; in particular, they were in charge of taking all the measures necessary to ensure public peace (*repos public*), public order, and tranquility, a task that they performed by drafting, enacting, and enforcing regulatory decrees (*arrêts de règlement*). Such *arrêts* stemmed from their broad jurisdiction over justice and police matters; they might deal with the prevention of fire, public health, regulation of public markets, surveillance of inns and cabarets, maintenance of public order, and even policing prostitution.

The *loi* of August 16-24, 1790, abolished this system of regulation in its article 12: ''They [the courts and tribunals] shall not make regulations, but they shall have recourse to the legislative body, whenever they think necessary, either

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anecdotal features that may better illustrate a fundamental principle of the French theory of statutory law: the national characteristic of representation means that statutes may only have a general object.

[65] Portalis, *supra* note 62, at p. 23.

[66] *Id.*, p. 24.

[67] See M. Verpeaux, *La naissance du pouvoir réglementaire (1789-1799)*, Paris, PUF, Les grandes thèses du droit français, 1991; A.-M. L.-B., ''Pouvoir réglementaire,'' *Dictionnaire constitutionnel* [Duhamel (O.) & Mény (Y.), Dir.], PUF, 1992, p. 782.

to interpret a law or to make a new one.'' Once regulatory decrees (*arrêts de règlement*) were forbidden, they certainly had to be replaced, because statutes, unless they address the minute details of particulars, must be followed by measures of enforcement. The *arrêts de règlement* were replaced by the regulatory decrees of the National Assembly, which eventually turned into a legislative body of unlimited powers, the concentration of all powers, legislative and executive.

Regulatory power, conceived as a power distinct from legislative power, and henceforth attributed to executive power, came into being under the Directoire in the Constitution of Year III (August 22, 1795). It was systematized in article 44 of the Constitution of Year VIII (December 13, 1799): ''The Government proposes the laws (*lois*) and makes the regulations necessary to secure their execution.''[68] Since then, this distinction has been part the French legal system, and it must be considered as a fundamental characteristic of the French conception of legislation.

*The distinction between the statute and the regulation.* In the history of French public law, regulatory power has been a decisive factor in the transformation of executive power. It is thanks to its existence that the executive power ceased to be considered as a mere faithful executor of the laws, in line with the fate that had become its lot after the Revolution, under the influence of English constitutional ideas. The regulatory power very clearly comes into being under the Directoire (1795-1799) and is consecrated under the Consulate (1799-1804). Two distinct kinds of regulatory decrees are identified: (1) the regulations of police that are made of all the texts necessary to secure public peace, public order, public tranquility and security, and that fall within the jurisdiction of several national or local authorities; (2) the regulations necessary to secure the execution of the statutes that, because of the principle of generality of statutes, are indispensable to concretely enforce the laws.

Contrary to a well-received, though ill-conceived set notion, the regulatory power did not develop at the expense of legislative power, as is too often said by those who invoke the republican tradition that allegedly authorized the National Assembly to occupy itself with any object of its own choice. The relation between legislative and executive powers is not a zero sum game; all that is gained by one power is not lost by the other. Legislative power gains in authority and legitimacy when it confines itself to general subjects. The principal advantage of a regulatory authority, complementary to a statutory authority, is that legislative power, forced to limit itself to general objects, may

[68] Anderson, *supra* note 16, at p. 276.

legitimately claim that, because of the generality of its object, which precludes granting particular advantages to specific groups, the statute is truly the expression of the general will and thus conforms to the general interest.[69]

*From theory to reality.* The distinction between statutes and regulations was explicated by Portalis in a lofty view of the legislative process as follows:

> Statutes (*lois*), strictly speaking, differ from mere regulations. It is the function of statutes to set down, in every sphere, the fundamental rules and to determine the basic legal forms. The particulars of enforcement, the provisional or incidental precautionary measures, the transitory or inconstant objects, in a word, anything that requires far more the vigilance of the administering authority than the intervention of the instituting or creating power, is the concern of regulations. Regulations are acts of magistracy, and statutes are acts of sovereignty.[70]

In practice, the distinction between statutes and regulations had many trials and tribulations. It was enshrined with great force in the Constitution of October 4, 1958, with the distinction between article 34, listing all the subjects in which Parliament was called upon to lay down either ''rules'' (*règles*) or ''fundamental principles'' (*principes fondamentaux*), and article 37, cursorily stating that ''matters other than those that fall within the domain of statutes shall be of a regulatory character.'' The idea behind these subtle distinctions was to oblige Parliament to remain at a sufficient level of generality and abstraction in order to avoid getting into the minute details of legislation that usually give rise to discrimination or unequal distribution of wealth through classifications between

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[69] In *Railway Express Agency* v. *New York* (336 US 106, 112-3 (1949)), Justice Jackson established a clear connection between the generality of a statute and the fairness of its content:

> I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

[70] Portalis, *supra* note 62, at p. 26.

people. This was particularly true in the domain where Parliament was invited to lay down ''fundamental principles'' as opposed to that where it was invited to adopt ''rules.''[71] The problem is that the distinction between ''rules'' and ''fundamental principles'' has never worked well. After the bitter experience of the Code of Civil Procedure being amended by the regulatory authority and subsequently invalidated in part by the Council of State on the ground that it conflicted in some provisions with general principles of law that are left to the legislative power for restriction or modification,[72] the government seems to have chosen to put forward its major projects before Parliament and to label them as ''bills'' (*projets de lois*).

Still, the idea of a Parliament that must limit itself to laying down the general maxims of the law, leaving to the regulatory authority the details of legislation, is alive and well in French legal thought. Even if the initial design of the 1958 Constitution has not been carried as far as it could have been, with the result that the so-called ''autonomous regulatory authority'' granted to the government by article 37 is in practice less broad than originally foreseen, the fact is that, in most cases, the statute is not self-executing in French law and is usually supplemented by regulatory decrees setting down the details necessary for its proper enforcement.

*Generality of the statute and equality before the law.* The principle of the generality of statutory law has close connections to that of equality before the law. Under the old regime, the fact that the statute could deal with any subject is precisely the reason for so much discrimination. Statutes were unequal; in particular, they could exempt the so-called privileged orders; thus, they were

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[71] In respect to the domain of ''fundamental rules,'' article 34 provides:

> Statutes shall determine the fundamental principles of:
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> The general organization of national defense;
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> The self-government of territorial unites, their powers and their resources;
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> The preservation of environment;
>
> Education;
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> The regime governing ownership, rights *in rem* and civil and commercial obligations;
>
> Labor laws, trade-union law and social security.

There is little doubt that the original intent of the Constitution was to make these fields a privileged domain for the regulations, save for the ''fundamental principles,'' a wording reserving on its face anything that could deal with political and/or civil rights, but probably too loosely formulated.

[72] See, in particular, Conseil d'État, Assemblée, *Dame David*, *Rec. Lebon*, 464, Conclusions Gentot; D. 1975, 369, note J.-M. Auby; *AJDA*, 1974, 525, chr. Franc & Boyon; *JCP*, 1975, II, 19967, note R. Drago.

arbitrary. At the Revolution, the principle of statutory generality was regarded as a prerequisite to effective equality of citizens before the statutes and, more generally, before the laws.

The principle of equality in statutory law is embodied in article 6 of the Declaration of the Rights of Man and the Citizen as follows: ''The statute must be the same for all, whether it protects or punishes.'' The statute may not grant privileges to anyone; it may not use economic or social distinctions between citizens and bestow a particular status on some of them while refusing it to others. The prohibition is of general application and applies both to the statutes that ''protect,'' such as civil laws, and to the statutes that ''punish,'' such as the penal laws. Fiscal laws, however, are not covered by the principle of equality in the same manner. Article 13 of the same Declaration that sets down the indispensable character of ''a communal contribution,'' in order to maintain a public force and to defray the expenses of the administration, adds an important caveat: ''It (the contribution) must be equally apportioned among all the citizens, according to their abilities.'' It is thus plainly clear that fiscal matters do authorize discrimination based upon factual situations. Fiscal law in the French republican model aims at real not formal equality.

When it was proclaimed in 1789, the principle of equality before the law marked a breaking point with the past. It took decades, however, before it was effectively applied as a principle of actual, not merely formal equality. The ''social question'' in the nineteenth century, the economic upheavals triggered by World War I, and the Great Depression played a role of first importance in the change of mentalities and thus of interpretations of the legal rules. Nowadays, it is commonly established that the legislature may, if not must, take into account, and legislate with due consideration for the factual differences of situation between people. Today, a paragraph routinely used by the Constitutional Council in its jurisprudence provides: ''The principle of equality does not preclude the legislature from treating different situations in different ways or from departing from equality for reasons in the general interest, provided, in both cases, the resultant difference of treatment is directly related to the purpose of the statute generating it.''[73] In fiscal matters, the Constitutional Council is more flexible, and the legislature is empowered with a discretion that would be inadmissible in other domains. In this particular domain, the legislature may bestow some advantages on certain classes of taxpayers while refusing them to others, provided that the legislature decides, for ''reasons in the general

[73] CC, 2004-507 DC, December 9, 2004, para. 5, Rec. 219; 2004-511 DC, December 29, 2004, para. 11, *ibid.* 236; for an English summary, see *ibid.* 421.

interest,'' a formula, which means that the advantages directly granted to some are compatible with the law if they also indirectly benefit the entire nation.

# Chapter 8
# State Power

*Trust in power.* No idea is more foreign to the spirit of the French republican model than that of limited power. The American model will never be at rest until power is limited in its exercise by being split into so many pieces that it can never be formed as a whole again, and sovereignty can be held to be rooted out from the government. By contrast, the French model has always understood power as a will put at the service of the nation for one purpose, the preservation of the enduring common interests of the people. As the Conseil d'Etat put it in 1999, what underlines the French political tradition is a ''preeminent inclination for a volontarist approach'' to the relationship between power and society.[1] Far from being limited, the French republican power is a complete power, a ''State power.''[2] If the American idea is that limiting arbitrariness must be sought as a first priority because individual liberty comes before efficiency, the French idea is that the nation must be, first and foremost, able to govern itself. The American model has consistently developed on the basis of a principle of distrust of the governed for the government, while the French model has developed around an idea of trust between the nation and its organs.

The reasons for the striking differences between the spirit of the American model and that of the French model are diverse. There is little doubt that all of them are related to the respective histories of both people, to their ideas, their beliefs, and all the prejudices deposited by history in their collective memories. The American model was built in Philadelphia on the basis of English institutions as they were in the middle of the eighteenth century, and it has not developed since, so to speak. Frozen on the model of limited, or constitutional

[1] See Conseil d'État, *Rapport public 1999*, Etudes et Documents no. 50 (*L'intérêt général*), Paris, La Documentation française, 1999, especially pp. 265-269.

[2] The expression ''State power'' (*pouvoir d'État*) is borrowed from M. Hauriou, *Précis de droit constitutionnel*, 2nd ed., Sirey, 1929, reprint CNRS 1965, p. 103.

monarchy, which had been achieved in England as early as 1689, it operates on the premise of a necessary protection for the individual against tyranny.[3]

In the late 1770s, Turgot, Comptroller-General of the Finances of France from 1774 to 1776, took the view that the free and independent States of America had modeled their institutions after ''an unreasonable imitation of the usages of England [. . .] Instead of bringing all the authorities into one, that of the nation, they have established,'' he said, ''different bodies, a House of Representatives, a Council, a Governor, because England has a House of Commons, a House of Lords, and a King. They undertake to balance these different authorities as if the same equilibrium of powers, which has been thought necessary to balance the enormous preponderance of royalty, could be of any use in republics, formed upon the equality of all citizens.''[4] In a few sentences, Turgot said everything that needs to be said about the second crucial cleavage that, after representation, separates the French model from its American counterpart. The French have never thought it either possible or realistic to govern the commonwealth in the republican age with the forces and counterforces of the separation of powers dating from the monarchical age. The French republican model was built on this firm belief. Its principle is therefore the exact opposite of that governing the American model. Its principle, exactly as Turgot forecast it in the eighteenth century, is not to separate the powers, but rather ''to bring all the powers into one, that of the Nation.'' This is the necessary implication of the principle of national sovereignty.

*The nation as the source of all powers*. The principle of national sovereignty, as conceived by Sieyès, enabled France to escape the old regime and the society divided into orders, a legacy of the feudal society. Sieyès's affirmation, ''the nation is prior to everything; it is the source of everything,''[5] paved the way for modern France in establishing the ''constituent power''

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[3] See R. Capitant, ''Régimes parlementaires,'' *Mélanges Carré de Malberg* (1933) reprinted in R. Capitant, *Écrits constitutionnels*, ''Les transformations du parlementarisme,'' Ed. CNRS, Paris 1982, p. 238.

[4] Letter written by Turgot on March 22, 1778, to Dr. Richard Price in London, reprinted in R. Price, *Observations on the Importance of the American Revolution and The Means of Making It a Benefit to the World*, London, 1778, p. 71. R. Price passed Turgot's letter onto John Adams who responded to Turgot's criticism in a vibrant *Defense of the Constitutions of Government of the United States of America*, 1787-1788, available at http://www.constitution.org/jadams/john_adams.htm. Adams takes the defense of the American conception of the separation of powers without saying much about the sovereignty of the people that, in his views, cannot mean something other than tyranny and oppression.

[5] Sieyès, *Qu'est-ce que le Tiers État*? (1788), PUF, Collection Quadrige, 1989, p. 67.

(*pouvoir constituant*)—the highest power, the supreme power, that which gives a country both its social and political constitution. Thanks to the constituent power, the National Assembly changed, first, the society, in establishing natural liberty and equality between all men and, second, the government, in making the nation the source of all powers (articles 1 and 3 of the Declaration of the Rights of Man and the Citizen).[6]

The nation is not a people that would be represented next to power; the nation is power itself, the supreme power, and all the powers derive from the nation. The direct relationship that unites the nation and power is a key element to understanding both the relationship of trust existing between the nation and its representatives and the justification for the authority it gives them. Once it is accepted that representation is national, not popular, and that representatives are elected so as to be bound to cleave always to the public good, the nation is naturally inclined to trust its representatives. There is no reason to anticipate a likely tyranny on their part nor to contrive the interior structure of the government in such a way that its constituent parts can impede each other by mutual entanglement. It is enough to watch out that they do not exceed the limits fixed to their authority by organizing a separation of functions (Section A). As for the rest, the will of the nation is one. It must be carried out by one single center of power, where the nation is represented and where the charge of realizing the republican State can be fulfilled (Section B).

## A. THE SEPARATION OF FUNCTIONS

*From separation of powers to separation of functions.* The separation of powers was enshrined in the very first text that laid down the foundations of French public law, the Declaration of the Rights of Man and the Citizen. Article 16 of this text provides: ''Any society in which neither the protection of rights is guaranteed nor the separation of powers established has no constitution.'' Before an article 17 was adopted at the last minute,[7] article 16 was supposed to

[6] Article 1 of the Declaration: ''Men are born and remain free and equal in rights.'' Article 3: ''The principle of all sovereignty remains in essence in the Nation.''

[7] Article 17 of the Declaration provides: ''As property is an inviolable and sacred right, nobody may be deprived of it, except in those cases where public necessity, legally established, obviously requires it, and provided that just and prior compensation has been paid.'' It was put forward by some representatives of the privileged orders who feared for their property rights, in particular their feudal rights, which were obviously doomed to disappear and for which they hoped to receive some compensation. The link between this provision and the feudal rights was clearly underlined in the very first version of the text, which referred to property in the plural form (properties, not property, in the second word); it was later modified and is now in the singular.