

A COMPARISON OF CONSTITUTIONALISM IN FRANCE AND THE UNITED STATES

Martin A. Rogoff

I. INTRODUCTION	22
II. AMERICAN CONSTITUTIONALISM	30
A. <i>American constitutionalism defined and described</i>	31
B. <i>The Constitution as a "canonical" text</i>	33
C. <i>The Constitution as "codification" of formative American ideals</i>	34
D. <i>The Constitution and national solidarity</i>	36
E. <i>The Constitution as a voluntary social compact</i> ...	40
F. <i>The Constitution as an operative document</i>	42
G. <i>The federal judiciary: guardians of the Constitution</i>	43
H. <i>The legal profession and the Constitution</i>	44
I. <i>Legal education in the United States</i>	45
III. THE CONSTITUTION IN FRANCE	46
A. <i>French constitutional thought</i>	46
B. <i>The Constitution as a "contested" document</i>	60
C. <i>The Constitution and fundamental values</i>	64
D. <i>The Constitution and national solidarity</i>	68
E. <i>The Constitution in practice</i>	72
1. <i>The Conseil constitutionnel</i>	73
2. <i>The Conseil d'État</i>	75
3. <i>The Cour de Cassation</i>	77
F. <i>The French judiciary</i>	78
G. <i>The French bar</i>	81
H. <i>Legal education in France</i>	81
IV. CONCLUSION	83

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I. INTRODUCTION

In the American legal system, the Constitution is the fundamental legal document. All law, and in fact any exercise of public power in any form, is evaluated for validity by constitutional standards. The Constitution deals with such crucially important matters as the structure and operation of government and the fundamental rights of the governed. The Constitution is also the most important symbol of American national life and the perceived repository of the most cherished values of the American people. In France, in marked contrast, a comprehensive code of private law, the *Code civil*, has for a long time occupied a similar central place in legal and national life,¹ and constitutions have had far less practical and symbolic importance. My experience teaching in both French and American law schools convinces me that it is often difficult for persons brought up in American legal culture to understand and appreciate the historical and contemporary importance of the *Code civil* in the French legal system and the relative lack of importance of the Constitution; likewise, persons educated in France often have similar difficulty in understanding and appreciating the centrality of the Constitution (and the role of judges in applying the Constitution) in the American legal system and the unsystematic and fragmented state of our private law.²

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1. See Jean Carbonnier, *Le Code Civil*, in 2 *LES LIEUX DE MÉMOIRE: LA NATION* 293 (Pierre Nora ed., 1986); Shael Herman, *From Philosophers to Legislators, and Legislators to Gods: The French Civil Code as Secular Scripture*, 1984 U. ILL. L. REV. 597. But see Antonio Gambaro, *Codes and Constitutions in Civil Law*, in *EUROPEAN LEGAL TRADITIONS AND ISRAEL* 157 (Alfredo Mordechai Rabello ed., 1994). For concise, comprehensive descriptions of the *Code civil*, see JEAN-LOUIS HALPÉRIN, *LE CODE CIVIL* (1996); JEAN-MICHEL POUGHON, *LE CODE CIVIL* (1992).

2. On attempts to rationalize and systematize private law in the United States, see David Dudley Field, *Codification*, in 3 *SPEECHES, ARGUMENTS AND MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD* 238 (Titus Munson Coan ed., 1890); Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L. J. 351 (1969); Maxwell Bloomfield, *William Sampson and the Codifiers: The Roots of American Legal Reform, 1820-1830*, 11 AM. J. LEGAL HIST. 234 (1967); Mildred V. Coe & Lewis W. Morse, *Chronology of the Development of the David Dudley Field Code*, 27 CORNELL L.Q. 238 (1942).

It is the purpose of this Essay to describe and account for the differing conceptions of constitutionalism in the United States and France. My central thesis is that both the United States Constitution and the French *Code civil* represent the incarnation in legal form of national movements that emerged triumphant from revolutionary struggles.³ While the American Revolution was one against perceived abuses of public power (the British government and colonial authorities), the French Revolution was directed primarily against private oppression (the remnants of the feudal system and the power and privileges of the Church and aristocracy) and the judicial class that was its bulwark.⁴ Thus, the documents embodying the revolutionary programs and expressing the deepest aspirations of each society necessarily took different forms: a Constitution in the United States, with its emphasis on the separation and limitation of (public) power; and a code of private law in France, based on the principles of legislative supremacy, equality, the personal and economic autonomy of the individual, and absolute ownership and freedom of alienation of property.⁵

3. Both the United States Constitution of 1788 and the French *Code civil* of 1804 entered into force several years after the dates that are usually associated with the revolutions in the two countries, 1776-1783 in the United States (the period between the adoption of the Declaration of Independence and the conclusion of the Treaty of Peace between the American states and Great Britain) and 1789-1799 in France (the period between the commencement of overt revolutionary activity and the ascension to power of Napoleon Bonaparte). Thus, both documents may be said not only to embody the revolutionary tradition, but also to benefit from certain sober "second thoughts" provoked by the disorder and excess of the revolutionary and post-revolutionary periods.

4. See JOHN DAWSON, *THE ORACLES OF THE LAW* 263-373 (1968); see also François Furet, *Night of August 4*, in *A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION* 107 (François Furet & Mona Ozouf eds. & Arthur Goldhammer trans. 1989); François Furet, *Feudal System*, in *A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION*, *supra*, at 684 [hereinafter *Feudal System*]; J.Q.C. MACKRELL, *THE ATTACK ON 'FEUDALISM' IN EIGHTEENTH-CENTURY FRANCE* (1973); ALEXIS DE TOCQUEVILLE, *THE OLD RÉGIME AND THE FRENCH REVOLUTION* (Stuart Gilbert trans., 1955) (1856); FRANKLIN L. FORD, *ROBE AND SWORD: THE REGROUPING OF THE FRENCH ARISTOCRACY AFTER LOUIS XIV* (1953); MARCEL GARAUD, *LA RÉVOLUTION ET LA L'ÉGALITÉ CIVILE* (1953); Alfred Cobban, *The Parlements of France in the Eighteenth Century*, *HISTORY* 64 (Feb. & June 1950); SYDNEY HERBERT, *THE FALL OF FEUDALISM IN FRANCE* (1921); ALPHONSE AULARD, *LA RÉVOLUTION FRANÇAISE ET LE RÉGIME FÉODAL* (1919).

5. On the pre-history of the *Code civil*, see JEAN-LOUIS HALPÉRIN, *L'IMPOSSIBLE CODE CIVIL* (1992); ANDRÉ-JEAN ARNAUD, *LES ORIGINES DOCTRINALES DU CODE CIVIL FRANÇAIS* (1969). For a collection of essays on various aspects of the *Code civil*, see *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* (Bernard Schwartz ed., 1956). For a collection of important texts related to the drafting and promulgation of the *Code civil*, see *NAISSANCE DU CODE CIVIL* (François Ewald ed., 1989). For a study of codification in France from the middle ages through the Revolution, see J. VAN KAN, *LES EFFORTS DE CODIFICATION EN FRANCE: ÉTUDE HISTORIQUE ET PSYCHOLOGIQUE* (1929).

Moreover, as political evolution continued in the United States, new developments and understandings were translated into constitutional doctrine through court decision or amendment of the Constitution itself.⁶ In France, on the other hand, where revolutionary forces remained active throughout much of the nineteenth century,⁷ it was the *Code civil* that became the focus for giving legal expression to continuing social and economic developments,⁸ and, as constitutions came and went, it was the *Code civil* that remained a constant, stabilizing force for French society.

Although the *Code civil* and the legal mindset and methodology it inspired continue to have great importance in France, and the present Constitution continues to occupy a problematical position, significant developments have taken place since 1945, particularly over the past twenty-five years, that appear to be undermining the traditional centrality of the *Code civil*⁹ while at the same time elevating the status and importance of the Constitution and constitutionally-based decision-making in the political life of the nation.¹⁰ As French society finally moves beyond the social and political divi-

6. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1991) (viewing the American Revolution as a process which began around 1760 and continued into the early years of the nineteenth century); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) (illustrating the embodiment of fundamentally new political understandings in the Constitution through amendment or judicial decision).

7. See FRANÇOIS FURET, *REVOLUTIONARY FRANCE 1770-1880* (Antonia Nevill trans., 1988). "The French Revolution began in 1789, but there is no clear date for its end. . . . Like the American Revolution . . . its desire was to found, within the law, a body politic of free and equal individuals; but the French Revolution was continually revising the terms of the undertaking" *Id.* at ix.

8. See James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 459 (1994) (arguing that the principles of freedom and individual autonomy were not those of the drafters of the *Code civil*, but rather "were the principles of French 19th century treatise writers who read them into the Code."). See also JEAN-LOUIS HALPÉRIN, *HISTOIRE DU DROIT PRIVÉ FRANÇAIS DEPUIS 1804* (1996); DAWSON, *supra* note 4, at 374-431; EUGÈNE GAUDEMET, *L'INTERPRÉTATION DU CODE CIVIL EN FRANCE DEPUIS 1804* (1935); Roscoe Pound, *The French Civil Code and the Spirit of Nineteenth Century Law*, 35 B.U. L. REV. 77 (1955). For a collection of essays on the *Code civil* after its first one hundred years, see 1 & 2 *LE CODE CIVIL, 1804-1904, LIVRE DU CENTENAIRE* (1904).

9. Recent developments have in fact limited the scope and devalued the status of acts of Parliament (*lois*) in general. French legal scholars use the terms "*la crise de la loi*" or "*la décadence de la loi*" to describe the results of these developments. See JACQUES GHESTIN ET AL., *TRAITÉ DE DROIT CIVIL: INTRODUCTION GÉNÉRALE* 214-17 (4th ed. 1994); JEAN-PIERRE GRIDEL, *INTRODUCTION AU DROIT ET AU DROIT FRANÇAIS* 661-86 (2d ed. 1994); François Terré, *La "crise de la loi,"* 25 *ARCHIVES DE PHILOSOPHIE DU DROIT* 17 (1980).

10. See GRIDEL, *supra* note 9, at 661-86; ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); F.L. Morton, *Judicial Review in France: A Comparative Analysis*, 36 AM. J. COMP. L. 89 (1988) (comparing constitutional developments in France and the United States). For a broad-ranging discussion of legal developments in France

sions of the revolutionary era, and as revolutionary rhetoric and ways of conceptualizing political and legal issues born during that period give way to different organizing principles and dialogues,¹¹ a new synthesis appears to be in the making whose impact is already evident in thinking about law and government.¹²

I offer these ideas in the hope that they will contribute to better mutual understanding between France and the United States. In my view, both nations share similar political interests and ideals. They are natural allies and natural friends. Unfortunately, however, each has developed a stereotypical view of the other which complicates their mutual political and economic relations and their cooperation in these and other areas. While the matters dealt with in this Essay represent only a small part of the mental make-up of the French and American people, they are nevertheless important; their exploration and elucidation will undermine stereotypical thinking thereby fostering mutual understanding and empathy. Also, I do not intend to praise or criticize the different approaches taken by French and American society to political, social, and legal organization. Our sole task here is comparison for purposes of enhancing understanding and communication, not evaluation.

The United States and France are linked by cultural and political bonds spanning more than two centuries. On the American side, one thinks of Thomas Jefferson, Thomas Paine, and Benjamin Franklin, three of the central figures in the founding of the American Republic.¹³ Both Jefferson and Franklin lived and travelled in

since 1958, see JEAN CARBONNIER, *DROIT ET PASSION DU DROIT SOUS LA V^e RÉPUBLIQUE* (1996).

11. See Ronald Tiersky, *Mitterrand's Legacies*, *FOREIGN AFF.*, Jan.-Feb. 1995, at 112, 115:

[Mitterrand's] new realism made possible a historic left-right accommodation, expanding the heretofore contested legitimacy of the Fifth Republic's political institutions and liberal economy. The willingness of both right and left to abandon France's two-century-old "silent civil war" inspired historians in the mid-1980s to declare that "the French Revolution is finally over."

Id.; see also STEVEN LAURENCE KAPLAN, *FAREWELL, REVOLUTION: DISPUTED LEGACIES, FRANCE, 1789/1989* (1995).

12. One important example of this new synthesis is the Constitution of the Fifth Republic of 1958, which reconciles a strong executive with the parliamentary tradition. For over 150 years, since the Revolution, French government had oscillated widely between the poles of executive dominance (Bonapartism) and parliamentary supremacy. For descriptions of these two traditions, see *STONE, supra* note 10, at 27-31. The *juste milieu*, or middle way, proved elusive. It appears that a blueprint for the *juste milieu* has now been found. It remains for the French to make it work.

13. See David A.J. Richards, *Revolution and Constitutionalism in America and France*, 60 *Miss. L.J.* 311, 313-14 (1990) (discussing the close relationship between constitutional thought in America and France during the formative period of the American Constitution, and arguing that "[b]ecause Americans understand their own revolutionary and constitutional project as . . . continuous with the events in France, they are absorbed by those events at the deep level of self-understanding

France and were profoundly influenced by their experiences there, and Thomas Paine, the author of the influential *Common Sense*, served as a deputy to the French Convention in 1792. The American Declaration of Independence and Constitution owe much to eighteenth century French political thinkers: above all to Montesquieu (separation of powers), to Rousseau (popular sovereignty), and to Voltaire (free speech and the separation of church and state). On the French side, one thinks of Lafayette, who symbolizes, more than any other person, the profound and historic links between the two countries.¹⁴ One thinks also of Alexis de Tocqueville, whose ideas about American political and social life seem remarkably contemporary even today, after more than 150 years.

Certainly, there are conflicts and disagreements between the United States and France today as there have been in the past. Our modern difficulties find their analogue even before 1800 in the XYZ Affair, which soured Franco-American diplomatic relations,¹⁵ and in the "undeclared war" or "half war" during which American warships attacked French vessels in the Caribbean.¹⁶ Today, tensions between the United States and France cover a broad range of issues: for example, France makes no secret of its desire to see American military and political leadership in Europe replaced by European preeminence; differences in the economic area are recurring; and the French are concerned with protecting their language and culture from perceived American encroachments.¹⁷

France and the United States are confronted by different geopolitical realities and have had different historical experiences that lead each nation to approach problems in different ways.¹⁸ The security afforded the United States by its ocean fortress, coupled with its immense natural and human resources, gives rise to far different perspectives on international security and economic organization and relations from that of France, whose close proximity to powerful and often threatening neighbors has made it the target of full-scale

that links the political legitimacy of their own project with that of France"; see also YVON BIZARDEL, *LES AMÉRICAINS À PARIS PENDANT LA RÉVOLUTION* (1972).

14. For a discussion of Lafayette that links his revolutionary experiences in America and France, see SIMON SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* 24-29 (1989). See also Patrice Gueniffey, *Lafayette*, in *A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION*, *supra* note 4, at 224; Philippe Raynaud, *American Revolution*, in *A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION*, *supra* note 4, at 593.

15. See WILLIAM STINCHCOMBE, *THE XYZ AFFAIR* (1980).

16. See ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801* (1966).

17. See RICHARD F. KUISEL, *SEDUCING THE FRENCH: THE DILEMMA OF AMERICANIZATION* (1993).

18. See HENRY KISSINGER, *DIPLOMACY* 119-20, 228-31, 235, 602-06, 618-19, 822-23 (1994); see also HENRY KISSINGER, *THE TROUBLED PARTNERSHIP: A REAPPRAISAL OF THE ATLANTIC ALLIANCE* 41-64 (1965).

armed invasion three times in the past 125 years.¹⁹ For example, one can view Gaullist insistence on an independent foreign policy and military self-sufficiency perhaps as the French version of the "never again" attitude. Rather than an arrogant and idiosyncratic assertion of national pride and independence, as many Americans would have it, French defense policy is simply a logical response to an uncertain and dangerous world where a nation would be foolish to rely on the help of others for its national security. On the domestic side, the highly centralized political and administrative systems that are characteristic of France, and are so different from American federalism, again represent reasonable responses to the centrifugal forces which so plagued France throughout its history.

On the philosophical level, France and the United States have different traditions which often lead to different ways of conceptualizing problems and articulating solutions.²⁰ The French Cartesian tradition places a premium on abstract thinking with a corresponding lack of attention to empirical detail;²¹ American pragmatism has an instinctive distrust of abstraction and values actual experience. The French present solutions to problems as logical deductions from more fundamental principles, while Americans prefer to reason and argue from concrete examples and actual outcomes in prior situations. To Americans, French rationalism may appear sterile and removed from reality; to the French, American pragmatism may appear unprincipled, unsystematic, and superficial.

France's tradition of Cartesian rationality may be regarded as an apt expression of certain French cultural traits that inform and structure interpersonal and organizational relationships. As Michel Crozier points out in his classic study, personal and group interrelations in France are characterized by "individual isolation and lack of constructive co-operative activities on the one side, strata isolation and lack of communication between people of different rank on the other. . . ."²² Because these basic cultural traits lead to "fears of conflict and of face-to-face relationships,"²³ "the ideal pattern of decision-making in France . . . present[s] the qualities of rationality,

19. See P. Terrence Hopmann, *French Perspectives on International Relations After the Cold War*, 38 MERSHON INT'L STUD. REV. 69 (1994); David P. Calleo & Alex T. Lau, eds., *France in the New European and World Order*, 13 SAIS REV. (Special Issue, Fall 1993).

20. For a discussion of the need to understand the intellectual background, or basic conceptual framework, of a foreign culture in order to understand its legal culture, see William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. PA. L. REV. 1889 (1995).

21. For a discussion of the influence of Descartes on legal thought in France, see MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* 552-79 (4th ed. 1975).

22. MICHEL CROZIER, *THE BUREAUCRATIC PHENOMENON* 218 (1964). See also *id.* at 209-314.

23. *Id.* at 253.

impersonality, and absoluteness that fit the basic French cultural traits."²⁴ Crozier contrasts these tendencies with the English-speaking tradition which "allows greater individual leeway in the use of power and more active participation by subordinates."²⁵ "In an American organization, individuals do not remain isolated as they do in a French one. It is easier for them to co-operate, and they do not try to avoid face-to-face relationships. Centralization, therefore, is not necessary to smooth over human relations."²⁶

At the legal level, too, there are important differences between the French and American systems that often lead to incomprehension, surprise, and criticism. Professor Damaška provides a useful framework for considering some of these differences.²⁷ He contrasts two "composite structures of authority": the "*hierarchical* ideal or vision of officialdom" and the "*coordinate* ideal."²⁸ The hierarchical structure "essentially corresponds to conceptions of classical bureaucracy. It is characterized by a professional corps of officials, organized into a hierarchy which makes decisions according to technical standards."²⁹ The coordinate structure "is defined by a body of nonprofessional decision makers, organized into a single level of authority which makes decisions by applying undifferentiated community standards."³⁰ Each structure has important implications for decision-making procedures.³¹ Professor Damaška also identifies two types of states, or two "contrasting dispositions of government: the disposition to manage society and the disposition merely to provide a framework for social interaction."³² He calls the former the "activist state," in which the goal of legal proceedings is the implementation of state policy, and the latter the "reactive state," in which the goal of legal proceedings is the resolution of conflict.³³ Each orientation has important procedural and substantive implications for a legal system.³⁴ While neither system approximates either ideal, the American legal system partakes of more characteristics of the "coordinate" and "reactive" model, while the

24. *Id.* at 252.

25. *Id.* at 232.

26. *Id.* at 234. For a discussion of the impact of the attitudes discussed in this paragraph on the economic sector in France, see FRANCIS FUKUYAMA, *TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY* 113-25 (1995).

27. MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986). See also Mirjan R. Damaška, *Reflections on American Constitutionalism*, 38 AM. J. COMP. L. 421 (Supp. 1990).

28. *Id.* at 17.

29. *Id.*

30. *Id.*

31. *Id.* at 47-70.

32. *Id.* at 71.

33. See *id.* at 73-88.

34. *Id.* at 90-180.

French legal system more closely resembles the "hierarchical" and "activist" model.³⁵

Moreover, even when French and Americans use the same terminology to articulate values, the substantive content or operational referents often differ. Michel Crozier points out, for example, that while among the core political beliefs of both American and Western European societies are freedom of the individual, equality, order and efficiency, and dualism, Americans and Europeans understand these concepts differently.³⁶ For instance, Crozier sees an

opposition between the European conception of freedom—which is a sort of *freedom-from*, that is, emphasizing the inalienable right of the individual not to be interfered with—and the American one—which is rather a *freedom-to*, that is, the inalienable right to take initiatives and to lead others if they so wish.³⁷

As for equality, "European egalitarianism . . . shows again a difference from the American variety. It is still a stratified kind of egalitarianism. People may require equality with their peers most punctiliously while they may accept inequality between statuses and strata."³⁸ As for order and efficiency,

[w]henver the development of freedom threatens to bring chaos, the demand for order is immediate, even violent. . . . The special West European form of order, however, has a more social and less juridical connotation than in the United States. Things (and people) have to be put in their proper place for society to operate. Due process is not the cardinal element of this belief. . . . Order is the way to achieve efficiency, which is the condition of a well-functioning society. West Europeans still value the good "efficient" scheme more than the concrete results.³⁹

35. See BEATRICE FRY HYSLOP, *FRENCH NATIONALISM IN 1789 ACCORDING TO THE GENERAL CAHIERS* (Octagon Books 1968) (1934). The author identifies *étatisme* as a key element in French nationalism.

Etatisme means the supremacy of the secular state over individuals or groups within its jurisdiction. This involves an exalting of the state and an enlargement of its functions. *Etatisme* is opposed to both the feudal and the clerical concept of the state, to any doctrine of plural sovereignty, and it is also opposed to the liberal concept of the state as a "passive policeman," a "necessary evil."

Id. at 26.

36. See generally MICHEL CROZIER ET AL., *THE CRISIS OF DEMOCRACY* 39-59 (1975).

37. *Id.* at 44.

38. *Id.* See also Cynthia A. Vroom, *Equal Protection Versus the Principle of Equality: American and French Views on Equality in the Law*, 21 *CAP. U. L. REV.* 199 (1992).

39. CROZIER ET AL., *supra* note 36, at 45.

Notwithstanding the historical, philosophical, cultural, and systemic differences just discussed, and despite the periods of turbulence throughout our 200-year relationship, French and American political and legal values and institutions are strikingly similar in many important respects. Indeed, the French and American revolutions, guided by the principles of democracy, respect for the rule of law, and the inalienable rights of man, together mark the transition from the old world to the new.⁴⁰ The political and legal documents that emerged from this period on both sides of the Atlantic, such as the Declaration of Independence, the Constitution, and the Bill of Rights in the United States, and *la Déclaration des Droits de l'Homme et du Citoyen*, the French Constitution of 1791, and the *Code civil* in France, embody many of the same lofty ideals and legal standards. Throughout the nineteenth and twentieth centuries both countries have been engaged in the defense and advancement of these ideals on the domestic and international plane. Many times during the twentieth century, whether in full-scale war or in United Nations operations, American and French soldiers have fought side by side in support of these ideals that have their source in the revolutionary period.

In the following sections of this Essay, I will discuss the centrality of the Constitution and the idea of "constitutionality" in the American political and legal system, and then compare it with the role of the Constitution in French society. I will also discuss current legal, political, and social developments in France which may be harbingers of a new way of looking at law and government that accords heightened importance to the Constitution and to constitutional adjudication.⁴¹

II. AMERICAN CONSTITUTIONALISM

Since the legal centrality, political symbolism, and social importance of the Constitution are often taken for granted in the United States, that is to say, we simply assume that the position the Constitution occupies here is inherent in any system that has a written constitution, it is important to highlight just how unique the American experience really has been. Many of the features that Americans associate with constitutionalism simply do not exist elsewhere. It is

40. *But see* PATRICE HIGONNET, *SISTER REPUBLICS: THE ORIGINS OF FRENCH AND AMERICAN REPUBLICANISM* 1-10 (1988) (pointing out significant differences between the ideologies animating the French and American revolutions and their differing legacies to the nineteenth and twentieth centuries).

41. This Essay will not deal with the *Code civil*. There is abundant literature on the Code which supports the point of view of the Code expressed in this Essay. *See* sources cited *supra* notes 1 and 5. For a broader perspective on the subject, *see* JEROME BLUM, *THE END OF THE OLD ORDER IN RURAL EUROPE* (1978). *But see* Gordley, *supra* note 8.

worthwhile, therefore, to describe some of those features before considering and contrasting the French experience.

A. American constitutionalism defined and described

American constitutionalism is based on the idea that the procedures, substantive provisions, and fundamental principles of the Constitution comprise the nation's preeminent political and legal values. The Constitution is not one among several sources of such values, but is the undisputed, ultimate fount of the fundamental principles, values, and procedures according to which American society is constituted and functions. It is not only the supreme source of positive law in the American legal system, but is also the principal symbol of national unity, of national values, and of the nation itself. The loyalty of Americans to the procedures, substantive provisions, and fundamental constitutional ideas is the ideological glue that binds together American political and social life. The Constitution is "[t]he foundation of our society"⁴² Commenting on the Constitution in America, Michel Crozier remarks: "There is something admirable and touching about the awe Americans feel toward their Constitution, whose principles they internalize more thoroughly than any other nation in history."⁴³ Carl Friedrich says, "In America, . . . constitutionalism struck deeper root than almost anywhere else on earth"⁴⁴

In America the idea of constitutionalism is intimately attached to, and in fact inseparable from, the actual written Constitution of the country.⁴⁵ Constitutionalism is not a vague concept calling for the separation and limitation of public power, the rights of the governed, and adherence to certain time-honored procedures, customs, and values.⁴⁶ It has rather an immediacy and a tangibility, and an

42. EARL WARREN, *A REPUBLIC, IF YOU CAN KEEP IT* 165 (1972).

43. MICHEL CROZIER, *THE TROUBLE WITH AMERICA* 99 (Peter Heinegg trans., 1984).

44. CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 28 (4th ed. 1968). For a historical background of constitutionalism, see FRANCIS D. WORMUTH, *THE ORIGINS OF MODERN CONSTITUTIONALISM* (1949).

45. For a discussion of the relationship between constitutionalism and constitutions, see WILLIAM G. ANDREWS, *CONSTITUTIONS AND CONSTITUTIONALISM* 21-23 (3d ed. 1968).

46. See CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* (rev. ed. 1947).

[C]onstitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will instead of law. . . . [T]he most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law.

Id. at 21-22.

association with a particular document, which is usually lacking even in other constitutional democracies.

The Constitution provides the framework for the political and legal discourse within which the most important questions of American life are debated and resolved.⁴⁷ The Constitution also contains the specific provisions that are applicable in the particular cases that come before judicial and administrative officials for decision. Eventually almost all such questions are submitted to courts for resolution in light of constitutional principles. Thus, final decisions about such important questions as abortion, the death penalty, desegregation and affirmative action, freedom of speech, the press, and religion, as well as economic doctrine and political structure are made by the federal courts, and ultimately the Supreme Court acting as authoritative interpreter of the Constitution.

Interest in the Constitution is not limited to the courts. It permeates all levels of society. The same comment that Alexis de Tocqueville made more than 150 years ago with respect to law in general could be repeated with equal truth regarding the role of the Constitution in American political life and discourse:

Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question. Hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, peculiar to judicial proceedings. As most public men are or have been legal practitioners, they introduce the customs and technicalities of their profession into the management of public affairs. The jury extends this habit to all classes. The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in the schools and courts of justice, gradually penetrates beyond their walls into the bosom of society, where it

47. See H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949 (1993) (analyzing the Constitution not as a set of rules creating and organizing the federal government, but as a document that inspired political debate and the culture out of which our notions and understandings of constitutionalism grew); see also MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 108 (1996) ("[C]onstitutional discourse has come to define the terms of political discourse in American public life."); SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

[I]t is obvious to anyone observing American political culture that much of our disputation is in some sense organized around constitutional categories. What in most other political systems is described simply as a "political" *contretemps* in our system tends to take on "constitutional" overtones, precisely because the Constitution is viewed as a way of structuring politics, of setting rules for the activity.

Id. at 27. "Constitutional law provides a public vocabulary absolutely essential to understanding the nature of political discourse within our society." *Id.* at 168. "The Constitution is a linguistic system, what some among us might call a discourse." *Id.* at 19. See generally MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

descends to the lowest classes, so that the whole people contract the habits and the tastes of the judicial magistrate.⁴⁸

B. The Constitution as a "canonical" text

The present Constitution of the United States entered into force in 1788, soon after the thirteen American colonies gained independence from British rule. Since the ratification of the Constitution in 1788, the United States has had only one Constitution.⁴⁹ It is now the oldest extant Constitution in the world. Moreover, this Constitution has been amended just twenty-seven times. The first ten amendments were added in 1791, when the Bill of Rights was added to the Constitution. These amendments are really part of the original Constitution, as their adoption was proposed during the ratification process and this prospect was regarded as necessary to assure the ratification of the Constitution itself. Thus, in over two hundred years, the Constitution has been amended a mere seventeen times: an average of once every fifteen years. In addition, the vast majority of these later amendments have affected neither the fundamental structure of the government nor the fundamental values expressed in the Constitution. The original Constitution including the first ten amendments, then, is of such great antiquity, relatively speaking, that it has in fact attained canonical status.⁵⁰

In addition, besides its antiquity, continuity, and textual stability, the Constitution functions as a quasi-religious document, as the tangible embodiment of American "civil religion." In this respect, as Thomas Grey points out, the Constitution resembles scripture and

constitutional law . . . represents the elucidation of the underlying collective mystery by a guild of priests, who draw out the deep meanings of the sacred document by esoteric hermeneutic methods. The institutional charisma bestowed by initiation into the priesthood . . . gives these interpretations their legitimacy. . . . The Constitution resembles the Bible of the new theologians—a sacred text indirectly representing an ineffable underlying reality.⁵¹

Moreover, according to Professor Grey,

48. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 280 (Phillips Bradley, trans. 1945).

49. It is also possible to regard the Articles of Confederation as the first American Constitution, with the present Constitution thus being the *second* American Constitution.

50. *But see* DANIEL LAZARE, *THE FROZEN REPUBLIC: HOW THE CONSTITUTION IS PARALYZING DEMOCRACY* 9 (1996) (arguing that only by rewriting the Constitution can America address its current problems: "Rather than submitting to an immutable Constitution, Americans should cast off their chains and rethink their society from the ground up.").

51. Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1, 23 (1984).

The Constitution's symbolic function is most clearly manifest in the third clause of article VI, which requires that all state and federal officers must swear or affirm "to support the Constitution." . . . [T]he Framers considered the constitutional oath a *substitute* for the religious tests the colonists were familiar with under the English established church. To push the point a bit: America would have no national church, . . . yet the worship of the Constitution would serve the unifying function of a national civil religion.⁵²

C. *The Constitution as "codification" of formative American ideals*

The American Constitution was drafted during the immediate aftermath of a revolutionary period, a period during which the country forged a new national identity. The Constitution might thus be described as the "codification" of the most important ideas and insights of the revolutionary period and also of the tumultuous post-revolutionary period when the newly independent states were unable to establish a political structure that was adequate to the needs of the time. Americans at the time had a vivid sense of what they had accomplished. There was a contemporary awareness among all Americans that the Constitution had actually created a political system "'so novel, so complex, and intricate' that writing about it would never cease."⁵³ The Constitution had become the climax of a great revolution. . . . Americans now told themselves with greater assurance than ever that they had created something remarkable in the history of politics.⁵⁴

The document is then a self-conscious reaction to the most pressing problems of the preceding regimes. Unlike the situation in France where concerns of political and legal reformers focused on the abolition of the remnants of the feudal system,⁵⁵ political leaders

52. *Id.* at 18. See also SANFORD LEVINSON, *supra* note 47, *passim*.

53. JAMES SULLIVAN, OBSERVATIONS UPON THE GOVERNMENT OF THE UNITED STATES OF AMERICA, at v (1791), *quoted in* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 593 (1969).

54. WOOD, *supra* note 53. See also *id.* at 614 ("The Americans of the Revolutionary generation believed that they had made a momentous contribution to the history of politics. They had for the first time demonstrated to the world how a people could diagnose the ills of its society and work out a peaceable process of cure.").

55. [T]he expression "feudal system" refers to a system of human relations which gradually established itself in western Europe after the Germanic invasions and which was based on the vassalage contract and the fief. It connotes the network of hierarchies and dependences that grew up among free, private individuals with the decay of public authority. By way of the fief, the lord and his vassal committed themselves to a mutual relation of protection and service.

Feudal System, *supra* note 4, at 684. See also 1 MARC BLOCH, FEUDAL SOCIETY: THE GROWTH OF TIES OF DEPENDENCE (L.A. Manyon trans. 1961); 2 MARC BLOCH, FEUDAL SOCIETY: SOCIAL CLASSES AND POLITICAL ORGANIZATIONS (L.A. Manyon trans. 1961); *supra* note 5.

in the former colonies focused almost exclusively on the organization and control of public power. The United States had never experienced the feudal system.⁵⁶ It was not the abuse of privilege and power by an aristocracy or organized religion that provoked the American war of independence, but rather heavy-handed political rule from England. The American colonists complained about their exclusion from the decision-making process concerning important issues that touched their lives, above all in the commercial and fiscal domains. They were incensed that these decisions were made in England, principally to advance English economic interests. They were also angered by restrictions on freedom of speech and the press and by the lack of respect that English authorities showed for other civil liberties. The Declaration of Independence of 1776 contained a list of eighteen specific grievances against the King of England; all dealt with the abuse of public power. The public debate that preceded the American Revolution focused on the appropriate organization of public power and on the protection of civil liberties.

Further imperatives for successful union became apparent when the colonies unsuccessfully attempted to implement the structure for united government represented by the Articles of Confederation. Once again, these matters pertained primarily to political, commercial, and fiscal relations, rather than to underlying economic or social structures.⁵⁷ While economic decline (due in large part to protectionist and retaliatory measures adopted by the states) and ineffective diplomacy were perhaps the two most visible problems of the period, thoughtful observers were also troubled by the tendency of state legislative bodies to pursue their narrow self-interests. "An excess of power in the people was leading not simply to licentiousness but to a new kind of tyranny . . . by the people themselves—what John Adams in 1776 had called . . . a democratic despotism."⁵⁸

The revolutionary and post-revolutionary concerns of Americans informed the original Constitution and the Bill of Rights. It was these documents, then, that gave legal structure to the political aspirations of the American people as they developed in the crucible of the revolutionary struggle against Great Britain and later in the dif-

56. See LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 3-32 (1955). Patrice Higonnet remarks that "[p]rerevolutionary France was a social and ideological inversion of the thirteen colonies." HIGONNET, *supra* note 40, at 5.

57. See EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC 1763-89*, at 112-27 (Daniel J. Bostin ed., rev. ed. 1977); WOOD, *supra* note 53, at 393-429 (1969); ANDREW C. McLAUGHLIN, *THE CONFEDERATION AND THE CONSTITUTION 1783-1789*, at 48-118 (1962). See also Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 69 (Richard Beeman, et al. eds., 1987).

58. WOOD, *supra* note 53, at 404.

ficult early years of independence.⁵⁹ Thus the Constitution (including the Bill of Rights) expresses in concrete form the political identity and aspirations of the American people that developed during the formative period of the American Republic. The three great principles that find expression in the Constitution are democracy, self-government, and liberty.⁶⁰ Later, after the Civil War, an additional fundamental idea, equality, was introduced by the Fourteenth Amendment.⁶¹ It is these ideas (democracy, self-government, liberty, and equality) that represent the leitmotifs or themes of American political life and discourse, and it is the Constitution that expresses and symbolizes them.

D. *The Constitution and national solidarity*

During the last two-thirds of the nineteenth century and during the first third of the twentieth century, millions of immigrants arrived in the United States. The population of the United States increased from about 31 million persons in 1860 to about 106 million persons in 1920.⁶² The immigrants came from many countries and

59. See CLINTON ROSSITER, *THE AMERICAN QUEST 1790-1860: AN EMERGING NATION IN SEARCH OF IDENTITY, UNITY, AND MODERNITY* 261 (1971) ("The writing, ratifying, and launching of this most successful of national charters [the Constitution] in 1787-1789 was the principal action in uniting the American people and setting a stage for the search for modernity."); see also John M. Murrin, *A Roof Without Walls: The Dilemma of American National Identity*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY*, *supra* note 57, at 333 (stressing the differences between the colonies during the revolutionary period, the non-inevitability of the "creation and triumph of the United States," *id.* at 339, arguing that "American national identity was . . . an unexpected, impromptu, artificial, and therefore extremely fragile creation of the Revolution," *id.* at 34, and characterizing the Constitution as an ingenious contrivance that enabled a precarious experiment to continue for another generation or two," *id.* at 348).

60. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 380-88 (1993).

61. See GARY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992):

[In the Gettysburg Address Lincoln] not only put the Declaration [of Independence] in a new light as a matter of founding *law*, but put its central proposition, equality, in a newly favored position as a principle of the Constitution What had been a mere theory of lawyers like James Wilson, Joseph Story, and Daniel Webster—that the nation preceded the states, in time and importance—now became a lived reality of the American tradition. . . . [The] people was "conceived" in 1776, "brought forth" as an entity whose birth was datable ("four score and seven" years back) and placeable ("on this continent"), something that could receive a "new birth of freedom."

By giving this language a place in our sacred documents, Lincoln changed the way people thought about the Constitution.

Id. at 145-46.

62. *THE WORLD ALMANAC AND BOOK OF FACTS* 1994, at 360-61 (1995). France, like the United States, is a country where a substantial proportion of the population has immigrant roots. Donald L. Horowitz, *Immigration and Group Relations in*

from all economic and social levels. The earlier generations of Americans and the new arrivals shared neither a common history, nor a common culture, nor a common religion. How could the United States retain, and hopefully deepen, its political and social unity in the face of such ethnic, social, religious, and economic diversity in the population? This task fell to the Constitution, as the embodiment of the "American Creed," the fundamental ideas of American life.⁶³ To be an American was not to share a common past experience or to possess common attributes in the present (like language or culture). It was, rather to believe in the fundamental ideas of the Constitution as guiding principles of action and of aspiration.⁶⁴

France and America, in IMMIGRANTS IN TWO DEMOCRACIES: FRENCH AND AMERICAN EXPERIENCE 3, 5-7 (Donald L. Horowitz & Gérard Noiriel eds. 1992). The importance of immigrant experience in the formation of the respective national identities of the two countries, however, differs significantly.

For a long time in France, immigrants were absent from the collective memory, whereas in the United States they were omnipresent In both cases, however, this opposition is related to the way that nation's foundational myths were forged and promoted by the state. In the United States, immigrants were from the outset agents of national construction, whereas in France, they arrived massively after national unity had been achieved.

GÉRARD NOIRIEL, *THE FRENCH MELTING POT: IMMIGRATION, CITIZENSHIP, AND NATIONAL IDENTITY* at xxii (Geoffrey de Laforcade trans. 1996); *see also id.* at 6-10, 257-61.

63. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* 8 (1944) (coining the term "American Creed" and stating: "The American Creed is a humanistic liberalism developing out of the epoch of Enlightenment when America received its national consciousness and its political structure. . . . For practical purposes the main norms of the American Creed as usually pronounced are centered in the belief in equality and in the rights to liberty."). *See also* SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* (1981) (especially chapter 2, entitled "The American Creed and National Identity").

64. *See* HANS KOHN, *AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY* (1957):

When the war ended with the victory of the revolutionaries in the thirteen colonies . . . a new nation was born. The tie which united it—and separated it at the same time from other nations—was not founded on the common attributes of nationhood—language, cultural tradition, historical territory or common descent—but on an idea which singled out the new nation among the nations of the earth.

What was this idea? It has found its expression in the Constitution and in the Bill of Rights, documents which have shown an astonishing persistency and vitality. . . . For the American Constitution is unlike any other: it represents the lifeblood of the American nation, its supreme symbol and manifestation. . . . It draws its lasting strength not from what it says but from what it is: the embodiment of the idea by which the United States was constituted To become an American has always meant to identify oneself with the idea.

Id. at 20.

On the most general level, notions of justice and individualism lie at the heart of the "American Creed" as it finds expression in the Constitution. The Constitution represents for Americans the promise of fair treatment and the recognition of the individual worth of every person. There does not exist, as in Europe, a high awareness of social and economic stratification. The dominant ideology in the United States is that each person can advance to the full extent of his talents and ambition. The principal function of government is the protection of this liberty of individual action. One does not count on the state for assistance; one asks of the state, rather, to refrain from action that inhibits or constrains individual initiative.

The original Constitution as ratified in 1788 purports to speak in the name of "We the People of the United States." But, as is well known, the Constitution as originally adopted was (almost fatally) flawed by its failure to include a significant number of inhabitants within the body politic. Even though the Constitution was ostensibly adopted by "We the People of the United States," it did not encompass within its embrace the slave population.⁶⁵ Moreover, the constituting sovereign, the "We the People of the United States," was an ambiguous reference to either the undifferentiated people of the United States acting as a collective or to the people as grouped in their different states.⁶⁶ Supporting the so-called compact theory of the Constitution (that is, that the Constitution was brought into force by the vote of the several states rather than by the people of the United States as a whole), was Article VII: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same."⁶⁷

It took the Civil War to finally give an inclusive, national content to the phrase "We the People." That occurred definitively with the adoption of the Fourteenth Amendment that altered fundamentally the American social contract represented by the Constitution. With regard to expressing national solidarity, then, the Constitution that emerged from the Civil War period was a far different document than the Constitution of the Founding Fathers.

65. See Paul Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY*, *supra* note 57 at 188. Finkelman argues that the Constitution as adopted was fundamentally imperfect; the Union was made more perfect "[o]nly after four years of unparalleled bloodshed [1861-1865] . . . by finally expunging slavery from the Constitution." *Id.* at 225.

66. See BEER, *supra* note 60, at 308-40 (1993).

67. U.S. CONST. art. VII; see *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1875 (1995) (Thomas, J., dissenting). But see BEER, *supra* note 60, at 327 (arguing that "the Constitution was not made or ratified by the states as sovereignties or political communities but was rather adopted in state conventions, by 'the immediate representatives of the people.'").

The concept of a national citizenship dates only from this time.⁶⁸ The lack of inclusivity of the concept before the Civil War was made distressingly clear by the Supreme Court in its *Dred Scott* decision.⁶⁹ According to Chief Justice Taney, writing for the Court,

It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognised as citizens in the several States, became also citizens of this new political body [the United States]; but none other; it was formed by them, and for them and their posterity, but for no one else. . . .

. . . .

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.⁷⁰

The Fourteenth Amendment, added to the Constitution in 1868, reversed the *Dred Scott* decision by proclaiming: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."⁷¹ Not only did the Fourteenth Amendment introduce the concept of national citizenship into the Constitution, it also worked a fundamental change in the legal relationship between the states and the federal government. Thus, the Fourteenth Amendment placed direct restrictions on the power of the states⁷² and empowered Congress to "enforce, by appropriate legislation, the provisions of this [Amendment]."⁷³

Since the Constitution must be interpreted as a whole, with each provision read in the context of all other relevant provisions, the Fourteenth Amendment has a significant bearing on the interpretation of the language "We the People of the United States." With the establishment of national citizenship and the allocation of substantial powers to the federal government to oversee the legislative, executive, and judicial activities of the states, the Constitution as

68. For a discussion of the concept of citizenship and the Constitution, see ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 33-54 (1975). See also WARREN, *supra* note 42, at 33-48.

69. *Scott v. Sanford*, 60 U.S. 393 (1856).

70. *Id.* at 406-07.

71. U.S. CONST. amend. XIV, § 1. See BICKEL, *supra* note 68, at 40-41.

72. "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

73. U.S. CONST. amend. XIV, § 5.

amended expressed a very different idea of the national community than the Constitution of the Founding Fathers.

One further matter concerning the ratification of the Constitution deserves comment. It is well known that there was considerable contemporary opposition to the ratification of the Constitution.⁷⁴ Ratification was not a foregone conclusion. In the key state of New York, for example, proponents of the Constitution argued long and hard for ratification. *The Federalist* was written as part of that effort. It is remarkable then that almost immediately after ratification, virtually all Americans rallied to the Constitution. "[N]o anticonstitutional party emerged in the new United States. As early as the spring of 1791 the Constitution was accepted on all sides as the starting point for further debates. . . . While interest in fundamental amendments persisted for years, determined opposition to the new plan of government disappeared almost as quickly as it arose."⁷⁵ And *The Federalist* soon acquired "a talismanic status in American constitutional interpretation."⁷⁶ The response of Americans to their new Constitution was thus extremely different from the French experience at the time of the Revolution and at later times when new constitutions were adopted.⁷⁷

E. *The Constitution as a voluntary social compact*

Besides expressing the political ideas and ideals of the American people, the Constitution probably resembles more closely than any

74. See, e.g., Steven R. Boyd, *Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787-1792*, PUBLIUS, Spring 1977, at 123, reprinted in THE FORMATION AND RATIFICATION OF THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS, at 78-92 (Kermit L. Hall ed. 1987) [hereinafter FORMATION AND RATIFICATION]; Robin Brooks, *Alexander Hamilton, Melancton Smith, and the Ratification of the Constitution in New York*, 24 WM. & MARY L.Q. 339 (1967), reprinted in FORMATION AND RATIFICATION, *supra* at 93; Albert Ray Newsome, *North Carolina's Ratification of the Federal Constitution*, 17 N.C. HIST. REV. 287 (1940), reprinted in FORMATION AND RATIFICATION, *supra* at 475.

75. Lance Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY L.Q. 167, 167-68 (1974), reprinted in FORMATION AND RATIFICATION, *supra* note 74, at 39-40.

76. James W. Ducayet, *Publius and Federalism: On the Use and Abuse of The Federalist in Constitutional Interpretation*, 68 N.Y.U. L. REV. 821, 821 (1993).

77. See *infra* notes 174-85 and accompanying text. According to Lance Banning:

Too little thought has been given to this remarkable turn of events, and its most peculiar feature remains to be explained. Revolutionary France tried six constitutions in fifteen years. Most of a century of civil strife lay behind the constitutional consensus of eighteenth-century England. The quick apotheosis of the American Constitution was a phenomenon without parallel in the western world. Nowhere has fundamental constitutional change been accepted with so much ease. Nowhere have so many fierce opponents of a constitutional revision been so quickly transformed into an opposition that claimed to be more loyal than the government itself.

FORMATION AND RATIFICATION, *supra* note 74, at 40.

comparable document in history a social compact voluntarily entered into by the people. Virtually all the present inhabitants of the United States or their ancestors (with the important and notable exceptions of native Americans, African-Americans, and a number of persons of Hispanic descent)⁷⁸ freely chose to migrate to and to remain in America for the perceived advantages that America had to offer.

In addition to voluntary presence in the United States, those persons who seek naturalization, that is, to become American citizens, must swear in open court "to support the Constitution of the United States" and "to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic."⁷⁹ This too is a voluntary act, representing a freely made choice to become an American citizen.⁸⁰

It is, of course, true that a large area of the present-day United States, that represented by the eleven Confederate states, is part of the national union by reason of conquest rather than volition. With this area in mind, as well as the blacks, native Americans, and Hispanics who are Americans by compulsion and not by free choice, it might be said that the notion of the Constitution as a voluntary social compact fails to describe the experience of a significant part of America and a significant number of Americans. From this point of view, the notion of the Constitution as a voluntary social compact is indeed a myth, obscuring a contentious and often bloody reality. Nevertheless, the great influx of immigrants, persons clearly choosing to be Americans, since the end of the Civil War, coupled with the great social and geographic mobility of Americans that has been a constant feature of the American experience, has done much to soften our sometimes harsh historical reality, and to entrench the myth of voluntary association in the American mind.

The American experience, and perhaps more to the point, the contemporary American view of that experience, is in marked contrast to that of most other nations where citizenship in a nation-state is determined primarily by the frontiers that the particular state was able to establish in its often centuries-long efforts to pacify given regions and to bring outlying areas within its domain. In this respect, nation-states like England, Spain, France, Germany, and Italy are more the result of dynastic combinations or the domination and conquest of populations than the voluntary choice of individuals to

78. See EDWARD COUNTRYMAN, *AMERICANS: A COLLISION OF HISTORIES* (1996) (stressing the historic and contemporary conflicts in American society between whites, blacks, and Native Americans).

79. 8 U.S.C. § 1448(a)(1) & (3) (1994).

80. For a discussion of the origin of the idea of "volitional allegiance" in the United States, see JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 173-209 (1978). See also WERNER SOLLORS, *BEYOND ETHNICITY: CONSENT AND DESCENT IN AMERICAN CULTURE* (1986).

become citizens of England, Spain, France, Germany, or Italy. Language, culture, and ethnicity, of course, play important roles in the formation of attachments of individuals to their particular nation, as do common, collective experiences once a particular nation-state comes into existence. Nonetheless, contrary to the common view in the United States, the basis for attachment in these and other countries is not the free, voluntary, and affirmative election of a particular form of government and certain political and social values as expressed in a particular document.

F. The Constitution as an operative document

The real genius of the American constitutional system lies in the operational reality of the ideas, procedures, and rules embodied in the Constitution. Perhaps the most remarkable thing about the American Constitution is that it is applied everyday in the courts as a source of law. There is no special constitutional court in the United States with the special charge of applying the Constitution, as there is in France. Also, again differing from the situation in France, constitutional review in the United States is not limited to a certain time period. In the United States, provisions of the Constitution can be applied by any court in any matter at any time. If a court determines that a law or administrative action conflicts with a constitutional provision, the court must defer to the Constitution and overturn the law or administrative action in question. One American historian has remarked that perhaps the greatest achievement of the authors of the Constitution was to make the Constitution the supreme law of the land and to require the courts to apply it.⁸¹ This dual directive stems from the Supremacy Clause of the Constitution, which not only accords supremacy to the Constitution and federal laws and treaties, but also obliges judges to apply these sources.⁸²

Courts have not been reluctant to give operational effect to their views of constitutional requirements. Utilizing open-ended provisions like the due process and equal protection clauses of the Fourteenth Amendment, federal courts have created vast bodies of substantive law, sometimes engaging in activity that is clearly legislative in nature, and fashioning remedies and executive capacity to implement their views of constitutional requirements in specific cases. For example, in an effort to end racial segregation in public

81. McLAUGHLIN, *supra* note 57, at 166-67.

82. Article VI, Clause 2 of the United States Constitution sets forth:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl.2.

schools, federal courts redrew the boundaries of local school districts and required cities to use busing.⁸³ Federal courts have also taken charge of mental hospitals and prisons to protect the rights of those held in those facilities.⁸⁴ The federal courts have assumed management of the federal electoral system to give effect to the constitutionally guaranteed right to vote.⁸⁵ To accomplish these tasks, which frequently require ongoing oversight and management, federal courts have developed administrative tools to assure that their interpretations of the Constitution are enforced.

G. The federal judiciary: guardians of the Constitution

While it is indeed possible for a state court to apply a provision of the Constitution, the Constitution finds its most frequent application in federal courts. In order to appreciate fully the American constitutional system in operation, it is necessary to be aware of the special character of the federal judiciary. It is this special character that predisposes and allows federal judges to act effectively as staunch defenders of constitutional rights against encroachments by the executive and legislative branches of the federal government and the states. The most important thing to understand about the federal judiciary is that federal judges are for the most part persons of very high ability, accomplishment, and status. They are usually named to the bench after having achieved great professional success as lawyers, government officials, or law professors. The lawyers, government officials, and law professors who become federal judges are among the most capable and distinguished of their peers, often having played important roles in the politics or economy of their state or region.⁸⁶ Equally important is that, according to the Constitution itself, once nominated, confirmed, and appointed, federal judges serve for life.⁸⁷ The federal judiciary is, therefore, composed of strong, independent, and prestigious individuals who do not hesitate

83. *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971). *But see Missouri v. Jenkins*, 495 U.S. 33 (1990).

84. *Lewis v. Casey*, 116 S. Ct. 2174 (1996) (prison); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (mental hospital).

85. *Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Louisiana v. United States*, 380 U.S. 145 (1965); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

86. See HENRY J. ABRAHAM, *THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND, AND FRANCE* 22-95 (5th ed. 1986); J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM* 87-124 (1981); JOHN PAUL RYAN ET AL., *AMERICAN TRIAL JUDGES: THEIR WORK STYLES AND PERFORMANCE* 121-45 (1980); JOHN R. SCHMIDHAUSER, *JUDGES AND JUSTICES: THE FEDERAL APPELLATE JUDICIARY* 41-104 (1979).

87. U.S. CONST., art. III, § 1. Also, to assure further the independence of federal judges, that same article provides that "they shall . . . receive for their Services, a

to confront other branches of the federal government or the states. The federal judiciary does not in any way resemble a bureaucracy.

Furthermore, the federal judiciary has undertaken, as its own special responsibility, to protect the constitutional rights of the people. Federal judges consider the safeguarding of constitutional rights as their most important responsibility. Federal judges have not been timid in protecting these rights. They have developed vast bodies of law based on vague and open-ended provisions of the Constitution (like due process, equal protection, and freedom of speech) and have fashioned the procedural and administrative means to implement their decisions.⁸⁸

H. The legal profession and the Constitution

Any consideration of the role of the Constitution in American legal and political life must also take into account the role played by American lawyers,⁸⁹ who constantly look to the Constitution to protect or assert the rights of their clients. In reality, it is often lawyers who devise new constitutional theories and present them before the courts. For example, after the Second World War, the leaders of the civil rights movement turned to the courts to overturn the system of legal segregation that existed in many southern states. In a series of cases in the late 1940s, 1950s, and 1960s, civil rights lawyers presented arguments based on the Constitution to the courts.⁹⁰

Reacting favorably to those arguments, federal courts struck down numerous state laws that had up to that time formed the legal basis for racial segregation. Another example of successful constitu-

Compensation, which shall not be diminished during their Continuance in Office." *Id.*

88. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). See CROZIER, *supra* note 43, for a French perspective lamenting "the delirium of due process" in America and commenting that government by judges "leads to two disastrous consequences, the first of which [is] the creation of a restricted caste with a monopoly over the decision-making process, [and] the second [is] a profound transformation in the very nature of the public debate. . . . The entire social system increasingly comes to revolve around . . . static juridical debate, which misses the essential point, namely, change and development." *Id.* at 116-17; see also *id.* at 98-117.

The activism of the federal judiciary has given rise to considerable criticism in the United States. For a thoughtful, well-reasoned, and moderate critique of judicial activism, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962) (discussing the justification for judicial review and advocating the "passive virtues" of judicial restraint).

89. For a description of American lawyers, see RICHARD L. ABEL, *AMERICAN LAWYERS* (1989).

90. See JONATHAN D. CASPER, *LAWYERS BEFORE THE WARREN COURT: CIVIL LIBERTIES AND CIVIL RIGHTS, 1957-66* (1972); see also FRED D. GRAY, *BUS RIDE TO JUSTICE: CHANGING THE SYSTEM BY THE SYSTEM* (1995); JEFFERSON B. FORDHAM, *THE LEGAL PROFESSION AND AMERICAN CONSTITUTIONALISM* (1957).

tional advocacy is the successful effort of lawyers in the area of reproductive rights.⁹¹

The legal profession is extremely prestigious in the United States. The economic and social status of lawyers is high. Lawyers occupy important positions in government at all levels and in the private sector, as private practitioners and as officers of major corporations, foundations, and universities. Highly intelligent and capable people are attracted to the profession, and the leading national law schools are recognized as occupying positions at the pinnacle of the educational system. When one considers the practical application of constitutional principles, one must take into account the activism of the bar—that body of capable, effective, creative, and aggressive lawyers who never hesitate to rely on the Constitution in the courts to protect and advance the interests of their clients.⁹²

I. Legal education in the United States

One final matter to highlight is the system of legal education in the United States, which differs significantly from the French system, for the activism and creativity of the American bench and bar owes much to the training received by lawyers and judges. The leading American law schools are prestigious and attract bright and ambitious students. Entry is extremely competitive. Methods of instruction are practical and result-oriented, focusing on analysis and problem-solving undertaken in the context of particular cases and transactions. Moreover, the Socratic method, where students must respond in class, even in large classes, to questions and follow-up questions from the instructor, aims at producing lawyers who are self-confident, can think on their feet, and can present and defend their views in challenging and stressful public settings. Lecturing by professors, with students passively taking notes, is regarded as a poor way to utilize class time. In addition, mandatory moot court programs, as well as upper-class trial practice courses, clinical practice programs, externships, interscholastic moot court competitions, and law review membership require students to think for themselves, to utilize the research skills that they have acquired, and to act independently.

Lawyers trained in the American system tend to view law as a tool to accomplish desired ends, rather than as a static body of principles and rules. Lawyers, as law students, have been taught to work with the legal materials at their disposal in innovative ways to create

91. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

92. The adjudicative process in the United States has been aptly described as a "lawyer driven process." I owe this characterization to my colleague, Professor Melvyn Zarr.

new legal doctrines and theories to advance the causes of their clients.

III. THE CONSTITUTION IN FRANCE

A. *French constitutional thought*

Although it is traditional to regard 987, the year in which Hugh Capet ascended to the throne of France, as the commencement of the French monarchy, it is more useful to begin our discussion of the French constitutional tradition about the year 1500, with the beginning of the consolidation of the French nation-state as we know it today.⁹³ At the beginning of the sixteenth century, French constitutional thought, reflecting the weakness of the monarchy and the corresponding power of the Church and nobility, embraced "the medieval conception of the social organism as composed of a great complex of individuals of varying rights, status, and consequent position in the hierarchical structure."⁹⁴ The work which best expresses this corporate or feudal view of the state is *La Grande Monarchie de France* by Claude de Seyssel, first published in 1519.⁹⁵ De Seyssel regarded the power of the hereditary monarch as "regulated and bridled by good laws, ordinances, and customs established in such a way that they can scarcely be broken or reduced to nothing Of these bridles by which the absolute power of the king of France is regulated I deem that there are three main ones. The first is religion, the second justice, the third the polity."⁹⁶ By polity de Seyssel meant "the many ordinances, made by the kings of France themselves and afterwards confirmed and approved from time to

93. Commencing in 1494 under Charles VIII (1483-1498), and continuing during the reigns of Louis XII (1498-1515) and François I (1515-1547), France embarked on successive invasions of northern Italy, which collectively had the effect of bringing France into close contact with the culture of Renaissance Italy. This period marks the transition from the medieval period to the modern age in France. Louis XII, who was king in 1500, is known in French history as the Father of His People. FREDERIC J. BAUMGARTNER, *LOUIS XII* 149 (1994); see also 2 FERNAND BRAUDEL, *THE IDENTITY OF FRANCE: PEOPLE AND PRODUCTION* 167-220 (Siân Reynolds, trans., William Collins Sons 1990) (1986). Braudel demonstrates that on the basis of demographic and economic factors—population, production, circulation of goods, price movements—France since 1450 has been a "success story," *id.* at 167, and its experience since then represents a marked departure from the "devastating hundred years between 1350 and 1450." *Id.*

94. WILLIAM FARR CHURCH, *CONSTITUTIONAL THOUGHT IN SIXTEENTH-CENTURY FRANCE* 179 (Octagon Books 1969) (1941). .

95. CLAUDE DE SEYSSSEL, *THE MONARCHY OF FRANCE* (Donald R. Kelley ed. & J. H. Hexter trans., 1981) (1519). On de Seyssel, see Nannerl O. Keohane, *Claude de Seyssel and Sixteenth-Century Constitutionalism in France*, in *CONSTITUTIONALISM* 47 (J. Roland Pennock & John W. Chapman eds., 1979); CHURCH, *supra* note 94, at 22-42; J. W. ALLEN, *A HISTORY OF POLITICAL THOUGHT IN THE SIXTEENTH CENTURY* 275-79 (1928).

96. DE SEYSSSEL, *supra* note 95, at 51.

time."⁹⁷ The most important of these "many ordinances" are those that pertain to the three estates of the people of France: "the realm can scarcely fall into great decadence while they are well maintained, since each estate has its own rights and preeminences according to its quality, and one estate can scarcely oppress the other, nor all three together conspire against the head and monarch."⁹⁸ In practical terms, de Seyssel regarded the royal prerogative as limited by the Church, the Parlements, and an independent judiciary as guardians of established legal usage.⁹⁹

The second half the sixteenth century was a time of great disorder in France. This was the period of the wars of religion between the Catholic majority and a substantial Huguenot (or French Protestant) minority. The reestablishment of domestic order was the first priority of the nation. In response to this need, constitutional theory provided the rationale for strong central authority, at first stressing the idea of sovereignty¹⁰⁰ and later, as the monarchy grew in power, particularly during the reigns of Henry IV (1589-1610),¹⁰¹ Louis XIII (1610-1643),¹⁰² and Louis XIV (1643-1715),¹⁰³ the theory of the divine right of kings.¹⁰⁴

According to Jean Bodin, writing in 1576, sovereignty is "the distinguishing mark of a commonwealth."¹⁰⁵ Sovereignty is "absolute"

97. *Id.* at 56.

98. *Id.* at 58. De Seyssel does not include the church among the three estates. For him, they are "the nobility, the middle people which might be called the rich people, and the lesser folk." *Id.*

99. *Id.* at 22-42. According to a fifteenth century writer, Jean de Terre Rouge, "the king was administrator of an authority not his, an authority which devolved upon him through law and which thus found its basis in established legal usage." *Id.* at 29.

100. The principal work on sovereignty is JEAN BODIN, *SIX BOOKS OF THE COMMONWEALTH* (M. J. Tooley trans., 1955), first published in 1576. See JEAN-JACQUES CHEVALLIER, *LES GRANDES OEUVRES POLITIQUES DE MACHIAVEL A NOS JOURS* 38-51 (Librairie Armand Colin 6th ed. 1960) (1949).

101. See JAMES B. COLLINS, *THE STATE IN EARLY MODERN FRANCE* 22-27 (1995). In 1598, Henry IV promulgated the Edict of Nantes, which guaranteed to French Protestants limited freedom of worship and allowed them to have special fortified towns. *Id.* at 103.

102. See *id.* at 28-60.

103. Louis XIV's attitudes toward the royal prerogative were significantly influenced by a series of internal disorders and rebellious activity, known as the Fronde, during the early years of his reign. See *id.* 65-78. Perhaps the event most symbolic of the centralizing and absolutist tendencies of the reign of Louis XIV was his repeal in 1685 of the Edict of Nantes by the Edict of Fontainebleau, which outlawed the Protestant religion in most of France. *Id.* at 103-05.

104. The principal theoretical work justifying the divine right of kings is JACQUES-BENIGNE BOSSUET, *POLITICS DRAWN FROM THE VERY WORDS OF HOLY SCRIPTURE* (Patrick Riley ed. & trans. Cambridge Univ. Press n.d.) (1709). For a discussion of this important work by Bishop Bossuet, largely completed by 1679 and published in 1709, see CHEVALLIER, *supra* note 100, at 70-84.

105. BODIN, *supra* note 100, at 25.

and "perpetual,"¹⁰⁶ "the principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent"¹⁰⁷ Furthermore, "the sovereignty of the king is in no wise qualified or diminished by the existence of Estates."¹⁰⁸

Whereas Bodin accepts the possibility that sovereignty can reside in different persons or bodies (a single prince, all the people, or a minority, corresponding respectively to monarchy, a popular state, or aristocracy), the divine right of kings theory, building on the concept of sovereignty elaborated by Bodin, locates sovereign power in the hereditary monarch. Royal power flows directly from God; the royal prerogative is absolute; it is subject to no "bridles" or limitations.¹⁰⁹ According to Bishop Bossuet, monarchy is the most common, the most ancient, the most natural, and the best form of government,¹¹⁰ and hereditary monarchy has particular advantages.¹¹¹

With the clear triumph of the monarchy over particularist internal forces that threatened the existence of the nation as such, the political need for royal absolutism diminished. It was in this climate that the work of Montesquieu found fertile soil. Reacting against the absolutist tradition and looking to the English system as a model,¹¹² Montesquieu, in his *De l'Esprit des Lois*, first published in 1748, developed a political analysis that focused on the idea of "constitution" as "the indispensable term to describe the fundamental order of a state, the models of political existence of a nation or people, the essential disposition of the elements or powers composing a form of government."¹¹³ In so doing, he "gave the term 'constitution' a new centrality in eighteenth-century political understanding,"¹¹⁴ and de-

106. *Id.*

107. *Id.* at 32.

108. *Id.* "Those who have written books about the duties of magistrates and such like matters are in error in maintaining that the authority of the Estates is superior to that of the prince. Such doctrines serve only to encourage subjects to resist their sovereign rulers." *Id.* at 31 (footnote omitted). Moreover, "[c]ustom only has binding force by the sufferance and during the good pleasure of the sovereign prince, and so far as he is willing to authorize it." *Id.* at 44.

109. See BOSSUET, *supra* note 104, *passim*.

110. *Id.* at 46-48.

111. *Id.* at 49-51.

112. See 1 MONTESQUIEU, *DE L'ESPRIT DES LOIS*, 161-95 (Gonzague Truc ed., Garnier Frères n.d.) (1748).

113. Keith M. Baker, *Constitution*, in *A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION*, *supra* note 4, at 479, 481.

114. *Id.*

Montesquieu in effect wrote out the English constitution, and Blackstone in copying it gave that version a semi-official standing

Montesquieu not only moved from medieval to modern constitutionalism; he also turned the classical notion of the mixed constitution into the more adaptable theory of the separation of powers.

scribed the conditions necessary for the limitation of power for the protection of political liberty.¹¹⁵ More specifically, in *De l'Esprit des Loïs* Montesquieu advocates a constitution based on the principle of separation of powers.¹¹⁶ To assure liberty, he maintains, legislative, executive, and judicial powers must be kept separate. The judicial power, however, is subordinate to the legislative power, as the sole function of the judge is to apply the law, for "the judges of the nation are . . . nothing but the mouth which pronounces the words of the law; they are inanimate beings who cannot moderate either the force or rigour of the law."¹¹⁷ In fact, he says, "Of the three powers of which we have spoken, the judicial is, in a sense, null."¹¹⁸

When the Estates-General met in May 1789, one of the principal demands expressed in the *cahiers de doléances* was for the formal, written, reaffirmation of traditional French constitutional principles.¹¹⁹ While Montesquieu's introduction of the idea of a written constitution into the intellectual mix of the times would prove important during the early years of the Revolution, revolutionary political thought would change his emphasis from that of giving expression to an *existing* "constitutional" order to that of viewing the constitution as an original act of establishing a *new* "constitutional" order.¹²⁰ Moreover, this new constitution was to be based on first principles, rather than on existing institutions and practices. Revolu-

JUDITH N. SHKLAR, MONTESQUIEU 112 (1987).

115. 1 MONTESQUIEU, *supra* note 112, at 161-95.

116. Article XVI of the Declaration of the Rights of Man and of the Citizen of 1789 did in fact equate constitutional government with separation of powers and the protection of individual rights. "Every society in which the guaranty of rights is not assured or the separation of powers established, has no Constitution." *Declaration des Droits de l'Homme et du Citoyen de 1789, reprinted in* STEPHANE RIALS, *LA DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN* 26 (1988).

117. 1 MONTESQUIEU, *supra* note 112 at 163-74. For a discussion of Montesquieu's views of separation of powers, the judicial power, and law, see MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 190-98 (1989).

118. MONTESQUIEU, *supra* note 112 at 163-74.

119. On the *cahiers*, see *infra* note 145. On the decision to convene the Estates-General, see JEAN EGRET, *THE FRENCH PREREVOLUTION 1787-1788*, at 179-214 (Wesley D. Camp trans., Univ. of Chicago Press 1977) (1962); on the election of the Estates-General, see WILLIAM DOYLE, *ORIGINS OF THE FRENCH REVOLUTION* 139-57 (1980); on the role of the Estates-General in the early months of the Revolution, see *id.* at 168-77.

120. See Baker, *supra* note 113, at 483.

The idea that France possesses a traditional form of government providing at least the elements of a constitution—whose principles could now be reaffirmed, perfected, and fixed in a written document—was finally rejected in favor of a conception of the constitution as created anew by an act of sovereign national will and instituted in accordance with abstract principles of political right.

Id. at 485; see also Marina Valensise, *La constitution française*, in 1 *THE FRENCH REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE: THE POLITICAL CULTURE OF THE OLD REGIME* 441, 444 (Keith Michael Baker ed., 1987).

tionary politicians were faced not only with the problem of establishing a new, legitimate political order, they also had to delegitimize the existing order which was to be replaced. Building on organic foundations therefore would not do.¹²¹

The work that best expressed the political and social aspirations of the French at the time of the Revolution and whose ideas still resonate powerfully in France today is Jean-Jacques Rousseau's *Du Contrat Social*, published in 1762. In spite of its ultimate impracticality and ambiguity, Rousseau's work epitomizes the different, often contradictory, strands of French thought regarding the organization of public life, and expresses certain visceral understandings of the French people regarding the political organization of society and law. Rousseau's conceptions of the "social contract," of "law," and of "republican virtue" are particularly important.

For Rousseau, the social order is founded on a social compact: "*Each of us places his person and all his power in common under the supreme direction of the general will; and as one we receive each member as an indivisible part of the whole.*"¹²² The formation of civil society by agreement does not result in loss of freedom for the individual; in fact, just the opposite. "[S]ince there is no associate over whom [the individual] does not acquire the same right that he would grant others over himself, he gains the equivalent of everything he loses, along with a greater amount of force to preserve what he has."¹²³ "The social order is a sacred right which serves as the foundation of all other rights,"¹²⁴ since "[the] passage from the state of nature to the civil state produces a remarkable change in man, for it substitutes justice for instinct in his behavior and gives his actions a moral quality they previously lacked."¹²⁵

According to Rousseau, the social contract, or "act of association," includes a reciprocal commitment between the public and private

121. See Marcel Gauchet, *Rights of Man*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION, *supra* note 4, at 818, 822-23; see also Valensise, *supra* note 120, who offers the following perceptive observation:

Absolutism, by abolishing the political space between governmental power and the individual, . . . brought into being conditions favorable to the creation of a society of subjects equal in their rights and in their submission and obedience to the sovereign power. Such a society would become the indispensable precondition to a simple and uniform representation, conforming to reason, which the Revolution would translate into the universal and general idea of the nation.

Id. at 457.

122. JEAN-JACQUES ROUSSEAU, ON THE SOCIAL CONTRACT 24 (Donald A. Cress ed. & trans., Hackett Publishing Co. 1983) (1762) (emphasis in original).

123. *Id.*

124. *Id.* at 17.

125. *Id.* at 26. Rousseau continues: "What man loses through the social contract is his natural liberty and an unlimited right to everything that tempts him and that he can acquire. What he gains is civil liberty and the proprietary right of all he possesses." *Id.* at 27.

individuals, and that each individual, contracting as it were, with himself finds himself under a twofold commitment: namely as a member of the sovereign to private individuals, and as a member of the state toward the sovereign."¹²⁶ Since individuals are in effect contracting with themselves, "it is apparent," says Rousseau, "that there neither is nor can be any type of fundamental law that is obligatory for the people as a body, not even the social contract."¹²⁷ Moreover, it is contrary to the very nature of sovereignty "for the will to tie its hands for the future."¹²⁸ "If, therefore, the populace promises simply to obey, it dissolves itself by this act, it loses its standing as a people. The very moment there is a master, there no longer is a sovereign, and thenceforward the body politic is destroyed."¹²⁹ Thus, in Rousseau's famous formulation, "sovereignty is inalienable."¹³⁰

These rather abstract ideas spring from and express deep feelings about the true nature of politics and society. Conventional political thinking by the end of the seventeenth century had embraced the doctrine of the divine right of kings. According to this theory, "royalty has its origin in Divinity itself . . . [God] chose a monarchical and hereditary state, as the most natural and the most durable . . ."¹³¹ Rousseau turned this idea on its head. Rather than the monarch being sovereign and the people subject to his will, Rousseau proclaimed the sovereignty of the people—a sovereignty that could not be lost by conquest¹³² or even relinquished voluntarily.¹³³ Or, in the words of Jean-Jacques Chevallier: "Sovereignty of the people, that is to say of the citizens as a body, . . . substituted for the concrete sovereignty of a Louis XIV usurped from that of God! A sovereignty which opposes *l'État c'est moi* of the absolute monarch with *l'État c'est nous* of the people as a body."¹³⁴

Rousseau's ideas continue to express the feelings of the French toward their fundamental law—which since 1791 has been embod-

126. *Id.* at 25.

127. *Id.*

128. *Id.* at 30.

129. *Id.*

130. *Id.* at 29.

131. BOSSUET, *supra* note 104, at 54.

132. *See* ROUSSEAU, *supra* note 122, at 19-20.

133. *See supra* notes 78-80 and accompanying text.

134. CHEVALLIER, *supra* note 100, at 153; *see also* Bernard Manin, *Rousseau*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION, *supra* note 4, at 818.

By insisting more than any other theorist on the idea that the people is one (or can be made one), and by defining it as a subject with a will of its own, Rousseau beyond any doubt laid the intellectual groundwork for the Revolution and prepared people to accept its single most characteristic act: that of installing those who expressed the will of the people in the place once occupied by the king.

Id. at 839.

ied in a succession of written constitutions. The fundamental law must be malleable; it must express the current will of the people. Not to alter it as political and social views change would be contrary to the very nature of the social contract. For it to be altered by acts of the government or by court decisions would also be contrary to the "inalienable" nature of the sovereignty of the people.¹³⁵

Furthermore, not only is the general will unitary and inalienable, it is also infallible and fundamentally just. This is so because the people is either virtuous or has the capacity to become so, or more generally, in the words of Bernard Manin, that "the people is good and worthy of love."¹³⁶ Rousseau expressed and expounded this point of view in *Émile*, his work on education, and in his novel *La Nouvelle Héloïse*. For Rousseau, politics and ethics are inseparable. In his *Confessions*, Rousseau writes:

[E]verything ultimately depends on politics, . . . a people could only ever be what the nature of its government would allow it to be; thus, the great question of the best possible government appeared to me to reduce itself to this: What is the type of government most likely to develop the most virtuous, the most enlightened, the wisest, the best people . . .¹³⁷

As a consequence, more than simply locate the general will in a unitary people, Rousseau argued for the fundamental rightness and desirability of this result based on his view of the goodness and perfectibility of man. "Most crucially," as Bernard Manin points

135. See Baker, *supra* note 113, at 479 ("Unlike the American Revolution, which effectively translated the assertion of revolutionary will into the establishment of a stable constitutional order, the French Revolution opened a widening gap between revolution and constitution, effectively resisting successive efforts to bring the revolutionary movement to its constitutional completion."). Professor Baker also makes the following telling observation:

A first implication of [the] constitutional choices of mid-September 1789 was that the Assembly opted for the radical, Rousseauian definition of the constitution as a formal organization of the organs and functions of government created *de novo* by an act of sovereign will. . . .

But if a constitution could be created anew in accordance with the principle of national sovereignty, could it not also be abolished and replaced on the same basis? And if popular action could force the acceptance of constitutional principles in the name of the nation, could it not also force their revision or repudiation once accepted? . . . Having unleashed the principle of national sovereignty, the National Assembly now faced the difficulties of containing it.

Id. at 490-91.

136. Manin, *supra* note 134, at 840; see also Mona Ozouf, *Regeneration*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION, *supra* note 4, at 781; Mona Ozouf, *La révolution française et l'idée de l'homme nouveau*, in 2 THE FRENCH REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE: THE POLITICAL CULTURE OF THE FRENCH REVOLUTION 213 (Colin Lucas ed., 1988); ERNST CASSIRER, *Kant and Rousseau*, in ROUSSEAU, KANT AND GOETHE 1 (1945).

137. JEAN-JACQUES ROUSSEAU, LES CONFESSIONS 480 (Jacques Voisine, ed., Garnier Frères 1964) (n.d.).

out, "Rousseau embodied these ideas in immediate, accessible images."¹³⁸

An understanding of Rousseau's conception of "law" is also necessary to understand and appreciate the French legal system. According to Rousseau, law (or legislation) is the expression of the general will. It is the law that makes the general will operational.¹³⁹ As an expression of the general will, law is enacted *by* the entire populace *for* the entire populace. A law then must be general, apply equally to all members of the body politic, and have an object that is general. "When I say that the object of the laws is always general, I have in mind that the law considers subjects as a body and actions in the abstract, never a man as an individual or a particular action."¹⁴⁰ That this abstract formulation is aimed at specific grievances against the *ancien régime* (like the privileges enjoyed by the nobility, the despotic rule of the hereditary monarch, etc.) is made clear by what follows in Rousseau's text:

Thus the law can perfectly well enact a statute to the effect that there be privileges, but it cannot bestow them by name on anyone. The law can create several classes of citizens, and even stipulate the qualifications that determine membership in these classes, but it cannot name specific persons to be admitted to them. It can establish a royal government and a hereditary line of succession, but it cannot elect a king or name a royal family. In a word, any function that relates to an individ-

138. Manin, *supra* note 134, at 841.

139.

Through the social compact we have given existence and life to the body politic. It is now a matter of giving it movement and will through legislation. . . . There must therefore be . . . laws to unite rights and duties and to refer justice back to its object. In the state of nature where everything is commonly held, I owe nothing to those to whom I have promised nothing. I recognize as belonging to someone else only what is not useful to me. It is not this way in the civil state where all rights are fixed by law.

ROUSSEAU, *supra* note 122, at 36-37.

140. *Id.* at 37. See also GRIDEL, *supra* note 9, at 661-65:

[The] work [of the legislator] reveals, more than it creates. His law proclaims rules and truths which, arise necessarily in the reason of all sensible men when they consider their own natures and the exigencies of their coexistence and take on an "immanente" and "immarcescible" quality. . . . [T]o be obliged to obey the law . . . means to cease being subject to human will, always suspected of caprice or mediocrity, whether it be that of monarchs, administrators, or judges. The . . . law . . . is a reflection of justice, objectivity, and permanence

It is this conjunction of unchallenged supremacy and timeless transcendence that has led historians . . . to speak of the law as sacred [*"la sacralisation de la loi"*], [implying] the submission of individuals and public authorities less to the will of the legislator than to the intrinsically superior rules ascertained by him and accepted as general and absolute, necessarily containing, either explicitly or implicitly, the solutions to all possible legal problems

Id. at 662-63.

ual does not belong to the legislative power. On this view, it is immediately obvious that it is no longer necessary to ask who is to make the laws, since they are acts of the general will; nor whether the prince is above the laws, since he is a member of the state; nor whether the law can be unjust, since no one is unjust to himself; nor how one is both free and subject to the laws, since they are merely the record of our own wills.¹⁴¹

But how is this "general" and "impersonal" law to be drafted and enacted? "How can a blind multitude, which often does not know what it wants, because it rarely knows what is good for it, undertake by itself as great and as difficult a task as creating a system of legislation?"¹⁴² Rousseau's surprising answer is to appeal to a sort of *deus ex machina*, an "extraordinary man," who possesses neither "magistracy nor sovereignty," a modern-day Moses, Lycurgus, Solon, or Calvin.¹⁴³ This disinterested individual would prepare legislation for approval by the sovereign people.

For Rousseau, then, the law is sacrosanct. As an expression of the general will it is "infallible"; it cannot err, it is "always right and always tends toward the public utility."¹⁴⁴ It follows then that the law must be applied as written by judges and by administrative and government officials; it may not be displaced by anyone but the sovereign body politic itself. In effect, Rousseau's conceptions of the law and the legislator describe almost exactly the *Code civil* and Napoleon, the "legislator" responsible for its preparation and promulgation.

Rousseau's views powerfully informed political thinking during the revolutionary period. The drive for a constitution approved by the French people as a whole and the need for enlightened legislation in the interest of the entire nation figured importantly during that tumultuous period of fundamental social and political change. During the period leading up to the convening of the States-General in 1789, there was considerable desire expressed by the people, as evidenced in the *cahiers de doléances*,¹⁴⁵ for the formal, written reaffirmation of traditional French constitutional principles before other

141. ROUSSEAU, *supra* note 122, at 37.

142. CHEVALLIER, *supra* note 100, at 155 (quoting Halbwachs).

143. ROUSSEAU, *supra* note 122, at 38-41.

144. *Id.* at 31.

145. On the *cahiers de doléances*, see HYSLOP, *supra* note 35, at 20-21:

Along with the development of the States-General in France grew the practice of giving written instructions to the deputies. When the States-General was summoned for 1789, the revival of this traditional procedure led to the composition of *cahiers de doléances* in all the electoral districts of France. Out of the total number of cahiers composed, six hundred fifteen were designed as the specific instructions for the deputies direct to the States-General. These may be called the general cahiers

Id.; see also JEAN EGRET, *THE FRENCH REVOLUTION* (Wesley D. Camp trans., Univ. of Chicago Press 1977) (1962).

business was undertaken.¹⁴⁶ As a preliminary matter, however, fierce debate raged around the questions of how the States-General should be organized and what its voting procedures ought to be. Should the States-General be organized and vote by order? Or should voting be by head? Should the Third Estate have a number of representatives and votes equal to that of the other two orders?

In January 1789 an anonymous pamphlet dealing with these matters appeared which made claims for the supremacy of the Third Estate and advanced arguments in their support which expressed in forceful and moving terms the latent, but until then imprecisely formulated, thoughts and feelings of the French people.¹⁴⁷ According to this work, which was later attributed to a clergyman, the Abbé Sieyès, a constitution should be adopted not by the States-General, but by a body composed of the Third Estate alone, what Sieyès called a "National Assembly."

Sieyès work, *Qu'est-ce que le Tiers État*,¹⁴⁸ provided a theoretical and practical blueprint for the first stage of the Revolution, leading up to the adoption of the Constitution of 1791. At the beginning of his work, he posed the three questions which provided the organizing principle for that period: "1) What is the Third Estate? *Everything*. 2) What has it been until now in the political order? *Nothing*. 3) What does it want to be? *Something*."¹⁴⁹ After advancing empirical arguments in support of each of these propositions in the first part of his work, he devotes the final part to establishing a theoretical basis for the supremacy of Third Estate, in essence arguing that the Third Estate is in fact *la Nation* and that it, and it alone, acting through its representatives, should adopt, or "constitute," a constitution for the nation. Article III of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 will later proclaim this proposition: "The principle of all sovereignty resides essentially in the Nation.

146. HYSLOP, *supra* note 35, at 39-42.

147.

A forgotten biographer of Sieyès, A. Neton, writes that *Le Tiers* was born from the circumstances and was the synthesis of everything that was seething "confusedly" in the minds and hearts of the people. Scattered and without connection until then, all its simmering desires, passions, and ideas, "thanks to Sieyès . . . came together, united, and focused on one single point."

CHEVALLIER, *supra* note 100, at 183; see also MURRAY FORSYTH, *REASON AND REVOLUTION: THE POLITICAL THOUGHT OF THE ABBÉ SIEYÈS* (1987); PAUL BASTIDE, *SIEYÈS ET SA PENSÉE* (1939).

148. EMMANUEL SIEYÈS, *QU'EST-CE QUE LE TIERS ÉTAT?* (Edme Champion ed. 1888) (n.d.).

149. EMMANUEL JOSEPH SIEYÈS, *WHAT IS THE THIRD ESTATE?* 51-52 (S.E. Finer ed. & M. Blondel trans., 1964).

No body and no individual may exercise authority which does not derive expressly therefrom."¹⁵⁰

In his final three chapters, Sieyès eschews history and tradition and founds his arguments for the supremacy of the Third Estate on logic and reason. Sainte-Beuve has called him the "*Descartes de la politique*."¹⁵¹ But it is passion rather than reason that really animates the work of Sieyès and that made it such a compelling and galvanizing force in French revolutionary politics. That emotional power is directed against the privileges of the aristocracy, and it is this critique that struck such a deep and responsive chord with the French people. It is thus the existence and the abuse of privilege which is really the gravamen of Sieyès's complaint and undergirds his theoretical analysis. According to Sieyès:

Who is bold enough to maintain that the Third Estate does not contain within itself everything needful to constitute a complete nation? It is like a strong and robust man with one arm still in chains. If the privileged order were removed, the nation would not be something less but something more. What then is the Third Estate? All; but an 'all' that is fettered and oppressed. What would it be without the privileged order? It would be all; but free and flourishing. Nothing will go well without the Third Estate; everything would go considerably better without the two others.¹⁵²

Sieyès goes on to argue:

It is not enough to have shown that the privileged, far from being useful to the nation, can only weaken and injure it; we must prove further that 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, surely, is foreign to the nation because of its *idleness*.¹⁵³

Sieyès's legacy to French constitutionalism was to decisively undermine the sanctity of written constitutions. By applying the theoretical insights of Rousseau to the constitutional controversy before the nation in early 1789, Sieyès drew on the practical implications of Rousseau's theory and supplied it with compelling emotional force.¹⁵⁴ But, "in repudiating claims for a traditional constitution,

150. RIALS, *supra* note 116, at 22; *see also* La Constitution de 1791 [CONST. 1791] tit. III, art. 1 (Fr.), in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 38 (Jacques Godechot ed., 1979).

151. CHEVALLIER, *supra* note 100, at 176; *see also* SIEYÈS, *supra* note 149, at 119-39.

152. SIEYÈS, *supra* note 149, at 56-57; *see also* EMMANUEL SIEYÈS, *Essai sur les privilèges*, in SIEYÈS, *supra* note 148, at 1.

153. SIEYÈS, *supra* note 149, at 57 (footnote omitted).

154. On the relation between the thought of Rousseau and Sieyès, *see* Bronislaw Baczko, *Le contrat social des Français: Sieyès et Rousseau*, in 1 THE FRENCH

Sieyès had also undermined the capacity of any constitutional arrangement to withstand the subversive effects of the principle of national sovereignty."¹⁵⁵

Views regarding the seat and exercise of national sovereignty and the primacy of *la loi* find comprehensive and systematic expression during the first part of the twentieth century in the writings of Raymond Carré de Malberg.¹⁵⁶ In spite of strong countercurrents represented by the contemporaneous thought of the important legal thinker Léon Duguit,¹⁵⁷ the ideas of Carré de Malberg eventually prevailed as the conventional way of viewing the law and the state and have been extremely influential up to the present day.¹⁵⁸ While Carré de Malberg takes issue with certain aspects of the theories of Montesquieu, Rousseau, and Sieyès, his conceptions of the nation and the state strongly reinforce the notion of the malleability of the constitution. His view of the law, however, while recognizing the priority accorded to it since the Revolution, exposes certain theoretical inconsistencies (what Georges Burdeau calls "intellectual

REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE: THE POLITICAL CULTURE OF THE OLD REGIME, *supra* note 120, at 493. *See also* Ran Halévi, *La révolution constituante: les ambiguïtés politiques*, in 2 THE FRENCH REVOLUTION AND THE CREATION OF MODERN POLITICAL CULTURE: THE POLITICAL CULTURE OF THE FRENCH REVOLUTION, *supra* note 136, at 69, 71 ("Rarely has a political writer traced with as much perspicacity the possible scenarios of a constitutional revolution. Rarely has a pamphlet given as much resonance to the passions of the day.").

155. Keith M. Baker, *Sieyès*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION, *supra* note 4, at 313, 321. The Constitution of 1793 states explicitly: "A people always has the right to review, reform, and change its Constitution. One generation cannot subject future generations to its laws." *La Constitution de 1793* [CONST. 1793] *Déclaration des Droits de l'Homme et du Citoyen* art. 28 (Fr.), in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, *supra* note 150, at 82.

156. The principal works of Carré de Malberg are: 1 R. CARRÉ DE MALBERG, *CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT* (1920); 2 R. CARRÉ DE MALBERG, *CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L'ÉTAT* (1922); and RAYMOND CARRÉ DE MALBERG, *LA LOI, EXPRESSION DE LA VOLONTÉ GÉNÉRALE* (Economica 1984) (1931) [hereinafter *LA LOI*].

157. *See* Harold J. Laski, *M. Duguit's Conception of the State*, in MODERN THEORIES OF LAW 52 (W. Ivor Jennings ed., Wiley & Sons 1963) (1933). For a comparison of the two competing legal philosophies that are exemplified by the work of Duguit and Carré de Malberg, *see* STONE, *supra* note 10, at 23-45.

158.

After initial disfavor due to the influence of the concurrent thought of . . . Léon Duguit, the constitutional thought of Raymond Carré de Malberg (1861-1935) encountered great success with an entire generation of legal thinkers (René Capitant, Charles Eisenmann, Georges Burdeau, Paul Bastid). It was even progressively transformed . . . into an incontestable dogma and an indispensable reference.

Olivier Beaud, *La souveraineté dans la "Contribution à la théorie générale de l'État" de Carré de Malberg*, 1994 REVUE DU DROIT PUBLIC 1251, 1252; *see also* Georges Burdeau, *Préface* to *LA LOI*, *supra* note 156, at vii-ix.

fraud")¹⁵⁹ underlying that doctrine that later would prove congenial to the founders of the Fifth Republic.

The key to the legal thought of Carré de Malberg is his conception of national sovereignty. He analyzes the political function of the principle of *la souveraineté nationale* (national sovereignty), expressed in Article 3 of the *Declaration des Droits de l'Homme et du Citoyen* of 1789 and in the Constitution of 1791, in order to give content to this key phrase that appears in successive constitutions.¹⁶⁰ For Carré de Malberg, *la souveraineté nationale* has a far different meaning from that which Rousseau attributed to the concept. Whereas Rousseau regarded national sovereignty as possessed by "the people" as individuals, Carré de Malberg regards national sovereignty as possessed by *la Nation* as a collective. He calls Rousseau's theory "atomistic"¹⁶¹ and rejects the Rousseauian equation of *la souveraineté nationale* with direct democracy. According to Carré de Malberg, "what the French Revolution established by virtue of the principle of national sovereignty is the representative regime, a regime in which sovereignty, being reserved exclusively to the collective and abstract entity of the nation, can only be exercised by a person or body in the capacity of representative of the nation."¹⁶² As for the constitution, however, it is still susceptible to modification or replacement. "[A] direct consequence of the idea of national sovereignty," maintains Carré de Malberg, "[is that] being the sole sovereign, the nation reserves the right at any time to take back power from those to whom it had entrusted it."¹⁶³

According to Carré de Malberg, the notion of separation of powers does not imply the equality of powers or of the governmental organs that exercise these powers. The political function of the doctrine of separation of powers is rather to assure to each organ of government (i.e., legislature, executive, judiciary) independence in its appropriate sphere, not to establish equality among them.¹⁶⁴ Malberg credits Rousseau and Montesquieu for recognizing that

the Revolution extracted as one of the great principles of the modern public law of France, the primacy and the supremacy of the legislative power. Thus . . . the Constituents of 1791 perceived no contradiction in establishing three equal and independent powers, on the one hand and in subordinating the

159. LA LOI, *supra* note 156, at ix.

160. The phrase *souveraineté nationale* appears in Article 3 of the present French Constitution: "National sovereignty (*la souveraineté nationale*) resides in the people, who shall exercise it through their representatives and by means of referendum." La Constitution [CONST.] art. 3 (Fr.).

161. 2 CARRÉ DE MALBERG, *supra* note 156, at 155.

162. *Id.* at 196-97.

163. *Id.* at 191.

164. *Id.* at 48-58.

executive and the judicial powers to the legislature on the other.¹⁶⁵

The primacy of the law, and therefore of parliament, however, rests on a questionable theoretical base. According to the generally accepted view of Rousseau, what gives the law its sanctity and primacy is that it is the expression of the general will. For Carré de Malberg, however, this premise is not true, because the law is enacted by a parliamentary body which in fact does not express the general will because the public is systematically excluded from the legislative process. Alone of all the French constitutions, the Constitution of 1793 established a mechanism for the will of the nation as a whole to be expressed in enacted law.¹⁶⁶ Public participation could also be accomplished by according to the people as a whole an active role in the legislative process (for example by allowing the people to initiate legislation or to disapprove legislative measures enacted by the parliament).¹⁶⁷ Thus, to say that the law is the expression of the general will is simply a legal fiction.¹⁶⁸

Important consequences flow from this analysis. First, because a law enacted by parliament is not the expression of the general will, whereas the constitution is if it is brought into force by approval in a popular referendum, parliamentary enactments, just like the acts

165. *Id.* at 49.

La loi—in the constitutional sense of the term—is not in essence characterized by its substance, but uniquely by its inherent authority, or its power, either present or potential. The present power of the law consists in that in every case the decision, general rule, or particular measure, mandated by virtue of legislative authority, necessarily applies with a superior force not only to subjects of the State, but even to all state authorities except the legislator itself[;] in so far as these authorities are required . . . to execute the law they can in no way impede its operation. The potential power of the law consists in that the law can decide and command without the need for support from a prior authorizing law; in addition, it can derogate from existing laws with respect to particular matters, as well as abrogating them in general.

1 *id.* at 328.

166. The Constitution of 1793 establishes "*Assemblées primaires*" in each canton composed of all male citizens over the age of 21. La Constitution de 1793 [CONST. 1793] art. 11 (Fr.), in *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 84. The "*Assemblées primaires*" play an important role in the national legislative process. La Constitution de 1793 [CONST. 1793] art. 59-60 (Fr.), in *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 87.

167. LA LOI, *supra* note 156, at 217.

168. *Id.* at 216. Although Carré de Malberg criticizes the notion that law enacted by Parliament is in fact an expression of the general will, he still regards parliamentary enactments, regardless of their content or generality, as supreme in the French legal system. In an oft-quoted definition of the law, Carré de Malberg says: "Law is not characterized by its content, but rather by its form and by the force inherent in this form. Law must be defined not by its particular subject matter but rather by its inherent power (*sa puissance spéciale de décision initiale*)."¹ CARRÉ DE MALBERG, *supra* note 156, at 329.

and decisions of the executive branch or the judiciary, are subject to the constitution. Moreover, "Parliament, the Executive, and the judiciary . . . are equal before the Constitution, which is the common source of their powers."¹⁶⁹ Thus, there is in principle "no obstacle to the establishment of judicial review of laws."¹⁷⁰

Even though the legal thought of Carré de Malberg for the most part remained within the traditional view of law and the state, his views of national sovereignty and the general will served to highlight problems with traditional notions. In addition, political activity in France came increasingly to be seen as dominated by a closed and self-perpetuating group, "*la classe politique*," which had less and less claim to be the voice of the general will. Legislation became more and more technical and specific, and thus clearly not the general and timeless expression of natural reason of the Rousseauian tradition. Consequently, the law as enacted by Parliament increasingly lost its claim to superior status.¹⁷¹ The Constitution of 1958 would eventually give legal expression to these developments by limiting the "domain of the law"¹⁷² and by establishing a mechanism for the constitutional review of legislation.¹⁷³

B. *The Constitution as a "contested" document*

Between 1791 and 1815 France had eight different constitutions.¹⁷⁴ During these volatile times, as absolute monarchy gave way to constitutional monarchy followed by radical republic, moderate reaction, dictatorship, and finally the restoration of the monarchy, each successive dominant political group wrote its own constitution for the nation. Subsequently, from 1815 to 1875, each major political upheaval resulted in a new constitution (in 1830, 1848, 1852, 1870, and 1875). Successive constitutions differed significantly with respect to their treatment of governmental structure

169. LA LOI, *supra* note 156, at 220.

170. *Id.* at 221. See Éric Maulin, *Le Principe du contrôle de la constitutionnalité des lois dans la pensée de Carré de Malberg*, 21 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 79 (1995).

171. See GRIDEL, *supra* note 9, at 663-65.

172. The demarcation of the domain of the law is accomplished by the enumeration of those matters which are to be dealt with by laws (*lois*) in Article 34 and Article 37, which states that "matters other than those which are within the domain of law have an executive character (*caractère réglementaire*)." La Constitution [CONST.] art. 37 (Fr.), in GEORGE A. BERMAN ET AL., FRENCH LAW ch. 2, at 9 (1994).

173. See Articles 56-63 of the Constitution of 1958, which establish and define the competence of the *Conseil Constitutionnel*; see also *infra* notes 227-33, and accompanying text.

174. See MARCEL PRÉLOT & JEAN BOULOUIS, INSTITUTIONS POLITIQUES ET DROIT CONSTITUTIONNEL 305-06 (11th ed. 1990) for a listing of France's 16 constitutions. See LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, *supra* note 150 for the complete texts of French constitutions since 1789 and for a discussion of each.

and fundamental values.¹⁷⁵ Rather than constitutional continuity, then, the French constitutional experience in its formative years could perhaps best be described as a succession of constitutions that represented the governmental ideas and social and civic values of the faction that controlled national political power at a given time. Since 1875, it is true, a certain constitutional stability has prevailed in France: the Constitution of the Third Republic, adopted in 1875, endured for sixty-five years, until 1940; after the short-lived Fourth Republic (1946-1958), France has lived under the Constitution of the Fifth Republic since 1958, for nearly forty years.¹⁷⁶

The "contested" nature of the French constitution is not only a revolutionary and nineteenth century phenomenon, it is also exemplified by post-war constitutional developments. By the referendum of October 21, 1945, French voters decided not to reinstate the Constitution of 1875, but rather to convene a Constituent Assembly to draft a new constitution.¹⁷⁷ The Assembly, dominated by a socialist-communist majority, produced a draft constitution which accorded complete supremacy to the legislature.¹⁷⁸ Thus, the single-chamber

175. For brief descriptions of all French constitutions since 1791, see *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150. Professor Dicey offers the following interesting observation on constitution making in France:

The errors committed by French constitutionalists have been . . . twofold. Frenchmen have always been blind to the fact that a constitution may be undermined by the passing of laws which, without nominally changing its provisions, violate its principles. They have therefore failed to provide any adequate means, such as those adopted by the founders of the United States, for rendering unconstitutional legislation inoperative. They have in the next place, generally, though not invariably, underrated the dangers of convoking a constituent assembly, which, as its meeting suspends the authority of the established legislature and Executive, is likely to become a revolutionary convention.

A. V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 475 (8th ed. 1931).

176. Between 1789 and 1959, in addition to 16 constitutions, France had 21 "semi-constitutional governments" and "de facto regimes," some lasting for periods as long as two or three years. See PRÉLOT & BOULOUIS, *supra* note 174, at 306-08. The volatility in French political life between 1789 and 1870 can be attributed to the continuing revolutionary tradition and to the reaction it provoked. See generally FURET, *supra* note 7.

177. The traditional French procedure for drafting a constitution based on republican principles was the convening of an *Assemblée constituante*. Tension ran high, however, because of the contemporary "climate of deep division," and the historical association of republican government with "the blood of the Terror, the June Days, and the Commune." PRÉLOT & BOULOUIS, *supra* note 174, at 544. For a good description of the various political forces which emerged from the war, see Stanley Hoffmann, *Paradoxes of the French Political Community*, in STANLEY HOFFMANN ET AL., *IN SEARCH OF FRANCE* 34-60 (1963).

178. In addition to naming the president and the prime minister, the legislature would have control over the composition, structure, and program of the executive branch of government, and over the operations of the judiciary. PRÉLOT & BOULOUIS, *supra* note 174, at 550-52. The text of the draft constitution of April 19,

National Assembly was accorded the power to elect the president, the prime minister, and all other ministers, to make laws and adopt the budget, and in effect to manage the government. This draft was approved in the Assembly by a vote of 309 to 249. In the referendum of May 5, 1946, the draft constitution was rejected by the people by a vote of 10,584,359 *non* to 9,454,034 *oui*.¹⁷⁹ The draft constitution was most likely defeated due to popular aversion to a "*régime d'Assemblée*," which was perceived as being closely associated with the Communist party or at least susceptible of being used by the Communists to seize power.¹⁸⁰ A new Constituent Assembly was elected to prepare a new Constitution. Although the parties of the left were still in the majority, centrist forces had improved their position. The result was a draft that accorded more power to the president, but still adhered to the basic principles of parliamentary supremacy. The Assembly approved this second draft by a vote of 440 to 106. Just several hours later, however, in a speech delivered at Épinal, General de Gaulle declared himself categorically hostile to the text which had just been adopted ("*Non, franchement non*").¹⁸¹ Nevertheless, in the ensuing referendum the draft was approved by the people (9,297,000 *oui*, 8,165,000 *non*).¹⁸² There were, however, about 1,000,000 blank ballots cast; and about 6,000,000 eligible voters did not cast ballots. The Constitution was thus approved by only thirty-six percent of the electorate.¹⁸³

By the mid-1950s France was once again in the midst of political crisis. The dominant role accorded to parliament by the 1946 Constitution continued to produce short-lived coalition governments that proved incapable of dealing with the pressing problems of the period, particularly those occasioned by post-war decolonization. Although constitutional revision had been under discussion since 1954 and some minor amendments had been made in that year, there was no progress on important matters. By the spring of 1958,

1946, appears in *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 371-88.

179. Marcel Prélôt and Jean Boulouis describe these results as "without precedent in our constitutional history, in which all the Constitutions submitted to the electorate had been until then approved by substantial, and often overwhelming, majorities." *PRÉLOT & BOULOUIS*, *supra* note 174, at 553. *See also* *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 361-62.

180. *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 362.

181. *PRÉLOT & BOULOUIS*, *supra* note 174, at 556. In an important speech delivered at Bayeux on June 16, 1946, General de Gaulle had previously expressed his preference for a strong president on the American model (that would, for example, allow the president to appoint the prime minister) as well as for a second legislative chamber. *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 362-63. Excerpts from General de Gaulle's speech at Épinal are reproduced in *PRÉLOT & BOULOUIS*, *supra* note 174, at 611-12.

182. *PRÉLOT & BOULOUIS*, *supra* note 174, at 556.

183. *LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789*, *supra* note 150, at 363.

extreme dissatisfaction with the government, particularly on the right and among the military, made a *coup d'état* or even civil conflict a distinct possibility. In May, after the resignation of Prime Minister Pierre Pflimlin, President René Coty invited General de Gaulle to form a government. General de Gaulle accepted the invitation. On June 1, the National Assembly accorded a vote of confidence (329-224) to the de Gaulle government and on June 3 the Assembly, at the behest of the new government, enacted a law authorizing the revision of the Constitution.¹⁸⁴ The new Constitution was submitted to referendum on September 28 and was overwhelmingly approved by the people by a vote of 31,066,502 *oui* to 5,419,749 *non*. The Constitution of the Fifth Republic was promulgated on October 4, 1958.¹⁸⁵

From these brief descriptions of the politics of constitution making in 1946 and 1958, one can readily observe the intensely political nature of the process. There are winners and losers. Voting in the constitutive bodies was along party (and ideological) lines, as was voting in the national referenda. Since constitution making is not regarded as a one-time enterprise, the losers can look forward to other chances in the future. Why, then, give one's allegiance to the particular constitution that has been adopted? After all, it represents the triumph of the political opposition.

There are certain original aspects of the Constitution of 1958 that should be noted. First, the Constitution of the Fifth Republic establishes a strong president. Although the original Constitution, as promulgated in 1958, provided for the indirect election of the president, a 1962 amendment provided for the direct election of the president by universal suffrage. Second, the Constitution clearly demarcates and limits the domain of the law and accords significant

184. The Constitutional Law of June 3, 1958, J.O., June 4, 1958, provided:

The Government of the Republic shall prepare the draft of a constitutional law implementing the following principles:

1. Universal suffrage shall be the sole source of power. Legislative power and executive power shall emanate from universal suffrage or from bodies elected thereby;

2. The executive power and the legislative power must be separated effectively in such a manner that the Government and the Parliament shall each, for itself and on its own responsibility, exercise fully the powers attributed to it;

3. The Government must be responsible to Parliament;

4. The judicial authority must remain independent in order that it shall be capable of assuring respect for the essential liberties defined by the Preamble to the Constitution of 1946 and by the Declaration of the Rights of Man to which it refers;

5. The Constitution must permit organization of the relations of the Republic with the peoples associated with it.

Constitutional Law of June 3, 1958, J.O. June 4, 1958, in BERMANN ET AL., *supra* note 172, at 8 n.2.

185. PRÉLOT & BOULOUIS, *supra* note 174, at 607.

rule-making power to the executive. Third, the Constitution establishes a mechanism for assuring that Parliament does not overstep its assigned domain at the expense of the executive by creating a Constitutional Counsel whose principal role is to enforce the allocation of competence between the executive and legislative branches. Taken together, these innovations in the Constitution of the Fifth Republic represent a marked departure from the Rousseauian tradition of parliamentary domination of both the political and legal systems.

It is also significant, however, that the Constitution does not establish a Bonapartist-type government. In fact, the Constitution of 1958 represents something of a novelty in France: it establishes a "mixed" form of government, one which combines aspects of a parliamentary system with a strong president. In so doing, the form of government instituted by the Constitution of the Fifth Republic may very well allow the government to function effectively while at the same time providing adequate representation for the diverse views of the French people.¹⁸⁶

C. *The Constitution and fundamental values*

One seeking an expression of the fundamental political and social values in France would not look to the Constitution or to the jurisprudence interpreting the Constitution. On a legal level, it is rather to the *Code civil*, as it has been amended and interpreted, or to *la jurisprudence du Conseil d'État*, that one would refer,¹⁸⁷ although this may be changing with the increasing role of the *Conseil constitutionnel* in articulating and applying the Constitution and other texts that have *une valeur constitutionnelle*.¹⁸⁸ Of more importance, however, the fundamental values of French society do not find their principal expression in legal texts at all; it is rather literary, philosophical, and political works that express the principal social and political ideals and aspirations of the French people.

Tocqueville gives the following explanation for the position of literary, philosophical, and political texts as the principal expressions of fundamental values in France, a phenomenon that he sees as dating from the mid-eighteenth century:

[B]y abolishing the ancient "liberties" and destroying the political function of the nobility without also permitting the formation of a new ruling class on a different basis, the monarchy unwittingly set up the writers as imaginary substitutes for

186. From 1791 to 1958, French systems of government oscillated from broadly representational, but ineffective, to authoritarian.

187. CLAUDE-ALBERT COLLIARD, *LIBERTÉS PUBLIQUES* 210-11 (7th ed. 1989).

188. See, e.g., Louis Favoreu, *The Principle of Equality in the Jurisprudence of the Conseil Constitutionnel*, 21 CAP. U. L. REV. 165 (1992).

that ruling class. Hence literature took on a political function[.]¹⁸⁹

François Furet describes certain important consequences which attend the primacy of literary texts as repositories of political and social values. Thus,

That confusion of rôles, in which men of letters assumed a function they could fulfill only in its imaginary aspects, that is, as opinion-makers who wielded no practical power whatsoever, was to shape political culture itself. The men of letters tended to substitute abstract right for the consideration of facts, principles for the weighing of means, values and goals for power and action. Thus the French, deprived as they were of true liberties, strove for abstract liberty; incapable of collective experience, lacking the means of testing the limits of action, they unwittingly moved toward the *illusion of politics*. Since there was no debate on how best to govern people and things, France came to discuss goals and values as the only content and the only foundation of public life.¹⁹⁰

Any American familiar with public political and social discourse in France will at once recognize the perspicacity of Furet's description. In contrast to public debate in America on these subjects, which is to a great extent focused on the practical and operational aspects of public policy, French debate appears highly theoretical and removed from the actual workings of the political process.¹⁹¹

I would like to discuss the principle of equality, as it has developed in France, as an example of the differing roots of fundamental values in France and the United States.

According to François Furet, "[t]he central tenet of [the Revolutionary] credo was the idea of equality, experienced as the reverse of the old society and perceived as the condition and purpose of the new social compact."¹⁹² Rousseau's *Du Contract Social* is the *locus classicus* of the French notion of equality. In that work, Rousseau describes a society of equals and provides a comprehensive and convincing rationale for it. He defines the principal political relation-

189. FRANÇOIS FURET, *INTERPRETING THE FRENCH REVOLUTION* 36 (Elborg Forster, trans., Cambridge Univ. Press 1981). Tocqueville developed these ideas in chapter 1 of Part 3 of his *THE OLD RÉGIME AND THE FRENCH REVOLUTION* (Stuart Gilbert, trans., 1955) (1856), at 138-48.

190. FURET, *supra* note 189, at 37.

191. Consider in this light Georges Sorel's famous book *RÉFLEXIONS SUR LA VIOLENCE* (1908), in which he advocates the "myth of the general strike" (*not the reality*) as the organizing principle for revolutionary syndicalism in its battle against the bourgeoisie. For a discussion of Sorel's *RÉFLEXIONS*, see CHEVALLIER, *supra* note 100, at 313-32.

192. FURET, *supra* note 189, at 53; see also COLLIARD, *supra* note 187, at 205 ("Equality (*égalité*) is the governing principle (*l'idée maîtresse*) of the Revolution of 1789. . . . The civic equality of the *Constituante* is a revolutionary affirmation of opposition to the privileges of the past.").

ships and institutions of such a society in a way that is coherent (for the most part) and which made and to a large extent continues to make intuitive sense to the French people.¹⁹³ For Rousseau, the social compact, by which civil society is constituted,

instead of destroying natural equality . . . , on the contrary, substitutes a moral and legitimate equality to whatever physical inequality nature may have . . . imposed upon men, and that, however, unequal in force and intelligence they may be, men all become equal by convention and by right.¹⁹⁴

The principles, and in fact the very language, of the *Déclaration des Droits de l'Homme et du Citoyen*, the one constitutional text that has endured unchanged from the revolutionary period, attests to Rousseau's influence.

In the constitutional sphere, the idea of equality finds direct expression in Article I and Article VI of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789,¹⁹⁵ but, as Professor Colliard argues, in a "singularly tentative" form.¹⁹⁶ Thus, the principle of equality does not appear in Article II, which enumerates the "natural and imprescriptible rights of man" (which are said to be "liberty, property, security and resistance to oppression"). The Constitutions of 1791 and 1793 clearly recognize the principle of equality as among the natural and imprescriptible rights of man,¹⁹⁷ but subsequent constitutions (e.g., those of 1852, 1875, 1946, and 1958) avoid such clear statements of the principle, referring instead to "the great principles proclaimed in 1789,"¹⁹⁸ "the rights and liberties of man and

193. See *supra* notes 122-44 and accompanying text.

194. ROUSSEAU, *supra* note 122, at 29.

195. "Men are born and remain free and equal in respect of their rights" RIALS, *supra* note 116, art. I, at 22. "The law is an expression of the general will. . . . It must be the same for all, whether it protects or punishes. All citizens being equal in its sight are equally eligible to all honors, offices, and public employments, according to their ability; and without distinction other than those of their virtues and talents." *Id.* art. VI, at 23.

196. COLLIARD, *supra* note 187, at 205. "[T]he striking thing about the eighteenth century's attempts to resolve the problem of inequality is their moderation. . . . [T]he Constituent Assembly . . . created legal equality, recoiled from political equality, and never abandoned the principle of property." MONA OZOUF, *Equality*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION, *supra* note 4, at 669, 673-77. Mona Ozouf points out the inherent tension between the dominant ideas of the Revolution—equality, liberty, and property. Thus, a people may be willing to endure the loss of liberty to ensure equality (as during the Napoleonic period) or to tolerate inequality to protect property (as during the bourgeois-dominated nineteenth century). *Id.* at 669-70.

197. La Constitution de 1791 [CONST. 1791] *Déclaration des Droits de l'Homme et du Citoyen* art. 1 (Fr.), in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, *supra* note 150, at 33; La Constitution de 1793 [CONST. 1793] *Déclaration des Droits de l'Homme et du Citoyen* art. 2 (Fr.), in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, *supra* note 150, at 80.

198. La Constitution de 1852 [CONST. 1852] tit. 1, art. 1 (Fr.), in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, *supra* note 150, at 292.

the citizen consecrated in the declaration of rights of 1789,"¹⁹⁹ or "the Rights of man . . . as defined by the Declaration of 1789, confirmed and completed by the preamble of the Constitution of 1946" and the guarantee of "the equality of all citizens before the law, without regard to origin, race or religion."²⁰⁰ The constitutional foundation of the principle is, therefore, uncertain and ambiguous.

In the jurisprudence of the *Conseil d'État*, however, the principle has received detailed development and application as an unwritten "general principle of law."²⁰¹ For instance, in a decision of 1951, the *Conseil d'État* decided that the administration of the *Radiodiffusion française* had violated the principle of equality in refusing to broadcast concerts of the *Société des concerts du Conservatoire* as a reprisal for a certain action taken by the Conservatoire which the *Radiodiffusion française* disapproved.²⁰² In its decision, the *Conseil d'État* referred to no text for the principle of equality or for its particular content as applied to the fact situation before the *Conseil*.

In 1973, the *Conseil constitutionnel*, for the first time, refused to allow the promulgation of a legislative provision on the ground that it "violates the principle of equality before the law contained in the Declaration of the Rights of Man of 1789 and solemnly reaffirmed by the Preamble to the Constitution."²⁰³ This decision marks the beginning of the frequent application of the principle of equality by the *Conseil constitutionnel* to legislative enactments. In its decisions applying the principle of equality, the *Conseil constitutionnel* has looked to the jurisprudence of the *Conseil d'État* for guidance, but, perhaps more importantly, has grounded its application of the principle in the *bloc de constitutionnalité*, and in this way has made the Constitution of 1958, the Preamble to the Constitution of 1946, and the Declaration of 1789 its authoritative reference points. The prin-

199. La Constitution de 1946 [CONST. 1946] preamble (Fr.), in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, *supra* note 150, at 371. The preamble to the Constitution of 1946 also recognizes equality in several specific domains, for example, the equal rights of men and women and equal access to education. Article 1 of the draft Constitution of April 19, 1946, which was rejected in a national referendum, clearly proclaimed the principle of equality: "All men are born and remain free and equal before the law." *Id.* art. 1.

200. Constitution of 1958 [CONST.] art. 2 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 9.

201. COLLIARD, *supra* note 187, at 221-27.

202. *Société des concerts du Conservatoire*, reprinted in M. LONG ET AL., LES GRANDS ARRÊTS DE LA JURISPRUDENCE ADMINISTRATIVE 444 (10th ed. 1993).

203. Decision of Dec. 27, 1973 (*Taxation d'Office*), reprinted in LOUIS FAVOREU & LOIC PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL 275 (7th ed. 1993); see also Decision of Jan. 16, 1982 (*Loi de nationalisation*), reprinted in FAVOREU & PHILIP, *supra* at 460. For a discussion of this decision, and the jurisprudence of the *Conseil constitutionnel* concerning the principle of equality, see Favoreu, *supra* note 188. For a comparison of American and French views of legal equality, see Vroom, *supra* note 38.

ciple, which led the greater part of its legal and symbolic life outside the constitutional domain, has now been brought within its confines.

D. *The Constitution and national solidarity*

As I have already discussed, in the United States the Constitution is the primary symbol of national unity. In France, this is not at all the case. As should already be apparent, the ephemeral, contested French Constitution is ill-equipped for that role. In France, the nation finds its symbolic expression elsewhere, principally in the idea of *la belle France* or *l'hexagone*, the physical home of the French people,²⁰⁴ in certain key historical events and personages,²⁰⁵ and in the idea of "civilization" and France's civilizing mission in the world.²⁰⁶ On the political level, the French Revolution was undoubtedly the event which gave birth to modern French political consciousness and which for more than two centuries has been the focus of national debate and attention. Unlike the American Revolution, however, the political legacy of the French Revolution does not have an agreed meaning or univocal symbolic value and, in fact, has been hotly contested to this day.²⁰⁷ In contrast, the *Code*

204. See ERNST ROBERT CURTIUS, *THE CIVILIZATION OF FRANCE* 35-62 (Olive Wyon trans., Vintage Books 1962) (1930); see also 1 FERNAND BRAUDEL, *THE IDENTITY OF FRANCE: HISTORY AND ENVIRONMENT* (Siân Reynolds trans., William Collins Sons 1988) (1986); 2 BRAUDEL, *supra* note 93. Curtius points out that race plays an unimportant role in French national identity. "The Frenchman has no race-consciousness and no race-instinct." CURTIUS, *supra* at 59. See also ALAIN FINKIEL-KRAUT, *THE DEFEAT OF THE MIND* 27-33, 41-47, 102 (Judith Friedlander trans., Columbia University Press 1995) (1987) (discussing French attitudes toward race and nation in the context of the German seizure of Alsace-Lorraine in 1870, and stating: "In the century when nationalism reigned, France—to its credit and originality—refused to accept the idea that the spirit had ethnic roots." *Id.* at 102); ERNST RENAN, *QU'EST-CE QU'UNE NATION?* 36-38 (Philippe Forest ed., Bordas 1991) (1882); JACQUES BARZUN, *THE FRENCH RACE: THEORIES OF ITS ORIGIN AND THEIR SOCIAL AND POLITICAL IMPLICATIONS PRIOR TO THE REVOLUTION* (1932).

205. CURTIUS, *supra* note 204, at 63-90. See also SANCHE DE GRAMONT, *THE FRENCH: PORTRAIT OF A PEOPLE* 65-113 (1969).

206. See CURTIUS, *supra* note 204, at 3-34.

Whatever we may think about the Revolution, for France it possesses the supreme significance of a new creation of the nation, and of the idea of a national mission. In the coalition wars the modern national consciousness of France arose. And this time, too, it coined a universal formula for its national aims, and this was: Civilization.

Id. at 18. On the universality inherent in the natural law thought of the *philosophes*, see Ernst Troeltsch's classic lecture, *The Ideas of Natural Law and Humanity in World Politics*, in OTTO GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800*, at 201 (Ernest Barker trans., Beacon Press 1957) (1934); see also ERNST CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (Fritz C.A. Koelln & James P. Pettegrove, trans., Beacon Press 1955) (1951).

207. See HANS KOHN, *MAKING OF THE MODERN FRENCH MIND* 14-15 (1955). For literary attempts to come to terms with the revolutionary period and its heritage, see VICTOR HUGO, *LES MISÉRABLES* (Gallimard 1973) (1862) and VICTOR HUGO, *QUATRE-VINGT-TREIZE* (Gallimard 1979) (1874). It is interesting to note that much

civil, which replaced diverse bodies of regional law with a single code of private law for the entire nation, came to be seen as the legal expression of the nation.

Perhaps more than any other writer, the nineteenth-century historian Jules Michelet gave expression to French ideas of nation. Michelet's highly romantic and emotionally charged portrait of France continues to speak with great power to the French people.²⁰³ According to Michelet, "[t]he true point of departure of our history must be a political division of France . . . [since] history is first and foremost nothing but geography."²⁰⁹ From his consideration of France region by region, Michelet ends up by presenting France as an organic whole, one which is animated by "the general, universal spirit of the country"; one in which the local spirit disappears more and more each day, with "the influence of soil, climate, and race giving way to social and political action."²¹⁰ Thus, he writes:

It is a great and marvelous spectacle to cast one's regard from the center to the extremities, and to take in with one's eyes this vast and powerful organism, in which the diverse parts are so skillfully brought together, opposed to each other, associated with each other, the weak to the strong, the negative to the positive

of the historical writing about the French Revolution is concerned with the legal and constitutional aspects of the period. For a discussion of French historiography during the Restoration period which focuses on law and jurisprudence, see DONALD R. KELLEY, *HISTORIANS AND THE LAW IN POSTREVOLUTIONARY FRANCE* (1984). Professor Kelley makes the following perceptive observation: "Although divergent in methods and aims, jurisprudence, like history, reflects national memory and mythology, tries to make intelligible social behavior and ideals, gives shape and substance to cultural tradition, and assumes a didactic and sometimes official function." *Id.* at 26. See also STANLEY MELLON, *THE POLITICAL USES OF HISTORY: A STUDY OF HISTORIANS IN THE FRENCH RESTORATION I* (1958) (arguing that during the Restoration period "history was the language of politics.").

It is interesting to note that the period after the American Revolution was marked by an unusual political harmony in the new nation. Political groupings, or parties, did not develop until somewhat later, out of the divergence of views of Hamilton and Jefferson. Later, during the administration of President Monroe (1817-1824), political parties declined in importance due to broad agreement on fundamental directions for the nation (the so-called Era of Good Feeling).

208. As Sanche de Gramont observes:

This idealized, romantic vision is necessary precisely because France, far from being predestined to be a nation, is not a geographical unit but a quilt of regions stitched over many centuries and after many wars, history's choice of one of several possible arrangements of Western Europe. The hexagon represents the longing for an orderly universe in compensation for a turbulent national history.

DE GRAMONT, *supra* note 205, at 17.

209. JULES MICHELET, *HISTOIRE DE FRANCE* 31 (François Bluche ed., 1971).

210. *Id.* at 88. See also JULES MICHELET, *THE PEOPLE* (John P. McKay trans., University of Illinois Press 1973) (1846).

Viewed from north to south, France unfurls in two long organic systems, just like the human body is composed of two systems, the gastric and the cerebrospinal: on the one hand, the provinces of Normandy, Brittany, and Poitou, Auvergne and Guyenne; on the other, those of Languedoc and Provence, Burgundy and Champagne, and finally those of Picardy and Flanders, where the two systems come together. Paris is the brain.²¹¹

Michelet goes on to personify his geographic, organic France as a woman. After discussing the achievements of Joan of Arc, he writes:

The savior of France had to be a woman. France is itself a woman. She has the fickleness of a woman, but also her sweet gentleness, her spontaneous and charming compassion, the perfection of her first reaction. Even though she takes pleasure in vain elegance and external refinement she is at bottom close to nature. The Frenchman, even when perverted or depraved, retains, more than a person of any other nationality, his good sense and a kind heart . . .²¹²

The recent two-volume work of the great contemporary French historian Fernand Braudel, *The Identity of France*,²¹³ which focuses on the geographic and human environment of France, continues in the tradition of Michelet of finding deep meaning in the physical home of the French people. While denying that "France [was] invented by its [g]eography,"²¹⁴ and distancing himself from the romantic, simplifying, and personifying approach of Michelet,²¹⁵ Braudel devotes his two volumes to a detailed, meticulous, and affectionate study of the different parts of France and the ties between them. Braudel's work and its popularity in contemporary France amply demonstrate the vitality of *la belle France* and *l'hexagone* as key components in the idea of French nationality.

A second central aspect of French national identity is the collective national memory of people and events in its past. As Ernst Renan remarked, the principle of a nation lies in "the common possession of a rich legacy of memories."²¹⁶ Vercingetorix, Roland, Joan of Arc, Napoleon, and General de Gaulle, for example, all fig-

211. MICHELET, *supra* note 209, at 88.

212. *Id.* at 328. See also DE GRAMONT, *supra* note 205, at 91 (discussing "Michelet and the Female Nation.").

213. 1 BRAUDEL, *supra* note 204; 2 *id.* Braudel died before he could complete the two other projected volumes of this project: Volume 3, *State, Culture, and Society* and Volume 4, *France outside France*.

214. 1 BRAUDEL, *supra* note 204, at 263.

215. *Id.* at 15, 18.

216. RENAN, *supra* note 204, at 41. Renan also astutely observes that a certain amount of forgetfulness and historical error are also essential to the creation of a nation. *Id.* at 34.

ure centrally in the collective memory of the French people,²¹⁷ and the memory of their triumphs and tragedies provides an anchor for French national consciousness.²¹⁸ Furthermore, shared "traumas"²¹⁹ of the past, like the French Revolution and the events of 1870 to 1871, 1914 to 1918, and 1939 to 1945, provide memories of shared sacrifices and suffering, which, in the words of Renan, "are worth more than triumphs, because they impose duties and mandate common efforts."²²⁰

For Renan, in addition to common memories, "present consent, the desire to live together, the willingness to continue to draw on the received common heritage,"²²¹ is an essential part of nationhood. While it is indeed true that certain parts of present-day France joined the French nation pursuant to popular referendum (such as Nice and Savoy),²²² it is also true that certain regions (such as parts of the Midi)²²³ are French in spite of their own preferences at the

217. According to Sanche de Gramont: "The French hero, whether Vercingetorix at Alesia, Roland at Roncevaux, Napoleon at Waterloo, or General de Gaulle fleeing London in 1940, is often a defeated soldier; American heroes, by contrast, are usually victorious soldiers like Washington, Grant, and Eisenhower." DE GRAMONT, *supra* note 205, at 70.

218. I would like to cite a personal experience as an example of the contemporary vitality of certain figures from the French past. On June 2, 1996, I was present in the Place du Vieux Marché in Rouen on the occasion of the 565th anniversary of the burning of Joan of Arc at the stake at that very spot in 1431. To commemorate the occasion, the Mayor of Rouen, Yvon Robert, and a former Minister of Justice and former President of the *Conseil constitutionnel*, Robert Badinter, delivered speeches on Joan's trial and execution and on the meaning of justice. The speeches were long and the thought complex. Nevertheless, hundreds of people, from all walks of life, listened in rapt attention as these two learned and eloquent political leaders made Joan live again in their imaginations and related her ancient travails to contemporary life and politics. It is inconceivable that an audience of ordinary Americans would have reacted similarly, or that American political leaders would have delivered such discourses. For the remarks of Yvon Robert and Robert Badinter, see Yvon Robert, *Jeanne, un combat pour la liberté de tous*, ROUEN MAGAZINE, Juillet-Août 1996, at 27, and Robert Badinter, *Qu'une Nation en opprime une autre, et par la force des armes lui impose sa domination, voilà qui s'appelle l'injustice*, ROUEN MAGAZINE, Juillet-Août 1996, at 28-29. See also DE GRAMONT, *supra* note 205, at 73-77, for a discussion of the cult of Joan of Arc.

219. This word is borrowed from Sanche de Gramont. DE GRAMONT, *supra*, note 205, 114-94.

220. RENAN, *supra* note 204, at 41.

221. *Id.*

222. Nice and Savoy became part of France pursuant to a treaty between France and Sardinia in 1860, which required a referendum in each of the areas to be ceded to France as a precondition to union. Treaty relative to the Reunion of Savoy and Nice to France, Mar. 24, 1860, Fr.-Sardinia art. 1, in 122 CLIVE PARRY, CONSOLIDATED TREATY SERIES 241 (Oceana Publications 1969).

223. Professor Strayer refers to the Albigensian Crusades of 1208 to 1226, by which France annexed Languedoc, as "a North French war of conquests." JOSEPH R. STRAYER, THE ALBIGENSIAN CRUSADES iv (1971). See also WALTER L. WAKEFIELD, HERESY, CRUSADE AND INQUISITION IN SOUTHERN FRANCE 1100-1250 (1974).

time they were incorporated into France. While this last observation does not speak directly to Renan's point concerning "current" consent, it does cast doubt on the idea that consent is central to the idea of nationhood in France.²²⁴

E. *The Constitution in practice*²²⁵

Unlike the Constitution of the United States, the French Constitution of 1958 is not a source of positive law which can be applied by any court at any time. While in theory, the French Constitution is the supreme law of the land, its actual application is narrowly limited.²²⁶ Since in France the functions performed by the United States Supreme Court are divided among three independent tribunals, the *Conseil d'État*, the *Conseil constitutionnel*, and the *Cour de*

224. Renan's famous lecture "Qu'est-ce qu'une Nation?" was delivered at the Sorbonne in 1882. Its unstated premise was that the provinces of Alsace and Lorraine, taken forcibly from France by Germany in the Franco-Prussian War, were part of the French nation regardless of the race, language, religion, commercial relations, or geography of those provinces. RENAN, *supra* note 204, at 36-41. For the first decade after becoming part of Germany, Alsace-Lorraine expressed its desire to rejoin France in an annual resolution. Later, however, as secularism gained ground in France, the people of devoutly-Catholic Alsace-Lorraine became less sure of their desires. Alsace-Lorraine was reincorporated into France after the First World War, but soon after special educational and religious regimes applicable only to Alsace-Lorraine were adopted. See COLLIARD, *supra* note 187, at 440-41, 531-33.

225. See generally CAPPELLETTI, *supra* note 117, at 153-54:

In the last few decades . . . much of the rest of continental Europe has been forcefully and openly moving away from the anti-judicial review approach. As for France—the historical leader in the reaction against abusive judicial activism—it should not be surprising that the movement away has been, instead, very cautious and gradual.

The classic work expressing the French hostility to judicial review is EDOUARD LAMBERT, *LE GOUVERNEMENT DES JUGES ET LA LUTTE CONTRE LA LÉGISLATION SOCIALE AUX ÉTATS-UNIS* (1921). See also Michael H. Davis, *A Government of Judges: An Historical Re-View*, 35 AM. J. COMP. L. 559 (1987).

226. Commenting on the situation in 1957, under the Constitution of the Fourth Republic, two French constitutionalists have this to say:

[T]he constitution has legal authority incontestably superior to that of law; hence, law cannot derogate from the constitution. There is no question of disputing the principle itself of such superiority, but, from a legal point of view, the French solution is peculiar since there is no means to ensure control of constitutionality. A principle without sanction cannot be considered a legal principle.

. . . .

The whole constitutional organization in France thus rests upon the power of Parliament. If Parliament should happen to vote a law which conflicts with the constitution, it would be necessary to regard this act less as a violation of the constitution than as an indirect amendment.

M. Letourneur & R. Drago, *The Rule of Law as Understood in France*, 7 AM. J. COMP. L. 147, 150-51 (1958). But see Denis Talon, *The Constitution and the Courts in France*, 27 AM. J. COMP. L. 567, 575 (1979) (arguing that "beyond our changing constitutions, the general principles of the law remain and courts have various means to enforce them . . .").

Cassation, it is necessary to examine separately how each of these tribunals relates to the Constitution in order to understand the practical application of the French Constitution in the courts.

1. *The Conseil constitutionnel*

According to Article 61 of the 1958 Constitution:

Organic laws, before their promulgation, and regulations of the Parliamentary assemblies, before they are put into effect, must be submitted to the Constitutional Council, which shall decide on their conformity to the Constitution.

For the same purpose, laws may be referred to the Constitutional Council before their promulgation by the President of the Republic, the Premier, the President of the National Assembly, the President of the Senate, or sixty deputies or sixty senators.²²⁷

Article 62 provides that "[a] provision declared unconstitutional may not be promulgated or put into effect."²²⁸

In essence, the *Conseil constitutionnel* is a non-judicial organ that plays a part in the legislative process.²²⁹ It has been called a "third legislative chamber."²³⁰ With respect to ordinary laws, it intervenes, if invoked, after a law is passed, but before it is promulgated and thereby enters into force, to determine whether or not the law conforms to the requirements of the Constitution. If the particular law under review does not conform to the Constitution, that law may still be modified by Parliament to bring it into conformity with the Constitution and thus enter into force.

As originally conceived by the drafters of the 1958 Constitution, the principle purpose of constitutional review was to assure that

227. La Constitution [CONST.] art. 61 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 25.

228. La Constitution [CONST.] art. 62 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 25.

229. See James E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972).

The invalidation of an act of Parliament on the ground that it infringes constitutionally protected rights of the citizen is alien to French constitutional tradition. The doctrine of separation of powers, the notion that Parliamentary legislation constitutes the authentic expression of the general will, and an aversion to "government by judges" which dates back to the *ancien régime* have formed an insurmountable barrier to the introduction of judicial review in France. The Constitution of the Fifth Republic which came into force on October 4, 1958, changed none of this but did provide for a non-judicial Constitutional Council (*Conseil Constitutionnel*) with power to determine whether legislation adopted by Parliament and submitted to the Council for review under rigorous procedural limitations is in "conformity with the Constitution."

Id. at 431 (footnotes omitted).

230. STONE, *supra* note 10, at 198.

Parliament did not encroach on the law making domain accorded to the executive branch of government by the Constitution.²³¹ One of the principal innovations of the Constitution of the Fifth Republic was to accord considerable law making power to the executive branch. Parliament's legislative authority extended only to those matters specifically enumerated in Article 34 of the Constitution;²³² "[m]atters other than those which are within the domain of law have an executive character (*caractère réglementaire*)."²³³

In a landmark decision in 1971, *Liberté d'Association*,²³⁴ which has been called France's *Marbury v. Madison*,²³⁵ the *Conseil constitutionnel* refused to allow the promulgation of a law enacted by Parliament on the ground that it was *substantively* unconstitutional. Even though the law in question was within the enumerated parliamentary domain and thus raised no separation of powers problems, in the *Conseil's* view it violated a substantive prohibition of constitutional status. The prohibition in question (the protection of the liberty of association) does not explicitly appear in the Constitution, but rather was derived by the *Conseil* from the Constitution's Preamble which provides: "The French people hereby solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble of the Constitution of 1946."²³⁶ The reference to the Preamble of the Constitution of 1946 allowed the *Conseil* to treat the following language from that Preamble as part of the Constitution of 1958: "[The French people] solemnly reaffirm . . . the fundamental principles recognized by the

231. La Constitution [CONST.] art. 41 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 19-20. See James Beardsley, *Constitutional Review in France*, 1975 SUP. CR. REV. 189, 212-23, 245-51. The Constitutional Council was also given the task of assuring that the electoral process, including referenda, complies with the Constitution and applicable law (articles 58, 59, and 60) and with reviewing all organic laws before their promulgation (article 61). La Constitution [CONST.] (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 1.

232. Even within the domain of the law, Parliament has rule-making power ("*La loi fixe les règles concernant*") only in specified areas; in other areas Parliament's power is limited to determining "fundamental principles" ("*La loi détermine les principes fondamentaux*") (e.g., in the areas of national defense, self-government of local governmental units, education, employment, labor unions, and social security) or enacting "planning laws" (*lois de programme*) (with respect to the economic and social activities of the State) ("*Des lois de programme déterminent les objectifs de l'action économique et sociale de l'État.*").

233. La Constitution [CONST.] art. 37 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 19.

234. For the complete text of the decision of the Constitutional Council and an excellent discussion and evaluation, see FAVOREU & PHILIP, *supra* note 203, at 242-59.

235. George D. Haimbaugh, Jr., *Was It France's Marbury v. Madison?*, 35 OHIO ST. L.J. 910 (1974).

236. La Constitution [CONST.] preamble (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 9.

laws of the Republic,"²³⁷ and then to determine that liberty of association was one such fundamental principle. Prior to the Constitutional Council's decision of 1971, it was never thought that simply because the Preamble of the Constitution of 1958 referred to the Declaration of 1789 and the Preamble of the Constitution of 1946 that those documents had legal force.²³⁸ By one bold stroke, then, the *Conseil constitutionnel* not only created a vast body of substantive constitutional law (the express provisions contained in the 1789 Declaration and the Preamble to the Constitution of 1946), but also laid the foundation for an open-ended ability to define "the fundamental principles recognized by the laws of the Republic."²³⁹ Taken together, these sources of law that have "constitutional status" (*valeur constitutionnelle*)—the Constitution of 1958, the Declaration of 1789, the Preamble to the Constitution of 1946, and "the fundamental principles recognized by the laws of the Republic"—have become known as "*le bloc de constitutionnalité*."²⁴⁰

While the *Liberté d'Association* decision established the right of the *Conseil constitutionnel* to review parliamentary enactments pursuant to a broad and somewhat indeterminate set of constitutional standards and principles, it did not extend the *Conseil's* scope of review. The window of opportunity for *Conseil* review remained extremely limited. In 1974, however, Article 61 of the Constitution was amended to allow 60 senators or 60 deputies to refer legislation to the *Conseil* for review.²⁴¹ Article 61, as presently written, thus assures that virtually all legislation can be brought before the *Conseil*, as it is extremely unlikely that the opposition will fail to win 60 seats in one of the two chambers.²⁴² Nevertheless, once a law (*loi*) is in fact promulgated, it is no longer susceptible to constitutional challenge, even though serious constitutional questions may arise in its application or relevant social values have undergone significant change.

2. The Conseil d'État

Constitutional principles may also be applied by the *Conseil d'État*, the apex of the French system of administrative tribunals.²⁴³

237. La Constitution of 1946 [CONST. 1946] preamble (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 6.

238. Morton, *supra* note 10, at 90.

239. La Constitution of 1946 [CONST. 1946] preamble (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 6.

240. See GHESTIN ET AL., *supra* note 9, at 229-32.

241. La Constitution [CONST.] art. 61 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 25.

242. The landslide victory of *la Droite* in the parliamentary elections of 1993, however, did come close to achieving this result.

243. The *Conseil d'État* was established by Napoleon in 1799. During the course of the nineteenth century, a section of the *Conseil*, which eventually came to be

In a 1959 decision, *Syndicat Général des Ingénieurs-Conseils*,²⁴⁴ the *Conseil d'État* decided that executive legislation (*règlements* pursuant to article 37 of the Constitution) is subject to judicial review.²⁴⁵ While *lois* must still be applied by administrative tribunals, the vast domain of *règlements* enacted by the government pursuant to article 37 of the Constitution is now subject to judicial scrutiny.

Moreover, in interpreting and judging the legality of executive legislation and specific administrative actions, the *Conseil d'État* applies *les principes généraux du droit* (general principles of law). "[T]he[se] principles are deduced as a matter of statutory interpretation, based on the assumption that the legislator is anxious to preserve the essential liberties of the individual."²⁴⁶ Among the sources from which the *Conseil d'État* derives these general principles of law are "constitutional documents such as the 1789 Declaration of the Rights of Man and the Preamble to the 1946 Constitution of the Fourth Republic. Examples include: liberty, respect of the rights of citizens, equality in all its aspects . . ."²⁴⁷ It is important to recognize, however, that these principles do not owe their binding force to any particular text, such as the Constitution; but are rather the application by the *Conseil d'État* of principles that it deems inherent in the liberal tradition of 1789, in the principle of equity, and

called the *Section du Contentieux*, emerged as a court of general jurisdiction which "manifest[ed] all the features which the French associate with a court—a public hearing . . . , the representation of the parties by counsel, a spokesman for the public interest, a collegiate bench, and a published judgment supported by reasons." L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 46 (4th ed. 1993). The need for such a body, to assure the legality of administrative action, arose from the withdrawal from the ordinary civil courts of any jurisdiction in administrative matters by the Law of 16-24 August 1790. Article 13 of that Law, which is still in force today, reads:

Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.

Id. at 43 (quoting and translating Article 13 of the Law of 16-24 August 1790). For a history of the development of administrative law in France (to 1908) and a comparison of the fundamental ideas underlying the French system of administrative law with Anglo-American jurisprudence, see the famous essay of Professor Dicey, "Rule of Law Compared with *Droit Administratif*," which appears as Chapter XII in DICEY, *supra* note 175, at 324-401. See also BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 306-38 (1954).

244. *Conseil d'État*, [D. Jur.] 541 (Fr.). The decision, along with a commentary, is reprinted in LONG ET AL., *supra* note 202, at 560.

245. See *supra* notes 225-33 and accompanying text.

246. BROWN & BELL, *supra* note 243, at 206; see also JEAN RIVERO & JEAN WALINE, *DROIT ADMINISTRATIF* 67-69 (15th ed. 1994).

247. BROWN & BELL, *supra* note 243, at 207. Brown and Bell remark that "[s]uch fundamental rights, which are mostly entrenched in the text of the United States Constitution, in French law are protected to a large extent by resort to the unwritten *principes généraux*." *Id.* at 209.

in the necessities of *la vie sociale*.²⁴⁸ Over time, these principles have been associated with the body of decisional law (*la jurisprudence*) of the *Conseil d'État*, rather than with the Constitution or other texts with *valeur constitutionnelle*.

3. The Cour de Cassation

The *Cour de Cassation*, which stands at the apex of the civil court system, also has taken a step toward the application of constitutional standards, although, again, in a somewhat oblique manner. Traditionally, the *Cour de Cassation* had no power whatsoever to refuse to apply a *loi* enacted by Parliament. Furthermore, the powers of the *Cour de Cassation*, were limited to assure that a strong judiciary did not emerge.²⁴⁹

In *Administration des Douanes v. Société Cafés Jacques Vabre*,²⁵⁰ the *Cour de Cassation* decided that it could apply constitutionally-derived standards to evaluate the applicability of a *loi* when faced with a conflicting international commitment. In that case the *Cour de Cassation* had to decide whether a regularly promulgated French *loi* that conflicted with a prior European Community norm should be refused application by French judges. The *Cour* refused to apply the French *loi* not on the ground that it conflicted with a norm that, in its view, was explicitly accorded higher status by the Constitution, but rather that a proper reading, or interpretation, of the subsequent *loi* indicated that the legislature intended to give precedence to the Community norm. Mauro Cappelletti describes the implica-

248. RIVERO & WALINE, *supra* note 246, at 68. According to Yves Gaudemet: [The general principles developed and applied by the administrative judge] are at the frontier of the law They are the windows that allow the light of day, but a subdued light, to enter the jurist's office. Thus, legal principles are not at the outset rules of law. As Fr. Génry wrote: "the general principles of law represent an ideal of reason and justice, in keeping with the permanent essence of human nature."

YVES GAUDEMET, *LES METHODES DU JUGE ADMINISTRATIF* 35 (1972) (footnotes omitted).

249. For example, the *Cour de Cassation* for many years lacked the power to render binding decisions even with respect to the particular matter that was before the court. Its power was limited to quashing the lower court judgment and sending the matter to another lower court for reconsideration *de novo*. The lower court was not bound by the decision of the *Cour de Cassation*. In 1979, this situation was changed by law. Now a decision of the *Cour de Cassation* is binding on the second lower court to which the case is referred after the *Cour de Cassation* has rendered a decision in a plenary session. Also, according to the famous Article 5 of the *Code civil*: "Judges are forbidden to decide by way of a general and rule-making decision the cases submitted to them." RUDOLF SCHLESINGER ET AL., *COMPARATIVE LAW* 465 (5th ed. 1988).

250. Cass. ch. mixte, May 24, 1975, D. 1975, 497, concl. Touffait. This case is reprinted, with commentary, in HENRI CAPITANT, *LES GRANDS ARRÊTS DE LA JURISPRUDENCE CIVILE* 15 (10th ed. 1994); see also CAPPELLETTI, *supra* note 117, at 157-61 (1989) (discussing the aforementioned case).

tions of the *Cafés Jacques Vabre* decision as "extremely far-reaching."²⁵¹ The decision in *Cafés Jacques Vabre* in effect resulted in the application of a Community norm because article 55 of the Constitution accords priority to treaties over laws. Thus it appears as if the court is refusing to apply a law on the basis of a provision of the Constitution. The *Cour de Cassation* nevertheless felt constrained to articulate its decision in terms less at variance with the long French tradition of the sanctity of the law.

F. The French judiciary

As discussed in the first part of this Essay, in the United States the federal judiciary is the principal guardian of the Constitution. Moreover, the men and women who occupy positions on the federal bench, at all levels, are extremely well equipped to apply the principles of that document in the actual cases that come before them and to fashion remedies to effectuate their decisions. In France the situation is markedly different. As we have seen, in France, since the Revolution, the judicial function has been regarded as subservient to the legislative power. In fact, one of the principal goals of the French Revolution was to remove power from judges, or, as Professor Merryman has remarked, "to make the law judge-proof."²⁵²

The post-revolutionary attitude toward the judicial function has had a significant impact on the nature of the French judiciary.²⁵³ Professor Merryman provides a telling description:

251. CAPPELLETTI, *supra* note 117, at 159. According to Professor Cappelletti: [A] consistent interpretation of the *Cafés Jacques Vabre* decision leads to a conclusion which is no less important for being paradoxical. Based on the traditional prohibition of judicial review of the constitutionality of (parliamentary) legislation, French *lois*, once promulgated, are not subject to court control; they are unchallengeable and supreme, no matter whether they violate the French constitutional texts, and, in particular, the sacred French texts and traditions on *les droits de l'homme*. Since *Cafés Jacques Vabre*, however, this basic prohibition can no longer bind the judges of France wherever French legislation is in conflict not with the French texts and traditions, but with a *transnational* bill of rights, the European Convention on Human Rights.

Id. at 160. See also Jörg Polakiewicz & Valérie Jacob-Foltzer, *The European Human Rights Convention in Domestic Law: The Impact of Strasbourg Case-Law in States where Direct Effect is Given to the Convention*, 12 HUMAN RIGHTS L.J. 65, 75-78 (1991); Barbie, Cass. ass. plén., Jan. 26, 1984, D. 1990.113.

252. John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109, 109 (1996) [hereinafter *The French Deviation*]. See also *supra* notes 225-33; DAWSON, *supra* note 4, at 263-431; Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995) (contrasting the official "portrait" of the French judge with what the judge does in practice); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 92-108 (1994); John Henry Merryman, *How Others Do It: The French and German Judiciaries*, 61 S. CAL. L. REV. 1865 (1988).

253. For a discussion of the organization of courts and the status of judges in the aftermath of the Revolution, see ISSER WOLOCH, *THE NEW REGIME* 297-320 (1994).

The most powerful consequence of the French doctrine of separation of powers may have been to demean judges and the judicial function. The attempt to depict the judicial function as something narrow, mechanical and uncreative and to portray judges as clerks . . . has had a self-fulfilling effect. Judges are at the bottom of the scale of prestige among the legal professions in France . . . and the best people . . . accordingly seek other legal careers.²⁵⁴

This description of the French judiciary of course does not apply to members of the *Section du Contentieux* of the *Conseil d'État* or to the members of the *Conseil constitutionnel*. In fact, it is these two institutions that have, within their limited spheres of competence, breathed life into the principles of the Constitution and the constitutional text itself.²⁵⁵

The *Conseil constitutionnel* is composed of nine members appointed for (unrenewable) nine-year terms, plus living ex-presidents of the Republic. Three members are appointed by the President of the Republic, three by the President of the Senate, and three by the President of the National Assembly.²⁵⁶ According to Alec Stone, "the single most important criterion for appointment . . . is political affiliation, and the Council has been dominated by professional poli-

According to Woloch, the guiding principles for the post-revolutionary organization of the judicial branch were the following:

The law quickly became the Revolution's transcendent deity. Judges, however, would no longer be its high priests Law would be made and, if need be, interpreted by the representatives of the people, the legislature. Judges . . . would simply uphold and apply the law as salaried employees of the state rather than as a caste or corporation within society.

Id. at 301.

254. *The French Deviation*, *supra* note 252, at 116. Professor Merryman also says:

Popular distrust of judges, the doctrine of the separation of powers and the post-Revolutionary measures taken to limit the judicial role in the legal process had a demeaning effect on the French judiciary. While the judges of the *parlements* in pre-Revolutionary France stood high in the legal and social order, the position of the judge in the Republic was that of a civil servant who did relatively undemanding work, merely following legislative and executive orders. The hierarchy of legal occupations ran from legislator at the top, through scholar and advocate in declining order of prestige, to judge at the bottom. Judicial recruiting practices, salaries, working conditions and career patterns reflected this point of view. . . . Judges, even on the highest courts, were faceless, anonymous career bureaucrats. This view of the legal function, and of judges, became self-fulfilling. The best legal minds chose other careers.

Id. at 113-14.

255. See *supra* notes 227-48 and accompanying text. See also John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988) (discussing selection of ordinary judges, administrative law judges, and members of the *Conseil constitutionnel*).

256. La Constitution [CONSTR.] art. 56 (Fr.), in BERMANN ET AL., *supra* note 172, ch. 2 at 24.

ticians."²⁵⁷ This tendency, as well as the unfamiliarity of *Conseil* members with public law, has been the subject of much criticism in France.²⁵⁸ Nevertheless, the *Conseil constitutionnel* has emerged as a major force in French legislative politics and has, by and large, succeeded in defining its role in judicial, rather than political, terms.²⁵⁹ In sum, the *Conseil constitutionnel* is not a part of a bureaucracy, nor is it staffed by bureaucrats. It is for the most part composed of high-status, senior officials who have achieved some degree of success in the political process. Moreover, once on the *Conseil*, they can act independently of political pressures to the degree that they wish.²⁶⁰

The *Section du Contentieux* of the *Conseil d'État*, the supreme tribunal for the system of administrative courts, is composed of about one hundred members, divided into ten subsections.²⁶¹ Most members of the Council, including those of the *Section du Contentieux*, are recruited from *l'École Nationale d'Administration* (the National School of Administration, known in France as *l'ÉNA*). The school attracts the best students and entry is highly competitive. Upon completion of the program, graduates choose among available positions in the administration, their choices depending on their class rank. The *Conseil d'État*, along with the *Cour des Comptes* and the *Inspection des Finances*, typically attracts those graduates with the highest class standing.²⁶² About one fourth of the members of the *Conseil* are recruited from among the most distinguished members of the active administration (the *corps préfectoral*). According to Brown and Bell:

This mixed system of entry provides the Conseil with a remarkable combination of young intellect and mature experience. It ensures that the Conseil has within its ranks both theoretical [sic] and practical expertise in public administration. And it has proved a highly successful recipe.²⁶³

257. STONE, *supra* note 10, at 50.

258. *Id.* at 52, 234.

259. *Id.* at 8-10.

260. See *id.* at 78-91 for a discussion of the role of the Council in a series of politically important decisions.

261. For a description of the composition, functioning, and role of the *Section du Contentieux* of the *Conseil d'État*, see BROWN & BELL, *supra* note 243, at 71-73. Although the *Section du Contentieux*, like the entire *Conseil d'État*, is composed of career civil servants, Brown and Bell state: "Step by step, from the origins of the Conseil d'État . . . the Section du Contentieux ha[s] progressively detached itself both from the administrative sections of the Conseil and from the 'active administration' outside the Conseil." *Id.* at 76.

262. *Id.* at 79.

263. *Id.* at 79-80. Brown and Bell also point out that recruitment to regional administrative tribunals follows a similar pattern. *Id.* at 80.

G. *The French bar*

The legal profession in France²⁶⁴ also differs in significant ways from its American counterpart, which makes French lawyers less likely than Americans to rely on the Constitution in the course of their work or to seek to construct novel substantive theories or devise new remedies to advance their clients' causes. In fact, during the last few decades the profession has been undergoing significant changes in both function²⁶⁵ and structure,²⁶⁶ with a decided orientation away from public service and toward the world of business,²⁶⁷ which makes creative and aggressive advocacy for social, economic, or political ends even less likely.²⁶⁸ Professor Karpik, the leading contemporary analyst of the French bar, makes the following interesting comparative observation regarding the American bar, which he regards as also oriented today toward business practice:

[I]n the United States, paradoxically, . . . the [legal] profession, although dominated by the business bar, also exhibits . . . a public orientation which manifests itself in the importance attributed to moral authority, to the civil dimension, to participation in governmental activity, and to the rallying of public opinion.²⁶⁹

H. *Legal education in France*

The system of legal education in France is quite different from that in the United States.²⁷⁰ The calibre of students attracted to legal education and the type of training they receive bear impor-

264. The term "lawyer" as it is understood in the United States has no real equivalent in France. For a description of the legal professions in France, see WALTER CARINS & ROBERT MCKEON, *INTRODUCTION TO FRENCH LAW* 45-50 (1995); CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 110-50 (1993).

265. See generally LUCIEN KARPIK, *LES AVOCATS: ENTRE L'ÉTAT, LE PUBLIC ET LE MARCHÉ, XIII^e-XX^e SIÈCLE* (1995).

266. *Id.* at 374-426; see also Anne Boigeol, *The French Bar: The Difficulties of Unifying a Divided Profession*, in 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 258 (Richard L. Abel & Philip S.C. Lewis eds. 1988); Yves-Louis Sage, *The 1990 French Laws on the Legal Professions*, 41 *AM. J. COMP. L.* 649 (1993).

267. "In France, the history of the [legal] profession can be organized around three models: the bar of the State, the classic bar, and the business bar, or, if one prefers, the principle of the State, the principle of the public, and the principle of the market. Each model represents a particular comprehensive regulatory structure as well as a different type of lawyer." KARPIK, *supra* note 265, at 456-57.

268. This has not always been the case in France. During the Third Republic (1870-1940), for example, lawyers played a major role in French political life and progressive advocacy. See KARPIK, *supra* note 265, at 170-227; YVES-HENRI GAUDEMET, *LES JURISTES ET LA VIE POLITIQUE DE LA RÉPUBLIQUE* (1970).

269. KARPIK, *supra* note 265, at 458.

270. See Claudine Bloch, *The Teaching of Law in France*, 15 *DALHOUSIE L. J.* 476 (1989); see also C. Mouly & C. Atias, *Faculty Recruitment in France*, 41 *AM. J. COMP. L.* 401 (1993). For a general description of the French system of higher education,

tantly on the proclivities and abilities of law-trained professionals aggressively and creatively to defend the social, economic, and political values embodied in the nation's fundamental legal texts. Whereas the American system can be described as attracting extremely capable students and training them to be effective, independent-minded advocates, the French law faculties do not, as a rule, attract the most capable students,²⁷¹ and methods of instruction tend not to foster independence, individual initiative, or practical skills.²⁷² Perhaps this is because, as Michel Crozier explains, the primary function of education in France is not the preparation of students for coping with the practical problems they will encounter later, but rather it is "selection," that is, the assignment of a place and function to each person in society.²⁷³ Consequently, as Crozier observes, "the processes of experimental learning are devalued, and the effort to make contact with the outside world is proscribed, while abstract programs and deductive methods are justified."²⁷⁴

The typical classroom experience for the French law student, especially in the formative early years, is the *cours magistral*, or large lecture class.²⁷⁵ Students are not expected to be prepared or to participate in discussion, and, in most cases, are not afforded the opportunity to pose questions. The professor lectures and the students take notes. Lectures are well-organized, systematic presentations of the course materials; professors often assist the students in taking accurate notes by telling students where new parts or subparts of their presentations begin. In fact, *cours magistraux* are in most cases dictations (*dictées*) by the professor, with the students seeking to

see JAMES CORBETT, *THROUGH FRENCH WINDOWS: AN INTRODUCTION TO FRANCE IN THE NINETIES* 112-32 (1994).

271. It is interesting to note that there are no *grandes écoles* for the teaching of law. "In terms of prestige the *grandes écoles* dominate the French educational system. . . . The *grandes écoles* lead to careers in the *grands corps*: the *Conseil d'État*, the *Inspection des Finances*, diplomacy, prefectorial administration, . . . et cetera." MICHEL CROZIER, *THE STALLED SOCIETY* 116 (1970).

272. "The narrowest kind of rationalism still dominates all these fields [classical humanities, legal studies, physics and mathematics, history] . . ." *Id.* at 114.

273. Michel Crozier describes French society as an "ascriptive society . . . [t]hat, is a society in which each person is assigned a place and function, not according to what he has achieved or seems capable of achieving but in terms of his status and rank of origin." *Id.* at 110.

274. *Id.* James Corbett points out that *lycée* (secondary school) students seeking entry into the *grandes écoles* typically specialize in mathematics and physics in preparation for taking the *baccalauréat* "C" (rather than the *bac A*—languages, literature, and the social sciences; *bac B*—economics; *bac D*—biology; *bac E*—engineering; *bac F, G, H*—various technical subjects, including business). CORBETT, *supra* note 270, at 115-16.

275. Whereas American students must have an undergraduate degree before entering law school, French students enter a *faculté de droit* immediately upon completion of secondary school. During the first two years of law study (which culminates with successful students receiving the *D.E.U.G.*) classes are extremely large and the total university experience impersonal.

transcribe the professor's presentation as accurately as possible. This experience breeds passivity and acceptance on the part of the student. Moreover, dynamics both in the classroom and outside produce and reinforce distance between professor and student, in effect teaching lessons of respect for authority and hierarchy. While it is true that French law students also attend *travaux dirigés*, small sections supposedly for the discussion of assigned materials under the direction of an instructor, what actually occurs in these settings tends to replicate the *cour magistral*: TD instructors present lengthy explanations of the material under consideration, or require students to prepare written responses to questions, which are then recited by the student to the class.

IV. CONCLUSION

The twin traumas of revolution and post-revolutionary turmoil gave birth to new political societies in both the United States and France. New political understandings were embodied in institutional arrangements and in legal conceptions associated with certain foundational texts—the Constitution in the United States and the *Code civil* in France. As a result, constitutionalism took deep roots in the United States, but did not do so in France. It is only recently, as the political heritage and conceptual categories of the Revolution fade in importance, that ideas usually associated with constitutional government, like judicial review of legislation and the limitation of executive power by courts pursuant to substantive constitutional standards, have begun to make much actual headway in France. The long resistance of French society to constitutional government attests to the perspicacity of Montesquieu and Rousseau who both regarded institutional and legal understandings established at the birth of political societies as formative and difficult, if not impossible, to alter subsequently.²⁷⁶

276. "At the birth of [political] societies, says Montesquieu, it is the leaders of republics who bring about the institution, and thereafter it is the institution that forms the leaders of the republic." ROUSSEAU, *supra* note 121, at 39.

Peoples, like men, are only docile in their youth. As they grow older they become incorrigible. Once customs are established and prejudices have become deeply rooted, it is a dangerous and vain undertaking to want to reform them.

... [There occur however] violent epochs when revolutions do to peoples what certain crises do to individuals, when the horror of the past takes the place of forgetfulness, and when the state, set afire by civil wars, is reborn, as it were, from its ashes and takes on again the vigor of youth . . .

Id. at 41-42 (footnote omitted).

What people, therefore, is suited for legislation? One that, finding itself bound by some union of origin, interest or convention, has not yet felt the true yoke of laws. One that has no custom or superstitions that are deeply rooted. . . . [F]inally, one that brings together the stability of an ancient people and the docility of a new people.

Id. at 45-46.

“John Adams’ favorite form of conversation was an argument. He thought that arguments were the only form of conversation that really forced you into truth...” – Historian Joseph Ellis. Great capacity to move people with the force of argument. He himself was a force.

Some background information about John Adams before we get into his diplomatic missions in the later 18th century. Mr. Adams was not a reactionary, was not a Bostonian and was not a blue blood. He was a farmer’s son from Braintree, Massachusetts.

America had no real history at this time. The founding fathers were all very educated in the classical history, Greek and Roman history. One of the tenants of classical history, which John Adams admired was Public Good and Virtue. Like his father, John Adams was a devout Christian and his father looked forward to the day that John would become a preacher or a minister. Against his father’s advice, John Adams decided to become a lawyer. It was hard work back then to become an attorney. He was extremely fortunate to obtain a scholarship to Harvard where he excelled.

The “pursuit of happiness” was not considered a vacation or trips, but was to educate the population. John Adams believed that an educated population was the metaphor for the transforming of the miracle of education.

When no one would defend the British soldiers following the Boston Massacre, Adam said “we must defend our beliefs” and took on the defense of the soldiers who were ultimately acquitted.

According to Historian David McCullough, John Adams was sometimes too honest and lacked tact. He was however, willing to get into the arena where Jefferson would not set a toe into the arena. Adams got right into the scrum and McCollough credits him with forcibly putting the Declaration of Independence over the top. He knew how to do it and did it well. He meant what he said and said what he meant.

John Adams was the only founding father who did not own a slave. His wife Abigail, felt it was a sin.

Diplomatic Missions

Between 1778 and 1788, John Adams served his Country as a diplomat in France, The Netherlands, and Great Britain. His independent, unbending temperament was not ideal for diplomacy, and his diplomatic triumphs were offset by feelings of alienation.

In the winter of 1778, John Adams volunteered and traveled to France across a dangerous ocean controlled by the British. No one wanted to go at the time. John Adams learned the language during this excruciating trip. He taught himself.

Adams sailed to France to join Benjamin Franklin and Arthur Lee on a three-man commission to negotiate an alliance with France. Unfortunately, he was greeted with devastating news: Franklin had already signed a pact.

During the next year, Adams' hostility to his fellow diplomatic group increased. Franklin was idolized in France, and it was he that was asked to remain as France's sole minister. In fact, when Adams was recalled to America, he wasn't even assigned a new post. Adams sailed home in July of 1779, vowing to return to private life. In August of 1779, one week after he returned from France to his home in Braintree, he was selected as a delegate to the State Constitutional Convention to meet on September 1st. Massachusetts was the only original colony to form a body whose only task was to create a constitution. This had never been done before.

In John Adams' draft of the original Massachusetts Constitution, it was the first State Constitution to clearly delineate the separation of powers, legislative, executive and judicial branches of government. This draft was critical to the creation of the United States Constitution. John Adams had listed thirty (30) individual rights in the Massachusetts Constitution, Fundamental Rights, not ten as set forth in James Madison's Bill of Rights.

Just a note of history, three years after the adoption of the Massachusetts Constitution, the Supreme Judicial Council declared slavery unconstitutional. As a sidenote, 225 years later the Massachusetts Supreme Court, Chief Justice would cite the same declaration of rights as the basis of the Court's

decision to legalize gay marriage in the Bay State. Liberty is treated more broadly and more seriously in the Massachusetts Constitution than in the United States Constitution.

Another major part of John Adams' constitutional fundamental rights was education. John Adams set forth that it was the legislature's duty to cherish our own interest in literature and the sciences. Adams believed that an educated citizenry is important for the protection of the rights and liberties. He believed that it was essential to creating a benevolent society. With all due respect to James Madison and Thomas Jefferson, David McCollough opines that John Adams was the greatest constitutional architect both in theory and in practice in the United States. Today, the constitution of the Commonwealth of Massachusetts is the oldest, still functioning, written constitution in the world. Not bad for a few weeks' work.

Keep in mind that John Adams drafted this constitution after his return from being humiliated in France by Franklin. A classic example of "just when I thought I was out, they pull me back in".

Adams' second stay in France was disastrous. In July 1780, he wrote French Foreign Minister Vergennes, that France was not doing enough to win the war. Affronted, Vergennes promptly severed communication with him. Franklin took the French minister's side in a damning letter to Congress:..."having nothing else wherewith to employ himself, Adams seems to have endeavored to supply what he may suppose my negotiations ineffective..." Adams' had alienated his colleagues in France and in Congress, which revoked his commission to negotiate the Peace Treaty alone. However, Adams didn't learn of Congress' decision for a year, during which time he traveled independently to the Netherlands to see, as he told Franklin, "whether something might be done to render us less dependent on France." It was a diplomatic success. Congress had long talked of seeking a loan from the Netherlands, which had already been secretly supplying arms to America. The Dutch were hesitant. The worse American defeat of the war had just occurred at Charleston, North Carolina, and they did not want to

stake themselves to the losing side. Nor did they wish to jeopardize their commercial relations with the British. But news of the American victory at Yorktown, Virginia, as well as Adams' tireless efforts – now endorsed by Congress – precipitated a change of heart. Adams secured a two million dollar loan.

A revived Adams returned to Paris in 1782 to negotiate the Peace Treaty that would end the Revolutionary War. The task united him with Benjamin Franklin. Like Adams, John Jay, the 3rd delegate refused to negotiate until England recognized American Independence. Franklin finally went against France's wishes and agreed to present a unified front. On September 3, 1783, the Treaty of Paris was signed and the United States in the eyes of the world was officially in existence.

Adams was appointed the United States First Minister to Great Britain, although this was not a unanimous decision. Some in Congress found Adams to be too independent and outspoken and feared that his appointment might jeopardize the new nation's position abroad. They need not have worried. England was not amenable to the opening of British ports to American ships or to the removal of British troops from American soil. During his time in England, John Adams also served as the emissary to Amsterdam for two years. Although he continued to negotiate loans with the Dutch, he was snubbed by the upper crust from province to province.

Not as dashing as Washington or Jefferson. Not as folksy as Franklin. Greatest love story of American History. Wrote 1,000 letters to Abigail. They endured 10 long years of separation. Felt women in general were superior to men.

John Adams described the VP as the "most insignificant office that ever the invention of man contrived or his imagination conceived." Despite his opinion Adams cast more tie breaking voters than any other VP in American History.

On his first night in the Whitehouse as President, John Adams wrote a letter to Abigail in which he stated "May none, but honest and wise men rule under this roof". You will note that he put honesty ahead of wisdom. During his

presidency, FDR sculptured this quote into the mantelpiece in the state dining room of the White House.

Trumbull's famous painting in the Capital of the signing of the Declaration of Independence is mostly inaccurate. However, of the three main characters, John Adams, Ben Franklin and Thomas Jefferson, it is John Adams that the artist places right in the center of the painting.