

10-1-1992

Divergent Models of Public Law in Latin America: A Historical and Prescriptive Analysis

Nicholas D.S. Brumm

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Comparative and Foreign Law Commons](#)

Recommended Citation

Nicholas D.S. Brumm, *Divergent Models of Public Law in Latin America: A Historical and Prescriptive Analysis*, 24 U. Miami Inter-Am. L. Rev. 1 (1992)

Available at: <http://repository.law.miami.edu/umialr/vol24/iss1/2>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

ARTICLES

DIVERGENT MODELS OF PUBLIC LAW IN LATIN AMERICA: A HISTORICAL AND PRESCRIPTIVE ANALYSIS

NICHOLAS D.S. BRUMM*

I. INTRODUCTION	2
II. THE RELATIONSHIP BETWEEN CONSTITUTIONAL AND ADMINISTRATIVE LAW IN CIVIL AND COMMON LAW LEGAL SYSTEMS	3
III. SEPARATION OF POWERS AND ITS IMPACT ON FRENCH ADMINISTRATIVE LAW AND U.S. CONSTITUTIONAL LAW	9
IV. LATIN AMERICAN SYSTEMS OF PUBLIC LAW	20
A. <i>Argentina</i>	22
B. <i>Colombia</i>	23
C. <i>The Political Dynamic of Latin America and Its Impact on Systems of Public Law</i>	25
D. <i>The Functional Advantages of the French Model in the Latin American Context</i>	28
V. CONCLUSION	34

* A.B., Harvard University (1988); maîtrise, University of Paris I (Panthéon-Sorbonne) (1989); B.A. Law, University at Oxford (1991); LL.M., Columbia University (1992).

The author would like to thank Mr. J.D. Feltham of Magdalen College, Oxford, and Dr. S.J. Whittaker of St. John's College, Oxford, for first interesting him in the areas of administrative and comparative law respectively. The author also thanks Professor Alejandro M. Garro of Columbia Law School for providing a great deal of encouragement and editorial assistance. Finally, the author acknowledges the assistance of Professor George A. Bermann of Columbia Law School.

I. INTRODUCTION

In one of the earliest modern treatises on comparative public law, the influential English constitutional theorist A.V. Dicey began his celebrated attack on civil law models of administrative law by noting: "In many continental countries, and notably in France, there exists a scheme of administrative law—known to Frenchmen as *droit administratif*—which rests on ideas foreign to the fundamental assumptions of our English common law, and especially to what we have termed the rule of law."¹ Much scholarship has since been devoted to refuting Dicey's criticism and to showing that civil law administrative systems are functionally similar to and, in the eyes of certain scholars, even operationally superior to common law systems in restraining unprincipled government action.²

This Article explores whether there are any real functional³ distinctions between the U.S. and the French models of public law, and attempts to define those differences and explain their continuing relevance to prescriptive analyses for Latin American public law reform. The use of the term "public law" is deliberate. This Article contends that it is not possible to recognize and understand the functional differences between the common law and civil law models for the restraint of unprincipled government action without expanding the inquiry beyond administrative law to include constitutional law and the interrelationship between these two domains, which together make up a single category of public law. Part I develops this contention.

Part II then identifies and explains the functional differences between what have historically been the two most important modern paradigms of public law: the French model of administrative law and the Anglo-American model of constitutional law. The anal-

1. A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 328-29 (10th ed. 1959).

2. On the similarity between the scope of judicial review under French administrative law and the scope of review under U.S. law, see George A. Bermann, *The Scope of Judicial Review in French Administrative Law*, 16 COLUM. J. TRANSNAT'L. L. 195 (1977). For a view that the French system of administrative law is generally superior in its operation, see L. NEVILLE BROWN & J. F. GARNER, *FRENCH ADMINISTRATIVE LAW* 172-181 (3d ed. 1983). See also Roger Errera, *Dicey and French Administrative Law: A Missed Encounter?*, 1985 PUB. L. 695.

3. Here, the term "functional" signifies the way in which a conception of public law, and the consequent series of practices to which it gives rise, serve to insure that government action is principled and to protect certain fundamental rights, most notably equality before the law and the civil liberties long recognized in the tradition of Western thought.

ysis focuses primarily on how these two models have used the doctrine of separation of powers as an organizing principle.

Part III studies the historical experience of Latin America, the most important region to draw broadly on both models. The countries of Latin America offer a particularly valuable opportunity to study the functional differences between the two models because their public law systems have recently traversed or continue to traverse periods in which they prove to be largely dysfunctional in restraining unprincipled government action.⁴

Part IV seeks to apply a historical understanding of the functional differences between the French and U.S. models of public law to explain why Latin America has tried to blend elements of the two paradigms, why such attempts have been largely unsuccessful, and how Latin American public law systems can be reformed to provide for effective control of executive action. Latin America's long-standing and generally unsuccessful attempts to blend the French and U.S. models are not simply a result of historical accident or biculturalism, but represent both a reaction to the tradition of executive dominance and an ambivalence as to the best way of controlling executive action in such a political climate. This Article traces the failure of Latin American public law systems to the unsuitability of the ordinary courts for the role of ultimate administrative watchdog which the U.S. model attributes to them. This Article concludes by arguing that to effectively restrain unprincipled executive action, Latin American systems ought to abandon the U.S. model of external review by a separate branch of government in favor of the French model of internal review by a specialized arm of the executive itself.

II. THE RELATIONSHIP BETWEEN CONSTITUTIONAL AND ADMINISTRATIVE LAW IN CIVIL AND COMMON LAW LEGAL SYSTEMS

The common law does not draw, even at a fundamental level,

4. In his recent landmark study, *The Other Path*, Hernando de Soto argues with special reference to Peru that the largely dysfunctional nature of public and private law in Latin America constitutes one of the most important barriers to economic development and social stability. He argues that this situation is due, in large part, to the dominance of the president in Latin American political systems where administrators, subject to no formal discipline, produce more than ninety-nine percent of all legislation. De Soto concludes that only by making administrators accountable to the governed can Latin America hope to achieve economic development and social stability. HERNANDO DE SOTO, *THE OTHER PATH* 131-187 (June Abbott trans., 1989).

the distinction between public and private law that appears in the first title of the first book of Justinian's *Institutes*.⁵ Indeed, it was precisely the collapsing of this civil law distinction that was fundamental to the success of the common law courts as instruments of royalist centralization. The king was viewed as having an interest in all legal relations between his subjects, and not simply those in which he or the state had a direct interest. In civil law nations such as France, however, the monarchy built its disparate possessions into a modern nation state not through the courts, but through the creation of an administrative machinery responsible only to the crown, and largely immune from ordinary judicial interference.⁶

These divergent approaches to the organization of public law created systems of administrative law that differ significantly from one another. Thus, while it is possible to define the subject matter of administrative law with relative ease (the analysis of the legal relationships between the government and the governed), and even to outline the general principles that should control dealings between the government and citizens (fairness, equality, and the right to be heard for example), it is extremely difficult to predict the content of any country's administrative law system in terms of what legal problems or relationships it will actually address. For example, the United States protects and analyzes the right to a hearing and other due process rights in terms of constitutional law, while England and civil law countries such as France treat these as

5. "There are two aspects of [the study of law], public and private. Public law is that which pertains to the Roman state, private that which concerns the well-being of the individual." J. INST. 1.1.4, reprinted in J.A.C. THOMAS, *THE INSTITUTES OF JUSTINIAN* 3 (1975). The distinction between public and private law is intimately related to the distinction between *ius civile* and *ius gentium*. Although this distinction is drawn in Justinian's *Institutes*, it is far more elegantly formulated in Gaius's own earlier *Institutes*:

Every people that is governed by statutes and customs observes partly its own peculiar law and partly the common law of all mankind. That law which a people establishes for itself is peculiar to it, and is called *jus civile* (civil law) as being the special law of that *civitas* (State), while the law that natural reason establishes among all mankind is followed by all peoples alike, and is called *jus gentium* (law of nations, or law of the world) as being the law observed by all mankind. Thus the Roman people observes partly its own peculiar law and partly the common law of mankind.

G. INST. 1.1, reprinted in FRANCIS DE ZULUETA, *THE INSTITUTES OF GAIUS* (1946). While the difference between these two distinctions was clear in Roman law, later writers, and particularly Montesquieu, had a tendency to collapse these distinctions into a single one, associating *ius gentium* with public law and *ius civile* with private law. See *infra* note 25.

6. See *infra* notes 48-58 and accompanying text for a development of this historical contrast.

matters of administrative law.⁷ Additionally, governmental liability for damage caused by its actions is often analyzed not only in constitutional or administrative terms but also, in common law countries at least, in terms of traditional private law tort analysis.⁸

Public law thus constitutes a peculiarly amorphous domain in any given legal system. Within this domain, the line between constitutional and administrative law is a point of particular flux. A legal system's conception of public law in general, and of administrative law in particular, is therefore more likely to be shaped by two distinct forms of external pressure: first, that exerted by the political history of the system in question; and second, and more importantly, that exercised by the most coherent legal categories (or sub-categories) over the more ill-defined categories.

In the common law tradition, the development of conflicting theories of sovereignty and the rule of law, and their use in the seventeenth-century battle between central royal authority and the nascent gentry—which culminated in the Civil War—propelled constitutional law to the forefront of the public law domain in England.⁹ In the American context, this English heritage, together

7. On the right to a hearing under French administrative law, see BROWN & GARNER, *supra* note 2, at 141-42; MARCEL WALINE, *DROIT ADMINISTRATIF* 399, 405 (7th ed. 1957). The right to a fair hearing is one of the touchstones of the English common law governing judicial review of administrative action. See P.P. CRAIG, *ADMINISTRATIVE LAW* 199-231 (2d ed. 1989); S.A. DE SMITH & J.M. EVANS, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 156-247 (4th ed. 1980); H.W.R. WADE, *ADMINISTRATIVE LAW* 496-579 (6th ed. 1988). The seminal case in this area is *Cooper v. Wandsworth Bd. of Works*, 143 Eng. Rep. 414 (C.P. 1863) (defendant statutory board liable for demolition of plaintiff's house pursuant to statutory authority where it failed to grant plaintiff a hearing prior to the demolition even though no statute explicitly required such a hearing).

8. For example, in several recent cases, English courts have used common law tort reasoning, particularly the question of the existence of a duty of care, to insulate administrators from liability. *Yuen Kun Yeu v. Attorney-General of Hong Kong*, [1988] App. Cas. 175 (P.C. 1987) (appeal taken from H.K.) (defendant not liable to depositors for negligently exercising its powers to inspect and report on the financial condition of deposit-taking companies because no duty of care existed); *Rowling v. Takaro Properties Ltd.*, [1988] App. Cas. 473 (P.C. 1987) (appeal taken from N.Z.) (defendant minister not liable to seller for failing to take legal advice on extent of his powers to block sale of property to foreigners because doubtful whether such failure could ever constitute negligence and in any event no duty of care existed); *Hill v. Chief Constable of West Yorkshire* [1988] 2 W.L.R. 1049 (police authority not liable for negligently failing to protect members of group particularly at risk due to activities of mass murderer because no duty of care existed).

In the United States, the government may, if negligent, be liable for discretionary actions carried out at the operational level, but not at a planning or policy level. See, e.g., *United States v. Gaubert*, 111 S. Ct. 1267 (1991); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Dalehite v. United States*, 346 U.S. 15 (1953).

9. In the thirty odd years between the Stuart accession and the Civil War, both royal-

with the discourse of the rebellion and the drive towards independence, elevated constitutional law to the preeminent position that it continues to occupy in the legal order of the United States.¹⁰

In both countries, the importance of constitutional law tended to delay the development of a distinct administrative domain of public law and greatly influenced its content and shape. In England, the power and coherence of the dual constitutional theory of parliamentary supremacy and Crown prerogative limited control of governmental action to those cases which could be analogized to existing private law legal categories.¹¹ A contract with a government body was enforceable as nothing more or less than an ordinary contract, and a hearing was available prior to the seizure of an individual's property because without the justification of such a hearing the government body would be guilty of a trespass.¹²

In the United States, the same pattern of controlling administrative action through analogy to private law remedies dominated. The difference was that, in creating rights against arbitrary administrative action, such as the right to a hearing, the U.S. courts did not have to analogize directly to private law, but could rely on the explicit language of the Constitution.¹³ In France, however, the de-

ists and parliamentarians gradually came to define and distinguish their positions through law and legalistic discourse. The importance of public law, particularly the notion of the rule of law, as an ideological background, is evident in the nature and discourse of the Stuart political crises foreshadowing the war, and particularly in the impeachments of the Duke of Buckingham and later of the Marquis of Hertford and in the famous Hampden ship-money case. See generally CONRAD RUSSELL, *THE CAUSES OF THE ENGLISH CIVIL WAR* 131-211 (1990).

10. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

11. Dicey's work demonstrates the overriding importance of the constitutional doctrine of parliamentary supremacy in the structuring of English administrative law. DICEY, *supra* note 1, at 39-180; see P.P. CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* 12-55 (1990).

12. *Cooper v. Wandsworth Bd. of Works*, 143 Eng. Rep. 414 (C.P. 1863); see WADE, *supra* note 7, at 496-579 (hearings), 787-90 (contracts with public bodies).

Compare the absence of a special regime for government contracts at common law with the creation by the French administrative courts of a complex law governing contracts between government bodies and private individuals. The seminal case in this area is the decision of the *Conseil d'État* in *Compagnie General d'Eclairage de Bordeaux*, 1916 D.P.III 25. See also BROWN & GARNER, *supra* note 2, at 125-131; 1 RENÉ CHAPUS, *DROIT ADMINISTRATIF GÉNÉRAL* 736-58 (4th ed. 1988); WALINE, *supra* note 7, at 494-563.

13. The Fifth Amendment to the United States Constitution reads in relevant part: "nor shall any person . . . be deprived of life, liberty, or property, without due process of law" U.S. CONST. amend. V. The Fourteenth Amendment provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV.

velopment of a coherent theory of administrative law, largely untrammelled by inapposite private law analogies, limited the need for a distinctive body of constitutional law.¹⁴ French constitutional law was an underdeveloped field, representing in practice little more than a theoretical underpinning for administrative law, which formed the real basis for exercising control over state action.¹⁵ By contrast, what is striking in the history of both English and U.S. administrative law is how long a number of doctrines drawn by analogy from the private law field restricted development of concepts more appropriate to the specific problems raised by administrative discretion and the necessity of controlling it.¹⁶

The importance of the hegemony of constitutional law over administrative law in the United States and England, and the opposite in France, can be seen in the political history of both of these countries. Nothing is more admired in the political history of either the United States or England than the long-term stability and organic evolution of their respective constitutional orders. In contrast, France has endured no less than eleven constitutions since 1789.¹⁷ In France, the administration, not the constitution, has provided continuity and stability. Constitutions have come and gone, radically varying the balance of power between the legislature and executive, and even changing the very nature of the executive branch.¹⁸ However, the same organs governing the administrative jurisdictions have remained from constitution to

14. For a discussion of how and why French administrative law largely escaped the influence of private law, see *infra* notes 29-35, 48-58 and accompanying text.

15. 1 CHAPUS, *supra* note 12, at 24-45 (describing the contemporary interaction between constitutional and administrative law and the growing importance of the former); WALINE, *supra* note 7, at 6-8, 106 (describing the situation prior to the current 1958 constitution).

16. A striking example of this tendency is the persistence of the distinction between a right and a privilege and the belief that only a right was entitled to due process protection, drawn from the private law concept of a right capable of giving rise to a cause of action. It is only in the last thirty years that both countries have broken with this distinction: England probably most notably in *In re H.K.*, [1967] 2 Q.B. 617 (1966) (immigration officer under duty to act fairly and accord applicant opportunity to be heard, despite fact that applicant had no right of entry); the United States even more conclusively in *Goldberg v. Kelly*, 397 U.S. 254 (1970) (state which terminates public assistance payments to a particular recipient violates the due process clause of the 14th Amendment if it does not grant some form of hearing); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267 (1975).

17. See MAURICE DUVERGER, *CONSTITUTIONS ET DOCUMENTS POLITIQUES* 17-260 (12th ed. 1989).

18. See *id.*; PIERRE AVRIL, *LA VE RÉPUBLIQUE: HISTOIRE POLITIQUE ET CONSTITUTIONNELLE* 29-32 (1987); JEAN GICQUEL, *DROIT CONSTITUTIONNEL ET INSTITUTIONS POLITIQUES* 504-559 (10th ed. 1989).

constitution.¹⁹ It has been in the traditionally marginal domain of constitutional law where the greatest development has taken place in the twentieth century, particularly in the post-war period. Not only did the current French constitution come into being after World War II, but the organ of constitutional review and the resulting jurisprudence are as new as the constitution itself.²⁰ In England, however, the last twenty years have witnessed an explosive growth in administrative law.²¹

The tendency in mature legal systems for constitutional and administrative law to reach some kind of equilibrium, and the fact that a given legal question can generally be analyzed from both a constitutional and administrative law perspective, suggest that the two domains are not only complementary, but also indivisible. The issue is really one of emphasis. The question is thus to understand why the Anglo-American model of public law traditionally stressed constitutional law and why, in contrast, the French model emphasized administrative law. In examining this question, it is useful to begin with the truism that at the heart of the differences between the common law and civil law paradigms of public law lie different conceptions of the doctrine of separation of powers.²²

19. In France, the jurisdiction and functions of the *Conseil d'État* have remained constant despite the frequent changes in constitutional structure. For an account of the historical role and jurisdiction of the *Conseil*, see *infra* notes 48-58 and accompanying text. See also BROWN & GARNER, *supra* note 2, at 38-39; 1 CHAPUS, *supra* note 12, at 477-87; WALINE, *supra* note 7, at 28-31.

20. Articles 56 to 63 of the French Constitution of 1958 establish the Constitutional Council which reviews legislation prior to its promulgation upon a request of the president, prime minister, the president of either house of the Parliament, or (since 1975) sixty deputies or sixty senators. The Council's decisions are final and binding upon all state bodies. GICQUEL, *supra* note 18, at 826-37.

21. The explosion in terms of practice can be seen both in the number and importance of the cases and in the diversity of issues currently being analyzed as questions of administrative law. Since the mid-1960s, English administrative law has made a quantitative and qualitative leap of enormous magnitude, demonstrated by decisions such as *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 App. Cas. 147 (1968), which signaled a greater openness to judicial review of administrative action. See CRAIG, *supra* note 7 at 253-70; DE SMITH & EVANS, *supra* note 7, at 3-11, 31-35; WADE, *supra* note 7, at 18-21. As to the variety of questions now treated as raising issues of administrative law, one has only to take the example of the right to a hearing. The number of issues currently analyzed under the right to a hearing/natural justice/duty to act fairly heading in English administrative law is simply bewildering. The area runs the gamut from questions of when and what constitutes a hearing to highly political questions such as the relationship between central and local government. CRAIG, *supra* note 7, at 199-231; DE SMITH & EVANS, *supra* note 7, at 156-247; WADE, *supra* note 7, at 496-579.

22. The observation is a familiar one and has been repeated by scholars of comparative law since at least the 1950s. Nonetheless, the observation is important because it represents the beginning of any comparative analysis of the civil and common law understandings of

The following section will consider the origins of the doctrine of separation of powers, as well as its impact on French administrative law and U.S. constitutional law, in order to explain the difference in emphasis between the two models and to develop a preliminary understanding of the functional differences between the two models, which can then be applied to an examination of the Latin American experience.

III. SEPARATION OF POWERS AND ITS IMPACT ON FRENCH ADMINISTRATIVE LAW AND U.S. CONSTITUTIONAL LAW

The close connection between the doctrine of separation of powers and the various paradigms of public law is far from coincidental. The doctrine of separation of powers represents for political theory the same kind of essentially flexible logical category that "constitutional" and "administrative" law represent for the legal world, the content of which may be endlessly varied to justify numerous political arrangements. Nowhere is the potential for multiple and conflicting interpretations of the concept of separation of powers more apparent than in the work of Montesquieu.²³ Both in France and the United States, his name is closely identified with the doctrine of separation of powers. As James Madison so aptly observed in *The Federalist*: "If [Montesquieu] be not the author of this invaluable precept in the science of politics, he has the merit of at least displaying and recommending it most effectually to the attention of mankind."²⁴

The ambiguity of the separation of powers concept is apparent in Montesquieu's opening formulation: "In each state, there are three sorts of powers: the legislative power, the power to execute things that depend on the *jus gentium* and the power to execute those things that depend on the *jus civilis*."²⁵ What is immediately

public law. See J. CRITTELA JÚNIOR, *DRIT ADMINISTRATIF COMPARÉ* 229-34 (1973); JOHN H. MERRYMAN, *THE CIVIL LAW TRADITION* 87-89 (2d ed. 1985); JEAN RIVERO, *COURS DE DROIT ADMINISTRATIF COMPARÉ* 111-16 (1955); BERNARD SCHWARTZ, *FRENCH ADMINISTRATIVE LAW AND THE COMMON-LAW WORLD* 4-7 (1954).

23. CHARLES LOUIS SECONDAT DE LA BRÈDE DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., 1900).

24. *THE FEDERALIST* No. 23, at 246 (Alexander Hamilton) (Max Beloff ed., 1987).

25. "Il y a dans chaque état trois sortes de pouvoirs: la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil." MONTESQUIEU, *supra* note 23, at 11:6; Richard J. Cummins, *The General Principles of Law, Separation of Powers and Theories of Judicial Decision in France*, 35 *INT'L. COMP. L.Q.* 598 (1986). On the distinction between *jus gentium* and

striking about Montesquieu's formulation of the doctrine is just how far it is from the U.S. principle that "the legislative, executive, and judiciary departments ought to be separate and distinct."²⁶ Considering judicial and administrative jurisdiction as two distinct aspects of a single executive authority, Montesquieu employs the traditional civil law distinction between public and private law to distinguish between these two aspects of executive authority: "By the first of these powers, the prince or the magistrate makes the laws By the second, he makes peace or war, sends and receives embassies, establishes security and prevents invasions. By the third, he punishes crimes or adjudicates disputes among private individuals."²⁷ Unlike Madison, Montesquieu is concerned with the separation of *powers*, not with the separation of *organs* of government. Where the power vests is simply not relevant, provided that power is independently exercised and not used in tandem with another category of powers. The U.S. conception of separation of powers, in contrast, is about institutional separation and competition, or in Madison's hallowed phrase, "checks and balances."²⁸

The modern French conception of separation of powers, which shaped French administrative law, was born of the Revolution. The historian François Furet, in his treatment of both the history and historiography of the Revolution, has repeatedly emphasized its dual nature as both a departure from the old order and the continuation, or even the culmination, of certain dynamics within the old order.²⁹ This duality explains two of the most important themes of the revolutionary struggle's impact on French public law: first, the central theme in revolutionary politics and the struggle for political control of departure from the past; second, the rapid and ruthless completion of the process of centralization through administrative control.³⁰

Nowhere is this pattern of continuity and departure more evi-

ius civilis, see *supra* note 5.

26. THE FEDERALIST No. 47, at 245 (James Madison) (Max Beloff ed., 1987).

27. "Par la première, le prince ou le magistrat fait des lois Par la seconde, il fait la paix ou la guerre, envoie ou reçoit des ambassades, établit la sûreté, prévient les invasions. Par la troisième, il punit les crimes ou juge les différends des particuliers." MONTESQUIEU, *supra* note 23, at 11:6.

28. For a development and explanation of this contrast, see *infra* notes 36-47 and accompanying text.

29. FRANÇOIS FURET, PENSER LA RÉVOLUTION FRANÇAISE 11-130 (1978).

30. *Id.*, at 209-56; ALEXIS DE TOCQUEVILLE, L'ANCIEN RÉGIME ET LA RÉVOLUTION (J.P. Mayer ed., 1967).

dent than in the French conceptions of separation of powers and of administrative law in the early years of the Revolution. The famous Law of August 16-24, 1790, which stopped the ordinary courts from exercising any legislative powers or jurisdiction over the administration, is often regarded as a decisive break with the old order.³¹ In explaining this limitation on the jurisdiction of the ordinary courts, historians and lawyers have focused on the unpopularity of the *parlements*, which used their powers to prevent royal centralization and to block any taxation that might affect them or their class.³² As important as this negative perception of the courts, however, was the positive example of the royal administrative model of government. In *ancien régime* France, more than anywhere else in Europe, an administrative model of government sought to centralize power in the agents of the king in direct opposition to the power of the courts. The model dominated the royal strategy for unifying the nation and extending monarchical power. As Tocqueville noted on the eve of the Revolution: "There was no country in Europe where the courts depended less on the central government than in France; but there was no country either where exceptional [administrative] jurisdictions were more widely employed."³³

This pattern of departure and continuity lies at the heart of the fundamental text on modern French administrative law, the Law of August 16-24, 1790. Article 13 of the Law of August 16-24, 1790 emphasizes the departure from the old order: "Judicial functions are distinct and will always remain separate from administrative functions. Judges may not, upon pain of forfeiture, disturb in any way whatsoever the operations of administrative bodies, nor cite before them administrative officials for any reason connected with their functions."³⁴

31. See generally WALINE, *supra* note 7.

32. Indeed, the final years of the *ancien régime* were characterized by an all-out jurisdictional war by the *parlements* on royal administrative officials. 1 CHAPUS, *supra* note 12, at 476-77; ALFRED SOBOUL, *LA RÉVOLUTION FRANÇAISE* 124-33 (1982); WALINE, *supra* note 7, at 24-25.

33. "Il n'y avait pas de pays en Europe où les tribunaux ordinaires dépendissent moins du gouvernement qu'en France; mais il n'y en avait pas guère non plus où les tribunaux exceptionnels fussent plus en usage." TOCQUEVILLE, *supra* note 30, at 122.

34. The French version reads:

Les fonctions judiciaires sont distinctes et demeureront toujours séparées des fonctions administratives. Les juges ne pourront, à peine de forfaiture, troubler, de quelque manière que ce soit, les opérations des corps administratifs, ni citer devant eux les administrateurs pour raison de leurs fonctions.

BERNARD RUDDEN, *A SOURCEBOOK OF FRENCH LAW* 121 (3d ed. 1991).

Montesquieu's exposition of the separation of powers doctrine provided a brilliant theoretical construct for the centralization of authority through the expansion of administrative jurisdiction. It also meshed perfectly with the fundamental Roman and civil law distinction between public and private law. The ordinary courts were concerned with settling differences among private individuals and punishing criminals, while the administration exercised those powers conferred by public law. Tocqueville captured perfectly the evolution from the fundamental political tendencies of the *ancien régime* to a new conception of separation of powers and administrative autonomy:

It had [already] become established, not in the laws themselves, but, as a maxim of government, in the minds of those that applied them, that all actions in which a public interest is involved, or that derive from the interpretation of an administrative act, are not within the jurisdiction of the ordinary judges, whose only role is to decide among private interests. In this area, we did no more than devise the formula; the idea itself belongs to the *ancien régime*.³⁵

The United States, in contrast, derived from the writings of Montesquieu a very different notion of separation of powers. The Colonial rebellion against the British fostered the same dynamic of departure and continuity that was present in the French Revolution. The United States saw itself as breaking away from England, but deliberately took much that was English with it, as numerous state general reception statutes indicate.³⁶ In particular, the

35. The French version reads:

Il s'établit, non dans les lois, mais dans l'esprit de ceux qui les appliquent, comme maxime d'état, que tous les procès dans lesquels un intérêt public est mêlé, ou qui naissent de l'interprétation d'un acte administratif, ne sont point du ressort des juges ordinaires, dont le seul rôle est de prononcer entre des intérêts particuliers. En cette matière nous n'avons fait que trouver la formule; à l'ancien régime appartient l'idée.

TOCQUEVILLE, *supra* note 30, at 123.

36. For a typical example, see the Vermont General Reception Statute of 1782 which provided:

Whereas, it is impossible, at once, to provide particular statutes adopted to all cases wherein law may be necessary for the happy government of this people.

And whereas, the inhabitants of this State have been habituated to conform their manners to the English laws, and hold their real estate by English tenures.

Be it enacted, &c. that so much of the common law of England, as is not repugnant to the constitution or to any act of the legislature of this State, be, and is hereby adopted, and shall be, and continue to be, law within this State.

And whereas, the statute law of England is so connected and interwoven

United States took with it a legacy of courts which were largely dependent upon royal power, and which since the late Middle Ages, had formed a crucial link in the construction of the nascent state.³⁷ The partnership between the Crown and the judiciary, so important to the building of a central English state, and so different from the administrative state-building pattern shared by the kingdoms of Continental Europe, left little room for the distinction between private and public law that is so fundamental to the civil law tradition.³⁸

This common law legacy provided the United States with the seeds of a new conception of separation of powers, one in which the judiciary would be perceived not simply as a body exercising a separate *power*, but rather as a separate *branch* of government. While part of the basis for this new conception was already at hand in the tradition of the royal English courts' involvement in public law, other elements emerged out of the struggle against the British and the consequent social and constitutional ferment to which it gave rise. The historians Bernard Bailyn and Gordon Wood have chronicled this rise and transformation of a distinct,

with the common law, that our jurisprudence would be incomplete [*sic*] without it; therefore,

Be it further enacted, that such statute laws and parts of laws of the kingdom of England, as were passed before the first day of October, Anno Domini one thousand seven hundred and sixty, for the alteration and explanation of the common law, and which are not repugnant to the constitution, or some act of legislature, and are applicable to the circumstances of the State, are hereby adopted and made, and shall be and continue to be, law within this State: and all courts are to take notice thereof, and govern themselves accordingly.

Vermont General Reception Statute of 1787, reprinted in ELIZABETH GASPAR BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836*, at 63-64 (1974).

37. DE SMITH & EVANS, *supra* note 7, at 5-6, 93-94, 585; G.R. ELTON, *THE TUDOR CONSTITUTION* 163-67 (2d ed. 1982); J.A. GUY, *THE CARDINAL'S COURT* 1-21, 132-39 (1977); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 31-36, 124-34 (2d ed. 1981).

38. As direct emanations of royal authority, the English courts, and particularly the courts of the Chancery and King's Bench, strived not only to settle private differences and punish criminals to preserve the King's peace, but also to extend royal jurisdiction as far as possible. Most importantly in political terms, the courts asserted jurisdiction against subordinate, local administrative authorities. Hence the writ was both a royal command issued under the King's authority and the foundation of the courts' jurisdiction. This historical background is essential to understanding the political role played by the English courts' extensive powers of enforcement, as reflected in the inherent jurisdiction and contempt powers. Because the English courts were direct emanations of royal authority and responsible for extending that authority's jurisdiction, they received the explicit powers of coercion that, in Roman and civil law systems, form an exclusive element of executive power. See JOHN C. FOX, *THE HISTORY OF CONTEMPT OF COURT* 1-4 (1927); RONALD L. GOLDFARE, *THE CONTEMPT POWER* 1-25 (1963); CHRISTOPHER J. MILLER, *CONTEMPT OF COURT* 1-2 (2d ed. 1989).

American conception of the doctrine of separation of powers in the years leading up to the American Revolution, and even more importantly between independence and the Constitutional Convention.³⁹

In the years leading up to the rebellion and during the Revolution itself, separation of powers was primarily invoked to prevent executive and judicial interference with the legislature, which alone was felt to represent the colonial peoples.⁴⁰ Post-independence state constitutions thus tended to weaken both the executive and the judiciary by requiring annual election of the executive by the legislature, by reserving most powers of appointment to the legislature, and in some instances, by providing for the direct election of judges.⁴¹ Factional struggles and governmental paralysis, which the legislature's dominance of the executive and judiciary was felt to engender, led in the first years of state independence to a recasting of the doctrine of separation of powers by members of the emerging Federalist movement. The Federalists discarded the ideas that popular sovereignty lay solely with the legislature and that separation of powers could only be achieved by preventing the executive and judiciary from interfering with the legislature. In its place the Federalists articulated a new conception—sovereignty by compact—in which the people conferred legitimacy on all three branches of government as consecrated by the Preamble to the Constitution.⁴² This transformation permitted the Federalists to

39. See *supra* note 10 and accompanying text.

40. As Wood and Bailyn have both noted from different angles, the fear of executive conspiracy against the liberties secured by the legislature was one of the principle themes of the rebellion of the colonies. Wood noted that there was a real dimension to this fear and that royal governors had, in most states, powers far beyond even those wielded by the executive in Great Britain. Patriots were suspicious not only of executive power, but also of the judges whom they saw as little more than mouthpieces of the executive. Wood, *supra* note 10, at 150-61. Bailyn noted that these fears of conspiratorial attack on the legislature found fertile ground in the psyche of the colonial elite who identified strongly with the struggle of the sixteenth-century parliamentarians against royal absolutism. BAILYN, *supra* note 10, at 198-229.

41. The Virginia Constitution of 1776, for example, reserved to the legislature the power of appointing all the chief judges and the attorney general by joint ballot. The Delaware Constitution of 1776 similarly gave the General Assembly and the President (the head of the executive authority) the power to appoint the leading justices of the state; the General Assembly also controlled the nomination of all justices of the peace. The Georgia Constitution of 1776 provided for the annual election of all judges except for justices of the peace and registers of probate, whom the legislature appointed. All of these constitutions provided for the election of the governor by joint ballot of the legislature, and all but Delaware limited the term to one year. See generally Wood, *supra* note 10, at 132-50.

42. The Preamble to the U.S. Constitution provides:

reformulate the concept of separation of powers into a theory of government in which three independent branches check and balance one another.⁴³

The transformation is readily apparent in Hamilton, Madison, and Jay's writings in *The Federalist*. In the first essays setting out the deficiencies of the Articles of Confederation, Hamilton dwelt at length on the need for a central judicial power. The passage is especially revealing because it captures the dual and distinctive dimensions of the common law legacy inherited by the United States in the public law domain: the legitimacy of government by courts as an emanation of central authority, and the concomitant power of coercion over both individuals and autonomous but inferior governmental bodies. Thus, Hamilton wrote:

Government implies the power of making laws. It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience This penalty, whatever it may be, can only be inflicted in two ways; by the agency of the courts and ministers of justice, or by military force; by the COERCION of the magistracy, or by the COERCION of arms. The first kind can evidently apply only to men; the last kind must of necessity be employed against bodies politic, or communities of states In an association, where the general authority is confined to the collective bodies of the communities that compose it, every breach of the laws must involve a state of war, and military execution must become the only instrument of civil obedience. Such a state of things can certainly not deserve the name of government, nor would any prudent man choose to commit his happiness to it.⁴⁴

The coercive public law role of the courts, which traditional English theory derived from their association with central royal authority, was now justified and recast in terms of popular sovereignty, transforming the judiciary into an independent, third branch of government and greatly expanding its field of action.

Arguing that the new union would require a central judicial

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. CONST. pmbl.

43. WOOD, *supra* note 10, at 446-63.

44. THE FEDERALIST No. 15, at 71 (Alexander Hamilton) (Max Beloff ed., 1987).

authority to review the constitutionality of the acts of other governmental bodies, Hamilton emphasized that sovereignty lay with the people, who exercised it via the constitutional compact, rather than with the legislature, which simply represented the people. "It is not otherwise to be supposed that the constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents."⁴⁵ In this context of limited legislative authority, review for excess of authority was a necessary corollary. That the review was to be judicial followed from the common law's collapsing of the distinction between public and private law. For Hamilton, a constitution was no more than a fundamental law, hierarchically superior, but not essentially different or separate from any other body of law:

The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be, regarded by the judges as a fundamental law. It must therefore belong to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body.⁴⁶

Where the two conflicted, the more fundamental must be preferred, and the conflicting legislative norm set aside. Hamilton was careful to emphasize, however, that this conclusion did not

by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed . . . by the fundamental laws, rather than by those which are not fundamental.⁴⁷

Thus, judicial review, conceived as the action of a branch of government external to and independent of both the legislature and the executive, emerged as the centerpiece of the new U.S. paradigm of public law.

The French paradigm of public law developed out of a different response to a very similar crisis. In France, as in the United States, the problem was legislative instability. The paralysis of the legislature under the Terror and Directory prevented effective government and gave Bonaparte the opportunity to organize first the

45. THE FEDERALIST No. 78, at 398 (Alexander Hamilton) (Max Beloff ed., 1987).

46. *Id.*

47. *Id.* at 398-99.

Consulate and then the Empire.⁴⁸ The genius of the Consulate and Empire was that they overtly adopted the royal administrative model on which the early revolutionaries, for all their insistence on legislative dominance of a republican government, had been compelled to rely.⁴⁹

The Empire not only glorified the administration, but provided it with new autonomy by insulating it from the legislative interference that had characterized all of the earlier revolutionary regimes.⁵⁰ Napoleon created and implemented a powerful and centralized administration as the State's primary tool for governance under the influence of a number of interrelated pressures. First, he had come to power as the principal representative of a diffuse series of interests which wished to create a strong executive authority capable of putting an end to confrontation among revolutionaries and counter-revolutionaries. Second, the revolutionary wars had demonstrated that even the mere beginnings of a modern bureaucracy could mobilize an entire nation for war, and the perfec-

48. Legislative instability during the Terror resulted largely from the practice of delegating authority to powerful committees such as Robespierre's Committee of Public Safety. The Directory Constitution which emerged from the Thermidorean reaction specifically forbade this practice. The Directory itself proved to be an unstable regime because of the legislative paralysis to which it gave rise. By initially reserving all the positions on the Directory (which constituted the executive and named and revoked the ministers who remained responsible to it alone) and the majority of the seats in the bicameral legislature to the revolutionary members of the Convention, it created a government that was far more republican and revolutionary than either the limited electorate enfranchised under the French Constitution of 1795 or the populace at large. As economic difficulties grew, both groups increasingly felt the attraction of the royalist counter-revolutionaries. In the elections of 1797, the electorate returned a majority of moderate counter-revolutionaries favorable to the restoration of a constitutional monarchy; the entrenched majority on the Directory remained, however, firmly republican in orientation. From the elections onwards, conflict between the executive and the legislature spiralled out of control with the Directory increasingly resorting to the army, and particularly to Bonaparte's troops, to maintain the counter-revolutionary politics of the legislature in check. Ultimately, Bonaparte in 1799 ended this political dynamic of paralysis and confrontation by seizing power himself. See DUVERGER, *supra* note 17, at 89; GICQUEL, *supra* note 18, at 507-12.

49. Most importantly, the revolutionaries had to rely on the royal, administrative machinery in organizing the Revolution's first outstanding success, the defence of the nation in 1791-1792 against invasion by Europe's monarchies. Forming and equipping the citizen-soldier units that were to transform modern warfare would not have been possible without the efficiency of the royal administrative machinery. 1 ALFRED COBBAN, *A HISTORY OF MODERN FRANCE* 91, 108, 204-205, 211, 235 (3d ed. 1963).

50. During the periods when the legislature dominated revolutionary politics, such as the years from the fall of the monarchy to the Directory, it was common for the assembly to dispatch roving commissions made up of deputies or appointed representatives to inquire into and often interfere with the activities of administrators. GICQUEL, *supra* note 18, at 507-12.

tion of a centralized administration thus formed an important dimension of Napoleon's plans to dominate Europe. Third, government through professional administrators found powerful support in the revolutionary and Bonapartist reading of imperial Roman history, representing only one of the many important effects that the ideology of neo-classicism had on the institutions of the Revolution and the Empire. This legacy of an autonomous administration, fully independent from the control of both the ordinary judiciary and the legislature, though bound to execute laws made by the latter, was probably the most lasting effect of the Empire on French political history.⁵¹

Administrative autonomy led logically and almost immediately to the second great strand in the French paradigm of public law: the need for administrative internal review. In the early revolutionary years, such review occurred on an ad hoc basis: claimants would simply appeal to superior administrative authorities or local administrative commissioners for a review of their subordinates' acts.⁵² This structure of internal review was systematized, as part of Bonaparte's 1799 constitutional reforms, by the creation of the *Conseil d'État*.⁵³ The Council heard claims for compensation for administrative action and for the annulment of administrative acts, which it would then pass on to the First Consul with a recommendation for resolution. Rarely did the head of state fail to follow such recommendations.⁵⁴ Thus, almost from the beginning it was

51. 2 COBBAN, *supra* note 49, at 19-26; FÉLIX PONTEIL, *NAPOLÉON IER ET L'ORGANISATION AUTORITAIRE DE LA FRANCE* 101-09 (2d ed. 1965).

52. The *directoire*, the collegial, executive organ of the newly formed departments, heard appeals from the actions of local administrators (Law of September 7-11, 1790); all other appeals went directly before the council of ministers presided over by the King (Law of April 27 - May 25, 1791). Following the fall of the monarchy and the adoption of the French Constitution of 1795 which suppressed the principle of ministerial collegiality, each minister judged appeals involving the actions of his own subordinates. 1 CHAPUS, *supra* note 12, at 476-77; WALINE, *supra* note 7, at 26.

53. The organizing principle behind many of Napoleon's reforms was the recognition of the importance of expertise. The Council represented the application of this principle to the administrative domain. 2 COBBAN, *supra* note 49, at 19-26; PONTEIL, *supra* note 51, at 101-09.

54. Formally, the decision lay with the titular head of state. Thus during the Empire it was with the Emperor; during the Restoration and July Monarchy with the King; and then with the Emperor again under the Second Empire. Although it is impossible to know with certainty the number of occasions on which the advice of the *Conseil d'État* was not followed due to the destruction of the Council's archives during the Paris Commune of 1871, it is believed that its recommendation was ignored only two or three times in the whole seventy-odd year history of this procedure. 1 CHAPUS, *supra* note 12, at 479; WALINE, *supra* note 7, at 27-28.

readily apparent that the theory that administrative adjudication belonged to the titular head of executive authority was a myth concealing the existence of an autonomous jurisdiction within the executive branch.

This reality of a specialized, independent jurisdiction was reinforced by the creation in 1806 of a separate adjudication section of the Council, the *section du contentieux*, which was fully autonomous from the sections that handled the drafting and advisory functions that formed and continue to form the Council's other primary domains of activity.⁵⁵ The same decree that established the *section du contentieux* also provided the Council with a procedural code, setting out the methods of pleading and guaranteeing the Council's impartiality.⁵⁶ The Council received full jurisdictional autonomy when the requirement of executive approval of its recommendations was abolished (first briefly under the Second Republic, and then definitively under the Third Republic).⁵⁷

The United States had combined the legacy of the English common law courts as organs of enforcement of royal public law with a reinterpretation of the concept of separation of powers, in light of popular sovereignty theory, to produce a public constitu-

55. WALINE, *supra* note 7, at 29 (discussing Decree of July 22, 1806). Under the French Constitution of 1799, the Council's primary function was to act as the government's adviser on and drafter of legislation. The Constitution of 1799 went so far as to require that the Council prepare drafts of all legislation; the legislature could only adopt or reject the proposed text and was forbidden any right of amendment. Even today under the French Constitution of 1958, the opinion of the Council is required on all drafts of parliamentary legislation (*projets de loi*), on all ordinances passed by the government pursuant to an exceptional delegation of law-making authority by the Parliament (Articles 38 and 39 of the 1958 Constitution) and on all governmental decrees modifying the legislative texts of the past Republics, or being made under laws explicitly requiring the opinion of the Council on the measures adopted to implement them. Even where the Council's opinion is not required, ministers commonly consult with the Council before exercising decree powers. WALINE, *supra* note 7, at 28-29, 152-53; 1 CHAPUS, *supra* note 12, at 298-305.

56. WALINE, *supra* note 7, at 29 (discussing Decree of July 22, 1806). Procedure before the *section du contentieux* of the Council was then, and remains today, extremely simple. The applicant lodges a straight-forward and brief complaint with the Council, which then delegates the task of fact-finding, known as *instruction* in French law, to one of its sub-sections. Typically, a sub-section will then solicit a formal, written response from the relevant administrative body and give the applicant an opportunity to respond to this response. Various independent, expert studies may also be commissioned where questions of fact are in doubt. The crucial reform of the 1806 code was to require the Council to act as an impartial finder of fact and to guarantee the applicant a right of reply to the administrative body's statement of the facts. See WALINE, *supra* note 7, at 29-31; BROWN & GARNER, *supra* note 2, at 57-64.

57. WALINE, *supra* note 7, at 30-31 (discussing Law of March 3, 1849, repealed by Decree of January 25, 1852, and reinstated by Law of May 24, 1872).

tional law, with external review by an independent judiciary as the centerpiece. France, in contrast, turned to the royal administrative model of its past, making use of its own conception of separation of powers to perfect administrative autonomy and internal review and to develop a public law which is primarily administrative, rather than constitutional, in form.⁵⁸

IV. LATIN AMERICAN SYSTEMS OF PUBLIC LAW

Most Latin American nations gained their independence in the ten or twenty years immediately following the development of these two paradigms of public law. The new nations of Latin America were thus faced with a unique opportunity to choose between the recently developed French and U.S. models. Both carried with them the prestige of a successful revolution. The French system had the additional advantage of deriving from the civil law tradition and of forming the counterpart to France's new private law code, which appeared as a natural model for the codes that the new nations of Latin America were already contemplating. The U.S. model had the attraction of deriving from a similar struggle of colonists who overthrew the representatives of the parent country. Yet, none of the new nations chose one system or the other. Instead, they drew on elements from both systems, adopting on the one hand, rigid constitutions that clearly subordinated both the executive and the legislature to the constitution and, on the other, elements of the French administrative law system of internal review.⁵⁹

This fusion of the two paradigms has tended to produce a certain amount of tension and ambiguity within the Latin American conception of public law and has contributed to the apparent lack of connection between political and legal structure that surrounds

58. This primarily administrative model of public law proved remarkably resilient, lasting with only slight variation through countless regimes until the collapse of the Fourth Republic in 1958 forced a reconsideration of the constitutional domain. The Gaullists who drafted the constitution of the Fifth Republic insisted on the introduction of a special constitutional tribunal, the Constitutional Council, to create an organ capable of adjudicating disputes between the legislature and the government. AVRIL, *supra* note 18, at 29-32; *Comité National chargé de la Publication des Travaux Préparatoires des Institutions de la Ve République*, in DOCUMENTS POUR SERVIR À L'HISTOIRE DE L'ÉLABORATION DE LA CONSTITUTION DU 4 OCTOBRE 1958, at 77-79, 149-54 (1991) [hereinafter *Comité National*]; GICQUEL, *supra* note 18, at 540-59, 826-37.

59. R.S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891 (1988).

the operation of the individual national systems. As Héctor Mairal noted in the preface to his recent comparative study of Argentine administrative law: "We Argentinean administrative lawyers have managed to impose our dream on reality. We dreamt of an administrative law made in the image of French law and, gradually, as professors, as authors and as legislators, we have converted our dream into reality despite its incongruity with our constitutional system."⁶⁰

The most intriguing aspects of combining these two dominant paradigms of public law are the widespread existence of the phenomenon within the Latin American region and its persistence over practically two hundred years of that region's history. Instead of conforming to one model, and then developing a balance between the administrative and constitutional domains, the Latin American systems have seesawed from one paradigm to the other and thus, have failed to develop a public law system capable of restraining the executive and insuring principled governance.⁶¹ As will be discussed below, this inability to conform decisively to one paradigm or the other reflects the fundamental Latin American political reality of presidential dominance and an ambivalence over how to react to such dominance.

The next two sections take Argentina and Colombia as historical examples, demonstrating how each country has seesawed back and forth from one paradigm to the other. This Article selects Argentina and Colombia because they both have a strong tradition of public law thought and commentary, and both have lately traversed or continue to traverse periods in which their public law systems prove to be largely dysfunctional. The third section analyzes these historical case studies to illustrate how presidential dominance, coupled with the aforementioned ambivalence, has prevented Latin American nations from conforming to any one paradigm. The last section argues that many of the most influential

60. The French version reads:

Como el personaje mítico de Borges, los administrativistas argentinos hemos logrado imponer nuestro sueño en la realidad. Hemos soñado un derecho administrativo hecho a la imagen y semejanza del francés y, gradualmente, como profesores, como autores, y como legisladores, lo hemos convertido en realidad a despecho de su incongruencia con nuestro sistema constitucional.

1 HÉCTOR A. MAIRAL, CONTROL JUDICIAL DE LA ADMINISTRACIÓN PÚBLICA, at vii (1984).

61. On the development of a balance between the administrative and constitutional domains, as observed in the mature legal systems of France and the United States, see *supra* Part II.

voices for reform err in urging closer conformity to the U.S. paradigm of public law as a basis for stability in Latin America and that only movement towards the French model can help the nations of Latin America to reorganize their public law systems.

A. *Argentina*

Argentina, after an initial period of hesitation, came out squarely in favor of judicial review in the Constitution of 1853.⁶² The Argentine Supreme Court later recognized that implicit in the adoption of language similar to that in the U.S. Constitution was acceptance of the *Marbury v. Madison* doctrine of judicial review.⁶³ Furthermore, in 1862, the legislature expressly conferred jurisdiction to hear administrative cases on all federal courts.⁶⁴ Thus, from the foundation of the modern Argentine Republic until the early twentieth century, judicial review represented the dominant theoretical framework for controlling administrative action.

Nevertheless, beginning in 1905 with Buenos Aires, the provincial governments began to adopt systems more closely modeled on the French conception of administrative autonomy and internal review. This movement towards the French paradigm in provincial administrative law culminated in the adoption in 1941 of the first "modern" provincial administrative code.⁶⁵ The federal legislature

62. At first Argentina alternated between entrusting review of administrative actions to the judiciary and permitting the executive to hear direct appeals along the lines of the French model of internal review. *Compare* Provisional Statute for the Organization of the Government of the State of 1815 (granting the executive the power to hear challenges against administrative actions) with ARG. CONST. art. 123 (1829) (granting the Supreme Court jurisdiction to hear challenges against administrative actions).

63. The relevant articles of the Argentine Constitution of 1853 (Articles 94 to 103) are practically a word-for-word translation of Article III of the U.S. Constitution. 1 MAIRAL, *supra* note 60, at 94-95; Alberto F. Garay, *Federalism, the Judiciary and Constitutional Adjudication in Argentina: A Comparison with the U.S. Constitutional Model*, 22 U. MIAMI INTER-AM. L. REV. 161 (1991). For a discussion of the *Marbury* view of judicial review, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); 1 MAIRAL, *supra* note 60, at 101-02.

64. 1 MAIRAL, *supra* note 60, at 96-97 (discussing Law 27 of 1862).

65. The first of the "modern" provincial administrative codes was that of the province Córdoba. The Córdoba code was even more openly modeled on the French conception of separation of powers than the Buenos Aires code of 1905. While leaving jurisdiction with the ordinary courts, it introduced French forms of action, in particular drawing the distinction fundamental to French administrative law, between the action for annulment (*recours en annulation*) which may be brought by any person showing a legitimate interest, and the action of full jurisdiction (*recours de pleine juridiction*), under which compensation for administrative action may be sought, but which may only be brought by a person who can demonstrate the infringement of a personal right, and even then only following an initial request to the responsible administrative body for compensation. BROWN & GARNER, *supra*

then began to propose separate administrative courts, but such proposals foundered on executive opposition. The debate over such a system came to a standstill in 1960, when the Supreme Court held that administrative courts were constitutional only to the extent that judicial review of their decisions was available.⁶⁶ Proponents of a system more closely modeled on the French one were successful, however, in organizing separate administrative chambers within the federal appellate courts.⁶⁷

This confusion of the French and U.S. systems was further exacerbated by the Administrative Procedure Law of 1972, which introduced a general requirement of exhaustion of administrative remedies and created extremely brief limitation periods. Although these restrictions were modeled on the French system, the Act failed to incorporate the broader rules of standing that French administrative law has traditionally recognized as a counter-balance to its exhaustion provisions and short limitation periods.⁶⁸ For this reason, the Administrative Procedure Law of 1972 has generally been viewed as retrogressive (even by partisans of the French paradigm) and has resulted in renewed calls for the transformation of the administrative chambers into a separate jurisdiction, the procedure and substantive law of which would be more closely modeled on the French system.⁶⁹

B. Colombia

In contrast to Argentina, Colombia began with a system of ad-

note 2, at 101-02, 109-121; 1 MAIRAL, *supra* note 60, at 101-02.

66. Judgment of Sept. 19, 1960 (Fernández Arias v. Poggio), CSJN, 247 Fallos 646, 652 (1960) (Arg.).

67. Appeals from decisions of the administrative chambers of the Federal Court of Appeals can be made to the Supreme Court, but only on matters involving federal law or the federal constitution. 1 MAIRAL, *supra* note 60, at 103-04 (discussing Laws 12,967 of 1947 and 13,278 of 1948).

68. 1 MAIRAL, *supra* note 60, at 105, 110-23 (discussing articles 23 and 27 of the Administrative Procedure Law of 1972). In French administrative law, short limitation periods, generally of sixty days or less, have traditionally been justified as the counterpart to broad rules of standing. The theory is that for the action of annulment, the breadth of protected interests capable of bringing an action is such that one or more affected parties ought to be able to bring an action within sixty days from the promulgation of the challenged text. The same period also applies to actions invoking the full compensatory jurisdiction of the court, but in such instances, the limitation period only runs from the date that the administration refuses to recognize that it has infringed a subjective right of the plaintiff and denies compensation. BROWN & GARNER, *supra* note 2, at 102-04.

69. 1 MAIRAL, *supra* note 60, at 106-07.

ministrative law modeled far more closely on the French system. As early as 1817, Bolívar created the *Consejo de Estado* as part of his liberation campaign.⁷⁰ As in France, the early Council's role was primarily advisory, but over time this advisory function blossomed into a genuine adjudicatory authority. This development was recognized by the Constitution of 1886, which provided for a separate section of the Council to sit as the nation's highest administrative court.⁷¹ The new Colombian Constitution of 1991 has largely preserved this state of affairs. However, just as Argentina has felt the attraction of the French administrative model, Colombia has felt the pull of the U.S. constitutional model. Indeed, the U.S. paradigm of public law has always represented a model for Colombian constitutional law, and each of Colombia's numerous nineteenth century constitutions relied heavily on the U.S. conception of separation of powers.⁷²

The conflict between the two paradigms gathered momentum with the liberal 1910 constitutional reforms which explicitly recognized the Supreme Court's role as "guardian of the integrity of the Constitution," granting the Court jurisdiction to review the constitutionality of laws.⁷³ The *Consejo de Estado* retained jurisdiction to hear all other challenges to administrative acts and decrees; such challenges could be made on constitutional grounds, or any of the grounds recognized by general principles of civil administrative law.⁷⁴ Colombia's new constitution leaves the jurisdiction of the *Consejo de Estado* entirely untouched.⁷⁵ It is the Supreme Court that loses ground to the new Constitutional Court, which assumes virtually the entire constitutional jurisdiction formerly exercised by the Supreme Court.⁷⁶ Indeed, despite the fact that the

70. EDUARDO ROZO ACUÑA, *SISTEMA CONSTITUCIONAL COLOMBIANO* 178-80 (1982).

71. COLOM. CONST. art. 141(3) (1886), reprinted in WILLIAM MARION GIBSON, *THE CONSTITUTIONS OF COLOMBIA* 337 (1948).

72. ROZO ACUÑA, *supra* note 70, at 49.

73. Until this year, this jurisdiction also extended to decrees passed under powers delegated to the executive by congress on an extraordinary basis, or for the making of public sector contracts or concessions, or pursuant to the recommendations of the standing committee on the national economic plan, or finally passed pursuant to the declaration of a state of emergency by the President. CONSTITUCIÓN POLÍTICA DE COLOMBIA 103-06, 175 (Javier Henao Hidrón, ed., 5th ed. 1984); ROZO ACUÑA, *supra* note 70, at 49-50, 168-71.

74. See ROZO ACUÑA, *supra* note 70, at 180; CONSTITUCIÓN POLÍTICA DE COLOMBIA, *supra* note 73, at 152, 177.

75. Articles 236 to 238 of the 1991 Colombian Constitution provide for a jurisdiction identical to that formerly exercised by the *Consejo de Estado* under Articles 141(3) and 216 of the previous constitution.

76. Articles 239 to 245 of the 1991 Constitution provide for the establishment of an

percieved need for an independent Constitutional Court was one of the primary motivations for the latest round of Colombian constitutional reforms, the grip of the French model on the Colombian system of administrative law is so strong that the new Constitutional Court will have no supervisory jurisdiction over decisions of the *Consejo de Estado* involving issues of constitutional law.⁷⁷

C. *The Political Dynamic of Latin America and Its Impact on Systems of Public Law*

The tendency of Latin American public law systems to draw on two disparate paradigms of public law, based on sharply divergent conceptions of the doctrine of separation of powers, reflects the fundamental reality of Latin American political history: the dominant position of the executive branch. Due to the authoritarian pattern of colonial rule, the nature of exploitative economic development, and the tradition of *caudillismo* (fostered by the struggle for independence from Spain and subsequent foreign and civil wars), presidential dominance of politics and government has long been, and remains today, the defining element of the Latin American political experience.⁷⁸ The reaction to this reality has been both complex and ambivalent. There have been frequent calls, and even some attempts, to rein in the powers of the executive. However, the tendency to fall back on a strong executive at

independent Constitutional Court with exclusive and final jurisdiction to hear direct actions challenging the constitutionality of a promulgated law, *see* COLOM. CONST. art. 245(4), or governmental objections to the constitutionality of proposed legislation, *see id.* art. 245(8). The Constitutional Court is also required to review the constitutionality of all legislation decreed by the executive pursuant to the President's emergency powers under Articles 212 to 215. *Id.* art. 245(7). All that remains of the ordinary judiciary's former constitutional role is the jurisdiction to hear cases brought for the protection of constitutional rights under the new action of tutela, *see id.* art. 86, an action for the injunctive protection of an individual's constitutional rights, similar to the *amparo* action existing in other Latin American legal systems. However, even in that case, the decision of the ordinary courts to grant or refuse an order for the protection of the applicant's rights will be subject to review by the Constitutional Court, *see id.* art. 241(9). The Colombian Constitutional Court has not yet begun to function and it is thus unclear what its eventual impact may be. There is, however, little reason to believe that it will result in any kind of fundamental transformation of the Colombian political system. The structure of its jurisdiction in no way challenges the tradition of presidential dominance which is the fundamental defect in Latin American public law systems.

77. On the desire for an independent Constitutional Court as one of the primary motivations for the latest round of Colombian constitutional reform, *see* DIEGO URIBE VARGAS, ESTRUCTURA CONSTITUCIONAL PARA EL CAMBIO 114-35 (1986).

78. Barker, *supra* note 59, at 891.

the slightest hint of crisis is equally strong, as indicated by the recent Brazilian experience with its Constitution of 1988 and the initial popularity in Peru of President Fujimori's coup.⁷⁹ The tendency of Latin American legal systems to waver and move towards incorporating elements of a rival paradigm can be understood in this context as reflecting a double ambivalence: an ambivalence as to the necessity of a strong executive authority, as well as to the methods of controlling such an executive.

The U.S. constitutional paradigm represents, in theory at least, one way of checking presidential power through the external review of executive acts, judged on substantive, exterior criteria contained (again, at least theoretically) within the constitutional text, by an independent judiciary, itself forming a separate branch of government.⁸⁰ The French model of administrative law represents, in contrast, a means by which an organ internal to the executive determines whether executive decisions and pronouncements are consonant with the rule of law.⁸¹

Thus, it would be false to suggest, as one may be all too easily

79. Keith S. Rosenn, *Brazil's New Constitutionalism: An Exercise in Transient Constitutionalism for a Transitional Society*, 38 AM. J. COMP. L. 773 (1990); James Brooke, *Peru's Chief: Every Bit the Emperor*, N.Y. TIMES, Apr. 16, 1992, at A3; Nathaniel C. Nash, *Peru Chief Orders New Mass Arrests*, N.Y. TIMES, Apr. 8, 1992, at A12; Nathaniel C. Nash, *Peru's Basic Problems Won't Be Ordered Away*, N.Y. TIMES, Apr. 12, 1992, at 4(2).

80. Of course, it would be idle to pretend that all the criteria for solving even the most straight-forward constitutional issues are really contained in the Constitution and are actually external to the courts. Such a simple, positivist account is not really viable in any legal domain. The court is and has always been a political organ, reacting to the social and economic exigencies of the time and bringing to bear on its decisions its view of the politics of the moment. RONALD DWORKIN, *LAW'S EMPIRE* 49-73 (1986); H.L.A. HART, *THE CONCEPT OF LAW* 121-32 (1961).

81. It is, of course, possible to question the extent to which the *Conseil d'État*, acting in its adjudicative role, and its subordinate administrative tribunals, can really be seen as an arm of the executive, as opposed to being considered merely a specialized set of courts. Formal analysis leads to the first conclusion, while a functional one points towards the latter. Nevertheless, both disguise the essential reality of the *Conseil d'État's* internal organization and membership. It is crucial to remember that it is staffed not by successful private lawyers and political appointees, but rather by civil servants who will generally have served elsewhere in the executive arm of the administration before coming to sit in judgment on the actions of their colleagues. This understanding of, and affinity with, the position of active administrators is reinforced by the requirement of rotation among the Council's adjudicatory, and drafting and advisory sections, introduced by De Gaulle following the *Canal* affair. See WALINE, *supra* note 7, at 28-31; 1 CHAPUS, *supra* note 12, at 477-87; BROWN & GARNER, *supra* note 2, at 38-39. There is, therefore, a very strong basis for interpreting the French paradigm as an independent arm of the executive sitting in judgment on the active administration, whatever functional similarity the Council may bear to a specialized administrative court.

tempted to do from a common law perspective, that the pull towards the French model simply corresponds to an authoritarian tendency to rely on the executive in times of crisis and to relieve it from the external control of the ordinary courts. In reality, the French paradigm, like the U.S. model, represents an attempt to subordinate executive authority to the rule of law. Indeed, the tendency in countries like Argentina to introduce the French model may have as much to do with concern about the ordinary courts' lack of effectiveness in checking executive excesses as a belief in the need to relieve the executive from judicial interference. Thus, the two rival models must be analogized not to tendencies to check or expand executive power, but rather to the complexity of responses that the aspiration to subordinate the executive to the law has engendered: each provides a theoretical framework for the restraint of unprincipled executive action. In this respect, the continuing debate on the appropriate administrative law model for Latin America is entirely analogous to the debate on whether a presidential or parliamentary system would better fit the needs of Latin American political development.⁸²

What becomes clear when the debate is placed in this context is that there can be no easy answer to the question of which conception of public law is most suitable for the Latin American legal systems. The argument that Latin American nations should adopt

82. The question of whether parliamentarism or presidentialism represents a better form of government for nations attempting to transform themselves into industrialized and developed democracies on the Western European and Northern American model is a hotly debated issue in political science. In Latin America, the debate is complicated by the region's tradition of authoritarian government, so that the question joins the broader one of whether reacting against the tradition of executive dominance or attempting to shape and make use of that tradition represents a better path to genuine participatory democracy. James L. Busey, *Observations on Latin-American Constitutionalism*, 24 *THE AMERICAS* 46 (1967); Carlos Santiago Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 *U. MIAMI L. REV.* 129 (1989). It may be that the best solution would be to blend both approaches. Certainly, the French Constitution of 1958 with its strong president and strong prime minister has ushered in an era of constitutional stability previously unknown in modern French history. The most recent Brazilian Constitution took some steps towards blending the two approaches, but the framers appear to have been too hesitant to insure anything more than friction and mutual recrimination between the two branches. Keith S. Rosenn, *supra* note 79, at 773-89. The challenge is not simply to split power between the executive and the legislative or even between different elements of an executive, such as the president and the government, but to split power in such a way so that both branches must work together to exercise their own powers. In France during the period of *cohabitation* in the mid-1980s, when for the first time one party dominated the assembly and government while the other controlled the presidency, the system proved successful in forcing the parties to work together to achieve their own political goals, thus preventing paralysis and instability. GICQUEL, *supra* note 18, at 585-88.

the U.S. paradigm of a constitutionally-based administrative law because the U.S. conception of separation of powers is strongly embedded in Latin American constitutions misses the point.⁸³ Constitutional and administrative law form a single, interlinking public law domain. Simply to rely on the postulate of constitutional law as the most fundamental law tells us nothing about what the content of that law should be. Thus, in trying to develop for Latin America a system that will achieve the ideal of public law, that is to say, a system in which the exercise of power is subordinated to the principle of legality, it is vital to rethink not only the administrative order, but also and simultaneously the constitutional order.

Given the extent to which the U.S. paradigm of constitutional law relies on the prestigious position that common law courts have occupied for hundreds of years as interpreters and enforcers of public law, it is hard to see how the adoption of this model could be anything but problematic for nations whose positive law and general legal conceptions remain firmly within the civil law tradition. In the nearly two centuries since the establishment of the U.S. paradigm of public law as the dominant model for Latin American constitutionalism, relatively little progress has been made in checking, or even shaping, the reality of executive dominance of government.⁸⁴

This is not a call for an abandonment of the U.S. conception of public law by Latin American nations. Indeed, the U.S. notion of separation of powers is as much a part of the Latin American tradition of constitutional law as it is in the United States. This is a call for experimentation. Given the lack of success in using judicial control of administrative action, it is time to consider whether the real focus of attention should instead be restructuring executive power.

D. The Functional Advantages of the French Model in the Latin American Context

The most interesting possibilities for restructuring Latin American public law systems reside in the internal division of executive power, the prototype of which is found in French administrative law and its development of the *Conseil d'État* into an inde-

83. For such an argument, see 1 MAIRAL, *supra* note 60, at vii-ix, 102-10.

84. Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America*, 22 U. MIAMI INTER-AM. L. REV. 20 (1990).

pendent, executive-branch organ, responsible for assuring the legality of governmental action. This pattern of the internal division of executive power lies at the heart of the current French constitution, which provides for both a strong president and a strong prime minister, and the division of executive power between the two.⁸⁵ Not only has this structure produced a far higher degree of constitutional stability in the last thirty years than at any other moment in modern French history, but it has also permitted the rapid development of a new and popularly legitimate organ of constitutional review, as well as an innovative constitutional jurisprudence on fundamental rights.⁸⁶

The French constitutional system is no more than one model among many, and contains a number of idiosyncrasies that would be inappropriate in the Latin American context.⁸⁷ But the internal division of executive authority, upon which its administrative law is based, may have much to offer Latin American nations. It is no easier to provide a general theory to account for the success of French administrative law in subordinating the exercise of executive authority to the principle of legality than it is to provide such an explanation for the success of U.S. constitutional law in fulfilling the same function. Thus, there is no *a priori* reason to assume that either system represents a better model for the control of executive authority in the Latin American context. Yet, some of the features that have been invoked to explain the success of the French system find a strong echo in Latin American legal systems.

Probably the single most important reason for the success of the *Conseil d'État* lies in its composition. Although the *section du contentieux* functions as a court, it is made up of career civil servants, many of whom join the Council only after a long career in other branches of the administration.⁸⁸ Furthermore, since the 1963 reforms, all members of the *section du contentieux* are periodically assigned to the drafting and advisory sections of the Coun-

85. See AVRIL, *supra* note 18, at 29-32; *Comité National*, *supra* note 58, at 77-79, 149-54.

86. GICQUEL, *supra* note 18, at 564-71, 578-88, 619-837.

87. Given Latin America's unfortunate experiences with state of siege provisions, it is rather frightening to think what uses a Latin American president might make of the vague and extensive emergency powers that Article 16 of the French Constitution of 1958 entrust to the President. GICQUEL, *supra* note 18, at 669-75.

88. The rest are recruited directly from among the top graduates of the National School of Administration (E.N.A.), France's elite graduate school. BROWN & GARNER, *supra* note 2, at 52-53; 1 CHAPUS, *supra* note 12, at 300; WALINE, *supra* note 7, at 148-49.

cil, and members from those sections are similarly assigned to the *section du contentieux*.⁸⁹ It is also common for members of the Council to be seconded to high positions elsewhere in the administration during the course of their careers. The members of the *section du contentieux* thus tend to have an intimate familiarity with not only all aspects of administrative law, but also the political realities of administration. When the actions of a French administrator are reviewed by the Council, the administration thus has no cause to feel that its authority is being challenged by a judge with little understanding of the exigencies of the exercise of administrative power. Rather the administrator is being judged both by an equal, as the judge is a fellow administrator, and a superior, as the Council is comprised of the cream of the civil service.⁹⁰

Another related factor in the success of the Council is its corporate nature. Although members may leave for periods of time to work elsewhere in the administration or to serve as politicians, they generally remain members of the Council throughout their career and are liable to be recalled to resume active service on the Council.⁹¹ These two factors (the Council's respected position within the administration and its own *esprit de corps*) have insured not only the effectiveness of the Council's decisions, but have also contributed to the simplicity and flexibility of the substantive tests employed. The Council's intimate knowledge of administration and its confidence in its own ability to make judgments as to what constitutes good government have enabled it to rest a policy of tough, intrusive review on very general and abstract standards, such as violation of the law and misuse of power.⁹²

The standards of review that the Council has developed flow from its special institutional position. The role of the Council as an organ of review internal to the executive creates a subtle, but vitally important difference in the French administrative law's conception of discretion and the scope of review. Under the common law model, the concept of discretion is the basis for the court's right of review. The court interferes only when the administrator

89. See BROWN & GARNER, *supra* note 2, at 38-39; 1 CHAPUS, *supra* note 12, at 477-87; WALINE, *supra* note 7, at 28-31.

90. BROWN & GARNER, *supra* note 2, at 41-56; 1 CHAPUS, *supra* note 12, at 300-01; WALINE, *supra* note 7, at 148-152.

91. BROWN & GARNER, *supra* note 2, at 54-56; 1 CHAPUS, *supra* note 12, at 301; WALINE, *supra* note 7, at 151-152.

92. BROWN & GARNER, *supra* note 2, at 50-52, 108-14; 1 CHAPUS, *supra* note 12, at 630-76; WALINE, *supra* note 7, at 389-425.

has gone beyond the bounds of discretion.⁹³ Unless a grant of discretion is fettered by substantive criteria provided by the empowering legislation, the only criteria that can logically be implied is reasonableness.⁹⁴ Thus, the entire question for a common law administrative judge generally comes down to a determination of the reasonable boundaries of the relevant administrator's discretion.⁹⁵ Reasonableness forms the overarching standard of review, appearing both in the construction of the discretion and as a substantive criterion.⁹⁶

In the French conception of administrative law, by contrast, discretion enters at a secondary level: as a limitation on the level of review that a French administrative judge would ordinarily exercise. This level of review requires the judge to decide what the *right* administrative decision would have been in the relevant circumstances.⁹⁷ This power of review is conceived of as inherent to the executive, which has vested it in the Council and its subordinate administrative tribunals, and can only be excluded by specific legislative action. Such intrusive review is possible due to its restricted scope. A French administrative judge reviews fully all alleged errors of fact and jurisdiction, procedural improprieties, and instances of bias or improper motivation, but only reviews an administrator's legal characterization of the facts to the extent that the law furnishes criteria by which to judge such characterizations.⁹⁸ To the extent that no such criteria are provided, the administrator has discretion to act, and any decision must be considered a *right* decision, provided the administrator acts in accordance with the facts and the forms called for by the empowering legislation and reaches a decision that is not manifestly erroneous.

The important conceptual difference between taking *reasona-*

93. CRAIG, *supra* note 7, at 240-41, 279-80; KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 142-43, 151-55 (1980); BERNARD SCHWARTZ & H.W.R. WADE, *LEGAL CONTROL OF GOVERNMENT; ADMINISTRATIVE LAW IN BRITAIN AND THE UNITED STATES* 209-16 (1972); WADE, *supra* note 7, at 23-26, 39-44.

94. In the U.S. administrative model, the criterion of reasonableness need not even generally be implied, since the argument can be framed as one of violation of a constitutional right. The difference is purely formal, however, since constitutional limits relevant to administrative action (e.g., due process) tend themselves to incorporate a reasonableness standard. SCHWARTZ & WADE, *supra* note 93, at 206-07, 239-51.

95. CRAIG, *supra* note 7, at 274-76, 289-305; WADE, *supra* note 7, at 36-38.

96. WADE, *supra* note 7, at 388-91, 395-410.

97. Bermann, *supra* note 2, at 206-14.

98. 1 CHAPUS, *supra* note 12, at 660-69.

bleness and taking *rightness* as the standard of review tends to be disguised by the fact that under the French system the fewer the criteria provided by the empowering legislation, the greater the discretion that must be imputed to the administrator and the more likely it is that a reviewing judge will recognize the decision of the administrator as a right decision. Of course, the administrator's decisions are always subject to the minimum review for errors of fact and jurisdiction, procedural improprieties, instances of bias or improper motivation, and manifest legal error in the characterization of the facts.⁹⁹ Thus, in both systems, the greater the degree of discretion accorded, the more review tends towards a minimum reasonableness standard. Nevertheless, this functional similarity must not be allowed to disguise the essential difference in conceptions of discretion because it has a significant impact on the procedure and operation of each system's administrative tribunals.

Because the actions of French administrators are judged by a standard of rightness rather than reasonableness, the administrative tribunals tend to avoid adversarial proceedings, take a far more active role in gathering evidence, and are, generally speaking, less patient with vague justifications of the need for administrative freedom and more ready to second guess their executive-branch colleagues. In contrast to the substantial evidence rule that reigns in one form or another throughout the common law world, and which requires the private party to gather and present sufficient evidence to make an arguable case that the administrator's conclusions lack a reasonable factual basis, French administrative tribunals take a far more active role in investigating the facts.¹⁰⁰

In the French administrative system, a suit filed by a private plaintiff is assigned to a sub-section whose president will in turn assign it to a member of the sub-section (the reporter) for *instruction*—the formal process by which the tribunal itself investigates the underlying facts of the case. The reporter will apprise the relevant governmental department of the complaint and invite its response within a fairly brief period of time. This response will then be made available to the plaintiff who has a similarly brief period in which to make a written response. If these written statements fail to resolve all the issues of fact initially raised, the reporter has full power to order depositions or an expert inquiry into technical

99. 1 CHAPUS, *supra* note 12, at 634-59; Bermann, *supra* note 2, at 228-44.

100. CRAIG, *supra* note 7, at 341-43; WADE, *supra* note 7, at 341-44; Bermann, *supra* note 2, at 199-201.

aspects of the case. The reporter will then begin to draft his report which will be considered by the full sub-section, which either adopts it or requests the reporter to redraft it.¹⁰¹

Following adoption, the report is passed on to the member of the sub-section who is acting as the *commissaire du gouvernement* in the case. The *commissaire* is responsible for representing the government's interest in the harmonious development of the law. The *commissaire* will consider whether the case raises any difficult or novel points of law in deciding to present a brief and oral argument.¹⁰² Once the *commissaire* has either prepared the brief or decided to make no submission, the same sub-section, generally sitting together with one or more sub-sections, depending on the complexity and importance of the case, will reach a judgment on the basis of the report and the *commissaire's* conclusions.¹⁰³

The proceedings thus remain essentially inquisitorial throughout the hearing of the case. This remains true, even when, as is generally the case, the Council is hearing the suit as an appeal from a decision of an appellate administrative court which itself hears appeals from first-instance administrative tribunals. When sitting as an administrative tribunal of last resort, the Council continues to follow the same basic procedure, even though the lower administrative tribunals follow substantially similar procedures and a report on the underlying facts is already available. The Council is not precluded from re-examining the facts of the case and revising the lower court's findings.¹⁰⁴ This feature of the French system enshrines as a matter of procedure the critical attitude towards executive action that has been decisive in the success of the French model of administrative law. Commentators are unanimous in maintaining that French administrative judges hold their executive-branch colleagues to a significantly higher standard of principled decision-making.¹⁰⁵

101. RENÉ CHAPUS, *DROIT DU CONTENTIEUX ADMINISTRATIF* 335-70 (1982).

102. BROWN & GARNER, *supra* note 2, at 64.

103. CHAPUS, *supra* note 101, at 409-26.

104. 1 CHAPUS, *supra* note 12, at 496.

105. Bermann, *supra* note 2, at 206; Edwin W. Borchard, *French Administrative Law*, 18 IOWA L. REV. 133, 135 (1932); Léon Duguit, *The French Administrative Courts*, 29 POL. SCI. Q. 385, 392-93 (1914); M. Letourneur, *Le contrôle de l'administration par le juge administratif*, 1964 PUB. L. 9; Prosper Weil, *The Strengths and Weaknesses of French Administrative Law*, 1965 C.A.M.B. L.J. 242.

V. CONCLUSION

The functional theory of comparative public law that this paper has developed comes down to the proposition that a system of public law is only as effective as the institutional bodies that take ultimate responsibility for it. The success of the Anglo-American model of public law depends on the special historical position of the judiciary, a status that the ordinary judiciary of civil law countries have never achieved. Thus, the attempt to incorporate the U.S model of judicial review as a means of controlling the executive has proven largely unsuccessful. The French model of internal review by a separate arm of the executive branch is more compatible with the civil law traditions of Latin American countries and therefore, may be a more effective means of restraining unprincipled executive action.

In Latin American legal systems, the civil service, particularly its upper echelons, generally enjoys a prestige as high as that of its French counterpart. Furthermore, corporate bodies and corporatism have long flourished as a mode of governance in Latin America.¹⁰⁶ Even where the judiciary has at times been able to achieve sufficient independence to exercise its constitutional jurisdiction, Latin American countries have tended to use the Anglo-American concept of reasonableness to fashion weak, unintrusive standards of review that simply do not represent an adequate check on executive authority.¹⁰⁷

106. Nino, *supra* note 82, at 141-46.

107. The standards of review adopted by the Argentine courts in the field of petitions for habeas corpus and *amparo* provide an excellent illustration of this tendency. Although the Supreme Court has asserted its jurisdiction to review the reasonableness of both executive suspension of constitutional rights during a state of siege, *see* Judgment of May 22, 1959 (Antonio Sofia), CSJN, 243 Fallos 504, 513 (1959) (Arg.), and, after some hesitation, of detention under the President's Article 23 emergency powers, *see* Judgment of Aug. 9, 1977 (Carlos Mariano Zamorano), CSJN, 298 Fallos 441, 443 (1977) (Arg.), it has failed, to date, to adopt a standard of reasonableness that represents a real check on the unfettered discretion of the executive to order a detention. In *Zamorano*, the court accepted as unreviewable any colorable assertion by the executive that the person being held was a threat to national security. In the recent case of *Granada*, Judgment of Dec. 3, 1985 (Jorge Horacio Granada), CSJN, 307 Fallos 2304 (1985) (Arg.), the majority hewed narrowly to the same line, ignoring provisions in the Habeas Corpus Law of 1984 (passed after the fall of the military government) that pointed towards a far broader and more intrusive standard of review (particularly Article 4(1) and (2)). Cynthia A. Lynch, *Constitutional Ambiguity and Abuse in Argentina—The Military Reign 1976-1983*, 6 N.Y.L. SCH. J. HUM. RTS. 353 (1989); John P. Mandler, *Habeas Corpus and the Protection of Human Rights in Argentina*, 16 YALE J. INT'L. L. 3 (1991).

Moving away from a conception of public law litigation as an adversarial proceeding designed to establish the reasonableness of administrative action, and towards one that places on the tribunal the responsibility for investigating the correctness of the executive action, could lead to far more intrusive standards, and even more crucially to a critical culture of review among those charged with maintaining an effective public law system. Finally, it is important to note that, unlike the U.S. paradigm of public law, the success of the French model of the internal division of executive power and self-review does not depend on constitutional stability. Indeed, the *Conseil d'État* has flourished in its absence.¹⁰⁸

The French paradigm of public law can no more be written off in the Latin American context than can that of the United States. The challenge is to look to the goal behind the U.S. conception of separation of powers and not to get bogged down in the means adopted by the U.S. Constitution. Perhaps no one more eloquently captured this lesson, or would today be more ready to recognize the possibilities implicit in dividing executive power from within along the lines of the French model of public law, than the author of *The Federalist* No. 51:

To what expedient then shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.¹⁰⁹

108. Just because it is clear that constitutional instability failed to hinder the development of either the *Conseil d'État* or of French administrative law in general does not mean that it would be correct to assume that such instability actually fostered their growth. Although the absence of a developed constitutional domain insured that the domain of administrative law would be a broad one, the French Constitution of 1958 achieved continued constitutional stability and continued prosperity for the *Conseil d'État* by carrying forward this pattern of dividing the executive powers between a strong president and a strong prime minister. 1 CHAPUS, *supra* note 12, at 298-305.

109. THE FEDERALIST No. 51, at 264 (James Madison or Alexander Hamilton) (Max Beloff ed., 1987).