

Stanford Law School

Marginalization and Myth: The Corporatist Roots of France's
Forgotten Elective Judiciary

Amalia D. Kessler
Stanford University

Research Paper No. 1470271

Stanford Public Law and
Legal Theory
Working Paper Series

Stanford Law School
Crown Quadrangle
Stanford, California 94305

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection
<http://ssrn.com/abstract=1470271>

Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary

Amalia D. Kessler*
Stanford University

Keywords:

French Judiciary
Civil-Service vs. Elective Judiciary
Corporatism
Extraordinary Jurisdiction
Commercial Courts
Labor Courts
Justices of the Peace
Administrative Law and Courts
Conciliation
History and Myth

Category:

Comparative Legal History

Address: Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610

Phone: (650) 725-5800 (Work)
(650) 948-4439 (Home)

Email: akessler@law.stanford.edu

Abstract:

* Professor of Law & (by courtesy) History, and Helen L. Crocker Faculty Scholar, Stanford University. All translations in this article are my own, unless otherwise noted. I am grateful for the many helpful comments and questions that I received from Ruth Gordon, Dan Ho, Bernie Meyler, Mathias Reimann, Teemu Ruskola, and Chaim Saiman, as well as from an anonymous reviewer and from the participants at the Villanova Law Faculty Workshop.

When American lawyers think of the French judiciary they imagine a system radically different from their own—a system, in short, of bureaucratized justice. Indeed, the French system is widely viewed as typifying the European judicial model—made perhaps most famous through John Langbein’s much cited article on *The German Advantage in Civil Procedure*. But while this bureaucratized model of the French judiciary is, insofar as it extends, accurate, it is also woefully incomplete and thus misleading. To depict the French judicial system in these terms is to ignore a vital component of the system (including especially the commercial and labor courts) that, while very different from the American model, is also premised on an elective judiciary. In this other, ignored component of the French judicial system, judges lack formal judicial (and usually legal) training of any kind and are elected mid-career to serve temporary terms of office. Those thus elected to office belong to the particular professional (and social) groups whose disputes they will resolve and which, in turn, are responsible for electing them. As a result, such judges are expected to have the substantive expertise (and social and political legitimacy) necessary effectively to resolve disputes among group members.

Strikingly, while France’s commercial and labor courts play a fundamentally important role in the contemporary French legal system, they have been marginalized not only within the comparative literature (largely written by American scholars), but also within standard French textbook descriptions of the French judiciary. This article provides the first account of this remarkable erasure of the French elective judiciary from the (transatlantic) scholarly literature and then addresses how this strange set of affairs came to pass. Tracing the roots of France’s elective judiciary to a set of Old Regime institutions described by contemporaries as “extraordinary courts,” the article shows that these courts were originally understood to be a form of administrative or regulatory institution, and thus to serve a clear function within the broader judicial framework. But for a variety of interrelated reasons—all stemming from the revolutionary turn against corporatism—nineteenth-century jurists ended up largely ignoring them, resulting in their marginalization within the standard account of the French judiciary. The ongoing inability to acknowledge the corporatist roots of these institutions helps explain the awkward, embattled position that they currently occupy within the French judicial landscape—including, in particular, the repeated calls for their abolition. At the same time, the failure to come to grips with history has contributed to an unfortunate narrowing of self-reflective and critical vision on the part of American comparative legal scholars, even while helping to generate a myth of the French judiciary that has shaped the professional identities of generations of lawyers, judges, and jurists on both sides of the Atlantic.

I. Introduction: The Odd Erasure of France’s Elective Judiciary

In the classic case of *Hilton v. Guyot*¹—decided by the United States Supreme Court in 1895—American business partners argued against the enforcement of a judgment obtained against them in a French commercial court. Among their arguments was that they had been denied “a full and fair trial” in the French proceedings because the court issuing the judgment was “a tribunal whose judges were merchants, ship captains, stockbrokers, and persons engaged in commercial pursuits, and of which . . . [the party in interest whom the plaintiff represented] had been a member shortly before the commencement of litigation.”² For American scholars of comparative and international law, *Hilton* stands to this day as one of the Supreme Court’s definitive statements on the recognition and enforcement of foreign judgments, though few remember the details of the parties’ many claims and defenses. As it turns out, however, the American defendants’ complaints about the French commercial court did not simply reflect (the strategic deployment of) parochial American conceptions of procedural justice. The complaint that the French court consisted of merchant judges lacking any legal training, who sat in judgment over their colleagues and friends—thus opening the door to mutual backscratching and corruption—actually echoed longstanding French anxieties about their own judicial institutions. Ever persistent, these anxieties continue to haunt the French legal landscape to this day. And as argued below, they have resulted in a remarkable tendency to marginalize the commercial courts within the standard (French) juristic account of the French judiciary—a tendency that has, in turn, been mirrored in American comparative scholarship.

When American legal scholars and practitioners think of the French judiciary they imagine a system radically different from their own in which the commercial courts have little, if

¹ 159 U.S. 113 (1895).

² *Id.* at 116.

any place—a system, in short, of professional, bureaucratized justice. Indeed, the French system is widely viewed as typifying the European judicial model—made perhaps most famous through John Langbein’s much cited article on *The German Advantage in Civil Procedure*.³ In this bureaucratized system, law-school graduates seeking to become judges pursue specialized judicial training and are then selected for judicial posts based exclusively on their academic records. Thereafter, they spend their entire careers as judges, advancing gradually through the bureaucratic ranks in accordance with the dictates of seniority and merit-based review. In sharp contrast, in the American system, practicing lawyers are selected to serve as judges mid-career through a political process (of election or appointment).

While the bureaucratized model of the French judiciary is, insofar as it extends, accurate, it is also woefully incomplete and thus misleading. To depict the French judicial system in these terms is to ignore a vital component of the system that, while very different from the American model, also relies on an elective judiciary. In this other, ignored component of the French judicial system, judges lack formal judicial (and usually legal) training of any kind and are elected mid-career to serve temporary terms of office. Those thus elected to office belong to the particular professional (and social) groups whose disputes they will resolve and which, in turn, are responsible for electing them. As a result, such judges are expected to have the substantive expertise (and social and political legitimacy) necessary effectively to resolve disputes among group members. This forgotten component of the French judiciary is perhaps best represented by the commercial courts, or *tribunaux de commerce*—one of which entered the judgment at issue in *Hilton*. Dating back to the mid-sixteenth century, these courts are a uniquely longstanding feature of the French judicial landscape, whose absence from traditional depictions

³ John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985).

of this landscape is therefore all the more puzzling. In addition, however, there are a number of other institutions that come within this electoral model of justice, including perhaps most importantly, the labor courts, or *conseils de prud'hommes*, and at least in the early years of their existence, justice of the peace courts, known first as bureaus of conciliation (*bureaux de conciliation*) and later simply as *justices de paix*.⁴

These forgotten courts play a fundamentally important role in the contemporary French legal system. While the justice of the peace courts were abolished in 1958, statistics released by the French Ministry of Justice in 2008 reveal that there are 191 commercial courts in France and 270 labor courts.⁵ To put these numbers in context, consider how they compare to the number of courts fitting the traditional, bureaucratized model of justice, of which there are two main types: *tribunaux de grande instance* (courts of general jurisdiction) and *tribunaux d'instance* (a kind of small claims court staffed by judges of the *tribunaux de grande instance*).⁶ There are 181 *tribunaux de grande instance*⁷ and 473 *tribunaux d'instance*.⁸ Thus, there are more commercial courts alone than there are *tribunaux de grande instance*, and the combined total of commercial

⁴ France also has a set of hybrid institutions, staffed by a combination of legally trained, judicial bureaucrats and lay, elected judges. These include, for example, the *tribunaux paritaires des baux ruraux*, or rural lease courts, which address disputes between landlords and tenants concerning agricultural leases and are staffed by an ordinary, civil-service judge and four lay judges (two elected by the landlords and two by the tenants). John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757, 1762-63 (1988). Since these courts are dominated by judges from the ordinary, civil-service bureaucracy, they are distinct from the elective judiciary on which I focus in this article.

⁵ MINISTÈRE DE LA JUSTICE (FRANCE), ANNUAIRE STATISTIQUE DE LA JUSTICE 41, 43 (2008), available at http://www.justice.gouv.fr/art_pix/1_stat_anur08_20081013.pdf [hereinafter *Annuaire statistique*].

⁶ The *tribunaux d'instance* have jurisdiction over property disputes under a certain value and over a hodgepodge of other matters, such as disputes over rental agreements and debt collection. See CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 57-60 (2d ed. 1996); ANDRÉ POUILLE, *LE POUVOIR JUDICIAIRE ET LES TRIBUNAUX* 324 (1985) (describing the *tribunal d'instance* as a “court specializing in small matters”).

⁷ *Annuaire statistique*, *supra* note 5, at 31.

⁸ *Id.* at 35.

and labor courts amounts to more than two-thirds of the total number of bureaucratically structured courts authorized to adjudicate basic civil and criminal matters.

Similarly, as of 2006, the most recent year for which there are available statistics,⁹ the commercial courts heard a total of 222,468 new cases and the labor courts 198,455 new cases.¹⁰ In the same year, the *tribunaux de grande instance* heard a total of 943,597 new cases and the *tribunaux d'instance* 614,480 new cases.¹¹ While the grand total of cases heard in the bureaucratically structured courts is, not surprisingly, significantly higher than that heard in the commercial and labor courts combined, the latter is not insignificant. Indeed, the combined total of cases heard in the commercial and labor courts in 2006 is more than one-quarter of the total heard in the bureaucratically structured courts. Moreover, numbers alone do not suffice to reveal the significance of an institution. The cases that come before the commercial and labor courts concern matters of vital social significance—namely, commercial transactions and employment disputes respectively.¹² Thus, by any measure, it is clear that the commercial and labor courts are crucial components of the French judicial system.

But while these courts play a vital role in the French legal system, they do not fit the standard depiction of France's bureaucratized model of justice. As a result, their existence has been largely ignored—and strikingly, not only by American comparative scholars trying to make sense of the French judicial system,¹³ but also by the French themselves. Standard French texts

⁹ For reasons that are unclear, statistics concerning the commercial courts (unlike the labor courts, the *tribunaux de grande instance* and the *tribunaux d'instance*) actually date from 2005, rather than 2006. *Id.*, at 43, 349-52.

¹⁰ *Id.* at 41 (discussing labor courts); *id.* at 43 (discussing commercial courts).

¹¹ *Id.* at 31 (discussing *tribunaux de grande instance*); *id.* at 35 (discussing *tribunaux d'instance*).

¹² DADOMO & FARRAN, *supra* note 6, at 63-64.

¹³ See, for example, John Merryman's (now co-authored) classic text, *The Civil Law Tradition*, which mentions only in passing the existence of distinct commercial courts and claims that French judges are selected and promoted as "civil servants, functionaries." JOHN MERRYMAN &

depicting the national judicial system of course acknowledge the existence of commercial and labor courts, but they make no attempt to explain how they relate to the traditional, bureaucratized model of the French judiciary.¹⁴ In classical continental fashion, the introductory sections of such books tend to be devoted to a broad, highly abstract overview of the nature and function of the judiciary and the principles on which it is based. Among these are principles of equality, hierarchy, and independence that fit at best uneasily with core structuring principles of the commercial and labor courts and thus lead authors to base their account of the French judiciary on the purposeful marginalization of these institutions. For example, in his *Institutions judiciaires*, law professor Roger Perrot opens his analysis with a discussion of the critical importance of equality before the law, a principle that mandates that “every person has an equal right to be judged by the same courts and according to the same rules of procedure without the least discrimination.”¹⁵ This principle he then observes cannot be easily reconciled with the existence of specialized commercial and labor courts before whom only certain kinds of disputants regularly appear. Such courts might pose a threat to the principle of equality before the law to the extent that they foster a return to an Old Regime corporatist mentality in which certain types of persons are entitled to distinctive privileges enforced by particularized judicial institutions before which only they are authorized to appear. Accordingly, vigilance is ever necessary to ensure that they not promote “the rebirth of a ‘class-based justice’ [*justice de*

ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 35, 87, 147-48 (3d ed. 2007).

¹⁴ Such texts acknowledge only one linkage between the elective judiciary and the bureaucratized courts—namely, the appeals process. (Commercial- and labor-court judgments over a certain value may be appealed to the *cours d’appel*, or appeals courts, staffed by judges of the ordinary, civil-service bureaucracy.) ROGER PERROT, *INSTITUTIONS JUDICIAIRES* 59 (9th ed. 2000), 136-44; POUILLE, *supra* note 6, at 226-28.

¹⁵ PERROT, *supra* note 14, at 59.

classe’]” devoted to “the systematic defense of particular social interests stemming from the status of the litigants.”¹⁶

Along similar lines, Perrot has difficulty reconciling his discussion of hierarchy—identified as a core structuring principle of the judiciary—with the fact of the commercial and labor courts’ existence. Judicial officers, he observes, are “civil servants,” carefully ranked in relation to one another so as to facilitate a system of bureaucratic supervision and evaluation that can then be “taken into account in a possible promotion.”¹⁷ As is true of his analysis of the principle of equality, however, the commercial and labor court judges must be exempted from this otherwise applicable framework. As Perrot explains, his account of the fundamental importance of hierarchy in structuring the French judiciary must “put to the side judges who do not operate within the public bureaucracy [*fonction publique*] (judges of the commercial courts, labor courts, etc.).”¹⁸

And, in the case of judicial independence, yet another foundational principle, the commercial and labor courts somehow disappear entirely from Perrot’s analysis. Independence, he argues, is necessary to promote rule of law, but must be balanced against the danger of the arbitrary exercise of authority. This danger, he observes, is that much more real due to the fact that “judges exercise a power whose legitimacy is not based on elections.”¹⁹ In reality, of course, the commercial- and labor-court judges enjoy precisely such electoral legitimacy, but otherwise marginalized in Perrot’s account, they at this juncture simply disappear.

To state that the commercial and labor courts are thus marginalized in (and at times erased from) standard French accounts of the French judiciary is not to suggest that they are

¹⁶ *Id.* at 60.

¹⁷ *Id.* at 76.

¹⁸ *Id.* at 75.

¹⁹ *Id.* at 38.

ignored entirely. Textbook accounts like Perrot's do, of course, acknowledge the existence of such institutions and provide a basic outline of such key issues as how these courts are structured, and in particular how their judges are elected and disciplined. But no attempt is made to relate such descriptive exercises to the overarching account of the nature and purposes of the French judiciary set forth in the book's introductory sections. Thus, to give but one example, in his later account of the "status of commercial-court judges," Perrot begins by acknowledging that it is "quite particular" and "has nothing in common with that of career magistrates."²⁰ Having so stated, he then makes no attempt to link his account of their (distinctive) status with that of the ordinary, civil service bureaucrats who provide the basis for his introductory discussion of the French judiciary. Instead, he simply ignores the glaring divide between the traditional model and the fact of the commercial and labor courts' existence.

When a rare text does venture into the realm of commentary, it tends to emphasize the problematic disjunction between model and practice, rather than to offer any kind of alternative or supplementary account of the French judiciary that would justify and explain the purpose and function of the elective judiciary. Consider in this regard *Le pouvoir judiciaire et les tribunaux*, another textbook account of the French judicial system, authored by law professor André Pouille. Pouille describes the basic, institutional mechanics of how commercial and labor courts function and then proceeds to bemoan the fact that their judges are elected to office. Implicitly drawing on the standard bureaucratized model of the French judiciary as a point of comparison, he observes that "[t]his [electoral] approach [to judicial selection] happily remains exceptional" because "in reality, the election of judges results in serious disadvantages."²¹ These disadvantages include most importantly the fact that (1) "elections do not enable the recruitment

²⁰ *Id.* at 113.

²¹ POUILLE, *supra* note 6, at 55.

of judges having the requisite legal knowledge; [and] elected judges thus have a tendency to judge according to equity—which is an often arbitrary notion—rather than according to law;” and that (2) “the judge becomes dependent on those who elect him [*ses mandats*]; which is the intrusion of politics into the courtroom.”²² Thus, in Pouille’s representative text, the distinctive features of the commercial and labor courts are depicted as failing to comply with the bureaucratized model of French justice and with this model’s goals of promoting expert, equal, and politically neutral justice.

As Perrot and Pouille’s accounts of the commercial and labor courts suggest, the French legal establishment remains deeply uncomfortable with institutions whose very existence seems to challenge core tenets of the standard bureaucratic model of the judiciary. That core aspects of the French judicial system would have critics from within the legal establishment is not in itself surprising. After all, to draw on a parallel American phenomenon, the widespread election of state-court judges has been frequently criticized by American legal scholars. But while much criticized, this practice also has vocal defenders, who assert that it fully comports with certain core structural values of the American legal system—including, most importantly, a commitment to ensuring the democratic accountability of all governmental officers.²³ In contrast, within the French legal establishment, one is hard pressed to find accounts of how the commercial and labor courts can be viewed as comporting with core values—and, as a result, these institutions tend to be marginalized or criticized in the manner that I have described. Moreover, to the extent that commercial and labor courts have received sustained (and favorable) scholarly attention, this has

²² *Id.*

²³ See, e.g., Michael R. Dimino, Sr., *The Worst Way of Selecting Judges—Except All the Others That Have Been Tried*, 32 N. KY. L. REV. 267, 303 (2005); *The Debate Over Judicial Elections and State Court Judicial Selection*, 21 GEO. J. LEGAL ETHICS 1347, 1379 (2008) (comments of Michael DeBow).

been from one of two types of academics—specialists in commercial and labor law, and social scientists—neither of which is particularly interested or well positioned to consider the place of such institutions within the broader judicial framework. Focusing exclusively on commercial or labor courts, specialists tend by professional custom to treat these institutions in isolation and thus make no effort to assess their role within the judicial structure as a whole.²⁴ And while a number of historians, sociologists and anthropologists have been intrigued by the alternative (non-elite) conception of justice that these institutions appear to embody, they lack the knowledge (and interest) necessary to address the place of this alternative conception of justice within the broader French judicial system.²⁵ As a result, the commercial and labor courts, though playing a vital legal and social function, remain the ignored misfits of the French judiciary.

How did we arrive at this strange set of affairs? And why should we care? Section II begins the inquiry, tracing the roots of France’s present-day elective judiciary to a broad set of Old Regime institutions, commonly described by contemporaries as “extraordinary courts.” Old Regime jurists, unlike their modern-day counterparts, had a precise understanding of the nature and purpose of these courts. In particular, they defined them as a type of administrative or regulatory institution, in the broad sense that they were designed to rationalize some particular aspect of socio-economic activity. Jurists thus understood these courts to serve a clear function within the larger judicial framework—though one that was demonstrably less important (and honorable) than that of the “ordinary courts” of general, civil jurisdiction.

²⁴ See, e.g., ROLAND LE ROUX-COCHERIL, *LES NOUVEAUX CONSEILS DE PRUD’HOMMES*, (2d ed. 1981); GEORGES RIPERT, *TRAITÉ DE DROIT COMMERCIAL* (René Roblot ed., 14th ed. 1991).

²⁵ See, e.g., PIERRE CAM, *LES PRUD’HOMMES: JUGES OU ARBITRES?: LES FONCTIONS SOCIALES DE LA JUSTICE DU TRAVAIL* (1981); *LES PRUD’HOMMES: ACTUALITÉ D’UNE JUSTICE BICENTENAIRE* (Hélène Michel & Laurent Willemez eds., 2008); *LA JUSTICE AU RISQUE DES PROFANES* (Hélène Michel & Laurent Willemez eds., 2007); *LA JUSTICE DE PROXIMITÉ EN EUROPE: PRATIQUES ET ENJEUX* (Anne Wyvekens & Jacques Faget eds., 2001).

Section III explores how, for a variety of interrelated reasons, the French Revolution served to undermine this long established understanding of the function of the extraordinary courts. The revolutionary commitment to equality before the law, and thus to eradicating France's corporatist past, led to strong opposition to the existence of any courts of limited, specialized jurisdiction. Accordingly, while certain extraordinary courts managed to survive into the nineteenth century—and indeed, were even created after 1789—these were from the outset considered to be of questionable legitimacy. Such concerns were exacerbated, moreover, by the fact that the extraordinary courts were modeled directly on—and thus structured much like—a number of Old Regime corporatist institutions. At the same time, the revolutionary turn against corporatism also manifested itself in the emergence of a strong separation between the private and public spheres, such that the notion of an administrative jurisdiction could no longer encompass the kinds of disputes between purely private individuals that had once come within the purview of the Old Regime's extraordinary (administrative) courts. Thus, in the post-revolutionary era, the once clear understanding of the purpose served by such institutions was lost, and they came to be marginalized within—and, indeed, largely erased from—the standard juristic account of the French judiciary.

Section IV examines the consequences of this marginalization. The corporatist origins of the commercial and labor courts, which nineteenth-century jurists refused to recognize, have continued to haunt these institutions to this very day, leading to repeated (though as yet unsuccessful) calls for their abolition. In this sense, the inability to come to grips with history helps explain the awkward, embattled position that these courts currently occupy within the French judiciary. At the same time, the marginalization of the commercial and labor courts within the standard account of the French judiciary has resulted in the failure of American

comparative law scholars properly to appreciate the complexity of the French judicial landscape. And this failure, in turn, has had the unfortunate consequence of limiting self-reflective inquiry of the kind that might lead to meaningful critique and reform. But for all its flaws—and indeed, precisely because of these—the standard account of the French judiciary has attained the status of a myth, and as such, it has helped to shape the professional identities of generations of lawyers, judges, and jurists on both sides of the Atlantic.

II. The Old Regime Conception of Extraordinary Courts as Administrative or Regulatory Institutions

To the (very limited) extent that commercial and labor courts have been assigned a place within the current judicial landscape, this has been through their categorization as “*juridictions extraordinaires*” or extraordinary courts. This phrase might be translated as “courts of limited jurisdiction,” but to do so misses an important nuance—namely, that these courts not only possess limited jurisdiction, but are also viewed as being quite literally out of the ordinary. They fall, in short, outside of the norms of the French judicial structure.

The concept of an extraordinary jurisdiction dates back a great many centuries to the law of ancient Rome,²⁶ but the term first came to be used in France during the Old Regime, as a shorthand for designating a species of administrative or regulatory jurisdiction. While there are histories of French administrative law that explore its Old Regime origins, these are focused on elaborating the genealogy of modern administrative jurisdictions, as these first took root with the

²⁶ The fascinating (and as yet untold) history of the concept of extraordinary jurisdiction—as it first emerged in Rome and later shaped the development of various European legal systems—extends well beyond the scope of this paper. As concerns its initial, Roman origins, see HANS JULIUS WOLFF, *ROMAN LAW: AN HISTORICAL INTRODUCTION* 72-73, 84-86 (1976); ANDRÉ GIFFARD, *LA “CONFESSIO IN IURE,” ÉTUDIÉE SPÉCIALEMENT DANS LA PROCÉDURE FORMULAIRE* 185-86 (1900); A.H.J. Greenidge, *Historical Introduction*, in *GAI INSTITUTIONES OR INSTITUTES OF ROMAN LAW BY GAIUS*, at xlviiii-xlix (Edward Poste trans., E.A. Whittuck ed., 4th ed. 1904).

establishment of Napoleon’s Council of State.²⁷ In this sense, to examine the Old Regime notion of an extraordinary court is to uncover an alternative model of administrative law—one that failed to survive the French Revolution and has thus been all but forgotten. It is by recovering this forgotten history of administrative law—of the path not taken—that we can begin to shed light on the odd, orphaned status of France’s modern-day elective judiciary.

Old Regime jurists identified a broad range of royally established courts as courts of extraordinary jurisdiction. Key among these were the predecessors of the present-day commercial courts—namely, the *juridictions consulaires*, or merchant courts. But there were also many other institutions deemed to be extraordinary courts. And, at first glance, the various institutions that together constituted the Old Regime’s extraordinary courts seem to modern eyes to share little, if anything, in common. As a group, they exercised a broad array of types of jurisdiction, including what we today would view as civil, criminal, and administrative jurisdiction.

The extraordinary courts were highly specialized institutions that arose out of the medieval and early modern monarchy’s increasing efforts to administer various aspects of social and economic life. But in the world of the Old Regime, in which the distinction between the public and the private had yet fully to emerge—in which Louis XIV allegedly declared that “l’état c’est moi”—the nature and scope of such administrative courts differed significantly from that of administrative courts today. As currently structured and conceptualized, French administrative courts focus primarily on claims made by private individuals or entities against state agents for misapplication of the law. Such suits thus typically entail a contest between

²⁷ See L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW* 45 (5th ed. 1998); see generally JEAN-LOUIS MESTRE, *INTRODUCTION HISTORIQUE AU DROIT ADMINISTRATIF FRANÇAIS* (1985).

private parties and public officials.²⁸ In an Old Regime world, however, in which numerous governmental officers actually owned (and indeed could bequeath) their offices as a form of private property, the line between state and private actor was far more fluid. Accordingly, the monarchy's extraordinary courts were conceived as a type of administrative or regulatory jurisdiction in the broad sense that they were designed to rationalize some particular aspect of socio-economic activity—and, in the process, to augment and centralize state power. But unlike today's administrative courts, they did not focus exclusively on matters brought by private parties against state agents. Instead, they often adjudicated disputes between private parties (which would today be viewed as falling squarely within the civil jurisdiction of the private, non-administrative courts) or suits brought by public officials to enforce compliance with the law (which would today come within either the civil or criminal jurisdiction of the private courts).

Consider, for example, the following five Old Regime extraordinary courts: (1) the *greniers à sel*, which in addition to storing salt, adjudicated disputes over application of the *gabelle*, the much despised tax on salt consumption;²⁹ (2) the *élections*, which adjudicated disputes concerning *tailles* (the primary form of direct tax) and *aides* (sales taxes);³⁰ (3) the *eaux et forêts*, which enforced regulations and resolved disputes concerning rivers and forests,

²⁸ In thus focusing primarily on claims by private parties against the state, French administrative courts differ markedly from their English and American counterparts, many of which also address matters of dispute between private parties (such as workers' compensation). BROWN and BELL, *supra* note 27, at 59 (noting, for example, that "French eyebrows are . . . raised at [the English] classification of rent or industrial tribunals as administrative; courts deciding issues between landlords and tenants or employers and employees are, to the French, essentially civil").

²⁹ 4 ENCYCLOPÉDIE MÉTHODIQUE, OU PAR ORDRE DE MATIÈRES: JURISPRUDENCE 816 (1784) (entry for "grenetier"); *id.* at 817 (entry for "grenier à sel"); M. MARION, DICTIONNAIRE DES INSTITUTIONS DE LA FRANCE, XVII^E-XVIII^E SIÈCLES 247-50 (1993) (entry for "Gabelle"); *id.* at 269 (entry for "Greniers à sel").

³⁰ LÉON BOUCHARD, SYSTÈME FINANCIER DE L'ANCIENNE MONARCHIE 25 (1981); MICHAEL S. KIMMEL, ABSOLUTISM AND ITS DISCONTENTS: STATE AND SOCIETY IN SEVENTEENTH-CENTURY FRANCE AND ENGLAND 41 (1988); MARION, *supra* note 29, at 198-201 (entry for "élections").

including rights to chop wood, hunt and fish;³¹ (4) the *prévôts de maréchaux*, a kind of military judge, responsible for enforcing laws against vagabonds and overseeing conduct on the king's highways;³² and as noted above, (5) the *juridictions consulaires*, merchant-run courts authorized to hear disputes among merchants concerning merchant activity. As suggested by this brief survey, the scope and nature of the jurisdiction exercised by the extraordinary courts varied widely. Some (like the *élections*) heard, among other types of disputes, suits that we today would view as falling within the jurisdiction of administrative courts—namely, suits brought by individuals claiming that governmental officers had misapplied the law (for example by overtaxing them).³³ But others (like the *greniers à sel, eaux et forêts* and *prévôts de maréchaux*) relied on governmental officials (and, in particular, venal officeholders) to bring enforcement actions aimed at ensuring compliance with some kind of civil or criminal regulation. And yet others (such as the *eaux et forêts* and *juridictions consulaires*) exercised jurisdiction over disputes between private parties on the theory that the subject matter of these otherwise private disputes implicated the broader public interest (thus necessitating a specialized expert and regulatory jurisdiction).³⁴

As articulated by Old Regime jurists, this conception of the extraordinary courts as a form of administrative or regulatory jurisdiction was intimately linked to a concomitant view that they occupied an inferior position in the status hierarchy of Old Regime courts. The Old Regime legal system was constituted by a near dizzying array of royal, seigneurial, and ecclesiastical

³¹ 4 ENCYCLOPÉDIE MÉTHODIQUE, OU PAR ORDRE DE MATIÈRES: JURISPRUDENCE, *supra* note 29, at 144 (entry for “eaux et forêts”); MARION, *supra* note 29, at 193-94 (entry for “eaux et forêts”).

³² *Id.* at 453-54 (entry for “prévôt des maréchaux”).

³³ 2 ROLAND E. MOUSNIER, THE INSTITUTIONS OF FRANCE UNDER THE ABSOLUTE MONARCHY: THE ORGANS OF STATE AND SOCIETY 286 (Arthur Goldhammer trans., 1984); HENRION DE PANSEY, DE L'AUTORITÉ JUDICIAIRE EN FRANCE 473 (Paris, Chez Théophile Barrois père 1818) [hereinafter HENRION DE PANSEY, DE L'AUTORITÉ].

³⁴ MOUSNIER, *supra* note 33, at 293, 300.

courts, and the jurisdictional boundaries between these institutions was a matter of constant dispute, as each court sought to expand its jurisdiction at the expense of others. In this context of fierce jurisdictional competition, heightened by the highly status-oriented nature of Old Regime society, the relative power and standing of courts in relation to one another was a matter of serious debate. And the leading jurists, themselves typically associated with what they deemed to be “ordinary courts”—namely, courts of general civil and criminal jurisdiction—were, not surprisingly, quite careful to insist on the extraordinary courts’ relative inferiority. This inferiority, they argued, was a product of history.

According to the leading Old Regime jurists, the ordinary courts were the first or original courts, dating back to time immemorial. Appointed by the first kings, the judges of these ordinary courts exercised full, princely authority, subdivided only insofar as different judges operated in distinct territorial regions. This conception of royally derived judicial authority—intimately linked to what Michel Antoine has described as the early modern ideal of the king as a “royal dispenser of justice”³⁵—was essentially feudal in nature. Royal control over territory, in short, was thought to entail a concomitant obligation to maintain the peace—including by providing courts of justice to adjudicate disputes among inhabitants. Jurists argued that the king was the most powerful of all noble lords, possessing both full territorial control, and as a corollary, full powers of adjudication. Accordingly, when the king delegated land possession to his trusted vassals, rights of justice ran with the land, such that noble landowners were empowered—and, indeed, required—to operate courts responsible for preserving the peace. Moreover, the king was free to delegate his adjudicatory powers directly to officers of his own choosing, thus establishing royal courts. According to the standard juristic account, the fact that

³⁵ Michel Antoine, *La monarchie française de François I^{er} à Louis XVI*, in *LES MONARCHIES* 185-208 (1986).

the ordinary courts were initially endowed with full princely authority meant that they necessarily retained such power to the present day—in sharp contrast to the more recently created extraordinary courts, which were from the outset courts of limited, inferior jurisdiction.

This account of the ordinary courts as exercising the king’s full adjudicatory authority—an authority deemed inherent in control over land—was elaborated at length by Charles Loyseau and Jean Domat, two of the Old Regime’s most renowned jurists. Writing in the late sixteenth and early seventeenth centuries, Loyseau practiced as a lawyer in the *Parlement* of Paris and also served as a judge in the *bailliage* of Châteaudun, a royal court of ordinary (general) jurisdiction.³⁶ Intimately associated with the ordinary royal courts, Loyseau not surprisingly embraced an account of the Old Regime judicial framework that sought to highlight their relative superiority. Accordingly, he insisted that while all officers to whom the king delegated a share of his (divinely established authority) might exercise a form of “public power,” it was only magistrates [*magistrats*], or judges of the ordinary courts, who possessed the “power of command” [*le commandement*].³⁷

In so arguing, Loyseau borrowed from the work of his highly influential predecessor, Jean Bodin—the mid- to late-sixteenth-century jurist, most famous for his advocacy of royal supremacy. Bodin defined “magistrate” as “the officer who has the power . . . to command,”³⁸ asserting, in particular, that “sovereign magistrates . . . recognize only the sovereign [as their

³⁶ Howell A. Lloyd, *Introduction to CHARLES LOYSEAU, A TREATISE OF ORDERS AND PLAIN DIGNITIES*, at xii-xiv (1994).

³⁷ CHARLES LOYSEAU, *LES ŒUVRES DE MAISTRE CHARLES LOYSEAU, AVOCAT EN PARLEMENT, CONTENANT LES CINQ LIVRES DU DROIT DES OFFICES, LES TRAITÉZ DE SEIGNEURIES, DES ORDRES ET SIMPLES DIGNITEZ, DU DÉGUERPISSEMENT ET DÉLAISSEMENT PAR HYPOTHEQUE, DE LA GARANTIE DES RENTES, ET DES ABUS DES JUSTICES DE VILLAGES, DENIÈRE ÉDITION 35* (Lyon, Compagnie des librairies, 1701).

³⁸ JEAN BODIN, *LES SIX LIVRES DE LA RÉPUBLIQUE 646* (Paris, Librairie Arthème Fayard 1986) (1576).

superior and] . . . hold under their power all [the state's] subjects.”³⁹ “The latin word Magistratus,” he reminded readers “mean[s] to master and to dominate.”⁴⁰ Relying on Bodin’s conception of magistracy, Loyseau claimed that it was precisely because magistrates possessed the power of command that they could be said to be “participants [in deploying] the supreme power of the prince.”⁴¹ Indeed, the similarity between the royal and judicial roles was so great that the phrase “the power of command” was itself used to refer “sometimes to the sovereign monarch and prince, who possesses as his property the universal power of command, and sometimes to magistrates, each of whom has the power of command, but only as a matter of delegated authority [*par exercice seulement*].”⁴² To be a king, in short, was to be the supreme magistrate, such that judges, in turn, were a kind of ersatz prince, exercising the highest form of royal or sovereign power.

Having thus equated royal and judicial power, Loyseau was careful to emphasize that not all who served judicial functions were magistrates in the proper sense of the term. In particular, he insisted, it was only the judges of the ordinary courts, and not their extraordinary counterparts who were true magistrates: “[I]t is only [the officers] of the ordinary courts of justice who are true magistrates, having exclusive ordinary power, complete jurisdiction, and true territory, which are for us the mark of jurisdiction and magistracy. And as for the officers of the extraordinary courts, they have a simple notion or power of judging, rather than a true jurisdiction.”⁴³ In contrast to the ordinary courts, the extraordinary courts were created by the monarchy at a later date, with an eye towards narrowly regulating particular aspects of social and

³⁹ *Id.* at 751.

⁴⁰ *Id.* at 647.

⁴¹ LOYSEAU, *supra* note 37, at 35.

⁴² *Id.* For like reasons “those over whom a magistrate has the ordinary power of command can be called his subjects.” *Id.*

⁴³ *Id.* at 37.

economic activity: “the *élus* are judges of the *aides* and *tailles*; the *grenetiers*, judges of salt; the *maîtres des eaux et forêts*, of the rivers and forests; the *prévôts des maréchaux*, of vagabonds; the *juges consuls*, of matters concerning merchandise”⁴⁴ As a result, the extraordinary courts never possessed the full (land-based) adjudicatory authority with which the ordinary courts were originally invested: “[T]he ordinary judges are judges of places and territory . . . ; and they normally have universal rights of justice over all persons and things that are in such territory, of which rights the other, extraordinary and extravagant justices are stripped”⁴⁵ The extraordinary courts were, in short, a type of administrative institution responsible for promoting the monarchy’s burgeoning regulatory interests. As such, they possessed a clear, but inferior, status and function within the extensive judicial hierarchy of the Old Regime.

Like Loyseau, the renowned jurist Jean Domat devoted a significant portion of his career to service in the ordinary royal courts, working as a prosecutor in the *présidial* of Clermont-Ferrand.⁴⁶ Writing at the end of the seventeenth century, he presented a quite similar account of the historical relationship between the ordinary and extraordinary courts, and of the reasons, therefore, for the former’s inherent superiority. Sovereign authority was at core a (delegable) power to judge. Initially delegated by God to the king, judicial power was thereafter delegated by the king to officers of his choosing. These judges, constituting the first or original courts—or what would become known as ordinary courts—exercised full princely (and thus divine) authority, limited only by the scope of the territory they controlled: “Since the full authority of justice resides in the person of the prince, and since he also has. . . the right to judge all kinds of disputes without distinction, . . . the first judges whom the first princes established could

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 1 RICHARD MOWERY ANDREWS, *LAW, MAGISTRACY, AND CRIME IN OLD REGIME PARIS, 1735-1789*, at 268 (1994).

naturally have divided this general authority amongst themselves . . . based on . . . the scope of their respective districts.”⁴⁷

As Domat conceived of it, the authority exercised by such ordinary-court judges was even more awesome—indeed, majestic—than Loyseau had imagined. A devout Jansenist, and therefore persuaded that human beings were fundamentally tainted by original sin, Domat emphasized that to judge was to act as God, and thus to serve a role for which no man was in fact well suited. As he explained, “Since judges act in the place of God, they are called gods: since the function of judging men, which nature makes all equal, is not natural to any of them, and since all authority of one man over another is a share in the authority of God, the function of judging can in this sense be called divine, because one is exercising a power that is natural only to God”⁴⁸ But while the role of judge was contrary to a spirit of Christian humility, it was, in Domat’s view, necessary for the proper functioning of society, which depended on judges “to be the guarantors of the law, to impose the yoke on those who do not submit to it voluntarily, and to maintain through the observation of that which it mandates, public order and ease.”⁴⁹ Thus, much like Loyseau, Domat argued that the key function of the original or ordinary judges, first appointed by the king to serve in his (and thus God’s) name, was to maintain peace and order, and that, divine in origin, the tremendous power with which they were endowed was worthy of the highest esteem.

From Domat’s perspective, like that of Loyseau, the ordinary courts were to be contrasted with their extraordinary counterparts, which were of more recent origins, and therefore occupied

⁴⁷ JEAN DOMAT, *OEUVRES DE J. DOMAT, NOUVELLE ÉDITION, REVUE, CORRIGÉE, ET PRÉCÉDÉE D’UNE NOTICE HISTORIQUE SUR DOMAT* 390 (Joseph Remy ed., Paris: Firmin Didot père et fils, 1829).

⁴⁸ *Id.* at 439-40.

⁴⁹ *Id.* at 359.

a lower position in the hierarchy of Old Regime courts. After the establishment of the ordinary courts, he argued, society became more complex, giving rise to new regulatory needs that transcended the problem of simply maintaining the peace and were thus distinct from the feudal tradition associating adjudicatory power (and obligations) with control over land. Accordingly, the monarchy established specialized administrative courts to address such regulatory needs— courts whose jurisdiction was carved out from (and therefore, by definition, lesser than) the otherwise full, unlimited authority of the ordinary courts. In Domat’s words: “[T]he size of states, the multiplicity of diverse types of business resulted in the emergence of distinct jurisdictions . . . ; as a result, older jurisdictions gave rise to newer ones, which are assigned matters that could have belonged to the first judges, who by nature have authority to hear all matters.”⁵⁰ But while the ordinary courts were thus deprived of jurisdiction that they once possessed, their historical origins as courts of universal, general jurisdiction ensured their continued supremacy: “[T]he ordinary judges are those who naturally hear all matters, without any exception other than those matters that have been expressly attributed to other judges.”⁵¹ Accordingly, like Loyseau, Domat depicted the extraordinary courts as regulatory institutions, serving a clear function within the broader judicial framework, but one that was demonstrably less important and honorable than that served by the ordinary courts.

III. The Revolutionary Challenge and the Subsequent Marginalization of the Extraordinary Courts

Under the Old Regime, as we have seen, there emerged a clear understanding of the place of the extraordinary courts within the broader judicial framework. Pursuant to this established

⁵⁰ *Id.* at 390.

⁵¹ *Id.* at 389.

understanding—one developed not uncoincidentally by jurists largely associated with the ordinary courts—extraordinary courts were of lesser authority and significance than their ordinary counterparts. But while the extraordinary courts were thus from the beginning deemed to be of lower status, they were also understood to serve a clear, well-defined function as regulatory institutions, created by the monarchy in its ongoing efforts to centralize and solidify processes of state administration.

A. The Turn Against Courts of Limited Jurisdiction (and Those Stemming from a Corporatist Past)

For three distinct, but interrelated reasons, the advent of the French Revolution undermined this established understanding of the function of the extraordinary courts. First, and perhaps most fundamentally, the revolutionary commitment to equality before the law threatened the legitimacy of the very notion of a court of limited, specialized jurisdiction. Foremost among the principles animating the revolutionaries' radical restructuring of the court system was a commitment to abolishing corporatism. Pursuant to this defining legal, social, and political principle of the Old Regime, it was the group, rather than the individual, which served as the key building block of the social order and was thus the primary object of legal regulation. And in accordance with the corporatist foundations of the Old Regime, its courts were oriented towards the protection of one or another kind of group privilege. Thus, the *parlements*, the main royal appeals courts, were staffed by a noble elite, which regularly deployed its institutional authority to protect noble privilege—including, most infamously, exemptions from taxation. Likewise, the many seigneurial courts that continued to operate until 1789 were based on the feudal notion that noblemen (initially delegated by the king) possessed a privilege (and obligation) to provide justice to those (peasants) inhabiting their land. And the *juridictions consulaires*, or merchant

courts, were premised on the view that these were institutions operated by and for merchants.

In declaring war on corporatism and privilege, the revolutionaries vowed to remake the foundations of the social order, such that henceforth all individuals would be equal before the law. This, in turn, necessitated restructuring the entire court system so as to ensure that it would deliver justice equally to all individuals alike. Towards this end, the revolutionaries abolished the *parlements* and the seigneurial courts, along with many other jurisdictions that had long been operated by particular corporatist entities in service of their own group interests. But the notion that all courts were now to impose a uniform rule of law, equally applicable to all, put new pressure on the longstanding distinction between courts of ordinary and extraordinary jurisdiction. The very existence of an extraordinary court—one that operated outside the ordinary frame and thus heard particular types of matters involving particular types of parties—seemed to depart from the new, fundamental commitment to absolute equality before the law. Accordingly, to the extent that some members of the revolutionary Constituent Assembly advocated maintaining a distinct set of extraordinary courts, they encountered significant opposition.

As concerns the vast majority of the Old Regime's extraordinary courts, the revolutionaries were largely in agreement that these ought to disappear. Most of these institutions were staffed by judges who owned their offices—a practice that seemed to epitomize the much reviled corporatist notion that justice was the property (and privilege) of particular classes of persons, rather than the equal right of all citizens. And many, like the *greniers à sel* and *eaux et forêts*, were designed expressly to protect the kinds of monopoly interests that the revolutionaries sought to abolish. But while the revolutionaries quickly agreed to dismantle most of the Old Regime's extraordinary courts, the merchant courts, in particular, retained many

advocates. Like so many other Old Regime institutions, these courts were initially based on the principle of corporatist privilege—on the notion, in particular, that merchants as a group possessed the privilege of resolving their own intra-merchant disputes. As I have argued elsewhere, however, the merchant courts were significantly reconceptualized over the course of the eighteenth century—largely as a result of the arguments and activities of merchants themselves. In particular, they came to be viewed as institutions devoted to facilitating commerce, now conceived not as the distinctive undertaking of particular corporatist groups (merchant guilds), but as that set of exchange activities necessary for society (composed of interdependent individuals) to thrive and survive. Thus reconceived (and renamed commercial courts), the merchant courts seemed potentially compatible with the new individualist foundations of the social order. As a result, unlike other Old Regime judicial institutions, they were preserved largely unchanged.⁵²

While the revolutionaries ultimately opted to retain the merchant courts, the decision to do so was not without conflict. Although they were reconceptualized as commercial, rather than merchant courts, the fact remained that they were a form of extraordinary jurisdiction, authorized to hear particular types of disputes involving particular types of persons. And in the view of some members of the Constituent Assembly, to allow particular persons or disputes to appear before special courts was to risk the reemergence of corporatism. As one deputy asserted, it would be a big mistake to “depart from the beautiful unity that you have always tried to maintain in your constitution.”⁵³ To make matters worse, these courts had a long tradition of promoting

⁵² See generally AMALIA D. KESSLER, *A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE* (2007).

⁵³ *Id.* at 282; Session of 27 May 1790, in 15 ARCHIVES PARLEMENTAIRES DE 1787 À 1860: RECUEIL COMPLET DES DÉBATS LÉGISLATIFS ET POLITIQUES DES CHAMBRES FRANÇAISES (Série 1), 687 (Paris, Libraire administrative de P. Dupont, 1879) (deputy Goupil de Préfelin).

informal conciliation, thus eschewing formal (and universally applicable) legal rules. And they sought to encourage conciliation by relying on precisely those habits of corporatist submission that the revolutionaries hoped to eradicate—for example, by appointing as mediators guild leaders and other prominent members of the local community to whose judgment litigants were accustomed to deferring.⁵⁴

As the nineteenth-century progressed, moreover, many of the core features of the new commercial courts seemed increasingly to reflect these institutions' corporatist origins. Consider, for example, how commercial-court judges were selected. As established by law, individual “wholesale traders [*négociants*], bankers, manufacturers, and factory owners,”⁵⁵ as well as “ship owners and ship captains,”⁵⁶ were to serve as electors. But just as the guilds once controlled the election of merchant-court judges, so too by the late 1860s, commercial-court judges came to be chosen largely by the employers' unions (or *chambres syndicales*)⁵⁷ that began to appear in the early nineteenth century and that quickly became a dominant feature of the social

⁵⁴ KESSLER, *REVOLUTION*, *supra* note 52, at 68-80.

⁵⁵ “Décret sur l'établissement d'un tribunal de commerce dans la ville de Paris” (24 January 1791), art. 7, in 22 ARCHIVES PARLEMENTAIRES, *supra* note 53, at 518.

⁵⁶ “Décret sur l'organisation judiciaire, du 16 août 1790, sanctionné par lettres patentes du 24 du même mois,” tit. 12, art. 1, in 18 ARCHIVES PARLEMENTAIRES, *supra* note 53, at 110.

⁵⁷ As Claire Lemercier recounts, the Parisian *chambres syndicales* developed the practice (in effect to this day) of forming a commission to identify candidates for election to both the local commercial court and the chamber of commerce. Since almost all of the candidates thus identified are typically elected, the *chambres syndicales* essentially control the election of commercial-court judges. CLAIRE LEMERCIER, *UN SI DISCRET POUVOIR: AUX ORIGINES DE LA CHAMBRE DE COMMERCE DE PARIS, 1803-1853*, at 235-37 (2003); Claire Lemercier, *Prud'hommes et institutions de commerce à Paris des origines à 1870*, at 9, 19 (2006), available at <http://halshs.archives-ouvertes.fr/halshs-00106150> [hereinafter Lemercier, *Prud'hommes et institutions*]; Claire Lemercier, *The Judge, the Expert, and the Arbitrator: The Strange Case of the Paris Court of Commerce (ca. 1800-ca. 1880)*, in *FIELDS OF EXPERTISE: A COMPARATIVE HISTORY OF EXPERT PROCEDURES IN PARIS AND LONDON, 1600 TO PRESENT*, 136 (Christelle Rabier ed., 2007) [hereinafter Lemercier, *The Judge, the Expert, and the Arbitrator*]. See also Ana Maria Falconi et al., *Le Contrôle social du monde des affaires: une étude institutionnelle*, 55 *L'ANNÉE SOCIOLOGIQUE* 451, 457-60 (2005).

and economic landscape, though they were not officially legalized until 1884.⁵⁸ Likewise, there is evidence that, just as the Old Regime merchant courts once appointed guild leaders to conciliate disputes, the nineteenth-century commercial courts frequently selected *chambres syndicales* to serve the same function.⁵⁹ Thus, even though the merchant courts were maintained, their existence as extraordinary courts, derived from and in many ways replicating a corporatist past, made them conceptually troubling in a way that had never before been the case.⁶⁰

To further complicate matters, the commercial courts were not the only extraordinary courts that populated the post-revolutionary judicial landscape. While the revolutionaries destroyed most of the Old Regime's extraordinary courts, they also ended up establishing several of their own. In 1790, they created justices of the peace (initially known as *bureaux de conciliation*), directed to reconcile disputants (and thus prevent litigation), but in the event such efforts failed, to adjudicate matters under a certain financial threshold.⁶¹ While the

⁵⁸ Although the *chambres syndicales* were not formally legalized until the passage of the Waldeck-Rousseau law of March 21, 1884, they were subject to a regime of official "toleration" as early as March 30, 1868. 2 ÉDOUARD DOLLÉANS, HISTOIRE DU MOUVEMENT OUVRIER, 1871-1936, at 24-25 (4th ed. 1948).

⁵⁹ See Claire Lemerrier's discussion of the nineteenth-century Parisian commercial court in *The Judge, the Expert, and the Arbitrator*, *supra* note 57, at 117, 130-35. Unfortunately, very little is known about the commercial courts' efforts to promote conciliation during the twentieth century.

⁶⁰ The conceptual uncertainty as to the commercial courts' legitimacy was reflected, in part, in an extensive early nineteenth-century debate concerning the proper foundations of their jurisdiction—and, in particular, whether these ought to be the merchant status of the litigants or the commercial nature of the transaction at issue in the dispute. Over time, jurists settled on a mixed, and never very clearly defined formula, combining elements of both status and transaction—a formula whose very indeterminacy manifested ongoing discomfort with the commercial courts' continued existence as specialized courts of limited jurisdiction. See Denis Tallon, *Civil Law and Commercial Law*, in 8 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: SPECIFIC CONTRACTS 29-41 (Konrad Zweigert ed., 1983).

⁶¹ The question of why the revolutionaries opted to entitle these institutions *bureaux de conciliation* and to staff them with individuals called justices of the peace has long been a subject of debate. Some scholars have suggested that they were inspired by Voltaire's mid-eighteenth

revolutionaries conceived of these institutions as radically new—as emblems of the modern, revolutionary commitment to overturning Old Regime privilege and thereby establishing true equality before the law—recent historical work suggests that the real story was, in fact, far more complicated.

Ironically, as Antoine Follain argues, the *bureaux de conciliation* are best viewed as the direct descendents of a set of quintessential Old Regime corporatist institutions—namely, the seigneurial courts, owned and operated by noblemen.⁶² While the revolutionaries were deeply committed to abolishing the seigneurial courts, the important role that these institutions played in rural France—at a time when the majority of the population lived in rural areas—meant that abolition could not be so easily accomplished.⁶³ The solution, Follain suggests, was to create ostensibly new institutions—the *bureaux de conciliation*—that would serve many of the same core functions as the seigneurial courts, while being owned and operated directly by the state.⁶⁴

century praise of a Dutch “tribunal of conciliators, called peace-makers [*feseurs de paix*].” A. J. Barnouw, *Goldsmith’s Indebtedness to Justus Van Effen*, 8 MOD. LANGUAGE REV. 33 (1913) (quoting Voltaire, *Fragment d’une lettre sur un usage très utile en Hollande* (1739)).

⁶² See generally Antoine Follain, *De la justice seigneuriale à la justice de paix*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX, 1790-1958*, at 19-33 (Jacques-Guy Petit ed., 2003).

⁶³ Historians long tended to accept the revolutionaries’ highly critical view of the seigneurial courts as emblematic of the many failures of the Old Regime. More recently, however, a number of scholars have begun carefully to examine the operation of these courts, attempting to assess them on their own merits and without preconceptions. While scholarly opinion is far from uniform, this reevaluation has suggested that the traditionally negative image of these institutions warrants some revision. See, for example, ANTHONY CRUBAUGH, *BALANCING THE SCALES OF JUSTICE: LOCAL COURTS AND RURAL SOCIETY IN SOUTHWEST FRANCE, 1750-1800*, at 31-54 (2001); JEREMY HAYHOE, *ENLIGHTENED FEUDALISM: SEIGNEURIAL JUSTICE AND VILLAGE SOCIETY IN EIGHTEENTH-CENTURY NORTHERN BURGUNDY* 3-7, 61-95 (2008); STEVEN G. REINHARDT, *JUSTICE IN THE SARLADAIS, 1770-1790*, at 238-66 (1991); Olwen Hufton, *The Seigneur and the Rural Community in Eighteenth-Century France. The Seigneurial Reaction: A Reappraisal*, 29 TRANSACTIONS ROYAL HIS. SOC’Y 31-32, 37-39 (1979); Antoine Follain, *supra* note 62, at 30.

⁶⁴ Follain, *supra* note 62, at 33.

That the *bureaux de conciliation* thus descended directly from the seigneurial courts is suggested by the significant institutional overlap between the two. In particular, many of the personnel who once staffed the seigneurial courts were employed by the new *bureaux de conciliation*,⁶⁵ and files from the seigneurial courts were often transferred directly to the *bureaux de conciliation*.⁶⁶ Similarly, the *bureaux de conciliation* had jurisdiction over precisely the same kinds of small, local disputes that were previously filed in the seigneurial courts.⁶⁷ Moreover, the *bureaux de conciliation* embraced what had been common, though informal practice in the seigneurial courts—namely, relying on traditions of corporatist deference within the village community as a means of promoting informal, equitable conciliation, rather than formal, legal adjudication.⁶⁸

While thus descended from the seigneurial courts, the *bureaux de conciliation* could, of course, no longer operate as a form of purely private justice. The revolutionary elimination of noble privilege, in short, necessitated a new means of appointing judicial staff. As initially established in 1790, justices of the peace were to be elected by all eligible voters in the district.⁶⁹ And in line with the revolutionary commitment to abolishing the formal legal system, voters

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ While the *bureaux de conciliation*, like the seigneurial courts before them, operated in cities, as well as in the countryside, they were widely viewed primarily as rural institutions and, in fact, resolved far more rural than urban disputes. Serge Bianchi, *La justice de paix pendant la Révolution, acquis et perspectives*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX, 1790-1958*, *supra* note 62, at 39; Gilles Rouet, *La justice de paix en France entre 1834 et 1950: une exploration spatiale*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX, 1790-1958*, *supra* note 62, at 98-99.

⁶⁸ Follain, *supra* note 62, at 25-26; REINHARDT, *supra* note 63, at 150-52.

⁶⁹ GEORGE MARTIN, *LES JUSTICES DE PAIX EN FRANCE: MANUEL PRATIQUE DES JUGES DE PAIX, PRÉCIS RAISONNÉ ET COMPLET DE LEURS ATTRIBUTIONS JUDICIAIRES, EXTRAJUDICIAIRES, CIVILES, ADMINISTRATIVES, DE POLICE ET D'INSTRUCTION CRIMINELLE EN SUITE DE TOUS LES CHANGEMENTS DE LÉGISLATION 2* (Paris, Garnier frères 1880); ISSER WOLOCH, *THE NEW REGIME: TRANSFORMATIONS OF THE FRENCH CIVIC ORDER, 1789-1820s*, at 307-08 (1994).

were in no way constrained to elect legal professionals. Instead, the expectation was that they would select locals of any profession who had become known to the community for their wisdom and virtue. As articulated by a deputy to the revolutionary Constituent Assembly who advocated the establishment of *bureaux de conciliation*, “any good man, even one with little experience, can be a justice of the peace.”⁷⁰ And remarkably, even after Napoleon reconfigured these courts to ensure that judicial selection would henceforth reside in his hands alone,⁷¹ nineteenth-century French justices of the peace continued generally to be locals, born in the region where they served and described by one historian as “small-scale notable[s] close to the peasantry.”⁷² The sons of farmers, vinters, and such lower-level professionals as notaries and court-clerks, they were selected not because of their legal expertise, but because they were respected individuals of established, yet modest origins, who knew and were known by the great majority of the litigants who appeared before them.⁷³

Like the commercial courts, the nineteenth-century *bureaux de conciliation* were thus courts of limited jurisdiction, staffed by local bigwigs without legal training, and assigned the

⁷⁰ HENRION DE PANSEY, *DE LA COMPÉTENCE DES JUGES DE PAIX* 3 (Paris, chez Théophile Barrois pere libraire, 2d ed. 1812) (quoting Deputy Thourette) [hereinafter HENRION DE PANSEY, *DE LA COMPÉTENCE*]; 11 D. DALLOZ, *JURISPRUDENCE GÉNÉRALE: RÉPERTOIRE MÉTHODIQUE ET ALPHABÉTIQUE DE LÉGISLATION DE DOCTRINE ET DE JURISPRUDENCE EN MATIÈRE DE DROIT CIVIL, COMMERCIAL, CRIMINEL, ADMINISTRATIF, DE DROIT DES GENS ET DE DROIT PUBLIC, NOUVELLE ÉDITION* 88-89, art. 5 (A. Pougin ed., Paris, Bureau de la jurisprudence générale, 1849) (entry for “compétence civile des tribunaux de paix”). Similarly, another deputy also described the justice of the peace in terms that sought to deemphasize the significance of strictly legal knowledge and skills—namely, as “a father in the middle of his children . . . [who] says a word, and injustices correct themselves, divisions dissipate, complaints cease.” HENRION DE PANSEY, *DE LA COMPÉTENCE*, *supra*, at 3 (quoting unnamed deputy).

⁷¹ MARTIN, *supra* note 69, at 405-06; WOLOCH, *supra* note 69, at 319.

⁷² Jean-Claude Farcy, *Les juges de paix et la politique au XIX^e siècle*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX, 1790-1958*, *supra* note 62, at 143, 161.

⁷³ Serge Defois & Vincent Bernaudeau, *Les juges de paix de Loire-Atlantique (1895-1958): une magistrature de proximité?*, in *UNE JUSTICE DE PROXIMITÉ: LA JUSTICE DE PAIX, 1790-1958*, *supra* note 62, at 195, 200-01.

task of resolving intra-community disputes. Moreover, at least as initially configured, their judges were to be elected for temporary terms of office by members of the very village community whose disputes they were responsible for resolving. And like the commercial courts, the *bureaux de conciliation* descended from a set of vital, Old Regime corporatist institutions that (while not themselves conceived as extraordinary jurisdictions) shared with the merchant courts a tendency to rely on corporatist traditions of communal deference to promote informal conciliation. Accordingly, in the view of many contemporaries, the *bureaux de conciliation* appeared to be a form of extraordinary jurisdiction—and one that was quite similar in these key respects to the commercial courts.

The *bureaux de conciliation*, however, were not the only post-revolutionary judicial institutions that seemed to be a form of extraordinary jurisdiction. At least as important were the labor courts, or *conseils de prud'hommes*, established by the Napoleonic regime in the early nineteenth century in order to help quell the extensive labor strife that emerged in the wake of the Napoleonic Wars and the widespread economic disorder that these generated. The first French labor court was created in Lyon on March 18, 1806, and a modified version thereof was then established throughout the country pursuant to a decree of June 11, 1809.⁷⁴ But while the modern institutions known as *conseils de prud'hommes* date back only to the early nineteenth century, they replicate in a variety of ways the corporate institutions designed to regulate labor and commercial activity under the Old Regime and were, in fact, first established in response to

⁷⁴ WILLIAM H. MCPHERSON & FREDERIC MEYERS, *THE FRENCH LABOR COURTS: JUDGMENT BY PEERS* 15-16 (1966); Monique Kieffer, *La législation prud'homme de 1806 à 1907*, 141 *LE MOUVEMENT SOCIAL* 9, 9-10 (1987).

the widespread demand for a return to such institutions that followed as a result of post-revolutionary economic disorder.⁷⁵

It was the Chamber of Commerce of Lyon, along with a commission of workers and manufacturers appointed by the prefect (a local administrator representing the state), that successfully lobbied for the creation of the first *conseil de prud'hommes*.⁷⁶ This *conseil*, in turn, was evidently modeled on the silk weavers' guild of Old Regime Lyon (*bureau commun de la Grande fabrique*)⁷⁷—an institution that, like all guilds, bore substantial responsibility for resolving disputes (between merchants, as well as between employers and workers) and for regulating market activity (for example, by setting minimum wages and fixing quality standards).⁷⁸ Thus, as initially established, the *conseils de prud'hommes* were designed not only to resolve individual labor disputes, but also to engage actively in the regulation of commercial and manufacturing activity. Indeed, like the guilds before them,⁷⁹ they were empowered to make surprise visits to workshops to try to ensure compliance with applicable regulations, and were required to record and investigate all complaints regarding the infraction of shop discipline.⁸⁰

Given their corporatist origins, the judges of the *conseils de prud'hommes* were, not surprisingly, elected much like guild leaders and merchant-court judges once were—namely, by

⁷⁵ Alain Cottureau, *Justice et injustice ordinaire sur les lieux de travail d'après les audiences prud'hommales (1806-1866)*, 141 LE MOUVEMENT SOCIAL 25, 33-34 (1987) [hereinafter Cottureau, *Justice*].

⁷⁶ CAM, *supra* note 25, at 24 (1981); Cottureau, *Justice*, *supra* note 75, at 33-34.

⁷⁷ MCPHERSON & MEYERS, *supra* note 74, at 1-16; ALAIN SUPIOT, DROIT DU TRAVAIL 5 (1987).

⁷⁸ ÉMILE LEVASSEUR, HISTOIRE DES CLASSES OUVRIÈRES ET DE L'INDUSTRIE EN FRANCE AVANT 1789, at 740-42 (2d ed. 1901).

⁷⁹ KESSLER, REVOLUTION, *supra* note 52, at 20-22.

⁸⁰ CAM, *supra* note 25, at 25; MCPHERSON & MEYERS, *supra* note 74, at 16; Kieffer, *supra* note 74, at 13-14. *See also* Title XII, Section I of the June 11, 1809 statute establishing *conseils de prud'hommes* throughout France and entitled “On inspection by the *prud'hommes* in workshops . . .” “Décret contentant règlement sur les conseils de prud'hommes (11 juin 1809), in COLLECTION COMPLÈTE DES LOIS, DÉCRETS, ORDONNANCES, RÉGLEMENS, AVIS DU CONSEIL-D'ÉTAT 391 (J. B. Duvergier ed., Paris, Guyot et Scribe 1836) [hereinafter Décret contentant].

the very people whose disputes they were to resolve and whose activities they were to regulate. Pursuant to the law of June 11, 1809, the electorate for each *conseil*⁸¹ was to consist of the sum total of manufacturers [*marchands fabricants*], shop supervisors [*chefs d'ateliers*], foremen [*contre-mâîtres*], and licensed artisans [*ouvriers patentés*] falling within the court's jurisdiction.⁸² And just as many Old Regime merchant-court judges were guild leaders, so too those elected as judges of the *conseils de prud'hommes* were often leaders of the newly formed employers' unions, or *chambres syndicales*.⁸³ Indeed, as the nineteenth century progressed, and employers and employees came (by 1880) to be guaranteed equal representation on the court,⁸⁴ unions representing workers also began to play a leading role in electing labor-court judges.⁸⁵ Moreover, in much the same way that Old Regime guilds and merchant courts had sought to resolve labor disputes by promoting compromise and reconciliation, rather than formal

⁸¹ As was the case with the guilds and their leadership, not all who were involved in manufacturing were to have equal representation. Thus, the 1809 law specified that there was to be one more manufacturer on the court than the sum total of shop supervisors, foremen, and independent artisans, and mere workers were to have no representation at all. *Id.* at 386 (Tit. I, art. 1); Kieffer, *supra* note 74, at 11. As discussed below, it was only in 1880 that employers and employees were definitively guaranteed equal representation on the court.

⁸² Décret contentant, *supra* at 80, at 387-88 (Tit. III: "Mode de nomination et d'installation des prud'hommes"). Because this law was itself an extension of the earlier March 18, 1806 law, which created a *conseil de prud'hommes* exclusively for Lyon (and its silk industry), it also included in the eligible electorate *teinturiers*, or dyers—namely, those responsible for dying silk. *Id.* at 386 (Tit. I, art. 1); *id.* at 388 (Tit. III, art. 18).

⁸³ Lemerrier, *Prud'hommes et institutions*, *supra* note 57, at 11-12.

⁸⁴ Such equal representation was established briefly during the 1848 revolution, but employer supremacy returned in 1853 during the second empire. Kieffer, *supra* note 74, at 15-19; SUPIOT, *supra* note 77, at 7-9.

⁸⁵ Philippe Couton, *A Labor of Laws: Courts and the Mobilization of French Workers*, 32 POL. & SOC'Y 327, 331-39 (2004).

adjudication, so too the *conseils de prud'hommes* were required first to attempt to conciliate the disputants.⁸⁶

The labor courts were thus modeled on the very institutions that gave rise to the commercial courts—namely, the Old Regime merchant courts and guilds—and were therefore, not surprisingly, structured along very similar lines. Staffed by lay leaders elected to temporary terms of office by the very community whose disputes they were expected to resolve (rather than by a permanent group of legally trained personnel), they too seemed to be a type of extraordinary jurisdiction. And as such, the labor courts—like the commercial courts and the *bureaux de conciliation*—were from the outset tainted by the revolutionary turn against corporatism.

B. The Rise of a Radical Divide Between the Private and Public Spheres

Aside from thus undermining their legitimacy, the Revolution also eviscerated the traditional, Old Regime conception of the extraordinary courts as a set of administrative or regulatory institutions. As we have seen, Old Regime jurists viewed the extraordinary courts as instruments of the monarchy's efforts to regulate key socio-economic processes. And they did so, moreover, without regard to whether the disputes at issue were of the kind that the French today would deem administrative—namely, those in which private parties challenge state action. But with the advent of the Revolution, it became impossible to view many of the types of disputes that came before the extraordinary courts—and most especially disputes between private parties (like those heard by the commercial courts)—as implicating a species of administrative or regulatory law. The reason for this important shift in attitude was the rise of a

⁸⁶ MCPHERSON & MEYERS, *supra* note 74, at 16; Cottureau, *Justice*, *supra* note 75, at 35; Décret contentant, *supra* at 80, at 388 (Tit. IV, art. 22); *id.* at 389 (Tit. V, art. 36); Kieffer, *supra* note 74, at 12.

newly sharp, unbending distinction between the private and public spheres, which was itself part and parcel of the Revolution's attack on corporatism. The abolition of corporate entities as a core structuring component of the social order meant that henceforth there were to be only two categories of social actors: (private) individuals and the (public) state. And among the revolutionaries' first efforts to enshrine this new commitment to the separation of the private from the public was to mandate a complete divide between judicial and administrative functions. Still in force today, the statute of 16-24 August 1790 provides that "the functions of the judiciary are and remain distinct and separate from those of the administration" and forbids judges on penalty of criminal prosecution from intervening in any matters of state administration.⁸⁷

In practice, throughout much of the Revolution itself, there was relatively little difficulty in separating judicial from administrative functions in that the revolutionaries largely eviscerated the judiciary. Upon abolishing almost all Old Regime courts, they instituted a new court system, including a series of civil "district courts," staffed by salaried officials, elected to office.⁸⁸ But this was not the primary focus of their reforms. As Isser Woloch has argued, the heart of the revolutionary program was to establish an entirely new kind of legal system that would seek to resolve disputes by relying primarily on informal mechanisms of mediation, rather than on formal law. Towards this end, they outlawed the legal profession, holding that all citizens could represent one another in court. Likewise, as noted above, they established regional justices of the peace—locals lacking legal training and elected to office for brief periods of time with the primary mission of attempting to reconcile disputants.⁸⁹ And at one point, they even declared

⁸⁷ BROWN & BELL, *supra* note 27, at 46; DADOMO & FARRAN, *supra* note 6, at 47-48.

⁸⁸ WOLOCH, *supra* note 69, at 303.

⁸⁹ *Id.* at 307-15.

(though never implemented) an intent to replace the entire court system with annually elected “public arbiters.”⁹⁰

Such efforts to undo the formal legal system were, in the end, mostly a failure. With the passing of the Terror, the revolutionary distaste for legal formality and professionalism receded, as did the more radical attempts to remake the judicial system. Lawyers returned, arbitration largely disappeared, and formal courts of law became once again the heart of the legal system. It was the Napoleonic Regime that, in the wake of the Terror, established the key institutions that would take root, thus constituting the progenitors of today’s court system. And a defining feature of this new court system, inherited directly from revolutionary sensibilities, was the effort clearly to distinguish between the private and public spheres, as reflected in the construction of two distinct systems—one private and the other public, or administrative.

At the core of the private system were courts of first instance jurisdiction, known as *tribunaux de première instance*, which (replacing the previously established district courts) possessed general jurisdiction over all civil and criminal matters.⁹¹ It was this institution that, renamed and slightly reconfigured, was to become the *tribunal de grande instance* in 1958.⁹² Appeals from the *tribunaux de première instance* were taken to a set of appeals courts, known to this day as *cours d’appel*. Both of these types of courts were to be staffed by legally trained and salaried professionals, appointed to office. And overseeing the entire system was the *tribunal de*

⁹⁰ In addition, they created family courts, staffed by the disputants’ relatives and friends, which were responsible for trying to reconcile the disputing couple. *Id.* at 313-16.

⁹¹ *Id.* at 358.

⁹² DADOMO & FARRAN, *supra* note 6, at 54. Today’s *tribunaux de grande instance* technically have jurisdiction only over civil, rather than criminal matters. The primary court of general criminal jurisdiction is called the *tribunal correctionnel*. *Id.* at 71-72. At core, however, these are the same institutions, constituted by the same judges—though, of course, the latter play a role in criminal suits that is quite distinct from their role in civil ones. *Id.* at 68.

cassation, which heard appeals from decisions of the *cours d'appel*.⁹³

Alongside this system of private courts, the Napoleonic regime established a distinct public, administrative court system, at the root of which were the *conseils de préfecture*. Responsible for providing advice to the local prefect (or state administrator), these *conseils* soon came to exercise jurisdiction over disputes brought by private individuals challenging state action—a jurisdiction which they shared with the *conseil d'état*, or council of state.⁹⁴ Renamed in 1953, the *conseils de préfecture* are now known as *tribunaux administratifs*. They thereafter gained the lion's share of first instance jurisdiction in administrative matters. As a result, the *conseil d'état*—aided since 1987 by the creation of a set of administrative appeals tribunals, or *cours administratives d'appel*—now functions largely as a supreme court for administrative matters.⁹⁵

The new regime's separation of private from public, or judicial from administrative functions, served to reconfigure Old Regime understandings of the proper bounds of administrative or regulatory jurisdiction. In particular, disputes between private parties (of the kind that typically came before commercial, labor, and justice-of-the-peace courts) could no longer be said to constitute a form of administrative jurisdiction, since the latter was now narrowly defined to encompass only those matters brought by private parties against state agents, challenging state action.

⁹³ By the time of the Napoleonic regime, the *tribunal de cassation* was renamed the *cour de cassation*—a change that reflected an important transformation in the institution's core mission and powers. The court was initially empowered only to quash those judgments not in accordance with the law (as established by the legislature), but not to enunciate its own view of the law. Thereafter, it evolved into a kind of supreme court of private law, fully authorized to state its own view of the law. MERRYMAN & PÉREZ-PERDOMO, *supra* note 13, at 40-41; J.J.H.M. Salmon, *Constitutions, Old and New: Henrion de Pansey Before and After the French Revolution*, 38 HIST. J. 907, 919 (1995).

⁹⁴ BROWN & BELL, *supra* note 27, at 50.

⁹⁵ *Id.* at 51; DADOMO & FARRAN, *supra* note 6, at 95-96.

Consider, for example, the work of the prominent late-eighteenth and early-nineteenth-century jurist, Pierre-Paul-Nicolas Henrion de Pansey. Having begun his career as a successful lawyer before the *Parlement* of Paris, Henrion survived the Revolution by disappearing from public and political life. Thereafter, in the early nineteenth century, he achieved great prominence as a presiding judge of the *cour de cassation*, and eventually a member of Napoleon's *conseil d'état*.⁹⁶ In one of his most famous and influential works, *De l'autorité judiciaire en France*, first published in 1810 and then reissued in substantially augmented form in 1818, Henrion set forth one of the most fully elaborated, early nineteenth-century accounts of the proper relationship between the judiciary and the executive—and in so doing, dedicated substantial attention to the question of “administrative litigation.”⁹⁷ Key to his analysis was his insistence, true to revolutionary principles, that there must be a total separation between the exercise of judicial and administrative authority. As he explained, “The internal organization of all political societies rests on two main foundations: administration and justice Distinct by nature, these powers must always be separated.”⁹⁸ One of the great evils of the Old Regime was that it failed properly to respect “this separation commanded by the nature of things”⁹⁹ and instead “administrative and judicial powers were generally confused.”¹⁰⁰ In an effort to ensure that the new regime would not repeat the mistakes of the old, Henrion devoted a significant portion of his treatise to elaborating on the distinction between the two types of authority. At the heart of this distinction, he explained, was the notion that “administrative power rules on the

⁹⁶ Salmon, *supra* note 93, at 909, 911, 919.

⁹⁷ HENRION DE PANSEY, *DE L'AUTORITÉ*, *supra* note 33, at 460-508. See also the discussion of Henrion's work in Salmon, *supra* note 93, at 919-22.

⁹⁸ HENRION DE PANSEY, *DE L'AUTORITÉ*, *supra* note 33, at 460.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 472.

relations between citizens and the state,” whereas “judicial power rules on the relations between citizens themselves.”¹⁰¹

Under this new framework, it was clear that, because the commercial, labor and justice of the peace courts adjudicated disputes between private parties, they did not belong within the administrative court system. They were thus henceforth understood to be components of the private court system. As such, they could no longer be readily viewed as serving an administrative or regulatory function. The once clear understanding of their function therefore disappeared. In this sense, the extraordinary courts became even more extraordinary than had previously been the case. Long deemed inferior, they now also became a kind of misfit, ousted from the newly constructed system of administrative courts, but lacking any clear place within the private court system.

C. A Challenge to the Longstanding Historical Account of the Relationship Between the Ordinary and Extraordinary Courts

Not only did the Revolution threaten the legitimacy of the extraordinary courts and destroy the once clear conception of their function, but in addition, it undermined the longstanding historical narrative that established their place in relation to the courts of ordinary jurisdiction. As we have seen, pursuant to this longstanding narrative, the extraordinary courts occupied a defined but inferior position in relation to the ordinary courts. While the latter were conceived as the first or original courts exercising an authority to maintain the peace that inhered in the (divinely and royally delegated) possession and control over land, the former were upstart institutions, created at a later date for the narrow purpose of regulating particular kinds of socio-economic activity. With the advent of the Revolution, however, it became impossible to imagine

¹⁰¹ *Id.* at 456.

the ordinary courts of general jurisdiction—namely, the district courts or *tribunaux de première instance*—as dating back to time immemorial. This was because the precise moment of their legislative creation was within (very recent) memory. The legislation creating these first instance courts, moreover, expressly carved out from their jurisdiction those cases that came within the jurisdiction of such extraordinary courts as the justices of the peace and the commercial courts. The statute of August 24, 1790 provided, in particular, that “[t]he judges of the district courts will hear in first instance all disputes . . . concerning any and all matters, except those that have been declared to fall within the competence of justices of the peace, [and] commercial matters”¹⁰² Thus, from the very moment of their creation these ordinary courts were quite clearly not courts of universal, general jurisdiction. Instead, like the justice of the peace and commercial courts, they were courts of limited jurisdiction—though the scope of their limited jurisdiction was of course significantly broader than that of their extraordinary counterparts.

Confronted with this cold reality, some jurists concluded that the centuries-old theory that the ordinary courts had truly universal, general jurisdiction no longer applied. Henrion, for example, argued that “it is necessary at least to recognize that this universality [of jurisdiction] is now only a theory and never in fact existed, since there were never any periods in which these new justices, though invested with ordinary jurisdiction, had as part of their attributions, those matters delegated to the extraordinary judges.”¹⁰³ Under the Old Regime, he noted, the ordinary royal courts might hear a case coming within the jurisdiction of the merchant courts on the theory that (at least if the defendant did not object), jurisdiction over merchant disputes had originally belonged to them. The ordinary royal court judge was, in his words, the “natural and

¹⁰² HENRION DE PANSEY, *DE LA COMPÉTENCE*, *supra* note 70, at 45.

¹⁰³ *Id.* at 45.

universal judge of his territory,” and as such, it was widely accepted that “he should legally have jurisdiction over a commercial matter, and over any other matter attributed to the extraordinary courts, which might be brought before him, and where remand is not requested.”¹⁰⁴ But under the new regime, ordinary courts could no longer claim a universal jurisdiction dating back to time immemorial, and thus, even if the defendant did not object to the ordinary court’s jurisdiction, the court itself was required to decline hearing the matter. As Henrion explained, “[T]oday the ordinary judge who rules on a dispute delegated by the new laws to the commercial courts or to the justices of the peace cannot say as before: I originally had the right to hear it, and a return to the original state of things [*à l’état primitif*] is always desirable.”¹⁰⁵

While Henrion was not alone among post-revolutionary jurists in concluding that the new regime’s ordinary courts lacked truly universal jurisdiction, this position was, not surprisingly, rejected by the majority, as it threatened to undermine the longstanding status hierarchy between ordinary and extraordinary courts. As between these two types of institution, jurists tended to ally themselves with the ordinary courts, before which they often practiced, and which (unlike the extraordinary courts) were staffed by judges who were themselves legal professionals. From the perspective of such jurists, the notion that both ordinary and extraordinary courts exercised a type of limited jurisdiction was worrisome in that it suggested that these entities were of equal status. In addition, such a notion deprived the ordinary courts of their power to assert jurisdiction over those matters, otherwise falling within the jurisdiction of their extraordinary counterparts, which plaintiffs filed in the ordinary courts and to which defendants did not object.

Early nineteenth-century jurists, moreover, had particularly good reason to be focused on such questions of relative status and power. While the jurisdictional (and status) battles between

¹⁰⁴ *Id.* at 43.

¹⁰⁵ *Id.* at 46.

ordinary and extraordinary courts dated back far into the Old Regime, these were exacerbated by the revolutionaries' efforts to dismantle the formal legal system (including the legal profession) in its entirety. While these efforts largely failed, the deep-rooted animosity towards the legal institutions of the Old Regime that animated them led to a lingering distaste for lawyers and the legal system that continued to prevail well into the nineteenth century. Forced to resurrect a largely defunct legal profession within this prevailing culture of disdain, jurists were particularly anxious to defend and promote their already beleaguered status. Accordingly, as Claire Lemerrier has persuasively argued, one of the primary ways that they sought "to reconstitute their professional identities" was by challenging the legitimacy of those judicial institutions in which legal professionals played no significant role (either as judges or as advocates)—namely, the commercial, labor, and justice-of-the-peace courts.¹⁰⁶

Nineteenth-century jurists therefore had even more reason than their Old Regime counterparts to insist on the supremacy of ordinary to extraordinary courts. But in seeking to establish the ordinary courts' supremacy, they, unlike their Old Regime predecessors, could no longer turn to the traditional historical account of the relationship between ordinary and extraordinary courts. As epitomized by Désiré Dalloz's highly influential *Répertoire méthodique*—the preeminent nineteenth-century legal dictionary, encompassing all manner of legal doctrine (including both statutory law and jurisprudence)—the solution they embraced was to reject history as an appropriate metric for distinguishing between courts' relative status and power. As argued in the 1849 edition of the dictionary, the Revolution had in no way undermined the traditional status distinction between ordinary and extraordinary courts. Indeed,

¹⁰⁶ Claire Lemerrier, *Juges du commerce et conseillers prud'hommes face à l'ordre judiciaire (1800-1880): la constitution de frontières judiciaires*, in LA JUSTICE AU RISQUE DES PROFANES 107, 110 [hereinafter Lemerrier, *Juges du commerce*].

the notion that the ordinary royal courts of the Old Regime once possessed universal jurisdiction was itself a pure fiction: “It would be necessary to go back very far to find a time in which the old ordinary courts exercised judicial power without sharing it in any way with the exceptional courts; and the results of this historical investigation would inevitably lead to the recognition that some of the old ordinary courts . . . never in fact had complete jurisdictional authority.”¹⁰⁷

Accordingly, history could not explain why ordinary courts had long been deemed superior to their extraordinary counterparts. Now that the Revolution had dispelled this myth linking power to historical origins, it was clear that the real explanation for the ordinary courts’ long established superiority was simply that they were more juridically competent.

In contrast to the judges of the extraordinary courts, who were mere laymen, elected for brief periods of service, the judges of the ordinary courts were trained in the law and worked within a bureaucratic system that sought to oversee their performance. Accordingly, the dictionary concluded, “The fact that the various civil jurisdictions that exist today were created simultaneously does not mean that the law that instituted them could not, at the same time that it assigned them their respective [jurisdictional] attributions, confer on one of them, in accordance with the former state of things, the character of an ordinary jurisdiction, and on the others, the character of exceptional jurisdictions.”¹⁰⁸ And pursuant to this traditional (and still operative) distinction, “There is evidently a profound difference between a jurisdiction that naturally extends to all matters of which it has not been specifically stripped by law, and jurisdictions that are narrowly limited to those matters that the law has expressly attributed to them.”¹⁰⁹

Moreover, because of their functional superiority, the ordinary courts could hear cases that

¹⁰⁷ DALLOZ, *supra* note 70, at 66, art. 3, § 215.

¹⁰⁸ *Id.* at 66, art. 3, § 216.

¹⁰⁹ *Id.* at 67, art. 3, § 216.

would otherwise come within the jurisdiction of the extraordinary courts (as long as the defendant did not object): “The reason that strikes us as decisive in favor of this extension of jurisdiction is the capacity of the ordinary magistrate; it is the instruction that he can be assumed to have received; it is the guarantees that the law demands of him, which it does not demand of the judge of an exceptional jurisdiction, guarantees that render him able to hear all the disputes that may divide the citizenry.”¹¹⁰

In this way, nineteenth-century jurists managed to construct a new, expertise-based account of the superiority of the ordinary to the extraordinary courts—one implicitly grounded in a theory (and celebration) of modernity. Contrasting themselves with their predecessors, who for centuries sought to justify the superiority of the ordinary courts by reference to some mythic notion of historical origins, these modern-day jurists conceived of themselves as relying instead on a rational, functionalist account of the state and its institutions. Pursuant to this account, the modern liberal state was self-consciously created and structured at a moment of democratic founding, with an eye towards deploying rational, modern processes of scientific state administration in service of bettering social conditions. Accordingly, these jurists insisted, the state’s judicial institutions were themselves to be constructed on a rational, scientific basis—as an expert, professional bureaucracy.

¹¹⁰ *Id.* at 66, art. 3, § 215. According to the dictionary, certain matters (such as commercial ones) were carved out of the jurisdiction of the ordinary courts for the sake of the parties’ interest in efficiency—“[w]ith an eye towards making the resolution of certain types of lawsuits easier, faster and less costly.” *Id.* at 67, art. 3, § 216. But if the plaintiff chose to file suit in an ordinary court and the defendant failed to object to this court’s jurisdiction, it was clear that the parties themselves had no desire to benefit from the efficiency gains that the extraordinary courts were expected to promote. And in this case, the dictionary concluded, there was no reason to insist that the parties appear before the extraordinary courts to achieve benefits that they themselves had renounced: “What does the public have to gain from a rule providing that, in a dispute concerning purely private interests, the parties are prohibited from renouncing the benefit of a speedier mode of procedure and a less costly judgment?” *Id.*

By thus developing such an expertise-based account of the judiciary, nineteenth-century French jurists managed to overcome the challenges posed by the Revolution's undermining of the traditional, historical account of the relationship between the ordinary and extraordinary courts. Therefore, after the Revolution, as before—and perhaps with even greater intensity—ordinary courts (and the jurists associated with them) continued to insist on the inferiority of their extraordinary counterparts. But if this new line of argument addressed the jurists' desire to promote their own professional interests and status, it did nothing to resolve the new conceptual challenges facing the post-revolutionary judicial order.

As we have seen, in the post-revolutionary period, the very legitimacy of the extraordinary courts was challenged from the outset, and these institutions lost, moreover, any claim to performing a clear function within the judicial framework. Each individual extraordinary court could (and did), of course, voice an account of the purposes it served—with the commercial courts, for example, emphasizing the cost-savings that inhered in having commercial experts decide matters pursuant to summary procedures, and the labor courts pointing to both the cost-savings and moral benefits that followed from their ability to promote conciliation.¹¹¹ But as a group, the extraordinary courts could no longer claim to serve some overarching function that might help to justify their (seemingly illegitimate) existence as institutions separate and apart from the ordinary courts. Accordingly, these courts were marginalized, and indeed erased, from prevailing understandings of the structure of the French judiciary. Indeed, like their modern-day counterparts, nineteenth-century accounts of the French judiciary (frequently drafted as pleas for one or another kind of reform) generally made barely, if

¹¹¹ Lemerrier, *Juges du commerce*, *supra* note 106, at 109-10.

any mention of the commercial and labor courts.¹¹² And while the justice of the peace courts tended to receive more extensive discussion, this was largely because under Napoleonic rule, their judges (like those of the ordinary courts) came to be appointed by the executive, rather than elected by local villagers.¹¹³ As a result, these institutions were to some extent assimilated into the ordinary, state-controlled civil service judiciary and thus ceased to bear such a troubling resemblance to historically corporatist institutions.

IV. The Consequences of Marginalization

In France today corporatism is officially a distant memory—the product of a primitive, feudal order firmly rejected in 1789 and shamefully (but only briefly) resurrected during the troubled years of Vichy. But as this brief history of the extraordinary courts suggests, France has long remained much more wedded to its corporatist past than suggested either by its own jurists’ internal, legitimizing discourse or by a broader political science literature that takes extensive union membership (itself lacking in France) as the *sine qua non* of neo-corporatist governance.¹¹⁴ And it was precisely the corporatist legacy of the extraordinary courts that nineteenth-century French jurists—committed as they were to the eradication of all corporatist forms—were so reluctant to acknowledge and which, in turn, caused them largely to marginalize these institutions.

¹¹² *See e.g.*, D’EYRAUD, *DE L’ADMINISTRATION DE LA JUSTICE ET DE L’ORDRE JUDICIAIRE EN FRANCE* (Paris, Chez Fanjat ainé 1825); ODILON BARROT, *DE L’ORGANISATION JUDICIAIRE EN FRANCE* (Paris, Librairie académique 1872).

¹¹³ MARTIN, *supra* note 69, at 405-06; WOLOCH, *supra* note 69, at 319.

¹¹⁴ For a discussion of the prevailing view that limited union membership in France is evidence of a relatively weak mode of corporatist governance, see, for example, HOWARD J. WIARDA, *CORPORATISM AND COMPARATIVE POLITICS: THE OTHER GREAT “ISM”* 75 (1997).

To so argue is not to claim that Old Regime corporatist practices and mentalities persisted into the nineteenth century unabated. A large body of literature establishes that this was quite clearly not the case.¹¹⁵ Moreover, there is good reason to conclude that many of the core, corporatist features of the extraordinary courts have since altered significantly. Ample evidence, for example, indicates that by the end of the nineteenth century both the commercial and labor courts had become much less effective at promoting conciliation than was once the case—though the reasons for this transformation remain the subject of some dispute.¹¹⁶ But there was nonetheless a remarkable continuity in core electoral and adjudicatory practices between the Old Regime and the new; and this continuity, in turn, led to the erasure of the extraordinary courts from the established, juristic account of the French judiciary.

What were the consequences of this erasure? Why, in other words, should we care that, in depicting the French judiciary as a civil-service bureaucracy, the standard account has been to a significant extent incomplete, and thus misleading? In part, of course, the answer is that there is a value in knowledge for its own sake. In this sense, inaccuracy is by definition to be lamented. But the deficiencies of the standard account of the French judiciary have had consequences that extend beyond the purely academic. In particular, as described below, the failure to come to grips with the corporatist roots of the French commercial and labor courts helps account for the troubled, precarious status of these institutions today, while also bearing

¹¹⁵ See e.g., Steven L. Kaplan & Philippe Minard, *Le corporatisme, idées et pratiques: les enjeux d'un débat incessant*, in *LA FRANCE: MALADE DU CORPORATISME: XVIII^E–XX^E SIÈCLES* (Steven L. Kaplan & Philippe Minard eds., 2004).

¹¹⁶ See e.g., Michel Armand-Prevost, *Fonctionnement et enjeux des tribunaux de commerce au cours des XIX^e et XX^e siècles*, in *LES TRIBUNAUX DE COMMERCE: GENÈSE ET ENJEUX D'UNE INSTITUTION* 138 (2007), 138; Cottureau, *Justice*, *supra* note 75, at 38; Kieffer, *supra* note 73, at 15.

some responsibility for the unduly narrow and self-satisfied—and thus largely ineffectual—vision of American comparative legal scholarship.

While a comprehensive history of France’s extraordinary courts in the nineteenth and twentieth centuries has yet to be written—and there is therefore a great deal about their development that we have still to learn—it is clear that the corporatist underpinnings of these institutions have repeatedly emerged as grounds for their delegitimization, and indeed abolition. The resulting irony is that, while receiving so little attention in standard textbook accounts of the French judiciary, they have become much discussed in public, political discourse—an emblem, in short, of the kinds of self-interested dealing and corruption thought necessarily to follow from corporatist forms. French anxieties regarding excessive judicial power are, of course, not unique to the commercial and labor courts, extending to some extent to the judiciary as a whole. Dating back at least as far as the revolutionary dismantling of the *parlements*,¹¹⁷ the longstanding French fear of a “government of judges” took on renewed force during the late nineteenth and early twentieth centuries with the proliferation of judicial review in American courts.¹¹⁸ But although French judges in general operate under a veil of suspicion, those of the commercial and labor courts are subject to a very particular (and heightened) kind of scrutiny, stemming from these institutions’ largely unsevered corporatist roots.

While judges of the ordinary, bureaucratized courts are criticized as being incompetent or out of control—for failing, in short, to operate within established, bureaucratic parameters—those of the extraordinary courts are chastised primarily for engaging in corporatist self-dealing.

¹¹⁷ For an overview of the French revolutionaries’ turn against the *parlements*, see John P. Dawson’s classic work, *THE ORACLES OF THE LAW* (1968), 350-431.

¹¹⁸ The term “*gouvernement des juges*” derives from the title of a study published by Edouard Lambert in 1921, warning against the likely reactionary results should the French embrace American-style judicial review. See Alec Stone Sweet, *Why Europe Rejected American Judicial Review—and Why It May Not Matter*, 101 *MICH. L. REV.* 2744, 2758-60 (2003).

Thus, for example, in recent years, commercial court judges have met frequently with one or another version of the allegations raised more than a century ago by the defendants in *Hilton v. Guyot*. In particular, they have been accused of adjudicating claims (especially in bankruptcy suits) so as to favor their own (and their friends') financial interests.¹¹⁹ Similarly, labor court judges have been regularly decried as mere mouthpieces for the unions responsible for electing them.¹²⁰ Moreover, while even the most severe criticism of the ordinary, bureaucratic courts has yet to result in any meaningful threat to these institutions' continued existence,¹²¹ the public outcry over the extraordinary courts has led to several legislative proposals to abolish or restructure them entirely.

To name but a few of the more recent examples, a serious debate took place in the 1970s about whether the labor courts ought to be dismantled. As Alain Cottereau recounts, the labor

¹¹⁹ See Jean-Paul Jean, *Le modèle français des tribunaux de commerce peut-il (et doit-il) être réformé*, in LES TRIBUNAUX DE COMMERCE 189-90; see generally ANTOINE GAUDINO, LA MAFIA DES TRIBUNAUX DE COMMERCE (1998).

¹²⁰ See, e.g., Laurent Willemez, *Le sens d'une élection et les frontières de la justice. Les controverses autour des élections prud'homales*, in LA JUSTICE AU RISQUE DES PROFANES 15, 15-16.

¹²¹ Consider, for example, the recent "*affaire d'Outreau*," an overview of which appears in WRONGFUL CONVICTION: INTERNATIONAL PERSPECTIVES ON MISCARRIAGES OF JUSTICE 19-20 (C. Ronald Huff & Martin Killias eds. 2008). In the wake of this scandal—in which thirteen people (later found innocent) were held in pre-trial custody for up to three years—there was widespread agreement that the fault lay in no small part with the excessive discretionary power vested in the "*juge d'instruction*," or investigating magistrate. But in accordance with the recommendations of a Commission of Inquiry appointed by the National Assembly, the resulting legislative reforms were hardly revolutionary, consisting instead of relatively modest procedural changes, such as requiring investigating magistrates to sit in panels, rather than alone, and holding that proceedings concerning pre-trial detention were henceforth to be open to the public. ASSEMBLÉE NATIONALE (FRANCE), RAPPORT FAIT AU NOM DE LA COMMISSION D'ENQUÊTE CHARGÉE DE RECHERCHER LES CAUSES DES DYSFONCTIONNEMENTS DE LA JUSTICE DANS L'AFFAIRE DITE D'OUTREAU ET DE FORMULER DES PROPOSITIONS POUR ÉVITER LEUR RENOUVELLEMENT, at II.iv. & II.vi.C. (June 6, 2006), available at http://www.assemblee-nationale.fr/12/rap-enq/r3125-t1.asp#P3047_740006; Law No. 2007-291 of March 5, 2007, Journal Officiel de la République Française, March 6, 2007, available at <http://www.justice.gouv.fr/index.php?rubrique=10017&ssrubrique=10024&article=12612>.

courts are institutions “based on individual conciliation between tradesmen [*gens de métier*], including the corporatist election of judges by those subject to their jurisdiction,” and as a result, “it was believed . . . [that they were] unsuited to modern anonymous forms, [and] to judicial rationalizations.”¹²² More recently, between 1998 and 2000, the National Assembly debated a proposal to require that professional judges sit on the commercial courts alongside the lay judges, and in many important cases, take the leading role.¹²³ As detailed in a report drafted by the Assembly’s Commission of Inquiry, the main reason for this proposal was concern that “the commercial court has . . . become a place where the exercise of functions in the public interest, to render justice, is confused sometimes with private interests”¹²⁴ and that there is a real “risk . . . [of] bias and corporatism.”¹²⁵ Some sense for the heated flavor of the ensuing debate can be garnered from the language of Jean-Pierre Mattei (then president of the Parisian Commercial Court and of the National Association of Commercial Courts),¹²⁶ who expressed his outrage at these proposed legislative reforms by quoting from, among others, Simon de Monfort, a leader of the early thirteenth-century Albigensian Crusade against Catharism: “Kill them all, God will recognize his own!”¹²⁷

¹²² Alain Cottureau, *Cent quatre-vingts années d’activité prud’homme*, 141 LE MOUVEMENT SOCIAL 3, 3 (1987).

¹²³ Jean, *supra* note 119, at 187, 191-93.

¹²⁴ ASSEMBLÉE NATIONALE (FRANCE), 1 RAPPORT FAIT AU NOM DE LA COMMISSION D’ENQUÊTE SUR L’ACTIVITÉ ET LE FONCTIONNEMENT DES TRIBUNAUX DE COMMERCE, at 1.II.C.4 (July 2, 1998), available at http://www.assemblee-nationale.fr/11/dossiers/tribunaux-de-commerce/rap1p2-4.asp#P171_18981.

¹²⁵ *Id.* (comments of Emmanuel Rosenfeld, a lawyer).

¹²⁶ The French name of this Association is the *conférence générale des tribunaux de commerce*.

¹²⁷ Jean, *supra* note 119, at 193 & n.23. Evidently quite persuasive, Mattei’s speech led many commercial-court judges across the country to resign from their positions, which in turn resulted in a sizeable judicial backlog and forced an abandonment of the most aggressive attempts at large-scale reform. *Id.* at 193.

Thus far, both the labor and commercial courts have managed to survive such challenges. In part, their survival is a product of the significant influence wielded by the various employers' and workers' unions that have long controlled these institutions.¹²⁸ In addition, however, it seems clear that the vital role played by these courts in the French judicial system is such that their outright abolition remains too dangerous to contemplate. That said, the current climate of public disdain and suspicion is such that it is far from evident that the commercial and labor courts will be able to continue in their present form well into the future. And in the interim, the status quo is hardly tenable: When a legal system depends to such a great extent on a set of institutions widely deemed to be inadequate and even corrupt, there is reason to fear that it is not only these particular institutions, but the system as a whole, whose fundamental legitimacy may ultimately be called into question.

In these respects, the commercial and labor courts would appear to exemplify Steven Kaplan and Philippe Minard's broader claims about the ways in which modern French social and political discourse—and policy—have been warped by France's ongoing inability to come to terms with its corporatist past. As they argue, the persistent post-revolutionary fear of corporatism—"of groups focused on defending their own privileges and disdainful of the general interest"¹²⁹—leads to group demands of various kinds being regularly challenged as corporatist and thus illegitimate. This impassioned anti-corporatist rhetoric has had little effect, however, in stifling the assertion of such demands or preventing the state from responding positively to them—including by continuing to delegate forms of self-regulatory authority. Instead, as these authors observe, the only real effect of such rhetoric has been to hinder clear thinking about the most effective and appropriate mechanisms for incorporating group action and demands into the

¹²⁸ See *supra* notes 55-59, 81-86 and accompanying text.

¹²⁹ Kaplan & Minard, *supra* note 115, at 5.

formulation of social policy. This is certainly an accurate depiction of the various (and largely failed) efforts to remake France’s two main extraordinary jurisdictions—the commercial and labor courts. On the brink of abolition, they have repeatedly reemerged, ever more committed to their traditions and ever more subject to public suspicion and scrutiny.

The inability to accept and address the corporatist legacy of France’s extraordinary courts—an inability exemplified by their marginalization within the standard account of the French judiciary—thus goes a long way towards explaining the awkward, embattled position that these institutions currently occupy in the French judicial landscape. But for scholars of comparative law, there are yet further reasons to bemoan the failings of the standard account. Relying in no small part on French understandings of their own judicial system, American comparative law scholars have not surprisingly parroted the view that the French judiciary consists exclusively of a civil-service bureaucracy. Indeed, as Mitchel de S.-O.-L.’E. Lasser suggests, American scholars have long emphasized the French devotion to bureaucratized justice as a counterpoint to (and thus evidence of) a supposedly distinctive American commitment to judicial creativity, common sense, and equity.¹³⁰ To the extent that the established paradigm has thus become a justification for the self-satisfied embrace of the status quo, it has constrained scholars’ vision and thereby prevented the kind of meaningful comparative inquiry that might lead to valuable critique and reform.

¹³⁰ In his words, “traditional American accounts . . . [of] the French Civil judicial system—the poster child of Continental European, civilian legality”—depict France’s bureaucratic, civil-service judiciary as “apply[ing] the codified dictates of the legislature in a passive and mechanical fashion,” and thereby present “an ongoing lesson about the dangers of formalism, a morality tale about all that American judicial practice has long since overcome and must continue to avoid.” MITCHEL DE S.-O.-L.’E. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 27-28 (2004).

That France contains a set of courts whose judges are chosen through electoral means, rather than bureaucratic ones, suggests that the United States is not as unique as widely assumed. France, in other words, is also at times willing to sacrifice the legal uniformity and predictability thought to follow from a civil-service judiciary—perhaps (at least in part) in exchange for the greater freedom for creative and equitable reasoning commonly associated with an elective judiciary. Examining the internal, hidden discourse of the French *Cour de Cassation*, Lasser argues that France permits a far greater sphere to equity—to case-by-case, factually contingent analysis—than American comparative law scholars have generally imagined.¹³¹ Along similar lines, the fact that the commercial and labor courts are structured as non-professional, elective judiciaries—and ones, moreover, that have a long tradition of promoting conciliation—suggests that they too might constitute an ignored, but nonetheless important realm of equitable, judicial decision-making. Whether (and to what extent) this is in fact the case is a question whose resolution far exceeds the scope of this paper. There is, however, no shortage of anecdotal evidence indicating that elected commercial- and labor-court judges may indeed be more equity-oriented than their bureaucratic counterparts. For example, as reported by the sociologist Jean-Pierre Bonafé-Schmitt, labor-court judges often seek to draft their decisions so as to emphasize that they are a product not of the formal law, but instead of informal equity—of basic common sense and good morals.¹³² For present purposes, the key point is not whether the commercial and labor courts do indeed foster a kind of equitable reasoning long thought to be largely unique to the American judiciary. It is, instead, that by recognizing and studying those features of the

¹³¹ *Id.* at 56-60, 252-55.

¹³² Jean-Pierre Bonafé-Schmitt, *Les prud'hommes: du conseil de discipline à la juridiction de droit commun du travail*, 141 LE MOUVEMENT SOCIAL 137 (1987). For example, in the words of one labor-court judge interviewed by Bonafé-Schmitt, “‘I draft [a decision] based on the particular case as lived [*en fonction du cas d'espèce vécu*], rather than based on the unifying law [*droit unificateur*].’” *Id.*

extraordinary courts that do not fit the standard juristic (and comparative) account, we can help ourselves gain a much needed critical distance from the self-congratulatory narrative of American exceptionalism.

At the same time, to recognize that the French legal system contains its own elective judiciary is in no way to suggest that such courts are comparable to American ones. Indeed, it is by reflecting on the surprising fact that France does have its own elective judiciary that we Americans can begin to come to grips with what is truly distinctive about our own electoral model. In both France and the United States, judicial elections are, in part, a mechanism for ensuring the democratic accountability (and thus legitimacy) of judges. But the divergent French and American electoral methods reflect quite distinct models of democratic rule. Lacking a corporatist tradition of the kind so deeply embedded in French (and more broadly, European) society, the American legal system has sought to ensure the political accountability of its judiciary by structuring judicial elections in a manner not unlike the election of political officials of the legislative and executive branches. While various states embrace rules of judicial ethics that limit the issues that candidates seeking judicial office might publicly discuss (for fear of otherwise compromising their independence),¹³³ judicial elections operate in all other respects much like any other election. Most importantly, they are designed to ensure the representation of all citizens within a given geographic (and thus governmental unit) in such a manner that individuals are treated as equal and undifferentiated under the law. In contrast, the French approach is one that seeks to ground representation not in an undivided ideal of unified and equal

¹³³ Such limits themselves have increasingly dissipated in the wake of the United States Supreme Court's 2002 decision in *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (holding that a Minnesota provision prohibiting judicial candidates from announcing their views on disputed legal or political issues constituted an unconstitutional violation of the candidates' First Amendment rights).

citizenship but instead in the voter's unique characteristics as a member of a particular social group.

As the example of the French extraordinary courts serves to highlight, the American approach to electing judges reflects the nation's unique history—the fact, in short, that the principle of individual equality before the law never had to be superimposed upon a long tradition of corporatist privilege and distinction. And significantly, to the extent that each country's approach to establishing an elective judiciary is shaped by its own particular history, it may be resistant to change. But careful comparative exploration of the distinctive features of each electoral model should permit a greater awareness of its unique capacities and limitations. For example, there may be important (but largely ignored) linkages between the different American and French methods of ensuring democratic accountability and the two legal systems' modes of dispute resolution. In particular, as suggested by the French extraordinary courts' distinctive historical (though now much weakened) capacity effectively to promote conciliation—a capacity (and commitment) traditionally lacking in American courts—France's corporatist approach would seem to be uniquely well suited to facilitating informal methods of conciliation, as opposed to formal adjudication. This does not, of course, mean that American advocates of conciliation should abandon all hope. But it does suggest that there are other methods of alternative dispute resolution that are perhaps better suited to the American tradition. Here as well, the particulars of the analysis must be left to another day. The essential point for now is that by recognizing the existence of France's elective judiciary—and by carefully examining, in turn, the distinctive American and French electoral models—it may be possible to begin thinking more deeply about how best to develop each in accordance with its own particular, historically constituted structures and limitations.

From the perspective of the comparative law scholar, however, perhaps the most important consequence of recovering the forgotten history of France's extraordinary courts is that it serves as an important reminder of the limits of comparative generalization. While it is true, in other words, that core components of the French judiciary are premised on a model of civil-service bureaucracy antithetical to the decentralized American system of political appointment and election to office, there are significant limits to the accuracy of this narrative. Indeed, in its strongest form, the prevailing account of the French judiciary as an expert bureaucracy is a myth. And in this, there is no small irony.

For the nineteenth-century French jurists who created the myth of a purely bureaucratized, expert judiciary, the reality of professional bureaucratization stood in opposition to the myth of history. For centuries, French jurists sought to ground the relative superiority of the ordinary courts with which they were associated in these institutions' historical origins—and, in particular, in the fact that they emerged first in time. With the advent of the Revolution, this longstanding turn to history was rejected as mere myth, and jurists grappled instead towards an account of the distinctive virtues of a professionalized bureaucracy—an account grounded in an implicit theory of the modern liberal state as created *ab initio* in a founding moment of democratic decision and rooted in scientifically rational processes of administration. They prided themselves, in short, in their ability to free themselves from history. But in so doing, they were the victims of a double irony. As we have seen, it was history—and, in particular, the corporatist origins of the extraordinary courts—that continued to shape their structure and function and, in the process, nagged uncomfortably at jurists anxious to ensure the individualist foundations of their ostensibly new social order. And while the jurists' characterization of the judiciary as an expert, professional bureaucracy enabled them to eschew the kinds of

historicizing claims on which their predecessors had depended, such a characterization was in the end, no less mythic.

But to characterize the now dominant account of a bureaucratized French judiciary as myth is in no way to denigrate its significance. Indeed, as Robert Cover powerfully reminded us, legal traditions are constituted not only by a set of rules, practices, and institutions, but also at least as importantly, by a set of defining “myths [that] establish the paradigms for behavior.”¹³⁴ Myths, in short, can be important in shaping legal culture and, in turn, professional identity. For Americans, as we have seen, it is France’s commitment to bureaucratized justice that underscores the supposedly distinctive American commitment to judicial creativity and equity. As John Merryman has famously argued, common law judges are embraced as “cultural heroes,” whereas their civil law counterparts tend to be viewed as “narrow, mechanical, and uncreative.”¹³⁵ Likewise, in the French case, a defining feature of the post-revolutionary legal system has been to insist on its commitment to a professional, bureaucratized judiciary—and therefore to marginalize the extraordinary courts—as a means of instantiating devotion to principles of expert justice and equality before the law. However much a fiction, the myth of a unified French, civil service judiciary has thus played an important role in shaping (and legitimating) the professional identities and commitments of generations of French lawyers, judges, and jurists.

¹³⁴ *The Supreme Court, 1982 Term—Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 9 (1983).

¹³⁵ MERRYMAN & PÉREZ-PERDOMO, *supra* note 13, at 34, 38.