

MONTESQUIEU'S
COMPARATIVE POLITICS
AND THE
SPIRIT OF AMERICAN
CONSTITUTIONALISM

ANNE M. COHLER
the



UNIVERSITY PRESS OF KANSAS

Constitution in the context suggested by this analysis. The limits on the government are, then, not a product of a principled notion of limited government, as in Locke. Rather, they are a consequence of the understanding of the limits within which a moderate government must act in order not to become despotic. Free government becomes a characteristic of that moderate government; it is a way of acting, a spirit. The balance of powers both preserves the distance required for moderate government and shapes the activity, and finally even the character, of the representatives. This is not to say that this is a whole account of the Founding; rather, it casts another light upon the thought behind the shape of the Constitution. Political action never has quite the consistency of political thought.

In chapter 8, we shall turn to Tocqueville and return to the problem of spirit and character. Tocqueville takes a look at the democratic man as he can be envisioned from the American experience. He fears the new despotism that was only suggested in Montesquieu. He dissects the character of the new democrat, which makes such a new despotism possible—the passions and the limited, crippled spirit that result from an acquiescence in the new principle of democratic rule.

In sum, it seems to me that a careful look at Montesquieu's *Spirit of the Laws* gives us another way to look at our common political experience. Montesquieu's concern with spirit and character, rather than law and principle, gave the Federalists and give us a way of considering politics that encourages thought about circumstance without losing sight of ends—that is, what was once called prudence.

2

NARRATIVE

The Spirit of the Laws is divided into thirty-one books, all but one of which are divided into a number of small chapters. The books are separated into six parts (1–8, 9–13, 14–18, 20–23, 24–26, and 27–31). An “Invocation to the Muses” was placed at the beginning of book 20, about halfway through. These guides do not appear in all the editions, largely because the man who was Montesquieu's representative to the printer mistakenly left out the parts in the first edition and objected to the “Invocation to the Muses” as being inappropriate in such a work.¹ Here, however, we shall make whatever use we can of as many guides as there are throughout this work. We shall use these chapters, books, and parts to find our way about the work, referring to books and then chapters in parentheses.

Part 1 is made up of books 1 through 8, but book 1, “On Laws in General,” stands apart and appears to be an introduction to the work as a whole. There Montesquieu says we are subject to divine laws as intelligent beings, to natural laws as natural beings, and to political and civil laws as subjects of some particular government; but he assures us that it is the ensemble, the spirit of these laws, with which he is concerned and that he will follow the order of its relations. In its outline, the sketch of the orders of the laws implies a traditional version of the various kinds of law and their relations. But upon examination, it is extremely difficult to make ordered sense of these brief remarks. Montesquieu may be suggesting here that if we are seen as intelligent beings, as Descartes's angels, we are minds without bodies whose justice is an exact reciprocity (1.1).² Even when we are taken as natural beings, as we are by Hobbes and Locke, our success in acquiring knowledge results, according to Montesquieu, in a motive for uniting in society beyond fear, hunger, or sexuality—the desire to live in society (1.2). When we begin with particular law and

custom, as lawyers do, it is difficult to find any grounds for unity other than our wanting to live together—that is, our wills; but the things that are ruled by the civil, political, or international law may well vary with some other circumstance or consideration (1.3). Later, the reader will learn that religious law, whose aim is the best, is a despotic guide to political life, whose realm is the good (24.7), that nature's force is despotic (bks. 15–17), and that property and even the potentiality for citizenship could become universal, not the consequence of some particular political law (bks. 9–10, 27–28). The political realm seems to escape from these legal categories. Montesquieu finally offers spirit as an encompassing category for political life.

In books 2–8, Montesquieu proposes a typology of three governments: republics, monarchies, and despotisms. Each government has a nature, or source of sovereign power, and a principle, or motive for its people's doing the things that maintain the government. The typology is a consequence of a classification of the nature or source of rule, in respect to the number of rulers and in respect to whether that rule is according to the law. Thus, a single ruler who rules according to the law is a monarch, and one who rules according to his will is a despot. If there are few or many rulers, the government is a republic.³ One is led to wonder about the status of rule under law in republics. Are there two kinds of republics? To establish their rule, republics require laws establishing suffrage; monarchies require intermediate, subordinate, and dependent powers which provide channels through which power flows. Despotisms require a despot, who in turn requires a vizier to rule for him.

Each government has a principle, a motive for the actions of the people that maintain the government: political virtue, honor, or fear. The citizenry is devoted to the country in a democratic republic. That devotion is political virtue. In an aristocracy, the aristocrats moderate their ambition for the sake of the republic. In a monarchy, one's honor is identified with one's place within the structure of the monarchy. That honor moves men to great actions, as they try to act in accordance with the way men who have such a place are supposed to act. Such actions both support the government and defend the honor of the person. The despot and all his subjects act out of fear for their lives. In each case the relation

between the people and the government is altogether different—shaped by the character of the citizens, by the structure of the government, or directly by fear of the ruler.

Montesquieu ends book 3, on the principles of the three governments, with a distinction between despotisms and moderate governments, between a government in which “men's portion, like beasts”, is instinct, obedience, and chastisement” (3.10), and those in which “tempering, modification, accommodation, terms, alternatives, negotiations, remonstrances” can be proposed (3.10). Religion provides the only limit to the actions of a despotic prince. If he is assumed not to be a man, natural right does not apply, but the laws of religion do (3.10). Moderation appeared first as the principle of aristocracies (3.4); but here it characterizes governments that are not despotic (3.10); and later it appears as the category within which are the governments free by their nature (11.4). We shall put these notions together with the forms of government in chapter 4.

These three governments are further described in book 4, on education; in book 5, on the legislator's laws which support each principle; in book 6, on the forms of justice; in book 7, on luxury; and in book 8, on corruption. These books answer the questions: How is the principle taught? Which laws allocating property, particularly through inheritance, lead to the society that supports each principle? How are the violators of the laws tried and punished? Is luxury, or the excess required for leisure, necessary in any of these governments? How are the three governments corrupted? This discussion covers the ground customary in a treatise on government. Why, then, we wonder, does Montesquieu think this is such an incomplete account of political life that he has scarcely written a fifth of his book? To answer this question one needs to ask whether his treatment of these topics offers suggestions as to what has not been considered, as to other approaches to the same questions that ought to be pursued.

Let us return to book 4, on education. When monarchies are compared to despotisms, they are said to elevate rather than debase the heart (4.3). In monarchies the inconsistency between the teachings of families, teachers, and society is ascribed to religion. “This comes partly from the opposition there is for us between the ties of religion and those of the world, a thing

unknown among the ancients" (4.4). Our religion—that is, Christianity—is not satisfied with the elevation of the heart of monarchies; it asks something else. Republican governments require the full strength of education (4.5). Fear is aroused by threats and punishments; honor is aroused by the divisions inherent in the monarchy; but virtue is a renunciation of oneself—a love of the laws in place of self-love (4.5). Political virtue must be taught, and Montesquieu reminds the reader about Plato, about music and gymnastics, about works on political life that turn on education. Here, however, education is that of the passions, a kind of habituation to constraint.

When Montesquieu, in book 5, turns to the laws that support republics and monarchies, he turns to laws that define families and establish the relations among those families. In republics, the laws must control the distribution of property so that each family has an equal share. The shares must also be small enough to ensure frugality (5.6). Then the attention and ambition of the citizens will turn to the good of their country. Monarchies, too, are supported by an inheritance law, but in their case the inheritance law ensures the preservation of the wealth and the prerogatives of great families (5.9). In both cases, commerce is disturbed. In monarchies "the laws must favor all the commerce that the constitution of this government can allow, so that the subjects can, without being ruined, satisfy the ever-recurring needs of the prince and his court" (5.9). Republics, when carried to their logical extension, have no commerce (4.6); nevertheless, there also seems to be an affinity between democracy and commerce (5.6). There are no laws in despotisms that support anyone or anything. "They cut down the tree to gather the fruit" (5.13). Despotic government is "uniform throughout; as only passions are needed to establish it, everyone is good enough for that" (5.14).

Although inheritance laws seem to determine the number and the relative wealth and importance of families, the question remains of the source and durability of that order (bks. 27 and 28) and of whether and the extent to which human government is thought to properly concern itself with the structure of families (bk. 26). In turn, the possibilities for commerce are shaped by inheritance laws, by the goods that can be traded and the men who can trade, and by increases or decreases in the number of each

(bks. 20–22). In certain circumstances the prince himself can be the product of an inheritance law (18.31).

In book 6, the principles of each government are related to the simplicity of civil and criminal laws (6.1–3), the forms of judgments (6.4–8), and the establishment of penalties (6.9–21). In the first and second section, complexity is defended, and severe penalties are said to be typical of despotisms and markedly less effective than was often thought. Republics, like despotisms, have simple laws; but like monarchies, republics do not have severe penalties. Monarchies differ from republics and despotisms in the complexity of their laws and in the deliberation required in their judgments; they are like republics and unlike despotisms in the severity of their penalties. When actions are not altogether forced by necessity and when there is some space free for action, penalties are less severe. But what about penalties for crimes that appear to be so terrible that harsh punishment seems to be forced by necessity? Then the political freedom of the citizen is the question, as in book 12.

Luxury, the topic of book 7, is whatever one has beyond the necessary; this is not to say that a surplus is used "luxuriously" but that a surplus of a certain proportion beyond the necessary is required to support an order. If goods are doubled and the sequence begins with the necessary amount, luxury progresses in a sequence of 0, 1, 3, 7, 15, 31, 63, 127. In a monarchy, luxury increases from the laborer to the artisan, to the merchant, to the nobles, to the magistrates, to the great lords, to the principal tax collectors, to the princes. In Plato's republic the sequence of luxury was arithmetic, 1, 2, 3, 4, matching the division of its census. Luxury in a monarchy, unlike luxury in the republic, does not follow the constitutional order. The use of luxury is controlled by sumptuary laws. Such laws are not necessary in well-constituted democracies, are required in aristocracies, and are pernicious in monarchies. Luxury raises the issue of the condition of women, because goods beyond the necessary that are not expended in political activities are available for private, or women's, use. Incontinence in women Montesquieu connects with luxury, with liberty for the impulses of the heart, and with the weakness of the spirit (7.14). Two other possibilities for the use of luxury are not mentioned here. First, although the clergy is included as an

intermediate order in monarchies, it is not included in the order of luxury. We are left to wonder about the goods that are made available to the church (25.5–6, 30.21, 31.9–10). Second, surplus goods, or luxury, can be used up in commercial activity when they are invested in further commerce, or they can be used by a warlike nobility (5.6, 20.22). Montesquieu ends book 7 with an observation that the weakness of women precludes their rule in households, but not in government (7.17).

Book 8, "On Corruption of the Principles of the Three Governments," can be divided into two sections, one on the corruption of the principles themselves (8.1–14) and one on the size appropriate for each government (8.15–20). The principle of a democracy is corrupted when it becomes either too egalitarian and despotic (8.3) or inequalitarian and aristocratic or monarchic. Aristocracies are corrupted when the nobles' rule becomes arbitrary; the extreme example is a hereditary aristocracy. Aristocracies hold more to the laws when they dread something, external power for example (8.5). Despotisms cannot decline. They are held together by external circumstances, or by religion's enforced order. In respect to size, republics are small; monarchies are of a middle size; and despotisms are large. Then, the conquests of a republic or of a monarchy threaten their principles.

Quite different patterns of governing are exhibited in republics, monarchies, and despotisms. In republics, government is the possession of the citizens, whose training and circumstances produce their devotion to the country. In monarchies, aspects of government are distributed to the heads of various families. In despotisms, there is only the power of the ruler, leaving everyone else equally subject to that power. Republics are singular, peculiar; despotisms are all alike, universal; monarchies are somehow in between. The question arises of the relation of these patterns of rule to the pattern suggested for justice in book 1, chapter 1—a question we shall examine in the next chapter.

In part 2, Montesquieu takes up the important issues in regard to liberty: whether the regime is of sufficient size that it can defend itself while remaining free, or moderate (bks. 9, 10); whether the constitution establishes political liberty and the security of the persons of the citizenry through the defense of the privacy of their thoughts (bks. 11, 12); and whether it sets taxes and some means

of collecting those taxes in a way that does not violate the security of property (bk. 13). Here is the agenda of the Federal Convention of 1787, which proposed the Constitution of the United States, and its problem—namely, devising a new form of government that would be both by the many and free. In part 2, liberty is a concern of all governments and is the end of one. Part 1 identifies distinctive, peculiar kinds of government; part 2 identifies a government whose distinction is its peculiar devotion to a universal principle. This change in the content of civil, political, and international law reminds one of the emptiness of those categories in book 1, chapter 3, and raises the question of what can be behind this change or revolution.

Solitary small republics are indefensible against other kinds of governments. They must federate to survive. Rome did so and conquered the world; then Rome was conquered by federations of barbarian tribes. In addition, small countries may properly conquer in their own defense, to protect their liberty; but conquering for defense gives them no grounds for plundering the conquered. The aim is accomplished when the enemy is defeated. Either a confederation or respect for the civil laws and way of life of a conquered people implies the acknowledgment of similarities among the citizens of these distinctive governments, and thus the acknowledgment of a common humanity in a new international law (10.3). Then, it seems, the provisions for the defense of a republic for the sake of its liberty put in question its singularity.

Political liberty also implies certain constitutional arrangements and respect for the safety of each individual citizen. Political liberty is not in the nature of small republics, aristocratic or democratic, but rather is found in moderate governments (11.4). In governments that are moderate by their nature, liberty exists within laws. These laws establish boundaries and a space within those boundaries that is freed from compulsion. Free people are able to do what is within those boundaries; but they are neither constrained to do what is outside of them nor not to do what is within them (11.3). Free constitutions balance powers to this end (11.4). The English constitution is the constitution that has political liberty as its purpose. England is somehow both monarchical and republican (5.19). It appears that these moderate governments may be a kind of government of which the monar-

chies of part 1 and the English government are both examples. Montesquieu's examination of the English government (11.6) brings to the fore executive, legislative, and judicial powers that seem closely related to those in the Constitution of the United States. These powers are separated by their different sources and are balanced through shared functions. A monarchy like that of the English was unknown to Aristotle and the ancients (11.9–11). The remainder of book 11 takes up the Roman balanced government (11.12–20), in which the senate and the people divide up the various powers. The constitution does not balance the offices; instead, the offices express the balance between the orders of the citizenry upon which the singularity of a small republic was based. Montesquieu remarks that the ancients called such governments *police*, "polities" (11.11). Nevertheless, throughout the rest of the book he uses this word in the ordinary sense of the everyday administrative arrangements for security and safety that guard civility.

Part 2 ends with a consideration of the means of securing that safety for one's person and possessions in the criminal law (bk. 12) and in taxation (bk. 13). In both cases, Montesquieu turns his attention to the substance of the question, not to the form. The question is how certain crimes are to be defined and what is to be taxed and how much, not legal procedure and not who can properly levy taxes. If we are to be able to act freely within the space given to us by the law, the government must not inquire into our thoughts, even when it suspects us of heresy or high treason. It must not take so many of our goods or take them in such a way that we cease to act, become lazy.

Once citizens are left with a space free of constraint and the power to act within it, what will they do? What then drives them and shapes them? What is the source of their spirit? These questions imply the need for a wider search, and Montesquieu begins such a search in part 3, in books about climate (14–17), terrain (18), and finally about the various spirits (19). Part 3 ends with a reconsideration of the English and an explanation of the extent and way in which their character is shaped by their constitution (19.27).

In his consideration of climate and terrain in part 3, Montesquieu presents the reader with two external, physical, things that

affect people and shape their souls, the one directly and the other indirectly. In examining these books, we can get a closer look at Montesquieu's view of the structure of the soul and the things that can shape it—at those things that make people alike and those that make people different. In this sense they are a kind of reconsideration of the questions about human nature raised in book 1, chapter 2. "If," he says, "it is true that the character of the spirit and the passions of the heart differ extremely in the various climates, laws should be relative both to the differences in these passions and to the differences in these characters" (14.1). In hot climates, people are extremely sensitive and subject to their passions, particularly to sexual passion; they are all equally subject to their passions and to their passions alone. In cold climates, people's sensations are more crude; people are more inclined to action and thus to pursuing their own ends. People then vary from those who are extremely sensitive and inactive to those who are very active and insensitive. Terrain limits the possibilities for action; this makes possible distinctions among the spirited as they pursue a particular way of life.

In books 15, 16, and 17, Montesquieu presents us with people who are subject to the despotic force of hot climates, to the circumstances of civil, domestic, and political slavery. Slavery, or despotic rule, is required when people are so subject to their passions that they will not work, when they are so involved in sexual passion that raising children is too much trouble, and when they are so fearful and cowardly that they do not protect themselves. In each case, only externally applied force can get people to do the things required for their preservation. Civil slavery that is founded on a natural reason occurs when, in a despotism, men put themselves under the protection of a lord or when "men come to perform an arduous duty only from fear of chastisement" (15.7). But such slavery goes against nature insofar as men are born equal. In Europe, civil slavery is not required by climate, and it was abolished by Christianity. Experience has demonstrated the workability of these arrangements (15.8). The remainder of book 15 is concerned with removing some of the abuses and dangers of slavery in the places where it exists and, finally, with prudent ways of freeing slaves. Distaste for slavery did not make an abolitionist of Montesquieu.

Turning from civil to domestic slavery, Montesquieu says that in hot climates, women have none of their natural modesty. Natural modesty is the shame intelligent beings feel for their imperfections; in this instance the imperfection is the conflict between their constant sexuality and the time-consuming care required for the preservation and education of children. This natural law is peculiarly applicable to women. "When the physical power of certain climates violates the natural law of the two sexes and that of intelligent beings, it is for the legislator to make civil laws which forcefully oppose the nature of the climate and reestablish the primitive laws" (16.12). The complexities, even the conflicts, in nature require legislation, choice. The grounds for that choice are the question. Montesquieu offers some suggestions in the succeeding books, and he invites the reader to reconsider the forms of government. I take up this problem in the consideration of forms of government and moderation in chapter 4.

Where do the despots come from in the climate of natural slavery? From elsewhere, unless they are eunuchs, from other climates where spirit and self-control are possible and encouraged. In places where there is no temperate zone, the strong and the weak meet directly, which leads to a succession of conquests, weakenings of the strong, and new conquests in turn. In a temperate zone, neighbors are more alike and can defend themselves from each other; and this encourages the liberty of those countries. According to Montesquieu, there is no temperate zone in Asia, and the terrain is one of broad expanses without major geographical divisions; in Europe there is a large temperate zone, and the terrain is divided by seas, major rivers, and snow-capped mountains. In both Asia and Europe the terrain adds to, rather than subtracts from, the effects of the climate.

Terrain—in the sense of both the quality of the land and its configuration—is a natural circumstance which channels the activities of people as they try to find food and shelter. Book 18 is divided into two sections: the first considers peoples who cultivate the land (18.1–8), and the second, those who do not and who depend on animals for their livelihood (18.9–31). In the first instance, only inhabitants of mountains and islands can defend themselves and remain free. In the second, savages, who hunt wild animals, are distinguished from barbarians, who herd domestic

animals. The first were the source of ancient republics and the second, of the modern monarchy. Montesquieu considers two barbarian peoples, the Tartars (18.19–21) and the Franks (18.22–31). Each of these peoples leads a distinctive, peculiar, singular way of life. Book 18 adds spirited, small, poor, free peoples to the passive, large, rich, despotic peoples of books 15 through 17. Here we see a suggestion of the ground for the distinction between republics and despotisms.

Book 19 is titled "On Laws in Their Relation with the Principles Forming the General Spirit, the Mores, and the Manners of a Nation." Some principles form the spirit, mores, and manners of a nation. Laws are related to these principles. The question arises whether there are principles so different from each other that laws relate to the principles in distinctive ways. The peoples discussed in the preceding books of part 3 form particular ways of life as a result of their natural circumstances. Other than conquest, there is no change and no source of change. But in book 19 Montesquieu introduces a people with a sociable humor who appear to be in a constant state of flux in which the people constantly watch each other's activities while copying, honoring, scorning, and changing each other. These people—surely the French—are compared to the Spanish, the Chinese, and finally the English. The comparison between the French and the Spanish suggests that reform of the French toward greater seriousness and constancy could lead to their becoming lazy like the Spanish. The comparison between the French and the Chinese differentiates China, where public life is conducted in terms of familial distinctions (19.19), from those countries in which Christianity confounds these distinctions, unifying rather than separating people (19.18). With this conjunction, Montesquieu is suggesting, as we shall show, that Christianity forms the modern spirit, limiting political possibilities to those that take its unifying spirit into account.

English government, as we saw at 11.6, depended upon representative institutions which were balanced so that passions countered passions. The forms into which Englishmen step and through which they are shaped are determined by a division of political power, rather than by an establishment along divisions analogous to the natural ones. Such an organization is the opposite

of China's. The English organization assumes the political irrelevance of the natural familial divisions within a people, upon which China was based. Rather, it proposes distinctions among rulers based upon the logic of ruling. In so doing, it assumes that there are no essential relations between ruling and a part of the population defined by nature. Montesquieu's descriptions of the effects of the balance of power in England are based on the possibility that a citizen might change allegiances from the executive to the legislative and back again as he seeks to influence the government. This is possible only if the population beneath the division of power contains no permanent divisions that can be related to political activity. Here we are in the arena of *Federalist* number 10. The population must be divided among a number of overlapping interests: those of geography, kinds of work, varied forms of wealth, and religions, no one of which is taken too seriously. If there are to be no permanent or ultimately important divisions among the people, economic life must be managed in a new way, and religion must be separated from direct involvement in political life. Montesquieu takes up these questions next in parts 4 and 5. Montesquieu marked the beginning of these sections of the second half of his book with his "Invocation to the Muses," in effect asking our patience for this most unpoetic consideration of the grounds of political life.

Like the French, the English have no fixed place, but unlike the French, one cannot tell from their appearance the place they claim. A leader of fashion, like a patrician or a mandarin and unlike a member of Parliament, can easily be picked out of a crowd. Of the English character, Montesquieu wrote, "But these men who are so proud, living mostly alone with themselves, would often find themselves among unfamiliar people; they would be timid and one would see in them, most of the time, a strange mixture of bashfulness and pride" (19.27). The question remains of the conditions under which a society can exist wherein men have no fixed place and have a character like that of the English.

The four books (20-23) of part 4 take up the questions that fit under the old title of political economy: the laws in relation with the nature and distinctions of commerce, the revolutions of commerce, the use of money, and the number of inhabitants. Montesquieu's discussion of commerce begins by presuming the

relations of equality and inequality, described in books 5 and 7, that result from the political structure. Equality at its most extreme leads to a society without commerce, as Plato realized. As commerce spreads, so do relations among peoples, softening and corrupting the mores of singular peoples. Commerce is an activity that takes place between peoples; its shape is determined by the constitutions of those peoples (bk. 20), by changes in the broader patterns of the exchange of money (bk. 22), and by changes in the distribution of population (bk. 23).

In states that are governed by one person alone, commerce is founded primarily on luxury, on the wants and needs of those who have wealth and power. In states that have popular governments, commerce is founded on the needs and wants of the many. In the first case, a few goods of great value and considerable profit for each item are traded; in the second, many goods of lesser value and profit per unit are traded. But the traders and their trade are problematic for monarchies, despotisms, and ancient republics. For the traders to have any considerable wealth and power, trade must become a public affair and traders public men, but there is little or no place for either in these governments. Although economic commerce is ascribed to Tyre, Carthage, Marseilles, Florence, Venice, and Holland (20.4), these small republics could perhaps be seen, in this context, as trading companies in which the citizenry gathers the profits. This trading, like the agricultural labor of the helots, provides for the leisure of the citizenry. Here the growth of trade is hampered by the small size of the countries, as it is in monarchies and despotisms, because they have no place in public affairs (20.4). England is singled out as the country in which political interest gives way to the interest of its commerce, as the country that knows best how to take advantage of religion, commerce, and liberty simultaneously (20.7). In taking up the revolutions in commerce in book 21, Montesquieu shows the movement of commerce from that of Tyre to that of England.

In book 21, commerce is viewed as inevitable, and certain physical conditions such as climate and terrain are viewed as fixed. These latter provide the limits of commerce. Revolutions in commerce are the result, then, of the changes in the peoples of the world and of the consequent changes in their relation with one another. "Commerce, sometimes destroyed by conquerors, some-

times hampered by monarchs, wanders across the earth, flies from where it is oppressed, and remains where it is left to breathe" (21.5). In ancient times, each step to broaden international trade using sea power came to grief. Sea trade is identified with economic commerce, with commerce among the people and between the peoples for everyday goods, because the costs of sea transportation are so much less than those of overland transportation. Sea trade leads to an expansion of trade. Commerce, from the point of view of book 20, is natural in the sense of being inevitable, but its shape is a result of political actions and decisions.

Exploration during ancient times was primarily by land. The seas were discovered from the land, as lands are now discovered by sea (21.9). "The Romans cared only for land troops, whose spirit made them stand ever firm, fight in one place, and die there. They did not esteem the practice of seafaring people, who offer themselves for combat, withdraw, return, always evading the danger, employing stratagems, and rarely force" (21.13). The barbarian invasions destroyed the existent commerce in luxury, but because of the personal laws of the barbarians, those same invasions helped to create a situation that supported the revival of commerce in a new form. The Roman political constitution took no interest in commerce. The Roman right of nations was repugnant to commerce, as strangers had no property rights, either in things or in their own persons (21.14). The barbarians, by contrast, left the conquered peoples their former laws and their right to property and protection (21.18). This latter practice is taken up at some length in book 28.

The way for commerce was barred, temporarily, by the Christian theologians who condemned lending at interest (21.20). Not until letters of exchange were invented by Jews to save their goods from rapacious princes did commerce begin to develop (21.20). The invention of the compass and the discovery of America and much of Asia and Africa led to the expansion of commerce over the world. This new commerce is much less vulnerable to direct political control than was the commerce of the ancients. It is worldwide and outside of any particular political order, and it is not the mission of some small peoples, as it had been. This new

commerce is the topic of book 22, "On Laws in Their Relation to the Use of Money."

With money as a topic, Montesquieu comes to the part of his discussion of economic things that is most like modern economics. In commerce, many commodities are traded. The kind of commodities and the extent of their trade are a result of the circumstances described in books 20 and 21; but once commodities are in commerce, they are all traded through the sign that represents them—money (22.2). That sign can be real, attached to a certain weight and grade of a metal; or it can be an idea, detached by debasement of the coinage from such certainty. Montesquieu preferred real monies (22.3). Money is rented for a price—interest—and is exchanged between countries. The price of goods, including that of money, is dependent upon the total quantity of goods marketed and upon the metals available for use as money. These variables are balanced out in the exchange (22.10). If it were not for the prevalence of international trade, particularly of an international trade that relies upon banks and letters of exchange rather than on precious metals, governmental action to control the relation between goods and money would be both possible and largely successful. Thus, although the Romans at the time of the Punic Wars could act directly to change the value of money in specie, they could not do so later, and modern governments have virtually no possibility of taking such direct action in regard to the value of money. Montesquieu concludes book 22 with a long description of Roman efforts to control usury in an economy whose prosperity depended upon wars. Those wars first required borrowing, and then the debts were repaid with the tribute from successful wars. He ends by remarking: "laws which are extremely good give birth to extreme evil. I shall continue to repeat: moderation governs men, not excesses" (22.22).

Population, like the value of money, has escaped from direct political constraint. Here Montesquieu is the sociologist, as he was the economist in the preceding chapter. In some circumstances population increases; in others it decreases. For the population to increase, families require fathers and some continuity; marriages must be prudently made; the government must not be harsh, although destitution in the midst of plenty leads the destitute to

have many children; the land must be cultivated rather than left as pasture; the land must be equally divided, or the arts must be practiced, if land is unequally divided; countries must be small, as they were in Greece or as they were, in effect, under the Carolingians. The Romans made laws to encourage fertile marriages, but their circumstances gradually made it less likely that the population would increase, and the laws were changed yet further.

In books 22 and 23, in regard both to money or trade and population, the particular or individual tendencies and some universal, apparently natural ones encounter each other directly. There is no barrier between them, no space, no shape established by a government that gives a particular form to individual or family life. Montesquieu brings this to our attention through his discussion of the effect that Christianity has on population. Christianity promotes celibacy as the best way of life for everyone and denies that "the multiplication of mankind could be a result of our cares" (23.21). The spirit of distance from public affairs had already been introduced by the philosophic sects. Christianity was what prohibited usury in a universal way, making commerce possible only through the Jews, who developed a technique for commerce that took advantage of their statelessness. The shape that Christianity tried to give to private life had the effect, not of establishing that shape, but of leaving individuals to face universal, natural pressures.

Religion is the topic of part 5: the nature, principle, and place of its rule. In book 24 Montesquieu presents himself in opposition to Pierre Bayle. Impure religions are better than none, according to Montesquieu; there may be no religion pure enough for Bayle. That some obey both religions and governments is important, even if some disobey (24.2). In book 23 Montesquieu objects to Christianity because of its insistence on pushing everyone to a perfection that is appropriate only for a few. Here he says that Christianity is appropriate for moderate governments because of its gentleness (24.3). In addition, he distinguishes between laws that act as precepts and those that act as counsels, between command and inspiration, between the spirit in laws and the heart in religion (24.7). Political laws are a command, an order that speaks to the spirit, whereas religion speaks through counsels,

inspirations, to the heart. The first can be general; the second should not be. Montesquieu's example is celibacy, which leads to an increasing number of rules when it is promulgated as a law for a certain order of people. Religion can support, run counter to, or replace aspects of political life, particularly those under the civil law, by proposing contemplation, penances of certain kinds, festivals, and other rules of conduct.

Religions build a way of life around their principle. The everyday activities their members pursue appear as an external police for the society at large. The sentiments or feelings of religion attach us to sensible things or to spiritual ones. The latter are stronger if they also contain the intellectual idea of a choice that the Divinity makes in their favor. Montesquieu's examples are Judaism and Mohammedanism (25.2). Religions have temples, ministers, wealth, monasteries, sacrifices, a pontificate. Tolerance, change in religion, persecution of other religions, or the relation between religions arise as topics in the context of their external police, not only with the state, but with each other. Here Montesquieu puts a dramatic condemnation of the Spanish Inquisition (25.13). In each case, Montesquieu explains that in their external relations, religious institutions must respect the limits set by political life.

In book 26 the varying orders of laws are related to the things over which the laws can have jurisdiction, particularly to rule over the structure of families (26.1). The bulk of this book is concerned with the proper place of laws whose claims are universal: namely, divine, natural, civil, and international law. Political laws—those laws that define the governments of a particular people—are defended against the civil law. The domain and order of succession of a royal family in a monarchy (26.16) and ostracism in a republic (26.17) are said to be matters for the rules of political, rather than civil, right. Montesquieu concludes with instances in which particular circumstances are of primary importance: the regulations of the police, which require prompt attention to everyday affairs (26.24), and cases such as a boat at sea, whose rules ought not be extended any further than the situation itself (26.25). This careful positioning of divine, natural, civil, and international laws is typical of modern, moderate governments. Perhaps a source of moderation is to be found in the very process

of people's being subject to universal laws while being protected from the direct application of any one of them by their very number and variety of ends: God and the preservation of life, property, and societies.

In parts 3, 4, and 5, Montesquieu explores the conditions—natural, economic, and religious—that underlie the governments whose structure he explored in parts 1 and 2. He seems to suggest that the relation between governments and those underlying conditions has changed. Some governments—namely, republics—used to try to shape those conditions, and they had some success without becoming simply despotic. They had some kind of moderation, even if it depended on the character of the citizens. Ancient republics and despotisms have assumed that the natural divisions among the people, however understood, have a relation to political distinctions. Those divisions no longer seem to be commensurate with political life, with distinctive ways of life, but rather to be a response to the working out of universal natural laws. Moderate government—monarchies and what we now call democratic republics—need to get some distance from this universality, to give a space for particular political life and ends. These are the topics of my chapters 4, 5, and 6.

The remaining question is how political law has been and can be shaped for moderate governments. In book 26, Montesquieu said that royalty and ostracisms—that is, excluding citizens from citizenship—were to be guided by political principles. In part 6 (bks. 27–31) the origins of political law for a monarchy are taken up at length. In parts 1 and 2, monarchical institutions were treated as a given. To discuss the source of the political law that defines monarchies is to question the rule of the king. For Montesquieu the shape of the French monarchy is a result of circumstances and decisions that can be understood strictly within human and political terms.

Books 27 and 28 are peculiar in form; book 27 is one long chapter, and book 28 has 45 chapters, far more than any other. Book 27 traces how in Rome the civil law escaped from political law, and thus from political purpose; book 28 traces the slow development in France of a way of judging disputes that could be called political. Book 29 describes how law should be written when it establishes a way of judging, or a way of legislating—that

is, when it acts indirectly. Books 30 and 31 take the reader from the origin of the French monarchy through some of its revolutions. The history of the variations of the institutions that form the monarchy—the nobility, the clergy, a separate judicial order—are the subject of these final books.

In book 27 Montesquieu analyzes how in Rome the control of inheritances by political laws was dissolved. Under Romulus, he says, the land was divided among the families, and inheritance laws designed to keep one plot for each family were established. The Romans believed in the absolute power of fathers over their children. This power seemed to extend logically to the share of the father's goods that each child inherited. These principles were in conflict, and the second principle pushed constantly toward individual testaments and toward accumulating the wealth or increasing the poverty of certain families. The citizenry was decimated by wars, and families that had children became markedly less prevalent. The restoration of the citizenry was encouraged by giving women with children the right to inherit. Then, the wealth of all nations inundated Rome. Finally, under Justinian, Roman law tried to follow natural equality, with no reference to the regime's interest in any kind of family or relation among families.

Book 28 describes the growth of French civil law, which was embedded in a way of judging rather than in a code of administered penalties. The conquerors of the Roman Empire did not impose their civil law on the conquered peoples. They thought of law as something attached to individuals, as something personal (28.2). The civil law of the barbarians was based on settlements that established satisfaction for wrongs done. Certain sums, called *freda*, were paid to the lord for his enforcement of the settlement; this constituted the justices of the lords, which was both a service and a payment. Quarreling families would have pursued their vendettas endlessly unless the lord could provide the justice for which he was paid—a settlement and an enforcement of that settlement. The codes that established settlements gradually ceased to be used. Because there were no canons of evidence, it was not clear how to tell the guilty from the innocent. Ordeals, of which combat was the chief example, were a way to leave the judgment to God. They also had the curious merit of solving the

problem of appropriate penalties. There was no possibility for an appeal of the judgment.

According to Montesquieu, the reign of Saint Louis, about two hundred years after the first Capetian king of France, began the turnaround toward a new civil law. Saint Louis set a general restriction on judicial combat in his domain, and he restricted it in his baronies in the case of a challenge for false judgment (28.29). Appeals of both the judgment itself and of the proceedings became possible. This led to a whole sequence of changes, which set up something like judicial process as we now know it. These changes, however, established, not a code, but a way of proceeding. They led to a distaste for the old way of doing things. "Sometimes many centuries must pass to prepare for changes; events ripen, and then there are revolutions" (28.39). The parlement, which was the judge of last resort and which considered questions between the holders of great offices in relation to the political order, was obliged to become a sitting body. The continuing establishment of the king's jurisdiction is the subject of the end of book 28. Written law required a study of which the nobles and illiterate peoples were not capable (28.43). The king needed officers to record and enforce the new rules for the kingdom.

Two questions are taken up in the remainder of the book. First, in book 29, How are laws to be written, composed, that will serve as did those of Saint Louis to settle disputes? The question is not, as in book 5, which laws ought the legislator give in order to promote the principles of the government, but how should laws be written so that they will both settle disputes and do so in the direction preferred by the legislator. According to Montesquieu, laws often seem similar but are not or seem different but are similar in their aims, effect, motive, spirit. They must be compared in the context of other laws, their purpose, and their circumstances. Only then will it be clear that a given law is truly the same in two countries or times. Laws must be composed so as not to encourage more disputes (29.16). They must not rule either through opinions on particular cases (29.17) or with excessive uniformity (29.18). And finally, one must beware of the passions of the legislator, even of the greatest legislators, the political philosophers (29.19). This formal discussion of the laws is most

appropriate for laws that establish relations rather than those that direct actions—for the laws that are typical of moderate governments and of their constitutions.

Second, the question for books 30 and 31 is, What changes in the structure of the government itself paralleled those in the civil law that led to the development of a civil law based on a way of judging rather than on a body of rules to be administered? The question of the political structure becomes the question of the source of the nobility and of the king. To begin with, the political law of the Frankish monarchy did not establish inherited fiefs, but it did distinguish nobles from other Franks. These nobles followed the kings to war, but they had to be asked to join (30.3). The kings constantly acquired goods in these wars and gave them to the nobles (30.4). These goods—benefices, honors, and fiefs—were regulated by the political, not by the civil, laws and were revocable (30.16). Then, although the nobility was as old as the monarchy, the nobility was not attached to particular rewards and duties; the distribution of particular goods was at the discretion of the king. At the beginning of the reign of the Merovingians, there were free cities and a large number of freemen, but by the beginning of the reign of the Capetians, the number of servitudes was prodigious. Only lords and serfs remained. Montesquieu ascribes this chiefly to the constant warfare in which booty and prisoners were constantly being taken and distributed (30.11).

Roman taxation by a central government had disappeared. The king's revenues came from his own domains (30.13). The words that had been used to describe that taxation were now used to describe altogether different practices (30.14). There were no taxes; instead, free men owed services. Military and civil jurisdiction was in the same person—the count, the bishops, or the vassals of the king. Fiscal rights were small, and judicial rights were shared with notables, so that the regime was not in fact despotic (30.18). The justice of the lords was the result of the original settlement; it was not a corruption of the government (30.20). When the church was given a fief or fief in order to support itself, the church's fief was held in the same way as other fiefs. But there was a problem when it became the bishop's duty to lead his followers to war alongside the vassals and counts. Over the course of the entire period of rule of the Merovingians and the

Carolingians, fiefs and underfiefs came to be inherited, and freeholds were converted into fiefs.

Montesquieu describes the efforts by kings and queens to halt this transformation, all of which were ultimately unsuccessful. When they tried to reassert the revocability of fiefs, they were resisted. Some regularity was essential, even in this nation. As fiefs were settled, the question of where the king could get fiefs to give his followers became acute. The attention of the kings turned to the wealth of the clergy. Because the church can inherit from everyone and is a permanent body, its goods increase continuously, making it a constant source of goods that kings can take and give to the nobles.

In the French constitution of that time, all power resided in the king, the nobility, and the clergy. Good kings balanced the other two powers and joined interests with one or both (31.21). Charles Martel despoiled the clergy and formed fiefs a second time. He "put an end to an abuse which, unlike ordinary evils, was the easier to cure for being so extreme" (31.9). Pepin protected the clergy and established tithes (31.12). Charlemagne kept the power of the nobility within limits and curtailed the oppression of the clergy and of freemen (31.18). His successor, Louis the Pious, antagonized both: the clergy by enacting excessively strict regulations for their behavior, and the nobility by elevating commoners (31.21). The kings and the clergy continued to weaken each other (31.23). The Battle of Fontenay in 842 irreparably damaged the monarchy (31.25). Afterwards the nobility could choose whether a new fief was to be under the king or under a lord; they were obliged only to follow the king to a defensive war (31.27). Each effort to reassert the political control of the king over fiefs actually furthered the great transformation to inherited fiefs and underfiefs. There was no longer any way of stopping the disintegration. Finally, the crown was given to Hugh Capet, who held the largest fief. Political government ended, and feudal government began when the crown was given to the most powerful vassal and was inherited as the fief had been (31.32). Women inherited crowns in kingdoms established later, as in Normandy, because the feudal order eventually permitted women to inherit fiefs (31.33). Fiefs became the concern of civil, rather than of political, laws (31.34).

In sum, between book 28 and books 30 and 31, Montesquieu

has collected two political laws for the French monarchy: the first established a way of judging disputes; the second regulated the inheritance of the crown according to the practice of the Salic Franks before they conquered Gaul. Out of this bare material Montesquieu fashioned, in books 2-8, an understanding of a new kind of government based on intermediate institutions—a monarch and nobility, a judicial order, and a clergy—which could be compared to the ancient republics. That government, neither singular nor universal, has had many variations. This construction may well be what had made Montesquieu say in his Preface that, with Correggio, he too was a painter. Let us, then, return to the beginning of the book, examining it this time in respect to the way the topics of the beginning are treated throughout. The question now will be, not the order of appearance, but the internal structure of the book.